CASE ARGUED APRIL 21, 2015

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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| State of Texas,<br>*Appellant*,<br><br>v.<br><br>United States of America, and Eric H. Holder, in his official capacity as Attorney General of the United States,<br>*Defendants*, and<br><br>Wendy Davis, et al.,<br>*Appellee-Intervenors*. | No. 14-5151 |

**REPLY IN SUPPORT OF APPELLEES' JOINT MOTION FOR APPELLATE ATTORNEYS' FEES**

Appellees request compensation at a reasonable rate for a reasonable number of hours. Appellees seek rates nearly identical to those already awarded in this case. And Appellees have demonstrated that the hours expended were reasonable, particularly in light of Texas's actions increasing the scope of the proceedings in this case. *See* Mot. at 7-8. The motion for fees should be granted.[1]

[1] As Appellees indicated in their motion, this Court may remand this issue to the district court, which is well equipped to determine the reasonableness of Appellees' fee request. *See* Mot. at 4; *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1179 (D.C. Cir. 1985) ("The calculation of the amount of the appellate attorneys' fee award can best be made by the district court.").

## I. Appellees Are Prevailing Parties Entitled to Appellate Fees.

Appellees are entitled to recuperate fees incurred in this appeal for successfully defending their award of fees in the underlying litigation. *See* Mot. at 2; *Bd. of Trs. of the Hotel & Rest. Emps. Local 25 v. JPR, Inc.*, 136 F.3d 794, 808 (D.C. Cir. 1998). Texas does not contend otherwise nor challenge the rule set forth in *JPR*. *See* Opp. at 2-3. Rather, Texas says it plans to file a petition for certiorari challenging the fee award for the underlying case, raising the same arguments this Court has already rejected. In light of Texas's failure to challenge Appellees' reliance on *JPR*, Appellees will reserve for the Supreme Court its arguments for why this Court was correct to affirm the district court's order awarding fees.

Texas has not shown that it is likely the Supreme Court will grant its petition for certiorari. *See* Slip Op. at 14 (characterizing Texas's arguments as "waived and forfeited twice over."). Nonetheless, Appellees do not object to the Court withholding its decision on this fees motion until after the Supreme Court resolves Texas's planned petition. Indeed, Texas's decision to seek certiorari means that Appellees will incur still more attorneys' fees, necessitating yet another motion for fees, which the Supreme Court would likely remand for resolution. Thus, judicial economy may best be served by considering both motions together (or remanding both to the district court after Texas's petition for certiorari is resolved).

## II. Appellees Request a Reasonable Fee Award.

Appellees' fee request is reasonable, both in the rate sought and the hours expended. Texas objects to the rates sought by the attorneys for the Davis and Gonzales attorneys and contends, for the first time in opposition to Appellees' Motion for appellate fees, that the USAO *Laffey* Matrix rates should be applied instead. But the rates sought are substantially the same as those already awarded by the district court in this case—rates Texas declined to challenge either in the district court or on appeal. Texas is thus precluded from challenging those rates now. Moreover, as the Davis and Gonzales attorneys' usual billing rates, they are presumptively reasonable. And Texas's objections to the hours expended by the attorneys for the Gonzales Appellees are not well founded.

### A. Appellees' Requested Rates are Reasonable.

#### 1. Texas Has Waived Its Ability to Challenge Appellees' Request for Compensation at Their Attorneys' Usual Billing Rates.

Texas has waived its ability to challenge the rates sought by Appellees. Texas contends that Appellees' attorneys should not be awarded their usual billing rates—the same measure of rates already awarded by the district court in this case—but instead should be awarded the substantially lower USAO *Laffey* Matrix

rates.[2] *See* Opp. at 8. Texas has waived this argument by failing to raise it either before the district court or on appeal from the district court's award of fees for the underlying litigation.

> [A]ppellate courts are precluded from revisiting not just prior *appellate* decisions but also those prior rulings of the *trial* court that could have been but were not challenged in an earlier appeal. "[A] legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, [governs] future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time."

*Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995) (quoting *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987) (emphasis and bracket in original)).

Texas could have challenged the district court's decision to award Appellees' attorneys their usual billing rates rather than those of the USAO *Laffey* Matrix either in the district court or on appeal, but Texas declined to do so. Texas therefore cannot now challenge those rates for the first time in its opposition to the motion for appellate fees. This rule exists for good reason. It would make no

[2] The only difference between the rates sought here and the rates already awarded by the district court in this case is due to small increases in the attorneys' usual billing rates to reflect the passage of time since those rates were awarded for work conducted in 2011 through 2013. *See* Davis Intervenors' Motion for Attorneys' Fees at 34, *Texas v. United States*, No. 1:11-cv-01303 (D.D.C. Dec. 17 ,2013) (ECF No. 256) (showing rates sought and awarded for Davis Intervenors); Gonzales Intervenors' Motion for Attorneys' Fees, Ex. A to J. Devaney Declaration, *id.* (ECF No. 257-4) (showing rates sought and awarded for Gonzales Intervenors).

sense for Appellees' attorneys to be awarded lower rates for this appeal than they were awarded for other phases of this litigation. As Appellees contended in their opening papers, *see* Mot. at 9, because the rates sought are substantially the same as those already awarded in this case, they should be awarded here.

Texas contends that the district court's decision to award Appellees' attorneys their usual billing rates is irrelevant because "the district court did not review Appellees' proposed hourly rates in the underlying litigation to determine whether they were reasonable." Opp. at 8. Not so. The district court concluded that intervenors had "adequately explained the hourly rates of their attorneys." *Texas v. United States*, 49 F. Supp. 3d 27, 44 (D.D.C. 2014). True, the court's analysis was brief—the court noted that it "need not tarry long on the reasonableness of the fees sought," *id.* at 43, but that was "because Texas . . . presented no argument contesting any aspect of them," *id.* The brevity of the district court's analysis—a direct consequence of Texas's decision to file an "Advisory" rather than actually responding to the fees motion below—cannot save Texas from its failure to appeal the awarded rates nor avoid their application here.

**2. Appellees' Attorneys' Usual Billing Rates Are Presumptively Reasonable.**

Even if Texas had not waived its argument, Appellees' attorneys' requested rates are nonetheless presumptively reasonable because they are their usual billing rates. *See, e.g., Kattan by Thomas v. Dist. of Columbia*, 995 F.2d 274, 278 (D.C.

Cir. 1993) ("[A]n attorney's usual billing rate is presumptively the reasonable rate, provided that this rate is in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." (internal quotation marks omitted)). Texas contends that the attorneys for the Davis and Gonzales Appellees have not met their burden to justify their usual billing rates in light of the prevailing rate for similar services in Washington, D.C., *see* Opp. at 7-12, and as a result the USAO *Laffey* matrix should be applied. But fee applicants may satisfy this burden by citing "evidence of recent fees awarded by the courts . . . to attorneys with comparable qualifications handling similar cases." *Covington v. Dist. of Columbia*, 57 F.3d 1101, 1109 (D.C. Cir. 1995). Appellees did so, citing the rates awarded by the district court in this very case. *See* Mot. at 9. No better evidence exists of the rates awarded to "attorneys with comparable qualifications handling similar cases," *Covington*, 57 F.3d at 1109, than the fees awarded to the *same* attorneys for the *same* litigation.[3]

Texas's reliance on the USAO *Laffey* matrix is misplaced. This case involved "various procedural and substantive complexities," Slip Op. at 20, and voting rights cases in general rank among the most complex types of cases to

[3] Moreover, Appellees demonstrated that Mr. Hebert's requested rate was actually below the LSI *Laffey* matrix, *see* Mot. at 14, and included a survey of law firm billing rates, *see id.* Ex. D to Devaney Declaration.

litigate.[4] In addition, through their declarations, Appellees have demonstrated that their attorneys exceed the general market in expertise and qualifications. Moreover, as this Court has noted, matrices such as the two *Laffey* matrices are "somewhat crude." *Eley v. Dist. of Columbia*, 793 F.3d 97, 101 (D.C. Cir. 2015). The matrix proposed by Texas, the USAO *Laffey* matrix, has lower rates because it is updated by general consumer inflation figures for Washington, D.C., not ones specific to the legal industry, even though "the cost of legal services nationally has far outstripped the increase in overall prices," *id.* (quotation marks omitted). The LSI *Laffey* matrix, which reflects higher rates, is somewhat better because it is based on increases in the costs of legal services. *Id.* at 101-02. Texas criticizes the LSI matrix for being based upon national figures, rather than ones specific to Washington, D.C. Opp. at 7; *see also Eley*, 793 F.3d at 102 (referring to use of national figures as an "imprecision"). But with hourly rates rising higher in Washington, D.C. than most other cities,[5] this fact actually causes the LSI *Laffey* matrix to *understate* the rates for Washington, D.C. In any event, Texas has

[4] *See* Federal Judicial Center, 2003-2004 Case Weighting Study at 60 (2005), http://www.fjc.gov/public/pdf.nsf/lookup/CaseWts0.pdf/$file/CaseWts0.pdf (ranking voting rights cases fifth most complex of forty-two categories).

[5] Catherine Ho, *Washington Law Firm Partners are Earning 14 Percent More Than They Were Two Years Ago*, Wash. Post, Sept. 19, 2012, http://www.washingtonpost.com/blogs/capital-business/post/washington-law-firm-partners-are-earning-14-percent-more-than-in-2010/2012/09/19/2d16ec2a-0274-11e2-8102-ebee9c66e190_blog.html (reporting that Washington, D.C. billing rates rose nine percent from 2010 to 2012 and were the fourth highest in the country).

waived its argument that the USAO *Laffey* matrix should be used, and even if it had not, Appellees have justified the use of their usual billing rates by pointing to the most relevant recent case—the rates they have already been awarded in this case. But if the Court is inclined to impose a *Laffey* matrix, the updated LSI matrix provides a better measure by basing its rates on the legal market, not the general consumer market.[6]

The Court should award the rates requested by Appellees.

### B. The Gonzales Appellees Request Compensation for a Reasonable Number of Hours.

The Gonzales Appellees request compensation for a reasonable number of hours. Texas objects to times spent by attorneys for the Gonzales Appellees on three filings: 1) an unfiled motion for extension of time to respond to Texas's motion for summary reversal, 2) the Gonzales Appellees' response to Texas's Motion for Summary Reversal, and 3) Appellees' joint merits brief. *See* Opp. at 13-14. These arguments are without merit.

*First*, the 7.6 hours spent by attorney Anyu Fang working on a motion for an extension of time to respond to Texas's summary reversal motion is reasonable.

[6] Texas contends that the Davis Appellees' attorneys forfeited their ability to favor the LSI *Laffey* matrix over the USAO matrix by not proposing this measure in the opening Motion. *See* Opp. at 9. This makes no sense. Appellees were not obligated to also propose alternative *lower* rates based on the LSI *Laffey* matrix in anticipation of Texas raising an argument Texas had already waived. Texas injected the *Laffey* matrix in its opposition; Appellees are entitled to respond to that argument in reply.

The fact that the motion was not filed does not make the time unreasonable. *See Kurowski v. Krajewski*, 848 F.2d 767, 776 (7th Cir. 1988) ("That the lawyers spent some time in blind alleys is irrelevant; this is inevitable, and the hourly rate reflects the fact that not all time is equally productive."). Given that Texas's eighteen page motion for summary reversal was the first time it had actually made any legal arguments in the case, it was not unreasonable of Appellees to consider (and prepare for the possibility of) seeking to extend the time to respond beyond the standard ten days. *See* Fed. R. App. P. 27(a)(3)(A). The time is compensable.

*Second*, the Gonzales Appellees' attorneys expended a reasonable amount of time responding to Texas's motion for summary reversal. Texas contends that the Gonzales Appellees' response was duplicative of the Davis Appellees' response and that it responded to an argument about the authority of a single-judge to award fees that Texas claims it did not make. Opp. at 15-16. Texas is wrong.

Texas's apparent argument that "the district judge improperly altered the basis of the three-judge district court's ruling on the State's motion to dismiss," Opp. at 16, was difficult to understand and premised upon a misrepresentation of the three-judge court's dismissal order and its own motion seeking dismissal based on *both* the legislative enactment *and Shelby County*. *See* Tex. Mot. for Summ. Reversal at 9-15. In light of the confusing and misleading argument raised by Texas, it was reasonable of the Gonzales Appellees to argue that the single judge

court had the authority to issue the fee award. And the Gonzales Appellees raised the well-taken argument that Texas's "single judge" argument—however Texas might characterize it—was never raised below and therefore waived. *See* Gonzales Appellees' Response to Mot. for Summ. Reversal at 6. The Gonzalez Appellees' remaining arguments did not duplicate those of the Davis Appellees. Moreover, the Court had not yet ordered the parties to file joint briefs. The time is compensable.

*Third*, the roughly thirty hours spent by the Gonzales Appellees' attorneys editing the merits brief was reasonable. Counsel provided important consultation, edits, and feedback on the brief, and took the lead in drafting the portion of the brief that was unique to the Gonzales and NAACP Intervenors. *See* Appellees' Br. at 40-41. Given the difficulties of coordinating a single brief across three parties, the time was reasonably expended, particularly given that the overall number of hours for which Appellees seek fees is similar to or below those awarded by this and other courts for less complicated appeals. *See* Mot. at 7-8.

## CONCLUSION

For the foregoing reasons, the Court should grant the motion for appellate fees. In the alternative, the Court should remand the motion to the district court for the district court to determine the fee award.

Dated: October 7, 2015

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that, on October 7, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

I further certify that four (4) paper copies of the document will be hand-delivered to the Clerk of the Court.

/s/ Paul M. Smith
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