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

BRIEF OF AMICI CURIAE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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.

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INTEREST OF *AMICI CURIAE*[1]

The International Municipal Lawyers Association (IMLA), previously known as the National Institute for Municipal Law Officers, is a non-profit, professional organization of over 2500 members. Since 1935, IMLA has served as a national, and now international, clearinghouse for legal information and has fostered cooperation on municipal legal matters. IMLA's mission is to advance the development of municipal law, which includes advocating the nationwide views of local governments on legal issues.

The National League of Cities (NLC) is the oldest and largest national organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with the 49 state municipal leagues, NLC serves as a resource to and an advocate for the more than 19,000 cities, villages, and towns it represents. More than 1,600 municipalities of all sizes pay dues to NLC and actively participate as leaders and voting members in the organization.

The United States Conference of Mayors (USCM) is the official nonpartisan organization of the 1,139 cities with populations of 30,000 or more. The primary roles of The U.S. Conference of Mayors are to promote the development of effective national ur-

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[1] The parties received notice of intention to file this amicus brief at least ten days prior to its due date and consented to its filing. No counsel for a party has authored this brief in whole or in part, and no person or entity, other than amici or their counsel, has made a monetary contribution to the preparation or submission of this brief.

ban/suburban policy; to strengthen federal-city relationships; to ensure that federal policy meets urban needs; to provide mayors with leadership and management tools; and to create a forum in which mayors can share ideas and information.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,068 counties. NACo advances issues with a unified voice before the federal government, improves the public's understanding of county government, and assists counties in finding and sharing innovative solutions through education and research.

The International City/County Management Association (ICMA) is the premier local government leadership and management organization. Founded in 1914, its mission is to create excellence in local governance by advocating and developing the professional management of local government worldwide. In addition to supporting its nearly 9,000 members, ICMA provides publications, data, information, technical assistance, and training and professional development to thousands of city, town, and county experts and other individuals throughout the world.

Amici have appeared as friends of the court on behalf of their members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts. The rule adopted below threatens serious harm to municipalities, which are frequently subject to ongoing federal court orders and consent decrees that implicate federal fee-shifting statutes. Accordingly, amici and

their members are particularly interested in this case.

SUMMARY OF ARGUMENT

I. Allowing non-adversarial litigants to recover attorney's fees as "prevailing parties" under the federal fee-shifting statutes would inflict widespread harm on municipalities. The rule adopted below gives rise to perverse incentives whenever a locality seeks to modify or terminate a continuing court order, typically a permanent injunction or consent decree, implicating any of the nearly 200 fee-shifting statutes that turn on this particular term. Literally thousands of such orders or decrees are in place across the Nation and, because public-law litigation frequently involves municipal institutions, localities are squarely in the crosshairs of the Eleventh Circuit's rule. Since the legal and societal landscape is constantly changing, moreover, municipalities must frequently seek modification or abolition of such orders, which invites non-adversarial litigants to join the fray and then bill localities for their "joint" efforts. Muncipalities can ill-afford such wasteful—and often severe—expenditures of taxpayer resources.

II. Localities are particularly vulnerable to the abusive potential of the Eleventh Circuit's rule. As the record in this case illustrates, awarding fees to non-adversarial litigants encourages nakedly strategic "claim-jumping." Congress intended the fee-shifting statutes to provide the balanced incentives necessary to secure adequate enforcement of certain federal laws, not to reward enterprising attorneys who join a government initiative in hopes of a payday. And because municipalities are required by law to conduct

almost all of their business in full public view, there is little hope of preventing would-be claim-jumpers from pursuing such strategies.

III. More fundamentally, the rule adopted below gives municipalities exactly the wrong incentives. It punishes localities that move to modify or abolish illegal or outdated orders and decrees, while, perversely, protecting those who simply remain silent. At the same time, it gives municipal defendants powerful incentives in the initial litigation to resist the possibility of ongoing federal jurisdiction either by fighting otherwise valid lawsuits or by capitulating to dubious claims in order to avoid even the possibility of an entry of judgment. Where the costs of ongoing federal jurisdiction are unclear and possibly quite significant—and that is precisely the specter that the Eleventh Circuit's rule creates—localities will seek to avoid it at almost any price.

REASONS FOR GRANTING THE PETITION

The issue presented here—whether a litigant who seeks precisely the same relief as the party from whom he later demands attorney's fees may be deemed a "prevailing party" under the federal fee-shifting statutes—warrants this Court's immediate review. As petitioners have persuasively demonstrated, this question has sharply divided the federal courts of appeals. Pet. 12-19. Standing alone, that conflict is sufficient to warrant the grant of certiorari and amici will not retread that ground here. Rather, amici seek to explain why the rule approved below will impose widespread and grave harm on municipalities and others exposed to its perverse operation.

I. THE ELEVENTH CIRCUIT'S RULE WILL DRAMATICALLY INCREASE MUNICIPALITIES' EXPOSURE TO ATTORNEY'S FEE AWARDS

Under the Eleventh Circuit's definition of "prevailing party," a litigant may recover attorney's fees from parties who achieved precisely the same relief from the court. See Pet. App. 5a ("[W]e see nothing in the language of section 1988 that * * * conditions the district court's power to award fees on the defendant's assuming an opposing posture."); Pet. 27 ("[T]he Eleventh Circuit's decision creates an inequitable 'lose–lose' proposition that exposes defendants in multiparty litigation to fee liability no matter what their position."). That rule may, at first blush, appear to have only limited application, but nothing could be further from the truth. As amici explain below, pp. 6-9, *infra*, there are literally thousands of instances in which courts have entered consent decrees or permanent injunctions that implicate federal fee-shifting statutes. In all these cases, the Eleventh Circuit's rule will create perverse incentives. The sheer breadth of this problem calls for this Court's immediate review.

Because they are subject to an immense number of ongoing court orders, municipalities are particularly vulnerable to the rule's harmful effects. Many of these orders are decades old and require frequent modification (or abolition) as factual circumstances change and the legal landscape evolves. The Eleventh Circuit's rule exposes municipalities to claims for attorney's fees virtually every time any such change occurs—even if the municipality itself initiates the change. Furthermore, the rule adopted be-

low has the potential to inflict serious harm upon municipal treasuries, which can scarcely afford to pay the fees of non-adversarial lawyers. This Court's review is necessary to prevent that legally erroneous—and profoundly misguided—appropriation of taxpayer dollars.

A. A Staggering Number of Ongoing Federal Court Orders Subject to Federal Fee-Shifting Statutes Require Periodic Modification

Since the rise of modern institutional litigation in the 1950s, ongoing court orders have proliferated. Perhaps most visibly, federal courts retain jurisdiction over a large number of cases arising out of litigation under 42 U.S.C. § 1983 and Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq*. Commentators estimate that thousands of orders in such cases remain enforceable and subject to ongoing jurisdiction. See Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. Rev. 550, 629 (2006) (observing that "thousands of federal consent decrees * * * currently exist"); cf. David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. Rev. 1015, 1018 (2004) ("[H]undreds of schools, and, eventually, thousands of other government institutions that were sued for constitutional and federal statutory violations came under the dominion of injunctions and consent decrees."). Indeed, *Brown* v. *Board of Education*, perhaps the most venerable civil rights case in American history, officially ended only a few years ago. See *Brown* v. *Unified Sch. Dist. No. 501*,

56 F. Supp. 2d 1212 (D. Kan. 1999). To be clear, amici do not mean to diminish the importance of appropriate institutional litigation; our point is simply that such suits have been (and are likely to remain) a fixture of the modern legal landscape and that they often result in court-ordered relief that remains in place for years.

Many of the institutions frequently subject to ongoing court orders are run by municipalities. As recently as 2004, "[h]undreds of school districts" were still under court supervision, Zaring, 51 UCLA L. Rev. at 1019, and, in 2001, more than one-quarter of all jails operated under court order, Camille Graham Camp & George M. Camp, *The Corrections Yearbook: Adult Systems* 38 (2001). In fact, at one time or another, court orders have governed local jails in all 50 States. Ross Sandler & David Schoenbrod, *Democracy by Decree* 4 (2003). Moreover, in 1996, 36 child welfare and foster care systems were subject to consent decrees. Zaring, 51 UCLA L. Rev. at 1018 n.8. And even these numbers likely understate the number of ongoing court orders because many decrees are not memorialized in reported decisions. See Schlanger, 81 N.Y.U. L. Rev. at 569 (noting that such orders are often "completely unobservable by ordinary case research methods").

These court orders often require modification or termination as on-the-ground circumstances change and the legal landscape evolves. Indeed, this Court has recognized the need for such revision. In *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 381 (1992), this Court advised courts to take a "flexible approach" to modification: "Because such decrees often remain in place for extended periods of time," this

Court explained, "the likelihood of significant changes occurring during the life of the decree is increased." *Id.* at 380. In *Agostini* v. *Felton*, for example, this Court granted the New York City Board of Education relief from a permanent injunction barring public school teachers from participation in a parochial school program. 521 U.S. 203 (1997). The Court noted that Establishment Clause jurisprudence had "changed significantly" since the injunction issued, making relief appropriate. *Id.* at 236.

Shifts in other areas of public law also regularly call into question the vitality of existing court orders. To name but one well-known example, this Court recently revised the permissible role of racial and ethnic considerations in the school admissions context. See *Grutter* v. *Bollinger*, 539 U.S. 306 (2003); *Gratz* v. *Bollinger*, 539 U.S. 244 (2003). Likewise, *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 127 S. Ct. 2738 (2007), recently clarified the proper use of racial classifications in public school districting decisions. Rules governing conditions of confinement offer yet another example of significant change in the legal landscape. See, *e.g.*, *Lewis* v. *Casey*, 518 U.S. 343, 350-354 (1996), ("disclaim[ing]" any suggestion that *Bounds* v. *Smith*, 430 U.S. 817 (1977), or its antecedents established that prison libraries and legal assistance programs are ends in themselves under the Eighth Amendment); *Wilson* v. *Seiter*, 501 U.S. 294, 304-305 (1991) (restricting the extent to which conditions of confinement can be viewed in combination to constitute an Eighth Amendment violation).

Courts are frequently required to modify existing decrees or injunctions in response to such significant

legal and factual changes. A federal district court in 2004, for example, granted a joint motion to modify a school desegregation consent decree first entered in 1980. *United States* v. *Board of Educ.*, No. 80-C-5124, 2004 U.S. Dist. LEXIS 3067 (N.D. Ill. Mar. 1, 2004). The court observed that "[t]here is no question that the Chicago of 1980 and before is not the Chicago of 2004" and concluded that the decree was "no longer capable of achieving its primary objectives." *Id.* at *4.

Similarly recognizing that ongoing court orders often require modification, Congress has taken steps to simplify that process. See, *e.g.*, Schlanger, 81 N.Y.U. L. Rev. at 602, 626. The Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626 *et seq.*, for example, makes it easier for States and localities to terminate judicial orders awarding prospective relief regarding prison conditions when the conditions that gave rise to the initial order change. The Act provides that courts shall terminate such an order after two years unless, among other things, the order remains necessary to correct a current or ongoing violation of a federal right. 18 U.S.C. § 3626(b)(1)-(3). Congress is also currently considering legislation that would subject one particular type of ongoing court order—federal consent decrees—to more searching periodic review. The proposed Federal Consent Decree Fairness Act, S. 2289, H.R. 4041, 110th Cong. (2007), would, upon the motion of a state or local government, modify or terminate any consent decree that is more than four years old in the absence of a demonstrated, ongoing need for the decree. See *id.* at § 3.

Unlike this Court and Congress, the Eleventh Circuit is apparently untroubled by this problem. Its

rule would discourage localities from asking courts to modify orders issued long ago to reflect current conditions. Under its approach, a municipality would naturally be reluctant to ask the court for relief. The threat of fee awards to non-adversarial litigants might simply be too great to justify the request.

B. Allowing Non-Adversarial Litigants to Collect Attorney's Fees Would Seriously Harm Cash-Strapped Municipalities

This Court has been (rightly) sensitive to the burden that attorney's fees impose on municipal budgets. That concern flows from the practical reality that monetary awards place a "strain on local treasuries and therefore on services available to the public at large." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (refusing to expose municipalities to punitive damages awards under Section 1983). "Liability for attorney's fees," this Court has observed, "would have a particularly severe impact" when localities face potentially large awards. *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 123 (2005).

That concern is well-founded. Attorney's fees can be significant and often exceed damages awarded on the merits. *Evans* v. *Jeff D.*, 475 U.S. 717, 734 (1986). Indeed, attorney's fees need not be proportionate to actual damages. *City of Riverside* v. *Rivera*, 477 U.S. 561, 574 (1986). In *Rivera*, for instance, the claimant was awarded $245,456 in attorney's fees but only $33,350 in damages. *Id.* at 582.

The Court's concern also reflects the reality that localities are frequently strapped for cash. In the 1990s, unbalanced municipal budgets were an "increasingly common phenomenon." Anthony G. Cahill & Joseph A. James, *Responding to Municipal Fiscal Distress: An Emerging Issue for State Governments in the 1990s*, 52 Pub. Admin. Rev. 88, 88 (1992). This unfortunate trend has not abated. Indeed, "about a hundred local governments have suffered from financial crisis in recent years." Omer Kimhi, *Reviving Cities: Legal Remedies to Municipal Financial Crises*, 88 B.U. L. Rev. 633, 633 n.2 (2008). Factors beyond municipalities' control are often to blame for these woes. Declining state aid, tax caps, and state constitutions that restrict certain revenue streams all contribute to the problem. Beth Walter Honadle, *The States' Role in U.S. Local Government Fiscal Crises: A Theoretical Model and Results of a National Survey*, 26 Int'l J. Pub. Admin. 1431, 1459 (2003). The recent rapid decline in home values, which constitute a significant component of most municipal tax bases, has compounded the crisis. Rural municipalities find it particularly difficult to solve financial problems due to their dependence on part-time workers, high turnover rates, outdated record-keeping systems, and limited economies of scale. *Ibid.*

Because attorney's fees can be high when budgets are tight, the Eleventh Circuit's rule presents localities subject to stale court orders with a Hobson's choice. Seeking modification may invite a rush of non-adversarial, fee-seeking litigants. To pay for these fees, impecunious localities may have to cut social services, raise taxes, or go further into debt. Alternatively, localities may be forced to ignore changes

in the legal and factual landscape and thus leave obsolete and even unconstitutional orders in place.

II. LOCALITIES ARE PARTICULARLY VULNERABLE TO THE CLAIM-JUMPING THAT THE ELEVENTH CIRCUIT'S RULE INVITES

A. As This Record Shows, Deeming Non-Adversarial Litigants "Prevailing Parties" Can Encourage Nakedly Strategic Claim-Jumping

The Eleventh Circuit's rule is further flawed because it encourages "claim-jumping," strategic behavior that the fee-shifting statutes should discourage. As the record in this case reveals, rewarding non-adversarial litigants with attorney's fees can encourage lawyers to jump into ongoing litigation for the wrong reason—to obtain large fees with minimal effort rather than to vindicate individual rights. See *Hensley* v. *Eckerhart*, 461 U.S. 424, 443-444 (1983) (Brennan, J., concurring in part and dissenting in part) (noting that fees should be adequate to attract competent counsel, but not produce windfalls to attorneys).

This case vividly illustrates the potential for the Eleventh Circuit's rule to invite claim-jumping. According to an affidavit submitted by the general counsel for the Alabama State Personnel Department, Alice Ann Byrne, respondent Pope's lawyer admitted that he was intervening in the litigation for the sole purpose of generating attorney's fees. See Doc. 748, Ex. A, ¶ 8 (Aff. of A. Byrne). While it is true that Pope contests Byrne's account, see Pope C.A. Br. 13 (quoting Timothy Pope's lawyer as claiming that

he had no "desire to horn in on the State's parade"), that debate is beside the point. Byrne's affidavit at the very least illustrates how the Eleventh Circuit's rule can encourage unseemly and unproductive behavior.

Pope was denied a promotion due to the No-Bypass Rule in September 2002, after which he filed an action alleging race discrimination. See Pet. App. 2a. It was not until February 25, 2003, however, that Pope moved to intervene in the *Frazer* litigation in order to challenge the Rule directly. *Ibid.*

According to Byrne's testimony, Pope's lawyer changed his tune only after learning that the State had commissioned at significant expense an expert study showing a basis for ending the No-Bypass Rule and planned to seek termination of the rule. See Doc. 748, Ex. A, ¶ 8 (Aff. of A. Byrne) (stating that Fitzpatrick admitted he filed the motion to intervene only after a lawyer for the State "told him about our expert report and how good the numbers looked for ending the No-Bypass Rule" and that the State had commissioned the report "at a cost of several hundred thousand dollars"). It was at that point that "Mr. Fitzpatrick told [Byrne] in unambiguous terms that he had filed their preemptive Pope intervention motion *for the purpose of hijacking the litigation to obtain attorney's fees*." *Ibid.* (emphasis added). According to Byrne:

> Mr. Fitzpatrick then started laughing and told me to go check [the fax machine]. Upon checking my fax machine, I found Pope's Motion to Intervene in the Frazer case. I * * * asked him why he had filed this motion, and Mr. Fitz-

> patrick stated that he was "claim-jumping Lisa", * * * who was one of the attorneys engaged by the State to work on terminating the Frazer no-bypass rule. When I said that I did not understand, Mr. Fitzpatrick replied "attorney fees." I responded "from whom" and he said "you."

Ibid.

Pope's motion to intervene thus powerfully illustrates the behavior that the Eleventh Circuit's rule encourages. Byrne's testimony suggests that the motion might have been aimed not at ending the No-Bypass Rule—or, if so, only incidentally—but at collecting attorney's fees in a case where the lion's share of the costs had already been borne by the State and the path for seeking termination of the rule had already been charted. Again, regardless of whether Pope was, in fact, "claim-jumping" so shamelessly, Byrne's affidavit vividly reveals the potential for such abuse that the Eleventh Circuit's rule creates.

To the extent the Eleventh Circuit's rule encourages claim-jumping, it thwarts the purpose of fee-shifting statutes. Fee-shifting statutes work as a limited exception to the "American" rule and award attorney's fees to prevailing plaintiffs who perform the services of a "private attorney general." Such plaintiffs "render[] substantial service * * * to the community at large by securing for it the benefits assumed to flow" from a defendant's "compliance with its constitutional mandate." *Bradley* v. *School Bd.*, 416 U.S. 696, 718 (1974). Awarding fees to non-adversarial litigants, by contrast, rewards lawyers for bringing unproductive, duplicative claims that do not promote

private enforcement of federal rights. That perverse incentive does not "serve" the community or meaningfully advance the important interests fee-shifting statutes are designed to promote.

B. Because Localities Almost Always Operate Transparently, They Are Particularly Vulnerable To Claim-Jumping

Municipalities are particularly vulnerable to the claim-jumping the Eleventh Circuit's rule invites. Open-government or "sunshine" laws, which require local governments to make decisions only after public deliberation, make it possible for plaintiffs' attorneys to receive advance notice of litigation decisions by municipalities. Attorneys may use that information to target litigation simply for the purpose of collecting attorney's fees. The rule thus both penalizes municipalities for challenging outdated and possibly unlawful court orders and encourages them to resist open-government laws.

Almost all municipalities are subject to open-government laws, which require local governments to conduct their meetings and deliberations in public and give the public complete access to municipal records. See Ann Taylor Schwing, *Open Meeting Laws* §§ 4.24-4.32 (1994). Practical concerns, moreover, lead many local governments to conduct their business, including matters related to potential litigation, in the open. Unlike state governments (and perhaps a handful of larger cities), most municipalities do not have regular access to teams of lawyers to plan out comprehensive litigation strategies outside of public view. Instead, municipal litigation is frequently debated in the ordinary (and public) course of business.

This fact makes municipalities uniquely vulnerable to claim-jumping because would-be claim-jumpers have easy access to municipalities' litigation strategies. If a city council, for example, considers seeking modification of a consent decree, those discussions almost always will be aired at public meetings. A would-be claim-jumper can prepare and simply wait to join the action once it begins and then obtain fees if the action is successful.

While most open-government laws place some limitations on required public disclosure of materials and discussions relating to litigation, these limitations are not universal and are generally limited only to attorney-client communications. See generally Schwing, §§ 7.60-7.66 (discussing the various approaches of the States that protect communications between a public body and its attorney); *id.* § 7.70 (examining those States that do not except attorney-client communications from open meeting laws). There may also be significant overlap between those activities that are undertaken in anticipation of litigation and those activities which set local policy, such as petitioners' decision here to fund the study to challenge the No-Bypass Rule. Cf. *Clark-Cowlitz Joint Operating Agency* v. *Federal Energy Regulatory Comm'n*, 798 F.2d 499, 502 (D.C. Cir. 1986) (en banc) (noting the difficulty in drawing a line between litigation strategy and policy formation).

Even if municipalities could employ attorney-client exceptions to shield certain litigation decisions, encouraging such reliance undermines the important objectives open-government laws serve. Such laws are designed to keep public officials accountable to the electorate and to provide the public a meaningful

role in making local policy decisions. See, *e.g.*, Ark. Code Ann. § 25-19-102 (West 2008) ("It is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy."). Public participation is vitally important at the local level, where government most immediately affects people's daily lives. See Schwing § 4.26, at 78-79 ("Application of open meeting requirements to * * * local public entities is especially significant because these entities operate in the same locale as the citizens they serve, making citizen participation in government readily available to the public."). And the public's interest is seldom greater than when debating the important policy matters that are frequently the subject of federal litigation.

III. THE ELEVENTH CIRCUIT'S RULE GIVES LOCALITIES EXACTLY THE WRONG INCENTIVES

A. The Rule Discourages Localities From Seeking to Modify Obsolete or Illegal Judicial Orders, Perversely *Increasing* The Need for "Private Attorneys General"

The Eleventh Circuit's rule contravenes the purposes underlying federal fee-shifting statutes in two principal ways. First, the rule encourages "private attorneys general" to participate in lawsuits where their participation is of minimal value. Second, it discourages localities from attempting to modify or terminate obsolete or illegal judicial orders.

"Under [the] 'American Rule,' we follow 'a general practice of not awarding fees to a prevailing party absent explicit statutory authority.'" *Buckhannon Bd. & Care Home* v. *W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001) (internal citations omitted) (quoting *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 819 (1994)). Fee-shifting provisions (such as 42 U.S.C. § 1988(b), at issue here) represent a limited exception to that rule. Fee-shifting statutes are designed to provide enforcement incentives for private attorneys general, but that underlying policy has limits:

> Since the fee-shifting statutes * * * allow defendants as well as plaintiffs to receive a fee award, we know that Congress did not intend to *maximize* the quantity of the enforcement of federal law by private attorneys general. Rather, Congress desired an appropriate level of enforcement—which is more likely to be produced by limiting fee awards to plaintiffs who prevail on the merits, or at least to those who achieve an enforceable alteration of the legal relationship of the parties.

532 U.S. at 620 (Scalia, J., concurring) (internal quotations and citation omitted).

The Eleventh Circuit's rule does not promote the "appropriate level of enforcement." Quite the opposite, in fact. It encourages "private attorneys general" to join litigation when their contribution merely duplicates others' efforts—that is, when their presence is needed *least*. The rule thus serves to maximize the number of litigants and so undermines efficiency. That result contravenes section 1988's "finely balanced congressional purpose to provide plaintiffs

asserting specified federal rights with 'fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys.'" *Hensley* v. *Eckerhart*, 461 U.S. 424, 443-444 (Brennan, J., concurring in part and dissenting in part) (quoting S. Rep. No. 1011, 94th Cong., 2d Sess., at 6 (1976)).

Furthermore, the Eleventh Circuit's rule serves none of the six recognized rationales for fee-shifting statutes: (1) that the losing litigant should pay the winner's costs in the interest of fairness; (2) that the litigant should be made financially whole for the legal wrong suffered; (3) that fee-shifting may have deterrent and punitive value; (4) that suits by private attorneys general should be encouraged because of their public usefulness; (5) that the relative strengths of the parties should be equalized; and (6) that a fee-shifting scheme may have desired incentive effects. See Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 Duke L.J. 651, 653 (1982).

None of these rationales justifies fee-shifting when, as here, public enforcement has already begun and the interests of the government are aligned with those of the attorney's fee-claimant. First, ordering the government to pay an aligned party's attorney's fees does not increase "fairness" in any meaningful sense. Nor is there a need to make the aligned party whole when his participation in the suit is unnecessary to achieving his desired outcome. Here, for example, because Alabama already had committed to ending the complained-of policy, Pope's rights could have been vindicated at no cost. Likewise, there is no punitive or deterrent value to fee awards where the government is actively working to achieve the same

result sought by the fee-claimant. In such cases, the government is not doing anything the fee-claimant would wish to deter or punish; rather, it acts in the fee-claimant's own interest.

Suits by private attorneys general are, moreover, significantly less useful when the government is already pursuing the same suit itself. In contrast to a litigant who initiates an independent suit, the litigant who joins on the government's side in a suit the government has initiated performs essentially duplicative and inefficient functions. As the D.C. Circuit has recognized:

> [T]he legislative history of sections 1973*l*(e) and 1988 emphasizes over and over again the critical goal of enabling private citizens to serve as "private attorneys general" in bringing suits to vindicate the civil rights laws. * * * [T]his objective is far less compelling when the actual Attorney General participates in the case. * * * It cannot be said [in such cases] that rights are being denied because of inability to pay attorney's fees.

Donnell v. *United States*, 682 F.2d 240, 246 (D.C. Cir. 1982).

There is also no need to equalize the relative strengths of parties that are on the same side of a lawsuit. In fact, requiring localities to pay the attorney's fees of others on their own side reduces the localities' economic strength and consequently harms the interests of both the locality and the aligned party (if not his attorney).

Finally, the Eleventh Circuit's rule perverts the fee-shifting statutes' laudable incentives. The rule not only encourages duplicative actions, but also penalizes those localities that seek to aid would-be litigants by modifying or terminating obsolete or illegal judicial orders. The rule serves only the interests of enterprising attorneys and does so by harming their clients. States and municipalities will understandably hesitate before seeking to modify obsolete injunctions and consent decrees if others who later jump in *on their side* can ultimately demand attorney's fees from them. And by discouraging localities from initiating such suits, the Eleventh Circuit's rule actually *increases* the need for private attorneys general to enforce civil rights laws.

Even more perversely, however, the Eleventh Circuit's rule punishes localities for attempting to comply with federal law. By forcing localities to pay fees when they succeed in modifying consent decrees or injunctions to accord with current legal requirements, the rule discourages such efforts and forces localities to remain under court orders that no longer reflect federal law.

B. The Rule Creates Incentives In Primary Litigation That Favor Protracted Litigation And Voluntary Capitulation Over Settlement

The Eleventh Circuit's rule also distorts the incentives of parties involved in primary litigation. Localities would be justifiably reluctant to submit to continued judicial supervision if faced with the possibility that additional fees would be awarded whenever they successfully update the original judicial decree

to reflect changed legal or factual circumstances. By effectively raising the cost of continued judicial supervision, the rule thus strongly discourages localities from settling on such terms. But often such settlements are the only ones possible. In these situations, then, settlement itself becomes more difficult or impossible and the many "benefits [it] provides for civil rights plaintiffs as well as defendants," *Evans* v. *Jeff D.*, 475 U.S. at 732-733 (citing *Marek* v. *Chesny*, 473 U.S. 1, 10 (1985)), are lost.

Another, equally troubling reaction is also possible. Whenever judicial resolution of primary litigation could entail continued supervision over a matter, defendants can be expected to try to avoid the issuance of such a judgment. As a result, local governments facing uncertain future liability for attorney's fees have powerful incentives to modify challenged practices in order to avoid judgment. When rejecting the "catalyst theory" as a basis for fee awards in *Buckhannon*, this Court discounted the threat that "mischievous defendants" would alter their behavior to "moot[] an action before judgment in an effort to avoid an award of attorney's fees." 532 U.S. at 608. When faced with the possibility of a permanent injunction or consent decree that would leave it vulnerable to unpredictable future attorney's fee awards, however, a locality may be forced to "slink away on the eve of judgment," *id.* at 618 (Scalia, J., concurring), in order to prevent the future application of "a rule that causes the law to be the very instrument of wrong—exacting the payment of attorney's fees to the [intervening] extortionist." *Ibid.*

Because "a mootness dismissal is not easily achieved," *Buckhannon*, 532 U.S. at 639 (Ginsburg,

J., dissenting), localities operating under the Eleventh Circuit's rule will face the temptation to moot threatened actions even before they even begin. In light of the uncertainty inherent in the estimation of a future litigant's fee award—and the ease with which a non-adversarial litigant could secure an award under the Eleventh Circuit's rule—the forward-looking locality will have an incentive simply to capitulate to a plaintiff's demands before the underlying primary litigation can reach final judgment. Like the "catalyst theory" the Court rejected in *Buckhannon*, the Eleventh Circuit's rule harms cash-strapped local governments by "putting pressure on them to avoid the risk of massive fees by abandoning a solidly defensible case early in litigation." *Id*. at 620 (Scalia, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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