No. 24-267

IN THE

Supreme Court of the United States

JOHN ABDELSAYED and
TRENDS REALTY USA CORP,
Petitioners,

v.

AFFORDABLE AERIAL PHOTOGRAPHY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

Respondent's opposition ignores the disharmony in the lower courts but concedes the first question is important and this case is an excellent vehicle to address it.

Respondent does not confront the Fourth Circuit's observation of the "disagree[ment]" and "divi[sion]" among federal courts on what *CRST* reserved. *Citi Trends, Inc. v. Coach, Inc.*, 780 F. App'x 74, 79 (4th Cir. 2019). Contrary to its argument that "there is no conflict (implicit or explicit)," Br. in Opp. 9, the Fourth Circuit concluded it is "a question that has evenly divided the few courts that have considered it." *Citi Trends*, 780 F. App'x at 79. Respondent similarly ignores the Eleventh Circuit's observation that "courts operating after *CRST* have taken different positions on" whether a defendant prevails after a non-preclusive judgment. *Beach Blitz Co. v. City of Elizabeth*, 13 F.4th 1289, 1301 (11th Cir. 2021). So patent is the split that even a state supreme court has highlighted it: "Federal courts are divided on whether a party can be a prevailing party when the opposing party voluntarily dismisses the case." *In re Herrera*, 912 N.W.2d 454, 471-72 (Iowa 2018).

Respondent also attempts to downplay the importance of the second question. The issue is important, however, as *King for Congress v. Griner*, no. 24-321, shows. This Court has not spoken on Rule 68 for nearly thirty years and the contours of Rule 68 are in need of clarification from this Court—both in terms of when the rule is triggered (this case) and the scope of the rule's consequences (*King for Congress*). Additionally, the Court's decision in *Waetzig v. Halliburton Energy Servs., Inc.*, no. 23-971, 2024 WL 4394126

(2024) (cert granted) on "whether a Rule 41 voluntary dismissal without prejudice is a "final judgment, order, or proceeding" under Rule 60(b)" may control the answer to the second question.

The Court should grant certiorari on both questions. Or it could hold the petition, grant on the first question as well as the forthcoming petitions also involving Respondent, and then consolidate. Or it could hold the petition, then grant, vacate, and remand on the second question in light of either *King for Congress*, or *Waetzig*. But the Court should, at a minimum, grant on the first question given the varied and incorrect lower court decisions post-*Buckhannon* and its widespread importance.

I. Disharmony in the lower courts is undeniable

Respondent does not dispute that the issue of whether a defendant is the prevailing party is an important one, nor does it quarrel with the suitability of this case as a vehicle to decide that question. But it is wrong to say there is clarity in the lower courts on when a defendant prevails after the plaintiff dismisses its action without prejudice. It cannot explain why multiple jurists have said otherwise. *Citi Trends*, 780 F. App'x at 79; *Beach Blitz*, 13 F.4th at 1301; *In re Herrera*, 912 N.W.2d at 471-72.

Rather than admit the disharmony (or the intra-circuit tension in several circuits), Pet. 12-22, Respondent instead reframes the first question by assuming its preferred legal rule as a predicate. Br. in Opp. 9 ("whether a voluntary dismissal without prejudice carries with it the necessary judicial imprimatur") (emphasis removed).

Its citation to *Xlear Inc. v. Focus Nutrition, LLC*, 893 F.3d 1227 (10th Cir. 2018), reinforces the need for this Court's review when contrasted with other decisions in the Tenth Circuit.

Consider *Cantrell*, where a defendant is the "prevailing party" under Rule 54(d) when the plaintiff dismisses its action without prejudice. *Cantrell v. IBEW, AFL-CIO, Local 2021*, 69 F.3d 456, 456 (10th Cir. 1995). Most recently, *Burton* reaffirmed that holding. *Burton v. Vectrus Sys. Corp.*, 834 F. App'x 444, 446 (10th Cir. 2020).[1]

Ten years earlier in *Lorillard* it reached a different outcome when addressing the Lanham Act's use of the identical term "prevailing party." *Lorillard Tobacco Co. v. Engida*, 611 F.3d 1209, 1214-17 (10th Cir. 2010). In contrast to *Burton*, its rationale in *Lorillard* was that the defendant could not be the prevailing party upon the plaintiff's voluntary dismissal without prejudice "[b]ecause the district court granted him no merits-based relief." *Id.* at 1215. *CRST* has since rejected the position that a defendant requires merits-based relief to prevail.[2]

Then it decided *Xlear* two years after *CRST*, but two years before *Burton*. That panel did not cite *Cantrell*, and its mention of *CRST* was limited to a single supporting parenthetical, after principally citing *Buckhannon*. *Xlear*, 893 F.3d at 1237 (asserting

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[1] Even while *Burton* distinguished *Buckhannon* on the basis that it was a prevailing plaintiff case, it never cited *CRST* or discussed how a defendant's objectives differ from those of a plaintiff.

[2] Petitioners inadvertently left a cross-reference to this analysis in their petition, Pet. 14, despite removing the part (now presented here) from Section III of the Petition, Pet. 25, after concluding that *CRST* has overruled *Lorillard*.

CRST stands for the same proposition as *Buckhannon*). Even more curiously, the *Xlear* panel cited its own pre-*CRST* prevailing plaintiff cases while continuing to reason that a defendant must show a merits-type decision. *Id.* at 1238 (the stipulation of dismissal did "not bear any attributes of a consent decree and did not permit the district court to retain jurisdiction to enforce any aspect of the dismissal relative to the merits of case"). *Xlear*'s understanding of when a defendant is a "prevailing party" appears in direct conflict with *Cantrell* and *Burton*—to say nothing of its inconsistency with *CRST*: "In summation, under *Buckhannon*, *Bell*, and *Biodiversity Conservation Alliance*, to establish that it was a prevailing party, a litigant must demonstrate the existence of judicial imprimatur by identifying judicial action that altered or modified the legal rights of the parties." *Burton* and *Lorillard* reach opposite conclusions about what "prevailing party" means for a defendant when the action is dismissed without prejudice. *Xlear* then follows *Lorillard* finding the defendant had not prevailed despite the preclusive effect of a stipulated dismissal which *Burton* says is sufficient. How are litigants to harmonize these decisions? Such an endeavor is fraught with uncertainty, breeding more litigation, not less.[3]

The Eleventh Circuit's jurisprudence fares no

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[3] Regardless of the tension and the Tenth Circuit's inconsistent construction of "prevailing party," Petitioners would, under *Burton* and *Cantrell*, likely have been awarded their attorney's fees if the action were litigated within the Tenth Circuit because the Copyright Act defines attorney's fees "as part of the costs," 17 U.S.C. § 505, while the Lanham Act does not. At a minimum, this case, had it been litigated there, would have resulted in the district court (and perhaps the Tenth Circuit) to confront the tension in these decisions.

better. For example, it held that a defendant was the prevailing party where the plaintiff voluntarily dismissed with prejudice under Rule 41(a)(2). *Mathews v. Crosby*, 480 F.3d 1265 (11th Cir. 2007). It did not mention imprimatur. Yet here, on the same procedural posture, it concluded there was no imprimatur on the same judicial event. App. 7a. The difference? Preclusive effect. But "judicial sanction" is not the equivalent of res judicata. The Eleventh Circuit's latest reasoning conflates the two, without articulating why either matters to a defendant's litigation objectives. They don't.

To make matters worse, it further clouded its own jurisprudence by narrowing *Mathews*, saying that only "some voluntary dismissals with prejudice can entitle a defendant to prevailing-party status," but without any sure test for when that might occur. *Affordable Aerial Photography Inc. v. Reyes*, no. 23-12051, 2024 WL 4024619 (11th Cir. Sept. 3, 2024) ("*Reyes*"). That is the same equivocation in *Beach Blitz*. 13 F.4th at 1301 ("whether other types of nonmerits involuntary dismissals should confer prevailing party status"). Despite the preclusive end to Respondent's action in *Reyes*, the defendant did not prevail because the preclusive notice-based dismissal "with prejudice" did not require "judicial action." *Reyes*, 2024 WL 4024619, at *2. (quoting *Affordable Aerial Photography, Inc. v. Property Matters USA LLC*, 108 F.4th 1358, 1363 (11th Cir. 2024) ("*Property Matters*")). The only difference between *Mathews* and *Reyes* is that the latter ended by respondent's notice under Rule 41(a)(1)(A)(i), whereas *Mathews* ended by court order on a Rule 41(a)(2) dismissal. Both were terminal events having res judicata effect. Both fulfilled the defendant's goals, permanently. Again, in neither case has the Eleventh Circuit articulated why

any of that matters to a defendant or any clear standard for when a defendant prevails.

Still other procedural contexts show the inconsistency of rationale and outcomes. Sometimes the "voluntariness" of the event matters. In *Beach Blitz* and *Burton* the defendant prevailed because the dismissal was an involuntary one under Rule 12(b), despite being non-preclusive. But the Second Circuit holds otherwise. *Dattner v. Conagra Foods, Inc.*, 458 F.3d 98 (2d Cir. 2006).

Similarly, the Federal Circuit holds that a Rule 41(a)(2) order of voluntary dismissal "has the necessary judicial imprimatur to constitute a judicially sanctioned change in the legal relationship of the parties," *Highway Equip. Co. v. Feco, Ltd.*, 469 F.3d 1027, 1035 (Fed. Cir. 2006), while the Eleventh Circuit holds that it does not, App. 7a. Yet the defendants do not "prevail" in either circuit, because neither order has preclusive effect.

That the circuits have struggled to coalesce around predictable rules of law for prevailing defendants shows the importance of the need for this Court's guidance. While Respondent's desired rule of law is evident, Br. in Opp. 8-18, those arguments are appropriately left for the merits stage. The lower courts' construction of the term "prevailing party" for defendants is inconsistent across contexts resulting in different statuses despite identical outcomes: the case being thrown out of court—an event any defendant would celebrate.

The Court should address the fallout of *Buckhannon*, decide the question reserved in *CRST*, and expand on the "detail[s for] how courts should determine whether a defendant has prevailed." *CRST*, 578 U.S. at 422.

II. Respondent, like the Eleventh Circuit, is wrong on the merits

Lower court decisions requiring imprimatur or preclusive effect for a defendant to prevail have gone so far afield from the historic, accepted, and usual course of judicial proceedings as to call for this Court's exercise of discretion to grant certiorari, even apart from the fractured decisions of the lower courts.

If the underlying action ended a century ago (or even as recently as 1995), there would be no doubt that Petitioners had prevailed in Respondent's lawsuit. There were seven possible outcomes of a suit in which the defendant prevailed:

> Every judgment against a plaintiff is either upon a retraxit, non prosequitur, nonsuit, nolle prosequi, discontinuance, or a judgment on an issue found by jury in favor of defendant, or upon demurrer. The inducements or preliminary recitals in these several kinds of judgment are variant, but the conclusion in each is always the same; it is as follows: 'Therefore it is considered by the court that plaintiff take nothing by his writ, and that the defendant go without day, and recover of plaintiff his costs.'

2 Abraham Clark Freeman, A Treatise on the Law of Judgments, Including All Final Determinations of the Rights of Parties in Actions or Proceedings at Law or in Equity § 751, at 1580 (Edward W. Tuttle, ed., 5th ed. 1925). Freeman further clarified that just two of the seven were preclusive to a second suit. *Ibid.* ("Of these several judgments, none but a retraxit or one on

the merits will bar subsequent actions.").

The circuits requiring imprimatur or preclusive effect ignore the real-world, practical result of the defendant's unrestrained freedom which it obtains from a case ending without the plaintiff securing any relief.

Here, a "take nothing" judgment is precisely what the district court gave Respondent in its lawsuit. App. 16a. Though the judgment did not include express language that Respondent would take nothing, there is no disagreement that is what actually occurred. Br. in Opp. 7 ("In voluntarily dismissing its lawsuit without prejudice, Respondent 'obtained' neither money damages nor injunctive relief."). Nor is there any doubt about the effect of the court's action—that is, the district court's decision to put the parties out of court without Respondent effecting a material alteration with Petitioners. Respondent does not contend otherwise, though it mischaracterizes the terminal event being its notice, Br. in Opp. 7,[4] rather than the district court's judgment, App. 16a.

What would also have been evident 100 years ago is the existence and finality of the judgment, and what that judgment terminated: the litigation, even though not res judicata to a second suit:

> judgments merely of dismissal, whether voluntary or involuntary, in actions at law are not on the merits and do not operate as a bar or estoppel … they do not bar a new action. A judgment of dismissal or nonsuit on any of the grounds specified in the statute is not on the merits

[4] Respondent appears to be arguing the merits of its cases in *Reyes* and *Property Matters*, not the facts on this record.

> and not a bar to another action ….

2 Freeman, § 753, at 1582-84; § 755, at 1592 (a nonsuit "terminates the action").

The Copyright Act's fee-shifting language (both under the 1909 and 1976 acts, and the DMCA) perfectly aligns with the historical understanding of what a voluntary dismissal concludes. Compare *id.* at § 753 ("a new action," "another action," "a subsequent action"), with 17 U.S.C. § 505 ("any civil action").

History and text show that the lower courts' refusal to recognize a defendant prevails in an action upon a voluntary dismissal is terribly misguided. None of the decisions focusing on imprimatur or preclusive effect makes sense for defendants, either common or historical. Courts and litigants alike should not be left with the "difficult task" of "determin[ing] whether [a judgment] has preclusive effect," *Beach Blitz*, 13 F.4th at 1300, as part of its prevailing defendant analysis at step one.

III. The Rule 68 issue is important

This Court has not directly addressed Rule 68 since *Marek v. Chesny*, 473 U.S. 1 (1985). Respondent argues the second question presented in the petition is unimportant while nevertheless conceding that it "sought and received" the judgment of dismissal. Br. in Opp. 6.

In a related context, the Court has granted certiorari in cases where the issue seems uncommon or of limited scope. For example, in *Waetzig v. Halliburton Energy Servs., Inc.*, no. 23-971, the Court will decide whether a voluntary dismissal without prejudice is a judgment, order, or proceeding under Rule 60(b).

Though seemingly a rare event and a shallow circuit split, the Court granted certiorari. Patent cases arising only out of the Federal Circuit also present narrower, no-split questions that this Court nevertheless reviews.

Like *Waetzig*, the question here is whether the same case-ending event is a judgment under Rule 68. Pet. i. Both cases involve application of the term "judgment" under Rule 54(a) to that term's meaning elsewhere in the rules.

The circuit split in *King for Congress v. Griner*, as well as the number of cases cited by Respondent shows that Rule 68 in copyright actions is not a "narrow issue." Br. in Opp. 2. The sole difference between this case and *King for Congress* is that Griner sought and received a monetary judgment, whereas Respondent changed its request from one for money damages to one for an end to its suit. In both cases the plaintiff obtained the judgment that ended the action. Litigants ought to know if *Delta Air Lines, Inc v. August*, 450 U.S. 346 (1981), applies to an adverse judgment requested by a plaintiff or only to judgments in which a plaintiff obtains a recovery from a defendant.

IV. This case is the best vehicle to clarify prevailing party status for defendants

Respondent does not dispute that this case is an ideal vehicle to address the issue left unresolved in *CRST* or an equally-suitable vehicle to address the related question under Rule 68. This case neatly presents the two questions, and respondent provides no good reason to think otherwise.

CONCLUSION

In the current environment, defendants are dis-incentivized from pursuing their attorney's fees given the effort and increasingly adverse decisions in the lower courts, as the record here shows. All told, the post-dismissal litigation has at least matched, if not exceeded, Petitioners' investment in defending against the merits and successfully ending the lawsuit. John Abdelsayed and his business are not alone in their uphill battle to oppose the enterprise of over-aggressive copyright plaintiffs who dismiss their cases when they sense defeat. Their reward? A "second major litigation" *CRST*, 578 U.S. at 435, to prove their successful exit. Petitioners have made extensive investment to seek this Court's review, and this is the ideal case to clarify the prevailing defendant standard.

The Court should grant the petition for a writ of certiorari on both questions. Or the Court might consider forthcoming petitions also involving Respondent, grant all of them, and consolidate.

Respectfully submitted,

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