CASE ARGUED APRIL 21, 2015

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

STATE OF TEXAS, *Appellant*, v. UNITED STATES OF AMERICA, and ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States, *Defendants*, and WENDY DAVIS, *et al*., *Intervenor-Appellees*.	No. 14-5151

RESPONSE TO APPELLEES' SUPPLEMENTAL JOINT MOTION FOR APPELLATE ATTORNEYS' FEES AND COSTS

The State of Texas, Appellant, files this Response to the Appellees' Supplemental Joint Motion for Appellate Attorneys' Fees, under 42 U.S.C. § 1988(b) and 52 U.S.C. § 10310(e), incurred in opposing the State's petition for writ of certiorari in this case.

The State raises no objection to (1) the requested $1,190.17 in costs in this supplemental motion; (2) the number of hours and hourly rates requested by the NAACP Appellees in this supplemental motion; and (3)

the number of hours requested by the Davis Appellees in this supplemental motion.

But the State does object to the hourly rates requested by the Davis Appellees. This Court should reduce Appellees' request for a supplemental award of $56,602.50 in attorney's fees because the Davis Appellees' request reflects excessive hourly rates. The USAO *Laffey* matrix, which courts in this Circuit frequently use in determining the proper hourly rate for fee awards, confirms that the requested rates are excessive. Moreover, other courts have used significantly lower rates for some of these same counsel when awarding them fees, and the anecdotes cited by Appellees of fees merely requested by other counsel do not establish the relevant hourly rate. The Davis Appellees should be awarded no more than $29,549 in attorney's fees for their work opposing the State's certiorari petition—which would mean a total award to Appellees of no more than $31,539.17 for this work.

A. The USAO *Laffey* Matrix Establishes Significantly Lower Hourly Rates for the Davis Appellees.

1. The USAO *Laffey* matrix should be used to establish the hourly rates here. The Appellees' supplemental joint motion for attorney's fees, like their previous motion for appellate fees, fails to utilize the USAO

Laffey matrix, which courts in this Circuit have frequently used for determining the prevailing market rate in the Washington, D.C. area. *See, e.g.*, *Covington v. Dist. of Columbia*, 57 F.3d 1101, 1109 (D.C. Cir. 1995); *Berke v. Fed. Bureau of Prisons*, 942 F. Supp. 2d 71, 77 (D.D.C. 2013); *Heller v. Dist. of Columbia*, 832 F. Supp. 2d 32, 48 (D.D.C. 2011); *Miller v. Holzmann*, 575 F. Supp. 2d 2, 18 n.29 (D.D.C. 2008); *Am. Lands Alliance v. Norton*, 525 F. Supp. 2d 135, 150 (D.D.C. 2007). The matrix is intended to establish the hourly rates for cases like this one, in which a "fee-shifting" statute permits the prevailing party to recover "reasonable" attorney's fees.[1]

Jenner & Block attorneys. The hourly rates requested for Jenner & Block attorneys and staff significantly exceed the prevailing market rates established by the USAO *Laffey* matrix for lawyers with similar experience. Paul M. Smith has 36 years of experience; Jessica Ring Amunson has 11 years; Mark P. Gaber has 5 years; and Cheryl L. Olson is non-attorney staff. Suppl. Joint Mot., Ex. A, Attach. 1, at 1–4. Under the USAO *Laffey* matrix, Mr. Smith's prevailing market hourly rate is

[1] *See* USAO *Laffey* matrix—2014–2015 at n.1, http://www.justice.gov/sites/default/files/usao-dc/legacy/2014/07/14/Laffey%20Matrix_2014-2015.pdf (last visited Feb. 12, 2016).

$520; Ms. Amunson's is $460; Mr. Gaber's is $300; and Ms. Olson's is $150.[2]

The Davis Appellees request an hourly rate of $1,150 for Mr. Smith; $700 for Ms. Amunson; $590 for Mr. Gaber; and $335 for Ms. Olson. Suppl. Joint Mot. 9. The requested hourly rates substantially exceed the prevailing market rate reflected in the USAO *Laffey* matrix. Because the Davis Appellees provide no sufficient basis to determine that their requested fees reflect the prevailing market rate, as explained below, the Court should rely on the rates reflected in the USAO *Laffey* matrix and reduce any fee award accordingly.

J. Gerald Hebert. Based on his 42 years of experience, Suppl. Joint Mot. 13, Ex. B, J. Gerald Hebert's requested rate of $650 per hour is higher than the rate of $520 applicable under the USAO *Laffey* matrix. *See supra* n.2. Fees awarded to Mr. Hebert should therefore reflect an hourly rate of no more than $520 per hour.

[2] *See* USAO *Laffey* matrix—2014–2015, http://www.justice.gov/sites/default/files/usao-dc/legacy/2014/07/14/Laffey%20Matrix_2014-2015.pdf.

2. Recent fee requests by some counsel for the Davis Appellees also confirm that the rates reflected in the USAO *Laffey* matrix are appropriate here.

In *McGee v. Cole,* No. 3:13-cv-24068 (S.D. W. Va. Dec. 2, 2014), ECF No. 146-1, at ¶ 9, Jenner & Block attorneys expressly stated:

> The federal courts in the District of Columbia customarily consider the Laffey Matrix rates to be reasonable for work performed by attorneys located in Washington, D.C. *See Harvey v. Mohammed*, 951 F. Supp. 2d 47, 54 (D.D.C. 2013) ("To determine reasonable hourly rates, it is customary in this District to apply the Laffey Matrix . . . .").

In that case, in 2014, counsel Paul Smith requested an hourly rate of $771 for himself and $175 for paralegal Cheryl Olson based on the *Laffey* matrix. *See id.* at ¶¶ 9,12.[3] The district court nevertheless awarded lower rates—setting Mr. Smith's hourly rate at $500 and Olson's hourly rate at $100. *McGee v. Cole*, No. 3:13-24068, 2015 WL 4366161, at **6–8 (S.D. W. Va. July 16, 2015). The court awarded these lower rates while acknowledging that a rate of $500 per hour for Mr. Smith "coincides with a highly competent, experienced senior litigator's rates." *Id.* at *6.

[3] In that case, Jenner & Block attorneys relied on a chart taken from the webpage www.laffeymatrix.com/see.html. *See McGee v. Cole*, No. 3:13-cv-24068 (S.D. W. Va. Dec. 2, 2014), ECF No. 146-6. In this case, by contrast, they have not relied on any version of the *Laffey* matrix to support their requested hourly rates.

Additionally, in parallel voting-rights litigation involving these parties, a district court recently set hourly rates of $418 for Mr. Smith, $324 for Ms. Amunson, $252 for Mr. Gaber, and $125 for Ms. Olson. *See Davis v. Perry,* 991 F. Supp. 2d 809, 848 (W.D. Tex. 2014), *supplemented,* 2014 WL 172119, at *2 (W.D. Tex. Jan. 15, 2014), *rev'd sub nom. Davis v. Abbott,* 781 F.3d 207 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 534 (2015).

3. Arguing against the USAO *Laffey* matrix, Appellees assert that "voting rights cases are among the most difficult to litigate" by citing only the Federal Judicial Center's 2003–2004 Case Weighting Study. Suppl. Joint Mot. 9. This study estimates the case-processing effort required by district judges to adjudicate the volume and mix of cases filed in their courts to identify the level of judicial resources needed by the courts.[4] The study does not rank voting rights cases in terms of difficulty to litigate. And in any event, their Supplemental Joint Motion here involves work only on opposing a certiorari petition on an issue of attorney's fees—which would not be analogous to most voting-rights cases involving, for example, detailed redistricting plans.

[4] *See* Federal Judicial Center, 2003–2004 District Court Case-Weighting Study at 1 (2005), http://www.fjc.gov/public/pdf.nsf/lookup/CaseWts0.pdf/$file/CaseWts0.pdf.

The Court should reject the requested rates and base any fee award on the hourly rates provided by the USAO *Laffey* matrix, which has been used by other courts even in voting-rights cases. *See, e.g.*, *Desena v. Lepage*, 847 F. Supp. 2d 207, 214 (D. Me. 2012). The following table shows the maximum fees recoverable by the Davis Appellees based on the total number of hours requested and the hourly rates set by the USAO *Laffey* matrix:

Attorney/Staff	**Hours**	**Rate**	**Total**
Smith (2015)	6.3	$520	$3,276
Amunson (2015)	12.5	$460	$5,750
Gaber (2015)	60.0	$300	$18,000
Hebert	2.4	$520	$1,248
Olson (2015)	8.5	$150	$1,275
Davis Total	**89.7**		**$29,549**

B. The Davis Appellees' Survey of Prevailing Market Rates Does Not Establish Rates Greater Than Those Recognized by the *Laffey* Matrix.

The Davis Appellees seek the actual rates charged by an international law firm (Jenner & Block) to private paying clients, claiming that these rates are "presumptively reasonable." *See* Suppl. Joint Mot. 6–7. But in order to be considered "presumptively reasonable,"

the rate must be "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Covington*, 57 F.3d at 1109 (quoting *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984)). The *Laffey* matrix sets that proper rate here.

The evidence presented by the Davis Appellees fails to demonstrate that the requested fees are presumptively reasonable. The anecdotes they cite largely focus on hourly rates *requested by*—not fees actually awarded to—attorneys in non-voting rights cases outside the community. *See* Suppl. Joint Mot., Ex. A (Smith Decl.), at ¶ 12. In one of the cases cited by Appellees, former U.S. Solicitor General Paul Clement's requested hourly rate of $1,100 was reduced to $300 for federal appellate litigation of a civil-rights claim. *Osterweil v. Bartlett,* No. 1:09-cv-825, ECF No. 56, at 11, 14 (N.D.N.Y. Mar. 11, 2015). In another, the Second Circuit affirmed the district court's denial of attorney's fees altogether, and while the Supreme Court has granted certiorari in that case, no court has made any determination about the reasonableness of hourly rates there. *See John Wiley & Sons, Inc. v. Kirtsaeng*, 08-CV-07834 (DCP), 2013 WL 6722887, at *6 (S.D.N.Y. Dec. 20, 2013), *aff'd,* 605 F. App'x 48, 49–50

(2d Cir. 2015), *cert. granted*, 2016 WL 205944 (U.S. Jan. 15, 2016). Appellees' other two anecdotes fare no better.[5]

As explained above, the requested hourly rates are not presumptively reasonable, and they are not in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. Appellees therefore failed to meet their burden of establishing that their requested rates should be used here. *See, e.g.*, *Blum,* 465 U.S. at 895 n.11 ("[T]he burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.").

[5] *See Patel v. City of Los Angeles,* No. 2:05-cv-01571-DSF-AJW (C.D. Cal. February 5, 2016), ECF No. 102, at ¶¶ 2–6 (tentative settlement of Supreme Court fees and agreement to mediate district court fees in Fourth Amendment case); *In re Lightsquared Inc.,* No. 1:12-bk-12080 (S.D.N.Y. Bankr. Aug. 30, 2012), ECF No. 295, at 3 (bankruptcy court approved engagement as "special litigation counsel"—as opposed to awarding attorney's fees under a fee-shifting statute—at an effective hourly rate of $1,800 for former U.S. Solicitor General Theodore Olson capped at 25 hours per month).

C. The State Has Not Waived—And Could Not Have Preemptively Waived—Its Ability to Challenge Appellees' Requested Hourly Rates Here.

Appellees further contend that the State waived its ability to challenge the requested hourly rates in their supplemental motion because the Court affirmed the district court's holding that the State did not properly challenge the request for previous fees in the district court. *See* Suppl. Joint Mot. 8. This argument is meritless because a party cannot preemptively waive (in a trial court) a challenge to fees for appellate work that has not yet even occurred.[6] The State has properly raised and preserved its objection to the Davis Appellees' hourly rates for appellate work regarding this attorney's fees dispute.

Indeed, this filing is the first time that the State could have possibly objected to the hourly rates requested by the Davis Appellees for their

[6] The authorities cited by Appellees do not support their effort to deprive the State of an opportunity to object to their request for appellate fees. *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735 (D.C. Cir. 1995), involved circumstances more appropriate to a claim of waiver on appeal—the defendant raised an unsuccessful limitations defense in the trial court, declined to challenge that ruling in the initial appeal, then challenged it years later in a subsequent appeal. *See id.* at 739. But even in those circumstances, this Court refused to deem the argument waived, explaining that the law-of-the-case doctrine and its subsidiary waiver principle establish "a prudential rule rather than a jurisdictional one." *Id.* at 739–40. The Supreme Court's passing reference in *Musacchio v. United States*, 136 S. Ct. 709, 716 (2016), to potential constraints on appellate review does not suggest any limitation on a party's ability to respond to claims made for the first time in an appellate court.

work connected to opposing the State's certiorari petition. The State challenges the hourly rate for the appellate fees that Appellees seek in their motion filed on February 3, 2016, which has not been ruled upon. Pursuant to Federal Rule of Appellate Procedure 27(a)(3), the State has 10 days after service of Appellees' motion to file a response. The State timely files this response challenging the hourly rates Appellees seek in their Supplemental Joint Motion for Appellate Attorneys' Fees. The State has not waived its right to dispute the hourly rates proposed in that fee request.

Similarly, Appellees' reliance on the district court's award of attorney's fees at their requested hourly rate for work done previously, based on the State's failure to object to the requested rate within the applicable time period, is not evidence establishing the prevailing rate for attorneys with comparable qualifications. *See* Suppl. Joint Mot. 7. The district court did not analyze their proposed hourly rates because the State challenged only their entitlement to fees for work done previously, not the reasonableness of the requested rates for that previous work. *See Texas v. United States,* 49 F. Supp. 3d 27, 44 (D.D.C. 2014). The district court merely found that the State waived any arguments challenging the

reasonableness of the hourly rates requested for work performed up to that point in time. *Id.* But here, the State has properly objected to Appellees' rates for their appellate work in this attorney's fees dispute.

CONCLUSION

The Court should use the USAO *Laffey* matrix to determine the reasonable hourly rate and award no more than $29,549 in attorney's fees to the Davis Appellees and up to $800.00 in attorney's fees to the NAACP Appellees. Accordingly, the Court should award the Appellees no more than $31,539.17 in attorney's fees and costs for their work in opposing the State's certiorari petition in this case.

Dated: February 12, 2016 Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that, on February 12, 2016, 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 paper copies of the document will be delivered to the Clerk of the Court via Federal Express next-day service.

/s/ Scott A. Keller
SCOTT A. KELLER