No. 00-829

In the Supreme Court of the United States

KELLY JEAN CHRIS, PETITIONER

v.

GEORGE J. TENET, DIRECTOR,
CENTRAL INTELLIGENCE AGENCY

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, federal district courts have jurisdiction over suits solely for the recovery of attorney's fees for work performed in federal administrative proceedings that resulted in the settlement of the merits of a Title VII claim in the administrative process.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 221 F.3d 648. The opinion of the district court (Pet. App. A17-A38) is reported at 57 F. Supp. 2d 330.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 2000. On October 10, 2000, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 24, 2000, and the petition was filed on November 16, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an employee of the Central Intelligence Agency (CIA). Beginning in 1993, she filed numerous claims of sex discrimination against the CIA alleging that she had been denied an overseas assignment because she was "too attractive" and had been issued a written warning regarding her relationship with a foreign national that would not have been issued to a male employee. Pet. App. A19. After the CIA issued a report relating to her allegations, petitioner filed a second complaint, alleging that the agency had retaliated against her by initiating a criminal investigation into her relationship with the foreign national. *Ibid.*

Following discovery, the parties entered into a confidential settlement agreement in June 1995 resolving both claims. Pet. App. A3. The settlement did not set the amount of attorney's fees petitioner's counsel would receive, but instead provided that the agency would pay reasonable fees and costs in accordance with the procedures set forth in 29 C.F.R. 1614.501(e) (1995).[1] Pet. App. A3.

Petitioner's counsel claimed a total of $79,484 in attorney's fees, based on 256.4 hours of work at an hourly rate of $310. The CIA ultimately paid petitioner's counsel $48,350, representing a fee award for 193.4 hours of attorney work at $250 per hour, and costs of $1,237.32. Pet. App. A3.

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[1] At the time of the settlement, the regulation provided, in relevant part, that if the agency and a complainant "cannot reach an agreement on the amount of attorney's fees or costs," then the "agency shall issue a decision determining the amount of attorney's fees or costs due," which "shall include a notice of right to appeal to the EEOC." 29 C.F.R. 1614.501(e)(2)(ii)(A) (1995).

Pursuant to 29 C.F.R. 1614.501(e)(1995), petitioner appealed the fee award to the Equal Employment Opportunity Commission (EEOC), which increased the hourly rate to $275 and awarded fees in the amount of $59,510. Pet. App. A3. On requests for reconsideration by both the agency and petitioner, the EEOC reduced the fee award to $56,593, but slightly increased the award of costs. *Id.* at A4. In its order on reconsideration, the EEOC advised petitioner that she could "petition the Commission for enforcement of the order," or "file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement." *Ibid.* In the alternative, the EEOC also informed petitioner that she had "the right to file a civil action on the underlying complaint," subject to statutory deadlines for such an action. *Ibid.*

Petitioner did not pursue any of the options listed in the EEOC's final order, but instead filed an action in district court seeking the difference between the attorney's fees and costs awarded by the EEOC and the fees and costs claimed in her fee petition.[2] Pet. App. A4. Petitioner also sought "fees on fees," for time spent appealing the agency's final decision to the EEOC. *Id.* at A22. Petitioner sought to invoke the court's jurisdiction under 28 U.S.C. 1331, 28 U.S.C. 1343, 42 U.S.C. 2000e-5(f)(3), and 42 U.S.C. 2000e-16(c) and (d). The government moved to dismiss the complaint for lack of jurisdiction.

2. The district court held (Pet. App. A17-A38) that it lacked jurisdiction over petitioner's suit solely for

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[2] Plaintiff initially filed her action in the United States District Court for the District of Columbia, but it was transferred for lack of proper venue to the Eastern District of Virginia.

attorney's fees, relying principally on the plain language of 42 U.S.C. 2000e-5(f)(3). The court found *North Carolina Department of Transportation* v. *Crest Street Community Council, Inc.*, 479 U.S. 6 (1986) (42 U.S.C. 1988 does not permit a suit solely to recover attorney's fees), to be the "most apt Supreme Court precedent" because the attorney's fee provision in Section 1988 "is virtually identical to the language in § 2000e-5(k)." Pet. App. A33. The court concluded, "[b]ecause the instant action is not one to enforce the substantive rights guaranteed under Title VII, then it follows that § 2000e-5(k), like its virtually identical twin, § 1988(b), does not support an independent federal action to adjudicate an attorney's fees claim." *Id.* at A34.[3]

3. The court of appeals affirmed. Pet. App. A1-A16. It agreed with the district court's conclusion that "the phrase 'actions brought under this subchapter' refers to legal proceedings in a court of law to enforce the substantive rights guaranteed by Title VII, specifically the right to be free from employment discrimination on the basis of race, color, religion, sex, or national origin." *Id.* at A8. The court of appeals explained that its interpretation of the term "actions brought under this subchapter"—to exclude actions solely for fees—was

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[3] In a subsequent decision, the district court dismissed a separate suit by petitioner solely for attorney's fees and costs arising from the administrative settlement of certain retaliation claims. Pet App. A40-A41. As in the prior case, the parties had settled the merits of petitioner's claims in the administrative process, reserving any attorney's fee issues for later resolution. Unsatisfied with the EEOC's fee award at a rate of $ 295/hour, petitioner filed suit in district court seeking additional fees at a rate of $ 315/hour. Relying on its prior decision, the district court dismissed her suit for lack of jurisdiction. The Fourth Circuit consolidated her appeals from each of those decisions. *Id.* at A6.

supported not only by "the specific context in which the language appears," *ibid.*, but also "by the manner in which other provisions of Title VII use the term 'action' or its plural form." *Id.* at A9. The court emphasized that "[i]nterpreting Title VII as not permitting an action solely for attorney's fees and costs is also consistent with the statutory scheme of Title VII, [while] * * * [t]o interpret Section 2000e-5(f)(3) as permitting a suit solely for attorney's fees and costs incurred during the course of the Title VII administrative process would run counter to the congressional aim of quick, less formal, and less expensive resolution of employment disputes." *Id.* at A10-A11.

The court of appeals rejected the argument that *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980), "dictates that we conclude that Title VII permits a complaint solely for attorney's fees," Pet. App. A11, explaining that petitioner's reliance on *Carey* was "misplaced for at least two reasons." *Id.* at A12. First, the court noted, "the plaintiff in *Carey*, unlike [petitioner], initially sought relief in federal court on the merits of her claims in addition to her claim for attorney's fees." *Ibid.* Second, the court emphasized that, in *Crest Street*, "the Supreme Court re-examined the policy concerns noted in the *Carey* decision and dismissed them as 'dicta' and 'exaggerated.'" *Ibid.* The Fourth Circuit found the reasoning of *Crest Street* persuasive, and concluded that its holding that a suit solely to recover attorney's fees is not authorized by Section 1988 "carries equal force when applied to [petitioner's] argument that Title VII's jurisdictional grant vests federal courts with jurisdiction over civil actions brought solely for attorney's fees and costs following settlement of all substantive claims during Title VII's administrative process." *Id.* at A13.

Finally, the court of appeals declined to follow the Eighth Circuit's contrary decision on a similar issue in *Jones* v. *American State Bank*, 857 F.2d 494 (1988), because that decision relied almost exclusively on policy arguments from *Carey* that were later repudiated in *Crest Street*. Pet. App. A14-A15.

ARGUMENT

The Fourth Circuit's decision is correct and does not conflict with any decision of this Court. Although petitioner contends (Pet. 10-19) that this decision is contrary to *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980), this Court did not address the question whether district courts have jurisdiction over suits *solely* for attorney's fees and costs in *Carey*, as Justice Stevens emphasized in a concurring opinion in that case (447 U.S. at 72). Subsequent decisions by this Court have eliminated whatever uncertainty may have existed at the time *Carey* was decided concerning a court's authority to entertain actions solely for attorney's fees. In *North Carolina Department of Transportation* v. *Crest Street Community Council, Inc.*, 479 U.S. 6 (1986), this Court held that district courts lack jurisdiction over suits solely for attorney's fees under 42 U.S.C. 1988, and endorsed the principle that "[i]t is entirely reasonable to limit the award of attorney's fees to those parties who, in order to obtain relief, found it necessary to file a complaint in [federal] court." 479 U.S. at 14. And, in *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983), this Court explained that "[a] request for attorney's fees should not result in a second major litigation,"—precisely the result that would occur if federal employees are allowed to take no-risk, second shots at obtaining additional attorney's fees in federal court, whenever their attorneys are not satisfied with

the fees awarded in the federal administrative process. Thus, although the Fourth Circuit's decision is in some tension with *Jones* v. *American State Bank*, 857 F.2d 494 (8th Cir. 1988), review by this Court is not warranted.[4]

1. Petitioner offers no textual analysis of the pertinent provisions of Title VII to support her contention that review is warranted in this case. Aside from her arguments that the Fourth Circuit's decision conflicts with *Carey* and *Jones*, petitioner relies exclusively on policy arguments as a basis for review. It is well established, however, that questions of statutory construction must begin with the language of the statute. *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). Moreover, because "[f]ederal courts are courts of limited jurisdiction," and "possess only that power authorized by Constitution and statute," *Kokkonen* v. *Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994), jurisdiction may not be inferred from ambiguous or conflicting statutory terms.[5]

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[4] *Jones* is distinguishable on its facts. See p. 17, *infra*. Petitioner's contention (Pet. 15) that the ruling below conflicts with *Slade* v. *United States Postal Service*, 952 F.2d 357 (10th Cir. 1991), is incorrect. Like *Carey*, *Slade* initially involved a suit on the merits (for lost wages) in addition to a claim for attorney's fees. *Slade*, 952 F.2d at 359. The Tenth Circuit was thus not presented with the question whether a suit filed in district court solely for the recovery of attorney's fees is authorized under Title VII.

[5] This rule is especially applicable to claims against the federal government: "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983). Thus, although 42 U.S.C. 2000e-16(c) undoubtedly constitutes a waiver of the government's immunity from certain "civil actions" by federal employees under Title VII, the question

As both the district court and the court of appeals concluded, the language and structure of Title VII indicate that suits solely for attorney's fees and costs are not authorized. The general attorney's fee provision of Title VII, 42 U.S.C. 2000e-5(k), states:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

This provision appears in a Section entitled "Enforcement provisions," describing the EEOC's general authority to enforce Title VII, 42 U.S.C. 2000e-5(a), the requirements for filing a charge with the EEOC, 42 U.S.C. 2000e-5(b) and (e), and the interaction of EEOC charges with state and local enforcement proceedings. 42 U.S.C. 2000e-5(c) and (d).

The provisions of Title VII specifically applicable to the federal government are contained in a separate Section, 42 U.S.C. 2000e-16. This Section gives the EEOC special enforcement powers with regard to federal employees: "to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay." 42 U.S.C. 2000e-16(b). The Section also permits federal employees to bring a civil action in district court within 90 days of final action on a

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remains whether suits solely for attorney's fees fit this definition. Cf. *Lane* v. *Peña*, 518 U.S. 187, 196 (1996) (noting "that Congress is free to waive the Federal Government's sovereign immunity against liability without waiving its immunity from monetary damages awards").

complaint by the EEOC or a government employer or, in any event, within 180 days of filing a charge of discrimination with the EEOC or an employer. 42 U.S.C. 2000e-16(c). Finally, the Section incorporates by reference certain provisions in Section 2000e-5: "The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder." 42 U.S.C. 2000e-16(d).

The manner in which Section 2000e-16(d) incorporates the general attorney's fee provision—Section 2000e-5(k)—suggests that fees are available only in pre-existing "civil actions brought hereunder"—that is, actions on the merits. By specifying that certain provisions of Title VII applicable to all plaintiffs, including Section 2000e-5(k), "shall govern civil actions brought hereunder," Section 2000e-16(d) indicates that one predicate for the application of the general attorney's fee provision is a "civil action[ ] brought hereunder." Thus, the structure of the statute suggests that an action for fees does not itself qualify as a "civil action" because there would be no need for Section 2000e-16(d) to specify that the general attorney's fee provision "shall govern civil actions brought hereunder" if one of the "civil actions" that was already authorized was an action for fees.[6]

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[6] The structure of 42 U.S.C. 2000e-5(k) supports a similar conclusion. By stating that a court may award fees "[i]n any action or proceeding under this subchapter," Section 2000e-5(k) requires some action or proceeding in court *other than* one for fees as a prerequisite for an award of fees. An action for attorney's fees cannot itself be the predicate action because Section 2000e-5(k)'s authorization to award fees "in" such an action would then be completely superfluous—nothing more than a circular declaration that "in an action for fees, the court may award fees." But constructions of statutes that fail to "give effect, if possible, to

Likewise, the provision of Title VII giving district courts "jurisdiction of actions brought under this subchapter," 42 U.S.C. 2000e-5(f)(3), suggests that suits solely for attorney's fees are excluded. As both the district court and the court of appeals concluded, "the phrase 'actions brought under this subchapter' refers to legal proceedings in a court of law to enforce the substantive rights guaranteed by Title VII, specifically the right to be free from employment discrimination on the basis of race, color, religion, sex, or national origin." Pet. App. A8, A25-A26. Thus, on its face, the grant of jurisdiction in Section 2000e-5(f)(3) does not extend to an independent action solely for attorney's fees and costs incurred in pursuing a claim for employment discrimination in an administrative forum.

Petitioner points to nothing in Title VII to cast doubt on the conclusion of the courts below that the phrase "actions brought under this subchapter" is limited to actions to vindicate substantive rights. Nor does petitioner dispute that attorney's fees are ancillary to relief on the merits. See *White* v. *New Hampshire Dep't of Employment Security*, 455 U.S. 445, 452 (1982) (noting that attorney's fees cannot "fairly be characterized as an element of 'relief' indistinguishable from other elements" because they "are not compensation for the injury giving rise to an action").[7] In sum, petitioner

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every clause and word of a statute" are not favored. See *Bennett* v. *Spear*, 520 U.S. 154, 173 (1997).

[7] Although petitioner argued in the Fourth Circuit that the right to attorney's fees was equivalent to "merits" relief, she appears to have abandoned that contention in this Court. In any event, it is "indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain." *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988). As *White* and

nowhere provides any textual support for her argument that Title VII authorizes a suit solely for attorney's fees in district court.

2. In lieu of textual analysis, petitioner contends (Pet. 10-19) that the instant decision conflicts with *Carey* and decisions from other circuits. However, *Carey*, *Crest Street*, and other decisions demonstrate that district courts lack jurisdiction over suits solely for attorney's fees, particularly when fees are available in the administrative process where a plaintiff has settled the merits of her discrimination claim.

In *Carey*, this Court held that a Title VII plaintiff who had prevailed on her race discrimination claims in state proceedings could recover attorney's fees in federal court for work done in those proceedings. Relying on the plain language of the general attorney's fee provision in Title VII, 42 U.S.C. 2000e-5(k), this Court explained that "Congress' use of the broadly inclusive disjunctive phrase 'action or proceeding' indicates an intent to subject the losing party to an award of attorney's fees and costs that includes expenses incurred for administrative proceedings." 447 U.S. at 61.

It is significant that the plaintiff in *Carey* filed an action on the merits in federal court as well as a request for fees.[8] Accordingly, as Justice Stevens emphasized, that case does *not* address the question whether a plaintiff who has participated in state administrative

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Budinich make clear, this Court has consistently treated attorney's fees as distinct from merits issues.

[8] Because of the time limits imposed by federal law, Carey was required to file her federal action asserting her Title VII claims while her state administrative proceedings were pending. *Carey*, 447 U.S. at 58.

proceedings can maintain an independent suit *solely* for fees. 447 U.S. at 72 (Stevens, J., concurring). Had this question been presented, Justice Stevens noted, "[i]t is by no means clear that the statute, which merely empowers a 'court' to award fees, would authorize a fee allowance when there is no need for litigation in the federal court to resolve the merits of the underlying dispute." *Ibid.*

Although this Court has not yet confronted a Title VII case in which a plaintiff has sought to maintain an action solely for fees, in *Crest Street*, *supra*, this Court held that the plain language of a similar attorney's fee provision, 42 U.S.C. 1988, does not permit a suit solely to recover attorney's fees for work performed to obtain a settlement in non-mandatory administrative proceedings.[9] Noting that Section 1988 permits an award of fees in "action[s] or proceeding[s] to enforce" the listed civil rights laws, the Court stated that plaintiff's action in federal court "is not, and was never, an action to enforce any of these laws." 479 U.S. at 12.

In reaching this result, the Court stated that its concern in *Carey* with the "anomalous" results that might flow from the denial of an action solely for fees in district court was "dicta" and "may have been exaggerated." *Crest Street*, 479 U.S. at 15. The Court observed that many types of behavior may induce compliance with civil rights laws. For example, an employee's discussions with his employer may cause the employer

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[9] Section 1988 provides: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. 1988 (1988).

to eliminate discriminatory practices. The Court acknowledged that "[i]n some sense it may be considered anomalous that this employee's initiative would not be awarded with attorney's fees. But an award of attorney's fees under § 1988 depends not only on the results obtained, but also on what actions were needed to achieve those results. It is entirely reasonable to limit the award of attorney's fees to those parties who, in order to obtain relief, found it necessary to file a complaint in court." *Id.* at 14.[10]

Petitioner seeks (Pet. 13) to distinguish *Crest Street* on the ground that the language of Section 1988—permitting an award of fees "*in the action or proceeding to enforce* the civil rights laws listed," 42 U.S.C. 1988—differs from 42 U.S.C. 2000e-5(k), the attorney fee provision at issue here and in *Carey*, which provides for an attorney's fee "[i]n any action or proceeding under this subchapter." But this Court's conclusion, in *Crest Street*, that a suit solely to recover fees is not "an action or proceeding to enforce the civil rights laws listed," at least suggests—if it does not require—a similar conclusion that a suit solely for attorney's fees is not an "action or proceeding under this subchapter" within the meaning of Title VII. While the statutory language is not identical, this Court has recognized that

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[10] The Court in *Crest Street*, 479 U.S. at 14-15 (citing *Carey* at 447 U.S. at 66 n. 6), also discounted its suggestion in *Carey* that denying an independent action for fees would create an incentive to file protective lawsuits in order to obtain attorney's fees. The *Crest Street* Court found the "better view" to be one that rejects an interpretation of Section 1988 based on the assumption that competent attorneys would advise their clients to forgo administrative proceedings simply because fees were not available in those proceedings. *Id.* at 14 (citing *Webb* v. *Board of Educ. of Dyer County*, 471 U.S. 234, 241 n.15 (1985)).

Section 1988 and Section 2000e-5(k) are essentially similar. See *Hanrahan* v. *Hampton*, 446 U.S. 754, 758 n.4 (1980). At a minimum, therefore, *Crest Street* demonstrates that the mere inclusion of the disjunctive term "action or proceeding" in an attorney's fee provision does not mandate the conclusion that an independent suit for fees in district court is authorized for any work performed in prior administrative proceedings.[11]

Contrary to petitioner's suggestion (Pet. 13 n.3), *Crest Street* also is not distinguishable based on the "structural differences between Title VI [at issue in *Crest Street*] and Title VII." Although Title VII requires the exhaustion of administrative remedies while Title VI does not, the holding in *Crest Street* does not depend on the rationale that the administrative proceedings in that case were not mandatory, and thus were not "proceedings to enforce" any of the listed civil rights laws within the meaning of Section 1988.[12] Unlike

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[11] *Crest Street* cannot be distinguished as relying on the legislative history of Section 1988. The pivotal language in that case is the Court's conclusion that, "[o]n its face, § 1988 does not authorize a court to award attorney's fees except in an action to enforce the listed civil rights laws." 479 U.S. at 12. See also *id.* at 17 (Brennan, J., dissenting) (noting that Court's holding is based on "the plain language of § 1988"). Thus, *Crest Street* rests on a plain language interpretation of Section 1988. The fact that the Court found that "[t]he legislative history of § 1988 supports the plain import of the statutory language" (*id.* at 12) does not change this conclusion.

[12] Despite petitioner's claim that the government believed the distinction between non-mandatory administrative proceedings under Title VI and mandatory proceedings under Title VII "justified the different results in *Crest Street* and *Carey*," Pet. 13 n.3, the results also differed because *Carey* involved a suit on the merits, not merely an action for fees (see note 8, *supra*). The

this Court's decision in *Webb* v. *Board of Education of Dyer County*, 471 U.S. 234 (1985)—which affirmed the exclusion of fees for work performed in optional administrative proceedings because "[a]dministrative proceedings established to enforce tenure rights created by state law simply are not any part of the proceedings to enforce § 1983"(*id.* at 241)—the Court assumed in *Crest Street* that fees *would* be available for work performed in the administrative process, provided the plaintiff found it necessary to file suit on the merits in court. See *Crest Street*, 479 U.S. at 15. Thus, it was not the absence of mandatory exhaustion requirements that was dispositive in *Crest Street* but the absence of an action in court to obtain relief on the merits.

For purposes of determining whether a given administrative proceeding is one for which attorney's fees are *available*, it is certainly significant that the relevant statute requires exhaustion. *Carey* confirms that fees are available for work performed in mandatory administrative proceedings under Title VII, and *Webb* demonstrates that fees are *not* available for work performed in non-mandatory administrative proceedings under Section 1983. But neither case addresses the question whether attorney's fees may be recovered in an independent action in federal court solely for fees.

For purposes of this question—addressed only in *Crest Street*—the most relevant distinction is not whether administrative exhaustion is required but

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government participated in *Carey* to make the point that attorney's fees should be available for work performed in mandatory administrative proceedings under Title VII, but explicitly noted that the case did *not* present the question whether a suit *solely* for attorney's fees was authorized. See No. 79-192 Amicus Brief for the United States and the Equal Employment Opportunity Comm'n at 13 & n.17.

whether fees may be recovered in the administrative process itself. If fees are *not* available in the administrative proceedings—as in *Carey*, 447 U.S. at 67 n.7—then an independent action to recover fees should be permitted because such an action provides the sole opportunity for recovery. *Id.* at 65-66 (noting that availability of fees should not depend upon the "fortuity" that a plaintiff "ultimately finds it necessary to sue in federal court to obtain relief other than attorney's fees"). But if fees *are* available in the administrative process, the concern identified in *Carey* is not present. It is not a choice between allowing an independent action for fees or nothing; it is merely a question of the forum and circumstances under which a recovery of fees will be allowed. In the latter case, therefore, it is entirely reasonable to limit recovery of fees in district court "to those parties who, in order to obtain relief, found it necessary to file a complaint in court." *Crest Street*, 479 U.S. at 14.

Because attorney's fees are clearly available in administrative proceedings under Title VII involving federal employees, see *West* v. *Gibson*, 527 U.S. 212 (1999) (affirming broad power of EEOC to award "appropriate remedies"); 29 C.F.R. 1614.501(e)(1) (1995) (agency or EEOC may award attorney's fees to prevailing party), it is not surprising that Congress did not provide federal employees with a judicial forum to litigate fee disputes independent from the merits of any discrimination claim. Thus, decisions like *Carey*—involving private plaintiffs who were not able to recover attorney's fees in state proceedings—are inapposite, and *Crest Street* provides better guidance.[13]

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[13] Petitioner contends (Pet. 16 n.5) that academic commentators agree with her view that district courts have jurisdiction to

For the same reason, the Eighth Circuit's decision in *Jones* v. *American State Bank*, 857 F.2d 494 (1988)—which petitioner contends is contrary to the ruling below—and decisions interpreting the Individuals with Disabilities Education Act (IDEA) are also distinguishable. In *Jones*, a private plaintiff sought fees in district court for work performed in the successful prosecution of pregnancy discrimination claims before a state agency. Emphasizing that attorney's fees were not available in the state administrative proceedings where plaintiff had obtained relief on the merits (*id.* at 495), the Eighth Circuit concluded that Title VII authorized an action solely for fees. Thus, the result in *Jones* rests primarily on the court's desire to avoid barring the most successful plaintiffs (those who have prevailed in state administrative proceedings) from recovering attorney's fees simply because they had no need to file an action on the merits in court and could not recover fees in the state proceedings.[14]

Likewise, courts interpreting the attorney's fee provision of the IDEA, 20 U.S.C. 1415(e)(4)(B), have undoubtedly been influenced by a similar difficult

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entertain actions brought solely for fees in Title VII cases. The academic view is not as uniform as petitioner suggests. See, *e.g.*, Michael J. Davidson, *Crest: Judicial Preclusion of an Independent Suit Solely for Attorneys' Fees Under Title VII*, 18 Del. J. Corp. L. 425 (1993) (suits solely for attorney's fees are not authorized).

[14] The Eighth Circuit offered no textual analysis of Title VII to support its conclusion that the statute authorized an action solely for attorney's fees. Instead, the court merely stated that "all of the policy arguments in *Carey* and the themes which pervade Title VII interpretation command the same conclusion." 857 F.2d at 498. As explained above, at least some of the policy arguments in *Carey* were discredited in *Crest Street*, which the Eighth Circuit summarily dismissed in a footnote. *Id.* at 498 n.10.

choice between allowing independent actions solely to recover attorney's fees for work performed in mandatory administrative proceedings or allowing no recovery of fees whatsoever to the most successful plaintiffs (who have no need to file suit on the merits in court). Because attorney's fees cannot be awarded in administrative proceedings under the IDEA, *Moore* v. *District of Columbia*, 907 F.2d 165, 170 n.8 (D.C. Cir.), cert. denied, 498 U.S. 998 (1990), those courts have uniformly allowed independent suits for the recovery of fees for work performed in the administrative process. *Id.* at 166 (citing cases in other circuits). But that rationale for permitting suits solely for attorney's fees does not extend to Title VII claims by federal employees—who clearly *may* recover attorney's fees in federal administrative proceedings before the EEOC.

3. Petitioner also asserts (Pet. 19) that the ruling below "denigrates the importance of attorney's fees in Title VII cases and encourages complainants to by-pass administrative remedies." In support of this claim, petitioner contends that "[t]he upshot of the court's ruling is that Title VII complainants are likely to bring their claims into federal court as soon as possible and end-run the state and federal agencies that Congress intended to play an integral role in resolving discrimination complaints." *Ibid.*[15] But it is more reasonable to assume that plaintiffs will simply settle their fee dispute in the same forum where they settle their merits claims.

In fact, petitioner's own position would encourage needless litigation in federal courts. Allowing plaintiffs who have settled the merits of their Title VII claims in

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[15] The Court in *Crest Street*, 479 U.S. at 14-15, rejected a similar argument. See p. 13 note 10, *supra.*

the administrative process to seek more fees than the EEOC has awarded would encourage plaintiffs to use federal courts as routine arbiters of fee disputes. If an action solely for attorney's fees is available, there is little incentive for plaintiffs to accept anything less than the full amount of fees requested in the administrative process, because there is little, if any, downside (*e.g.*, jeopardizing a settlement) to pursuing additional fees.

Indeed, this case provides a compelling example of the resulting disincentives for plaintiffs to compromise a fee dispute with the federal government if an independent suit solely for fees were permitted in district court. Petitioner's initial suit for fees was based on a dispute between the $275/hour awarded by the EEOC and the $310/hour claimed by plaintiff's counsel (pp. 2-3, *supra*), while her second suit for fees (on her retaliation claim, see p. 4 note 3, *supra*) was based on a dispute between the $295/hour awarded by the EEOC and the $315/hour claimed. If a suit for the disputed amount of attorney's fees would in any way have jeopardized petitioner's settlement, it is highly likely that she would have chosen not to litigate this matter, instead accepting the sizeable amount of fees already awarded. However, because petitioner believed she could continue litigating without risk to her settlement, she did so.

The foregoing incentive structure runs directly contrary to this Court's admonitions that attorney's fee provisions should be interpreted in such a manner that "[a] request for attorney's fees should not result in a second major litigation." *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983). Given the scant, if any, reason *not* to pursue additional fees in court—and the possibility of generating "fees on fees" if a plaintiff prevails in an independent action for fees in court—there is every reason to believe that under petitioner's interpretation

requests for attorney's fees would often "result in a second major litigation."

In addition to encouraging plaintiffs routinely to litigate fee disputes in federal court, permitting independent suits solely for fees would frustrate the pro-settlement goals of Title VII (see *West* v. *Gibson*, 527 U.S. at 218-219) because *defendants* would have reduced incentive to settle the merits of Title VII cases in the administrative process if their ultimate liability for attorney's fees and costs would not be determined until litigation over fees is completed in federal court. See *Evans* v. *Jeff D.*, 475 U.S. 717, 734-735 (1986) (noting defendants' proper interest in fixing liability as to fees in addition to merits); accord, *White* v. *New Hampshire Dep't of Employment Security*, 455 U.S. at 454 n.15; *Crest Street*, 479 U.S. at 15.

In sum, compelling reasons—such as promoting settlement in administrative proceedings and discouraging needless litigation—support Congress's determination not to allow actions solely for attorney's fees following the administrative settlement of Title VII claims by federal employees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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