No. 17-1389

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DAVID BRAT; BARBARA COMSTOCK; ROBERT WITTMAN, Congressman; BOB GOODLATTE, Congressman; RANDY FORBES, Congressman; MORGAN GRIFFITH, Congressman; SCOTT RIGELL, Congressman; ROBERT HURT, Congressman,

Intervenors/Defendants - Appellants,

ERIC CANTOR, Congressman; FRANK R. WOLF, Congressman

Intervenors/Defendants

and

VIRGINIA STATE BOARD OF ELECTIONS; KENNETH CUCCINELLI, II

Defendants

v.

GLORIA PERSONHUBALLAH, an individual; JAMES FARKAS, an individual

Plaintiffs – Appellees

JAMES B. ALCORN; CLARA BELLE WHEELER; SINGLETON B. MCALLISTER

Defendants - Appellees

and

DAWN CURRY PAGE, an individual

Plaintiff

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA (NO. 3:13-cv-00678-REP-LO-AD)

CORRECTED BRIEF FOR APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Local Rule 26.1, Appellants Robert J. Wittman, Robert Goodlatte, Randy J. Forbes, H. Morgan Griffith, Scott Rigell, Robert Hurt, David Brat, and Barbara Comstock make the following disclosures: All Appellants are individuals. No Appellant is a publicly held corporation or other publicly held entity. No Publicly held corporation or other publicly held entity has a direct financial interest in the outcome of this litigation. No Appellant is a trade association. This case does not arise out of a bankruptcy proceeding.

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellees filed this lawsuit challenging the congressional districting plan that the Virginia General Assembly enacted in 2012. Appellants are or were elected members of the United States House of Representatives who intervened in the district court to defend the districts where they were seeking reelection ("Intervenor-Defendants"). The Virginia attorney general initially defended the suit on behalf of the state, but after a new attorney general was elected he abandoned the defense on appeal, leaving Intervenor-Defendants as the sole remaining defendants. After plaintiffs prevailed in their challenge, on March 3, 2017, the district court issued a final Memorandum Opinion and Order awarding attorney fees against both the state and Intervenor-Defendants (JA178). The district court had subject-matter jurisdiction pursuant to 28 U.S.C. § 2284. Intervenor-Defendants noticed an appeal of the fee award on March 24, 2017. (JA190). This Court has appellate jurisdiction under 28 U.S.C. § 1291. *See Consumers Union of U.S., Inc. v. Virginia State Bar*, 688 F.2d 218, 220 & n.1 (4th Cir. 1982).

STATEMENT OF THE ISSUE

In *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989), the Supreme Court announced a categorical rule that when parties intervene as defendants in a civil-rights case but have not themselves violated any civil-rights law, they are subject to an award of attorney fees "only where the

intervenors' action was frivolous, unreasonable, or without foundation." *Id*. at 761. The question in this appeal is whether the district court erred by departing from that categorical rule and imposing fee liability on Intervenor-Defendants, even though they concededly did not violate any civil-rights law and their intervention concededly was not frivolous, unreasonable, or without foundation.

STATEMENT OF THE CASE

This is an appeal of an order awarding attorney fees and costs against Intervenor-Defendants (JA178), a group of elected members of the U.S. House of Representatives who intervened as defendants in the case below and are the Appellants in the present appeal.

A. The Litigation on the Merits

This case began as a challenge to the U.S. congressional redistricting map that was enacted by the Virginia legislature in 2012 ("the 2012 Plan"). *See Page v. Virginia State Bd. of Elections*, No. 3:13-cv-678, 2015 WL 3604029 (E.D. Va. June 5, 2015). The 2012 Plan was designed with "the overarching goal of compliance with the Voting Rights Act of 1965," including the preservation of minority voting rights. *Id*. at *1. The United States Department of Justice ("DOJ") granted preclearance of the 2012 Plan under Section 5 of the Voting Rights Act after determining that it "did not effect any retrogression in the ability of minorities to elect their candidates of choice." *Id*.

Nonetheless, in 2013, the plaintiffs (the Appellees in the present appeal) brought suit challenging the 2012 Plan under the Equal Protection Clause. They claimed that even though the redistricting plan complied with Section 5 and preserved minority voting strength, it nonetheless amounted to an unconstitutional "racial gerrymander" because in relying on racial considerations to comply with Section 5, it did not satisfy strict scrutiny. *Page*, 2015 WL 3604029 at *5. The lawsuit was organized, financed, and filed "at the instance of the National Democratic Redistricting Trust," a well-funded national political organization that recruited a group of individual voters to serve as plaintiffs. *See Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 571 (E.D. Va. 2016) (Payne, J., concurring in part and dissenting in part).

The case was initially defended by Virginia's elected Republican attorney general on behalf of the state. A group of elected Republican members of the U.S. House of Representatives, who are Appellants in the present appeal, intervened as defendants to defend the congressional districts were they were seeking reelection. In granting their motion for intervention, the district court determined that they had "satisfied the requirements of Fed. R. Civ. P. 24 and the principles governing standing." *See Personhuballah v. Alcorn*, No. 13-cv-678 (E.D. Va.), Dkt. Nos. 165, 26.

After a trial, the three-judge district court ruled in favor of the plaintiffs by a vote of 2-1. Over a dissent by Judge Payne, the court agreed with the plaintiffs that in attempting to preserve minority voting strength in order to comply with Section 5 of the Voting Rights Act, the 2012 Plan was improperly motivated by racial considerations and was thus unconstitutional. *See Page v. Virginia State Bd. of Elections*, 58 F. Supp. 3d 533, 554 (E.D. Va. 2014).

In the meantime, a new Democratic attorney general was elected who had been represented during the election by Marc Elias, the plaintiffs' counsel. Under his counsel, the Virginia state defendants declined to appeal. (A new Democratic governor had also been elected, who was also a client of Mr. Elias.) Thus, "with the change of parties in the offices of Governor and Attorney-General," the Virginia state defendants stopped defending the case and "changed sides" to support the plaintiffs. *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 571 n.17 (E.D. Va. 2016) (Payne, J., concurring in part and dissenting in part).

With the Virginia state defendants taking the side of the plaintiffs, the Intervenor-Defendants were left alone to pursue an appeal to defend the districts where they held office, and where they were spending substantial time and effort in pursuit of reelection. In that appeal, the Supreme Court vacated the district court's judgment and remanded the case for further consideration in light of *Alabama*

Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015). *See Cantor v. Personhuballah*, 135 S. Ct. 1699 (2015).

On remand, the district court once again determined by a 2-1 vote that the 2012 Plan was unconstitutional because racial considerations improperly predominated in the legislature's drawing of the redistricting map. *See Page*, 2015 WL 3604029 at *1. To support its finding of racial predominance, the court emphasized that the "primary priority" of the Virginia legislature was "avoiding retrogression [in minority voting power] in the Third Congressional District" in order to comply with Section 5. *Id*. at *8. Although the constitutionally permissible goals of "partisan politic[s]" and "a desire to protect incumbents" also "inarguably" "played a role in drawing" the 2012 Plan, the court nonetheless held that the Plan was subject to, and failed, strict scrutiny under the Equal Protection Clause because the legislature correctly noted that compliance with Section 5 of was "mandatory." *Id*. at *13-14. Once again, Judge Payne dissented. He pointed out that by treating "compliance with Section 5" as "a de facto trigger for strict scrutiny," the majority put the legislature in a "trap[] between the competing hazards of liability" under the Equal Protection Clause and the Voting Rights Act. *Id*. at *26.

B. The Remedial Litigation and Dismissal of the Appeal

The Intervenor-Defendants again filed a direct appeal to the Supreme Court, and also filed a motion to stay remedial proceedings pending the outcome of the appeal. The three-judge district court rejected the stay request by a vote of 2-1, holding that "the balance of equities favors our immediate imposition of a remedial redistricting plan" without waiting for the appeal to be resolved. *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 556 (E.D. Va. 2016). The court thus ordered the rapid creation of a new districting plan to be implemented in time for the 2016 election cycle. *Id*.

In dissent, Judge Payne explained that the denial of the stay created an impossible situation for the Intervenor-Defendants because it meant that "the landscape for the 2016 election [would] change immediately and irreparably." *Id*. at 569. As a result, the Intervenor-Defendants were left with no choice but to try to run for Congress in two districts at once: They were forced "to run in the districts as fixed by the Enacted Plan so that, if the case is reversed on the merits, they will be positioned to be elected in the district[s] specified by the General Assembly." *Id*. But at the same time, they also were forced "to run in the districts under the remedial plan so that, if the merits opinion is affirmed, they will be positioned to be elected" under the alternative districts created in the remedial plan. *Id*.

The resulting political difficulties proved impossible for the Intervenor-Defendants to surmount. When the Supreme Court heard oral argument in March 2016, counsel for Intervenor-Defendants was asked whether, if the appeal were to succeed, the intervening congressman whose district had been eviscerated by the new remedial map "would abandon his election effort in [the new] Congressional District 2 and run in his old district, namely, Congressional District 4." *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016). Counsel answered in the affirmative. Counsel subsequently sent a letter to the Court stating that the affected congressman had, unbeknownst to counsel, made certain non-public commitments to constituents and supporters to continue to seek election in the new District 2 regardless of whether the old plan were reinstated. Based on that information, the Supreme Court determined that the Court "lack[ed] jurisdiction," and accordingly "dismiss[ed] the appeal." *Id*.

C. The Decision Below

Having thus prevailed on the merits in the district court without any appellate review, the plaintiffs filed a motion seeking attorney fees against both the state defendants and the Intervenor-Defendants under 42 U.S.C. § 1988. The Intervenor-Defendants opposed the motion, relying on the Supreme Court's decision in *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989). In particular, the Intervenor-Defendants pointed to the "categorical" rule of

Zipes that intervenors who "have not violated anyone's civil rights" cannot be held liable for attorney fees unless their intervention was "frivolous, unreasonable, or without foundation." *Id*. at 761.[1] Because nobody argued that the intervenors had violated anyone's civil rights, or that their intervention was frivolous, unreasonable, or without foundation, they contended that they were immune from fee liability under *Zipes*.

The district court rejected Intervenor-Defendants' argument and held them personally liable for fees and costs in the amount of $479,887.67. (JA178). The court refused to apply the "categorical" rule of *Zipes* barring fees against innocent good-faith intervenors, and instead applied a four-factor balancing test based on its conclusion that "the *Zipes* majority emphasized four key factors," which the court believed required a different result in the present case. (JA142). In addition to the fee award against Intervenor-Defendants, the court also held the state liable for fees and costs in the amount of $866,684.07. (JA178). The state apparently does not contest its liability for that amount.

Judge Payne dissented from the fee order. In his view, the "categorical" rule of *Zipes* "foreclose[d]" any award of fees against the Intervenor-Defendants

[1] While *Zipes* involved the fee-shifting statute of Title VII, the Court explained that the "similar language" of the fee-shifting statutes "is a strong indication that they are to be interpreted alike," and accordingly applied its prior case law under § 1988. *See Zipes*, 491 U.S. at 758 n.2.

"because they have not violated anyone's civil rights." (JA179). He criticized the majority for "misapprehend[ing] the holding in *Zipes* and misconstru[ing] the precedent from other jurisdictions on which the award against the [intervenors] is based." (JA180).

SUMMARY OF ARGUMENT

I. A. In *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989), the Supreme Court adopted what it called a "categorical" rule that intervenors who have not violated anyone's civil rights cannot be held liable for attorney fees unless their intervention was "frivolous, unreasonable, or without foundation." Under that clear categorical rule, the district court's decision must be reserved because it is undisputed that Intervenor-Defendants here did not violate anyone's civil rights, and that their intervention was not "frivolous, unreasonable, or without foundation."

B. The district court erred by refusing to apply the categorical rule of *Zipes* and instead adopting a convoluted multi-factor balancing test of its own invention. While the court claimed to find support for its approach in various post-*Zipes* decisions of other courts, all of the cited decisions are readily distinguishable because all of them involved fee liability against intervenor-defendants that were legally responsible for the underlying civil-rights violations. In every case, the state was the real party in interest: the state (through its agents) had been found liable

for violating the plaintiffs' civil rights, and thus the state (through its agents) could be held liable for attorney fees. That is entirely different from the present case, where Intervenor-Defendants intervened purely in their private capacity, and were undisputedly free from any merits liability.

C. While the district court raised a flurry of distinctions in an effort to differentiate this case from *Zipes*, the asserted distinctions are by turns factually confused and legally irrelevant. In every possible dimension that is conceivably relevant as a matter of law or logic, this case is entirely undistinguishable from *Zipes*. As Judge Payne's dissent explained, the district court was thus bound to abide by the "categorical" rule that good-faith intervenors who did not violate anyone's civil rights cannot be subject to fee liability. (JA179).

II. If the decision below is upheld, it will do enormous damage to the adversarial process by deterring the participation of good-faith intervenors in a wide variety of civil-rights cases. It will deter minority officeholders and civil-rights groups from intervening to defend majority-minority districts, and it will deter minority students and business owners from intervening to defend affirmative-action programs and minority-owned business promotions. It will also deter individuals and non-profit organizations from intervening as defendants in Section 1983 cases challenging campaign-finance regulations under the First Amendment, or firearms regulations under the Second Amendment. In all of these

cases and more, the logic of the decision below threatens good-faith intervenors with enormous fee liability whenever they intervene to protect their perfectly legitimate interests. This will discourage parties from joining litigation where their interests are directly at stake, thus depriving courts of crucial arguments and information that bear directly on the cases before them. Even worse, it will encourage collusive litigation between plaintiffs and sympathetic government officials, who will be empowered to abandon their defense of laws or policies that they disfavor, secure in the knowledge that no third party will be willing to risk the threat of fee liability to intervene as a defendant. That is exactly what the Supreme Court sought to prevent in *Zipes*.

III. Upholding the decision below would also create a square circuit split that would virtually guarantee Supreme Court review. Multiple circuits have faithfully applied the categorical rule of *Zipes* on facts that are materially indistinguishable from the present case. No circuit has adopted anything like the four-factor balancing test relied on by the court below to impose fee liability on innocent good-faith intervenors. This Court should not become the first to affirm a fee award against such intervenors in direct conflict with the Supreme Court's decision in *Zipes* and multiple other circuits.

STANDARD OF REVIEW

Whether the district court applied the proper standard for awarding attorney fees is a pure question of law. "This court reviews pure questions of law *de novo*." *United States v. Han*, 74 F.3d 537, 540 (4th Cir. 1996).

ARGUMENT

In *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989), the Supreme Court held that intervenors who have not violated anyone's civil rights cannot be held liable for attorney fees unless their intervention was "frivolous, unreasonable, or without foundation." Here, it is undisputed that Intervenor-Defendants did not violate anyone's civil rights, and that their intervention was not "frivolous, unreasonable, or without foundation." That should have been enough to decide this case. But instead, the court below disregarded the rule of *Zipes* and imposed a half-million-dollar fee award against Intervenor-Defendants based on a cavalcade of fine-grained distinctions that are as logically flimsy as they are legally irrelevant. As recognized by the dissenting member of the three-judge district court, the majority's decision not only "misapprehends the holding in *Zipes* and misconstrues the precedent" on which it relies, but also attempts "to overrule the binding precedent of the Supreme Court" based on its own policy preferences. (JA180, 188).

If the decision below is allowed to stand, it will create a massive distortion of the adversary process by threatening to impose ruinous fee liability on innocent good-faith intervenors in a wide variety of civil-rights cases. To take but a few examples, minority congressmen routinely intervene in racial-gerrymandering challenges to defend the constitutionality of minority-majority districts; civil-rights groups regularly intervene to defend controversial laws such as Section 5 of the Voting Rights Act; minority students commonly intervene to defend affirmative-action programs against Equal Protection challenges; and public-interest groups often intervene to defend campaign-finance laws against First Amendment attacks under Section 1983. The decision below declares open season on all of these good-faith intervenors and more. It also encourages the spread of collusive litigation between activist plaintiffs and sympathetic government officials, who will be emboldened to cooperate with plaintiffs seeking to strike down disfavored laws and policies, secure in the knowledge that few if any outside parties will be willing to risk the price of intervention.

Unsurprisingly, every other circuit to consider the issue has recognized that the Supreme Court's decision in *Zipes* flatly prohibits the imposition of attorney fees against innocent good-faith intervenors like the ones in this case. While the majority cited a handful of post-*Zipes* cases that it claimed provided some support for its decision, every single case involved intervenors who were not remotely

"innocent" like the ones here, but were instead official state actors who were *directly responsible* for the civil-rights violations at issue. Accordingly, upholding the decision below will virtually guarantee Supreme Court review by defying the Supreme Court's binding precedent and creating a square circuit split.

I. THE DECISION BELOW CONTRADICTS BINDING SUPREME COURT PRECEDENT

A. *Zipes* Established A "Categorical" Rule That Innocent Good-Faith Intervenors Cannot Be Liable For Attorney Fees

In *Zipes*, the Supreme Court established what it called a "categorical" rule that when parties intervene as defendants to protect their interests in a civil-rights case, but have not themselves "violat[ed] anyone's civil rights," they presumptively cannot be held liable for attorney fees. 491 U.S. at 760-61. Under that "categorical" rule, fees can be assessed against such innocent intervenors "*only* where the intervenors' action was frivolous, unreasonable, or without foundation." *Id*. at 761 (emphasis added). Absent that type of bad-faith conduct, "§ 1988 fees [a]re not recoverable." *Id*. at 763 (citation omitted). The Court reiterated the point several times, emphasizing the "crucial connection between liability for violation of federal law and liability for attorney's fees under federal fee-shifting statutes." *Id.* Accordingly, "[l]iability on the merits and responsibility for fees go hand in hand." *Id*. "[F]ee and merits liability run together." *Id.* "Section 1988 simply does not create fee liability where merits liability is nonexistent." *Id.*

The Court acknowledged that, under its categorical rule barring fee awards against good-faith intervenors that have not violated anyone's civil rights, plaintiffs sometimes "must litigate without prospect of fee compensation." *Id*. at 762. *Zipes* itself illustrates this point, as the Court's decision there left the plaintiffs with significant uncompensated legal fees. The plaintiffs were female airline employees who sued for sex discrimination, claiming among other things that the airline's "seniority" system unfairly benefited male employees at the expense of female employees. *Id*. at 756-57. At an early stage of the litigation, the airline agreed to settle the case by abandoning its discriminatory seniority program. *Id.* That settlement would have ended the litigation, but the employees' union intervened as a defendant in order "to protect the bargained-for seniority rights" that the plaintiffs were challenging. *Id*. at 762. As a result, the plaintiffs were forced to undergo three full rounds of litigation before ultimately prevailing against the union intervenor—they had to litigate not only in the district court and the court of appeals, but also in the Supreme Court. *Id*. at 757. Needless to say, this extraordinary amount of extra litigation was quite expensive for the plaintiffs, who otherwise would have reached a relatively quick and cheap settlement with the original defendant. But nonetheless, the Court held that the intervenors could not be subject to a fee award because they were entirely "blameless" and "innocent," because they had not violated any civil-rights law. *Id.* at 763.

The Court recognized that "the inability generally to recover fees against intervenors [might] create some marginal disincentive against [civil rights] suits" by requiring plaintiffs to bear some uncompensated litigation costs. *Id*. at 762. But nonetheless, the Court explained that the rule barring fee awards against innocent good-faith intervenors is still justified by "other considerations." *Id*. at 762. In particular, the "[f]oremost" consideration is the well-established need to "distinguish[] between wrongdoers and the blameless" in the civil-rights context. *Id.* at 763. "[I]n contrast to losing [civil-rights] defendants who are held presumptively liable for attorney's fees, losing intervenors . . . have not been found to have violated anyone's civil rights." *Id.* at 762. Accordingly, "[a]warding attorney's fees against such an intervenor would further neither the general policy that wrongdoers make whole those whom they have injured nor [the civil-rights laws'] aim of deterring [people] from engaging in discriminatory practices." *Id*.

Instead of deterring discrimination, imposing fee awards against innocent good-faith intervenors would "distort the adversary process" by deterring third parties from asserting good-faith arguments in defense of their interests. *Id*. at 764. That result would be "strongly disfavored" because it would deprive courts of crucial information and arguments that help to enhance the quality, comprehensiveness, and fairness of judicial decision-making. *Id.* Because good-faith intervenors add significant value to the adversarial process, the Court

explained, they are not "disfavored participants" in civil-rights litigation, but are instead "particularly welcome." *Id*.

Lest there be any doubt that *Zipes* categorically prohibited fee awards against good-faith intervenors who had not violated anyone's civil rights, both the majority and the dissent expressly recognized the "categorical" nature of the rule. The dissent explicitly stated that "the majority has adopted a blanket rule that *all* intervenors must be treated like plaintiffs for purposes of fee liability." *Id*. at 775 (Marshall, J., dissenting) (emphasis added). The dissent likewise recognized that the majority "adopt[ed] a categorical rule directing district courts to treat all intervenors like civil rights plaintiffs," even where "an intervenor asserts non-civil-rights claims of third parties, or where an intervenor raises no third-party claims at all." *Id*. at 778. The majority responded not by denying that it was adopting precisely such a categorical rule, but by affirmatively defending the *virtue* of categorical rules. In particular, the majority noted that the Supreme Court's previous cases had already adopted the categorical rule that civil-rights *plaintiffs* cannot be subject to fee awards "unless [their] action is frivolous," and then emphasized that this well-established rule is "no less 'categorical' than the rule we set forth today." *Id*. at 761. Thus, while the majority and the dissent disagreed about practically everything else, they expressly *agreed* on the categorical nature

of the rule that the majority adopted barring fees against innocent good-faith intervenors.

This Court, too, has expressly recognized that *Zipes* established a categorical "rule" that "leave[s] the burden of intervention-related fees and expenses with the plaintiff," because "shift[ing] fees to an intervenor, who has not violated anyone's civil rights, would not advance the national policy of vindicating wrongful discrimination." *Rum Creek Coal Sales, Inc v. Caperton*, 31 F.3d 169, 176-77 (4th Cir. 1994). Thus, like the Supreme Court in *Zipes* itself, this Court has squarely affirmed that plaintiffs must bear their own costs in litigating against a good-faith intervenor who has not violated anyone's civil rights. While the precise question at issue in *Rum Creek* was whether intervention-related costs could be assessed against the original defendant, the court's reasoning depended directly on the premise that *Zipes* requires "*the plaintiff*" to bear "the burden of intervention-related fees and expenses" as long as the intervenor has not "violated anyone's civil rights." *Id*. at 176-77 (emphasis added). That rule was an integral component of the court's holding, and thus it is binding circuit precedent that squarely controls this case.

In describing the rule of *Zipes* on multiple different occasions, this Court's language has been unwaveringly categorical: In *Rum Creek*, the Court bluntly stated that "*Zipes* . . . held that a prevailing plaintiff in a civil rights case can

recover from an intervening party *only when* the intervening party's action is 'frivolous, unreasonable, or without foundation.'" *Id.* at 176 (quoting *Zipes*, 491 U.S. at 761 (emphasis added)). Likewise, in *In re Crescent City Estates, LLC*, 588 F.3d 822, 827 (4th Cir. 2009), this Court observed that "[t]he Supreme Court has repeatedly emphasized the 'crucial connection' between liability on the merits and liability for attorneys' fees under fee-shifting statutes." And in *Ohio River Valley Envtl. Coalition v. Green Valley Coal Co.*, 511 F.3d 407 (4th Cir. 2007), this Court once again correctly described *Zipes* as holding that "an intervenor [can] be liable for attorney fees . . . *only if* its participation in the litigation was 'frivolous, unreasonable, or without foundation.'" *Id*. at 416 (emphasis added). *See also Podberesky v. Kirwan*, 38 F.3d 147, 162 n* (4th Cir. 1994) ("attorneys' fees are not awarded as a matter of course against unsuccessful intervenors.").

B. Since *Zipes*, No Other Court Has Deviated From the Categorical Rule Barring Fee Awards Against Innocent Good-Faith Intervenors

In refusing to apply the categorical rule of *Zipes*, the three-judge court asserted that its holding was supported by "cases that have distinguished *Zipes* in the 27 years since it was decided." (JA140). In fact, however, the decision below marks the first and only time that any court has ever deviated from the clear categorical rule of *Zipes* that fee awards cannot be imposed against good-faith intervenors who have not violated anyone's civil rights, thus wholly obliterating

"the 'crucial connection' between liability on the merits and liability for attorneys' fees under fee-shifting statutes." *In re Crescent City Estates*, 588 F.3d at 827. None of the cases cited by the district court is remotely inconsistent with that simple rule. To the contrary, in every case cited, the fee award was assessed against an intervenor that was also *an official state defendant*, which was legally responsible for the underlying civil-rights violation.

1. The three-judge court relied primarily on *Planned Parenthood of Central New Jersey v. Attorney General*, 297 F.3d 253 (3d Cir. 2002), which it found "very similar" to the present case. (JA143-145). But in fact, that case was radically different because the intervenor was the New Jersey *State Legislature*, which was not remotely "innocent" but was *directly responsible* for the civil-rights violation at issue: it had *enacted* the challenged state law. After the Attorney General refused to defend the law, the state legislature intervened as a defendant in its official capacity. *Id*. at 262. Then, after the legislature lost the case, the state was required to pay the plaintiffs' attorney fees. In upholding the fee award, the Third Circuit explained that "New Jersey cannot escape an obligation under federal law to pay attorneys' fees by assigning . . . to the Legislature" the "task of defending the constitutionality of a state law." *Id*. at 264 n.3. Crucially, the state legislature was an *official arm of the state* and was plainly *guilty* of the civil-rights violation at issue. That makes it entirely different from the Intervenor-Defendants

here, who intervened purely in their *private* capacity, and are concededly *innocent* of violating anyone's civil rights.

Similarly, in *Mallory v. Harkness*, 923 F. Supp. 1546 (S.D. Fla. 1996), the Attorney General of Florida intervened on behalf of the state to defend a state law after the named defendant, a private bar organization, refused to defend the law. After the plaintiffs prevailed, they sought fees against "the State of Florida." *Id*. at 1551. The court noted that the state intervenor was not "blameless" because "[t]he State and the Attorney General were primarily responsible for violating Plaintiff's civil rights." *Id*. at 1552. The court explained that the *Zipes* rule did not apply because "the AG, acting as a representative of the state, cannot be 'innocent' in terms of violating the Plaintiff's civil rights." *Id*. at 1553. After all, the AG had intervened on behalf of the state, which "enacted, enforced, and defended the unconstitutional statute." *Id.* Thus, because the state bore direct responsibility for the civil-rights violation, it cannot "use its intervenor status to escape liability for attorney's fees," as "[a]llowing such a loophole" would "violate[] the policy behind 42 U.S.C. § 1988." *Id*. Once again, that is entirely different from the present case.

The district court also cited *May v. Cooperman*, 578 F. Supp. 1308 (D.N.J. 1984), but that case is doubly inapposite. Most obviously, it was decided a full five years before the Supreme Court's decision in *Zipes*, so it cannot possibly have any

bearing on the state of the law post-*Zipes*. But in any event, the intervenors there were once again state actors who intervened in their official capacity as part of "the New Jersey Legislature." *Id*. at 1310. The fee award was thus payable directly by the state, which was once again not an "innocent" party but was squarely responsible for the civil-rights violation at issue.

The three-judge court next cited the unpublished decision in *Daggett v. Kimmelman*, Civ. Nos. 82-297, 82-388, 1989 WL 120742 (D.N.J. July 18, 1989), but that case is *triply* irrelevant: First, the fee award was once again issued several years *before* the Supreme Court's decision in *Zipes*, and thus says nothing about the law in a post-*Zipes* world. *Id*. at *1. Second, the only question in the case was whether to grant a Rule 60(b) motion vacating the earlier fee award in light of the subsequent decision in *Zipes*, which the district court refused to do for reasons *entirely unrelated* to the merits; the court did not even reach the *Zipes* issue. *Id*. at *4-5. Third, even if the court had reached the *Zipes* issue, the intervenor was once again "the New Jersey State Legislature," which was not "completely blameless," but rather "had [a] part in the constitutional violation" because it enacted the statute that violated the plaintiffs' rights, *Id*. at *7 n.6.

2. The district court claimed that the decisions above did not turn on the fact that the intervenors were official-capacity state defendants for three reasons. First, "the opinions themselves make no such distinction." (JA152). But, as

demonstrated by the quoted passages above, all of the opinions recognized that the state was the real party in interest that had both committed the civil-rights violation at issue and that would be subject to attorney fees—thus *comporting* with the rule that "[l]iability on the merits and responsibility for fees go hand in hand." *Zipes*, 491 U.S. at 763. None of the courts in those cases had any occasion to consider whether *Zipes* would allow a fee award against purely private intervenors who had not violated anyone's civil rights, because that fact pattern was not present in any of the cases. But in any event, to the extent any of the cited opinions contained dicta suggesting that such a fee award would be permissible, that dicta is plainly contrary to *Zipes* and accordingly must be rejected.

Second, the district court noted that "both the original defendants *and* the intervenors in *Mallory* and *Planned Parenthood* were branches of the state government," and thus "it would not matter whether the original or the intervening defendants were liable for fees because they were both organs of the state." (JA152). But that is precisely the point: The intervenors in those cases were held liable for fees because *the state* was the real party in interest, and the state was guilty of the underlying civil-rights violation. The state could not *avoid* its fee liability by shifting the defense of the lawsuit to another one of its agents. The state (through its agents) had committed the civil-rights violation, and thus the state (through its agents) could be held liable for fees. In the present case, by contrast,

the intervenors are not "organs of the state," and no merits liability can be attributed to them.

Finally, the district court suggested that because Intervenor-Defendants are "congressional representatives" who were "seeking *reelection*," that somehow meaningfully "distinguishe[s] them from private intervenors, such as the union in *Zipes*." (JA152). But in fact, that distinction is entirely irrelevant under the controlling rule of *Zipes*, which expressly ties fee liability to merits liability. As the district court acknowledged, the Intervenor-Defendants are not "state officials," and thus they cannot bear any responsibility for the civil-rights violation perpetrated by the state of Virginia. (JA152). Moreover, because Intervenor-Defendants intervened in their purely "personal" capacity, to protect their "personal" interest in "*reelection,"* (JA148), that is yet another reason that they could not be held responsible for any civil-rights violation perpetrated by the state.

3. The district court did cite one case involving a fee award against an innocent non-state intervenor, *Charles v. Daley*, 846 F.2d 1057 (7th Cir. 1988), but that is a pre-*Zipes* decision. Because that decision squarely contradicts the categorical rule of *Zipes*, it plainly does not survive the Supreme Court's decision in *Zipes* the following year. The three-judge court speculated that *Charles* somehow might survive because, after *Zipes* was decided, the Supreme Court "denied certiorari" in *Charles* "rather than remanding for reconsideration."

(JA146). But that speculation is plainly incorrect for two reasons. First, it is black-letter law that a denial of certiorari says nothing about the merits of the underlying case. *See Felton v. Barnett*, 912 F.2d 92, 94-95 (4th Cir. 1990) (citing *United States v. Carver*, 260 U.S. 482, 490 (1923)). But second, and more importantly, the Supreme Court obviously denied certiorari in *Charles* solely for procedural reasons: As the Seventh Circuit explained, the intervenors there had "abandoned [the *Zipes*] argument for purposes of appeal by raising it only in their Reply Brief," and were thus "barred procedurally" from pressing the issue. *Charles*, 846 F.2d at 1059 n.1. That procedural default was thus an adequate and independent ground for affirmance that required the Supreme Court to deny certiorari regardless of the merits of the Seventh Circuit's decision.

The district court's alternative theory for the cert denial in *Charles* is obviously wrong: *Charles* cannot be distinguished from *Zipes* on the ground that "the intervenors [in *Charles*] were advancing interests separate and distinct from those asserted by the . . . defendants," (JA146), because the same exact thing was true in *Zipes*: The union intervenor's interest in protecting the seniority benefits was distinct from the interest of the defendant airline, which was all too eager to discard the seniority benefits in order to settle the case and minimize both its litigation costs and its Title VII liability.

Strangely, just two pages after positing the rationale that the *Charles* intervenors were *not* protected under *Zipes* because they advanced a distinct third-party interest, (JA146), the district court reversed itself and claimed that *only* intervenors that advance a "separate legal interest from Defendants" are entitled to protection under *Zipes*. (JA148). Needless to say, this is entirely incoherent. Advancing a "separate third-party interest" cannot both *expose* an intervenor to fees under *Zipes* and also be a necessary factor in *shielding* the intervenor from fees under *Zipes*.

In sum, none of the cases cited by the district court provides even the slightest bit of support for its decision. In every post-*Zipes* case, the intervening defendants were an arm of the state that committed the civil rights violation; they were "intervenors" only because they were new state agents substituting for other state agents that otherwise would have defended the challenged state policy. Thus, those cases stand only for the proposition that a state cannot avoid fee liability for a civil-rights violation simply by switching the defense from one state lawyer to another. That principle has no application here, where the Intervenor-Defendants are not state officials, they intervened purely in their private capacity, they did not enact the challenged law, they cannot be held liable for any civil-rights violation in *any* capacity, and there is no risk that the state was seeking to avoid fee liability by shifting its defense to different state lawyers.

C. The Decision Below Cannot Be Reconciled With *Zipes*

As explained above, *Zipes* established a clear categorical rule that "intervenors [who] have not been found to have violated anyone's civil rights" can be held liable for attorney fees "*only* where the intervenors' action was frivolous, unreasonable, or without foundation." 491 U.S. at 761-62 (emphasis added). Here, it is entirely undisputed that Intervenor-Defendants did not violate anyone's civil rights, and that their intervention was not "frivolous, unreasonable, or without foundation." Neither the plaintiffs nor the district court disputed either point, which should have been enough to decide this case in simple fashion, as every other court has done on these facts. But instead, the district court disregarded the clear rule of *Zipes* and applied a convoluted four-factor balancing test of its own invention to impose fee liability. In particular, the court "examin[ed]" what it considered to be "the four key factors underlying" the *Zipes* decision, and found the factors "all to be distinguishable from the circumstances of [the present] case." (JA155). In reality, the web of fine distinctions spun by the district court does not in any way derive from *Zipes* and cannot logically distinguish *Zipes*, much less override its "categorical rule."

As a threshold matter, the district court's adoption of an indeterminate four-factor balancing test is flatly contrary to the categorical "rule" that the Supreme Court established in *Zipes*: that innocent intervenors can *never* be held liable for

attorney fees if their action was not "frivolous, unreasonable, or without foundation." Lower courts are not authorized to depart from such clear categorical rules just because they think that the Supreme Court instead should have adopted a more context-sensitive balancing test. Nor are lower courts permitted to violate the Supreme Court's categorical rules whenever they think that the various *justifications* the Supreme Court offered in support of a rule would be better served by departing from that rule in a particular case.

In applying its four-factor test, the district court took exactly the approach advocated in the *Zipes dissent*, which chided the majority for "adopt[ing] a categorical rule directing district courts to treat all intervenors like civil rights plaintiffs" for purposes of fee liability. *Zipes*, 491 U.S. at 778 (Marshall, J., dissenting). Whatever the merits of the dissent might have been, the majority squarely rejected it and expressly adopted a "categorical" rule, which the district court was bound to apply. *Id*. at 760-61. Under that binding rule, the only two considerations that are relevant are (1) whether the intervenors "violated anyone's civil rights," and (2) whether "the intervenors' action was frivolous, unreasonable, or without foundation." *Id.* at 761-62. Because both points are undisputed, the district court's decision should be reversed for that reason alone.

In any event, even under the district court's legally erroneous four-factor balancing test, the present case is entirely indistinguishable from *Zipes* on all four of the supposed "factors."

1. Intervenor-Defendants are "Blameless"

The district court's primary ground for distinguishing this case from *Zipes* was its assertion that, unlike the union intervenor in *Zipes*, Intervenor-Defendants here cannot be considered "blameless." (JA142, 148-149, 155). As *Zipes* makes clear, however, the sole test for "blamelessness" is whether the intervenor has "been found to have violated the Civil Rights Act or any other federal law." 491 U.S. at 755. To erase any doubt, the Supreme Court expressly equated the concept of "blameless" and "innocent" intervenors with those who had not "violated anyone's civil rights," and who thus lacked any "[l]iability on the merits." *Id*. at 762-63. The Court further explained that good-faith intervenors must "bear fee liability under § 1988" only if they are "legally responsible for relief on the merits." *Id*. at 763 (citation omitted). Under that simple test, Intervenor-Defendants here are every bit as "blameless" as the union intervenor in *Zipes* because they are concededly not responsible for violating anyone's civil rights.

a. The three-judge court ignored *Zipes*'s clear command by converting the "blameworthy" category from those who *violate* plaintiffs' civil rights to those who *defend* against claims that the defendant has violated those

rights. Specifically, the court found that Intervenor-Defendants are not "blameless" because "they intervened specifically to enforce and defend an unconstitutional gerrymander that impacted the voting rights of thousands of citizens." (JA155). But by definition, *every* losing intervenor-*defendant* in a civil-rights case seeks to enforce and *defend* a law or policy that has been found to violate someone's civil rights. Precisely the same thing was true in *Zipes*: The union intervened to defend a system of discriminatory "seniority" benefits that violated the civil rights of a large class of female employees under Title VII. Notably, the airline had already agreed to accept the plaintiffs' preferred remedy, and thus the union was solely responsible for standing between the plaintiffs and the relief that they (and ultimately the courts) deemed necessary to put an end to the unlawful discrimination. Thus, it is crystal clear that intervenors not responsible for violating civil rights are "blameless," and do not lose that status simply because they fulfill the defined, expected function of intervening defendants; *i.e.*, resisting plaintiffs' claims for relief.

Indeed, if anything, the union in *Zipes* was far *more* "blameworthy" than the Intervenor-Defendants here, because the union was as responsible as the airline for *creating* the discriminatory "seniority" rights at issue there: the union "bargained for" and *agreed to* those discriminatory rights through the collective-bargaining process. 491 U.S. at 755. Here, by contrast, the state legislature alone enacted the

redistricting law. Of course, Intervenor-Defendants had a strong *interest* in defending the contours of their congressional districts, because they had built up enormous reliance interests on them, which is why they had standing to intervene—but that is a far cry from *creating* the offending districts. Accordingly, the Supreme Court's description of the union intervenor as "blameless" in *Zipes* applies with even greater force to the Intervenor-Defendants here.

b. The district court also suggested that Intervenor-Defendants were not "blameless" because they were somehow "liable on the merits" for Virginia's violation of the Fourteenth Amendment. (JA151). The panel majority was forced to concede that "under *Zipes,* fee liability should lie with the party 'liable on the merits' for the boundaries of the Third Congressional District." (JA150). It was also forced to concede that the only entity liable for violating the Equal Protection Clause's commands to "state[s]" is, of course, "the Commonwealth of Virginia, whose laws ran afoul of the Federal Constitution," not the Intervenor-Defendants. (JA150). Notwithstanding these obvious, dispositive concessions, the panel majority nevertheless strained to suggest that Intervenor-Defendants, although not employees of the Commonwealth, were "liable on the merits" because (1) they were purportedly just as liable as the named state defendants, who did have fees assessed against them, and (2) because they stood in

the way of "Plaintiffs' relief *on the merits*" since they did not "simply drop [their] defense" of the redistricting law after the state abandoned its defense. (JA149).

As to the first point, the panel majority asserted that the named defendants were not "legally capable of violating federal law—the way the term is actually used in *Zipes*" because "*we never held that any of the defendants violated federal law*" and also because they "could not be blameworthy in any moral sense." (JA149-151). Thus, the district court apparently reasoned that, since the named state defendants were not "liable on the merits," this somehow justified imposing fees on Intervenor-Defendants, who also were not liable on the merits.

Both the premise and conclusion of this syllogism are obviously wrong. The Commonwealth of Virginia was "liable on the merits" for the Fourteenth Amendment violation and, because of sovereign immunity, that liability is affixed through suits against the state officials who can implement the remedy in their "official capacity," even though the state that employs them is the "real party in interest." *Ex parte Young*, 209 U.S. 123, 184 (1908); *see also, e.g.*, *Lewis v. Clarke*, No. 15-1500, 2017 WL 1447161, at *5 (U.S. Apr. 25, 2017) ("In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself."). Under this black-letter law, the named state defendants are indeed "liable on the merits" because they are liable for the state's constitutional violations, "in their capacity as

representatives of the sovereign will of the Commonwealth." (JA151). If defendants were not liable on the merits, the district court could not have entered any injunctive relief against them, just as it did not and could not enter any such relief against Intervenor-Defendants. *See Milliken v. Bradley*, 418 U.S. 717, 756 (1974) (federal court has no power to order a remedy in the absence of a violation). (Nor could the court have assessed fees against the state defendants.)

Apparently recognizing this reality, the three-judge court sought to equate the "Intervenor Representatives" with the "Attorney General, [and] the individuals on the Board of Elections" who are responsible state officials under *Ex Parte Young*, such that the "Intervenor Representatives" could also somehow be held liable for the state's constitutional violation. (JA151). This equation is, of course, patently incorrect since Intervenor-Defendants are not state officials and therefore cannot be held liable in their "official capacity" under *Ex Parte Young*.

As to the second point, intervenors obviously cannot be "blameworthy" under *Zipes* merely because they continued the litigation after the named defendants acquiesced. As a practical matter, the issue of whether intervenors are liable for fees *only arises* if the named defendants have previously acquiesced, because otherwise the named defendants will pay the plaintiffs' attorney fees (which is why the district court here ordered the state defendants to pay all fees for the periods during which they were jointly defending the law (JA158)). So this

"distinction" would, in reality, wholly eviscerate the *Zipes* rule that good-faith intervening defendants are immune from fees.

The district court's distinction is also directly contrary to the holding and facts of *Zipes*. The plaintiffs in *Zipes* would have immediately obtained all litigation-related benefits provided in the settlement if the intervening union had "simply dropped" its challenge to the settlement agreement that the defendant employer had previously agreed to. *See Zipes*, 491 U.S. at 757 (making clear that the union launched a legal attack against "the proposed settlement" as a whole, thus blocking all relief agreed to by the parties); *Air Line Stewards & Stewardesses Ass'n, Local 550 v. Trans World Airlines, Inc*., 630 F.2d 1164, 1165 (7th Cir. 1980) (describing the union's attack on the entire settlement, premised on its its arguments that "the district court lacked subject matter jurisdiction necessary for it to approve the settlement," and that "the settlement violates several statutes"). Thus, just as here, only the intervenor's litigation efforts stood between the plaintiffs and the relief that they desired.

Moreover, just as in *Zipes*, Intervenor-Defendants here could not unilaterally "remedy [the defendants'] violations," (JA148), because they could not order the Commonwealth to alter the law establishing the congressional districts, any more than the union in *Zipes* could order the airline to grant the "backpay" and changes in "competitive seniority" benefits sought by the plaintiffs. 491 U.S. at 769. (If

anything, Intervenor-Defendants here were even *less* capable of providing a unilateral remedy compared to the union in *Zipes*, which had some ability to alter the discriminatory seniority benefits that it had sought and obtained through collective bargaining.) Like the intervening defendants in *Zipes*, all the Intervenor-Defendants here could do was stop *opposing* the relief that plaintiffs sought. [2] Again, however, *Zipes* made clear that intervening defendants are not rendered "blameworthy" merely because they make a good-faith effort to exercise their due-process rights by defending their personal interests through intervention.

In short, being responsible for *violating* plaintiffs' rights is fundamentally different from continuing to litigate the issue of *whether* plaintiffs' rights have been violated and, under *Zipes*, the latter activity cannot render an intervening defendant "blameworthy."

2. There Is No Plausible "Third-Party Interest" Distinction

Relatedly, the district court opined that, for some unexplained reason, the "categorical rule" of *Zipes* applies only to intervening defendants pursuing "third-party interests" that are somehow "separate from the interests alleged by the state in passing and defending the law," and thus does not protect intervenors that "defend that statute on the merits." (JA145, 151). This is plainly wrong.

[2] For the same reason, it is irrelevant that the *Zipes* plaintiffs challenged a "practice" and the Plaintiffs here challenged a "law," and there is no other rational basis for distinguishing between a "practice" and "law" under *Zipes*. The district court certainly did not suggest any.

a. To the extent the district court suggested that *Zipes* protects only those intervenors advancing "separate" interests and arguments, or *partial* defenses objecting to some of the requested relief, that is flatly incorrect. The Supreme Court expressly stated in *Zipes* that it makes no difference if an intervenor plays the role of a defendant by making "an argument that brings into question not merely the appropriateness of the remedy but the plaintiff's very entitlement to relief." 491 U.S. at 765. Moreover, just because "an intervenor [may] advance the same argument as a defendant," that "does not mean that the two must be treated alike for purposes of fee assessments." *Zipes*, 491 U.S. at 765. Indeed, in *Zipes* itself, the union intervenor objected to the *entire* settlement, thereby blocking *all relief* for all plaintiffs, and also "advanced [an] argument that would have prevented" a subclass of plaintiffs from *ever* being eligible for "*any* relief." *Id*. (emphasis added).

Moreover, in constitutional challenges to states' laws or practices, intervenor-defendants are *required* to advance the same justification or interest "alleged by the state in passing and defending the law." (JA151). That is because, in *Shaw* cases and all other heightened-scrutiny constitutional cases, "separate" interests that were *not* alleged by the state when the law was passed are facially inadequate. *See, e.g., Shaw v. Hunt*, 517 U.S. 899, 910 (1996) (in order to survive strict scrutiny, a state must have supporting evidence "*before* it embarks on" a

constitutionally suspect course of action); *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 792 (2017) ("The proper inquiry . . . concerns the actual considerations that provided the essential basis for the [state action], not post hoc justifications that the legislature could have used but did not.").

The district court's invented "distinction" is also illogical because an intervenor who presents new arguments distinct from those of the defendants imposes additional burdens of work and time on the plaintiffs, who must then respond to the new arguments. Thus, if anything, because intervenors who advance the same interests or arguments as the original defendants are *less* burdensome on plaintiffs, there is *less* justification for allowing plaintiffs to recover fees against them.

In light of the above, it is hardly surprising that *Zipes* affirmatively rejected the notion that only "separate" or "partial" intervening defendants were protected against fee liability. It is also unsurprising that a number of cases have applied *Zipes* to intervenors that defend the state against liability. *See, e.g., Miller v. Moore*, 169 F.3d 1119, 1126 (8th Cir. 1999) (holding that *Zipes* precludes fees against intervenor who defended government against First Amendment claim); *Dem. Party of Washington v. Reed*, 388 F.3d 1281, 1288 (9th Cir. 2004) (same, First Amendment Claim); *Thorstenn v. Barnard*, 883 F.2d 217, 219 (3d Cir. 1989) (same, Privileges and Immunities Clause claim). Indeed, Intervenor-Defendants are

not aware of any case anywhere holding that the applicability of *Zipes* turns on whether intervenor-defendants are offering a separate or partial defense instead of defending the original defendant against a finding of liability.

b. If the panel majority was not trying to (erroneously) distinguish between intervenors that offer separate or limited defenses and those who defend against all liability, its "third party interest" factor is extraordinarily difficult to comprehend. In all events, any "third-party interest" requirement is necessarily satisfied by Intervenor-Defendants here because the third-party interest they asserted in this litigation is both logically and legally indistinguishable from the interest asserted by the intervenor in *Zipes*. This is why, again, no court anywhere has ever suggested that the particular type of "third party interest" asserted by an intervenor provides any basis for departing from *Zipes*.

All intervening defendants necessarily assert "the interests of third parties"—they assert their own interest as third parties, so that they can intervene in litigation between the two (or more) extant parties. Here, the district court expressly recognized that Intervenor-Defendants had a strong third-party interest when it granted their motion to intervene, holding that they not only met the "interest" requirements of Rule 24, but also the demanding "personal injury" requirements for Article III standing. *See Personhuballah v. Alcorn*, No. 13-cv-678 (E.D. Va.), Order granting Motion to Intervene, Dkt. No. 165 (finding that Movants had

"satisfied the requirements of Fed. R. Civ. P. 24 and the principles governing standing"); *see also* Fed. R. Civ. P. 24(a)(2) (requiring "an interest relating to the property or transaction that is the subject of the action"). Indeed, in the opinion below, the district court also emphasized that Intervenor-Defendants' interests were separate from those of the Commonwealth defendants, since their interest was the "personal" one of "*reelection*." (JA148, 152) (emphasis in original). Accordingly, just as the union intervenor in *Zipes* had a third-party interest in opposing plaintiffs' effort to disrupt the status quo that benefited the union (the seniority system), so too here Intervenor-Defendants had a third-party interest in resisting disruption of a status quo that benefitted them (by providing election districts in which they had previously been successful, and on which they had built up significant reliance interests).[3]

c. The panel majority nonetheless sought to evade this truism by declaring that losing intervenors *cannot* have a valid interest in defending unlawful discrimination, and that only the *plaintiffs'* interests mattered in this context.

[3] The district court was flatly incorrect to assert that the Supreme Court "held that the Intervenors did not have a separate legal interest from Defendants" and dismissed their appeal for that reason. (JA148). In fact, the Supreme Court never resolved Appellants' standing to appeal. Instead it expressly reserved that issue and held only that the intervenors lost standing after the district court prematurely imposed a new remedial map, thus forcing Representative Forbes to abandon the decimated District 4 while the appeal was still pending. *See Wittman v. Personhuballah*, 136 S. Ct. 1732, 1737 (2016) ("[W]e need not decide whether, at the time he first intervened, Representative Forbes possessed standing.).

Again, both assertions constitute a frontal assault on *Zipes* and are facially erroneous.

First, the district court held that Intervenor-Defendants' personal interest in reelection was somehow illegitimate, asserting that "reelection under an unconstitutional districting regime cannot be considered a cognizable third-party interest." (JA148). By the same logic, seeking to preserve an illegally discriminatory seniority system would not be a cognizable interest, but *Zipes* held precisely the opposite. That is because the *existence* of a valid interest does not remotely depend on whether the intervenors *prevail in defending that interest*. The *Zipes* intervenor had a valid interest in defending the airline's discriminatory seniority benefits even though its defense ultimately failed. So too here, Intervenor-Defendants had a valid interest in defending their congressional districts even though those districts were ultimately ruled unconstitutional (by two of the three judges to reach the merits, and without appellate review).

If the district court were correct that there can be no valid interest in defending a "discriminatory" or unconstitutional policy, losing intervenor-defendants would *always* be liable for fees because, under the district court's *ipse dixit,* an intervenor can *never* have a valid interest in defending an unlawful policy. For example, if a group of minority students intervened to defend an affirmative-action program, and the program were held to be unlawfully discriminatory, the

students would lack any "cognizable interest" and would thus be subject to fee liability. That result is plainly contrary to both the letter and the spirit of *Zipes*.

Second, and relatedly, the district court extended its "plaintiffs are always right" principle to conclude that "the contractual seniority rights at risk in *Zipes* bear no resemblance to the voting rights at issue in this case," because the "key interests here belonged to the citizens of the Commonwealth of Virginia, who enjoyed a well-established right to cast their vote under a non-discriminatory districting scheme." (JA148). Again, one might as well say that the "key interest" in *Zipes* belonged to the airline's female employees, who enjoyed a well-established right to work under a non-discriminatory employment scheme. But again, the question is the *intervenor-defendants*' interest, not the interest asserted by the *plaintiffs* they are opposing. This obvious mistake further reveals that the district court's invented "third party interest" theory is incapable of neutral or consistent application.

Finally, the district court seemed to suggest that only intervenors asserting *other people's* interests are fully protected by *Zipes*. The district court noted that the union in *Zipes* sought to protect the third-party "interests of [its] *members*," while Intervenor-Defendants here intervened "on their own behalf" to protect *their own* reelection prospects, (JA147) (emphasis added). Tellingly, however, the district court did not even attempt to explain why this distinction is meaningful.

Zipes emphasized that intervenors should be encouraged to protect *their own* "contract-based rights," *their own* "constitutional rights," or *their own* "statutory rights," which "are entitled to no less respect" than any other third-party rights. 491 U.S. at 765. Intervenors asserting their own third-party interests "serve the congressional policy in favor of 'vigorous' adversary proceedings," and avoid "distort[ion]" of "the adversary process." *Id*. at 765-66.

If anything, an intervenor who represents his own interests will ensure a *more* vigorous adversary process. That is why, *inter alia,* standing is generally limited to those alleging a "personal stake" in the controversy, and why intervention of right under Rule 24 requires an assertion of the intervenor's *own* "interest." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). By contrast, advancing a *third party's* interest is almost always inadequate to confer standing, save for limited exceptions. *See, e.g., Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977) (noting that parties generally must have a "personal stake" in litigation, but that a group such as "a union" can have associational standing if "its members would otherwise have standing to sue in their own right."); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 546–47 (1981) (Stevens. J., dissenting) (noting that First Amendment claims vindicating the "protected speech of third parties" are an "exception to [ordinary] standing doctrine").

Indeed, this case vividly illustrates how third-party intervenors can help to ensure a healthy adversary process: The state defendants here had a close political alliance with the plaintiffs—indeed, the plaintiffs' counsel previously represented the state's Attorney General—and the Attorney General conveniently chose to admit liability in a manner that promised to directly benefit their mutual political party. Once that occurred, Intervenor-Defendants' strong third-party interest in defending their congressional districts would have gone entirely undefended but for Intervenor-Defendants' intervention. Thus, just as in *Zipes*, the Intervenor-Defendants' participation was the only way to ensure a truly "vigorous" adversary process.

3. *Zipes* and *Rum Creek* Expressly Require Plaintiffs to Bear the Costs of Litigating Against Intervenors

The district court next attempted to distinguish *Zipes* by noting that here, after the state "abandoned [its] defense of the law, it removed the party that would otherwise shoulder responsibility for paying [plaintiffs'] attorney's fees," thus leaving plaintiffs on their own to pay their intervention-related expenses. (JA155). But once again, the exact same thing was true in *Zipes*: After the airline agreed to settle, the union intervenor was the only remaining defendant, which alone forced the plaintiffs to go through three rounds of wholly uncompensated litigation. The Supreme Court expressly acknowledged that the plaintiffs were forced to litigate against the union "without prospect of fee compensation," but it found this entirely

justified by the equitable need to avoid imposing fee awards on intervenors that had not "violated anyone's civil rights." *Id*. at 762-63. That is why this Court has squarely recognized that *Zipes* "leave[s] the burden of intervention-related fees and expenses with the plaintiff," based on the principle that "shift[ing] fees to an intervenor, who has not violated anyone's civil rights, would not advance the national policy of vindicating wrongful discrimination." *Rum Creek*, 31 F.3d at 176-77.

The concern over uncompensated litigation costs is especially unfounded in the present case because the plaintiffs here did not finance the litigation, but were simply recruited by a national law firm to establish standing. Specifically, the case was financed by a well-funded national political organization, the National Democratic Redistricting Trust, which has recruited plaintiffs to pursue strategic redistricting litigation across the country in order to advance the electoral prospects of the Democratic Party. *See Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 571 (E.D. Va. 2016) (Payne, J., concurring in part and dissenting in part) (noting that "this case was spawned not by a citizen who felt that his or her constitutional rights had been violated," but instead "was brought at the instance of the National Democratic Redistricting Trust," and that "Plaintiffs' initial fee application in this case contains an entry showing that it was necessary to go out and drum up a client"). *See also* Jenna Portnoy, "Supreme Court Takes Up Virginia Redistricting

Case," THE WASHINGTON POST, Nov. 13, 2015 ("The two Virginia lawsuits and similar ones around the country were brought by Marc E. Elias and funded by the National Democratic Redistricting Trust. Elias is general counsel to Hillary Rodham Clinton's presidential campaign and worked on the McAuliffe campaign."). On top of that, the "plaintiffs'" law firm was also awarded nearly a million dollars in attorney fees against the state, which is not contesting that award. (JA178). That large award "alone create[d] a substantial added incentive" for the plaintiffs to sue, to the extent they needed one. *Zipes*, 491 U.S. at 761.

4. This Case Implicates Judicial-Economy Concerns at Least as Much as *Zipes* Did

Finally, the district court claimed that, unlike in *Zipes*, discouraging the type of intervention at issue here would not raise any "judicial economy" concerns because third parties like Intervenor-Defendants could not "levy collateral attacks against the new redistricting plan" as an alternative to intervention. (JA155). That is simply incorrect. If anything, the concern over collateral litigation is even *more acute* in this type of racial-gerrymandering case than it was in *Zipes*, because incumbent congressmen will *always* have a choice between intervening directly to defend an existing map or instead waiting to file a collateral attack against whatever remedial map may be imposed. And because "plaintiffs in independent lawsuits attacking provisions of [a remedial map] are presumptively shielded from [fee] liability," assessing fees against intervenors "would encourage [incumbents]

to await the entry of judgment and collaterally attack remedial [maps]." *Zipes*, 491 U.S. at 764. "This would serve the interests of no one: not plaintiffs, not defendants, not intervenors." *Id*.

This case is illustrative, as Intervenor-Defendants argued in the court below that various proposed remedial maps were unlawfully "racially motivated" because they departed from race-neutral districting criteria to create an extra minority-opportunity district. *See Personhuballah v. Alcorn*, No. 13-cv-678 (E.D. Va.), Intervenor-Defendants' Brief Regarding Proposed Remedial Plans Submitted By Plaintiffs and Non-Parties, Dkt. No. 251, at 12-13, 18 (Oct. 7, 2015). Intervenor-Defendants could have made the same argument by filing a separate lawsuit alleging an independent "constitutional violation." Indeed, that is precisely the same type of violation that plaintiffs here alleged in their original challenge, which claimed that the map drawn by the Virginia legislature was unconstitutional because it relied on racial considerations for the avowed purpose of "compliance with Section 5" of the Voting Rights Act (JA155). The district court agreed, holding that the map was predominantly motivated by race because compliance with the Voting Rights Act was a higher priority than discretionary state-law criteria. *Page*, 2015 WL 3604029 at *5. However, the remedial map that the district court subsequently adopted was even more driven by "racial considerations," because it created an *extra* minority-opportunity district, at least in

part to comply with Section 2 of the Voting Rights Act. *See Personhuballah*, 155 F. Supp. 3d at 565 (explaining racial effects of remedial plan as necessary to survive challenge under Section 2). Accordingly, as an alternative to intervention, Intervenor-Defendants could have filed a collateral attack against the remedial map based on their own "racial gerrymandering" theory alleging an impermissible use of race to comply with the Voting Rights Act. Far from being "difficult to imagine," (JA155), such a collateral attack is quite *easy* to imagine.

Regardless of whether such a collateral attack would have prevailed on the merits, *Zipes* recognized that it is far better to encourage this type of dispute to be litigated as part of the original case rather than incentivizing separate collateral challenges for the purpose of avoiding fee liability. 491 U.S. at 764. That concern does not remotely *distinguish* this case from *Zipes*, but instead illustrates why it is all the more urgent for the rule of *Zipes* to be faithfully applied across the board.

II. UPHOLDING THE DECISION BELOW WOULD DISTORT THE ADVERSARIAL PROCESS BY DETERRING GOOD-FAITH INTERVENORS

While *Zipes* sought to avoid deterring good-faith intervenors because that would "distort[]"the adversary process, the district court's approach will produce precisely that effect in a wide variety of civil-rights contexts. 491 U.S. at 764. Under the categorical rule established in *Zipes*, innocent good-faith intervenors are encouraged to participate because they know with certainty at the outset that they

will be free of fee liability. Under the district court's multi-factor balancing test, however, the calculus changes dramatically because every potential intervenor will face the very real risk that joining the proceedings will subject them to hundreds of thousands or millions of dollars in fee liability. That risk alone will, of course, discourage a broad range of intervenors from participating in litigation where their interests are directly at stake and their perspective is sorely needed. Indeed, for the reasons noted above, the district court's circular, result-oriented reasoning makes it extremely likely that fees will be assessed against any intervenor-defendant offering a broad-based defense against liability.

To take the most obvious example, civil-rights organizations have long "played an important role in representing the interests of minority voters" by participating in litigation as defendant "intervenors." Br. For Amici Curiae Section 5 Litigation Intervenors, *Shelby County v. Holder*, 2013 WL 432972, *28 (2013). For example, in *Shelby County v. Holder*, 811 F. Supp. 2d 424, 444 (D.D.C. 2011), "several civil rights groups" (including the NAACP) intervened to defend the constitutionality of Section 5 of the Voting Rights Act against a constitutional challenge brought by plaintiffs. Similarly, in *Vera v. Richards*, 861 F. Supp. 1304, 1310 (S.D. Tex. 1994), the League of United Latin American Citizens (LULAC) intervened to defend the constitutionality of majority-minority districts in Texas against an Equal Protection challenge. The district court's approach would

seriously hamper the ability of these and similar organizations to provide a crucial voice in this type of litigation by exposing them to massive fee liability.

All manner of issue-oriented advocacy groups, too, routinely intervene to defend laws against constitutional challenge. For instance, in *Randall v. Sorrell*, 548 U.S. 230, 240 (2006), various "private groups," including the Vermont League of Women Voters, "intervened in the District Court proceedings in support of" Vermont's campaign-finance regulations. Similarly, in *Northwest Austin Municipal Utility District No. One v. Mukasey*, 573 F. Supp. 2d 221, 230 (D.D.C. 2008), organizations such as People for the American Way intervened to defend Section 5. Under the district court's approach, however, these advocacy groups could participate only by bearing the burden of potentially paying the often quite expensive fees of the plaintiffs.

Aside from organizational intervenors, individual voters frequently intervene in election cases, and minority voters have been some of the most frequent and staunchest defenders of the constitutionality of majority-minority districts. Thus, in *Shaw v. Hunt*, 861 F. Supp. 408, 420 (E.D.N.C. 1994), 22 "persons registered to vote in North Carolina, both African-American and white," intervened in support of majority-minority districting. In *Abrams v. Johnson*, "a group of black and white registered voters" intervened to defend majority-minority districts. Br. of Intervenor-Defendants, *Abrams v. Johnson*, 1996 WL 416713, at *2 (U.S. 1996).

And in *Hunt v. Cromartie*, a group of "white and African-American citizens and registered voters" did likewise. Br. of Appellant-Intervenors, *Hunt v. Cromartie*, 1998 WL 792304, at *1 (1998). All of these intervenors, again, would face the direct threat of fee-shifting under the district court's approach.

Finally, civil-rights cases involving universities routinely prompt intervention by student groups. Thus, in *Grutter v. Bollinger*, "41 individually named black, Latino, Native American, Arab American, Asian Pacific American, other minority and white students" intervened "to present [their] defense of the [University of Michigan] Law School's affirmative action plan." Br. For Respondents Kimberly James, et al., *Grutter v. Bollinger*, 2003 WL 716302, at *1 (U.S. 2003). In the related case *Gratz v. Bollinger*, a "group of African-American and Latino students" intervened to defend Michigan's undergraduate affirmative-action policy. *Gratz v. Bollinger*, 539 U.S. 244, 252 n.4 (2003). To take a slightly different example, in *University of Notre Dame v. Sebelius*, 743 F.3d 547, 558 (7th Cir. 2014), a group of women students intervened to defend their right to benefits under the federal contraceptive mandate, which was challenged by Notre Dame under the Religious Freedom Restoration Act, which in turn incorporates the fee-shifting language of § 1988. And in *Christian Legal Society v. Martinez*, 561 U.S. 661, 673 n.4 (2010), Hastings Outlaw—a campus gay-rights group—intervened to defend UC Hastings' nondiscrimination policy from a First Amendment challenge.

On the district court's theory, all of these student intervenors could face liability for attorney's fees, even if the students did nothing wrong and acted entirely in good faith.

But the truly cruel and dangerous result of the district court's hostility to intervening defendants is that it *guarantees* that thinly-funded public interest groups or individuals will be on the hook whenever an Attorney General (or other state lawyer) refuses to defend against or appeal the plaintiffs' challenge, as the Attorney General did here. This will most likely happen in the most consequential, highly charged cases where, for example, a Republican Attorney General refuses to defend or appeal challenges to gay or transgender nondiscrimination laws, affirmative-action programs, restrictive gun or campaign-finance regulations or, as here, inherently partisan voting-rights or other redistricting cases. Thus, the obvious and daunting deterrent effect of the panel majority's fee-shifting rule will be most likely felt in cutting-edge cases where potential intervening defendants will most justifiably fear that an Attorney General with a different political affiliation or ideology than the legislature (past or present) that passed the law will offer only a tepid, ineffective defense or opportunistically refrain from pursing a meritorious appeal. Consequently, where the intervenors' robust adverseness is *most* needed, it will be most likely to be unavailable. For the same reason, in all of these cases and more, the district court's holding will affirmatively *encourage*

government defendants to abandon the defense of laws that they oppose on policy grounds, safe in the knowledge that few private parties will intervene as defendants due to the threat of massive fee liability.

The present case well illustrates the problem: It involved highly strategic plaintiffs who were fully funded by a national partisan entity, and a state attorney general of the same party who conveniently abandoned his defense of the state electoral map in a way that advanced the party's electoral interests. In future cases, of course, the shoe may well be on the other partisan foot, as it has typically been in prior *Shaw* cases. But regardless of which political party may benefit more or less from this dynamic, it clearly contravenes the fundamental fairness of the rule of *Zipes*, which is designed to *encourage* the participation of intervenors and *discourage* plaintiffs and defendants from shutting out third parties who have concrete interests at stake.

III. UPHOLDING THE DECISION BELOW WOULD CREATE A CIRCUIT SPLIT AND INVITE SUPREME COURT REVIEW

If this Court were to uphold the decision below, it would virtually guarantee Supreme Court review because it would defy the Supreme Court's controlling precedent and create a square circuit split. Indeed, the district court itself recognized that its decision cannot be reconciled with the precedent of the Ninth Circuit, which has upheld the broad and unqualified rule of *Zipes* that "fee awards should be made against losing intervenors *only where* the intervenors' action was

frivolous, unreasonable, or without foundation." JA143 n.5 (quoting *Democratic Party of Washington State v. Reed*, 388 F.3d 1281, 1288 (9th Cir. 2004) (emphasis added)).

In *Davis v. San Francisco*, 890 F. 2d 1438, 1441 (9th Cir. 1989), a union intervened as a defendant in a civil-rights case to block a "consent decree," and was thus the sole functional defendant that forced the plaintiffs to incur extra litigation costs. The Ninth Circuit held that the intervenor could not be liable for attorney fees, applying *Zipes* in simple syllogistic terms: "[*Zipes*] held that attorney fees should be awarded . . . against an intervenor *only where* the intervenor's actions were 'frivolous, unreasonable, or without foundation." *Id*. (emphasis added). "Here, as in *Zipes*, the [intervention] was neither frivolous, unreasonable, or without foundation." Thus, "[f]ollowing the reasoning in *Zipes*, we decline to award attorney fees."*Id*. at 1452. That is how the *Zipes* rule is supposed to be applied.

The Eighth Circuit has applied *Zipes* in the same straightforward manner, holding that "a court should assess attorney's fees 'against losing intervenors only where the intervenors' action was frivolous, unreasonable, or without foundation.'" *Miller v. Moore*, 169 F.3d 1119, 1126 (8th Cir. 1999). In that case, the Eighth Circuit vacated a district court's imposition of fees against an intervenor and rejected the argument that the intervenors were responsible for fees because they

were "active in the suit" and caused the plaintiffs to incur extra costs. *Id*. *See also McNabb v. Riley*, 29 F.3d 1303, 1307 (8th Cir. 1994) ("[The] fee-shifting provision . . . does not permit award of attorney's fees against innocent intervenors.").

Several other circuits have recognized the same point. In the Third Circuit, for example, the categorical rule is that "losing intervenor[s] cannot be assessed with attorneys' fees under 42 U.S.C. § 1988" as long as "no relief was sought or granted against" the intervenor. *Thorstenn v. Barnard*, 883 F.2d 217, 219-20 (3d Cir. 1989) (squarely rejecting the argument that an intervenor could be subject to fees under the plaintiffs' theory that it was "the functional equivalent of a defendant"). Likewise in the Sixth Circuit, the law recognizes that "intervenors [can] *only* be liable for fees if the intervenors' action was 'frivolous, unreasonable, or without foundation,'" and otherwise the costs of "paying for plaintiffs' litigation against intervenors" must "be borne by plaintiffs." *Binta B. ex rel S.A. v. Gordon*, 710 F.3d 608, 634-35 (6th Cir. 2013) (emphasis added). The Second Circuit, too, has broadly recognized the categorical rule that "where there is no finding of liability under a federal statute, there can be no award of attorneys' fees." *Preservation Coalition of Erie County v. FTA*, 356 F.3d 444, 456 (2d Cir. 2004).

If this Court were to uphold the contrary decision of the court below, it would become the first Circuit to depart from the clear rule of *Zipes* in nearly three decades. By thus defying the Supreme Court's controlling precedent and creating a

lop-sided circuit split, it would leave the Supreme Court little choice but to grant certiorari and correct this bald-faced error.

CONCLUSION

For the reasons above, Intervenor-Defendants respectfully ask this Court to reverse the judgment of the district court and vacate the award of fees and costs against the Intervenor-Defendants below.

May 17, 2017

Respectfully submitted,

/s/ Michael A. Carvin

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,614 words, excluding the parts of the brief exempted by rule, as counted using the word-count function on Microsoft Word 2007 software.

May 17, 2017

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CERTIFICATE OF SERVICE

I hereby certify that, on this 17th day of May 2017, I electronically filed the original of the foregoing document with the clerk of this Court by using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. Pursuant to this Court's Local Rule 31(d), I will also file one paper copy of the foregoing document with the clerk of this Court.

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