

No.

In the Supreme Court of the United States

WC REALTY GROUP, INC.,

Petitioner,

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

1. Whether a defendant is barred from recovering attorney’s fee under 17 U.S.C. §505 because a plaintiff’s Rule 41(a)(1) voluntary dismissal is not a court-ordered dismissal.¹

2. In exercising discretion under §505, this Court has identified factors to be considered so long as their application remains faithful to the purposes of the Copyright Act. The Fifth and Sixth Circuits apply these factors with a presumption in favor of granting fee awards, whereas the First, Eighth, and Ninth Circuits reject a presumption. The Seventh Circuit employs a shifting presumption that balances against the goals of the Act and asymmetric recoveries available to litigants, resulting in a “very strong” presumption in favor of a defendant recovering attorney’s fees, including after a voluntary dismissal. By contrast, the Eleventh Circuit does not apply a presumption, but has approved weighing a plaintiff’s Rule 41(a)(1) voluntary dismissal as a factor *against* granting a defendant’s fee motion.

The question presented is:

Whether a plaintiff’s voluntary dismissal of its infringement claims weighs in favor of granting a defendant’s fee motion, or weighs against it, under the analysis required by §505 of the Copyright Act and the goals and purposes of encouraging defendants to stand on their rights and present meritorious defenses instead of paying nuisance settlements.

¹ This question is also presented in *Property Matters USA, LLC v. Affordable Aerial Photography, Inc.*, No. 24-688.

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

Petitioner is WC Realty Group, Inc. Petitioner is not a publicly traded company, has no parent company, and there is no publicly held corporation that owns 10% or more of its stock.

Respondent is Affordable Aerial Photography, Inc.

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

Affordable Aerial Photography, Inc. v. W.C. Realty Group, Inc., Civ. No. 22-81256 (order denying attorney's fees entered April 7, 2023, and order denying reconsideration entered May 22, 2023)

United States Court of Appeals (11th Cir.):

Affordable Aerial Photography, Inc. v. Reyes, et al., No. 23-12051 (decision of the panel issued September 3, 2024, rehearing en banc denied November 1, 2024)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner WC Realty Group, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Eleventh Circuit's decision (App., *infra*, 1a-7a) is unreported but available at 2024 WL 4024619. The opinion of the district court denying Petitioner's fee motion (App., *infra*, 10a-11a) is unreported but is available at 2023 U.S. Dist. LEXIS 63034. The district court's order denying rehearing (App., *infra*, 8a-9a) is unreported. The Eleventh Circuit's denial of

rehearing and rehearing en banc (App., *infra*, 12a-13a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 2024, and its order denying rehearing was entered on November 1, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Section 505 of Title 17 of the United States Code provides:

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.

INTRODUCTION

This petition is an obvious candidate for review, presenting two important, recurring, and related legal questions that divide the circuits. The first question addresses the predicate for an attorney's fee award after a plaintiff's voluntary dismissal, the antecedent question in the §505 analysis.² The second question addresses the appropriate weight to give a plaintiff's voluntary dismissal in §505 analysis—whether it weighs in favor of awarding fees or against an award—taking into account the Act's asymmetric recoveries and the Act's goals and purposes of encouraging

² This question is also presented in *Property Matters USA, LLC v. Affordable Aerial Photography, Inc.*, No. 24-688.

defendants to stand on their rights and present meritorious defenses, rather than paying nuisance settlements. These are purely legal questions addressing an important area of federal law that divide the circuits. See, e.g., *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 521 (1994) (granting certiorari to resolve a circuit split on an important area of federal law); *Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197, 201 (2016) (same).

Section 505 of the Copyright Act of 1976, 17 U.S.C. §101 et seq. (“Copyright Act” or “Act”), permits the “prevailing party” to recover the costs of the action, including attorney’s fees, based on the exercise of equitable discretion in light of the larger objectives of the Act. *Kirtsaeng*, 579 U.S. at 203-04 (citing *Flight Attendants v. Zipes*, 491 U.S. 754, 758 (1989)). While the Court “noted with approval ‘several nonexclusive factors’ to inform a court’s fee-shifting decisions: ‘frivolousness, motivation, objective unreasonableness[,] and the need in particular circumstances to advance considerations of compensation and deterrence,’” *id.* at 202 (citing *Fogerty*, 510 U.S. at 534, n.19), it cautioned that those factors “may be used to guide courts’ discretion, so long as such factors are faithful to the purposes of the Copyright Act and are applied to prevailing plaintiffs and defendants in an evenhanded manner,” *Fogerty*, 510 U.S. at 534, n.19.

In *Fogerty* and *Kirtsaeng*, the Court addressed the importance of the Act’s objective in encouraging defendants to stand on their rights and present meritorious defenses. See, e.g., *Fogerty*, 510 U.S. at 527 (“defendants who seek to advance meritorious defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement.”); *Kirtsaeng*, 579 U.S. at

204 (“fee awards under §505 should encourage the types of lawsuits that promote those purposes. (That is why, for example, *Fogerty* insisted on treating prevailing plaintiffs and prevailing defendants alike—because the one could ‘further the policies of the Copyright Act every bit as much as’ the other.”)). The importance of encouraging defendants to advance meritorious defenses was emphasized by the Court in both holdings, and *Kirtsaeng* recognized that doing so is often more costly than a nuisance settlement. 579 U.S. at 205; *Fogerty*, 510 U.S. at 527.

The decision below departs from this Court’s precedents and the goals and objectives it has said guide the fee-shifting analysis. When sued, Petitioner stood on its rights and presented meritorious legal defenses with supporting evidence. Respondent initially maintained the action, forcing Petitioner to incur legal costs in excess of the potential damages and in excess of a nuisance settlement. Respondent then voluntarily dismissed its case “with prejudice,” pursuant to Rule 41(a)(1)(A)(i).

The Eleventh Circuit affirmed the denial of Petitioner’s fee motion by applying a new categorical bar whereby defendants cannot “prevail” following a Rule 41(a)(1) dismissal, because dismissal is not court ordered. App, *infra*, 4a-5a (citing *Affordable Aerial Photography, Inc. v. Property Matters USA, LLC*, 108 F.4th 1358, 1364-65 (CA11 2024), petition for cert. filed, No. 24-688 (Dec. 24, 2024) (“*Property Matters*”). That bar directly conflicts with the Ninth Circuit’s rule and indirectly conflicts with the Second, Fourth, Seventh, Eighth, Tenth, and Federal Circuits in interpreting the term “prevailing party” outside of the Copyright Act. The bar also conflicts with this Court’s holding in *CRST Van Expedited, Inc. v. EEOC*, 578

U.S. 419 (2016), articulating the test for whether a defendant “prevails” in an action. *Id.* at 431-32.

In a final advisory paragraph, the Eleventh Circuit added that “even if” Petitioner had prevailed, it saw no error with the district court’s fee denial, App., *infra*, 6a, which weighed Respondent’s voluntary dismissal as a factor *against* an award, because it occurred before the court considered the reasonableness of Respondent’s claims, App., *infra*, 11a (order denying fees); App., *infra*, 8a-9a (order denying reconsideration). That alternative statement of affirmance, rejecting the issues pressed by Petitioner below, conflicts with this Court’s decisions in *Fogerty* and *Kirtsaeng*, the Seventh Circuit’s decision in *Live Face on Web, LLC v. Cremation Soc’y of Ill., Inc.*, 77 F.4th 630 (CA7 2023), and the presumption of awarding fees in the Fifth, Sixth, and Seventh Circuits.

Despite dismissal “with prejudice,” the Eleventh Circuit held that Petitioner did not “prevail” and, therefore, was barred from recovering its fees. The Eleventh Circuit also approved of weighing Respondent’s voluntary dismissal as a factor *against* awarding Petitioner its fees and approved of denying Petitioner’s fee motion without assessing the objective reasonableness of Respondent’s claims. In the Eleventh Circuit, frivolous infringement claims are welcome, so long as they are voluntarily dismissed before a court must address them; defendants lose by presenting meritorious defenses to baseless claims.

The Eleventh Circuit’s decision was erroneous on two important and recurring issues of law, deepening circuit splits as to the interpretation of “prevailing party” for defendants, and as to the proper legal standard for awarding fees to a prevailing defendant. Conflicting approaches to §505, driven by divergent

interpretations of “prevailing party” status, and an unspoken resistance to legislated abrogation of the American Rule for copyright cases, result in different litigation outcomes solely dependant on where a case is filed, and incentivizes the filing of nuisance lawsuits and “trolling” behavior. The Eleventh Circuit’s rules are contrary to the goals and purposes of the Copyright Act.

This petition is an ideal vehicle for the Court to address the legal questions presented and harmonize the dissonant decisions of the lower courts. The petition for a writ of certiorari should be granted.

STATEMENT

A. Background

Section 505 provides discretion to award fees to the prevailing party in a copyright action. But unbounded discretion would condone judicial “whim” or predilection, rather than reasoned judgment. *Kirtsaeng*, 579 U.S. at 203-04; see also *Zipes*, 491 U.S. at 758 (“in a system of laws discretion is rarely without limits.”); *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005) (“a motion to [a court’s] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles”). Limits to that discretion are found by looking to the goals and objectives of the Copyright Act. *Kirtsaeng*, 579 U.S. at 204-05.

In *Fogerty*, the Court noted factors that can guide courts’ exercise of discretion under §505, “so long as such factors are faithful to the purposes of the Copyright Act and are applied to prevailing plaintiffs and defendants in an evenhanded manner,” *Fogerty*, 510 U.S. at 534, n.19, while “[e]aving] open the possibility of providing further guidance in the future,”

Kirtsaeng, 579 U.S. at 202 (citing *Fogerty*, 510 U.S. at 534-35); accord *Martin*, 546 U.S. at 140, n.* (noting that *Fogerty* was not intended to be the end of the matter).

Kirtsaeng refined the §505 analysis by holding that the objective reasonableness of the losing party’s position should be given substantial weight, but due consideration must still be given to all other relevant factors. 579 U.S. at 199-00. Doing so deters plaintiffs from filing objectively unreasonable cases and also encourages defendants to stand on meritorious defenses. *Id.* at 205. Recognizing that litigation costs are often more costly than a settlement on unreasonable claims, the Court explained that “the likelihood [a plaintiff] will have to pay two sets of fees discourages legal action.” *Ibid.*

Section 505, however, only permits fees awards to the “prevailing party,” an important antecedent question that the Court addressed in *CRST*, under the fee-shifting provision of 42 U.S.C. §2000e-5(k), while highlighting the differences between a defendant’s and a plaintiff’s litigation objectives. 578 U.S. at 431. A plaintiff seeks a material alteration in the legal relationship between the parties, *id.* at 431, which requires “judicial *imprimatur* on th[at] change” to distinguish from out-of-court voluntary change in conduct, *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 604-06 (2001) (emphasis in original). A defendant, however, seeks only to prevent alteration in the parties’ legal relationship, to the extent it is in the plaintiff’s favor. *CRST*, 578 U.S. at 431. Therefore, a defendant “prevails” even if the action is dismissed for a non-merits reason. *Id.* at 431-32.

The Court recognized that defendants can recover fees under §2000e-5(k) where the “claim was frivolous, unreasonable, or groundless,” *id.* at 432 (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978)), explaining “[i]t would make little sense if Congress’ policy of sparing defendants from the costs of *frivolous* litigation depended on the distinction between merits-based and non-merits-based frivolity,” *ibid.* (internal quotation and citation omitted). The Court recognized that “[i]mposing an on-the-merits requirement for a defendant to obtain prevailing party status would undermine that congressional policy by blocking a whole category of defendants for whom Congress wished to make fee awards available.” *Ibid.*

Congress did not require a heightened showing for a copyright defendant to recover its attorney’s fees. *Fogerty*, 510 U.S. at 534-35 (rejecting a heightened standard for prevailing defendants). Instead, Congress authorized prevailing party fees in the court’s discretion “as part of the costs” of the action, codifying a common law approach where “attorney’s fees were regarded as an element of ‘costs’ awarded to the prevailing party.” See *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200-01 (1988) (citing 10 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure: Civil* § 2665 (1983) and *Marek v. Chesney*, 473 U.S. 1, 43-48 (1985) (Brennan, J., dissenting) (collecting statutes, including the Copyright Act, providing for fees to be taxed and collected as “costs”)).

B. Facts And Procedural History

1. Petitioner WC Realty Group, Inc., is a South Florida real estate broker. Joris C. Reyes, a co-defendant in the district court, is a real estate agent who worked under Petitioner’s brokerage prior to the filing

of the underlying action. Respondent Affordable Aerial Photography, Inc., is a Florida corporation owned by real estate photographer Robert Stevens. Respondent is also a repeated copyright litigant documented in court records. Of the more than 144 copyright actions Respondent has filed, few—if any—have been resolved on the merits. App., *infra*, 2a; 1 C.A. App. 14-15, 179-180, 187-189, 196.

In 2014, Respondent created the photograph of the city name in Wellington, Florida, at issue (the “Work”), and on November 16, 2017, Respondent registered it with the Register of Copyrights. Thereafter, the Work was uploaded to the real estate multiple listing service website, in connection with a property in Wellington (the “MLS listing”), providing a conventional image of the city name where the property was located. 1 C.A. App. 17-18.

Respondent assumed Reyes uploaded the Work to the MLS listing and, therefore, that Petitioner was liable for infringement. The MLS listing, however, showed the Work was one of several images present that were not uploaded by Reyes. 1 C.A. App. 108-122; 2 C.A. App. 49-51.

2. On August 11, 2022, Respondent filed a complaint in the Southern District of Florida, alleging direct infringement by Reyes and vicarious infringement by Petitioner. Petitioner promptly contacted Respondent to address deficiencies in the allegations and claims, and that it was objectively unreasonable to pursue the action against Petitioner. Petitioner highlighted the lack of evidence as to Petitioner and provided affirmative evidence showing there was no liability. Petitioner requested Respondent dismiss its claim before Petitioner was forced to incur

unnecessary legal costs in defending the action. 1 C.A. App. 190-191, 218-228.

Respondent persisted, requiring Petitioner to move to dismiss the complaint by addressing those deficiencies, including that the “evidence” attached to the complaint drew from third-party websites unassociated with Petitioner. Respondent quickly settled its claim with Reyes, but instead of dismissing the action or responding to Petitioner’s motion, Respondent amended the complaint and attached the MLS listing as a basis to maintain its claim. 1 C.A. App. 48-77.

Petitioner was forced to move a second time to dismiss the action. That second motion articulated how the MLS listing negated any cause of action against either defendant and articulated that Respondent withheld the document when filing the complaint. To avoid review of these issues, Respondent filed a Rule 41(a)(1)(A)(i) voluntary dismissal “with prejudice” of all claims against Petitioner. 1 C.A. App. 126-149, 151-152.

Petitioner, having prevailed, moved for its attorneys’ fees addressing why all *Fogerty* and *Kirtsaeng* factors supported an award. Petitioner articulated that the claims were objectively unreasonable, as confirmed by Respondent’s voluntary dismissal based on the arguments and evidence Petitioner pressed at the outset of litigation. In a one-paragraph analysis, the district court denied Petitioner’s motion because at the time of dismissal it had “made no determination as to the validity of the Amended Complaint,” citing the timing of the voluntary dismissal as grounds to deny fees. App., *infra*, 10a-11a; 1 C.A. App. 156-182.

Petitioner moved for reconsideration, pressing *Kirtsaeng’s* requirement that objective reasonableness and *all* other relevant factors be considered in a

§505 analysis, and that considering Respondent’s voluntary dismissal as grounds to *deny* fees creates a judicial “safe harbor” contrary to the goals and objectives of the Copyright Act. In a two-paragraph explanation, the district court denied the motion, citing *Kirtsaeng’s* discussion of administrability and reiterating that it “never ruled on the merits of the claim,” because the case “was dismissed with prejudice shortly after the [second] motion to dismiss.” App, *infra*, 8a-9a.

3. On appeal, Petitioner pressed that denying fees based on a voluntary dismissal *encourages*—rather than discourages—the filing of unreasonable claims and *discourages*—rather than encourages—defendants from litigating meritorious defenses. Further, the voluntary dismissal should raise an inference that the claims were objectively unreasonable. During briefing, the Seventh Circuit decided *Live Face on Web*, which vacated a fee denial following a Rule 41(a)(1) dismissal—the relief Petitioner sought—with reasoning supporting Petitioner’s arguments. 77 F.4th at 633-36.

The Eleventh Circuit decided the case under its new rule that a defendant does not “prevail” without a court-ordered dismissal of a plaintiff’s claims. Under *Property Matters*, a defendant is barred from recovering fees under §505 following a Rule 41(a)(1)(A)(i) dismissal, regardless of whether the dismissal is preclusive. In *Property Matters*, the dismissal was preclusive due to the statute of limitations but not based on action by the court. The panel confirmed the categorical nature of that rule, holding that Petitioner did not prevail because the “with prejudice” dismissal was not based on court action. App., *infra*, 4a-6a.

In a final, advisory paragraph, the panel stated that “even if” Petitioner had prevailed, it saw no abuse of discretion by the district court. In so doing, the panel approved of factoring a voluntary dismissal *against* a defendant’s fee award, even if the claims were unreasonable. App., *infra*, 6a.

4. The Eleventh Circuit denied rehearing and rehearing en banc. App., *infra*, 12a-13a.

REASONS FOR GRANTING THE PETITION

This case is a clear candidate for certiorari. It presents two important questions of law, each dividing the circuits, each focused on the effect of a plaintiff’s voluntary dismissal.

CRST recognized the importance of applying the correct standard for determining whether a defendant “prevailed” for purposes of a fee-shifting statute, the first question presented in this Petition. That standard is not applied consistently between the circuits, particularly with respect to the Copyright Act where the Eleventh Circuit’s categorical bar directly conflicts with the Ninth Circuit. Only this Court can harmonize those lower court decisions and bring uniformity to this important area of federal law.

Similarly, both *Fogerty* and *Kirtsaeng* highlighted the importance of properly channeling discretion under §505. In the Fifth, Sixth, and Seventh Circuits that discretion includes a presumption in favor of fee awards, while the First, Eighth, and Ninth Circuits reject such presumption. By contrast, the Eleventh Circuit approves of a voluntary dismissal as weighing *against* a defendant’s fee award, conflicting with the Seventh Circuit, even where doing so is unfaithful to the Copyright Act’s purposes.

The questions presented address the impact of a voluntary dismissal on the §505 analysis, both as to whether the defendant “prevails” and how it is weighed in a court’s equitable analysis. Both are important legal questions which continue to divide the circuits, and only this Court can resolve those conflicts. This petition presents both questions cleanly for the Court’s review and is an optimal vehicle for this Court. The petition for certiorari should be granted.

A. The Eleventh Circuit’s Bar on a Defendant “Prevailing” After a Rule 41(a)(1) Dismissal Conflicts with the Ninth Circuit and Deepens the Split Among Circuit Courts Interpreting “Prevailing Party” in Other Statutes.

1. a. The Eleventh Circuit’s bar to defendants “prevailing” after Rule 41(a)(1) voluntary dismissals directly conflicts with the Ninth Circuit’s rule, indirectly conflicts with the Second, Fourth, Seventh, Eighth, Tenth, and Federal Circuits as to their interpretation of “prevailing party,” and operates contrary to the goals and purposes of the Copyright Act.

Kirtsaeng held that exercising discretion under §505 requires giving substantial weight to the objective reasonableness of the losing party’s position, and due consideration to all other relevant factors, because such focus advances the Copyright Act’s goals in “both encourag[ing] parties with strong legal positions to stand on their rights and deterr[ing] those with weak ones from proceeding with litigation.” 579 U.S. at 199-00, 204-05. Section 505 provides every incentive to fight meritless copyright claims, “no matter that attorney’s fees in a protracted suit might be as or more costly than a settlement.” *Id.* at 205. Consequently,

§505 discourages litigating unreasonable positions. *Ibid.*

Section 505, however, only permits fees to be awarded to the “prevailing party,” 17 U.S.C. §505, a legal term of art that *Kirtsaeng* did not address.

b. In *CRST*, the Court clarified that although it established the test for determining whether a plaintiff prevails in litigation, 578 U.S. at 422 (citing *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 793 (1989) and *Buckhannon*, 532 U.S. at 605), it “ha[d] not set forth in detail how courts should determine whether a defendant has prevailed,” *ibid.* In “hold[ing] that a defendant need not obtain a favorable judgment on the merits in order to be a ‘prevailing party,’” the Court explained that a defendant’s litigation goals differ from those of a plaintiff. *Id.* at 431. “A plaintiff seeks a material alteration in the legal relationship between the parties. A defendant seeks to prevent this alteration to the extent it is in the plaintiff’s favor.” *Ibid.*

While a defendant may prefer a judgment on the merits, it fulfills its primary objective, i.e., prevails, “whenever the plaintiff’s challenge is rebuffed, irrespective of the precise reason for the court’s decision.” *Ibid.* Although that wording—“irrespective of the precise reason for the court’s decision”—was employed to reject the need for an on-the-merits-dismissal, courts misapply that language as adding the requirement of a “court’s decision” before a defendant “prevails.”

2. a. There is a clear circuit split between, at least, the Ninth and Eleventh Circuits as to whether a Rule 41(a)(1) dismissal can provide the basis for a §505 fee award. Even though *CRST* clarified that the test for whether a defendant “prevails” is different than for a plaintiff, “[f]ederal 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 (Iowa 2018) (collecting cases). Conflicts result from importing requirements from the *Buckhannon* prevailing-plaintiff test into the *CRST* prevailing-defendant test.

b. The Ninth Circuit holds that a defendant “prevails” and may recover fees under §505 after a Rule 41(a)(1) dismissal that materially alters the parties’ legal relationship. *Cadkin v. Loose*, 569 F.3d 1142, 1149 (CA9 2009) (citing *Buckhannon*, 532 U.S at 604). But where a voluntary dismissal permits refile in a new action, such defendant has not “prevailed,” and cannot recover fees under §505. *Id.* at 1150 (“a defendant is a prevailing party following dismissal of a claim if the plaintiff is judicially precluded from refile the claim against the defendant in federal court.”). Consequently, courts in the Ninth Circuit assess the preclusive effect of dismissal to determine whether the defendant “prevailed” for purposes of §505. *Good Job Games Bilism Yazilim Ve Pazarlama A. v. SayGames LLC*, Case No. 19-cv-07916, 2023 WL 3260528, at *6 (N.D. Cal. May 4, 2023) (defendant prevailed and was entitled to an award under §505 based on the preclusive effect following the Rule 41(a)(1) dismissal).

Prior to *Buckhannon*, the Ninth Circuit did not require a preclusive effect for a defendant to “prevail.” A copyright defendant was entitled to seek fees as the “prevailing party” where it had “been put to the expense of making an appearance and of obtaining [a]n order for the clarification of the complaint” if the plaintiff then voluntarily dismissed the action without prejudice. *Corcoran v. Columbia Broadcasting Sys., Inc.*, 121 F.2d 575, 576 (CA9 1941) (addressing the similar language of §40 of the 1909 Copyright Act, Pub. L. 60-

349, ch. 320, 35 Stat. 1084). The Ninth Circuit overruled *Corcoran* based on *Buckhannon*, requiring a “material alteration” before any party “prevails.” *Cadkin*, 569 F.3d at 1148-49.

The Eleventh Circuit’s bar to a defendant “prevailing” following a Rule 41(a)(1) dismissal directly conflicts with the Ninth Circuit’s decision in *Cadkin*, which would have resulted in a different outcome below due to Respondent’s preclusive, Rule 41(a)(1) dismissal “with prejudice.”

c. Conflicts in the courts are driven by conflicting interpretations of “prevailing party.” In the Fourth Circuit and Seventh Circuit a Rule 41(a)(1) dismissal that operates as a dismissal “with prejudice” renders the defendant the prevailing party. *Nexus Servs. v. Moran*, Civil Action No. 16-cv-00035, 2018 WL 1461750, at *13-15 (W.D. Va. Mar. 23, 2018), *aff’d*, 750 Fed. Appx. 241, 241-42 (CA4 2019); *Craig v. PopMatters Media, Inc.*, 448 F. Supp. 3d 844, 846-47 (N.D. Ill. 2020) (addressing defendant’s fee motion under §505).

In *Nexus*, the notice operated as an adjudication on the merits, materially altering the parties’ legal relationship in the defendant’s favor, though the plaintiff argued that there was no “judicial imprimatur” on that change because the dismissal was a self-executing notice, precluding the defendant from “prevailing.” 2018 WL 1461750, at *13. In rejecting that argument, the court explained that while it made sense in *Buckhannon* to require “judicially sanctioned” relief for a plaintiff, the required “judicial imprimatur” for a defendant does not require a court-ordered dismissal. *Id.* at *14. The court “interpret[ed] *Buckhannon* as meaning that a ‘judicial imprimatur’ results where the result is achieved through litigation, not outside of it as in *Buckhannon*.” *Ibid.* The Fourth Circuit affirmed

that decision and the district court's reasoning. *Nexus Servs. v. Moran*, 750 Fed. Appx. 241, 241-42 (CA4 2019).

The Tenth Circuit holds that a defendant “prevails” under Rule 54 “when, in circumstances not involving settlement, the plaintiff dismisses its case against the defendant, whether the dismissal is with or without prejudice.” *Cantrell v. Int’l Bhd. of Elec. Workers, Local 2021*, 69 F.3d 456, 458 (CA10 1995) (en banc) (citing Fed. R. Civ. P. 54); accord *Burton v. Vectrus Sys. Corp.*, 834 Fed. Appx. 444, 445-46 (CA10 2020). However, it has also held that a defendant seeking attorneys’ fees under the Lanham Act, 15 U.S.C. §1117, does not “prevail” following a Rule 41(a)(1)(A)(ii) stipulated dismissal because there was no judicial action. *Xlear, Inc. v. Focus Nutrition, LLC*, 893 F.3d 1227, 1238-39 (CA10 2018) (citing *Buckhannon, Bell v. Bd. of Cty. Comm’rs*, 451 F.3d 1097 (CA10 2006), and *Biodiversity Conservation All. v. Stem*, 519 F.3d 1226 (CA10 2008)).

Relying on *Cantrell*, the Eighth Circuit held that a Rule 41(a)(1)(A)(i) dismissal without prejudice “rendered defendants the prevailing parties for purposes of an award of costs under Rule 54(d)(1).” *Sequa Corp. v. Cooper*, 245 F.3d 1036, 1037-38 (CA8 2001) (citing *Cantrell*, 69 F.3d at 458). Though including language that “a voluntary dismissal without prejudice means that neither party can be said to have prevailed,” the court affirmed the costs award to the defendants “as the prevailing parties.” *Ibid.* However, in rejecting a defendant’s argument that allowing a Rule 41(a)(2) dismissal to be entered “without prejudice” was legal prejudice by “depriv[ing] [defendant] of the ability to recover attorney’s fees as a prevailing party,” the Eighth Circuit said that a defendant does not “prevail”

following a Rule 41(a)(2) dismissal without prejudice for the purposes of a fee award under the Lanham Act, 15 U.S.C. §1117. *SnugglyCat, Inc. v. Opfer Com-muns., Inc.*, 953 F.3d 522, 526-27 (CA8 2020).

The Federal Circuit, addressing the Patent Act, 35 U.S.C. §285, interprets “prevailing party” differently depending on the form of dismissal. If dismissal occurs under Rule 41(a)(1), i.e., without a court-order, the inquiry turns on whether it is *labeled* “with prejudice” or “without prejudice,” regardless of the practical effect of dismissal. See, e.g., *O.F. Mossberg & Sons, Inc. v. Timney Triggers, LLC*, 955 F.3d 990, 992-93 (CAFC 2020) (defendant did not “prevail” after a Rule 41(a)(1)(A)(i) notice of dismissal “without prejudice” even though dismissal followed cancellation of the patents by the USPTO, precluding any refiling); *United Cannabis Corp. v. Pure Hemp Collective Inc.*, 66 F.4th 1362, 1365-68 (CAFC 2023) (holding defendants “prevailed” after a Rule 41(a)(1)(a)(ii) stipulation for dismissal “with prejudice,” despite the lack of any court-ordered dismissal). By contrast, if dismissal is based on a court order, the Federal Circuit looks to *the effect* of dismissal. See, e.g., *Ranier v. Microsoft Corp.*, 887 F.3d 1298, 1306 (CAFC 2018) (defendant “prevailed” after dismissal “without prejudice” for lack of standing because the patents could not be reasserted); *B.E. Tech., L.L.C. v. Facebook, Inc.*, 940 F.3d 675, 678-79 (CAFC 2019) (defendant “prevailed” after dismissal “without prejudice” under the doctrine of mootness following cancellation of patents by the USPTO based on the preclusive effect).

Applying these interpretations, the Federal Circuit denied fees under §285 of the Patent Act following dismissal made through leave to amend and drop a party under Rule 15, even though the original trial judge

found the case to be “exceptional” and warrant a fee award. *Giesecke & Devrient GmbH v. United States*, No. 22-2002, 2024 WL 3171658, at *1-3 (CAFC June 26, 2024).

In the Southern and Eastern Districts of New York, “even in situations where a plaintiff has voluntarily dismissed his claim without prejudice, ‘a court must examine the circumstances * * * to determine if the defendant may properly be considered a “prevailing party.”” *Manhattan Review LLC v. Yun*, No. 16 Civ. 0102, 2017 WL 11455317, at *5 (S.D.N.Y. Sept. 21, 2017) (quoting *Silberstein v. Digital Art Solutions, Inc.*, No. 02 Civ. 8187, 2003 WL 21297291, at *1 (S.D.N.Y. June 4, 2003)); accord *Espada v. Rosado*, No. 00cv6469, 2001 WL 1020549, at *2 (S.D.N.Y. Sept. 5, 2001) (“Where, however, a ‘calculating’ plaintiff obtains dismissal in order to avoid an adverse ruling on the merits, the case for the defendant becomes more compelling * * * [A] plaintiff should not be able to avoid paying attorney’s fees by bringing a frivolous case and then obtaining a dismissal before a ruling on the merits.”); see also *Carter v. Incorporated Village of Ocean Beach*, 759 F.3d 159, 166 (CA2 2014) (calling it “obvious” that claims voluntarily dismissed with prejudice, without court action, still rendered the defendant the prevailing party on those claims); but see *Polaris Images Corp. v. CNN, Inc.*, 365 F. Supp. 340, 343 (S.D.N.Y. 2019) (holding defendant was not the “prevailing party” because the alteration in the parties’ relationship by Rule 41(a)(1)(A)(i) dismissal “was not the sort of ‘judicially sanctioned change’ that constitutes a precondition to prevailing-party status.”).

d. The Eleventh Circuit’s interpretation of “prevailing party” and its categorical bar, conflicts with the Second, Fourth, Seventh, Eighth, Ninth, and

Tenth Circuits' interpretation of that same term, as well as the interpretation of the Southern and Eastern Districts of New York in the context of §505. And while the Eleventh and Federal Circuits are largely aligned in their understanding, even they conflict when addressing Rule 41(a)(1) dismissals "with prejudice."

The Eleventh Circuit's categorical bar disregards a defendant's litigation goals and disregards any determination of whether the dismissal "materially altered" the parties' legal relationship in the defendant's favor. Instead, it looks only to whether the dismissal was court-ordered or not: "to obtain prevailing party status, a 'court itself must act to reject or rebuff the plaintiff's claims.'" App., *infra*, 4a (quoting *Property Matters*, 108 F.4th at 1363). A defendant is categorically barred from recovering fees following a Rule 41(a)(1) dismissal, even if preclusive.

3. The Circuits conflict in their interpretations of "prevailing party" when addressing defendants. Petitioner's case would have been decided differently in different jurisdictions. Petitioner would have "prevailed" in the Second, Fourth, Seventh, Ninth, and Federal Circuits, following Respondent's voluntary dismissal "with prejudice." Petitioner would likely have "prevailed" in the Eighth and Tenth Circuits because fees in the Copyright Act are awarded "as part of the costs" of the action, unlike in the Lanham Act, and Petitioner would have "prevailed" for the purposes of "costs" under *Cantrell* and *Sequa*.

But under the Eleventh Circuit's rule, Petitioner is categorically barred from recovering fees because Respondent's Rule 41(a)(1) dismissal bars it from "prevailing." That bar applies even in the most egregious cases, e.g., where infringement claims are frivolous,

maintained to the point where the defendant incurs significant fees in defending the baseless claims—far more than the nuisance settlement—and then dismissed to avoid judicial review.

The question presented is a recurring one of substantial legal and practical importance that is dividing the circuits. Because the Eleventh Circuit created a categorical bar to a defendant recovering fees based on a question of law, this case presents an optimal vehicle for the Court’s review of the question presented and realignment of the lower courts.

B. The Eleventh Circuit’s Weighing a Voluntary Dismissal as a Factor *Against* a Defendant’s Fee Award Conflicts With This Court’s Precedent, the Seventh Circuit’s Holding in *Live Face on Web*, and the Presumption Applied in the Fifth, Sixth, and Seventh Circuits.

1. The Eleventh Circuit’s approval of weighing a voluntary dismissal as a factor *against* a defendant’s fee award conflicts with *Fogerty* and *Kirtsaeng*, the Seventh Circuit’s holding in *Live Face on Web*, and the presumption applied in the Fifth, Sixth, and Seventh Circuits. In refining the standard for exercising discretion under §505, this Court has not explicitly passed on how courts should consider a voluntary dismissal, an important issue on which the Circuits are split. Precedent, however, indicates it should be taken as a factor *in favor of* a defendant’s fee award, not as a factor *against* granting fees.

In *Fogerty*, the Court rejected the “dual” standard that required defendants to show bad faith or frivolity before awarding fees. 510 U.S. at 520-21. The Court also rejected the argument that §505 adopts an

automatic fee award, i.e., the “British Rule,” because it clearly connotes discretion. *Id.* at 533-34. While the Court provided factors to help guide that discretion, it cabined their application by requiring that they only be applied faithfully to the purposes of the Copyright Act. *Id.* at 534, n.19.

Recognizing the need for further guidance in channeling discretion to remain faithful to the Copyright Act’s purposes, *Kirtsaeng* rejected a test focused on demarcating the bounds of copyright law. 579 U.S. at 203-06. Instead, the Court held that the objective reasonableness of the losing party’s position should be given “substantial weight,” but courts must also give due consideration to all other relevant factors. *Id.* at 199-00. The Court also clarified that a finding of reasonableness cannot be the controlling factor or even create a presumption against granting fees, *id.* at 208-09, since a plaintiff controls which cases to file and presumably will only file facially reasonable claims.

The Court did not address how to weigh a plaintiff’s voluntarily abandonment of its claims after forcing a defendant to incur costs. The Court recognized, however, that fees are “almost invariably” awarded to plaintiffs on a default judgment. *Id.* at 208, n.3. Contrary to the decision below, the evenhandedness required by *Fogerty* supports weighing a voluntary dismissal as a factor *in favor* of granting a defendant’s fee motion. See 510 U.S. at 527, 534, n.19.

2. The Eleventh Circuit’s approval of a plaintiff’s voluntary dismissal as a factor *against* awarding a defendant fees under §505 conflicts with the Seventh Circuit’s decision in *Live Face on Web*, decided during briefing below. In the Seventh Circuit, Respondent’s voluntary dismissal would have weighed in favor of granting Petitioner’s fee motion.

In *Live Face on Web*, the plaintiff voluntarily dismissed its claims with prejudice asserting that the recent holding in *Google LLC v. Oracle America, Inc.*, 593 U.S. 1 (2021), defeated its claims. 77 F.4th at 633. The district court then denied the defendants' fee motion, stating defendants only "prevailed" from a fortuitous *Google* decision, rather than the defenses. *Ibid.*

The Seventh Circuit vacated, explaining that the defendants had prevailed *because of* their defenses, and it was not clear that *Google* even impacted those defenses. *Ibid.* In remanding, the Seventh Circuit instructed the court to weigh the plaintiff's arguments against the presumption that the defendants would be awarded their fees, explaining that because defendants have no potential for monetary recovery in defending infringement suits, there is no motivation to present meritorious defenses other than the likelihood of being made whole for the defense costs. See *id.* at 633-36; see also *Kirtsaeng*, 579 U.S. at 205 (addressing the "likelihood" of recovering fees for unreasonable claims).

The Eleventh Circuit's rule also conflicts with the presumption applied in the Fifth, Sixth, and Seventh Circuits. In the Fifth and Sixth Circuits, fees to the prevailing party is the "rule rather than the exception" and "should be awarded routinely." See, e.g., *Bridgeport Music, Inc. v. WB Music Corp.*, 520 F.3d 588, 592 (CA6 2008); *Keck v. Mix Creative Learning Ctr., L.L.C.*, 116 F.4th 448, 458 (CA5 2024). In the Seventh Circuit, there exists a presumption in favor of granting fees to a prevailing plaintiff when monetary stakes are small, which becomes "strong" in favor of a defendant, "who by definition receives not a small award but no award." *Assessment Techs. of WI, LLC v. Wire Data, Inc.*, 361 F.3d 434, 436-37 (CA7 2004). In the

Fifth, Sixth, or Seventh Circuits, Respondent’s voluntary dismissal would not have weighed *against* Petitioner recovering its fees, i.e., the opposite of the Eleventh Circuit’s decision. But see *Markham Concepts v. Hasbro, Inc.*, 77 F.4th 80, 85, n.10 (CA1 2023) (collecting cases on fee presumptions and noting the First, Second, Eighth, and Ninth Circuits do not apply a presumption).

Weighing a voluntary dismissal as a factor against a fee award conflicts with the evenhandedness required by *Fogerty*. Where a copyright suit is not defended, the plaintiff is “almost invariably” awarded its fees. *Kirtsaeng*, 579 U.S. at 208, n.3. *Fogerty*’s evenhandedness would instruct that where a plaintiff abandons when faced with meritorious defenses, the defendant should “almost invariably” recover its fees. See *ibid*.

3. A voluntary dismissal is a strong indication the claims are unreasonable, which should weigh in favor of granting a defendant’s fee motion. A plaintiff alone controls which claims it files; presumably, it only files claims believed to be reasonable. A voluntary dismissal suggests the plaintiff has either changed its outlook on the claims’ reasonability or that they were never reasonable. After forcing a defendant to incur costs, a plaintiff should not be permitted to evade §505’s consequences for filing unreasonable claims.

Early dismissal prevents the defendant from incurring further fees but will not eliminate the costs a defendant has already incurred. Section 505 will not encourage defendants to present meritorious defenses if doing so means a plaintiff may simply dismiss the action to avoid the consequence of bringing unreasonable claims. Such a rule would only encourage frivolous litigation and copyright “trolling” behavior, contrary

to the goals and purposes of §505, as expressed by this Court. See *Kirtsaeng*, 579 U.S. at 205.

C. The Petition Presents Recurring Questions on Important Issues of Federal Law, Warranting This Court’s Review.

The petition presents recurring questions of substantial legal and practical importance regarding the impact of a voluntary dismissal. The Eleventh Circuit’s categorical bar conflicts with this Court’s precedent, the goals and purposes of the Copyright Act, and common law understandings of “prevailing.” Similarly, weighing a voluntary dismissal as a factor *against* the granting of a defendant’s fee motion discourages defendants from presenting meritorious defenses to unreasonable claims. Both positions encourage frivolous litigation, a matter of significant importance that has been a growing trend over the past decade. This case presents the questions cleanly, making it an optimal vehicle for the Court’s review.

1. a. As articulated in *Fogerty* and *Kirtsaeng*, §505 is important in advancing the goals and objectives of the Copyright Act and the discretion exercised under §505 must remain faithful to those purposes. *Kirtsaeng*, 579 U.S. at 203-04; see also *Fogerty*, 510 U.S. at 525 and 534, n.19. Courts “may not treat prevailing plaintiffs and prevailing defendants differently; defendants should be ‘encouraged to litigate [meritorious copyright defenses] to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement.’” *Kirtsaeng*, 579 U.S. at 202 (quoting *Fogerty*, 510 U.S. at 527); *Fogerty*, 510 U.S. at 526-27. Therefore, the discretion to award or deny fees under §505 requires consideration of the objective reasonableness of the losing party’s position, while

also considering all other relevant factors. *Kirtsaeng*, 579 U.S. at 199-00, 204-05. Doing so serves the Act’s purpose of disincentivizing the filing of unreasonable claims and encouraging defendants to present meritorious defenses, preventing nuisance settlements on unreasonable claims. *Id.* at 205.

The Eleventh Circuit’s treatment of Rule 41(a)(1) dismissals, both in categorically barring a defendant from “prevailing” and as weighing *against* a defendant’s fee award, contradicts these goals and the purposes of the Copyright Act, diluting much of this Court’s holdings in *Kirtsaeng* and *Fogerty*. A plaintiff with an unreasonable position is encouraged—rather than discouraged—to file suit and seek a nuisance settlement, because a Rule 41(a)(1) removes any consequences.

b. Similarly, *CRST* articulated the importance of correctly addressing when defendants “prevail.” 578 U.S. at 431-32. Defendants litigate to re-establish the pre-suit status quo. *Id.* at 431. While they may prefer a preclusive result, they prevail even whenever the suit ends, even for non-merits reasons. *Ibid.* In rejecting a merits-based-dismissal requirement, the Court explained that “prevailing party” status does not alone authorize fees, discretion is still exercised under the relevant statute. *Id.* at 432. Under §2000e-5(k), defense fees are only awardable for “frivolous, unreasonable, or groundless” claims. *Ibid.* (quoting *Christiansburg*, 434 U.S. at 422). It makes no sense to bar defense fees for a frivolous claim even if dismissed for a non-merits reason. *Ibid.* The decision to award fees requires an analysis of the plaintiff’s *claim*, not of the manner of dismissal. See *ibid.*

In the Copyright Act, defense costs are available if they serve the purposes of the Act, including by

encouraging defendants to present meritorious defenses rather than pay nuisance settlements. *Kirtsaeng*, 579 U.S. at 205. It makes no sense to deny defense fees where the only motivation to present meritorious defenses is the “likelihood” that those fees will be recovered under §505. See *ibid.*; see also *Assessment Techs.*, 361 F.3d at 437. The “likelihood” of defense fees being awarded prevents the filing of unreasonable claims. *Kirtsaeng*, 579 U.S. at 205. Thus, a voluntary dismissal should weigh *in favor of* granting a defendant’s fee motion—not against it, as occurred below.

c. The Eleventh Circuit’s rules also risk increasing the growing trend of copyright trolling. See, e.g., *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1097 (CA7 2017) (explaining the unsavory rise of intellectual property “trolling”); M. Sag, *Copyright Trolling, An Empirical Study*, 100 Iowa L. Rev. 1105, 1107-11, 1113-14 (2015) (discussing and describing copyright “trolling”). Such cases are characterized by copyright holders bringing “strategic infringement claims of dubious merit in the hope of arranging prompt settlements with defendants who prefer to pay modest or nuisance settlements rather than be tied up in expensive litigation.” *Design Basics*, 858 F.3d at 1097; accord *Klinger v. Conan Doyle Estate, Ltd.*, 761 F.3d 789, 792 (CA7 2014) (“The [troll’s] business strategy is plain: charge a modest license fee for which there is no legal basis, in the hope that the ‘rational’ writer or publisher asked for the fee will pay it rather than incur a greater cost, in legal expenses, in challenging the legality of the demand.”); *Live Face on Web*, 77 F.4th at 634 (same).

Section 505 deter “trolling” by encouraging defendants to rebel against such efforts and further the

Copyright Act’s objectives by “combating a disreputable business practice—a form of extortion.” *Live Face on Web*, 77 F.4th at 634 (quoting *Klinger*, 761 F.3d at 792). The willingness to fight “injects risk into [that] business model,” “exposing [that] unlawful business strategy.” *Ibid.* (quoting *Klinger*, 761 F.3d at 792); see also *Klinger*, 761 F.3d at 792 (such defendant “deserves a reward but asks only to break even.”).

The Eleventh Circuit’s categorical bar motivates, rather than discourages, such “disreputable” conduct by eliminating the risk from filing unreasonable (even frivolous) claims. If a quick settlement cannot be obtained, the plaintiff can dismiss under Rule 41(a)(1) before the court rules on a Rule 12(b)(6) motion (a process that can drag out for months or years). The plaintiff can unilaterally force a defendant to appear and defend a lawsuit, maintaining the case just long enough for fees to exceed the value of a case or a “modest” settlement, then unilaterally dismiss under Rule 41(a)(1) to bar the defendant from ever being made whole, while avoiding a court’s review of its claims and conduct. Defendants, understanding that litigation strategy, will see no point in defending.

While a defendant may prevent a Rule 41(a)(1) dismissal by answering, in lieu of moving to dismiss unreasonable claims, even there the Eleventh Circuit makes it nearly impossible for that defendant to “prevail” and recover its fees under §505. See *Affordable Aerial Photography, Inc. v. Trends Realty USA Corp.*, No. 23-11662, 2024 WL 835235, at *3-4 (CA11 Feb. 28, 2024), cert. denied, 2025 WL 76430 (Jan. 13, 2025) (denying §505 fees because the defendant cannot “prevail” on a Rule 41(a)(2) court-ordered voluntary dismissal “without prejudice”).

2. a. The Eleventh Circuit’s bar to defendants recovering fees, following a Rule 41(a)(1) dismissal, conflicts with *CRST*’s holding that a defendant need not obtain a merits-based dismissal, and its explanation as to what is required for a defendant to “prevail.” *CRST* rejected an on-the-merits dismissal requirement, 578 U.S. at 421, 431, yet the Eleventh Circuit is effectively re-inserting that merits-based-dismissal requirement by requiring *the court* to “reject[] or rebuff[] a plaintiff’s claim” before a defendant can “prevail,” App., *infra*, 4a-5a. But a defendant’s litigation goals are achieved, i.e., it “prevails,” when the action is dismissed without a material alteration of the parties’ legal relationship in the plaintiff’s favor, even for non-merits reasons. *CRST*, 578 U.S. at 431.

The Eleventh Circuit’s effective re-insertion of a “merits-based-dismissal” requirement, contrary to *CRST*, is confirmed by its “prevailing party” decisions following court-ordered dismissals. When an action is involuntarily dismissed “without prejudice” under Rule 12(b)(6), the Eleventh Circuit holds that the defendant has “prevailed.” *Beach Blitz Co. v. City of Miami Beach*, 13 F.4th 1289, 1300 (CA11 2021). But where a court dismisses an action voluntarily under Rule 41(a)(2), the defendant does not “prevail.” *Trends Realty*, 2024 WL 835235, at *3-4. Both actions are dismissed by court order, but the defendant may only prevail following an involuntary dismissal. *Beach Blitz*, 13 F.4th at 1298-00 (discussing Rule 12(b)(6) dismissals “without prejudice” as being judgments on the merits); cf. Fed. R. Civ. P. 41(b) (such dismissals “operat[ing] as an adjudication on the merits”).

b. The Eleventh Circuit’s bar also renders much of *Kirtsaeng* and *Fogerty* a dead letter. This Court held

that defendants should be *encouraged* to present meritorious defenses by awarding them fees under §505 when, *inter alia*, a plaintiff's claim is objectively unreasonable. *Kirtsaeng*, 579 U.S. at 205; *Fogerty*, 510 U.S. at 527. But the Eleventh Circuit bars a defendant from recovering fees for defending against unreasonable claims so long as the plaintiff dismisses under Rule 41(a)(1) before the court addresses a defendant's motion to dismiss. That bar contravenes §505 and the goals of the Copyright Act by allowing a plaintiff to file unreasonable claims, force a defendant to appear and defend, and then evade §505's consequences; it *encourages* the filing of unreasonable claims and *discourages* presenting meritorious defenses.

c. The Eleventh Circuit's bar also conflicts with common law understandings of "prevailing party" and that Rule 41(a)(1) voluntary dismissals were considered judgments for the defendant. See, *e.g.*, Black's Law Dictionary 655 (1st ed. 1891) (a "judgment" against a plaintiff includes a voluntary or involuntary judgment of *nonsuit*, judgement of *retraxit*, and a judgment of *nolle prosequi*); *Anderson v. Gold Seal Vineyards*, 505 P.2d 790, 793 (Wash. 1973) ("6 J. Moore, *Federal Practice* para. 54.70[4], at 1306 (1966, Supp. 1967), states the rule to be that where there is a dismissal of an action, even where such dismissal is voluntary and without prejudice, the defendant is the prevailing party, noting that it may be otherwise if the dismissal results from a settlement of the plaintiff's claim before trial."); *ibid.* (applying "the general rule pertaining to voluntary nonsuits, that the defendant is regarded as having prevailed").

d. Further, the Eleventh Circuit's bar conflicts with the limitations of Rule 41(a)(1)(A)(i) articulated in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384

(1990). Rejecting the argument that a Rule 41(a)(1) dismissal deprived courts of the authority to address a Rule 11 motion, the Court explained that Rule 41(a)(1) is a limitation on a plaintiff's rights, not on a defendant's rights. *Id.* at 397-98 ("Rule 41(a)(1) * * * was designed to limit a plaintiff's ability to dismiss an action."). Rule 41(a)(1) is designed to curb a plaintiff's abuses of the judicial system and burdens on defendants; it "does not codify any policy that the plaintiff's right to one free dismissal also secures the right to file baseless papers." *Id.* at 397-98.

Yet the Eleventh Circuit's categorical bar expands Rule 41(a)(1) to codify a right to file objectively unreasonable, even baseless, copyright infringement claims, forcing defendants to appear and defend, and thereby incur more in legal fees than a "modest" settlement. If met with a defendant that fights back, it permits a plaintiff to simply dismiss the case without suffering any consequences normally attendant to §505. The Eleventh Circuit's interpretation incorrectly expands Rule 41(a)(1)'s limits, contrary to the purposes behind that rule. See *Cooter & Gell*, 496 U.S. at 397-98.

3. The practical consequences of the Eleventh Circuit's categorical bar is additional and unnecessary litigation. Beyond the growing trend of copyright "trolling," which will only be encouraged by this bar, *supra* at 27-29, copyright defendants in the Eleventh Circuit are now deprived of the benefit of Rule 12(b) motions; they must answer every complaint to foreclose a Rule 41(a)(1) dismissal and then move for judgment on the pleadings, seek evidentiary hearings on personal jurisdiction, etc. If a plaintiff later seeks to voluntarily dismiss "without prejudice" under Rule 41(a)(2), a defendant—who would always seek dismissal—must instead *oppose* dismissal, arguing

dismissal must either be “with prejudice” or the suit must continue. See, e.g., *Prepared Food Photos, Inc. v. Pool World, Inc.*, _ F. Supp. 3d __, 2024 WL 4344955 (E.D. Wash. Sept. 30, 2024) (denying Rule 41(a)(2) voluntary dismissal “without prejudice” because it would be clear legal prejudice by depriving the defendant of the ability to “prevail”).

4. The Court’s decision in *CRST*, and the accompanying oral argument, provides the roadmap to answer the question presented. When a plaintiff serves a complaint, it forces the defendant to appear and defend under threat of a default judgment. Fed. R. Civ. P. 4(a)(1)(E) (a summons must “notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint”); see also *Kirtsaeng*, 579 U.S. at 208, n.3 (§505 fees are “almost invariably” awarded following a default judgment).

If that plaintiff fails to cause a material alteration in the legal relationship of the parties, then the defendant has prevailed. See *CRST*, 578 U.S. at 431 (a defendant seeks to prevent a material alteration in the legal relationship, to the extent it is in the plaintiff’s favor). A defendant “prevails” whether the action is dismissed “with prejudice” or “without prejudice,” by a court order, a Rule 41(a)(1) notice, or for any other reason. See, e.g., 6 J. Moore, *Federal Practice* ¶54.70[4], at 1306; A. C. Freeman, *Law of Judgments*, §261 (2d ed. 1874) (a voluntary *nonsuit* is a voluntary dismissal “without prejudice,” and it is a judgment *against* the plaintiff).

The manner of dismissing the action, and even the potential for refiling the claims, does not affect prevailing party status in a specific case. Historically it did not bar a defendant from recovering its fees, and it

should not be a bar under §505. When the case ends, as here, with the plaintiff abandoning after forcing the defendant to appear and incur defense fees, the defendant prevailed in *that* action. Though the plaintiff might file a second action at some later time, that would be a separate action—the defendant would still have prevailed in the first action. Moreover, the award of fees under §505 at the end of a theoretical second action would not generally include the fees incurred during the first action; barring §505 fees in a first action because a second action might, or even will, be filed cannot account for the fees a defendant was forced to incur in defending the first action and does not serve the Copyright Act’s goals.

5. Whether a defendant “prevailed,” however, does not mean that it will certainly be awarded its fees under §505, or that it will get all of the fees it might request. Section 505 is still discretionary and is limited to “reasonable” fees. A defendant must still establish that an award is warranted based on the goals and purposes of the Copyright Act under the analysis articulated in *Fogerty* and *Kirtsaeng*, and the reasonableness of the amount sought. Courts will still exercise their reasoned decision making and consider the objective reasonableness of the plaintiff’s claim, as well as all other relevant factors, before determining whether to award or deny fees. But there, the voluntary dismissal should be weighed as a factor *in favor of* granting such an award.

* * *

The Eleventh Circuit’s categorical bar, that a defendant cannot prevail after a Rule 41(a)(1) dismissal, highlights a growing split among the lower courts both with respect to a fee award under §505 and to the understanding of the term “prevailing party” more

generally. The Eleventh Circuit's bar is contrary to text, precedent, and history. It creates a direct split with the Ninth Circuit on §505 and splits with, at least, the Second, Fourth, Eighth, Tenth, and Federal Circuits as to how they interpret "prevailing party." A defendant "prevails" when a plaintiff does not; this is true even when a plaintiff "quits" and dismisses "without prejudice" under Rule 41(a)(1), consistent with the statutory language, precedent, the historical meaning of "prevailing party," and the goals and purposes of the Copyright Act.

Similarly, the goals and purposes of the Copyright Act instruct that a voluntary dismissal must weigh *in favor of* a defendant's fee award. Otherwise, a defendant necessarily "loses" by presenting meritorious defenses and refusing to pay a nuisance settlement.

Only this Court can resolve the splits among the circuits, by correcting the Eleventh Circuit's errors as to how a Rule 41(a)(1) dismissal impacts the §505 analysis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 2025