No. 20-12388

In the United States Court of Appeals for the Eleventh Circuit

COMMON CAUSE GEORGIA,
PLAINTIFF-APPELLEE,

v.

SECRETARY, STATE OF GEORGIA,
DEFENDANT-APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA
(CIV. NO. 18-05102)
(THE HONORABLE AMY TOTENBERG, J.)

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel for Plaintiff-Appellee Common Cause Georgia hereby certify that Plaintiff-Appellee, a state office of Common Cause, has no parent corporation and that no publicly traded company owns 10% or more of its stock. Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Eleventh Circuit Rules 26.1-1 through 26.1-3, Counsel for Plaintiff-Appellee further certify that the following persons have or may have an interest in the outcome of this case or appeal:

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STATEMENT REGARDING ORAL ARGUMENT

Common Cause Georgia respectfully submits that oral arguments would be helpful to the disposition of this appeal given the complexity of Appellant's presentation of the record and the issues. Although many of Appellant's arguments are not properly before this Court because they have been raised for the first time on appeal, this case nevertheless presents important questions concerning when a litigant is a prevailing party entitled to attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

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STATEMENT OF THE ISSUES

1. Whether the District Court erred in determining that Common Cause Georgia was a prevailing party entitled to attorneys' fees and costs pursuant to 42 U.S.C. § 1988 in light of the conduct of the litigation and the specific relief requested and granted.

2. Whether, upon determining that Common Cause Georgia was a prevailing party, the District Court abused its discretion in awarding $161,682.50 in attorneys' fees.

STATEMENT OF THE CASE

I. THE COMPLAINT AND TRO ORDER

In the lead up to the November 6, 2018 general election, Georgia's voter registration systems were vulnerable to serious security breaches; these vulnerabilities increased the risk that eligible voters would be impermissibly removed from the State's election rolls or that their registration information would be unlawfully manipulated in a way that would prevent them from casting a regular ballot. ECF No. 1 at 5–11 (¶¶ 9–24) (Complaint); ECF No. 62 at 1 (TRO Order). While voters whose names could not be found on the voter registration list were supposed to be able to vote by provisional ballot, under the State's then-existing provisional balloting scheme, such ballots would be rejected if election officials could not find the voters' names on the very registration server that was vulnerable to manipulation in the first place. ECF No. 62 at 2. Moreover, the risk of voter

registration tampering was heightened by then-Secretary of State Brian Kemp's decision to publicize the security vulnerabilities in the days prior to the election, and to baselessly accuse the Democratic Party of hacking the voter registration database. ECF No. 1 at 9–10, 12–14 (¶¶ 21, 25–29). In other words, as a result of the Secretary of State's actions and inactions, there was a very real risk that voters would be impermissibly denied their right to vote.

In response to these circumstances and the mounting evidence that the security vulnerabilities were likely going to result in qualified voters having their votes nonetheless rejected, on November 5, 2018, Common Cause Georgia[1] filed a Complaint against Kemp alleging violations of the Fourteenth Amendment of the U.S. Constitution (Counts I and II); the Help America Vote Act, 52 U.S.C. § 21082 (Count III); Article II, Section 1 of the Georgia Constitution (Count IV); and Georgia Code § 21-2-211 (Count V). ECF No. 1 at 14–20 (¶¶ 32–55).

On November 7, 2018, the day after Election Day, Common Cause Georgia filed a Motion for a Temporary Restraining Order ("TRO Motion") to enjoin the rejection of any provisional ballots cast on the basis that the voter's name was not found on the voter registration list, pending a decision on the permanent relief sought in the Complaint. ECF No. 15 (TRO Motion); ECF No. 62 at 3. Common Cause Georgia also sought expedited discovery of: (1) the number of provisional

[1] Common Cause Georgia is "a non-partisan citizen lobby devoted to electoral reform and the protection and preservation of the rights of all citizens to vote in national, state, and local elections." ECF No. 62 at 30.

ballots cast per county and the reason for each; (2) guidance provided by the Secretary to county officials regarding counting provisional ballots or assessing the eligibility of provisional voters; and (3) all coding sheets or similar documents used in review of provisional ballots and ascertaining the eligibility of voters who voted by provisional ballots. ECF No. 15 at 1–2; ECF No. 62 at 3–4. The Secretary of State opposed the TRO Motion, arguing that the relief requested by Common Cause Georgia was "extraordinary" and would create a "massive disruption to the state's election processes." *See, e.g.*, ECF No. 44 at 1, 13, 23 (TRO Opposition). The District Court set a hearing on the TRO Motion for the following day, November 8, 2018. ECF No. 17 (Order for Immediate Hearing).

Between November 7, 2018, when it filed its TRO Motion, and November 12, 2018, when the Court decided that Motion, Common Cause Georgia filed an additional seven briefs, eighteen fact and expert declarations, and requests for production of documents,[2] and argued the TRO motion at an in-person hearing. ECF No. 123 at 24 (Attorneys' Fees Order).

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[2] *See* ECF No. 15-1 (Br. in Support of TRO Motion); ECF No. 15-11 (Plaintiff's Requests for Production); ECF No. 15-12 (Berse Decl.); ECF No. 25 (Morris Decl.); ECF No. 26 (Geltzer Decl.); ECF No. 27 (Wood Decl.); ECF No. 28 (Grant Decl.); ECF No. 29 (Henderson Decl.); ECF No. 30 (Flanagan Decl.); ECF No. 31 (Owens Decl.); ECF No. 35 (Wallach Decl.); ECF No. 36 (Barry Decl.); ECF No. 37 (Plaintiff's Br. Regarding Standing); ECF No. 46 (McDonald Decl.); ECF No. 47 (Plaintiff's Suppl. Submission); ECF No. 48 (Cortés Decl.); ECF No. 49 (Lamb Decl.); ECF No. 50 (Suppl. Morris Decl.); ECF No. 53 (Plaintiff's Opp'n to Defendant's Motion to Strike); ECF No. 55 (Plaintiff's Suppl. Submission in Support of TRO Motion); ECF No. 56 (Suppl. Henderson Decl.); ECF No. 58 (Suppl.

On November 12, 2018, the District Court granted the TRO in large part, finding that Common Cause Georgia demonstrated a substantial likelihood of succeeding on its claims that the Secretary of State's failure to properly maintain a reliable and secure voter registration system "has and will continue to result in the infringement of the rights of the voters to cast their vote and have their votes counted," ECF No. 62 at 41–42; that a temporary restraining order would prevent irreparable harm, ECF No. 62 at 42; and that the balance of equities and the public interest supported injunctive relief, ECF No. 62 at 45. The District Court thus ordered the Secretary of State to (1) immediately establish and publicize a hotline or website where provisional voters could determine if their ballots were counted and if not, the reason why; (2) direct each of the 159 county election superintendents to do the same; and (3) upon the receipt of certified returns from county superintendents, to either (a) direct county election superintendents to engage in a good faith review of the eligibility of voters issued provisional ballots coded PR ("provisional registration") using all available registration documentation, including registration information made available by voters themselves, or (b) conduct an independent review of the same. ECF No. 62 at 52–53; ECF No. 123 at 2–3. The District Court also enjoined the Secretary of State

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Morris Decl.); ECF No. 59 (Plaintiff's Response to Defendant's Sunday Suppl. Submission); ECF No. 60 (Plaintiff's Suppl. Submission Regarding Standing); ECF No. 60-1 (Richter Decl.); ECF No. 60-2 (Willingham Decl.).

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from prematurely certifying the results of the election before the deadline in the Georgia election code without undertaking the review ordered. ECF No. 62 at 52; ECF No. 123 at 3.[3] As the District Court observed, absent this Order, the Secretary of State would have proceeded with certifying the election results the same day it received the final certifications from the counties and would not have taken any of the additional time provided for under Georgia's election code to fully discharge its independent duty of review. ECF No. 123 at 12. The Secretary of State did not notice an appeal from the TRO Order and later agreed to comply with the Order's relevant requirements in connection with the December 2018 run-off election. *See* ECF No. 123 at 3; ECF No. 71 (Joint Preliminary Report & Discovery Plan).

II. ENACTMENT OF H.B. 316 AND H.B. 392

Following the District Court's order, the parties began seeking and taking discovery. In addition to serving document requests on the Defendant, Common Cause Georgia served non-party subpoenas on 18 Georgia counties, as well as on a number of state agencies that might have had relevant information. ECF No. 119-1 at 9 (¶ 15) (Berse Decl. in Support of Fee Motion). As the parties were engaged in this discovery effort, Georgia's legislature was, in parallel, considering relevant amendments to the State's election laws.

[3] The District Court also granted Common Cause Georgia's request for expedited discovery. ECF No. 62 at 54–55.

On April 2, 2019, House Bill 316 was signed into law, and amended Georgia's provisional ballot counting laws in ways directly relevant to the relief sought by Common Cause Georgia. ECF No. 116 at 2 (Joint Stipulation of Dismissal). For example, Section 37 of that Bill requires that, "[a]t the earliest time possible after the casting of a provisional ballot, the election superintendent shall notify the Secretary of State that an elector cast a provisional ballot, whether such ballot was counted, and, if such ballot was not counted, the reason why such ballot was not counted." ECF No. 116 at 2. Common Cause Georgia had requested that the District Court order the Secretary of State to issue guidance to county election officials requiring them to notify the Secretary of State of any provisional ballots rejected at the County level, along with the evidence used to make the determination of ineligibility. ECF No. 1 at 22, 24.

Similarly, Section 38 of that Bill requires that county officials make good faith efforts to determine whether a person casting a provisional ballot was entitled to vote in the election. ECF No. 116 at 2–3. Those efforts include "a review of all available voter registration documentation, including registration information made available by the electors themselves and documentation of modifications or alterations of registration data showing changes to an elector's registration status." ECF No. 116 at 2. Additional information sources "may include, but are not limited to, information from the Department of Driver Services, Department of Family and Children Services, Department of Natural Resources, public libraries,

or any other agency of government, but not limited to, other county election and registration offices." ECF No. 116 at 2–3. By comparison, Common Cause Georgia requested that the District Court order the Secretary of State to require county election officials to consider information beyond information contained in the state's election database prior to rejecting a provisional voter's ballot. ECF No. 1 at 23.

Section 38 also requires county election officials to notify persons whose provisional ballots were rejected because the county could not determine if the individual timely registered or if the individual voted in the wrong precinct, "[a]t the earliest time possible after a determination is made regarding a provisional ballot." ECF No. 116 at 3. Likewise, Common Cause Georgia requested that the District Court order the Secretary of State to require county election officials to notify provisional voters whose provisional ballots were rejected at the county level and to include the reason for the rejection. ECF No. 1 at 23–24.

One month later, House Bill 392 was signed into law, which provided additional protections for the voter registration system. Specifically, it directs the Secretary of State to:

> promulgate a regulation that establishes security protocols for voter registration information maintained and developed by the Secretary of State pursuant to Code Section 21-2-211 and 52 U.S.C. Section 21083. The regulation shall be generally consistent with current industry security standards, and in promulgating the regulation, the Secretary of State shall consider those security standards issued by the National Institute of Standards and Technology, the Center for Internet Security, and the federal

> Election Assistance Commission. The Secretary of State shall, at least annually, certify that the State of Georgia has substantially complied with the requirements of the regulation promulgated pursuant to this Code section[.]

ECF No. 116 at 3.

Common Cause Georgia had sought declaratory relief that the Secretary of State's maintenance of the state's voter registration database violated Code Section 21-2-211 and 52 U.S.C. § 21082 because he failed to secure the voter registration database and publicized the vulnerabilities. ECF No. 1 at 21. H.B. 392 directs the Secretary of State to address this violation and secure the voter registration database.

III. DISMISSAL OF THE CASE AND SUBSEQUENT FEES LITIGATION

In light of these two new laws, the parties agreed to dismiss the case. Pursuant to the parties' June 14, 2019 stipulation, the District Court dismissed the litigation and set a briefing schedule for Common Cause Georgia's Motion for Attorneys' Fees (the "Fee Motion"). ECF No. 116 at 4; 4 App. at 23 (docket text so-ordering joint stipulation). Common Cause Georgia filed its Motion for an Award of Attorneys' Fees on July 22, 2019, and sought attorneys' fees in the amount of $179,065.00 for 433 hours billed up through the issuance of the TRO Order on November 12, 2018 and for fees incurred in connection with the Fee Motion. ECF No. 123 at 15, 24. It also sought $4,527.59 in litigation costs and expenses. ECF No. 123 at 15, 29.

These fees paled in comparison to the actual time and resources that Common Cause's counsel poured into the case. Common Cause Georgia did *not* seek reimbursement for (1) approximately $683,700 in fees for an additional 1,000 hours incurred while litigating the case after the entry of the TRO; (2) fees incurred by Paul, Weiss, Rifkind, Wharton, & Garrison LLP ("Paul, Weiss") for 23.1 hours of work deemed to be duplicative, excessive, insufficiently documented, or primarily administrative between November 5 and 11, 2018; (3) fees incurred by Paul, Weiss in connection with 18 hours of research billed by a visiting attorney from the United Kingdom and 35.6 hours of paralegal and support staff time incurred between November 5 and 11, 2018; (4) fees incurred by The Brennan Center for Justice at New York University School of Law ("The Brennan Center") for time charged by certain of its personnel; or (5) any fees or expenses incurred by Common Cause Georgia's local counsel. ECF No. 123 at 18–19. Common Cause Georgia's counsel also sought hourly rates consistent with the hourly rates for attorneys at major law firms in the Atlanta area. ECF No. 123 at 20–21. Had Common Cause Georgia sought fees based on Paul, Weiss's customary rates, it would have sought an additional $115,731.50 fees for work through the TRO Order and $44,121.50 in fees for the Fee Motion. *See* ECF No. 123 at 16 (Chart A); ECF No. 122-2 (Exh. 1 to the Suppl. Berse Decl. in Support of Fee Motion). In total, had Common Cause Georgia sought reimbursement for all of its fees in connection with this litigation, at full rates, it

would have sought more than $1 million—nearly 6 times the $183,592.59 actually sought. *See* ECF No. 119-1 at 14; ECF No. 119-4 at 9–10 (Pérez Decl. in Support of Fee Motion); ECF No. 122-1 at 3; ECF No. 122-2; ECF No. 122-4 at 2 (Exh. 1 to the Suppl. Pérez Decl. in Support of Fee Motion); ECF No. 123 at 16 (Chart A). The Fee Motion was supported by declarations from both Paul, Weiss and The Brennan Center, along with supporting exhibits, as well as by a declaration from David G.H. Brackett, a lawyer with over 20 years of experience in the Atlanta, Georgia legal market with the law firm Bondurant, Mixson & Elmore LLP, who opined that (1) the hourly rates requested by Common Cause Georgia's counsel were within the range of reasonable metro Atlanta market rates for attorneys with comparable skills, experience, and reputation; and (2) the hours expended by Common Cause Georgia's counsel were necessary and reasonable under all of the circumstances of the litigation. ECF No. 119-7 at 2, 11, 13 (Brackett Decl. in Support of Fee Motion).

In response to the Fee Motion, the Secretary of State argued that Common Cause Georgia was not entitled to *any* fees but that, should the Court disagree with that analysis, the award should be no more than $34,314. ECF No. 123 at 15. The basis of the Secretary's disputes over the amount of appropriate fees boiled down to complaints about the prevailing rates in the Atlanta market—although the Secretary, unlike Common Cause Georgia, submitted no evidence on that issue, ECF No. 123 at 20–23—and complaints about the billing practices of counsel,

ECF No. 123 at 23–29. Those arguments have, however, all been abandoned on appeal. Common Cause Georgia submitted a reply brief responding to the Secretary's arguments and also seeking fees for litigating the Fee Motion. The Secretary of State did not file a Sur-Reply objecting to Common Cause Georgia's entitlement to fees for litigating the Fee Motion or to the amount of fees requested in connection with the Fee Motion. ECF No. 123 at 19 n.14.

On May, 29, 2020, the District Court granted the Fee Motion, holding that Common Cause Georgia was the prevailing party and was entitled to fees pursuant to 42 U.S.C. § 1988 because the litigation was necessary "to alter the legal relationship between the parties and to obtain an injunction providing significant relief to prevent the irreparable harm to the rights of Georgians who sought to cast their votes and have them counted." ECF No. 123 at 13. In a 31-page opinion carefully examining the law and the reasonableness of the fees sought, the Court rejected almost all of the Secretary's arguments and awarded $161,682.50 in attorneys' fees and $4,527.59 in expenses for a total award of $166,210.09—90% of the amount requested by Common Cause Georgia. ECF No. 123 at 13, 31; ECF No. 124 (Judgment Awarding Fees).

Specifically, the District Court agreed with Common Cause Georgia and found that (1) its counsel's hourly rates were reasonable and "commensurate with the prevailing Atlanta market rates," with one small exception;[4] (2) the hours billed

[4] The Court reduced the hourly rate of two Paul, Weiss associates, who had each passed the New York Bar exam but had not yet been admitted to the

were not excessive, with one small exception;[5] and (3) the expenses requested were reasonable and Common Cause Georgia was entitled to the full amount requested. ECF No. 123 at 20–31. On June 26, 2020, the Secretary of State filed its notice of appeal from the Order granting attorneys' fees. ECF No. 125.

STANDARD OF REVIEW

This Court determines *de novo* "[w]hether the facts as found" by the District Court "suffice to render the plaintiff a 'prevailing party'" entitled to an award under 42 U.S.C. § 1988, while reviewing the underlying factual findings for clear error. *Church of Scientology Flag Serv., Org.* v. *City of Clearwater*, 2 F.3d 1509, 1512–13 (11th Cir. 1993). As this Court has noted, "[t]he scope of the district court's discretion" to deny a fee award altogether to a prevailing party is "exceedingly narrow." *Id.* at 1513.

Once a party is deemed to have prevailed, the District Court's award of attorneys' fees and costs is reviewed for an abuse of discretion. *Id.* An abuse of discretion occurs if the court "fails to apply the proper legal standard or to follow proper procedures in making the determination, or bases an award upon findings of

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bar as of the relevant time period, from $250 per hour to $225 per hour, resulting in a $2,270 deduction. ECF No. 123 at 21 & n.15.

[5] The Court reduced 35 hours from the amount of fees sought in connection with the Complaint, resulting in a deduction of $15,112.50 in attorneys' fees. ECF No. 123 at 28–29.

fact that are clearly erroneous." *See, e.g.*, *ACLU of Ga.* v. *Barnes*, 168 F.3d 423, 427 (11th Cir. 1999) (citation omitted).

SUMMARY OF ARGUMENT

The District Court correctly ruled that Common Cause Georgia was a prevailing party and, as such, was entitled to an award of attorneys' fees and expenses pursuant to 42 U.S.C. § 1988. After engaging in a careful and thorough analysis of the facts and circumstances of this litigation and the evidence submitted in support of the fee application, the District Court also held that, apart from minor reductions, Common Cause Georgia's requested fees were reasonable. Having acted within its discretion, the District Court's fee award should be affirmed.

First, the record establishes that Common Cause Georgia is the prevailing party, having received relief on the merits of its claim through the District Court's TRO Order, which materially altered the relationship between the parties. *Common Cause/Ga.* v. *Billups*, 554 F.3d 1340, 1356 (11th Cir. 2009). The TRO accomplished Common Cause Georgia's goal of preventing material harm to Georgian voters who sought to have their votes counted in the 2018 general election by ordering Appellant to (1) establish a website or hotline for which provisional voters could check the status of their provisional ballot, and (2) direct county election officials to engage in a good faith determination of whether provisional voters were eligible to vote by using all available documentation. As the District Court found, absent the TRO Order, Appellant would have certified the

election results without fully discharging his duties and obligations under Georgia law.

Second, Appellant's attempts to minimize the relief granted by the TRO order do not deprive Common Cause Georgia of its prevailing-party status. To satisfy the prevailing party inquiry, a party need only to obtain success on a "significant issue." *Tex. State Tchrs. Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 791–92 (1989). Particularly, in the context of a TRO, a party must only obtain relief of "the same general type" as that requested. *Dillard* v. *City of Greensboro*, 213 F.3d 1347, 1354 (11th Cir. 2000) (citation omitted). Common Cause Georgia easily meets this test, as discussed in detail below. Additionally, despite Appellant's mischaracterization otherwise, the relief granted to Common Cause Georgia was significant, and cannot fairly be described as *de minimis* or technical. *Tex. State Tchrs. Ass'n*, 489 U.S. at 791–92. Finally, Appellant's argument—improperly raised for the first time on appeal—that the District Court's *sua sponte* orders negate Common Cause Georgia's success is devoid of legal support and should be rejected as a belated attempt to relitigate the merits of the TRO Order, which is not the subject of this appeal.

Lastly, the fees and expenses requested by and awarded to Common Cause Georgia were reasonable. The District Court did not abuse its discretion when it engaged in a thorough and careful analysis of the reasonableness of the Common Cause Georgia's fee request, as controlling precedent requires. Appellant's

arguments that the fee award is unreasonable because Common Cause Georgia obtained only a portion of its requested relief and that the awarded fees include fees incurred for litigating unsuccessful claims are without merit, as demonstrated below.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN CONCLUDING THAT COMMON CAUSE GEORGIA WAS A PREVAILING PARTY ENTITLED TO ATTORNEYS' FEES AND COSTS.

A. The District Court Correctly Held That the Legal Relationship Between the Parties Was Materially Altered by the TRO.

In determining that Common Cause Georgia was entitled to prevailing party status, the District Court correctly focused on what has been described as "[t]he touchstone" of the relevant inquiry: "the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Compare* ECF No. 123 at 7, *with Common Cause/Ga.* v. *Billups*, 554 F.3d 1340, 1356 (11th Cir. 2009) (citing *Sole* v. *Wyner*, 551 U.S. 74 (2007)). As this Court has explained, the material-alteration determination "require[s] either (1) a situation where a party has been awarded by the court at least *some* relief on the merits of his claim or (2) a judicial imprimatur on the change in the legal relationship between the parties." *Billups*, 554 F.3d at 1356 (emphasis added).

The TRO obtained by Common Cause Georgia plainly qualifies as "some relief on the merits of [its] claim" that was "awarded by the court."[6] At the outset,

[6] As the District Court correctly noted, a preliminary injunction is the type of

as the District Court put it, "there is no basis for disputing that [Common Cause Georgia] prevailed on the merits of its motion" by establishing a "substantial likelihood of proving that the Secretary's failure to properly maintain a reliable and secure voter registration system ha[d] and [would] continue to result in the infringement of the rights of the voters to cast their vote and have their votes counted." ECF No. 123 at 8 (quoting ECF No. 62 at 41–42). Indeed, the Court found that "the combination of the statistical evidence and witness declarations," including expert witness evidence, "persuasively demonstrate[d] the likelihood of Plaintiff succeeding on its claims" under the Fourteenth Amendment and HAVA § 302(a). ECF No. 62 at 41. Although he belatedly objects (at 27–30) to the District Court's role in creating the evidentiary record at the TRO stage, Appellant

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"enforceable judgment on the merits" that can warrant an award of attorneys' fees. *See, e.g.*, *Lefemine* v. *Wideman*, 568 U.S. 1, 4 (2012) ("[A]n injunction or declaratory judgment, like a damages award, will usually satisfy [the prevailing party test]."); *Billups*, 554 F.3d at 1356 ("[T]he underlying rule that a preliminary injunction is a material alteration of the legal relationship of the parties remains good law." (internal quotation marks omitted)); *see also* ECF No. 123 at 6–7. While Appellant appears to suggest in a footnote (at 17 n.2) that the "§ 1988 prevailing party jurisprudence" has been misapplied in the preliminary-injunction context, Appellant has not asked this Court to address that issue in this appeal. In any event, as other Circuits have held, TROs can confer prevailing-party status when, as here, they do more than merely preserve the status quo. *LSO, Ltd.* v. *Stroh*, 205 F.3d 1146, 1161 (9th Cir. 2000) (prevailing-party status is available where TRO does more than merely preserve the status quo); *see also* ECF 123 at 7 (citing *Windsor* v. *United States*, 379 F. App'x 912, 916–17 (11th Cir. 2010)).

does not identify error in the District Court's weighing of that record evidence and, of course, the grant of the TRO and the District Court's underlying evidentiary findings are not the subject of this appeal.

Unable to quarrel with the fact of Common Cause Georgia's success, Appellant seeks to reinterpret the TRO into irrelevance by analogy to *Walker* v. *Anderson Electrical Connectors*, 944 F.2d 841 (11th Cir. 1991), a case that stands for the unremarkable proposition that a jury finding of liability, standing alone, will not confer prevailing-party status upon a plaintiff that has obtained *no* relief—declaratory, injunctive, at law, or otherwise. *Compare* Appellant's Br. 20–23, *with Walker*, 944 F.3d at 846. But that analogy fails. Unlike in *Walker*, Common Cause Georgia's victory on the legal questions presented was accompanied by substantial court-ordered relief that materially altered the relationship between the parties and that accomplished Common Cause Georgia's goal of preventing irreparable harm to the rights of Georgians who sought to cast their votes in the 2018 general election and have them counted. *See* ECF No. 123 at 9, 13. As the District Court observed, "what Plaintiff effectively [sought]," and ultimately secured, "[wa]s that provisional ballots be carefully reviewed and not be finally rejected prior to the statutory deadline for the Secretary of State to certify election results on November 20, 2018." *See* ECF No. 123 at 9 (alterations in original) (quoting ECF No. 62 at 45).

To that end, the District Court not only enjoined the premature certification of election results, but also required Appellant to (i) establish a hotline or website for provisional ballot voters that explained why provisional ballots were not counted and (ii) direct county election officials to remit certified returns and engage in a good faith review of the eligibility of provisional ballot voters using all available documentation. ECF No. 62 at 52–53; ECF No. 123 at 10 (explaining how the TRO operated against Appellant's "stated intention" of following an expedited certification timeline "without properly considering the eligibility of all voters who were required to cast provisional ballots at the polls as a result of issues with their voter registration status"). The record therefore belies Appellant's contention (at 22), raised for the first time on appeal, that "Common Cause obtained no relief requiring some action or cessation of action by the Secretary."

Indeed, the District Court found it was "clear" that, but for its Order, the Secretary of State would have certified the election results "the same day [he] was to receive final certifications from the counties" without fully discharging his obligations under Georgia law. *See* ECF No. 123 at 12; *see also People Against Police Violence* v. *City of Pittsburgh*, 520 F.3d 226, 233 (3d Cir. 2008) ("This was not a case where the filing of the lawsuit resulted in voluntary change on the part of the City. It was precisely because the Court believed voluntary change was not to be expected that it ordered the City not to engage in the practices of which

plaintiffs complained.”). That is precisely the change in behavior that Appellant agrees (at 25) that the law requires.[7]

B. Appellant’s Other Attempts to Minimize the Relief Granted Cannot Defeat Common Cause Georgia’s Entitlement to Attorneys’ Fees.

Common Cause Georgia obtained relief on a significant issues in its suit, and it is therefore entitled to a fee award under § 1988. *See Tex. State Tchrs. Ass’n*, 489 U.S. at 791–92 (“If the plaintiff has succeeded on any significant issue in

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[7] To the extent that Appellant is suggesting (at 13, 24) that attorneys’ fees were not warranted because, in Appellant’s view, the TRO benefitted—if anyone—Georgia voters who cast provisional ballots, and not Common Cause Georgia directly, that argument fails. As a starting point, Appellant did not make this argument below, and it is thus forfeited. *See, e.g.*, *Atwater* v. *Nat'l Football League Players Ass'n*, 626 F.3d 1170, 1177 (11th Cir. 2010) (declining to consider argument not raised before the district court and alluded to in “two ambiguous sentences” in the opening brief on appeal). But even if that argument were properly before the Court, it should be rejected. A requirement of a direct benefit to an organizational plaintiff like Common Cause Georgia is inconsistent with precedent that allows such plaintiffs to recover attorneys’ fees in litigations brought on behalf of voters. *See, e.g.*, *Billups*, 554 F.3d at 1356 (holding that the “*NAACP and voters*” are prevailing parties “because the preliminary injunction they obtained materially altered their legal relationship with the election official” by precluding enforcement of a photo identification requirement against voters). Moreover, the argument that a direct benefit to the organizational plaintiff is required, if taken to its natural conclusion, would threaten civil rights litigation by undermining the incentives that Congress intended to set up for organizational plaintiffs with expertise in important substantive areas. *Dowdell* v. *Apopka*, 698 F.2d 1181, 1189 (11th Cir. 1983) (“The purpose of the Attorney’s Fees Awards Act is to ensure the effective enforcement of the civil rights laws by making it financially feasible to litigate civil rights violations.”).

litigation which achieve[d] some of the benefit the parties sought in bringing suit, the plaintiff has crossed the threshold to a fee award of some kind." (alteration in original) (internal quotation marks omitted)).[8] Appellant, nevertheless, asks this court to overturn the District Court's fee award because, according to Appellant, the relief granted (1) falls short of the full relief Common Cause Georgia sought in its complaint; (2) qualifies as modest, if not *de minimis*, in absolute terms; and (3) would not have been obtained without the District Court's request for additional evidence during the TRO proceedings. As explained below, each of these arguments is meritless and, in any event, does not bear on the prevailing-party determination but rather, at most, on the reasonableness of the attorneys' fees awarded.

1. The District Court Did Not Err in Finding Common Cause Georgia to Be a Prevailing Party, Even Though Common Cause Georgia Did Not Obtain All the Relief It Sought.

Appellant argues (at 27) that prevailing-party status should be denied because Common Cause Georgia did not, in Appellant's view, obtain the relief that

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[8] Appellant tries to create some daylight between this Circuit's precedent and the District Court's analysis by suggesting (at 19) that the "[g]enerous formulation" of the prevailing-party test has been tightened such that somehow it is no longer enough to establish success "on any significant issue" to the benefit of the plaintiff. But the case Appellant cites, *Smalbein*, did not displace the "significant issue" test, the applicability of which was reaffirmed by this Court in *Billups* six years later. *See* 554 F.3d at 1356; *see also Friends of the Everglades* v. *S. Fla. Water Mgmt. Dist.*, 678 F.3d 1199, 1201 (11th Cir. 2012) (citing *Tex. State Tchrs. Ass'n*, 489 U.S. at 791–92).

was the "driving factors" of the Complaint and the TRO motion. Specifically, Appellant faults the district court for finding prevailing party status even though the TRO did not provide "declaratory and injunctive relief addressing security breaches in the Secretary's voter-registration database and imagined impacts on provisional ballots." This argument should be rejected.

As the District Court correctly held, "the prevailing party inquiry does not turn on the magnitude of the relief obtained." ECF No. 123 at 7 (quoting *Farrar* v. *Hobby*, 506 U.S. 103, 114 (1992)). The "degree of success," which Appellant attacks under the guise of contesting prevailing-party status, is relevant *only* to the reasonableness of the amount of fees awarded. *See id.* (citing *Farrar*, 506 U.S. at 114; *Smalbein ex rel. Estate of Smalbein* v. *City of Daytona Beach*, 353 F.3d 901, 907 (11th Cir. 2003)). A prevailing party is entitled to an award of attorneys' fees even where she did not prevail on all of the contentions asserted; all that is required is success on a "significant issue." *Tex. State Tchrs. Ass'n*, 489 U.S. at 791–92; *see also Dillard*, 213 F.3d at 1354 (a prevailing party does "not need to obtain relief to the extent demanded; getting something suffices to authorize an award of fees"). And indeed, in the context of preliminary injunctions—and by extension, TROs—"a party need not obtain relief identical to the relief that it specifically demanded, as long as the relief obtained is of the same general type." *Dillard*, 213 F.3d at 1354 (alteration, citation, and internal quotation marks omitted);

Institutionalized Juvs. v. *Sec'y of Pub. Welfare*, 758 F.2d 897, 912 (3d Cir. 1985) (same).

Under that flexible standard, the record establishes that Common Cause Georgia succeeded on a significant issue pertaining to the procedures governing the handling of provisional ballots, and obtained relief that, while not identical to that pleaded in the complaint, was "of the same general type." *Dillard*, 213 F.3d at 1354*; see* ECF No. 123 at 13 (noting that Common Cause Georgia obtained "significant relief to prevent the irreparable harm to the rights of Georgians who sought to cast their votes and have them counted"). The District Court did not abuse its discretion in holding that Common Cause Georgia was entitled to attorneys' fees and costs under these circumstances.

2. The District Court Did Not Err in Finding That the Relief Obtained by Common Cause Georgia Was Significant Rather Than Modest, Let Alone De Minimis.

Appellant also tries to avoid the conclusion that attorneys' fees were warranted by mischaracterizing (at 25) the relief granted as modest. Appellant appears to take this approach to fit this case within the narrow band of cases in which attorneys' fees were denied to a prevailing party because the success was only "technical" or "*de minimis*." *See* Appellant's Br. 30 n.4 (citing *Farrar*, 506 U.S. at 115). But the relief granted here was a far cry from the type of "*de minimis*" relief that courts rely on to deny fees. *See, e.g.*, *Farrar*, 506 U.S. at 116, 122 (O'Connor, J., concurring) (plaintiffs' victory was *de minimis* where, in a ten-

year litigation against multiple defendants that served no public purpose, he recovered a nominal damages award of $1 from only one of the defendants out of the $17 million he sought).

But, perhaps more importantly, the District Court already rejected Appellant's characterization of the relief granted as "modest." Below, Appellant tried to pluck that word out of context from the text of the TRO Order in his opposition to the Fee Motion. As the District Court explained quite clearly, its use of the word "modest" was not intended to describe the significance of the relief, but rather to demonstrate that it would not "cause massive disruption" as Appellant claimed. ECF No. 123 at 10 n.7. In fact, the District Court chastised Appellant for his attempts to "downplay and diminish the relief ordered by the Court," which the Court characterized as "significant." ECF No. 124 at 8–10.

Although Appellant abandons the quotation marks around the term "modest" this time around, the result is the same. As a starting point, the District Court's interpretation of what it intended by its own order should be accorded great deference. *See Ala. Nursing Home Ass'n* v. *Harris*, 617 F.2d 385, 388 (5th Cir. 1980) ("Great deference is due the interpretation placed on the terms of an injunctive order by the court who issued and must enforce it.")[9]; *Cave* v. *Singletary*, 84 F.3d 1350, 1354 (11th Cir. 1996) ("[T]he district court's

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[9] All decisions handed down by the former Fifth Circuit before October 1, 1981 are binding precedent in this Circuit. *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

interpretation of its own order is properly accorded deference on appeal when its interpretation is reasonable."); *see also In re Chiquita Brands Int'l, Inc.*, 965 F.3d 1238, 1250 (11th Cir. 2020) (deferring to the district court's interpretation of its own protective order, rather than the interpretation urged by one of the parties). Even *de novo* review of the relief granted, however, leads to the same result. But for the TRO, the Secretary of State would have certified the election results without fully discharging his obligations under the law. *See* ECF No. 123 at 12. Instead, he was enjoined from certifying such results before the deadline provided in the Georgia election code without first (i) directing county election superintendents to engage in a good-faith review, using all available registration information, to determine whether voters issued provisional ballots were eligible to vote; or (ii) conducting such review independently. ECF No. 123 at 2–3.

Similarly, Appellant's efforts to minimize the significance of the TRO because, according to him, it was "within the bounds of Georgia's statutory framework," are equally misplaced and, indeed, somewhat absurd. *See* Appellant's Br. 11. If accepted, that argument would eliminate the right to attorneys' fees in all § 1988 claims brought by civil rights litigants who secured orders mandating state defendants' compliance with federal and state laws that they decided to violate or ignore. That is not the law. *See, e.g.*, *Miller* v. *Caudill*, 936 F.3d 442, 449–50 (6th Cir. 2019) (awarding attorneys' fees to plaintiffs who

obtained a preliminary injunction requiring the county clerk to issue marriage licenses to same-sex couples pursuant to her government duties).

Moreover, the state's subsequent actions confirm the significance of the relief granted. As the District Court noted, beyond benefitting the voters on whose behalf Common Cause Georgia sued while certification was pending, the TRO put in place new standards for the count and certification of provisional ballots, which also governed the December 2018 run-off election and were subsequently codified into Georgia law. ECF No. 123 at 3. These subsequent developments, made permanent by legislation, are relevant to the assessment whether plaintiffs have prevailed. *See People Against Police Violence*, 520 F.3d at 233 (affirming finding that plaintiffs were prevailing parties where "the defendant, after opposing interim relief, chose not to appeal" from a preliminary injunction, "remained subject to its restrictions for a period of over two years" and "ultimately avoided final resolution of the merits of plaintiffs' case by enacting new legislation giving plaintiffs virtually all of the relief sought in the complaint").

3. The District Court's Sua Sponte *Orders Do Not Alter Common Cause Georgia's Entitlement to Attorneys' Fees.*

For the first time on appeal, Appellant argues (at 27–30) that Common Cause Georgia is not entitled to prevailing-party status because its success purportedly rested on the District Court's "*sua sponte* orders seeking evidence that bolstered and ultimately led to factual findings that the district court relied upon to grant" the TRO.

As a starting point, having failed to make this argument before the District Court, Appellant forfeited it. *Access Now, Inc.* v. *Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004). But even if Appellant could present this argument for the first time in this Court, Appellant's attempt to distinguish (at 30) between work "responding to beneficial *sua sponte* orders" and "organic work of counsel" is conspicuously devoid of any case-law support. That is not surprising, as Appellant recognizes (at 29) that the law allows for attorneys' fees for "time . . . spent in achieving the outcome" in the case. *Fox* v. *Vice*, 563 U.S. 826, 834 (2011). The cases do not differentiate between such work based on whether it was done in response to a request of the court or at counsel's own initiative.

Appellant's argument, at its core, again appears to be a back-door attempt to challenge an Order that is not the subject of this appeal. The argument (at 28–29) boils down to the contention that Common Cause Georgia, without the District Court's help, would not have carried its burden of proof and would not have secured the relief it obtained. But Appellant cannot rely on counterfactuals about the evidence Common Cause Georgia would have presented but for the District Court's active management of the hearing. Nor can Appellant relitigate the evidentiary findings underlying the TRO Order—or reverse the District Court's ultimate determination that Common Cause Georgia was entitled to a TRO—through this appeal after foregoing to notice an appeal from the grant of the TRO itself. Unable to change the fact of Common Cause Georgia's predicate victory—

or the scope of the relief granted—Appellant's arguments cannot alter Common Cause Georgia's prevailing-party status.

At most, Appellant may argue that Common Cause Georgia's success is attributable, somehow, to the District Court's assistance and not Common Cause Georgia's own efforts, such that the fees granted were unreasonable. But as a factual matter, this argument strains credulity: As detailed above, Common Cause Georgia initiated the litigation on behalf of its members and Georgia voters, determined which claims to bring and what relief to seek, identified and procured declarations from individuals who were harmed by Appellant's actions, and argued its case before the District Court, all while under intense time constraints. Appellant's attempts to dismiss all this work as immaterial to Common Cause Georgia's success should be dismissed out of hand. In any event, Appellant did not make that argument below or in its opening brief, and that argument is therefore forfeited and waived. *See Atwater* v. *Nat'l Football Players Ass'n*, 626 F.3d 1170, 1177 (11th Cir. 2010) (declining to consider argument first raised on reply during appeal). And if it were before this Court, it should be rejected as unsupported by law for reasons described above.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THE MAJORITY OF THE FEES REQUESTED BY COMMON CAUSE GEORGIA WERE REASONABLE.

Upon concluding that Common Cause Georgia was a prevailing party, the District Court carefully followed controlling precedent to determine a reasonable attorneys' fee award.

In a well-reasoned, fifteen page-section of its opinion, the District Court first determined a reasonable hourly rate by considering the evidence presented by Common Cause Georgia on the prevailing market rates in the Atlanta community, ECF No. 123 at 20–21, introduced a "tweak" to the rates for certain attorneys based on their experience, *id.* at 21& n.15, and considered whether two of the factors identified in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), which were highlighted below by Appellant—namely the lack of difficulty of the questions presented and the skill requisite to perform the legal services—warranted a downward adjustment of those rates, ECF No. 123 at 20, 22–23. Next, the District Court considered—and largely rejected—Appellant's arguments challenging the reasonableness of the number of hours billed, including his contention that a 75% reduction was warranted because of Common Cause Georgia's limited degree of success, purported block-billing practices, and duplicative billing and other inefficiencies. ECF No. 123 at 23–29. Relying on its earlier findings about the significance of the relief obtained by Common Cause Georgia, the District Court rejected the challenge based on degree of success,

while carefully parsing through the purportedly block-billed entries that Appellant identified and considering whether time billed for certain tasks was excessive or duplicative. ECF No. 123 at 24–29. Throughout this process, the District Court applied its "superior understanding of the litigation" and "its own knowledge and experience" concerning the reasonableness of attorneys' fees, as it is entitled to do. *See Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983); *Dial HD, Inc.* v. *ClearOne Commc'ns*, 536 F. App'x. 927, 930–31 (11th Cir. 2013). At the end of this process, the District Court implemented a reduction of $15,112.50 from the total award requested by Common Cause Georgia, which itself reflected discounts to account for differences in local billing rates, exclusions of time spent by certain staff, and other deductions. ECF No. 123 at 31.

On appeal, Appellant abandoned most of those arguments and only reasserts (at 31–32) that the fee award is unreasonable because it fails to reflect Common Cause Georgia's supposed limited success or, more concretely, because it takes into account "fees incurred for unsuccessful claims." Those argument are meritless[10] and, in any event, they concern only one subset of the many factors that

[10] Although Appellant also makes bare reference (at 11–12) to additional arguments it presented to the District Court—that Common Cause Georgia's "proposed hourly rate should have been reduced" and its "expenses should have been reduced"—such cursory references to claims do not raise those arguments on appeal, and they are therefore waived. *Atwater*, 626 F.3d at 1177 (declining to consider argument alluded to in "two ambiguous sentences" in the opening brief on appeal); *Dragash* v. *Fed. Nat'l Mortg. Ass'n*, 700 F. App'x 939, 943–44 (11th Cir. 2017). If Appellant seeks to address the substance of those argument in more detail in his reply brief,

the District Court carefully considered and thus cannot warrant a significant reduction in the total attorneys' fees awarded.

As explained above, contrary to Appellant's claims and as the District Court found, Common Cause Georgia's success was substantial. *See* ECF No. 123 at 10, 25. A "theory of limited success" can no more support depriving Common Cause Georgia of its prevailing-party status than it can provide a "basis to reduce [its] fee request," as the District Court held. *See* ECF No. 123 at 25. The cases Appellant cites (at 30) do not compel a different conclusion.

Those cases, which were brought under the Individual with Disabilities Education Act, are nothing like this case. In both, the District Court itself had exercised its discretion to find that certain educational plan revisions obtained by plaintiffs were "de minimis in context of [plaintiffs'] broader goals" in their education suits. *See Monticello Sch. Dist. No. 25* v. *George L. on Behalf of Brock L.*, 102 F.3d 895, 908 (7th Cir. 1996) (affirming District Court's denial of attorneys' fees); *Linda T. ex rel. William A.* v. *Rice Lake Area Sch. Dist.*, 417 F.3d 704, 708–09 (7th Cir. 2005) (same). Here, by contrast, the District Court in its discretion found that Common Cause Georgia obtained "significant" relief and that determination, which was based on the District Court's intimate knowledge of the

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"those arguments [will] come too late." *Dragash*, 700 F. App'x at 944 (citing *Timson* v. *Sampson*, 518 F.3d 870, 874 (11th Cir. 2008) (finding that issues not briefed on appeal are deemed abandoned)).

litigation and the meaning of the Order it entered and enforced, should be accorded deference. *Ala. Nursing Home Ass'n*, 617 F.2d at 388.

Appellant's argument that the attorneys' fees award rewards Common Cause Georgia for its unsuccessful claims fares no better. When multiple "claims for relief . . . involve a common core of facts or [are] based on related legal theories," courts are not required to disaggregate work on various aspects of the case for purposes of assessing attorneys' fees. *United States* v. *Jones*, 125 F.3d 1418, 1429 (11th Cir. 1997). In such cases, "[m]uch of counsel's time will be devoted generally to the litigation as a whole" and the "district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Hensley*, 461 U.S. at 435; *see also Haitian Refugee Ctr.* v. *Meese*, 791 F.2d 1489, 1500 (11th Cir.) (affirming fee award for whole case where the legal theories and facts developed in connection with compensable and noncompensable issues were intertwined), *vacated in part on other grounds*, 804 F.2d 1573 (11th Cir. 1986).

Here, Common Cause Georgia is entitled to fees on a whole case-basis because its successful motion for a TRO and its broader complaint shared a "common core of facts" that it litigated "based on related legal theories." At all times Common Cause Georgia emphasized the vulnerability of the voter registration systems in the days leading up to the 2018 election, the Secretary of State's response to reports of those vulnerabilities, and the inadequacy of

Georgia's provisional ballot counting scheme; and, indeed, to prevail on the TRO, Common Cause Georgia had to prove "a substantial likelihood of succeeding on *the merits of its claims*." ECF No. 123 at 25 (emphasis added). Additionally, it goes without saying that filing a complaint was a precondition to moving for injunctive relief of any kind. The District Court therefore did not abuse its discretion in granting Common Cause Georgia fees for the whole litigation through the TRO hearing. *See Jones*, 125 F.3d at 1427; *Carmichael* v. *Birmingham Saw Works*, 738 F.2d 1126, 1137 (11th Cir. 1984) (directing that "the court should not disallow hours that were related and necessary to the successful claims" when plaintiff prevailed on wage discrimination claim but not his hiring or promotion claims because plaintiff "had to develop fully the facts concerning his employment for the court to be able to evaluate his contentions").

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Robert A. Atkins, counsel for appellee and a member of the Bar of this Court, certify, pursuant to Federal Rules of Appellate Procedure 32(a)(7)(B) and 32(g)(1), that the attached Brief of Appellee is proportionately spaced, has a typeface of 14 points or more, was prepared using Microsoft Word 2016, and contains 8,373 words.

/s/ Robert A. Atkins
ROBERT A. ATKINS

CERTIFICATE OF SERVICE

I, Robert A. Atkins, counsel for appellee and a member of the Bar of this Court, certify that, on November 30, 2020, a copy of this Brief of Appellee was filed electronically through the appellate CM/ECF system and that a resulting electronic notice was sent to all counsel of record.

/s/ Robert A. Atkins
ROBERT A. ATKINS