No. 19-45

In The
Supreme Court of the United States

NEXUS SERVICES, INC., et al.,

Petitioners,

v.

DONALD LEE MORAN,
Individually and in His Official Capacity, as a
Deputy Sheriff of Augusta County, Virginia, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

After analyzing the entire course of the lawsuit, the District Court awarded fees against the plaintiffs on three grounds – 42 U.S.C. § 1988(b), the inherent authority of the Court, and 28 U.S.C. § 1927, and the Court of Appeals affirmed on all grounds. Plaintiffs do not dispute the frivolousness findings or the alternative bases for the fees award. Plaintiffs question only the "prevailing parties" aspect of § 1988(b), arguing defendants were not prevailing parties despite plaintiffs' voluntary dismissal being an "adjudication on the merits" pursuant to Fed. R. Civ. P. 41(a)(1)(B), and contend, incorrectly, that there is disagreement among the circuits.

The adjudication on the merits the defendants obtained in the lawsuit materially changed the legal relationship between the parties, making the defendants prevailing parties as this Court discussed in *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001). Moreover, in 2016, this Court held in *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1646, 1651-52 (2016), that a fees award to a *defendant* as the prevailing party is not limited to when the defendant has obtained a judgment on the merits, given the different objectives of defendants and congressional policy.

The question presented is:

> Whether, despite the alternative bases on which the fees were awarded, despite the defendants having obtaining an adjudication on

QUESTION PRESENTED – Continued

the merits, and despite *CRST* establishing that a *defendant* can recover fees as a prevailing party even without obtaining an adjudication on the merits, this Court should nevertheless grant certiorari to consider whether the defendants should not be considered prevailing parties for purposes of § 1988(b) merely because the adjudication on the merits did not require further judicial action.

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STATEMENT

Plaintiffs Nexus Services, Inc., its President and CEO Michael Donovan and Executive Vice-President Richard Moore, and their attorneys orchestrated successive delays and diversions, including misrepresentations to the District Court, dragging their litigation out and requiring defendants Augusta County, Virginia Sheriff Donald Smith and Deputies Donald Moran and Michael Roane to defend themselves against plaintiffs' frivolous and abusive lawsuit, before plaintiffs ran out of ways to keep their lawsuit afloat and dismissed it, as they had their prior state court lawsuit including the same claims, with the dismissal being an adjudication on the merits pursuant to Rule 41(a)(1)(B). Pet. *i*; App. 4a-14a.

On motion by the defendants for recovery of defense attorney's fees pursuant to 42 U.S.C. § 1988(b), the inherent authority of the Court, and 28 U.S.C. § 1927, the District Court thoroughly analyzed the plaintiffs' claims and the entirety of the lawsuit from beginning to end, and awarded fees to the defendants on all three grounds against the plaintiffs and four of their attorneys.[1] App. 15a-39a. The Court of Appeals

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[1] Nexus Services, Inc., Donovan, Moore, and two of plaintiffs' attorneys, Mary Donne Peters and Michael J. Gorby, were referenced as petitioners in the application for an extension of time to file a petition for a writ of certiorari. The petition for a writ of certiorari makes no reference to any of plaintiffs' attorneys being included as petitioners, however. Nor does the petition question the basis for the plaintiffs' attorneys being held jointly responsible with plaintiffs for a portion of the fees awarded, 28 U.S.C. § 1927. *See* App. 45a-46a. To the extent that any of plaintiffs'

affirmed the District Court's fees award on all grounds, and denied plaintiffs' petition for rehearing and rehearing *en banc*. App. 2a-3a, 50a.

Prevailing defendants may be awarded attorney's fees under a fees-shifting statute if a plaintiff's claim was "frivolous, unreasonable, or groundless" or "the plaintiff continued to litigate after it clearly became so." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). Plaintiffs do not question the below Court's findings that their lawsuit was replete with frivolous and legally and factually groundless allegations and claims and conducted in bad faith. App. 4a-35a, 39a, 41a, 45a-46a, 48a.[2]

Plaintiffs also do not question the District Court's alternative bases for awarding attorney's fees, including awarding the same fees pursuant to the inherent authority of the Court (and the Court of Appeals affirmed on the alternative bases as well). App. 3a, 26a-27a, 39a. This Court has made clear that courts have the inherent authority to assess fees for the "full range of litigation abuses." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46, 50 (1991).

Regardless of the determination as to the question plaintiffs present in their petition, the result would

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attorneys were considered to be petitioners with respect to the petition for a writ of certiorari, use of the term "plaintiffs" in this opposition includes them as well.

[2] Plaintiffs nevertheless resort to plucking out and gratuitously offering up in this Court fragments of such baseless and inflammatory allegations, not relevant to plaintiffs' question presented to this Court for review. Pet. *i*, 4-5.

therefore be the same given the alternative bases for the fees award.

Furthermore, the defendants were correctly determined to be the prevailing parties, entitled to a fees award pursuant to 42 U.S.C. § 1988(b). Plaintiffs ignore the import of Rule 41(a)(1)(B)'s plain language rendering the plaintiffs' dismissal an "adjudication on the merits" in the lawsuit, materially changing the legal relationship of the parties. Plaintiffs' reliance on *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001), for their argument is misplaced. *See* Pet. 3, 7, 10, 11. *Buckhannon* did not involve a Rule 41(a)(1)(B) adjudication on the merits, but rather rejected the "catalyst theory" for considering the plaintiff to be a "prevailing party" entitled to a fees award for a voluntary change in conduct outside of the litigation. 532 U.S. at 600-601, 604-605, 608, 610; App. 36a-38a.

Not only did the defendants receive an adjudication on the merits pursuant to Rule 41(a)(1)(B), making them prevailing parties, but plaintiffs also ignore that in 2016, this Court, in a unanimous decision in *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642 (2016), established that different considerations apply when determining whether a *defendant* is a prevailing party. For a *defendant* to be considered a prevailing party is not limited to circumstances where the defendant has received an adjudication on the merits. 136 S. Ct. at 1646. "Congress must have intended that a defendant could recover fees expended in frivolous, unreasonable, or groundless litigation when the case is

resolved in the defendant's favor, whether on the merits or not." *Id*. at 1652.

The fees award on the basis that the defendants are the prevailing parties here is not in conflict with this Court's decisions. Nor does the fees award conflict with decisions of courts of appeals of other circuits. Not only is the fees award correct, but deciding the question plaintiffs present in their petition would not make any difference to the outcome, in any event, given the alternative bases for the fees award.

REASONS FOR DENYING THE PETITION

I. Given the alternative bases for the fees award against the plaintiffs, including the inherent authority of the courts to sanction those who abuse the judicial process, the question plaintiffs present does not merit this Court's review.

The Court of Appeals affirmed the District Court's fees award against the plaintiffs on three separate grounds, including pursuant to the Court's inherent authority to sanction those who come before it. App. 3a, 39a. Such inherent authority has long been recognized by this Court, and plaintiffs do not question the below Courts' alternative bases for the fees award. *Chambers*, 501 U.S. at 38, 45-47, 50 (assessing attorney's fees against a party and the party's counsel; "the inherent power extends to a full range of litigation abuses," including "abus[ing] the judicial process" through "meritless motions and pleadings and delaying action," or

bad faith shown by delaying litigation, or acting vexatiously, wantonly, or for oppressive reasons, and the inherent power is not displaced by other rules or statutes that may also provide a mechanism for imposing attorney's fees).

The outcome of the case would thus not be changed, regardless of the determination of the question plaintiffs present for review, and there is therefore especially no reason for this Court to grant the petition for a writ of certiorari.

II. The fees award against the plaintiffs pursuant to 42 U.S.C. § 1988(b), in favor of the defendants as prevailing parties, is also correct.

Not only were fees awarded on alternative bases that plaintiffs do not question, but the ruling awarding fees against the plaintiffs pursuant to § 1988(b) because the defendants are the prevailing parties is also correct. Plaintiffs argue that, "The question presented by this petition has divided the courts of appeal and the ruling below is in conflict with this Court's precedent." Pet. 3.

Plaintiffs are wrong on both counts.

A. The dismissal is an adjudication on the merits, pursuant to Fed. R. Civ. P. 41(a)(1)(B)

As the Federal Rules of Civil Procedure plainly provide with respect to a voluntary dismissal such as plaintiffs filed:

> (B) Effect. Unless the notice or stipulation states otherwise, the dismissal is without prejudice. **But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as *an adjudication on the merits*.**

Fed. R. Civ. P. 41(a)(1)(B) (emphasis added).

Plaintiffs previously dismissed a state court action based on or including the same claims, and their notice of dismissal was thus an adjudication on the merits, pursuant to the plain language of Rule 41(a)(1)(B), as was correctly ruled below. Pet. *iv*, 2, 5-6 ¶5; App. 14a, 35a.

B. The dismissal materially altered the legal relationship of the parties – forever barring plaintiffs from litigating those claims – making the defendants prevailing parties, consistent with this Court's decisions.

The dismissal here, an adjudication on the merits pursuant to Rule 41(a)(1)(B) – making the dismissal of plaintiffs' claims with prejudice and barring plaintiffs

from refiling them – materially changed the legal relationship between the plaintiffs and the defendants to the benefit of the defendants.

Plaintiffs would have the Court read out of existence the Rule 41(a)(1)(B) provision that makes the dismissal here an "adjudication on the merits," which the Court cannot do. "We give the Federal Rules of Civil Procedure their plain meaning." *Business Guides, Inc. v. Chromatic Communications Enter., Inc.*, 498 U.S. 533, 540 (1991).

Plaintiffs suggest that finding the defendants to be prevailing parties here is in conflict with *Buckhannon*, because the Rule 41(a)(1)(B) dismissal did not require separate court action. Pet. *i*, 7-8. Plaintiffs' suggestion is without merit.

Buckhannon rejected the "catalyst theory" for awarding fees to plaintiffs under the Fair Housing Amendments Act, holding that plaintiffs were not entitled to fees as a prevailing party where the legislature changed the statutory provisions alleged to have violated the FHAA and had not done so pursuant to anything in the lawsuit that changed the legal relationship of the parties such as an adjudication on the merits or a consent decree. 532 U.S. at 601, 604, 608, 610. *S-1 and S-2 v. State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir. 1994), Pet. 7, similarly rejected a "catalyst for post-litigation changes" theory for awarding fees.

Finding the defendants to be the prevailing parties in plaintiffs' lawsuit, as the District Court did and the Court of Appeals affirmed, does not conflict with

Buckhannon or any other decision of this Court. App. 36a, 38a.

C. The defendants are the prevailing parties for the additional reasons discussed in this Court's 2016 decision in *CRST Van Expedited*, establishing that a favorable ruling on the merits is not even required for a defendant to be the prevailing party and recover fees.

Not only did the defendants obtain an adjudication on the merits in the lawsuit that rendered them the prevailing parties for purposes of a fees award pursuant to § 1988(b), but the correctness of that finding is shown even more by this Court's decision in *CRST*, which squarely addresses when a *defendant* should be considered a prevailing party.

As this Court stated in *CRST*:

> Common sense undermines the notion that a defendant cannot "prevail" unless the relevant disposition is on the merits. Plaintiffs and defendants come to court with different objectives. A plaintiff seeks a material alteration in the legal relationship between the parties. A defendant seeks to prevent this alteration to the extent it is in the plaintiff's favor. The defendant, of course, might prefer a judgment vindicating its position regarding the substantive merits of the plaintiff's allegations. The defendant has, however, fulfilled

> its primary objective whenever the plaintiff's challenge is rebuffed. . . .
>
> There is no indication that Congress intended that defendants should be eligible to recover attorney's fees only when courts dispose of claims on the merits. The congressional policy regarding the exercise of district court discretion in the ultimate decision whether to award fees does not distinguish between merits-based and non-merits-based judgments. Rather . . . Congress wanted "to relieve defendants of the burdens associated with fending off frivolous litigation[."] The Court, therefore, has interpreted the statute to allow prevailing defendants to recover whenever the plaintiff's "claim was frivolous, unreasonable, or groundless." It would make little sense if Congress' policy of "sparing defendants from the costs of *frivolous* litigation," depended on the distinction between merits-based and non-merits-based frivolity. Congress must have intended that a defendant could recover fees expended in frivolous, unreasonable, or groundless litigation when the case is resolved in the defendant's favor, whether on the merits or not. Imposing an on-the-merits requirement for a defendant to obtain prevailing party status would undermine that congressional policy by blocking a whole category of defendants for whom Congress wished to make fee awards available.

136 S. Ct. at 1651-52 (internal citations omitted).

Plaintiffs state that in *CRST*, "the Court reiterated that '[t]he "touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties,"'" and "this change in the parties' legal relationship must be 'marked by "judicial imprimatur."'" Pet. 8. *CRST* makes that reference, however, in noting what had been said in the past regarding when a *plaintiff* is a "prevailing party," before continuing on to distinguish the different reasoning that applies when a *defendant* is a prevailing party. 136 S. Ct. at 1646 (noting that "the Court has not articulated a precise test for when a defendant is a prevailing party").

The defendants here prevailed completely. Having had to defend themselves against plaintiffs' frivolous and abusive litigation for over nine months (with respect to the plaintiff's second, federal, lawsuit alone), the plaintiffs then voluntarily dismissed the lawsuit, in circumstances that forever bar plaintiffs from pursuing those claims, pursuant to Rule 41(a)(1)(B).

The ruling below finding the defendants to be the prevailing parties is consistent with the decisions of this Court.

D. The fees award against the plaintiffs does not conflict with decisions of other courts of appeals or lower courts.

Not only is the fees award against the plaintiffs in accordance with this Court's precedents, including on the ground that the defendants are the prevailing

parties for purposes of § 1988(b), but the decision does not conflict with other courts of appeals. Plaintiff's argument that this Court should review this case because the fees decision conflicts with the Tenth, Eleventh, and Federal Circuits, is without merit. Pet. *i*, 8-9.

In the decision plaintiffs cite from the Tenth Circuit, *Lorillard Tobacco Co. v. Engida*, 611 F.3d 1209 (10th Cir. 2010), the plaintiff filed a notice of voluntary dismissal without prejudice, so the case could be refiled. *Id*. at 1212, 1215.

Similarly, in the decision plaintiffs cite from the Federal Circuit, *RFR Indus., Inc. v. Century Steps, Inc.*, 477 F.3d 1348, 1351-53 (Fed. Cir. 2007), the plaintiff filed a voluntary dismissal without prejudice. As the court noted, "a voluntary dismissal without prejudice . . . does not constitute a change in the legal relationship of the parties because the plaintiff is free to refile its action." *Id*. at 1353.

The decision plaintiff cites from the Eleventh Circuit is unpublished, *First Time Videos, LLC v. Oppold*, 559 F. App'x 931 (11th Cir. 2014). In *First Time Videos*, not only did the plaintiff file "a notice of voluntary dismissal without prejudice," but also "[t]he district court dismissed the case without prejudice." *Id*. at 931.[3]

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[3] The district court in *First Time Videos* also refused to award the defendant attorney's fees on other grounds, including the inherent power of the court and 28 U.S.C. § 1927, but the defendant did not appeal those issues and they were deemed abandoned by the court of appeals. 559 F. App'x at 931 n.1.

The circuit-level decisions plaintiffs cite are also all prior to this Court's decision in *CRST* with its discussion of the broader circumstances in which *defendants* are properly considered prevailing parties for purposes of fees awards, in addition to plaintiffs citing decisions that, unlike here, do not involve Rule 41(a)(1)(B) dismissals that constitute adjudications on the merits precluding re-filing. The fees award to the defendants as prevailing parties is not in conflict with decisions from other circuits.

Plaintiffs' assertion that the fees award to the defendants as prevailing parties is "contrary to the greater weight of district court opinions on the issue," Pet. 10, is also not correct.

The language to which plaintiffs point in the patent case of *Hopkins Mfg. Corp. v. Cequent Performance Products, Inc.*, 223 F. Supp. 3d 1194 (D. Kan. 2016), Pet. 10, is dicta. The court entered summary judgment in favor of the defendant in *Hopkins*, and on that basis ruled that the defendant was entitled to fees as the prevailing party. 223 F. Supp. 3d at 1203. *Hopkins* furthermore does not even mention *CRST*.

Plaintiffs also cite to an unpublished decision, *Smalley v. Account Serv. Collections, Inc.*, 2017 WL 1092678 (W.D. Pa. 2017), Pet. 10, that itself cites to *Hopkins*, and also does not mention *CRST* – although *Smalley* too is after this Court's decision in *CRST*. Both *Hopkins* and *Smalley* also involved circumstances in which the parties *agreed* to the stipulation of dismissal, *not* the circumstances here, of plaintiffs

having filed a unilateral dismissal that invoked Rule 41(a)(1)(B), by which the "notice of dismissal operates as an adjudication on the merits," and in the face of motions to dismiss pending.

In the only other district court decision that plaintiffs cite that is after *CRST*, the unpublished decision in the patent case of *O.F. Mossberg & Sons, Inc. v. Timney Triggers, LLC*, 2018 WL 4398249 (D. Conn. 2018), *appeal filed*, the plaintiff filed a Rule 41 voluntary dismissal without prejudice. As the court noted, "a Rule 41 dismissal without prejudice is not a decision on the merits" and therefore does not alter the legal relationship between the parties. *Id*. *5.

The other district court decisions plaintiffs cite, Pet. 10-11, are prior to this Court's decision in *CRST*. Furthermore, those decisions, *Malibu Media, LLC v. Baiazid*, 152 F. Supp. 3d 496 (E.D. Va. 2015), and *Harris v. Captiva Condominiums, LLC*, 2008 WL 4911237 (M.D. Fla. 2008), did not involve Rule 41(a)(1)(B) dismissals that constitute adjudications on the merits.

The defendants were properly awarded attorney's fees pursuant to 42 U.S.C. § 1988(b) as the prevailing parties, in addition to the other grounds on which the fees were awarded, as the District Court correctly determined and the Court of Appeals correctly affirmed.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

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