No. 08-345

In the
Supreme Court of the United States

STATE OF 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

REPLY BRIEF FOR PETITIONERS

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QUESTION PRESENTED

"Numerous federal statutes allow courts to award attorney's fees to the 'prevailing party.'" *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600 (2001). The question presented here, which has divided the lower courts, is:

> Whether a litigant who requests and obtains the same relief as the party from whom he seeks attorney's fees—and whose interests are therefore aligned with those of the would-be fee payer—is a "prevailing party" entitled to fees within the meaning of federal fee-shifting statutes.

The Eighth and Eleventh Circuits have answered yes to this question; the Second, Seventh, and D.C. Circuits have all answered no.

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The State demonstrated in the petition that the Eleventh Circuit's decision—

- deepens a circuit split and reflects lower-court confusion about whether federal fee-shifting statutes permit awards against aligned, prevailing parties;
- conflicts with this Court's recognition that these statutes codify a "loser-pays" system; and
- implicates an issue of extraordinary practical importance.

Pope tries to explain away the circuit split and this Court's attorney's-fees decisions, but to no avail. As we will show, the lower courts' confusion is manifest, and the conflict with this Court's precedents is stark.

Tellingly, Pope has not denied that this case presents a question of national importance. Nor could he, given that 27 States and every major local-government group in the country have urged the Court to grant certiorari precisely *because of* the alignment issue's real-world significance.

I. The Lower Courts' Confusion Is Clear.

Pope buries his response to the circuit split deep in his opposition. And with good reason: His efforts to paper over the split are not convincing. Indeed, the only thread holding Pope's split arguments together is his persistent refusal to engage what the lower courts have actually said about alignment.

1. Pope asserts, for instance, that *Firebird Society v. Members of the Board of Fire Commissioners*, 556

F.2d 642 (2d Cir. 1977), turned on the fact that the fee-seeking plaintiffs had merely "opposed a procedural motion by nonparties." Opp. 19. But that is not what the Second Circuit said at all. The *Firebird* court rejected the fee request on the ground that the government defendants "joined in opposing intervention and as to that issue were as much prevailing parties as" the plaintiffs. 556 F.2d at 644.

2. Pope likewise discounts *ASH v. Civil Aeronautics Board*, 724 F.2d 211 (D.C. Cir. 1984), as involving only a "passing" reference to alignment. Opp. 19. That, too, is incorrect. With respect to the issue presented here, the *ASH* court stated its principal holding as follows: "We agree with the Board that ASH cannot be considered a 'prevailing party' on an issue on which both ASH and the government took the same position." 724 F.2d at 216. Notably, in so holding, the D.C. Circuit cited *Firebird* for support.

3. Pope similarly tries to pass off *Bigby v. City of Chicago*, 927 F.2d 1426 (7th Cir. 1991), as involving only a routine "application of the *Texas State Teachers* standard." Opp. 20. Wrong again. What the Seventh Circuit actually *said*—relying on *ASH*—was (1) that "the Bigby plaintiffs cannot be characterized as prevailing parties vis-à-vis the City with respect to" an issue on which they agreed; and (2) that because "[t]he City was as much a prevailing party" with respect to the agreed-upon issue as the Bigby plaintiffs, the latter did "not qualify for an award of attorney's fees." 927 F.2d at 1429.

4. Moving to the other side of the split, Pope makes no effort to deal with *Jenkins v. Missouri*, 73 F.3d 201 (8th Cir. 1996), in which the Eighth Circuit acknowledged the State's invocation of *Firebird*, *ASH*, and

Bigby in support of an alignment argument—but then expressly refused to follow those decisions.

5. Pope's reliance on *Turner v. District of Columbia Board of Elections & Ethics*, 354 F.3d 890 (D.C. Cir. 2004), and *King v. Illinois State Board of Elections*, 410 F.3d 404 (7th Cir. 2005), is misplaced. Neither even begins to resolve the current confusion. The *Turner* court declined to consider the alignment issue because it had been raised "for the first time on appeal" and therefore was "not properly before the court." 354 F.3d at 897. And *King*, which arose in "the *sui generis* category of redistricting cases," merely held that because the State had made no effort whatsoever to defend a challenged reapportionment plan, it had not "prevail[ed]" in a way that would exempt it from fee liability. 410 F.3d at 409, 422 (quotations omitted).

The disorder in the lower courts is unmistakable.[1] This Court should grant certiorari to provide much-needed guidance.

II. The Conflict With This Court's Decisions Is Stark.

Pope fails to cite a single case in which this Court has authorized a fee award against an aligned, prevailing party. And he has no meaningful answer to the petition's demonstration that this Court's "entire attorney's-fees

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[1] For still further evidence of the lower-court uncertainty, compare *LULAC v. Clements*, 923 F.2d 365, 368-69 (5th Cir. 1991) (en banc) (refusing successful intervenor's request "to assess her fees, not against a losing party, but rather against the prevailing [state defendant]"), with *Pennsylvania v. Flaherty*, 40 F.3d 57, 62 (3d Cir. 1994) (indicating willingness to assess fee awards against nominally prevailing defendants).

jurisprudence rests on the assumption that federal fee-shifting statutes codify a loser-pays system." Pet. 20-25. Pope offers two responses, neither of which holds water.

1. Pope first presses a novel "once-a-loser-always-a-loser" rule. He contends that because nearly 40 years ago the State was adjudicated liable for discriminating against black workers, it remains "guilty"—even as to him—today. Opp. 12. The State, Pope says, "was the *loser* in 1970 and remains the loser until the case is closed." *Id.*

That makes no sense at all. The State's original liability for discriminating against black workers has nothing to do with this case. The State has never been found liable in this case for discriminating against Pope or, for that matter, any other white worker. Indeed, this case isn't about discrimination at all. This case is about terminating the No-Bypass Rule. That is the *sole* issue for which Pope sought fees. And on that issue, the State most certainly was *not* a loser. Litigating alongside both the United States and Pope, the State obtained precisely the relief it sought.

Logic aside, Pope's once-a-loser rule finds no support in the law. Indeed, it is well settled that an enjoined defendant is not a loser in perpetuity *even vis-à-vis the original prevailing plaintiff*. Rather, even in that scenario, "[a]ncillary or offshoot proceedings" that are "clearly separable from the proceeding that led up to the entry of the decree" are sensibly treated as discrete cases for fee-shifting purposes. *Alliance to End Repression v. City of Chicago*, 356 F.3d 767, 771-72 (7th Cir. 2004) (Posner, J.). That principle—that winners and losers are determined on a phase-by-phase basis—applies *a fortiori* here, where the State indisputably never "lost" on the lone issue to which the fee request pertains. *Cf.*

Pennsylvania v. Delaware Valley Citizens' Council, 478 U.S. 546, 549 (1986) (separating disputes into "phases" is "a system for analyzing requests for attorney's fees and costs that appears to be useful in protracted litigation").

Pope's retort also highlights one of the most urgent concerns that the State and local-government *amici* have expressed about the Eleventh Circuit's decision. A rule making government defendants liable for their aligned co-parties' attorney's fees will have pernicious effects in the thousands of institutional-reform cases (like this one) that are presently pending in courts around the country. State Br. 5, 8-11; Local Br. 5-12, 17-23. Whereas many institutional-reform decrees "are decades old and require frequent modification (or abolition) as factual circumstances change and the legal landscape evolves," the Eleventh Circuit's rule exposes States and municipalities to fee requests "virtually every time any such change occurs—even if the [government defendant] itself initiates the change." Local Br. 5. The problem is that almost *every* institutional-reform decree has its genesis in a finding of governmental liability. If, as Pope seems to believe, that initial (and often distant) finding automatically puts the government defendant on the hook for all subsequent fee requests—whenever, from whomever, and about whatever—then States and municipalities "will understandably hesitate before seeking to modify obsolete injunctions and consent decrees." *Id.* at 21.

2. Relatedly, Pope insists that despite the State's complete success in the termination litigation, it *must* be liable to pay his lawyers' bill, lest he be "entitled to fees from nobody." Opp. 24. But there is no inalienable right to recoup legal fees. Federal fee-shifting statutes are not lawyers'-full-employment acts; they exist to ensure "an *appropriate* level of enforcement." *Buckhannon Bd.*

& Care Home, Inc. v. West Va. Dep't of Health & Human Res., 532 U.S. 598, 620 (2001) (Scalia, J., concurring). Where, as here, "the State is devoting its resources to obtaining the very relief the plaintiff seeks, the private litigant already has a champion," and "a fee award is not justified." State Br. 13.

When Pope moved to intervene, both Alabama and the United States promptly objected. In no uncertain terms, they told him that his services were not needed and reassured him that his interests "were adequately represented" (App. 3a) because, just like him, they sought "to terminate the no-bypass rule." Doc. 632, p.4; *accord* Doc. 633, p.2. Having bulled ahead in the face of that clear warning, Pope's "entitled-to-fees-from-nobody" lament rings hollow. If ever there were a case in which a fee award would result in an unjustifiable "windfall[]," this is it. *Hensley v. Eckerhart*, 461 U.S. 424, 444 (1983) (Brennan, J., dissenting).

III. Pope's Efforts To Evade The Question Presented Are Unavailing.

Rather than join issue on the question that this case presents—whether an aligned, prevailing party can be made liable for a co-party's attorney's fees—Pope deploys a series of smokescreens aimed at suggesting that the case may not present the alignment question at all. Pope's diversionary tactics, however, cannot be squared with the record and thus cast absolutely no doubt on this case's evident certworthiness.

Before setting the record straight, there is an important point worth emphasizing at the outset: Neither the district court nor the Eleventh Circuit questioned the fact of the parties' alignment. To the contrary, both

courts took it as given—and decided the case based on the premise—that the State's and Pope's interests were aligned because both parties sought and obtained the No-Bypass Rule's termination. App. 3a, 13a. They simply held that "as a matter of law" the parties' alignment did not preclude a fee award. App. 5a. It is that "pure legal issue" (Pet. 33) that the State now asks this Court to consider.

A. The State Aggressively Sought The No-Bypass Rule's Termination.

Pope first tries to paper over the parties' alignment by simply writing the State out of the story altogether. Indeed, reading Pope's opposition, one might wonder whether the State played *any* active role in the No-Bypass-Rule litigation. Nowhere is Pope's creative editing more apparent than in his discussion of the district court's June 2006 order finally terminating the Rule. Pope describes that order as follows:

> 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.'

Opp. 7. The truth, however, is lost among the ellipses and brackets. Compare Pope's description with what the district court's order actually says, with emphasis added to highlight Pope's omissions:

> (1) Intervenor Timothy D. Pope's motion for summary judgment (doc. no. 757) *and the State defendants' motion for summary judgment (doc. no. 759) are* granted.

> (2) *Plaintiff United States of America and the State defendants' joint motion to terminate no-bypass provisions of injunctive orders (doc. no. 634) and* intervenor Pope's motion to modify injunction (doc. no. 659) *are* granted.

App. 24a-25a.

Pope likewise asserts that the district court described its May 2005 order preliminarily suspending the Rule as being "'based on Pope's motion.'" Opp. 7. What the district court actually said was that "*[f]or the reasons stated in the court's April 29 order and* based on Pope's motion, the court will grant the suggested preliminary relief." App. 32a (emphasis added). Significantly, in its April 29 order the district court had emphasized that "the evidentiary record *submitted by United States and state defendants* shows a strong likelihood that, when all is said and done, the rule cannot continue." App. 29a (emphasis added). On that basis, the court granted *both* the State defendants' and United States' joint motion *and* Pope's motion:

> (1) The joint motion to terminate the no-bypass rule (Doc. No. 634) is treated as a motion for preliminary relief filed by defendants and said motion is granted.
>
> (2) Plaintiff intervenor Timothy Pope's motion for preliminary relief (Doc. No. 732) is granted.

App. 34a.

There is no need (or room) to multiply examples. Suffice it to say that Pope consistently portrays the No-Bypass Rule's termination as a solo effort in which the

State played no role. *See* Opp. 1 ("Pope obtained an order …."), 6, 7, 11, 13, 14, 15, 16, 17, 21. The truth, as reflected in the district court's and the Eleventh Circuit's own opinions, is that the State and Pope litigated the termination issue hand-in-hand, side-by-side. *See* App. 2a-3a, 4a, 8a-10a, 13a, 21a-22a, 24a-25a, 27a-28a, 29a, 30a, 31a, 32a, 34a.

B. The State Urged The Rule's Termination From The Very Outset Of The Litigation.

To the extent Pope acknowledges the State's presence in the case at all, he consistently insinuates that the State was merely a latecomer who hopped the termination train as it was leaving the station. He asserts, for instance, that the State agreed with his position only "at the last minute" and, indeed, even rephrases the Question Presented so that it applies only to a defendant who "belatedly agrees with the plaintiff's position on the merits." Opp. i, 11. Pope's suggestion that the State was (at best) riding his coattails is a consistent theme of his opposition. *See id.* at 1, 3, 4, 5, 11, 16.

It is also verifiably false. We have already explained in detail that the State's efforts to terminate the No-Bypass Rule predated Pope's arrival on the scene. Pet. 3-8. But the Court needn't take our word for it. The district court's own chronology demonstrates that the timing point is not debatable. App. 8a-10a. As does the Eleventh Circuit's summary, which opens with the "undisputed" fact that "the State defendants commenced a review of the continuing necessity of the No-bypass Rule in May 2002, well *before* Pope moved to intervene." App. 2a.

C. The State And Pope Sought And Obtained Precisely The Same Relief.

Pope also seeks to mask the parties' alignment by asserting that "while the State and Pope ultimately sought an end to the No-bypass Rule … they approached the problem with very different arguments." Opp. 18; *accord id.* at 4-5, 6, 8, 13, 16, 17. Even if that were true (it isn't[2]), it wouldn't make a bit of difference. In determining prevailing-party status—and thus alignment, as well—"[t]he result is what matters," not the "legal grounds for a desired outcome." *Hensley*, 461 U.S. at 435. The State and Pope indisputably sought and obtained the same "result."

Indeed, Pope's fixation on the nuances of the parties' litigating positions highlights one of the principal problems with allowing aligned parties to seek fees. "Because the amount that plaintiffs and intervenors can recoup from aligned defendants will necessarily be tied to the nature and extent of their contributions to the relief obtained, they will nearly *always* find it necessary to engage in 'major' fee-related litigation." Pet. 32. Pope's opposition, which obsesses over who argued what (and when, and to what effect) and repeatedly seeks to outline and justify his own "contribution" to the litigation, is powerful evidence of the coming fee-litigation explosion that we have described. *Id.* at 31-33. Far from "simplif[ying]" it "to the maximum extent possible," the Eleventh Circuit's rule only makes fee litigation more "protracted, complicated, and exhausting." *Pennsyl-*

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[2] The State *repeatedly* made the constitutional argument for which Pope takes sole credit. *See, e.g.*, Doc. 663, ¶¶13-15 (answer); Doc. 760, pp.14-23 (summary judgment brief); Doc. 794, Exh. A, pp.13-15 (status conference).

vania v. Delaware Valley Citizens' Council, 483 U.S. 711, 722 (1987).

D. Pope's Separate Discrimination Suit Has No Bearing On The Parties' Alignment Here.

Finally, in attempting to obscure the parties' alignment, Pope consistently conflates the two separate lawsuits in which he is currently involved. *See* Opp. 1, 3, 11, 14, 16, 24. As we have explained (Pet. 4), after his promotion was rescinded as violative of the No-Bypass Rule, Pope did two things. First, "[s]eeking individual redress for the forfeited promotion," he sued the State, alleging that its compliance with the Rule violated Title VII and the Equal Protection Clause. *Pope v. Alabama*, 2008 WL 2874483, at *3 (M.D. Ala. 2008). In that private suit, Pope sought retrospective relief including instatement to the position he would have held but for the rescission, back-pay, and compensatory damages (and attorney's fees, as well). Second, and separately, Pope moved to intervene in the ongoing *Frazer* action "for the purpose of seeking modification or vacation" of the No-Bypass Rule on a prospective basis. Doc. 605, p.1.

To be sure, the State is adverse to Pope in his separate discrimination suit, which is presently on appeal to the Eleventh Circuit. If Pope ultimately prevails there—he lost in the district court—he will be entitled to seek an award of attorney's fees, and the State has never suggested otherwise. But as the summary above makes clear—and as both the district court and the Eleventh Circuit correctly recognized—the State's and Pope's interests in *this* case are precisely aligned. As the district court explained, when Pope formally intervened in *Frazer*, he "*joined* the United States and the state defendants in their termination motion." App. 22a, 27a-28a (emphasis added).

* * *

The fact therefore remains that "from the very outset of this litigation, the interests of the United States, the State defendants and Pope have, as relevant here, been squarely aligned." Pet. 5. Based on that premise, the Eleventh Circuit decided—and the petition now squarely presents—a pure legal issue: Can an aligned, prevailing party be put on the hook for a co-party's fees? Given the uncertainty in the lower courts, this Court should take this opportunity to definitively resolve that important question.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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