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:

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

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/s/ *Bryan P. Tyson*
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TABLE OF CONTENTS

Summary of Argument 1

Argument 1

I. It was reversible error for the district court to grant the fees motion because Common Cause is not a prevailing party. 1

A.The TRO did not modify the Secretary's behavior or authority. 3

B. The TRO is not enduring. 6

C.The TRO did not accomplish what Common Cause's lawsuit originally set out to do. 8

II. Even if Common Cause is a prevailing party, its pyrrhic victory requires a significant reduction in the amount awarded. 14

Conclusion 15

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

Ala. Nursing Home Ass'n v. Harris,
617 F.2d 385 (5th Cir. 1980) 12

Alabama Dep't of Econ. & Cmty. Affairs v. Ball Healthcare-Dallas, LLC (In re Lett),
632 F.3d 1216 (11th Cir. 2011) 2

Blue Kendall, LLC v. Miami Dade Cnty. Fla.,
816 F.3d 1343 (11th Cir. 2016) 3

Buckhannon Bd. & Care Home, Inc. *v. W. Va. Dep't of Health & Human Res.*,
532 U.S. 598 (2001) 6, 7

Cave v. Singletary,
84 F.3d 1350 (11th Cir 1996) 12-13

Dean Witter Reynolds, Inc. v. Fernandez,
741 F.2d 355 (11th Cir. 1984) 3

Dillard v. City of Greensboro,
213 F.3d 1347 (11th Cir. 2000) 12

Farrar v. Hobby,
506 U.S. 103 S. Ct. 566 (1992) 12

Hensley v. Eckerhardt,
461 U.S. 424, 103 S.Ct. 1933 (1983) 15

Hewitt v. Helms,
482 U.S. 755 (1987) 5

Hughey v. JMS Dev. Corp.,
78 F.3d 1523 (11th Cir. 1996) 11

In re Chiquita Brands Int'l Inc. Alien Tort Statute & S'holder Derivative Litig., 965 F.3d 1238 (11th Cir. 2020) 13

In re Novack,
639 F.2d 1274 (5th Cir. 1981) 3

Loggerhead Turtle v. County Council,
307 F.3d 1318 (11th Cir. 2002) 13

Miller v. Caudill,
936 F.3d 442 (6th Cir. 2019) 5

Rhodes v. Stewart,
488 U.S. 1, 109 S.Ct. 202 (1988) 6

Smalbein v. City of Daytona Beach,
353 F.3d 901 (11th Cir. 2003) 3, 4, 12

Sole v. Wyner,
551 U.S. 74 (2007) 7, 11

Federal Statutes

42 U.S.C. § 1988 15

SUMMARY OF ARGUMENT

Common Cause valiantly attempts to obscure the simple fact that the TRO order mandated procedures that the plaintiff never requested. Common Cause benefitted from the district court's commitment to the litigation, but the court cannot require that the Secretary pay for those benefits. Nothing in the TRO modified Defendant's behavior or authority; thus, Common Cause cannot be a "prevailing party."

Even if Common Cause were a "prevailing party," the district court failed to disaggregate the distinct unsuccessful claims from the limited relief that the TRO awarded. The case law, including that cited in the Common Cause brief, shows that the award should be reduced to no more than $33,980.

ARGUMENT

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

Throughout its response brief, Common Cause claims that the Secretary is raising claims for the first time on appeal. In some instances, Common Cause is simply wrong. *See* Appellee's Brief at 18 ("Appellant's contention, raised for the first time on appeal, that 'Common Cause obtained no relief requiring some

action or cessation of action by the Secretary'"); ECF 120 at 6 ("review of the data provided did not result in any change in the elections processes in use in Georgia"). In most instances, including the Court's unprompted and determinative findings on "statistical significance," Common Cause ignores the fact that the Secretary never had an opportunity to object because he first learned of the issue in a *sua sponte* ruling from the district court. In such circumstances, dismissing an issue because the district court first gave notice in its order would undermine the purposes of the general principle that issues raised on appeal be raised first in the district court and effectively insulate the district court from any degree of accountability.

The rule requiring that all appeal issues be raised in the district court is grounded in a recognition that the district court needs sufficient opportunity to consider arguments and apply the evidence developed in the record before it. *Alabama Dep't of Econ. & Cmty. Affairs v. Ball Healthcare-Dallas, LLC (In re Lett)*, 632 F.3d 1216, 1226-27 (11th Cir. 2011). In situations such as this, where the district court *sua sponte* develops the record, raises issues on its own, and then decides the issues without notice, that principle does not apply.

Furthermore, the rule requiring that issues be raised in the district court is not a jurisdictional limitation, but "merely a rule of practice" which *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 360 (11th Cir. 1984). Where a party had no opportunity to raise the issue in the district court, this Court may consider it. *Id.,* see also *Blue Kendall, LLC v. Miami Dade Cnty. Fla.*, 816 F.3d 1343, 1349 (11th Cir. 2016) and *In re Novack*, 639 F.2d 1274, 1277 (5th Cir. 1981). Thus, there is no barrier to this Court's considering all of the Secretary's arguments.

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

In its response brief, Common Cause gives short shrift to the question of material alteration of the legal relationship between the parties, concentrating instead on the relief contained in the TRO. The facts show that the TRO did not directly affect the actions of the Secretary in a way that benefitted Common Cause or materially altered the legal relationship between the parties. *Smalbein v. City of Daytona Beach*, 353 F.3d 901, 905 (11th Cir. 2003).

The TRO placed two burdens on the Secretary. First, the Secretary had to create and publicize a way for voters to determine if provisional ballots were counted and to direct county

election superintendents to do the same. ECF No. 62 at 52. Common Cause does not dispute that it never sought this relief and does not identify any benefit it received from it. This portion of the order did not materially change the relationship of the parties in a substantive manner.

The dispute is over the second burden. The court required the Secretary to wait until November 16, 2018 to certify the results of the election, and to ensure that review of certain provisional ballots in certain counties used "all available registration documentation." ECF No. 62 at 52. This provision also did not change the Secretary's behavior. The November 16 date was well within the discretion that Georgia statutes allowed the Secretary. At most, the order delayed the Secretary by a mere two days.[1]

[1] The district court determined that the Secretary intended to certify the election results on Wednesday, November 14. ECF No. 62 at 47. The court cited as evidence an announcement on the Secretary's website that is not part of the record, and information from "the Secretary's counsel in these proceedings." *Id.* at n. 26. The district did not cite the record for that communication. A review of the transcript and other record documents does not reveal the source of the judge's information. On the other hand, the district court did recognize in its order that the Secretary had until at least November 20, 2018 to certify the results. *Id.* at 10.

Furthermore, the evidence before the district court clearly established that county election directors already reviewed provisional ballots using registration documentation. According to Georgia's Director of Elections, counties in Georgia generally assign provisional review to "the more experienced people." ECF No. 54 at 118:7-8. If provisional ballots are marked because the voter is not in the registration database, those examiners "would often go to the paper files. And they would check the paper copies. And they also would generally check the applications that came after the deadline." ECF No. 54 at 119:2-5. Common Cause nowhere has identified any additional records that the TRO would require either the Secretary or county elections officials to review, or any different procedure that the TRO would require. Thus, the TRO did not affect the behavior of the Secretary towards Common Cause. *See Hewitt v. Helms,* 482 U.S. 755, 761 (1987).

This case is not one where the Secretary had announced an intention to ignore his obligations under the law, as did the clerk in *Miller v. Caudill*, 936 F.3d 442, 449-50 (6th Cir. 2019). To the contrary, the undocumented assertion that the Secretary would certify the vote within a few days was a fulfillment of his obligations under the law. The district court's conclusion otherwise is thinly sourced with no citations in the record that

this Court can review. The unrebutted evidence is that the TRO required the Secretary to supervise the same county-by-county review that he always had supervised.

In sum, Common Cause's only claim of compensation for the district court's work of gathering evidence and crafting a remedy is "limited injunctive relief *within the bounds of Georgia's statutory framework*." Doc. No. 62 at 50 (emphasis added). *Hewitt* and the other case law in Appellant's brief emphasize that some action or cessation of some action by the defendant must be awarded. Lacking a substantive victory, Common Cause cannot be a prevailing party. *Rhodes v. Stewart*, 488 U.S. 1, 4, 109 S.Ct. 202 (1988).

B. The TRO is not enduring.

The Secretary understand 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. Supreme Court precedents make clear that a party is not a "prevailing party" entitled to attorney's fees unless the party secures relief that is both (1) court-ordered and (2) enduring. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 610 (2001).

Section 1988 authorizes courts to allow a reasonable attorney's fee to a "prevailing party" in civil rights actions. That term of art imposes a pair of basic requirements for fee eligibility. First, the party must have won a "court-ordered 'change in the legal relationship between' " the parties. *Buckhannon*, 532 U.S. at 604 (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792) (cleaned up). Thus, *Buckhannon* rejected the circuit courts' "catalyst theory" of fee eligibility, under which they had allowed a fee award "if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Id.* at 601. Second, that requisite court-ordered change in legal relationship must be "enduring," in the sense that the ordered relief lives on after the case is closed. *Sole v. Wyner*, 551 U.S. 74, 86 (2007). *Sole* held that winning a preliminary injunction against enforcement of a state rule against nudity in state parks did not make the plaintiff a prevailing party because by the end of the case, she had lost on the merits and the challenged rule remained in place. *Id.*

In short, a "prevailing party" is one who, at the end of the day, wins the lawsuit: the party gets a desired court-ordered and enduring change in the legal relationship between the parties. While Common Cause obtained "court-ordered" relief with the

TRO, that relief failed to affect enduring change in the legal relationship between the parties nor, as argued *supra*, did it create any material change in the legal relationship.

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

Common Cause claims that it is a prevailing party because "what [it] effectively [sought was] 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." Appellee's Brief at 17, *citing* ECF No. 123 at 9, in its turn citing ECF No. 62 at 45. This is already the law. Moreover, both Common Cause and the district court apparently believe that because Common Cause asked for something and the district court gave it something (different from what it asked for), then the Secretary should pay its attorney's fees. That is not the standard.

First, the district court did not grant the relief that no provisional ballots be rejected before the full statutory time had elapsed. Furthermore, Common Cause was never consistent in its requests. In its TRO motion, Common Cause sought an order "enjoining 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, *pending a decision on the permanent relief requested in this case*." ECF No. 15 at 1 (emphasis added). At the hearing, counsel indicated a shorter time frame, ECF No. 54 at 9:21-24 ("while we figure it out"), and when the district court pressed for a specific deadline, counsel responded that she believed "we would need the entirety" of the statutory time frame. ECF No. 54 at 10:14-15. The court's TRO order, of course, did not require the Secretary to wait either for permanent relief or for the entire statutory time.

More important, Common Cause never identified what it wanted the Secretary to do other than wait. Before Common Cause at the TRO hearing asked the district court for the unspecified "process" cited above, ECF No. 54 at 116:18-21, it sought very broad and complicated relief. In its Complaint, Common Cause sought sweeping relief. ECF No. 1. It specifically asked for a TRO enjoining the Secretary from enforcing Georgia's provisional ballot laws subject to complicated rules and exceptions. ECF No. 1 at 22-25. In its later TRO motion, Common Cause somewhat narrowed its requested relief to "enjoining 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." ECF No. 15 at 1.

In the hearing on the Common Cause motion, the district court noted that that the TRO requested different relief than the Complaint. ECF No. 54 at 9:6-7. Counsel for Common Cause responded that the request was for "narrow relief just to prevent people from being rejected in the interim while we figure it out." ECF No. 54 at 9:22-24. As for the scope of the relief, counsel for Common Cause asked that the court "prevent the final rejection of a very narrow class of people who got provisional ballots." ECF No. 54 at 17:23-24.

This request that the district court prevent the final rejection of certain ballots until an unspecified contingency occurred was a constant (indeed the only constant) theme in Common Cause's presentation below. Counsel for Common Cause began the hearing stating,

> We are specifically asking for a very, very narrow order preventing the final rejection of provisional ballots for the narrow class of persons 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.

ECF No. 54 at 8:8-12. Counsel never specified what measures would make her "feel a little bit more confident." Throughout the hearing, Common Cause continued to request that the court figure

out a way to prevent final rejection of specific provisional ballots. ECF No. 54 at 15:5-9, 17:22-24, 21:23-25. Immediately before the statement that the district court quoted in its orders, counsel stated, "We want a limited and segregatable [sic] and identifiable number of ballots to not be rejected." ECF No. 54 at 116:16-17. Then Common Cause asked the court for "some sort of review." *Id.* at 116:20.

Common Cause, then, received none of the remedies that it sought in its pleadings. The relief it did receive was only a response to its open-ended invitation to create "some sort of review" process. The court responded with (a) actions that Common Cause never sought, and (b) actions that the Secretary already was following pursuant to Georgia law within a time shorter than Common Cause requested. Those differences are differences in kind that prevent Common Cause from claiming the windfall of being a party "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).

Common Cause in its brief presented no law that supports its claim that it prevailed in this litigation. It incorrectly claims that

the degree of its success is relevant only to the reasonableness of the amount of fees. Appellee Brief at 21. The authority that it cites, however, makes clear that the "touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties . . . *where such change has occurred*, the degree of the plaintiff's overall success goes to the reasonableness of the award." *Smallbein v. City of Daytona Beach,* 353 F.3d 901, 907 (11th Cir. 2003), *quoting, Garland*, 489 U.S. at 792-93. *See also*, *Farrar v. Hobby*, 506 U.S. 103, 113, 113 S. Ct. 566 (1992) (material alteration analysis includes review of remedy), *cf.*, *Dillard v. City of Greensboro*, 213 F.3d 1347, 1354 (11th Cir. 2000) (relief obtained must be of "same general type"; no dispute that relief in that case gave "a complete remedy for the city's acknowledged violation.")

Common Cause also errs in claiming that this Court must grant deference to the district court's view of what it accomplished in the TRO. The cases that it cites all involve *enforcement* of an order, not determining who is a prevailing party. *See, e.g.*, *Ala. Nursing Home Ass'n v. Harris*, 617 F.2d 385, 388 (5th Cir. 1980) (plaintiffs sued claiming that defendant's actions violated injunction, deference due to court "who must enforce" injunction); *Cave v. Singletary*, 84 F.3d 1350 (11th Cir 1996) (criminal

defendant challenging extension of time for new sentencing hearing required by *habeas corpus* order); *In re Chiquita Brands Int'l Inc. Alien Tort Statute & S'holder Derivative Litig.*, 965 F.3d 1238 (11th Cir. 2020) (court modifying previously-entered protective order). None of these cases requires this Court to defer to the district court in its interpretation of whether Common Cause was a prevailing party.

Furthermore, Common Cause's standard would nullify this Court's obligation of *de novo* review of the district court's order. Whether Common Cause is a prevailing party is a legal question, *Loggerhead Turtle v. County Council*, 307 F.3d 1318, 1322 (11th Cir. 2002). It is not a fact question requiring deference to a factfinder.

In sum, Common Cause asked in its complaint for sweeping relief and convoluted rules. The TRO order did not grant that relief. Common Cause asked in its TRO motion for a pause in certification until it received a permanent injunction. The TRO order did not grant that relief. Common Cause asked at the hearing that certain provisional ballots not be permanently rejected, at least until Common Cause felt "a little more confident." The TRO order did not grant that relief. Rather, the district court, after doing its own investigation via *sua sponte*

orders, fashioned relief that Common Cause never requested in the record and made no material alterations of the legal relationship of the parties.

Common Cause merely gave the district court an open-ended invitation to do justice and counted on the court's enthusiasm for doing just that. Such vague requests and enthusiastic orders do not make a party a prevailing one.

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

Common Cause argues that it is entitled to all of the fees that the district court granted because all of its work on the successful motion for TRO shared a common core of facts and related legal theories with its unsuccessful claims. These arguments cannot surmount the hurdle that the district court never considered whether the claims shared common facts or legal theories and that the record does not evidence such commonality.

First, the district court did not weigh Common Cause's successful claims against its unsuccessful ones. It simply reviewed the amount of time expended on each phase of the case. ECF No. 123 at 16-17. Common Cause's claim of related facts and legal theories has no support in the record.

Even if the record clearly showed that common facts and legal theories underlay all five counts of the Complaint and the TRO motion, Common Cause cannot show the "significance of the overall relief" that it obtained "in relation to the hours reasonably expended on the litigation." *Hensley v. Eckerhardt*, 461 U.S. 424, 435, 103 S.Ct. 1933 (1983). As explained exhaustively above, the TRO order granted almost nothing of the relief that Common Cause requested. The only relief that it received was the open-ended invitation that it gave to the district court to fashion a process. Given that the district court granted only the relief that Common Cause requested in the hearing, if Common Cause should have received any award, it should only have been the amount it expended in that hearing or $33,980.

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 21st day of December, 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 3,169 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 December 21, 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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