No. 14-1375

In The
Supreme Court of the United States

CRST VAN EXPEDITED, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* AMERICANS FOR FORFEITURE REFORM IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

Americans for Forfeiture Reform[1] ("AFR") is a non-profit, non-partisan civic group concerned with the government's fearsome power to forfeit private property, which "can be devastating when used unjustly." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 634 (1989). To this end, AFR is especially focused on the problem of civil forfeiture abuse. Civil forfeiture lets the government profit by seizing property allegedly linked to crime without ever having to prove the owner's guilt. This power thus raises the "serious risk that an innocent person will be deprived of his property." *United States v. $191,910*, 16 F.3d 1051, 1069 (9th Cir. 1994).

Given this reality, AFR works to increase public awareness of civil forfeiture abuse and the urgent need for legal reform. AFR advances this goal in a variety of ways, including the filing of *amicus curiae* briefs and helping property owners find effective legal counsel in civil forfeiture cases.[2]

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[1] This brief is filed based on Petitioner's blanket letter of consent (which is on file with the Court) and Respondent's written consent. No counsel for either party authored this brief in whole or in part; nor did any person or entity, other than AFR and its counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

[2] *See, e.g.*, Brief of *Amicus Curiae* Americans for Forfeiture Reform in Support of Petitioner, *Luis v. United States*, No. 14-419 (U.S. Aug. 25, 2015); Brief of *Amicus Curiae* Americans for Forfeiture Reform in Support of Defendants-Appellants, *United States v. $28,000*, 802 F.3d 1100 (9th Cir. 2015) (No. 13-55266).

AFR is accordingly interested in the present case. This case requires the Court to answer a legal question that could affect the willingness of property owners to resist wrongful government civil forfeiture actions despite Congress's enactment of a fee-shifting law meant to enable such resistance.[3] That question, in short, is whether the court-ordered dismissal of a government suit for failure to comply with statutory preconditions to filing suit renders the defendant a "prevailing party" eligible to seek a fee award.

AFR believes the Court should answer this question with a resounding "yes." By doing so, the Court will clarify its fee-award jurisprudence in a manner that "permits meaningful judicial review and produces reasonably predictable results." *Perdue v. Kenny A.*, 130 S. Ct. 1662, 1672 (2010). The Court will also vindicate the "interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government." *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 61 (1984); *see id.* at 61 n.13 (collecting cases).

[3] *See* Louis S. Rulli, *The Long Term Impact of CAFRA: Expanding Access to Counsel and Encouraging Greater Use of Criminal Forfeiture*, 14 FED. SENT. R. 87, 88–90 (2001).

SUMMARY OF THE ARGUMENT

In his 2015 Year-End Report the Chief Justice reminded all lawyers of their duty to avoid "antagonistic tactics, wasteful procedural maneuvers, and teetering brinksmanship."[4] Yet, when it comes to government civil suits against private defendants, the government too often engages in just such brinksmanship. Consider the present case. The district court found that the "EEOC's failure to investigate the [Title VII] claims of . . . 67 allegedly aggrieved persons . . . foreclosed any possibility that the parties might settle all or some of this dispute without the expense of a federal lawsuit." Pet. App. 211a.

But so long as this kind of conduct enables the government to "pound an opponent into submission," the government has every incentive to engage in it. *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 48 (D.C. Cir. 1992). Thus, to level the playing field, Congress has enacted a host of fee-shifting laws granting private defendants who prevail in court the ability to recover their attorney's fees from the government. These laws include 42 U.S.C. § 2000e-5(k), which holds the government liable for fees in Title VII suits, and 28 U.S.C. § 2465(b)(1)(A), which does the same in federal civil forfeiture actions.

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[4] Chief Justice Roberts, U.S. Supreme Court, *2015 Year-End Report on the Federal Judiciary* 11 (2015), http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf.

For these laws to serve their purpose, however, it must be recognized that private defendants do not need a merits judgment or a court-ordered consent decree in order to "prevail" against the government and qualify for a fee award. *Cf. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600 (2001). Private defendants also serve to prevail when the court orders dismissal of the government's claims. *See Angel v. Bullington*, 330 U.S. 183, 190 (1947) ("The 'merits' of a claim are disposed of when it is refused enforcement.").

The Eighth Circuit failed to realize that here. It held that the district court's dismissal of sixty-seven government claims did not make Petitioner a "prevailing party" eligible to receive fees under § 2000e-5(k). *See* Pet. App. 23a–24a. The Eighth Circuit based this conclusion on the legal ground for the dismissal: the government's failure to satisfy Title VII's preconditions for filing suit. *See id.* The Eighth Circuit held that because this ground was "not . . . a ruling on the merits," Petitioner lacked any basis to claim prevailing-party status. *Id.*; *see Buckhannon*, 532 U.S. at 603–04 (a "prevailing party" is usually a litigant who has received "some relief on the merits").

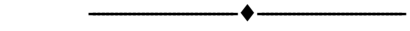
What the Eighth Circuit's analysis did not take into account, however, is the effect of Federal Rule of Civil Procedure 41 on the "dismissal of actions." In particular, Rule 41(b) provides that for "involuntary dismissals"—like the dismissal here—"[u]nless the dismissal order states otherwise . . . **any dismissal not under this rule**—except one for lack of

jurisdiction, improper venue, or failure to join a party under Rule 19—**operates as an adjudication on the merits**." This means the Eighth Circuit had to treat the district court's dismissal order in this case as a ruling "on the merits" given that this order: (1) did not "state otherwise"; and (2) did not concern "lack of jurisdiction, improper venue, or failure to join a party under Rule 19." *See* Pet. App. 202a–217a.

The Eighth Circuit should thus be reversed for failing to follow Rule 41. At the same time, the Court should observe that Rule 41 clarifies three further aspects of prevailing-party status for defendants. ***First***, court-ordered dismissals will often confer prevailing-party status on defendants. ***Second***, court-ordered dismissals for failure to meet statutory preconditions to filing suit are as much "on the merits" as dismissals for failure to establish a claim element. ***Third***, court-ordered dismissals "without prejudice" can still alter the parties' legal relationship in ways that make defendants into prevailing parties.

Taken together, these observations reconcile the Court's fee-shifting jurisprudence with the main goal of defendants in court: to avoid an adverse judgment and end the litigation. Defendants should be eligible for fee awards regardless of how they achieve this goal—be it through a merits judgment in their favor, a consent decree, or a court-ordered dismissal. The Court now has the chance to clarify this point of law

and, in the process, incentivize the government to litigate its suits in a far more level manner.



ARGUMENT

I. This case stands to affect fee awards far beyond the Title VII fee award at issue, including fee awards under the Civil Asset Forfeiture Reform Act ("CAFRA").

The Court has agreed to decide here whether the "dismissal of a Title VII case, based on the government's total failure to satisfy its pre-suit . . . obligations . . . can form the basis of an attorney's fee award to the defendant under 42 U.S.C. § 2000e-5(k)." The Court should not assume, however, that its decision here will be applied by lower courts only in the context of fee-shifting under Title VII. To the contrary, practical experience proves that whatever decision the Court reaches here will have a ripple effect on how fee awards are decided under many other fee-shifting laws, no matter how far removed these other fee-shifting laws might be from this case.

That includes the fee-award provision enacted under the Civil Asset Forfeiture Reform Act of 2000, or CAFRA, 28 U.S.C. § 2465(b)(1)(A). Under this law: "[I]n any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for . . . reasonable attorney fees." Notice that the words "prevailing party" appear nowhere in this

provision. But that has not kept lower courts from holding that this provision is bound by this Court's definition of the term "prevailing party."

Consider the Ninth Circuit's decision in *United States v. $186,416*, for example. 642 F.3d 753, 755–57 (9th Cir. 2010). The panel ruled in this case that CAFRA fee awards must be paid in the same way as fee awards under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. The panel reached this conclusion based on *Astrue v. Ratliff*, 130 S. Ct. 2521, 2524 (2010), in which this Court found that EAJA's use of the term "prevailing party" meant that EAJA awards were not payable to counsel in the first instance. The panel reasoned this holding applied equally to CAFRA fee awards because "*Ratliff* counsels that in the absence of explicit instructions from Congress . . . direct payment to the attorney should not be presumed." 642 F.3d at 756. Yet, the same panel conceded that while "EAJA specifically assigns fee awards to 'the prevailing party' . . . CAFRA does not." *Id.*

Now consider how CAFRA fee awards have been impacted by this Court's analysis of prevailing-party status in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001). "Several lower courts have cited *Buckhannon* for the operative definition of 'substantially prevails' as it is used in CAFRA." *United States v. 2007 BMW 335i Convertible*, 648 F. Supp. 2d 944, 948 (N.D. Ohio 2009) (collecting cases). This is despite the fact that *Buckhannon*, by its own terms, only sought to establish that Congress's use of the

term "prevailing party" does not reach plaintiffs who obtain "a voluntary change in the defendant's conduct" but no judicial relief. 532 U.S. at 600.

Put another way, this Court did not consider in *Buckhannon* what the outcome would have been under a statutory grant of fee awards to litigants who "substantially prevail"—language "broaden[ing] the class that can receive fees." *United States v. $60,201*, 291 F. Supp. 2d 1126, 1130 (C.D. Cal. 2003); *cf. Pierce v. Underwood*, 487 U.S. 552, 565 (1988). But courts have still applied *Buckhannon* to limit CAFRA fees to just those forfeiture claimants who "w[in] in court." *United States v. Khan*, 497 F.3d 204, 209 n.7 (2d Cir. 2007); *see United States v. Minh Huynh*, 334 F. App'x 636, 639 (5th Cir. 2009).

Based on this history, the Court should expect that its decision here will impact fee shifting under Title VII and many other laws, including CAFRA. After all, to decide this case, the Court must again define what "prevailing party" means—specifically, whether a defendant "prevails" when a government lawsuit is dismissed for failure to satisfy statutory preconditions to filing suit. *See* Pet. App. 23a–24a. And lower courts will once again draw broad insights from how the Court rules. With this in mind, one of the most critical insights that the Court can impart through this case is that private defendants should not be forced to foot the bill for suits the government was not entitled to bring in the first place.

II. Fee awards to defendants are appropriate whenever a government suit is dismissed because the government failed to obey the law—be it Title VII or CAFRA.

It is axiomatic that "[t]he government, like its citizens, must follow the law." Pet. App. 215a. But at no time is that axiom more important than when the government seeks to deprive someone of their life, their liberty, or their property through the judicial system. Indeed, in contrast to private parties, the "[g]overnment . . . has a more unfettered hand over those [that] it either serves or investigates." *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 156 (4th Cir. 2014) (Wilkinson, J., concurring). It is consequently "incumbent upon public officials, high and petty, to maintain some appreciation for the extent of the burden that their actions may impose." *Id.*

One of the ways that Congress has tried to boost this appreciation—as well as protect the rights of all Americans—is by imposing strict rules on when and how the government may litigate in various sensitive legal contexts. In this regard, Title VII sets out strict rules that the Equal Employment Opportunity Commission (EEOC) must follow when litigating employment discrimination actions against private employers. *See* 42 U.S.C. §§ 2000e *et seq*. And CAFRA sets out strict rules that the Justice Department must follow when litigating civil forfeiture actions against private property. *See* 18 U.S.C. § 983.

Under Title VII's litigation rules, the EEOC owes certain administrative duties to employers in addressing charges of discrimination. These duties include: "a duty reasonably to investigate charges, a duty to conciliate in good faith, and a duty to cease enforcement attempts after learning that an action lacks merit." *EEOC v. Agro Distribution LLC*, 555 F.3d 462, 473 (5th Cir. 2009). As such, "[u]nlike the typical [private] litigant . . . the EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties." *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 455, 368 (1977); *see also*, *e.g.*, *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) ("Title VII . . . imposes a duty on the EEOC to attempt conciliation of a discrimination charge prior to filing a lawsuit.").

CAFRA's litigation rules are equally restrictive. When the government seizes property to forfeit it, the government must send notice to any party with an interest in the property. *See* 18 U.S.C. § 983(a)(1). Then, if anyone makes a valid claim to the property, the government must file a civil forfeiture action in court within 90 days of getting the claim—a deadline that can be extended only "for good cause shown [to a court] or upon agreement of the parties." *Id.* § 983(a)(3)(A). If the government does not file suit in 90 days or secure an extension, then the government must "release the property." *Id.* § 983(a)(3)(B).

In the end, when the government plays by the above rules (and others like them), it avoids forcing private parties to bear unfair burdens—for example,

an employer does not have to bear the cost of a Title VII suit due to conciliation[5]; or a person does not have to wait indefinitely to get their property back due to prompt judicial review.[6] The government also saves court time and upholds the rule of law. As this Court has noted, "strict adherence to procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980).

Unfortunately, the government time and again refuses to play by the rules—at least, when it comes to Title VII and CAFRA. The present case illustrates the point for purposes of Title VII.[7] The EEOC sued

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[5] *See Mach Mining*, 135 S. Ct. at 1651 (explaining that the EEOC's duty to conciliate under Title VII is "a key component" of Title VII's statutory scheme because in "pursuing the goal of bringing employment discrimination to an end, Congress chose cooperation and voluntary compliance as its preferred means" (internal alterations and quotation marks omitted)).

[6] *See United States v. 2007 Harley Davidson St. Glide Motorcycle*, 982 F. Supp. 2d 634, 640–41 (D. Md. 2013) ("In mandating [under CAFRA] that the United States file forfeiture complaints within the specified amount of time, Congress effectively determined that the interest in apprising claimants of the alleged basis of the forfeiture and expeditiously processing forfeiture complaints outweighed the loss of dismissing potentially meritorious claims for untimely filing.").

[7] *See also*, *e.g.*, *EEOC v. CVS Pharmacy, Inc.*, No. 14-3653, 2015 U.S. App. LEXIS 21963, at *1–2 (7th Cir. Dec. 17, 2015) (affirming dismissal where EEOC refused to conduct pre-suit conciliation); *EEOC v. OhioHealth Corp.*, No. 2:13-cv-780, 2015 U.S. Dist. LEXIS 84016, at *2 (S.D. Ohio June 29, 2015) ("[T]he EEOC has failed to engage in good faith conciliation . . . ."); *EEOC v. Bloomberg L.P.*, 967 F. Supp. 2d 802, 814 (S.D.N.Y.

(Continued on following page)

on behalf of sixty-seven allegedly aggrieved workers without following any of Title VII's litigation rules on pre-suit investigation and conciliation. *See* Pet. App. 204a–206a. This failure, in turn, "foreclosed any possibility that the parties might settle . . . this dispute without the expense of a federal lawsuit" and instead forced Petitioner to incur over $4 million in attorney's fees. *Id.* at 211a; *see id.* at 74a–81a, 84a.

The above state-of-affairs led the district court here to cast the government's conduct as a "'sue first, ask questions later' litigation strategy." *Id.* at 214a. That description also fits how the government has litigated more than a few civil forfeiture cases in recent years.[8] In one such case, the government's complaint itself proved that the case was invalid. *See United States v. $80,891.25*, No. 4:11-cv-183, 2011 U.S. Dist. LEXIS 145500, at *2–3 (S.D. Ga. Dec. 19, 2011) ("According to the Government's complaint . . . Davila-Tosado filed a claim on April 13, 2011 . . . . The Government had to file its complaint on or before July 12, 2011, ninety days after . . . . Instead, the Government filed . . . on July 14, 2011.").

2013) ("The EEOC's conduct . . . blatantly contravenes Title VII's emphasis on resolving disputes without . . . litigation.").

[8] *See, e.g.*, *Harley Davidson*, 982 F. Supp. 2d at 641 ("[T]he United States has not shown good cause for its failure to file the Complaint within the time that § 983(a)(3)(A) [i.e., CAFRA] prescribes."); *United States v. Funds from Fifth Third Bank Account*, No. 13-11728, 2013 U.S. Dist. LEXIS 157447, at *25 (E.D. Mich. Nov. 4, 2013) ("[T]he Government failed to seek an extension before the 90-day period expired . . . .").

The government's sue-first strategy often comes with a further price tag for property owners and private employers who decide to defend themselves in court: months, if not years, of litigation over fruitless last-ditch efforts by the government to forestall defeat.[9] This may be seen here in the EEOC's failure to cite any "binding legal authority that allow[ed] it to do what it [was] attempting to do"—avoid its Title VII duty to conciliate. Pet. App. 206a. This may also be seen in *EEOC v. Freeman*, where the EEOC asserted "positions not grounded in law" to protect an EEOC expert witness with a "record of slipshod work, faulty analysis, and statistical sleight of hand." 778 F.3d 463, 471 (4th Cir. 2015) (Agee, J., concurring).

The government's obstinacy in civil forfeiture cases is even more staggering. In one recent case, the government pressed "specious litigation arguments" in support of its forfeiture claim. *United States v. $28,000*, 802 F.3d 1100, 1104 (9th Cir. 2015). In another case, the government raised a forfeiture claim through a motion "for summary judgment and supporting affidavits [that] contained material omissions." *United States v. $167,070*, No. 3:13-CV-00324, 2015 U.S. Dist. LEXIS 76473, at *43 (D. Nev. June

[9] Of course, the government's last-ditch efforts also reflect a waste of government time and resources—not to mention its reputation. Such waste has recently led one judge to note in a Title VII case that "the nation's deep commitment to combatting discrimination will be affected for good or ill by the esteem in which this important agency [i.e., the EEOC] is held." *Propak*, 746 F.3d at 157 (Wilkinson, J., concurring).

12, 2015). And in a third notable case, the government "fail[ed] to disclose . . . [a] history of directly contrary rulings" to its legal position. *United States v. One 2003 Mercedes Benz CL500*, No. PWG-11-3571, 2013 U.S. Dist. LEXIS 143041, at *13 n.5 (D. Md. Oct. 1, 2013). The list goes on.[10]

This is where Title VII's and CAFRA's fee-award provisions come into play. Both of these provisions allow prevailing defendants to recover their fees and costs from the government. In particular, 42 U.S.C. § 2000e-5(k) allows the "prevailing party" in a Title VII action "a reasonable attorney's fee . . . as part of the costs" and establishes that the EEOC "and the United States shall be liable for costs the same as a private person." And under 28 U.S.C. § 2465(b)(1)(A), CAFRA provides that whenever a property owner "substantially prevails" in a civil forfeiture action, "the United States shall be liable for . . . reasonable attorney fees and other litigation costs reasonably incurred by the claimant." *See supra* Part I.

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[10] *See, e.g.*, *United States v. $220,030*, No. 11-cv-7779, 2013 U.S. Dist. LEXIS 20188, at *10 (N.D. Ill. Feb. 14, 2013) ("The Government . . . appears to misapprehend the rules governing this action."); *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11CV504, 2012 U.S. Dist. LEXIS 47012, at *8–9 (E.D. Mo. Mar. 31, 2012) ("The Government cannot . . . initiate a civil forfeiture proceeding on the basis of one bold assertion . . . ."); *United States v. 2005 Toyota Sequoia*, No. CV 09-2012, 2010 U.S. Dist. LEXIS 116665, at *4–5 (D. Ariz. Oct. 25, 2010) ("[The Government] challenges Claimant's standing . . . . Despite ample case law on this issue, [the Government] inexplicably diverge[s] from the established Article III standing analysis.").

Congress enacted these statutes to ensure that the government could not "pound an opponent into submission"—especially through lawsuits that were premature or unwinnable. *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 48 (D.C. Cir. 1992). Title VII's fee-award provision thus forces the EEOC to confront "the same potential penalties as private parties who bring vexatious litigation." *Propak*, 746 F.3d at 155 (Wilkinson, J., concurring).

The same goes for CAFRA's fee-award provision. Civil forfeitures are rarely fought because property owners often have little or no "money left after the seizure to fight the battle." H.R. Rep. No. 106-192 at 14 (1999). CAFRA fee awards level the playing field. District courts have thus granted CAFRA fee awards in cases where the government did not obey CAFRA's litigation rules. *See, e.g.*, *United States v. $80,891.25*, No. 4:11-cv-183, 2012 U.S. Dist. LEXIS 6196, at *1–7 (S.D. Ga. Jan. 19, 2012) (granting fees after dismissal of a time-barred civil forfeiture claim). In doing so, these courts have vindicated CAFRA's goal to make property owners "whole after wrongful government seizures." *$28,000*, 802 F.3d at 1107.

These kinds of awards, whether under CAFRA or Title VII, should continue—and this Court's fee-shifting jurisprudence supports that outcome. The Eighth Circuit held otherwise here only because of the wide confusion that currently exists among lower courts on how to reconcile court-ordered dismissals with this Court's definition of "prevailing party." The

Court should now make use of Federal Rule of Civil Procedure 41 to resolve that confusion.

III. This Court should apply Fed. R. Civ. P. 41 to clarify that a court-ordered dismissal can make a defendant (or a forfeiture claimant) into a "prevailing party."

This Court's review of the judgment in this case ultimately turns on one simple question: was Petitioner a "prevailing party?" *See* Pet. App. 23a–24a. Any answer to that question must begin and end with the Court's ruling in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001).

In *Buckhannon*, the Court observed that many federal laws "allow courts to award attorney's fees and costs to the 'prevailing party.'" *Id.* at 600. The Court then established the following meaning for this term: to be a "prevailing party," a litigant must be the beneficiary of a "judicially sanctioned change in the legal relationship of the parties." *Id.* at 605. And no reason exists to believe this definition applies less to defendants than it does to plaintiffs. *Cf. Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994).

Yet, while plaintiffs and defendants are bound by the same definition of "prevailing party," this does not mean they must achieve prevailing-party status in the exact same way. Common sense teaches that plaintiffs and defendants have very different goals. Plaintiffs want to win relief through their suit. This

means that the ways that plaintiffs usually prevail are by "a judgment on the merits or a court-ordered consent decree." *Buckhannon*, 532 U.S. at 600.

Defendants, however, want something different: they want *to avoid* an adverse decision and end the litigation.[11] *See R.T. Nielson Co. v. Cook*, 40 P.3d 1119, 1126 (Utah 2002) ("[I]f [a] defendant . . . avoids adverse judgment, [the] defendant has prevailed."). Now defendants may achieve this through a merits judgment in their favor or through a consent decree. But defendants can also achieve this outcome in a third way: through a court-ordered dismissal.

The question then becomes when does a court-ordered dismissal satisfy the *Buckhannon* test for prevailing-party status? There can be no doubt that *court-ordered* dismissals by definition pass the first part of this test, for all such dismissals are "judicially sanctioned." But are all these dismissals equal in producing the kind of "change" in the parties' legal relationship that *Buckhannon* requires?

Fortunately, Federal Rule of Civil Procedure 41 provides a clear framework for answering this hard

[11] In speaking about "defendants," Amicus includes property owners defending their property against judicial civil forfeiture actions filed by the government. Forfeiture claimants resemble regular civil defendants in several key respects, including the ability to prevail through dismissal. *See* Fed. R. Civ. P., Supp. R. G(8)(b)(i) ("A claimant who establishes standing to contest forfeiture may move to dismiss the action under Rule 12(b).").

question.[12] Rule 41 governs the "dismissal of actions" and separates dismissals into two categories. Rule 41(a) covers "voluntary dismissals," which are dismissals imposed at the plaintiff's request. Rule 41(b) covers "involuntary dismissals," which are dismissals imposed against the plaintiff's will.

Viewing Rule 41 as a whole, however, it is clear this rule requires court ratification of a dismissal in two situations: (1) when the dismissal is involuntary; and (2) when a plaintiff seeks dismissal without the defendant's consent and after the defendant has filed an answer or a motion for summary judgment. The following review of both situations, in turn, reveals their capacity to "change" the legal relationship of the parties. Rule 41 consequently makes it clear that court-ordered dismissals will in many cases confer prevailing-party status on defendants.

A. Petitioner is a prevailing party here because the district court ordered an involuntary dismissal that Rule 41(b) classifies as "on the merits."

Rule 41(b) establishes a default standard for the legal effect of involuntary dismissals—i.e., dismissals imposed by the court against the plaintiff's will. Under this standard, all involuntary dismissals must be treated as "operat[ing] as an adjudication on the

[12] Rule 41 is binding on all federal courts via the operation of the Rules Enabling Act, 28 U.S.C. §§ 2071 *et seq.*

merits" unless the dismissal falls within one of two exceptions: (1) the dismissal "states otherwise"; or (2) the basis for the dismissal is "lack of jurisdiction, improper venue, or failure to join a party."

Thus, where a court involuntarily dismisses a plaintiff's claims and the court's dismissal order does not fall into the above exceptions, Rule 41(b) casts the dismissal order as a ruling "on the merits."[13] This makes sense given that "[t]he 'merits' of a claim are disposed of when it is refused enforcement." *Angel v. Bullington*, 330 U.S. 183, 190 (1947). So, when a dismissal falls under Rule 41(b), the defendant now enjoys "relief on the merits"—and that is a "judicially sanctioned change in the legal relationship of the parties" that makes the defendant into a prevailing party. *Buckhannon*, 532 U.S. at 605.[14]

Applying that reasoning here, Petitioner was entitled to claim prevailing-party status based on the district court's involuntary dismissal of sixty-seven EEOC claims. Rule 41(b) classifies the district court's

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[13] *See Link v. Wabash R.R. Co.*, 370 U.S. 626, 637 n.1 (1962) (Black, J., dissenting) (where Rule 41(b) applies and "the order of dismissal . . . d[oes] not specify that it was without prejudice," then "the dismissal operates as a judgment on the merits").

[14] *See, e.g., Morris v. Kesselring*, 514 F. App'x 233, 236–37 (3d Cir. 2013) ("Because a dismissal pursuant to Rule 41(b) 'operates as an adjudication on the merits,' . . . [the defendants here] are prevailing parties.").

dismissal order as "an adjudication on the merits" because the order does not fall under any of the rule's exceptions to its on-the-merits presumption.

Rule 41(b)'s first exception establishes that an involuntary dismissal is a non-merits decision when the underlying dismissal order says so. The dismissal order here, however, "bar[red] the EEOC from seeking relief" on the sixty-seven claims at issue. Pet. App. 215a. That is a dismissal on the merits since "[t]he 'merits' of a claim are disposed of when it is refused enforcement." *Angel*, 330 U.S. at 190.

Rule 41(b)'s second exception establishes that involuntary dismissals for "lack of jurisdiction, improper venue, or failure to join a party" are non-merits decisions. The dismissal order here, however, rested on the EEOC's failure to meet its Title VII pre-suit duties—a ground held by the Eighth Circuit to be "nonjurisdictional." Pet. App. 22a. And while this conclusion led the Eighth Circuit to deem the dismissal order to be a non-merits decision for purposes of prevailing-party analysis, the Eighth Circuit's earlier affirmance of the same dismissal order still stands. *See* Pet. App. 115a-116a.

Hence, under the plain terms of Rule 41(b), the district court's dismissal order must be deemed an "adjudication on the merits," and the Eighth Circuit erred in holding otherwise (and in denying Petitioner

prevailing-party status as a result).[15] *See* Pet. App. 23a-24a. That makes this case very simple for the Court to resolve. Moreover, while the parties did not point out this solution in their respective certiorari-stage briefing, the Court nevertheless "retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991).

Application of Rule 41(b) to this case would also give this Court a chance to prevent confusion among the lower courts on two related points of law:

Point #1: Since Rule 41(b) lets district courts remove involuntary dismissal orders from the rule's on-the-merits presumption by "stat[ing] otherwise," this raises the question of whether that should have happened here. Put another way, should the district court have classified its dismissal as a non-merits ruling because it was based on plaintiff's failure to comply with statutory preconditions to filing suit? The answer is "no," because these preconditions bear as much on the sufficiency of a plaintiff's claims as the elements of these claims themselves.

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[15] *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 66 (1991) (Kennedy, J., dissenting) ("[T]he Federal Rules of Civil Procedure are as binding as any statute . . . and federal courts have no more discretion to disregard the Rules' mandate than they do to disregard constitutional or statutory provisions." (internal alterations and quotation marks omitted)).

This answer ultimately rests on the legal status of non-jurisdictional preconditions to filing suit. In short, these preconditions are affirmative defenses that generally fall into one of two categories. First, there are filing deadlines that operate like statutes of limitation. *See* Fed. R. Civ. P. 8(b). Second, there are procedural duties, like CAFRA's duty to give notice or Title VII's duty to conciliate. Courts have seen fit to describe these duties as "administrative remedies" that plaintiffs must exhaust before filing suit.[16] *See Jones v. Bock*, 127 S. Ct. 910, 919 (2010) ("[T]he usual practice under the Federal Rules is to regard exhaustion as an affirmative defense.").

This means that Plaintiffs do not have to allege in their complaints that all preconditions to filing suit have been met.[17] Defendants can also waive these preconditions.[18] But these preconditions, like any other affirmative defense, also go to the merits of a claim because the Federal Rules only allow for the pleading and enforcement of claims "*showing that the pleader is entitled to relief*." Fed. R. Civ. P. 8(a)(2). It is for this reason that defendants may demand the

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[16] *EEOC v. Dots, LLC*, No. 2:10-cv-319, 2010 U.S. Dist. LEXIS 129064, at *9 (N.D. Ind. Dec. 6, 2010).

[17] *See, e.g. Hollander v. Brown*, 457 F.3d 688, 691 n.1 (7th Cir. 2006) ("[A] complaint need not anticipate or overcome affirmative defenses . . . .").

[18] *See, e.g.*, *Janowiak v. Corp. City of South Bend*, 576 F. Supp. 1461, 1465 (N.D. Ind. 1983) ("Affirmative defenses can be waived or equitably tolled.").

dismissal of a claim not only because the plaintiff has failed to plead a claim element (e.g., actual loss) but also because the claim is not one "*upon which relief can be granted*." Fed. R. Civ. P. 12(b)(6).[19]

To put this in concrete terms, a plaintiff may plausibly allege every element of a Title VII claim (e.g., membership in a protected group, etc.) that she had 50 years ago. The defendant may then assert that the claim is indisputably time-barred. Dismissal of the plaintiff's Title VII claim on the merits is then proper because no court can enforce a time-barred claim.[20] The district court here thus correctly determined that its "dismissal of claims due to the EEOC's failure to satisfy its pre-suit obligations [was] a dismissal on the merits." Pet. App. 59a.[21]

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[19] *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981) ("[D]ismissal for failure to state a claim under . . . [Rule] 12(b)(6) is a 'judgment on the merits.' ").

[20] *See Jones*, 127 S. Ct. at 920–21 ("A complaint is subject to dismissal for failure to state a claim if the allegations, taken as true, show the plaintiff is not entitled to relief. If the allegations, for example, show that relief is barred by the applicable statute of limitations, the complaint is subject to dismissal for failure to state a claim . . . .").

[21] Under the Rule 41 analysis given here, prevailing-party status only attaches to *complete* dismissals. Indeed, a dismissal must pass into judgment before a fee motion may be filed. *See* Fed. R. Civ. P. 54(d). Prevailing-party status therefore would not attach to dismissals that grant plaintiffs leave to amend. *Cf. Hanrahan v. Hampton*, 446 U.S. 754, 759 (1980) (mere appellate reversal of a directed verdict could not confer prevailing-party

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Point #2: In applying Rule 41 to this case, the Court should distinguish *Costello v. United States*, 365 U.S. 265, 284–88 (1961). In *Costello*, this Court held that Rule 41(b)'s exemption of jurisdictional dismissals from its scope covered dismissals "based on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim." *Id.* at 285.

At first blush, this statement might be taken to mean that Rule 41(b)'s exemption of jurisdictional dismissals covers all dismissals based on statutory preconditions to filing suit, including Title VII's pre-suit duties. But the facts of *Costello* clarify that this statement only refers to preconditions that are *truly jurisdictional* in nature—preconditions that divest a court's power to hear a case as opposed to merely impairing a plaintiff's entitlement to relief.

Indeed, in *Costello*, the Court attributed power-stripping impact to a federal law that required the government to file an affidavit as part of initiating a denaturalization proceeding.[22] *See id.* at 287. As the Court observed, "failure of the Government to file the

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status upon plaintiffs: it was still an open question as to whether plaintiffs would win at trial).

[22] It seems unlikely that the Court would rule the same today. "In recent years, [the Court] ha[s] repeatedly held that procedural rules, including time bars, cabin a court's power only if Congress has clearly stated as much." *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015) (alterations, brackets, and quotation marks in original omitted).

affidavit with the complaint requires the dismissal of the proceeding." *Id.* The same cannot be said of the Title VII pre-suit duties at issue here.

To the contrary, as this Court has recently held, when the EEOC files suit before meeting its Title VII duty to conciliate, the EEOC's suit should be stayed to allow for conciliation. *See Mach Mining*, 135 S. Ct. at 1653. If Title VII's preconditions to filing suit were jurisdictional, however, then case dismissal would be required. *See* Fed. R. Civ. P. 12(h)(3). Rule 41(b) thus continues to apply with full force to the dismissal at issue here, and the Court should clarify that *Costello* does not contradict that reality.

B. Defendants can also prevail when a court orders voluntary dismissal.

While this case hinges on the Eighth Circuit's refusal to find that Petitioner was a prevailing party under the district court's sixty-seven-claim dismissal order, there is one more dismissal at play that merits the Court's attention. The Eighth Circuit held in a footnote that Petitioner was not a prevailing party "as to Jones's claim, which the EEOC voluntarily dismissed"—subject to the legal requirements of Rule 41(a)(2)[23]—because of the agency's "failure to satisfy its presuit obligations." Pet. App. 24a n.4.

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[23] The district court's fee opinion indicates that the EEOC voluntarily dismissed Jones's claim by filing a "Notice of Withdrawal of Claim for Tillie Jones." *See* Pet. App. 59a. The EEOC's

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This footnote is troubling because it exposes the problem with any attempt to resolve this case on the narrow ground that Petitioner only prevailed on the sixty-seven claims that were involuntarily dismissed by the district court. In short, such a holding would send the following message to the government: litigate inherently defective cases to the very brink of defeat, and then voluntarily dismiss those cases whenever defeat—and a fee award—is imminent.

Such brinksmanship can be prevented. The Court should clarify that defendants may also prevail when a court orders a voluntary dismissal without prejudice under Rule 41(a)(2).[24] The need for such clarification is pressing given the persistent contrary view held in error by many lower courts. *See, e.g.*, *United States v. Ito*, 472 F. App'x 841, 842 (9th Cir. 2012) ("[D]ismissal without prejudice precludes prevailing party status."); *Sequa Corp. v. Cooper*, 245 F.3d 1036, 1037–38 (8th Cir. 2001) ("[A]

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notice could not effect a dismissal of Jones's claim, however, unless the notice followed the requirements of Rule 41(a)(2). That rule dictates that once an answer has been filed, any plaintiff-requested voluntary dismissal is allowed "only by court order, on terms that the court considers proper."

[24] The Court's grant of certiorari here fully empowers the Court to review all parts of the decision and judgment below. *See Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 567–68 (1931) ("The entire record . . . is before this court with power to review the action of the court of appeals and direct such disposition of the case as that court might have made of it upon the appeal from the district court.").

voluntary dismissal without prejudice means that neither party can be said to have prevailed.").

A recent example of this error may be seen in *United States v. $32,820.56*, No. C13-4102, 2015 U.S. Dist. LEXIS 67528 (N.D. Iowa May 22, 2015). In this forfeiture case, the court empathized with the target of the forfeiture, Carole Hinders, "a 67 year-old woman on the doorstep of retirement."[25] *See id.* at *10–11. The court noted that "[a]fter seizing [Hinders'] money and causing [her] to incur substantial expenses over a long period of time to fight that seizure, the Government elected to drop the case, effectively saying 'never mind.' The return of the seized funds hardly makes [Hinders'] whole." *Id.* at 11.

Nevertheless, the same court ruled that it could not entertain Hinders' request for a CAFRA fee award because the Rule 41(a)(2) voluntary dismissal that the court granted to the government—over Hinders' objection—was "without prejudice." *Id.* As the court explained, "dismissal without prejudice lacks the required judicial imprimatur to qualify as a material alteration of the parties' legal relationship." *Id.* at *10–11. The most the court felt it could do was order the government to pay Hinders' costs. *See id.* at *17–20. Troubled by this result, the court included in its analysis the following plea: "Perhaps Congress or a higher court will find it appropriate to allow relief

[25] Appellant's Brief at 1, *United States v. $32,820.56*, Nos. 15-2622, 15-2624, 2015 WL 5544838 (8th Cir. Sept. 17, 2015).

under these circumstances. This court, however, lacks the authority to do so." *Id.* at *11.

As it turns out, however, the court in *$32,820.56* did have the authority under *Buckhannon* to find that Ms. Hinders was a prevailing party. The same goes for the district court here in finding Petitioner prevailed on Jones's claim. *See* Pet. App. 59a-60a. What has prevented courts from recognizing this is the persistent myth that "dismissal with prejudice" is the only way a court-ordered voluntary dismissal can alter the parties' legal relationship. Not so.

Indeed, one of the most well-established ways that a voluntary dismissal under Rule 41(a)(2) can change the parties' legal relationship—even when the dismissal is "without prejudice"—is by forcing a plaintiff to pay the defendant's costs. To understand the history supporting this observation, however, it is necessary to consider how Rule 41(a) works.

From its inception, Rule 41(a)(1) has allowed a plaintiff to "dismiss an action without a court order" by filing either: (1) "a notice of dismissal" before the defendant has served "an answer or a motion for summary judgment"; or (2) "a stipulation of dismissal signed by all the parties who have appeared." Any Rule 41(a)(1) dismissal will then be treated as being "without prejudice" unless the notice or stipulation of dismissal says otherwise. This Court has thus noted that: "Rule 41(a)(1) preserves th[e] unqualified right of the plaintiff to a dismissal without prejudice prior

to the filing of [a] defendant's answer."[26] *Cone v. West Va. Pulp & Paper Co*., 330 U.S. 212, 217 (1947).

Now, once a defendant has served an answer, the only way that plaintiffs can dismiss their case—absent a stipulation with the defendant—is through Rule 41(a)(2). This rule provides that "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." The rule further presumes that a 41(a)(2) dismissal is "without prejudice" unless the dismissal order "states otherwise." Taken together, these provisions are "framed so as to prevent the voluntary dismissal of an action on the mere whim of the plaintiff after answer is served." *Welter v. E. I. Du Pont de Nemours & Co.*, 1 F.R.D. 551, 553 (D. Minn. 1941).

In the wake of Rule 41's adoption, many courts recognized the vital importance of this goal and thus debated how to give full weight to Rule 41(a)(2)'s requirement that voluntary dismissals be granted

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[26] This is ultimately why a Rule 41(a)(1) dismissal generally cannot trigger prevailing-party status: the court has no role in enabling this form of dismissal as the notice of dismissal is self-executing. This is arguably also true of 41(a)(1) dismissals when plaintiffs—or the parties by stipulation—agree to a dismissal "with prejudice," as such dismissals are just private agreements between the parties with no judicial imprimatur. *See Samsung Elecs. Co., Ltd. v. Rambus Inc.*, 440 F. Supp. 2d 495, 509 (E.D. Va. 2006). *But see BWP Media USA, Inc. v. Gossip Cop Media, LLC*, No. 13 Civ. 7574, 2015 U.S. Dist. LEXIS 8804, at *11–12 (S.D.N.Y. Jan. 26, 2015) (holding that a Rule 41(a)(1) dismissal with prejudice can give rise to prevailing-party status).

only "upon such terms and conditions as the court deems proper."[27] A leading authority soon emerged: *McCann v. Bentley Stores Corp.*, 34 F. Supp. 234, 234 (W.D. Mo. 1940).[28] In *McCann*, Judge Otis noted that before Rule 41, federal courts had faced the following reality: a case would go to trial, the defendant would present his case "at great expense," and then "the plaintiff would dismiss, just at the moment the court was about to direct a verdict for defendant." *Id.*

What made this legal maneuvering particularly "outrageous," Judge Otis explained, was that the plaintiff's "dismissal was without prejudice," which meant "the defendant ha[d] been put to expense literally for nothing." *Id.* Rule 41(a)(2), however, "put an end to that evil" by dictating that such dismissals could now be granted by the court only on "terms and conditions as the court deem[ed] proper." *Id.* at 234–35. This led Judge Otis to conclude that "no 'terms and conditions' are conceivable except such as are

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[27] *McCann*, 34 F. Supp. at 234 (quoting the language of Rule 41(a)(2) in 1940). The present text of Rule 41 states the same requirement, allowing voluntary dismissal under 41(a)(2) "only by court order, on terms that the court considers proper."

[28] *See, e.g.*, *Hannah v. Lowden*, 3 F.R.D. 52, 53 (D. Okla. 1943) (following *McCann*); *Gold v. Geo. T. Moore Sons*, 3 F.R.D. 201, 202 (S.D.N.Y. 1943) (same); *Mott v. Conn. Gen. Life Ins. Co.*, 2 F.R.D. 523, 526 (N.D. Iowa 1942) (same); *Taylor v. Swift & Co.*, 2 F.R.D. 424, 424 (S.D. Fla. 1942) (same); *Hamilton Watch Co. v. Hamilton Chain Co.*, 43 F. Supp. 85, 93 (D.R.I. 1942) (same); *Welter v. E. I. Du Pont de Nemours & Co.*, 1 F.R.D. 551, 554 (D. Minn. 1941) (same).

calculated to compensate the defendant for the expense to which he has been put." *Id.*

To this end, many other federal courts have ruled that a necessary term-and-condition of any Rule 41(a)(2) dismissal is that the plaintiff be required to pay the defendant's costs.[29] As the Eighth Circuit has explained, "[t]he rule has long prevailed in both law and equity that a plaintiff may dismiss his case without prejudice only by payment of the costs."[30] *Home Owners' Loan Corp. v. Huffman*, 134 F.2d 314, 317, 319 (1943) (district court "abused its discretion" in permitting voluntary dismissal without prejudice "unless conditioned on payment of costs").

Federal courts have thus long understood Rule 41(a)(2)'s terms-and-conditions requirement to be a "protection of the rights of the defendant." *Id.* at 318. This has led many courts to order plaintiffs to pay not only costs but also fees. *See Colombrito v. Kelly*, 764 F.2d 122, 133 (2d Cir. 1985) ("Fee awards are often made when a plaintiff dismisses a suit without prejudice under Rule 41(a)(2)."). These orders reveal in

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[29] *See, e.g.*, *De Filippis v. Chrysler Sales Corp*., 116 F.2d 375, 377 (2d Cir. 1940) (affirming cost award to defendant under Rule 41(a)(2)); *Lawson v. Moore*, 29 F. Supp. 175, 176 (W.D. Va. 1939) ("Plaintiff's motion to dismiss without prejudice is . . . granted, but the plaintiff must pay the costs in this action."); *see also supra* note 28 and the cases cited therein.

[30] *See also Ex parte Skinner & Eddy Corp.*, 265 U.S. 86, 93 (1924) (finding it "clear from an examination of the authorities, English and American" that plaintiffs were generally entitled to "dismiss[al] . . . without prejudice, on payment of costs").

turn that "voluntary dismissal under Rule 41(a)(2) bears considerable similarity to a consent decree." *Samsung Elecs. Co., Ltd. v. Rambus Inc.*, 440 F. Supp. 2d 495, 509 (E.D. Va. 2006). This is because "[u]nlike a stipulated dismissal, to which the parties have an absolute right, a Rule 41(a)(2) dismissal is committed to the discretion of the district court. In exercising that discretion, district courts can impose terms and conditions on the plaintiff in order to obviate any prejudice to the defendant."[31] *Id.*

Hence, when a court exercises its discretion under Rule 41(a)(2) and conditions the dismissal of an action without prejudice on payment of costs, the court renders the defendant a prevailing party. The court does this by "forcing . . . [the plaintiff] to pay an amount of money" to the defendant that the plaintiff "otherwise would not pay." *Farrar v. Hobby*, 506 U.S. 103, 113 (1992). And that is all the prevailing-party test demands. *See id.* at 114 (prevailing-party test does not turn on "magnitude of relief").[32]

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[31] Besides payment of costs and fees, other possible terms-and-conditions that a court may decide to impose on a voluntary dismissal without prejudice are: "restricting the forum in which the plaintiff may refile the claim"; "requir[ing] the plaintiff to (or not to) use existing discovery in any refiled action"; and "requir[ing] the plaintiff to produce additional discovery." *Samsung Elecs.*, 440 F. Supp. 2d at 509.

[32] This possibility has occurred to at least one other court. *See United States v. Cathcart*, 291 F. App'x 360, 364 (2d Cir. 2008) (speculating whether an "award of costs or fees as part of

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The Court should therefore discourage the myth that voluntary dismissals must be "with prejudice" in order to trigger prevailing-party status. By doing so, the Court will help ensure that voluntary dismissals are not used as get-out-of-court-free cards, while also enabling potentially meritorious claims to be kept alive.[33] The Court will also make fee-shifting review more objective by eliminating the need for courts to speculate about a plaintiff's true motives in seeking a voluntary dismissal. *See, e.g.*, *Dean v. Riser*, 240 F.3d 505, 511 (5th Cir. 2001). Instead, courts can consult the terms and conditions of their Rule 41(a)(2) orders, which should already reflect both the equities and the legal effect of the dismissal at hand.

C. Finding prevailing-party status just opens the door to a fee award.

Rule 41 clarifies that defendants are eligible to be treated as prevailing parties even if they do not possess a merits judgment or a court-ordered consent decree—a court-ordered dismissal will also do. At the same time, attorney's fees are almost never awarded to prevailing parties automatically or as a matter of

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the 'terms' of a Rule 41(a)(2) dismissal" gives rise to prevailing-party status "within the meaning of *Buckhannon*").

[33] This is why the default status of dismissals under Rule 41(a)(2) is "without prejudice." The rule presumes that most 41(a)(2) dismissals will involve cases where "the court believes that although there is a technical failure of proof there is nevertheless a meritorious claim." *Cone*, 330 U.S. at 217 n.5.

course. Prevailing-party status is rather "step one" in a "three-step framework" by which any litigant may be awarded fees. *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2154 (2010).

Step two requires a prevailing party to show they meet all the other conditions that an applicable fee-shifting law places on recovery. *See id.* Then, *step three* requires the court to calculate a reasonable fee award, which entails more limits on recovery. *See id.; see also Perdue*, 130 S. Ct. at 1669. What all of this ultimately means is that while Rule 41 allows more defendants to meet step one than the Eighth Circuit recognized here, step two will nonetheless remain a significant obstacle for many defendants.[34]

For instance, "a prevailing defendant in a Title VII case" cannot receive a Title VII fee award unless that defendant can also show "the plaintiff's action was frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). And many fee-shifting laws further let courts deny fee awards as a matter of discretion even when all key statutory factors are met. *See, e.g.*, 42 U.S.C. § 1988(b) ("[T]he court, *in its discretion*, may allow . . . a reasonable attorney's fee . . . ." (emphasis added)); 42 U.S.C. § 2000e-5(k) (same).

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[34] CAFRA's fee-award provision is an exception. It *mandates* fee awards to those property owners who "substantially prevail" against the government and contains no other limitation. *See* 28 U.S.C. § 2465(b)(1)(A) ("[T]he United States *shall* be liable for . . . reasonable attorney fees . . . ." (emphasis added)).

As such, there is no policy concern that precludes application of Rule 41 in the manner prescribed above. Nor does the American Rule pose any bar—litigants must still point to a statute or contract that allows them a fee award before they can seek one. The preceding analysis just enforces Rule 41's clear mandate on how dismissals work, in accord with this Court's routine observation that "courts should generally not depart from . . . usual practice under the Federal Rules." *Jones*, 127 S. Ct. at 919.

CONCLUSION

Rule 1 of the Federal Rules of Civil Procedure was recently amended by "a mere eight words" to make a simple point: that judges and lawyers must "work cooperatively in controlling the expense and time demands of litigation."[35] To this end, the new Rule 1 establishes that the Federal Rules of Civil Procedure "should be construed, administered, and employed *by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding." (emphasis added)

The Court now has an opportunity to put that principle to work. Rule 41 clarifies when a defendant is a "prevailing party" in the wake of a court-ordered dismissal. The Court should use this framework to

[35] Chief Justice Roberts, *supra* note 4, at 6.

achieve a "just, speedy, and inexpensive" resolution of this case. By doing so, the Court will ultimately ensure that when the government sues its citizens, the government has every incentive to "search out cooperative solutions, chart a cost-effective course of litigation, and assume shared responsibility with opposing counsel to achieve just results."[36]

Respectfully submitted,

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[36] *Id.* at 11.