No. 02-553

In the Supreme Court of the United States

BRICKWOOD CONTRACTORS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
MICHAEL JAY SINGER
MICHAEL E. ROBINSON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

This Court ruled in *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598, 600 (2001), that the term "prevailing party," which is used in numerous federal statutes allowing courts to award attorney's fees and costs, does not include "a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nevertheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." The questions presented are:

1. Whether the *Buckhannon* ruling applies to the determination of "prevailing party" status for purposes of awarding attorney's fees and costs under the Equal Access to Justice Act, 28 U.S.C. 2412.

2. Whether the *Buckhannon* ruling applies only to voluntary changes of conduct resulting from the intervening act of a legislature, as was the case in *Buckhannon*, and not to a voluntary change in conduct initiated by a government agency, as occurred in this case.

3. Whether petitioner meets the definition of a "prevailing party" notwithstanding the *Buckhannon* ruling.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

No. 02-553

BRICKWOOD CONTRACTORS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 288 F.3d 1371. The order of the Court of Federal Claims granting attorney's fees and expenses (Pet. App. 41-74), is reported at 49 Fed. Cl. 148, and the order denying reconsideration (Pet. App. 17-39) is reported at 49 Fed. Cl. 738.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 2002. The petition for writ of certiorari was filed on August 1, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner sought recovery of its attorney's fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412, on the theory that its initiation of a lawsuit challenging the Department of the Navy's amendment of a bid solicitation caused the Navy to withdraw the solicitation. The trial court awarded petitioner $10,939 in fees and expenses. The court of appeals reversed that award, holding that, under this Court's decision in *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598, 600 (2001), petitioner was not a "prevailing party" within the meaning of the EAJA. See Pet. App. 1.

1. The Department of the Navy issued an invitation for bids (IFB) to repair elevated water storage tanks at the Naval Air Station in Patuxent River, Maryland. The Navy subsequently issued amendments to the solicitation adding PCB contamination testing to the base requirements and adding three options related to removing the contamination from the water tanks. The Navy received five bids. Based on the total price (base bid plus options), the Navy identified petitioner as the apparent low bidder. Pet. App. 2, 18. The Navy later conducted its own test for PCB contamination to determine whether the options would need to be exercised. It concluded that there was no evidence of PCB contamination and announced that the bids on the options would be excluded from the final price evaluation because they no longer were needed. Had the options been evaluated along with the base bids, petitioner would have had the low bid. Without the options, petitioner would have been displaced in the evaluation

by two other bidders who had lower base bids. *Id.* at 2, 18-19.

In light of the results of its own testing, the Navy issued an amendment to the solicitation that attempted to convert the solicitation from an IFB to a request for proposals (RFP) and eliminated the requirements regarding PCB testing. Following the conversion to an RFP, the Navy intended to negotiate with the bidders for bids that did not include the cost of the unnecessary PCB testing. Pet. App. 2, 19. In response, petitioner filed suit in the Court of Federal Claims seeking an injunction preventing the Navy from converting the IFB to an RFP and directing the Navy to proceed with the award of the contract to petitioner. The court held a hearing on petitioner's request for a temporary restraining order (TRO). *Ibid.* The court indicated that it was inclined to grant the TRO "if I get nothing further." *Id.* at 83. The Navy then issued an amendment cancelling the solicitation. As a consequence, the Navy filed a motion to dismiss the action. Because the Navy cancelled the solicitation, instead of converting from an IFB to an RFP, the court dismissed petitioner's suit on July 22, 1999, "without reaching the merits of the case." *Id.* at 2, 44. Petitioner eventually submitted another bid and received a contract for the work. *Id.* at 45.

2. Petitioner filed an EAJA application seeking attorney's fees and expenses for work performed on the lawsuit protesting the Navy's attempted conversion from a solicitation for bids to a request for proposals. Pet. App. 2-3, 45. The court found that petitioner was the "prevailing party" in its litigation challenging the procurement procedures, that the government's position in the litigation was not "substantially justified," and that there were no "special circumstances" that

would "make an award [of fees] unjust." *Id.* at 57, 70-71. In holding that petitioner was a "prevailing party" for purposes of the EAJA, the court relied on the "catalyst" theory:

> It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award * * *. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment—e.g., a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.

Id. at 53 (quoting *Hewitt* v. *Helms*, 482 U.S. 755, 760-761 (1987)). The court noted, however, that this Court had granted a petition for a writ of certiorari in *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, "in which the viability of the catalyst theory is directly at issue." *Id.* at 52 n.4. The court nevertheless entered a judgment awarding petitioner $10,939.09 in fees and expenses. *Id.* at 75.

3. After the trial court entered its judgment, this Court issued its decision in *Buckhannon*, which rejected the "catalyst theory" as a basis for awarding attorney's fees and expenses under federal fee-shifting statutes. 532 U.S. at 610. In *Buckhannon*, a company that operated assisted-living residences in West Virginia failed a state fire inspection because some residents were incapable of "self-preservation" as defined by state law. After receiving orders to close its facilities, the company and others sued, seeking declaratory and injunctive relief that the "self-preservation"

requirement 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.* While the action was pending, the West Virginia legislature eliminated the "self-preservation" requirement, and the district court then granted the defendants' motion to dismiss the case as moot. The company thereafter sought attorney's fees as the "prevailing party" under the FHAA and ADA, basing its entitlement on the catalyst theory. The district court and the court of appeals refused to award fees on the catalyst theory, and this Court affirmed. See 532 U.S. at 600-602.

The Court recognized at the outset that "[n]umerous federal statutes allow courts to award attorney's fees and costs to the 'prevailing party.'" 532 U.S. at 600. The Court concluded that the term "prevailing party" is limited to those parties who "secure a judgment on the merits or a court-ordered consent decree." *Ibid.* The term does not include those who merely "achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Ibid.* The Court reasoned that the term "prevailing party" is limited to "one who has been awarded some relief by [a] court." *Id.* at 603. The term does not include those who bring a suit that prompts a defendant to change its conduct in the absence of judicial relief because, in the absence of a judicial judgment, "there is no judicially sanctioned change in the legal relationship of the parties," which is the hallmark of prevailing party status. *Id.* at 605.

4. The government filed a motion under Rule 60(b), Fed. R. Civ. P., asking the Court of Federal Claims to reconsider its judgment in this case in light of *Buckhannon*. The court accepted the invitation to revisit

the issue, but it ultimately adhered to its position that petitioner was a "prevailing party" under the EAJA. The court conceded that *Buckhannon* might seem difficult to distinguish "[a]t first blush," Pet. App. 25, but it ultimately concluded that *Buckhannon* was not controlling for three reasons.

First, the court held that *Buckhannon* did not apply to attorney's fees under the EAJA because "[t]he EAJA [was] not mentioned in the *Buckhannon* opinion." Pet. App. 26. Second, the court held that *Buckhannon* involved state legislative action, which the court viewed as significantly different from voluntary action by an executive branch agency. *Id.* at 27. Third, the court stated that the language of the EAJA fee-shifting provision differs from the language of the statutes addressed or referenced in *Buckhannon*, because the EAJA requires an award of fees if the statutory conditions are met and requires the court to analyze the merits in ruling on the fee request, in order to determine if the government's position was "substantially justified." *Id.* at 31.

The court additionally stated that, even if *Buckhannon* applied in determining "prevailing party" status under the EAJA, petitioner would prevail in this case, because the facts "meet[] the concerns described in *Buckhannon*." Pet. App. 34. The court reasoned that, in its exchange with government counsel at the hearing on whether to issue a TRO, "the court, although it did not issue a written opinion, announced its acknowledgment of the merits of plaintiff's claims, the rectitude of plaintiff's position and the error of defendant's actions." *Id.* at 36. Those comments, the court stated, "represent the necessary 'judicial imprimatur' that caused the change in the legal relationship of the parties. * * * [T]he court's remarks at the TRO

hearing amounted to a finding that the Navy had acted unlawfully, and the defendant's change in conduct was a product of judicial action in the lawsuit." *Id.* at 37.

5. The court of appeals reversed. The court held that its "examination of the text and the legislative history of the EAJA leads us to conclude that there is no basis for distinguishing the term 'prevailing party' in the EAJA from other fee-shifting statutes." Pet. App. 10. The court also rejected the notion that the "catalyst theory" survived *Buckhannon* if executive, rather than legislative, action caused the change. The court explained that the "holding in *Buckhannon* leaves no room for a distinction to be drawn between whether a change is brought about by the legislature, as in *Buckhannon* or by the government's cancellation of the solicitation in this case." *Ibid.* Finally, the court held that the "'very preliminary' remarks at a TRO hearing" were "not sufficient to establish a judicial imprimatur and they do not constitute a 'court-ordered change in the legal relationship' of the parties as *Buckhannon* requires." *Id.* at 13-14.

ARGUMENT

The court of appeals correctly applied this Court's decision in *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598, 600 (2001), to petitioner's request for attorney's fees under the EAJA. The only other court of appeals that has squarely addressed the issue has also concluded that *Buckhannon*'s "prevailing party" analysis applies to the EAJA. See *Perez-Arellano* v. *Smith*, 279 F.3d 791, 794 (9th Cir. 2002) ("[W]e discern no reason to interpret the EAJA inconsistently with the Supreme Court's interpretation of 'prevailing party' in the FHAA and the ADA as explained in

Buckhannon."). Consequently, the court of appeals' decision does not conflict with any decision of this Court or another court of appeals and does not otherwise warrant this Court's review.

1. Petitioner contends (Pet. 5) that this Court's decision in *Buckhannon* holds only that "the 'catalyst theory' is not a permissible basis for the award of attorney's fees under the FHAA, 42 U.S.C. § 3613(c)(2), and ADA, 42 U.S.C. § 12205," 532 U.S. at 610, and therefore does not resolve whether the catalyst theory remains an appropriate basis for an award of attorney's fees under the EAJA. Petitioner is mistaken. As the court of appeals correctly recognized, the Court's rejection of the catalyst theory in *Buckhannon* precludes application of that theory in other federal fee shifting statutes, such as the EAJA, that award fees to a "prevailing party." Pet. App. 7-8.

This Court granted review in *Buckhannon* to address a question of general importance respecting federal fee-shifting statutes. As the Court observed at the outset of its decision, "[n]umerous federal statutes allow courts to award attorney's fees and costs to the 'prevailing party.'" *Buckhannon*, 532 U.S. at 600. The Court identified the critical issue as whether "this term"—meaning "prevailing party"—"includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Ibid.* Thus, the Court clearly expressed its understanding that its decision in *Buckhannon* would apply to other federal fee shifting statutes that also employ the "prevailing party" standard.

The Court reemphasized the general applicability of its ruling later in the decision, noting that Congress

"has authorized the award of attorneys' fees to the 'prevailing party' in numerous statutes in addition to those at issue here." *Buckhannon*, 532 U.S. at 602. It specifically identified three fee-shifting statutes, in addition the FHAA and the ADA, to which its "prevailing party" analysis would apply—the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), the Act of Aug. 6, 1975, 42 U.S.C. 1973*l*(e), and the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988. 532 U.S. at 602-603. The Court also cited the Appendix to Justice Brennan's dissenting opinion in *Marek* v. *Chesny*, 473 U.S. 1, 43-51 (1985), which lists more than 100 federal fee-shifting statutes. 532 U.S. at 603. In a footnote immediately following the reference to the *Marek* Appendix, the Court stated:

> We have interpreted these fee-shifting provisions consistently, see *Hensley* v. *Eckerhart*, 461 U.S. 424, 433, n.7 (1983), and so approach the nearly identical provisions at issue here.

Id. at 603 n.4. The Court stated in *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983) (which interpreted the fee-shifting provisions contained in 42 U.S.C. 1988) that "[t]he standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" 461 U.S. at 433 n.7. The Court has accordingly treated the EAJA consonantly with other "prevailing party" statutes. See *Commissioner* v. *Jean*, 496 U.S. 154, 161 (1990) (applying "prevailing party" analysis in *Hensley* to cases under the EAJA).

Petitioner acknowledges that the EAJA employs the "prevailing party" standard, but nevertheless contends (Pet. 7-12) that the EAJA is "distinct" from other fee-shifting statutes in certain respects. But the distinc-

tions that petitioner cites do not justify departing from *Buckhannon*'s understanding of the term "prevailing party." A party that "fail[s] to secure a judgment on the merits or a court-ordered consent decree" is not a "prevailing party," 532 U.S. at 600, regardless of whether the EAJA "mandates" an award of attorney's fees to a "prevailing party" in certain circumstances (Pet. 7-8) or whether a court must determine if the government's position is "substantially justified" (Pet. 9-10). See *Perez-Arellano*, 279 F.3d at 794 n.4.

Petitioner's reliance (Pet. 10-12) on the EAJA's legislative history is also misplaced. Petitioner notes that congressional reports accompanying the EAJA legislation make reference to the potential availability of fees in situations in which a case is settled. This Court explicitly considered and rejected similar legislative history in *Buckhannon*, stating:

> 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.

532 U.S. at 608. Indeed, rather than providing a basis for distinguishing the EAJA, the legislative history states that "[i]t is the committee's intention that the interpretation of the term ['prevailing party'] be consistent with the law that has developed under existing statutes." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11 (1980).

2. Petitioner argues (Pet. 12-13) that this Court's ruling in *Buckhannon* does not apply here because in that case a state legislature, rather than an Executive Branch agency, took action that mooted the litigation. That distinction is immaterial. The Court unambigu-

ously rejected the "catalyst theory" without regard to the action that led to termination of the litigation. The crucial consideration is whether the party seeking fees has secured "a judgment on the merits or a court-ordered consent decree" that creates a "material alteration of the legal relationship of the parties." *Buckhannon*, 532 U.S. at 600, 604 (quoting *Texas State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989)). Petitioner obtained neither in this case and accordingly is not a "prevailing party" for purposes of an attorney's fee award.

3. Petitioner asserts (Pet. 13-16) that it is a "prevailing party" within the meaning of *Buckhannon* because the trial court made comments at the hearing on its motion for a temporary restraining order suggesting that petitioner's legal arguments had merit. As the court of appeals recognized, those statements fall far short of satisfying *Buckhannon*'s requirement of a "judicially sanctioned change in the legal relationship of the parties." 532 U.S. at 605. The trial court simply made "'very preliminary' remarks at a TRO hearing." Pet. App. 14. The court of appeals correctly concluded that those remarks "are clearly not sufficient to establish a judicial imprimatur and they do not constitute a 'court-ordered change in the legal relationship' of the parties as *Buckhannon* requires." *Id.* at 13-14.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
MICHAEL JAY SINGER
MICHAEL E. ROBINSON
Attorneys

DECEMBER 2002