No. 05-40

# In the Supreme Court of the United States

MARTHA MCSALLY, PETITIONER

*v.*

DONALD H. RUMSFELD, SECRETARY OF DEFENSE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## QUESTION PRESENTED

Whether a party that has failed to secure a judgment on the merits, or any form of judicial relief, but has nonetheless benefitted from legislation that mooted the party's lawsuit, is a "prevailing party" eligible for recovery of attorney's fees under 42 U.S.C. 1988(b).

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### OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A2) is unreported. The memorandum orders of the district court (Pet. App. A3-A4, A5-A6) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on April 8, 2005. The petition for a writ of certiorari was filed on July 1, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Since as early as 1995, service members assigned to the 363rd Air Expeditionary Wing (363 AEW) in Saudi Arabia who wished to leave their duty station were subject to certain force-protection measures. See Pet. 6; Pet. App. A12. Among other restrictions, the

regulations required female service members to wear an abaya, or head scarf. Petitioner, a female service member, filed a lawsuit challenging the force-protection restrictions on women, asserting that the regulations violated the First and Fifth Amendments to the United States Constitution and the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq*. See Pet. 13.

In early 2002, the Commander of the 363 AEW modified the travel regulations for service members under his command. In particular, the regulations no longer required women to wear an abaya, although the regulations encouraged them to do so. Pet. 13; Pet. App. A5-A6, A22. Contending that nothing had changed in practice, petitioner continued with her lawsuit, which also included a request for attorney's fees and costs. See Pet. App. 16.

Later that year, Congress enacted the Bob Stump National Defense Authorization Act for Fiscal Year 2003 (the Act), Pub. L. No. 107-314, 116 Stat. 2458, and the President signed that legislation. See Pet. 16. The Act, *inter alia*, prohibited the military from requiring or formally urging servicewomen to wear the abaya. § 563, 116 Stat. 2556; Pet. 16. Petitioner thereafter conceded that the Act "had resolved her claims" and that she therefore "was prepared to dismiss all claims regarding the Abaya Policy." Pet. 16. On April 20, 2004, the parties filed a stipulation of dismissal of the action with prejudice, "except as to attorney fees and costs." Pet. App. A7.

2. Petitioner thereafter filed a motion for attorney's fees and costs with respect to her abaya claim. See Pet. 16. The district court denied the motion. The court held that petitioner was "unquestionably the 'catalyst'

for [respondent's] adjustment of the regulations and then for Congressional action," but that, under *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), petitioner needed to show that she had "obtain[ed] a judicially ordered 'material alteration of the legal relationship of the parties' before [she could] be considered a prevailing party." Pet. App. A4 (citation omitted). The court concluded that petitioner "ha[d] not shown a way to distinguish or circumvent the rule of *Buckhannon*" and therefore denied her request for fees. *Ibid.*

The court of appeals summarily affirmed. Pet. App. A1-A2. That court, like the district court, concluded that *Buckhannon* controlled the matter. *Ibid.* The court explained that "the term 'prevailing party' does not authorize an award of attorneys' fees when the plaintiff achieves the desired result through legislative—not judicial—action." *Id.* at A2.

**ARGUMENT**

The court of appeals correctly concluded that *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), controls this case. The court of appeals' decision does not conflict with any decision of this Court or of another court of appeals. Further review therefore is not warranted.

1. This Court's decision in *Buckhannon* conclusively establishes that petitioner is not a "prevailing party" within the meaning of 42 U.S.C. 1988(b). In *Buckhannon*, an assisted living facility challenged a West Virginia "self-preservation" regulation, alleging that it violated the Fair Housing Amendments Act of 1988

(FHAA), 42 U.S.C. 3601 *et seq*., and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq*. See 532 U.S. at 600-601. Before the district court could rule on the merits, the state legislature amended the state law, rescinding the provision in dispute. *Id*. at 601. The district court dismissed the case as moot, and the facility sought attorney's fees under the FHAA and ADA. *Ibid*. The facility relied on the "'catalyst theory,' which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Ibid*. This Court rejected that theory and ruled that "a 'prevailing party' is one who has been awarded some relief *by the court*." *Id*. at 603 (emphasis added). The Court held that, to achieve "prevailing party" status, a plaintiff must obtain either an "enforceable judgment[] on the merits" or a "court-ordered consent decree[]." *Id*. at 604.

Under *Buckhannon*, petitioner cannot be considered a "prevailing party" in this case. Petitioner essentially concedes that she seeks recovery based on the "catalyst theory." She states: "[Petitioner's] lawsuit resulted in landmark legislation in which Congress forced an unwilling executive department to end nearly a decade of illegal activity. * * * [Thus,] her litigation caused a legally enforceable involuntary change in the [Defense Department] policy and resulted in a material change of the position of both [petitioner] and the [Defense Department]." Pet. 19. The court of appeals properly held that the legislative relief obtained by petitioner was insufficient to make her a "prevailing party" under *Buckhannon*. See Pet. App. A2 (citing *Buckhannon*, 532 U.S.

at 601, 604-606). Petitioner does not contend that she received "court-ordered" relief of any kind.[1]

2. Petitioner nonetheless argues that *Buckhannon* is "factually distinguishable" from her case and therefore not controlling. See Pet. 19. According to petitioner, *Buckhannon* overruled the "catalyst theory" by holding that "[a] defendant's *voluntary* change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." Pet. 20 (emphasis added) (quoting *Buckhannon*, 532 U.S. at 605). "In so holding," petitioner contends, "this Court specifically determined that a *voluntary change* did not rise to the standard of conferring 'prevailing party' status on a plaintiff, but the decision is conspicuously silent regarding *involuntary* changes in the behavior of the defendant." *Ibid.* In this case, petitioner argues, "[petitioner's] litigation was resolved when a third party, the U.S. Congress, prohibited the [Defense Department] from further denigrating female service members by way of its Abaya Policy. The [Defense Department] did not voluntarily discontinue use of the policy as would be necessary for an argument based on the 'catalyst theory.'" *Id.* at 21. Those assertions are wrong.

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[1] Petitioner voluntarily dismissed all of her claims before the district court could rule on their merits. Thus, it cannot be known whether petitioner ultimately would have prevailed on those matters had she litigated her case to judgment. See *Buckhannon*, 532 U.S. at 606 ("We cannot agree that the term 'prevailing party' authorizes federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the 'sought-after destination' without obtaining any judicial relief.") (quoting 532 U.S. at 634 (Ginsburg, J., dissenting)).

*Buckhannon*, like this case, involved legislative action. The plaintiff in that case sued a state agency, and the agency discontinued its challenged practice when the state legislature changed the governing law. This Court nevertheless concluded that the challenged practice was mooted by the defendant's voluntary conduct for purposes of the "catalyst theory." See 532 U.S. at 600-601; see also *id*. at 605. This case is indistinguishable from *Buckhannon.* Congress's elimination of the abaya policy mooted petitioner's claims in the same way that the state legislature's elimination of the "self-preservation" requirement in *Buckhannon* mooted the plaintiff's claims in that case.

In any event, even if there were some difference between the operation of the catalyst theory in this case and in *Buckhannon*, the fact remains that Congress's action prohibiting the Defense Department from enforcing the abaya policy "lacks the necessary judicial *imprimatur* on the change." See 532 U.S. at 605. Although Congress ultimately enacted a law that provided the result that petitioner had sought in her lawsuit, petitioner did not secure an "enforceable judgment[] on the merits" or a "court-ordered consent decree[]." *Id.* at 604. She accordingly was not a "prevailing party" in her lawsuit. 42 U.S.C. 1988(b).

3. Petitioner contends that the federal courts are "divided over the appropriate interpretation" of *Buckhannon* and that "[r]eview by this Court is required to resolve the uncertainty created by these conflicting decisions." Pet. 6. Petitioner also contends that the court of appeals has misconstrued *Buckhannon* and that the opinion in this case is at odds with decisions purportedly recognizing that "other possibilities beyond a final judgment or consent decree could satisfy the prevailing

party standard." Pet. 26. Those contentions are without merit.

Petitioner's claim of a conflict relies on decisions (Pet. 5-6, 26) that, unlike this case, almost uniformly involve some sort of judicial relief—either a judgment on the merits or a judicially enforceable settlement agreement that is the functional equivalent of a consent decree.[2] Petitioner identifies only two cases that fall outside of those categories. See *Tyler* v. *O'Neill*, 112 Fed. Appx. 158 (3d Cir. 2004); *Barrios* v. *California Interscholastic Fed'n*, 277 F.3d 1128 (9th Cir.), cert. denied, 537 U.S. 820 (2002).

The Third Circuit's unpublished decision in *Tyler* states in passing that a party can be said to prevail "to the extent extrajudicial relief renders claims moot." 112

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[2] See *Palmetto Props., Inc.* v. *County of DuPage*, 375 F.3d 542, 549-550 (7th Cir. 2004) (plaintiff who secured a partial summary judgment striking down a portion of a county adult-entertainment zoning ordinance was a "prevailing party" under *Buckhannon* even though the district court abstained from entering a final order closing the case until county had an opportunity to repeal the ordinance and moot the case), cert. denied, 125 S. Ct. 965 (2005); *Smalbein* v. *City of Daytona Beach*, 353 F.3d 901, 905-907 (11th Cir. 2003) (holding that "final settlement between the parties [that] was incorporated by reference into the order of dismissal *and* [over which] the court retained jurisdiction to enforce [its] terms" was the "functional equivalent of a consent decree"); *Roberson* v. *Giuliani*, 346 F.3d 75, 82 (2d Cir. 2003) ("the district court's retention of jurisdiction [to enforce the settlement agreement] in this case is not significantly different from a consent decree and entails a level of judicial sanction sufficient to support an award of attorney's fees"); *Truesdell* v. *Philadelphia Hous. Auth.*, 290 F.3d 159, 165 (3d Cir. 2002) (noting that, "under *Buckhannon*, attorney's fees may be awarded based on a settlement when it is enforced through a consent decree" and concluding that the district court's order incorporating settlement and giving plaintiff "the right to request judicial enforcement of the settlement against [defendant]," qualified as such a decree).

Fed. Appx. at 161. Because judgment had been entered in favor of the parties who were deemed to have prevailed, the court's unexplained statement was irrelevant to the outcome of the case. In any event, the Third Circuit's unpublished decision is not binding even within that circuit. See 3d Cir. R. 28.3; 3d Cir. App. I, IOP 5.3. The decision accordingly cannot provide the basis for a concrete conflict among the courts of appeals.

The Ninth Circuit's decision in *Barrios* held that a private settlement was sufficient to make the plaintiff a "prevailing party" because the plaintiff "[could] enforce the terms of the settlement agreement against the [defendant]." 277 F.3d at 1134. The Ninth Circuit acknowledged, however, that its conclusion was inconsistent with *Buckhannon*, which states that a plaintiff qualifies as a prevailing party only if the plaintiff receives a favorable judgment on the merits or enters into a court-supervised consent decree. See *id.* at 1134 n.5 (citing *Buckhannon*, 532 U.S. at 604 n.7). The Ninth Circuit characterized *Buckhannon*'s statement as non-binding "dictum" and followed pre-*Buckhannon* Ninth Circuit precedent. *Ibid.*

Although the Ninth Circuit improperly decided *Barrios*, it provides no basis for the Court to review this case. *Barrios* addressed only the status of a "legally enforceable" settlement agreement. This case does not involve a settlement agreement. The Ninth Circuit's decision in *Barrios* did not suggest that a plaintiff whose suit became moot as a consequence of legislation—the situation presented here—would be entitled to fees. To the contrary, the Ninth Circuit acknowledged that *Buckhannon* rejected the catalyst theory, which is the only basis for petitioner's fee request in this case. See

277 F.3d at 1134 n.5 (citing *Bennett* v. *Yoshina*, 259 F.3d 1097, 1101 (9th Cir. 2001)).

4. Petitioner also claims that the legislative history of 42 U.S.C. 1988(b) supports a broad reading of the term "prevailing party" and provides a basis for distinguishing *Buckhannon*. See Pet. 6, 22-24. The Court's *Buckhannon* decision forecloses that argument. The Court indicated in *Buckhannon* that its "prevailing party" analysis would apply to a broad spectrum of statutes, explicitly including the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988. 532 U.S. at 602-603.

The Court was aware of the legislative history of Section 1988(b), but expressed "doubt that legislative history could overcome what we think is the rather clear meaning of 'prevailing party'—the term actually used in the statute." 532 U.S. at 607. It concluded that the legislative history at issue was "at best ambiguous" as to whether Congress intended to allow the award of attorney's fees to parties who did not actually obtain judicial relief. *Id.* at 607-608. "Particularly in view of the 'American Rule' that attorney's fees will not be awarded absent 'explicit statutory authority,' such legislative history is clearly insufficient to alter the accepted meaning of the statutory term." *Id.* at 608 (quoting *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 819 (1994)).[3]

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[3] See *Hanrahan* v. *Hampton*, 446 U.S. 754, at 758 (1980) ("[O]nly when a party has prevailed on the merits of at least some of his claims * * * has there been a determination of the 'substantial rights of the parties,' which Congress determined was a necessary foundation for departing from the usual rule in this country that each party is to bear the expense of his own attorney.") (quoting H.R. Rep. No. 1558, 94th Cong., 2d Sess. 8 (1967)).

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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