No. 17-1389

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

Intervenors/Defendants - Appellants,

v.

GLORIA PERSONHUBALLAH; JAMES FARKAS,

Plaintiffs - Appellees.

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

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT FOR THE EASTERN DISTRICT OF VIRGINIA AT RICHMOND

BRIEF FOR PLAINTIFFS - APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Local Rule 26.1, Appellees Gloria Personhuballah and James Farkas make the following disclosures: All Appellees are individuals. No Appellee 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 Appellee is a trade association. This case does not arise out of a bankruptcy proceeding.

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INTRODUCTION

Plaintiffs-Appellees Gloria Personhuballah and James Farkas ("Appellees") filed suit in 2013 against Defendants-Appellees James B. Alcorn, Clara Belle Wheeler, and Singleton B. McCallister (the "State Defendants"), challenging the congressional map adopted by the Commonwealth of Virginia after the 2010 Census as a racial gerrymander.[1] Shortly after the lawsuit was filed, Intervenors-Appellants ("Appellants"), the Republican congressional delegation, intervened.[2] Appellees prevailed, the congressional map was redrawn, and a three-judge panel of the district court (the "Panel") awarded fees, expenses, and costs to Appellees, allocating the total award between the State Defendants and Appellants.

This appeal concerns an auxiliary dispute between Appellants and the State Defendants. The merits of this case have been resolved by the United States Supreme Court on direct appeal. Appellants do not challenge the Panel's subsequent determination that Appellees are the prevailing parties in this matter,

[1] The State Defendants are the current Chairman, Vice-Chair, and Secretary of the Virginia State Board of Elections, sued in their official capacities. *See* JA137.

[2] The caption of Appellants' brief reflects this matter's complex procedural history. Over the course of this long-running case, various current and former members of the Republican congressional delegation intervened in the lawsuit. The instant appeal was filed by Robert J. Wittman, Robert Goodlatte, Randy J. Forbes, H. Morgan Griffith, Scott Rigell, Robert Hurt, David Brat, and Barbara Comstock. *See* JA190. Defendants-Intervenors Eric Cantor and Frank R. Wolf are former representatives who did not join in this appeal. *See id.* The caption also lists the Virginia State Board of Elections and Kenneth Cuccinelli as defendants and Dawn Curry Page as a plaintiff, all of whom were dismissed from this case via stipulation before trial. *See* JA137 n.2; Dkt. No. 79.

and no party appeals the Panel's determination that Appellees are entitled to a fee award of $1,239,403.00, and litigation costs and expenses of $107,168.74. Rather, Appellants challenge only the Panel's determination that Appellants are liable for a portion of that award.

The resolution of this appeal may be of keen concern to Appellants and the State Defendants, but it is of little concern to Appellees. Regardless of the disposition of this appeal, the Panel awarded Appellees a total award of $1,346,571.74. If Appellants are not held responsible for a portion of that total award, then Appellees are entitled to a full recovery against the State Defendants—who chose not to appeal the overall fee award.

That said, while the Panel was not required to apportion some of the total award to Appellants, it was entirely justified in doing so. Appellees filed suit to challenge the unconstitutional racial gerrymander of Virginia's Third Congressional District. After a bench trial in 2014, the Panel issued a Memorandum Opinion manifesting a sweeping and comprehensive victory for Appellees. In early 2015, in light of the "clear error" standard of review that governed the Panel's factual findings and the United States Supreme Court's decision in *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015) ("*Alabama*"), which confirmed the Panel's legal reasoning, the State Defendants largely gave up the fight. The fact that this case is still being litigated more than

two years later is the consequence of Appellants' decision to mount an unyielding defense of the unconstitutional racial gerrymander of the Third Congressional District. That decision ultimately led Appellants to file an appeal before the Supreme Court that was so baseless that the Supreme Court did not need to reach the merits. Rather, in a brief opinion, a unanimous Court dismissed the appeal because Appellants did not even have standing. *See Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016).

In these circumstances, the Panel found it appropriate to take into account, in apportioning the total fee award, that Appellants had cast themselves as the functional equivalent of a defendant, dramatically run up Appellees' fees, and done so not in the pursuit of any cognizable legal interest (again, they had no standing to appeal), but to stand in the schoolhouse door in a futile attempt to block the remedy of a bald racial gerrymander.

Appellants' gambit failed. Their actions have consequences. The Court should affirm the Panel's apportionment of Appellants' total award of $1,346,571.74 between Appellants and the State Defendants.

JURISDICTIONAL STATEMENT

Appellants noticed an appeal of the Panel's Memorandum Opinion (the "Opinion") awarding Appellees fees and litigation expenses and costs on March

24, 2017. JA190. The Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

The Panel below determined that Appellees are entitled to a total award of fees, expenses, and costs in the amount of $1,346,571.74. Neither Appellants nor the State Defendants challenge the determination that Appellees are the prevailing parties or that Appellees are entitled to a total award in the amount of $1,346,571.74. Instead, the only issue on appeal is the allocation of the award between Appellants and the State Defendants. Because Appellants interjected themselves into the litigation as the functional equivalent of a defendant, effectively prolonged the litigation by years, and did so to protect an unconstitutional racial gerrymander rather than discrete and legitimate third-party interests, the Panel determined that Appellants were liable for a portion of Appellees' total fees and expenses. The question in this appeal is whether the Panel erred by finding Appellants jointly responsible for Appellees' fees and expenses, or whether the Panel was required to hold the State Defendants solely liable for the total award in the amount of $1,346,571.74.

STATEMENT OF THE CASE

A. Appellees Prevail on Their Racial Gerrymandering Claim After a Bench Trial

In October 2013, Appellees filed this lawsuit, alleging that Virginia's Third Congressional District, as redrawn following the 2010 Census, was an unconstitutional racial gerrymander in violation of the Equal Protection Clause of the United States Constitution. Appellees named as defendants the Commonwealth officials responsible for implementing elections—the State Board of Elections and the Attorney General. As noted above, Appellees then substituted—by stipulation—the current individual members of the State Board of Elections as defendants. *See* JA151 n.11. On December 2, 2013, Appellants filed a motion to intervene as defendants, which the district court granted on December 3, 2013. Dkt. No. 26.[3]

In November 2013, one month after Appellees filed suit, Virginians elected Terry McAuliffe as Governor and Mark Herring as Attorney General. After Governor McAuliffe and Attorney General Herring assumed office, the State Defendants continued to defend the case, aligning the Commonwealth fully with Appellants. Thus, alongside Appellants, the State Defendants filed and argued

[3] This motion sought intervention by the then-current Republican congressional delegation. Appellants Comstock and Brat sought intervention by motion dated April 13, 2015, Dkt. No. 147, which the Panel granted on May 11, 2015, Dkt. No. 165.

(unsuccessfully) a motion for summary judgment seeking dismissal of Appellees' claims in their entirety. Dkt. No. 40 (Order Setting Oral Argument); Dkt. No. 50 (Order Denying Summary Judgment). The State Defendants also defended the case at trial in full cooperation with Appellants. *See, e.g.*, Dkt. No. 85 (Trial Brief of Intervenor-Defendants and Defendants). As the Panel noted in its post-trial opinion, "[s]ince there [was] no distinction between the interests of Defendants and Intervenor-Defendants," it was appropriate to "refer to them collectively" simply as Defendants. *See* Dkt. No. 109 at 4 n.5.

Following a bench trial, and by order dated October 7, 2014, Dkt. Nos. 109, 110, the Panel below found in Appellees' favor that the Third Congressional District was an unconstitutional racial gerrymander. The Panel enjoined the Commonwealth of Virginia "from conducting any elections subsequent to 2014 for the office of United States Representative until a new redistricting plan is adopted" and ordered the Virginia General Assembly to act to "remedy the constitutional violations found in this case." Dkt. No. 110.

Although the State Defendants had defended the case aggressively through trial, they chose at that point to accept the writing on the wall and concede defeat on the merits. As the State Defendants explained in their briefing below, they determined that, in light of the factual findings underpinning the Panel's Opinion and the deferential "clear error" standard of review, further litigation would be

futile and a poor use of the Commonwealth's resources. Dkt. No. 321 at 2-3. Accordingly, although Appellants filed an appeal to the Supreme Court, the State Defendants chose not to do so.

B. Appellees Prevail After Appellants' First Appeal to the Supreme Court

On March 30, 2015, the Supreme Court vacated the judgment and remanded for further consideration in light of *Alabama*. *See* Dkt. No. 150. The Panel asked the parties to submit briefing on the effect of *Alabama*, if any, on its prior decision on the merits. Dkt. No. 142. In response, Appellants continued to maintain that the Panel's prior decision in Appellees' favor was in error. Dkt. No. 151. The State Defendants, on the other hand, took the position that *Alabama* did not alter the legal rule applied to the facts as determined by the Panel, which could be set aside only for clear error. Thus, while the State Defendants had disputed the facts at trial, "[g]iven its findings of fact on disputed evidence, [the Panel] correctly applied the legal rule fleshed out in *Alabama*." Dkt. No. 145. As the Panel noted in its Opinion, "[the State] Defendants' brief on the effect of *Alabama* marks a turning point in this case" where, thereafter, "responsibility shifted to [Appellants], who significantly prolonged the litigation by vigorously defending the unconstitutional districting scheme." JA158.

After considering the parties' briefing, the Panel again awarded Appellees the relief they sought in a Memorandum Opinion and Order of June 5, 2015, Dkt.

Nos. 170, 171, ordering that the "Commonwealth of Virginia is hereby enjoined from conducting any elections for the office of United States Representative until a new redistricting plan is adopted." Dkt. No. 171.

C. Appellees Prevail After Appellants' Second Appeal to the Supreme Court

On June 18, 2015, Appellants (but not the State Defendants) appealed the Panel's June 5, 2015 Order to the United States Supreme Court. Appellants moved to stay the remedial proceedings pending their appeal. Dkt. No. 172. In their brief before this Court, Appellants complain that the Panel wrongly denied that motion and thus adopted a new remedial plan "prematurely" (after years of litigation), Appellants' Brief ("Br.") at 39 n.3, but neglect to mention that the United States Supreme Court also summarily rejected their application for a stay pending appeal, *see* Order in Pending Case, *Wittman v. Personhuballah*, No. 14-1504 (U.S. Feb. 1, 2016).

On appeal, the three sets of parties took very different positions. While the State Defendants sided with Appellees on the merits, they sided with Appellants on the issue that proved to be the basis of the Supreme Court's affirmance of Appellees' victory below—whether Appellants had standing to appeal. Appellees argued they did not, as Appellants had no legally cognizable interest in defending an unconstitutional racial gerrymander, and none could or would suffer any cognizable legal injury as a result of the remedial plan the Panel had adopted. Brief

for Appellees at 8-19, *Wittman v. Personhuballah*, No. 14-1504 (U.S. Jan. 27, 2016). Appellants, on the other hand, claimed they had standing on the strength of the eyebrow-raising argument that the remedial plan adopted by the Panel would "harm[] at least one Appellant by shifting black . . . voters out of District 3 and into one or more of the surrounding" districts represented by Appellants. Brief for Appellants at 57, *Wittman v. Personhuballah*, No. 14-1504 (U.S. Dec. 28, 2015).

The State Defendants agreed with Appellants' claim that they had standing to appeal. *See generally* Brief of Virginia State Board of Elections Appellees at 28-33, *Wittman v. Personhuballah*, No. 14-1504 (U.S. Jan. 27, 2016). In siding with Appellants on this critical issue, the State Defendants took direct aim at Appellees, arguing that Appellees were "confuse[d]" as to the appropriate rules governing "the standing of an intervenor-defendant to appeal an adverse judgment that directly and adversely affects his interests." *Id.* at 31.

The Supreme Court agreed with Appellees and rejected the standing arguments proffered by Appellants and the State Defendants. *Wittman*, 136 S. Ct. at 1734. This was not a close call: The decision was unanimous. On the record presented, the Supreme Court found it unnecessary to even determine whether the "kind of injury" posited by Appellants—representing additional black Virginians who tend to vote for Democratic candidates—was "legally cognizable," as

Appellants had "not identified record evidence establishing their alleged harm." *Id.* at 1737. The Supreme Court was unsparing in its assessment:

> When challenged by a court (or by an opposing party) concerned about standing, the party invoking the court's jurisdiction cannot simply allege a nonobvious harm, without more. Here, there is no "more."

Id. (citation omitted). *Id.* The Supreme Court "therefore dismiss[ed] the appeal for lack of jurisdiction." *Id.* at 1736.

D. History of Fee Petitions In this Matter

After finding in Appellees' favor after the 2014 bench trial, the Panel entered a fee award against the State Defendants in the amount of $779,189.39. JA137.[4] At the State Defendants' request, the Court stayed enforcement of that order pending appeal. JA137.

After the Panel again found in Appellees' favor on remand from Appellants' first appeal, Appellees filed a Third Supplemental Motion for Attorneys' Fees, addressing their work on remand, and seeking an award in the amount of $73,540.50 against both Appellants and the State Defendants (as the Panel deemed appropriate). JA138. After Appellants again appealed to the Supreme Court, the

[4] This order was premised on Appellees' initial fee application, JA100, as supplemented by Appellees' Supplemental Motion for Attorneys' Fees, JA105, and Second Supplemental Memorandum in Support of Plaintiffs' Motion for Attorneys' Fees, Expert Fees, and Costs, Dkt. No. 136.

Panel dismissed the motion without prejudice pending the disposition of the appeal. *Id.*

After the Supreme Court affirmed, Appellees filed their Fourth Supplemental Motion for Attorneys' Fees, JA132, which gives rise to the present appeal. Appellees sought fees, expenses, and costs that can be broken into three major categories.

First, Appellees sought an explicit order from the Panel reinstating its original fee award of $779,189.39 against the State Defendants. JA133. *Second*, Appellees sought recovery of the fees they incurred on the first remand leading up to the Panel's June 5, 2015 Order reaffirming its original merits determination, in the total amount of $73,540.50. *Id. Third*, Appellees sought recovery of the fees they incurred during the remedial phase of the litigation and in prevailing on Appellants' second appeal to the Supreme Court. *Id.* With respect to their supplemental fee requests, Appellees argued that the State Defendants and Appellants were jointly liable and that the Panel "ha[d] discretion to determine the appropriate allocation of fees" and Appellees left "that allocation to the Court's judgment or the private agreement of" the other parties. Dkt. No. 317 at 12.

E. The Panel's Order Awarding Appellees Fees

In a lengthy, careful, and well-reasoned Opinion dated March 3, 2017, the Panel granted Appellees' Fourth Supplemental Motion for Attorneys' Fees in part and denied it in part.

The Panel followed the well-established three-part process in determining a reasonable fee, in which the court first determines the lodestar figure, subtracts fees for hours spent on unsuccessful claims, and then awards a percentage of the remaining total depending on the plaintiff's degree of success. *See* JA159-60 (citing *McAfee v. Boczar*, 738 F.3d 81, 88 (4th Cir. 2013)).

The Panel reinstated the first award, in the amount of $779,189.39. JA160. As to Appellees' supplemental fee request, the Panel calculated the appropriate lodestar figure, and after making various reductions from Appellees' requested sum, held that Appellees were entitled to a total supplemental fee award of $490,486. JA174-75. As to Appellees' request for a supplemental award of $19,316.75 in litigation expenses and costs, neither Appellants nor the State Defendants objected, and the Panel awarded the full sum requested. JA177.

The Panel thus held that "Plaintiffs are entitled to a total award of $1,346,571.74." JA140. The Panel then determined whether and how to allocate that total award between the State Defendants and Appellants. For reasons explained at length in the Opinion (JA140-59), the Panel concluded that all fees

and expenses prior to April 13, 2015 should be apportioned to the State Defendants, as should fees related to the remedial phase of the litigation, and that all other fees postdating April 13, 2015 should be apportioned to Appellants. JA158-59. Accordingly, the Panel allocated $463,275.27 of the fee award and $16,612.40 of the cost award to Appellants. JA175, JA178.

Appellants, and only Appellants, appealed from the Opinion. The scope of the appeal is narrow. Appellants do not challenge the Panel's determination that Appellees are entitled to a total award in the amount of $1,346,571.74 but, rather, "whether the district court erred by . . . imposing fee liability on Intervenor-Defendants." Br. at 2 (Statement of the Issue).

SUMMARY OF ARGUMENT

The Court should affirm the Panel's reasonable and well-supported determination that, of the $1,346,571.74 in fees and expenses awarded to Appellees as the prevailing parties, it is appropriate to apportion $479,887.67 to Appellants. In *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989), the United States Supreme Court held that a prevailing plaintiff cannot, under Title VII, recover fees against an "innocent" intervenor who enters a lawsuit to protect a discrete interest unless the intervenor's actions are frivolous or unreasonable. *Id.* at 758 n.2, 761-63. If an intervenor is not "innocent" in the relevant sense, a prevailing plaintiff can recover attorneys' fees against the

intervenor regardless of whether the intervenor's actions in the lawsuit were frivolous or unreasonable. *See Ohio River Valley Envtl. Coal., Inc. v. Green Valley Coal Co.*, 511 F.3d 407, 416 (4th Cir. 2007).

The Panel here carefully and thoughtfully considered the procedural history of this case and Appellants' role in it under the governing legal standard, and determined that—as the litigation had progressed, the State Defendants had conceded their loss on the merits, and Appellants pressed on alone—Appellants had become functional defendants. As such, they were not "innocent" in the relevant sense and fell outside the general rule established in *Zipes*. That determination lay well within the Panel's discretion, is wholly consonant with *Zipes* and analogous cases probing the boundaries of *Zipes*, and should not be disturbed on appeal.

STANDARD OF REVIEW

As this Court has recognized, "appeals from awards of attorney's fees, after the merits of a case have been concluded, . . . must be one of the least socially productive types of litigation imaginable." *Daly v. Hill*, 790 F.2d 1071, 1079 n.10 (4th Cir. 1986) (citation and quotation marks omitted). Accordingly, as a general matter, when considering a party's appeal from an attorneys' fees award, the Court's "standard of review is exceptionally deferential," as it applies "a 'sharply circumscribed' version of [its] traditional abuse-of-discretion standard." *Best Med.*

Int'l, Inc. v. Eckert & Ziegler Nuclitec GmbH, 565 F. App'x 232, 236 (4th Cir. 2014) (quoting *Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 243 (4th Cir. 2009)). Under this deferential standard, "the fee award must not be overturned unless it is clearly wrong," *Robinson*, 560 F.3d at 243 (quoting *Plyler v. Evatt*, 902 F.2d 273, 277-78 (4th Cir. 1990)), and the Court "will not ordinarily disturb the award even though [it] might have exercised th[e] discretion [to award fees] quite differently." *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1418 (4th Cir. 1992) (citation and quotation marks omitted). This deference derives from the recognition that "[t]he fixing of attorneys' fees is peculiarly within the province of the trial judge, who is on the scene and able to assess the oftentimes minute considerations which weigh in the initiation of a legal action." *EEOC v. Great Steaks, Inc.*, 667 F.3d 510, 517 (4th Cir. 2012) (quoting *Arnold v. Burger King Corp.*, 719 F.2d 63, 65 (4th Cir. 1983)). Pure questions of law are reviewed de novo. *Williams v. Sandman*, 187 F.3d 379, 381 (4th Cir. 1999).

ARGUMENT

A. Appellees Are Prevailing Parties and Will Remain Prevailing Parties Entitled to the Full Award Regardless of the Disposition of this Appeal

No party has appealed from the Panel's determination that (a) Appellees are the prevailing parties; (b) an award of fees and expenses to Appellees is appropriate; and (c) Appellees "are entitled to a total award of $1,346,571.74" in fees, expenses, and costs. JA140; *see also* JA177 (Appellees are "entitled to the

full combined attorney's fees award of $1,239,403.00" and the "full amount" of expenses and costs requested by Appellees). The only issue before the Court on appeal concerns the allocation of the total award of $1,346,571.34 between Appellants and the State Defendants.

This dispute is of no moment to—and does not impact—Appellees' rights in any material way. In their briefing below, Appellees asserted that while the Panel *could* exercise its discretion to allocate fees between Appellants and the State Defendants, they took no position as to whether it *should*. *See* Dkt. No. 322 at 2 ("Plaintiffs leave the question of how fees will be allocated between the two to the sound discretion of the Court or private resolution between Defendants and Intervenors."). The Panel chose to allocate fees between the State Defendants and Appellants. If the Court affirms the Panel's allocation, Appellees will await payment of their remaining fees from Appellants. If the Court sides with Appellants, Appellees will be entitled to a full award of $1,346,571.34 against the State Defendants.[5] Either way, Appellees are and will remain the prevailing parties.

As the Panel noted in the Opinion, it was resolving the State Defendants' and Appellants' "dispute [regarding] the allocation, if any, of the fee award between them." JA139. The Opinion makes clear that the State Defendants are

[5] The State Defendants have already paid Appellees the portion of the award as to which they were held solely liable.

"*fully* liable" for Appellees' fees before the State Defendants submitted their brief on the effect of *Alabama* on April 13, 2015, and "*solely* liable for the work done in the remedial phase of the litigation." JA158 (emphasis added); *see also* JA150 (noting that the Commonwealth of Virginia is "liable on the merits" for the violation of Appellees' constitutional rights and thus properly the subject of an attorneys' fee award). Nothing in the Opinion suggests that as to the portion of fees for which the State Defendants are not *solely* liable, the State Defendants could not be held liable for such fees *at all*.

In short, the State Defendants remain jointly liable for the total award regardless of how the Court resolves this appeal. *See, e.g.*, *Jenkins by Agyei v. Missouri*, 967 F.2d 1248, 1250 (8th Cir. 1992) (requiring the State of Missouri to pay the plaintiffs' attorneys' fees incurred defending a remedial school desegregation plan against intervenors' challenges, and rejecting the state's argument that "it cannot be liable for attorneys' fees the plaintiff incurred in litigation against other parties"); *see also Nash v. City of Tyler*, 736 F. Supp. 733, 734-35 (E.D. Tex. 1989) (*Zipes* "does not in any way require that attorney's fees governed by § 1988 are necessarily to be borne by a prevailing plaintiff rather than a losing defendant when a third party intervenes to vindicate its rights").

That makes eminent good sense. Appellees filed this lawsuit against the State Defendants, who were sued in their official capacity as representatives of the

Commonwealth, and who were responsible for implementation of the Third Congressional District. The State Defendants were permanently enjoined from enforcing the boundaries as drawn in the 2012 plan and "conducting any elections for the office of United States Representative until a new redistricting plan is adopted." Dkt. No. 171.

And on remand, even after the State Defendants had waived the white flag as to liability, they and Appellees hardly acted with a unity of purpose. Most notably, the State Defendants sided with Appellants and against Appellees on the critical issue on appeal before the Supreme Court. Unlike Appellees, the State Defendants insisted that Appellants had standing to appeal. That dispute turned out to be the whole ballgame: The Supreme Court rejected Appellants' appeal on standing grounds. *Wittman,* 136 S. Ct. at 1737. Appellees are confident that the Panel's well-reasoned opinion striking down the Third Congressional District as a racial gerrymander would have been upheld on the merits. But the fact remains that Appellees prevailed on appeal before the Supreme Court—the work that generated much of the fees in question—because they prevailed on an issue on which they disagreed with both Appellants *and* the State Defendants.

As discussed below, Appellees believe that the Panel reasonably exercised its discretion in apportioning the overall fee award between Appellants and the State Defendants. Regardless, however, this appeal provides no occasion to revisit

the Panel's unchallenged determination that Appellees are entitled to a total award of $1,346,571.34.[6]

B. The Panel Reasonably Exercised Its Discretion to Allocate a Portion of the Overall Fee Award to Appellants

As a general matter, trial courts have discretion to allocate fees awarded to a prevailing plaintiff between the parties against whom the plaintiff prevailed. *Jones v. Southpeak Interactive Corp. of Delaware*, 777 F.3d 658, 677 (4th Cir. 2015). Appellants argue that the Panel lacked discretion to allocate fees against them here because they are intervenors. While the outcome of this appeal will not affect Appellees' right to a full recovery of the fees awarded by the Panel, Appellees do

[6] To the extent Appellants suggest that Appellees should bear their own fees, *see* Br. at 43-44, they are plainly incorrect, for at least three reasons. First, no party has appealed the Opinion to the extent the Panel found that Appellees are entitled to a total award of $1,346,571.34. Second, *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169 (4th Cir. 1994), upon which Appellants rely for this half-hearted assertion, held only that a plaintiff could not recover the fees it incurred in unsuccessfully opposing a motion to intervene, not that a plaintiff was barred from recovering against a defendant for successfully prevailing on the merits of a claim. Third, while Appellants repeatedly allude to Appellees' financial status, Br. at 3, 44-45, Appellants cite no case to support the notion that a plaintiff's financial means (or those of the voting rights organizations that support them) has any bearing on its entitlement to fees. It is well-established that "the plaintiff's financial resources and access to counsel are not valid reasons to deny fees under § 1988." *Herrington v. County of Sonoma*, 883 F.2d 739, 743 (9th Cir. 1989); *see also Duncan v. Poythress*, 777 F.2d 1508, 1511 (11th Cir. 1985) (a "plaintiff's lawyer is not denied fees under section 1988 merely because the plaintiff is able to pay for a lawyer, or because plaintiff is not actually required to pay his or her lawyer") (citations omitted); *Int'l Oceanic Enters., Inc. v. Menton*, 614 F.2d 502, 503 (5th Cir. 1980) ("The plaintiff's ability to pay is not a special circumstance sufficient to render an award under [§] 1988 unjust.").

agree that the Panel reasonably exercised its discretion to apportion part of the overall fee award to Appellants.

1. *Zipes* Itself Recognizes that Fees Can Be Awarded Against Intervenors Depending on the Specific Facts of a Case

There is no dispute that a prevailing civil rights plaintiff is generally entitled to recover its fees against a defendant under 42 U.S.C. § 1988 as a matter of course. *Fox v. Vice*, 563 U.S. 826, 833 (2011).

Appellants state accurately that *Zipes* sets out a general rule under which "innocent" intervenors are not liable for a prevailing plaintiff's fees save in certain circumstances. Br. at 14 (citing *Zipes*, 491 U.S. at 760-61). Thus, in a run-of-the-mill case, an "innocent" intervenor who enters a lawsuit to protect a discrete interest is not liable for attorneys' fees unless the intervenor's actions are frivolous or unreasonable. *Zipes*, 491 U.S. at 758 n.2, 761-63.

But what Appellants fail to acknowledge is that whether this general rule applies is fact-specific. Some intervenors are "innocent" in the relevant sense. Others are not.

Zipes involved a lawsuit brought by plaintiffs under Title VII challenging the employer's discriminatory practice of terminating flight attendants who became mothers. *Id.* at 755. After the employer settled, the union representing the flight attendants intervened to address and litigate an auxiliary issue—the effect of the settlement on the seniority rights of other employees. *Id.* In Title VII litigation, a

prevailing plaintiff is presumptively entitled to fees against the defendant. *Id.* at 759. The lower courts in *Zipes* applied that presumption to the union intervenor. On appeal, the Supreme Court reversed.

In holding that it is inappropriate to hold all "losing" intervenors in Title VII litigation presumptively liable for attorneys' fees, the Supreme Court dove deep into the procedural history of the case at bar and the purposes underlying fee awards in Title VII cases. As the Supreme Court noted, "innocent intervenors raising non-Title VII claims" are "welcome" participants in Title VII proceedings, given the "necessity of protecting, in Title VII litigation, 'the legitimate expectations of . . . employees innocent of any wrongdoing.'" *Id.* at 763-64 (quoting *Teamsters v. United States*, 431 U.S. 324, 372 (1977)). The *Zipes* court thus rejected "the regime proposed by respondents—that those who intervene in a Title VII suit are presumptively liable for fees," *id.* at 764 (emphasis omitted), and remanded for further consideration because the lower courts "incorrectly presumed that [the intervenor] was liable for attorney's fees," rather than determining, based on the specific facts presented, whether a fee award against the intervenor was appropriate, *id.* at 766.

In essence, then, *Zipes* flipped the usual presumption. Unlike losing defendants in civil rights matters who are presumptively liable for a plaintiff's fees, a losing intervenor in such matters is presumably *not* liable for such fees. Only

where the specific circumstances of the litigation warrant it is an intervenor liable for fees.

2. This Court and Others Have Held Intervenors Accountable for Fees in Comparable Circumstances

The question, then, is whether, given the specific facts and circumstances of a case, an intervenor is "innocent" or "blameless" in the relevant sense. Appellants contend that *Zipes* categorically bars fee awards against intervenors in the absence of "bad-faith conduct." Br. at 14. But this Court has already flatly rejected that reading of *Zipes*. *Ohio River Valley*, 511 F.3d at 416.

In *Ohio River Valley*, the Court affirmed a fee award against a mining company that intervened in a lawsuit brought against an agency in which the plaintiff contended that the agency could not lawfully accept certain mining permit applications. *Id.* at 410. In the first phase of this litigation, the district court entered a preliminary injunction enjoining the agency from accepting the applications and thereafter ordered the intervenor to pay the plaintiffs' attorneys' fees. *Id.*[7] On appeal, plaintiffs conceded that the intervenor's "actions were not frivolous,

[7] Fees were awarded under the fee-shifting provisions of the Surface Mining Control and Reclamation Act, under which courts can award fees "whenever appropriate." *Id.* at 410, 413.

unreasonable, or without foundation," but argued that *Zipes* did not bar the fee award. *Id.* at 416. This Court agreed and affirmed the fee award.[8]

This Court found that, although the intervenor could not be found liable in the lawsuit, "*Zipes* instructs that the discretion to award fees is guided by the 'large objectives' of the underlying substantive provisions in a statute." *Ohio River Valley*, 511 F.3d at 416 (quoting *Zipes*, 491 U.S. at 759). The objective of the environmental statute in question was to ensure compliance with its provisions, and that purpose "would be undercut by a rule that protects operators from fee liability when they intervene to defend allegedly illegal mining permits and practices." *Id.*

This Court stands in good company. Numerous courts have likewise held that *Zipes* does not bar fee awards against intervenors who insert themselves into litigation as the functional equivalent of the original defendant or who otherwise, based on the specific facts presented, are not "blameless" in the relevant sense. *See, e.g.*, *Planned Parenthood of Cent. New Jersey v. Attorney Gen. of State of New Jersey*, 297 F.3d 253, 273 (3d Cir. 2002); *Charles v. Daley*, 846 F.2d 1057, 1064 (7th Cir. 1988); *Mallory v. Harkness*, 923 F. Supp. 1546 (S.D. Fla. 1996), *aff'd*, 109 F.3d 771 (11th Cir. 1997). The Panel discussed these cases at length in

[8] Appellants thus mischaracterize *Ohio River Valley* as standing for the proposition that *Zipes* mandates that an intervenor can be liable only if its actions are frivolous, unreasonable, or without foundation. *See* Br. at 19. *Ohio River Valley*, in fact, *flatly rejected* that reading of *Zipes*.

its Opinion (JA143-46) and explained why the efforts of Appellants (and the dissent below) to distinguish them missed the mark (JA147-53). The Panel's reasoning speaks for itself, and Appellants offer little that is new in their appeal brief. Appellees therefore respond only briefly to Appellants' strained efforts to distinguish the authority the Panel rightly concluded supported its decision to allocate fees to Appellants.

Appellants suggest that the decisions cited by the district court hold only that "official-capacity state defendants" can be held liable under *Zipes* because in all those cases the "state" was liable on the merits. That is plainly not a fair reading. First, as Appellants acknowledge, *Charles* involved a non-state intervenor. *See* Br. at 24-25.[9] Second, Section 1988—the basis for Appellees' fee award—"does not itself contain a state action limitation—instead it refers only to a prevailing party's entitlement to fees, not to a losing party's liability for the same." *ADT Sec. Servs.*,

[9] Appellants claim that the *Charles* intervenors had "abandoned the *Zipes* argument" on appeal, and thus the issue was not presented in the subsequent certiorari petition that the Supreme Court denied. Br. at 25 (citation and brackets omitted). This is a flat misreading of *Charles*. There, the intervenor had abandoned the argument that it could not be held liable for fees because it was a "functional plaintiff" that had sought to vindicate its own constitutional rights in the litigation. *Charles*, 846 F.2d at 1059 n.1. Appellants have made no such argument here. The *Charles* court explicitly considered the question presented here—whether a losing intervenor could be held liable for fees— and concluded that it could: "We reject the intervenors' interpretation of section 1988 for it erroneously presupposes that the statute flatly precludes fee awards against private intervenors; in our view, such an interpretation represents too facile an approach to the central question: Did the plaintiffs in fact prevail against the intervenors?" *Id.* at 1064 (emphasis omitted). *Charles* is precisely on point.

Inc. v. Lisle-Woodridge Fire Prot. Dist., 86 F. Supp. 3d 857, 862 n.4 (N.D. Ill. 2015) (noting that the *Charles* court "award[ed] fees under Section 1988 against an intervenor-defendant as to whom no substantive liability under Section 1988 had ever been alleged, much less found"). And third, the cases cited by the Panel involved the imposition of fees against intervenors who could not be found "liable on the merits" of the claim. For example, *Planned Parenthood of Central New Jersey* involved the intervention of the New Jersey legislature, which was "immune from liability under 42 U.S.C. § 1983" and thus in no circumstances could have been found liable on the merits. 297 F.3d at 261.

Appellants' insistence that *Zipes* categorically bars imposition of fees against intervenors unless they are substantively liable on the merits is therefore contrary to the law of this circuit and numerous other post-*Zipes* cases.

3. The Panel Reasonably Concluded that a Portion of the Total Award Should Be Allocated to Appellants

Having determined that it *could* allocate a portion of the total award to Appellants, the Panel then reasonably concluded that it *should* exercise its discretion to do so. The Panel below engaged in precisely the kind of thoughtful, fact-specific analysis that this Court conducted in *Ohio River Valley* and concluded that Appellants are scarcely "innocent" intervenors. As detailed at length in its Opinion, the Panel examined the role Appellants played in the case (i.e., dramatically prolonging the case and thereby thwarting the relief ordered by the

Panel below for years to perpetuate a racial gerrymander in the expectation that doing so would profit their political careers). The Panel may not have been required to apportion some of Appellees' fees to Appellants, but its decision to do so was fully supported by the governing law and the facts of this case.

The Panel noted that Appellants were not seeking to protect cognizable third-party interests, as they had no right to be elected under an unconstitutional districting scheme. JA148. To the contrary, they acted as functional defendants mounting a Stalingrad defense of an unconstitutional racial gerrymander. JA149. As the litigation progressed, there came a time—as the Panel found—where the only thing standing in the way of the relief Appellees sought was Appellants' obstinate and baseless defense. *Id.* In those circumstances, as the self-appointed guardians of an unconstitutional racial gerrymander, Appellants took on the risk of a fee award. JA149-50. The Panel's reasoning is sound, fully consistent with *Zipes*, and well-supported by analogous precedent, including this Court's holding in *Ohio River Valley*, as well as the authority from other jurisdictions cited by the Panel in its opinion.

Likely recognizing that the role they played in this litigation engenders little sympathy, Appellants seek to both minimize their role and distract the Court's attention from the facts and circumstances on which the Panel based its decision in favor of hypothetical scenarios not presented. Neither tact aids their cause.

First, Appellants argue that they are entirely "blameless" because the "state legislature alone enacted the redistricting law" and thus they had nothing to do with the underlying constitutional violation. Br. at 30-31. To be sure, the state legislature formally passed the law in question, but it is difficult to reconcile Appellants' current characterization of their role with what they told the Supreme Court. When arguing to the Supreme Court that they had standing, Appellants claimed that they "effectively drew their own districts." Brief for Appellants at 39, *Wittman v. Personhuballah*, No. 14-1504 (U.S. Dec. 28, 2015). Appellants can scarcely expect to have it both ways—minimizing their role when trying to disclaim responsibility for Appellees' fees after representing to the Supreme Court, in an unsuccessful bid to establish standing, that they were the driving force behind the constitutional violation giving rise to Appellees' injury.

Second, Appellants argue that the Court should reverse the Panel's allocation of fees because there are intervenors out there who actually are innocent and who should not be subject to a fee award. In that regard, Appellants—who sought to preserve an unconstitutional racial gerrymander that reduced the political power of African-American voters in Virginia—argue they are akin to "civil-rights organizations" that seek to represent minority voting interests. Br. at 48. Appellants' effort to compare themselves to the NAACP intervening in a lawsuit to protect minority voting rights is offensive for a host of reasons, not least of which

is that the NAACP sought to intervene in *this* lawsuit to protect minority voting interests—and Appellants opposed the request. Dkt. No. 167. Indeed, before the Supreme Court, Appellants argued that the remedial plan adopted by the Panel would harm Appellants by forcing them to represent more African-American voters. *See* Brief for Appellants at 57-58, *Wittman v. Personhuballah*, No. 14-1504 (U.S. Dec. 28, 2015). ("Indeed, the judgment necessarily requires a remedy that harms at least one Appellant by shifting black . . . voters out of District 3 and into one or more of the surrounding Republican districts, and an equal number of non-black . . . voters into District 3.").[10]

In any event, contrary to Appellants' suggestion, the Panel did not adopt a rule that all losing intervenors are liable for fees. Instead, and in accordance with *Zipes*, the Panel conducted a careful review of the relevant case law and the granularities of the litigation below, and exercised its discretion to determine that,

[10] Appellants start their brief on appeal with a paean to the 2012 plan, casting that plan as a concerted attempt to preserve "minority voting rights" that was "nonetheless" challenged by Appellees. Br. at 2-3. This is a plan repeatedly struck down as an unconstitutional racial gerrymander that unlawfully packed African-American voters into a single district, *Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2015 WL 3604029, at *16 (E.D. Va. June 5, 2015), *appeal dismissed sub nom. Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016), that the NAACP declared manifested "uninformed, harmful assumptions about the representational preferences of voters" and constituted an "unjustified and offensive packing strategy" that "limited the ability of black voters to participate in and influence elections" in Virginia, *Amicus Curiae* Brief of the Virginia State Conference of the NAACP in Support of Appellees at 6, *Wittman v. Personhuballah*, No. 14-1504 (U.S. Feb. 3, 2016).

in the circumstances presented, an award of fees against Appellants was appropriate. The Panel's Opinion holding white incumbent congressional representatives accountable for defending a racial gerrymander they believe advanced their political interests is a far cry from a holding that the NAACP would necessarily and categorically be liable if it intervened in a lawsuit to protect its membership's interests.

Finally, Appellants contend that the allocation of the fee award against Appellants here would somehow undermine the "adversary process" by inviting collusion between plaintiffs and state defendants. Br. at 43. This argument is not only a red herring, it is demonstrably false, with respect to both this case and the hypothetical cases to which Appellants allude.

As an initial matter, Appellants' thinly veiled accusations that Appellees conspired with the State Defendants is not borne out by the procedural history of this case, improperly impugns the other parties to this matter (and their counsel), and is unworthy of attorneys of the caliber of those who represent Appellants. At several points, Appellants claim that after Governor McAuliffe and Attorney General Herring were elected in November 2013, the State Defendants immediately "abandoned" their defense for partisan reasons and, they insinuate, Appellees' counsel manipulated them into doing so. Br. at 4-5, 44-45, 52. In essence, Appellants argue that the State Defendants "opportunistically refrain[ed]

from pursing [sic] a meritorious appeal," leaving Appellants to do so, and so they should not have to pay the fees Appellees incurred in defending against that appeal. Br. at 51. But as set forth above, *supra* at 5-6, the State Defendants litigated this case in full alliance with Appellants *after* the change in administration *until* the State Defendants lost comprehensively at trial. And then, too, the State Defendants sided with Appellants—and lost—on the outcome-determinative issue of standing before the Supreme Court.[11] Clearly, the State Defendants' attempt to avoid throwing good money after bad may not align with Appellants' self-interested desire to perpetuate a racial gerrymander for their own partisan benefit. But the Court should look past Appellants' effort to distract and confuse the issues before the Court.

And, indeed, even crediting Appellants' concern about the potential for "collusion" in some other case, there are any number of counter-factual hypotheticals wherein Appellants' preferred rule—that intervenors are inoculated from fee awards—would lead to equally baleful outcomes. For instance, one can imagine Democratic plaintiffs suing a Republican state government official who

[11] Indeed, in *Bethune-Hill v. Virginia State Board of Elections*, Civil Action No. 3:14-cv-852-REP-AWABMK (E.D. Va.), litigation filed after the November 2013 election in which Appellees' counsel represent plaintiffs challenging certain of Virginia's legislative districts, the same State Defendants defended the case at trial (along with the Virginia House of Delegates as intervenor) and have continued to oppose the plaintiffs' position. The difference in *Bethune-Hill* is that the district court, at this stage, has not issued a ruling in the plaintiffs' favor subject to clear error review.

thereafter coordinates with an aligned intervenor such that the official steps back and the intervenor steps in to assume the defense. According to Appellants, a district court would be powerless to award fees against the "innocent" intervenor. Thus, simple gamesmanship would either effectively deny Section 1983 plaintiffs the fees to which they are entitled or deter meritorious constitutional challenges by plaintiffs who lack the means to pursue them. The point is that district courts are best positioned to determine the factual circumstances regarding an intervenor's "innocence" (or whether it acted frivolously or unreasonably) and whether a fee award against the intervenor is appropriate. If the possibility of collusion is the disease, Appellants' cure would kill the patient.

Like any litigant, an intervenor faces a choice as to whether the rewards of litigation outweigh the risks. And where, as here, an intervenor chooses to become the functional equivalent of a defendant, it assumes the risk of a fee award against it. *See, e.g.*, *Charles*, 846 F.2d at 1064 (affirming fee award against private intervenors: "[W]e cannot and refuse to ignore the fact that the [private] intervenors' unilateral decision, one week after the plaintiffs filed suit, to join with the state defendants in adamantly defending the constitutionality of the Abortion Act rendered them full-fledged parties to the lawsuit and entitled them to participate independently in all phases of the litigation.").

CONCLUSION

For the reasons stated above, the Panel's award of $1,346,571.74 to Appellees as prevailing plaintiffs is not before the Court, and the Panel reasonably exercised its discretion to apportion $479,887.67 of this overall award to Appellants.

DATED: June 15, 2017

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CERTIFICATION 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 7,558 words, excluding the parts of the brief exempted by rule.

DATED this 15th day of June, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on June 15, 2017.

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