No. 24-30237

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ANTHONY ALLEN,
Plaintiff,

JOHN L. WEIMER; GREG CHAMPAGNE; CRAIG WEBRE; MIKE TREGRE,
Intervenors-Appellees

v.

STATE OF LOUISIANA; R. KYLE ARDOIN, SECRETARY OF STATE OF LOUISIANA IN HIS OFFICIAL CAPACITY,
Defendants-Appellants

On Appeal from the United States District Court
for the Middle District of Louisiana
19-cv-479

OPENING BRIEF OF R. KYLE ARDOIN, SECRETARY OF STATE OF LOUISIANA IN HIS OFFICIAL CAPACITY

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CERTIFICATE OF INTERESTED PERSONS

Under Fifth Circuit Rule 28.2.1, Defendant-Appellant, as a governmental party, need not furnish a certificate of interested persons.

/s/ John C. Walsh
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Counsel for Defendant-Appellant

STATEMENT CONCERNING ORAL ARGUMENT

Without waiving the right to oral argument should it be granted, Defendant-Appellant herein does not believe that oral argument is necessary to aid this Court in its decision, especially as the issues will have been extensively briefed.

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JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction over the Judgment pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in finding that Intervenors were a "prevailing party" within the meaning of 42 U.S.C. § 1988.

2. Whether the district court erred in holding the State Defendants were "state actors" within the meaning of §1983.

3. Whether the district court erred in holding that Intervenors provided the requisite "notice" to the State Defendants of their request for attorney's fees.

4. Whether the district court erred by not finding that special circumstances existed in this case to render an award of attorney's fees against the State Defendants unjust.

CONCISE STATEMENT OF THE CASE[1]

A. Lawsuit and Background

On July 23, 2019, Plaintiffs, the Louisiana State Conference of the National Association for the Advancement of Colored People ("NAACP"), Anthony Allen, and Stephanie Anthony, filed suit under the Voting Rights Act of 1965, 52 U.S.C. § 10301 *et seq.* against the State of Louisiana and R. Kyle Ardoin[2] in his capacity as Secretary of State of Louisiana ("Secretary of State") (collectively, "State Defendants"), seeking declaratory and injunctive relief concerning Louisiana's Supreme Court districts. ROA.44.

Specifically, Plaintiffs requested the district court to declare, in pertinent part, that the current apportionment of Louisiana Supreme Court districts was a Section 2 violation, to enjoin Defendants from "administering, implementing, or conducting any future elections for the Louisiana Supreme Court," and to order the implementation of a new method of elections complying with Section 2 of the Voting Rights Act, 52 U.S.C. § 10301 and the U.S. Constitution. ROA.57.

[1] While the Secretary of State is likely to be aligned with the State of Louisiana in this appeal, the latter has recently been granted an extension of time of its opening brief. Therefore, the Secretary of State reserves the right to adopt by reference the opening brief that will be later filed on behalf of the State of Louisiana pursuant to Fed. R. App. 28(i).

[2] Since this litigation was initiated, the term of service of R. Kyle Ardoin as Louisiana's Secretary of State has ended, and Nancy Landry was subsequently elected and became Louisiana's Secretary of State. She is therefore substituted herein in place of R. Kyle Ardoin in her official capacity. *See* Fed. R. Civ. P. 25(d).

The State Defendants each filed motions to dismiss the *Complaint* pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) arguing, *inter alia*, that this action should be dismissed for lack of jurisdiction based upon the *Chisom* Consent Decree issued by the Eastern District of Louisiana on August 21, 1992. ROA.243 and ROA.288. Plaintiffs opposed the State Defendants' *Motions to Dismiss*. ROA.317 and ROA.340. Both motions were later denied by the district court on June 26, 2020. ROA.406.

The State Defendants thereafter filed a *Motion for Interlocutory Appeal*, ROA.505, pursuant to 28 U.S.C. § 1292(b) concerning the district court's denial of their *Motions to Dismiss*. The district court certified the interlocutory appeal but denied State Defendants' request for stay of the proceedings during the pendency of the interlocutory appeal. ROA.580.

On appeal, this Court issued its ruling in *Allen v. State of Louisiana*, No. 20-30734 (5th Cir. 2022) on September 17, 2021, affirming the denial of the State Defendants' *Motions to Dismiss* upon determining the *Chisom* decree did not prevent the district court from having jurisdiction to hear this matter.

Having determined it worthwhile to discuss a potential settlement of this matter, on May 2, 2022, the parties jointly filed a consent motion to stay all Louisiana Supreme Court elections until the voting districts could be reapportioned. ROA.720. As stated within that motion,

> "Given that any agreement of the parties would require the Louisiana Legislature and the Eastern District of Louisiana to act, the Parties agreed that a stay of any upcoming Supreme Court elections was necessary and in the public interest." ROA.728.

On May 4, 2022, the district court granted the consent motion and issued an order staying all Louisiana Supreme Court elections ("Consent Stay Order"). ROA.735.

B. Motion to Intervene

Intervenors, John L. Weimer ("Weimer"), Greg Champagne, Mike Tregre, and Craig Webre, in their individual capacities ("Intervenor Voters"), and Weimer in his capacity as a candidate for Louisiana Supreme Court District Six ("Intervenor Candidate") (collectively, the "Intervenors") filed a *Motion to Intervene* in this matter on June 29, 2022, seeking a partial lift of the Consent Stay Order. ROA.753. The Intervenor Voters were all located in District Six, which had been scheduled for an election in November 2022, and in which Intervenor Candidate also wished to qualify to run for Supreme Court Justice. ROA.754; ROA.794. The Intervenors argued that because District Five, not District Six, was the target of the reapportionment efforts, District Six's election should be able to continue. ROA.755.

Intervenors thereafter filed an *Amended Motion to Intervene* on July 5, 2022, asking for a temporary restraining order and preliminary injunction to allow the November 2022 election to move forward. ROA.794. An *Answer, Counterclaim, and Cross-Claim* were filed along with the *Amended Motion to Intervene* as Exhibit 1. ROA.832. In the *Answer*, Intervenors prayed for an award of attorney's fees and

costs against Plaintiffs. ROA.843. Significantly, Intervenors included in their pleadings no prayer for attorney's fees in their *Counterclaim* or their *Cross-Claim*. ROA.847; ROA.848.

Plaintiffs filed a response opposing the intervention. ROA.896. The State Defendants also opposed the intervention in an opposition filed jointly on July 7, 2022. ROA.901. The State of Louisiana later filed July 8, 2022, a separate opposition opposing Intervenors' *Motion for Temporary Restraining Order*. ROA.949. The district court granted the *Amended Motion to Intervene* in part on July 11, 2022, allowing Intervenors to intervene in the litigation without addressing the temporary restraining order. ROA.1063.

On July 12, 2022, the State of Louisiana filed a *Motion to Clarify* seeking clarification of the procedure for the hearing then set on the *Motion for Temporary Restraining Order* for July 15, 2022. ROA.1082.

Then, on July 13, 2022, the district court granted the *Motion to Partially Lift Consent Stay Order* raised in the original *Motion to Intervene* and thereby vacating the Consent Stay Order which had stayed all Louisiana Supreme Court elections. ROA.1092. In doing so, the district court set forth its analysis, stating,

> "Having carefully considered the matter, the Court finds that, even if the Consent Stay Order were a preliminary injunction or consent decree (which the Court finds questionable but which both parties seem to agree it is), then modifying that order is appropriate." ROA.1099.

While the district court went on to modify the Consent Stay Order based upon its "authority to modify the terms … when faced with changed circumstances," it did so without making any finding that the State Defendants had violated the rights of Intervenors. ROA.1103. The *Motion for Temporary Restraining Order to Maintain the Status Quo was* denied as moot, and the July 15, 2022, hearing on that motion was cancelled as unnecessary. ROA.1105.

C. Intervenors' Motion for Attorney's Fees

On July 27, 2022, Intervenors filed a *Motion for Attorney's Fees* pursuant to Federal Rule of Civil Procedure 54 and 42 U.S.C. § 1988, requesting an award of attorney's fees totaling $41,845.00. ROA.1112. Intervenors did not request that the Plaintiffs also share in paying the award of attorney's fees but instead asked that their fees be assessed solely against the State Defendants. This was despite the fact the Plaintiffs had also requested and consented to the very same stay from which Intervenors sought relief in this matter and had similarly opposed their intervention. Further, Intervenors' "notice" had never specified that Intervenors would be seeking attorney's fees from the State Defendants in this matter.

On March 6, 2024, the district court issued its decision granting in part and denying in part Intervenors' *Motion for Attorney's Fees*. ROA.1442. The district court determined that the Intervenors were entitled to attorney's fees because they were prevailing parties under § 1988, that the State Defendants may be considered

state actors vis-à-vis the Consent Stay Order, and that the State Defendants were "on notice" of Intervenors' request for attorney's fees against them based on the prayer in their Answer. ROA.1450. The district court did, however, slightly reduce the amount of attorney's fees that Plaintiffs would be awarded. *Id*.

D. The State Defendants Appealed

On April 5, 2024, the State Defendants each filed a timely notice of appeal. ROA.1494; ROA.1496. Unopposed Level 1 extensions of time were thereafter sought by both State Defendants and were subsequently granted by the Fifth Circuit Clerk of Court, extending the deadline for their Opening Briefs to July 18, 2024.[3] Doc. 33; Doc. 34; Doc. 35; Doc. 36. The State of Louisiana later filed a motion seeking an additional extension of time, which this Court granted on July 12, 2024, thereby extending the deadline for filing its Opening Brief until August 17 (or August 19 due to the date falling on a Saturday.) Doc. 37; Doc. 38.

SUMMARY OF THE ARGUMENT

The district court improperly awarded attorney's fees to Intervenors in this proceeding. Intervenors should not have been considered prevailing parties under 42 U.S.C. § 1988 as the district court never awarded them the specific relief requested within their pleadings nor do they qualify as prevailing parties under the standard set forth by the Supreme Court in *Farrar v. Hobby,* 506 U.S. 103 (1992). Moreover,

[3] On July 18, 2024, the Secretary of State was granted a three-day extension to July 23, 2024.

the State Defendants were not "state actors" within the meaning of §1983 respective to the stay order from which Intervenors sought relief. Intervenors also did not provide sufficient notice that they were seeking an award of attorney's fees against the State Defendants. Finally, the district court erred by not finding that special circumstances existed in this case to render an award of attorney's fees unjust.

ARGUMENT

A. The district court erred in finding that Intervenors were a "prevailing party" within the meaning of 42 U.S.C. § 1988.

This Court reviews a district court's award of attorneys' fees for abuse of discretion. *Coffel v. Stryker Corp.*, 284 F.3d 625, 640 (5th Cir. 2002). The district court's factual findings related to the award are reviewed for clear error and its legal conclusions are reviewed *de novo*. *Dearmore v. City of Garland*, 519 F.3d 517, 520 (5th Cir. 2008). *De novo* review is therefore appropriate in determining whether a party is "a prevailing party for purposes of § 1988." *Jenevein v. Willing*, 605 F.3d 268, 270 (5th Cir. 2010).

Although the district court noted the correct legal standard set forth in *Farrar v. Hobby,* 506 U.S. 103 (1992), for determining whether Intervenors should be considered a prevailing party, it misapplied that standard to the facts in this case. According to *Farrar*, "a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the

defendant's behavior in a way that directly benefits the plaintiff." *Id*. 506 U.S at 111–12.

The District Six election had only been temporarily stayed until such time as reapportionment was complete, which meant that Intervenor Candidate would remain in his current office until such time as an election was held. Nothing in the Consent Stay Order required him to relinquish his seat early, nor did it prevent him from competing as a candidate in the next scheduled election. Meanwhile, the Intervenor Voters also were not prejudiced by the Consent Stay Order as they would have an opportunity to vote in the District Six election *when that election was held*, and they were not then without a member of the Supreme Court from their district. Thus, there was no basis for contending they were being denied the right to vote in an election that no one else had an opportunity to vote in because the election would be held at a future date nor were they being denied representation.

In the memorandum in support of their *Amended Motion to Intervene*, Intervenors did not assert that the parties violated their constitutional rights by seeking and/or obtaining the stay of Supreme Court elections; rather, they acknowledged the goal was to seek resolution of the instant litigation. ROA.825. They contended that, while such a resolution "may have been achievable … when the Consent Stay was entered … the constitutional rights of those affected by the stay have now become paramount." ROA.825. Again, the specific relief the

Intervenors sought was not a dissolution of the stay but instead a modification or limitation of the stay "with respect to the impending District Six election on November 8, 2022." ROA.825.

Contrary to the district court's characterization, there was no 'legal relationship' existing between Intervenors and the Secretary of State that was the subject of the intervention, nor was the Secretary of State's 'behavior' altered through their intervention in a way that may be said to have directly benefitted Intervenors. Once the Consent Stay Order went into effect, only the district court was clothed with the authority to modify or lift the stay. The district court ultimately vacated the stay order it had previously entered but did so based upon its "authority to modify the terms … when faced with changed circumstances"; yet, it did so without making any finding that the State Defendants had violated the rights of Intervenors. ROA.1103. Vacating the Consent Stay Order did not result in a material alteration of any legal relationship that existed between the Secretary of State and Intervenors, nor did it cause the Secretary of State to change its behavior in a way that would directly benefit Intervenors. The sole benefit was the dissolution of the stay order, which was distinctly within the district court's authority.

The district court also glossed over its analysis of the final element in *Farrar* (i.e., that the legal relationship between the parties alters the defendant's behavior in a way that benefits the Intervenor) by swiftly determining this was met simply

because "the stay that Defendants advocated for" was dissolved following the intervention so that "Intervenors no longer had a barrier to voting." ROA.1452. This statement is not conclusive though of whether the element was actually satisfied.

Notably, the district court did not find as an antecedent that there was any legal relationship existing between the State Defendants and the Intervenors that could be impacted through the intervention. The district court even notes that the State Defendants' actions were distinctly *in the past* inasmuch as they had previously "advocated for" the stay. Thus, the relief sought by Intervenors was not intended to modify any then-existing legal relationship between the parties or to modify the State Defendants' current behavior with respect to them. The action was brought solely to defeat the stay order that had been in place for nearly two months. Upon issuance of the Consent Stay Order, only the district court had the authority to modify or dissolve the stay. The "barrier to voting" complained of by Intervenors was the Consent Stay Order itself and had nothing to do with any specific behavior by State Defendants that could be impacted by proscriptive relief sought through the intervention.

This is perhaps most strikingly illustrated by the fact that the district court took no action at all upon the requested injunctive and declaratory relief or the § 1983 claims raised in Intervenors' *Cross-Claim*. Instead, the district court took the less contentious approach of granting the *Motion to Partially Lift Consent Stay Order*. By doing that, the district court awarded some relief to Intervenors by

dissolving the Consent Stay Order but foreclosed to the parties any opportunity of obtaining a decision on Intervenors' §1983 claims. Later, by way of artful analysis in considering the *Motion for Attorney's Fees*, the district court interpreted the *Motion to Partially Lift Consent Stay Order* as requesting "relief … provided for in § 1983." ROA.1451. On that basis, the district court determined that the State Defendants could now be subjected to attorney's fees under § 1988, even though Intervenors' actual §1983 claims were never considered and ruled upon in this matter. *Id*. Thus, in a roundabout fashion, the district court rebranded Intervenors' *Motion to Partially Lift Consent Stay Order* as raising a §1983 claim and then stretched the reasoning of the *Farrar* standard to award attorney's fees to Intervenors when none were warranted. The district court's erroneous legal conclusions ultimately finding that Intervenors were "prevailing parties" were clearly erroneous and are subject to reversal based upon this Court's review.

Moreover, this Court has previously held that prevailing party status should not be conferred where a party's success is based merely on a technicality. "[A] technical victory may be so insignificant ... as to be insufficient to support prevailing party status." *Jenevein v. Willing*, 605 F.3d 268, 271 (5th Cir. 2010), citing *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.,* 489 U.S. 782, 792, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989). "Where the plaintiff's success on a legal claim can be

characterized as **purely technical or *de minimis*,**" he is not a prevailing party. *Id.* (Emphasis added.)

In *Jenevein*, which concerned a censure by the Texas State Commission on Judicial Conduct, this Court determined that relief in the form of a "partial expungement of the commission's censure was *de minimis."* 605 F.3d at 271. Regardless of the partial expungement, six violations of judicial conduct remained on the judge's record. In *Roark & Hardee LP v. City of Austin,* 522 F.3d 533 (5th Cir.2008), this Court found that the district court had not abused its discretion in refusing to award fees to a bar owner challenging a city ordinance as Plaintiffs success was deemed *de minimis* "[c]onsidering the numerous other claims Plaintiffs lost and the fact that the City [could] still enforce the license revocation provision, as long as it provide[d] expeditious judicial review." *Id*., at 556. Meanwhile, in *Walker v. City of Mesquite*, 313 F.3d 246 (5th Cir. 2002), this Court awarded attorney's fees to homeowners challenging a remedial order requiring public housing projects that was deemed unconstitutional upon finding that they had "achieved exactly the outcome they desired" *Id*., at 250.

Here, Intervenors did not achieve exactly the outcome they desired. Though the Consent Stay Order was ultimately vacated, that was a technical win based on the district court's exercise of its inherent authority to modify its own orders. It was not pursuant to their request for declaratory and injunctive relief nor their *Cross-*

Claim specifically asserting a §1983 claim. Indeed, this was done without any legal finding at all establishing that the State Defendants had indeed violated the rights of Intervenors. While Intervenors may be said to have obtained technical or *de minimis* relief from the district court by removing the barrier of the Consent Stay Order, they cannot reasonably be said to have *prevailed* on their specific claims raised as to the State Defendants.

B. The district court erred in holding the State Defendants were "state actors" within the meaning of §1983.

As noted in the district court's ruling, "Section 1983 requires action 'under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or District of Columbia.'" ROA.1452. In reaching the erroneous legal conclusion that the State Defendants should be considered as having acted under color of state law because they "did not simply comply with a court order; they advocated for the stay and argued against the intervention and the lifting of the stay," the district court failed to recognize that the sole obstacle to Intervenors' requested relief was the Consent Stay Order previously entered by the district court, not the specific actions of the State Defendants. *Id*. Also, the district court failed to recall that the Secretary of State had previously asserted **no position** on Intervenors' motions, a fact the district court had previously acknowledged in its ruling vacating the stay. See ROA.1093.

The district court's basis for determining the State Defendants to be 'state actors' is that, while acting in their official capacities, they had previously 'advocated for' a stay of the instant litigation (including any purportedly unconstitutional elections due to the districting issues raised in the lawsuit) so that the parties could attempt to resolve the matter amicably. This is a dangerous proposition that, if allowed to stand, would have a chilling effect on parties' (particularly state parties) ability to resolve litigation amicably, which often entails a stay of litigation efforts.

Furthermore, while the district court noted the appropriate standard set forth in *West v. Atkins*, 487 U.S. 42, 48 (1988), requiring both a violation of a right protected by the Constitution or federal laws and deprivation by a person under color of state law, it is important to note that the district court, in granting relief on the *Motion to Partially Lift Consent Stay Order*, never found that a violation of Intervenors' constitutional rights had occurred. Instead, the district court ultimately determined to lift the stay based upon equitable considerations and its authority to modify its orders. That decision, made through the inherent power of the district court, should not be allowed to stand now as a basis for holding the State Defendants accountable for purportedly violating the Intervenors' rights. This is especially true given that Intervenors made a specific §1983 claim in their Cross-Claim, which has never been adjudicated.

Similarly, the district court's reasoning in determining that the State Defendants acted under color of state law is also fallacious. By the time Intervenors sought to intervene in this matter in late June 2022, there was no present state action to be challenged. Intervenors' real grievance was the action taken by the district court in issuing the Consent Stay Order, which was then in effect. While that was the sole obstacle to Intervenors' ability to exercise their rights concerning the upcoming election for District 6, an order of a federal court is clearly not state action that can be subject to an action brought under Section 1983. That is likely why the district court, rather than take up that difficult issue, chose instead to grant the *Motion to Partially Lift Consent Stay Order*. Based upon these facts, it was error for the district court to reach its legal conclusion that the Secretary of State was a state actor who should become liable for the order being lifted.

C. The district court erred in holding that Intervenors provided the requisite "notice" to the State Defendants.

"[T]o be entitled to attorneys' fees, a party must (1) request attorneys' fees in its pleadings and (2) file a timely motion for attorneys' fees under Rule 54(d)(2) within fourteen days after the entry of final judgment." *Romaguera v. Gegenheimer*, 162 F.3d 893, 895 (5th Cir. 1998), decision clarified on denial of reh'g, 169 F.3d 223 (5th Cir. 1999), *citing United Industries, Inc. v. Simon–Hartley, Ltd.,* 91 F.3d 762, 766 (5th Cir.1996).

While Intervenors did file a timely motion for attorney's fees under Rule 54(d)(2), they did not set forth a request for attorney's fees directed against the Secretary of State within their pleadings. The district court improperly determined that "notice" of their attorney's fees claim was sufficient because Intervenors requested attorney's fees in their prayer included in their *Answer* to Plaintiffs' *Complaint* which was attached to their *Amened Motion to Intervene*. ROA.1453. This was a striking departure from this Circuit's prior treatment of attorney's fees as special damages that must be specifically set forth. *See United Indus.*, 91 F.3d at 764 ("While this Circuit has not specifically held that attorneys' fees are items of special damage that must be specifically pleaded, we have intimated that this is so") (citing *Crosby v. Old Republic Ins. Co.*, 978 F.2d 210, 211 n.1 (5th Cir. 1992).

Notably, the only reference to attorney's fees at all in Intervenors' pleadings appears within their prayer for relief contained in Paragraph 72 of their Answer:

> Wherefore, the Intervenors pray that this Answer be deemed good and sufficient, that after all proceedings are had the **Plaintiff's claims be dismissed with prejudice at their cost**; and for all general and equitable relief that justice requires, including but not limited to **an award of Intervenors' attorneys' fees** and reasonable costs. ROA.843.

Undeniably, the *Answer* applied solely to the *Complaint* filed by Plaintiffs in this matter.

While Intervenors also asserted a *Cross-Claim* against the Secretary of State alleging a violation of 42 U.S.C. § 1983 and seeking prospective relief "to restrain

unconstitutional conduct" because the Secretary of State had consented to the stay order, none of the few paragraphs in their *Cross-Claim* indicate that Intervenors were also seeking an award of attorney's fees against the Secretary of State. ROA.843. Indeed, though Intervenors were mindful enough to adopt and incorporate paragraphs 73 through 88 of their pleading into their *Cross-Claim*, they did not bother to adopt Paragraph 72 – their *only* reference to an award of attorney's fees found in any of their pleadings. ROA.846. Looking past Intervenors' startling oversight, the district court determined that "[a]lthough Intervenors did not pray for attorney's fees in the claim against Defendants, Defendants knew about the prayer for attorney's fees in the *Answer* and were on notice that fees would be sought." ROA.1450. Such notice, however, was clearly insufficient.

This Court has previously recognized the importance of putting a party on notice that attorney's fees are sought, stating:

> "As a general rule … we find nothing inappropriate with requiring a party to put its adversaries on notice that attorneys' fees are at issue in a timely fashion or waive that claim. **This is accomplished by specifically pleading for attorneys' fees in the complaint**." *United Indus.*, 91 F.3d at 765 (Emphasis added.)

Some exceptions have nonetheless been observed in this Circuit "such as when the issue is tried by consent or included in a pretrial order." *Id*. It has further been noted that such lapses in pleading may later be cured by amendment. *See Al-Saud v. Youtoo Media, L.P.*, 754 F. App'x 246, 255-256 (5th Cir. 2018) (unpublished). A fee-related

pleading defect may also be cured upon finding that "other filings giving notice … when considered in combination with language from the complaint" constitute sufficient notice. *Id*., 256. In *Al-Saud*, the "other filings" deemed to provide such notice were a motion for summary judgment and a joint pretrial order asserting entitlement to fees. *Id*.

In the present case, Intervenors never specifically pleaded a claim for attorney's fees against the Secretary of State – not within their *Motion to Intervene*, not in their *Amended Motion to Intervene*, nor within their *Cross-Claim*. Despite having ample opportunity, this fee-related pleading defect was never cured by any subsequent amendment. The issue of Intervenors' entitlement to attorney's fees also was not tried by consent nor was it ever included in a pretrial order. Indeed, none of the exceptions previously recognized by this Court were present in this case. As noted, the only mention of attorney's fees was in Paragraph 72 of their *Answer* to Plaintiffs' *Complaint*. ROA.843.

The district court stated that this Court "has acknowledged that there are times when the court may consider a request for fees without a specific pleading, particularly when the circumstances are such that the opposing party is on notice that attorney's fees would be sought,"[4] citing *United Indus.*, 91 F.3d at 765, n.4 (citing *Engel v. Teleprompter Corp.*, 732 F.2d 1238 (5th Cir. 1984)). Yet, the district court

[4] ROA.1453.

failed to recognize that the sort of "notice" at issue in *Engel* concerned an "explicit contract provision that the prevailing party would be entitled to fees in the event of litigation." *United Indus.*, 91 F.3d at 765, n.4. Unlike the situation in *Engel*, there was no explicit contractual provision entitling Intervenors to an award of attorney's fees against the Secretary of State.

The sole basis for Intervenors to recover attorney's fees against the Secretary of State was their *Cross-Claim* brought pursuant to 42 U.S.C. § 1983; however, their Cross-Claim never set forth any claim for attorney's fees at all. By not specifically pleading a claim for attorney's fees in their Cross-Claim (essentially, the only iteration of their true complaint directed against the Secretary of State), they waived any claim for attorney's fees against the Secretary of State. *See United Indus.*, 91 F.3d at 765. Short of mischaracterizing *United Indus.*, the district court cited zero authority to support the proposition that notice of attorney's fees sought in a pleading to one party operates as sufficient notice of a claim for attorney's fees to a different party, especially when one considers that the first party is a plaintiff and the second party is a defendant. Such a manufacture of reason goes well beyond the laudable goals of notice pleading.

In further support for its decision, the district court also cited the U.S. Supreme Court's decision in *Lefemine v. Wideman*, 568 U.S. 1 (2012) noting that prevailing parties should ordinarily recover an attorney's fee unless special circumstances

would render such an award unjust'" *Id*., 568 U.S. at 4 (2012), quoting *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). That statement is taken out of context, however, as the Supreme Court was not addressing in *Lefemine* the issue of what constitutes sufficient notice. There, the issue was focused upon whether the plaintiff should be considered a prevailing party under § 1988. Noting this language from *Lefemine* shows that the district court may have given undue consideration to that language when determining simply whether notice of the attorney's fees request was sufficient in this particular case.

For the reasons stated, notice of Intervenors' request for attorney's fees against the Secretary of State was insufficient under controlling precedent. The district court improperly deemed express notice of a fee claim against the Plaintiffs as sufficient to support a fee claim against the State Defendants; however, the district court appears to have based this upon a misreading of *United Indus.* and cited no other legal authority for that proposition.

D. The district court erred by not finding that special circumstances existed in this case to render an award of attorney's fees unjust.

"A prevailing party "should ordinarily recover an attorney's fee **unless special circumstances would render such an award unjust**." *Lefemine v. Wideman*, 568 U.S. at 5, 133 S. Ct. at 11, citing *Hensley v. Eckerhart,* 461 U.S. at 429, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). (Emphasis added.) The district court failed to find that there were special circumstances in this case that would support

the denial of fees. ROA.1454. That was error, however, as there were special circumstances in this case which rendered an award of attorney's fees assessed against the State Defendants to be singularly unjust.

First, there is the fact that the true aim of the Intervenors' claims was to obtain relief from the Consent Stay Order. The intervention was not filed in an attempt to modify any legal relationship existing between themselves and the State Defendants, nor was it to impact the State Defendants' behavior for their ultimate benefit. Once the Consent Stay Order was rendered, the only way to undue it was by resorting to the district court for that specific relief. It was not dependent upon any legal relationship with the State Defendants nor their behavior respective to Intervenors. The intervention was not done in order for Intervenors to align with either Plaintiff or the State Defendants; it was done with the purpose of seeking relief from the Consent Stay Order. This is a special circumstance that makes this action different from most any other claim for attorney's fees brought under § 1988.

A close kin to the above is the fact that only the district court had the authority to undue the Consent Stay Order and it determined to do so because of "changed circumstances." ROA.1103. While Intervenors also sought declaratory and injunctive relief, they never actually succeeded on their claims, nor were the State Defendants required to take any particular action following the district court's granting of the *Motion to Partially Lift Consent Stay Order*. The district court never

awarded Intervenors any relief on their claims asserted and especially it did not do so on the Cross-Claims asserting a § 1983 action.

It is also important to note the State Defendants did not ask to be sued by Plaintiffs in this matter. Far from it, the State Defendants defended this proceeding vigorously by seeking its dismissal, then requesting certification of the denial of their motions to dismiss and appealing that ruling to this Court. Upon this Court's decision affirming the district court's denial of their motions to dismiss (ROA.406), they had little choice then but to accept that Plaintiffs would likely be granted relief on their claims. The decision to request a stay of this matter and all Supreme Court elections was to prevent presumptively unconstitutional elections from going forward so that the parties could reach a resolution of Plaintiffs' claims. Any impact upon the rights of Intervenors was merely incidental.

Holding the Secretary of State accountable for Intervenors' attorney's fees is especially unjust when one considers the origination of the Consent Stay Order, the Secretary of State's limited role respecting Intervenors' motions, and the district court's reasoning in later deciding to modify the Consent Stay Order.

The district court's July 13, 2022 Ruling and Order (ROA.1092) show how the decision to stay this case initially arose out of discussions between itself and the parties:

> "[T]his Court's intent is found in the manner in which the Consent Stay Order was adopted. At a status conference for the purpose of discussing

> settlement the Court announced it would "stay and administratively close this case to allow the parties [ ] time to attempt to resolve the matter." (Doc. 97 at 1.) **The Court then "reserve[d] entering the stay order at [that] time to allow the parties to file a Motion to Stay the upcoming Louisiana Supreme Court elections," with appropriate authority.** (*Id.*) Again, the Court signed this order without conducting a hearing, listening to testimony, or issuing formal findings of fact and conclusions of law—precisely because it believed that the Court could revisit and re-assess the appropriateness of the order should a third party raise an objection." ROA.1100. (Emphasis added.)

Not only was the stay order borne out of discussions between the parties and the district court with an aim toward resolving the case, any subsequent modification thereof was deemed part and parcel of the district court's inherent authority.

> "Further, the Court's intent must be seen in the context of the countless other cases in which it has entered stay orders to allow parties an opportunity to resolve cases without resorting to trial. In the Court's view, **this Consent Stay Order was like any other interlocutory order entered before a final judgment that could be "revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities**." *See* Fed. R. Civ. P. 54(b)." ROA.1100. (Emphasis added.)

Finally, while stating in its ruling that the State Defendants were the "driving force behind the opposition to lifting the stay," (ROA.1454), the district court failed to recognize that the Secretary of State was only party to the brief in opposition filed on July 7, 2022. The district court also failed to recall the Secretary of State's non-position respecting Intervenors' motions, which was duly noted in its decision to vacate the stay:

> These motions are opposed in part by the other parties in this case. Specifically, Defendant Secretary of State R. Kyle Ardoin expressed at

> a status conference that he had **no position on these motions** and that he would conduct the elections as directed by the Court and Louisiana law. ROA.1093. (Emphasis added.)

Inasmuch as the district court appears to justify the award of attorney's fees to Intervenors based upon the resistance to their relief by the State Defendants, it does not hold that the district court should use that as a basis for assessing fees against the Secretary of State.

CONCLUSION

As explained herein, the district court improperly awarded attorney's fees to Intervenors in this proceeding. Intervenors were not prevailing parties under 42 U.S.C. § 1988, they were not "state actors" within the meaning of §1983 respective to the stay order from which Intervenors sought relief, nor did Intervenors a provide sufficient notice that they were seeking an award of attorney's fees against the State Defendants. The district court also erred by not finding that special circumstances existed in this case to render an award of attorney's fees unjust. As Intervenors were not entitled to the benefit of any fee-shifting statute, the district court should have applied the American Rule, requiring Intervenors to pay their own fees in this matter. Accordingly, the Secretary of State asks that the district court's decision granting Intervenors attorney's fees be reversed.

Dated: July 19, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On July 19, 2024, this brief was served via the Court's CM/ECF filing system in compliance with Rule 25(b) and (c) of the Federal Rules of Appellate Procedure, on all registered counsel of record and was transmitted to the Clerk of Court via the Court's CM/ECF Document Filing System.

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CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6317 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word (the same program used to calculate the word count).

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