No._____

IN THE

SUPREME COURT OF THE UNITED STATES

———————◆———————

ALDON SMITH,

Petitioner,

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS,

Respondent.

———————◆———————

On Petition For Writ Of Certiorari
To the United States Court of Appeals
For the Federal Circuit

———————◆———————

PETITION FOR WRIT OF CERTIORARI

———————◆———————

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QUESTIONS PRESENTED

This Court in *Buckhannon* addressed an award of prevailing party attorneys' fees pursuant to Fair Housing Amendments Act of 1988 and Americans with Disabilities Act of 1990 due to voluntary change in position by the government party. Many courts have extended *Buckhannon's* holding to the Equal Access to Justice Act.

1. Does *Buckhannon* apply in fee determinations under the Equal Access to Justice Act?

2. Is Government, in this case, a "mischievous defendant" under *Buckhannon,* warranting an award of attorney's fees under the Equal Access of Justice Act when Government moved to moot a case by granting all requested relief, after a judicial determination had been made at a lower court, and Government disclosed for the first time information on appeal, which would have provided Government defeat, if known to the Petitioner, at the lower court?

3. Does *Buckhannon* apply in fee determinations under the Equal Access to Justice Act if there is an intervening voluntary reversal in conduct by Government after an initial victory by the Government in a lower court?

PARTIES TO THE PROCEEDING

Petitioner, Appellant-Petitioner below, is Aldon Smith.

Respondent, Appellee-Respondent below, is Robert Wilkie, a constitutional officer of the United States of America appearing in his official capacity.

RULE 29.6 STATEMENT

Petitioner, Aldon Smith, is not a business organization but rather a natural individual.

STATEMENT OF RELATED CASES

I. *Smith v. Shulkin*, No. 17-2787, United States Court of Appeals for Veterans Claims. Order entered November 27, 2017.

II. *Smith v. Wilkie*, No. 2018-1483, United States Court of Appeals for the Federal Circuit. Order entered November 5, 2018 and March 12, 2019.

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

Petitioner (Appellant), Aldon Smith respectfully petitions this Honorable Court for a Writ of Certiorari to review the ruling of the United States Court of Appeal for the Federal Circuit.

OPINIONS BELOW

Below the Federal Circuit issued a *per curiam* order on Petitioner's application for attorney's fees pursuant to the Equal Access of Justice Act (EAJA). This order was issued on March 12, 2019. (Appx. 1).

JURISDICTION

The order of the Court of Appeals for the Federal Circuit was issued on March 12, 2019. The time for petitioning this Honorable Court for Certiorari was enlarged by Circuit Justice, John Roberts to: August 9, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 2412(d)(1)(A) states in full:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil

action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

STATEMENT OF THE CASE

I. THE UNDERLYING EVENTS

This petition appeals a denial of attorney's fees in 2019 but events start in 1970 when Mr. Smith first came into contact with Agent Orange in the Republic of Vietnam. At the end of Mr. Smith's military service he lived out a civilian life. In 2012 Mr. Smith developed a tumor in his voice box that was deemed service connected. Mr. Smith was awarded 100% VA rating and benefits. He underwent emergency surgery to prevent air pathway blockage. In addition to surgery Mr. Smith was hospitalized and bed ridden for two months while undergoing radiation and chemotherapy treatment. Mr. Smith's ultimate test was to learn to swallow again. Mr. Smith to this day is without saliva glands but suffers from an overproduction of mucus causing him discomfort throughout the day. Mr. Smith is also essentially without a voice box.

In 2017 VA sought to reduce Mr. Smith's disability benefits he received for his service connected medical conditions. Mr. Smith demanded a predetermination hearing pursuant to 38 C.F.R. § 3.105(i). Mr. Smith received no response to his multiple demands and his benefits were reduced. With no response from VA Mr. Smith sought judicial review.

II. MR. SMITH SEEKS JUDICIAL REVIEW AT COURT OF VETERANS CLAIMS

Mr. Smith petitioned CAVC for a writ of mandamus. CAVC, unpersuaded by VA's inaction and possible due process violations, denied Mr. Smith's request. Mr. Smith sought further review and appealed his CAVC denial.

III. MR. SMITH APPEALS CAVC DECISION TO THE FEDERAL CIRCUIT

After Mr. Smith's initial brief was before the Federal Circuit VA discovered, in records available throughout the relevant time periods, the notices at issue were sent to an incorrect address.

VA then capitulated and granted Mr. Smith all the relief he sought. Mr. Smith demanded attorney's fees. Government moved to dismiss Mr. Smith's appeal as moot. Federal Circuit granted the Government's motion over Mr. Smith's objections.

Mr. Smith then petitioned the Federal Circuit for attorney's fees under the Equal Access to Justice Act. Federal Circuit denied Mr. Smith's application stating that Mr. Smith was not a "prevailing party" under *Buckhannon* analysis. Federal Circuit cited to *Brickwood Contractors, Inc.* applying *Buckhannon's* analysis to EAJA in the Federal Circuit. 288 F.3d 1371, 1383 (Fed. Cir. 2002). (Appx. 2).

REASONS FOR GRANTING THE WRIT

This Honorable Court should grant certiorari on three independent basis. 1. Circuits remain confused on the application of *Buckhannon* to the Equal Access of Justice Act. 2. Circuits are inconsistent on the concept of "mischievous defendants" or "tactical mooting" which this Honorable Court left unresolved in *Buckhannon*. 3. Application of *Buckhannon* to EAJA when there has been an intervening surrender on appeal by the United States is of fundamental importance.

I. COURTS OF APPEAL REMAIN DIVIDED ON APPLICATION OF *BUCKHANNON* TO EAJA CAUSING CONFUSION

"Yet are those decisions sound?[1]" Mr. Smith answers **NO** to Judge Prosner's question on the application of *Buckhannon* to EAJA. When circuits have spoken on application of *Buckhannon* to EAJA they have done so in the affirmative but each for different reasons. The result is an incoherent mosaic of reasoning. No two circuits have followed the same reasoning to reach the same conclusion. The circuits have evaluated and adopted four reasons to apply *Buckhannon* to EAJA.

1. Legislative history of EAJA.
2. Position of other circuits applying *Buckhannon* to EAJA.
3. *Buckhannon's* prevailing party definition.
4. *Buckhannon's* dicta suggests its holding applies to other fee shifting statutes.

[1] *Jeroski v. Fed. Mine Safety and Health Rev. Com'n*, 697 F.3d 651, 654 (7th Cir. 2012).

7th and Federal circuits are split on EAJA legislative history to justify *Buckhannon's* application to EAJA

7th Circuit denied EAJA legislative history supports *Buckhannon's* application in the administrative appeal process. *Jeroski*, 697 F.3d. at 656. At the district court level, in the 7th Circuit, *Buckhannon* has not been applied to EAJA on in the judicial review context, for reasons including legislative history. *Kholyavskiy v. Schlecht*, 479 F. Supp. 2d 897, 907 (E.D. Wisc. 2007).

In contrast Federal Circuit has found legislative history favors application of *Buckhannon* to EAJA. *Brickwood Contractors, Inc. v. U.S.*, 288 F.3d at 1379.

7th Circuit extends *Buckhannon* to EAJA merely because other circuits have extended *Buckhannon* to EAJA

Finding legislative history does not support *Buckhannon's* application to EAJA the 7th Circuit relents and accepts its peers' pressure to extend *Buckhannon* to EAJA. *Jeroski*, 697 F.3d. at 655. "The Court's approach in *Buckhannon* supports the position that eight circuits have taken with respect to the meaning of 'prevailing party,' and we bow to this heavy weight of authority." *Id*. The 2nd, 10th, and 11th circuits also accept the peer pressure reasoning as a non-exclusive reason for *Buckhannon's* extension to EAJA.

6th and District of Columbia circuits extended *Buckhannon* to EAJA solely on this Court's "prevailing party" definition

6th and District of Columbia circuits extended *Buckhannon* to EAJA solely on this Court's "prevailing party" definition in *Buckhannon*. *Marshall v. Commissioner of Social Security*, 444 F.3d 837, 840 (6th Cir. 2006) and *Thomas v. National Science Foundation*, 330 F.3d 486, 493 (D.C. Cir. 2003). These circuits rely

on only this Honorable Court's "prevailing party" definition highlighting the inconsistent reasoning behind application of *Buckhannon* to EAJA.

Six circuits extend *Buckhannon* to EAJA on this Court's dicta suggesting *Buckhannon's* application to other statutes.

Six circuits have extended *Buckhannon* to EAJA on dicta that this Court treats federal fee shifting statutes alike. "We have interpreted these fee-shifting provisions consistently, *see Hensley v. Eckerhart,* 461 U.S. 424, 433, n. 7 (1983), and so approach the nearly identical provisions at issue here." 532 U.S. at 603, n. 4. 1st, 2nd, 4th, 10th, 11th, and Federal circuits have applied *Buckhannon* to EAJA on this Court's dicta as a non-exclusive reason. *Aronov v. Napolitano*, 562 F.3d 84, 89 (1st Cir. 2009); *Ma v. Chertoff*, 547 F.3d 342, 344 (2d Cir. 2008); *Goldstein v. Moatz*, 445 F.3d 747, 751 (4th Cir. 2006); *Iqbal v. Holder*, 693 F.3d 1189, 1194 (10th Cir. 2012); *Morillo-Cedron v. U.S. Citizenship and Immigration Services*, 452 F.3d 1254, 1258 (11th Cir. 2006); *Brickwood Contractors, Inc.*, 288 F.3d at 1377 (Fed. Cir. 2002).

Circuit confusion is evident

Lack of coherent reasoning in the application or non-application causes inconsistencies between the circuits. As an illustrative example on factually similar circumstances the First Circuit in *Aronov*, 562 F.3d at 89, found a party not prevailing but the District of Minnesota did, in *Zheng Liu*, 538 F. Supp. 2d at 1121.

Both cases involved adjudication of naturalization application under 8 U.S.C. § 1447(b). In both plaintiff's were frustrated by the delay caused by FBI name check. In *Aronov* Government did not file a response but entered into a joint motion for remand to USCIS. *Aronov* district court granted the joint motion. Likewise in

Zheng Liu the district court remanded the matter to USCIS. EAJA fees were awarded in *Zheng Liu* but not in *Aronov*. *See also Babar Rashid v. D.H.S.*, et al, No. 2:14-cv-2109 (E.D. Cal. October 31, 2017).

This case is an excellent vehicle to resolve the confusion among the circuits on whether to extend *Buckhannon* to EAJA.

II. THE SECOND QUESTION PRESENTED IS OF FUNDAMENTAL IMPORTANCE PRESENTED BUT UNRESOLVED IN *BUCKHANNON*

This Court in *Buckhannon* suggested voluntary change in position would not insulate "mischievous defendants" as "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." 532 U.S. at 609. (citing *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000)).

Circuits have struggled with the "mischievous defendants" circumstance which the 4th Circuit labeled "tactical mooting." Application of "tactical mooting" is uncertain with circuits hesitant to believe a right to find the "mischievous defendant" exists. *See Goldstein*, 445 F.2d at 752.

Goldstein defines "tactical mooting" as: "where a defendant has agreed to the plaintiff's requested relief in order to avoid the prospect of an adverse fees and costs award." *Id*. n. 4. This case is not Government's first time "tactical mooting" a case to avoid attorney's fees in the Federal Circuit. *See Russell v. U.S.*, 661 F.3d 1371, 1378 (Fed. Cir. 2011).

This case is an excellent vehicle to address the manifestation of this Court's fears in *Buckhannon*. Government "discovered" its clerical error only after the response brief on appeal to the Federal Circuit was due. Had Government provided information on its clerical error earlier Government would have lost at CAVC and negated the need for appeal to the Federal Circuit. Under Buckhannon how should "mischievous defendants" be treated? This case can help answer that question.

III. THIRD QUESTION PRESENTED IS OF FUNDAMENTAL IMPORTANCE UNRESOLVED BY THIS COURT OF INTERVENING SURRENDER ON APPEAL IN FEDERAL FEE SHIFTING CASES

Buckhannon did not address or resolve intervening surrender by the Government. Federal Circuit's application of *Buckhannon* to this case does not address the intervening surrender issue. Government won at CAVC. Government then voluntarily changed its position ***after*** a legal change in the relationship of the parties. Below the Government concedes there is no authority on like factual circumstance in this case.

Courts have addressed the similar situation where a party wins at the trial level then the case becomes moot pending appeal. Courts have held prevailing party at the trial level retains the prevailing party status. *See Diffenderfer v. Gomez-Colon*, 587 F.3d 445, 453 (1st Cir. 2009).

Courts have not addressed Mr. Smith's circumstance where a party loses at the trial level but the case becomes moot on appeal by the surrender of the opposing party. This case addresses that circumstance which the Federal Circuit declined to address.

IV. A LIMITED RECORD WILL FOLLOW ALL LIKE CASES

Record on appeal for this petition in limited. By the nature of the circumstance of this and like cases, the record will always be limited. This case is petitioned because the Government caused Mr. Smith great effort to correct a minor administrative error. Government only conceded the error, last minute, once the Government was before the Federal Circuit.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should be granted.

Respectfully submitted,
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Appendix A

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

ALDON SMITH,
Claimant-Appellant

v.

ROBERT WILKIE, Secretary of Veterans Affairs,
Respondent-Appellee

2018-1483

Appeal from the United States Court of Appeals for Veterans Claims in No. 17-2787, Judge Joseph L. Toth.

ON APPLICTION

Before DYK, REYNA and TARANTO, *Circuit Judges*.

PER CURIAM.

O R D E R

Aldon Smith filed the underlying petition for a writ of mandamus at the United States Court of Appeals for Veterans Claims seeking to compel the Secretary of Veterans Affairs to reinstate his benefits and provide a predetermination hearing before any benefit reduction. The Veterans Court denied his petition. After Mr. Smith

filed his opening brief before this court, the Secretary determined that the initial notice of proposed benefits reduction may have gone to an address for Mr. Smith that was not current when the notice was sent, though Mr. Smith had not so alleged in his appeal. Based on that determination, the Secretary voluntarily reinstated Mr. Smith's benefits and provided Mr. Smith with notice that he could have a predetermination hearing before any future action to reduce his benefits was taken. Having been provided all the relief he sought on appeal, this court, over Mr. Smith's objections, granted the Secretary's motion to dismiss his appeal on mootness grounds. Mr. Smith now asks for $11,385 in attorney fees under the Equal Access to Justice Act, ("EAJA"), largely for the work done in preparing his opening brief.

We deny that request. Under the EAJA, a party may not be awarded fees unless it is the "prevailing party." 28 U.S.C. § 2412(d)(1)(A). In *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 601–02 (2001), the Court rejected the "catalyst theory" for awarding fees, under which a plaintiff "prevailed" if he achieved "the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." A defendant's voluntary change, even one precipitated by litigation, the Court explained, does not amount to "a court-ordered change in the legal relationship" between the plaintiff and defendant, as required to establish prevailing party status. *Id.* at 604. This court has recognized that *Buckhannon*'s analysis applies in the EAJA setting. *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371, 1383 (Fed. Cir. 2002).

This court's dismissal order in the present case—the only order issued by this court aside from two prior orders granting each party an extension of time to file their merits briefs—was nothing like an "enforceable judgment[] on the merits" or "court-ordered consent decree," that could establish prevailing party status. *Rice Servs.,*

Ltd. v. United States, 405 F.3d 1017, 1026 (Fed. Cir. 2005) (citing *Buckhannon*, 532 U.S. at 604). Far from materially altering the legal relationship between the parties, the dismissal order left undisturbed the Veterans Court's denial of relief to Mr. Smith. This court's order merely recognized that Mr. Smith's appeal could no longer continue after the Secretary voluntarily restored Mr. Smith's benefits and promised a predetermination hearing. In these circumstances, we conclude that Mr. Smith was not a prevailing party and therefore may not receive fees under EAJA.

Accordingly,

IT IS ORDERED THAT:

The application is denied.

FOR THE COURT

Mar. 12, 2019
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

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Appendix B

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

ALDON SMITH,
Claimant-Appellant

v.

ROBERT WILKIE, Secretary of Veterans Affairs,
Respondent-Appellee

2018-1483

Appeal from the United States Court of Appeals for Veterans Claims in No. 17-2787, Judge Joseph L. Toth.

ON MOTION

Before DYK, REYNA, and TARANTO, *Circuit Judges*.

TARANTO, *Circuit Judge*.

O R D E R

The Secretary of Veterans Affairs moves to waive Federal Circuit Rule 27(f) and to dismiss this appeal for lack of jurisdiction. Aldon Smith opposes the motion.

I

In 2013, Mr. Smith was granted entitlement to service-connection benefits for laryngeal cancer, at a 100% scheduler rating. In December 2015, the Department of Veterans Affairs issued a rating decision proposing to reduce certain of Mr. Smith's benefits, but sent notice of that proposed reduction to an address that the Secretary now says may not have been accurate.

After the Department took its proposed reduction action in March 2017, Mr. Smith petitioned for a writ of mandamus with the United States Court of Appeals for Veterans Claims, asking that court to compel the Secretary to reinstate his benefits and provide a predetermination hearing. The Veterans Court denied the petition. Mr. Smith appealed to this court and filed an opening brief in which he states in his relief sought section he "wants to return to his benefit award prior to the reduction of benefits in March 2017 and wants [the] opportunity to participate in a pre-determination hearing before any benefits are reduced." Appellant's Br. at 24.

After the opening brief was filed, the Secretary acted to reinstate Mr. Smith's benefits, applied a cost of living adjustment to those benefits, and, on August 29, 2018, provided Mr. Smith with a new decision proposing to reduce his benefits and notification that Mr. Smith may seek a predetermination hearing within 30 days. In light of those actions, the Secretary now moves to dismiss this appeal as moot. Mr. Smith opposes the motion.

II

If events occur during a case, including during the course of an appeal, that make it "impossible for the court to grant any effectual relief whatever to a prevailing party," the appeal must be dismissed as moot. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (internal quotation marks and citation omitted). We

agree with the Secretary that Mr. Smith's receipt of all the relief that he sought in his opening brief was such an event.

The only conduct challenged in this appeal was whether the Secretary could reduce Mr. Smith's benefits without a predetermination hearing. Once the Secretary restored the benefits and notified Mr. Smith that he may seek a predetermination hearing before any reduction of his benefits, any decision from this court on appeal as to whether the Veterans Court erred would provide Mr. Smith no meaningful relief in this case.

Mr. Smith invokes the voluntary cessation doctrine, which places the burden on the defendant claiming that its voluntary compliance with the law moots a case to show that it is absolutely clear the allegedly wrongful behavior "cannot reasonably be expected to start up again." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citation omitted). But there is no plausible argument that the Secretary will revert back to the old notice and prior failure to offer a predetermination hearing.

Mr. Smith points out that Secretary is still seeking to reduce his benefits and "may still ignore fundamental due process," "may still delay," and "may still ignore his own regulations." But the possibility of misconduct that may arise in a future adjudication of Mr. Smith's benefits does not suffice to create the sort of live injury needed to establish a continuing case or controversy. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 96 (2013) ("Although the voluntary cessation standard requires the defendant to show that the challenged behavior cannot reasonably be expected to recur, we have never held that the doctrine—by imposing this burden on the defendant—allows the plaintiff to rely on theories of Article III injury that would fail to establish standing in the first place.").

Accordingly,

IT IS ORDERED THAT:

(1) The motion is granted. This appeal is dismissed.

(2) Each side shall bear its own costs.

FOR THE COURT

Nov. 5, 2018
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

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ISSUED AS A MANDATE: November 5, 2018

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-2787

ALDON SMITH, PETITIONER,

V.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before TOTH, *Judge*.

O R D E R

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

Veteran Aldon Smith filed through counsel a petition for extraordinary relief in the nature of a writ of mandamus, asking the Court to order the Secretary to reinstate his disability benefits until a predetermination hearing has been held under 38 C.F.R. § 3.105(i). He asserts that after receiving notice in March 2017 of VA's decision to reduce his benefits, he filed a timely request for a predetermination hearing and an appeal to the Board. His request was not acknowledged, and his benefits were subsequently reduced in July. Smith immediately demanded reinstatement of his benefits until a predetermination hearing could be held, but no response was received.

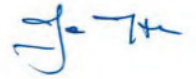
Acting on this Court's September 22, 2017 order, VA submitted a response to the petition. Upon review, the Court concludes that the appropriate notice concerning the proposed reduction was delivered to Mr. Smith in December 2015. The March 2017 letter to which Mr. Smith responded within 30 days was the implementation of the 2015 proposal; it was not the "advance written notice" described in 38 C.F.R. § 3.105(i) which triggers the 30-day clock. Because Mr. Smith did not respond within 30 days of the December 2015 notice, he fails to demonstrate a clear and indisputable right to the writ. *See Erspamer v. Derwinski*, 1 Vet.App. 3, 9 (1990).

Upon consideration of the foregoing, it is

ORDERED that the petition is DENIED.

DATED: November 29, 2017

BY THE COURT:



JOSEPH L. TOTH
Judge

Copies to:

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VA General Counsel (027)