No. 20-12388

In the

United States Court of Appeals
for the Eleventh Circuit

Secretary, State of Georgia,
Defendant-Appellant,

v.

Common Cause Georgia,
Plaintiff-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.
No. 1:18-cv-05102-AT — Amy Totenberg, Judge

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

I hereby certify that the following persons and entities may have an interest in the outcome of this case:

1. Anderson, Kimberly K.: Former counsel for Appellant in underlying case.

2. Athens-Clarke County Attorney's Office: Counsel for Athens-Clark County Board of Elections, objector in underlying case.

3. Athens-Clarke County Board of Elections: Objector in underlying case.

4. Atkins, Robert A.: Counsel for Appellee in underlying case.

5. Augusta, Georgia Law Department: Counsel for Richmond County, interested party in underlying case.

6. Belinfante, Joshua Barrett: Counsel for Appellant in underlying case.

7. Berse, Farrah R.: Counsel for Appellee in underlying case.

8. Boren, Nancy: Interested party in underlying case.

9. Brennan Center for Justice at NYU School of Law: Counsel for Appellee in underlying case.

10. Campbell, Christopher G.: Counsel for Appellee in underlying case.

11. Carr, Christopher M.: Counsel for Appellant in underlying case.

12. Clark, Jr., James Clinton: Counsel for Nancy Boren and Muscogee County Board of Elections, interested parties in underlying case.

13. Common Cause Georgia: Appellee-Plaintiff.

14. Crittenden, Robyn A.: Former defendant in underlying case.

15. Crumly, Jonathan: Counsel for Appellant in underlying case.

16. DeGennaro, Mark L.: Counsel for Andrew Harper, objector in underlying case.

17. DeKalb County Board of Registrations and Elections: Objector in underlying case.

18. Denmark, Winston A.: Interested party in underlying case.

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22. Fincher, Denmark & Williams & Minnifield, LLC: Counsel for Winston A. Denmark, interested party in underlying case.

23. Freeland, William E.: Counsel for Appellee in underlying case.

24. Georgia Department of Human Services: Movant in underlying case.

25. Georgia Law Department: Counsel for Appellant and Georgia Department of Human Services, movant in underlying case.

26. Hall County: Interested party in underlying case.

27. Hannah, Penny: Counsel for Georgia Department of Human Services, movant in underlying case.

28. Harper, Andrew: Objector in underlying case.

29. Hawkins, John Matthew: Counsel for Athens-Clarke County Board of Elections and Charlotte Sosebee, objectors in underlying case.

30. Hiromi, Makiko: Counsel for Appellee in underlying case.

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32. Kemp, Brian: Former Defendant in underlying case.

33. Lake, Brian Edward: Counsel for Appellant in underlying case.

34. Law Office of Brian Spears: Counsel for Amicus Curiae Greg Palast in underlying case.

35. Layerenza, Melina Maria Meneguin: Counsel for Appellee in underlying case.

36. Mack, Rachel Nicole: Counsel for Richmond County, interested party in underlying case.

37. Miller, Carey Allen: Counsel for Appellant in underlying case.

38. Mirer, Jeanne Ellen: Counsel for Amicus Curiae Greg Palast in underlying case.

39. Mirer, Mazzocchi & Julien PLLC: Counsel for Amicus Curiae Greg Palast in underlying case.

40. Muscogee County Board of Elections: Interested party in underlying case.

41. Newton County Board of Elections and Registration: Objector in underlying case.

42. Page Scrantom, Sprouse, Tucker & Ford, P.C.: Counsel for Nancy Boren, interested party in underlying case.

43. Palast, Greg: Amicus Curiae in underlying case.

44. Paul Weiss Rifkind Wharton & Garrison, LLP: Counsel for Appellee in underlying case.

45. Perez, Myrna: Counsel for Appellee in underlying case.

46. Pinson, Andrew: Counsel for Appellant.

47. Raffensperger, Brad: Appellant-Defendant.

48. Rhodes, Jody Marie: Counsel for Appellee in underlying case.

49. Richmond County: Interested party in underlying case.

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52. Sosebee, Charlotte: Objector in underlying case.

53. Spears, George Brian: Counsel for Amicus Curiae Greg Palast in underlying case.

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55. Sugarman, F. Skip: Counsel for Appellee in underlying case.

56. Taylor English Duma LLP: Counsel for Appellant in underlying case.

57. Teague, William Ryan: Counsel for Appellant in underlying case.

58. Totenberg, Honorable Amy: United States District Court Judge, Northern District of Georgia, Atlanta Division, who is the Judge in the underlying case.

59. Troup County Board of Elections and Registration: Objector in underlying case.

60. Tyson, Bryan P.: Counsel for Appellant in underlying case.

61. Weiser, Wendy: Counsel for Appellee in underlying case.

62. Willard, Russell D.: Counsel for Appellant in underlying case.

63. Willis McKenzie LLP: Counsel for Andrew Harper and Troup County Board of Elections and Registration, objectors in underlying case.

/s/ *Bryan P. Tyson*
Bryan P. Tyson

STATEMENT REGARDING ORAL ARGUMENT

The Secretary requests oral argument in this case. Oral argument will assist the Court in understanding the brief – but highly unusual – preliminary-injunction proceedings that resulted in a TRO and ultimately led the district court to determine Common Cause was a prevailing party, including *sua sponte* requests for discovery, testimony, and arguments made by the district court and not by Common Cause, and ordered relief fashioned by the district court and different from anything Common Cause requested. Oral argument will aid the Court in unpacking this unusual record and reviewing the novel legal questions that have arisen as a result.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Federal Statutes

State Statutes

JURISDICTION

The district court had subject-matter jurisdiction over this case pursuant to 28 U.S.C. §§ 1331, 1343, and 1367 because this is an action arising from claims asserted under the Constitution and laws of the United States, among other claims.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, governing appeals from final orders, because Defendant appeals from the district court's Order entered May 29, 2020, disposing of all parties' claims (Doc. 123) (the "Fee Order") and the final judgment entered by the district court on May 29, 2020, in the amount of $166,210.09 (Doc. 124).

Defendant timely filed its Notice of Appeal from the district court's Order and final judgment in the district court on June 26, 2020 (Doc. 125).

STATEMENT OF ISSUES

1. Whether the district court err in granting Appellee Common Cause Georgia's Motion for Prevailing Party Attorneys' Fees and Expenses, finding that Common Cause is a prevailing party despite not awarding any of the relief Common Cause requested in its complaint or motion for temporary restraining order.

2. Whether the district court's fee award should be substantially reduced, where the district court denied the relief the plaintiff requested, the relief granted was not requested by the plaintiff in its pleadings, and the granted relief was merely that the Secretary comply with existing state law, in the absence of any allegation it was not complying with the cited law.

STATEMENT OF THE CASE

This is an appeal of an award of attorneys' fees issued when (1) the relief obtained is not the same as the relief sought; (2) the relief and award relied on facts not initially shown or addressed by Common Cause; and (3) the relief included fees for work on unsuccessful matters. The award should be reversed.

A. Factual Background

Filed late the evening before the 2018 general election, Common Cause's complaint alleged that the Georgia Secretary of State failed to maintain a secure voter registration database, and consequently, foreign agents or others were likely hacking the voter-registration database and depriving registered voters the ability to exercise the franchise. *See generally*, Doc. No. [1]. As evidence of this purported lack of security, Common Cause cited to increased use of provisional ballots, which are used when there is a question about, *inter alia*, the voter's identity or registration status. See O.C.G.A. § 21-2-418. "Once the provisional ballot is cast, it will be counted if and only if the person is later determined to have been entitled to vote." Doc. No. [62] at 7 (citing O.C.G.A. § 21-2-419).

Common Cause argued that the increase in provisional ballots cast in the 2018 general election demonstrated there was a flaw or error with the voter-registration system. Consequently, Common Cause sought declaratory and injunctive relief seeking changes to Georgia's election laws addressing Defendant's voter registration database, provisional ballots, and the process for administering both. Doc. No. [1] at 20-25.

The case was transferred from the Honorable Eleanor L. Ross to the Honorable Amy Totenberg on November 6, 2018. Doc. No. [4]. Two days after Common Cause filed the complaint, it moved for a temporary restraining order, expedited discovery, and an immediate hearing. Doc. No. [15].

Common Cause's motion for temporary restraining order ("Common Cause's TRO Motion") sought sweeping relief, specifically to "enjoin[] the rejection of any provisional ballots cast during the 2018 election on the ground that the voter's name is not found on the voter registration list." Doc. No. [15] at 1. On the day the Common Cause moved for its temporary restraining order, the district court granted Plaintiff's request for an immediate hearing. On November 7, 2018, the district court set a hearing on Common Cause's TRO Motion for the following day, November 8. Doc. No. [17]. At the hearing, the district court heard from two of

the Defendant's witnesses and oral argument. *See generally*, Tr. TRO Hr'g at 3. The district court also considered the declarations filed by the Common Cause. *Id.* Four days after the hearing, the district court granted what it categorized as "modest" relief, issuing a temporary restraining order (the "TRO"). Doc. No. [62] at 51. The district court later granted Common Cause's request for attorneys' fees on May 29, 2020 (the "Fee Order"). Doc. No. [123]. The attorneys' fees award reduced the requested relief slightly, and pursuant to Common Cause's request, it covered fees accrued only from the preparation of the initial pleadings through the November 12, 2018 TRO order. Doc. No. [123] at 4.

The district court awarded attorneys' fees of $166,201.09 in a case that started and effectively finished in seven (7) days. The case was filed on November 5, 2018, Common Cause's TRO Motion heard on November 8, 2018, and decided one week later, on November 12, 2018. Doc No. [123] at 1-2.

B. Proceedings Below

1. The District Court's Use of *Sua Sponte* Orders

Throughout the course of the short-lived litigation, the district court issued multiple *sua sponte* orders seeking evidence that bolstered and ultimately led to factual findings that the

district court relied upon to grant relief. First, on November 7, 2018 (the day before the hearing), the district court issued its first *sua sponte* order directing Common Cause to provide evidence—either testimonial or from an affidavit—on the fact issues raised by the TRO Motion. Doc. No. [18]. No one had asked the district court to seek the information; it did so upon "reviewing the [Common Cause's] Motion." *Id*.

On the morning of the 1:30 pm hearing, the district court issued two more *sua sponte* orders. The first directed the Secretary to be prepared to provide information on provisional ballots during the hearing. Doc. No. [20]. The second directed Common Cause to provide evidence to "establish a basis for the organization['s] standing" before the 1:30 pm hearing. Doc. No. [21]. Standing was a contested issue in the case, and the district court later relied on Common Cause's affidavits when ruling that Common Cause had the Plaintiff established standing. Doc. No. [62] at 28-35.

Throughout the process, the district court continued to request evidence that Common Cause itself failed to provide. Indeed, some of the requests went to the very heart of Common Cause's legal theories about the significance of provisional ballots. For example, going into the hearing, Common Cause did not have

evidence regarding the number of provisional ballots cast in the general elections of 2014, 2016, or 2018. "At the [district court's] request, [the Secretary] provided" that information. Doc. No. [62] at 21. Specifically, Common Cause needed to show that any greater use of provisional ballots in the 2018 general election was statistically significant. The district court's order made this clear when it said the relief Common Cause sought "***hinged*** on the statistical significance of the increase in the number of provisional ballots" in the 2018 general election. Doc. No. [62] at 22 (emphasis added); *see also* [id.] at 43, 50.

Despite the centrality of the concept of statistical significance to its case, none of Common Cause's initial pleadings even uses the phrase. Doc. Nos. [1, 15-1]. Going into the hearing, Common Cause did not have evidence regarding the number of provisional ballots cast in the general elections of 2014, 2016, or 2018.

The lack of evidence continued through the hearing. Common Cause never proffered evidence or even argument that the increased use of provisional ballots in the 2018 election was statistically significant. Common Cause's omission occurred despite Common Cause having had a statistician on staff who examined information prior to the hearing. (TRO Hr'g Tr. at 15.)

Indeed, the first time the phrase "statistically significant" appears to be used is in the November 7 hearing on cross-examination. (TRO Hr'g Tr. at 62.) At that time, Common Cause's counsel asked Georgia Elections Division Director whether there is a statistically significant difference in ballots cast in 2018 and other years. *Id.* The Secretary's counsel objected on the grounds that a conclusion about statistical significance requires expert testimony. *Id.* In response, Common Cause's counsel rephrased the question, but the Elections Division Director could not answer: "I'm not sure what statistically significant would be." *Id.* at 62.

The concept of statistical significance did not come up again until after the close of evidence, and then by the district court on a *sua sponte* basis. (TRO Hr'g Tr. at 88). There, the district court directed a question to Common Cause's counsel "about the posture of the case … In the complaint – original complaint, it seemed to [the court] that [Common Cause was] tying [its] request for relief in part on whether relief would make a difference and whether it would – and whether the increase in provisional ballots was *statistically significant*." *Id.* (emphasis added). Common Cause's counsel did not deny this and went on to discuss the type of relief sought, not the evidentiary basis of the relief. *Id.* at 88-91.

At the close of the hearing, the district court recognized the shortcoming in Common Cause's evidence. As Common Cause began its closing argument, the district court stated "you haven't really addressed are we in that statistically significant range." (TRO Hr'g Tr. at 109.) Common Cause's counsel claimed they did not have the data prior to the hearing and then moved onto other argument. *Id.* at 109-10. Thus, the hearing ended without any competent evidence (or otherwise supported allegation) of a statistically significant increase in the use provisional ballots.

Without request for leave from Common Cause, the day after the hearing, the district court entered another *sua sponte* order directing Common Cause to file an affidavit "from a qualified statistician … regarding whether or not there is a statistically significant increase in the percentage of provisional ballots cast" between the 2018 and 2016 election and the 2018 and 2014 election. Doc. No. [41]. The district court's *sua sponte* order authorized the Secretary to submit an affidavit at the same time. *Id*. The parties were given mere hours to comply. *Id*.

Common Cause's affidavit concluded that the changes were statistically significant. Doc. No. [62] at 22-23 (citing Doc. 46). The Secretary's declarant concluded that he could not determine whether the information was statistically significant or not. Doc.

No. [62] at 23-24 (citing Doc. 45). The district court did not request responses to the declarations.

Ultimately, the district court agreed with Common Cause's affiants that the difference in provisional ballots cast was statistically significant. *See, e.g.*, Doc. No. [62] at 39. The district court's order made clear that its finding on statistical significance was central to the only order on the merits—the TRO. Doc. No. [62] at 43 ("[Common Cause's] claims are centrally linked to there being a statistically significant increase in the number of provisional ballots cast in the 2018 election.") The finding was also important in the fee order. "The Court determined, based on the preliminary evidence offered by both parties, that Common Cause had persuasively demonstrated: (1) there had been a statistically significant increase in the proportion of voters required to vote on provisional ballots relative to the total vote." Doc. No. [123] at 2.

2. The Narrow Relief

At the hearing, Common Cause narrowed its requested relief from what it sought in its pleadings. Specifically, Common Cause at the hearing, sought a temporary restraining order to prevent any rejected provisional ballots for voters "who had registration problems until we can all feel a little bit more confident that there was not widespread manipulation of the voter registration

database." (TRO Hr'g at 8.) Common Cause offered nothing more to flesh out what would create the "confidence" it sought. At the hearing, the district court noted that the newly requested relief was not the same as the one in the complaint, and Common Cause's counsel agreed. *Id.* at 9. Throughout the hearing Common Cause's counsel continued to narrow its requested relief. *Id.* at 17, 21, 26.

The district court granted, in part, Common Cause's TRO Motion on November 12, 2018. Doc. No. [62]. The relief ordered was, indeed, "modest" and not what Common Cause originally sought. Doc. No. [62] at 51. Instead, the TRO required the Secretary (and 159 non-party county election superintendents) to publish information referring to an election hotline or website where provisional ballot voters could determine whether their vote was counted. Doc. No. [62] at 52. In addition, the TRO enjoined the Secretary from certifying the results of the election prior to the statutory deadline set forth in O.C.G.A. § 21-2-499. *Id.* Finally, the district court required the Secretary to direct the non-party counties to engage in a "good faith review" of rejected provisional ballots where the voter's eligibility was questioned; the ordered review necessitated the use of "all available registration

documentation." *Id.*[1] All of the granted relief restates what the testimony indicated county officials already do—check paper files if they cannot locate a registration record. TRO H'rg Tr. at 118-119.

The TRO expressly rejected the relief Common Cause originally sought as "not practically feasible." Doc. No. [62] at 49. Consequently, the district court afforded only "limited injunctive relief within the bounds of Georgia's statutory framework." Doc. No. [62] at 50. The district court's TRO continued by describing the remedy it ordered as "follow[ing] the processes set by the Georgia legislature in ensuring the certification of correct and complete election results." Doc. No. [62] at 51. Nothing addressed the security of the voter-registration database. The TRO provided the sole basis for the attorneys' fees award. Doc. No. [123] at 4, 8.

3. The Attorney's Fees Award

The Secretary opposed Common Cause's motion for Attorneys' fees on three grounds. First, the district court issued only partial relief that fell within the Secretary's existing authority. Consequently, the TRO did not change the legal relationship between the parties. Doc. No. [120] at 3-6. Second, the proposed

[1]The TRO also allowed Defendant to conduct the review itself, but Defendant declined this option. Doc. No. [62] at 53.

hourly rate should have been reduced. *Id*. at 7-18. Third, Common Cause's expenses should have been reduced. *Id*. at 18-21.

The district court reduced a minor portion of the hours spent preparing the complaint, but it otherwise awarded Common Cause all of its requested fees. *See generally* Doc. No. [123]. As discussed, when considering whether Common Cause was ultimately successful or changed the relationship between the parties, the attorneys' fee award focused on the district court's finding—based on the court's own request for evidence after Common Cause apparently failed to meet their evidentiary burden—that Common Cause showed there was a "statistically significant" increase in provisional ballot use in the 2018 election. Doc. No. [123] at 2. The district court also recognized, however, that the relief it awarded "was narrower than [what Common Cause] actually presented in its papers." Doc. No. [123] at 9 n.6. The district court credited Common Cause with responding to her questions at oral argument and, consequently, seeking a less significant order. *Id*. at 9. In other words, the district court recognized that Common Cause's oral presentation was not as robust as the written motion for temporary restraining order, but it awarded fees for work done before the hearing despite being unsuccessful in obtaining the relief Common Cause actually requested.

Another factor considered in the attorneys' fees award was the district court's conclusion that "it was clear that [the Secretary] would have" certified elections sooner "[a]bsent" the district court's injunction. Doc. No. [123] at 12. As the basis of this conclusion, the district court cited to page 51 of the TRO. [*Id.*] But, that section of the TRO addresses only the relief provided and not Defendant's conduct. Further, at no point did Common Cause present evidence substantiating this assertion by the district court.

C. Standard of Review

An award of attorneys' fees is reviewed *de novo* because it is a question of law. *Loggerhead Turtle v. County Council*, 307 F.3d 1318, 1322 (11th Cir. 2002). Whether the legal relationship between Common Cause and Defendant changed, and whether Common Cause directly benefitted from the TRO, are legal questions, so a *de novo* review is also appropriate. *Virdi v. Dekalb Cty. Sch. Dist.*, 216 F. App'x 867, 870 (11th Cir. 2007).

SUMMARY OF ARGUMENT

The district court committed reversible error by concluding that Common Cause was entitled to an award of attorneys' fees and expenses pursuant to 42 U.S.C. § 1988 ("§ 1988"). Rather than granting relief which had actually been requested by Common

Cause, the district court cobbled together what it thought Common Cause should have asked for, put it in an order, and then granted prevailing party status even though Common Cause never articulated the relief granted by the district court. The case law is clear that Common Cause may only receive attorneys' fees and expenses if it is a "prevailing party" under § 1988. The TRO provides no sustainable basis for the district court's determination that Common Cause was a "prevailing party" under § 1988. Nothing in the TRO modified Defendant's behavior or authority under the challenged statutes. Further, Common Cause never achieved any significant goal of its lawsuit as alleged in its pleadings as the relief granted was not related to any of the relief actually requested by Common Cause.

First, Common Cause is not a "prevailing party" because the TRO did not alter the legal relationship between Defendant and Common Cause. The Supreme Court has held that evidence must exist that the district court's judgment "materially alters the legal relationship between the parties by *modifying the defendant's behavior in a way that directly benefits the plaintiff*." *Farrar v. Hobby*, 506 U.S. 103, 111, 131 S. Ct. 566 (1992) (emphasis added). In the instant case, Common Cause did not directly benefit from the TRO at *the time it was rendered*, as required by *Hewitt v.*

Helms, 482 U.S. 755, 107 S. Ct. 2672 (1987) and *Rhodes v. Stewart*, 488 U.S. 1, 109 S. Ct. 202 (1988). Nothing in the TRO substantially modified Defendant's behavior, let alone in a way that directly benefited Common Cause. Indeed, the TRO did not enjoin the Defendant from enforcing any statute whatsoever. Accordingly, since Common Cause failed to obtain a benefit from the TRO at the time it was entered or mandate Defendant change its behavior, Common Cause is not a prevailing party under § 1988 entitled to attorney's fees and expenses.

Second, Common Cause is not a "prevailing party" because it did not accomplish what its lawsuit originally set out to do. Common Cause admitted that the relief granted in the TRO was not originally sought in its pleadings. (TRO Hr'g at 8-9.) Therefore, the modest relief Common Cause obtained is not of the general type it originally sought. Common Cause is not a prevailing party in the instant case, as a "prevailing or substantially prevailing party is one who prevailed in what the lawsuit originally sought to accomplish." *See Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1532 (11th Cir. 1996).

Finally, even if Common Cause were a "prevailing party," Common Cause's award should be reduced to no more than $33,980 since attorneys' fees should not be awarded for legal

services on unsuccessful claims that were distinct from the successful claim. *See Hensley v. Eckerhardt*, 461 U.S. 424, 103 S. Ct. 1933 (1983).

ARGUMENT

I. It was reversible error for the district court to grant the fees motion because Common Cause is not a prevailing party.

Common Cause filed a five-count complaint seeking sweeping declaratory judgments and broad injunctive relief asking the district court to implement (i) a judicial overhaul of Georgia's voter-registration database; (ii) extensions of statutorily mandated election-certification deadlines; and (iii) a prohibition on enforcement of all provisional-ballot laws. Common Cause sought expansive injunctive relief consistent with these counts in its TRO Motion. In contrast to these requests, Common Cause obtained what the district court called "modest," limited relief which was expressly limited to the bounds of Georgia's then-existing statutory framework. The TRO required the Secretary (and 159 non-party county election superintendents) to publish information referring to an election hotline or website where provisional ballot voters could determine whether their vote was counted. Doc. No. [62] at 52. In addition, the TRO enjoined the Secretary from

certifying the results of the election prior to the statutory deadline set forth in O.C.G.A. § 21-2-499. *Id*. Finally, the district court required the Secretary to direct the non-party counties to engage in a "good faith review" of rejected provisional ballots where the voter's eligibility was questioned; the ordered review necessitated the use of "all available registration documentation." *Id*.

The threshold legal question before this Court is whether a single order granting highly limited relief (1) which did not alter any aspect of Defendant's conduct toward Common Cause and (2) which Common Cause never requested in any of its pleadings confers prevailing party status.[2] The simple answer is no. The TRO did not materially alter the legal relationship between the parties in a manner that directly benefits Common Cause and alters Defendant's behavior toward it. *Texas State Teachers Assoc. v. Garland Independent School Dis.*, 489 U.S. 782, 109 S. Ct. 1486, 103 L.Ed.2d 866 (1989).

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[2] The Secretary understands that this Court's authority allows fee awards based on a preliminary injunction; however, the Secretary believes this is an incorrect application of § 1988 prevailing party jurisprudence. Nevertheless, the Secretary notes that in this case, the TRO failed to grant any substantive relief even if it is treated as a preliminary injunction. Absent substantive relief, prevailing party status is not appropriate under § 1988.

A party "prevails" for purposes of § 1988 when he or she obtains "actual relief on the merits" of a claim that "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar*, 506 U.S. at 111-12, 131 S. Ct. 566 at 572-73. "Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement." *Id.*, at 111, 113 S. Ct. at 573. Therefore, a plaintiff that succeeds on the merits nonetheless is not a prevailing party for the purpose of attorneys' fees if it does not directly benefit from the district court's injunction at the time it is rendered. *See Hewitt*, 482 U.S. at 755 (because of the defendants' official immunity plaintiff received no damages award, "[t]hat is not the stuff of which legal victories are made"); *Rhodes*, 488 U.S. at 1 ("[a] declaratory judgment … is no different from any other judgment. It will [confer prevailing party status] … if, and only if, it affects the behavior of the defendant toward the plaintiff"); and *Hanrahan v. Hampton*, 446 U.S. 754, 757, 100 S. Ct. 1987, 1989 (1980) (unless a party has established his entitlement to some relief on the merits of his claims, he is not a prevailing party entitled to an award of attorney's fees).

The TRO did not accomplish enough for Common Cause to be a prevailing party.

A. The TRO did not modify the Secretary's behavior or authority.

To obtain prevailing-party status, Common Cause must achieve actual success on the merits that directly benefits the Common Cause and changes the relationship of the parties in a substantive manner that directly affects the actions of the Secretary. *Smalbein v. City of Daytona Beach*, 353 F.3d 901, 905 (11th Cir. 2003) The TRO does not do this.

In *Hensley*, 461 U.S. at 433, 103 S. Ct. at 1939, the Supreme Court defined a "prevailing party" as one who succeeded "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." However, that "generous formulation" is no longer the standard. As this Court noted in *Smalbein*, 353 F.3d at 905, "[i]t is now established that in order to be considered a prevailing party under § 1988(b), there must be a 'court-ordered' … 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." citing *Buckhannon*, 532 U.S. at 604, 121 S. Ct. 1835 and *Texas State Teachers Assoc.*, 489 U.S. at 792 – 793, 109 S. Ct. at 1493 – 1494.

In *Texas State Teachers Association,* the Supreme Court held that "the touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Id.*,

489 U.S. at 792, 109 S. Ct. at 1494. This statement has been interpreted by this Court to require that plaintiffs achieve success on the merits that directly affects the actions of the defendants. To prevail, Common Cause must have prevailed on the merits of its claim and victory must grant it the "spoils of victory" which must directly benefit it. This simply did not occur with the single, substantive ruling in this case—the TRO.

In *Walker v Anderson Electrical Connectors*, 944 F. 2d 841 (11th Cir. 1991), this Court denied attorneys' fees to a Title VII plaintiff who was deemed to have been sexually harassed but was awarded no damages.[3] This Court held that a jury's finding of sexual harassment, "without more, will not ordain a litigant the prevailing party." *Id.* The plaintiff in *Walker* asserted that she was a "prevailing party" and therefore entitled to attorney's fees. This Court rejected the argument, reasoning that a jury's finding of sexual harassment, unaccompanied by any relief, "is not the

[3]The provision for counsel fees in 42 U.S.C. § 1988 was patterned upon the attorney's fees provisions of 42 U.S.C. §§ 2000a-3(b) and 2000e-5(k). *Hanrahan*, 446 U.S. at 758 n. 4, 100 S. Ct. at 1989 n. 4 (1980). Therefore, cases addressing prevailing-party status under § 2000e-5(k) apply to cases brought pursuant to § 1988. *See Chicano Police Officer's Ass'n v. Stover*, 624 F.2d 127, 130 (10th Cir. 1980) (same standard is to be applied in awarding fees under sections 1988 and 2000e-5(k)). *Also see Slade for Estate of Slade v. U.S. Postal Service*, 952 F.2d 357 (10th Cir. 1991).

stuff of which legal victories are made." *Id.* at 847 (quoting *Hewitt*, 482 U.S. at 760, 107 S. Ct. at 2676). The key holding in *Walker* is that Common Cause must obtain some substantive relief that directly benefits it (*i.e.*, addressing the voter registration database or restraining actions by the Secretary allowed under Georgia statute).

In *Hewitt*, a plaintiff was denied attorneys' fees, despite a finding by the Third Circuit that his due-process rights had been violated. *Hewitt*, 482 U.S. at 757-59, 107 S. Ct. at 2674-75. The plaintiff, a prisoner in the Pennsylvania state prison system, sued prison officials for placing him in disciplinary confinement without due process of law. The district court dismissed the case on a summary-judgment motion. On appeal, the Third Circuit reversed, finding that there had, indeed, been a violation of due process. The case was remanded to the district court with instructions to award the plaintiff damages unless the defendants were able to assert an immunity defense. Finding such a defense, the district court again dismissed the case in a motion for summary judgment and in a later ruling denied the plaintiff attorneys' fees. With regard to the denial of attorney's fees, the Third Circuit reversed. Equating its initial finding of a due process violation with a declaratory judgment, the Third Circuit

held that the plaintiff was a "prevailing party" under § 1988 and entitled to an award of attorney's fees.

The Supreme Court rejected the Third Circuit's rationale and reversed, holding:

> In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces – the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought through the court, but from the defendant. This is no less true of a declaratory judgment suit than of any other action. The real value of the judicial pronouncement – what makes it a proper judicial resolution of a "case or controversy" rather than an advisory opinion – is the settling of some dispute which affects the behavior of the defendant towards the plaintiff.

Hewitt, 482 U.S. at 761, 107 S. Ct. at 2676. Here, Common Cause obtained no relief requiring some action or cessation of action by the Secretary. While the TRO was issued, it did not alter any conduct of the Secretary vis-a-vis Common Cause.

The plaintiff in *Walker* argued that *Hewitt* was not controlling because, unlike the plaintiff in *Hewitt*, she achieved much more than a hollow pronouncement on a matter of law. Walker pointed out that she won a favorable jury determination on the ultimate factual issue in the case and that this determination was an

important part of "settling the score" with her employer. The jury finding of sexual harassment, she contends, has forever changed the legal relationship between the parties by foreclosing the defendant's denial of such sexual harassment. This Court rejected this argument:

> While we find this argument appealing, it simply does not conform to the basic premise of *Hewitt*. With regards to the plaintiff in *Hewitt*, the Court noted that, "[t]he only 'relief' he received was the moral satisfaction of knowing that a federal court concluded that his rights had been violated." *Hewitt*, 482 U.S. at 762, 107 S. Ct. at 2676. Walker received nothing more. The jury's finding of sexual harassment no more altered the legal relationship between the parties than the Third Circuit's finding of a due process violation in *Hewitt*. And, just as the Third Circuit's finding was an important first step on the road to obtaining relief and "affect[ing] the behavior of the defendant towards the plaintiff," *id.* at 761, 107 S. Ct. at 2676, so too is the jury's finding of sexual harassment an important first step for Walker. But, as *Hewitt* suggests, such a finding, without more, will not ordain a litigant the prevailing party.

Walker, 944 F.2d at 847.

This Court in *Walker* also concluded that the Supreme Court's decision in *Rhodes*, 488 U.S. at 1, 109 S. Ct. at 202, reinforced its holding. In *Rhodes*, two plaintiffs obtained a declaratory judgment for violations of their First Amendment rights as prisoners in a state corrections facility. Prior to the court's announcement of

declaratory relief, however, one of the plaintiffs was released from prison and the other died. The Supreme Court held that the declaratory judgment could not, under those circumstances, affect the legal relationship between the parties. The plaintiffs' victory was moot despite the fact that they were awarded a declaratory judgment. As the Court noted, "[a] declaratory judgment … is no different from any other judgment. It will constitute relief … if, and only if, it affects the behavior of the defendant toward the plaintiff." *Rhodes*, 488 U.S. at 4, 109 S. Ct. at 203. In this case, the TRO did not affect the behavior of the Secretary towards Common Cause. This Court in *Walker* explained *Rhodes* in terms that apply here as well:

> While the jury's finding of sexual harassment in this case is not moot as it concerns Walker, Walker did not attain even a declaratory judgment as did the plaintiffs in *Rhodes.* Instead, Walker's only claim to the spoils of victory is a jury finding of sexual harassment. "That is not the stuff of which legal victories are made." *Hewitt*, 482 U.S. at 760, 107 S. Ct. at 2675. Therefore, in accordance with *Hewitt* and *Rhodes,* we hold that to be a prevailing party for purposes of 42 U.S.C. § 2000e-5(k), requires the attainment of something more tangible than a jury finding of sexual harassment. The district court did not err in denying Walker's request for attorney's fees.

Id.

In this case, Common Cause's only claims to the spoils of victory is a TRO issuing modest relief which the district court acknowledged was "*within the bounds of Georgia's statutory framework*." Doc. No. [62] at 50 (emphasis added). *Walker* makes it clear that something more tangible is required. *Hewitt* emphasizes that some action or cessation of some action by the defendant must be awarded. To be a prevailing party, Common Cause would actually have to have been awarded some substantive relief sought in its complaint or TRO Motion. Without a substantive victory (an order addressing the voter-registration database or enjoining the application of the election statute in issue) that changes the behavior of the Secretary towards Common Cause, it cannot be a prevailing party. *Rhodes*, 488 U.S. at 4.

In *Barnes v. Broward County Sheriff's Office*, 190 F.3d 1274 (11th Cir 1999) an applicant for the position of detention deputy brought an action against the county sheriff's office under the Americans with Disabilities Act (ADA) and Age Discrimination in Employment Act (ADEA). The district court entered summary judgment in favor of applicant on his claim that pre-employment psychological testing violated ADA, permanently enjoined the county from continuing such practice, entered summary judgment

in favor of the sheriff's office on the applicant's remaining claims, and denied the applicant's request for attorney fees. Applicant appealed as to the attorney fees. This Court held that, even with the issuance of an injunction, the applicant was not entitled to attorney fees, absent evidence that discontinuation of psychological testing affected his relationship with county at the time judgment was rendered, or that he directly benefited from the injunction.

In *Barnes*, after referencing *Hewitt*, *Rhodes* and *Farrar*, this Court explained the lack of any change in the legal relationship:

> Our review of the foregoing decisional law convinces us that we are bound, in this instance, to conclude that Barnes is not entitled to attorney's fees. Despite the fact that the court granted injunctive relief with respect to the County's use of pre-employment psychological testing, there is neither evidence that this change in policy affected the relationship between Barnes and the County at the time judgment was rendered, nor any indication that Barnes directly benefited from the injunction. As alluded to by the Supreme Court in *Hewitt,* the fact that Barnes conceivably could benefit from the court's order prohibiting the referenced examinations if he ever chose in the future to re-apply to the Sheriff's office for a job is not adequate to render him a prevailing party with respect to *this* litigation. See *Hewitt*, 482 U.S. at 763-64, 107 S. Ct. at 2677.

Barnes, 190 F.3d at 1278.

B. The TRO did not accomplish what Common Cause's lawsuit originally set out to do.

In both its complaint and TRO Motion, Common Cause primarily sought declaratory and injunctive relief addressing alleged security breaches in the Secretary's voter-registration database and imagined impacts on provisional ballots. The TRO provided no relief whatsoever on any of these driving factors in Common Cause's complaint and TRO Motion. Consequently, Common Cause is not a prevailing party, as a "prevailing or substantially prevailing party is one who prevailed in what the lawsuit originally sought to accomplish." *See Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1532 (11th Cir. 1996), quoting *Washington Public Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883, 887 (9th Cir. 1993). Having lost the bulk of the case and having secured injunctive relief that was meaningless under the circumstances, Common Cause has not prevailed on what its original lawsuit sought to accomplish and, hence, cannot recover attorneys' fees.

C. The TRO relied upon facts developed under *sua sponte* orders of district court, not evidence presented by Common Cause at the hearing.

As noted above, throughout the course of this short-lived litigation, the district court issued *sua sponte* orders seeking

evidence that bolstered and ultimately led to factual findings that the district court relied upon to grant even the modest, limited relief in the TRO. Perhaps one of the most significant of those *sua sponte* orders involved Common Cause's failure to present any statistical evidence on use of provisional ballots at the hearing. During the hearing, Common Cause never proffered evidence or even argument that the increased use of provisional ballots was statistically significant. Despite the district court recognizing this fatal shortcoming in Common Cause's evidence and Common Cause admitting as much (TRO Hr'g Tr. at 109 – 110), the district court decided to correct this issue itself and issued a *sua sponte* order after the hearing to fix Common Cause's lack of statistical evidence on provisional ballots. Absent this post-hearing, *sua sponte* order, Common Cause would have admittedly failed to meet its burden on what the district court later said was a critical element of its request for extraordinary relief.

These *sua sponte* orders upend principles of evidence and the burden imposed on Common Cause as the party seeking extraordinary relief. Common Cause did not tender evidence during the hearing. First, Common Cause could have never been a prevailing party given the evidence sought by the district court it put forward at the hearing. Because Common Cause bore the

burden of proof in the proceeding on their TRO Motion, their omission should have been dispositive. *See McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998). If Common Cause failed to put sufficient evidence before the district court to satisfy their burden, the TRO Motion should have been denied. *Id.*

The district court's decision to intervene in the evidentiary process matters. This Court has held that "[i]t is a matter of common knowledge that courts occasionally consult sources not in evidence, ranging anywhere from dictionaries to medical treatises. … The trial judge may not, however, undertake an independent mission of finding facts outside the record of a bench trial over which [she] presides." *Johnson v. United States*, 780 F.2d 902, 910 (11th Cir. 1986). Even if the numerous *sua sponte* orders of the district court do not rise to the level of an independent fact-finding mission, it is indisputable that the critical factual finding leading to the TRO's minimal relief arose from the post-hearing statistical evidence submitted at the district court's initiative. Put differently, had the district court not ordered Common Cause to supplement the evidence in support of its motion, no relief could be granted. In similar circumstances, the Supreme Court has held that §1988 compensates "the plaintiff for the time his attorney spent in achieving the outcome." *Fox v. Vice*, 563 U.S. 826, 834,

131 S. Ct. 2205, 2214 (2011). Here, the district court awarded fees for the time Common Cause's counsel spent responding to beneficial *sua sponte* orders and not organic work of counsel. Because the TRO is the sole basis for the fee motion, it is inherently unjust to award fees under § 1988 to a party that failed to timely present sufficient evidence to justify even the minimal relief awarded.

II. Even if Common Cause is a prevailing party, its pyrrhic victory requires a significant reduction in the amount awarded.

The granting of "prevailing party status" merely establishes that Common Cause may be entitled to some fees. A reasonable fee award for a prevailing plaintiff who obtains only a "Pyrrhic victory" is zero. *Linda T. ex rel. William A. v. Rice Lake Area School Dist.*, 417 F.3d 704 (7th Cir. 2005). *See also Monticello Sch Dist No. 25 v. George L.*, 102 F.3d 895 at 906-07 (7th Cir. 1996).

Even if Common Cause were a prevailing party, the amount of fees that Common Cause could be granted is minimal.[4] Most of the fees incurred in this case were related to Common Cause's

[4]However, the Supreme Court in *Farrar* held that "[i]n some circumstances, even a plaintiff who formally 'prevails'… should receive no attorney's fees at all." 506 U.S. at 115. Defendant urges this Court to apply *Farrar* and reverse the Fees Order given all the facts and circumstances in the record.

unsuccessful claims for (i) a judicial overhaul of Georgia's voter registration database; (ii) extensions of statutorily mandated election certification deadlines; and (iii) a prohibition on enforcement of all provisional ballot laws. As Common Cause was unsuccessful on these claims, it may not recover fees for litigating them. *Hensley*, 461 U.S. at 433.

The Supreme Court in *Hensley* explained that a fee award should reimburse the plaintiff for work "expended in pursuit of" the success achieved. 461 U.S. at 435, 103 S. Ct. at 1940. To determine the appropriate amount of a fee award, the district court should first identify "the number of hours reasonably expended on the litigation" and multiply that number "by a reasonable hourly rate." *Id*. at 433, 103 S. Ct. at 1939 (the "lodestar" figure). The Court should then subtract fees for hours spent on unsuccessful claims *Id*. at 435, 103 S. Ct. at 1940. Once the court has subtracted fees incurred for unsuccessful claims, it should then award some percentage of the remaining amount, depending upon the degree of success achieved by the plaintiff. *Id*. at 435–436, 103 S. Ct. at 1940–1944.

Common Cause did not succeed on *any* of its original claims. At the hearing, the district court noted that the relief sought was not the same as the one in the complaint, and the Common

Cause's counsel agreed. (TRO Hr'g at 9.) Throughout the hearing the Common Cause's counsel continued to narrow the requested relief. *Id.* at 17, 21, 26. As a result, the only claim Common Cause was "successful" on was one it admittedly did not include in its complaint or TRO Motion. Consequently, assuming *arguendo* it is a "prevailing party," Common Cause should only be awarded attorney's fees for the time required to attend and conduct the hearing. At most, this would be $33,980 reflected in the fee order as the value of attorney's fees incurred for "Oral Argument (including preparation of declarations requested by the Court)." Doc No. [123] at 17.

CONCLUSION

For the reasons set out above, this Court should reverse the judgment of the district court because Common Cause is not a prevailing party for purposes of attorney's fees under 42 U.S.C. § 1988.

Respectfully submitted this 30th day of September, 2020.

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,855 words as counted by the word-processing system used to prepare the document.

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2020, I served this brief by electronically filing it with this Court's ECF system, which constitutes service on all attorneys who have appeared in this case and are registered to use the ECF system.

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