IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC. *et al.*, *Plaintiffs*, v. JOSH STEIN, *et al.*, *Defendants*.	Case No.: 1:16-cv-25

PLAINTIFFS' OPENING BRIEF IN SUPPORT OF THEIR MOTION FOR ATTORNEY FEES AND COSTS UNDER 42 U.S.C. § 1988

INTRODUCTION

Plaintiffs submit this Opening Brief, supporting declarations, and counsel's timesheets in support of their Motion for Attorney Fees and Costs under 42 U.S.C. § 1988 and Local Rule 54.2. As detailed below, the requested fee award is appropriate because Plaintiffs prevailed and achieved substantial success, obtaining a permanent injunction against all challenged provisions of the North Carolina Property Protection Act. Plaintiffs request a court order awarding them $612,009.43 in attorney fees, which is the product of reasonable billing rates and a reasonable number of hours (the Lodestar), and $10,296.28 in costs. *See* Levine Dec., Exhibit A.

BACKGROUND

On June 3, 2015, the State of North Carolina passed the Property Protection Act (or Anti-Sunshine Law). The state's General Assembly enacted the law to deter and punish investigations designed to expose illegal or unethical conduct at government and private facilities. The law

would impact Plaintiffs' ability to investigate practices at, for example, UNC-Chapel Hill's animal laboratory.

Soon after it was passed, on January 13, 2016, Plaintiffs filed a pre-enforcement lawsuit against four provisions of the Anti-Sunshine Law, ECF Doc. 1, and amended the complaint a few weeks later to add two organizations as Plaintiffs, ECF Doc. 21. On April 4, 2016, the state moved to dismiss the First Amended Complaint, arguing, among other things, Plaintiffs lacked constitutional standing. ECF Doc. 30, 31.

This Court granted the state's motion to dismiss, concluding the injury-in-fact element of standing could not be shown—while not reaching the other bases for dismissal presented in the motion. *PETA v. Stein*, 259 F.Supp.2d 369 (M.D.N.C. 2017). The Fourth Circuit reversed on June 5, 2018, finding the complaint sufficiently alleged standing. *PETA v. Stein*, 737 Fed. Appx. 122 (4th Cir. 2018).

At a December 19, 2018 status conference, the Court considered the remaining issues raised in the motion to dismiss and ruled that Plaintiffs' two federal constitutional claims could proceed, but the claims rooted in the North Carolina constitution could not. ECF Doc. 73. The state claims mimicked Plaintiffs' federal constitutional claims and were based on the exact same facts and legal principles. Shortly thereafter, the Court permitted the North Carolina Farm Bureau to intervene permissively. ECF Doc. 92.

At Defendants' insistence, Plaintiffs and the state engaged in discovery during the spring and summer of 2019. The state's discovery focused on standing while Plaintiffs pursued evidence related to applying strict and intermediate scrutiny: namely, the absence of past harms from conduct that the Anti-Sunshine Law sought to regulate, and whether pre-existing—and less

speech-restrictive—laws had proven inadequate to solve the identified problems. *See* ECF Doc. 114 at 23-24, Exhs. H, J, K.

The parties then filed cross-motions for summary judgment on September 3, 2019. ECF Doc. 99. After a February 6, 2020 oral argument, the Court ruled that each provision challenged by Plaintiffs was unconstitutional under the First Amendment. *PETA v. Stein*, 2020 WL 3130158 (M.D. N.C. June 12, 2020). The Court issued a permanent injunction against Defendants, enjoining any efforts to enforce the Anti-Sunshine Law against Plaintiffs. *Id*.

ARGUMENT

Plaintiffs brought their constitutional challenge against North Carolina's Property Protection Act under 42 U.S.C. § 1983. For successful 1983 cases like this, the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, provides the authority for Plaintiffs to recover their attorney fees and costs. Section 1988(b) states: "the court, in its discretion, may allow the prevailing party…a reasonable attorney's fee as part of the costs" in a civil rights action. *See Perdue v. Kenny*, 559 U.S. 542, 550 (2010) (noting fee awards help "ensure that federal rights are adequately enforced").

As an initial matter, Plaintiffs note that the Court should decide this Motion for Attorney Fees and Costs. This Court retains jurisdiction to resolve the Motion, even though Defendants filed a Notice of Appeal on July 13, 2020. ECF Doc. 145.[1] Despite an appeal, district courts retain jurisdiction to determine collateral and ancillary matters that do not affect the questions presented in the appeal. *Langham-Hill Petroleum v. S. Fuels*, 813 F.2d 1327, 1330-31 (4th Cir.

[1] Subsequently, Plaintiffs filed a targeted cross-appeal to reserve their ability to raise additional constitutional arguments against the Property Protection Act, including that (b)(1) and (b)(5) are facially invalid under the First Amendment and unconstitutionally overbroad. Muraskin Dec. ¶ 30.

1987). Awarding costs and attorney fees is generally recognized as a collateral issue appropriate for resolution by the trial court when an appeal has been taken. *Id*. at 1331. *See U.S. v. Johnson*, 2015 WL 8346676, *2 (M.D. N.C. Dec. 8, 2015). Moreover, resolving Plaintiffs' fee motion now would promote efficiency and avoid the potential for piecemeal appeals. *Langham-Hill Petroleum*, 813 F.2d at 1331 ("Piece-meal appeals will be avoided if district courts promptly hear and decide claims to attorney's fees. Such practice normally will permit appeals from fee awards to be considered together with any appeal from a final judgment on the merits.").

I. PLAINTIFFS ARE ENTITLED TO AN AWARD OF FEES AND COSTS

For purposes of section 1988, "a party in whose favor a judgment is rendered…is the prevailing party." *McAfee v. Boczar*, 738 F.3d 81, 88 (4th Cir. 2013) *as amended* (Jan. 23, 2014). *See Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) ("Congress intended to permit the ... award of counsel fees only when a party has prevailed on the merits."). "[A] party has prevailed if there has been a material alteration of the legal relationship of the parties, and there is a judicial imprimatur on the change." *McAfee*, 738 F.3d at 88 (internal quotations and citations omitted). *See also Buckhannon Bd. of Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001) (finding "prevailing party" is "a legal term of art," defined as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded").

Plaintiffs prevailed in this case. As made clear in the Court's June 12, 2020 decision, "the challenged provisions of law fail to pass muster under the First Amendment—two provisions fail facially, and the remaining two provisions fail as applied to Plaintiffs." *PETA*, 2020 WL 3130158, *1. Simply put, the challenged Property Protection Act provisions can no longer inhibit Plaintiffs' desired investigations, having been found to violate the First Amendment. *Id*. at *25. The court explicitly enjoined Defendants "from attempting to enforce"

them against Plaintiffs. *Id*. As a result, Plaintiffs are entitled to their reasonable fees and costs as the prevailing party. *See Farrar v. Hobby*, 506 U.S. 103, 111 (1992) ("[T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim.").

II. PLAINTIFFS SEEK A REASONABLE FEE AWARD BASED ON THE LODESTAR FORMULA

The Supreme Court has explained that "[a] reasonable fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case." *Perdue*, 559 U.S. at 552. Congress enacted section 1988 because "the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process…These victims ordinarily cannot afford to purchase legal services at the rates set by the private market." *City of Riverside v. Rivera*, 477 U.S. 561, 576 (1986); *Lefemine v. Wideman*, 758 F.3d 551, 555 (4th Cir. 2014).

Plaintiffs seek to recover their reasonable attorney fees. Reasonable fees are computed through the Lodestar method. *McAfee*, 738 F.3d at 88-89. The lodestar is calculated based on the number of reasonable hours multiplied by the reasonable hourly rate. *Rum Creek Coal Sales v. Caperton*, 31 F.3d 169, 174 (4th Cir. 1994). A claimant is entitled to the presumption that this lodestar amount reflects a reasonable fee. *Pennsylvania v. Delaware Valley Citizens' Council for Clean*, 478 U.S. 546, 563-65 (1986); *McAfee*, 738 F.3d at 88-89 ("The Supreme Court has indulged a 'strong presumption' that the lodestar number represents a reasonable attorney's fee.").

A. Plaintiffs Seek Market Rates For Their Counsel

Requested rates are to be consistent with "the prevailing market rates in the relevant community for the type of work for which he seeks an award." *Plyler v. Evatt*, 902 F.2d 273, 277

(4th Cir. 1990). *See also Robinson v. Equifax Info. Servs.*, 560 F.3d 235, 244 (4th Cir. 2009). This means looking at what attorneys with comparable skill, experience, and reputation earn performing similar services in similar circumstances. *Rum Creek*, 31 F.3d at 175.

However, the hourly rates from an attorney's out-of-state market may also be considered. "In certain circumstances, such as when the complexity of the case is such that no attorney with the required skills is available locally, it may be reasonable to retain attorneys from other communities and to consider those higher, out-of-town rates." *Fisher-Borne v. Smith*, 2018 WL 3581705, at *3 (M.D.N.C. July 25, 2018) (accepting higher, with some downward adjusted, out-of-market rates); *Rum Creek*, 31 F.3d at 179 ("Rates charged by attorneys in other cities, however, may be considered when the complexity and specialized nature of a case may mean that no attorney, with the required skills, is available locally, and the party choosing the attorney from elsewhere acted reasonably in making the choice.").

This lawsuit is unique and different from other First Amendment cases that have been pursued in North Carolina. *See* Craige Dec. ¶ 7; Sigmon Dec. ¶ 9. Several of Plaintiffs' counsel specialize in constitutional challenges to anti-whistleblower legislation—like North Carolina's Anti-Sunshine Law—enacted, in part, to protect industrial-scale food producers. These so-called "Ag-Gag" laws have become increasingly prevalent in several states. As was the case here, Plaintiffs, through their attorneys, have successfully argued that legislative attempts to insulate industrial agricultural from oversight and compliance with environmental, animal protection, and worker safety laws—to the economic detriment of family farms and sustainable food producers—violate the First Amendment. *See, e.g.*, *Western Watersheds Project v. Michael*, 869 F.3d 1189, 1197 (10th Cir. 2017); *Western Watersheds Project v. Michael*, 353 F.Supp.2d 1176 (D. Wyo. 2018); *Animal Legal Def. Fund v. Reynolds*, 2019 WL 8301668 (S.D. Iowa Dec. 2,

2019); *Animal Legal Defense Fund v. Reynolds*, 353 F.Supp.2d 812 (S.D. Iowa 2019); *Animal Legal Defense Fund v. Kelly*, 434 F.Supp.3d 974 (D. Kan. 2020), *as amended* 2020 WL 1659855 (D. Kan. Apr. 3, 2020); *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018); *Animal Legal Defense Fund v. Hebert*, 263 F.Supp.3d 1193 (D. Utah 2017). To Plaintiffs' knowledge, the lawyers involved in the present litigation are the only lawyers in the country who have pursued this type of litigation. *See* Stella Dec. ¶ 6.

Out-of-state rates would be appropriate here. *See* Craige Dec. § 7. As detailed below, those rates are higher than the local market. However, Plaintiffs are requesting rates that better reflect the prevailing market in this district for constitutional litigation and civil rights work to ensure their attorney fee request is reasonable.

David Muraskin of Public Justice was lead counsel in this case. As detailed in his declaration, Mr. Muraskin's office is located in Washington D.C. Muraskin Dec. ¶ 8, where his hourly rate using the Laffey Matrix for an attorney with eleven years of experience is $510/hour. Muraskin Dec., Exhibit A. *See also id*. ¶ 37 (attesting his law firm rate in D.C. is $800/hour).[2] Because he has developed expertise in litigating Ag-Gag cases throughout the country, Muraskin Dec. ¶ 12, and no comparable First Amendment case had been previously pursued in North Carolina, requesting Mr. Muraskin's D.C. rate would be reasonable here. *See Fisher-Borne*, 2018 WL 3581705, at *3. Nonetheless, Plaintiffs seek a reduced rate of $450 per hour for Mr.

[2] Other than local counsel, all of the lawyers work at non-profit organizations or have solo practices and represent clients *pro bono*. Thus, they do not have a typical rate that they actual charge clients. *See Spell v. McDaniel*, 824 F.2d 1380, 1402 (4th Cir. 1987) (taking into account counsel's actual billing practices in making reasonable fee award). The Supreme Court has held, however, that non-profit attorneys recover at the same prevailing market rates as private firm lawyers. *See Blum v. Stenson*, 465 U.S. 886, 895 (1984).

Muraskin. Muraskin Dec. ¶ 40. Local North Carolina lawyers Mark Sigmon and Burton Craige, who are very familiar with the local market, attest to the reasonableness of Mr. Muraskin requested rate based on his specialized skills and the lack of comparable lawyers in North Carolina who would take on this case *pro bono*, and because this rate fairly reflects the market in the Middle District of North Carolina for complex federal court, civil rights, and First Amendment litigation. Sigmon Dec. ¶ 8; Craige Dec. ¶ 7. *See Robinson*, 560 F.3d at 245 (highlighting significance of "affidavits of other local lawyers who are familiar both with the skills of the fee applicants and more generally with the type of work in the relevant community").

Like Mr. Muraskin, attorneys Leslie Brueckner, Matthew Struger, and Christina Stella have specialized experience and expertise in these types of constitutional challenges to Ag-Gag laws. Muraskin Dec. ¶¶ 11-12; Struger Dec. ¶¶ 3, 6; Stella Dec. ¶¶ 6-7. *See also* Craige Dec. ¶ 7; Sigmon Dec. ¶¶ 8-9. For these out-of-state attorneys, Plaintiffs seek rates that also reflect the North Carolina market, as opposed to their home markets. Ms. Brueckner is a partner-level attorney at Public Justice's Oakland office, with 33 years of litigation experience. Muraskin Dec. ¶ 21. She has developed, coordinated, and litigated multiple "Ag-Gag" cases. *Id*. In this case, Ms. Brueckner's work was concentrated on developing the case, preparing the complaint, advising Mr. Muraskin throughout the litigation, and assisting during Plaintiffs' appeal on standing. Levine Dec., Exhibit A; Muraskin Dec. ¶ 22. Although her home market rate is above $700/hour, Muraskin Dec. ¶ 21, Plaintiffs are requesting a reasonable rate of $475/hour for Mr. Brueckner. Sigmon Dec. ¶ 8; Craige Dec. ¶ 7. Mr. Struger is a Los Angeles-based attorney with more than 16 years of experience as a litigator in federal and state courts. Struger Dec. ¶¶ 2-5. He specializes in First Amendment law, civil rights litigation, and environmental law as they

intersect with animal welfare and protection. *Id*. ¶¶ 2-3, 6. His local rate currently is $725/hour, *id*. ¶ 10, but here Mr. Struger is requesting $450/hour, *id*. ¶ 9. Ms. Stella has 9 years of experience and has been working exclusively for non-profit organizations (two of the Plaintiffs in this case, Animal Legal Defense Fund and Center for Food Safety), whose missions involve protecting animals, preserving the environmental, limiting pollution, and challenging industrial agriculture's approach to food production. Stella Dec. ¶¶ 3-7. She too has litigated multiple Ag-Gag cases in Idaho, Wyoming, Arkansas, Iowa, and Utah. *Id*. Ms. Stella has her office in the San Francisco Bay Area, where she commands a rate of $455/hour, but Plaintiffs seek a reasonable rate of $350/hour for her time. Stella Dec. ¶ 10. The rates for Ms. Brueckner, Mr. Struger, and Ms. Stella conform to the market in the Middle District of North Carolina and are reasonable. Sigmon Dec. ¶¶ 8-9; Craige Dec. ¶ 7.

North Carolina attorneys Mark Sigmon and James Whitlock support the rates being sought by other Public Justice attorneys. For Kellan Smith, a Public Justice associate attorney with 3 years of experience, Muraskin Dec. ¶ 22, Plaintiffs seek a reasonable rate of $225/hour. Sigmon Dec. ¶ 8. Neil Levine is a Public Justice attorney with 28 years of federal court litigation experience whose work was limited to Plaintiffs' claim for attorney fees and cost issues. Levine Dec. ¶¶ 7-8. Plaintiffs seeks $400/hour for his time, *id*. ¶ 11, which also reflects the market for someone with Mr. Levine's level of skill and expertise. Whitlock Dec. ¶ 5; Sigmon Dec. ¶ 8. Further, for Lisa Reed, a Public Justice paralegal who has more than 18 years of experience managing all phases of discovery as well as supporting motions practice, trials and appeals, Plaintiffs request $125/hour, Muraskin Dec. ¶ 23, which is on the low end of the local market for paralegals. *See* Bryson Dec. ¶¶ 16-17 (stating paralegal market warrants rates of $175/hour).

Three of Plaintiffs' attorneys served as local counsel (Daniel Bryson, Jeremy Williams, and Patrick Wallace of Whitfield Bryson), which is required by the Court's Local Rules. *See* Rule 83.l(d) of the Local Rules of the Middle District of North Carolina (requiring local counsel's presence at court conferences and dispositive motion hearings and signature on pleadings). The rates sought by Mr. Bryson ($550/hour), Mr. Williams ($300/hour), and Mr. Wallace ($300/hour) are the Raleigh-based firm's usual and customary rates, Bryson Dec. ¶¶ 16-17, *see Rum Creek*, 31 F.3d at 175, 78-79, while also reflecting the local North Carolina market, Sigmon Dec. ¶ 8. Whitfield Bryson also seeks $175/hour for their paralegal Scott Heldman, a rate they typically charge their clients. Bryson Dec. ¶ 16. The Middle District of North Carolina recently found these rates to be reasonable. *Demetra Rush v. The NRP Group, LLC, et al.* Case No. 1:18-cv-00886-NCT-JEP, ECF Doc. 58 (memorandum in support of motion for attorney fees setting forth Whitfield Bryson's requested rates) and ECF Doc. 60 (approving requested rates) (M.D.N.C. February 27, 2020).

Plaintiffs are also seeking for attorney fees for three in-house staff attorneys: Gabriel Walters, Staff Attorney with People for the Ethical Treatment of Animals, Sarah Nash, Staff Attorney with the Government Accountability Project, and Amy van Saun, Senior Staff Attorney with Center for Food Safety. All have at least 9 years of experience and seek compensation at a $300/hour rate, Muraskin Dec. ¶ 26, which is slightly below the local market rate. *See* Bryson Dec. ¶¶ 16, 17 (seeking $300/hour for attorneys with six years of experience). These rates account for the fact that their practice is not as specialized and they do not have the same level of experience challenging AG-Gag laws for constitutional violations.

In sum, Plaintiffs' counsel are requesting reasonable hourly rates that are consistent with those charged by local attorneys with similar reputation and skill. The rates also reflect each

attorney's relative legal experience and specialization in the constitutional issues raised by this case. And Plaintiffs support these market rates with testimony from three attorneys with specific knowledge of the North Carolina market and Plaintiffs' counsel.

B. The Number Of Hours Spent By Counsel Are Reasonable

Plaintiffs seek attorney fees for the hours their counsel actually and reasonably spent working on this case and that were kept contemporaneously by each timekeeper. Counsel are submitting their detailed timesheets with this Motion, Levine Dec., Exhibit A, which are broken-down by the six major events in the case: (1) case preparation and drafting the complaint; (2) responding to Defendants' motion to dismiss; (3) appealing this Court's standing decision; (4) discovery and case management after the appeal; (5) cross-motions for summary judgment that resulted in an injunction against the Property Protection Law; and (6) seeking Plaintiffs' attorney fees and costs. The hours spent on these tasks reflect the case's duration, difficulty, and intensity. As this Court is aware, the litigation raised novel issues of considerable complexity, each of which were hard fought by Defendants.

Overall the work was delegated and divided among Plaintiffs' attorneys. But, as plainly reflected in the timesheets, Levine Dec., Exhibit A, the vast majority of the time spent was by Mr. Muraskin in his role as lead counsel. Craige Dec. ¶ 8 ("David Muraskin, as lead attorney, performed most of the work."). Because the overwhelming majority of attorney time in this case was spent by Mr. Muraskin, few hours spent by Plaintiffs' counsel can be characterized as duplicative.

Each of the other attorneys provided support, often during different phases of the litigation or for different discrete tasks. A core group of attorneys—Leslie Brueckner, Matthew Struger, and Cristina Stella—helped develop the case and strategize about pursuing only the best

legal theories and claims. Once the case was underway, Mr. Muraskin's colleagues at Public Justice provided the bulk of the assistance. Ms. Brueckner's work was limited to case development (43 hours), responding to the motion to dismiss (36.1 hours), preparing the appeal (40.6 hours) and some minimal time on summary judgment briefing (5.6 hours). Kellan Smith, an associate attorney at Public Justice, helped draft discovery responses and manage documents produced by Defendants (combined 86.5 hours) and, during three rounds of briefing cross-motions for summary judgment, he prepared standing declarations and edited and cite-checked the briefs (129.4 hours). Neil Levine's time was limited to working on Plaintiffs' request for attorney fees and costs. Levine Dec. ¶ 8; Muraskin Dec. ¶ 24. Plaintiffs' in-house attorneys primarily assisted with discovery targeting their organizations and preparing standing declarations, and providing limited input on some of the briefing. Muraskin Dec. ¶ 26. The three lawyers at Whitfield Bryson provided assistance throughout the case in their role as local counsel. For example, Patrick Wallace's time on this case was limited to attending two court appearances—a status conference and oral argument on dispositive summary judgment motions. Levine Dec., Exhibit A. Jeremy Williams attended the motion to dismiss hearing and reviewed the various briefs and filings in this case. *Id*. Daniel Bryson's involvement was restricted to case development and reviewing filings and court rulings. *Id*.

As the timesheets and attorney-declarations show, the case was staffed efficiently and effectively, with little to no unnecessary duplication. Craige Dec. ¶ 8 ("The case was staffed efficiently to avoid duplication of effort."). This is not a case where lawyers duplicated the work of others. *See Fisher-Borne*, 2018 WL 3581705, *8 (finding each firm did not bill excessive hours for same major activities and thus no evidence of duplicative hours).

Exercising billing discretion, counsel have each removed time spent that may be considered not recoverable, including time spent on press work, clerical tasks, addressing intervenors, and obtaining organizational approval. Levine Dec. ¶ 9; Muraskin Dec. ¶ 34. Law and fellow clerk time has also been removed, Muraskin ¶ 34, even though such hours are recoverable. *See Missouri v. Jenkins*, 491 U.S. 274, 284-89 (1989). In the further exercise of billing judgment, time spent by several lawyers have been cut entirely. Levine Dec. ¶ 9; Muraskin Decl. ¶ 34 (those providing edits and comments on briefs and preparing Mr. Muraskin for oral arguments). Plaintiffs have also reduced the number of hours in-house lawyers spent reviewing and editing briefs but kept some of those hours because their input added to the overall work product and ensured the positions being advanced did not run create internal tension with other organizational positions. Levine Dec. ¶ 9; Muraskin Dec. ¶ 26. And time specifically devoted to state constitutional claims (Claims 3-5 in First Amended Complaint), such as researching *Ex parte Young* issues and arguing the dismissal motion on these claims, have been eliminated from counsel's timesheets. Levine Dec. ¶ 9.

Further, some of lead counsel's hours have been reduced by fifteen percent to account for inefficiencies and to ensure the total time reflects a reasonable amount: reductions have been made for time spent briefing the motion to dismiss on standing—in both the district court (282 hours down to 239.7 hours) and the Fourth Circuit (345.7 hours down to 293.8 hours)—and for briefing summary judgment (350.60 hours reduced to 298 hours). Levine Dec. ¶ 9; *id*., Exhibit A. Mr. Smith's overall time has also been reduced by fifteen percent. *Id*. These broad, across-the-board cuts—beyond those reductions already discussed—have been taken in an abundance of caution, to account for any hours that may be deemed excessive, redundant, or unnecessary. *See Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) (referencing plaintiffs taking

nine percent across-the-board reduction). Reviewed as a whole, Plaintiffs' attorney fee request includes a reasonable number of hours. Craige Dec. ¶ 8 ("I believe that the specific tasks performed and number of hours spent by Plaintiffs' counsel is a case of this complexity are reasonable."); Sigmon Dec. ¶ 10 ("[T]he total hours expended for this litigation are reasonable, especially considering the successful outcome, and are not surprising for this type of complex constitutional case").

Although the lodestar provides an objective basis for calculating a fee amount, some courts also consider the twelve *Johnson* factors[3] to more thoroughly assess the requested rates and the number of expended hours. *Trimper v. City of Norfolk*, 58 F.3d 68, 73-74 (4th Cir. 1995) (applying factors in reviewing fee award under Section 1988).[4] Most of the *Johnson* factors are subsumed in Lodestar formula and are not relevant for this case. But some provide additional support for the requested lodestar. For instance, this was a novel and difficult case that presented complex constitutional issues. Sigmon Dec. ¶¶ 7, 10; Craige Dec. ¶ 8. It required Plaintiffs to distinguish prior circuit precedent and respond to various arguments strenuously advanced by the Defendants. *See City of Riverside v. Rivera*, 477 U.S. 561, 580 n.11 (1986) (defendant "cannot litigate tenaciously and then be heard to complain about the time necessarily spent by plaintiff in

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[3] *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-19 (5th Cir. 1974). "The twelve *Johnson* factors are: (1) the time and labor required to litigate the suit; (2) the novelty and difficulty of the questions presented by the lawsuit; (3) the skill required properly to perform the legal service; (4) the preclusion of other employment opportunities for the attorney due to the attorney's acceptance of the case; (5) the customary fee for such services; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount in controversy involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the attorney's professional relationship with the client; and (12) awards in similar cases." *Trimper*, 58 F.3d at 73.

[4] The Supreme Court has denounced the *Johnson* factors as too subjective and endorsed the lodestar formula as being more objective. *See Perdue*, 559 U.S. at 551-52.

response"). Moreover, there are few, if any, North Carolina counsel with similar experience on the subject matter as Mr. Muraskin, Mr. Struger, and Ms. Stella, who have developed a specialized skill and practice in litigating First Amendment challenges to Ag-Gag laws. Sigmon Dec. ¶ 8; Craige Dec. ¶ 7 ("No lawyer in North Carolina has comparable experience."). Moreover, counsel took this case on contingency, without any guarantee of payment. Sigmon Dec. ¶ 8; *See U.S. Equal Employment Opportunity Comms. v. Widenhouse*, 2013 WL 12091637, *4 (M.D.N.C. May 7, 2013). And as the other Ag-Gag cases demonstrate, counsel have a longstanding relationship with the Plaintiff-organizations involved in this litigation and have together embarked on a multi-year campaign challenging this series of unconstitutional laws. Muraskin Dec. ¶¶ 11-12; Struger Dec. ¶ 6; Stella Dec. ¶ 6.

III. THERE IS NO BASIS TO DISTURB THE PRESUMPTIVE FEE CALCULATION

"The Supreme Court has indulged a 'strong presumption' that the lodestar number represents a reasonable attorney's fee." *McAfee*, 738 F.3d at 88-89. That presumption cannot be rebutted here.

The Supreme Court has held that "the most critical factor" in determining the reasonableness of a fee award "is the degree of success obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). Here, Plaintiffs achieved outstanding success—complete relief that enjoined each of the challenged provisions; there is no basis to reduce the lodestar under the "degree of success" factor. Indeed, a cursory comparison of Plaintiffs' requested relief, ECF Doc. 21, ¶ 142, and the Court's order underscores this conclusion. *See Fisher-Borne*, 2018 WL 3581705, at *11 ("This court finds that this injunctive and declaratory relief is not limited in comparison to the scope of the litigation as a whole, nor is this the rare circumstance where the lodestar does not equal a reasonable fee.") (internal quotations and citation omitted). And this is

not a case where the fee award is several times higher that a damages award, which is the typically reason for reducing a fee award under the "degree of success" consideration, *See Mercer v. Duke Univ.*, 401 F.3d 199, 204 (4th Cir. 2009) ("When considering the extent of the relief obtained, we must compare the amount of damages sought to the amount awarded."). In short, as the Supreme Court ruled in *Hensley*, '[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Hensley*, 461 U.S. at 435.

Courts may reduce the lodestar when a prevailing party loses on a claim that is unrelated to those that are successful. *Hensley*, 461 U.S. at 434-35, 440. *See McAfee*, 738 F.3d at 88. However, "[w]hen a lawsuit consists of related claims, a plaintiff winning substantial relief should not have his or her attorneys' fees reduced simply because the district court did not adopt each contention raised." *Cone v. Randolph Cty. Sch. Bd. of Educ.*, 2010 WL 1610445, at *4 (M.D.N.C. Apr. 19, 2010).

All of Plaintiffs' claims were related: they were all based on constitutional theories advanced against the same provisions of North Carolina's Anti-Sunshine Law, seeking the same remedy. For instance, Plaintiffs argued the same four statutory subsections violated the First Amendment. True, as compared to subsections (b)(2) and (b)(3), this Court did not find that subsections (b)(1) and (b)(5) were facially invalid under the First Amendment. Nonetheless, the court held that these two provisions violated the First Amendment *as applied* to Plaintiffs' organizations. *See Zorostrian Ctr. v. Rustam Guiv Found.*, 822 F.3d 739, 754 n.8 (4th Cir. 2016) ("Federal courts ... allow[ ] prevailing party to recover fees for unsuccessful claims where the entire case 'involve[s] a common core of facts or ... related legal theories."). Consequently, all the provisions challenged violate the First Amendment and, at least for Plaintiffs, are no longer enforceable.

It is also true that the Court did not rule in Plaintiffs' favor on their alternative theories at summary judgment—arguments that the state enacted unconstitutionally overbroad provisions that also violated the Fourteenth Amendment. *PETA*, 2020 WL 3130158, *19-24. But this outcome does not justify reducing the Lodestar amount. As an initial matter, Plaintiffs did not lose these arguments entirely. That is, the Court did not find subsections (b)(2) and (b)(3) would survive against these alternative theories; rather, the Court never reached these arguments after finding these same subsections were facially unconstitutional. *Id*. at *19 ("Because subsections (b)(2) and (b)(3) do not survive a facial challenge, Plaintiffs' remaining challenges [to those two provisions] are moot and need not be addressed."). Moreover, these arguments were intimately related to Plaintiffs' First Amendment claim, because they were premised on the idea that, like the First Amendment claims, the Property Protection Act was passed out of animus for Plaintiffs and their speech, and because it did not have the clarity that is required of laws regulating protected speech. In addition, Plaintiffs' decision to pursue alternative constitutional arguments against subsections (b)(1) and (b)(5) to vindicate the civil rights of all persons in North Carolina was not unreasonable. Indeed, as the Supreme Court has held, "[l]itigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds in not sufficient reason for reducing a fee." *Hensley*, 461 U.S. at 435; *Fisher-Borne*, 2018 WL 3581705, at *10 ("this court declines to apply a percentage reduction for the adoption claims because they were based on the same core set of facts as Plaintiffs' ultimately successful claims"). Notably, Plaintiffs' counsel would not have worked materially fewer hours had they raised only First Amendment arguments. Notwithstanding the forgoing, Plaintiffs have still chosen to exercise their billing discretion and removed all hours that specifically correspond to their overbroad and Fourteenth Amendment arguments, Levine Dec. ¶

9, and have also reduced Mr. Muraskin's time by fifteen percent to capture time that may be attributable to these alternative arguments against subsections (b)(1) and (b)(5) during the summary judgment phase of the case, *id*.

Finally, Plaintiffs acknowledge that three of their original claims—based specifically on the North Carolina constitution— were dismissed after the Fourth Circuit issued its standing decision. *See PETA v. Stein*, 2020 WL 3130158, *3. However, these claims (Claims 3, 4 and 5) were related to and mimic Plaintiffs' federal First Amendment claims. *See Hensley*, 461 U.S. at 435 (no deduction where claims "involve[s] a common core of facts or ... related legal theories"). And, in any case, hours specifically devoted to these particular state-law claims—time limited to developing the complaint and preparing for the December 2018 status conference— have been eliminated. Levine Dec. ¶ 9.

IV. PLAINTIFFS ARE ENTITLED TO FEES FOR TIME SPENT TO RECOVERY THEIR REASONABLE FEES AND COSTS

Plaintiffs are entitled to recover their fees-on-fees. *Mercer v. Duke Univ.*, 301 F. Supp. 2d 454, 469 (M.D.N.C. 2004), aff'd, 401 F.3d 199 (4th Cir. 2005) ("[T]he Fourth Circuit has specifically held that fees-on-fees are available to prevailing parties under § 1988."). *See INS v. Jean*, 496 U.S. 154, 161, 162 (1980) ("[A] fee award presumptively encompasses all aspects of the civil action."). Here, only one of Plaintiffs' counsel, Neil Levine, spent time on the fee issues. Levine Dec., ¶ 8. His time was limited to engaging in settlement discussions with the state and filing this Motion. *See* Statement of Fee Consultation (filed concurrently); *See also* Levine Dec., ¶ 8, and Exhibit A.[5] These tasks were reasonable, and the number of hours spent is commensurate with the tasks performed. Whitlock Dec. ¶ 6.

[5] Plaintiffs will supplement their fees on fees request upon filing a reply brief.

V. PLAINTIFFS SEEK THE RECOVERY OF THEIR REASONABLE COSTS

"A prevailing plaintiff in a civil rights action is entitled, under § 1988, to recover those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services." *Spell v. McDaniel*, 852 F.2d 762, 771 (4th Cir. 1988). *See Fisher-Borne*, 2018 WL 3581705, *3 (awarding defendant to pay plaintiffs' costs for courier services, filing fees, printing, and travel).

Here, Plaintiffs incurred $10,296.28 in out-of-pocket expenses—limited to and divided between Public Justice ($8,872.19) and Whitfield Bryson ($1,424.09). Plaintiffs' taxable[6] and non-taxable costs are broken down as follows: (1) filing fees: (2) legal research, (3) travel, and (4) printing, copying, & postage. These types of costs are authorized for recovery under Rule 54 and are costs typically awarded by courts under Section 1988. *Trimper*, 58 F.3d at 75 (costs that may be awarded will generally include travel, copy, and other expenses that would normally be charged to clients).

CONCLUSION

Plaintiffs request an award of $612,009.43, in fees and $10,296.28 in costs, plus additional fees to be incurred for preparing a reply brief on this Motion. Given the duration, complexity, intensity, and success of this litigation, these fees and costs are warranted and reasonable.

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[6] On August 10, 2020, Plaintiffs submitted a Bill of Costs for their taxable costs, which cover court fees for filing, appealing, and admissions fees.

Respectfully submitted on August 10, 2020

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

Pursuant to Local Rule 7.3(d)(1), the undersigned hereby certifies that the foregoing brief complies word limit for briefs in support of a motion and contains 5,822 words, excluding the caption, signature lines, certificates, and table of contents and authorities, as counted using the word count feature in Microsoft Word.

s/ Neil Levine
Neil Levine
Public Justice

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of August, 2020, a copy of Plaintiffs' Opening Brief in Support of Motion for Attorney Fees and Costs and Supporting Declarations were filed with the Clerk of the Court using the CM/ECF System and served by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

s/ Neil Levine
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