No. A137012

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

MONA FIELD, ET AL.,

Plaintiffs and Appellants,

v.

DEBRA BOWEN, ET AL.,

Defendants and Respondents, and

ABEL MALDONADO, ET AL.,

Intervenors-Respondents.

Appeal from Aug. 1, 2012 Order Granting Attorney's Fees in *Field v. Bowen*, San Francisco County Super. Ct. No. CGC-10-502018 (Hon. Curtis E.A. Karnow, Presiding).

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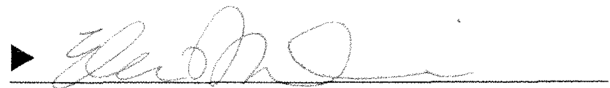
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INTRODUCTION

> **WARNING**: If you bring claims challenging the constitutionality of a law enacted by ballot initiative or proposition, and the law's backers intervene to defend the law, you will owe those intervenors their attorney's fees if your claims fail—regardless of the merits of your claims, or the contributions of the intervenors to resolution of the case.

If the Superior Court's order granting Intervenors attorney's fees is affirmed by this Court, only the wealthiest Californians will dare to challenge the constitutionality of laws in court; for anyone of average means, the threat of a fees award would make participation in a case like this financially reckless.

The Superior Court reached its decision only by completely failing to apply the law, which imposes multiple safeguards against such an unjust award. First, the Superior Court failed to consider that federal law preempts Intervenors' claim for fees. Because the Plaintiffs brought non-frivolous federal constitutional claims, 42 U.S.C. §1988 bars an award of fees for those claims, and for any work inextricably related to defending those claims. Intervenors have never argued that Plaintiffs' claims were frivolous. Because Plaintiffs' state law claims overlap significantly with their federal law claims, §1988 bars any fees award in this case. Yet Intervenors obtained an award for all of their fees, including defending the federal claims. The Superior Court's entire analysis of the preemption

issue was that it found the argument "inapposite." JA[VII]1787.[1] But preemption is not an optional policy to be applied at whim; it is a federal constitutional rule that prevents conflicts between state and federal law. This error is sufficient reason for this Court to reverse the fees award.

Second, the Superior Court ignored the requirements of Code of Civil Procedure §1021.5 by treating Intervenors as though they were the only cause for Plaintiffs' loss, ignoring that the Secretary of State vigorously defended this action from its start. Under §1021.5, the Superior Court was required to analyze whether Intervenors: (1) prevailed separately from the Secretary; (2) advanced any successful and non-duplicative arguments, thus materially contributing to the outcome they sought; or (3) benefitted the public interest or advanced a public right. The Superior Court failed to apply any of these factors and instead granted the Intervenors fees simply because the Plaintiffs lost claims they had brought in the public interest. Normally, these requirements should prevent an award of fees like the one below. Because Intervenors satisfy none of the §1021.5 elements, the award should be reversed.

[1] The Joint Appendix is cited as "JA[ ]__" with the volume number in brackets and the page number(s) following the brackets. The Reporter's Transcript is cited as "RT[ ]__" with the volume number in brackets and the page and line number(s) following the brackets. Because the Reporter's Transcripts have duplicative volume numbers, we have re-designated them as follows: August 24, 2010 Hearing is Vol. Ia; September 14, 2010 is Vol. IIa; January 20, 2011 is Vol. Ib; December 2, 2011 is Vol. IIb; January 27, 2012 is Vol. III; August 1, 2012 is Vol. IV; and October 24, 2012 is Vol. V.

STATEMENT OF THE CASE

A. The Parties

Plaintiffs are a group of individual voters and aspiring congressional candidates, including Mona Field, Richard Winger, Stephen Chessin, Jennifer Wozniak, Jeff Mackler, and Rodney Martin. They are a group of ordinary people with divergent political affiliations who came together to challenge the constitutionality of Senate Bill 6. JA[I]0039-40. They brought this suit due to shared concerns about the constitutionality of Senate Bill 6, seeking absolutely no monetary benefit for themselves.

Intervenors are the California Independent Voter Project ("IVP"), Californians to Defend the Open Primary ("CADOP"), and Abel Maldonado, a former State Senator and Lieutenant Governor. The motion for fees, which is the sole issue on appeal, was brought by IVP and CADOP and was not joined by Mr. Maldonado. JA[IV]1017. IVP is funded by wealthy donors, such as billionaire Charles Munger, Jr.[2] CADOP has similarly deep pockets, as evidenced by the "millions" it spent to campaign for Proposition 14.[3]

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[2] *See* JA[V]1167 (Intervenors' counsel billed time to "prepare for meeting with Charles Munger").

[3] RT[Ia]8:13-14; JA[I]0147.

B. Background on Proposition 14 and Senate Bill 6

Proposition 14 was approved by voters in June 2010 and became effective on January 1, 2011. *See Field v. Bowen* (2011) 199 Cal.App.4th 346, 350, 352 (*"Field"*). Proposition 14 and its implementing statute, Senate Bill 6, changed California's primary system. Before Proposition 14, qualified parties held party primaries.[4] Voters affiliated with the qualified party and voters who declined to state a party affiliation could vote in the party primary if the party agreed to it. The qualified party candidate who received the most votes advanced to the general election as the party's nominee. Candidates could also qualify to be on the general election ballot by meeting the requirements for independent nomination by petition. In addition, a person could run as a write-in candidate in the general election. *Id.* at 351.

Proposition 14 replaced the old party primary system with a top-two primary system for all voter-nominated offices. All candidates for a voter-nominated office are listed on a single primary ballot. *Id.* Senate Bill 6 allowed candidates who preferred a qualified party to state their party preference on the ballot. The ballot would state next to the candidate's name, "My party preference is the _______ Party." Candidates who

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[4] A qualified party is "a political party or organization that has qualified for participation in any primary election." California Elections Code § 338.

preferred a non-qualified party, however, were not able to indicate their party preference; instead "No Party Preference" would be printed next to their names on the ballot.

Any registered voter, regardless of party affiliation, can vote in the top-two primary. The candidates who receive the highest and second highest number of votes in the primary advance to the general election. *Field* at 351.

Senate Bill 6 originally stated that ballots shall be printed to provide "[t]he names of candidates with sufficient blank spaces to allow the voters to write in names not printed on the ballot." JA[I]0087. At the same time, Senate Bill 6 banned the counting of write-in votes in the general election. JA[I]0079 ("A person whose name has been written on the ballot as a write-in candidate at the general election for a voter-nominated office shall not be counted.").

The Secretary interpreted these provisions of Senate Bill 6 to mean that lines for write-in votes must be provided on general election ballots, but any write-in votes cast in the general election should not be counted. *Field* at 370-72. On March 17, 2011, the Chief of the Secretary's Election Division sent a memorandum to county clerks and registrars of voters, "advis[ing] that consistent with [Elections Code] sections 13207(a) and 13212, ballots must contain a blank space below the names of the qualified candidates. However, consistent with [Elections Code] section 8606, any

name that is written on the ballot as a write-in candidate at the general election for a voter nominated office shall not be counted." JA[VI]1304-05. Accordingly, in the May 3, 2011 special general election for Assembly District 4, lines were provided on the ballot for write-in votes, but write-in votes were not counted. JA[VI]1257-60.

C. Plaintiffs' Challenge to Senate Bill 6

Plaintiffs filed suit in July 2010, naming the Secretary and other officials as defendants. Plaintiffs challenged the constitutionality of Senate Bill (SB) 6. In particular, Plaintiffs made two allegations: (1) SB 6 is unconstitutional because it allows the casting of write-in votes but forbids the counting of such votes ("write-in" issue); and (2) SB 6 is unconstitutional because it allows candidates to indicate a preference for qualified parties on the ballot but forbids candidates from indicating a preference for non-qualified parties on the ballot ("party label" issue). JA[I]-0034-38. Plaintiffs brought these claims under both state and federal law: Plaintiffs' write-in claim was brought under state constitutional provisions regarding the right to have votes counted, the right to free speech, and the right to due process and under federal constitutional provisions providing parallel rights under the Elections Clause, First Amendment, and Due Process Clause. Plaintiffs' party label claim was brought under the state constitutional provision regarding equal protection

and under the federal constitutional provision providing similar rights under the Elections Clause. JA[I]0042-48.

On July 29, 2010, Plaintiffs moved for a preliminary injunction of Proposition 14 based on the two challenged provisions of SB 6. JA[I]0001-28. On August 16, 2010, Plaintiffs filed a First Amended Complaint. JA[I]0029-111. On August 17, 2010, Intervenors moved *ex parte* to intervene in the case. The motion was granted over Plaintiffs' objection. JA[I]0143-60; JA[I]0255-56. At the hearing on the Motion to Intervene, the Secretary took no position but stated that she "intend[ed] to vigorously defend this lawsuit as represented in the papers." RT[Ia]9:17-22. On August 30, 2010, both the Secretary and Intervenors filed oppositions to Plaintiffs' motion for preliminary injunction. [JA[I]0263-83; JA[II]0284-0307. On October 5, 2010, the Superior Court denied that motion. JA[II]0333-38.

Plaintiffs timely appealed the denial. Plaintiffs filed their Opening Brief on January 10, 2011. JA[II]0365-524. Intervenors and the Secretary both filed Respondents' Briefs. JA[III]0525-94; JA[III]0595-646. After hearing oral argument, on September 19, 2011, this Court issued a 30-page opinion denying the motion for preliminary injunction, finding SB facially constitutional, and therefore finding that Plaintiffs' claims had no chance of success. *Field* at 372. In its order, the Court adopted primarily arguments advanced by the Secretary. On the party label issue, the Court found that

Intervenors' argument was "not as reasonable as the Secretary's." *Field* at 355. On the write-in issue, the Court adopted an argument made by both the Secretary and the Intervenors—that SB 6 banned the counting of write-in votes for voter-nominated offices at the general election. *Id* at 369. However, the Court agreed with the Intervenors' interpretation that SB 6 also banned casting of write-in votes for such offices at the general election, and did not permit lines for write-in votes to be printed on the ballot. *Id*. at 371. In contrast, the Secretary had argued that write-in lines would be permitted. *Id*. The Secretary had also instructed counties that write-in lines should be provided on general election ballots for voter-nominated offices, though votes written on those lines would not be counted. JA[VI]1305.

On November 23, 2011, the case was remanded to the Superior Court. On December 5, 2011 and January 5, 2012, Intervenors and the Secretary each filed Motions for Judgment on the Pleadings. JA[III]0693-737; JA[IV]0904-922. On December 20, 2011, the Plaintiffs filed a Motion to Amend the Complaint to bring as-applied challenges to the write-in and party label provisions of SB 6. JA[IV]0739-903. On January 13, 2012, both the Secretary and Intervenors filed Oppositions to the Motion to Amend. On January 27, 2012, the Court granted the Motions for Judgment on the Pleadings, and denied the Motion to Amend the Complaint. JA[IV]1006-9.

D. Amendment of Senate Bill 6

In September 2011, AB 1413 was introduced as "cleanup" legislation for Senate Bill 6. The State Senate's analysis of AB 1413 stated:

> Write-In Candidates: One of the provisions of SB 6 prohibited write-in votes from being counted at a general election for a voter-nominated office. Other provisions of law that require that write-in spaces appear on the ballot, however, were unaffected. This could create confusion, and could mislead voters into thinking that write-in votes for candidates for voter-nominated office at a general election will be counted. This bill eliminates write-in spaces on the ballot for voter-nominated offices at the general election in order to avoid this confusion.

JA[VI]1343. On February 10, 2012, the Governor signed AB 1413 into law. JA[VI]1307.

E. Motion for Fees

On March 27, 2012, IVP and CADOP's attorneys moved for an award of fees under §1021.5. JA[IV]1017. Intervenors sought all fees incurred,[5] including fees incurred due to Plaintiffs' federal law claims brought under 42 U.S.C. §1983, amounting to $243,279.50. JA[IV]1029. In support of their fee motion, Intervenors submitted billing records that did not distinguish between time spent on Plaintiffs' state law claims and time

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[5] Because Abel Maldonado did not join the motion for fees, the remaining two Intervenors sought two-thirds of the total fees incurred. JA[V]1043.

spent on Plaintiffs' federal law claims. JA[V]1034-1228; JA[VII]1741-1769.

Plaintiffs did not seek fees from Intervenors, but filed a motion for fees from the Secretary under §1021.5 on April 10, 2012, arguing that they were the catalyst for the changes in write-in provisions in AB 1413, and therefore the prevailing party in the litigation. JA[V]1229-50. The Court issued a tentative order denying both fees motions. JA[VII]1800-01.

At oral argument, the Intervenors argued that Plaintiffs should be responsible for fees because they sought "broad, sweeping relief" (meaning injunctive relief) broader than necessary to defend their individual interests in voting and running for office. RT[IV]49:5-51:21. Plaintiffs responded that while the write-in ban was potentially severable (therefore not requiring an injunction, even if the Plaintiffs had prevailed on the issue), the party label issue was not severable. RT[IV]53:11-54:7. Plaintiffs also noted that Intervenors advanced a losing argument on the party label issue. *Id.* Intervenors made no direct response to this argument. RT[IV]54:14-55:4. The Superior Court issued a final order denying Plaintiffs' motion for fees and granting Intervenors' motion for fees. JA[VII]1784-89.

Plaintiffs moved for reconsideration of the portion of the order granting fees to Intervenors. The motion was denied. JA[VII]1790-1807; JA[VIII]1878-80. Plaintiffs now appeal the Superior Court's order granting Intervenors fees.

STATEMENT OF APPEALABILITY

An appeal may be taken from an order awarding fees after a final judgment. Code Civ. Proc., §904.1, subd. (a)(2).

STANDARD OF REVIEW

The court's factual findings in granting an award of fees are reviewed for an abuse of discretion; thus, if the court has applied the correct legal standard in awarding fees, the decision to grant fees is usually also reviewed for abuse of discretion. *Abouab v. City and County of San Francisco* (2006) 141 Cal.App.4th 643, 660. "[T]o determine if discretion is abused, the appellate court reviews 'the entire record, paying particular attention to the trial court's stated reasons in denying or awarding fees and whether it applied the proper standards of law in reaching its decision.'" *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 83 (internal citations omitted). Where, as in this case, the lower court applies an incorrect legal standard in granting fees, the court's order is subject to *de novo* review. *Azure, Ltd. v. I-Flow Corp.* (2012) 207 Cal.App.4th 60, 69.

Determining whether preemption bars an award of fees in this case requires legal analysis and statutory interpretation that is properly reviewed *de novo*. In addition, because the Superior Court failed to consider preemption, it is properly determined in the first instance by this Court.

Moreover, even if this Court were to apply the abuse of discretion standard of review, the Superior Court abused its discretion by failing to

consider and address Plaintiffs' argument concerning preemption. *See Koon v. United States* (1996) 518 U.S. 81, 100 (*"Koon"*) ("A district court by definition abuses its discretion when it makes an error of law.").

When the court of appeal decided the merits in the case, the "appellate court is in at least as good a position as the trial court to judge whether the legal right enforced through its own opinion is 'important' and 'protects the public interest' and whether the existence of that opinion confers a 'significant benefit on the general public or a large class of persons.'" *Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1, 8 (holding that these factors are reviewed *de novo* in this situation) ("*Police Protective*").

ARGUMENT

I. Preemption Bars an Award of Fees in This Case.

Although Plaintiffs raised the issue of preemption by federal law in their opposition to Intervenors' motion for fees, the Superior Court did not address this issue. JA[VII]1595-97. The only reference the Superior Court made to plaintiff's preemption argument in its order granting fees was, "I reject as inapposite the analogies made to Title VII and FEHA cases." JA[VII]1787. However, Plaintiffs did not merely draw an analogy based on Title VII and FEHA cases; Plaintiffs made a preemption argument, which the Superior Court failed to consider. As discussed below, this Court

should reverse the Superior Court's award of fees because preemption bars such an award in this case.

A. Because Plaintiffs' Claims Were Not Frivolous, Preemption Bars Awarding Fees Incurred Due to Plaintiffs' §1983 Claims.

1. Preemption Bars Awarding Fees for Non-Frivolous §1983 Claims.

State law is preempted when "it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *California v. ARC America Corp.*(1989) 490 U.S. 93, 100-101 (*"ARC Am."*) (internal citations omitted). In this case, Plaintiffs brought non-frivolous §1983 claims, but the Superior Court awarded fees to Intervenors for defending those claims, as well as significantly-overlapping state law claims.

a. Section 1021.5 Conflicts with Federal Law (42 U.S.C. §1988).

There is a clear conflict between state and federal law regarding the award of fees against plaintiffs bringing §1983 claims. 42 U.S.C. §1988 is the federal statute governing the award of fees for private attorney generals in §1983 actions. The U.S. Supreme Court has held that this statute bars awarding fees against a plaintiff who brought suit under §1983 unless "the plaintiff's action was frivolous, unreasonable, or without foundation."

Hughes v. Rowe (1980) 449 U.S. 5, 14 (*"Hughes"*); *see also Choate v. County of Orange* (2001) 86 Cal.App.4th 312, 322 (*"Choate"*).

In contrast, California Code of Civil Procedure §1021.5—the California statute governing the award of fees for private attorney generals—does not distinguish between plaintiffs and defendants. *See County of San Luis Obispo v. Abalone Alliance* (1986) 178 Cal.App.3d 848, 869. Section 1021.5 thus permits awarding fees against a plaintiff who brought a non-frivolous §1983 action. *See id.*at 866-69 (rejecting argument that "section 1021.5 permits fee awards to *defendants* only if the litigation is frivolous").

b. Awarding Fees Against Plaintiffs Bringing Non-Frivolous §1983 Actions Directly Conflicts with Congressional Intent in Enacting §1988.

"The purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485. The purpose of §1988 was to promote the vigorous enforcement of civil rights legislation. *See* Attachment A, Senate Report No. 94-1011, 94th Cong., 2d. Sess. 4-5, at 5910-11[6]; *Del Rio v. Jetton* (1997) 55 Cal.App.4th 30, 37 ("Congress intended the fee-shifting provision in section 1988 to *encourage*

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[6] Appellants attach copies of this Senate Report and a House of Representatives Report for the Court's convenience; these documents do not require judicial notice to be considered. *See Sharon S. v. Superior Court (Annette F)* (2003) 31 Cal.4th 417, 440, fn.18.

plaintiffs to bring good faith civil rights actions") (emphasis added) ("*Del Rio*"). Thus, a different standard applies to prevailing plaintiffs and defendants under this statute:

> [B]ecause of the need to encourage vigorous enforcement of good faith civil rights claims . . . [p]rivate citizens should not forego the opportunity to vindicate core federal rights because they lack financial resources or because they fear they will have to pay the other side's attorney fees if they lose. The specter of attorney fees should chill only vexatious plaintiffs who bring meritless lawsuits to settle scores, not disputes.

Choate at 322-23.

As the U.S. Supreme Court explained in *Hughes*, "assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement" of civil rights legislation. 449 U.S. at 14-15. Congress recognized the chilling effect of such an award of fees and made clear:

> Such "private attorneys general" should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose. Such a party, if unsuccessful, could be assessed his opponent's fee only where it is shown that his suit was clearly frivolous, vexatious, or brought for harassment purposes.

See Attachment A (Senate Report No. 94-1011) at 5912.

Under §1021.5, however, plaintiffs who brought non-frivolous claims but ultimately did not prevail may be forced to shoulder their opponent's fees. When applied to §1983 claims, this creates a chilling effect directly contrary to Congress's intent in enacting §1988. *See Del Rio* at 37. By permitting such fee awards, §1021.5 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting §1988. *ARC Am.* at 101.

Before the Superior Court, Intervenors pointed to various other §1021.5 requirements to contend that §1021.5 imposes a higher standard than §1988 and therefore does not conflict with §1988. JA[VIII]1871. These other requirements are red herrings. It is undisputed that §1021.5 permits an award of fees against plaintiffs bringing non-frivolous §1983 claims, while §1988 bars such an award. Whether §1021.5 requires a party seeking fees to meet other criteria unrelated to the frivolity standard is irrelevant to the pertinent question: does §1021.5's allowance of fee awards against plaintiffs bringing non-frivolous §1983 claims conflict with Congress's intent in enacting §1988? The answer is yes. As evidenced in both the House and Senate reports, Congress was concerned with any chilling effect on plaintiffs bringing non-frivolous civil rights actions and thus made clear that fees against plaintiffs should only be awarded when the claims were "clearly frivolous, vexatious, or brought for harassment purposes." Attachment A at 5912; *see also* Attachment B (excerpt of

House of Representatives Report No. 94-1558, 94th Cong., 2d Sess. (1976)) at 6-7 ("To avoid the potential 'chilling effect' noted by the Justice Department and to advance the public interest articulated by the Supreme Court . . . such an award may be made only if the action is vexatious and frivolous, or if the plaintiff has instituted it solely to harass or embarrass the defendant".).

c. Controlling Federal Law Bars Fee Awards for Non-Frivolous §1983 Claims.

The Supremacy Clause in the U.S. Constitution provides that federal law is controlling when there is a conflict between state law and federal law. *See Altria Group, Inc. v. Good* (2008) 555 U.S. 70, 76 ("[S]tate laws that conflict with federal law are 'without effect' . . . ."). Because awarding fees under §1021.5 against a plaintiff bringing non-frivolous §1983 claims directly conflicts with Congress's intent in enacting §1988, such an award is barred under the doctrine of preemption.

The cases Intervenors cited before the Superior Court in opposing this fundamental proposition are not on point. None of those cases even raised the issue of preemption. Rather, the courts in those cases determined that, *for purposes of interpreting and construing state law*, federal law regarding fees for private attorney generals was persuasive but not controlling. *See Serrano v. Unruh* (1982) 32 Cal.3d 621, 639 n.29 (Federal authority is only of "analogous precedential value *in construing section*

1021.5") (emphasis added); *Sokolow v. County of San Mateo* (1989) 213 Cal.App.3d 231, 249 ("*In interpreting and applying [the right to attorney fees] under section 1021.5*, federal precedent is of only analogous precedential value; it is not controlling . . . .") (emphasis added); *Sundance v. Municipal Court* (1987) 192 Cal.App.3d 268, 274 (same). None of these cases held that federal law is not controlling when, as in this case, there is an actual conflict between state law and federal law. *See Turner v. Ass'n of American Medical Colleges* (2011) 193 Cal.App.4th 1047, 1063 ("A case is not authority for propositions not considered therein.").

It is not surprising that Intervenors could not find a single case supporting their position, given the U.S. Constitution's directive that federal law "shall be the supreme Law of the Land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary, notwithstanding." Article VI, cl.2, U.S. Constitution. Accordingly, §1988's bar on awarding fees to defendants for non-frivolous §1983 claims controls.

2. Plaintiffs' Claims Were Not Frivolous.

Attorney's fees may be awarded against a plaintiff bringing §1983 claims only if "the plaintiff's action was frivolous, unreasonable, or without foundation." *Hughes* at 14. The U.S. Supreme Court has explained that this frivolity standard is not met simply because the plaintiff ultimately loses: "The plaintiff's action must be meritless in the sense that it is

groundless or without foundation. The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees." *Id.*

"Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." *Christiansburg Garment Co. v. Equal Employment Opportunity Commission* (1978) 434 U.S. 412, 422 (*"Christiansburg"*). Thus, even dismissal for failure to state a claim does not necessarily render a claim frivolous. *Hughes* at 15-16; *see also Cummings v. Benco Bldg. Services* (1992) 11 Cal.App.4th 1383, 1388 (*"Cummings"*) (fee "award was an abuse of discretion if the trial court relied on plaintiff's failure to establish a prima facie case"). When "reasonable minds may differ as to the strength of [plaintiff's] case," plaintiff's action was not frivolous. *Cummings* at 1389. Frivolity is met only when plaintiff's case "was patently baseless for objective reasons." *Id.*

In *Christiansburg*, the U.S. Supreme Court held that plaintiff's case was not frivolous because plaintiff's interpretation of the relevant statute was not frivolous. *Christiansburg* at 423-24. In *Hughes*, the U.S. Supreme Court found that even though plaintiff's allegations were dismissed for failure to state a claim, they were not frivolous because they required and received careful examination by the district court and court of appeals. *Hughes* at 15-16.

Plaintiffs' claims in this case were not frivolous for the same reasons. Plaintiffs' statutory interpretation of Senate Bill 6 was reasonable and well-grounded. Although the Court of Appeal rejected Plaintiffs' claims, these claims required and received careful examination, resulting in a published 30-page appellate opinion. *Field,* 199 Cal.App.4th 346.

a. Plaintiffs' Write-In Claims Were Not Frivolous.

Senate Bill 6 provided that ballots shall be printed to provide "[t]he names of candidates with sufficient blank spaces to allow the voters to write in names not printed on the ballot." JA[I]0087. Yet Senate Bill 6 also stated, "A person whose name has been written on the ballot as a write-in candidate at the general election for a voter-nominated office shall not be counted." JA[I]0079. Plaintiffs interpreted these provisions to mean that Senate Bill 6 permitted voters to cast write-in ballots, but forbade counting such write-in votes, and argued that this was unconstitutional.

Plaintiffs' statutory interpretation was not frivolous. Indeed, the Secretary shared this same interpretation. The Secretary advised county clerks and registrars of voters that "ballots must contain a blank space below the names of the qualified candidates. However . . . any name that is written on the ballot as a write-in candidate at the general election for a voter nominated office shall not be counted." JA[VI]1305. Indeed, this is how Senate Bill 6 was actually implemented: in the May 3, 2011 special

general election for Assembly District 4, ballots had lines for write-in votes, but write-in votes were not counted. JA[VI]1258-60.

The State Senate also believed that Senate Bill 6 "prohibited write-in votes from being counted at a general election for a voter-nominated office" while continuing to "require that write-in spaces appear on the ballot." JA[VI]1343. In its committee analysis of AB 1413 ("cleanup" legislation for Senate Bill 6), the State Senate concluded "[t]his could create confusion, and could mislead voters into thinking that write-in votes for candidates . . . at a general election will be counted." JA[VI]1343. Accordingly, the State Senate decided to amend Senate Bill 6 through AB 1413, "eliminat[ing] write-in spaces on the ballot for voter-nominated offices at the general election in order to avoid this confusion." JA[VI]1343. Such amendment was necessary because Senate Bill 6, as originally written, could reasonably be understood as Plaintiffs had understood it—to permit the casting, but not the counting, of write-in votes.

Plaintiffs' interpretation of Senate Bill 6 regarding write-in ballots was reasonable and well-grounded; it was shared by the Secretary and the State Senate, and this was how the bill was implemented. Moreover, the Court of Appeal recognized that this statutory interpretation raised constitutional issues. *See Field* at 371 ("Including a line for write-in votes on a ballot when those votes will not be counted raises constitutional questions."). Plaintiffs' write-in claims were therefore non-frivolous. *See*

Christiansburg at 423-24 (suit was not frivolous because it raised an issue of first impression requiring judicial resolution and plaintiff's statutory interpretation was not frivolous).

b. Plaintiffs' Party Label Claims Were Not Frivolous.

Plaintiffs interpreted Senate Bill 6 as allowing candidates who prefer a qualified political party to state their party preference on the ballot, while forbidding candidates who prefer non-qualified parties to do so. The Court of Appeal agreed. *Field* at 354. Plaintiffs' statutory interpretation regarding party label restrictions clearly was not frivolous.

Plaintiffs' position that this restriction was unconstitutional was also reasonable and supported by case law. The Court of Appeal recognized that "[r]estricting the party label a candidate can use on an election ballot implicates the candidate's constitutional rights to freedom of speech, freedom of association, and equal protection." *Field* at 355. The Court of Appeal cited a line of cases recognizing the constitutional issues raised by such restrictions and agreed that "to the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." *Id.* at 356.

Plaintiffs also cited a number of cases supporting their position that the party label restriction was unconstitutional. In *Rubin v. City of Santa Monica*, the Ninth Circuit held that regulations affecting party labels on ballots affect "core political speech." *Rubin*, (2002) 308 F.3d 1008, 1015. In *Rosen v. Brown*, the Sixth Circuit found that an election statute prohibiting candidates from using the ballot designation "Independent" was unconstitutional because it "affords a crucial advantage to party candidates by allowing them to use a designation, while denying the Independent the crucial opportunity to communicate a designation of their candidacy." *Rosen* (1992) 970 F.2d 169, 172. In *Bachrach v. Secretary of the Commonwealth*, the Supreme Court of Massachusetts held that labeling candidates as "Unenrolled" when they sought a ballot designation of "Independent" was unconstitutional. *Bachrach*, (1981) 382 Mass. 268, 274-77. The Court found the ballot regulation "inherently suspect" because it restricted the content of the communication (not its time, place, or manner) and pointed out that "Unenrolled is hardly a rallying cry." *Id.* at 275-76.

In this case, the party label restrictions in Senate Bill 6 also affect "core political speech" and provide candidates who prefer a qualified party a crucial advantage by allowing them to express their preference on the ballot, while denying candidates who prefer a non-qualified party the

opportunity to designate their preferences. Much like the term "Unenrolled," "No Party Preference" is hardly a rallying cry.

The fact that the Court of Appeal ultimately ruled against Plaintiffs does not render Plaintiffs' party label claims frivolous. *See Christiansburg* at 421-22 ("it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation"). Moreover, while the Court of Appeal found *Libertarian Party v. Eu* (1980) 28 Cal.3d 535, to be controlling on the party label issue, reasonable minds can differ on the relevance of *Libertarian Party* to this case. For example, during oral argument in a related Ninth Circuit case (also challenging the constitutionality of the same party label restriction), Judge Berzon emphasized she did not find *Libertarian Party* relevant because it was based on the old system where qualified parties could select a candidate for the general election ballot.[7] Ninth Circuit

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[7] "I read the *Libertarian Party*, which is your [the Proposition 14 defending appellees'] bedrock case, very carefully, and it is -- the reasons it gives for doing this, almost all have to do with the fact that the representation on the general ballot is that this is the candidate of that party, and that they're entitled to limit the number of parties that make that representation to the ones that actually had a nomination process and did nominate parties, and for the Libertarian Party to be coming in after going through an independent process, which was not at the behest of the Libertarian Party, and then just say this is the Libertarian Party, they say -- it just is completely inconsistent with our whole system. With the new system, I think all of the arguments in favor of having the qualified parties,

(Footnote continued)

Court of Appeals, Transcript of Audio Recording of Oral Argument in *Michael Chamness*, *et al*. *v*. *Abel Maldonado*, *et al*., Case No. 11-56303, and *Michael Chamness, et al. v. Debra Bowen*, Case No. 11-56449 (Feb. 13, 2013), audio file available at http://www.ca9.uscourts.gov/media/view.php?pk_id=0000010402).[8] Judge Watford, on the same panel, also indicated that he found Senate Bill 6's party label restrictions troubling.[9] *Id.*

The Court of Appeal adopted Plaintiffs' statutory interpretation of Senate Bill 6 regarding the party label restriction and recognized that this interpretation raised constitutional issues. While reasonable minds can differ on the constitutionality of these restrictions, Plaintiffs' claims were certainly not frivolous. *See Cummings* at 1389 (plaintiff's action was not frivolous because "reasonable minds may differ as to the strength of [plaintiff's] case").

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at least have to be very different, and they certainly can't rest on the conclusion on the *Libertarian Party* or on the confusion issues." Appellant's Request for Judicial Notice, Ex. A at 23:02-23:19. "As I indicated, I have real problems transposing the *Libertarian Party* case to this situation." *Id.* at 36:18-19

[8] Appellants have moved for judicial notice of this recording and a transcript of it.

[9] "I am troubled by the compelled speech nature of being forced with no other option to have this 'Party Preference None' label affixed there." Appellant's Request for Judicial Notice, Ex. A at 29:07-09. "That really gives me a lot of concern because I find that particular label -- it is misleading. It's misleading even to somebody like me." *Id.* at 29:16-19.

3. Because Plaintiffs' §1983 Claims Were Non-Frivolous, Preemption Bars Awarding Fees Incurred Due to Plaintiffs' §1983 Claims.

As discussed above, preemption bars awarding fees against a plaintiff for non-frivolous §1983 claims. Because Plaintiffs' claims were not frivolous, preemption bars awarding fees incurred due to Plaintiffs' §1983 claims.

This principle has been applied by a number of courts. In *Fabbrini*, the Ninth Circuit held that "the district court improperly awarded fees for time spent defending a §1983 action that it had not found to be frivolous" because "[a] district court may award attorney's fees to a prevailing §1983 defendant 'only where the action brought is found to be unreasonable, frivolous, meritless or vexatious.'" *Fabbrini v. City of Dunsmuir* (2010) 631 F.3d 1299, 1302. Similarly, the Supreme Court of Colorado found that Colorado's attorney fees statute (which, under certain circumstances, awards fees against plaintiffs bringing non-frivolous §1983 claims) conflicted with federal law (which bars an award for non-frivolous §1983 claims). *State v. Golden's Concrete Co.* (1998) 962 P.2d 919, 925-926. The Court concluded that "42 U.S.C. §1988 preempts Colorado's attorney fees statute." *Id.* at 926. Likewise, the Second District Court of Appeal of Florida held that a statute allowing an award of fees against plaintiffs bringing non-frivolous §1983 claims was preempted by §1988. *Moran v. City of Lakeland* (1997) 694, So.2d 886, 887.

Before the Superior Court, Intervenors argued that a showing of frivolity was not required to award fees against Plaintiffs. However, none of the cases they cited addresses preemption, much less supports Intervenors' position that they are entitled to fees incurred due to Plaintiffs' non-frivolous §1983 claims despite §1988's bar on such fees.[10]

The only case Intervenors cited where the court considered preemption was *Pruitt v. Arlington*, but Intervenors baldly mischaracterized this case's holding. According to Intervenors, *Pruitt* held that §1988 does not preempt a state law that requires a "lesser showing" of frivolousness because the state law imposed other requirements not contained in federal law. JA[VIII]1871. In fact, *Pruitt* held the *opposite*—that a state law that requires a greater showing of frivolousness is not federally preempted:

> While § 1988 requires only that the plaintiff's suit be objectively groundless in order for the defendant to obtain attorney's fees, RCW 4.24.350(2) requires the defendant to prove *additionally* that the plaintiff subjectively knew that the claim was false. The two statutes do not conflict.

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[10] *See Wal-Mart Real Estate Business Trust v. City Council of City of San Marcos* (2005) 132 Cal.App.4th 614, 617 (plaintiff did not allege §1983 claims and thus did not implicate §1988) ("*Wal-Mart*"); *Hull v. Rossi* (1993) 13 Cal.App.4th 1763, 1765 (same) ("*Hull*"); *Wilson v. San Luis Obispo County Democratic Central Committee* (2011) 192 Cal.App.4th 918, 926 (finding plaintiff's good faith irrelevant to awarding defendant fees but not addressing preemption or frivolity, which requires claims to be *objectively* groundless); *County of San Luis Obispo v. Abalone Alliance* (1986) 178 Cal.App.3d 848, 866, 869 (holding only that *state law* did not require a showing of frivolity to award fees against plaintiffs).

Pruitt, (W.D. Wash. Feb. 23, 2009, No. C08-1107) 2009 WL 481293, at *2 (emphasis added) (A copy of this opinion is attached as Attachment C, under California Rule of Court 8.1115(c)). The Court found no conflict between a Washington malicious prosecution statute and §1988 because the Washington statute required a finding of frivolity *in addition to* other requirements. *Id.* Thus, *Pruitt* also does not support Intervenors' position.

B. Intervenors Cannot Recover Fees Based on Plaintiffs' Parallel State Law Claims.

1. Intervenors Are Limited to Fees That Would Not Have Been Incurred But For Plaintiffs' State Law Claims.

This case involves both state and federal law claims. As discussed above, §1988 bars Intervenors from recovering fees for Plaintiffs' federal law claims because they are non-frivolous. Nor can Intervenors claim fees for work relating to both federal and state law claims. Because Plaintiffs' state and federal claims are inextricably intertwined, Intervenors' entire fee request is preempted by §1988.

The U.S. Supreme Court has addressed how to determine what, if any, fees can be awarded when a fee award is barred under §1988 for some, but not all, of a plaintiff's claims. In *Fox v. Vice*, some, but not all, of plaintiff's claims were frivolous. *See Fox,* (2011) 131 S.Ct. 2205, 2212. Because §1988 barred an award of fees for plaintiff's non-frivolous claims, the defendant was limited to "costs that the defendant would not have

incurred but for the frivolous claims." *Id.* at 2211. For example, where "a defendant's attorney conducts a deposition on matters relevant to both a frivolous and a non-frivolous claim—and more, that the lawyer would have taken and committed the same time to this deposition even if the case had involved only the non-frivolous allegation," fees for this deposition are not recoverable. *Id.* at 2215. Because the defendant would have incurred the same fees anyway due to plaintiff's non-frivolous claims, the defendant "has suffered no incremental harm from the frivolous claim." *Id.*

In other words, §1988 completely bars an award of fees against plaintiffs for a protected class of claims (i.e., non-frivolous §1983 claims). When a plaintiff has also brought other, non-protected claims, any fee award is limited to the incremental additional fees uniquely attributable to the non-protected claims. Fees for attorney time that would have been expended anyway due to protected claims are non-recoverable, even if the work was also relevant and helpful in defending against non-protected claims.

The Ninth Circuit applied this but-for test in *Fabbrini*, where the plaintiff brought a §1983 claim and a state law defamation claim. *Fabbrini* at 1301. The district court had awarded fees for the defendant's successful anti-SLAPP motion to strike the defamation claim and included time spent on an unsuccessful motion to dismiss the §1983 claim to the extent that work on the two motions was "inextricably intertwined." *Id.* at 1302. The

Ninth Circuit held "the district court improperly awarded fees for time spent defending a §1983 action that it had not found to be frivolous." *Id.* "Unless the district court makes a proper finding that the § 1983 claim was frivolous, the City is entitled to fees only for work that is exclusively attributable to the anti-SLAPP motion." *Id.*

In *Haynes v. City of Gunnison*, defendants sought fees for time spent on both state law and §1983 claims, without showing the §1983 claims were frivolous. *Haynes,* (2002) 214 F.Supp.2d 1119, 1120 (*"Haynes"*). Defendants argued that "the state law claims in this action completely overlap the federal claims, rendering work done on the federal claims equally applicable to the state law claims." *Id.* at 1122. But the district court denied the motion for fees because "[f]ederal law and policy . . . compels the conclusion that fees not be awarded under Colorado law for work performed defending the overlapping §1983 claims." *Id.* at 1122. Allowing a defendant to recover fees "incurred in whole or in part to defend a federal civil rights claim, without also requiring him to meet §1988's standard for a fee award" would chill non-frivolous suits, which was the reason for §1988's frivolity standard in the first place. *Id.* at 1123. Thus, defendants were "strictly limited to fees incurred in defense of covered state claims only, and no award should be made under [the Colorado] statute for any work performed in defense of overlapping § 1983 claims absent a demonstration of entitlement to such fees under § 1988." *Id.*

The but-for principle applied in *Fox*, *Fabbrini*, and *Haynes* is directly applicable to this case. Intervenors are limited to fees that would not have been incurred but for Plaintiffs' state law claims. *Fox* at 2211.[11] Any attorney hours that are "inextricably intertwined" with defending against Plaintiffs' §1983 claims are not recoverable. *Fabbrini* at 1302. Awarding fees that would have been incurred anyway due to Plaintiffs' non-frivolous §1983 claims would be a windfall to Intervenors and "would chill plaintiffs' pursuit of civil rights claims and thus thwart the strong public policy in favor of private enforcement of individual civil rights claims." *Haynes* at 1123.

Before the Superior Court, Intervenors claimed they were entitled to *all* attorney's fees incurred. The two cases Intervenors cited do not support their position. JA[VIII]1873. *Woodland Hills Residents Association, Inc. v. City Council of Los Angeles* held that when a plaintiff's statutory and constitutional claims "arose out of a common nucleus of operative fact," the fact that the court decided the case based on statutory issues without

[11] Moreover, at least one court has concluded that §1988 preempts *any* fee award for non-frivolous state law claims arising from the same facts and circumstances as plaintiff's federal civil rights claims. *See Gordon v. Beary* (M.D.Fla., Apr. 24, 2012, No. 6:08-cv-73-Orl-35-KRS) 2012 WL 2505515, at *2-3 (*"Gordon"*) ("Because all of the state law causes of action arose from the facts and circumstances as the civil rights claim, under the rationale of *Moran*, *Jones*, and *Alanstar*, federal law preempts an award of attorney's fees under section 768.79 for work performed defending the state law causes of action.") (A copy of this opinion is attached as Attachment D, under California Rule of Court 8.1115(c)).

reaching constitutional issues does not necessarily mean that no "important right" was vindicated and thus bar fees under §1021.5. *Woodland Hills*, (1979) 23 Cal.3d 917, 937-38 (*"Woodland Hills"*). *Best v. California Apprenticeship Council* held that a plaintiff could recover fees under §1988, even though his claims were decided on state law grounds because his state law claims "arose out of the same common *nucleus* of operative facts as a federal constitutional claim under section 1983." *Best*, (1987) 193 Cal.App.3d 1448, 1464. Neither case discusses awarding fees *against* a plaintiff or suggests that fees due to non-frivolous §1983 claims are recoverable if plaintiff's state and federal claims arose out of a common nucleus of operative facts. In contrast, *Fabbrini* and *Haynes* explicitly address how to allocate fees when state and federal claims overlap, and both apply the principle set out in *Fox*: the defendant is limited to costs he would not have incurred but for the non-protected, state law claims.

2. Intervenors Have Not Established Any Attorney's Fees That Would Not Have Been Incurred But For Plaintiffs' State Law Claims.

Rather than making any attempt to separate their fees between those incurred due to Plaintiffs' §1983 claims and those uniquely attributable to Plaintiffs' state law claims, Intervenors claimed entitlement to all fees. Intervenors cling to this untenable position because they cannot show that they have incurred substantial, if any, fees due to Plaintiffs' state law claims.

Plaintiffs' state and federal claims are inextricably intertwined. They arise out of the same nucleus of operative facts and are based on similar provisions in the California and U.S. Constitution.[12] Regardless of whether they arise under state or federal constitutional provisions, Plaintiffs' claims boil down to the allegation that Senate Bill 6 is unconstitutional because: (1) it allows the casting of write-in votes but forbids the counting of such votes; and (2) it allows candidates to indicate a preference for qualified parties on the ballot but forbids candidates from indicating a preference for non-qualified parties on the ballot. The parallel nature of Plaintiffs' state and federal claims and the complete overlap in underlying facts is also reflected in Intervenors' billing records, which do not distinguish between time spent on state claims and time spent on federal claims. JA[V]1054-1217; JA[VII]1748-69.

When attorney hours are inextricably intertwined between state law and §1983 claims, as in this case, fees should be denied. *See Fabbrini* at 1302 (vacating award of fees for attorney hours where work was "inextricably intertwined" between plaintiff's state law claim and §1983

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[12] Plaintiffs' write-in claim was brought under state constitutional provisions regarding the right to have votes counted, the right to free speech, and the right to due process and under federal constitutional provisions providing parallel rights under the Elections Clause, First Amendment, and Due Process Clause. Plaintiffs' party label claim was brought under the state constitutional provision regarding equal protection and under the federal constitutional provision providing similar rights under the Elections Clause. JA[I]0042-48.

claim); *see Haynes* at 1122 (denying fee award where defendants sought fees for work performed for both state and federal claims because "the state law claims in this action completely overlap the federal claims, rendering work done on the federal claims equally applicable to the state law claims").

At most, Intervenors could have sought to recover fees uniquely attributable to Plaintiffs' state law claims. Since Intervenors have failed to establish that there were any such fees, the entire fees award should be vacated. *See Gordon*, 2012 WL 2505515, at *3 (denying fees where defendants "have not presented evidence supporting their assertion that they performed work on the state law causes of action that they would not have performed in defending the civil rights claim"); *Haynes* at 1123 (denying fees because "[a]lthough Defendants submitted voluminous time records in support of their fee request, they did not identify any particular entries that related to defense of the [state law] battery claim against King or submit any other evidence that provides a basis for distinguishing between fees incurred in relation to that claim and those incurred in respect to other [federal law] claims").

II. Intervenors Did Not Satisfy §1021.5's Requirements for an Award of Fees.

A. Section 1021.5 Fees and Underlying Policies

Code of Civil Procedure §1021.5 provides that:

> Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate . . . .

The statute aims "to encourage suits effectuating a strong [public] policy by awarding substantial attorney's fees . . . to those who successfully bring such suits and thereby bring about benefits to a broad class of citizens." *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 27. Fee-shifting is necessary because "privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible." *Woodland Hills* at 933.

In order to claim fees, an intervening party "must make a clear showing of some unique contribution to the litigation." *Crawford v. Bd. of Educ.* (1988) 200 Cal.App.3d 1397, 1407 (*"Crawford"*). If the intervenor

co-litigates with a public entity, it must show that its actions were non-duplicative of the public entity's acts, and necessary to the result achieved before fees can be awarded. *McGuigan v. City of San Diego* (2010) 183 Cal.App.4th 610, 636.

B. The Court Applied an Incorrect Standard of Its Own Creation in Awarding All Requested Fees to Intervenors.

In its fees order, the Superior Court recited the proper legal standard from the Code of Civil Procedure §1021.5. *See* JA[VII]1787. It stated that §1021.5 fees may be awarded to a party who (1) prevails, and can show that (2 "the action resulted in the enforcement of an important right affecting the public interest; [3] a significant benefit was conferred on the general public or a large class of persons; and [4] the necessity and financial burden of private enforcement were such as to make the award appropriate." *Id*. The court applied this standard when denying Plaintiffs' fee request, stating that they failed the first element because they were not a "successful party." JA[VII]1786.

But in its page-and-a-half analysis of the Intervenors' fee request, the Superior Court substituted a new test. Under this test, a court shall award fees to a party intervening to defend the constitutionality of a statute so long as the plaintiffs (1) lose and (2) brought their claims in the public interest. JA[VII]1787-88. This new test ignores all of the §1021.5 factors. The Court did not determine that Intervenors, as opposed to the Secretary:

(1) were prevailing; (2) enforced an important right affecting the public interest; (3) provided a significant public benefit; or (4) took necessary action in light of the active participation in the case by the Secretary.

If the Superior Court's new test for fees under §1021.5 is adopted by other courts, it will have a profound chilling effect on plaintiffs asserting public interest claims, including those challenging the constitutionality of new laws. Plaintiffs asserting constitutional challenges to ballot initiatives or other laws stand to gain no money if they win. Yet, if the Superior Court's order stands and is applied by other courts, these individuals will owe fees to any private party who intervenes to defend the law if the plaintiffs lose. Period. It doesn't matter if the official state defendant, and not the intervenor, is the real prevailing party. It doesn't matter if the intervenor provides no benefit to the public, or advances no public right. It also doesn't matter if the intervening party added primarily duplicative or losing arguments.

Under the Superior Court's test, no rational person (without great personal wealth) would risk acting as a plaintiff in a constitutional challenge to state law. The Superior Court's new rule turns the policy behind §1021.5 on its head. Rather than incentivizing privately-initiated lawsuits asserting claims seeking to vindicate constitutional or statutory rights, this rule imposes fees against anyone unsuccessful in bringing such claims, if a private party intervenes as a defendant. That is not the law.

C. Intervenors Did Not Prevail.

1. To "Prevail," a Party Must Cause the Relief Obtained.

The California Supreme Court has held that "there must be a causal connection between the plaintiffs' lawsuit and the relief obtained in order to justify a fee award under section 1021.5 to a successful party." *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1291 (*"Maria P."*). "The appropriate benchmarks in determining which party prevailed are (a) the situation immediately prior to the commencement of suit, and (b) the situation today, and the role, if any, played by the litigation in effecting any changes between the two." *Id*. (internal citations omitted). Intervening parties must show "with particularity" that their contributions "added in an essential way" to the resolution of the issues in the case. *Crawford* at 1409. Courts must focus on "the impact of the action, not the manner of its resolution." *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 566 (internal citation omitted).

Intervenors cannot rely on the state's work to claim a fee award. Therefore, Intervenors must show that their actions in litigation (separate from the actions of the Secretary) have a causal connection to the relief obtained.

2. Intervenors Prevailed, at Most, on a Portion of One Question—How to Interpret the Write-In Provisions.

In their motion for fees, Intervenors proclaim that "there was no consequential part of this litigation on which Movants did not prevail." JA[IV]1020. The Intervenors omit that they did not "prevail" alone. The Secretary (the original defendant) vigorously defended the action from the beginning. And the only lasting successes achieved in the litigation were the Secretary's, not Intervenors'. Therefore, Intervenors are not entitled to fees.

Plaintiffs moved for a preliminary injunction of Proposition 14 and SB 6 on the grounds that the party label and write-in provisions of SB 6 were unconstitutional. The Intervenors and the Secretary advanced different arguments in opposing Plaintiffs' claims. This Court rejected the Intervenors' party label argument, finding it was "not as reasonable as the Secretary's." *Field* at 355. Thus, it was the Secretary, not Intervenors, who argued successfully against Plaintiffs' claims on the party label question. Applying the test from *Maria P.*, when the situation before Plaintiffs' request for preliminary injunction is compared to the situation afterwards,

Intervenors played no role in prevailing on the party label question, because their argument on this point was rejected.[13]

Regarding write-in voting, the Court adopted an argument made by both Intervenors and the Secretary: that the law, as amended by SB 6, prevented any write-in candidate from being qualified to run in a general election and therefore banned counting of any general-election vote for such a candidate. *Id*. at 369. The only winning argument Intervenors uniquely advanced concerned whether spaces for write-in votes could be provided for offices for which write-in candidates could not qualify at the general election. On this question, the Court noted that "[i]ncluding a line for write-in votes on a ballot when those votes will not be counted raises constitutional questions." The Court avoided those questions by interpreting the law to bar provision of write-in lines for voter-nominated offices in the general election, as urged by Intervenors. *See Field* at 371.

Therefore, at most, Intervenors can claim to be prevailing parties based on the one portion of the write-in argument where they advanced a unique argument.

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[13] To the extent that Intervenors rely on this Court's citation of their arguments about *Libertarian Party v. Eu* in the *Field* opinion to show they prevailed, this small addition does not rise to the level of a compensable contribution, as discussed in Section II.E.2. Intervenors may also argue that their argument rejected by the Court was only in the alternative, while they advanced the same primary party label argument as the Secretary. But as discussed in Section II.E, duplicative arguments do not merit fees awards.

3. Legislative Changes Rendered Intervenors' Success Null.

Intervenors cannot claim to have ultimately prevailed on the write-in question, however. After this Court issued its order adopting Intervenors' statutory construction forbidding write-in lines for positions where write-in votes would not be counted, the legislature amended the write-in provisions to explicitly forbid such write-in lines (as proposed by the Secretary). AB 1413 §39 ("[N]o spaces shall be printed for voter-nominated offices at a general election.") If the legislature had interpreted the law according to the *Field* decision, this change would have been unnecessary. Instead, the legislature changed the law on which Intervenors' only unique and winning argument in this case had been based, rendering that argument moot.

Before Plaintiffs filed their claims, the law read one way; afterwards, it was amended. The law is now explicit that write-in lines will not be provided in the general election ballot for voter-nominated offices. Intervenors' arguments in litigation advocated the same resolution, but by a different route (statutory construction versus statutory amendment). Ultimately, Intervenors' limited contributions to the litigation had no lasting effect. Under *Maria P.*, this is not enough to claim prevailing party status. *Maria P.* at 1291.

For example, in *Crawford*, the lower court denied fees under §1021.5 to a number of intervenors who joined to help shape the remedy as

the court implemented school desegregation plans. Although the intervenors had made "substantial contributions" at the trial level, *id.* at 1404, the lower court's denial of fees was upheld., because "events transpiring outside the litigation process render[ed] intervener's efforts nugatory." *Id*. at 1407 (internal citations omitted). Specifically, while the desegregation plan was being implemented, voters passed a proposition making elements of the plan (which intervenors had opposed) unconstitutional. *Id*. at 1408. Intervenors could not claim their litigation activities were the cause of this legislative change (even though one of them was "the organizing force" behind the initiative); therefore, they were not "prevailing parties" under §1021.5. *Id*. Similarly, Intervenors in this case cannot claim they prevailed, because the legislative change made their limited contribution to the litigation irrelevant.

4. ***All*** **Parties Held Highly Similar Positions on Write-In Voting.**

All of the parties' positions on the write-in provisions of SB 6 were highly similar. The Plaintiffs, the Intervenors, and the Secretary all recognized that ballots should not provide write-in lines for candidates if write-in votes for such candidates would not be counted.[14] All of the

[14] As the Court is aware, the Secretary advanced this argument outside of litigation, and supported amending the law accordingly. JA[I]0218-251.

parties grasped what this Court called the "constitutional questions" raised by the combination of write-in lines and a ban on counting write-in votes.

The Plaintiffs argued that providing write-in lines on the general election ballots would indicate to voters that write-in votes were permissible; because such votes would not be counted, this would confuse and potentially disenfranchise voters. Plaintiffs also recognized that banning write-in voting is constitutional. JA[I]0010-11; JA[II]0428. The Intervenors argued that the law should be interpreted to forbid write-in lines to avoid this problem. JA[I]0275; JA[III]0559. Likewise, the Secretary proposed legislative changes to ensure that no blank spaces for write-in votes would be provided. JA[I]0218-20.

When all parties share similar positions, one party cannot be singled out as "prevailing." When a resolution that addresses universally-recognized problems is achieved, any one party cannot show that his actions alone were the cause.

Like the intervenors in *Crawford*, the *Field* Intervenors cannot show the "essential" causation between their efforts and the current state of the law. Because Intervenors advocated a losing argument on the party label question, they had no role in preventing an injunction against those provisions. And Intervenors' partial win on write-ins was short-lived, rendered "nugatory" by subsequent changes to the legislation. Finally, all of the parties recognized the same basic problem with providing lines if

votes written on them could not be counted. Accordingly, Intervenors failed to show with particularity that they were responsible for causing the outcome they pursued, and therefore failed to establish that they were prevailing parties entitled to fees.

D. Intervenors' Actions in This Litigation Resulted in No Enforcement of a Public Right and No Significant Public Benefit.

1. These Factors Are Reviewed *De Novo*, and Evolving Law Undermines the Public Benefit of a Published Appellate Decision.

When a case results in an appellate decision, the Court of Appeals is "in at least as good a position as the trial court to judge whether the legal right enforced through its own opinion is 'important' and 'protects the public interest' and whether the existence of that opinion confers a 'significant benefit on the general public or a large class of persons.'" *Police Protective* at 8. As a result, when the Court of Appeals has issued an opinion in the case, these two §1021.5 factors are reviewed *de novo*, with no deference for the trial court's judgment. *Id*. at 8-9.

De novo review is particularly appropriate in this case, because the judge who issued the order granting Intervenors' fees is not the same judge who ruled on the merits of Plaintiffs' Preliminary Injunction Motion. *See Police Protective* at 9 ("It makes little sense to defer to the discretion of a single trial judge who may have had to make this decision in a matter of moments on the basis of a rather cursory review of the legal field involved

when the deferring body would be three judges who have already researched the legal aspects of the case in depth in order to produce a full-fledged appellate opinion on the subject."). Accordingly, *de novo* review applies to the "enforcement of an important right affecting the public interest" and "conferred a significant benefit on the general public or a large class of persons" requirements for a §1021.5 fees award.

Although not dispositive, it is an indication that a court decision benefits the public interest or enforces a public right if it is selected for publication, if "the reason for publication of the opinion is to announce a rule not found in previously published opinions." *See Police Protective* at 12; *see also In re Adoption of Joshua S.* (2008) 42 Cal.4th 945,958 ("whether litigation generates important appellate precedent is a factor courts may consider in determining whether the litigation can be said to enforce an important right affecting the public interest."). If a published opinion helps to clarify the law, it may enforce an important right or contribute a significant public benefit. *Punsly v. Ho* (2003) 105 Cal.App.4th 102, 115 (disapproved on other grounds in *Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1226 n4 (*"Whitley"*)). But if later events (including grant of review of the issues by another court) suggest that there are still "open questions" and "evolving" "legal policies" on the questions addressed by the published opinion, the "nature and extent of the benefit conferred upon the public . . . cannot be fully assessed." *Punsly* at 115.

2. Intervenors Presented Insufficient Evidence of Advancing a Public Right or Significantly Benefitting the Public Interest.

In their motion for fees, Intervenors argued that their participation in this case vindicated an important right and significantly benefitted the public interest because the case related to voting rights, and because this Court published its opinion. JA[IV]1022. Intervenors also argued that due to their participation, Plaintiffs' request to enjoin the new Top Two Primary rules from taking effect was denied, and thus the will of California voters was not frustrated. *Id*. at 1022-23.

Careful consideration of these arguments reveals that, when the Secretary's significant contributions are taken into account, Intervenors did not contribute to the advancement of a public right or significant public benefit. As discussed above, the only unique argument that Intervenors presented and won was on a portion of the write-in issue. But Intervenors cannot rely on their victory in this Court to claim the benefit of preventing an injunction of the Top Two Primary rules.

Plaintiffs admitted that banning write-in voting is constitutional, and never argued that the write-in provisions were not severable, such that an injunction would be required if Plaintiffs' arguments were adopted. Indeed, in urging this court to "sever[ ] the challenged restrictions" if it found problems with SB 6, Intervenors noted Plaintiffs had "abandoned" any claim that the write-in provisions were not severable. JA[III]0587.

Intervenors mockingly characterized the write-in argument as having "second-class status" in Plaintiffs' Appellate Brief; they cannot puff up the importance of this argument now just to claim a fee award. JA[III]0554. Therefore, Intervenors cannot claim to have fended off an injunction by making their single successful argument on write-in voting.

The only public benefit Intervenors can credibly attempt to claim is the publication of this Court's opinion finding that the SB 6 write-in provisions were constitutional as drafted. However, the opinion lost its utility for clarifying that portion of the law when the legislature changed the law on February 10, 2012. The statutory construction this Court issued on September 19, 2011 was therefore only relevant for five months.

Intervenors' contribution to this Court's opinion is no longer useful in interpreting the law, because the law has changed and now clearly states what this Court inferred: that write-in lines are not permitted if write-in votes will not be counted. As in *Punsly*, this Court's opinion must be evaluated in light of the law as it has changed. The *Punsly* court noted that although its opinion clarified the law, the later grant of review by the California Supreme Court on a related issue indicated that the "legal policies . . . [were] still evolving" and therefore that the "'significant benefit' criteria cannot be said to be a determining factor in the overall question of fee entitlement under these circumstances." *Punsly*, 105 Cal.App.4th at 115. In light of the explicit change in the law relating to

SB 6's write-in provisions, it is even more clear than in *Punsly* that this Court's opinion, as it relates to write-in lines, no longer "serve[s] an important function in clarifying the law."

The Superior Court made no determination of whether Intervenors' actions (separate from those of the Secretary) enforced a public right affecting the public interest and significantly benefitted the public interest. Nor was the record before the Court sufficient to support the conclusion that Intervenors themselves made any such contributions through their litigation activities.

E. Public Enforcement Would Have Resulted in the Same Outcome, so Private Enforcement Was Not Necessary.

1. Private Parties Co-Litigating with Public Entities Must Show Their Actions Were Necessary.

Because Intervenors chose to step in and litigate this case in addition to the Secretary, they face an uphill battle to show that their actions were "necessary" because "public enforcement was . . . not sufficiently available." *Whitley* at 1214, 1217. A private party that intervenes in cases impacting the public interest "is not, *ipso facto*, eligible for attorney fees under section 1021.5 in every case in which that party colitigates with a governmental entity . . . ." *Committee to Defend Reproductive Rights v. A Free Pregnancy Center* (1991) 229 Cal.App.3d 633, 642-43 (*"Reproductive Rights"*). Intervenors must show that they "contribute[d]

significantly to the result" to claim fees. *Nestande v. Watson* (2003) 111 Cal.App.4th 232, 240.

To evaluate whether private enforcement is necessary, the court should answer the following questions: "(1) [d]id the private party advance significant factual or legal theories adopted by the court, thereby providing a material non *de minimis* contribution to its judgment, which were nonduplicative of those advanced by the governmental entity? (2) [d]id the private party produce substantial evidence significantly contributing to the court's judgment which was not produced by the governmental entity, and which was neither duplicative of nor merely cumulative to the evidence produced by the governmental entity?" *Reproductive Rights* at 642-43.

Subsumed within the first factor is the question of whether "similar results would not have been obtained 'but for' [the] private party's acts." *Ciani v. San Diego Trust & Savings Bank* (1994) 25 Cal.App.4th 563, 573 (*"Ciani"*). The overall question is "whether any unnecessary duplication of effort took place." *McGuigan v. City of San Diego* (2010) 183 Cal.App.4th 610, 636.

The second question is easily answered in the negative. This Court noted that there were no material disputed facts in this case. *Field* at 353. In addition, Intervenors did not argue in moving for fees that they made any contribution of substantial evidence that was necessary to the outcome or unique from submissions by the Secretary.

Thus, finding Intervenors' contributions necessary to this case turns on whether they provided non-duplicative and "significant . . . legal theories adopted by the court," that made "a material non *de minimis* contribution to its judgment." If Intervenors had never joined the case in the first place, the outcome today would be exactly the same. Accordingly, Intervenors were not necessary parties.

2. Intervenors Provided Insufficient Evidence of Necessary Contributions to Justify a Fee Award.

In moving for fees, Intervenors argued that they had contributed four unique arguments to this Court, not advanced by the Secretary, and that these evidenced their necessary contribution to the case. However, simply putting forward a unique argument is not enough. As noted in *Reproductive Rights*, even obtaining separate injunctive relief against an additional party does not automatically mean that the necessity factor is met; the court must first decide if the results obtained by the private party caused "a benefit of significance to the public over that obtained by the judgment secured by the public entity." *Reproductive Rights* at 643.

First, Intervenors point to their argument that SB 6 (as it read in 2011) prohibited providing lines for write-in votes in the general election, while the Secretary argued (outside of litigation) that SB 6 permitted the lines. JA[IV]1025. But as described above in Section II.C.2, at least half of Intervenors' write-in argument was also advanced by the Secretary.

When an intervenor makes the same arguments as the public attorney general, his contributions fail the "necessity" requirement for §1021.5 fees. *Ciani* at 573 (finding intervenor's actions unnecessary when he made "identical" arguments as the public entity).

In addition, while it is true that Intervenors persuaded this Court to adopt their interpretation of the write-in lines provisions, Intervenors did not persuade the Secretary, or ultimately the legislature. Those with the power to change the law concluded that the law *did* require amendment to resolve the "constitutional problem" of soliciting write-in votes by providing lines for them on a ballot, but prohibiting the counting of votes written on those lines. Thus, although the Intervenors' write-in position was "literally different" from that advanced by the State, it "lack[ed] significance in contributing to the result obtained." *Reproductive Rights* at 643.

The Secretary and the legislature have had the last word on the issue of lines for write-ins. Intervenors have been on notice throughout this litigation that the law would likely be amended, as outlined in the August, 2010 e-mails outlining the Secretary's proposed "need[ed]" changes to SB 6. JA[I]0218-251. While they were free to proceed with their argument, there was no need to do so. As discussed above (Section II.D), their temporary victory cannot be said to significantly benefit the public interest. Intervenors' unnecessary efforts in advancing the write-in lines

argument do not satisfy the "necessity of private enforcement" element justifying an award of fees under §1021.5.

Second, Intervenors claim that even though their argument on the party label issue was rejected by this Court, they should be awarded fees for *all* their work in advancing this losing argument because this Court relied on Intervenors' analysis in one paragraph of its opinion rejecting some of Plaintiffs' arguments about *Libertarian Party v. Eu* (1980) 28 Cal.3d 535. Intervenors cannot show that their contribution of this one point in the opinion transforms their otherwise superfluous contributions into necessary ones.

The Court's opinion did not turn on the points raised by Intervenors. Both Intervenors and the Secretary cited *Libertarian Party*, and the Court found that the case was "controlling" authority requiring adoption of the Secretary's party label argument. JA[III]0629-30. The Court devoted nearly two pages to analyzing *Libertarian Party* and concluding that it was dispositive of Plaintiffs' claims. *Field* at 357-359. The Court cited Intervenors' arguments based on the case in just a single paragraph, where the Court relied on five differences between qualified and non-qualified parties to reject Plaintiffs' reading of the case. Two of these five differences had been pointed out by the Secretary. JA[III]0622-23. Thus, Intervenors' only argument with any (minor) resonance on the party label issue significantly overlapped with the Secretary's arguments. In the

context of the Court's decision as a whole, Intervenors' contribution was *de minimis*, and "lack[ed] significance in contributing to the result obtained." *Reproductive Rights* at 643.

Since this Court found *Libertarian Party* to control the party label question, and since the Secretary pointed out several of the cited differences between qualified and non-qualified parties, it is implausible that the party label issue would have been differently decided absent Intervenors' contributions.

Third, Intervenors urge that they were the only party who "argued that the Court of Appeal had the power to resolve this case on its merits, as a matter of law." JA[IV]1025. Intervenors exaggerate. In their Opening Brief, Plaintiffs also argued that the case turned on pure matters of law, rather than factual questions, and therefore that *de novo* review applied. JA[II]0386. *See* P.I. Appeal at 22. This Court could decide the merits of the case only if the issues presented were purely legal. *See North Coast Coalition v. Woods* (1980) 110 Cal.App.3d 800, 805. Thus, the Court had what it needed to decide the case based on Plaintiffs' recognition that the case turned on legal issues.

Intervenors' only "contribution" on this score was to provide citations to California Supreme Court and appellate cases reciting the rule that a court can decide the merits of a case on appeal of denial of preliminary injunction if pure issues of law are presented. *Field* at 352.

Providing the court with a well-known procedural rule is simply too minor an addition to qualify as a "necessary" contribution. *Compare Nestande*, 111 Cal. App. 4th at 236-238 (noting that the lower court awarded fees to a private defendant when it was the only party to raise standing, the dispositive question in the case).

Fourth, and finally, Intervenors opine that although the Secretary "vigorously defended this action," Plaintiffs argued that the Secretary had made admissions, which "if credited . . . would have undermined the Secretary's ability to defend Proposition 14." JA[IV]1026. Intervenors omit that Plaintiffs also argued that *Intervenors* admitted or waived arguments relating to the constitutionality of the laws at issue—though they are obviously aware of this because they devoted an entire brief section to the subject. JA[III]0549 ("APPELLANTS' DOGGED RELIANCE ON PURPORTED 'CONCESSIONS' BY RESPONDENTS AND INTERVENERS MISREPRESENTS THE FACTS AND BETRAYS THE WEAKNESS OF APPELLANTS' CASE."). If Plaintiffs' arguments could have undermined the Secretary's ability to litigate the case, then they could have compromised the Intervenors' ability to litigate, too.

In any event, the Court did not credit Plaintiffs' admission/waiver arguments. *Field* at 355 n.3 ("[P]laintiffs maintain that the Secretary and interveners have effectively conceded every point at issue . . . [a]ll of the claims of alleged concessions are fruitless.") The Secretary's "vigorous"

defense of this case was successful, and the Intervenors were an unnecessary and duplicative addition to the case.

Thus, Intervenors failed to show that any of their cited contributions were significant and non-*de minimis*. This is most clear when considering what the outcome of the case would have been if Intervenors had never been involved: as of today, nothing would be different. The legislature has changed the law such that the only unique and winning argument Intervenors made is no longer relevant. The Secretary would have prevailed on the party label issue without the additional points raised by Intervenors. Overall, Intervenors' contributions have been to make unsuccessful or duplicative arguments. "[I]f there is a public attorney general available to enforce the important right at issue there is no utility in inducing a private attorney general to duplicate the function." *City of Sacramento v. Drew* (1989) 207 Cal. App. 3d 1287, 1299. Intervenors cannot claim fees for this work.

F. Awarding Fees to Intervenors Is Unprecedented and Unsupported by Law.

Intervenors did not cite a single case in their Motion for Fees in which a private party intervening to defend a case alongside an active and able public attorney general (like the Secretary in this case) was awarded §1021.5 fees. Many of the cases Intervenors relied on do not involve private parties litigating alongside a public entity at all, but instead involve

private parties suing the government; in that situation, plaintiffs can potentially recover fees because there is no public attorney general to prosecute the case. *See Woodland Hills* at 941 (because the "action proceeded against the only governmental agencies that bear responsibility for the subdivision approval process, the necessity of private, as compared to public, enforcement becomes clear"); *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 85, *rev. denied*, (Cal. Apr. 27, 2005, S132081) 2005 Cal. LEXIS 4616 (noting that when a private party prosecutes a case against the government, the "necessity of private enforcement" is "readily met").

When Intervenors did cite cases that address intervention by private parties joining to assist public parties, the majority involved situations where public enforcement was unavailable or severely inadequate. *See, e.g.*, *Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal. App. 4th 499, 545 (finding "necessity" factor met because the litigation "was beyond the capabilities of the Placer County District Attorney to prosecute, and . . . outside counsel was necessary."); *Wal-Mart* at 623 (finding necessity factor met when public party filed no opposition to Wal-Mart's petition, leaving it to private parties to oppose); *Hull* at 1765 (respondents defended truth and accuracy of ballot arguments alone, without assistance from county clerk respondent).

As for the rest of Intervenors' cited cases, of the few where fees were awarded to an intervening private party despite the availability of public enforcement, none involved a "vigorous" defense by a public attorney general. *See Reproductive Rights* at 636 (remanding for determination of whether fees were due to private plaintiff who initiated action four months before District Attorney brought similar action "spurr[ed] by private complaint"; *Nestande* at 235-40 noting, without reviewing, grant of fees to intervenors by lower court when public entity failed to appeal loss in lower court, and failed to raise the key dispositive issue in case, plaintiffs' standing to bring suit).

Intervenors sought and obtained an unprecedented and unjustified windfall from the Plaintiffs in the award of all their fees. The Superior Court did not reveal its decision-making process on any of the §1021.5 factors, but as outlined above, the evidence before the court did not support the conclusion that the Intervenors met any of the relevant factors. When analyzed independently from the contributions of the Secretary, Intervenors' contributions were minimal and did not impact the ultimate result of any issue in the case.

G. If the Court Affirms an Award of Fees to Intervenors, It Should Reduce the Award to Reflect Work that Meets the §1021.5 Standard.

If only a portion of a party's efforts meet the §1021.5 criteria, "the court may legitimately restrict the award to only that portion of the

attorneys' efforts that furthered the litigation of issues of public importance." *Whitley*, 50 Cal. 4th at 1226. Plaintiffs submit that Intervenors should be denied all fees. But if this Court finds that a portion (but not all) of Intervenors' contributions meet the criteria for a fee award, then the award should be limited to work relating to those contributions. Intervenors claimed, and were awarded, all of the fees they spent on the case. But there is no reason to award all fees if not all of the work meets the test. If only a portion of the work merits a fee award, "the section's broad language and the theory underlying the private attorney general concept would permit the court to shift only an appropriate portion of the fees to the losing party or parties." *Woodland Hills* at 942; *see also Hammond v. Agran* (2002) 120 Cal.Rptr.2d 646, 658-661 (remanding for determination of fees for only one issue out of several litigated).[15] Out of two issues in the case, Intervenors lost on one (party labels) and contributed a unique and winning argument on only half of the other (lines for write-in votes). Thus, Intervenors' fees should be reduced by at least 75%.

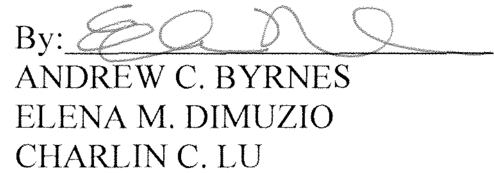
[15] These cases dealt with limiting fees to the portion of work that met the "necessity of private enforcement" requirement; under the same logic, failure to meet another one of the §1021.5 factors requires limiting fees in the same manner.

CONCLUSION

The Superior Court abused its discretion and made errors of law in awarding fees, and its order should be reversed.

Dated: March 29, 2013

COVINGTON & BURLING LLP

By: 
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CERTIFICATE OF WORD COUNT

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 13,464 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: March 28, 2013

Elena M. DiMuzio

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am a citizen of the United States. My business address is One Front Street, 35th Floor, San Francisco, California 94111. I am employed in the County of San Francisco where this service takes place. I am over the age of 18 years, and not a party to the within cause. I am readily familiar with my employer's normal business practice for collection and processing of correspondence for mailing with the U.S. Postal Service. On the date set forth below, I served the foregoing document(s) described as:

1. **APPELLANTS' OPENING BRIEF; JOINT APPENDIX (VOLS. I - VIII); APPELLANTS' REQUEST FOR JUDICIAL NOTICE; PROPOSED ORDER GRANTING APPELLANTS' REQUEST FOR JUDICIAL NOTICE**

on the following person(s) in this action as follows:

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[X] (BY ELECTRONIC SERVICE) I e-mailed copies of the brief to the above-listed e-mail addresses, and caused the documents referenced above to be uploaded to the SFTP site at 216.200.93.165.

1. **APPELLANTS' OPENING BRIEF; APPELLANTS' REQUEST FOR JUDICIAL NOTICE; PROPOSED ORDER GRANTING APPELLANTS' REQUEST FOR JUDICIAL NOTICE**

on the following person(s) in this action as follows:

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

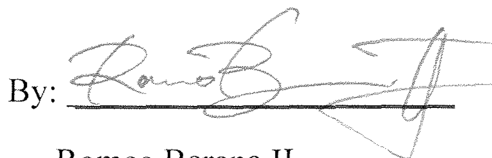
[X] (BY ELECTRONIC SUBMISSION) I caused the documents listed above to be sent electronically to the website http://www.courts.ca.gov/7423.htm set forth above on this date.

Honorable Curtis E.A. Karnow
SF Superior Court
400 McAllister Street Dept. 608
San Francisco, CA 94102

[X] (BY U.S. Postal Service) I caused such envelope(s) to be delivered by mail this date to the offices of the addressee(s).

[X] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 29, 2013, at San Francisco, California.

By: 

Romeo Berana II

ATTACHMENT A

S. REP. 94-1011, S. Rep. No. 1011, 94TH Cong., 2ND Sess. 1976, 1976 U.S.C.C.A.N. 5908, 1976 WL 14051 (Leg.Hist.)

****5908** P.L. 94-559, THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976
Senate Report (Judiciary Committee) No. 94-1011,
June 29, 1976 (To accompany S. 2278)
House Report (Judiciary Committee) No. 94-1558,
Sept. 15, 1976 (To accompany H.R. 15460)
Cong. Record Vol. 122 (1976)
DATES OF CONSIDERATION AND PASSAGE
Senate September 29, 1976
House October 1, 1976
The Senate bill was passed in lieu of the House bill.
The Senate Report is set out.

(CONSULT NOTE FOLLOWING TEXT FOR INFORMATION ABOUT OMITTED MATERIAL. EACH COMMITTEE REPORT IS A SEPARATE DOCUMENT ON WESTLAW.)

SENATE REPORT NO. 94-1011
June 29, 1976

***1** The Committee on the Judiciary, to which was referred the bill (S. 2278) to amend Revised Statutes section 722 (42 U.S.C. 1988) to allow a court, in its discretion, to award attorneys' fees to a prevailing party in suits brought to enforce certain civil rights acts, having ****5909** considered the same, reports favorably thereon and recommends that the bill do pass.

* * * *

PURPOSE

This amendment to the Civil Rights Act of 1866, Revised Statutes Section 722, gives the Federal courts discretion to award attorneys' fees to prevailing parties in suits brought to enforce the civil rights acts which Congress has passed since 1866. The purpose of this amendment is to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), [1] and to achieve consistency in our civil rights laws.

***2** HISTORY OF THE LEGISLATION

The bill grows out of six days of hearings on legal fees held before the Subcommittee on the Representation of Citizen Interests of this Committee in 1973. There were more than thirty witnesses, including Federal and State public officials, scholars, practicing attorneys from many areas of expertise, and private citizens. Those who did not appear were given the opportunity to submit material for the record, and many did so, including the representatives of the American Bar Association and the Bar Associations of 22 States and the District of Columbia. The hearings, when published, included not only the testimony and exhibits, but numerous statutory provisions, proposed legislation, case reports and scholarly articles.

In 1975, the provisions of S. 2278 were incorporated in a proposed amendment to S. 1279, extending the Voting

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Rights Act of 1965.

The Subcommittee on Constitutional Rights specifically approved the amendment on June 11, 1975, by a vote of 8-2, and the full Committee favorably reported it on July 18, 1975, as part of S. 1279. Because of time pressure to pass the Voting Rights Amendments, the Senate took action on the House-passed version of the legislation. S. 1279 was not taken up on the Senate floor; hence, the attorneys' fees amendment was never considered.

On July 31, 1975, Senator Tunney introduced S. 2278, which is identical to the amendment to S. 1279 which was reported favorably by this Committee last summer.

Shortly thereafter, similar legislation was introduced in the House of Representatives, including H.R. 955p, which is identical to S. 2278 except for one minor technical difference. The Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee has conducted three days of hearings at which the witnesses have generally confirmed the record presented to this Committee in 1973. H.R. 9552, the counterpart of S. 2278, has received widespread support by the witnesses appearing before the House Subcommittee.

STATEMENT

The purpose and effect of S. 2278 are simple-- it is designed to allow courts to provide the familiar remedy of reasonable counsel fees to ****5910** prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866.S. 2278 follows the language of Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. 2000a-3(b) and 2000e-5(k), and section 402 of the Voting Rights Act Amendments of 1975, 42 U.S.C. 1973l(e). All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nations's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

***3** Congress recognized this need when it made specific provision for such fee shifting in Titles II and VII of the Civil Rights Act of 1964:

When a plaintiff brings an action under (Title II) he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a a ‘private attorney general,‘ vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts. Congress therefore enacted the provision for counsel fees-- * * * to encourage individuals injured by racial discrimination to seek judicial relief under Title II.‘ Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968). [2]

The idea of the ‘private attorney general‘ is not a new one, nor are attorneys' fees a new remedy. Congress has commonly authorized attorneys' fees in laws under which ‘private attorneys general‘ play a significant role in enforcing our policies. We have, since 1870, authorized fee shifting under more than 50 laws, including, among others, the Securities Exchange Act of 1934, 15 U.S.C. 78i(c) and 78r(a), the Servicemen's Readjustment Act of 1958, 38 U.S.C. 1822(b), the Communications Act of 1934, 42 U.S.C. 206, and the Organized Crime Control Act of 1970, 18 U.S.C 1964(c). In cases under these laws, fees are an integral part of the remedy necessary to achieve compliance with our statutory policies. As former Justice Tom Clark found, in a union democracy suit under the Labor-Management Reporting and Disclosure Act (Landrum-Griffin),

Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. * * * Without counsel fees the grant of Federal jurisdiction is but an empty gesture * * * . Hall v. Cole, 412 U.S. 1 (1973), [3] quoting 462 F.2d 777, 780-81 (2d Cir. 1972).

The remedy of attorneys' fees has always been recognized as particularly appropriate in the civil rights area, and civil rights and attorneys' fees have always been closely interwoven. In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights ****5911** laws. [4] The very first attorneys' fee statute was a civil rights law, the Enforcement Act of 1870, 16 Stat. 140, which provided for attorneys' fees in three separate provisions protecting voting rights. [5]

Modern civil rights legislation reflects a heavy reliance on attorneys' fees as well. In 1964, seeking to assure full

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compliance with the Civil Rights Act of that year, we authorized fee shifting for private suits establishing violations of the public accommodations and equal employment provisions. 42 U.S.C. 2000a-3(b) and 2000e-5(k). Since 1964, every major civil rights law passed by the Congress has included, or has been amended to include, one or more fee provisions. ***4** E.g., Title VIII of the Civil Rights Act of 2968, 42 U.S.C. 3612(c); the Emergency School Aid Act of 1972, 20 U.S.C. 1617; the Equal Employment Amendments of 1972, 42 U.S.C. 2000e-16(b); and the Voting Rights Act Extension of 1975, 42 U.S.C. 1973l(e).

These fee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy. Before May 12, 1975, when the Supreme Court handed down its decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), [6] many lower Federal courts throughout the Nation had drawn the obvious analogy between the Reconstruction Civil Rights Acts and these modern civil rights acts, and, following Congressional recognition in the newer statutes of the 'private attorney general' concept, were exercising their traditional equity powers to award attorneys' fees under early civil rights laws as well. [7]

These pre-Alyeska decisions remedied a gap in the specific statutory provisions and restored an important historic remedy for civil rights violations. However, in Alyeska, the United States Supreme Court, while referring to the desirability of fees in a variety of circumstances, ruled that only Congress, and not the courts, could specify which laws were important enough to merit fee shifting under the 'private attorney general' theory. The Court expressed the view, in dictum, that the Reconstruction Acts did not contain the necessary congressional authorization. This decision and dictum created anomalous gaps in our civil rights laws whereby awards of fees are, according to Alyeska, suddenly unavailable in the most fundamental civil rights cases. For instance, fees are now authorized in an employment discrimination suit under Title VII of the 1964 Civil Rights Act, but not in the same suit brought under 42 U.S.C. 1981, which protects similar rights but involves fewer technical prerequisites to the filing of an action. Fees are allowed in a housing discrimination suit brought under Title VIII of the Civil Rights Act of 1968, but not in the same suit brought under 42 U.S.C. 1982, a Reconstruction Act protecting the same rights. Likewise, fees are allowed in a suit under Title II of the 1964 Civil Rights Act challenging discrimination in a private restaurant, but not in suits under 42 U.S.C. 1983 redressing violations of the Federal Constitution or laws by officials sworn to uphold the laws.

****5912** This bill, S. 2278, is an appropriate response to the Alyeska decision. It is limited to cases arising under our civil rights laws, a category of cases in which attorneys' fees have been traditionally regarded as appropriate. It remedies gaps in the language of these civil rights laws by providing the specific authorization required by the Court in Alyeska, and makes our civil rights laws consistent.

It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by S. 2278, if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968). [8] ***5** Such 'private attorneys general' should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose. Richardson v. Hotel Corporation of America, 332 F.Supp. 519 (E.D. La. 1971), aff'd, 468 F.2d 951 (5th Cir. 1972). (A fee award to a defendant's employer, was held unjustified where a claim of racial discrimination, though meritless, was made in good faith.) Such a party, if unsuccessful, could be assessed his opponent's fee only where it is shown that his suit was clearly frivolous, vexatious, or brought for harassment purposes. United States Steel Corp. v. United States, 385 F.Supp. 346 (W.D. Pa. 1974), aff'd, 9 E.P.D. 10,225 (3d Cir. 1975). This bill thus deters frivolous suits by authorizing an award of attorneys' fees against a party shown to have litigated in 'bad faith' under the guise of attempting to enforce the Federal rights created by the statutes listed in S. 2278. Similar standards have been followed not only in the Civil Rights Act of 1964, but in other statutes providing for attorneys' fees. E.g., the Water Pollution Control Act, 1972 U.S.Code Cong. & Adm.News 3847; the Marine Protection Act, Id. at 4249-50; and the Clean Air Act, Senate Report No. 91-1196, 91st Cong., 2d Sess., p. 483 (1970). See also Hutchinson v. William Barry, Inc., 50 F.Supp. 292, 298 (D. Mass. 1943) (Fair Labor Standards Act).

In appropriate circumstances, counsel fees under S. 2278 may be awarded pendente lite. See Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974). [9] Such awards are especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues. See Bradley, supra; Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970). Moreover for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. Kopet v. Esquire Realty Co., 523 F.2d 1005 (2d Cir. 1975), and cases cited therein;

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****5913** Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970); Richards v. Griffith Rubber Mills, 300 F.Supp. 338 (D. Ore. 1969); Thomas v. Honeybrook Mines, Inc., 428 F.2d 981 (3d Cir. 1970); Aspira of New York, Inc. v. Board of Education of the City of New York, 65 F.R.D. 541 (S.D.N.Y. 1975).

In several hearings held over a period of years, the Committee has found that fee awards are essential if the Federal statutes to which S. 2278 applies are to be fully enforced. [10] We find that the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance. Fee awards are therefore provided in cases covered by S. 2278 in accordance with Congress' powers under, inter alia, the Fourteenth Amendment, Section 5. As with cases brought under 20 U.S.C. 1617, the Emergency School Aid Act of 1972, defendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, [11] will be collected either directly from the official, in his official capacity, [12] from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

***6** It is intended that the amount of fees awarded under S. 2278 be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature. The appropriate standards, see Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974); Davis v. County of Los Angeles, 8 E.P.D. 9444 (C.D. Cal. 1974); and Swann v. Charlotte-Mecklenburg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.' Davis, supra; Stanford Daily, supra, at 684.

This bill creates no startling new remedy-- it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys' fees which had been going on for years prior to the Court's May decision. It does not change the statutory provisions regarding the protection of civil rights except as it provides the fee awards which are necessary if citizens are to be able to effectively secure compliance with these existing statutes. There are very few provisions in our Federal laws which are self-executing. Enforcement of the laws depends on governmental action and, in some cases, on private action through the courts. If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.

* * * *

***7 **5914** COST OF LEGISLATION

The Congressional Budget Office, in a letter dated March 1, 1976, has advised the Judiciary Committee that: 'Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 2278, a bill to award attorneys' fees to prevailing parties in civil rights suits.

'Based on this review, it appears that no additional costs to the government would be incurred as a result of the enactment of this bill.'

1 95 S.Ct. 1612, 4 L.Ed.2d 141.

2 88 S.Ct. 964, 19 L.Ed.2d 1263.

3 93 S.Ct. 193, 36 L.Ed.2d 702.

4 For example, the Civil Rights Act of 1866 directed Federal courts to 'use that combination of Federal law, common law and State law as will be best adapted to the object of the civil rights laws.' Brown v. City of Meridian, Mississippi, 356 F.2d 602, 605 (5th Cir. 1966). See 42 U.S.C. 1988; Lefton v. City of Hattiesburg, Mississippi, 333

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F.2d 280 (5th Cir. 1964).

5 The causes of action established by these provisions were eliminated in 1894. 28 Stat. 36.

6 95 S.Ct. 1612, 44 L.Ed.2d 141.

7 These civil rights cases are too numerous to cite here. See, e.g., Sims v. Amos, 340 F.Supp. 691 (M.D. Ala. 1972), aff'd, 93 S.Ct. 290, 409 U.S. 942, 34 L.Ed.2d 215 (1972); Sanford Daily v. Zurcher, 366 F.Supp. 18 (N.D. Cal. 1973); and cases cited in Alyeska Pipeline, supra, at n. 46. Many of the relevant cases are collected in 'Hearings on the Effect of Legal Fees on the Adequacy of Representation Before the Subcom. on Representation of Citizen Interests of the Senate Comm. on the Judiciary.' 93rd Cong., 1st. sess., pt. III, at pp. 888-1024, and 1060-62.

8 88 S.Ct. 964, 19 L.Ed.2d 1263. In the large majority of cases the party or parties seeking to enforce such rights will be the plaintiffs and/or plaintiff-intervenors. However, in the procedural posture of some cases, the parties seeking to enforce such rights may be the defendants and/or defendant-intervenors. See, e.g., Shelley v. Kraemer, 334 U.S. 1 (1948).

9 94 S.Ct. 2006, 40 L.Ed.2d 476.

10 See, e.g., 'Hearings on the Effect of Legal Fees,' supra.

11 Fairmont Creamery Co. v. Minnesota, 275 U.S. 168 (1927).

12 Proof that an official had acted in bad faith could also render him liable for fees in his individual capacity, under the traditional bad faith standard recognized by the Supreme Court in Alyeska. See Class v. Norton, 505 F.2d 123 (2d Cir. 1974); Doe v. Poelker, 515 F.2d 541 (8th Cir. 1975).

(Note: 1. PORTIONS OF THE SENATE, HOUSE AND CONFERENCE REPORTS, WHICH ARE DUPLICATIVE OR ARE DEEMED TO BE UNNECESSARY TO THE INTERPRETATION OF THE LAWS, ARE OMITTED. OMITTED MATERIAL IS INDICATED BY FIVE ASTERISKS: *****. 2. TO RETRIEVE REPORTS ON A PUBLIC LAW, RUN A TOPIC FIELD SEARCH USING THE PUBLIC LAW NUMBER, e.g., TO(99-495))

S. REP. 94-1011, S. Rep. No. 1011, 94TH Cong., 2ND Sess. 1976, 1976 U.S.C.C.A.N. 5908, 1976 WL 14051 (Leg.Hist.)

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ATTACHMENT B

94TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 94-1558

THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976

SEPTEMBER 15, 1976.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. DRINAN, from the Committee on the Judiciary, submitted the following

REPORT

[Including cost estimate of the Congressional Budget Office]

[To accompany H.R. 15460]

The Committee on the Judiciary, to whom was referred the bill (H.R. 15460) to allow the awarding of attorney's fees in certain civil rights cases, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

H.R. 15460, the Civil Rights Attorney's Fees Awards Act of 1976, authorizes the courts to award reasonable attorney fees to the prevailing party in suits instituted under certain civil rights acts. Under existing law, some civil rights statutes contain counsel fee provisions, while others do not. In order to achieve uniformity in the remedies provided by Federal laws guaranteeing civil and constitutional rights, it is necessary to add an attorney fee authorization to those civil rights acts which do not presently contain such a provision.

The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the United States have civil rights responsibilities, their authority and resources are limited. In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality. Unless the judicial remedy is full and complete, it will remain a meaningless right. Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, H.R. 15460 is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law.

57-006

HeinOnline -- 1 Civil Rights Attorney's Fees Awards Act of 1976 (Public Law 94-559, S. 2278) Source Book: Legislative History, Texts, and Other Documents 209 1976

The three key features of this attorney's fee provision are: (1) that awards may be made to any "prevailing party"; (2) that fees are to be allowed in the discretion of the court; and (3) that awards are to be "reasonable". Because other statutes follow this approach, the courts are familiar with these terms and in fact have reviewed, examined, and interpreted them at some length.

1. Prevailing party

Under H.R. 15460, either a prevailing plaintiff or a prevailing defendant is eligible to receive an award of fees. Congress has not always been that generous. In about two-thirds of the existing statutes, such as the Clayton Act and the Packers and Stockyards Act, only prevailing plaintiffs may recover their counsel fees.[13] This bill follows the more modest approach of other civil rights acts.

It should be noted that when the Justice Department testified in support of H.R. 9552, the precedessor to H.R. 15460, it suggested an amendment to allow recovery only to prevailing plaintiffs. Assistant Attorney General Lee thought the phrase "prevailing party" might have a "chilling effect" on civil rights plaintiffs, discouraging them from initiating law suits. The Committee was very concerned with the potential impact such a phrase might have on persons seeking to vindicate these important rights under Federal law. In light of existing case law under similar provisions, however, the Committee concluded that the application of current standards to this bill will significantly reduce the potentially adverse affect on the victims of unlawful conduct who seek to assert their federal claims.

On two occasions, the Supreme Court has addressed the question of the proper standard for allowing fees in civil rights cases. In *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (per curiam), a case involving racial discrimination in a place of public accommodation, the Court held that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."

Five years later, the Court applied the same standard to the attorney's fee provision contained in Section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. 1617. *Northcross* v. *Memphis Board of Education*, 412 U.S. 427 (1973) (per curiam). The rationale of the rule rests upon the recognition that nearly all plaintiffs in these suits are disadvantaged persons who are the victims of unlawful discrimination or unconstitutional conduct. It would be unfair to impose upon them the additional burden of counsel fees when they seek to invoke the jurisdiction of the federal courts. "If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." *Newman* v. *Piggie Park Enterprises, Inc., supra* at 402.

Consistent with this rationale, the courts have developed a different standard for awarding fees to prevailing defendants because they do "not appear before the court cloaked in a mantle of public interest." *United States Steel Corp.* v. *United States*, 519 F.2d 359, 364 (3rd Cir. 1975). As noted earlier such litigants may, in proper circum-

[13] 15 U.S.C. 15 (Clayton Act) ; 7 U.S.C. 210(f) (Packers and Stockyards Act).

HeinOnline -- 1 Civil Rights Attorney's Fees Awards Act of 1976 (Public Law 94-559, S. 2278) Source Book: Legislative History, Texts, and Other Documents 214 1976

stances, recover their counsel fees under H.R. 15460. To avoid the potential "chilling effect" noted by the Justice Department and to advance the public interest articulated by the Supreme Court, however, the courts have developed another test for awarding fees to prevailing defendants. Under the case law, such an award may be made only if the action is vexatious and frivolous, or if the plaintiff has instituted it solely "to harass or embarrass" the defendant. *United States Steel Corp.* v. *United States*, *supra* at 364. If the plaintiff is "motivated by malice and vindictiveness," then the court may award counsel fees to the prevailing defendant. *Carrion* v. *Yeshiva University*, 535 F.2d 722 (2d Cir. 1976). Thus if the action is not brought in bad faith, such fees should not be allowed. See, *Wright* v. *Stone Container Corp.* 524 F.2d 1058 (8th Cir. 1975); see also *Richardson* v. *Hotel Corp of America*, 332 F. Supp. 519 (E.D.La. 1971), *aff'd without published opinion*, 468 F.24 951 (5th Cir. 1972). This standard will not deter plaintiffs from seeking relief under these statutes, and yet will prevent their being used for clearly unwarranted harassment purposes.

With respect to the awarding of fees to prevailing defendants, it should further be noted that governmental officials are frequently the defendants in cases brought under the statutes covered by H.R. 15460. See, *e.g.*, *Brown* v. *Board of Education*, *supra*; *Gautreaux* v. *Hills*, *supra*; *O'Connor* v. *Donaldson*, *supra*. Such governmental entities and officials have substantial resources available to them through funds in the common treasury, including the taxes paid by the plaintiffs themselves. Applying the same standard of recovery to such defendants would further widen the gap between citizens and government officials and would exacerbate the inequality of litigating strength. The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities.[14]

The phrase "prevailing party" is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits. It would also include a litigant who succeeds even if the case is concluded prior to a full evidentiary hearing before a judge or jury. If the litigation terminates by consent decree, for example, it would be proper to award counsel fees. *Incarcerated Men of Allen County* v. *Fair*, 507 F.2d 281 (6th Cir. 1974); *Parker* v. *Matthews*, 411 F. Supp. 1059 (D.D.C. 1976); *Aspira of New York, Inc.*, v. *Board of Education of the City of New York*, 65 F.R.D. 541 (S.D.N.Y. 1975). A "prevailing" party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed. *E.g.*, *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir.). *cert denied*, 409 U.S. 982 (1972); see also *Lea* v. *Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971); *Evers* v. *Dwyer*, 358 U.S. 202 (1958).

A prevailing defendant may also recover its fees when the plaintiff seeks and obtains a voluntary dismissal of a groundless complaint,

[14] Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments. *Fitzpatrick* v. *Bitzer*, ——U.S.——, 96 S.Ct. 2666 (June 28, 1976).

HeinOnline -- 1 Civil Rights Attorney's Fees Awards Act of 1976 (Public Law 94-559, S. 2278) Source Book: Legislative History, Texts, and Other Documents 215 1976

Corcoran v. *Columbia Broadcasting System*, 121 F.2d 575 (9th Cir. 1941), as long as the other factors, noted earlier, governing awards to defendants are met. Finally the courts have also awarded counsel fees to a plaintiff who successfully concludes a class action suit even though that individual was not granted any relief. *Parham* v. *Southwestern Bell Telephone Co., supra; Reed* v. *Arlington Hotel Co., Inc.*, 476 F.2d 721 (8th Cir. 1973).

Furthermore, the word "prevailing" is not intended to require the entry of a *final* order before fees may be recovered. "A district court must have discretion to award fees and costs incident to the final disposition of interim matters." *Bradley* v. *Richmond School Board*, 416 U.S. 696, 723 (1974); see also *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). Such awards pendente lite are particularly important in protracted litigation, where it is difficult to predicate with any certainty the date upon which a final order will be entered. While the courts have not yet formulated precise standards as to the appropriate circumstances under which such interim awards should be made, the Supreme Court has suggested some guidelines. "(T)he entry of any order that determines substantial rights of the parties may be an appropriate occasion upon which to consider the propriety of an award of counsel fees. . . ." *Bradley* v. *Richmond School Board, supra* at 722 n. 28.

2. Judicial discretion

The second key feature of the bill is its mandate that fees are only to be allowed in the discretion of the court. Congress has passed many statutes *requiring* that fees be awarded to a prevailing party.[15] Again the Committee adopted a more moderate approach here by leaving the matter to the discretion of the judge, guided of course by the case law interpreting similar attorney's fee provisions. This approach was supported by the Justice Department on Dec. 31, 1975. The Committee intends that, at a minimum, existing judicial standards, to which ample reference is made in this report, should guide the courts in construing H.R. 15460.

3. Reasonable fees

The third principal element of the bill is that the prevailing party is entitled to "reasonable" counsel fees. The courts have enumerated a number of factors in determining the reasonableness of awards under similarly worded attorney's fee provisions. In *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), for example, the court listed twelve factors to be considered, including the time and labor required, the novelty and difficulty of the questions involved, the skill needed to present the case, the customary fee for similar work, and the amount received in damages, if any. *Accord*: *Evans* v. *Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974); see also *United States Steel Corp.* v. *United States, supra.*

Of course, it should be noted that the mere recovery of damages should not preclude the awarding of counsel fees.[16] Under the anti-

[15] E.g., 7 U.S.C. 499g(b) (Perishable Agricultural Commodities Act); 15 U.S.C. 1640(a) (Truth-in-Lending Act); 46 U.S.C. 1277 (Merchant Marine Act of 1936); 47 U.S.C. 206 (Communications Act of 1934).

[16] Similarly, a prevailing party is entitled to counsel fees even if represented by an organization or if the party is itself an organization. *Incarcerated Men of Allen County* v. *Fair, supra; Torres* v. *Sachs*, 69 F.R.D. 343 (S.D.N.Y. 1975), aff'd. —— F.2d —— (2d Cir., June 25, 1976); *Fairley* v. *Patterson*, 493 F2d 598 (5th Cir. 1974).

HeinOnline -- 1 Civil Rights Attorney's Fees Awards Act of 1976 (Public Law 94-559, S. 2278) Source Book: Legislative History, Texts, and Other Documents 216 1976

ATTACHMENT C

2009 WL 481293
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Seattle.

Sherman PRUITT, and Melody Pruitt, Plaintiffs,
v.
The CITY OF ARLINGTON, a municipal corporation, and Jonathan Wells, and John Doe Arlington Police Officers 1–5, Defendants.

No. C08–1107 MJP. | Feb. 23, 2009.

Attorneys and Law Firms

Lembhard Goldstone Howell, Seattle, WA, for Plaintiffs.

Richard B. Jolley, Keating, Bucklin & McCormack, Seattle, WA, for Defendants.

Opinion

ORDER DENYING PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIM OF DEFENDANTS

MARSHA J. PECHMAN, District Judge.

***1** This matter comes before the Court on Plaintiff's motion to dismiss the Defendants' counterclaim under RCW 4.24.350. Having considered Plaintiff's motion and supporting documents (Dkt.Nos.15–16), Defendants' response (Dkt. No. 21), and Plaintiffs' reply (Dkt. No. 25), the Court DENIES Plaintiffs' motion.

Background

Plaintiffs bring this action alleging violations of 42 U.S.C. § 1983 and the Fourth and Fourteenth Amendments of the United States Constitution. (Dkt. No. 1 at 3–5.) In response, Defendants bring a counterclaim for malicious prosecution under RCW 4.24.350(2). (Dkt. No. 12.)

Discussion

Washington common law provides a remedy for malicious prosecution if seven elements are met: 1) the defendant instituted or continued a prior action; 2) probable cause for that action was absent; 3) the proceedings were instituted or continued through malice; 4) the proceedings were terminated on the merits in favor of the plaintiff; 5) the plaintiff suffered injury or damage as a result of that action; 6) an arrest or seizure of property occurred; and 7) the plaintiff suffered special injury of a nature that would not necessarily result from similar actions. *Clark v. Baines,* 150 Wash.2d 905, 911–12, 84 P.3d 245 (2004).

RCW 4.24.350 eliminates the need to show arrest, seizure, or injury, and lessens the burden of proving malicious prosecution for judicial officers, prosecuting attorneys, and law enforcement officers. The statute also allows liquidated damages and reasonable attorney's fees. RCW 4.24.350(2).

Plaintiffs' argument, that this statute violates the First Amendment's protections of free expression, fails. Plaintiffs argue that lawsuits are protected speech (Dkt. No. 15 at 9). Even if lawsuits generally are protected speech, the lawsuits covered by the Washington statute concern suits that are false and unfounded. Baseless litigation, motivated by unlawful purpose, is not protected by the First Amendment. *BE & K Constr. Co. v. NLRB,* 536 U.S. 516, 531, 122 S.Ct. 2390, 153 L.Ed.2d 499 (2002), nor is it a fundamental right. *Wender v. Snohomish County,* No. C07–197Z, 2007 WL 3165481, at *4 (W.D.Wash. Oct.24, 2007). Governmental and police officials are not a suspect class. *Id.* Therefore, the Court reviews this statute by asking whether the Legislature had a rational basis for enacting it. *Id.* (adopting Judge Bryan's approach in *Bakay v. Yarnes,* No. C04–5803–RJB, 2005 WL 2454168, at *6 (W.D.Wash. Oct.4, 2005). RCW 4.24.350(2) was passed in response to the "growing number of unfounded lawsuits, ... filed against law enforcement officers, ..." and with the purpose of providing a remedy to those officials. Laws of 1984, ch. 133, 1. RCW 4.24.350(2) easily survives rational basis review because the Washington Legislature set forth a "rational reason for the statute," and there is a "rational relationship between the stated reason for the statute and the statute's content." *Bakay,* 2005 WL 2454168, at *6.

***2** Second, Plaintiffs erroneously rely upon *Chaker v. Crogan,* 428 F.3d 1215, 1227–28 (9th Cir.2005) (holding that a California statute unconstitutionally restricted certain viewpoints by making it a misdemeanor to file false complaint reports with the police department). *Chaker* is distinguishable. While the California statute

was penal in nature and thus actively proscribed certain conduct, RCW 4.24.350(2) is a civil statute that was intended to be purely remedial. *See* Laws of 1984, ch. 133, 1, 3. In *Chaker,* the California statute was invalidated because *only* false complaints against government officials were proscribed. *Chaker,* 428 F.3d at 1226. In contrast, the Washington statute proscribes no conduct at all. Washington common law provides anyone with a cause of action for malicious prosecution; the State Legislature merely limited the elements that must be proven by certain plaintiffs. The Washington statute limits no one's access to the courts, nor does it dictate what type of lawsuit may be filed. Thus, *Chaker* does not control this Court's analysis.

The Plaintiffs' argument that RCW 4.24.350(2) is preempted by the Federal Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 is unavailing. Plaintiffs claim that RCW 4.24.350(2) conflicts with the federal statute because the state law requires a "lesser showing" to prove that an action is frivolous. (Dkt. No. 15 at 13.) This argument is directly contradicted by the requirements of the respective statutes. While § 1988 requires only that the plaintiff's suit be objectively groundless in order for the defendant to obtain attorney's fees, RCW 4.24.350(2) requires the defendant to prove additionally that the plaintiff subjectively knew that the claim was false. The two statutes do not conflict.

Finally, the Plaintiffs unsuccessfully contend that RCW 4.24.350 violates the Washington State Constitution, in particular Article I §§ 4, 5, and 12. Plaintiffs provide no support for their position and merely quote the articles. (Dkt. No. 15 at 14.) As to Article I, § 12, the privileges and immunities provision (Dkt. No. 15 at 14), they rely upon *Harmon v. McNutt,* 91 Wash.2d 126, 130–31, 587 P.2d 537 (1978), which stands for the twin propositions that Article I, § 12 requires that persons similarly situated with respect to the purpose of the law receive like treatment and that the question of "like treatment" be determined by rational basis review. As discussed above, RCW 4.24.350(2) survives that deferential review. Unlike the situation in *Harmon,* the case before this Court does not involve similarly situated groups of individuals. There is insufficient authority to support a finding that RCW 4.24.350(2) violates the Washington State Constitution.

The Court DENIES Plaintiff's motion to dismiss Defendants' counterclaim. The Clerk is directed to send a copy of this order to all counsel of record and mail a copy to Plaintiff.

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ATTACHMENT D

2012 WL 2505515
Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Orlando Division.

Bridget GORDON, Mitchell Gordon a/k/a Mitch Gordon, Plaintiffs,
v.
Kevin BEARY, City of Ocoee, City of Winter Garden, Ronald Wilcox, Donna OLphie, Mike Henry, Brian Pace, Brian Saterlee, Defendants.

No. 6:08–cv–73–Orl–35KRS. | April 24, 2012.

Attorneys and Law Firms

Abbye Erika Alexander, Howard S. Marks, Lisa J. Geiger, Burr & Forman, LLP, Winter Park, FL, for Plaintiffs.

Bruce R. Bogan, Deborah I. Mitchell, Hilyard, Bogan & Palmer, PA, Orlando, FL, for Defendants.

Opinion

REPORT AND RECOMMENDATION

KARLA R. SPAULDING, United States Magistrate Judge.

***1 TO THE UNITED STATES DISTRICT COURT:** This cause came on for consideration without oral argument on the following motion filed herein:

MOTION:	DEFENDANTS, SHERIFF KEVIN BEARY'S AND RONALD WILCOX'S, RENEWED MOTION FOR ATTORNEY'S FEES (Doc. No. 163)
....	
FILED:	December 16, 2011

I. PROCEDURAL HISTORY.
In the Second Amended Complaint, Plaintiff Bridget Gordon alleged that Defendant Ronald Wilcox violated her constitutional rights under 42 U.S.C. § 1983, including her Fourth and Fourteenth Amendment rights to be free from unlawful search, wrongful arrest, malicious prosecution and unlawful seizure. Doc. No. 58. She also alleged state law claims of false arrest and malicious prosecution against Wilcox. Gordon alleged that Defendant Kevin Beary, in his official capacity as sheriff of Orange County, Florida, also violated her constitutional rights under § 1983, and she asserted state law claims of false arrest and conversion against Sheriff Beary. Plaintiff Mitchell Gordon asserted the state law claim of loss of consortium against both Sheriff Beary and Wilcox. *Id.*

On September 18, 2008, Beary and Wilcox served Proposals for Settlement on Plaintiffs. Doc. No. 141–1. The proposals offered to settle the state law claims for $100.00. *Id.* Plaintiffs did not respond to the proposals within thirty days and the offers were deemed denied under Florida law. Fla. R. Civ. P. § 1.442(f)(1).

On April 12, 2010, the Court granted Sheriff Beary and Defendant Wilcox's motions for summary judgment. Doc. No. 134. Judgment was entered in favor of Beary and Wilcox on April 13, 2010. Doc. No. 135.

On May 13, 2010, Beary and Wilcox filed a motion for attorney's fees, and Plaintiffs responded to the motion. Doc. Nos. 141, 147. The Court denied the motion for attorney's fees without prejudice due to the pendency of a motion for reconsideration. Doc. No. 150. On August 20, 2010, the Court denied the motion for reconsideration. Doc. No. 153.

Beary and Wilcox renewed their motion for attorney's fees. Doc. No. 154. Subsequently, Plaintiffs filed a notice

of appeal. Doc. No. 156. The Court denied the motion for attorney's fees without prejudice based on the pending appeal. Doc. No. 157. The United States Court of Appeals for the Eleventh Circuit affirmed the entry of summary judgment. Doc. No. 161.

Thereafter, Sheriff Beary and Wilcox filed a renewed motion for attorney's fees. Doc. No. 163. Plaintiffs responded to the motion. Doc. No. 165. The motion for attorney's fees was referred to the undersigned for issuance of a report and recommendation and is now ripe for review.

II. ANALYSIS.

Defendants Beary and Wilcox seek $93,989.40 in attorney's fees. Originally, Plaintiffs contended that the motion for attorney's fees was not timely filed, but Plaintiffs have now withdrawn that argument. Doc. No. 165 at 13.

A. Attorney's Fees Pursuant to the Proposals for Settlement

***2** In their renewed motion for attorney's fees, Defendants Beary and Wilcox incorporate the arguments made in their initial motion for attorney's fees. Doc. Nos. 141, 163. Beary and Wilcox claim they are entitled to attorney's fees for work performed on the state claims pursuant to Florida Statute § 768.79 and Florida Rules of Civil Procedure 1.442 and 1.525, which allow attorney's fees in certain circumstances following proposals for settlement.

Plaintiffs contend that the proposals for settlement were not valid, that no work was done solely on the state claims, and that fees permitted under section 768.79 are preempted by § 1983.

1. *Preemption.*

In *Moran v. City of Lakeland,* 694 So.2d 886 (Fla.2d Dist.Ct .App.1997), the Second District Court of Appeal considered whether a prevailing defendant could be awarded attorney's fees under section 768.79 in a civil rights action brought pursuant to § 1983. The Court held that fees were preempted by 42 U.S.C. § 1988, which has been construed to limit attorney's fees awarded to a prevailing defendant to cases in which the suit is vexatious, frivolous, or brought to harass or embarrass the defendant. *Id.* at 886–87; *see also Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 416–17, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978). In *Jones v. United Space Alliance, LLC,* 494 F.3d 1306, 1310–11 (11th Cir.2007), the United States Court of Appeals for the Eleventh Circuit, in reliance on *Moran,* held that federal law also preempted an award of attorney's fees under section 768.79 for work performed on state law claims that were joined with federal claims brought under Title VII. More recently, the Eleventh Circuit held in *Alansari v. Tropic Star Seafood, Inc.,* 395 F. App'x 629 (11th Cir.2010) (per curiam), an unpublished decision, that attorney's fees under section 768.79 were preempted as to retaliation claims brought pursuant to the Florida Whistleblower Act and the Florida Workers' Compensation Act because the facts underlying those state law claims were the same as the facts underlying that plaintiff's Title VII claim. *See also JES Properties, Inc. v. USA Equestrian, Inc.,* 432 F.Supp.2d 1283, 1295 (M.D.Fla.2006) (court found that fees under section 768.79 for state law claim of violation of the Florida Deceptive and Unfair Trade Practice Act was preempted by fee provisions of the federal antitrust claim).

In the present case, Bridget Gordon's civil rights act claim under § 1983 was based on the same facts underlying the state law claims against Sheriff Beary and Defendant Wilcox by both Bridget and Mitchell Gordon. In the order on Defendants' motion for summary judgment, regarding the claims against Defendant Wilcox, the Court stated:

> Plaintiff Bridget Gordon alleges against Defendant Wilcox federal claims for violations of her Fourth and Fourteenth Amendment rights to be free from unlawful search, wrongful arrest, malicious prosecution and unlawful seizure. Plaintiff Bridget Gordon also alleges against him corresponding state claims for false arrest and malicious prosecution. **Mrs. Gordon's state law claims rest on the same facts, and nearly the same law, as her corresponding federal claims.** Thus, the Court addresses concurrently Mrs. Gordon's federal and state claims.

***3** Doc. No. 134 at 11–12 (emphasis added). Similarly, the Court stated that the claims against Defendant Beary were "based almost entirely on those facts alleged against Defendant Wilcox." Doc. No. 134 at 27. The Court also found that the loss of consortium claim was a derivative tort and that without any liability to Bridget Gordon, there could be no liability to Mitchell Gordon. Doc. No. 134 at

30.

Because all of the state law causes of action arose from the facts and circumstances as the civil rights claim, under the rationale of *Moran, Jones* and *Alanstar,* federal law preempts an award of attorney's fees under section 768.79 for work performed defending the state law causes of action.

Even if an award of attorney's fees under section 768.79 was not preempted, Sheriff Beary and Defendant Wilcox have not presented evidence supporting their assertion that they performed work on the state law causes of action that they would not have performed in defending the civil rights claim. *Cf. Fox v. Vice,* ––– U.S. ––––, 131 S.Ct. 2205, 180 L.Ed.2d 45 (2011) (United States Supreme Court held in a civil rights case asserting both frivolous and non-frivolous claims that prevailing defendant may be awarded fees incurred solely because of the frivolous claims but may not be awarded fees for any work that would have been done in the absence of the frivolous claims). As such, they have not provided evidence sufficient to apportion fees for work that was performed solely in defense of the state law claims.

2. *Validity of Proposals.*
Plaintiffs alternatively contend that the proposals for settlement were not valid. Bridget Gordon argues that the proposals made to her included ambiguous language regarding the release of claims, which language could be interpreted to release her § 1983 claim because it arose from the same facts underlying Bridget Gordon's claim for false arrest and malicious prosecution and Mitchell Gordon's claim for loss of consortium. The pertinent release language in the proposals to Bridget Gordon is as follows:

> BRIDGET GORDON ... does hereby remise, release and forever discharge RONALD WILCOX, ... of and from *any and all manner of action, or actions, cause and causes of actions, suits ... claims and demand whatsoever, in law or in equity,* which ... BRIDGET GORDON ... shall or may have upon or by reason of the alleged false arrest and malicious prosecution claims currently pending [in the present case].

Doc. No. 141–1 at 6–7 (emphasis added); *accord* Doc. No. 141–1 at 15 (release in offer from Sheriff Beary).

The pertinent release language in the proposals to Mitchell Gordon is as follows:

> MITCHELL GORDON ... does hereby remise, release and forever discharge RONALD WILCOX, ... of and from *any and all manner of action, or actions, cause and causes of actions, suits ... claims and demand whatsoever, in law or in equity,* which ... MITCHELL GORDON ... shall or may have upon or by reason of the alleged loss of consortium claim currently pending [in the present case].

***4** Doc. No. 141–1 at 22–23 (emphasis added); *accord* Doc. No. 141–1 at 30–31 (release in offer from Sheriff Beary).

"Where, as here, a release is requested as a condition of the proposal, either the proposed language of the release or a summary of the substance of the release being sought should be included within the proposal to comply with the requirement that it be 'particular.' " *Nichols v. State Farm Mutual,* 851 So.2d 742, 746 (Fla. 5th Dist.Ct.App.2003) (citing Fla. R. Civ. P. 1.442(c)(2) (C),(D)). The terms of the proposal should be "devoid of ambiguity, patent or latent." *Nichols,* 851 So.2d at 746. Because the scope of the release in the proposals to Bridget Gordon could apply to the federal claim as well as the state law claims, the terms of the release are ambiguous. Therefore, under Florida law, the offers of settlement to Bridget Gordon are invalid.

The terms of the proposals of settlement and release made to Mitchell Gordon do not contain the same ambiguity because Gordon has not asserted claims other than the state law loss of consortium claim. Thus, the offers of settlement to Mitchell Gordon were valid.

3. *Good Faith of Offers.*
Section 768.79(7)(a) provides as follows: "If a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees." "The good faith inquiry requires the trial court to review the facts and circumstances known to the offeror at the time it made the offer." *JES Properties, Inc.,* 432 F.Supp.2d at

1295. Plaintiffs bear the burden of proving the absence of good faith. *Tiara Condominium Ass'n v. Marsh USA, Inc.,* 697 F.Supp.2d 1349, 1353 (S.D.Fla.2010).

Plaintiffs rely solely on the nominal amount of the offers and the timing of the offers in support of their assertion that Defendants could not have had a reasonable foundation on which to ground their offers. Case law provides, however, that a nominal offer of judgment and the lack of discovery does not, standing along, establish bad faith. *Id.* Therefore, Plaintiffs have failed to sustain their burden of proving that the offers were not made in good faith.

III. RECOMMENDATION.

Based on the foregoing, I respectfully recommend that Defendants, Sheriff Kevin Beary's and Ronald Wilcox's, Renewed Motion for Attorney's Fees, Doc. No. 163, be **DENIED.**

Failure to file written objections to the proposed findings and recommendations contained in this report within fourteen (14) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

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