

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

MOHAMED A. EL-TABECH,	)	
	)	Case No.: 4:04CV3231
Plaintiff,	)	
	)	
v.	)	<b>PLAINTIFF’S MOTION FOR RELIEF</b>
	)	<b>UNDER FED. R. CIV. P 69(a) OR 70</b>
HAROLD W. CLARKE, ET AL.	)	
	)	
Defendants.	)	

Plaintiff, pursuant to Fed. R. Civ. P. 69(a) and 70, requests that the Court enter an order requiring the Defendants and/or Shane Osborn, the Nebraska State Treasurer, and Carlos Castillo, the Nebraska Director of Administrative Services, pay the judgment for attorneys’ and costs entered by this Court on May 5, 2008 (Judgment, Filing No. 204, May 5, 2008) in the total amount of \$204,856.28 within 10 days of the date of this Court’s order, together with the additional interest and relief sought in this motion.

In addition, Plaintiff requests that the Court increase the amount of post-judgment interest payable on such judgment to a rate deemed reasonable by the Court and appropriate to insure the Defendants’ compliance with the Court’s order. Plaintiff further requests that the Court require that Defendants reimburse Plaintiff’s counsel for interest on their law firm’s operating note at the rate of \$28.47 per day from the date of judgment until paid. Finally, Plaintiff requests that in the event Defendants or any representative from the State of Nebraska appeal from this Court’s order effectuating the relief sought above, that the Court not stay execution of the judgment pending appeal.

In support of this Motion, Plaintiff relies upon its Brief in Support of Plaintiff’s Motion for Relief under Fed. R. Civ. P. 69(a) or 70, and Plaintiff’s Index of Evidence.

MOHAMED A. EL-TABECH, Plaintiff

BY: OGBORN, SUMMERLIN & OGBORN, P.C.  
GENE SUMMERLIN - 19611  
TED J. LANE - 23426  
610 J Street, Suite 200  
Lincoln, NE 68508  
(402) 434-8040  
gene@osolaw.com  
ted@osolaw.com

BY: /s/ Gene Summerlin

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 21st day of October, 2008, the foregoing document was electronically filed using the CM/ECF system which sent notification of the filing to the following:

Matthew A. Works  
Assistant Attorney General  
2115 State Capitol Bldg.  
Lincoln, NE 68509  
[matt.works@ago.ne.gov](mailto:matt.works@ago.ne.gov)

/s/ Gene Summerlin

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MOHAMED A. EL-TABECH,	)	
	)	Case No.: 4:04CV3231
Plaintiff,	)	
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v.	)	<b>BRIEF IN SUPPORT OF PLAINTIFF’S</b>
	)	<b>MOTION FOR RELIEF UNDER FED. R.</b>
HAROLD W. CLARKE, ET AL.	)	<b>CIV. P 69(a) OR 70</b>
	)	
Defendants.	)	

**INTRODUCTION**

This Court issued a judgment directing Defendants to pay \$204,856.28 in attorneys’ fees and costs to Plaintiff’s attorneys. Defendants refuse to pay the judgment.

Federal courts are not reduced to issuing judgments against state officers and hoping for compliance.

...  
The defendants . . . last desperate effort [to] . . . refuse[] to pay over the attorneys’ fees, raising Eleventh Amendment arguments . . . [is] so clearly meritless as to be frivolous.

Gates v. Collier, 616 F.2d 1268, 1271 (5th Cir. 1980).

[T]he district court awarded ARC attorneys’ fees. The State did not comply with this valid court order. A district court may take any reasonable action to secure compliance with its orders, and only when the district court’s response is so inappropriate as to amount to an abuse of discretion will the Court of Appeals intervene.

Association for Retarded Citizens v. Olson, 713 F.2d 1384, 1396 (8th Cir. 1983).

Where state law fails to supply the necessary procedure, or actually stands in the way of enforcement [of a judgment against the State], the district court may take the necessary steps to ensure compliance with its judgment.

Hankins v. Finnel, 964 F.2d 853, 860 (8th Cir. 1992).

A state cannot frustrate the intent of section 1988 by setting up state law barriers to block enforcement of an attorneys’ fee award.

Spain v. Mountanos, 690 F.2d 742, 746 (9th Cir. 1982).

If a state agency refuses to adhere to a court order, a financial penalty may be the most effective means of insuring compliance.

Hutto v. Finney, 437 U.S. 678, 691 (1978).

On May 5, 2008, this Court entered judgment against the Defendants for \$204,856.28 in attorneys' fees and costs. (Mem. and Order, Filing No. 203 at 2-4, May 5, 2008.) The Defendants refuse<sup>1</sup> to comply with this Court's order and pay the judgment to Plaintiff's attorneys.<sup>2</sup> As every federal court that has addressed the issue has held, the State has no basis to refuse to comply with a valid federal court order to pay attorneys' fees under 42 U.S.C. § 1988. This Court has the authority to order the Defendants or the State Treasurer and Director of Administrative Services to immediately pay the judgment to Plaintiff's attorneys. The Nebraska claims process which requires legislative approval and appropriation prior to the State's payment of a federal court judgment for attorneys' fees under 42 U.S.C. § 1988 is preempted by the Supremacy Clause of the United States Constitution.

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<sup>1</sup> Defendants claim that they are not technically refusing to pay the judgment. Rather, the Defendants claim they will pay the judgment if the Plaintiff files a claim for the amount of the judgment with the Nebraska State Claims Board, the Board approves the "claim" and the Nebraska Unicameral agrees to appropriate money to fund the Defendants' payment of the judgment in accordance with Neb. Rev. Stat. § 25-1806 and the State Miscellaneous Claims Act, Neb. Rev. Stat. § 81-8,294 et. seq. Since this Court's order awarding attorneys' fees occurred after the end of the 2008 Legislative Session, the earliest that an appropriations bill could be passed would be the 2009 Legislative session which begins January 7, 2009, and ends June 4, 2009. Appropriations for claims against the State are generally passed near the end of the Legislative Session. See e.g., LB 1019 (2008 Bill for payment of claims against the State approved by Governor April 2, 2008, Legislative session ended April 17, 2008), thus, even assuming that a legislative appropriation is made, the earliest that Defendants would pay the judgment is June of 2009, more than a year after this Court's entry of judgment.

<sup>2</sup> In the Eighth Circuit, awards of attorneys' fees under section 1988 and similar fee shifting statutes are made to the prevailing party's attorney. Ratliff v. Astrue 540 F.3d 800 (8th Cir. 2008); Curtis v. City of Des Moines, 995 F.2d 125, 129 (8th Cir. 1993).

### **FACTUAL BACKGROUND**

On July 17, 2007, this Court found that defendants violated Moham ed El-Tabech's civil rights. (Mem. and Order, Filing No. 179 at 5, 6 July 17, 2007.) On May 5, 2008, this Court entered a judgment against the defendants for attorneys' fees and costs of \$204,856.28. (Mem. and Order, Filing No. 203 at 2-4, May 5, 2008.) Despite this Court's judgment in favor of Plaintiff, the Defendants have refused to pay the attorneys' fees and costs awarded to Plaintiff.

After Defendants initially refused to respond to Plaintiff's counsel's inquiries concerning satisfaction of the judgment, Plaintiff's counsel informed Defendants that Plaintiff intended to file a motion under Fed. R. Civ. P. 69(a) and 70 seeking enforcement of the judgment. (G. Summerlin Aff., Pl.'s Ex. 1 at ¶¶ 3-4.) Defendants' attorneys then stated that the judgment had not been paid "due to a glitch in the system . . . Things are moving now and it shouldn't be too much longer." (G. Summerlin Aff., Pl.'s Ex. 1 at ¶ 5, Ex. A.) In a subsequent telephone call, Defendants informed Plaintiff that the State would issue a warrant for payment of the judgment within two to six weeks. (G. Summerlin Aff., Pl.'s Ex. 1 at ¶ 5.) Relying on the State's promise to quickly pay the judgment, Plaintiff agreed not to file a motion for enforcement of the judgment. (G. Summerlin Aff., Pl.'s Ex. 1 at ¶ 5, Ex. B.) On October 6, 2008, the State reneged on this agreement and took the position that the Defendants would not pay the judgment unless Plaintiff's counsel submitted to the requirements of the State Miscellaneous Claims Act as outlined in Neb. Rev. Stat. § 25-1806 and Neb. Rev. Stat. § 81-8,294 et. seq. (G. Summerlin Aff., Pl.'s Ex. 1 at ¶ 6, Ex. C.)

The State Miscellaneous Claims Act requires that Plaintiff's counsel submit a claim for the amount of the judgment to the State Claims Board, that the claim be approved by the Board, that the claim then be approved by the Legislature, and that the Legislature appropriate funds to pay the claim. Neb. Rev. Stat. § 81-8,300. Acceptance of payment under this statutory procedure results

in “a complete release . . . of any claim against the state and against the employee of the state whose act or omission gave rise to the claim by reason of the same subject matter.” Neb. Rev. Stat. § 81-8,301.<sup>3</sup> Plaintiff continues to litigate Defendants’ compliance with this Court’s substantive orders and Plaintiff’s counsel is entitled to and intends to seek supplemental attorney’s fees for Plaintiff’s counsel’s post-judgment monitoring. See Plaintiff’s Motion for Contempt, Filing 205, Aug. 26, 2008; Mem. and Order, Filing 203 Ftnt. 1, May 5, 2008. Plaintiff and Plaintiff’s counsel are unwilling to release these claims in order to obtain payment under the Miscellaneous Claims Act.

Finally, after Defendants reneged on their agreement to pay the judgment, Plaintiff’s counsel provided Defendants’ counsel with citations to the authority cited in this brief and informed Defendants’ counsel that Plaintiff would proceed with a motion to enforce the judgment. (G. Summerlin Aff., Pl.’s Ex. 1 at ¶ 7, Ex. C.) In response, Defendants’ stated that if this Court granted the Plaintiff’s motion to enforce the judgment, the Defendants would simply appeal the District Court’s decision and further delay payment to Plaintiff’s counsel. (G. Summerlin Aff., Pl.’s Ex. 1 at ¶ 7.)

## ARGUMENT

### **I. NEITHER THE STATE OF NEBRASKA NOR ITS OFFICIALS CAN REFUSE TO PAY A VALID FEDERAL DISTRICT COURT JUDGMENT OR RELY UPON STATE STATUTORY SCHEMES TO DELAY PAYMENT OF THE JUDGMENT.**

Federal District Courts unquestionably have the authority to order States and their officials to comply with a federal court’s orders, including those requiring the payment of a judgment for attorneys’ fees under 42 U.S.C. § 1988. Similarly, state statutory or constitutional schemes which

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<sup>3</sup> See, e.g., L.B. 1019 (2008 State Claims Bill which directed that no payment shall be made to claimants “until a receipt and release in full, releasing the State of Nebraska, its officer, employees, and agents, and their successors and assigns, has been filed by each of the beneficiaries respectively.”) (available online at <http://uniweb.legislature.ne.gov/FloorDocs/Current/PDF/Final/LB1019.pdf>)

purport to require a plaintiff to obtain legislative appropriation or approval prior to enforcing a valid federal court judgment against a State are preempted by the Supremacy Clause of the United States Constitution. Following the passage of 42 U.S.C. § 1988 in 1976, the federal courts made it explicitly clear that States could not frustrate the payment of a valid federal court judgment by hiding behind state statutes or constitutional provisions which impose procedural burdens on the collection of a 42 U.S.C. § 1988 judgment against a State or its officials.

**A. Plaintiff's Judgment for Attorneys' Fees Is a Judgment Against the State of Nebraska.**

Where attorneys' fees are awarded against a state official in his official capacity, "it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, 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)." Hutto v. Finney, 437 U.S. 678, 694 (1978); Tabech v. Gunter 869 F.Supp. 1446, 1474 (D. Neb. 1994) (ordering that attorneys' fee award under 42 U.S.C. § 1988 "be paid by defendants Clarke and Hopkins, in their official capacities, to the Clerk of the United States District Court for the District of Nebraska" and that Clerk "shall distribute said sum to the trust account of the law firm.")

**B. The State Has No Eleventh Amendment Immunity Against the Enforcement of a Judgment for Attorneys' Fees and Any State Statute Which Inhibits the Collection of a Valid Judgment for Attorneys' Fees under 42 U.S.C. § 1988 Is Preempted by Federal Law.**

In Gates v. Collier, 616 F.2d 1268 (5th Cir. 1980), a group of inmates brought suit against the Superintendent of the Mississippi State Penitentiary and other state officials alleging that various conditions at Mississippi's Parchman Penitentiary violated the inmates' constitutional rights. After prevailing on their constitutional claims, the district court awarded plaintiffs attorney's fees under 42 U.S.C. § 1988. Id. at 1270-71. To enforce the judgment for attorneys' fees, the district court

ordered that the defendant prison officials submit a requisition to the State Auditor for the issuance of a warrant upon the State Treasurer to satisfy the judgment out of funds appropriated for the operation of Parchman or out of any other funds subject to the control of the State Treasurer. Id. at 1270. Like the Defendants in this case, the Mississippi defendants asserted that the State could not pay the judgment without first obtaining a legislative appropriation. Id. The Mississippi officials relied on Miss. Code Ann. § 11-45-5, which required that the Mississippi legislature appropriate funds to pay any judgment against the State. Id. Since the district court's order required the Auditor and Treasurer to pay the judgment without an appropriation by the legislature, the defendants claimed that the district court lacked the authority to order the defendants to pay the judgment in violation of Mississippi law.

The Fifth Circuit rejected Mississippi's claim. The court began its analysis by pointing out that Congress abrogated the States' Eleventh Amendment immunity when it enacted 42 U.S.C. § 1988. Id. at 1271 (citing Hutto v. Finney, 437 U.S. 678, 693-94 (1978)); see also, Kentucky v. Graham, 473 U.S. 159, 171 (1985) (“[I]n an official capacity action . . . a plaintiff who prevails is entitled to look for relief, both on the merits and for fees, to the governmental entity.”); Missouri v. Jenkins, 491 U.S. 274, 279 (1989) (“An award of attorneys’ fees ancillary to prospective relief is not subject to the strictures of the Eleventh Amendment.”). In addition, Congress provided the federal district courts with the means to enforce their judgments through Federal Rule of Civil Procedure 69, which authorizes execution on a district court’s judgment, and Federal Rule of Civil Procedure 70, which authorizes the court to direct or appoint an individual to do any act necessary to comply with a district court’s judgment. Id. at 1271.



Where a state expresses its unwillingness to comply with a valid judgment of a federal district court, the court may use any of the weapons generally at its disposal to ensure compliance. Federal courts are not reduced to issuing judgments against state officers and hoping for compliance.

Id. at 1271 (internal citations omitted).

The court of appeals explained that the issue was not whether the district court's order required that Mississippi officials violate state law, but rather, whether the Mississippi officials could hide behind state law to refuse to implement a federal court's order. Id. at 1272.

Congress has declared that states and their officials who violate federal civil rights laws must reimburse the successful plaintiff for costs incurred in seeking redress. To strike down the [district court's] order in this case because it conflicts with the laws of Mississippi would be no different than reversing a bare judgment for attorneys' fees. In either case, we would be allowing the state, by legislative action, to recloak itself with Eleventh Amendment immunity which Congress has chosen to remove. Such a result would be contrary to the command of the Supremacy Clause of the United States Constitution.

Id.

In the strongest of terms, the court of appeals held that Mississippi's reliance upon Mississippi law to avoid paying the judgment for attorneys' fees until the legislature appropriated funds was "*so clearly meritless as to be frivolous.*" Id. at 1280 (emphasis added).

The court reached a similar result in Gary W. v. Louisiana, 622 F.2d 804 (5th Cir. 1980). In Gary, the plaintiffs obtained a judgment for attorneys' fees under 42 U.S.C. § 1988 against the State of Louisiana and William Cherry, in his official capacity as the Secretary of the Louisiana Department of Health and Human Resources ("DHHR"). Id. at 805. When the defendants initially refused to pay the judgment, plaintiffs obtained an order from the district court pursuant to Fed. R. Civ. P. 70 directing Cherry, in his official capacity as Secretary of DHHR, to pay the judgment from DHHR funds. Id. Defendants argued that the district court lacked the authority to direct Cherry to pay the judgment because the Louisiana Constitution prohibited the payment of a judgment against

the state except from funds appropriated for that purpose by the legislature. Id. at 805. Louisiana claimed that the federal court could do nothing to ensure compliance with its judgment since Rule 69(a) provided that procedures for enforcement of a judgment were to be carried out in accordance with state law, and Rule 70 did not provide an alternative means for executing on a money judgment. Id. at 806.

Like the Gates court, the Gary court rejected these arguments: “[A]n order directing the responsible state official to satisfy the judgment out of state funds is the only reasonable way to ensure compliance with a valid federal judgment.” Id. at 807. Under the Supremacy Clause of the United States Constitution, neither a state statute nor a state constitutional provision could prevent a federal district court from enforcing its judgment. “State constitutional provisions, as well as state statutes must comport with federal law.” Id. at 807. See also, Collins v. Thomas, 649 F.2d 1203, 1206 (5th Cir. 1981) (“It is now beyond dispute that a federal district court has the authority to order that attorneys’ fees be paid out of the state’s treasury. . . . The County may not successfully hide behind state procedural shields to avoid the consequences of a valid district court judgment effectuating an appropriate §1988 award.”); Spain v. Mountanos, 690 F.2d 742, 746 (9th Cir. 1982) (“[A] state cannot frustrate the intent of section 1988 by setting up state law barriers to block enforcement of an attorney’s fee award” and the federal district court was authorized to order the California Controller to pay the judgment despite California’s statutory requirement that the judgment be paid only after approved by legislature and funds for payment are appropriated); Arnold v. Blast Intermediate Unit 17, 843 F.2d 122, 128 (3rd Cir. 1988) (Blast’s argument that it cannot pay “non-budgeted” judgment “founders on the precedential shoals that support the enforcement of a federal judgment even where state law bars the seizure of funds or the payment of a judgment without legislative appropriation. State and local entities may not frustrate the supremacy of federal

law through the adoption of immunizing procedures or vague statutory schemes.”)

In Hankins v. Finnel, 964 F.2d 853 (8th Cir. 1992), the Eighth Circuit Court of Appeals expressly adopted Gates, Gary, and Spain in holding that a federal district court could enforce its section 1983 judgment against the State of Missouri and a state official pursuant to Federal Rule of Civil Procedure 69(a) or 70, despite a Missouri statute to the contrary. Id at 855. Hankins was an inmate at the Missouri State Penitentiary where Finnel was a teacher. Hankins brought suit against Finnel alleging that Finnel sexually assaulted him. The jury returned a verdict in favor of Hankins against Finnel. Id. at 854. Prior to paying the judgment, Missouri filed an ex parte action in state court seeking to obtain a percentage of Hankins’ judgment against Finnel under the Missouri Incarceration Reimbursement Act (the “IRA”) which allowed the state to seek up to ninety percent of a prisoner’s assets to reimburse the state for incarceration expenses. Id at 854. The IRA defined a prisoner’s assets to include “a money judgment received from the State as a result of a civil action against one of its employees.” Id. Under this reimbursement scheme, Missouri paid the judgment into Hankins’ inmate account and simultaneously withdrew the judgment amount as “cell reimbursement” under the IRA. Id. at 854-55.

The district court determined that it had authority under Fed. R. Civ. P. 69(a) to enforce its judgment and conduct proceedings to aid Hankins in executing the judgment. Id. at 855. The district court held that because Missouri’s IRA conflicted with the purposes of section 1983, the Supremacy Clause invalidated the Missouri statute as it was applied to Hankins and the court ordered the State of Missouri to repay the funds it had taken from Hankins inmate account. Id.

On appeal, the Eighth Circuit held that Missouri’s IRA “does not relieve the officials taking possession of [Hankins’] fund from liability to [re]pay the money in response to a court order directed to those individuals.” Id. at 859. The Court of Appeals concluded “that the district court

retains plenary power to enforce its commands.” Id. at 860 (citing Spain, 690 F.2d at 747).

Where state law fails to supply the necessary procedure [to enforce the judgment], or actually stands in the way of enforcement, the district court may take the necessary steps to ensure compliance with its judgment.

Id. (citing Gary, 622 F.2d at 806-07; Gates, 616 F.2d at 1271-72). Thus, under either Fed. R. Civ. P. 69(a) or 70, the district court had the power to enforce its judgment against the Missouri state officials. Id. at 860-61.

Under the Supremacy Clause, state law is preempted whenever it contradicts or interferes with an Act of Congress. . . . Preemption in this instance will arise when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [under section 1983].

Id. at 861 (internal citations and quotations omitted).

Similarly, in Association for Retarded Citizens v. Olson, 713 F.2d 1384 (8th Cir. 1983), ARC obtained an interim attorneys’ fee award under 42 U.S.C. § 1988 against a number of North Dakota State Officials sued in their official capacities. When the State and its officials failed to pay the interim judgment, the district court entered an order requiring the State to pay an additional fourteen percent interest on the amount of the judgment from the date of allowance until paid and requiring the State to reimburse ARC’s counsel for all interest payments on counsels’ operating loans until the State paid the interim attorneys’ fee award. Id. at 1395. The Eighth Circuit Court of Appeals affirmed the authority of the district court to take these actions to enforce its judgment:

[T]he district court awarded ARC attorneys’ fees. The State did not comply with this valid court order. A district court may take any reasonable action to secure compliance with its orders, and only when the district court’s response is so inappropriate as to amount to an abuse of discretion will the Court of Appeals intervene. . . . We cannot say the district court’s action under the circumstances was unreasonable.

Id. at 1396 (citing Gates, 616 F.2d 1268).

In the present case, the State of Nebraska and its officials take precisely the same position previously rejected by the Third, Fifth, Eighth and Ninth Circuits. Nebraska asserts that because it has a procedural statutory scheme which requires legislative approval and appropriation prior to paying a federal court judgment for attorneys' fees, the Plaintiff must comply with that scheme before the Defendants' obligation to pay the judgment arises. As stated by the Fifth Circuit Court of Appeals in Gates, this argument is "so clearly meritless as to be frivolous." Gates, 616 F.2d. at 1280. By enacting 42 U.S.C. § 1988, Congress abrogated Nebraska's Eleventh Amendment Immunity with respect to awards of attorneys' fees in civil rights cases. Hutto v. Finney, 437 U.S. 678, 693-94 (1978). Indeed, the "holding of Hutto . . . was not just that Congress had spoken sufficiently clearly to overcome Eleventh Amendment immunity in enacting § 1988, but rather that the Eleventh Amendment did not apply to an award of attorney's fees ancillary to a grant of prospective relief." Missouri v. Jenkins, 491 U.S. 274, 280 (1989). The Congressional purpose of 42 U.S.C. § 1983 "is two-fold: to compensate victims and to deter future deprivations of federal constitutional rights." Hankins v. Finnel, 964 F.2d 853, 861 (8th Cir. 1992). As the legislative history of § 1988 makes clear, Congress believed that the awarding of attorneys' fees was critical to the enforcement of the civil rights laws.

The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens. . . . 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 attorneys' fees, [the proposed legislation] is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law.

H. Rep. No. 1558 at 1, 94th Cong., 2d Sess. (1976).

If the law does not authorize the awarding of attorneys' fees in meritorious civil rights cases, many potential plaintiffs will be deterred from bringing deserving cases to remedy violations of the Constitution, especially those cases in which the appropriate relief is primarily equitable or injunctive rather than monetary.

122 Cong. Rec. H 12165 (daily ed. Oct. 1, 1976).

“Under the Supremacy Clause, state law is preempted whenever it contradicts or interferes with an Act of Congress.” Hankins, 964 F.2d at 861 (quoting Hayfield Northern R.R. Co. v. Chicago & N.W. Transp. Co., 467 U.S. 622, 627 (1984)). “Preemption . . . will arise when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Hankins, 964 F.2d at 861 (quoting Schneidewind v. ANR Pipelines Co., 485 U.S. 293, 300 (1988)). State statutory schemes which require legislative approval or appropriation prior to paying a federal court's judgment for attorneys' fees under 42 U.S.C. § 1988 are preempted by the Supremacy Clause of the United States Constitution. Gates, 616 F.2d at 1272; Gary W., 622 F.2d at 807; Spain, 690 F.2d at 746 (“Under the Supremacy Clause of the United States Constitution, a court, in enforcing federal law, may order state officials to take actions despite contravening state laws.”); see also Hankins, 964 F.2d at 861 (Missouri statute frustrating payment of damages under 42 U.S.C. § 1983 is preempted); Collins v. Dallas County, 649 F.2d 1203, 1206 (5th Cir. 1981) (“To the extent that § 1988's authorization of district court orders awarding attorneys' fees conflicts with Texas' restriction on the execution of judgments against counties, the federal statute must prevail over state law.”)

Even more, Nebraska's statutory scheme goes far beyond the mere imposition of procedural hurdles to the collection of a federal court judgment under § 1988, and demands that the acceptance of payment constitute “a complete release . . . of any claim against the state and against the employee of the state whose act or omission gave rise to the claim by reason of the same subject

matter.” Neb. Rev. Stat. § 81-8,301. Because Defendants have failed to comply with this Court’s orders to honor Plaintiff’s First Amendment rights, post-judgment litigation in this case continues. See Plaintiff’s Motion for Contempt, Filing 205, Aug. 26, 2008. Further, this Court has already determined that Plaintiff’s counsel is entitled to seek supplemental attorney’s fees for the post-judgment monitoring. Mem. and Order, Filing 203 Ftn. 1, May 5, 2008. Neither Plaintiff nor Plaintiff’s counsel are willing to release the Defendants and forgo these claims in order to obtain payment under the Miscellaneous Claims Act. To state the obvious, a state statute which purports to require a prevailing civil rights plaintiff to release not only a claim for attorneys’ fees, but the enforcement of injunctive relief designed to protect the plaintiff’s civil rights, “contradicts or interferes” with the purposes of Congress in enacting 42 U.S.C. § 1983 and 1988, and is, therefore, preempted by federal law.

**II. PLAINTIFF’S ATTORNEYS ARE ENTITLED TO AN ORDER REQUIRING THAT DEFENDANTS IMMEDIATELY PAY THE JUDGMENT AND ADDITIONAL INTEREST AS A RESULT OF DEFENDANTS’ PRIOR DELAY IN PAYING THE JUDGMENT.**

**A. This Court Possesses the Authority to Require the Defendants to Pay the Judgment for Attorneys’ Fees.**

As the Fifth Circuit recognized in Gates:

Neither Hutto nor the legislative history of [42 U.S.C. § 1988] . . . address the question of how to make an unwilling state or its officials satisfy a judgment for attorneys’ fees. This is not surprising however, for it has never been the practice of Congress, when providing a statutory basis for the recovery of money damages or costs including attorneys’ fees, to specify in the same legislation the appropriate means of enforcing the judgment. In all likelihood, Congress assumed it was unnecessary to consider the subject because the Federal Rules of Civil Procedure contains a provision for the execution of district court judgments, Fed.R.Civ.P. 69,

and a provision authorizing the court to ppoint an individual to do any act on behalf of a party who has refused to comply with the judgment himself, Fed.R.Civ.P. 70. We have been cited to no authority, nor have we found any, to indicate that these statutes do not apply to a state and its officials.

Gates, 616 F.2d at 1271.

In Gates, the district court order ed that the Mississippi Auditor and Treasurer satisfy the plaintiffs' judgment for attorneys' fees under 42U.S.C. § 1988 without awaiting legislative approval under Miss. Code Ann. § 11-45-5. "[T]he district acted well within its au thority to ensure compliance with its lawful orders. If statutory authority is needed for the court's actions, it may be found in Fed. R. Civ. P. 70." Gates, 616 F.2d at 1271. Sim ilarly, in Gary, the district court was authorized under Fed. R. Civ. P. 70(a) to order the Secretary of Louisiana's Department of Health and Human Resources to pay the § 1988 attorneys' fees judgment from his agency's funds. Gary, 622 F.2d at 806. In Hankins the Eighth Circuit Court of Appeals "conclude[d] that the district court retains plenary power to enforce its commands" and that the district court was authorized to order the Missouri officials to pay the plaintiff's judgment under either Fed. R. Civ. P. 69 or 70. Hankins, 964 F.2d at 860-61. As these cases m ake clear, there is no doubt that this Court possesses the authority to order the Deñdants, or Shane Osborn and Carlos Castillo, the Nebraska Treasurer and Director of Administrative Services, respectively, to immediately pay the judgment for attorneys' fees.<sup>4</sup>

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<sup>4</sup> The State Treasurer has a duty "[t]o disburse the public money upon warrants drawn upon the state treasury according to law." Neb. Rev. Stat. § 84-602(2). A "warrant" is an order drawn by the Director of Administrative Services upon the State Treasurer, directing the Treasurer "to pay a specified amount to a specified payee by the use of a dual signature negotiable instrument." Neb. Rev. Stat. § 81-1121(1)(b). The Director of Administrative Services must sign each warrant, and the Treasurer must countersign. Neb. Rev. Stat. § 81-1121(2), (3).



**B. Plaintiff is Entitled to Additional Interest to Compensate Plaintiff's Counsel for the Defendants' Delay in Paying the Attorneys' Fees Judgment.**

Throughout this litigation, the Defendants have demonstrated an astonishing itch to fight the Plaintiff at every turn. Defendants' reluctance to obey this Court's orders has resulted in additional post-judgment litigation to insure compliance with the First Amendment rights of Plaintiff, Defendants' adherence to the Kosher Meal Protocol previously agreed to by the Defendants, and to secure Plaintiff's counsel's reimbursement for attorneys' fees and costs. As the Supreme Court held in Hutto, where "a state agency refuses to adhere to a court order, a financial penalty may be the most effective means of insuring compliance. The principles of federalism that inform Eleventh Amendment doctrine surely do not require federal courts to enforce their decrees only by sending high state officials to jail. The less intrusive power to impose a fine is properly treated as ancillary to the federal court's power to impose injunctive relief." Hutto, 437 U.S. at 691.

In Association for Retarded Citizens v. Olson 713 F.2d 1384 (8th Cir. 1983), North Dakota state officials refused to pay an interim award of attorneys' fees under 42 U.S.C. § 1988. Instead of holding the officials in contempt, the district court ordered that plaintiffs' attorneys "receive fourteen percent interest on the interim award from the date of allowance until paid, and . . . that the State reimburse ARC attorneys for all interest payments on operational loans taken out by ARC counsel until the State paid the interim fee award." Id. at 1395. The Eighth Circuit affirmed the action of the district court as a "reasonable action to secure compliance with its orders." Id. at 1396.

Here, Defendants have ignored Plaintiff's counsel's inquiries concerning satisfaction of the attorneys' fee judgment, have promised counsel that they will pay the judgment only to avoid or delay a motion for execution on the judgment, and then have disavowed that promise. Defendants currently assert that they cannot be forced to pay the judgment until the conclusion of the next

legislative session in June of 2009, and promise to appeal any enforcement decision of this Court to further delay payment to Plaintiff's counsel. The Defendants are unquestionably "a state agency [which] refuses to adhere to a court order, [and] a financial penalty may be the most effective means of insuring compliance." Hutto, 437 U.S. at 691. Since the entry of judgment for attorneys' fees on May 5, 2008, the law firm of Ogborn, Summerlin & Ogborn, P.C. has carried an operating line of credit with First National Bank of Omaha. (G. Summerlin Aff., Pl.'s Ex. 1 at ¶ 9.) The balance of the firm's operating line has exceeded \$204,856.28 from May 5, 2008, to date. (G. Summerlin Aff., Pl.'s Ex. 1 at ¶ 9.) Interest accrues on the line at the rate of five percent per year, or \$28.47 per day attributable to the \$204,856.28 due from the Defendants. (G. Summerlin Aff., Pl.'s Ex. 1 at ¶ 9.) Thus, as of October 21, 2008, the firm has incurred an additional \$4,839.90 in interest obligations as a result of the Defendants' refusal to pay the attorneys' fee judgment, and the firm will continue to incur an additional \$28.47 per day in interest until the judgment is paid.

**III. IN THE EVENT THAT THE COURT ENTERS AN ORDER REQUIRING THE DEFENDANTS OR THE STATE OF NEBRASKA TO PAY THE JUDGMENT, THE JUDGMENT SHOULD NOT BE STAYED PENDING AN APPEAL BY THE DEFENDANTS.**

Pursuant to Fed. R. App. P. 8(a), "[a] party must ordinarily move first in the district court for the following relief: (A) a stay of the judgment or order of a district court pending appeal." Fed. R. App. P. 8(A). In the event that this Court orders the Defendants or any other officials of the State of Nebraska to satisfy the judgment for attorneys' fees and costs, and a Notice of Appeal is thereafter filed by the Defendants or State officials, Plaintiff requests that this Court's decline any request to stay the judgment pending appeal.

**CONCLUSION**

Plaintiff respectfully requests that the Court enter an order directing the Defendants or the Treasurer and Director of Administrative Services for the State of Nebraska to immediately issue a warrant payable to Plaintiff's counsel to satisfy the May 5, 2008, judgment for attorneys' fees and costs. In addition, Plaintiff requests that the Court increase the amount of post-judgment interest payable on such judgment to a rate deemed reasonable by the Court and appropriate to insure the Defendants' compliance with the Court's order. Plaintiff further requests that the Court require that Defendants reimburse Plaintiff's counsel for interest on their law firm's operating note at the rate of \$28.47 per day from the date of judgment until paid. Finally, Plaintiff requests that in the event Defendants or any representative from the State of Nebraska appeal from this Court's order effectuating the relief sought above, that the Court not stay execution of the judgment pending appeal.

MOHAMED A. EL-TABECH, Plaintiff

BY: OGBORN, SUMMERLIN & OGBORN, P.C.  
GENE SUMMERLIN - 19611  
TED J. LANE - 23426  
610 J Street, Suite 200  
Lincoln, NE 68508  
(402) 434-8040  
gene@osolaw.com  
ted@osolaw.com

BY: /s/ Gene Summerlin

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 21st day of October, 2008, the foregoing document was electronically filed using the CM/ECF system which sent notification of the filing to the following:

Matthew A. Works  
Assistant Attorney General  
2115 State Capitol Bldg.  
Lincoln, NE 68509  
[matt.works@ago.ne.gov](mailto:matt.works@ago.ne.gov)

/s/ Gene Summerlin