No. 25-10184 (consolidated with 25-10186, 25-10613, and 25-11163)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Disability Rights Florida, et al.,
Plaintiffs-Appellees,

v.

Florida Secretary of State,
Defendant-Appellant.

U.S. District Court for the Northern District of Florida, Nos. 4:21-cv-186-MW-MAF, 4:21-cv-187-MW-MAF, 4:21-cv-201-MW-MAF, and 4:21-cv-242-MW-MAF
(Walker, J.)

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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Per Rule 26.1 and Circuit Rule 26.1-1 to 26.1-3, Defendant-Appellant Florida Secretary of State certifies that the following have an interest in the outcome of this case. Note that "Defendant(s)," as opposed to "Defendant-Appellant," refers to defendants in the case other than the Florida Secretary of State.

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244. United States of America, *Amicus*

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251. Walker, Gertrude, *Defendant*

252. Walker, Mark, *District Court Judge*

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260. Zacherl, Frank, *Attorney for Intervenor-Defendant*

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Per Circuit Rule 26.1-2(c), Defendant-Appellant Florida Secretary of State certifies that the CIP contained herein is complete.

Dated: April 1, 2026

/s/ Mohammad O. Jazil
Mohammad O. Jazil
Counsel for Defendant-Appellant Florida Secretary of State

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ARGUMENT

I. Plaintiffs wrongly assert that they can be "prevailing parties" for a judgment that was vacated.

"[I]t is clear that a plaintiff may not claim status as a 'prevailing party' by virtue of any success during the course of a civil rights case." *Doe v. Busbee*, 684 F.2d 1375, 1380 (11th Cir. 1982). That's particularly true when an apparently successful order is vacated under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). *Munsingwear* vacatur "eliminates a judgment" after a case becomes moot. *Id.* at 40. It prevents that moot judgment from having "any legal consequences," thereby clearing the way for future litigation. *Id.* at 41. And with the judgment rendered moot, and the decision vacated, it follows that Plaintiffs can't be "prevailing parties" when *Munsingwear* applies.

Plaintiffs nevertheless insist that they remain "prevailing parties" entitled to fees for their challenge to the Registration-Disclaimer Provision. That's despite the legislature's repeal of the provision and this Court's vacating the judgment for mootness. With respect, the cases Plaintiffs cite in support of their argument neither do justice to the effect of *Munsingwear* vacatur nor bind this Court.

Thomas v. Bryant, 614 F.3d 1288 (11th Cir. 2010), certainly doesn't control here. *Bryant* only held that a successor in interest could pursue attorneys' fees as the "prevailing party" after the claim became moot because the original plaintiff passed away. *Id.* at 1294. It did not involve a challenged statutory provision that was repealed

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by the legislature. Nor did it apply *Munsingwear* and the effects of vacatur under that decision. *Bryant* therefore didn't address the precise issue now before this Court.

Johnson v. Mississippi, 606 F.2d 635 (5th Cir. 1979), did involve a challenge to a state statute that was subsequently amended and the appeal dismissed as moot. *Id.* at 636. But that case didn't discuss at any length the correctness of designating plaintiffs "prevailing parties" after an action by the legislature moots a challenge to a law. That's because the defendants didn't raise that issue in their appeal of the fees judgment. *Id.* at 637. *Johnson* didn't specifically apply *Munsingwear*, either.

Jacksonville Property Rights Ass'n v. City of Jacksonville, 635 F.3d 1266 (11th Cir. 2011), involved a challenge to city zoning regulations that were subsequently amended and the case dismissed as moot. *Id.* at 1275. Unlike the repeal of the Registration-Disclaimer Provision, the amendments to the zoning regulations were done by the defendant itself—the City of Jacksonville—not another branch of government. *Id.* at 1273. That's why the doctrine of voluntary cessation applied. *Id.* at 1274-75. *Munsingwear* didn't.

Doe v. Marshall, 622 F.2d 118 (5th Cir. 1980), neither involved a challenge to a statute (let alone one repealed by the legislature) nor an application of *Munsingwear*. That's also true of *Gaylor v. North Springs Associates, LLLP*, 648 F. App'x 807 (11th Cir. 2016), and *Jefferson County Board of Education v. Bryan M.*, 706 F. App'x 510 (11th Cir. 2017). There was also no vacatur in *Bryan M*. *Id.* at 516 (concluding that "vacatur was not appropriate" in that case).

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As for the decisions from other circuits that Plaintiffs cite, many didn't involve a claim becoming moot because the challenged statutory provision was repealed by the legislature. And almost none of them cited *Munsingwear*. Specific cases can be further distinguished for different reasons. For example, *National Rifle Ass'n of America, Inc. v. City of Chicago*, 646 F.3d 992 (7th Cir. 2011), involved parties that went through the full process of appellate review. The prevailing parties even obtained a favorable judgment from the Supreme Court. *Id.* at 994. The point is that the authorities Plaintiffs rely on for the most part don't address the specific situation in this case: vacatur of a district court's decision about a provision of state law because the legislature chose to repeal the provision before appellate litigation could assess the provision's constitutionality.

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More fundamentally, "[a]n order vacating the judgment on grounds of mootness would deprive [a plaintiff] of its claim for attorney's fees under 42 U.S.C. § 1988 (assuming, *arguendo*, it would have such a claim), because such fees are available only to a party that 'prevails' by winning the relief it seeks." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990). And if the principle underlying *Munsingwear* vacatur is that "none" should be "prejudiced by a decision which in the statutory scheme was only preliminary," 340 U.S. at 40, then the Secretary shouldn't be on the hook for attorneys' fees and costs for a challenge to a moot provision, a vacated district court order, or the actions of a different entity (the Florida Legislature).

II. Plaintiffs wrongly assert that they can recover fees from a party that was not the named defendant and whose intervention was not frivolous, unreasonable, or without foundation.

Turning to the Solicitation Definition claim, it's undisputed that the district court dismissed the claim against the Secretary. 4:21-cv-186, Doc.274 (order on motions to dismiss). That leaves the question of whether the Secretary's intervention on this claim was "frivolous, unreasonable, or without foundation." *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989). The district court did not find that it was any of these. That should be the end of the inquiry. Plaintiffs say it isn't.

As support, Plaintiffs rely on the Southern District of Florida's decision in *Mallory v. Harkness*, 923 F. Supp. 1546 (S.D. Fla. 1996), *aff'd without opinion*, 109 F.3d 771 (11th Cir. 1997). *Mallory* held that the Attorney General was liable for attorneys' fees under § 1988 as an intervening defendant for two main reasons. First, the Southern District considered the Attorney General's role in the case, specifically the point at which the Attorney General entered the case as an intervenor and the extent of the Attorney General's participation in the defense of the challenged statute. *Id.* at 1553. Second, the Southern District found it was important that the Attorney General was "acting as a representative of the state." *Id.* But neither of these reasons are part of *Zipes*'s categorical rule. *Zipes* makes no exceptions for government parties versus private parties, or intervening sooner versus intervening later.

Consider also the different roles of the named defendants and intervenors in *Mallory* and this case. In *Mallory*, "[t]he State and the Attorney General," not the named

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defendants, "were primarily responsible for violating Plaintiff's civil rights." *Id.* at 1552. By contrast, in this case, the district court dismissed the claim against the Secretary precisely because it found that the Supervisors of Elections were primarily responsible for enforcing the Solicitation Definition and *not* the Secretary. *See* 4:21-cv-186, Doc.274 (order on motions to dismiss).

Planned Parenthood of Central New Jersey v. Attorney General, 297 F.3d 253 (3d Cir. 2002), isn't dispositive, either. It primarily addressed whether legislative immunity applied in a case where the legislature intervened to defend a statute. *Id.* at 261-65. In holding that the legislature was liable for fees, the court found it significant that the legislature didn't intervene to protect the interests of a third party. *Id.* at 264-65. Again, that third-party distinction is not required by the rule stated in *Zipes*.

Jenkins v. Missouri, 967 F.2d 1248 (8th Cir. 1992), and *Freed v. Thomas*, 137 F.4th 552 (6th Cir. 2025), also aren't on point. *Jenkins* addressed a different question: whether the State of Missouri, as the named defendant, could be liable for fees incurred by plaintiffs in litigating against intervenors. 967 F.2d at 1250. The Eighth Circuit recognized that "[s]ince *Zipes* considered the liability of a losing intervenor, not that of a defendant, its holding obviously does not decide the issue in this case." *Id.* at 1250-51. And unlike the Secretary, the State in *Jenkins* was found to be "a Constitutional violator," and thereby "not entitled to the solicitude *Zipes* showed the 'blameless' intervenor." *Id.* at 1251.

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In *Freed*, the State of Michigan intervened in the case pursuant to 28 U.S.C. § 2403(b). 137 F.4th at 555. That statute "makes intervening states 'subject to all liabilities of a party as to court costs.'" *Id.* (quoting 28 U.S.C. § 2403(b)). In holding the State liable for fees, the Sixth Circuit found it important that "[s]ection 2403(b) tells us to make those parties liable for 'all… court costs,' which includes attorneys' fees in the § 1983 context." *Id.* at 560 (omission in original) (quoting 28 U.S.C. § 2403(b)). By contrast, in this case, the Secretary didn't move to intervene under § 2403(b). *See* 4:21-cv-186, Doc.337 (motion to intervene); *see also* 4:21-cv-186, Doc.359 (order granting motion to intervene, which did not cite § 2403(b)).

For what it's worth, the Fourth Circuit's decision in *Brat v. Personhuballah*, 883 F.3d 475 (4th Cir. 2018), supports the Secretary's position. There, the Fourth Circuit held that several Congressmen who intervened to defend a districting plan were not liable for fees under § 1988. *Id.* at 484. Applying the rule from *Zipes*, the Fourth Circuit concluded that the intervening defendants were not liable because they "were not alleged to have carried out the unconstitutional delineation of congressional districts." *Id.* at 481. The intervenors "were not charged with any responsibility in the enactment of the state law." *Id.* And "the relief that the plaintiffs sought could not have been obtained from" the intervening defendants. *Id.*

Brat even rejected the argument being forward here that "by defending a practice or a law, intervenors thereby become wrongdoers responsible for that practice or law." *Id.* at 482. The Fourth Circuit explained that, for purposes of the *Zipes* rule, "blameless"

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intervenors are "intervenors who had not been found to have committed wrongdoing under the relevant statute." *Id.* The intervening Congressmen were blameless because "they were never accused of enacting or enforcing an unconstitutional law, nor were they found to have violated § 1983 and the Equal Protection Clause." *Id.*

As *Brat* correctly explained, the "focus" of the *Zipes* rule is "on who *was liable* under the law," not "on who *was defending* a law." *Id.* at 483. "Clearly, simply engaging in the act of litigating and taking a position opposed to the plaintiffs are not violations of § 1983 and the Constitution so as to justify a fee award." *Id.* at 482. "It is not the parallel advancement of positions that determines whether the *Zipes* principle applies; it is whether the intervenors are wrongdoers *from whom plaintiffs could obtain relief*." *Id.* at 483 (emphasis added); *see also Zipes*, 491 U.S. at 765 ("that an intervenor can advance the same argument as a defendant does not mean that the two must be treated alike for purposes of fee assessments").

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Judged against the standard from *Zipes*, the Secretary shouldn't be liable for fees. Plaintiffs aren't obtaining relief from the Secretary when it comes to the Solicitation Definition. This Court has already made clear that the Supervisors of Elections—not the Secretary—enforce provisions like this one. *Jacobson v. Florida Secretary of State*, 974 F.3d 1236, 1254 (11th Cir. 2020). The district court's order dismissing the Secretary came to the same conclusion. So, borrowing from the district court, it would now be "strange" to make the Secretary liable for fees given "the standing framework created by the Eleventh Circuit in *Jacobson*." *E.g.*, 4:21-cv-186, Doc.784 at 11 n.5.

Turning back to *Zipes* then, when the intervenor isn't responsible for causing the alleged harm, the rule is this: "district courts should similarly award [§ 1988] attorney's fees against losing intervenors only where the intervenors' action was frivolous, unreasonable, or without foundation." 491 U.S. at 761. An intervenor can make "vigorous" "arguments that go to the merits" without incurring fees. *Id.* at 766.

Lastly, about Plaintiffs' policy argument, it's true that the purpose behind fee-shifting statutes like § 1988 is "to make the wrongdoers pay at law—assuring that the incentive to such suits will not be reduced by the prospect of attorney's fees that consume the recovery." *Id.* at 761. "Assessing fees against blameless intervenors, however, is not essential to that purpose." *Id.* And, in the end, the Secretary was not found to have violated any constitutional right. Nor was the Secretary's defense of the Solicitation Definition frivolous, unreasonable, or without foundation. *Zipes* thus compels the conclusion that the Secretary is not liable for fees and expenses.

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CONCLUSION

For these reasons, the State asks this Court to reverse the district court's orders granting Plaintiffs fees and expenses for the Registration-Disclaimer Provision and Solicitation Definition claims.

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B)(i) because it contains 2,059 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it has been prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

Dated: April 1, 2026

/s/ Mohammad O. Jazil
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed on ECF.

Dated: April 1, 2026

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