IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DICK ANTHONY HELLER, et al.,	)	Case No. 03-CV-0213-EGS
	)	
Plaintiffs,	)	**MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR ATTORNEY FEES AND COSTS**
	)	
v.	)	
	)	
DISTRICT OF COLUMBIA, et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR ATTORNEY FEES AND COSTS

COME NOW Plaintiff Dick Anthony Heller and his undersigned counsel, and submit their Memorandum in Reply to Defendants' Opposition to Motion for Attorney Fees and Costs.

Dated: October 8, 2008

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PRELIMINARY STATEMENT

Before considering the details of Defendants' opposition, a word about context is in order. Notably missing from the opposition is any valuation of the services performed by the legal team working for the District of Columbia. While Defendants denigrate moving counsels' qualifications, minimize the importance of this case, distort legal precedents, and misrepresent the contents of the moving papers, they carefully avoid placing the fee issue in the most relevant direct context – how *both* sides approached the litigation. If Defendants wanted to substantiate their assertions that the hours of Plaintiff's lead counsel should be cut by an astonishing 40 percent, one would expect that Defendants would describe what their hours – including the hours worked by O'Melveny & Myers, Akin Gump, and Covington & Burling – totaled. After all, Defendants fought this case no less aggressively than Plaintiff prosecuted it. That information is conspicuously missing from Defendants' opposition.

Plaintiff supplied some of the hourly rates of Defendants' attorneys – O'Melveny, $705; Akin, $350-$600 six years ago; Covington, $510-$800 last year. Defendants did not contest this evidence. Moreover, something more is known of what *this specific case* cost, or should have cost, Defendants:

> Walter Dellinger estimates that when his firm, O'Melveny & Myers, briefs and argues a Supreme Court case on a pro bono basis, ***it usually eats up about $500,000 worth of otherwise billable hours***. But when the District of Columbia called on him in early January to ask him to defend its handgun laws in the Second Amendment case of D.C. v. Heller, Dellinger did not hesitate. ***He said yes, even though he now estimates that the cost to his firm in lost fees will be "well over $1 million."***

Tony Mauro, "D.C. Battle Draws Top Guns," *Legal Times*, 2/18/08 (Exh. 13) (emphasis added).

In other words, O'Melveny's going rate for a run-of-the-mill Supreme Court representation is $500,000.[1] But O'Melveny worked more than twice as hard at this case as it normally does – and it was just one of three such mega-firms working the case, to say nothing of the Defendants' in-house attorneys.

It's easy to see how the value of Defendants' effort spiraled into the millions. For example, "the District government's massive legal team" mooted Mr. Dellinger before "[t]hree dozen lawyers." David Nakamura, "An Old Hand At Court Gears Up for Battle," *Washington Post*, 3/18/08, p. B01. Yet despite using *millions* of dollars worth of legal services at the Supreme Court phase alone, Defendants outrageously insist that prevailing Plaintiff's entire legal team, after nearly six years of litigation in three federal courts, is entitled to less than $800,000.

No person faintly knowledgeable with the practice of law could *credibly* claim that a case of this magnitude would be litigated in less than 1,000 hours by its lead counsel, charged with researching and writing all the pleadings, from the initial complaint, through the merits brief at the Supreme Court. Yet Defendants insist that much of counsels' time constituted "over-preparation" – presumably unnecessary effort intended solely to fulfill the longer-term professional aspirations of Plaintiff's counsel – which should be deferred "over the course of their careers." Opp. at 18. That preposterous notion has no support in law or common sense. After six years of not being paid, counsel are to be paid *now*. Under Section 1988, *Defendants*,

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[1]O'Melveny's billing is not unusual. Covington billed the Philippines government $500,000 for six months' work lobbying against conditioning American military aid to their client on human rights progress. "It Ain't $50 Million, But It's Not Bad," *Blog of Legal Times*, 1/2/08 (Exh. 14). Lewis "Scooter" Libby's legal defense cost $5 million – and he was convicted. "GOP Achievers Want to Compile $5 Million for Libby Defense," *Washington Post*, 2/22/06, p. A13.

not anyone else, not some mysterious future clients that have yet to and might never materialize, are liable for fairly compensating counsel for their time.[2] Clients cannot challenge bills on grounds that their attorneys might have *other* paying work in the future, and lawyers cannot ethically increase a bill to compensate for a different client's refusal to pay in an earlier matter.

Defendants both understate and misstate the results in this case, oddly claiming that Plaintiff "did not win on the licensing and safe storage challenges." Opp. at 22. Plaintiff never challenged the licensing requirement. And as Defendants should know, the Supreme Court did, in fact, strike down the so-called "safe storage" law. Plaintiff supported the concept of safe-storage, but the Court agreed with Plaintiff that the Defendants's draconian version had constructively imposed a functional firearms ban.[3]

Equally erroneous is the claim that counsel were less responsible for success because they "had the assistance of the brief from the Department of Justice," *id.* – the same brief that urged the Supreme Court to vacate Plaintiff's victory because the laws might be constitutional. Of course this is not how the Defendants saw it at the time. "Peter Nickles, the District's acting attorney general, called the brief a 'somewhat surprising and very favorable development.'" Robert Barnes, "Justice Dept. Critical of Appellate Ruling on Guns," *Washington Post*, 1/12/08, A03. Walter Dellinger added, "I am gratified they recognize the Court of Appeals erred in striking down the District's law . . ." *Id.* "The Brady Center welcomes this surprising development. It demonstrates the problem with the 'private purpose' interpretation of the Second

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[2]The notion is yet more absurd considering the public interest focus of counsels' practice.

[3]As discussed further below, the attorneys who prepared Defendants' opposition appear unfamiliar with this litigation.

Amendment. " Paul Helmke, "The Bush Administration's Support for Gun Control," http://www.huffingtonpost.com/paul-helmke/the-bush-administrations_b_82890.html (last visited Oct. 5, 2008). If anything, the Solicitor General's behavior in this case warrants an increase in the fee multiplier.

Carefully examining the opposition's details confirms what is obvious on the opposition's face: Defendants' approach to this fee motion is not merely parsimonious – it is punitive, and so far outside the realities of the legal profession as to utterly lack credibility. All of Defendants' "evidence" comes in the form of mere assertions by its counsel, who is poorly qualified to offer expert opinion on the matters at issue. Some of Defendants' assertions, particularly their theory of how rates are to be determined, are barred by circuit precedent. Others are barred by Defendants' previous litigating positions. And the rest are simply wrong.

ARGUMENT

I. DEFENDANTS ARE JUDICIALLY ESTOPPED FROM CLAIMING THIS WAS A SIMPLE, NON-EXCEPTIONAL CASE.

That this case qualifies as exceptional within the meaning of *Blum* v. *Stenson*, 465 U.S. 886 (1984), and thus warrants award of a fee enhancement, is plainly obvious and in any event requires no further argument to establish beyond what was written in the original moving papers.

However, because Defendants suddenly claim that the case was a simple one, and particularly as they seek to radically limit counsels' compensable hours, it is critical to recall accepted notions of judicial estoppel. "[J]udicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire* v. *Maine*, 532 U.S. 742, 749 (2005) (citations

omitted); *Elemary* v. *Holzmann*, 533 F. Supp. 2d 116, 125 n.6 (D.D.C. 2005). Judicial estoppel "protect[s] the integrity of the judicial process . . . by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire*, 532 U.S. at 749-50 (citations omitted); *Moses* v. *Howard Univ. Hosp.*, ___ F. Supp. 2d ___, 2008 U.S. Dist. LEXIS 49685 at *10-14 (D.D.C. July 1, 2008). The "purpose is to prohibit litigants from playing 'fast and loose,' or 'blowing hot and cold,' with the courts." *Donovan* v. *United States Postal Service*, 530 F. Supp. 894, 902 (D.D.C. 1981) (citations omitted).

Barely a month ago, Defendants claimed they needed more time to file their opposition "in light of the complicated, *sui generis* nature of the litigation." Mot. to Enlarge Time, 8/28/08, at 1-2. "Complicated." "*Sui generis.*"

But there is more. Seeking more time to file their brief in the D.C. Circuit, Defendants contended "additional time is need [sic] to cope with the large volume of briefs – 49,000 word [sic] – filed on behalf of the other side in thisappeal [sic]." Mot. for Extension, 7/6/06. Seeking to stay the mandate to prepare a petition for writ of certiorari, Defendants claimed that "[a] petition for certiorari in this case plainly would present substantial questions." Mot. for Stay of Mandate, 5/15/07, at 1.

And when the stay of mandate proved insufficient, here is what the Defendants argued to the Chief Justice of the United States in seeking an extension of time to file their petition for certiorari: **"this case is uniquely important and complex.** The Mayor appropriately required in-depth discussion with and analysis by the Attorney General for the District and other officials before making the decision." Supreme Ct. App. No. 07-A51, at 4 (emphasis added).

This "in-depth discussion and analysis" required the entire length of the initial stay of

mandate, which then had to be extended again. Defendants continued:

> This case presents extraordinarily important issues warranting a carefully prepared Petition. The decision marks the first time in the Nation's history that any appellate court has struck down a law as unconstitutional under the Second Amendment. The issues involve fundamental questions . . . . In recognition of the seriousness of these issues, the Court of Appeals stayed its mandate and four judges on the Court of Appeals would have granted rehearing *en banc*.
>
> In addition to involving extraordinarily important issues, the decision of the Court of Appeals is in admitted conflict with the majority of other federal Courts of Appeals and with many State courts of last resort. * * * Petitioners have recently retained outside counsel with Supreme Court expertise to assist in this case. Additional time is necessary and warranted for that counsel, inter alia, to become familiar with the record below, relevant legal precedents and historical materials, and the issues involved in this matter.

Id., at 4-5.

> It bears repeating that at the very outset of the litigation, Defendants claimed:
>
> Even a cursory review of plaintiffs' [pleadings] reveals that plaintiffs' counsel has been researching and crafting argument on the central issue in this case for months if not years . . . . Litigating this case requires analysis that goes well beyond the legal research sufficient to argue most legal issues and encompasses 200 years of historical materials and debate.

Mot. to Enlarge Time, 4/3/03, at 5.

In 2003, it was self-evident to Defendants that Plaintiff's counsel had been "researching and crafting argument on the central issue in this case for months if not years," but now, almost six years later, this was a simple case that should not have taken lead counsel even 1,000 hours to take all the way to the Supreme Court. It cannot be said more plainly: Defendants' new position, with respect to the supposed simplicity of this case and the extreme attack on the number of hours *worked* by Plaintiff's counsel, is dishonest. Time and time and time again, Defendants came before this Court, the D.C. Circuit, and the Supreme Court, and pled the complexity and difficulty of this case, even as litigated by their veritable militia of high-powered attorneys, as

grounds for relief from the normal operation of court rules. *Two of these requests were made in connection with just this motion.*

Enough is enough. Defendants are judicially estopped from now claiming that the case was ordinary, and their pattern of endless requests for leave to perform additional work should be kept in mind by the Court in considering the various attacks upon counsels' hours.

II. COUNSELS' WORK PRODUCT WAS OF THE HIGHEST QUALITY.

Notwithstanding their grudging admission that counsels' work in this case was "above-average," opp. at 23 (it was more than that), Defendants claim the quality of counsels' work is insufficient to support fee enhancement because the evidence of high quality is based upon allegedly self-serving statements. Actually, with respect to this issue, Plaintiff's counsel pled *res ipsa loquitur*. Mot. at 12. The Court is in a position to determine the work product's quality. Yet a response to Defendants' complaint can be found in their attorney's words:

> Mauro: Walter, how was Alan Gura as an adversary?
>
> Dellinger: He was outstanding; he was great. He did a superb job, as I told him after the argument. It was really great . . . a number of people making their first or second argument in the Court are as good as you'll ever hear, if it's the right person.

"Sizing Up the 2007-08 Supreme Court Term," *Legal Times*, 7/30/08 (exh. 15). Of course, the argument was merely an example of consistently high-quality work performed by the entire team.

III. OPPOSING COUNSEL IS POORLY QUALIFIED TO OFFER EXPERT OPINIONS.

Defendants are free to criticize any aspect of the hours worked in this case. But this criticism cannot be gussied up as "expert" opinion – not least by, of all people, Defendants' counsel. It is the definition of chutzpah for Defendants to claim that the fee petition is "self-

serving," yet then hold out their counsel, who served for six years as General Counsel of the D.C. Financial Control Board, as an expert on Plaintiffs' counsels' fees.

Mr. Rezneck is no expert on fees, nor is he an expert on what is required to litigate this case. At least, he is less expert than Plaintiff's counsel. Mr. Rezneck's curriculum vitae reveals that he last engaged in the private practice of law in 1995 – when Plaintiff's most senior counsel were just graduating from law school. Notably, the one case where Mr. Rezneck was accepted as an expert on fees took place in 1996. Since that time, his government positions have been largely managerial.

Since Mr. Rezneck last worked in the private sector, Plaintiff's counsel accumulated substantial work experience, in small, mid, and very large sized firms, including Sidley & Austin, Thompson & Knight, Howrey & Simon, and Kenyon & Kenyon. It never occurred to Plaintiff's counsel to qualify themselves as experts on the practice of law and on the prevailing fees in the community, even though their knowledge is more recent and comprehensive than Mr. Rezneck's. And although seventeen attorneys appeared at the Supreme Court for Defendants,[4] Mr. Rezneck was not among them. Mr. Rezneck is poorly positioned to lob allegations that Plaintiff's counsel spent too much time preparing this case at the Supreme Court.

Rezneck's lack of knowledge is mathematically demonstrable. Recall Mr. Dellinger estimated that his firm spent the equivalent of well over a million dollars at the Supreme Court phase of this litigation. At Mr. Rezneck's recommended U.S. Attorney rates, Walter Dellinger

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[4] **Akin, Gump:** Thomas Goldstein, Christopher Egleson, **O'Melveny & Myers**: Walter Dellinger, Matthew Shors, Mark Davies, Geoffrey Wyatt, Brianne Gorod, Joseph Blocher; **Covington & Burling**: Robert Long, Jonathan Marcus; **D.C. Atty General's Office**: Alan Morrison, Peter Nickles, Linda Singer, Todd Kim, Edward Schwab, Donna Murasky, Lutz Prager.

and his partners are worth no more than $465 an hour; a million dollars' worth of his firm's time would equate to 2,150 hours – approximately two-thirds of the total hours spent by all of Plaintiff's counsel over the entire litigation, and over double the number of hours Mr. Rezneck claims should be awarded to Plaintiff's lead counsel for the entire six years of litigation.

Even at a billing rate of $1,000 an hour, a more accurate estimation of what Mr. Dellinger's time is worth,[5] $1 million in fees equates to 1,000 hours – still more than the total number of hours Rezneck would allow for Plaintiff's lead counsel over the course of the entire litigation – and not all of O'Melveny's time was expended by Mr. Dellinger, never mind the time spent by Defendants' in-house counsel and their other firms.

Mr. Rezneck lacks foundation to testify as to current market conditions. He can do no more than navigate to the U.S. Attorney's website. Of course, Mr. Rezneck is no economist, either, a point on which his qualifications compare unfavorably with Dr. Kavanaugh's. Mr. Rezneck may be a talented attorney, and his record of community service and accomplishment is commendable. But none of that is relevant to any issue before the Court. The Court cannot credit Rezneck's opinion as "expert" simply because he is an accomplished attorney, given his complete lack of current expert foundation.

IV. COUNSEL ARE SEEKING MARKET RATES, NOT "ENHANCED" RATES.

Defendants persist in the myth that the USAO *version* of the Laffey Matrix is some sort of official standard, from which deviation must be justified. This is simply untrue. The USAO's version of the Laffey Matrix is just that – the USAO's *version*, from the perspective of a large

[5]Benjamin Civilleti first broke the $1,000 an hour mark in 2005. Mr. Dellinger is no less-qualified.

government defense practice that would prefer to not pay much in attorney fees to civil rights litigants. The USAO matrix is nothing more than "a concession by that office of what it will deem reasonable when a fee-shifting statute applies and its opponent prevails and seeks attorneys' fees. That concession relieves that office from having to litigate the market rate in the hundreds of fee-shifting cases that it defends." *Adolph Coors Co.* v. *Truck Ins. Exch.*, 383 F. Supp. 2d 93, 98 (D.D.C. 2005).[6]

A "Laffey Matrix" is a type of matrix, with certain categories of attorney experience pegged to particular rates. The term refers to a format, similar to a baseball score card. As a matter of law, there is no standard content to a Laffey Matrix, even though the cases uniformly endorse the principle behind it. The D.C. Circuit has long indicated that the original *Laffey* rates, from the *Laffey* litigation, which the U.S. Attorney's Office endorses, may be obsolete:

> We do not intend, by this remand, to diminish the value of the fee schedule compiled by the District Court in *Laffey*. Indeed, we commend its use *for the year to which it applies*. Perhaps the most desirable result of the present litigation would be the compiling of a similar schedule of prevailing community rates for other relevant years.

Save Our Cumberland Mountains, Inc. v. *Hodel ("SOCM")*, 857 F.2d 1516, 1525 (D.C. Cir. 1989) (en banc) (emphasis added).

On remand in *SOCM*, counsel followed the D.C. Circuit's suggestion and conducted a new, then-current survey of rates. "Although the updated matrix was never expressly approved by the court because the parties settled the issue of fees, it does provide an accurate and updated schedule of attorney fees in this District." *Trout* v. *Ball*, 705 F. Supp. 705, 709 n.10 (D.D.C.

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[6]In many smaller cases, plaintiffs readily accept this concession because the fee issues are not worth litigating. This case is different – especially given the unreasonable and punitive positions committed to by Defendants.

1989). *This* "updated" version of the Laffey Matrix, using more current rates than in the original litigation on which the USAO is fixated, is the version employed by Dr. Kavanaugh. Indeed, Judge Lamberth twice noted that an updated Laffey Matrix is not necessarily the same thing as the U.S. Attorney's version:

> Plaintiffs' chief evidence is a pair of court-approved matrices. The first of these matrices -- the Laffey matrix -- is an updated fee matrix that has been relied upon, at least in part, by six District of Columbia district judges [citing *inter alia Trout*] and that has received a degree of approval from the Court of Appeals for the District of Columbia Circuit. The second matrix -- developed by the U.S. Attorney's Office for the District of Columbia for use in negotiating settlements -- extrapolates from the 1981-82 rates set by the Laffey court in 1982 by adding the Consumer Price Index increase for the Washington, D.C., metropolitan area to the prior year's rate, and rounding upwards if the sum is within $ 3 of the next $ 5 multiple.

Sexcius v. *District of Columbia*, 839 F. Supp. 919, 924 (D.D.C. 1993) (footnotes omitted); *Covington* v. *District of Columbia*, 839 F. Supp. 894, 898 (D.D.C. 1993), *aff'd*, 57 F.3d 1101 (D.C. Cir. 1995).

It could not be more plain: two matrices – one, an updated matrix; another, the old 1982 rates, as manipulated by the USAO in perpetuity, for "negotiating settlements."

Considering Judge Lamberth's opinion on appeal, the D.C. Circuit affirmed, and explained that the U.S. Attorney version *may* be used – just as an updated (meaning, more current than 1982 rates) Laffey Matrix may be used: "[I]n order to demonstrate [the prevailing market rate in the community], plaintiffs may point to such evidence as an updated version of the Laffey matrix *or* the U.S. Attorney's Office matrix, *or* their own survey of prevailing market rates in the community." *Covington* v. *District of Columbia*, 57 F.3d 1101, 1109 (D.C. Cir. 1995) (emphasis added).

Defendants cite *Covington* for a proposition it does not contain, asserting that "The USAO Laffey matrix reflects prevailing market rates for representation in 'complex federal litigation.'" Opp. at 6 (citing *Covington*, at 1103). Such a holding appears nowhere in *Covington*, and not on p. 1103. It is simply not in the opinion. The most that can be said of the USAO matrix under *Covington* is that it is evidence of the prevailing rate, but is not binding.[7]

Absolutely nothing in *Covington* or any other circuit precedent holds that the USAO matrix is the standard from which deviation must be justified. Quite the contrary. *SOCM* and *Covington* expressly cast doubt on the continuing vitality of the 1982 rates. *SOCM* suggested the rates be recalculated because they were, at the time, seven years old. *Covington* cautioned that "although fee matrices are somewhat crude [they] do provide a useful starting point," which may be supplemented in a variety of ways. *Covington*, 57 F.3d at 1109. The Court is not bound by the USAO's faulty economics, but to Section 1988's command that a fee be "reasonable."

It is utterly false to claim that "[m]ost courts that have examined the Kavanaugh approach have rejected it," opp. at 7, and the case cited for that proposition – *Interfaith Comty. Org.* v. *Honeywell Int'l*, 426 F.3d 694, 709 (3rd Cir. 2005) – does not support it. To the contrary, in *Interfaith*, the Third Circuit engaged an extended discussion examining the relative adoption of the USAO and Dr. Kavanaugh's matrices – and *affirmed* the use of Dr. Kavanaugh's rates. *Interfaith.*, 426 F.3d at 710. Moreover, the Third Circuit cautioned that rates are more accurate when based more on recalibration of rates than on statistical measures of inflation. *Interfaith*, 426 F.3d at 710 n.14. Dr. Kavanaugh's rate has the advantage over the USAO version of being

[7]Defendants also continue to cite *Muldrow* v. *Re-Direct, Inc.*, 397 F. Supp. 2d 1 (D.D.C. 2005) as an example of the USAO rates being employed when in fact, as Plaintiff pointed out, the base rates in that case appeared to be Dr. Kavanaugh's. Mot. at 20.

based on more recent rate surveys.

In any event, the D.C. Circuit, which is the relevant authority, has specifically endorsed using an updated Laffey Matrix that is not the USAO matrix. And if Defendants believe Dr. Kavanuagh's approach is faulty, they could have employed an economist knowledgeable about the legal services market to explain why.

Defendants' claims that the documented rates are "the very highest big-firm rates," opp. at 7, and that "there is no evidence to suggest the use of the USAO *Laffey* matrix is unreasonable," opp. at 8, are insupportable.[8] The evidence clearly shows that O'Melveny has at least one partner billing at $705 an hour; that Covington's partnership range is $510-$800; and that Akin's partnership range, six years ago, was $350-$600. "The very highest big-firm" rates last year included: Wilmer, $1,000; Patton, $920; Hogan, $850, and Arent, $675. Median and average partner rates at Hogan exceeded Plaintiff's highest claimed rates. Median and average partner rates at Patton were similar.[9]

Defendants argue further still that $557 an hour should be a rate reserved only for "attorneys who have spent a lifetime in public interest law handling complex federal litigation." Opp. at 7 (citation omitted). The inference is that the firms cited in Plaintiff's papers are

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[8]Defendants badly mischaracterize *Salazar* v. *District of Columbia*, 123 F. Supp. 2d 8 (D.D.C. 2000) on this point. The cited footnote observed that "[t]he only experience level at which there is any divergence between the rates sought by Plaintiffs and those described in the surveys, is at the top end of senior partner billings," *Salazar*, at 14 n.4, but the court awarded those rates anyway because they were in range. Defendants do raise an interesting point: if Kavanaugh's rates are outside the market, perhaps Defendants should have submitted actual evidence to that effect.

[9]The attack on the use of survey data is specious. Courts have accepted such data before, *e.g. Salazar*, at 14. Were these surveys inaccurate with respect to the rates reported for Defendants' attorneys, perhaps they should have submitted declarations explaining the errors.

irrelevant, because Plaintiff's counsel would not qualify to work at such places or would not merit those billing rates if they did. This ignores the fact that the majority of Plaintiff's counsel (including Plaintiff's top two billers) have in fact worked at prestigious law firms that command hourly rates in line with those charged by Defendants' outside counsel. Revealingly, Plaintiff's counsel prevailed in this litigation over several such vaunted firms.

Yet the charge is rebuttable. Robert Podgursky, a legal placement specialist with Klein, Landau, Romm & Schwartz, has intimate knowledge of the market for legal placement and billing rates. Mr. Podgursky has reviewed counsels' qualifications and is confident that they can be placed at major firms commanding market billing rates. Podgursky Decl., ¶ 8.

> In the Washington, D.C. market, these market rates, for attorneys with 11-19 years of experience, range from $500-$800 an hour. Accordingly, the rates sought by this motion for attorney fees are consistent with ordinary market rates for attorneys of the movants' caliber. I do not agree that the rates sought by the attorneys in this fee motion are the highest possible rates, for any of the claiming attorneys. Nor are the requested rates reserved for those who have spent a lifetime handling complex litigation. The requested rates, $557 per hour, $494 per hour, and $285 an hour, are quite ordinary for attorneys with the qualifications respectively possessed by the movants.

Podgursky Decl., ¶ 9.

The additional attack on Levy's rate is absurd. Levy, now Chairman of the Board of Directors at the Cato Institute, is a respected legal scholar. He has earned a PhD as well as a JD, clerked for federal judges Royce Lamberth and Douglas Ginsburg, taught for seven years at the Georgetown University Law Center, lectured at more than 50 law schools, and published widely in professional journals and law reviews. Although he has no experience as a litigator, his legal insights and perspective were essential to Heller's success. Levy could easily command $557 for an hour of his time. Comparing him to a paralegal, opp. at 8, is ridiculous.

Finally, Defendants' insistence that recovery at market (misdescribed as "enhanced") rates was not required to attract attorneys to this litigation, opp. at 8, is false. Gura's declaration makes clear that in exchange for being paid an effective nominal rate of less than $10 an hour, it was understood that full market rates could be recovered under Section 1988. There is no way Gura, or any other self-employed, non-independently wealthy lawyer for that matter, would have litigated this case for the nominal compensation proposed by Defendants. The absence of any civil challenge to these laws seeking vindication of the Second Amendment over a thirty-year period belies Defendants' claims that attorneys were eager to take on this litigation.

V. COUNSEL HAVE EARNED COMPENSATION FOR ALL SUBMITTED HOURS.

Opposing counsel appear to bill at $500,000 increments, but every decimal hour of Plaintiff counsels' time is questioned as though it were shoplifted. The attacks on counsels' time are not merely inequitable and legally unjustified, but also lose sight of the task before the Court. "It must be remembered that the ultimate inquiry is whether the total time claimed is reasonable." *Smith* v. *District of Columbia*, 466 F. Supp.2d 151, 158 (D.D.C. 2006). Again, it is useful to consider the hours O'Melveny must expend – at any billing rate – to yield over $1 million in fees. It hardly seems a productive use of Court resources to engage in a Scrooge-like analysis of every grain in the hourglass when the aggregate time commitment was self-evidently reasonable given the magnitude of the project – the essence of the frequent admonition that "[a] request for attorney's fees should not result in a second major litigation." *Bd. of Trs. of the Hotel & Rest. Emples. Local 25* v. *JPR, Inc.*, 136 F.3d 794, 798 (D.C. Cir. 1998) (citation omitted).

The question before this Court is whether the total time expended by Plaintiffs' counsel in conceiving, investigating, researching, and litigating this case to ultimate victory in the Supreme

Court over a period of six years was reasonable. But the Defendants – who were represented by a small army of lawyers from the D.C. Attorney General's office and three of the nation's biggest, most elite law firms – never once address that question, much less compare Plaintiff's counsels' expenditure of time on this case with their own. Instead, Defendants subject Plaintiff's counsels' time entries to baseless, self-contradictory criticisms together with a hyper-critical, ill-informed nickel-and-diming of specific line items that is divorced not only from reality (including, almost certainly, the reality of Defense counsels' own efforts in this case) but equity as well. It would be most interesting to know how the total hours spent litigating this case by Plaintiff's remarkably lean legal team compares with the total hours spent by the dozens of lawyers engaged by the Defendants, but of course they make no reference whatsoever to that comparison, which would almost certainly render their entire attack on Plaintiff's attorney time risible. But beyond their notable silence on the two teams' relative investments of attorney time, the Defendants' attempt to slash Plaintiff's already modest time investment by a further 25-50 percent is both legally and factually unsustainable.

First, no client could legitimately complain about the details of the time entries reflected in Plaintiff's counsel's submissions. The few examples cited by Defendants of allegedly inadequate records reflect the reality of legal practice and are undoubtedly perfectly consistent with (if not more detailed than) the billing records presented by Defendants' private law firms to their own paying clients. It is perfectly sufficient to record, for example, that four hours were spent reviewing the scholarship of Carl Bogus, one of the leading and most prolific academic critics of our position in this case. And Defendants should know full well that "research DC/State and immunity from BOR [Bill of Rights] issue" refers to one of their many, many

misbegotten theories of the Second Amendment, all of which the Plaintiff had to research and brief repeatedly.

But then, no level of billing detail would satisfy a client willing to declare – as Defendants incredibly do – that counsel should have spent less than 28 hours preparing to argue a case of this magnitude before the D.C. Circuit, and not even 50 hours preparing such an historic, complex matter for oral argument before the Supreme Court. Opp. at 18. Perhaps not surprisingly, the Defendants are entirely mute regarding how those numbers compare with the preparation time of their own counsel for those same arguments.

Second, besides abandoning any genuine attempt to address the true issue in this case – namely, whether the total amount of time submitted by Plaintiff's counsel represents a "reasonable" expenditure of time to win a case of this magnitude and complexity, and against such an extraordinary array opponents – Defendants' criticisms of counsels' time entries reflects a surprising lack of familiarity with the procedural history of the litigation, the issues and players involved, and the various figures on both sides of the Second Amendment debate. For example, there should be no mystery who "G. St Lawrence" is – she is a plaintiff in this case. And most people vaguely familiar with the issue would recognize "W. La Pierre, D. Lehman, R. Dowlut, C. Cox, S. Froman" as the executive leadership of the National Rifle Association. It was important to meet with them. Nelson Lund is a very prominent Second Amendment academic. Charles Cooper, of Cooper and Kirk, is quite a prominent local attorney and NRA's chief outside counsel.

It is important to recall the standard: the same sort of time sheet that attorneys present their clients. Time sheets are not designed to anticipate any and all questions that someone might

have about a bill. Many clients have perfectly legitimate questions about perfectly legitimate bills. But after six years of this case, Defendants should know who Gillian St. Lawrence, Carl Bogus, and Wayne LaPierre are.

Third, the notion that all reconstructed hours must, as a rule, be discounted, is specious as well. Were this so, unscrupulous attorneys would artificially inflate their reconstructed hours by the discount amount. Again, the inquiry is whether the total hours claimed are reasonable. There are no automatic discounts for reconstructed time, unless the reconstruction appears itself to be unreasonable or unreliable in light of the circumstances.

> [I]t is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted. To enable opposing counsel adequately to assess the merits of the motion, and the court to fulfill its obligations, no more is necessary than fairly definite information as to the hours devoted to various general activities, e.g., pretrial discovery, settlement negotiation, and the hours spent by various classes of attorneys . . .

Jordan v. *United States Dep't of Justice*, 691 F.2d 514, 520 (D.C. Cir. 1982) (citations omitted) (no reduction where hours reconstructed).[10]

The criticism of alleged "block billing" is unwarranted. Block billing is mainly a problem if some of the tasks within a block are themselves not properly billable. The case cited by Defendants makes this very clear. In *Role Models Am., Inc.* v. *Brownlee,* 353 F.3d 962, 971 (D.C. Cir. 2004), the block billing problem arose from the fact that the blocks contained tasks for unrelated matters. That most certainly did not happen here – all the time submitted relates to *this* case, and Defendants do not identify one task – not one – that is contained in an alleged "block"

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[10]As for the alleged deficiency in Levy's recording of emails, virtually all those emails included Gura – whose records usually reveal the subject of the email. There is no need to reprint the (privileged) text of each email in the billing records, although the Court should note: if time is claimed for an email, counsel all but certainly have it archived. *E.g.* Gura Decl., ¶ 6.

entry, but which they claim should be uncompensable. Even were the Court to find questionable items within a so-called "block bill" entry – something Defendants have failed to demonstrate – the Court could only properly discount a portion of any questionable entry. It would be irrational to discount the entire claim, simply because it contains a few instances of so-called "blocks."

Regarding "billing judgment," Defendants characterize counsels' exclusion of many non-compensable tasks as a self-serving statement, and then without any sense of irony proceed to help themselves to an across-the-board 10 percent reduction of the bill on their say-so – *without citing a single example of supposed bad judgment*. And this is on top of a 15 pecent reduction for allegedly bad time entries, presumably designed to root out bad billing judgment. Neither "discount" is applicable here, and certainly not twice, or thrice: Defendants do separately list tasks the inclusion of which, in their view, is inappropriate (addressed below).

But Defendants do not stop there – they allege that even though the time entries are vague and incomplete (they are not), the time should be cut further still because it is excessive. Simply put, in their heedless bid to slash Plaintiff's counsel's time any which way they can, Defendants invoke any argument that comes to mind, no matter how self-contradictory, how divorced from the reality of real-world legal billing practices, and without necessary, concrete examples or concern for duplication. The practice of piling discount upon discount for each perceived problem is not appropriate. Any defects in the time claims that cannot be particularized to specific entries must be considered as a whole. *See, e.g. New York* v. *Microsoft Corp.*, 297 F. Supp. 2d 15, 44 (D.D.C. 2003) (single 15% discount for inadequate entries and reconstruction issues).

The test for whether time is compensable is whether the time was "reasonably expended in pursuit of the litigation." *JPR,* 136 F.3d at 800. Defendants confuse this standard with the prohibition on seeking compensation for unsuccessful *claims*. There were no unsuccessful claims in this case – the Supreme Court struck down all three challenged provisions on Plaintiff's sole Second Amendment argument. Defendants' improper "claims" criticisms are thus misplaced. Tactical motions, and oppositions to the same, are not "claims" – they do, however, consume time, and the question is whether an attorney could be expected to bill for such time.

Preservation of Mr. Heller's litigation goal was plainly threatened by the dismissal of the other plaintiffs, making necessary the cross-petition. And it cannot be said that the cross petition failed. The Supreme Court held the petition for the entire term, denying it only after entering judgment for Heller.

Also not optional was researching the Ninth Amendment and unenumerated rights issues. It was important to know of the interplay between Second Amendment rights and any independent rights of self-defense. The Supreme Court's opinion in this case, with its extensive discussion of the historic right of self-defense, makes that obvious. Unenumerated self-defense rights had been litigated in this circuit, *Abigail Alliance* v. *Von Eschenbach*, 495 F.3d 695 (D.C. Cir. 2007) (en banc), including in relation to the Second Amendment, *Fraternal Order of Police* v. *United States*, 173 F.3d 898 (D.C. Cir. 1999), although counsel decided not to pursue such a separate claim. *See* Complaint. The cross-petition and Ninth Amendment research were crucial matters that any responsible attorney exercising a basic standard of care would have investigated and pursued.

To assert that every unsuccessful motion or opposition in the case was per se

uncompensable is likewise error. Lawyers routinely bill for unsuccessful motions or oppositions that are, nonetheless, "reasonably expended in pursuit of the litigation." Opposing half of Defendants' endless requests for delay was in that vain. So, too, was the motion to lift the stay of mandate, which succeeded in eliciting from Judge Silberman a helpful response that was cited at the Supreme Court in successfully defeating Defendants' Question Presented – a very significant development in the case.

Defeating the consolidation effort was also plainly done "in pursuit of the litigation," as this Court found – siding with Plaintiff on the matter, and agreeing that consolidation would impede the litigation. This allowed Plaintiff to proceed unhindered by extraneous claims, and enabled careful distinction of Heller's standing as against those of the competing litigants. That Defendants took no position on the matter is irrelevant. The time spent was not optional to responsible attorneys – and Plaintiff prevailed on the matter, advancing the litigation at a critical juncture.

The other criticisms are so baseless as not to require much exposition. Counsel was not discussing this case with the press in 2002, months before it was filed, but was gathering information and conducting research. Attending a symposium *about the case* is valid research. And Plaintiff's counsel were not to about to ignore a petition for rehearing and rehearing en banc in the D.C. Circuit. Eight hours for three lawyers to consider that filing is hardly unreasonable. After all, if government Defendants choose to pursue a win-at-all-costs litigation approach – as the Defendants in this case assuredly did – then they can hardly be heard to complain about the corresponding increase in the amount of time necessary to successfully prosecute the case.

Attacking counsel for including time spent performing initial client interviews is likewise specious. Law firms routinely bill for initial consultations, even when turning down or advising clients against proceeding. On information and belief, O'Melveny, Akin, and Covington do not provide free initial consultations to all comers. The Supreme Court has long recognized that the formative stages of strategic civil rights litigation are not merely appropriate to the practice of law, but constitutionally protected. *NAACP* v. *Button*, 371 U.S. 415 (1963). It would be odd to declare that attorneys' front-end activities to organize civil rights litigation, necessary to preserve access to the courts, are constitutionally protected but not compensable under Section 1988.

Finally, there is Defendants' criticism of counsel attending the Supreme Court session in which the decision was announced. This may seem like a pointless formality to Defendants who do not care for the result, but it was a session of the Court all nine justices and the client chose to attend. Did any city officials or opposing counsel take sick or vacation leave to attend the Supreme Court that day, or were they on duty? What else could Plaintiff's counsel have been reasonably expected to do that day.

CONCLUSION

Defendants' opposition is not a constructive aid to the Court's decision-making process. It misstates the law, often mistakes the facts, strives to imagine problems with the claim, and fails to address the central question in this proceeding, which is the reasonableness of Plaintiff's counsel's fee petition in the overall context of this case. Counsel should not be paid for winning, only a very small fraction of what the other side spent or would have spent losing. No one could possibly believe the fees proposed in the opposition have any relationship to the practice of law in Washington, D.C. in 2008.

Defendants' accusations of "windfall" are wholly unjustified, factually and legally. Public interest law does not create great wealth, and this case would be no exception. Awarding the full amount of the fee request will not bring Plaintiff's counsels' profits per partner anywhere near the levels routinely enjoyed by Defendants' attorneys. When public interest lawyers who have risked significant amounts of their time and money vindicating a dormant civil right seek fair compensation after years of being paid *nothing*, charges of avarice are inappropriate and not well-taken.

There may be a time and place to discuss whether, as a normative matter, "lawyers make too much money." But a Section 1988 fee request is not the appropriate forum for such a discussion. Holding that public interest lawyers are entitled to no more than plainly sub-market rates posted on governmental defendant websites, or that public interest lawyers must have their hours nitpicked into oblivion while the District of Columbia deploys nearly unbounded mega-firm resources, would not solve the legal profession's perceived problems. These approaches to Section 1988 would not reduce the rates charged by O'Melveny, Akin, and Covington; nor would they reduce the amount of frivolous litigation clogging the courts. But they would guarantee a reduction in the availability of pro bono legal counsel for deserving but difficult cases.

The fees sought in the motion reflect the market as well as the realities of this case, and thus, a just result that satisfies the requirements of 42 U.S.C. § 1988.

The motion should be granted.

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Respectfully submitted,

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