

No. 24-_____

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*

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Copyright Act provides that a “court may . . . award a reasonable attorney’s fee to the prevailing party.” 17 U.S.C. § 505. In *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419 (2016), this Court held that “a defendant need not obtain a favorable judgment on the merits in order to be a ‘prevailing party’” for purposes of statutory attorney’s fees, *id.* at 431, but “decline[d] to decide” whether “a defendant must obtain a preclusive judgment in order to prevail,” *id.* at 434. That important question has divided the circuits 7-3, and is cleanly presented in this copyright case:

1. Does a dismissal without prejudice that reestablishes the pre-suit status quo make a defendant the “prevailing party” under 17 U.S.C. §§ 505 and 1203(b)(5)?

A further and related question left unaddressed in *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981), is presented, and important to all civil litigants:

2. Is a final judgment of voluntary dismissal without prejudice, entered in response to a plaintiff’s request under Rule 41(a)(2), a “judgment that [a plaintiff] finally obtains” for purposes of Rule 68?

These questions provide related, defendant-based counterpoise to those now pending in *Lackey v. Stinnie*, 144 S. Ct. 1390 (2024).

**PARTIES TO THE PROCEEDINGS AND
CORPORATE DISCLOSURE STATEMENT**

Petitioner Trends Realty USA Corp does not have a parent corporation and no publicly held company owns 10% or more of its stock.

In addition to the caption, the district court proceedings included third-parties who, while they appear in the caption of the Eleventh Circuit, were not parties to the appeal, and are not parties to this petition:

Robert Stevens

Cornelius McGinnis

Old Palm Real Estate, LLC

DIRECTLY RELATED PROCEEDINGS

Affordable Aerial Photography, Inc. v. Abdelsayed et al., No. 9:21-cv-81331-AMC (S.D. Fla.); case closing order entered Jan. 6, 2023.

Affordable Aerial Photography, Inc. v. Trends Realty USA Corp, et al., No. 23-11662 (11th Cir.); judgment entered February 28, 2024; rehearing denied May 8, 2024.

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INTRODUCTION

The district court denied petitioners’ motion for attorney’s fees after more than a year of defensive effort—effort that resulted in fulfilling their primary objective of ending the lawsuit and completely resisting the plaintiff’s attempt to obtain relief. The Eleventh Circuit affirmed, concluding petitioners had both won and lost at the same time: They could not be the “prevailing party” for purposes of §§ 505 or 1203(b)(5) of the Copyright Act because they did not secure a preclusive judgment (defendants lost), nor could they recover their fees as costs under Rule 68(d)¹ because the judgment was “unfavorable” to the plaintiff (defendants won).

This case presents an issue expressly reserved in *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419 (2016) whether a preclusive judgment is necessary for a defendant to be a “prevailing party.” The circuits have splintered answering that question, as both the Fourth and Eleventh Circuits have recognized.

Consistent with more than a century of history, the minority view is that if a lawsuit ends without the plaintiff altering its legal relationship with the defendant, the defendant has prevailed in the action. *In re Paoli R.R. Yard PCB Litig.*, 221 F.3d 449, 471 n.10 (3d Cir. 2000) (“the majority rule [is] that defendants can be ‘prevailing parties’ when a plaintiff voluntarily dismisses his action without prejudice”).

But a sea change occurred after this Court’s decision in *Buckhannon Bd. & Care Home, Inc. v. W.*

¹ Under Eleventh Circuit precedent, costs under Rule 68 include attorney’s fees in copyright actions. *Jordan v. Time Inc.*, 111 F.3d 102 (11th Cir. 1997) (citing *Marek v. Chesny*, 473 U.S. 1 (1985)).

Virginia Dep't of Health & Hum. Res., 532 U.S. 598 (2001). A new majority has eschewed text and history, with the Ninth Circuit abandoning its longstanding view. *Cadkin v. Loose*, 569 F.3d 1142, 1147-49 (9th Cir. 2009) (overruling its 1942 precedent which held a copyright defendant prevails upon the plaintiff's voluntary dismissal because such an outcome was "clearly irreconcilable with *Buckhannon*"). Post-*Buckhannon*, a majority of circuits now employ a "risk of refiling" test in which a defendant is nonprevailing whenever it remains "at risk" of a second suit. And further division exists respecting whether defendants must accomplish their goal of exiting a case with judicial imprimatur. Commentators have alarmed at this shift. See Nathan Nash et al., Comment, *The Tarnished Golden Rule: The Corrosive Effect of Federal Prevailing-Party Standards on State Reciprocal-Fee Statutes*, 127 YALE L.R. 1068, 1084-89 (2018) (the "original understanding of when [d]efendants prevail is undermined by post-*Buckhannon* developments"). The conflict among the circuits presents an intolerable environment for defendants, whose status as prevailing party depends solely on where they are haled into court. That divide is mature and urgently in need of resolution.

The new "risk of refiling" test is ahistorical, atextual, and inconsistent with the Copyright Act in particular. It discourages defendants from standing on meritorious defenses while encouraging plaintiffs to file unreasonable infringement claims. The rule also defies common sense because defendants are never immunized from being forced to defend even barred suits. Nor is imprimatur required for a defendant to accomplish its primary objective.

The question reserved in *CRST* is cleanly presented in this simple copyright case. More precise

guidance for each type of litigant is needed to avoid further confusion and stem the drift away from historic, commonsense understanding of what it means for a defendant to prevail. That confusion may only increase without a concurrent counterpart to the Court's decision this term in *Lackey v. Stinnie*, 144 S. Ct. 1390 (2024), because plaintiffs' and defendants' objectives in litigation are different, *CRST*, 578 U.S. at 431.

John Abdelsayed and Trends Realty USA Corp petition the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case, to resolve the question reserved in *CRST* which has divided the lower courts, and to clarify when judgments trigger Rule 68.

OPINIONS BELOW

The Eleventh Circuit's opinion is unreported, but available at 2024 WL 835235 (App. 1a-9a). The order of the United States District Court for the Southern District of Florida denying petitioners' post-judgment motion for attorney's fees is unreported but is available at 2023 WL 3597542 (App. 10a-15a).

JURISDICTION

The Eleventh Circuit Court of Appeals entered its opinion on February 28, 2024, and petitioners timely sought rehearing en banc, which it denied on May 8, 2024. On July 28, 2024, Justice Thomas extended the time to file this petition for a writ of certiorari to September 5, 2024. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The Copyright Act of 1976 prevailing party fee provision, 17 U.S.C. § 505 (2018), provides, in full:

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

The Digital Millenium Copyright Act prevailing party fee provision, 17 U.S.C. § 1203(b)(5) (2018), provides, in relevant part:

In an action brought under subsection (a), the court— . . . in its discretion may award reasonable attorney's fees to the prevailing party;

Federal Rule of Civil Procedure 68(d) provides:

If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

STATEMENT OF THE CASE

A. The action and its termination

John Abdelsayed and his small business, Trends Realty USA Corp, thought an email they received alleging copyright infringement and demanding immediate payment of \$35,000 based on the presence of a

photograph on Trends Realty’s website was a scam. He was quickly disabused of that notion when Affordable Aerial Photography, Inc. (“Affordable Aerial”) brought suit against him and Trends Realty, alleging direct and vicarious copyright infringement under 17 U.S.C. § 501 and copyright management information (“CMI”) removal under 17 U.S.C. § 1202(b). He had no means to pay Affordable Aerial’s large settlement demand. When the district court struck Trends Realty’s *pro se* answer for not being signed by an attorney, he was forced to find a lawyer to represent his business or else face a potential six-figure default judgment.² He retained counsel willing to represent him and Trends Realty on a contingency fee basis—just as plaintiffs like Affordable Aerial routinely do—and they raised defenses that the Copyright Act incentivized them to pursue through the Act’s fee-shifting provisions. They also availed themselves of the protections provided by Rule 68, and made Affordable Aerial the best offer they could within their financial means to try and avoid litigation.

Affordable Aerial rejected that offer and more than a year of intense litigation ensued, including through the completion of discovery, multiple rounds of summary judgment briefing, and further reopening of discovery after Affordable Aerial’s principle made false statements in its opposition to the defendants’ summary judgment. As a direct consequence of their defensive effort, Affordable Aerial admitted its CMI

² Large default judgments are often awarded for a photograph appearing on the accused’s website. *E.g.*, *Affordable Aerial Photography, Inc. v. Win Capital, LLC*, No. 22-cv-22671, 2022 WL 3975192 (S.D. Fla. Sept. 1, 2022) (\$124,839.80 awarded by default, including attorney’s fees and costs). Affordable Aerial includes these default judgments as representative cases in its demand letters, like the one petitioners received.

removal claim was objectively unreasonable (“I admit that the [subject image] didn’t have the CMI”), and abandoned that claim by amended pleading pursuant Rule 15(a)(2). Discovery also revealed serious problems with Affordable Aerial’s infringement claims, including multiple arguments they briefed on summary judgment that Affordable Aerial’s claims were time-barred, that it could not claim statutory damages or attorney’s fees as a consequence of 17 U.S.C. § 412, that it had no actual damages, that the image was not registered, and that they had acquired a license to it in any event. All of those defensive issues—issues that Affordable Aerial forced petitioners to develop through litigation—ultimately caused Affordable Aerial to abandon its remaining infringement claims seventeen months after it initiated the lawsuit. It called petitioners’ dispositive arguments “novel legal theories” that it did not think was “worth the continued effort” to address.

Affordable Aerial’s decision to abandon its case came just after the district court instructed defendants to refile their Rule 12(b)(1) and Rule 56 motions together as a single combined dispositive motion. Affordable Aerial quickly moved to voluntarily dismiss its action under Rule 41(a)(2) without prejudice. Petitioners then immediately filed their second renewed motion for summary judgment and opposed Affordable Aerial’s voluntary dismissal, seeking a merits ruling on the arguments they had invested in developing and which were ripe for disposition. They attacked Affordable Aerial’s purported reason for seeking dismissal without prejudice as disingenuous because, as a practical matter, it would never file a second suit. They argued Affordable Aerial’s motion was calculated solely to avoid the consequences of its doomed litigation by escaping any liability for the defendants’ attorney’s fees.

The district court allowed Affordable Aerial to suffer a voluntary nonsuit, with the exact conditions it requested. It entered a judgment of dismissal reestablishing the defendants' pre-suit status, including repayment of their taxable costs incurred in their defense. App. 16a. That judgment ultimately fulfilled their primary objective of terminating the litigation without any obligation to Affordable Aerial.

B. The post-judgment fees litigation

Based on the final judgment of dismissal, John Abdelsayed and Trends Realty moved for their attorney's fees under the Copyright Act, 17 U.S.C. §§ 505 and 1203(b)(5), arguing they were the prevailing parties. They also argued, pursuant to Rule 68(d), that their unaccepted offer was more favorable than the dismissal Affordable Aerial requested, mandating cost-shifting, which includes fees in copyright cases under Eleventh Circuit precedent. They proceeded with the conferral requirements and deadlines prescribed by the district court's local rules, and timely filed their fees motion. *See* Fed. R. Civ. P. 54(d)(2)(D) (providing for special procedures by local rule); S.D. Fla. R. 7.3(a), (b).

The district court denied defendants' entitlement to fees. Rather than viewing it as a post-judgment fees motion, the court perceived it as a motion for "reconsideration of the Court's Order Granting Plaintiff's Motion to Voluntarily Dismiss" and concluded that "[r]econsideration is not warranted." App. 12a. Consequently, it did not decide which party prevailed, and did not reach the Rule 68 issue. App. 15a. Abdelsayed and Trends Realty sought reconsideration and highlighted the difference between a judge's equitable discretion under Rule 41 prior to dismissal and prevailing party status post-judgment under § 505 and Rule 68. The district court denied that motion. App. 22a-23a.

C. The court of appeals' opinion

Abdelsayed and Trends Realty appealed, arguing that they had prevailed because they rebuffed Affordable Aerial's CMI removal claim by its own admission and it left court emptyhanded on its infringement claims. They further argued that the dismissal order was, at a minimum, an enforceable costs judgment and judicially-sanctioned end to the lawsuit that satisfied any requirement for "judicial imprimatur."

At the same time, they argued the judgment of dismissal was one that Affordable Aerial had requested, and therefore it had "obtained" that judgment for purposes of Rule 68, thus mandating cost-shifting regardless of prevailing party status.

The Eleventh Circuit affirmed the denial of petitioners' attorney's fees, but on different grounds. App. 3a. It concluded that a judgment of voluntary dismissal without prejudice—though requiring Affordable Aerial to reimburse Abdelsayed and Trends Realty thousands of dollars in costs and reestablishing the *status quo ante*—did not carry "judicial imprimatur" to make the defendants prevailing parties. App. 7a-8a. It reasoned that the "dismissal does not prevent AAP from refileing its claims," App. 8a, and relied on its prior decision in *United States v. \$70,670.00 in U.S. Currency*, 929 F.3d 1293 (11th Cir. 2019), holding that a preclusive judgment is necessary for petitioners to be deemed prevailing.

Despite concluding that Abdelsayed and Trends Realty had not prevailed, the circuit court simultaneously agreed with them that Affordable Aerial "secured no affirmative relief" and reasoned Rule 68 did not apply because the judgment was "adverse" to Affordable Aerial. App. 5a ("an adverse judgment against

the plaintiff does not trigger Rule 68”). Because the judgment was unfavorable to Affordable Aerial, it could not have “obtained” that judgment, and relied on the “favorability” language from *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981). App. 4a-6a.

According to the Eleventh Circuit, petitioners both won and lost, saying the dismissal was a “judgment against the plaintiff” under Rule 68, App. 5a, yet also stating defendants did not receive a “judgment rejecting the [plaintiff’s] claim” under the Copyright Act, App. 8a. The net result, under its rule, is that a copyright plaintiff can litigate its claims without risk of fees liability under § 505 or Rule 68, so long as it obtains a dismissal without prejudice as soon as it senses a possible defeat—even if, as here, that occurs after more than a year of intense litigation.

The Eleventh Circuit has joined six other circuits which employ a “risk of refiling” test, requiring a judgment to have preclusive effect before a defendant can be deemed a prevailing party. Three circuits remain focused on the termination itself, with the split recognized by the Fourth Circuit.

REASONS FOR GRANTING THE PETITION

The circuits are divided on whether a defendant is a “prevailing party” without the entry of a preclusive judgment. A clear divide has emerged, shaped by this Court’s prevailing plaintiff jurisprudence. See Nash, *The Tarnished Golden Rule*, 127 YALE L.R. at 1087-88 (“the pre-*Buckhannon* ‘general rule . . . [was] that the defendant is regarded as having prevailed’ when a plaintiff voluntarily withdraws the action without consideration”). While the language of the circuits in the post-*Buckhannon* majority varies, they all share a common rationale: where the suit’s end does not

preclude a second suit on the same issue, a defendant cannot be the prevailing party. Seven circuits subscribe to this “risk of refiling” test. Conversely, three circuits focus on the suit’s outcome to the defendant without requiring a preclusive judgment.

The Fourth Circuit expressly recognized the new divide. The disharmony, it concluded, resulted from *CRST* declining “to decide whether a nonmerits judgment without preclusive effect is sufficient for a party to prevail.” *Citi Trends, Inc. v. Coach, Inc.*, 780 F. App’x 74, 79 (4th Cir. 2019). It observed both district and circuit “courts that have addressed whether a partially preclusive judgment suffices to achieve prevailing party status have disagreed.” *Ibid.* Illustrating the difficulty faced by the lower courts in the present environment, the Fourth Circuit “decline[d] to determine whether [the defendant] was a prevailing party” and disposed of the appeal on the exceptionality requirement of § 1117(a) the Lanham Act. *Ibid.*

The Eleventh Circuit too has observed that “courts operating after *CRST* have taken differing positions on” whether “certain types of non-merits involuntary dismissals confer prevailing party status.” *Beach Blitz Co. v. City of Elizabeth*, 13 F.4th 1289, 1301 (11th Cir. 2021) (emphasis in original).

Even apart from conflict among the circuits, intracircuit tension exists together with a separate divide on whether defendants must show judicial imprimatur, resisting rules of ready administrability which calls out for this Court’s authoritative voice.

The “risk of refiling” rule is wrong because it fails to appreciate how a defendant’s objectives in litigation differs from a plaintiff’s. It is not grounded in either text or history while also contravening the very purpose of fee-shifting statutes, like the Copyright Act.

The importance of clarifying “prevailing party” status for a defendant, as compared to plaintiffs, is also evident, as district courts struggle to apply *CRST*. See *Wakefern Food Corp. v. Marchese*, No. 20-15949 (WJM), 2022 WL 1639044 at *3 (D.N.J. May 24, 2022) (“it is unclear, based on the authority cited by both Plaintiff [(*Buckhannon*)] and Defendants [(*CRST*)] whether Defendants are the prevailing party following the Court’s dismissal of Plaintiff’s claims without prejudice”). This case, together with *Lackey v. Stinnie*, presents an ideal opportunity to clarify—concurrently in a pair of decisions over the same term—what is a “prevailing party” for opposite sides of a lawsuit that ends without trial.

In addition to copyright cases, the issue is relevant to a vast number of other civil actions where costs or fees are awarded the “prevailing party” either by rule or statute. Proper framing of the issue for each type of party is also paramount to provide needed guidance to litigants across contexts in evaluating the risks of litigation, including both cost-shifting and fee-shifting rules and statutes.

This is an ideal case to address the ongoing confusion based on a simple record, post-judgment, respecting a purely legal question of a defendant’s prevailing party status in “the first part of the fee-shifting inquiry.” *CRST*, 578 U.S. at 423. At the same time, it also highlights and presents the opportunity to clarify whether defendants can avail themselves of the protections afforded by Rule 68 when a plaintiff obtains a judgment of voluntary dismissal.

I. The circuits are split on whether a defendant is a “prevailing party” when an action is dismissed without prejudice

Courts need guidance to determine when a defendant prevails. After this Court’s decision in *Buckhannon*, circuits questioned and overruled their own longstanding precedents, resulting in a divide that turns not on fulfillment of the defendant’s objectives, *CRST*, 578 U.S. at 431, but rather on whether a defendant remains “at risk” of being sued again. Seven circuits subscribe to this “risk of refiling” test where a defendant cannot be the “prevailing party” for purposes of fees- or costs-shifting statutes where the action ends through a dismissal without prejudice. In contrast, the minority rule, subscribed to by three circuits, is that the termination of the action without an alteration of the parties’ legal relationship is paramount; a defendant prevails upon the occurrence of that outcome irrespective of the possibility it might be sued again in a second action.

Here, the Eleventh Circuit applied the “risk of refiling” test, holding that a defendant cannot prevail if the action terminates by a dismissal without prejudice because, so it reasons, the district court’s “order of dismissal does not prevent [plaintiff] from refiling its claims.” App. 8a (relying on *\$70,670*, 929 F.3d at 1303).

Though not in a copyright case, the Tenth Circuit has held directly to the contrary: “a defendant is a prevailing party” when “the plaintiff dismisses its case against the defendant, whether the dismissal is with or without prejudice.” *Cantrell v. IBEW, AFL-CIO, Local 2021*, 69 F.3d 456, 456 (10th Cir. 1995) (en banc). That was the majority position prior to *Buckhannon*, as the Third Circuit observed. *In re Paoli*, 221 F.3d at

471 n.10. Together with the D.C. Circuit, these three courts remain true to history, text, and common sense.

Only this Court can provide the guidance needed to resolve this direct and mature conflict.

A. Three circuits hold that preclusive effect is irrelevant to a defendant's prevailing party status

Historically, a defendant was the prevailing party whenever the plaintiff's action was dismissed, whether that dismissal was entered with or without prejudice. *See* Restatement (First) of Judgments § 53 cmt. a (1942) (a plaintiff may “abandon the action” and “submit to a nonsuit” if “the plaintiff feared that the verdict would be rendered against him,” in which case judgment would then “be given for the defendant” even though “the judgment would not preclude the plaintiff from bringing a new action”). Three circuits remain true to that history, though without expressly acknowledging it. They focus on the outcome obtained by the defendant rather than forward-looking speculation about whether the plaintiff might file a second lawsuit.

The leading case for the minority view, and which presents a square conflict with the decision below, is the Tenth Circuit's en banc decision in *Cantrell*, where it addressed a defendant's post-dismissal claim to costs as the “prevailing party” under Rule 54(d). *Cantrell*, 69 F.3d at 457. It overruled its prior precedent, finding persuasive the rationale of the Fifth Circuit that was critical of it: “With all due respect to the [Tenth Circuit], we are completely at a loss to explain [its] distinction” because a “dismissal with prejudice [simply] affords a defendant considerably more relief than a dismissal without prejudice.” *Schwarz v.*

Folloder, 767 F.2d 125, 131 n.8 (5th Cir. 1985). Except in cases of settlement, the Tenth Circuit holds a defendant is the “prevailing party” if a plaintiff’s action is voluntarily dismissed, “whether that dismissal occurs with or without prejudice.” *Cantrell*, 69 F.3d at 458.

It has since emphasized *Cantrell*’s abandonment of the with/without prejudice distinction for prevailing defendants was central to its holding, and in one case resisted imbuing its prevailing defendant jurisprudence with language from *Buckhannon*. “*Cantrell* makes clear that the defendant . . . qualifies as a ‘prevailing party’ under Rule 54(d)(1) as a result of the dismissal of the action.” *Burton v. Vectrus Sys. Corp.*, 834 F. App’x 444, 446 (10th Cir. 2020). In *Burton*, looked to the outcome of the action, reasoning that “we fail to see how a defendant is a prevailing party under *Cantrell* when a plaintiff voluntarily dismisses an action without prejudice, but a defendant who successfully litigates a motion to dismiss under Rule 12(b)(6) and obtains a dismissal without prejudice and a final judgment in its favor is not.” *Ibid.* It repeatedly added emphasis to the word “*plaintiff*” in distinguishing *Buckhannon*, noting it “did not involve a defendant.” *Id.* at 447. It also added that “even before *Cantrell* this court held that a voluntary dismissal without prejudice triggers prevailing-party status.” *Id.* at 446 n.2. But it has recently held a defendant was not a prevailing party where there is no judicial imprimatur, demonstrating a further conflict among the circuits post-*Buckhannon*. See Section III, *infra*.

Similar to the Tenth Circuit’s focus on the outcome to the defendant, the Third Circuit instructs district courts to “analyze the results obtained by the petitioning party.” *Hughes v. Repki*, 578 F.2d 483, 486 (3d Cir. 1978); see also *In re Paoli*, 221 F.3d at 471 n.10 (“the

majority rule is that defendants can be ‘prevailing parties’ when a plaintiff voluntarily dismisses his action without prejudice”). Even after *Buckhannon*, it still subscribes to that (now minority) rule. *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 753 Fed. App’x 135, 140 (3d Cir. 2019) (“a defendant can still be the ‘prevailing party’ where a plaintiff’s claims are dismissed without prejudice”).

The D.C. Circuit agrees with the Tenth and Third. Two of this Court’s former justices, while judges of the D.C. Circuit, held the defendant was the prevailing party upon a dismissal of the plaintiff’s action based on inconvenient forum. *Noxell Corp. v. Firehouse No. 1 Bar-B-Que Rest.*, 771 F.2d 521 (D.C. Cir. 1985) (*Noxell II*). The plaintiff argued the defendants had not prevailed because the dismissal was “not preclusive of a second action elsewhere.” *Id.* at 524. Then-judges Ginsberg and Scalia rejected that argument, noting the circuit court, in its prior decision, had “ordered the district court to dismiss a trademark infringement action, pursuant to 28 U.S.C. § 1406(a) (1982), because venue had been laid in the wrong district.” *Id.* at 523 (citing *Noxell Corp. v. Firehouse No. 1 Bar-B-Que Rest.*, 760 F.2d 312, 317 (D.C. Cir. 1985) (*Noxell I*)). Thus, the D.C. Circuit held the defendant was the prevailing party under the Lanham Act, even though the plaintiff could file a new action in the Northern District of California on the same dispute, because the plaintiff’s “suit stands dismissed” in the District of Columbia. *Id.* at 525. The court reasoned that the Congressional goal of fee-shifting statutes included awarding fees to defendants who “obtain[ed] dismissal of the proceeding,” *id.* at 526, and “aligned [the D.C. Circuit] with the position taken by the Ninth Circuit under the copyright act provision for attorney’s fees,” *id.* at 525 (citing *Corcoran v. Columbia Broadcasting*

Sys., 121 F.2d 575 (9th Cir. 1941)).

In *Corcoran*, the Ninth Circuit originally led the pre-*Buckhannon* majority. Looking to the text of the fee shifting statute, § 40 of the 1909 Copyright Act, it concluded the provision “is not in terms limited to the allowance of fees to a party who prevails only after a trial on the merits.” *Corcoran*, 121 F.2d at 576. It found that where “a defendant has been put to the expense of making an appearance and of obtaining an order for the clarification of the complaint, and the plaintiff then voluntarily dismisses,” then the “party sued is the prevailing party within the spirit and intent of the statute even though he may, at the whim of the plaintiff, again be sued on the same cause of action.” *Ibid.* In reaching its decision, it found the Second Circuit’s opinions in *Marks v. Leo Feist, Inc.*, 8 F.2d 460 (2d Cir. 1925) and *Cohan v. Richmond*, 86 F.2d 680 (2d Cir. 1936) instructive. *Ibid.* Congress even cited *Corcoran* as an example of when a defendant prevails. See *Noxell II*, 771 F.2d at 525. The Ninth Circuit, however, has since concluded that *Corcoran* was “clearly irreconcilable with *Buckhannon* and no longer good law” and adopted the “risk of refileing” test. *Cadkin*, 569 F.3d at 1147-50.

In *Marks*, the Second Circuit likewise held under the 1909 Copyright Act that a defendant had prevailed upon a plaintiff’s voluntary dismissal. *Marks*, 8 F.2d at 460-61 (plaintiff’s voluntary dismissal was entered “in favor of defendant” and affirmed defendant’s fee award). In keeping with that rationale, it also held the withdrawal of a copyright infringement claim by amendment “in effect made the defendants the prevailing parties on that issue” and cited *Corcoran* for that proposition. *Warner Bros. Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1126 (2d Cir. 1989). However, without overruling *Marks*, *Cohan*, or *Dae Rim*

Trading, it has since held that *Buckhannon* “applies to ‘prevailing defendant’ cases.” *Mr. L. v. Sloan*, 449 F.3d 405 (2d Cir. 2006) (Sotomayor, J.). It has also held that a dismissal for forum non conveniens does not make a defendant the prevailing party because such a dismissal does not “immunize a defendant from the risk of further litigation.” *Dattner v. Conagra Foods, Inc.*, 458 F.3d 98 (2d Cir. 2006). Although the Second Circuit has recently questioned *Dattner* in view of *CRST, Manhattan Review LLC v. Yun*, 919 F.3d 149, 153 (2d Cir. 2019), it illustrates tension within Second Circuit jurisprudence on whether a preclusive judgment is necessary for a defendant to prevail.

Before *Buckhannon* the majority rule was a defendant is the “prevailing party” upon a voluntary dismissal without prejudice. *In re Paoli*, 221 F.3d at 471 n.10. But since 2001, a new majority has formed that that disentitles fees to defendants who successfully exit a lawsuit without any obligation towards the plaintiff.

B. Seven circuits employ a “risk of refileing” test and require preclusive effect for a defendant to be deemed prevailing

In contrast to the Tenth, Third, and D.C. Circuits, the Eleventh Circuit aligned itself with the new majority of circuits which have subscribed to a “risk of refileing” test in which a defendant cannot be a prevailing party if an action is dismissed without prejudice because, so they reason, such a terminal event “poses ‘no legal bar precluding’ the plaintiff from “refiling the same” action. *\$70,670*, 929 F.3d at 1303.

“What matters” according to the Eleventh Circuit, “is that the [defendants] have not obtained a ‘final judgment reject[ing] the [plaintiff’s] claim.” *Ibid.* Because the proceedings are “a nullity” which “leaves the parties as if the action had never been brought,” *ibid.* the plaintiff’s claim “remains unadjudicated,” *id.* at 1304. In declining to find a defendant prevails except upon a preclusive judgment, it joined the First, Fifth, Eighth, Ninth, Federal, and (perhaps) Second circuits, all of which now read an “at risk” disqualification into the term “prevailing party” for a defendant. Despite its alignment with the new majority, the Eleventh Circuit nevertheless recognized that “courts operating after *CRST* have taken differing positions on” when dismissals confer prevailing party status. *Beach Blitz*, 13 F.4th at 1301.

In a copyright case, the First Circuit held that a defendant is not a prevailing party where the plaintiff’s claims would be heard in an arbitral forum instead, even though the court had dismissed the action with prejudice under Rule 12(b)(6). *Cortés-Ramos v. Sony Corp. of Am.*, 889 F.3d 24 (1st Cir. 2018). Notwithstanding the “with prejudice” aspect of the district court’s judgment, it reasoned that the plaintiff’s claims need to be fully “extinguished” for a defendant to prevail, and cited *Sole v. Wyner*, 551 U.S. 74, 82 (2007) rather than *CRST*. *Cortés-Ramos*, 889 F.3d at 25.

The Fifth Circuit originally appeared poised to follow the Tenth Circuit. Before *Buckhannon*, it reasoned that any “rule that categorically forecloses the possibility of a defendant being found a prevailing party . . . could seriously threaten” the purpose of fee-shifting statutes by allowing a plaintiff to “be able to shirk responsibility for his actions [and] strip the defendant’s protection” provided by such laws. *Dean v.*

Riser, 240 F.3d 505, 510 (5th Cir. 2001); *see also Schwarz*, 767 F.2d at 131 n.8. But it ultimately abandoned its rationale in *Schwarz* and *Dean* when it applied *Buckhannon* to the defendant’s status. *Dunster Live, LLC v. LoneStar Logos Mgmt. Co.*, 908 F.3d 948, 951 (5th Cir. 2018) (a defendant cannot be the prevailing party when plaintiff dismisses without prejudice because “the litigation is just postponed with the possibility of the winner being declared at a later time in a new arena”). Like the First Circuit, it did not cite *CRST* and instead looked to this Court’s prevailing plaintiff decisions.

The Seventh Circuit was one of the first proponents of the “risk of refiling” test. In *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987), it held the defendant did not prevail in the federal action because the voluntary dismissal did “not decide the case on the merits” and the “defendant remain[ed] at risk” of a second lawsuit, even though the defendant did, in fact, win that second case. *Ibid.* The mere risk of the second suit alone precluded the defendant from being the prevailing party in the first action. *Id.* at 1076-77. It reaffirmed that position in *Citizens for a Better Env’t v. Steel Co.*, 230 F.3d 923 (7th Cir. 2000), reasoning that some defensive victories “merely prolon[g] litigation” and if the “dispute will continue later, or elsewhere, . . . it remains to be seen who will prevail”) (citing *Hanrahan v. Hampton*, 446 U.S. 754 (1980)).

Like the First, Fifth, Seventh, and Eleventh circuits, the Eighth Circuit also employs a “risk of refiling” test. *United States v. \$32,820.56 in U.S. Currency*, 838 F.3d 930, 934 (8th Cir. 2016) (an order of dismissal “without prejudice does not preclude the [plaintiff] from refiling an action”). It “see[s] no basis in the text” of the fee statute (28 U.S.C. § 2465(b)(1))

to say that a forfeiture “claimant, even if analogous to a civil defendant, may recover fees without any judicially sanctioned change in the relationship between parties.” *Id.* at 936. And it continues to adhere to that logic for defendants specifically, even after *CRST*, because “[w]here an action is dismissed without prejudice, there is no ‘prevailing party;’” it is “pure speculation” “which party would have prevailed had the action continued.” *SnugglyCat, Inc. v. Opfer Commc’ns, Inc.*, 953 F.3d 522, 527 (8th Cir. 2020) (citing its prior precedent relying on *Buckhannon* and *Sole*).

The Ninth Circuit was, for sixty-eight years before *Buckhannon*, aligned with the Tenth and D.C. circuits. It previously held that a defendant “is the prevailing party within the spirit and intent of the [1909 Copyright Act] even though he may, at the whim of the plaintiff, again be sued on the same cause of action.” *Corcoran*, 121 F.2d at 576. But it then overruled itself, finding that *Corcoran* was “clearly irreconcilable with *Buckhannon* and no longer good law” because the plaintiffs “remained free to refile their copyright claims against the defendants.” *Cadkin*, 569 F.3d at 1145. *CRST* has not altered its adherence to the “risk of refile” test. *Criminal Prods., Inc. v. Cordoba*, 808 F. App’x 585, 586 (9th Cir. 2020) (rejecting copyright defendant’s argument that *CRST* made her the prevailing party after plaintiff dismissed its infringement claims without prejudice).

The Federal Circuit similarly concludes that a patent infringement defendant cannot be a prevailing party where the plaintiff is allowed to abandon claims without prejudice either by withdrawing them through an amended pleading under Rule 15(a)(2), *Gieseke & Devrient GmbH v. United States*, No. 22-2002, 2024 WL 3171658 (Fed. Cir. Jun. 26, 2024), or by unilaterally dismissing them under Rule 41(a)(1),

O.F. Mossberg & Sons, Inc. v. Timney Triggers, LLC, 955 F.3d 990 (Fed. Cir. 2020), because “regardless of whether the dismissal is voluntary or involuntary, ‘the risk of re-filing underlying their reasoning applies in both procedural postures,’” *Gieseke & Devrient*, 2024 WL 3171658 at *3.

Within the Eleventh Circuit, fee exposure is unpredictable, with inconsistent outcomes under its varying formulations of the “risk of refile” test. On the one hand, a defendant is not a prevailing party where the action ends through a non-preclusive dismissal under Rule 41(a)(2). *\$70,670*, 929 F.3d at 1303 (voluntary dismissal without prejudice). But on the other hand, a defendant is the prevailing party where an action ends through a non-preclusive dismissal under Rule 12(b). *Beach Blitz*, 13 F.4th at 1297-1301 (involuntary dismissal without prejudice). In *Beach Blitz* the court struggled to reconcile the “without prejudice” aspect of the district court’s judgment, calling it a “problem” and stating that “we usually understand ‘without prejudice’ to mean that a judgment is not claim-preclusive.” *Id.* at 1300. Rather than employing the risk of refile test—as it had in *\$70,670*—the Eleventh Circuit simply concluded that a “‘without prejudice’ label, without more, cannot alter our conclusion in this case” because, so it said, the “practical” effect of the dismissal without prejudice had rebuffed the plaintiff’s claims. *Ibid.*

Like the Fourth Circuit, it too noted that “some of our sister circuits have held after *CRST* that certain types of non-merits involuntary dismissals confer prevailing party status” but took “no position” on “whether other types of non-merits involuntary dismissals should confer prevailing party status.” *Ibid.* (emphasis in original). Thus, the Eleventh Circuit’s version of the “risk of refile” test further includes a

“dismissal type” prong and leaves open myriad other possible outcomes—outcomes difficult for litigants to predict which party might ultimately be found the prevailing party. Although the dismissals without prejudice here and in *Beach Blitz* fulfilled each defendant’s objectives (ending the litigation and reestablishing the *status quo ante* without effecting a material alteration between the parties), under Eleventh Circuit precedent only one is considered a prevailing defendant.

The judgment of the Eleventh Circuit below and the views of its sister circuits—many of which had previously constituted the majority rule just two decades ago—now form a new post-*Buckhannon* majority subscribing to a “risk of refiling” test that requires preclusive effect for a defendant to prevail. Three circuits still adhere to historically-accurate notions of when defendant prevails, and an intractable 7-3 divide exists among the circuits on the issue that calls out for this Court’s authoritative clarity.

II. The “risk of refiling” test is atextual, ahistorical, and incorrect

The “risk of refiling” test is incorrect and unworkable. It runs counter to what was long settled federal and common law, where a defendant prevails upon a plaintiff’s voluntary surrender. Restatement (Second) of Judgments § 20(1)(b) (1982) (a “judgment for the defendant” occurs “[w]hen the plaintiff agrees to or elects a nonsuit (or voluntary dismissal) without prejudice”); accord, e.g., *Bryson v. Sullivan*, 412 S.E.2d 327, 338 (N.C. 1992).

In their analysis of the prevailing party issue, courts have ignored historical case-ending events, like judgments of *nonsuit*, *retraxit*, and *nolle prosequi*, see,

e.g., Black’s Law Dictionary 1024-28 (3d ed. 1933), to inform their analysis of the effect of a dismissal under the modern Rules of Civil Procedure. More particularly for this case, those historical judgments occurred while the 1909 Copyright Act³ was in force. It was under those procedural and substantive laws that *Marks* was decided. *Corcoran* then applied the logic of *Marks* within the new procedural environment created by the Federal Rules of Civil Procedure to reach the same result. *See also Home Owners’ Loan Corp. v. Huffman*, 134 F.2d 314 (8th Cir. 1943). These decisions have fallen out of favor by the passage of time and recency of *Buckhannon*.

Nor have courts looked to the statutory text to provide context for when a defendant prevails. *See Daniel Schlein, Asymmetric Fees Awards in Civil Rights Litigation: A Critical Reevaluation*, 48 RUTGERS L. REC. 77, 94 (2021) (the “recurrent theme among” courts which have resisted awarding defendants’ statutory fees is “not based on a plain reading of the text”). Here, as in most statutes, Congress explicitly identified what terminates: the “action.” 17 U.S.C. §§ 505, 1203(b)(5).

The “risk of refiling” rule also undermines the even-handedness of § 505 the Copyright Act by “blocking a whole category of defendants” at “the first part of the fee-shifting inquiry.” *CRST*, 578 U.S. at 432; 423. That category is substantial: nearly eleven percent of all cases. *See* Section IV.A., *infra*. A preclusivity barrier to prevailing party status discourages defendants from “advanc[ing] a variety of meritorious copyright defenses,” *Fogerty v. Fantasy, Inc.*, 510 U.S.

³ The 1909 Act’s fees provision is nearly identical to the current 1976 Act. *Compare* 17 U.S.C. § 40 (1970), *with* 17 U.S.C. § 505 (2018).

517, 527 (1994), because it permits plaintiffs, at the second step, to evade scrutiny of “the totality of circumstances in a case,” including “frivolousness, motivation, [and] objective unreasonableness,” *Kirtseng v. John Wiley & Sons, Inc.*, 597 U.S. 197, 203 (2016).

The “risk of refiling” test also works against the simplicity principle this Court has emphasized for fee disputes. *Hensley v. Ekerhart*, 461 U.S. 424, 437 (1983) (the determination of fees “should not result in a second major litigation”). The Eleventh Circuit’s type-based formulation illustrates the problem, as evidenced by its extensive analysis wrestling with the non-preclusive effect of the district court’s judgment. *Beach Blitz*, 13 F.4th at 1297-1301; *see also id.* at 1306-09 (Newman, J., concurring) (finding the majority’s “mix of reasons” “confusing”).

And from a practical standpoint, preclusivity does not “immunize” a defendant from being forced to defend a lawsuit in any event because such defenses must nevertheless be asserted in a barred action, with the burden lying on the defendant. *E.g.*, *Sims v. Viacom, Inc.*, 544 F. App’x 99 (3d Cir. 2013) (affirming dismissal of third copyright suit as barred under *res judicata*). So a defendant is never truly free from a “risk” of being sued.

Preclusive effect has, both historically and commonsensically, never had any bearing on whether a defendant prevails in a given action, until recently, and increasingly so post-*Buckhannon*. Nash, *The Tarnished Golden Rule*, 127 Yale L.R. at 1082 (“[t]he federal trend towards restricting the definition of ‘prevailing party’ was cemented in 2001, in *Buckhannon*”); *see also Epps v. Fowler*, 351 S.W.3d 862, 872-73 (Tex. 2011) (Hecht, J., dissenting) (criticizing the majority’s reliance on *Buckhannon* in deciding Texas common law).

The “risk of refiling” test employed by the majority is incorrect. So too is the Eleventh Circuit’s conclusion that a plaintiff’s request for a judgment is not one that it “obtains” under Rule 68.

III. The circuits are also divided on whether a Rule 41(a)(2) judgment has judicial imprimatur

In addition to the split on whether a case must end with preclusive effect for a defendant to prevail, the circuits are also divided on whether a Rule 41(a)(2) judgment has “judicial imprimatur.”

Here, the Eleventh Circuit concluded that the judgment of dismissal under Rule 41(a)(2) requiring Affordable Aerial to pay the defendants’ costs carried no judicial imprimatur. App. 7a-8a.

In conflict with the Eleventh Circuit, the Seventh and Federal Circuits implicitly hold that a Rule 41(a)(2) order of voluntary dismissal has judicial imprimatur, provided it has preclusive effect. *See Live Face on Web, LLC v. Cremation Soc’y of Ill., Inc.*, 77 F.4th 630 (7th Cir. 2023) (reversing district court’s denial of copyright defendant’s attorney’s fees after plaintiff voluntarily dismissed with prejudice); *accord Riviera Distribs., Inc. v. Jones*, 517 F.3d 926 (7th Cir. 2008); *Highway Equip. Co. v. Feco, Ltd.*, 469 F.3d 1027, 1035 (Fed. Cir. 2006).

Consequently, a further conflict exists among the circuits on whether a court order of dismissal under Rule 41(a)(2) has judicial imprimatur.

That rationale applied to defendants, however, is incorrect. While a “material alteration” of the relationship marked by “judicial imprimatur” supported rejecting the catalyst test, *Buckhannon*, 532 U.S. at 604-05, it is illogical to apply that rationale to defendants

because they “come to court with different objectives,” *CRST*, 578 U.S. at 431; *see also Epps*, 351 S.W.3d at 873; Nash, *The Tarnished Golden Rule*, 127 YALE L.R. at 1085-86 (“defendants do not require a ‘judicial imprimatur’ to achieve their goal”).

IV. The questions presented are important and recurring issues on which both plaintiffs and defendants need guidance

The importance of the two questions in this case is evident, with the issues applicable to more than just the fee-shifting provisions of the Copyright Act, and to both plaintiffs and defendants alike. Parties need to evaluate fee exposure risks pre-suit, during the course of litigation, and upon its termination.

A. Fee- and cost-shifting statutes are many, and cases often end without a preclusive judgment

One-hundred or more statutes provide for the “prevailing party” to be awarded fees. *See* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice*, 42 AM. U.L. REV. 1567, 1588 (1993) (“over 200 federal statutes . . . provide for shifting of attorney’s fees”). This Court has previously granted certiorari in construing the term “reasonable”—a word common to many fee-shifting statutes. *Burlington v. Dague*, 505 U.S. 557, 561-62 (1992) (“our case law construing what is a ‘reasonable’ fee applies uniformly to all of” the “many other federal fee-shifting statutes” with similar language). The issue there, as here, is also a recurring one because it “affects the proper application of at least one hundred federal fee-shifting statutes that allow the prevailing

party to recover a reasonable attorney's fee from the losing party." *Kenny ex rel. Winn v. Perdue*, 547 F.3d 1319, 1331 (11th Cir. 2008) (Carnes, J., dissenting from denial of rehearing en banc). Even apart from fee-shifting, rules and statutes respecting costs for the "prevailing party" are implicated. *E.g.*, Fed. R. Civ. P. 54(d)(1); *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385-86 (2013) ("Numerous statutes overlap with Rule 54(d)(1).").

This case is representative of thousands of suits abandoned by plaintiffs without a preclusive judgment. Copyright infringement cases in particular are some of the rarest cases to reach trial, just 0.2 percent in 2023, while also having one of the highest rates of resolution without any court action: 42.8 percent. Admin. Office of the U.S. Courts, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY, Table C-4 (2023). Among those terminated without court action, nearly eleven percent are voluntarily dismissed without prejudice, and less than one percent reach a merits outcome either at trial or through Rules 12 or 56. Melissa Eckhause, *Fighting Image Piracy or Copyright Trolling? An Empirical Study of Photography Copyright Infringement Lawsuits*, 86 ALB. L. REV. 111, 152-53 (2023). The issue of prevailing party status for defendants, as well as accurately anticipating that status by plaintiffs, is important and recurring.

Confusion among the district and circuit courts about whether a defendant prevails when a case ends without a preclusive judgment has substantial practical importance to civil litigants well beyond copyright, where costs or attorney's fees may accrue to the "prevailing party" upon termination of the suit, and which thus influence both suit initiation in terms of pre-filing risk analysis, as well as when and how lawsuits end. A decision clarifying defendants' status will

compliment that of plaintiffs' this term in *Lackey v. Stinnie*.

Indeed, the very adversarial nature of litigation yields the unavoidable question of "Who won?" each time a case ends without settlement.

B. Whether a Rule 68 offer is enforceable after a voluntary dismissal is an important, logically related question to "prevailing party" status

Whether a plaintiff's voluntary dismissal is a "judgment that the offeree finally obtains" is also a recurring and important question for litigants. It is applicable to any civil case as a cost-shifting mechanism, and takes on special importance where a statute defines fees as costs. There are many such statutes. See *Marek v. Chesny*, 473 U.S. 1, 44-48 (1985) (Brennan, J., dissenting) (identifying 63 statutes where costs include attorney's fees). By its operation, Rule 68 transforms what might be a discretionary event under Rule 41(a)(2) or Rule 54(d)(1) into a mandatory one.

Like the Eleventh Circuit's rationale denying defendants prevailing party status, its analysis of the Rule 68 issue is incorrect for overlooking the history of tender "which led to Rule 68," *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 169 (2016) (Thomas, J., concurring), as well as ignoring the plain text of the rule itself, requiring only that the plaintiff "obtain" the judgment, Fed. R. Civ. P. 68(d).

A voluntary dismissal was simply not a kind of judgment contemplated by the three categories used in *Delta Air Lines* to illustrate the majority's analogical and deductive reasoning. Only five justices subscribed to the notion that "a judgment 'obtained' by the plaintiff is also a favorable one." 450 U.S. at 362

(Powell, J., concurring) (disagreeing with the majority's reasoning). *Delta Air Lines'* holding, regardless of the "favorability" of a judgment, is that Rule 68 "is simply inapplicable" where "it [i]s the defendant that obtain[s] the judgment." *Id.* at 352. Rule 68(d) should apply when the plaintiff elects a nonsuit, because if the court grants what the plaintiff requests, then it surely has "obtained" such a judgment even if by doing so the plaintiff suffers a defeat. *See Versa Prods., Inc. v. Home Depot, USA, Inc.*, 387 F.3d 1325, 1327 (11th Cir. 2004) ("the plaintiff has acquired that which he sought"). Defendants and plaintiffs alike must understand and be able to predict the enforceability of an offer of judgment with its corresponding increase in costs and possibly fees that perhaps only one side will bear.

The Rule 68 issue is an important and recurring one given its applicability in any civil action, and should be addressed together with the prevailing defendants issue.

V. This case is a clean vehicle to address what both *CRST* and *Delta Air Lines* did not while potentially complimenting a decision in *Lackey v. Stinnie*

The Eleventh Circuit's judgment crisply framed the issue as whether a defendant can prevail and enforce its Rule 68 offer where a suit ends in a non-preclusive dismissal, and more particularly where a court orders a voluntary dismissal without prejudice. Unlike the "fact-sensitive" issue in *CRST* that led the Court to defer considering such a question, here there is only one plaintiff which alleged three related causes of action all arising under the Copyright Act against two related defendants. All of Affordable Aerial's

claims were abandoned; one by way of amendment under Rule 15, and the other two pursuant to Rule 41(a)(2). There is no mixed outcome; Affordable Aerial requested and received a judgment that ended its action, and the statute of limitations has run.

Besides *CRST* expressly reserving the question presented here, *Delta Air Lines* neither reached nor contemplated voluntary dismissals. And so this case is also a clean vehicle to clarify when a plaintiff “obtains” a “judgment” for purposes of Rule 68.

Additionally, the Court has taken up related issues of prevailing plaintiffs in *Lackey v. Stinnie*, 144 S. Ct. 1390 (2024). The questions there are framed broadly (“a party”) and assume all litigants have the same objectives. The Court clarified in *CRST* that is untrue, but lower courts, in deciding defendant-based issues, have looked past *CRST* to *Buckhannon* and other prevailing plaintiff cases. The ongoing lack of appreciation for the “different objectives” of the various types of litigants illustrates how a decision in *Lackey* could easily be misread and misapplied by courts if not thoughtfully counterbalanced by an explicitly defendant-framed decision on preclusive judgments, which this case presents. Notably, the First Circuit’s opinion in *Cortés-Ramos*, decided two years after *CRST* but citing to *Sole*, illustrates the urgency of needed contrast and clarification.

Given the lower courts’ transition from a majority to minority view of when defendants prevail post-*Buckhannon*, their confusion after *CRST*, and the influence this Court’s decisions have had on state common law prevailing party jurisprudence, this Court’s authoritative voice is needed to provide clear counterpoise guidance for both types of litigants.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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