No. 17-1389

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DAVID BRAT; *et al.*,

Intervenors/Defendants – Appellants,

v.

GLORIA PERSONHUBALLAH, *et al.*,

Plaintiffs – Appellees,

JAMES B. ALCORN, *et al.*,

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA (3:13-cv-00678)

BRIEF OF DEFENDANTS-APPELLEES

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June 15, 2017

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 17-1389 Caption: Brat v. Personhuballah

Pursuant to FRAP 26.1 and Local Rule 26.1,

JAMES B. ALCORN
(name of party/amicus)

who is Defendant-Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Trevor S. Cox Date: 4/20/2017

Counsel for: Defendant-Appellee

CERTIFICATE OF SERVICE

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I certify that on 4/20/2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Trevor S. Cox (signature) 4/20/2017 (date)

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No. 17-1389 Caption: Brat v. Personhuballah

Pursuant to FRAP 26.1 and Local Rule 26.1,

Singleton B. McAllister
(name of party/amicus)

who is Defendant-Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Trevor S. Cox Date: 4/20/2017

Counsel for: Defendant-Appellee

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No. 17-1389 Caption: Brat v. Personhuballah

Pursuant to FRAP 26.1 and Local Rule 26.1,

Clara Belle Wheeler
(name of party/amicus)

who is Defendant-Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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Signature: /s/ Trevor S. Cox Date: 4/20/2017

Counsel for: Defendant-Appellee

CERTIFICATE OF SERVICE

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/s/ Trevor S. Cox (signature) 4/20/2017 (date)

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INTRODUCTION AND RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

The fee dispute at issue in this appeal represents the tail end of prolonged litigation before a three-judge district court surrounding the constitutionality of Virginia's Third Congressional District ("CD3"), which members of Virginia's Republican congressional delegation defended as intervenors alongside the members of the State Board of Elections. Following a two-day trial on the merits in which Defendants and Intervenor-Defendants shared the burden of defense, the district court issued an opinion resolving the disputed facts in favor of Plaintiffs and finding CD3 to be an unconstitutional racial gerrymander.

Recognizing the insurmountable standard of review, and the applicable legal framework recently reiterated by the Supreme Court, Defendants did not appeal the decision and ended their defense of CD3 after more than a year. Intervenor-Defendants persisted in defending CD3, however, trapping the parties in another year of litigation that ended only when the Supreme Court held that Intervenor-Defendants lacked standing to appeal the district court's decision that CD3 was unconstitutional.

After the merits proceedings concluded, the district court addressed Plaintiffs' petitions for fees and costs. The district court rejected Plaintiffs' request to hold Defendants and Intervenor-Defendants jointly liable for all their fees and costs. Instead, it held Defendants solely liable for Plaintiffs' reasonable fees

before they ended their defense of CD3, and Intervenor-Defendants solely liable for Plaintiffs' reasonable fees thereafter.

In this narrow appeal by Intervenor-Defendants of the fee award against them, Plaintiffs' separate fee award against Defendants is not at issue; Plaintiffs did not cross-appeal the district court's decision not to hold Defendants and Intervenor-Defendants jointly liable. The only question presented for review therefore is:

> In light of *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989), who is responsible for the fees and costs Plaintiffs incurred when litigating only against Intervenor-Defendants—Intervenor-Defendants or Plaintiffs themselves?

STATEMENT OF CASE AND FACTS

The facts presented at length below provide context that is absent from Defendants' opening brief, including: the Attorney General's active defense of CD3 until the district court, following a two-day trial, found it unconstitutional; the litigation choices of Intervenor-Defendants that extended the litigation; and the district court's apportionment of fees between Defendants and Intervenor-Defendants.

A. Represented by the Attorney General, the members of the State Board of Elections defend against this suit until, following a two-day trial, the district court finds in Plaintiffs' favor.

1. Plaintiffs bring suit against the State Board of Elections challenging the constitutionality of CD3, and a group of Republican Congressmen intervene to join in the defense.

This case originated in October 2013, when Plaintiffs sued the Virginia State Board of Elections, its three members, and Virginia Attorney General Ken Cuccinelli, challenging CD3 as a racial gerrymander in violation of the Equal Protection Clause.[1] The Chief Judge of this Court granted Plaintiffs' request for a three-judge district court.[2]

The Republican members of Virginia's Congressional delegation—Eric Cantor, Robert J. Wittman, Bob Goodlatte, Frank Wolf, Randy J. Forbes, Morgan Griffith, Scott Rigell, and Robert Hurt—moved to intervene, claiming a "strong interest in protecting Virginia's legislatively enacted congressional districting plan."[3] Defendants consented to the intervention, so long as the Congressmen "do

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[1] Compl., *Page v. Va. State Bd. of Elections*, No. 3:13-cv-00678 (E.D. Va. Oct. 2, 2013), ECF No. 1. To avoid unnecessary repetition, Defendants' brief will refer to trial court documents not included in the appendix by the title of the filing, the date of the filing, and by the ECF number. By stipulation of the parties, the Attorney General and the State Board of Elections were dismissed from the case a month later. *See* Stipulation of Dismissal (Nov. 21, 2013), ECF No. 14.

[2] Order at 2 (Oct. 21, 2013), ECF No. 10.

[3] Va. Reps.' Am. Unopposed Mot. to Intervene at 1 (Dec. 2, 2013), ECF No. 23.

not seek to disrupt or depart from the discovery schedule negotiated between Plaintiffs and Defendants,"[4] and the court granted the Congressmen's intervention on December 3, 2013.[5]

2. Represented by newly elected Attorney General Mark Herring, Defendants actively defend the redistricting plan alongside Intervenor-Defendants—but, following trial, the district court decides against them.

By the time Intervenor-Defendants intervened, the November 5, 2013 general election had taken place, in which Mark Herring was elected Attorney General. Contrary to Intervenor-Defendants' account of the timeline—which falsely suggests that the election precipitated a change in Defendants' position[6]—from the time General Herring took office in January 2014, career lawyers in his office led Defendants' active defense of CD3 through trial and the district court's decision nine months later.

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[4] *Id.*

[5] Order (Dec. 3, 2013), ECF No. 26. The district court later granted a motion to intervene by Representatives David Brat and Barbara Comstock. Order (May 11, 2015), ECF No. 165.

[6] *See* Opening Br. at 4 (asserting that, due to the change of parties in the November 2013 election, "the Virginia state defendants stopped defending the case"); *id.* at 1 ("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 . . . .").

Throughout those proceedings, Defendants and Intervenor-Defendants collaborated in defending the constitutionality of CD3. Defendants and Intervenor-Defendants both filed motions for summary judgment, which were denied in light of material factual disputes,[7] and they continued to share the burden of litigation by jointly designating experts and filing a joint pre-trial brief.[8] At the two-day trial, Defendants adopted Intervenor-Defendants' arguments and joined in all their substantive motions.[9] And following trial, Defendants again joined with Intervenor-Defendants in a post-trial brief.[10]

On October 7, 2014, the district court issued a memorandum opinion concluding that CD3 was an unconstitutional racial gerrymander.[11] Although Defendants and Intervenor-Defendants had disputed that the General Assembly had used "a 55% BVAP floor" in redrawing CD3, the district court resolved that

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[7] Order (Jan. 27, 2014), ECF No. 50.

[8] *See* Trial Br. of Intervenor-Defs. & Defs. (Apr. 16, 2014), ECF No. 85.

[9] Trial Tr. at 22:8-10 (May 21, 2014), ECF No. 102 ("adopt[ing] the arguments of the intervenor defendants"); *id.* at 240:2-3 (joining in Intervenor-Defendants' motion for directed verdict); Trial Tr. at 394:6-7 (May 22, 2014), ECF No. 103 (joining in Intervenor-Defendants' renewed motion for directed verdict); *id.* at 443:5-6 (joining in Intervenor-Defendants' renewed motion for judgment as a matter of law).

[10] Post-Trial Br. of Intervenor-Defs. & Defs. (June 20, 2014), ECF No. 106.

[11] *Page v. Va. State Bd. of Elections*, 58 F. Supp. 3d 533 (E.D. Va. 2014), *vacated sub nom. Cantor v. Personhuballah*, 135 S. Ct. 1699 (2015).

dispute in favor of Plaintiffs, based on the evidence and testimony presented at trial.[12] It ordered the General Assembly to adopt a new redistricting plan "as expeditiously as possible, but no later than April 1, 2015."[13]

B. Intervenor-Defendants file multiple appeals of the district court's decisions, resulting in another 18 months of litigation.

Only following the district court's decision, and the accompanying factual findings, did Defendants and Intervenor-Defendants part company. In the ensuing year and a half, while Defendants worked to end the litigation and remedy the constitutional violation found by the district court, only Intervenor-Defendants continued to pursue litigation, causing Plaintiffs' fees to multiply.

1. Intervenor-Defendants, but not Defendants, appeal the district court's first decision holding CD3 unconstitutional.

Intervenor-Defendants appealed the district court's decision to the Supreme Court,[14] but Defendants chose not to appeal. As we later explained,[15] we appreciated the very deferential standard of appellate review: the Supreme Court

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[12] *Page*, 58 F. Supp. 3d at 553.

[13] Order at 2 (Oct. 7, 2014), ECF No. 110.

[14] *See generally* Jurisdictional Statement, *Cantor v. Personhuballah*, 135 S. Ct. 1699 (2015) (No. 14-518), 2014 WL 5659399.

[15] *See generally* Defs.' Opening Br. Regarding the Legal Effect of *Alabama Legislative Black Caucus v. Alabama* at 3 (Apr. 13, 2015), ECF No. 145.

would reverse the district court's factual findings "only for 'clear error'"[16] and would not reverse simply because it might have "decided the case differently."[17] In consideration of that demanding legal standard, we could not say that the district court's findings were clearly erroneous or that the Supreme Court would be "left with the definite and firm conviction that a mistake ha[d] been committed."[18]

2. Intervenor-Defendants, but not Defendants, contend that *Alabama* undermined the district court's decision.

After the Supreme Court decided *Alabama Legislative Black Caucus v. Alabama*,[19] it vacated the district court's decision in this case and remanded for further consideration in light of *Alabama*.[20] On remand, the parties all agreed that no further evidence was needed, and the district court ordered supplemental briefing on the legal effect of *Alabama*.[21] Defendants agreed with Plaintiffs that *Alabama* did not change the legal outcome of the case. The court aligned

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[16] *Easley v. Cromartie*, 532 U.S. 234, 242 (2001).

[17] *Id.* (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)).

[18] *Id.* (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

[19] *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015) [hereinafter *Alabama*].

[20] *Cantor v. Personhuballah*, 135 S. Ct. 1699 (2015) (remanding "for further consideration in light of [*Alabama*]").

[21] Order (Apr. 3, 2015), ECF No. 144.

Defendants and Plaintiffs on the same side of the issue and ordered their briefs to be filed at the same time.[22] Defendants joined Plaintiffs in arguing that the district court had used the correct legal framework, as later confirmed in *Alabama*.[23] Because nothing in *Alabama* changed the district court's factual findings, and because *Alabama* applied the same legal rules that the district court had followed, we recognized that the district court's decision should be the same.[24]

On June 5, 2015, the district court issued a memorandum opinion reaffirming its earlier decision on the basis of the same factual findings and legal grounds, agreeing with Plaintiffs and Defendants that *Alabama* provided further support for the Court's decision.[25] Although Judge Payne dissented from the decision, all three judges agreed that *Alabama* did not change the legal framework.[26] Both the majority opinion and dissent noted that Defendants had

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[22] *Id.*

[23] *Id. See generally* Defs.' Opening Br. Regarding the Legal Effect of *Alabama Legislative Black Caucus v. Alabama* (Apr. 13, 2015), ECF No. 145; Pls.' Opening Br. Regarding *Alabama Legislative Black Caucus v. Alabama* (Apr. 13, 2015), ECF No. 148.

[24] *See generally* Defs.' Opening Br. Regarding the Legal Effect of *Alabama Legislative Black Caucus v. Alabama* (Apr. 13, 2015), ECF No. 145.

[25] *See Page v. Va. State Bd. of Elections*, No. 3:13-cv-678, 2015 WL 3604029 (E.D. Va. June 5, 2015), *appeal dismissed sub nom. Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016).

[26] *See id.* at *19 (Payne, J., dissenting).

taken a different position from Intervenor-Defendants and had not appealed the Court's earlier ruling.[27] The district court ordered the General Assembly to adopt a new redistricting plan by September 1, 2015.[28]

3. Intervenor-Defendants, but not Defendants, oppose the Special Master's recommended plans and fight to prevent the remedial plan from taking effect.

The court-ordered deadline passed without the General Assembly's adopting a remedial plan. The district court therefore oversaw the remedial process, selecting a redistricting expert as a Special Master and inviting the parties and non-parties to submit remedial plans for consideration. Plaintiffs submitted a remedial plan for consideration;[29] Intervenor-Defendants submitted two competing plans.[30] And while Plaintiffs and Defendants took no issue with the Special Master's

[27] *See id.* at *5 n.10 (majority op.), *19 n.30 (Payne, J., dissenting).

[28] Order (June 5, 2015), ECF No. 171.

[29] *See generally* Pls.' Mem. in Supp. of Their Proposed Remedial Plan (Sept. 18, 2015), ECF No. 229.

[30] *See generally* Intervenor-Defs.' Br. in Supp. of Their Proposed Remedial Plans, (Sept. 18, 2015), ECF No. 232.

reliance on racial-bloc-voting analysis in formulating his recommendation,[31] Intervenor-Defendants opposed it.[32] The Court overruled their objections.[33]

Following briefing on the merits of the various plans, the Special Master recommended that the Court adopt either one of the two plans he had formulated.[34] While Defendants and Plaintiffs supported the Special Master's recommendation, Intervenor-Defendants opposed it, both in their written "statement of position" and at the hearing on December 14, 2015.[35] Intervenor-Defendants' attacks on the Special Master's report and recommendations led him to issue two supplemental reports in response to their "mischaracterizations" of and "misstatements" about his methodology.[36]

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[31] *See* Pls.' Statement of Position Regarding Report of Dr. Lisa Handley at 1 (Nov. 9, 2015), ECF No. 264; Defs.' Statement of Position Regarding Special Master's Use of Dr. Handley's Data at 1 (Nov. 9, 2015), ECF No. 266.

[32] *See* Intervenor-Defs.' Statement of Position Regarding Use of Data Submitted by Dr. Lisa Handley at 1 (Nov. 9, 2015), ECF No. 265.

[33] *See* Order (Nov. 12, 2015), ECF No. 268.

[34] *See* Report of the Special Master at 2 (Nov. 16, 2015), ECF No. 272.

[35] *See* Intervenor-Defs.' Statement of Position Regarding the Special Master's Final Report (Nov. 24, 2015), ECF No. 279.

[36] Suppl. Comments to the Report by the Special Master at 1 (Dec. 11, 2015), ECF No. 294; Suppl. II to the Report of the Special Master: Comments on the Dec. 14, 2015 Hr'g at 2 (Dec. 15, 2015), ECF No. 297-1.

Meanwhile, Intervenor-Defendants also filed a motion to stay proceedings pending Supreme Court review of the case, and thereby to prevent any remedy from being implemented.[37] Both Plaintiffs and Defendants opposed Intervenor-Defendants' motion, which the parties briefed and argued at the December 14, 2015 hearing.[38]

On January 7, 2016, the district court rejected Intervenor-Defendants' objections, adopted one of the Special Master's plans, and ordered its implementation.[39] The district court also denied Intervenor-Defendants' motion to stay the implementation pending Supreme Court review.[40] On January 12, 2016, the Intervenor-Defendants filed in the Supreme Court an application to stay the remedial plan pending the Supreme Court's review. Plaintiffs and Defendants again filed briefs opposing that relief. On February 1, the Supreme Court denied Intervenor-Defendants' application.

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[37] Intervenor-Defs.' Mot. to Suspend Further Proceedings and To Modify Injunction Pending Supreme Court Review (Nov. 16, 2015), ECF No. 270.

[38] Order (Dec. 4, 2015), ECF No. 292.

[39] Mem. Op. (Jan. 7, 2016), ECF No. 299.

[40] *See id.* at 14; Order (Jan. 7, 2016), ECF No. 300.

At the conclusion of the remedial stage, Defendants paid the entire costs of the Special Master, amounting to $80,789.[41] And despite that Intervenor-Defendants had significantly extended the litigation over the remedial phase, Defendants did not seek to shift liability to the Intervenor-Defendants for those costs or for the Plaintiffs' fees in obtaining the remedial plan.[42]

4. Intervenor-Defendants, but not Defendants, appeal the district court's second decision on the merits, as well as the remedial plan adopted by the district court.

During the remedial phase, Intervenor-Defendants also carried forward their appeal of the district court's second ruling that CD3 was unconstitutional. As before, Intervenor-Defendants appealed.[43] Defendants did not. Instead, consistent with our previous appellate position, we filed a motion asking the Supreme Court to summarily affirm, arguing that the district court did not commit clear error in finding that race predominated in redrawing CD3 and that the legislature's use of

[41] Special Master Statement of Fees & Expenses (Jan. 12, 2016), ECF No. 302.

[42] *See* Order at 2 (Sept. 3, 2015), ECF No. 207; Order at 2 (Jan. 29, 2016), ECF No. 304.

[43] *See* Jurisdictional Statement, *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016) (No. 14-1504), 2015 WL 3862735.

race was not narrowly tailored.[44] Plaintiffs also filed a motion to dismiss or affirm.[45]

On November 13, 2015, the Supreme Court noted probable jurisdiction and directed the parties to address the question of Intervenor-Defendants' standing. Over the next four months, the parties prepared and filed their briefs with the Supreme Court. Although Defendants agreed with Intervenor-Defendants that they had standing to appeal, on the merits we again took the same position as Plaintiffs that the district court did not err in invalidating CD3.

While their appeal of the Court's merits decision was pending, Intervenor-Defendants also noted an appeal of the Court's remedial opinion and order.[46] Neither Plaintiffs nor Defendants appealed that order.

Oral argument in *Wittman* was held on March 21, 2016, at which Defendants split argument time with Plaintiffs and the United States; Intervenor-Defendants had half the argument time to themselves. Four days later, counsel for Intervenor-Defendants informed the Supreme Court of facts that fatally undermined their

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[44] Mot. to Affirm, *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016) (No. 14-1504), 2015 WL 4498865.

[45] Mot. to Dismiss or Affirm, *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016) (No. 14-1504), 2015 WL 4481310.

[46] *See* Intervenor-Defs.' Notice of Appeal of Remedial Op. & Order (Mar. 4, 2016), ECF No. 308.

claim of standing.[47] On May 23, 2016, the Supreme Court dismissed *Wittman* based on the absence of evidence that any Intervenor-Defendant had standing,[48] thereby leaving undisturbed the district court's merits decision. A month later, Intervenor-Defendants voluntarily dismissed their appeal of the remedial opinion.[49]

C. In response to Plaintiffs' four petitions for attorney's fees and costs in this case, the district court awards approximately $1.35 million—about two-thirds against Defendants, for fees incurred until they stopped defending CD3, and the remainder against Intervenor-Defendants.

1. Plaintiffs file two petitions for their fees and costs incurred through the district court's first decision on the merits, which result in an award of nearly $780,000 solely against Defendants.

Plaintiffs' first fee petition, filed two weeks after the district court's initial decision on the merits, asked for more than $1 million in fees and costs.[50] Their second petition asked for more than $75,000 in attorney's fees for the cost of

[47] *See Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736-37 (2016).

[48] *Id.* at 1737.

[49] Stipulation of Dismissal of Appeal of Remedial Op. & Order (June 22, 2016), ECF No. 314.

[50] *See* Pls.' Mot. for Att'ys Fees, Expert Fees, & Costs (Oct. 20, 2014), ECF No. 111; Pls.' Mem. in Supp. of Mot. for Att'ys' Fees, Expert Fees, & Costs at 11 (Oct. 20, 2014), ECF No. 112.

preparing their first petition.[51] Defendants contested the reasonableness of Plaintiffs' claims on a number of grounds—including the hourly rates claimed, the number of hours claimed, and the use of block-billing—but did not argue that Intervenor-Defendants bore any liability for those fees.[52]

On March 11, 2015, the district court granted in part and denied in part Plaintiffs' first two petitions, awarding $691,337.40 in attorney's fees, $49,448.79 in expert fees, and $38,403.20 in costs, for a total of $779,189.39.[53] The court stayed the enforcement of the award during the pendency of Intervenor-Defendants' appeal.[54]

2. Plaintiffs' third and fourth petitions—the resolution of which is challenged here—ask for fees and costs incurred during and following Intervenor-Defendants' appeals.

Two weeks after the district court reaffirmed its previous decision on remand from *Alabama*, Plaintiffs filed a third petition for the work performed on remand.[55] They indicated that they did "not seek fees or costs incurred during the

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[51] JA 105 (Pls.' Suppl. Mot. for Att'ys' Fees at 1 (Dec. 12, 2014), ECF No. 122).

[52] *See* Defs. Mem. in Opp'n to Pls.' Mot. for Att'ys' Fees, Expert Fees, & Costs (Nov. 19, 2014), ECF No. 118; Defs.' Mem. in Opp'n to Pls.' Suppl. Mot. for Att'y's Fees (Dec. 23, 2014), ECF No. 124.

[53] Mem. Op. & Order at 28 (Mar. 11, 2015), ECF No. 139.

[54] *Id.*

[55] JA 127 (Pls.' Third Suppl. Mot. for Att'ys' Fees (June 19, 2015), ECF No. 175).

course of the appeal itself."[56] After accepting lower hourly rates and accounting for additional fees requested in their reply brief, Plaintiffs had asked for $51,040.50 in fees for their work on remand through May 31, 2015, and $22,500 for work through July 21, 2015.[57] Plaintiffs asked the district court to "grant attorneys' fees incurred on remand against Intervenor-Defendants as well as Defendants,"[58] and repeatedly argued that they were jointly liable.[59]

In response, Defendants argued that, because they did not prolong the litigation or oppose any relief sought by Plaintiffs, they were not liable for any of Plaintiffs' attorneys' fees incurred on remand, and that the fees requested were unreasonably high.[60] For their part, Intervenor-Defendants agreed that Plaintiffs' fees were excessive and additionally argued that intervenors cannot be held liable

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[56] Pls.' Mem. in Supp. of Third Suppl. Mot. for Att'ys' Fees at 2 n.1 (June 19, 2015), ECF No. 176.

[57] Pls.' Reply in Supp. of Third Suppl. Mot. for Att'ys' Fees at 3 (July 13, 2015), ECF No. 184.

[58] JA 127-28 (Pls.' Third Suppl. Mot. for Att'ys' Fees at 1-2 (June 19, 2015), ECF No. 175).

[59] Pls.' Mem. in Supp. of Third Suppl. Mot. for Att'ys' Fees at 7-9 (June 19, 2015), ECF No. 176; Pls.' Reply in Supp. of Third Suppl. Mot. for Att'ys' Fees at 5-8 (July 13, 2015), ECF No. 184.

[60] *See generally* Defs.' Br. in Opp'n to Pls.' Third Suppl. Mot. for Att'ys' Fees (July 6, 2015), ECF No. 183.

for attorney's fees absent extraordinary circumstances not alleged by Plaintiffs.[61] On July 29, 2015, the district court, finding it "prudent to defer ruling further on attorneys' fees until the merits of the case have been decided by the Supreme Court," denied Plaintiffs' third petition without prejudice.[62]

A year later, following the Supreme Court's dismissal of Intervenor-Defendants' second appeal, Plaintiffs filed a fourth petition renewing their third petition for fees and asking for an additional $644,648.75 in fees and costs incurred on remand, during the remedial phase, and on Intervenor-Defendants' second appeal.[63] As with their third petition, Plaintiffs asked the district court to hold Defendants and Intervenor-Defendants jointly liable for those additional fees and costs.[64] Defendants again opposed Plaintiffs' fees as unreasonable and argued that Intervenor-Defendants should bear responsibility for the fees that their actions

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[61] *See generally* Intervenor-Defs.' Opp'n to Pls.' Third Suppl. Mot. for Att'ys' Fees (July 6, 2015), ECF No. 182.

[62] Order at 2 (July 29, 2015), ECF No. 198.

[63] JA 133 (Pls.' Fourth Suppl. Mot. for Att'ys' Fees at 2-3 (July 8, 2016), ECF No. 316).

[64] Pls.' Mem. in Supp. of Fourth Suppl. Mot. for Att'ys' Fees at 12-14 (July 8, 2016), ECF No. 317; Pls.' Reply in Supp. of Fourth Suppl. Mot. for Att'ys' Fees at 2-3 (July 28, 2016), ECF No. 322 (recognizing that "Defendants have effectively been held hostage in this lawsuit by Intervenors over the past two years," but asserting, "[M]ake no mistake: Defendants *are* responsible for Plaintiffs' fees on remand").

alone caused Plaintiffs to incur.[65] Intervenor-Defendants reiterated their position that Plaintiffs' fees were excessive and that intervenors cannot be liable for attorney's fees.[66]

3. The district court holds Defendants liable for Plaintiffs' reasonable fees incurred through trial and in the remedial phase, and holds Intervenor-Defendants liable for the fees Plaintiffs incurred after Defendants stopped defending CD3.

On March 3, 2017, the district court issued an order granting in part and denying in part Plaintiffs' fourth petition.[67] It reinstated its award against Defendants for Plaintiffs' earlier petitions and, with respect to Plaintiffs' new fee requests, significantly reduced the claimed fees that were excessive, vague, block-billed, or the result of overstaffing.[68] The new fees awarded amounted to $567,382.35.[69]

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[65] *See generally* Defs.' Br. in Opp'n to Pls.' Fourth Suppl. Mot. for Att'ys' Fees (July 22, 2016), ECF No. 321.

[66] *See generally* Intervenor-Defs.' Opp'n to Pls.' Fourth Suppl. Mot. for Att'ys' Fees (July 22, 2016), ECF No. 320.

[67] JA 136 (Mem. Op. & Order (Mar. 3, 2017), ECF No. 327 [hereinafter Mem. Op. & Order]).

[68] *See* JA 166-74 (Mem. Op. & Order at 31-39).

[69] *See* JA 178 (Mem. Op. & Order at 43).

As to who should pay those fees, the district court rejected Intervenor-Defendants' argument that *Zipes* categorically precluded an award of fees against them. After examining the "key factors" that guided the decision in *Zipes*, and surveying the case law since then, the district court concluded that *Zipes* was distinguishable.[70] It found more persuasive the reasoning of cases in the Third, Seventh, and Eleventh Circuits, which likewise found *Zipes* inapposite and supported imposing liability on intervenors in similar situations.[71]

Having found that Intervenor-Defendants could be held liable, it then allocated Plaintiffs' fees based on when Defendants stopped defending CD3: "Intervenors are liable for attorney's fees incurred after April 13, 2015, the date on which Defendants formally abandoned their defense of [CD3] and left Intervenors as the only functional defendants in the case."[72] That determination allowed the district court to calculate the apportionment of fees between Defendants on the one hand, and Intervenor-Defendants on the other:

> Of the Third Petition's award of $57,579.60, Defendants are liable for $16,122.29 in fees, and Intervenor-Defendants are liable for the remaining $41,457.31. Finally, for the Fourth Supplemental Petition, Defendants are liable for $68,668.04 in fees and $2,704.35 in costs.

[70] *See* JA 140-56 (Mem. Op. & Order at 5-21).

[71] *See* JA 140-46 (Mem. Op. & Order at 5-11).

[72] JA 140 (Mem. Op. & Order at 5).

> Intervenor-Defendants are responsible for the remaining $421,817.96 in fees and $16,612.40 in costs.[73]

All told, as summarized in the table below, the district court awarded Plaintiffs fees and costs from two different sources: "a total award of **$866,684.07** against Defendants"—about 64% of Plaintiffs' overall recovery—"and a total award of **$479,887.67** against Intervenor-Defendants," about 36% of Plaintiffs' overall recovery.[74]

	Fees & Costs Awarded	**Allocated to Defs.**	**Allocated to Int.-Defs.**
3rd petition	$ 57,579.60	$ 16,122.29	$ 41,457.31
4th petition	$ 509,802.75	$ 71,372.39	$ 438,430.36
TOTAL (3rd & 4th petitions)	**$ 567,382.35**	**$ 87,494.68**	**$ 479,887.67**
previously awarded (1st & 2nd petitions)	$ 779,189.39	$ 779,189.39	$ 0.00
TOTAL	**$ 1,346,571.14**	**$ 866,684.07**	**$ 479,887.67**

The district court did not accept Plaintiffs' repeated request to hold Defendants and Intervenor-Defendants "jointly liable" for the fees.[75] The closest it came was to hold each of the Intervenor-Defendants "jointly and severally liable" for Intervenor-Defendants' fee award.[76]

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[73] JA 178 (Mem. Op. & Order at 43).

[74] *Id.*

[75] JA 158-59, 178 (Mem. Op. & Order at 23-24, 43).

[76] JA 158 (Mem. Op. & Order at 23) (emphasis added).

Judge Payne concurred in part and dissented in part.[77] Although he "agree[d] with the quantum of fees and costs awarded in the majority opinion as against the Defendants," he did "not agree that the Intervenor-Defendants are liable for *any* fees because . . . [he] underst[ood] the Supreme Court's decision in [*Zipes*] to foreclose such an award against the Intervenor-Defendants."[78]

D. Only Intervenor-Defendants appeal, seeking reversal of the district court's award of fees against them.

Intervenor-Defendants timely filed an appeal under 28 U.S.C. § 1291, and ask this Court to "reverse the judgment of the district court and vacate the award of fees and costs against the Intervenor-Defendants."[79] Plaintiffs and Defendants did not appeal any aspect of the district court's ruling.

SUMMARY OF ARGUMENT

This appeal is a dispute only between Plaintiffs and Intervenor-Defendants over which of them is responsible for Plaintiffs' fees incurred after Defendants stopped defending CD3. The outcome of that dispute does not affect Defendants'

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[77] JA 179 (Mem. Op. & Order at 44) (Payne, J., concurring in part and dissenting in part).

[78] *Id.* (emphasis added).

[79] Opening Br. at 55.

liability for the fees previously awarded against them, a judgment that Defendants did not appeal and that Defendants have already paid and satisfied.

First, neither Intervenor-Defendants nor Plaintiffs have made the amount of Plaintiffs' fee award against Defendants an issue in this appeal. Intervenor-Defendants do not argue that Defendants' fee liability is in any way tied to their own, nor do they claim that any such liability should be shifted to Defendants. For their part, Plaintiffs did not cross-appeal the district court's decision not to hold Defendants liable for Plaintiffs' fees incurred as a result of Intervenor-Defendants' extending the litigation. Accordingly, neither Plaintiffs nor Intervenor-Defendants can use this appeal to impose any greater liability or any new judgment on Defendants.

Second, however the Court resolves the issue on which the appeal turns—the applicability of *Zipes*—should have no impact on Defendants' fee liability. If *Zipes* applies, as Intervenor-Defendants urge, then Plaintiffs must bear their own fees and costs. And if *Zipes* does *not* apply, then Intervenor-Defendants must bear Plaintiffs' fees and costs. In neither case would *Defendants* bear any increased liability. Indeed, the district court's apportionment of fees between Defendants and Intervenor-Defendants was reasonable and in keeping with how other courts have allocated fees in similar situations.

STANDARD OF REVIEW

"Ordinarily, [this Court] review[s] an award of attorney's fees for abuse of discretion," but legal determinations made in connection with fee awards are reviewed de novo.[80] We agree with Intervenor-Defendants that their liability as intervenors, under *Zipes*, is a question of law reviewed de novo.[81]

ARGUMENT

I. The sole question on appeal is whether Plaintiffs can recover their fee award from Intervenor-Defendants; the apportionment of fees between Defendants and Intervenor-Defendants is not at issue.

In the district court, the parties disputed Defendants' and Intervenor-Defendants' liability for Plaintiffs' fees, and Plaintiffs unsuccessfully sought to hold each group jointly liable for the fees apportioned to the other. Because Intervenor-Defendants do not seek to shift liability to Defendants, and because Plaintiffs did not cross-appeal the district court's decision to increase Defendants' liability, the sole issue in this appeal is a narrow one: whether *Zipes* prevents Plaintiffs from recovering fees from Intervenor-Defendants. The scope of Defendants' liability, by contrast, has been settled and is not an issue on appeal.

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[80] *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 274 (4th Cir. 2002) (citing *Perry v. Bartlett*, 231 F.3d 155, 163 (4th Cir. 2000)).

[81] *Cf. id.* (noting that designation of a party as a prevailing party is a legal determination).

A. Intervenor-Defendants do not seek to hold Defendants liable for the fees and costs awarded against Intervenor-Defendants.

As Intervenor-Defendants have framed their case, "[t]his is an appeal of an order awarding attorney fees and costs against Intervenor-Defendants."[82] The amount of fees and costs awarded against Defendants is not at issue;[83] the sole "question in this appeal is whether the district court erred by . . . imposing fee liability on Intervenor-Defendants."[84] They ask only that the Court "reverse the judgment of the district court and vacate the award of fees and costs against the Intervenor-Defendants."[85]

Intervenor-Defendants rest their limited appeal on a single argument: that *Zipes* categorically excuses them from liability for Plaintiffs' fees. Nowhere in Intervenor-Defendants' brief do they suggest that *Defendants* should be held liable for all or any part of the fee award against Intervenor-Defendants. Rather, they contend that *Plaintiffs* must shoulder the costs of litigating against them.[86] That

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[82] Opening Br. at 2.

[83] *See id.* at 8 (referencing the fee award of $866,684.07 against Defendants and noting that Defendants do "not contest . . . liability for that amount").

[84] *Id.* at 2; *see also id.* at 8 ("The district court rejected Intervenor-Defendants' argument and held them personally liable for fees and costs in the amount of $479,887.67.").

[85] *Id.* at 55.

[86] *See id.* at 43-45.

focus is consistent with their arguments below and with Judge Payne's dissenting opinion.[87]

Even if Intervenor-Defendants had wished to argue on appeal that some or all of their fee liability should be shared by or shifted to Defendants, their time for doing so has now passed. Under Federal Rule of Appellate Procedure 28(a), the argument section of an opening brief must contain "appellant's contentions and the reasons for them."[88] Failure to do so results in waiver of the issue.[89] Thus, based on their own arguments, Intervenor-Defendants' fee liability turns exclusively and entirely on whether *Zipes* applies.[90]

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[87] *See* JA 188 (Mem. Op. & Order at 53 n.34) ("*Zipes* instructs that the plaintiff bears his own costs for the portion of the case against 'blameless' intervenors.'")

[88] Fed. R. App. P. 28(a)(8)(A).

[89] *See, e.g.*, *United States v. Bartko*, 728 F.3d 327, 335 (4th Cir. 2013) (finding that a defendant's failure to raise issue of withheld evidence in opening brief waived the issue).

[90] *See* JA 140 (Mem. Op. & Order at 5) (framing the liability issue below as "whether this case is controlled by [*Zipes*], or whether it is instead guided by the cases that have distinguished *Zipes* in the 27 years since it was decided"); JA 180 (Mem. Op. & Order at 45) (Payne, J., concurring in part and dissenting in part) ("The majority correctly recognizes that the outcome of the motion for a fee award against the Intervenor-Defendants turns on whether *Zipes* applies in this case.").

B. Plaintiffs did not cross-appeal the district court's rejection of their request that fees and costs be awarded jointly against Defendants and Intervenor-Defendants.

Plaintiffs' decision not to cross-appeal the district court's decision also insulates Defendants from any greater fee liability on appeal.

1. The district court rejected Plaintiffs' request that fees and costs be awarded jointly against Defendants and Intervenor-Defendants.

In their third and fourth fee petitions, Plaintiffs repeatedly asked the district court to hold Intervenor-Defendants and Defendants "jointly liable" for any fee award.[91] But the district court declined that request. Instead, it specifically held Defendants liable for some fees and Intervenor-Defendants liable for others, and held neither group liable for the other's fee award.

Not including the costs of the remedial phase, the district court identified a specific point at which Defendants' liability for fees ended and Intervenor-Defendants' liability began: April 13, 2015, when Defendants stopped defending the constitutionality of CD3 in light of *Alabama*. The district court found that "[b]efore that point, Defendants are fully liable for attorney's fees"—but after that

[91] *See* Pls.' Mem. in Supp. of Third Suppl. Mot. for Att'ys' Fees at 7-9 (June 19, 2015), ECF No. 175; Pls.' Reply in Supp. of Third Suppl. Mot. for Att'ys' Fees at 5-8 (July 13, 2015), ECF No. 184; Pls.' Mem. in Supp. of Fourth Suppl. Mot. for Att'ys' Fees at 12-14 (July 8, 2016), ECF No. 317; Pls.' Reply in Supp. of Fourth Suppl. Mot. for Att'ys' Fees at 2-3 (July 28, 2016), ECF No. 322.

point, "responsibility shifted to Intervenors."[92] That determination allowed it to apportion Plaintiffs' fees accordingly, into independent awards against Defendants and Intervenor-Defendants: "a total award of **$866,684.07** against Defendants, and a total award of **$479,887.67** against Intervenor-Defendants."[93]

The district court also declined to hold Defendants and Intervenor-Defendants jointly liable. While it conspicuously made all Intervenor-Defendants "jointly and severally liable" for the award against them, it did not extend that shared liability to Defendants:

> *Intervenors* should bear responsibility for the fees and costs Plaintiffs incurred in successfully litigating its claims on remand and again on appeal to the Supreme Court. *Each intervenor will be jointly and severally liable for these fees* . . . . [Defendants] are still *solely* liable for the work done in the remedial phase of the litigation.[94]

The district court's order could not have been clearer that liability was divided between Defendants and Intervenor-Defendants, not shared: for the third fee petition, "Defendants are liable for $16,122.29 in fees, and Intervenor-Defendants are liable for the remaining $41,457.31"; for the fourth petition, "Defendants are

[92] JA 158 (Mem. Op. & Order at 23).

[93] *Id.*

[94] *Id.* (emphasis added).

liable for $68,668.04 in fees and $2,704.35 in costs," while "Intervenor-Defendants are responsible for the remaining $421,817.96 in fees and $16,612.40 in costs."[95]

2. Plaintiffs' decision not to cross-appeal the district court's judgment—including with respect to the award of fees against Intervenor-Defendants alone—precludes enlarging the judgment to recover those fees from Defendants instead.

After failing to convince the district court to hold Defendants and Intervenor-Defendants jointly liable for the fees they were awarded, Plaintiffs did not move to alter or amend the judgment. And the time for doing so has long since passed.[96] Plaintiffs also chose not to appeal the district court's judgment to this Court.[97] That prevents Plaintiffs from now seeking an enlargement of their judgment as to Defendants, including reapportioning any of Intervenor-Defendants' fee award against Defendants.

It is black-letter law that "an appellate court may not alter a judgment to benefit a nonappealing party."[98] This holds true in cases involving fee awards.

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[95] *Id.*

[96] *See* Fed. R. Civ. P. 59(e) ("A motion to alter or amend a judgment must be filed no later than 28 days after entry of the judgment.").

[97] *See* Fed. R. App. P. 4(a)(3) (establishing deadline for appellee to file cross-appeal).

[98] *Greenlaw v. United States*, 554 U.S. 237, 244 (2008); *see also United States v. Clawson*, 650 F.3d 530, 535 n.4 (4th Cir. 2011).

For instance, in *Thurston v. United States*,[99] this Court refused the United States Postal Service's arguments contesting the trial court's grant of attorney's fees because the Postal Service "did not file notice of a cross-appeal as required by Federal Rule of Appellate Procedure 4(a)(3)."[100] In doing so, the Court followed a "well established rule":

> [W]ithout filing a cross-appeal, an appellee "may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, where what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below."[101]

Other circuits likewise prevent parties from contesting the amount or denial of fee awards when they have not filed a cross-appeal.[102]

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[99] 810 F.2d 438 (4th Cir. 1987).

[100] *Id.* at 447.

[101] *Id.* (quoting *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924)).

[102] *See, e.g.*, *Montgomery v. City of Ardmore*, 365 F.3d 926, 944 (10th Cir. 2004) ("Because the FOP failed to file a cross-appeal, we do not consider its request for this Court to decide whether Mr. Montgomery should have been awarded attorneys' fees."); *Doherty v. Wireless Broad. Sys. of Sacramento, Inc.*, 151 F.3d 1129, 1131 (9th Cir. 1998) ("[The party's] claim that the district court erred in reducing its fee award is not properly before us. [The party] seeks to enlarge its rights under the judgment of the district court as to the amount of attorney fees, but failed to file a separate cross appeal as is required under Fed. R. App. P. 4(a)(3)."); *Davis v. Murphy*, 587 F.2d 362, 365 (7th Cir. 1978) ("If counsel were dissatisfied with the district court award [of attorney's fees], he should have filed a cross

Expanding Plaintiffs' fee award against Defendants—whether by making them jointly liable for the fees allocated against Intervenor-Defendants, or otherwise shifting liability to Defendants—would clearly be "enlarging [Plaintiffs'] rights" improperly. Because Plaintiffs have not appealed the district court's judgment, altering Defendants' liability now is not relief within Plaintiffs' reach.

II. Whether or not *Zipes* categorically precludes the imposition of fees on Intervenor-Defendants, Defendants are not liable for those fees.

As shown above, the apportionment of fees between Defendants and Intervenor-Defendants was settled by the district court and has not been appealed. Accordingly, the only issue on appeal is whether *Zipes* shields Intervenor-Defendants from liability.[103] Defendants' fee liability is unaffected by the outcome: whichever way this Court resolves the issue of *Zipes*'s applicability, Defendants should not be liable for the fees awarded against Intervenor-Defendants.

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appeal in this court. Lacking such an appeal this court cannot review the district court's decision.").

[103] *See* JA 140 (Mem. Op. & Order at 5) (framing the issue as "whether this case is controlled by [*Zipes*], or whether it is instead guided by the cases that have distinguished *Zipes* in the 27 years since it was decided"); JA 180 (Mem. Op. & Order at 45) (Payne, J., concurring in part and dissenting in part) ("The majority correctly recognizes that the outcome of the motion for a fee award against the Intervenor-Defendants turns on whether *Zipes* applies in this case.").

A. If *Zipes* applies, Plaintiffs bear their own fees, not Defendants.

Relying on *Zipes*, Intervenor-Defendants have consistently argued that, as intervenors, they cannot be held liable for any attorney fees. If they are correct on that point, they are also correct that Plaintiffs are liable for their own fees, not Defendants.[104]

Zipes itself explains that losing defendants are not liable for prevailing plaintiffs' fees against intervenors:

> In every lawsuit in which there is a prevailing Title VII plaintiff there will also be a losing defendant who has committed a legal wrong. That defendant will . . . be liable for all of the fees expended by the plaintiff in litigating the claim *against him* . . . .[105]

But it contrasted fee liability for claims against defendants with those against intervenors, "whose claims the plaintiff must litigate without prospect of fee compensation."[106]

Although they criticized that part of the majority opinion, the concurring and dissenting Justices in *Zipes* also understood that to be the conclusion of the five Justices in the majority. In his concurring opinion, Justice Blackmun said that he

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[104] *See* Opening Br. at 43-44.

[105] *Zipes*, 491 U.S. at 761; *see id.* (explaining "that liability alone creates a substantial added incentive for victims of Title VII violations to sue").

[106] *Id.* at 761-62.

would have allowed the possibility for plaintiffs to recover fees from a losing defendant, and that he therefore disagreed with the majority's rule that "the defendant's fee liability goes no further" than to cover "'fees expended by the plaintiff in litigating the claim *against him*.'"[107] In dissent, Justice Marshall also criticized the majority for limiting the fees recoverable from a losing defendant to those incurred in litigating the claim "against him." He was skeptical that "the typical victim" would "have available discretionary income . . . to spend to counter intervenors' claims."[108]

In *Rum Creek Coal Sales v. Caperton*,[109] this Court read *Zipes* to mean that prevailing plaintiffs, not losing defendants, must bear the cost of "intervention-related fees."[110] Although the dispute between plaintiffs and defendants in *Rum Creek* was over a different kind of "intervention-related fees"—plaintiffs' fees in opposing the attempted intervention of a third party—it understood *Zipes* to bar

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[107] *Id.* at 767 (Blackmun, J., concurring) (quoting *Zipes*, 491 U.S. at 761).

[108] *Id.* at 775 (Marshall, J., dissenting, joined by Brennan, J.).

[109] 31 F.3d 169 (4th Cir. 1994).

[110] The district court's conclusion that *Rum Creek* "does not control the answer to the question before us," JA 147 (Mem. Op. & Order at 12), relates to whether *Zipes* protects intervenors from fee liability—not to which other parties bear liability lies if *Zipes* does not apply.

plaintiffs from recovering fees against the "losing defendant."[111] As the Court succinctly reasoned, "[t]hat the majority retained the 'against him' language in the face of these attacks [by Justices Blackmun and Marshall] surely implies that intervention-related fees ought normally to be borne by a plaintiff," not a "losing defendant."[112]

This Court is not alone in its interpretation of *Zipes*. The Sixth Circuit also has interpreted *Zipes* to mean that, "even though defendants are liable for the successful claims against *them*, they are not responsible for paying for plaintiffs' litigation against intervenors"—rather, those "costs should be borne by plaintiffs."[113] Based on that understanding, it decided against "sticking defendant with the bill for plaintiffs' litigation against plaintiff-intervenors."[114]

Thus, if Intervenor-Defendants are correct about the applicability of *Zipes*, not only are they not liable for any fees, neither are Defendants.

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[111] *Rum Creek*, 31 F.3d at 178.

[112] *Id*.

[113] *Binta B. ex rel. S.A. v. Gordon*, 710 F.3d 608, 635 (6th Cir. 2013).

[114] *Id.*

B. If *Zipes* does not apply, Intervenor-Defendants are liable for Plaintiffs' fee award against them, and the district court properly apportioned those fees against Intervenor-Defendants.

If this Court were to agree with the district court that *Zipes* does not apply—and that, therefore, Intervenor-Defendants are not categorically exempt from liability for fees—the allocation of Plaintiffs' fees between Defendants and Intervenor-Defendants should not be disturbed, given the respective roles they played in the litigation.[115]

As shown above, Intervenor-Defendants themselves do not contest the reasonability of the fees or seek to shift any fee liability to Defendants. And for the reasons below, that would be a meritless argument.

1. Intervenors have been held liable in other cases where they, rather than defendants, have persisted in defending unconstitutional laws and needlessly prolonged the litigation.

As the district court pointed out, a number of cases similar to this one have distinguished *Zipes* and found intervenors liable for prevailing plaintiffs' fees.[116] Intervenor-Defendants dispute the relevance of those cases for determining

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[115] *See Jones v. Southpeak Interactive Corp. of Del.*, 777 F.3d 658, 677 (4th Cir. 2015) (noting that the "proposition that district courts have discretion over the proper allocation of a fee award among multiple defendants is widely recognized").

[116] JA 143-46 (Mem. Op. & Order at 8-11).

whether *Zipes*'s categorical rule applies.[117] But if the rule does not apply—and therefore some apportionment of fees was necessary between Intervenor-Defendants and Defendants—those cases support the district court's apportionment.[118]

A number of cases support the point,[119] but two in particular are relevant. *Daggett v. Kimmelman*[120] was a case, like this one, involving the constitutionality of a redistricting plan (the "Feldman Plan"), and in which intervening defendants

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[117] Opening Br. at 19-26.

[118] *See District of Columbia v. Merit Sys. Prot. Bd.*, 762 F.2d 129, 132 (D.C. Cir. 1985) (noting, in a dispute over attorneys' fees, that the "price" of intervention is "the possibility that the plaintiff will be able to obtain relief against the intervenor-defendant").

[119] *See, e.g., Planned Parenthood of Cent. N.J. v. Att'y Gen. of State of N.J.*, 297 F.3d 253, 272-73 (3d Cir. 2002) (holding that legislature may be liable for fees when it "intervenes to defend the constitutionality of an act which the executive branch is unwilling to defend" because "it becomes the functional equivalent of a defendant"); *Mallory v. Harkness*, 923 F. Supp. 1546, 1553 (S.D. Fla. 1996) (rejecting argument that intervenor was "innocent" where he "defended the unconstitutional statute voluntarily and in doing so attempted to aid in the offending statute's enforcement"; holding intervenor liable for the majority of attorneys' fees), *aff'd*, 109 F.3d 771 (11th Cir. 1997). *Cf. United States v. Arkansas*, 791 F.2d 1573, 1577-78 (8th Cir. 1986) (in school desegregation case, holding State not liable for attorneys' fees incurred by co-defendant school districts in an appeal not joined by the State; noting that the "school districts made their own decisions regarding legal strategy and the vigor with which the lawsuit would be resisted, and we decline to extend responsibility to the State for costs associated with those decisions").

[120] 617 F. Supp. 1269 (D.N.J. 1985), *aff'd*, 811 F.2d 793 (3d Cir. 1987).

were held liable for attorneys' fees. After the Feldman Plan had been found unconstitutional, the question was whether the plaintiffs' attorneys' fees should be assessed against the New Jersey Legislature, which had intervened to defend the plan, or the original State defendants, including the Governor, the Attorney General, and the Secretary of State, who did not defend it.[121] The court concluded that attorneys' fees were properly assessed against the intervenors *rather than* the State defendants. The court found that, by intervening to defend the redistricting plan, the New Jersey Legislature had opened itself up to a fee claim:

> [O]nce the Legislature intervened to defend the [plan], even if it did so because the executive branch refused to defend [it], the Legislature took on a quasi-enforcement role, and gave up its immunity. Therefore . . . the Legislature-Intervenors in this case are liable for an assessment of an attorney's fee.[122]

In contrast with the *Daggett* intervenors, however, the State defendants "ha[d] not defended the Feldman Plan in litigation . . . . For the most part, the State Defendants were silent . . . ."[123] Accordingly, the *Daggett* court assessed fees against only the Intervenors.[124]

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[121] The Democratic members of Congress also intervened as defendants, but the plaintiffs did not seek fees from them. *Id.* at 1278.

[122] *Id*. at 1279 (citations omitted).

[123] *Id.*

[124] *Id.* at 1283. Four years later, when the *Daggett* intervenors filed a Rule 60(b) motion to vacate the district court's judgment in light of *Zipes*, the court denied the

In *Charles v. Daley*, the Seventh Circuit held that private parties who intervened to defend the constitutionality of an Illinois abortion statute were properly liable for half of plaintiffs' attorneys' fees awarded under 42 U.S.C. § 1988.[125] There, the two physicians who intervened as defendants—joining the Illinois Attorney General, the director of the state's public health department, and the State's Attorney for Cook County—had "adopted the posture of fully participating parties [who argued] every issue with vigor equal to, or greater than the efforts of the state defendants,"[126] and had taken the leading role in defending the statute:

> [T]hroughout these proceedings, both in the district court and on appeal to this court, the state defendants time and again have adopted as their own the briefs, motions, and other opposing papers filed by the intervenors who, for all practical purposes, were their alter ego—a fact borne out by the intervenors' ultimate decision to appeal the case to the Supreme Court despite the State of Illinois' reluctance to so proceed.[127]

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motion, noting its "serious doubts about the applicability of *Zipes*." *Daggett v. Kimmelman*, Civ. Nos. 82-297, 82-388, 1989 WL 120742, at *7 n.6 (D.N.J. July 18, 1989). The court "question[ed] the defendants-intervenors' qualifications as 'blameless' intervenors, in light of the vigorous battle fought defending an unconstitutional statute . . . ." *Id.*

[125] *See* 846 F.2d 1057, 1077 (7th Cir. 1988).

[126] *Id.* at 1064 (citations omitted).

[127] *Id.* at 1064-65; *see also id.* at 1064 n.9 (citing instances in which the defendants adopted intervenors' arguments as their own).

Given that the intervenors were "actively participating parties . . . whose presence in the lawsuit was both voluntary and self-initiated," the Seventh Circuit held that they could "fairly be charged with the consequences of choosing to proceed as intervening defendants rather than as *amici*, a status that would have permitted them to present their legal arguments to the court while protecting them from any liability for fees."[128]

2. The district court's allocation of fee liability between Defendants and Intervenor-Defendants was appropriate.

As more fully laid out in the Statement of Case and Facts, Intervenor-Defendants, not Defendants, were responsible for prolonging the litigation for more than a year.[129] The district court's allocation of liability properly recognized that Defendants should not be held liable for fees that were incurred after

[128] *Id.* at 1067. Four days after its decision in *Zipes*, the Supreme Court denied review of the Seventh Circuit's decision in *Charles*, and subsequently denied a petition for rehearing as well—thereby letting stand the fee award against the intervenors. *See Diamond v. Charles*, 492 U.S. 905, *reh'g denied*, 492 U.S. 938 (1989).

[129] Plaintiffs also recognized below that Defendants were not responsible for the attorney's fees Plaintiffs incurred. *See* Pls.' Mem. in Supp. of Third Suppl. Mot. for Att'ys' Fees at 7 (June 19, 2015), ECF No. 176 ("Intervenor-Defendants, *and not Defendants*, are responsible for the ongoing litigation following this Court's October 7, 2014 Opinion and Order . . . . Without Intervenor-Defendants, *this litigation would have ended over eight months ago*.") (emphasis added).

Intervenor-Defendants persisted in defending CD3 after Defendants ended their defense.[130]

Defendants have accepted—and have duly satisfied—total liability for Plaintiffs' attorneys' fees while they continued to defend CD3; they never looked to Intervenor-Defendants to contribute to those costs, despite Intervenor-Defendants' active role in the defense. Defendants also did not attempt to shift to Intervenor-Defendants any liability for fees incurred during the remedial phase. Defendants likewise paid all the costs of the Special Master.[131]

But after the Court declared CD3 unconstitutional and Defendants ceased to defend it, it is a different story. As the district court recognized, Plaintiffs' dispute was then only with Intervenor-Defendants—not Defendants.[132] Accordingly, Intervenor-Defendants alone should bear liability for the fees that are solely attributable to them.

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[130] JA 140 (Mem. Op. & Order at 5) ("Intervenors are liable for attorney's fees incurred after April 13, 2015, the date on which Defendants formally abandoned their defense of [CD3] and left Intervenors as the only functional defendants in the case.").

[131] Special Master Statement of Fees and Expenses (Jan. 12, 2016), ECF No. 302 (documenting costs of $80,789); Order at 2 (Sept. 3, 2015), ECF No. 207; Order at 2 (Jan. 29, 2016), ECF No. 304.

[132] *See* JA 156 (Mem. Op. & Order at 21) (asking, after Defendants ended their defense, "against whom did Plaintiffs prevail? In this case, the only logical answer is the Intervenors.").

CONCLUSION

In this dispute between Plaintiffs and Intervenor-Defendants solely over Intervenor-Defendants' liability for Plaintiffs' fees, the scope of Defendants' liability for Plaintiffs' fees is not an issue on appeal and cannot now be enlarged.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary under Rule 34(a)(2). The facts and legal arguments are adequately presented in the briefs and record, and the Court may affirm on the basis of the district's opinion.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 32(f) because it contains 8,654 words, excluding the parts exempted by Rule 32(f), according to the count of Microsoft Word.

/s/

Trevor S. Cox

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2017, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/

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