ORAL ARGUMENT NOT YET SCHEDULED

No. 18-7004

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

D.L., *et al*.
Plaintiffs-Appellants,

v.

DISTRICT OF COLUMBIA, *et al*.
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANTS

CAROLYN SMITH PRAVLIK
TODD A. GLUCKMAN
Terris, Pravlik & Millian, LLP
1816 12th Street, NW, Suite 303
Washington, DC 20009-4422
(202) 682-2100
cpravlik@tpmlaw.com
tgluckman@tpmlaw.com

CYRUS MEHRI
Mehri & Skalet, PLLC
1250 Connecticut Avenue, NW
Suite 300
Washington, DC 20036
(202) 822-5100

Counsel for Plaintiffs-Appellants

May 25, 2018

CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

1. PARTIES AND AMICI

The following individuals, who were preschool-aged when this case was brought in 2005, and are identified by their initials, are the named plaintiffs in this class action who brought this case by and through their respective parents and next friends, who are also identified: D.L. (Tamika Ford), X.Y. (Tammika Thompson-Young and Bryan Young), H.W. (Kerianne Piester and Ronald Wisor), T.L. (Arlette Mankemi and Timothy Lantry), J.B. (Leah Bland), F.D. (Monica Davy and Frederick Davy), and T.F. (Angelique Moore).[1]

Four subclasses were certified in this case, as follows:

> Subclass 1: All children, who, when they were or will be between the ages of three and five, were or will be disabled, as defined by the IDEA, lived or will live in, or were or will be wards of, the District of Columbia, and were not or will not be identified and/or located for the purposes of offering special education and related services.
>
> Subclass 2: All children, who, when they were or will be between the ages of three and five, were or will be disabled, as defined by the IDEA, lived or will live in, or were or will be wards of, the District of Columbia, and did not or will not receive an initial evaluation within 120 days of the date of referral for the purposes of offering special education and related services.
>
> Subclass 3: All children, who, when they were or will be between the ages of three and five, were or will be disabled, as defined by the IDEA, lived or will live in, or were or will be wards of, the District of

[1] O.U.L. (Elizabeth Umaña Lazo and Darwin Lazo) and D.C. (Doris Cockrell), previous named-plaintiffs, were replaced by X.Y., H.W., and T.L.

> Columbia, and did not or will not receive a determination of eligibility within 120 days of the date of referral for special education and related services.
>
> Subclass 4: All children with disabilities, as defined by the IDEA, who lived in or will live in, or are or will be wards of, the District of Columbia, and who participated or will participate in early intervention programs under Part C of IDEA, and who participated or will participate in preschool programs under Part B, and who did not or will not have a "smooth and effective" transition from Part C to Part B by the child's third birthday. A transition shall be considered "smooth and effective" if (1) the transition begins no less than 90 days prior to the child's third birthday; (2) the child is provided with an IEP listing both the type of placement and a specific location for services by the child's third birthday; (3) there is no disruption in services between Part C and Part B services; and (4) Part B personnel are involved in the transition process.

Subclass 1 is represented by D.L. and J.B. Subclass 2 is represented by T.F. and H.W. Subclass 3 is represented by D.L., T.F., and H.W. Subclass 4 is represented by X.Y. and T.L.

Defendants are the District of Columbia, Amanda Alexander, in her official capacity as the Interim Chancellor of the District of Columbia Public Schools,[2] and Hanseul Kang, in her official capacity as the State Superintendent of Education[3] (together, "the District").

[2] Amanda Alexander replaced her predecessors, Clifford Janey, Michelle Rhee, Kaya Henderson, and Antwan Wilson.

[3] Hanseul Kang replaced her predecessors, Deborah Gist and Hosanna Mahaley Johnson.

There have been no *amici curiae* in the district court. However, the United States filed a Statement of Interest.

Defendants previously appealed district court decisions in this case to this Court, which were docketed under numbers 11-7153 and 12-7042 and consolidated. The following organizations filed an *amici* brief supporting plaintiffs in those appeals: AARP, the National Federation of the Blind, the National Disability Rights Network, the Council of Parent Attorneys and Advocates, the Judge David L. Bazelon Center for Mental Health Law, the National Health Law Program, University Legal Services Protection and Advocacy Program, and the Lawyers' Committee for Civil Rights Under Law.

Defendants previously appealed other district court decisions in this case to this Court, which were docketed under number 16-7076. The following organizations filed an *amici* brief supporting plaintiffs in that appeal: AARP, AARP Foundation, the National Federation of the Blind, the National Disability Rights Network, the Council of Parent Attorneys and Advocates, the Judge David L. Bazelon Center for Mental Health Law, the National Health Law Program, Disability Rights DC at University Legal Services, and the Lawyers' Committee for Civil Rights Under Law.

On March 2, 2018, Public Citizen, Howard University School of Law Civil Rights Clinic, National Health Law Program, and Washington Lawyers Committee

for Civil Rights and Urban Affairs filed a notice that they and potentially other organizations intend to file an *amici* brief supporting plaintiffs-appellants on this appeal.

2. RULINGS UNDER REVIEW

Plaintiffs appeal from the following orders and opinions of the district court (Senior Judge, Royce C. Lamberth), issued in response to Plaintiffs' Motion for an Award of Litigation Costs, Including Attorneys' Fees and Related Expenses (RD537): Order, dated August 25, 2017, Record Document ("RD") 579, Joint Appendix ("JA") 2194-2195, 267 F.Supp.3d 55, 81; Memorandum Opinion, dated August 25, 2017, RD580, JA2196-2231, 267 F.Supp.3d 55, 55-81; and Order, dated December 15, 2017, RD590, JA2238-2240, no official citation available. This appeal relates to the hourly rates used in the fee award.

3. RELATED CASES

There have been three related proceedings before this Court, none of which is currently pending.

First, as stated above, the District appealed district court decisions in this case to this Court, which were docketed under numbers 11-7153 and 12-7042 and were consolidated. On April 12, 2013, this Court issued a decision (713 F.3d 120) vacating the underlying class certification order and consequently the orders finding liability and ordering relief, and remanding for reconsideration of whether a class,

classes, or subclasses may be certified and, if so, to redetermine liability and appropriate relief.

Second, on November 8, 2013, the district court issued a Memorandum Opinion (RD389, 302 F.R.D. 1) which, *inter alia*, certified the subclasses described above. On November 22, 2013, the District petitioned this Court for permission to appeal that certification order, which was docketed under number 13-8009. On January 30, 2014, this Court issued an Order denying that petition for permission to appeal.

Third, as stated above, the District appealed district court decisions in this case to this Court, which were docketed under number 16-7076. On June 23, 2017, this Court issued a decision (860 F.3d 713) affirming the district court decisions in all respects.

Plaintiffs are not aware of any related cases currently pending before this Court or any other court.

Respectfully submitted,

/s/ *Todd A. Gluckman*
CAROLYN SMITH PRAVLIK, Circuit Bar No. 49882
TODD A. GLUCKMAN, Circuit Bar No. 56780
Terris, Pravlik & Millian, LLP
1816 12th Street, NW, Suite 303
Washington, DC 20009-4422
(202) 682-2100
cpravlik@tpmlaw.com
tgluckman@tpmlaw.com

CYRUS MEHRI, Circuit Bar No. 41159
Mehri & Skalet, PLLC
1250 Connecticut Avenue, NW, Suite 300
Washington, DC 20036
(202) 822-5100

May 25, 2018 *Counsel for Plaintiffs-Appellants*

TABLE OF CONTENTS

TABLE OF AUTHORITIES[4]

Page(s)

Cases

[4] Authorities on which plaintiffs-appellants chiefly rely are marked with asterisks.

Federal Statutes

D.C. Code

GLOSSARY OF ABBREVIATIONS

1989 Updated *Laffey* Matrix	1989 Update of the Original *Laffey* Matrix by Joseph Yablonski in response to this Court's suggestion in *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516, 1525 (D.C. Cir. 1988)(*en banc*); serves as base data for the LSI *Laffey* Matrix; JA622-627
2011 ALM Survey	ALM 2011 Survey of Law Firm Economics (referred to in the record below as the 2011 ALM SLFE); JA1455-1550
2014 ALM Survey	ALM 2014 Survey of Law Firm Economics (referred to in the record below as the 2014 ALM SLFE); JA1607-1643
ALM	ALM Legal Intelligence
BLS	Bureau of Labor Statistics
CPI	Consumer Price Index published by BLS
Custom report	Custom report prepared for USAO by ALM and drawn from the 2011 ALM Survey for the four-state area; the custom report is the base data for the USAO-ALM Matrix; JA1573;JA1593;JA1286
Four-state area	The region, including the District of Columbia and parts of Maryland, Virginia, and West Virginia, from which the base data for the USAO-ALM Matrix is drawn
IDEA	Individuals with Disabilities Education Act
JA	Joint Appendix
Laffey Matrix	Schedule of rates developed by Daniel Rezneck for *Laffey v. Northwest Airlines*, 572 F.Supp. 354 (D.D.C. 1983), affirmed in part and reversed in part on other grounds, 746

	F.2d 4 (D.C. Cir. 1984), overruled in part on other grounds, *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516, 1525 (D.C. Cir. 1988)(*en banc*)
LSI	Legal Services Index published by BLS; JA475
LSI *Laffey* Matrix	1989 Updated *Laffey* Matrix adjusted for passage of time using the LSI; referred to as the LSI Matrix by the district court; JA477-480
Original *Laffey* Matrix	Same as the *Laffey* Matrix; serves as base data for the USAO *Laffey* Matrix; JA566-595
RD	Record Document
Salazar-JA	Joint Appendix in *Salazar v. D.C.*, D.C. Circuit Appeal Nos. 14-7035 and 14-7050
USAO	United States Attorney's Office for the District of Columbia
USAO *Laffey* Matrix	USAO adjustment of the Original *Laffey* Matrix using the CPI; *e.g.*, JA2180-2181;JA484-485
USAO-ALM Matrix	USAO fee matrix adopted in 2015, based on the custom report from the 2011 ALM Survey, adjusted using the Producer Price Index-Office of Lawyers published by BLS; referred to as the USAO Matrix by the district court; JA481-483;JA2232-2234

INTRODUCTION

This class action relates to the District's systemic failure to provide special education to preschool-aged children in accordance with the Individuals with Disabilities Education Act ("IDEA"), the Rehabilitation Act, and local law. The District strenuously fought liability for more than a decade, plaintiffs overwhelmingly prevailed, and, in 2016, the district court issued an injunction. *See* JA121-132;JA133-262. This lawsuit has led to substantial reforms benefiting many of the most vulnerable children in D.C. *See, e.g.*, JA157.

This appeal relates to plaintiffs' fee application. A district court must calculate fees according to the prevailing market rates in the community for attorneys of reasonably comparable skill, experience, and reputation. *Covington v. D.C.*, 57 F.3d 1101, 1107-1108 (D.C. Cir. 1995). For decades, courts in this Circuit have used *Laffey* matrices as the measure of prevailing market rates for complex federal litigation in D.C.[1] *See Reed v. D.C.*, 843 F.3d 517, 527 (D.C. Cir. 2016)(concurrence collecting cases). In 2015, in *Salazar v. D.C.*, 809 F.3d 58, 64-65, this Court approved an award based upon the LSI *Laffey* Matrix, where the District argued that the lower court erred by awarding these higher rates over those in the USAO *Laffey* Matrix. In doing so, this Court approved the finding that the

[1] The matrices are explained below (pp. 4-10).

LSI *Laffey* Matrix is "probably a *conservative* estimate" of rates for complex federal litigation in D.C. *Id*. at 65 (emphasis in original). *Salazar* is identical to this case with respect to the question of hourly rates—both are complex systemic class actions brought against the District of Columbia by the same lead counsel, a public interest firm that represents traditionally underserved populations (JA266).

Here, despite finding this lengthy class action to be "complex federal litigation" (JA2210), the district court based its fee calculation on a survey of billing rates that reflects neither the relevant community (the District of Columbia) nor rates charged by attorneys of reasonably comparable skill, experience, and reputation (those who practice complex federal litigation). It rejected the LSI *Laffey* Matrix, which was approved in *Salazar*, and instead awarded rates based upon a survey of rates for **all** types of legal services (including a wide variety of non-litigation work, such as wills, divorces, and real estate closings) in a four-state area including D.C. and parts of Maryland, Virginia, and West Virginia ("four-state area"). Plaintiffs demonstrated that those rates—which are the rates in the USAO-ALM Matrix created by the United States and argued by the District to be the appropriate rates here—are irrelevant to, and well below, the prevailing market in D.C. for complex federal litigation.

The district court erred. It intended to award rates prevailing in D.C. for complex federal litigation. *See* JA2210. Instead, it awarded rates that are neither

for complex federal litigation nor for D.C., and made numerous errors. As a result, the rates awarded are substantially lower than the rates awarded in *Salazar* several years earlier, which were found to be a conservative estimate of the prevailing market rates for complex federal litigation in D.C. The district court explained that "this is an issue on which minds differ within this Circuit" and that further guidance is needed from this Court. JA2214.

After *Salazar*, the rates issue should have become less, rather than more, complex. However, the opposite occurred. Plaintiffs are hopeful that this appeal will substantially simplify this issue going forward.

JURISDICTION

The district court's jurisdiction over the federal and D.C. claims is based on 28 U.S.C. 1331 and 1367. On January 10, 2018, plaintiffs timely noticed their appeal (JA2241-2242) of the August 25, 2017, opinion and order (JA2194-2195;JA2196-2231), and the December 15, 2017 fee award (JA2238-2240), which is a final order. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF ISSUES

Whether, in awarding fees to prevailing parties in complex federal litigation lasting over a decade, the district court erred by rejecting the *Laffey* Matrix long used in this Circuit (as adjusted for inflation and accepted by this Court in *Salazar*), and

instead accepting a new matrix based on a survey of rates for legal services that were neither for complex federal litigation nor for D.C.

STATEMENT OF THE CASE

The district court concluded that plaintiffs are entitled to fees and expenses under the fee-shifting provisions of IDEA (20 U.S.C. 1415(i)(3)(B)(i)(I)) and the Rehabilitation Act (29 U.S.C. 794a(b)). JA259. Plaintiffs sought compensation at LSI *Laffey* Matrix rates, which they demonstrated to be below market for complex federal litigation. The District and the U.S. (which filed a Statement of Interest) argued that plaintiffs should be compensated at rates in the newly-created USAO-ALM Matrix, which are below the LSI *Laffey* Matrix rates. The district court awarded USAO-ALM Matrix rates. JA2194;JA2206-2217;JA2238-2240.

STATEMENT OF FACTS

Understanding the relevant facts requires background on the hourly rate matrices that have been used in D.C. to award fees for counsel who lack a standard billing rate because, for public-spirited reasons, they either do not charge for their services or they charge below-market rates.

A schedule of prevailing market rates for complex federal litigation, which has become known as the "*Laffey* Matrix," was developed in *Laffey v. Northwest Airlines*, 572 F.Supp. 354 (D.D.C. 1983), affirmed in part and reversed in part on other grounds, 746 F.2d 4 (D.C. Cir. 1984), overruled in part on other grounds, *Save*

Our Cumberland Mountains v. Hodel, 857 F.2d 1516, 1525 (D.C. Cir. 1988)(*en banc*)("*SOCM*"). The *Laffey* Matrix was developed by Daniel Rezneck, counsel in *Laffey*, and provides prevailing market rates for complex federal litigation in D.C. for 1981-1982 for attorneys at different levels of experience.[2] JA566-595; *SOCM*, 857 F.2d at 1525; *Covington v. D.C.*, 57 F.3d 1101, 1105 (D.C. Cir. 1995). In *SOCM*, this Court, *en banc*, expressed its favor for the *Laffey* Matrix and suggested that it be updated. 857 F.2d at 1525.

The *Laffey* Matrix has been updated to provide current rates in two ways. First, until 2015, the United States Attorney's Office for the District of Columbia ("USAO") updated the *Laffey* Matrix using the Consumer Price Index ("CPI"). This update or adjustment of the *Laffey* Matrix is usually referred to as the "USAO *Laffey* Matrix." JA484-485; *Salazar*, 809 F.3d at 62. Second, in response to this Court's suggestion in *SOCM*, the *Laffey* Matrix was updated through 1989 by Joseph Yablonski, counsel in *SOCM* (referred to herein as the "1989 Updated *Laffey* Matrix"). JA622-627. This Court did not review the 1989 Updated *Laffey* Matrix in *SOCM* because the fees were settled. JA623. It later reviewed and approved it in *Covington*, as described below (pp. 30-31).

[2] The *Laffey* Matrix uses a rate year from June 1 through May 31 to correspond to law school graduation. *See, e.g.*, JA484.

Decades ago, there was very little difference between the updated rates for the two matrices. For example, in *Covington*, 839 F.Supp. 894, 900 (D.D.C. 1993), the district court noted that the 1989 Updated *Laffey* Matrix and the USAO *Laffey* Matrix provided identical rates for attorneys with 11-19 years of experience. On appeal, this Court affirmed the award based on both of those matrices and established the evidentiary standard for future cases. *Covington*, 57 F.3d at 1105-1106, 1109-1112. This Court held that, to demonstrate reasonable hourly rates, "plaintiffs may point to such evidence as an updated version of the *Laffey* matrix or the U.S. Attorney's matrix, or their own survey of prevailing rates in the community." *Id.* at 1109. The "updated version of the *Laffey* matrix" referenced by this Court was the 1989 Updated *Laffey* Matrix. *See* pp. 30-31.

Here, plaintiffs sought fees based on the 1989 Updated *Laffey* Matrix rates used in *Covington*, adjusted to the present using the Legal Services Index ("LSI") published by the Bureau of Labor Statistics ("BLS"). This was the method accepted by this Court in *Salazar*, 809 F.3d at 62, and referred to there as the "LSI *Laffey* Matrix." *See Eley v. D.C.*, 793 F.3d 97, 102, n.4 (D.C. Cir. 2015); JA266-267,341-342; *see also Salazar v. D.C.*, 123 F.Supp.2d 8, 13 (D.D.C. 2000). In *Salazar*, this Court affirmed a fee award based on the LSI *Laffey* Matrix, which the district court

found to be a conservative representation of prevailing market rates for complex federal litigation in D.C. 809 F.3d at 63-65.[3]

Despite this Court's decision in *Salazar*, the U.S. "contends that the *Salazar* Matrix [the LSI *Laffey* Matrix] is fundamentally flawed." JA483. In 2015, the USAO shifted from the USAO *Laffey* Matrix to its newly-created USAO-ALM Matrix. JA481-483. The data for that matrix comes from the 2011 ALM Survey of Law Firm Economics (herein "2011 ALM Survey"; referred to in the record below as "2011 ALM SLFE") conducted by ALM Legal Intelligence ("ALM"). The 2011 ALM Survey provides rates for **all** types of legal services divided by experience level for 31 states, including D.C. JA1647;JA1463,1488-1498,1506-1523. The 2011 ALM Survey includes average rates for D.C. for all but two experience levels. JA1489. ALM prepared, for the USAO, a custom report drawn from the data in the 2011 ALM Survey, which widened the geography from D.C. to the four-state area and included rates for all experience levels. JA1344-1345;JA1573;JA1574-1575;JA1579-1580;JA1593;JA1595-1597;JA1286. The base data for the USAO-

[3] For many years, fee litigation in this Circuit focused on whether the USAO *Laffey* Matrix or the LSI *Laffey* Matrix better reflected the prevailing market for complex federal litigation. *See*, *e.g.*, *Salazar*, 809 F.3d at 62-65. That dispute centered on the appropriateness of the different inflation indices. *Id.* at 62, 64.

ALM Matrix is that custom report.[4] *Ibid*. The USAO adjusts the data in the custom report for the passage of time using BLS's Producer Price Index-Office of Lawyers (generally labelled "PPI-OL"). JA481, n.2. The USAO-ALM Matrix is not based on any *Laffey* Matrix and has never been reviewed by this Court.[5]

The base data for the LSI *Laffey* Matrix are rates in D.C. for complex federal litigation. *See* JA572-573,586-595;JA622-627; *Covington*, 57 F.3d at 1105; *see* Section III(B) below. In contrast, the base data for the USAO-ALM Matrix are rates for **all** types of legal services in the four-state area. JA1345-1346;JA1573;JA1595-1596;JA1647; *see* Section I below.

---

[4] Before the U.S. disclosed it in its Statement of Interest in this case (JA1286), the base data for the USAO-ALM was not publicly available or available for purchase, because it is a custom report. *See* JA486-487,1344-1345,1573-1592,1595-1597,1606. It took considerable effort to obtain the base data. *Ibid*.

The district court explained that the base data for the USAO-ALM Matrix is data from the "2010 & 2011" ALM SLFE. JA2207. As shown above, the record shows that the source is the custom report drawn from data in the 2011 ALM Survey.

[5] Earlier, plaintiffs referred to the new matrix as the USAO Matrix 2015-2017 (as it was titled, JA481), but the matrix has now continued into 2018 (JA2232). The District, the U.S., and the district court referred to it as the USAO Matrix. *See, e.g.*, JA2207. However, doing so leads to confusion because the USAO *Laffey* Matrix is also often referred to as the USAO Matrix and some courts now erroneously refer to the USAO-ALM Matrix as the USAO *Laffey* Matrix (*see, e.g., Texas v. U.S.*, 247 F.Supp.3d 44, 50 (D.D.C. 2017)(erroneously finding that the USAO-ALM Matrix has the *Laffey* Matrix as its base). To avoid confusion, plaintiffs refer to the USAO's new matrix as the USAO-ALM Matrix.

The inflation indices used to adjust the LSI *Laffey* Matrix and the USAO-ALM Matrix for the passage of time have rates of price change over the relevant period that are about the same. JA493. Accordingly, this dispute does not focus on the inflation indices.

Plaintiffs submitted substantial market evidence showing that the LSI *Laffey* Matrix reflects, but is below, the prevailing market rates in D.C. for complex federal litigation. JA343-350,710-885,1392-1454. The market evidence includes affidavits and other materials supporting fee applications filed in other cases, affidavits of D.C.-based complex federal litigators, and Westlaw reports related to rates sought in bankruptcy cases. *Ibid*. This is the same type of evidence that was submitted in *Salazar*. JA350;JA1350. These extensive materials show that the LSI *Laffey* Matrix rates are 9.36% below market and that the USAO-ALM rates are 29.68% below market. *See* JA346-350;JA743.

Plaintiffs also presented 2012-2013 rates for complex federal litigation in D.C. from Valeo Partners adjusted to 2016-2017 using the Producer Price Index-Office of Lawyers (the index used for the USAO-ALM Matrix). JA777,781-789;JA1346-1348;JA1384-1385;JA1392-1427. The Valeo data include rates charged by 55 additional firms. JA777,781-789;JA1392-1427;JA2183. The LSI *Laffey* Matrix rates are below the adjusted Valeo rates. JA1393-1394. The USAO-

ALM Matrix rates, which the district court awarded (JA2216), are even lower (JA1393-1394).

SUMMARY OF ARGUMENT

The district court abused its discretion when it awarded fees based on the USAO-ALM Matrix. After finding that this case is complex federal litigation, the district court was required under this Court's precedent to award prevailing market rates for complex federal litigation in D.C. Instead, it awarded rates that are neither for complex federal litigation nor for D.C. This was reversible error.

ARGUMENT

Standard of Review

This Court reviews fee awards "for abuse of discretion…and will not upset [an] hourly rate determination 'absent clear misapplication of legal principles, arbitrary fact finding, or unprincipled disregard for the record evidence.'" *Eley*, 793 F.3d at 103-104 (citation omitted). In selecting the USAO-ALM Matrix rates, the district court misapplied legal principles, including those regarding the District's burden, engaged in arbitrary fact-finding, and disregarded record evidence.

I

THE DISTRICT COURT ERRED BY AWARDING RATES FOR ALL TYPES OF LEGAL SERVICES IN A FOUR-STATE AREA INSTEAD OF RATES FOR COMPLEX FEDERAL LITIGATION IN D.C.

"[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*, 57 F.3d at 1107 (citing *Blum v. Stenson*, 465 U.S. 886, 896, n.11 (1984)). There was no challenge below to plaintiffs' showing as to the first two elements.[6] The district court erred with respect to the prevailing market rate.

A. THE AWARDED USAO-ALM MATRIX RATES ARE NOT RATES FOR COMPLEX FEDERAL LITIGATION

1. The District Court Erroneously Held that the USAO-ALM Matrix Rates Are Presumptive Rates for Complex Federal Litigation

After concluding that this case qualifies as complex federal litigation "to which one of the fee matrices presumptively applies," the district court stated that it

[6] *See* JA265-273,278-280,309-312;JA352-354;JA355-389 (describing lead counsel's billing practices, skill, experience, and reputation), JA390-391,393-398,400-403;JA404-408,412-414,418-419,422-425;JA426-429,432-453 (same regarding co-counsel). *See also Salazar v. D.C.*, 123 F.Supp.2d 8, 12 (D.D.C. 2000)(plaintiffs' counsel there (lead counsel here) provided "lawyering of the highest quality and professionalism"); *SPIRG v. AT&T*, 842 F.2d 1436, 1445 (3d Cir. 1988).

"must determine whether the USAO Matrix or the LSI Matrix is appropriate." JA2210. This would have been the correct approach if the competing matrices were the USAO *Laffey* Matrix and the LSI *Laffey* Matrix, both of which presumptively apply in complex federal litigation because they are based on rates for complex federal litigation. *See Reed*, 843 F.3d at 521-522, 524-525; *Eley*, 793 F.3d at 103, 105; *see also Flood v. D.C.*, 172 F.Supp.3d 197, 209 (D.D.C. 2016). However, the district court was not comparing those matrices. It was comparing the established LSI *Laffey* Matrix with the new USAO-ALM Matrix. The USAO-ALM Matrix, never reviewed by this Court, is not accorded the presumption that the district court afforded it. Of the matrices compared, only the LSI *Laffey* Matrix is properly afforded that presumption.

As shown below (Section 2), the USAO-ALM Matrix rates are rates for **all** types of legal services provided in a four-state area—not rates for complex federal litigation in D.C. Because the district court erroneously applied the presumption, it failed to assess whether the District met its rebuttal burden under *Covington* and *Salazar*. As shown below (Section 3), the District failed to meet that burden.

2. The USAO-ALM Matrix is Not Based on Rates for Complex Federal Litigation

The district court correctly concluded that this class action is complex federal litigation. JA2210. The court was therefore tasked with awarding rates for complex

federal litigation. *See Salazar*, 809 F.3d at 64-65; 20 U.S.C. 1415(i)(3)(C)(rates for the "kind and quality of services furnished").

However, the USAO-ALM Matrix is not based on rates for complex federal litigation. It is based on rates for **all** types of legal services, including a wide variety of non-litigation work, such as wills, divorces, and real estate closings. JA1647;JA1654. Nearly half of the rates in the 2011 ALM Survey, from which the USAO-ALM base data were drawn, are for non-litigation work. *Compare* JA1506-1507 *with* JA1516-1517. There is no evidence that the USAO-ALM Matrix even includes any rates for complex federal litigation. The LSI *Laffey* Matrix, on the other hand, consists exclusively of rates for complex federal litigation. *See* JA572-573,586-595;JA622-627; *Covington*, 57 F.3d at 1105.

Dr. Laura Malowane, the District's expert, explained that the 2011 ALM Survey, from which the custom report underlying the USAO-ALM Matrix was drawn, "provides data of actual average billing rates of attorneys in the Washington, DC area, from law offices of all sizes and types" (emphasis added).[7] JA1647;JA1654. She never claimed that the 2011 ALM Survey includes rates for

[7] The underlined material was included in Dr. Malowane's declarations in other cases (JA1647;JA1654), but is absent from her declaration in this case (JA1014-1031). In addition, Dr. Malowane mischaracterizes the base data as "actual" billing rates. JA1015. As discussed below (pp. 48-49), the USAO-ALM Matrix base rates are standard billing rates.

complex federal litigation in D.C. *See* JA1014-1031. She explained in her affidavit in *CREW v. DOJ* that such data are not available (JA1654):

> [T]o determine the prevailing rates in the community for similar services it would be ideal to have data reflecting the actual prevailing rates for attorneys in the DC area who perform federal litigation services. To my knowledge such precise data are not available. Data do exist for billing rates of all attorneys in the local community, regardless of area of legal expertise.[8] [emphasis added]

Dr. Michael Kavanaugh, plaintiffs' expert, also explained that the 2011 ALM Survey is based on rates for **all** types of legal services (JA1381):

> The 2011 ALM [Survey] obscures rates data for complex federal litigation by combining rates from complex litigation with rates from non-complex litigation. The 2011 ALM [Survey]…provides the distribution of the law firms participating in its survey [JA1468]. For the South Atlantic region, of which the District of Columbia is a part [*see* JA1467], twenty-six of the forty-one firms identified their practice area as General Law [JA1468]. Only seven of the forty-one firms identified their practice area as litigation. Five of the seven identified as Insurance Defense Litigation. Often, such litigation is not complex federal litigation [JA1373].[9]

See also JA1463 (2011 ALM Survey has a total of 56 non-litigation and litigation practice areas).

---

[8] Dr. Malowane proceeded to discuss such data, which are in the 2011 ALM Survey (the source of the custom report that is the base for the USAO-ALM Matrix). JA1654.

[9] In fact, there is no information in the 2011 ALM Survey that shows that it includes any data for complex federal litigation. *See* JA1455-1550. Dr. Kavanaugh assumes that the USAO-ALM Matrix base data may include some rates for complex federal litigation for purposes of his testimony. *See* JA1381-1383.

Dr. Kavanaugh explained why it is a "serious defect" (JA1380) that the 2011 ALM Survey is not comprised of rates for complex federal litigation (*ibid.*):

> It is a simple economic principle that comparable prices are found by observing comparable goods. In preparing an offer for a luxury car, for example, prospective buyers seeking a comparable price do not look at car prices for cars of all sizes and types, they do not look at the whole automobile market. Instead, comparable prices are sought from the prices of comparable luxury cars. The same is true for attorneys. The price for DWI/DUI legal defense work is not comparable to the price for complex federal litigation. The attorneys in these two markets command different prices and their skills are not ready substitutes.

Dr. Malowane similarly explained that rates for many services other than complex federal litigation are cheaper than rates for complex federal litigation (JA1024-1025):

> Because of legal specialization and the skills necessary to supply specific legal services, there is no reason to expect that lawyers who supply federal litigation services also supply, in a professional, equally compensated capacity, personal legal services, such as preparation of wills or defense of traffic tickets. [emphasis added]

See also Lee v. D.C., 2018 U.S. Dist. LEXIS 5796, at *18 (D.D.C. 2018)(rejecting Dr. Malowane's ALM survey data because the data were not relevant to the market at issue); *EPIC v. DHS*, 218 F.Supp.3d 27, 49 (D.D.C. 2016)(rejecting ALM survey data because "Dr. Malowane's declaration fails to establish that the firms in her sample primarily engaged in [complex federal litigation]"); *Makray v. Perez*, 159 F.Supp.3d 25, 51 (D.D.C. 2016)("the inclusion of rates charged by attorneys across all practice areas significantly undermines the degree to which this survey fairly

reflects rates charged by attorneys engaged principally in complex federal litigation"). *Contra Gatore v. DHS*, 286 F.Supp.3d 25, 38-40 (D.D.C. 2017).

The District acknowledged that use of a topically and geographically irrelevant matrix would be an error. It explained (RD554, p.14): "where the Court is obliged to select rates that apply to the relevant market as well as the relevant community of practice, 20 U.S.C. § 1415(i)(3)(C), it would border on irresponsible to employ a matrix whose sampling methodology produces data that is inferior in both respects" (emphasis added). Plaintiffs agree entirely.

The district court ignored the fact that the USAO-ALM Matrix is not based on rates for complex federal litigation, and is not for D.C. (*see* Section I(B) below). Instead, after erroneously finding that both matrices were ones to which the presumption applies, it compounded its error by erroneously determining that the rates issue "ultimately comes down to dueling expert witness affidavits." JA2210. There was no such duel. Both parties' experts agreed that the USAO-ALM Matrix rates are not rates for complex federal litigation.

Thus, the district court erred by misapplying legal principles, arbitrarily finding a non-existent duel between experts, and disregarding record evidence when it awarded the USAO-ALM Matrix as rates for complex federal litigation.

3. The District Court Erred in Adopting the USAO-ALM Matrix Rates Without Requiring the District to Satisfy its Burden

After plaintiffs submitted extensive evidence (*see* pp. 9-10) demonstrating that the LSI *Laffey* Matrix rates are reasonable and below the prevailing market rates for complex federal litigation in D.C., the burden shifted to the District to show through "equally specific countervailing evidence" that the requested rates are erroneous. *Covington*, 57 F.3d at 1109 (quoting *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1326 (D.C. Cir. 1982)). The District had to "either accede to [plaintiffs'] requested rate or provide specific contrary evidence tending to show that a lower rate would be appropriate." *Id.* at 1110.

The district court relieved the District of its burden in rebuttal. It erred in not requiring the District to show that the USAO-ALM Matrix presented prevailing market rates for complex federal litigation in D.C. The District failed to present such evidence. Instead, it offered the USAO-ALM Matrix, an irrelevant matrix based on rates for **all** types of legal services in a four-state area.

The district court found "that the District…submitted evidence showing that the USAO Matrix had more indicia of reliability and more accurately represents prevailing market rates." JA2212. But the District's evidence did not show that. It could not have, since the District set forth no such evidence regarding the prevailing market rates for complex federal litigation in D.C. Otherwise said, the District's

evidence was not relevant to the inquiry. *Cf. Salazar*, 809 F.3d at 65 (District failed to "rebut[]…with relevant arguments"). Since the District's evidence was irrelevant, it failed to present a "precise and well-founded challenge." *Concerned Veterans*, 675 F.2d at 1338 (concurrence). By awarding the irrelevant USAO-ALM Matrix rates, the district court relieved the District of its burden.

This reversible error is similar to the error in *Eley* where the district court was found to have clearly misapplied legal principles and thus abused its discretion when it relieved the plaintiff of her burden. 793 F.3d at 105. Here, the district court clearly misapplied legal principles when it relieved the District of its burden.

B. THE AWARDED USAO-ALM MATRIX RATES ARE NOT D.C. RATES

IDEA requires that fees "be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished." 20 U.S.C. 1415(i)(3)(C). The relevant community here is D.C. *See Donnell v. U.S.*, 682 F.2d 240, 251 (D.C. Cir. 1982); *Copeland v. Marshall*, 641 F.2d 880, 892 (D.C. Cir. 1980)(*en banc*); *see also Eley*, 793 F.3d at 100 (general fees jurisprudence applied to IDEA cases). The district court erred by awarding rates that reflect a geographical area substantially more expansive than D.C.

The base data for the USAO-ALM Matrix is not restricted to D.C. It is data for "DC-VA-MD-WV"—that is, the District of Columbia, Virginia, Maryland, and

West Virginia. JA1346;JA1595-1596;JA1286;JA1573. That area is identified in the base data as the "Washington, D.C. Metro Area." *Ibid*.

Rates in the immediate suburbs of the District have been found to be lower than rates in D.C. *See Jackson v. Estelle Place*, 2009 U.S. Dist. LEXIS 39837, at *8 (E.D. Va. 2009)("courts…repeatedly recognized that hourly rates charged in Washington, D.C. are usually higher than hourly rates charged in the Eastern District of Virginia"), affirmed, 391 F.App'x 239 (4th Cir. 2010); *accord* JA481-482, n.8 (USAO recognizing that data should be "specific to the D.C. market"). The USAO-ALM Matrix base data extends well beyond the communities immediately surrounding D.C.; it extends into West Virginia. JA1345-1346;JA1573;JA1595-1596.

Dr. Kavanaugh explained the impact of this flaw (JA1381-1382):

> As the geography of the survey area expands, the composition of the data or product mix changes. Data limited to the District of Columbia likely included some rates for complex federal litigation and some rates for non-complex representation, but as the geography is expanded the composition or product mix changes to include more practitioners of other types of legal services, such as DWI/DUI defense, wills and trusts, and simple bankruptcies. The more data added for services other than complex federal litigation, the more the product mix of complex federal litigation to non-complex federal litigation shifts toward non-complex federal litigation. As the product mix shifts toward non-complex federal litigation, this dilutes the rates and reduces the degree to which the data reflects rates for complex federal litigation.

As shown in the chart below, more than half of the lawyers whose data comprise the base data for the USAO-ALM Matrix practice outside of the District.

That is, in addition to the fact that the data do not relate to complex federal litigation, more than half of it is entirely irrelevant to rates in D.C.

Experience Level	Number of D.C. Lawyers (JA1489)	Number of Total Lawyers in the Four-State Area (JA1344-1345,1573; JA1286)	Percentage of Lawyers Outside of D.C.
31+ years	33	61	45.90%
21-30 years	35	83	57.83%
16-20 years	18	40	55.00%
11-15 years	14	43	67.44%
8-10 years	8	30	73.33%
6-7 years	11	26	57.69%
4-5 years	17	34	50.00%
2-3 years	12	24	50.00%
Less than 2 years	5	9	44.44%

If more than half of the data underlying the USAO-ALM Matrix rates were from Nebraska, there is little doubt it would have been found to be irrelevant and unacceptable. Likewise, the fact that more than half of the underlying data comes from Maryland, Virginia, and West Virginia means that it is not relevant and therefore not evidence of D.C. rates.

On the other hand, the LSI *Laffey* Matrix is specific to D.C. and based on rates for complex federal litigation. *See* pp. 4-5, 8, 29-40. Moreover, although the 2011 ALM Survey is not based on complex federal litigation, it provides rates specific to D.C. in all but two experience levels. JA1489; *see* p. 7. The USAO-ALM Matrix is not based on those D.C.-specific rates. Instead, the USAO based the rates on its

custom report that broadened the geography to the four-state area. The D.C.-specific rates in the 2011 ALM Survey are higher than those in the custom report and for each of the other states included in the four-state area. JA1382; *compare* JA1489 *with* JA1573,JA1593,JA1286, *and with* JA1492,JA1497-1498.

The District's expert, Dr. Malowane, recognized that "complex federal litigation may have some of the higher rates in the litigation specialty" and, on that basis, analyzed the top 10% of rates (the ninth decile). JA1020. Dr. Kavanaugh showed how the top 10% supports the LSI *Laffey* Matrix rates (JA1383-1384):

> The 2011 ALM [Survey] has ninth decile rates [top 10%] for the District of Columbia. [JA1464,1489] The ninth decile rate for the top experience level is $763. [*Ibid*.] If that rate is adjusted in the same manner as the [USAO-ALM Matrix] updates the 2011 ALM [Survey] data, then the updated rate is $879. This adjusted rate is higher than the top rate of $826 in the LSI *Laffey* Matrix. [footnotes omitted]

It is also substantially higher than the USAO-ALM Matrix top rate of $581. JA481. This underscores that the LSI *Laffey* Matrix rates are below market, but better aligned with the D.C. market than the USAO-ALM Matrix.[10]

[10] When Dr. Malowane compared the matrices to top 10% rates, she used national rates from the 2014 ALM Survey for "Other Litigation." JA1020-1021;JA1688. Those top 10% 2014 national rates are substantially lower than the top 10% rates for D.C. reported in the 2011 ALM Survey. *Compare* JA1642 *with* JA1489 (rates in Ninth Decile column).

In sum, the district court erred in awarding rates that were not for the relevant community in addition to awarding rates that are unrelated to complex federal litigation. This requires reversal.

II

THE DISTRICT COURT ERRED BY AWARDING RATES SUBSTANTIALLY LOWER THAN THE LSI *LAFFEY* MATRIX RATES THAT THIS COURT APPROVED IN *SALAZAR*

In *Salazar*, while affirming an award of LSI *Laffey* Matrix rates over USAO *Laffey* Matrix rates, this Court explained that the market evidence submitted by the plaintiffs, who were represented by the same counsel as plaintiffs here, was more than ample (809 F.3d at 64-65):

> Like the fee applicants in *Covington*, 57 F.3d at 1110, Plaintiffs submitted "a great deal of evidence regarding prevailing market rates for complex federal litigation." Plaintiffs submitted evidence for their preferred *Laffey* Matrix update, including the affidavit of the economist that developed the LSI *Laffey* Matrix—Dr. Michael Kavanaugh….
>
> In addition to this evidence, Plaintiffs went further and submitted more evidence supporting the use of the rates approved by the district court than the submissions found adequate in *Covington*. For instance, Plaintiffs submitted billing rates tables demonstrating the difference between average national law firm rates and the LSI update to the *Laffey* Matrix, as well as the difference between average national law firm rates and the USAO update to the *Laffey* Matrix. J.A. at 2292. As an example, for lawyers with experience levels between eleven and nineteen years from the date of law school graduation, the average national law firm rate in 2012 to 2013 was $672. *Id*. For the same experience level in the same time frame, the LSI updated rate was closer to the average national law firm rate at $626, while the USAO updated rate was $445. *Id*. On average, the LSI *Laffey* Matrix rates were 14%

> lower than the average national law firm rates for all experience levels in this time period. *See id*. On the other hand, the USAO *Laffey* Matrix rates were 38% lower than the average national law firm rates. *See id*. [11]
>
> Furthermore, a 2012 National Law Journal Rates Survey showed that the rates for partners in Washington, D.C. on the high-end of the market far exceeded the rates in the LSI update. *See* J.A. at 2293.

This Court concluded (809 F.3d at 65):

> With these numbers and submissions in the record, the district court's point that "the LSI-adjusted matrix is probably a *conservative* estimate of the actual cost of legal services in this area," does not appear illogical. *See Salazar III*, 991 F.Supp.2d at 48 (citation and internal quotation marks omitted). The District, neither below nor on appeal, rebuts this logic with relevant arguments.... [emphasis in original]

A fortiori, the rates in the USAO-ALM Matrix for 2016-2017, which are substantially lower than the LSI *Laffey* Matrix rates for 2012-2013, which were at issue in *Salazar*, could not possibly be an accurate measure of the market in 2016-

[11] This is referred to as a comparison between matrix rates and "average national law firm rates," but is, in fact, a comparison between matrix rates and market data showing rates for complex federal litigation in D.C., much of which came from firms with a national presence. The document that this Court cited in *Salazar* as "J.A. at 2292" was also filed in this case. JA719. That document is similar to the table that plaintiffs submitted here based on 2015-2016 market evidence from D.C., which shows that the LSI *Laffey* Matrix is 9.36% below market and the USAO-ALM Matrix is 29.68% below market. *Compare ibid. with* JA743; *see* Section IV(A) below. The market data collected and presented in this case was collected and presented in the same way as in *Salazar*. JA343-350;JA1350. *See also* Joint Appendix in *Salazar*, Appeal Nos. 14-7035 and 14-7050 ("*Salazar*-JA"), pp.1844-1851 (describing the *Salazar* evidence).

2017 for complex federal litigation in D.C.[12] In short, the decision below cannot be reconciled with *Salazar*.[13]

Bruce Terris was counsel in both this case and *Salazar*. *See* JA267; *Salazar*, 809 F.3d at 60. It defies logic that two judges could each correctly conclude, based on essentially the same evidence (*see* Section IV(A) below), that the 2016-2017 market rate in D.C. for an attorney such as Mr. Terris with over 50 years of complex federal litigation experience (JA267) is both $826 per hour (per the LSI *Laffey* Matrix) and $581 per hour (per the USAO-ALM Matrix). However, this would be the result if the decision below is affirmed. *See SPIRG*, 842 F.2d at 1443, n.6

[12] For example, the 2012-2013 LSI *Laffey* Matrix rate for attorneys with 20 or more years of experience is $753 (JA479;JA719; *Salazar*-JA2292), and the top rate in the 2016-2017 USAO-ALM Matrix is $581 (31+ years of experience)(JA481).

[13] *See also National Security Counselors v. CIA*, 2017 U.S. Dist. LEXIS 192545, at *45-46 (D.D.C. 2017)("The Circuit held that a plaintiff in complex federal litigation can meet the burden of showing that the LSI *Laffey* Matrix rates apply by submitting" the same or similar evidence to that submitted in *Salazar*); *Texas*, 247 F.Supp.3d at 51-52 (awarding LSI *Laffey* Matrix rates); *EPIC*, 218 F.Supp.3d at 48-49 (awarding LSI *Laffey* Matrix rates where evidence was "indistinguishable from evidence offered in [*Salazar*]"); *CREW v. DOJ*, 2014 U.S. Dist. LEXIS 182097, at *21-25 (D.D.C. 2014)(awarding LSI *Laffey* Matrix rates (court's reliance on the reversed decision in *Eley* does not affect this decision because *Eley* was reversed on other grounds)); *CREW v. DOJ*, 2014 U.S. Dist. LEXIS 182098, at *13 (D.D.C. 2014)("this Court has, for many years, accepted the appropriateness of and greater accuracy of rates based on the LSI Index"); *Eley v. D.C.*, 999 F.Supp.2d 137, 150-156 (D.D.C. 2013)(extensive discussion of why LSI *Laffey* Matrix rates are market rates for complex federal litigation in D.C.; "the LSI-adjusted matrix is probably a *conservative* estimate of the actual cost of legal services in this area" (emphasis in original)), reversed on other grounds, 793 F.3d 97.

("Occasionally, courts merely award hourly rates based on their general notions of what constitutes a fair rate.... While this method is tempting and convenient, it reduces the fee award inquiry to the subjective judgment of the presiding judge, and does not square with our caselaw").

III

THE DISTRICT COURT'S FINDINGS REGARDING THE RATES MATRICES CONFLICT WITH BINDING PRECEDENT, ARE ARBITRARY, AND DISREGARD RECORD EVIDENCE

A. THE DISTRICT COURT'S FINDINGS REGARDING THE USAO-ALM MATRIX CONFLICT WITH BINDING PRECEDENT, ARE ARBITRARY, AND DISREGARD RECORD EVIDENCE

1. The District Court Erred in Favoring Statistical Reliability Over Relevance

The district court found that the USAO-ALM Matrix better reflects the prevailing market rates for complex federal litigation because it is based on a statistically reliable survey. JA2212-2213. However, it is irrelevant how well an analysis is performed if it is analyzing the wrong data. As shown above, the USAO-ALM Matrix is not based on rates for complex federal litigation and is not based on D.C. rates—it uses the wrong data. Thus, regardless of how statistically reliable the underlying ALM data may be, it is not relevant to the inquiry.

ALM attempted to ensure accuracy by only reporting data if there are a minimum number of data points. JA1018-1019;JA1465; *see also* JA481-482, n.8 (USAO will update data if "data specific to the D.C. market" becomes available).

As explained above (pp. 7-8, 20-21), the 2011 ALM Survey includes rates that were specific to D.C. That D.C.-specific data did not satisfy ALM's standards in two experience levels so there are no average rates reported for those experience levels. JA1465,1489. The USAO sought a custom report that expanded the geography beyond D.C. to the four-state area. *See* JA1344-1346;JA1573;JA1595-1596. As shown above (Section I(B)), this geographically expanded data is irrelevant and contrary to IDEA's requirement for community rates. Thus, by accepting the USAO-ALM Matrix, the district court arbitrarily chose statistical reliability over relevance. That was an abuse of discretion.

Moreover, a statistically reliable survey is not required. In *Covington*, this Court declined to institute a requirement for a statistically reliable rates survey. The dissent recommended "[*a*] *statistically reliable, well-documented, and extensive survey*," citing Judge Lamberth. 57 F.3d at 1113 (emphasis in original). However, the majority did not require such an evidentiary showing. Instead, this Court held that plaintiffs may rely upon "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." *Id*. at 1109. Plaintiffs here did that and provided more market evidence than was found to be substantial in both *Covington* and *Salazar*. *See* pp. 9-10 above, Section IV below; *see also Salazar*, 809 F.3d at 64-65 (evidence

in *Salazar* more extensive than in *Covington*). The district court's decision conflicts with *Covington* and is, therefore, an abuse of discretion.[14]

2. The District Court Erred in Finding that Additional Experience Levels in the USAO-ALM Matrix Make it a Better Reflection of the Prevailing Market Rates for Complex Federal Litigation in D.C.

The district court justified its selection of the USAO-ALM Matrix over the LSI *Laffey* Matrix because the former has nine experience levels and the latter has five. JA2213. That is not a rational basis for rejecting relevant evidence in favor of irrelevant evidence.

As this Court explained, "[o]nce the fee applicant has provided support for the requested rate, the burden falls on the Government to go forward with evidence that the rate is erroneous." *Covington*, 57 F.3d at 1109. The District did not show that the LSI *Laffey* Matrix rates are erroneous. It provided no evidence that the experience levels in the LSI *Laffey* Matrix fail to reflect prevailing market rates for complex federal litigation.[15] Also, as explained above (pp. 17-18), it provided no

[14] A statistically reliable rates survey would be beyond the financial means of most civil rights plaintiffs and would exacerbate the contentiousness of fee litigation, including expert battles over statistical reliability, in violation of the Supreme Court's repeated admonition that fees litigation not become a second major litigation. *See, e.g., Fox v. Vice*, 563 U.S. 826, 838 (2011). Here, there was no need for plaintiffs to address whether the base data for the USAO-ALM Matrix is in fact statistically reliable because that data is irrelevant.

[15] It could not do so since the same experience levels are in the USAO *Laffey* Matrix, which the District and the U.S. have supported for decades (*see, e.g.*,

evidence that the USAO-ALM Matrix provides prevailing market rates for complex federal litigation in D.C.

Moreover, plaintiffs presented the Valeo rates data (*see* pp. 9-10) using the nine experience levels from the USAO-ALM Matrix. Those rates exceed the LSI *Laffey* Matrix rates at each level and further exceed the USAO-ALM Matrix rates at each level. *See* JA1393; *see also* JA777,781-789;JA1346-1348;JA1384-1385; JA1392-1427. The district court abused its discretion by ignoring this record evidence and arbitrarily selecting the USAO-ALM Matrix as representing rates in D.C. for complex federal litigation.

B. THE DISTRICT COURT'S FINDINGS REGARDING BASE DATA FOR THE LSI *LAFFEY* MATRIX CONFLICT WITH BINDING PRECEDENT, ARE ARBITRARY, AND DISREGARD RECORD EVIDENCE

1. The LSI *Laffey* Matrix is the Most Current Matrix of Rates for Complex Federal Litigation in D.C.

The district court found that the LSI *Laffey* Matrix was less reliable than the USAO-ALM Matrix because its base data is from 1989 as opposed to 2011. JA2211. The USAO-ALM Matrix's base data is newer, but irrelevant (*see* Section I).

Salazar, 809 F.3d at 64-65; JA484-485). Although the U.S. no longer prepares annual adjustments to the USAO *Laffey* Matrix, it does not oppose use of those experience levels and rates if properly adjusted for the passage of time. *See* JA2207, n.1;JA481-482, n.5. This Court has approved *Laffey* matrices, which use the same experience levels, for decades. *See SOCM*, 857 F.2d at 1525; *Salazar*, 809 F.3d at 64-65; pp. 28-33.

As shown below, in *Covington*, this Court instructed fee applicants that to demonstrate prevailing market rates for complex federal litigation, they could use, *inter alia*, the 1989 Updated *Laffey* Matrix (the base data for the LSI *Laffey* Matrix (JA627)). This is precisely what plaintiffs here have done. Other than the market evidence presented by plaintiffs in cases such as this (*see* Section IV below) and *Salazar*, that 1989 data is the most current evidence of market rates for complex federal litigation in D.C.[16]

2. The 1989 Updated *Laffey* Matrix is Reliable and Has Been Accepted by this Court and Numerous District Court Judges as Reflecting the Prevailing Market Rates for Complex Federal Litigation in D.C.

The district court erred in finding the base data for the LSI *Laffey* Matrix to be unreliable when it was contemporaneously found by this Court and others, including itself, to have been a reliable statement of the prevailing market rates for complex federal litigation in D.C. for that period.

As explained above (Section II), in *Salazar*, this Court affirmed an award based on the LSI *Laffey* Matrix, which uses the LSI to adjust the 1989 Updated *Laffey* Matrix. 809 F.3d at 62, 65; *see* pp. 6-7.

[16] Until 2015, the District and the U.S. advocated for the USAO *Laffey* Matrix, which is based on data from 1981-1982, and the U.S. still supports it. *See* JA484-485; n.15 above. Thus, the number of years that have passed since the establishment of the base data is not a basis for rejecting the LSI *Laffey* Matrix.

That was not the first time that this Court affirmed an award based on the 1989 Updated *Laffey* Matrix rates. It did so twenty years earlier in *Covington*. There, this Court explained (57 F.3d at 1105):

> The *Covington* plaintiffs submitted a good deal of evidence establishing the prevailing market rates for comparably experienced attorneys handling complex federal litigation. They submitted the original *Laffey* matrix, a schedule of charges based on years of experience developed in *Laffey*…. Plaintiffs also submitted affidavits attesting to increases in the market rates since the original *Laffey* matrix was established; the U.S. Attorney's Office version of the updated *Laffey* matrix [the USAO *Laffey* Matrix]; the memorandum opinions in *Robles v. United States*, Civ. Action No. 84–3635, (D.D.C. Jan. 10, 1992), J.A. at I–119, and *Fischbach v. District of Columbia*, Civ. Action No. 87–0646 (D.D.C. Jan. 3, 1993), J.A. at I–254, in which district courts awarded fees based, in part, on the *Laffey* matrix; and an EEOC decision, *Hatfield v. Garrett*, Appeal No. 01892909 (E.E.O.C. Sept. 26, 1990), J.A. at I–90, in which the EEOC awarded attorneys' fees using the updated *Laffey* matrix.[17]
>
> Based on this evidence, plaintiffs requested fees…at a rate of $260 per hour, which represented the 1993 prevailing market rate for experienced federal court litigators with eleven to nineteen years of experience in an updated version of the *Laffey* matrix[n13] and the U.S. Attorney's Office matrix.
>
> > [n13]Although the [updated] *Laffey* matrix charts fees only up to 1988-89, the *Robles* district court updated the *Laffey* matrix by adding $10 per hour to the 1988-89 hourly rate of $220 and to the hourly rates of each succeeding year.... [underlines added; some footnotes omitted]

[17] The "updated *Laffey* matrix" to which this Court referred is the 1989 Updated *Laffey* Matrix. It was set forth in Appendix A to the underlying decision. *See* 839 F.Supp. at 898, n.10 & 904; *compare ibid. with* JA627;JA1777 (1989 Updated *Laffey* Matrix); *see also Eley*, 999 F.Supp.2d at 151, n.5.

This Court then affirmed the fee award, which was based on both the 1989 Updated *Laffey* Matrix and the USAO *Laffey* Matrix. *Id*. at 1110-1112. It also instructed (*id*. at 1109):

> In order to demonstrate [prevailing market rates in the relevant 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.... To supplement any matrix that has been offered, plaintiffs may also provide surveys to update the matrix; affidavits reciting the precise fees that attorneys with similar qualifications have received from fee-paying clients in comparable cases; and evidence of recent fees awarded by the courts or through settlement to attorneys with comparable qualifications handling similar cases. [emphases added]

Here, plaintiffs followed these instructions precisely, relying upon the 1989 Updated *Laffey* Matrix, adjusting it to present with the LSI, and verifying it with market data to ensure that it aligns with the market for complex federal litigation in D.C.

Several judges, including Judge Lamberth, contemporaneously relied upon the 1989 Updated *Laffey* Matrix for fee awards in the late 1980s and early 1990s, many of which were cited in the *Covington* passage above. *See Trout v. Ball*, 705 F.Supp. 705, 709, n.10 (D.D.C. 1989)(the 1989 Updated *Laffey* Matrix is "an accurate and updated schedule" for D.C.); *Fischbach v. D.C.*, 1993 U.S. Dist. LEXIS 19756, at *9-10 (D.D.C. 1993)(awarding highest rate from the 1989 Updated *Laffey* Matrix); *Robles v. U.S.*, 1992 WL 558952, at *6-7 (D.D.C. 1992)(relying on rates

from the 1989 Updated *Laffey* Matrix,[18] and citing *Trout*); *Brown v. Pro Football*, 846 F.Supp. 108, 116 & 117, n.12 (D.D.C. 1994)(Judge Lamberth stating that "[t]he matrices and affidavits that plaintiffs have produced support their requested $325 hourly rate for the work of Mr. Yablonski" and explaining that $325 was higher than both the USAO *Laffey* Matrix and the 1989 Updated *Laffey* Matrix, updated by adding $10 annually[19]), reversed on other grounds, 50 F.3d 1041 (D.C. Cir. 1995); *Galloway v. Superior Court*, 1994 WL 162410, at *2 (D.D.C. 1994)(awarding rates based on the 1989 Updated *Laffey* Matrix, updated to 1993, *see* JA2190-2193); *see also Hatfield v. Garrett* (JA1778-1793)(EEOC awarding rates based on the 1989 Updated *Laffey* Matrix, calling it (JA1788) "credible evidence of the prevailing D.C. rates"). The fact that so many contemporaneous decisions awarded fees based upon the 1989 Updated *Laffey* Matrix underscores its reliability.

The U.S. argued below that, in these cases, which mostly relate to fees awarded against the District or the U.S., "defendants did not meaningfully contest the reasonableness of the claimed rates." RD574, p.7. Surely, if the 1989 Updated *Laffey* Matrix were inflated, the District and the U.S. would have contemporaneously

[18] *Compare Robles*, 1992 WL 558952, at *7 (awarding rates in the 1989 Updated *Laffey* Matrix and noting (n.7) that "[t]he *Laffey* fee matrix does not extend beyond…1989"), *with* 1989 Updated *Laffey* Matrix (JA627;JA1777).

[19] At that time, many courts updated the 1989 Laffey Matrix by adding $10 annually, rather than by an inflation index. *See Covington*, 57 F.3d at 1105, n.13.

challenged it to protect the public fisc. No such challenge was raised, presumably because the 1989 rates under the USAO *Laffey* Matrix and the 1989 Updated *Laffey* Matrix were nearly identical. *Compare* JA2180 *with* JA627.

In *Covington*, the 1989 Updated *Laffey* Matrix rates were awarded after adjusting them to 1992-1993 by adding $10 annually. 57 F.3d at 1105, n.13. In *Salazar*, the 1989 Updated *Laffey* Matrix rates were awarded after adjusting them to 2012-2013 using the LSI. *See Salazar*, 809 F.3d at 62, 64-65; JA1350; pp. 6-7 and Section II above. Regardless of the method of adjusting the 1989 Updated *Laffey* Matrix, the base data for that matrix is the same, and it has been approved many times. Rejecting the 1989 Updated *Laffey* Matrix, which this Court instructed applicants to use, is an abuse of discretion.

3. The 1989 Updated *Laffey* Matrix Rates are Consistent with Contemporaneous Market Evidence, Including Evidence Regarding the District's Counsel

The reliability of the 1989 Updated *Laffey* Matrix is further underscored by contemporaneous evidence.

Daniel Rezneck, who developed the original *Laffey* Matrix, subsequently worked for the D.C. Office of the Attorney General on this very case. *See* JA2160,2162,2165-2167. Mr. Rezneck is a well-respected litigator (*see* JA2168-2175) and former President of the D.C. Bar (JA567) who, to plaintiffs' knowledge,

continues to work as Senior Counsel for the District (*see* JA2176). He expressed his belief that the 1989 Updated *Laffey* Matrix was accurate. JA625.

Peter J. Nickles was the Attorney General for D.C. for part of the period that this case was pending. His rates were $280 in 1989 and $300 in 1990 (JA2057,2059), which are higher than the highest rate in the 1989 Updated *Laffey* Matrix ($265)(JA627). Mr. Nickles' colleague described those rates as "reasonable hourly rates for the Washington, D.C. area based on the type of work involved and the experience of the persons performing the work." JA2054. In addition, "[a]ccording to an affidavit filed by Mr. Peter J. Nickles…the 'reasonable hourly rates for the Washington, D.C. area' for lawyers of Mr. Yablonski's experience in 1992-93 was $343.17 per hour." *Brown*, 846 F.Supp. at 117, n.13. Such rate is higher than the highest 1989 Updated *Laffey* Matrix rate, adjusted to 1992-1993 by adding $10 annually. *See* n.19 above.

Plaintiffs presented other contemporaneous evidence of market rates. *See* JA2126-2129 (market rates of $200-$250 in 1984-1985 align with $210 rate for that rate year, which is also included in the 1989 Updated *Laffey* Matrix (JA627)); JA2125 (same in 1986-1987); JA1794-1799 (testimony that rates in the 1989 Updated *Laffey* Matrix "reflect the prevailing rates in [D.C.] for * * * complex federal litigation"); *see also* JA1804-1805,2077-2091,2095,2104-2123.

All this evidence demonstrates that the 1989 Updated *Laffey* Matrix rates reflect market rates for complex federal litigation in D.C. as of that time. The district court abused its discretion by ignoring this contemporaneous evidence.

4. The 1989 Updated *Laffey* Matrix Was Developed in the Same Way as the Original *Laffey* Matrix

The district court arbitrarily found that the 1989 Updated *Laffey* Matrix was less reliable than the USAO-ALM Matrix based on Dr. Malowane's testimony that "'[Joseph] Yablonski never explained how he identified the attorneys and firms to sample, the number of attorneys he spoke with, how many data points were collected to derive each individual billing rate in the matrix, or how many data points were collected in total'" when he prepared the 1989 Updated Laffey Matrix. JA2211.

The original *Laffey* Matrix was developed by Daniel Rezneck, counsel in *Laffey*. *See* JA566-595. To update the *Laffey* Matrix in 1989, Joseph Yablonski used the same process that Mr. Rezneck used. Dr. Kavanaugh describes the process as an expert survey. JA1379,1390; *see also* JA1369-1370. Like Mr. Rezneck, Mr. Yablonski conducted an inquiry into the rates for complex federal litigation (*compare* JA571-573 *with* JA623-625), and he relied upon information from Mr. Rezneck and other complex federal litigators. JA623-625. Plaintiffs' legal industry expert Bruce MacEwen explained that this is precisely the process he advises clients to use to set their rates. JA1369-1370.

Mr. Yablonski also asked many attorneys engaged in fee-shifting litigation in D.C. to vet the updated *Laffey* Matrix. JA624-625. Mr. Yablonski explained that "none of these individuals…indicated anything other than agreement with the rate information presented." JA625.

Messrs. Rezneck and Yablonski were both extremely familiar with complex federal litigation and the rates for such litigation due to their careers as complex federal litigators and their extensive work on rates issues in fee-shifting litigation. *See, e.g.*, JA566-595;JA622-626;JA1742-1746. They were the appropriate experts to be involved in the effort to update the *Laffey* Matrix. *See* JA1379,1390 (describing expert surveys); *see also* JA1369-1370. The affidavits and supporting materials from Messrs. Yablonski and Rezneck are far more detailed than the affiant testimony on rates that this Court contemplated in *Concerned Veterans*, 675 F.2d at 1325-1326:

> To be useful an affidavit stating an attorney's opinion as to the market rate should be as specific as possible. For example, it should state whether the stated hourly rate is a present or a past one, whether the rate is for a specific type of litigation or for litigation in general, and whether the rate is an average one or one specifically for an attorney with a particular type of experience or qualifications. The affidavit should also state the factual basis for the affiant's opinion. The best evidence would be the hourly rate customarily charged by the affiant himself or by his law firm. Alternatively, the affidavit might state that the stated rate is based on the affiant's personal knowledge about specific rates charged by other lawyers or rates for similar litigation.
>
> This does not mean that the affidavit must be replete with names of other attorneys and firms or otherwise filled with minute details, as

> these may be difficult to obtain. But when the attorney states his belief as to the relevant market rate, he should be able to state, for example, that it was formed on the basis of several specific rates he knows are charged by other attorneys.

The district court wanted further detail related to Mr. Yablonski's process of preparing the 1989 Updated *Laffey* Matrix. JA2211. However, this Court has not required such detail, and such additional detail cannot be provided now due to the passage of time. Moreover, as shown above, this Court found the 1989 Updated *Laffey* Matrix to be reliable in *Covington.*

The district court also suggested that the 1989 Updated *Laffey* Matrix is biased because it was developed by Mr. Yablonski "for his own use in *SOCM*." JA2211. Plaintiffs do not dispute that Mr. Yablonski updated the *Laffey* Matrix, as recommended by this Court, *en banc*, in *SOCM*, to secure fees. All of the matrices share this trait. Just like Mr. Yablonski, Mr. Rezneck developed the original *Laffey* Matrix as a tool to secure fees. *See* JA569-572. Moreover, both the USAO *Laffey* Matrix and the USAO-ALM Matrix were developed by the U.S., a frequent defendant in fee-shifting cases, for use in settlement, presumably with the goal of minimizing its exposure to fee awards. *See McKesson v. Iran*, 935 F.Supp.2d 34, 42 (D.D.C. 2013), reversed on other grounds, 753 F.3d 239 (D.C. Cir. 2014); *Sexcius v. D.C.*, 839 F.Supp. 919, 924 (D.D.C. 1993); *Covington*, 839 F.Supp. at 898. Nothing in the district court's opinion expresses any reticence toward the USAO-ALM Matrix on that basis.

Moreover, any suggestion of unreliability of the 1989 Updated *Laffey* Matrix or bias by Mr. Yablonski is untenable because, as explained above (p. 33), the 1989 Updated *Laffey* Matrix rates for 1988-1989 are almost identical to the 1988-1989 rates in the USAO *Laffey* Matrix. *Compare* JA2180 *with* JA627.[20] Indeed, in *Covington*, the district court awarded rates that were identical under the 1989 Updated Laffey Matrix and the USAO *Laffey* Matrix. *See* p. 6.

5. The 1989 Updated *Laffey* Matrix Rates Are Consistent with National Law Journal Rates at the Time

Mr. Yablonski further confirmed the accuracy of the rates in the 1989 Updated *Laffey* Matrix by comparing them to rates reported in the National Law Journal ("NLJ"). JA625. The district court explained that "reliance on [NLJ] surveys has been called into question by other courts," citing several district court decisions. JA2212. The district court erred in rejecting the 1989 Updated *Laffey* Matrix on this basis.

First, in *Salazar*, this Court relied upon NLJ surveys to support its conclusion that the LSI *Laffey* Matrix was below market.[21] *See* 809 F.3d at 64-65; *see also Makray*, 159 F.Supp.3d at 47, 50-52, 56 (relying on NLJ survey evidence post-

[20] The 1988-1989 rates in the USAO *Laffey* Matrix are the rates from the original *Laffey* Matrix for 1981-1982 adjusted for inflation by the USAO using the CPI.

[21] Dr. Malowane, the District's expert, also relied on the NLJ survey in evaluating rates. *Makray*, 159 F.Supp.3d at 50-52. *See also* n.23 below.

Salazar). The district court abused its discretion by ignoring this precedent in favor of district court decisions to the contrary.[22]

Second, Mr. Yablonski only used the NLJ to confirm his matrix—he did not base his matrix on the NLJ. *See* JA625.

Third, the district court erred by focusing on the NLJ to the exclusion of the other extensive evidence described above showing that the 1989 Updated *Laffey*

[22] To the extent that the district court may have rejected use of the NLJ due to firm size (*see* JA2212), it erred by misapplying legal principles. In *Salazar*, this Court rejected the District's position that plaintiffs' attorneys should receive the lower USAO *Laffey* Matrix rates because they are not large firm attorneys. *See Salazar*, Case Nos. 14-7035 and 14-7050, Final Brief for Appellants, pp. 52-54 and Final Reply Brief for Appellants, pp. 25-26; 809 F.3d at 63-65. In *Makray*, Chief Judge Howell explained that awarding plaintiffs lower rates because they are not represented by a large firm is inconsistent with the Supreme Court's decision in *Blum*, this Court's *en banc* decision in *SOCM*, and this Court's decision in *Salazar*. 159 F.Supp.3d at 52-53; *see also Eley*, 999 F.Supp.2d at 154-155, reversed on other grounds, 793 F.3d 97. *Contra Gatore*, 286 F.Supp.3d at 42, n.14.

Moreover, the marketplace is not divided by size. Each of the firms in the marketplace compete against each other to represent those who require its services. JA427;JA494;JA505;JA562;JA807;JA879-880;JA883. This can be seen from the original *Laffey* Matrix data. Nathan Lewin, then with a firm of 17 lawyers (*see* JA612-613), had a rate of $250, which was among the highest rates in the data underlying the original *Laffey* Matrix. JA588;JA586-595;JA879. When he moved to a two-attorney firm, his rate rose to account for general yearly increases. JA880. Further, plaintiffs' experts regarding the legal market explained that firm size is irrelevant to the setting of hourly rates for complex federal litigation; rather, rates are a function of the value of the services in the market. JA494;JA505;JA562; *see also* JA427;JA880;JA883-885. Many small firms do less complex work, but when complex federal litigation is at issue, firm size is irrelevant. *See ibid*.

Matrix is a reliable statement of the prevailing market rates for complex federal litigation at that time.

6. The District and the U.S. Have Recognized the Reliability of the 1989 Updated *Laffey* Matrix and the LSI *Laffey* Matrix

In 2015, the District used the LSI *Laffey* Matrix in its law regarding worker protections. For wage enforcement litigation, the District adopted fees "computed pursuant to the matrix approved in *Salazar v. District of Columbia*, 123 F.Supp.2d 8 (D.D.C. 2000), and updated to account for the current market hourly rates for attorney's services." D.C. Code 32-1308(b)(1), 32-1308.01(m)(1)(JA693,698). The matrix approved in *Salazar* is the LSI *Laffey* Matrix. *Salazar*, 123 F.Supp.2d at 13-15. Thus, the District itself endorsed the LSI *Laffey* Matrix and the underlying 1989 Updated *Laffey* Matrix in its law. *See Makray*, 159 F.Supp.3d at 48 ("[T]his endorsement of the *Salazar*/LSI Matrix by the local governing body in the context of wage enforcement litigation provides additional evidence that the rates included in this matrix are equally reasonable in the context of arguably more complex gender discrimination suits brought under a federal civil rights statute").

The U.S. also recognized the propriety of the LSI *Laffey* Matrix in complex cases such as this. In 2014, in *CREW*, the U.S. argued (No. 11-cv-1021, D.D.C., ECF No. 63, pp. 24-25) that the LSI *Laffey* Matrix "might be appropriate in a subset of cases involving extensive pretrial litigation, trials on the merits, and appeals" and that "whether a plaintiff merits such an award should be examined on a case-by-case

basis." After it released the USAO-ALM Matrix (*see* JA2207), the U.S. agreed to LSI *Laffey* Matrix rates in *EPIC v. DHS*. 197 F.Supp.3d 290, 295 (D.D.C. 2016).[23]

* * *

The district court's conclusions regarding the 1989 Updated *Laffey* Matrix are erroneous. Moreover, the fundamental objective is to award prevailing market rates for complex federal litigation in D.C. As was overwhelmingly proven here and in *Salazar*, the LSI *Laffey* Matrix rates are below market for complex federal litigation in D.C. *See Salazar*, 809 F.3d at 64-65; Section IV below.

IV

THE DISTRICT COURT'S FINDINGS REGARDING PLAINTIFFS' MARKET EVIDENCE CONFLICT WITH BINDING PRECEDENT, ARE ARBITRARY, AND DISREGARD RECORD EVIDENCE

A. PLAINTIFFS' MARKET EVIDENCE COMPORTS WITH *COVINGTON* AND *SALAZAR*, AND SHOWS THAT THE LSI *LAFFEY* MATRIX RATES ARE CLOSE TO BUT BELOW MARKET

As described above (pp. 9-10), plaintiffs gathered extensive evidence of market rates for complex federal litigation in D.C. as of 2016. As shown in the tables

[23] Consistent with this, in 2012, Dr. Malowane explained that $705 is a reasonable partner rate for "'national' firms based in Washington, D.C," and the U.S. "accepted [that rate, which exceeds the highest 2016 USAO-ALM rate] as the rate for Washington, D.C…." *Makray*, 159 F.Supp.3d at 51-52; *Biery v. U.S.*, 2012 WL 5914260, at *4 (Fed. Cl. 2012).

below, that evidence proves that the LSI *Laffey* Matrix rates are 9.36% below market and the USAO-ALM Matrix rates are 29.68% below market.[24] *See* JA743;JA495.

Experience Levels	Market Evidence Average (JA743)[25]	LSI *Laffey* Matrix (JA480)	Difference	Average Difference
20+	$842	$826	-1.91%	-9.36%
11-19	$684	$686	0.23%	
8-10	$637	$608	-4.56%	
4-7	$585	$421	-28.02%	
1-3	$433	$342	-21.07%	
Paralegal	$189	$187	-0.85%	

Experience Levels	Market Evidence Average (JA743)	USAO-ALM Matrix (JA481)	Difference	Average Difference
20+	$842	$581	-31.00%	-29.68%
11-19	$684	$516	-24.61%	
8-10	$637	$395	-38.00%	
4-7	$585	$339	-42.04%	
1-3	$433	$322	-25.69%	
Paralegal	$189	$157	-16.76%	

Plaintiffs' market evidence includes, *inter alia*, affidavits from 11 experienced litigators familiar with the prevailing market rates for complex federal litigation in

[24] Plaintiffs extensively described the materials relied upon and the methods used to obtain rates evidence, calculate these statistics, and compare data from the two matrices. JA343-350; *see also* JA710-885.

[25] The market average includes rates data from January 1, 2015, to September, 2016, when the fee application was filed. JA343,347. The comparison of that older market data to the 2016-2017 rates in the two matrices is therefore conservative. JA347.

D.C. JA426-430,753-817,841-848,871-885. Each affidavit confirms that the rates in the LSI *Laffey* Matrix are consistent with or below prevailing market rates for complex federal litigation in D.C. *Ibid*. For example, Anthony Pierce, the partner in charge of Akin Gump's D.C. office, explained that "the hourly rates in the LSI *Laffey* Matrix are comparable to, if not below, the market rates for complex federal litigation in Washington, D.C." JA877. Nathan Lewin, whose rate was included in the original *Laffey* Matrix (JA579,588;JA878-879), explained that his current rate for complex federal litigation is $750 (JA880), a rate better aligned with the LSI *Laffey* Matrix than the USAO-ALM Matrix for a litigator with his level of experience.

Plaintiffs' evidence is essentially the same evidence as was offered in *Salazar*, except that it was updated to account for a different rate year. JA350;JA1350. In *Salazar*, such a "great deal of evidence" was an adequate basis to conclude that the LSI *Laffey* Matrix is a conservative estimate of the actual cost of complex federal litigation in D.C. 809 F.3d at 64; *see also Eley*, 999 F.Supp.2d at 154 ("Washington, D.C. is among the most expensive legal services markets in the country").

In addition, here, plaintiffs presented the 2012-2013 Valeo rates data adjusted to 2016-2017 to further show that the LSI *Laffey* Matrix rates are below market. JA1393-1394; *see also* JA777,781-789;JA1346-1348; pp. 9-10. Neither the District, the U.S., nor the district court addressed the Valeo data.

B. THE DISTRICT COURT'S FINDINGS REGARDING PLAINTIFFS' MARKET EVIDENCE ARE ARBITRARY AND DISREGARD RECORD EVIDENCE

The district court was "not swayed" by plaintiffs' market evidence, due to what it called "several methodological issues." JA2213. Those findings are clearly erroneous and disregard record evidence.

1. Both USAO Matrices Include Bankruptcy Rates, and the LSI *Laffey* Matrix is Below Market, Even if Bankruptcy Data is Disregarded

The district court rejected plaintiffs' market data because it included rates for bankruptcy matters. JA2213. That is an abuse of discretion for several reasons.

First, the matrices favored by the District and the U.S. also include rates for bankruptcy work. The 2011 ALM Survey, from which the custom report underlying the USAO-ALM Matrix was drawn, includes rates for bankruptcy litigation and non-litigation work. *See* JA1463,1506,1508,1516,1518,1540;JA1551;JA1570;JA1573. The USAO *Laffey* Matrix has as its base the original *Laffey* Matrix, which also includes bankruptcy rates as part of its mix. *See* JA580-582. Therefore, the U.S. and the District, frequent advocates for those rates (*see, e.g.*, *Salazar*), and the courts awarding rates based on these two matrices, deemed the inclusion of bankruptcy rates acceptable. If bankruptcy rates infected an analysis, then neither of the USAO matrices would be acceptable. Moreover, the market evidence in *Salazar* that this Court found to be "'a great deal of evidence regarding the prevailing market rates

for complex federal litigation'" (809 F.3d at 64), included bankruptcy rates. *Salazar*-JA1844-1849,1920-2002.

Second, plaintiffs' market evidence is based on evidence well beyond bankruptcy rates. *See* pp. 9-10, 41-43; JA426-430,744-885. Moreover, in response to the District's argument criticizing the inclusion of bankruptcy rates, plaintiffs eliminated the bankruptcy rates from the Valeo rates data. *See* JA1348;JA1428-1454.[26] Even with the bankruptcy rates eliminated, the Valeo rates still substantially exceed the LSI *Laffey* Matrix rates.[27] *See* JA1428-1430. Therefore, even if the district court were correct that bankruptcy rates are not relevant, that would not affect the fact that market rates for complex federal litigation in D.C.—excluding bankruptcy work—still exceed the LSI *Laffey* Matrix.

Third, in *Blum*, a case addressing whether a legal aid organization should be awarded fees based on market rates, the Supreme Court explained that fees awarded under Section 1988 shall "'be governed by the same standards which prevail in other

---

[26] All data in that exhibit exclude bankruptcy rates, even though two tables inadvertently state "with" bankruptcy rates. JA1429-1430; *see* JA1348; *compare* JA1392-1427 *with* JA1428-1454.

[27] There is one minor exception. In one experience category (21-30 years), the rate ($823) based on the Valeo data after excluding the bankruptcy data is $3 less than the LSI *Laffey* Matrix rate ($826). JA1428-1429. It is still $280 more than the USAO-ALM Matrix rate ($543). *Ibid*. For all other experience categories, the Valeo rates, excluding the bankruptcy data, substantially exceed both the USAO-ALM Matrix rates and the LSI *Laffey* Matrix rates. JA1428-1430.

types of equally complex Federal litigation, such as antitrust cases.'" 465 U.S. at 893. Antitrust, like certain bankruptcy matters, command rates on the higher end of the range for complex federal litigation. JA1373;JA1021. Nothing about antitrust rates caused the Supreme Court to reject those rates for legal aid counsel in *Blum*.

The district court's findings regarding bankruptcy data are arbitrary and disregarded record evidence, particularly the Valeo data.

2. Exclusion of Rates for "Counsel" and "Of Counsel" is Irrelevant

The district court stated that plaintiffs have "not included the rates for practitioners without the labels of 'partner' or 'associate,' such as those who are titled 'counsel' or 'of counsel.'" JA2213.

Plaintiffs "excluded these billers[] because plaintiffs are not seeking fees for individuals classified as 'Of Counsel' and because [they] could not verify that 'Of Counsel' were considered the same as permanent associates or partners and…were given equally difficult assignments commanding the same rates as permanent associates or partners." JA1349. Neither the District nor the U.S. showed otherwise.

Moreover, similar to the bankruptcy rates addressed above, in response to the District's objection regarding the exclusion of "Counsel" and "Of Counsel" rates, plaintiffs included such lawyers in the adjusted Valeo rates data. JA1349. With such lawyers included, the Valeo rates adjusted to 2016-2017 still substantially exceed both the LSI *Laffey* Matrix rates and the USAO-ALM Matrix rates. JA1393-

1394;JA1384-1385; *see also* JA1428-1430; p. 45. Again, neither the District, the U.S., nor the district court addressed the Valeo data.

The finding regarding "Counsel" and "Of Counsel" rates is arbitrary and disregards record evidence. Accordingly, the district court abused its discretion.

3. Plaintiffs' Market Data Provide Evidence of Market Rates for Complex Federal Litigation in D.C.

The district court misunderstood the purpose of plaintiffs' market data when it stated that "much of plaintiffs[']data is unhelpful…because…the affiants are not IDEA practitioners." JA2213. The market evidence was intended to show the rates for complex federal litigation in D.C., not provide rates charged by IDEA practitioners such as those in *Joaquin v. D.C.*, 210 F.Supp.3d 64 (D.D.C. 2016).[28] The relevant market for class action litigation such as this case is complex federal litigation, as the district court found.[29] JA2210.

---

[28] Plaintiffs demonstrated that the kind and quality of legal services provided in this case are more aligned with those provided in *Salazar* than with those provided in individual IDEA proceedings such as those in *Joaquin*. *See* JA274-299,303-340;JA1295-1299 (describing the complexity of this class action); JA1357-1368 (describing the differences between this IDEA class action and individual IDEA proceedings).

[29] The district court appears to have conflated two alternative tests. It explained that fee applicants can meet their burden by "demonstrat[ing] that IDEA proceedings qualify as 'complex federal litigation,' to which *Laffey* rates presumptively apply" or, "alternatively," by "demonstrat[ing] that rates customarily charged by IDEA practitioners in the District are comparable" to matrix rates. JA2208. Then, when the district court analyzed the first alternative, it applied the standard from the

4. Neither USAO Matrix is Based on Rates Received and Plaintiffs Provided Evidence of Rates Received

The district court stated that plaintiffs' market evidence is unhelpful because many of the affidavits address rates charged as opposed to rates received. JA2213,2215-2216. That finding is arbitrary and disregards record evidence because neither USAO matrix is based on rates received and it disregards plaintiffs' evidence of rates received.

Despite the district court's interest in awarding market rates received, it awarded fees pursuant to the USAO-ALM Matrix, which is not based on rates received. Dr. Malowane explained that the USAO-ALM Matrix is based on "actual average billing rates" (JA1015;JA2212-2213 (district court quoting Malowane)), but the base data for the USAO-ALM Matrix is standard rates, not actual or received rates. *See* JA1379-1380,1385;JA1540;JA1573;JA1286.

The 2011 ALM Survey—from which the custom report that is the base for the USAO-ALM Matrix was drawn—defines "Billing Rates" as the "Most commonly assigned (standard) hourly rate as of January 1, 2011" and states that "Law firms frequently employ this rate, usually called the Standard Rate, in their budgeting

---

second: "much of plaintiffs[']] data is unhelpful in determining whether the 'rates customarily charged by IDEA practitioners in the District are comparable to those provided under' the LSI Matrix." JA2213.

practices." JA1461,1469. The custom report itself explicitly states at the top "STANDARD HOURLY BILLING RATES." JA1573;JA1286.

Likewise, the original *Laffey* Matrix, which is the base for the USAO *Laffey* Matrix, provides standard billing rates. JA568-569,572-584. The 1989 Updated *Laffey* Matrix does so as well, since it is an update of the original *Laffey* Matrix. *See* JA622-627;JA1744-1756 (cited by Yablonksi);JA1989-2021 (same). In *Covington*, where this Court described the evidentiary burden for rates, it pointed to both the 1989 Updated *Laffey* Matrix and the USAO *Laffey* Matrix (57 F.3d at 1109; *see also* pp. 30-31), which are based on standard rates, not rates received.

The District faulted plaintiffs for not providing actual rates paid and then relied upon data that is not based on actual rates paid. The district court erred in arbitrarily preferring the USAO-ALM Matrix over the LSI *Laffey* Matrix on this basis.

Moreover, contrary to the district court's finding, plaintiffs presented evidence of rates received. Six of the affidavits plaintiffs presented provided evidence of rates received, either through court awards or client payments. *See* JA427-428;JA746,750;JA756,759;JA816;JA844;JA850-851. In addition, lead counsel here received the LSI *Laffey* Matrix rates in *Salazar*. *See* Section II above. Further, the Valeo data provides rates "actually billed to a client or determined by a

court—they are not surveyed, self-reported, or estimated." JA777. The Valeo rates substantially exceed both the LSI *Laffey* Matrix and the USAO-ALM Matrix.

The district court may have been expressing concern that clients can negotiate discounts and therefore market rates may be lower than they otherwise would appear. Undoubtedly discounts are negotiated in certain circumstances, but plaintiffs demonstrated that they are not the types of clients who are in a position to pay for legal services or negotiate discounts. *See* JA1370-1371;JA807. Quite the contrary, in a contingent fee situation such as this, instead of extending discounts to clients, firms demand a premium for risk and for delay in payment. *Ibid.*; JA574;JA658-659; *see also Blum*, 465 U.S. at 903 (Brennan, J., concurring)("Lawyers operating in the marketplace can be expected to charge a higher hourly rate when their compensation is contingent on success than when they will be promptly paid, irrespective of whether they win or lose"). To the extent that the district court believed that plaintiffs' counsel should be compensated as though their clients pay monthly and negotiate discounts, when in fact plaintiffs' counsel only get paid if they prevail (in this case, after more than a decade of work), that would be an abuse of discretion.

In any event, the LSI *Laffey* Matrix rates are 9.36% less than the rates in the market (*see* p. 42), and are substantially below the rates that would be demanded to

account for the risk of non-payment. Thus, a discount is already included, even though plaintiffs would not obtain a discount in the marketplace.[30]

* * *

Plaintiffs proved that the LSI *Laffey* Matrix rates are close to but below market for complex federal litigation in D.C. The record does not include any evidence that the USAO-ALM rates are market rates for complex federal litigation in D.C.; instead there is ample evidence that those rates are significantly below the relevant market.[31] Otherwise said, plaintiffs met their burden, and the District failed to meet its burden in rebuttal. *See* pp. 17-18. Indeed, nowhere in its decision does the district court ever state that the USAO-ALM Matrix presents prevailing market rates for complex federal litigation in D.C. Applying those rates was error.

---

[30] The district court may also have been echoing the District's arguments regarding realization rates. A realization rate is the percentage at which a firm is compensated in comparison to the total amount expended or sought. JA1371-1372. Calculation of the realization rate includes both the hourly rate and the time expended. *Ibid*. Fee applicants always end up with a realization rate since they are rarely, if ever, awarded 100% of the time expended. If courts were to apply a realization rate reduction on top of the reductions in hours ordered and time voluntarily cut, that would result in a double or triple reduction to the lodestar.

[31] The closest that the District or the U.S. ever came was to show that some practitioners are willing to accept rates lower than the LSI *Laffey* Matrix. That may be true but it does not mean that plaintiffs should be compensated at such below-market rates. *See Makray*, 159 F.Supp.3d at 46 ("Just because some lawyers are willing to take some civil rights, employment, or discrimination cases at low-end rates…, does not establish those rates as the prevailing market rate[s]…" (citation omitted)); JA810.

V

THE DISTRICT COURT ERRED IN FAILING TO AWARD CYRUS MEHRI HIS BILLING RATE

Cyrus Mehri requested an award based on his billing rate at the time of the fee application (September 2016), which was $795 for both class actions and pay-by-the-hour matters (slightly lower than the LSI *Laffey* Matrix rate of $826 for his experience level of over 20 years). RD537, pp.10,35-36; JA427-429. Mr. Mehri explained that courts have approved fees based on his then-current hourly rate dozens of times and that he had never had a court reduce or question his hourly rate. JA427-428. The district court awarded all of plaintiffs' counsel, including Mr. Mehri, the current USAO-ALM Matrix rates. JA2194;JA2206-2216. For Mr. Mehri, the awarded rate was $563. JA2232;JA2237. That rate is more than $200 below Mr. Mehri's 2016 billing rate of $795.

There is no reason to compensate Mr. Mehri at anything other than his billing rate. *See McKesson Corp.*, 935 F.Supp.2d at 42 ("'the best measure of the rates the market will allow are the rates actually charged'"); *see generally SOCM*, 857 F.2d at 1517-1524. The district court abused its discretion in failing to compensate Mr. Mehri at his established billing rate for complex federal litigation.

If Mr. Mehri is properly compensated at his billing rate, but the rest of plaintiffs' counsel are compensated at the USAO-ALM Matrix rates, then Mr. Mehri would be compensated at a rate that is much higher than plaintiffs' other counsel.

That would be entirely inconsistent with this Court's holding in *SOCM* that "Congress did not intend the private but public-spirited rate-cutting attorney to be penalized for his public spiritedness by being paid on a lower scale than his higher priced fellow barrister from a more established firm or his salaried neighbor at a legal services clinic." 857 F.2d at 1524.

CONCLUSION

The district court abused its discretion in awarding fees in this complex federal litigation based on the USAO-ALM Matrix, which is not based on rates for complex federal litigation or for D.C. This Court should reverse and remand for an increase in fees based on the LSI *Laffey* Matrix rates, and, in Mr. Mehri's case, based on his billing rate.

REQUEST FOR ORAL ARGUMENT

Appellants request oral argument.

Respectfully submitted,

/s/ *Todd A. Gluckman*
CAROLYN SMITH PRAVLIK, Circuit Bar No. 49882
TODD A. GLUCKMAN, Circuit Bar No. 56780
Terris, Pravlik & Millian, LLP
1816 12th Street, NW, Suite 303
Washington, DC 20009-4422
(202) 682-2100
cpravlik@tpmlaw.com
tgluckman@tpmlaw.com

CYRUS MEHRI, Circuit Bar No. 41159
Mehri & Skalet, PLLC
1250 Connecticut Avenue, NW, Suite 300

Washington, DC 20036
(202) 822-5100

May 25, 2018 *Counsel for Plaintiffs-Appellants*

CERTIFICATE OF COMPLIANCE WITH RULE 32

I hereby certify that:

(1) this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,998 words, excluding the parts of the brief exempted by 32(a)(7)(B)(iii), and

(2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14 Point Font.

/s/ Todd A. Gluckman
TODD A. GLUCKMAN
Counsel for Plaintiffs-Appellants

May 25, 2018

ADDENDUM

TABLE OF CONTENTS

20 U.S.C. 1415(i)(3)(B), (C) (Individuals with Disabilities Education Act)

Procedural safeguards

* * *

(i) Administrative procedures

* * *

(3) Jurisdiction of district courts; attorneys' fees

* * *

(B) Award of attorneys' fees

(i) In general. In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs (I) to a prevailing party who is the parent of a child with a disability….

(C) Determination of amount of attorneys' fees

Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

29 U.S.C. 794a(b) (Rehabilitation Act)

Remedies and attorney's fees

* * *

(b) In any action or proceeding to enforce or charge a violation of a provision of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

D.C. Code 32-1308(b)(1)
Civil actions

(a)(1)(A) Subject to subparagraph (B) of this paragraph, a person aggrieved by a violation of this chapter, the Minimum Wage Revision Act, the Sick and Safe Leave Act, or the Living Wage Act may bring a civil action in a court of competent jurisdiction against the employer or other person violating this chapter, the Minimum Wage Revision Act, the Sick and Safe Leave Act, or the Living Wage Act and, upon prevailing, shall be awarded reasonable attorneys' fees and costs and entitled to relief including….

* * *

(b)(1) The court, in any action brought under this section shall, in addition to any judgment awarded to the prevailing plaintiff or plaintiffs, allow costs of the action, including costs or fees of any nature, and reasonable attorney's fees, to be paid by the defendant. In any judgment in favor of any employee under this section, and in any proceeding to enforce such a judgment, the court shall award to each attorney for the employee an additional judgment for costs, including attorney's fees computed pursuant to the matrix approved in *Salazar v. District of Columbia*, 123 F.Supp.2d 8 (D.D.C. 2000), and updated to account for the current market hourly rates for attorney's services. The court shall use the rates in effect at the time the determination is made.

D.C. Code 32-1308.01(m)(1)
Administrative actions on employee complaints

(a) When an employee requests administrative enforcement of this chapter, the Minimum Wage Revision Act, the Living Wage Act, and the Sick and Safe Leave Act, the Mayor shall investigate and make an initial determination regarding alleged violations. A physically or electronically signed complaint for non-payment of earned wages shall be filed with the Mayor, no later than 3 years after the last date upon which the violation of this chapter, the Minimum Wage Revision Act, the Sick and Safe Leave Act, or the Living Wage Act is alleged to have occurred or the date on which the employer provided the complainant with actual or constructive notice of the employee's rights, whichever is later.

* * *

(m)(1) The administrative law judge, in any action brought under this section shall, in addition to any administrative order awarded to the prevailing plaintiff, allow costs of the action, including costs or fees of any nature, and reasonable attorney's fees, to be paid by the defendant. In any administrative order in favor of any employee under this section, and in any proceeding to enforce an administrative order, the court shall award to each attorney for the employee an additional judgment for costs, including attorney's fees computed pursuant to the matrix approved in *Salazar v. District of Columbia,* 123 F.Supp.2d 8 (D.D.C. 2000), and updated to account for the current market hourly rates for attorney's services. The administrative law judge shall use the rates in effect at the time the determination is made.

CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2018, I caused a true copy of the foregoing Brief for Appellants to be delivered electronically via the Court's CM/ECF system to counsel for defendants-appellees, Loren AliKhan, Stacy L. Anderson, and Lucy Pittman, and counsel for *amici* for appellants, Michael Kirkpatrick.

/s/ *Todd A. Gluckman*
TODD A. GLUCKMAN, Circuit Bar No. 56780
Terris, Pravlik & Millian, LLP
1816 12th Street, NW, Suite 303
Washington, DC 20009-4422
(202) 682-2100
tgluckman@tpmlaw.com