No. 08-345

IN THE
Supreme Court of the United States

ALABAMA, *et al.*,

Petitioners,

v.

TIMOTHY D. POPE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the prevailing party test for assessing liability for civil rights attorney's fees under 42 U.S.C. § 1988 should be modified to exempt a defendant from fee liability when it belatedly agrees with the plaintiff's position on the merits of the claim yet does not change its conduct until after the court grants relief? Not one circuit court has agreed with the position advocated by the Petitioners.

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STATEMENT OF THE CASE

Petitioners State of Alabama, et al. ("State" or "Alabama") seek review of the long-standing precedent of this Court creating the "prevailing party" test for awards of attorney's fees under 42 U.S.C. § 1988. Alabama contends that because it eventually confessed the unconstitutionality of its raced-based employment policy, respondent Timothy D. Pope ("Pope") was aligned with Alabama and as a matter of law cannot be a prevailing party for purposes of awarding attorney's fees under § 1988, despite the fact that Pope obtained an order changing the legal relationship between the parties. Pope believes this case does not present an appropriate vehicle for revision of the prevailing party standard.

The Eleventh Circuit's seven page unpublished decision affirmed the district court's order awarding attorney's fees to Pope under the abuse of discretion standard. App. 6a. Contrary to the claims of the artfully-crafted petition, this case does not present an issue on which the circuits are split. The Eleventh Circuit's decision follows the long-standing rule that a civil rights plaintiff that obtains a court order that changes the conduct of a defendant employer is considered a prevailing party entitled to fees under § 1988. In this case, Pope was unlawfully denied a promotion by the State and successfully obtained an order from the district court requiring Alabama to stop applying a racial preference for African-American job applicants which had been adversely applied to Pope. Pope had to pursue litigation for over two years in order to obtain that result and change the conduct of the defendant.

A. Proceedings in the District Court.

This case was filed in 1968 by the United States against various agencies of the State of Alabama to enforce the anti-discrimination provisions of federal funding statutes. App. 1a. The district court found Alabama liable and entered an injunction governing the defendants' employment practices on July 28, 1970. App. 2a; *United States v. Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970). Alabama officials were enjoined from bypassing a higher-ranked black applicant in favor of a lower-ranked white applicant:

> 2. Negro applicants shall be appointed to positions other than custodial, domestic, laborer or laboratory aide, when said Negro applicants are listed on a Certification of Eligibles, unless higher-ranking white applicants on the certificate are appointed to fill the vacancy (or all the vacancies) in the listed position, or unless the defendants determine that the Negro applicant is not qualified to perform the duties of the position, or is otherwise not fit for the position.
>
> 3. Defendants shall not appoint or offer a position to a lower-ranking white applicant on a certificate in preference to a higher-ranking available Negro applicant, unless the defendants have first contacted and interviewed the higher-ranking Negro applicant and have determined that the Negro applicant cannot perform the functions of the position, is otherwise unfit for it, or is

> unavailable. In every instance where a determination is made that the Negro applicant is unfit or unavailable, documentary evidence shall be maintained by the defendants that will sustain that finding.

Frazer, 317 F. Supp. at 1091; doc. no. 65.[1] Several other State departments and officials were subsequently joined as defendants and the district court entered a further injunction on August 20, 1976. Doc. no. 142. This overtly race-based remedy order was commonly referred to as the *Frazer* No-bypass Rule. App. 2a. The district court conducted no further review of the injunctions until after Pope initiated these proceedings in 2003. App. 33a.

Pope is a white male employee of the Alabama Department of Corrections. He was offered and accepted a promotion in September 2002. Shortly thereafter, the promotion was rescinded as violative of the No-bypass Rule. App. 2a. Pope filed a pro se charge of race discrimination with the EEOC and received a right to sue letter on December 4, 2002. Pope also sought assistance from the Attorney General of Alabama. The State refused to take any action to seek relief from the rule or otherwise promote Pope. After obtaining counsel in January 2003, Pope filed his individual suit on February 21, 2003. The district court's dismissal of Pope's individual Title VII case is now pending before the Eleventh Circuit Court of Appeals. *Pope v. State of Alabama*, no. 08-14729 (11th Cir.).

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1. Record citations in this brief are to the appendix to the petition for writ of certiorari or to the document numbers assigned by the district court.

Because of the continuing impact of the *Frazer* No-bypass Rule on his promotional opportunities, on February 25, 2003 Pope also moved to intervene in *Frazer* and sought an order ending the racially discriminatory preference. Pope asserted that the 30-year old *Frazer* No-bypass Rule was facially unconstitutional under modern strict scrutiny standards and should be terminated. App. 2a.

Alabama's counsel asked the district court to delay action on Pope's motion to intervene while they discussed the matter with counsel for the United States. Doc. no. 608. Finally, on May 20, 2003, Alabama urged the court to deny Pope's intervention motion. Doc. no. 633. At the same time, the United States and Alabama filed a "Joint Motion To Terminate No-Bypass Provisions of Injunctive Orders." App. 2a, 3a; doc. no. 634. The United States and the State of Alabama defendants sought termination of the No-bypass Rule alleging that "the evidence that the discriminatory practices requiring the implementation of the no-bypass rule have ceased and the effects of such practices have been remedied." *See* doc. no. 634. In his response to the joint motion, Pope agreed that the No-bypass Rule should be terminated as he had urged several months earlier, but pointed out that the United States and the State defendants had not raised the constitutional issues raised by Pope in his complaint-in-intervention and motion to modify. Unlike the State of Alabama, Pope urged the district court to immediately suspend operation of the rule without further proceedings due to its facial unconstitutionality. Doc. no. 648. The State defendants subsequently filed an expert's statistical

report in support of the joint motion. *See* doc. nos. 634, 675.[2] While Pope was seeking an immediate end to the rule due it its facial unconstitutionality, Alabama made the fact-intensive claim that after thirty years its workforce was sufficiently diverse that the preference was no longer needed.

Alabama opposed Pope's effort to intervene and the rule remained in effect. There was no progress for eight months until the district court granted Pope's motion to intervene on January 20, 2004. App. 3a. Pope's complaint-in-intervention and motion to modify was then filed by the clerk on January 28, 2004. Doc. no. 659. The district court also granted intervention to a group of African-American state employees. The African-American intervenors urged the continuation of the race-based No-bypass Rule and filed their own expert report in response to the State's expert report. *See* App. 3a; doc. no. 698. The proceedings became mired in

2. Alabama claims it retained experts and commenced its review in May 2002, before it rescinded Pope's promotion. Pet. at 3. While that assertion by its counsel is not supported by any evidence other than its counsel's affidavit, it only bolsters Pope's position that the State knew the rule was invalid when it rescinded Pope's promotion. Alabama continues to claim that it was pursuing vacation of the order before Pope moved to intervene. While the State represents that it was busy working to vacate the rule in May 2002, the face of the expert report shows it is based on year-end 2002 data and was not completed until April 2003, some two months *after* Pope moved to intervene. Indeed, it appears that the intense two-month application of resources cited by Alabama, Pet. at 3, occurred after Pope received his right to sue letter from the EEOC and after the filing of Pope's litigation to bring this matter before the district court.

extended factual disputes between the African-American intervenors and the State over the fact-based issues raised by their pleadings and competing expert reports. Meanwhile, Pope repeatedly urged the Court to immediately vacate the rule on the constitutional grounds raised in Pope's complaint. Only under questioning from the district court did one of the State's counsel eventually concede the unconstitutionality of the rule on April 2, 2004. Doc. no. 794. The unconstitutional rule remained in effect and Alabama continued to implement it.

On May 20, 2005, over two years after Pope first sought relief, the district court entered an order granting Pope's motion for preliminary injunction and granting the relief that he requested in his initial filing, the suspension of the No-bypass Rule. App. 3a, 32a; doc. no. 605 at p. 3 ("the movant-intervenor respectfully asks this Court for leave to intervene in this action for the purpose of challenging this unconstitutional, un-tailored race-based application of the Frazer/Ballard injunction . . ."); *and* Complaint and Motion to Modify Injunction of Plaintiff-Intervenor Timothy D. Pope, doc. no. 659, ¶18 (urging the Court to "modify the injunction by vacating the no-bypass rule and other race-based requirements and/or alternatively ordering the defendants to implement lawful race-neutral selection procedures").

Pope obtained actual relief on the merits that materially altered the legal relationship between the parties by modifying the defendants' behavior. Pope prevailed in this litigation by securing the race-neutrality of the State defendants' employment selection procedures through the grant of his motion for relief from "the continued implementation of the race-conscious,

indeterminate, across-the-board no-bypass rule." App. 33a. The district court stated that this relief was granted "based on Pope's motion." App. 32a. The State then ceased implementation of the No-bypass Rule.

As required by Rule 54(d)(2), F.R. Civ. P., on June 1, 2005 Pope filed a motion for attorney's fees and costs. Doc. nos. 740, 744, 747. The State defendants opposed the motion claiming Pope was not a prevailing party. Doc. no. 748.[3]

On June 30, 2006, after further extended briefing and factual disputes between the other parties, the district court granted Pope's motion for summary judgment and entered final judgment permanently ending the No-bypass Rule. App. 24a, 25a. The Court's order states plainly that "Pope's motion for summary judgment (doc. no. 757) . . . [is] granted." *Id.* The district court further stated that "intervenor Pope's motion to modify injunction (doc. no. 659) [is] granted." App. 25a.

3. In opposing the fee motion, the State launched a vituperative attack on Pope's counsel with an affidavit by State staff counsel Byrne claiming that Pope intervened for the sole purpose of gaining fees. Pope responded with three separate affidavits rebutting each of the State's claims. Neither the district court nor the Eleventh Circuit credited the State's attack and the State's new counsel in this Court concedes the matter is "immaterial." Pet., at 4 n.2. Despite that acknowledgment, one of Petitioners' amici picks up the fight where the State's lower court counsel left off, devoting four pages of its brief to a personal attack on the undersigned counsel of record. Br. of Amici Curiae International Municipal Lawyers, et al., at 12-15. The Court should take note of such an abuse of the privilege given to amici to express views on important legal issues before this Court.

Pope filed a supplemental motion for attorney's fees and costs on July 12, 2006, which the defendants opposed on the same grounds. App. 3a, 20a; doc. nos. 781, 782, 783.

B. The District Court's Order.

On September 17, 2007, the district court granted Pope's two motions for attorneys fees and awarded some 58% of the total amount requested. App. 3a, 19a, 20a. The district court held that Pope "achieved a sought-after 'judicially sanctioned change in the legal relationship of the parties'" as required by *Buckhannon Bd. & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 600 (2001). App. 13a.

The district court found that Pope made a separate contribution to the litigation warranting an award of fees. App. 15a. The district court also found that Pope and the State defendants made different arguments to end the no-bypass rule. Characterizing Pope's position as "forceful" the district court attributed the preliminary suspension of the rule largely to Pope's efforts. App. 17a.

In determining the amount of Pope's fee award, the Court generously discounted the requested amount to the benefit of the defendants, subtracting 30% of the requested fees up until the granting of the preliminary injunction and 60% of the requested fees thereafter.[4]

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4. While Pope believed these reductions were inappropriate, and at no time did the defendants contest the (Cont'd)

The court also deducted $5,000.00 of the fees Pope's attorneys claimed for work performed litigating fee issues and deducted all fees incurred that were attributed to an unsuccessful motion for class intervention. The district court ordered that all of Pope's expenses be reimbursed by the defendants. App. 17a-19a.

The State defendants appealed the district court's order, disputing the district court's determination that Pope is a prevailing party under the applicable fee-shifting statutes and arguing that he was entitled to nothing. App. 3a, 4a. While no stay was sought, the State failed to comply with the district court's order.

C. The Eleventh Circuit's Affirmance.

The Eleventh Circuit upheld the district court's award of attorney's fees in all respects on June 18, 2008. First, the appeals court recognized that Pope succeeded in obtaining a judicially changed legal relationship between the parties, thereby meeting the prevailing party test under *Hensley v. Eckerhart*, 461 U.S. 424 (1983), *Texas State Teacher's Ass'n v. Garland Ind. Sch. Dist.*, 489 U.S. 782 (1989) and *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001). App. 4a.

(Cont'd)

requested hourly rates, he also recognized that appellate review of the district court's decision is governed by the abuse of discretion standard and fee issues should not result in a "second major litigation." Hence, Pope did not increase the costs or burden the appellate court with a cross-appeal.

Second, the appeals court rejected Alabama's effort to "engraft a requirement that the defendant must assume an adversarial posture as a pre-condition to finding prevailing-party status." App. 5a. Finding that "Pope's efforts contributed to a change in the State defendants personnel practices . . . Pope was . . . a prevailing party vis-a-vis the State defendants – for purposes of a fee award." *Id.*

Finally, the Eleventh Circuit upheld the district court's finding that the narrow special circumstances exception did not apply in this case. App. 5a, 6a. In doing so, the appeals court recognized the various facts the defendants asserted in support of special circumstances and opined that all were sufficiently considered when the district court substantially reduced the lodestar amount. App. 6a.

The Eleventh Circuit affirmed on June 18, 2008. No rehearing application was filed. On August 14, 2008, after Pope sought issuance of the mandate by the Eleventh Circuit, the Petitioners first moved to stay the issuance of the mandate. On August 19, 2008, the Eleventh Circuit denied the motion to stay the mandate and directed issuance of the mandate instanter. The Petitioners complied with the district court's injunctive order on August 28, 2008. *See*, *USA v. Flowers*, no. 07-18454 (11th Cir.).

REASONS FOR DENYING THE PETITION

Alabama seeks review claiming that it was aligned with Pope throughout these proceedings and therefore the district court was precluded from awarding fees to Pope to be paid by the defendants. First, as demonstrated below, the underlying claim that Pope and the Alabama defendants were "squarely aligned" is simply not factually accurate. Pet. at 5, 8. The State admits it denied Pope a promotion on the basis of his race and has fought his efforts to redress that wrong at every step for the past six years. Second, a civil rights defendant cannot avoid fee liability by agreeing with plaintiff's legal argument at the last minute when the plaintiff is forced to obtain a court order to end the defendant's discriminatory practice. Third, the State claims that a ruling from this Court is needed to explain "[w]ho is liable to *pay* attorney's fees under federal fee-shifting statutes". Pet. 11, 12 (emphasis in original). The lower courts have uniformly implemented this Court's rulings that a defendant whose conduct is changed by the litigation is the party due to pay fees and costs. This is not a case that warrants certiorari review.

This Court's decisions are clear that the central issue in evaluating a fee request is whether the litigation resulted in an order changing the legal relationship of the parties. Pope obtained a court order requiring the defendants to stop applying the race-based preference in its employment decisions. Because the State eventually agreed with Pope that the injunction should be vacated, Alabama contends that it, too, was a prevailing party and should not be liable for fees. As demonstrated below, the State of Alabama is the party that maintained a segregated employment system; the notion that it is also a "prevailing party" is preposterous.

I. This Court's Prevailing Party Standard Should Not Be Reviewed Again In This Case.

The State Petitioners seek to revise the prevailing party standard by adding an additional requirement that the defendant must actively oppose the merits of the plaintiff's claim. Alabama's argument ignores the fact that this Court's decisions all look to whether the suit has changed the legal relationship of the parties as the operative threshold test for fees under § 1988. Alabama's claim that it is a prevailing party in this case and therefore not responsible for fees is meritless. The State of Alabama and its agencies and officials were the *defendants* in an action bought by the United States over thirty-five years ago. The State was found guilty of segregative employment practices and enjoined by order of the federal courts. Having been found liable, it certainly is fair to assess the State with all costs related to the injunction, including costs incurred in ending the injunction. *See W. R. Grace & Co. v. Local 759*, 461 U.S. 757, 770 (1983) ("obeying injunctions is a costly affair").

The State of Alabama is under the delusion that it "won" the case when the injunction was ended in 2005. The fact that the injunction was ended does not change the fact that the State was the defendant in civil rights litigation and found liable for maintaining a segregated workforce. The State did not prevail when the order was eventually lifted. It was the *loser* in 1970 and remains the loser until the case is closed. The State did not succeed by obtaining an order changing its own conduct. The State remains the defendant in a case where liability was established. Nothing changes the principles of the fee-shifting statute requiring the civil rights defendant

to pay fees to a party that successfully changes the defendant's conduct through the litigation process.

Both the district court and the Eleventh Circuit found that Pope met the traditional standard for prevailing party status under this Court's decisions. App. 4a, 13a. The State claims that it, too, is a prevailing party and as a consequence Pope should be denied fees. But, as the district court's decision demonstrates, having found Pope to be a prevailing party and after calculating the lodestar amount, the district court then substantially reduced the fee to one which, in the district court's view, represented Pope's separate contribution to the litigation.

This Court's prevailing party standard need not be revisited. In determining responsibility for payment of fees, this Court has always looked to the party responsible for the provision of relief. Just two Terms back, in *Sole v. Wyner*, 551 U.S. __, 127 S. Ct. 2188 (2007), this Court unanimously reconfirmed that the standard for an award of fees to a prevailing party is the material alteration of the legal relationship of the parties:

> "The touchstone of the prevailing party inquiry," this Court has stated, is "the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782, 792-793, 109 S. Ct. 1486, 103 L. Ed. 2d 866 (1989). See *Hewitt v. Helms*, 482 U.S. 755, 760, 107 S. Ct. 2672, 96 L. Ed. 2d 654 (1987) (plaintiff must "receive

> at least some relief on the merits of his claim before he can be said to prevail"); *Maher v. Gagne*, 448 U.S. 122, 129, 100 S. Ct. 2570, 65 L. Ed. 2d 653 (1980) (upholding fees where plaintiffs settled and obtained a consent decree); cf. *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 605, 121 S. Ct. 1835, 149 L. Ed. 2d 844 (2001) (precedent "counsel[s] against holding that the term 'prevailing party' authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties").

Id. at 2194.

This Court's decisions have consistently followed the principle that fees should come from the party responsible for providing relief. *Flight Attendants v. Zipes*, 491 U.S. 754, 762 (1989). The Eleventh Circuit's decision here is entirely consistent with that principle. The State denied Pope a promotion on the basis of his race claiming it had no option but to reflexively implement the thirty year old No-bypass Rule. Pope was left with no option but to seek an order from the federal court directing Alabama to stop applying the race-based No-bypass Rule. *See also Hewitt v. Helms*, 482 U.S. 755,761 (1987) (central to prevailing party status is "the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*") (emphasis by the Court).

In this case, the State of Alabama was found responsible for the provision of relief when it was found liable in 1970. As the enjoined party, it was the *loser* in this case. Again, in 2005, it was found responsible for provision of relief to Pope when he obtained an order requiring the State to stop applying the No-bypass Rule to Pope's employment opportunities. The State was the party directed to provide relief – both in 1970 and again in 2005 for Pope.

In *Kentucky v. Graham*, 473 U.S. 159 (1985), this Court addressed the question that the Petitioners claim should now be reviewed. The Court confirmed that the party responsible to pay attorney's fees is the defendant whose conduct is changed by the litigation:

> [I]t is clear that the logical place to look for recovery of fees is to the losing party – the party legally responsible for relief on the merits. That is the party who must pay the costs of the litigation, see generally Fed Rule Civ Proc 54(d), and it is clearly the party who should also bear fee liability under § 1988.

473 US at 164. This Court concluded that "liability on the merits and responsibility for fees go hand in hand . . .". *Id.* at 165. This Court has defined the term "losing party" as "the party legally responsible for relief on the merits." Contrary to its posturing as the winner, the State of Alabama is the party legally responsible for relief on the merits and was properly assessed fees when Pope obtained an order that changed the State's conduct vis-a-vis Pope.

As demonstrated in Part III, below, the decisions of the lower courts are entirely consistent with this Court's precedents requiring that the material change in legal relationship between the parties triggers the right to fees under the statute.

II. The State Was Never Aligned With Pope.

Alabama repeatedly claims it was aligned with Pope and there was no difference in their positions in this case. Pet. at 5, 12, 13, 17, 22, 25, 27. That claim is absolutely disputed and contrary to the holdings of the courts below. Both the district court and the Eleventh Circuit recognized the differences in the positions taken by the State and Pope and the practical effect of those differences. The Eleventh Circuit made a finding that Pope prevailed vis-a-vis the State "because Pope's efforts contributed to a change in the State defendants' personnel practices." App. 5a. While the State agreed with Pope's constitutional argument late in the process, it was the fact that Pope succeeded in obtaining a court order changing the State's conduct that made Pope a prevailing party due to receive fees.

Contrary to the State's claims, Pope was never "squarely aligned" with the State. Pet. 5, 27. It is undisputed that Pope was denied a promotion, filed an EEOC change, and left with no recourse but to file litigation seeking an immediate end to an unconstitutional practice. After he moved to intervene in this case, the State delayed these proceedings and opposed Pope's motion to intervene. Doc. no. 633. The State refused to join his argument that the rule was

patently unconstitutional and due to be immediately stopped, opting instead for the more politically palatable claim that the 1970 order was due to be vacated under the *Freeman v. Pitts*, 503 U.S. 467 (1992) standards for ending desegregation orders. Doc. no. 634, at p. 12. The State slowed the proceedings down with its wasteful fact-intensive battle of highly-compensated experts with the African-American intervenors. Finally, after two years of delays occasioned primarily by the litigation strategies of the State's counsel,[5] the district court granted Pope's motion to preliminarily enjoin operation of the rule on the very grounds advocated by Pope from the outset – that the policy was facially unconstitutional as a matter of law. App. 15a, 34a.

The district court found that Pope was justified in initiating his actions in this case:

> . . . [W]hen Pope filed his motion to intervene in February 2003, the rule still applied to him, and, indeed, according to him, he had been, and continued to be, denied promotions

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5. On April 2, 2004, the district court conducted a conference among counsel. During that conference, not only were there differences between the parties concerning the applicable standards for evaluation of the No-bypass Rule, there was confusion between the State's own counsel. *Compare*, comments of State attorney Byrne (advocating *Freeman* standard) with those of State attorney Weller (agreeing for the first time with Pope's facial constitutional argument). Doc. no. 794, pp. 5-15. And, the United States refused to take a position on the applicable standard at all. *Id.*, at 11. Indeed, both the United States and the State of Alabama deferred to Pope on the constitutional issue. *Id.* at 11-14.

> because of the rule. He therefore had a *real* and *live* dispute with the State at that time.

App. 14a. The district court further recognized that it was Pope's argument that led to the suspension of operation of the rule in 2005:

> Pope's forceful position in this case, that the no-bypass rule was unconstitutional on its face and should be terminated immediately without any consideration of evidence from any of the other parties, played a substantial role in convincing the court that the rule should be suspended early . . .

App. 7a.

The district court recognized that while the State and Pope ultimately sought an end to the No-bypass Rule, first, they approached the problem with very different arguments, and, second, it was Pope's argument that was credited with leading to the initial suspension of the rule. The notion that Pope and the State were "squarely aligned" is simply false.

III. There Is No Circuit Split For This Court To Reconcile.

Petitioners have not demonstrated any split between the circuits that merits review by this Court. The Second and Seventh Circuit cases cited by the State of Alabama did not involve facts where the party claiming fees met the threshold test for prevailing party status by obtaining an order changing the defendant employer's

conduct. Those cases only involved a victory by the plaintiff on procedural issues. The case from the D. C. Circuit involved the application of a different statute with different operative language. None of the three cases cited by the State support the stark split in the circuits asserted in the Petition. Moreover, both the Seventh and D. C. Circuits have subsequently decided cases in a manner consistent with the Eleventh Circuit's decision here.

1. In the Second Circuit's decision of *Firebird Society v. Members of the Board of Fire Commissioners*, 556 F.2d 642 (2d Cir. 1977), black plaintiffs were denied fees against the defendant employer when they successfully resisted intervention by a group of nonparty white employees. The black employees in that case were properly denied fees because their successful opposition to intervention did not meet the prevailing party test. The *Firebird Society* plaintiffs did not change the defendant's conduct by opposing an intervention motion. While the Second Circuit observed that the plaintiffs "were as much prevailing parties . . ." as the defendants in opposing intervention, neither met the prevailing party test of this Court's subsequent precedents when they successfully opposed a procedural motion by nonparties.

2. In *Action on Smoking and Health v. Civil Aeronautics Board*, 724 F.2d 211 (D.C. Cir. 1984), the court awarded attorney's fees against a federal agency under the Equal Access to Justice Act ("EAJA"). The court denied fees on one minor issue on which the court noted the plaintiff and government took the same position. While noting in passing the agreement of the

plaintiff and defendant on the single issue, the court's decision on the point turned on the language of the EAJA, which materially differs from § 1988: "the [government's] position on this issue was 'substantially justified' and, consequently, fees cannot be awarded on this issue under the EAJA." Indeed, the EAJA includes specific language altering the standard for awarding fees from that of § 1988.

3. The Seventh Circuit's decision in *Bigby v. City of Chicago*, 927 F.2d 1426 (7th Cir. 1991), is another case where black plaintiffs that succeeded in defending a court order against the claims of white intervenors were denied fees payable by the defendant employer. In *Bigby*, the Seventh Circuit rejected the plaintiffs' claims that they were "prevailing parties" under the *Texas State Teachers* standard. The Seventh Circuit agreed that a "Title VII defendant's fee liability does not presumptively extend to cover the fees incurred by plaintiff in litigating third party interests . . ." 927 F.2d at 1428, 29. Again, this Seventh Circuit case did not involve a successful effort by the party seeking fees that changed the defendant's conduct by court order. Rather, it demonstrated a correct application of the *Texas State Teachers* standard governing prevailing party status that focuses on the results of the litigation.

Neither of the two § 1988 cases cited by the Petitioners in support of their circuit-split allegation involved a plaintiff seeking fees that obtained some substantive change in conduct by the defendant as a result of the litigation. In this case, the Eleventh Circuit found that Pope was a prevailing party because he succeeded in obtaining the "judicially sanctioned change

in the legal relationship of the parties" required by this Court's decision in *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources*, 532 U.S. 598 (2001). Pope succeeded on the merits in his effort to gain a court order ending the State's application of the No-bypass Rule. The fact that the State eventually agreed with Pope's position does not change the fact that Pope had to obtain a court order to stop the State's continued application of the No-bypass Rule against Pope and similarly situated public employees.

Other cases from the Seventh and D. C. Circuits have addressed the issue of responsibility to pay fees under fee-shifting statutes in a manner consistent with the Eleventh Circuit's decision in this case. The D. C. Circuit's decision in *Turner v. District of Columbia Bd. of Elections and Ethics*, 354 F.3d 890 (D. C. Cir. 2004), addresses factual circumstances similar to that in this case. The *Turner* plaintiff sued the D. C. Board of Elections to certify the results of a ballot initiative. The United States intervened and claimed the ballot initiative violated federal law. The D. C. Board eventually agreed with the plaintiff that the federal statute was unconstitutional. The courts ultimately found the statute unconstitutional and granted plaintiff relief requiring the certification by the Board. The defendant D. C. Board then opposed plaintiff's request for attorney's fees, claiming it was not the culpable party. The D. C. Circuit appeals court rejected the Board's position finding that it was the party responsible for providing relief on the merits to the plaintiff:

> There is no basis to conclude that the Board was not "the party legally responsible for relief

> on the merits," *Kentucky v. Graham*, 473 U.S. 159, 164 (1985), as only it, and not the United States, could certify the votes on Initiative 59. Results, not litigating positions, are determinative of prevailing party status. *Hensley*, 461 U.S. at 435. Turner incurred and continued to incur attorney's fees and expenses because the Board refused to certify the election results.

354 F.3d at 897. The D. C. Circuit rejected the defendant's claim that it is excused from fee responsibility because it agreed with the plaintiff's legal argument in the same manner as the Eleventh Circuit's decision in this case:

> . . . the Board continued to enforce the Barr Amendment throughout Turner's § 1983 litigation, it is irrelevant for purposes of § 1988 that in court the Board supported Turner's constitutional challenge to the Barr Amendment.

Id. The D. C. Circuit looked to the traditional test of a change in the legal relationship of the parties to determine fee liability, just as the Eleventh Circuit did in this case. Contrary to the Petitioners' claims, the D. C. Circuit's caselaw is consistent with that of the Eleventh Circuit.

The Seventh Circuit has also addressed the same issue raised here and decided it in a manner consistent with the Eleventh Circuit's decision. *King v. Illinois State Bd. of Elections*, 410 F.3d 404 (7th Cir. 2005) was a complex multi-party voting rights case. The Seventh

Circuit ruled that intervening parties that successfully protected their constitutional interests were entitled to fees against the defendant State agency even though the state claimed it, too, was the "winning" party. "[B]ecause the intervenors were vindicating their civil rights, we think that the appropriate party from whom to seek fees in this case is indeed the State." Finding that the State had failed to make adequate efforts to ensure that its redistricting plan was constitutional, the Court found it appropriate to require the State to pay the intervenor's fees. In this case, Pope was required to bring the lawfulness of the No-bypass Rule before the district court after his complaint to State of Alabama officials was backhanded.

Alabama's assertion of a "clear, mature and acknowledged" split in the rulings of the circuits is of no substance. Pet. 19. The two § 1988 cases cited by the defendants did not involve fee-applicants that succeeded on the merits. In relatively recent decisions ignored by Petitioners and their amici, the Seventh and D. C. Circuits have ruled in a manner consistent with the Eighth and Eleventh Circuits. The Eleventh Circuit's decision here, consistent with every other circuit, correctly recognized and implemented this Court's precedents that look to the results obtained on the merits in determining fee liability. There is not one circuit court that adopts the Petitioners' argument in this case.

IV. Review By This Court Is Not Merited.

This Court has recognized that the statute imposes attorney's fees "as part of the costs." *Hutto v. Finney*, 437 U.S. 678, 695 (1979). Here, the district court and the Eleventh Circuit correctly awarded costs against the defendant State of Alabama and its agencies and officials. The State claims that Pope should have been denied fees against the State because it, too, sought vacation of the No-bypass Rule. The upshot of the State's argument is that Pope, while a prevailing party, is entitled to fees from nobody. Pope did not seek fees from the African-American intervenors because he sought and obtained no relief from them.[6] Rather, the party Pope sought relief from was the party that denied him an employment opportunity on the basis of his race.

The State of Alabama has turned what should have been a routine fee application into a "second major litigation". *Hensley*, 461 U.S. at 424. While there is no doubt that the State of Alabama and its amici are hostile to the policy objectives of § 1988, and openly disparage the motives of counsel for civil rights claimants[7], as this case demonstrates, the issue is not about liberal versus conservative principles in the proper role of federal judicial authority over states and local governments. Rather, this

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6. While Pope disagreed with the litigation positions of the African-American intervenors, their arguments did not justify fees under the *Christianburg Garment* standard for fees against plaintiffs that maintain baseless litigation.

7. *See* Petition at 27, 28, 31, 32; Brief of Amici Curiae International Municipal Lawyers, etc., at 12-15; and, *cf.*, Brief of Commonwealth of Virginia, et al., at 11.

case is about whether the plain language and principles of the fee-shifting statute benefitting those that succeed in protecting constitutional rights are to be respected.

The fee award here should have been a "run-of-the-mill occurrence." *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719, 739 (1980). While Alabama may grouse about its mounting obligation to pay "fees-on-fees", Pet. at 32, it alone is responsible for the multiplication of costs in this case.

This Court has adopted a bright line test governing liability for fees under § 1988: responsibility for fees follows responsibility on the merits. The circuits are unanimous on this point. There is no need for this Court to revisit the issue in this case.

CONCLUSION

Respondent Timothy D. Pope requests that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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