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 SUPPORT OF PLAINTIFF'S MOTION FOR ATTORNEY FEES AND COSTS**
	)	
v.	)	
	)	
DISTRICT OF COLUMBIA, et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR ATTORNEY FEES AND COSTS

COME NOW Plaintiff Dick Anthony Heller and his undersigned counsel, and submit their Memorandum in Support of Plaintiff's Motion for Attorney Fees and Costs.

Dated: June 18, 2010

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Court Rules

Other Authorities

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEY FEES AND COSTS

INTRODUCTION

The Supreme Court has provided significant new guidance regarding the issue of lodestar adjustments in exceptional cases such as this. *Perdue* v. *Kenny A.*, 130 S. Ct. 1662 (2010). However, *Perdue* did not revise established precedent controlling the initial lodestar calculation. Much of this motion will thus be familiar to the Court. Apart from incorporating *Perdue*, this revised motion also updates the various data points that have evolved since August, 2008. The bill of costs on file, and total hours claimed in the underlying litigation, are unchanged.

Perdue is an unusually lucid, brief, and direct opinion. Its guidance is not mysterious. *Perdue* confirms that lodestar fee adjustments are warranted in appropriate cases. It provides specific examples of when such adjustments are warranted. And finally, *Perdue* replaces the previous, somewhat arbitrary method of adjusting the lodestar using multiplier factors or percentages with more specific guidance, depending on each adjustment's nature.

Perdue offers something for both sides in this case. *Perdue* confirms beyond all doubt that this case qualifies for two of three authorized upward fee adjustments: a matrix adjustment to market rates, and an interest adjustment for excessive delay in payment.[1] Plaintiff recognizes that the net effect of these adjustments produces an overall lower, if more transparent and predictable result than was available under the previously accepted approach.

Given this case's exceptional nature, *Perdue* also renders largely irrelevant the parties' dispute about which version of the Laffey Matrix to use. Performance adjustment is no longer

[1] Counsel are not seeking compensation for advancing unusually large expenses.

achieved by multiplying the lodestar result, but rather, by ensuring that the rate initially used to calculate the lodestar reflects the market value of the work performed. *Perdue* makes clear that the ultimate hourly rate, not any particular matrix-derived initial base rate, is what matters, citing *both* sides' proposed Laffey matrices as examples of rates warranting adjustment.

* * *

Title 42 U.S.C. § 1988 attracts competent counsel to difficult, non-remunerative litigation by promising them a "reasonable attorney's fee," making the defense of civil rights no less viable for lawyers than the representation of big business. Within the reality of the market for high stakes, complex federal litigation, counsel earned the fees requested here the old fashioned way.

The fees sought are reasonable, both by the standards of complex federal litigation in this community, and relative to the degree of counsel's success given the unique demands of this litigation. Notably, the request represents a tiny fraction of the value assigned by the District's lawyers to their work. The fees reflect compensation for hours reasonably worked by efficient attorneys exercising sound billing judgment, charging normal and customary hourly rates far from the top of the local market and, in all likelihood significantly below the rates ordinarily charged by the District's outside counsel. Interest is then sought, as expressly authorized by *Perdue*, to account for the excessive delay in payment. Added to this amount, counsel request reimbursement for actual cash expenses of litigation, which are not particularly high.

STATEMENT OF FACTS

Following six years of careful planning and extensive litigation, culminating at the Supreme Court, Plaintiff has completely prevailed against the Defendants. The result is one of the

most profound victories available under our system of justice: the Supreme Court has established that people enjoy a fundamental, individual constitutional right enumerated in the Bill of Rights.

Although the individual-rights model of the Second Amendment is now settled law, in 2002, when the case was organized, the challenged laws had been on the books for over two decades. All but one of the federal circuit courts to consider the issue had ruled against the individual-rights interpretation of the Second Amendment, and in the face of that nearly uniform adverse precedent, lawyers were not rushing to litigate the constitutionality of gun regulations – in this circuit, or anywhere else.

The Plaintiffs, like virtually all civil rights plaintiffs, were in no position to retain competent (or any) counsel to pursue this lawsuit, which struck many attorneys as quixotic. Counsel were happy to work on the case, but adequate representation could not have been secured absent Section 1988's promise of reasonable compensation to reflect the true market value of a victory. The risks, and open-ended time commitment, were daunting enough without the prospect of not being compensated for this work. Gura Decl. ¶¶ 8-11, 15-17.

Plaintiff's counsel worked in a highly efficient manner. Most of the work was performed by just three attorneys. In contrast, Defendants were represented at the Supreme Court by at least nine attorneys from three of the nation's largest law firms, and had access to all the legal resources provided by the District's sizeable budget.[2] The case also saw one of Defendants' top attorneys (Lutz Prager) return from retirement, as well as the addition of noted litigator Alan Morrison as a special counsel for the sole purpose of handling the defense of this matter. And in

[2]The D.C. Office of the Attorney General boasts approximately 700 professional staff, including 340 attorneys. http://occ.dc.gov/occ/cwp/view,a,3,q,530974,occNav,|31692|.asp

case Defendants needed any additional help, the Solicitor General's Office supported their position at the Supreme Court, urging that the D.C. Circuit's opinion in the case be vacated and remanded for further proceedings because the laws might well be constitutional.

This case was filed in February, 2003, following extensive research, analysis, and preparation. Defendants vowed publicly to vigorously defend the challenged laws – and, along with their amici, made good on those vows. The docket reveals contested requests by Defendants for additional time, heavily briefed cross-dispositive motions, significant amici participation, various briefs solicited by the Court to better its own understanding of the issues, and a failed consolidation effort by copy-cat litigants seeking to derail Plaintiff's litigation goals.

The D.C. Circuit twice ordered the parties to brief whether Plaintiffs were even entitled to be heard, and Defendants repeatedly argued for summary affirmance or dismissal of the appeal. Of course, the depth and breadth of the core issues litigated before this Court, the D.C. Circuit, and the Supreme Court, were vast. No fewer than sixty-seven amicus briefs were filed at the Supreme Court alone, many raising unique and challenging perspectives.

Throughout it all, Plaintiffs' legal team consisted primarily of the three undersigned attorneys, with occasional support from a small handful of others, all working on a pro bono basis. Lead counsel Alan Gura was paid a nominal, reduced, and capped rate by co-counsel Robert Levy, who also personally bore all the expenses of the litigation.[3] Gura only agreed to this

[3] Although Gura asked for an exiguous payment to get involved in the matter, he never saw this as anything other than a pro bono case, the great bulk of which might ultimately be paid for by Defendants under Section 1988. Counsel prefer that the details of this arrangement remain confidential, but will disclose those details if the Court deems them relevant. Suffice it to say that dividing Gura's fee by the number of hours worked, the hourly compensation in dollars is a single-digit number, and the final payment under this arrangement was received in mid-2003. Levy will, of course, be reimbursed this amount from the amount recovered by Gura pursuant to this motion.

arrangement because of Section 1988. None of Plaintiffs' other counsel received any compensation whatsoever for working on this case.

Attorneys Gura, Huff, and Possessky kept contemporaneous records of most of the time invested in this litigation.[4] Neily, Levy, and Healy have largely reconstructed their time. None of these records fully reflects the time actually required to competently conduct the representation: some hours were inadvertently omitted from our records, or overlooked in the process of reconstructing timesheets; other tasks were not recorded because the associated hours do not qualify as billable, e.g., responding to and working with media, training clients to do the same, lobbying against legislative interference, responding to inquiries about the matter, and generally engaging the court of public opinion on the important issues raised by the case.

The hours to be billed, as accounted for in the attached exhibits and declarations: Alan Gura: 1,661 hours; Clark Neily: 808.3 hours; Robert Levy: 595.6 hours; Thomas Huff: 153.6 hours; Gene Healy: 33.7 hours; and Laura Possessky: 18 hours. The base hourly billing rate for Gura, Neily, Levy, Possessky, and Healy is $589; and the base hourly billing rate for Huff is $361.

Before *Perdue*, precedent amply supported a fee multiplier request of 2.0. That much is no longer available, replaced with two more-specific enhancements. Under *Perdue*, the above-noted base rates should be adjusted to $790 and $400, and the total then adjusted by applying a 7.25% interest rate compounded annually for three years to account for the unforeseeable and grossly excessive delay in payment, attributable largely to Defendants' dilatory tactics.

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[4]Gura and Possessky's former partner, Christopher Day, also kept contemporaneous time records. However, in the interest of simplifying this motion, that nominal amount of time (3.5 hours) will be resolved among the former partners at the conclusion of this litigation.

Additionally, Mr. Levy expended $3,544 in travel expenses, $212.36 in postage, $765.44 in photocopy and printing expenses, $124.47 in messenger fees, $244 in teleconferencing charges, $3,250 as payment to attorney Stephen Halbrook to conduct some initial research into the matter, and $4,400 to attorney Don Kates, for assistance in drafting Plaintiffs' reply brief in the D.C. Circuit. These expenses are all recoverable under Section 1988. Reimbursement of these expenses will not make Levy whole, but will partially compensate him for cash layouts over a period of many years to sustain this litigation.

SUMMARY OF ARGUMENT

Until recently, the lodestar method of calculating Section 1988 fees was well-established as the product of three variables: the number of hours reasonably worked, the reasonable value of counsel's time expressed as an hourly rate, and in exceptional cases, a performance enhancement expressed as a "multiplier" or percentage adjustment. *Perdue* altered this formula by eliminating the third variable, and replacing it with at least three other adjustments, two of which apply here: adjustment of the hourly rate to reflect market realities, and charging interest for excessive delays.

The hours submitted by counsel are patently reasonable. In ordinary cases before this Court, in the absence of other evidence of counsel's ordinary and accepted rates, the hourly rate is set pursuant to an updated version of the so-called "Laffey Matrix," as first described in *Laffey* v. *Northwest Airlines, Inc.*, 746 F.2d 4 (D.C. Cir. 1984), *overruled in part*, *Save Our Cumberland Mountains, Inc.* v. *Hodel*, 857 F.2d 1516 (D.C. Cir. 1989) (en banc).

The D.C. Circuit, and judges of this Court, have accepted updated versions of the Laffey Matrix that reflect relevant market conditions. In this instance, Plaintiff's counsel submit the expert analysis of noted economist Dr. Michael Kavanaugh, whose expertise has been accepted in

this Court (among others) on this subject before, to establish their rates pursuant to the Laffey Matrix.[5] Of the six attorneys, five are in the Laffey Matrix's "11-19" year experience level, and one is in the "4-7" experience level.

Perdue instructs that where the lodestar would not reflect the value of the work performed, rates based upon a *Laffey* Matrix should be enhanced to reflect the market value of the attorneys' performance, in order to properly serve Section 1988's purpose of attracting qualified counsel.

Perdue is not ambiguous on this point. It replaces vague concepts about what makes a case "exceptional" with highly specific and direct instructions that courts applying the *Laffey* methodology are to consider when increasing their base hourly rates in order to properly reflect the value of the work actually performed by counsel. *Perdue* assumes that a standard *Laffey* matrix – regardless of how calculated – will not reflect market realities for high quality legal work. That much is obvious here, where the *Laffey* rates fall well below the market for complex federal litigation. Plaintiff does not seek enhancement to the top of the market, but clearly, as even Defendants previously conceded, counsel's work here was at least "certainly of above-average quality." Defs. Br., 9/30/08, at 23. In fairness, the work performed by Plaintiffs' counsel in winning this case, particularly in the face of nearly uniform adverse circuit precedent, was not merely "above-average."

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[5]Counsel acknowledge that Chief Judge Lamberth has not adopted Dr. Kavanaugh's rates. Respectfully, Chief Judge Lamberth erred in describing Dr. Kavanaugh's methodology. Of course, *Perdue* renders this dispute somewhat academic, at least in this case, for the reasons explained below.

Compensating counsel today at yesteryear rates is economically irrational, failing to account for the present value of money. The easiest, most readily accepted practice accounting for compensation delay is to award counsel their fees for all hours at the current rate. *Perdue* confirms this practice, but specifies that in cases such as this, an additional interest rate should be applied to compensate for excessive payment delays.

Accordingly, the base attorney fees due and owing, not including fees for the presentation of this motion,[6] are as follows:

Alan Gura: 1,661 hours x ($589/hr. *Laffey* + $201/hr *Perdue* adjustment) = $1,312,190
Clark Neily: 808.3 hours x ($589/hr. *Laffey* + $201/hr *Perdue* adjustment) = $638,557
Robert Levy: 595.6 hours x ($589/hr. *Laffey* + $201/hr *Perdue* adjustment) = $470,524
Thomas Huff: 153.6 hours x ($361/hr. *Laffey* + $39/hr. *Perdue* adjustment) = $61,440
Gene Healy: 33.7 hours x ($589/hr. *Laffey* + $201/hr *Perdue* adjustment) = $26,623
Laura Possessky: 18 hours x ($589/hr. *Laffey* + $201/hr *Perdue* adjustment) = $14,220

The base attorney fees total $2,523,554. The *Perdue* interest charge (3 year excessive delay, 7.25% compounded) is $589,627.95. The cost bill, unchanged, totals $13,215.30. The total amount sought is $3,126,397.25.

ARGUMENT

I. PLAINTIFF'S COUNSEL ARE ENTITLED TO RECOVER THEIR FEES PURSUANT TO 42 U.S.C. § 1988.

"The purpose of § 1988 is to ensure effective access to the judicial process for persons with civil rights grievances. Accordingly, a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983) (citations and internal quotation marks omitted).

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[6]Fees and costs associated with the fee litigation will be the subject of a supplemental motion. *See Sierra Club* v. *E.P.A.*, 769 F.2d 796, 811 (D.C. Cir. 1985).

> Where, as here, the relief sought is generally nonmonetary, a substantial fee is particularly important if that statutory purpose is to be fulfilled. It is relatively easy to obtain competent counsel when the litigation is likely to produce a substantial monetary award. It is more difficult to attract counsel where the relief sought is primarily nonmonetary.

Copeland v. *Marshall*, 641 F.2d 880, 907 (D.C. Cir. 1980). Nor does available monetary relief fully reflect the value of civil rights litigation. "Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *Blanchard* v. *Bergeron*, 489 U.S. 87, 96 (1989) (citation omitted).

Counsel have earned their fees.

"The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. Adjustments to that fee then may be made as necessary in the particular case." *Blum* v. *Stenson*, 465 U.S. 886, 888 (1984) (citation omitted).

II. THE TIME SUBMITTED BY COUNSEL WAS REASONABLY NECESSARY TO ACHIEVE SUCCESS IN THE LITIGATION.

The total hours sought by counsel for litigating a case of this magnitude and complexity – less than 3,300 – is extremely low, reflecting careful billing judgment and, to Defendants' benefit, the relatively high efficiency nature of counsel's practice.

A. This "Sui Generis" Case was "Complicated," "Uniquely Important and Complex," "of Extreme Importance to the Public" and Required "a Thorough Examination of the Issues" "Encompass[ing] 200 Years of Historical Materials and Debate."

Throughout this litigation, Defendants acknowledged that the case would be time-consuming. Seeking significant extension of time to respond to Plaintiffs' motion for summary judgment and opposition to Defendants' motion to dismiss, Defendants remarked,

> Even a cursory review of plaintiffs' [briefs] 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.

Def. Mot. to Enlarge Time, 4/3/03, at 5. "This is an issue of extreme importance to the public and should be decided based on a thorough examination of the issues." *Id.* at 4. Defendant Mayor Williams stated the challenged laws were aspects of the city's "core" culture. Defendant Mayor Fenty remarked that this litigation was the most important ever faced by the city.

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 a writ of certiorari, Defendants noted 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" consumed the entire length of the initial stay of mandate, which then had to be extended again. In their request for more time, 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.

And again, in response to the initial fee petition, Defendants requested more time for opposition "in light of the complicated, *sui generis* nature of the litigation." Mot. to Enlarge Time, 8/28/08, at 1-2.

B. The Hours Billed by Plaintiff's Counsel in Connection with this "Uniquely Important and Complex Case" are Documented and Eminently Reasonable.

It bears recalling that in 2003, Defendants charged that "plaintiffs' counsel has been researching and crafting argument on the central issue in this case for months if not years." Def. Mot. to Enlarge Time, 4/3/03, at 5. Indeed, Defendants said they gleaned as much from "a cursory review of plaintiffs' [briefs]." *Id.* The attached time sheets record far less time than the "months if not years" Defendants surmised for the initial briefing, but their larger point is useful: on its face, a fee petition reflecting fewer than 3,300 hours for a "uniquely important and complex" constitutional challenge "encompass[ing] 200 years of historical materials and debate" is eminently reasonable, and, particularly in comparison to the number of hours apparently expended on the Defendants behalf, in fact remarkably low. The records submitted are plainly adequate to justify the petition under established D.C. Circuit precedent.

"[I]t is the law of this Circuit that the requirement of submitting detailed records should not be applied in a draconian manner." *Novak* v. *Capital Mgmt. & Dev. Corp*., 496 F. Supp. 2d 156, 158 (D.D.C. 2007) (citation omitted). The D.C. Circuit admonishes,

> it can be exceptionally difficult for a court to review attorney billing information over the life of a complex litigation and make a determination about whether the time devoted to the litigation was necessary or reasonable. This Court has reiterated the Supreme Court's warning that "[a] request for attorney's fees should not result in a second major litigation."

Swedish Hosp. Corp. v. *Shalala*, 1 F.3d 1261, 1269-70 (D.C. Cir. 1993) (citations and internal quotation marks omitted).

Fortunately, there is no need for "a second major litigation" nit-picking at the records, as they are more than sufficiently detailed, and reflect normal amounts of time for tasks performed. "[T]he fee application need not present 'the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney.'" *Nat'l Ass'n of Concerned Veterans* v. *Sec'y of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982) (quoting *Copeland*, 641 F.2d at 891)).

> [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, e.g., senior partners, junior partners, [and] associates. . . .

Jordan v. *United States Dep't of Justice*, 691 F.2d 514, 520 (D.C. Cir. 1982) (footnote and quotation marks omitted). Judge Kessler explained the time-keeping requirements well:

> When a lawyer writes, for example, that she spent six or eight hours in one day "researching and drafting" a brief dealing exclusively with issues on which her client has ultimately prevailed, there is certainly no need for her to itemize every case she looked up or every paragraph she labored over. Trial courts must recognize how lawyers work and

> how they notate their time. *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) (emphasis added).

The Court possesses ample documentation to discern roughly how much time was spent in this case, by whom, doing what, and the extent to which the *total time claimed* for the work performed over a period of six years in taking this case to the Supreme Court and prevailing was "reasonable."

Plainly it is. To keep Plaintiff's counsel's hours in perspective: one of Defendants' firms, O'Melveny and Myers, recently billed a bankrupt client nearly $3.1 million for six months' work, exceeding 4,000 hours, for responding to government subpoenas. Dan Levine, "O'Melveny's $12 Million Cash Cow Case: New Century Subprime Lending Case," *The Recorder*, 01/11/08 (Exh. 9). This is almost as much time as Plaintiff's legal team would bill for nearly six years of litigation securing a fundamental constitutional right before the Supreme Court. Another of Defendants' firms, Covington & Burling, 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. 10). 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.

If Section 1988's mission is to be taken seriously, ordinary people with civil rights claims must be afforded the same access to quality legal representation available to bankrupt sub-prime lenders, human rights violators, and high government officials.

Indeed, notwithstanding Defendants' resistance to discovering this information, something is known of the intensity of the effort they dedicated in defending this cause:

> 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. 11) (emphasis added). Even assuming a $1000 per hour billing rate, just one of Defendants' firms, just at the Supreme Court, expended "well over" 1,000 hours. Obviously, Plaintiff is requesting compensation for a very tiny fraction of the time Defendants spent working on this case.

III. THE HOURLY RATES PROFFERED BY PLAINTIFFS ARE CONSISTENT WITH ESTABLISHED RATES IN THE WASHINGTON, DC MARKET.

"[A] fee applicant's burden in establishing a reasonable hourly rate entails a showing of at least three elements: the attorneys' billing practices; the attorneys' skill, experience, and reputation; and the prevailing market rates in the relevant community." *Covington* v. *District of Columbia*, 57 F.3d 1101, 1107 (D.C. Cir. 1995). Each factor is addressed in turn.

A. The Attorneys' Billing Practices.

As is typical among attorneys dedicated largely or exclusively to public interest work, Plaintiff's counsel lack relevant hourly billing practices. Neily, Levy, and Healy are employed by non-profit public interest organizations that do not charge hourly billing rates. But "reasonable fees under § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or non-profit counsel." *Blum*, 465 U.S. at 895 (footnote omitted).

Gura and Possessky are partners at a private, for-profit law firm, but do not have standard, fixed hourly rates. Their work is typically performed on a flat-fee, contingency, or blended basis that produces no particular billing history reflected in a set hourly rate. Where comparable flat-fee services are provided to non-public interest clients, the firm charges substantially higher prices. To the extent they charge hourly rates, those rates are frequently set at sub-market rates in order to provide legal services to those who otherwise could not afford them, on a case-by-case basis, and even these typically contain blended additional compensation elements.[7] Attorneys "who either practice privately and for-profit but at reduced rates reflecting non-economic goals or who have no established billing practice" are "quite clear[ly] . . . entitled to an award based on the prevailing market rates." *Covington*, 57 F.3d at 1107 (footnote omitted). "[T]he prevailing market rate method heretofore used in awarding fees to traditional for-profit firms and public interest legal services organizations shall apply as well to those attorneys who practice privately and for profit but at reduced rates reflecting non-economic goals." *Covington*, 57 F.3d at 1107 (quoting *Save Our Cumberland Mountains*, 857 F.2d at 1524).

"Deciding whether an attorney has a public-spirited reason for a representation should not be all that difficult. An important part of this inquiry will focus on whether the fee charged in fact differs significantly from the market value of the attorney's services." *Bd. of Trs. of the Hotel & Rest. Emples. Local 25* v. *JPR, Inc.*, 136 F.3d 794, 807 (D.C. Cir. 1998). Considering that Gura's effective rate in this case was nominal, and that Possessky's rate was zero, these were, by

[7]Section 1988 and other fee shifting provisions acknowledge the simple reality that people of ordinary means cannot access the market for complex federal litigation, especially in civil rights cases seeking declaratory and injunctive relief where no monetary relief is available to form the basis of a contingency fee. Even where contingency fees are available, it is often the prospect of fee shifting that makes the litigation economically viable.

definition, below market. Indeed, Gura expressly offered a "reduced, flat fee" rate because, as stated in his initial proposal, he was "sympathetic to the cause and sensitive to the need to limit the cost of this venture." Gura Decl. ¶ 9. On principle, Gura honored the original fee agreement despite a generous offer to advance additional funds owing to the unforeseen development of the case, until the case was won at the Supreme Court. Gura Decl. ¶ 15. *Cf. Goos* v. *National Ass'n of Realtors*, 997 F.2d 1565, 1569 (D.C. Cir. 1993) ("there [was] nothing in the record . . . to suggest that Ms. Goos's attorney offered her a discounted rate for altruistic reasons.")[8]

B. The Attorneys' Skill, Experience, and Reputation.

Counsel's skill is best reflected in the quality of their work product. However, as precedent instructs in reviewing counsel's experience and reputation, some discussion of these factors is in order. Alan Gura entered this case with extensive civil rights litigation experience. Gura began his litigating career serving as a Deputy Attorney General for the State of California, in the Civil Division of the state's justice department. As such, Gura was tasked with first-chair responsibility for representing the state and its employees in a broad array of matters in California state and federal courts, in trial and on appeal. Gura handled dozens of cases, ranging from aviation to privacy rights, including a heavy emphasis on civil rights. Gura Decl. ¶ 2.

As a litigation associate with Sidley & Austin, Gura continued developing experience in the civil rights field, defending various of the firm's clients who, albeit private entities, faced civil rights issues as state actors owing either to their contractual assumption of state functions or for

[8]It is also beyond dispute that Gura and Possessky frequently represent clients at below-market rates for non-economic reasons, are active in civic and bar affairs, and could, were they motivated to return to large-firm practice, again command much higher hourly rates for their expertise than those they charge their public-interest clients. The same, of course, is true of Neily, Huff, Healy, and notwithstanding his lack of mega-firm experience, Levy. Podgursky Decl. ¶ 8.

other reasons alleged by opposing counsel. Gura left Sidley to serve as Counsel to the United States Senate Judiciary Committee, and subsequently opened his own practice, focusing primarily on civil rights and intellectual property litigation. Gura Decl. ¶ 3.

Last year, Gura was named among Washington's Top 40 Lawyers Under 40, and a "Champion of Justice," by *Legal Times*. Earlier this year, Gura argued his second case before the Supreme Court, *McDonald* v. *City of Chicago*, Supreme Ct. No. 08-1521. Gura's petition for certiorari was accepted by the Supreme Court, the only one granted of three petitions presenting the same issue. *McDonald*, like this case, is another landmark in constitutional law, resolving whether the Fourteenth Amendment's Privileges or Immunities or Due Process clauses require the States to respect the right to arms. Gura Decl. ¶ 6.

Gura earned degrees at Cornell and Georgetown, and has been published in various legal and general interest publications, ranging from the *UCLA Law Review* to *Washington Jewish Week*. Gura Decl. ¶¶ 1, 7. He frequently teaches bar-sponsored CLE courses, and debates and lectures at law schools throughout the United States. Gura Decl. ¶ 7. Alan Gura was first admitted to practice law in 1995, and is a member of the California, District of Columbia, and Virginia bars. Gura Decl. ¶ 1.

Clark Neily is likewise highly experienced in handling civil rights matters, having served for the past ten years as Senior Attorney at the Institute for Justice, among the nation's preeminent public interest law firms. During that time he has practiced constitutional law exclusively and has served as lead counsel in numerous state and federal cases, first-chairing several trials, briefing and arguing appeals in both federal and state courts, routinely serving as lead counsel in federal court challenges from initial filing to cert petition, and working on several

of the Institute's well-known Supreme Court cases, including *Kelo* v. *City of New London*, 545 U.S. 469 (2005) (eminent domain); *Zelman* v. *Simmons-Harris*, 544 U.S. 460 (2005) (school vouchers), and *Swedenburg* v. *Kelly*, 536 U.S. 639 (2002) (interstate wine shipping). Neily Decl. ¶ 3. Neily's work at the Institute for Justice also involves supervising staff attorneys, *id.* ¶ 5, and teaching, writing about, and speaking publicly about constitutional law issues, about which he has published six law review articles and numerous pieces in other outlets. *Id.* ¶ 5.

Neily also has substantial large firm experience with Dallas's Thompson & Knight, where he served as lead counsel in dozens of cases, gained first-chair trial experience, and worked on a variety of professional liability, complex commercial, and intellectual property cases. Neily Decl. ¶ 2. Neily holds undergraduate and law degrees from the University of Texas, where he served as Chief Articles Editor of the Texas Law Review. Neily was first admitted to practice law in 1994 and is a member of the Supreme Court, District of Columbia, Texas and various federal court bars. Neily Decl. ¶ 1.

Robert Levy is a leading legal commentator and constitutional scholar whose expertise is frequently sought by major media outlets, and whose books, law review articles, and other prolific writings are widely known and well-respected. Levy was an adjunct professor of law at Georgetown University for seven years, and has lectured on constitutional law at dozens of law schools. Among other appearance, Levy also spoke before the judicial conferences of the Eighth and Tenth circuits in 2009. Levy Decl. ¶¶ 4, 5.

Levy is currently Chairman of the Board of Directors at the Cato Institute, which he first joined in 1997 as a senior fellow in constitutional studies, and serves on the boards of the Institute for Justice, Federalist Society, and George Mason University School of Law. In addition, Levy

co-chairs, along with former White House Chief of Staff John Podesta, the Board of Advisors of the American Foundation for Equal Rights. Levy Decl. ¶¶ 3-5. Levy received his Juris Doctor from George Mason University in 1994, the year in which he was first admitted to practice law. Levy was class valedictorian and chief articles editor of the law review. He holds Bachelors, Masters, and Ph.D. degrees in Business from the American University. Levy Decl. ¶¶ 1-3.

Gura, Neily, and Levy have all clerked in United States District Courts. Levy also clerked for D.C. Circuit Judge Douglas Ginsburg. Gura Decl. ¶ 2; Neily Decl. ¶ 2; Levy Decl. ¶ 2.

Gene Healy, a 1999 graduate of the University of Chicago law school and 1994 graduate of Georgetown, is currently a Vice President of the Cato Institute. A scholar in his own right, Healy once worked as a commercial litigation associate at Howrey. Healy Decl. ¶¶ 1-2.

Laura Possessky earned a Juris Doctor from Georgetown in 1995 and a Bachelors degree, *magna cum laude*, from the University of Pennsylvania in 1991. Ms. Possessky handles media and intellectual property matters for the firm, and her practice has a strong public interest emphasis. In addition to several years either in the employ of or counseling public interest clients, she has devoted many years of voluntary service to the District of Columbia Bar, having been elected by the membership as a voluntary leader three times. Possessky Decl. ¶¶ 1-3. Possessky is currently an elected member of the District of Columbia Bar's Board of Governors, and the President of Washington Area Lawyers for the Arts. Possessky Decl. ¶ 2. She has served as Executive Vice President of Women in Film and Video. *Id.*

Thomas Huff recently joined Gura & Possessky as an associate, and continues to handle pro bono matters pre-existing this employment in addition to the firm's work. As an associate at Kenyon & Kenyon, Huff handled a variety of intellectual property matters, but also participated in

his firm's pro bono practice, in affiliation with the ABA's Death Penalty Representation Project (assisting criminal defendants) and the Office of the Capital Defender in Northern Virginia. Huff Decl. ¶ 2. Huff received a Thurgood Marshall Award from The Association of the Bar of the City of New York for pro bono appellate representation of an individual facing a sentence of death. *Id.* Huff has earned a Bachelor of Science in Computer Science from George Mason University, and a Juris Doctor from George Washington University. Huff Decl. ¶¶ 1, 2.

C. The Prevailing Market Rates in the Community.

"[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*, 57 F.3d at 1109. Contrary to Defendants' assertions, use of the U.S. Attorney's version of the Laffey Matrix is optional – the D.C. Circuit explicitly authorizes "an updated version of the Laffey Matrix." *Id.*

"[I]t is clear, as the Court of Appeals explained in *Covington*, that plaintiffs may submit a matrix alone, or 'may' supplement such matrix with surveys, affidavits, and evidence of recent court awards of fees to attorneys with comparable qualifications handling similar cases." *Salazar* v. *District of Columbia*, 123 F. Supp.2d 8, 14 (D.D.C. 2000) (citation omitted).

In *Salazar*, the Court accepted the methodology and expertise of Dr. Michael Kavanaugh in updating the Laffey Matrix, as well as billing surveys reported by the National Survey Center, the *National Journal*, and *Legal Times.* Plaintiffs present the same high quality of information in this proceeding to assist the Court in determining the community's prevailing market rate.

1. *The Updated Laffey Matrix*.

If not for *Perdue*, the updated Laffey Matrix, as confirmed by the recent NLJ salary survey, would be conclusive. As shown below, however, *Perdue* renders irrelevant, for purposes of this case, the parties' dispute as to who has the better version of the Laffey Matrix. *Perdue*'s impact notwithstanding, the updated Laffey Matrix is highly instructive.

Dr. Kavanaugh's background and the widespread acceptance of his expertise by courts is reflected in his attached declaration and curriculum vitae. His methodology is based on sound economic science and accepted legal principles. The rates of various local firms – including those retained in this case by the non-prevailing Defendants – confirm Kavanaugh's accuracy.

The science behind updating the Laffey Matrix is straightforward: attorney fee rates previously adopted by the courts as reasonably reflecting the local market are updated by applying an accepted rate of inflation. The Office of the U.S. Attorney for the District of Columbia prepares its version of the Laffey Matrix by taking the 1982 hourly rates for the Washington D.C. metropolitan area approved by the D.C. Circuit in 1983, and applying the change in the Metropolitan Washington area Consumer Price Index (CPI) to those 1982 rates. Kavanaugh Decl. ¶ 8; http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_8.html.[9]

The method utilized by Plaintiff's expert, Dr. Kavanaugh produces a significantly more accurate matrix for two reasons. First, Dr. Kavanaugh uses an index specific to legal services; the U.S. Attorney uses the entire CPI for Metropolitan D.C., which includes items that are not

[9]It should be noted that both Dr. Kavanaugh and the USAO traditionally adjust their Laffey matrices using BLS data released in June, consistent with the anniversary of the *Laffey* decision. Owing to this case's deadline, Dr. Kavanaugh's rates submitted here are current as of the April, 2010 data, released last month.

relevant to the market for legal services. Indeed, these other items are given much more weight than legal services.[10] Second, the U.S. Attorney's method starts with rates recorded in 1982; the method Dr. Kavanaugh uses applies the specific legal services index to the more recent survey of rates for the Washington D.C. metropolitan area developed in 1989 in response to the remand decision in *Save Our Cumberland Mountains, supra*, 857 F.2d 1516. Kavanaugh Decl. ¶ 9.

The method used to find the 1989 rates is described in the declaration of Joseph Yablonski submitted in the case of *Broderick* v. *Ruder*, D.C. Civil No. 86-1824 (Pratt, J.). Yablonski's survey is recognized as an appropriate basis for the updating of Laffey rates. Kavanaugh Decl. ¶ 9; *see, e.g.*, *Salazar*, 123 F. Supp.2d at 13; *Sexcius* v. *District of Columbia*, 839 F. Supp. 919, 924 (D.C. Cir. 1993); *Trout* v. *Ball*, 705 F. Supp. 705, 709 n.10 (D.D.C. 1989); *Palmer* v. *Barry*, 704 F. Supp. 296, 298 (D.D.C. 1989).

It is easy to see why Dr. Kavanaugh's approach would yield more accurate rate estimates than that of the U.S. Attorney's Office. First, Dr. Kavanaugh uses more recent approved data as a starting point. Kavanaugh Decl. ¶ 10. Furthermore, in keeping with sound economic practice, Dr. Kavanaugh employs the most specific price index available – the index for legal services. Kavanaugh Decl. ¶ 11. Applying a generalized all-inclusive CPI to specific markets for goods and services would be unreliable. Kavanaugh Decl. ¶ 12. For example, the price of a computer in 1970, adjusted by the overall CPI, would be radically higher than the actual price of that computer today. Conversely, predicting the price of gasoline using the overall CPI increase since 2001

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[10] A partial listing of such "non-legal service" items includes: food "away from home," alcoholic beverages, rent on primary residence, fuels and utilities, household furnishings and operations, apparel, private transportation, gasoline, medical care, recreation and "education and communication." *See* http://data.bls.gov/PDQ/outside.jsp?survey=cu

would not account for the steep rise in oil prices. "Beans, corn and hamburger may have appreciated less than an hour of a lawyer's time, but plaintiffs must shop in the legal market, not the supermarket." *De Walt* v. *Sullivan*, 756 F. Supp. 195, 201 (D.N.J. 1991), *reversed*, 963 F.2d 27 (3d Cir. 1992).[11]

The superiority of Dr. Kavanaugh's approach, explained at ¶¶ 11-16, was recognized by Judge Kessler in *Salazar*: "[Kavanaugh's] Laffey index has the distinct advantage of capturing the more relevant data because it is based on the legal services component of the Consumer Price Index rather than the general CPI on which the U.S. Attorney's Office matrix is based." *Salazar*, 123 F. Supp.2d at 14-15; *Smith*, 466 F. Supp.2d at 156. Magistrate Judges Kay and Robinson have also accepted Kavanaugh's work. *Flynn* v. *Dick Corp.*, 624 F. Supp. 2d 125, 131 (D.D.C. 2009); *Ricks* v. *Barnes*, 2007 U.S. Dist. LEXIS 22410 at *16 n.3 (D.D.C. March 28, 2007).

Judges Kessler, Kay and Robinson are not alone. Other courts likewise authorize the use of the legal services component. *Interfaith Cmty. Org.* v. *Honeywell Int'l, Inc.*, 426 F.3d 694, 710 (3d Cir. 2005) (Kavanaugh Laffey updates approved); *N.C. Alliance for Transp. Reform, Inc.* v. *United States DOT*, 168 F. Supp. 2d 569, 580 & n.6 (M.D.N.C. 2001). The legal services component is also sometimes preferred to the general CPI in other attorney fee contexts. *See, e.g. Sullivan* v. *Sullivan*, 958 F.2d 574, 577 n.7 (4th Cir. 1991) (attorney fees under 28 U.S.C. § 2412(b)); *Baker* v. *Bowen*, 839 F.2d 1075, 1084 (5th Cir. 1988) (same); *but see supra* n.11.

[11]The Third Circuit reversed, holding that the general CPI must apply under 28 U.S.C. § 2412(d) by strictly construing that provision's use of the term "cost of living." In contrast, the exercise under Section 1988 is to determine a "reasonable attorney's fee," which should be based on the trends in the market for legal services.

Dr. Kavanaugh's Laffey Matrix sets the current rate for Gura, Neily, Levy, Possessky, and Healy, all of whom are in the 11-19 year category, at $589 an hour; Huff's current hourly rate, in the 4-7 year category, is set at $361. Kavanaugh Decl. ¶ 16. Counsel must be compensated at current market rates to compensate for ordinary delay in payment. *Missouri* v. *Jenkins*, 491 U.S. 274, 283-84 (1989). "Paying counsel at historical, or even current, rates based on their experience levels when they performed the work would not achieve this equivalence." *Miller* v. *Holzmann*, 575 F. Supp. 2d 2, 20 (D.D.C. 2008); *Sexcius*, 839 F. Supp. at 926.

Plaintiffs are mindful that Chief Judge Lamberth recently rejected Dr. Kavanaugh's approach in *Miller*. But with all due respect to Chief Judge Lamberth, whose opinion is excellent in certain other respects, *Miller*'s criticism of Dr. Kavanaugh's analysis is misplaced.

Chief Judge Lamberth correctly observed that "rates used in calculating the lodestar should accord with those 'prevailing in the community,'" *Miller*, 575 F. Supp. 2d at 17 (quoting *Blum*, 465 U.S. at 896 n.11), and that "plaintiff must produce data concerning the prevailing market rates in the relevant community." *Miller*, 575 F. Supp. 2d at 18 (quoting *Covington*, 57 F.3d at 1108). But Chief Judge Lamberth erred in next stating, "Kavanaugh's matrix does not comply with this mandate for geographic specificity." *Id.*

As described above and in Dr. Kavanaugh's declaration, the "prevailing market rates" employed by Dr. Kavanaugh are indeed "from the relevant community" – these are the same Washington, D.C. rates drawn from the 1989 Yablonski survey long- approved in this circuit. Judge Lamberth apparently confused Kavanaugh's "rates," which are indeed local as required by precedent, with rates of change in the CPI, which is specific to legal services but drawn nationally. *See Miller*, 575 F. Supp. 2d at 17 ("Kavanaugh's matrix thus reflects *national* inflation trends,

while the USAO matrix accounts for price inflation within the *local community* -- a crucial distinction") (emphasis in original).

Absolutely nothing in *Blum*, *Covington*, or any other precedent mandates that generalized CPI data be used rather than data specific to the market for legal services. To the contrary: the portion of *Blum* upon which Chief Judge Lamberth relies clearly discusses localized market hourly rates for legal services, not the method economists use to update such data. And as confirmed by Dr. Kavanaugh, the use of the generalized CPI is scientifically unsound.

Ideally, local rates specific to legal services should be adjusted by a local index specific to legal services. Both Kavanaugh and the USAO matrix meet the first requirement: They start with local base rates specific to legal services, although Kavanaugh's rates are more current. Unfortunately, there is no local D.C. inflation index specific to legal services. The Bureau of Labor Statistics "does not produce a legal services index specific to any particular metropolitan area. To ask that the Washington DC area rates be adjusted by a Washington DC legal services index is to ask for an item that does not exist." Kavanaugh Decl. ¶ 15 n.5.

Kavanaugh resolves that problem by using a national index specific to legal services. The USAO matrix, by contrast, uses an index that is local but general-purpose, in which legal services play a minor role. Given a choice between those two admittedly imperfect approaches, it is clear that a national specific index is preferable to a local general-purpose index. Self-evidently, wide disparities can exist between changes in D.C.'s legal rates and changes in D.C.'s overall price index. Indeed, legal rates could be advancing while overall prices decline, or vice versa. On the other hand, there is little reason to believe that major disparities will exist between changes in D.C.'s legal rates and changes in national legal rates.

Put differently, when measuring rate *changes*, legal specificity is more important than geographical specificity. Were the choice purely binary, the relevant market (legal services) would trump the locality. For example, changes in attorney billing rates nationwide would be more relevant to our inquiry than changes in the price of milk at the courthouse cafeteria.

It is important to recall the guiding principle that leads courts to require the use of local community rates: accuracy. Using billing rates "prevailing in the community," *Blum*, 465 U.S. at 896 n.11, leads to greater accuracy. Using generalized CPI data that is local, but based overwhelmingly on prices having nothing to do with *legal services*, leads to decreased accuracy. Dr. Kavanaugh's matrix is "more accurate in that the calculation was based on increases/decreases in legal services rather than increase/decreases in the entire CPI which includes price changes for many different goods and services." *Smith*, 466 F. Supp.2d at 156.

Chief Judge Lamberth's claim that "Kavanaugh's alternative methodology has achieved only limited acceptance in this District," *Miller*, 575 F. Supp. 2d at 17, is overstated. The claim is supported by a footnote referencing three cases as "declining to adopt," *id.* n.28, but *Dr. Kavanaugh did not participate in two of those cases*. Kavanaugh Decl. ¶ 4 n.1. Indeed, in one of these cited cases in which Kavanaugh did not participate, the Court *accepted* an updated Laffey Matrix virtually identical to that proposed by Kavanaugh for 2005-06, but reduced the award by 25% because the case was simple. *Muldrow* v. *Re-Direct, Inc.*, 397 F. Supp.2d 1 (D.D.C. 2005).

The second case cited in *Miller*, in which Kavanaugh did not participate rejected the updated Laffey Matrix for lack of a "significant evidentiary record" supporting the proffered rates. *Yazdani* v. *Access ATM*, 474 F. Supp.2d 134, 138 (D.D.C. 2007). *Yazdani* drew upon *McDowell* v. *District of Columbia*, 2006 U.S. Dist. LEXIS 46371 (D.D.C. 2006), which suffered from the

same flaw. The lesson of these cases is that parties wishing to employ an expert's analysis must employ the expert.

The only case cited by *Miller* declining to adopt Dr. Kavanaugh's expertise is simply wrong as a matter of law. *American Lands Alliance* v. *Norton*, 525 F. Supp.2d 135 (D.D.C. 2007) erroneously considered the U.S. Attorney's Laffey Matrix as "the standard" rate, which it most certainly is not. 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). "The so called Laffey matrix is promulgated by the Civil Division of the United States Attorney's Office to indicate to the bar those rates to which the government will not object." *Novak*, 496 F. Supp. 2d at 159.[12] The U.S. Attorney was not involved in the original *Laffey* litigation, entering only an appearance as amicus curiae during the fee dispute. But more critically, *Covington* specifically instructs that the U.S. Attorney's matrix is to be afforded *the same* consideration as any other updated Laffey Matrix or a party's own survey. *Covington*, 57 F.3d at 1109; *Salazar*, 123 F. Supp.2d at 14.

It is thus error to refuse consideration of any rate evidence, on the presumptive assumption that the government's matrix is controlling. It is not. *American Lands* also based its conclusion on a determination that the case was not complex; at the very least, *American Lands* would be distinguishable on this point. Dr. Kavanaugh does not claim that his methodology

[12] Plaintiffs accept this concession when litigating the rates is not worth the effort.

captures any enhancement for complexity, a factor that is ordinarily included in the total number of hours worked.

2. *Current Survey Data.*

Although Dr. Kavanaugh's updated Laffey Matrix would on its own suffice to establish the prevailing market rates, specific survey data confirms the Matrix's exceptional accuracy. *See Salazar*, 123 F. Supp.2d at 13; *Interfaith*, 426 F.3d at 710.

Plaintiffs first turn to the *National Law Journal*'s most recent survey of 2009 rates charged by various associate classes, with emphasis on the rates charged by Washington, D.C. firms. At Dickstein, Shapiro, seventh and eighth year associates are billed at $488 an hour, while fourth year associates bill at $393 an hour. Hogan & Hartson charge $525 an hour for an eighth year associate, $405 for a fourth year associate. Eighth and fourth year associates yield $370 and $480 an hour, respectively, at Patton, Boggs. Dr. Kavanaugh's assessment that Thomas Huff, who billed at $330 an hour in 2009, Huff Decl. ¶ 3, could charge $361 an hour in 2010, is well in line with these rates. Exh. 12.

The U.S. Attorney's version of the Laffey Matrix, highly incongruent with the real world data, holds 11-19 year attorneys to a rate of $410 in 2009 – a rate exceeded by fifth year associates at Dickstein Shapiro ($438) and Hogan & Hartson ($435), and by sixth year associates at Patton Boggs ($425). Thompson Knight, Mr. Neily's previous firm, exceeds this rate for associates in their seventh year ($425). Exh. 12.

Turning to the *National Law Journal*'s 2009 law firm rate survey, Exh. 13, the picture is equally clear. Again, focusing only on Washington, D.C. based firms:

	Firmwide Avg. Rates	Top Rate	Avg. Partner Rates	Median Partner Rates	Top Assoc. Rate
Arent Fox		$755			$485
Dickstein	$520	$950	$633	$630	$515
Hogan	$540	$990	$675	$660	$550
McKenna		$775	$471		$470
Patton Boggs	$521	$990	$650	$625	$540
Venable	$457	$975	$556	$550	$450

Additionally, Sidley Austin's Washington, D.C. office is known to bill $950 per hour. "Sidley Austin Lobbying for Cayman Islands," *Blog of Legal Times*, 5/25/2010. (Exh. 14).

An examination of the rates charged by some of opposing counsel's firms is also instructive. As noted *supra*, O'Melveny & Myers charged $705 for at least one experienced partner in 2008. Exh. 9. Covington & Burling partners, some of whom worked on this case, started at $510 and ranged up to $800, with associates billing as much as $525 an hour – in 2007. Exh. 11 to 2008 motion.

While these real world rates are in line with the rates predicted by Dr. Kavanaugh's Updated Laffey Matrix, they are not remotely reflected by the U.S. Attorney's model. The USAO's predicted top rate for the absolutely most experienced attorneys in Washington is exceeded by the average billing rate of lawyers in at least three firms, and is within ten dollars of a fourth. It is exactly what the Hogan firm charges for *sixth year associates*, substantially below the top rate for associates ($550), and over *two hundred* dollars below that firm's average partner rate ($675). Dickstein Shapiro associates exceed the top of the USAO matrix in their seventh year ($487); Patton Boggs associates break the top USAO rate in their eighth year ($480).

Finally, legal placement specialist Robert Podgursky, who is intimately familiar with the market for high quality attorneys and the rates they command in this market, confirms that

Kavanaugh's projected rates are "quite ordinary," and well within the range that Plaintiff's counsel could charge private clients for this type of representation. Podgursky Decl. ¶¶ 8, 9.

IV. COUNSEL ARE ENTITLED TO LODESTAR ADJUSTMENTS FOR SUPERIOR PERFORMANCE, AND EXCESSIVE DELAY IN PAYMENT.

A. The Supreme Court Has Reconfirmed the Availability of Lodestar Adjustments.

The lodestar calculation is only "the most useful *starting point* for determining the amount of a reasonable fee."*Hensley*, 461 U.S. at 433 (emphasis added). "The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" *Hensley*, 461 U.S. at 434 (footnote omitted).

"Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified." *Blum*, 465 U.S. at 901 (quoting *Hensley*, 461 U.S. at 435). "In view of our recognition that an enhanced award may be justified in some cases of exceptional success, we cannot agree with [the] argument that an upward adjustment is never permissible." *Blum*, at 897 (internal quotation marks omitted).

Perdue confirmed this basic rule:

> This case presents the question whether the calculation of an attorney's fee, under federal fee-shifting statutes, based on the "lodestar," *i.e.*, the number of hours worked multiplied by the prevailing hourly rates, may be increased due to superior performance and results. We have stated in previous cases that such an increase is permitted in extraordinary circumstances, and we reaffirm that rule.

Perdue, 130 S. Ct. at 1669 (footnote omitted).

"[T]he lodestar method produces an award that *roughly* approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case." *Perdue*, 130 S. Ct. at 1672 (emphasis original). "[W]e have repeatedly said that enhancements may be awarded in 'rare' and 'exceptional' circumstances." *Perdue*, 130 S. Ct. at 1673 (citations omitted).

> In light of what we have said in prior cases, we reject any contention that a fee determined by the lodestar method may not be enhanced in any situation. The lodestar method was never intended to be conclusive in all circumstances. Instead, there is a "strong presumption" that the lodestar figure is reasonable, but that presumption may be overcome in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee.

Id.

To warrant a lodestar adjustment, Plaintiff "has the burden of identifying a factor that the lodestar does not adequately take into account and proving with specificity that an enhanced fee is justified." *Perdue*, 130 S. Ct. at 1669. The Supreme Court identified three specific, non-exclusive circumstances under which lodestar adjustment is justified. It then set out a particular method of adjusting the lodestar under each of these circumstances.

Two of the three *Perdue* circumstances are plainly apparent: (1) superior attorney performance, and (2) excessive delay in payment.

B. Adjustment is Due for An Exceptional Performance.

The first *Perdue* lodestar adjustment qualification is a careful restatement of the old rule at the heart of Section 1988's rationale: the fee should reflect the market value of the work performed, so as to attract competent counsel to a deserving case. Difficult cases may sometimes be won accidentally, but an exceptional performance might also play a role. *Perdue*, 130 S. Ct. at

1674. In any event, the market would not award ordinary fees for an exceptional performance, and thus, neither does Section 1988:

> [W]e inquire whether there are circumstances in which superior attorney performance is not adequately taken into account in the lodestar calculation. We conclude that there are a few such circumstances but that these circumstances are indeed "rare" and "exceptional," and require specific evidence that the lodestar fee would not have been "adequate to attract competent counsel."

Id.

Critically, *Perdue* then provides the first example of when the lodestar may not reflect the rate necessary to attract competent counsel:

> First, an enhancement may be appropriate where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value, as demonstrated in part during the litigation. This may occur if the hourly rate is determined by a formula that takes into account only a single factor (such as years since admission to the bar) [footnote 6: citing *Salazar* and *Laffey*] or perhaps only a few similar factors. In such a case, an enhancement may be appropriate so that an attorney is compensated at the rate that the attorney would receive in cases not governed by the federal fee-shifting statutes.

Id. (other footnote omitted).

This language is conclusive. And if there were any doubt that this describes cases governed by the Laffey Matrix, the Supreme Court's citation to Judge Kessler's opinion in *Salazar*, adopting Dr. Kavanaugh's updated Laffey Matrix, and to the original *Laffey* case, settles it. This is only common sense: the matrices supply useful presumptions, but it well may be that a matrix "does not adequately measure the attorney's true market value." *Id.*

Thus the precise matrix looked to by the Court is unimportant in cases governed by *Perdue*. If the performance is exceptional, its value will not be captured by any matrix, and "the

trial judge should adjust the attorney's hourly rate in accordance with specific proof linking the attorney's ability to a prevailing market rate." *Id.*

"[I]f the Supreme Court's caveat authorizing enhancements in rare and exceptional cases is to be more than a theoretical possibility, then this proceeding is one of such cases, deserving of an enhancement." *McKenzie* v. *Kennickell*, 875 F.2d 330, 338 (D.C. Cir. 1989), *overruled on other grounds, King* v. *Palmer*, 950 F.2d 771 (D.C. Cir. 1991) (en banc).

The exceptional nature of the work performed by counsel should be self-evident, as Defendants have acknowledged.

> 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). Counsel were required to scrutinize a great range of complex material, synthesize coherent and persuasive arguments, and anticipate, dissect, and respond to the opposition's analyses – all within the art of litigation as practiced at the highest level.

Courts do not lightly yield results such as that which occurred here without some confidence in counsel's work product. Judge Silberman found counsel's work influential. "It's only because I had never looked at the issue in any legal proceeding that I had this background view . . . that it was a collective right. When I started reading the briefs in the case and carefully looking at the language of the Second Amendment, I concluded otherwise."[13]

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[13] http://tv.nationalreview.com/uncommonknowledge/post/?q=MzkxZGRmZTg1ODhlOTZkZmU2MWI5NjBhNmI0NDAxYTY= (at approx. 3:00 mark)

As this Court stated in rejecting Plaintiffs' claims,

> While plaintiffs extol many thought-provoking and historically interesting arguments for finding an individual right, this Court would be in error to overlook sixty-five years of unchanged Supreme Court precedent and the deluge of [contrary] circuit case law . . .

Parker v. *District of Columbia*, 311 F. Supp.2d 103, 109-110 (D.D.C. 2004). Considering the scope of this litigation, that the Supreme Court's majority and dissenting opinions in this case comprised only 157 pages is a testament to their *brevity*. *Cf. Smith*, 466 F. Supp.2d at 158 n.7 ("Judge Tatel's 29-page opinion, along with the dissent of Chief Judge Ginsburg, evidence the complexity of the legal issues involved in this case.")

After *Perdue*, the result itself is not grounds for enhancement, but it may still serve as evidence that the performance was indeed exceptional. Courts have long awarded significant enhancements in ground-breaking cases securing previously unrecognized or underutilized rights. *See, e.g. Shakman* v. *Democratic Org. of Cook County*, 677 F. Supp. 933, 945 (N.D. Ill. 1987) (1.333 multiplier where "[i]magination and creativity on the part of plaintiffs' counsel were necessary to fashion arguments persuasive enough to invoke judicial protection of constitutional rights which previously had not been clearly recognized by the courts"); *Brotherton* v. *Cleveland*, 141 F. Supp.2d 907, 913 (S.D. Ohio 2001) (1.5 multiplier awarded sole practitioner who "took a case with compelling facts, but scant case-law and brought to light a previously unrecognized cause of action"); *cf. Barnes* v. *City of Cincinnati*, 401 F.3d 729, 746 (6th Cir. 2005) (1.75 multiplier in transsexual sex discrimination case presenting "novelty and difficulty" and where "immense skill [is] requisite to conduct[] case properly").

A corollary to this rule holds that significant enhancements apply where, as here, the controversial or otherwise particularly challenging nature of the issue made the case unattractive

to many lawyers. *Guam Soc'y of Obstetricians & Gynecologists v. Ada,* 100 F.3d 691, 698-99 (9th Cir. 1996) (100% enhancement in abortion rights case facing strong local opposition). "[W]hen a lawyer risks permanent harm to his career to defend fundamental, if unpopular, legal principles, the lodestar may be inadequate to fully compensate him for this extraordinary sacrifice." *Miller*, 575 F. Supp. 2d at 53 n.82.

This case will stand as a landmark foundational precedent in American constitutional law. It marked the first time the Supreme Court defined the meaning and scope of the Second Amendment directly, and in doing so overruled the "deluge" of contrary precedent from nine federal circuit courts of appeals. Prior to this case, no federal appeals court had ever struck down a legislative enactment as violating the Second Amendment. If this is not a case where the attorney performance reflects a higher-than-matrix value, Section 1988's promise of a "reasonable attorney's fee" is illusory. And if the bar cannot expect that Section 1988 would reward this sort of representation with a commensurate market rate, then Section 1988 will not attract competent counsel to this most challenging, controversial, yet critically necessary work.

As noted *supra*, the Updated Laffey Matrix reflects average predictable market rates, while the USAO matrix is merely the government's offer, bearing zero relation to anything occurring in this market. As anticipated by *Perdue*, neither matrix reflects the rates needed to attract this type of performance. Consistent with established rates, counsel respectfully request adjustment to $790 per hour for the "11-19 year" experience range, and $400 per hour for the "4-7 year" experience range. As Mr. Podgursky testifies, these "are fair rates, but comfortably below the highs." Podgursky Decl. ¶ 9. Indeed, here is how Plaintiff's requested rates, and the matrix rates, stack up against rates in the market for complex litigation:

Partner High in $/hour	
Locke Lord Bissell	1045
Foley & Lardner	1035
Buchanan Ingersoll	1020
Jenner & Block	1000
Winston & Strawn	995
Hogan & Hartson	990
Patton Boggs	990
Venable	975
Dickstein Shapiro	950
Loeb & Loeb	950
Sidley Austin	950[14]
Hughes Hubbard & Reed	925
Cozen O'Connor	880
Schulte Roth & Zabel	880
Kelley Drye & Warren	875
Nixon Peabody	865
Alston & Bird	860
Epstein Becker & Green	855
Greenberg Traurig	850
Manatt Phelps & Phillips	850
Nelson Mullins	850
Thompson & Knight	825[15]
Pepper Hamilton	820
Perkins Coie	815
Fitzpatrick Cella Harper	810
Saul Ewing	800
Sullivan & Worcester	800
Sutherland Asbill & Brennan	800
Brownstein Hyatt Farber	795
Dorsey & Whitney	795
Duane Morris	795
Post-*Perdue* 11-19 yr	**790**
Kavanaugh Laffey 11-19 yr	**589**

Associate High in $/hr	
Cozen O'Connor	695

[14]Alan Gura's former firm.

[15]Clark Neily's former firm.

Hughes Hubbard & Reed	695
Schulte Roth & Zabel	670
Winston & Strawn	615
Saul Ewing	585
Buchanan Ingersoll	580
Curtis Mallet-Prevost	575
Greenberg Traurig	575
Nixon Peabody	570
Sullivan & Worcester	560
Alston & Bird	555
Bryan Cave	550
Brinks Hofer	550
Hogan & Hartson	550
Loeb & Loeb	550
Dorsey & Whitney	545
Kelley Drye & Warren	545
Patton Boggs	540
Jenner & Block	535
Locke Lord Bissell	525
Shepard Mullin	525
Dickstein Shapiro	515
Perkins Coie	515
Manatt Phelps & Phillips	505
Lowenstein Sandler	500
Thompson & Knight	500[16]
Edwards Angell Palmer	495
Arent Fox	485
Snell & Wilmer	480
Sutherland Asbill & Brennan	480
Epstein Becker & Green	475
McKenna Long & Aldridge	470
Day Pitney	465
USAO Laffey 20+ yr	**465**
Townsend & Townsend	460
Duane Morris	450
Pepper Hamilton	450
Venable	450
Davis Wright Tremaine	445
Gardere Wynne Sewell	445
Fitzpatrick Cella Harper	440
Smith Gambrell	440

[16]Clark Neily's former firm.

Jackson Lewis	425
Kilpatrick Stockton	425
Morris Maning & Martin	425
Womble Carlyle	415
USAO Laffey 11-19 yr	**410**

Plaintiff's requested hourly rates reflect the quality of representation demonstrated in this case – and are required to achieve the degree of success attained. With at least 31 firms maintaining higher, sometimes far higher rates, it cannot be said that counsel's requested hourly rates approach the market top for complex federal litigation.

C. Plaintiff Is Entitled to *Perdue* Interest.

Perdue leaves unaltered the rule that compensation for the delay in payment is ordinarily obtained by paying attorneys at their current rates. *Perdue*, 130 S. Ct. at 1675 (citing *Missouri* v. *Jenkins*, *supra*, 491 U.S. at 282). "But we do not rule out the possibility that an enhancement may be appropriate where an attorney assumes these costs [of delayed payment] in the face of unanticipated delay, particularly where the delay is unjustifiably caused by the defense." *Perdue*, 130 S. Ct. at 1675.

Where an unanticipated delay adjustment is appropriate, "the enhancement should be calculated by applying a method similar to that described above in connection with exceptional delay in obtaining reimbursement for expenses." *Id.* That adjustment "must be calculated using a method that is reasonable, objective, and capable of being reviewed on appeal, such as by applying a standard rate of interest to the qualifying outlays of expenses." *Id.* at 1674-75.

Plaintiff submits that this case involves a great deal of "unanticipated delay," much of it "unjustifiably caused by the defense," although this is not strictly required to award *Perdue* interest. The City of Chicago fought no less capably in defending its handgun ban, but the

Supreme Court's decision in *McDonald* is expected within two years of that complaint's filing in the District Court. While *McDonald* might have moved relatively quickly, the present litigation is now in its eighth year, with no prospect of counsel seeing payment for their services any time soon. This delay is neither typical, nor could it have been anticipated.

The District's dilatory conduct in this case began almost at day one. After announcing to the newspapers that it would forcefully oppose the lawsuit, Plaintiffs' motion for summary judgment "fell through the cracks." Gura Decl. 4/14/03, ¶ 2. A seventy-day extension to respond to that motion (and seventy-four day extension to reply to Plaintiff's opposition to the motion to dismiss) followed. On appeal, the District obtained an order holding the case in abeyance from August 25, 2004 through November 2, 2005 – 434 days during which it twice moved for summary affirmance and opposed Plaintiffs' motions to set the case for briefing and argument.

Following the D.C. Circuit's decision, the District would ordinarily have had ninety days to file its petition for certiorari. But the District unsuccessfully moved for rehearing en banc, and then obtained an additional stay of the mandate and corresponding extension of time to file its petition. In connection with this motion, the District first obtained Plaintiff's consent for an enlargement of time to respond, for the alleged purpose of trying to negotiate a settlement. But the District did not seriously negotiate, and sought an additional an extension of time.

All told, by April 15, 2009, the District had caused delays totaling 617 days. Delay, of course, begets further delay. Had the case been resolved 617 days earlier, the District would not have been in the position to seek another 450 day delay: the time between the staying of this

matter pending *Perdue*, and the time this motion will be fully briefed, assuming the District requests no further extensions.[17]

Again, *Perdue* does not require that the unanticipated delay be a product of the Defendant's conduct to merit an interest adjustment. But this case should have been concluded a long time ago, and at least 1,067 days – virtually three years of delay – can be squarely attributed to the District. Pervasive delays are routine for plaintiffs litigating against the District of Columbia. These endless delays cost plaintiffs and their counsel money, and those costs should be internalized by the District when it loses. Apart from the simple justice of having the District pay for the costs of the delays it causes, there must also be some disincentive for the District to prolong matters for years.

Accordingly, Plaintiff respectfully seeks three years of *Perdue* interest, compounded annually. *Perdue* does not specify what the precise interest rate should be (nor even mandate that the adjustment for excessive delay take the form of interest). However, by directing that an appropriate measure is a "standard rate of interest [applied] to a qualifying outlay of expenses," *Perdue*, 130 S. Ct. at 1674-75, the Supreme Court indicates that attorneys must be made whole for the cost of replacing the money they would have earlier had. Expenses, after all, are a cost item of doing business for attorneys who must invest money to keep litigation alive.

The most appropriate "standard" rate of *Perdue* interest appears to be the Small Business Administration's basic interest rate for unsecured general purpose "Section 7(a)" loans. Under this program, fixed rate loans exceeding $50,000 maturing within 7 years, which would cover the

[17]Plaintiff does not question the decision to await *Perdue*, which confirmed Plaintiff's entitlement to a positive fee adjustment. However, the law is constantly evolving, and it is predictable that any 617 day delay might foretell changes in the landscape governing this motion.

sums at issue here, are typically issued at the prime rate + 2.25%.[18] When counsel became entitled to payment (June 26, 2008), the prime rate stood at 5%.[19] Accordingly, a basic fixed rate unsecured SBA loan would have been issued at 7.25%.

V. COUNSEL IS ENTITLED TO HIS REASONABLE EXPENSES IN ADVANCING THIS LITIGATION.

Counsel are not typically required to donate large sums of their own money, on top of their pro bono time commitments, to advancing meritorious civil rights litigation. Consistent with his established philanthropic record, Mr. Levy has in this case gone well beyond what might be expected of a publicly spirited attorney committed to advancing individual rights in our country. Mr. Levy's expenses here are not fully recoverable, most notably the many thousands of dollars necessarily expended on printing the specialized brief booklets required by the Supreme Court, which the Supreme Court sees fit to render non-recoverable. Sup. Ct. R. 43.3. Ordinary filing and transcript costs born by Mr. Levy are set forth in the cost bill on file.

But in addition to these ordinary costs, pursuant to Section 1988's allowance of expenses, Levy requests other compensable and ordinary expenses. Levy requests the cost of his travel to Washington, D.C. on those occasions where his presence here was reasonably required in order to participate in the case, as Levy's residence was in Florida during most of this six-year litigation. Levy also seeks to recover his expenditures for teleconferencing, postage, photocopying, and messenger fees, as well as legal fees advanced in the case to others for performing certain tasks.

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[18]http://www.sba.gov/financialassistance/borrowers/guaranteed/7alp/FINANCIAL_GLP_7A_TERMS.html

[19]http://research.stlouisfed.org/fred2/data/PRIME.txt

> Reasonable photocopying, postage, long distance telephone, messenger, and transportation and parking costs are customarily considered part of a reasonable "attorney's fee." If plaintiffs' request for these costs are sufficiently well-documented and reasonable, plaintiffs may recover these out-of-pocket expenses pursuant to the statutory authority of § 1988 to shift "attorney's fees."

Sexcius, 839 F. Supp. at 927. Travel expenses to Washington, D.C. have been allowed by this Court as part of a Section 1988 recovery. *Palmer*, 704 F. Supp. at 298-99.

Levy's claimed travel expenses are eminently reasonable, as they consist primarily of coach airfare. There can be no doubt that the photocopying, postage, teleconferencing, messenger and outside attorney charges are likewise recoverable.

CONCLUSION

Many lament the dearth of quality legal representation for public interest cases. Congress enacted Section 1988 to remedy this problem, but this solution requires court implementation. Plaintiffs' counsel have not only earned the right to their fees and costs under existing law, but it is in the public interest that they be fairly compensated lest the word go out to the bar that civil rights practice requires independent wealth or vows of poverty in addition to generosity of spirit.

Consistent with Supreme Court precedent, courts (wrongly, in our view) bar fee recoveries that reflect the substantial risk of non-payment in these plainly contingent matters. The least that can be done is to compensate counsel at market rates for their reasonable hours worked, reflecting the true value of their performance, and add interest compensation for exceptional delay.

The motion should be granted.

Dated: June 18, 2010

Respectfully submitted,

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