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Media Contact: Glenn Lammi | glammi@wlf.org | 202-588-0302

WLF Asks Supreme Court to Preserve ‘Forfeiture of Forfeiture’ Rule and Appellate Discretion

(Younge v. Fulton Judicial Circuit District Attorney’s Office)

“A litigant forfeits the right to argue forfeiture when it fails to raise that argument in a timely fashion.”

— Cory Andrews, WLF General Counsel & Vice President of Litigation

WASHINGTON, DC—Washington Legal Foundation (WLF) today urged the U.S. Supreme Court to clarify that, when resolving the procedural question in a discrimination case, it is not disturbing the well-established ‘forfeiture of forfeiture’ rule or reviewing courts’ discretion to consider forfeited issues on the merits. WLF contends that procedural rules promote orderly litigation only when properly invoked by the parties, and that sua sponte judicial action on forfeiture violates the party-presentation principle. WLF’s brief was drafted with the generous pro bono assistance of John Querio, Justin R. Sarno, and Jasjaap S. Sidhu of Horvitz & Levy LLP.

The case arises from Jasmine Younge’s Title VII discrimination suit against the Fulton Judicial Circuit District Attorney’s Office following her termination from a senior staff position. The office raised its statutory personal-staff exemption as a defense for the first time at summary judgment. The district court permitted the late assertion on a finding of no prejudice to Younge, and the Eleventh Circuit’s affirmance led to the appeal now pending before the Supreme Court.

In its amicus brief supporting neither party, WLF argues that even assuming an unpleaded affirmative defense is forfeited under Rule 8, the plaintiff must still timely assert that forfeiture or lose the argument forever under the Court’s precedents in *Eberhart*, *Kontrick*, and *Hamer*. WLF further explains that appellate courts retain longstanding discretion to reach forfeited issues when they present pure questions of law, advance the interests of justice or judicial economy, or when the policies underlying forfeiture do not apply.

Celebrating its 49th year, WLF is America’s premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.

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