IN THE SUPREME COURT OF THE UNITED STATES

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CRST VAN EXPEDITED, INC., :

Petitioner : No. 14-1375

v. :

EQUAL EMPLOYMENT OPPORTUNITY :

COMMISSION, :

Respondent. :

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Washington, D.C.

Monday, March 28, 2016

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

PAUL M. SMITH, ESQ., Washington, D.C.; on behalf of Petitioner.

BRIAN H. FLETCHER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 14-1375, CRST Van Expedited v. Equal Employment Opportunity Commission.

Mr. Smith.

ORAL ARGUMENT OF PAUL M. SMITH

ON BEHALF OF THE PETITIONER

MR. SMITH: Mr. Chief Justice, and may it please the Court:

On the issue we initially asked this Court to resolve in the petition for certiorari, the parties are now in complete agreement. That issue, of course, was whether a prevailing defendant in a Title VII case is barred from seeking attorneys' fees if it hasn't prevailed on the merits. As we showed in our opening brief, such a rule, which exists only in the Eighth Circuit, makes little sense. It doesn't -- it is certainly not compelled by the statutory language and doesn't serve any rationing statutory policy to take away the power of work fees in a -- in a case of a non-merits disposition.

The EEOC, having staunchly defended that rule in its brief in opposition, executed an about-face in its merits brief and now agrees with us that a

non-merits disposition can be the basis of a defendant attorneys' fee award under Title VII.

Now, for that reason and for all the reasons in our opening merits brief, which the government apparently found convincing, at least, we would suggest that the Court should reverse the Eighth Circuit's ruling and resolve the circuit conflict and rule that prevailing defendants can seek fees as long as they meet the Christiansburg standard, whether or not the disposition was on the merits.

If there are no questions about that, the second issue is, what do we do --

JUSTICE SOTOMAYOR: Isn't the standard whether the EEOC's actions were frivolous, unreasonable, or without foundation?

MR. SMITH: That's the Christiansburg standard, yes, Your Honor.

JUSTICE SOTOMAYOR: So what difference does it make on what ground it was dismissed?

MR. SMITH: I couldn't agree more.

JUSTICE SOTOMAYOR: I've been reading these briefs, and with or without prejudice, merits, non-merits, I don't know that even if a judge gets to that point of deciding whether it was on the merits or not, that's not enough. You always have to decide the

bottom line.

MR. SMITH: Right. But the Eighth Circuit's ruling was that even if it was frivolous or unreasonable or without foundation, if the reason it was frivolous or unreasonable or without foundation was the fact that it was res judicata, or was time-barred or something like that --

JUSTICE GINSBURG: There wasn't the slightest suggestion of any frivolity or groundlessness to this complaint.

MR. SMITH: Your Honor, there certainly is. As the case turned out, they never had any foundation whatever for bringing this class claim. They never had any pattern of practice that they could identify and -- and prove.

JUSTICE GINSBURG: They -- the claim was that many women had been harassed by lead drivers, not one, but many.

MR. SMITH: That was -- that was the allegation, Your Honor. But in order to bring a class claim -- a collective claim under Title VII, what the EEOC needs is a pattern or practice, which means either an express policy that's discriminatory or some unexpressed standard operating procedure. That's the term the Court used in the Teamster's case. In the

absence of that, what you have is a --

JUSTICE GINSBURG: I thought that was the whole thing, that the -- the -- that the company was not giving the lead drivers adequate training. To put it bluntly, they were not taking sexual harassment seriously.

MR. SMITH: Your Honor --

JUSTICE GINSBURG: That was -- that was the complaint about the employer, that there were complaints about these lead drivers, and the -- and the employer just didn't take them seriously.

MR. SMITH: But what became clear as the case proceeded is that, A, the EEOC never investigated any kind of pattern or practice at the investigatory phase. They only investigated two cases. And then when it -- when they started alleging that they had a pattern of practice and telling the Court they wanted to go to trial on a pattern of practice, we -- we filed a motion for summary judgment and said, what is your evidence that there's a consistent policy of disregarding these complaints, that there is a consistent failure?

And -- and the -- and as Judge Reed found, the evidence didn't remotely support that. The evidence --

JUSTICE GINSBURG: The EEOC, when it was

investigating this case, asked CRST, tell us about complaints you've gotten of sexual harassment. And initially, the company came out with two names.

MR. SMITH: Your Honor --

JUSTICE GINSBURG: There were well over a hundred.

MR. SMITH: Your Honor, the -- the EEOC's suggestion that we did not answer their question completely was looked at in detail both by the district court and by the Eighth Circuit, and they both concluded that the only -- the question at issue was a question about people who had complained about the conduct at issue in this case, meaning Ms. Starke -- Ms. Starke's harassment. The -- the suggestion that we had not answered that question completely was rejected by the district court on Pages 168 and 69 of the Petition Appendix. It was rejected by the Eighth Circuit as factually baseless on Page 92 of the Petition Appendix. They simply didn't ask a question that called for that until later in the investigation. And what the -- what -- all the judges below, the -- the district judge and the majority in the Eighth Circuit, concluded is we answered every question in the investigation fully and accurately. So that is not a basis for what --

JUSTICE GINSBURG: Is it so that, when you

were initially asked how many complaints have you gotten or tell us the names of the people who have complained, they came up with two people?

MR. SMITH: It is true that they named two people. And as Judge Reed concluded --

JUSTICE GINSBURG: That wasn't accurate, was it?

MR. SMITH: Well, that wasn't the question. The question that we were answering was people who had complained about the particular issue in the charge. And so as Judge Reed concluded, we gave them more information than the EEOC requested. That's on page 169 of the Cert Petition Appendix.

When they later on asked for all the people who had filed charges of discrimination, we gave them all that information. That was about eight more people that they got.

Finally, at the end of the investigation phase, they said, Give us the names of all the women who have driven for you in the last several years with their contact information. We gave them that. They didn't do anything with it.

They then filed their -- their class finding of reasonable cause, having investigated Ms. Starke's complaint and one other with -- and did no sort of

systematic look at how things were done at the company.

And then when they put together this case in court, they listed 270 people who were so-called class members; and it turns out most of those claims washed out. They simply were non-meritorious. And we file a motion for summary judgment saying they don't have any evidence of a systematic problem here of a -- of a pattern of practice. And Judge Reed looked at this wealth of information, which has developed 154 depositions, accepted the truth of everything that those -- those women said in those depositions, and concluded that, in fact, by and large the policies exist. The policies are followed. People -- complaints are followed up. Remedies are -- are put in place. Women are protected.

And she said if -- assuming the truth of everything that's in these depositions, there may be examples of sporadic exceptions to that where the managers could have done a better job. Maybe they didn't act fast enough. Maybe they could have been more severe in their sanction or whatever, but that that's -- that no rational finder of fact could conclude on this record that there is any kind of pattern of neglecting sexual harassment complaints, any kind of problem with the policies that existed, any kind of problem with the

training. That was all factually not true.

It is true that there were some complaints which, of course, when you read them are -- are quite serious, but that doesn't mean the company is liable, certainly not liable on a class basis where -- for claims which were never investigated, never conciliated. The whole policy of the statute, of course, is to have a reasonable investigation, have a reasonable cause finding, have conciliation. And here that became meaningless, except with respect to one claimant.

JUSTICE GINSBURG: Well, you're here complaining about a threshold question. That is, you said that the investigation and conciliation efforts were inadequate. But you said that after 18 months of heavy litigation.

MR. SMITH: No, Your Honor. Here's what happened. They come in October 15, 2008, with their list of 270 people. They -- we said -- we then say to the Court, well, they can't possibly have investigated 270 claims, and how are we going to adjudicate this, anyway? They respond and say, This is a pattern of practice case. We're going to -- we're going to litigate it the way we litigate pattern of practice cases. We're going to have bifurcation. We are going to have an initial phase of the trial where we prove

that it is their de facto policy to neglect sexual harassment, and then we're going to have a damages phase where individual claimants will come in.

And so we had a class claim which they said was a pattern of practice claim. And there was no way at that point for us to say, well, you -- you can't litigate these individual claims, because they were classifying these people as class members, and they were going to use them as witnesses to establish this supposed -- this policy of neglect of sexual harassment.

We then do 154 depositions of all of these people, except for the ones who didn't show up at all, the other 99. And most of those claims turned out to be non-meritorious, even accepting the truth of everything that the -- the complainants said.

We then file a motion that says, You don't have a pattern of practice case. This is not a class case. You can't litigate this case because there is no systematic policy that has been identified.

And we have this wealth of factual information from these 154 depositions, 154 different stories involving different drivers, different charges, different conduct, different responses. And Judge Reed reads thousands of pages of testimony and concludes there isn't any evidence that would allow a rational

trier of fact to conclude that there is a -- a systematic --

JUSTICE KENNEDY: So that all gets to the reasonableness or unreasonableness point. And we -- this Court need not reach that, I take it, if we -- we address the -- the prevailing party argument. And it is -- as you understand the government's position -- we can, of course, ask them in a few minutes -- in what cases, where there is not an adjudication on the merits, would the government agree that there is a prevailing party, that the defendant can be a prevailing party?

MR. SMITH: I think they have -- they've said the merits issue is not really relevant. They have -- as I understand it, what they've said certainly is, you know, if it was -- they -- they would say if it's a disposition with prejudice, whether it's based on a merits issue or some other merits, non-merits issue, like statute of limitations or something else, that appears to be their position.

And I think the problem with the without prejudice/with prejudice distinction, which they -- they brought out in their merits brief, is that's the first time in this litigation that that argument has ever been made by the EEOC. They have never in the lower courts ever argued that, A, the disposition here was without

prejudice or, B, that that's a basis on which CRST was not a prevailing party.

JUSTICE KAGAN: Mr. Smith, understanding that you think that, but if we could just go on from that, what is wrong with that position? And do you have a substitute test, or -- or is there no substitute test, in your view?

MR. SMITH: Well, Your Honor, as -- as to the first question, the first problem with the argument is it's factually not true. The -- the disposition here was with prejudice.

JUSTICE KAGAN: Right. Let's just assume that it were.

MR. SMITH: Okay. Leaving aside the waiver and the fact that there's no factual predicate for the argument here, on the merits, we didn't have an opportunity to brief this issue because it's not in the case until we're writing our reply brief. So we have about a paragraph on the issue.

I think that it's a -- there's -- there is a circuit conflict on the question whether or not a district judge ought to have the power, in the suitable circumstances when dismissing a case for failure to do something like pre-suit petitions, where there was a sufficient level of abusiveness by the plaintiff, he

should have known -- he or she should have known that this case was not ready for suit, and it has cost the -- the defendant money that shouldn't have had to be spent; that even in a without prejudice dismissal situation, there ought to be the power of a court to exercise its discretion --

JUSTICE KAGAN: Even if the -- even if the reason for the dismissal -- for the dismissal is completely curable?

MR. SMITH: Well, it's curable perhaps, but there are going to be situations -- and this case is a good illustration -- where you can't get rid of the fact that you've spent lots and lots of money litigating claims which, if they'd been -- been investigated and had to make reasonable cause findings and been conciliated, likely would never have seen court to begin with. 87 of these claims were -- where summary judgment was granted after the women were deposed, 99 never showed up for their deposition.

JUSTICE KAGAN: But -- but then you're suggesting that whatever the reason for the dismissal is, with prejudice, without prejudice, for any reason whatsoever, curable or not, it's up to the discretion of the Court?

MR. SMITH: I -- I guess I would -- given

the severity of the Christiansburg standard, I'm -- it's not clear to -- clear to me that -- that you can't trust district judges in those situations. It's not clear to me that we need to have a categorical bar that turns on this issue of with prejudice or without prejudice.

JUSTICE KENNEDY: In -- in this case as to, I guess, the 67 women that the Court -- before it goes to the court of appeals on round number one, says the Court bars the EEOC from seeking relief.

MR. SMITH: Yes, sir.

JUSTICE KENNEDY: Is that a phrase district courts use often, "bars"?

MR. SMITH: You know, I think it was invented by the judge here because she's dealing with a rather peculiar animal, which is a one-count complaint which says Ms. Starke was sexually harassed and it was not appropriately handled, and a class of people were sexually harassed and it was not appropriately handled. And they start bringing these things in, and to the extent that -- at that point in the case, they're trying to litigate them as individual claims.

And the -- so rather than dismiss the -- the claims, she said individuals -- when they were litigating on their own behalf, she would dismiss the -- the claim with prejudice, but she would tell the EEOC,

You're barred from litigating this claim, this claim, and this claim. And there were six or seven different categories of claims where she went through and said, You can't do these six because there was never a complaint made to the -- to management. You can't do these six because the conduct just wasn't severe enough to be sexual harassment.

And then she gets to the 67 and says, You can't do these claims because you never investigated them or conciliated them or made a reasonable cause finding. And there was -- the whole class thing, which led you to bring them into court --

JUSTICE GINSBURG: With respect to those 67, I thought we had held that in Mach Mining, that the remedy for inadequate conciliation, investigation and conciliation, is not dismissal, but return to continue the efforts to conciliate.

MR. SMITH: What you held in Mach Mining, Your Honor, is that where there is a failure of conciliation, the appropriate remedy is a stay so they can conciliate some more. And you cited a provision in Title VII in 706 which specifically authorizes a judge to stay a case for further conciliation.

What Judge Reed concluded is that a stay wouldn't make sense here. She expressly considered that

question and said, well, you haven't even investigated the claims, and you haven't made any findings about the merits of the claims, and you've put the court and the parties through years of litigation.

In that situation, the -- the additional sanction of barring you from litigating the case is appropriate, and I think that clearly ought to be within the discretion of the district court --

JUSTICE KAGAN: Mr. Smith, do you understand her order as -- as saying that if the EEOC did engage in conciliation, had made the initial findings, had satisfied all the pre-suit requirements, could the EEOC, do you think, have come back and brought those individual claims?

MR. SMITH: Certainly I -- I think she was very clear that that was not available to them --

JUSTICE KAGAN: Even after filing the pre-suit requirements? Even after satisfying the pre-suit requirements?

MR. SMITH: Yes. Because she -- she considered whether to stay the case and let them go do that and said, no, I'm going to do the much more severe remedy of dismissing these claims.

And then the government --

JUSTICE KAGAN: Why didn't she say "with

prejudice," then?

MR. SMITH: Well, she does eventually, Your Honor. The -- the judgment that ends the merits case in this -- in this -- the merits phase in this case in 2013 entered with the -- the agreement of the government expressly says that the case and all the claims that were litigated in this case are dismissed with prejudice. That's on page 118 of the Joint Appendix.

JUSTICE GINSBURG: Why -- why isn't it --

JUSTICE KAGAN: But back in 2009, she didn't say that. So why didn't she say that? You had asked for the case, the -- all of them to be dismissed with -- with prejudice.

MR. SMITH: Right.

JUSTICE KAGAN: She did not include that language.

MR. SMITH: She didn't use that language. She said the government shall take nothing in the judgment. She said, I'm not going to stay the case and let you go back and do it -- do a do-over. And she said it's a severe remedy that means these claims may not ever see the inside of a courtroom. But she didn't use the word -- "prejudice" language at that point.

But the government understood what she meant, what they complain in their brief appealing that

order, that they had -- that the order had barred these claims from ever seeing the inside of a courtroom and that the judge acknowledged that fact. They did that again in the second appeal from the Eighth Circuit.

And then, most tellingly, they file a Rule 60 motion after Mach Mining is decided last year in which they asked the district judge to reopen the case, and say, you should have done a stay; you shouldn't have dismissed this. And the reason you should do that is because we have been prevented for the last six years from litigating these claims.

And does Judge Reed then say, no, it was dismissed without prejudice. I wasn't telling you, you couldn't litigate these claims. No. She said I did what I did, and I did it for good and sufficient reason because of the way you messed up this case, and you abused the process and didn't follow your obligations, and I'm -- and I'm denying the motion.

And they then appealed that to the court of appeals. And the day before they file their merits brief in this Court, they -- they pull that appeal because they recognize that the Rule 60 motion and arguments they're making is completely inconsistent with the argument they're about to make --

JUSTICE KAGAN: But if I understand, their

motion did not say now we've satisfied all our pre-suit requirements, right? So she might just have said, well, you still haven't satisfied your pre-suit requirements, so of course I'm not changing anything.

MR. SMITH: Well, Your Honor, there's --

JUSTICE KAGAN: The question is what would have happened if the government came back and said we have satisfied the pre-suit requirements. Would she then have thought, okay, well, that's a different story now. I didn't -- I didn't dismiss these with prejudice. Now that the government has satisfied the pre-suit requirements, it can go ahead.

MR. SMITH: No, Your Honor. I think it's quite clear from what she did say last fall, in December, actually, that -- that she knew it was with prejudice, intended it to be with prejudice, and wasn't going to change her mind. And I think there's no other way to read the record here.

And we ultimately have a judgment that says with prejudice, which is the controlling judgment --

JUSTICE BREYER: Where is that? There's a piece of paper called "the judgment" somewhere. What does it say?

MR. SMITH: But you see if you look at the Joint Appendix -- first of all, I'm at Joint Appendix,

Your Honors -- there is a judgment that appears on page 115 and 116 which says, "Judgment is entered in accordance with the attached." And the attached is an order of dismissal which was negotiated by the parties.

And if you look at the bottom of 118a, the order of dismissal, which was incorporated in the judgment, at the bottom of 118a it says, "Based on EEOC's withdrawal of its claim on behalf of Tillie Jones, the parties' settlement of EEOC's claim on behalf of Monika Starke and the mandate issued by the court of appeals on September 14, 2012, with respect to all other claims asserted by the EEOC, this case is dismissed with prejudice."

JUSTICE BREYER: That's the end of it, isn't it? It was dismissed with prejudice.

MR. SMITH: That's the point, Your Honor.

(Laughter.)

MR. SMITH: There doesn't seem to be any doubt about it. And the government knew it. It actually agreed to this form of judgment. So we found it rather remarkable that we were facing this -- this argument.

JUSTICE SOTOMAYOR: Mr. Smith, what is -- what's -- what are you asking us to do in this case? What's the disposition that you're seeking?

MR. SMITH: Well, you should --

JUSTICE SOTOMAYOR: Are we supposed to say Eighth Circuit, you're wrong, it has nothing to do with -- exclusively with the merits? Do a do-over?

MR. SMITH: That's -- that's the issue we should -- you should certainly reverse them on, Your Honor. But there's -- I think we have agreement in the courtroom that that's just -- at least on this side of the -- of the bench -- that that's an incorrect ruling.

And then, you know, I think you should give the back of the hand to this idea that the judgment here was without prejudice and therefore that has some impact on this case. It's just not factually true. It was not preserved, and it's -- and it's not -- it's not -- probably not the right line, anyway.

Then the --

JUSTICE GINSBURG: Mr. Smith -- Mr. Smith, will you explain why "dismiss this case with prejudice" isn't talking about the case that was settled, the Starke case?

The -- there were -- all the other women were out of it; it was down to two women; one dropped out; one was left. Why isn't this case the case that was just settled?

MR. SMITH: Well, it refers to her case; it

refers to the Tillie Jones case, and to all the other claims asserted by the EEOC under a one-count complaint. There is no separate count for each of these people. And so when you dismiss that count, it expressly says, "With respect to all the other claims asserted by the EEOC," I think it's pretty obvious that the case is dismissed with prejudice with respect to all the claims asserted by the EEOC, including the 67, Your Honor. That was --

JUSTICE KAGAN: All the claims that were then being litigated by the EEOC, which did not include the claims that had previously been dismissed for failure to satisfy the pre-suit requirements.

MR. SMITH: It's a basic principle that a judgment at the end of the merits phase goes back and incorporates all the -- the prior rulings of the court, and is based on the prior rulings in which --

JUSTICE KAGAN: I think that's not -- it's not right, if the prior ruling was based on a curable dismissal and the EEOC had simply done nothing with respect to that set of claims, neither cured it nor renounced the possibility that they would cure it.

In 2013, the court was facing a much reduced set of claims in a different suit.

MR. SMITH: Your Honor, I think that -- that

the judgment is going to go back and cover everything that happened in the case. If there was something left that could be reopened with -- that had been dismissed without prejudice, you wouldn't agree to a judgment in this form.

In any event, the -- the government told the Eighth Circuit twice in two separate appeals that these claims were dismissed with prejudice, and that was a problem for them, that they were precluded. They file a Rule 60 motion acknowledging that they were dismissed with prejudice and asking for that dismissal to be lifted. I just -- it's hard for me to believe that -- that they're -- that this argument is available for them, especially since they never made it before.

JUSTICE SOTOMAYOR: So why should we decide this?

MR. SMITH: Well, I think it --

MR. SMITH: Why don't we just remand it completely, and let the Eighth Circuit decide, or the district court decide what it meant?

MR. SMITH: Well, you should certainly decide the issue that was -- we brought you here, which is the circuit conflict --

JUSTICE SOTOMAYOR: Assuming we reverse, why don't we leave it to the court below to decide whether

they will, in fact, entertain the government's new argument because there might be a waiver of that, or whether there's a factual predicate for it at all?

MR. SMITH: We could do that, Your Honor. I guess the -- the main reasons you -- you might want to at least address it briefly is -- is if you're going to go on and follow the government's lead and reach the Christiansburg issue here, which the government asked you to do at the -- at the end of their brief, and decide that there -- they want you to decide that the -- whatever positions they took on behalf of these 67 women were -- were not without foundation; were not unreasonable.

We're actually, in some ways, tempted to ask you to go ahead and rule on that issue too, because we've been doing this -- the issue now for six years. And I think the government's conduct here was glaringly unreasonable that that --

JUSTICE KENNEDY: On that one -- on that one issue, was -- the amount awarded some $4 million. Did the debt include this -- was -- was that your entire bill, or did you segregate -- the attorneys segregate out the costs for the Starke?

MR. SMITH: I think the Starke issue gets -- gets separated out. It's the entire bill for all 154 of

the depositions, including the ones that were --

JUSTICE KENNEDY: But there were -- but there -- in other words, this was not 100 percent of the fees? There was --

MR. SMITH: Oh, no, Your Honor.

JUSTICE KENNEDY: The fees were separated out.

MR. SMITH: First of all, they were Cedar Rapids rates, and we charge Chicago rates. But aside from that problem, it was about -- there was certainly -- the part that the government had prevailed on, it was where there was a settlement. That was certainly taken out. So I don't think there's an argument about the amount here of any significance.

So -- so I do think that there's a -- there may be some value in the Court reaching the Christiansburg issue, if only to instruct the EEOC that there's a different -- difference between a pattern-or-practice class case where you have an actual practice of policy that you're litigating, and a case where you just have a bunch of individual claims which you -- which don't add up to any kind of pattern or practice.

If you -- if you allow the EEOC to use class language like this as kind of a club at the end of an

investigation that's not a class investigation in a complaint for which they have no factual basis, then you end up creating a great deal of litigation exposure for defendants in situations where class litigation really isn't appropriate.

JUSTICE KAGAN: Mr. Smith, do you think it's possible to have a pattern of practice appropriate class claim with respect to sexual harassment?

MR. SMITH: I do, Your Honor. I think it would -- but it -- but it may be more difficult than in other contexts. For example, you could have a pattern of practice case, I think, about one work setting in which the hostile work environment would affect any woman working in that setting. I think that would be appropriate.

If -- if they had some specific policy that they identified that they said has a discriminatory effect such as, for example, we had a three-strikes policy. You have to harass people three times before we'll take the complaint or something like that. That could be a pattern of practice case.

But what I don't think you can do is have 154 individual stories involving different alleged malefactors, different alleged conduct, different allegations about who -- what complaints were brought to

management's attention and different stories about how management responded.

JUSTICE GINSBURG: Couldn't you have a pattern and practice case of saying there -- there are -- all these complaints were made, and the employer didn't take them seriously, he either did nothing or gave the -- the driver a slap on the wrist?

MR. SMITH: Your Honor, I think you can have a -- a standard operating procedure that you show by saying over and over again they don't do what they're supposed to do and that their policies are not taken seriously. But you have to show a consistent pattern or practice in order to do that. And what Judge Reed said is, by and large, that's not what they do. They do exactly the opposite.

There may be some situations, if we take the testimony of the complainants at -- at face value without any -- hearing from anybody else, that where some of the managers didn't do good -- as good a job as they might have in some of these cases, but that's the sporadic exception; that's not the rule. That's not what they do as a matter of policy.

If I could save the balance of my time, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Fletcher.

ORAL ARGUMENT OF BRIAN H. FLETCHER

ON BEHALF OF THE RESPONDENT

MR. FLETCHER: Thank you, Mr. Chief Justice, and may it please the Court:

The question on what this Court granted certiorari is not, as Mr. Smith suggested, and has been the basis for his waiver arguments, whether or not the Eighth Circuit was correct to say that a Title VII defendant has to prevail on the merits in order to secure a fee award and to be a prevailing party.

Instead, the question that petitioner framed in the petition and the question on what this Court granted certiorari is whether the dismissal of a Title VII case, based on the EEOC's failure to satisfy its pre-suit investigations, can form the basis for an award of attorneys' fees.

JUSTICE ALITO: In your brief in opposition, you argued that the Eighth Circuit was correct; did you not?

MR. FLETCHER: We did. We endorsed --

JUSTICE ALITO: Have you abandoned that argument?

MR. FLETCHER: We're advancing a slightly different argument that yields the same answer on the

question presented.

JUSTICE ALITO: Have you abandoned the argument that there must be an evaluation of the merits?

MR. FLETCHER: We are -- we're making a slightly different argument, yes.

JUSTICE BREYER: You have abandoned it, was the question.

MR. FLETCHER: Well --

JUSTICE BREYER: Yes or no?

MR. FLETCHER: We have abandoned the Eighth Circuit's view that you need a disposition on the merits.

JUSTICE BREYER: Thank you.

MR. FLETCHER: But I think in explaining -- I don't think that the change in our argument and -- the change in our argument to a different argument that's still within the scope of the question presented constitutes a waiver. I'd like to talk about two reasons why, because I understand Mr. Smith to have argued that we're waiving the version of the argument that we're presenting now at two stages --

JUSTICE BREYER: I don't care if it -- I mean, that's up to you, what you want to argue. But I would like -- look, it says, can the dismissal, based on the failure to satisfy form the basis for an attorney's

fees? I take that to mean, is the defendant -- can the defendant in such a case be a prevailing party?

MR. FLETCHER: Yes.

JUSTICE BREYER: He has to meet the other standard, too.

MR. FLETCHER: Yes.

JUSTICE BREYER: I would think the answer is obviously yes. They won. Okay? So if they won, why isn't that the end of it? It says judgment -- it says -- it says the -- the case is dismissed with prejudice. Therefore, they won. So why aren't they the prevailing party?

MR. FLETCHER: Sir, I'd like to talk about the dismissal with prejudice, which is a -- a case-specific issue here that I -- I do want to address.

But I think first, I want to talk about the broader question, which is what makes a party a prevailing party? Because this Court addressed that in its Buckhannon decision. It said prevailing party is a term of art. In the fee-shipping statutes, including Title VII, it means a party that has secured an order that materially alters the legal relationship between the parties.

JUSTICE BREYER: Can't a plaintiff be a prevailing party? I don't know the answer, but I

thought the plaintiff brings a suit charging, you know, serious discrimination. After lots of litigation, the parties decide to settle, and they settle on terms very favorable to the plaintiff, really because of the litigation. I thought in such cases, the plaintiff was the prevailing party. A.m. I wrong?

MR. FLETCHER: Well, under Buckhannon, it depends. What this Court says that under Buckhannon, if the Court incorporates the settlement agreement into a consent decree or the lower courts have held if the settlement agreement is approved by the court or incorporated into the judgment such that it's enforceable by the court, then yes. But the courts have generally said that private settlement agreements, or the particular issue in Buckhannon, if the defendant just voluntarily changes its conduct and the plaintiff gets what it wants, the plaintiff is not a prevailing party because it has not secured an order that materially changes the party's legal relationship.

JUSTICE SOTOMAYOR: You see, I found --

CHIEF JUSTICE ROBERTS: I suppose that the settlement agreements often take into account liability for attorneys' fees --

MR. FLETCHER: Yes.

CHIEF JUSTICE ROBERTS: -- how they are going

to apportion those.

MR. FLETCHER: Very often, yes.

JUSTICE SOTOMAYOR: Why do we apply the same standard to a defendant? The plaintiff is seeking a change of the status quo, but a defendant is actually -- all they want is the status quo. They want just to stay -- not to be found liable. So why do we apply the question of whether there's been a legal change between the parties? The defendant was never seeking that.

MR. FLETCHER: So what the defendant was seeking, though, was a judicial declaration that essentially ratifies the status quo, that -- that ends the dispute. And so after this Court's decision in Buckhannon, the circuits have looked at this question. And eight of them, which we cite at Pages 26 to 28 of our Brief, as far as we can tell, every court to consider this question has said that the same rule applies to the defendant. And if the defendant obtains a dismissal because the plaintiff voluntarily withdraws or because it's in the wrong forum or something like that, something that allows the underlying dispute to continue, then the defendant hasn't prevailed in the litigation in the sense in which the fee-shifting statutes have used --

CHIEF JUSTICE ROBERTS: I don't know where

that -- where that artificial line comes from. I mean, the defendant wants to win. And I don't know -- it's getting pretty -- when I was practicing that -- parties didn't come in and say, I want to win, and I want to win on this ground. They said, I want to win. I want the case thrown out.

MR. FLETCHER: Well, I -- I think that's -- that's right, but I think that what the defendant wants -- and I think this is perhaps expressed best, of all the cases we cite, in Judge Easterbrook's opinion in the Steel Co. case. The defendant wants to win, but the defendant wants to win in a way that definitively ends the litigation. And if the defendant wins on a ground that makes clear that the plaintiff can come back to court the next day, or in a different district, or after satisfying a precondition to suit, I don't think the defendant has won in the way that the defendant wants to win.

JUSTICE ALITO: There is a material alteration in their relationship, is it not? I mean, it's not as big a one as the defendant would like. A defendant would like to have a -- a win that precludes future litigation. But don't you think a defendant who secures a dismissal of a complaint, and, therefore, doesn't know whether the -- the complaint is going to be

filed again is going to celebrate? Isn't that a -- an alteration in the relationship between the parties?

MR. FLETCHER: I'm sure the defendant would be happy about that, in much the same way a party would be happy if they secured the reversal of a directed verdict on appeal or if they defeated a motion for summary judgment. And you could, in some sense of the words, say that all of those things materially changed the party's legal relationship because they settle certain issues and they alter the course of the future litigation.

But what this Court has said in Buckhannon and in the cases that it ascribed there is that those sorts of interlocutory wins don't count.

JUSTICE BREYER: Oh, well, this is not interlocutory. This ended the litigation. So, I mean, I have the same question the Chief Justice had, where a defendant secures the end of a case, dismissed, goodbye, you win. Now, maybe they can bring another case tomorrow; that's another case. But they won this case. That's going to be pretty hard for them to get attorneys' fees anyway because there's a very tough standard. But why isn't a simple rule the best rule? If the case is over, the defendant won, he is the prevailing party for purposes of that case.

Then we could go on to take all the things you wanted to into account when we consider what kind of fee is reasonable and when we consider whether it's based on frivolousness. I mean, the -- the plus of that, to me, is the simplicity. And -- and I don't see how it would work any unfairness or serious harm to the objective of this statute. So I'd appreciate it if you would address what could be my benighted view.

MR. FLETCHER: I wouldn't go that far, but I do think it's a different view, and a very different view, than the one that all of the courts of appeals that have considered --

JUSTICE BREYER: Well, then they might -- I mean, unfortunately, I a.m. in the position of having to decide it.

(Laughter.)

JUSTICE BREYER: So I put the question to you. And I'd say at first blush, the simplicity of this approach, its consistency with the language, its ease of administration, and so forth, in terms of prevailing parties has that to recommend it. So now what is -- you don't like it, so tell me why.

MR. FLETCHER: So I think because when a defendant prevails on this sort of round because the plaintiff, say, withdraws the claim voluntarily or

secures a dismissal with prejudice, the dispute really isn't over. And it certainly isn't over in the sense that this Court used the term in Buckhannon, which requires a judicially sanctioned, material alteration of the legal relationship of the parties. And I this Judge Easterbrook put this well in Steel Co. If the plaintiff can come back the next day or if the plaintiff can sue in a next district or if the dispute is going to continue, that really doesn't -- hasn't changed the legal relationship of the parties.

CHIEF JUSTICE ROBERTS: What if they don't? What if they don't come back the next day? What if they don't sue in the next district? Then it seems to me the purposes of this fee-shifting provision have not been served.

MR. FLETCHER: Well, I -- I don't think that's quite right. I think you're right, as Your Honor's question alludes to. I think the purpose of the fee-shifting statute -- and this is what the Court said in Fox versus Vice and Christiansburg -- is to protect defendants who are forced to bear factually or legally unjustified suits. I think, first of all, there's some reason to question whether that purpose is served, where the reason why this suit is defeated is a failure to satisfy a procedural precondition. I'm not sure it's

fair to say that that's a factually or legally ungrounded suit. It's a suit where the plaintiff failed to take a step that it was supposed to take before coming to court, but a curable step.

I think in those sorts of circumstances to say that those defendants can't recover for whatever fees they secure in resolving that initial procedural question doesn't really get at the core of what the statute was.

JUSTICE BREYER: Well, there -- because -- now, there's much to recommend what you're saying, saying at least if you come back the next day, at least if you could sue in another district. But have you heard of the Hatfields and the McCoys? You see -- you see why I bring them up? Because they're going to be fighting each other for 30 years. And if you tell them they can't sue in this district, they'll change the complaint slightly and go to a different district.

So if I adopt the standard you're just suggesting, I will discover a whole host of questions: Is this really the same suit? What about the possibility that they could have sued in Tasmania? And what about the possibility -- you -- you see where I'm going. And so I'm back, again, to that kind of concern, an administrative concern --

MR. FLETCHER: Yes.

JUSTICE BREYER: -- versus the simplicity of saying, well, that ended this case. If they bring another case and it's frivolous, we'll consider attorneys' fees in that one.

MR. FLETCHER: So, I guess, to the -- to the administrative point, I do think the -- the views that the circuits, and the views that the circuits have been applying for 16 years, in some cases more now, ought to be persuasive? Not just because that's what the circuit --

JUSTICE BREYER: I didn't say that. I haven't read them yet.

MR. FLETCHER: But -- but just in -- in the notion that if the sort -- if our rule was going to cause problems of administration like you suggest, you would expect to see it in the circuits, and I don't think you're seeing that in the circuits. I think they're applying this rule; has the plaintiff been barred from pursuing this claim permanently? If so, then the defendant is a prevailing party. If not, if it's a different ground, if it's a precondition to suit, if it's the wrong forum, if it's a dismissal without prejudice, then the defendant hasn't been precluded. I -- I don't think you can hypothesize cases. I don't

think we've seen them in --

CHIEF JUSTICE ROBERTS: Wouldn't it be an adequate response to your concern if fees were awarded solely on the ground in which the case was dismissed? That would be -- in other words, the judge would have the discretion to do that. If the judge looks at this and says, okay, it's clear you're in the wrong venue, you know, and hours of research would have showed you that. So, you know, it's frivolous on that ground, and I'm throwing the case out because the -- the defendant prevails on that ground.

Now, the defendant may have spent a lot of other money with depositions and everything else. But the judge could say, well, you can file the -- the case again tomorrow. You probably will. You just have to go into the next district. So I a.m. going to award fees. They're going to be equal to the amount of time the defendant had to spend defending against your frivolous venue assertion.

It doesn't have to do that. I mean, you know, if you have the wrong venue, and they spend five years doing depositions because you have the wrong venue, they should probably get fees for all of it. But if it's just, you know, a small portion, easily disposed of, is that a possible remedy?

MR. FLETCHER: Sir, I think that's a better, a more sensible rule. Certainly I'll -- I'll say a little bit about why I think it may be a little tricky to fit into the doctrine, but just to illustrate its application in this case, for instance, a petitioner got a fee award on the order of 4.6, $4.7 million, as we explain in our brief. The amount of those fees that are attributable to actually litigating about this ground here, whether or not we satisfied the preconditions to suit, is a little more than $100,000.

CHIEF JUSTICE ROBERTS: Well, then that may be a case contrary to the proposal where it's that discreet. In other words, your frivolity on that particular point compelled them to incur $4.6 million over many years. It's not their fault that that issue didn't come up until later in the litigation.

MR. FLETCHER: Well, first of all --

CHIEF JUSTICE ROBERTS: It's sort of intertwined with the merits. It's not a venue objection.

MR. FLETCHER: Well, I -- I'm not sure that's -- that's right, Mr. Chief Justice.

First of all, we -- we disagree that we were frivolous in thinking we satisfied our pre-suit obligations. That's an issue that hasn't been resolved

by the Eighth Circuit yet, and we think for some of the reasons that Justice Ginsburg suggested and that Judge Murphy suggested on the merits in the Eighth Circuit. Actually, we very much were not frivolous on thinking we had satisfied these preconditions.

But to get to the -- the heart of your question, I do think, actually, that it is a very discreet issue. It's -- Title VII says before you come into court, you have to do an investigation. There has to be a reasonable-cause determination and you have to attempt to conciliate --

CHIEF JUSTICE ROBERTS: Yeah. Well, it may be a discreet issue, but it's a cause in fact for all the other fees.

MR. FLETCHER: Well, I -- I'm not sure that's right, in that if Petitioner had raised this early on -- and I -- I do want to be clear, that from the outset in this litigation, I disagree a little bit with what Mr. Smith said about what the EEOC looked into in its investigation. But from the outset, everyone knew that we had told them in conciliation, we think you have a problem here; we think you're engaged in sexual harassment against a class of women. We tried to conciliate that class claim; they declined to do that.

CHIEF JUSTICE ROBERTS: Wait. Wait. I

suppose whether the issue we're debating may not be directly pertinent, my question is whether or not that could be a factor that the district courts could look at in deciding the amount of fees and so on.

MR. FLETCHER: Yes, I take that point. If -- if you resolved the question against us, you say a defendant could be a prevailing party when it prevails on this sort of ground that doesn't foreclose for litigation, then I absolutely agree with you that it would be perfectly appropriate and -- and indeed, I think a good idea for the district court to engage in this kind of inquiry. But, I -- I guess, I think the main question --

JUSTICE KENNEDY: So -- so as I understand your answer, let's assume a hypothetical case, not this case. For five years there's litigation, and the litigation is finally dismissed because the EEOC has not followed its obligations. It's a frivolous or an unreasonable suit. The trial judge said you are barred from proceeding further in this case.

MR. FLETCHER: Yes.

JUSTICE KENNEDY: Doesn't say with prejudice or without.

MR. FLETCHER: Yes.

JUSTICE KENNEDY: Could fees be awarded in

that case?

MR. FLETCHER: I believe, no. I believe that is this case, but -- but I believe no.

JUSTICE KENNEDY: Because he didn't say with -- with prejudice?

MR. FLETCHER: Because that sort of dismissal under principles of res judicata, under this Court's interpretation of Federal Rule of Civil Procedure 41, when you have -- even after extended litigation --

JUSTICE KENNEDY: Incidentally, is it clear that after this time that there was no time bar if they had come back again?

MR. FLETCHER: That's right. The EEOC does not have a statute of limitation that's applicable to -- to suits brought by the commission.

JUSTICE KENNEDY: So then, your position that no matter how unreasonable the plaintiff has been, no matter how costly it's been, no matter how long it's taken, that you cannot award fees unless the case -- and then the case is dismissed, and the judge says you're barred from bringing this claim in this suit, no fees; that's your position.

MR. FLETCHER: That's correct. And I understand that in some cases -- I don't think this is

such a case -- but in some cases, that might have unappealing consequences.

JUSTICE ALITO: Well, and that's -- in a case like that, what if the -- the EEOC after that dismissal goes back and looks at these cases and says, you know what, we really have nothing here, and therefore, chooses not to bring the case, you would say that because the -- because the first case was dismissed without prejudice, there could be no fees?

MR. FLETCHER: I -- I would, and I think that follows --

JUSTICE ALITO: What sense does that make?

MR. FLETCHER: I think it follows from Buckhannon. Remember, that -- the issue in Buckhannon was you have a plaintiff that brings a suit. By hypothesis, let's assume it's a meritorious suit, and there's some litigation and the plaintiff incurs fees, and then at some point the defendant sees the writing on the wall and voluntarily recedes from the conduct and gives the plaintiff exactly what they want.

I think the Court recognized that there is a really strong policy argument for allowing courts to award fees to plaintiffs in that case, because they're doing what Title VII and the Civil Rights Act intended to -- to encourage plaintiffs to do. And they're sort

of left, you know, out of pocket for all the fees if they're not eligible for fee awards.

This Court still said they're not entitled to get fee awards because they haven't secured a court order that materially alters the party's legal relationship. I think the same thing is true of the --

JUSTICE ALITO: I guess I just don't see what functional sense that makes. If -- if the defendant has wasted a huge amount of litigation resources and caused the -- I'm sorry, the plaintiff has -- has caused -- imposed a great and unjustified burden on the defendant, I don't -- I don't see why, as a functional matter, unless this is foreclosed by a prior decision, there shouldn't be a possibility of fees in that situation.

MR. FLETCHER: Well, I do think it's pretty close to foreclosed by Buckhannon. Obviously, Buckhannon dealt with whether or not a plaintiff is prevailing. Our argument is that the Court's rationale was "prevailing party" is a legal term of art. It means a party that secured a material alteration in the legal relationship of the parties.

And the court in Buckhannon stuck to that, despite very strong policy arguments, saying that those sorts of plaintiffs ought to get fee awards. And I

think it ought to do the same thing here when it's presented with essentially the converse --

JUSTICE BREYER: Then what is the argument? I take it your argument now is what's sauce for the goose is sauce for the gander.

Buckhannon says that a plaintiff can't recover, even if he litigates to death and they find -- give up and pay him a billion dollars. Unless there is a judicially sanctioned change in legal relationship, he can't recover fees. And if he can't recover it, why should the defendant recover, unless there is a judicially sanctioned change in relationships and the only candidate for such a thing is a dismissal with prejudice of some form.

MR. FLETCHER: Yes, that's correct.

JUSTICE BREYER: Okay. Got the argument.

So if that's the argument, and that argument is correct, why don't we have the situation here? Because you heard the judgment being read. It says "with prejudice."

MR. FLETCHER: Yes. So there's two judgments in this case, the one that's entered after the district court resolves the issue that's before you now -- the 67 claims that are before you now is found at pages 216 to 217 of the Petition Appendix. And what the

district court says is the EEOC has asked me to stay this to allow it to go conciliate. I'm not going to do that. I'm going to dismiss instead. And it drops a footnote -- this is a few pages earlier on, pages 213 to 14 -- and it cites another case that dismissed a claim under the same circumstances. That earlier case that the district court cited as precedent for the dismissal was expressly a dismissal without prejudice.

The district court then goes on to say -- and this is language that you've referred to, Justice Kennedy -- that the EEOC is barred from further litigation on the claims. But it says barred from further litigation in this case. It cannot pursue relief in the trial in this case.

And I think most importantly, when the district court says it's dismissing, and then when it ultimately enters a judgment of dismissal, it does not specify that the judgment is with prejudice.

And we actually have a Federal Rule of Civil Procedure, Rule 41(b), that is particularly and expressly designed to address this situation to ensure that parties and courts don't have to engage in the kind of inquiry that Mr. Smith was engaged in, in the first half of the argument, of trying to figure out what does the judge mean, what do the parties think that the judge

means.

This is at -- Rule 41(b) is at page 17a at Petition Appendix, and it says, "An involuntary dismissal" -- it establishes a default rule. It says, "Ordinarily, if you have an involuntary dismissal by the court, unless the court specifies otherwise, it operates as an adjudication on the merits." Ordinarily dismissal with prejudice.

CHIEF JUSTICE ROBERTS: Now, so what you're saying is in -- the judge said they cannot precede again in this case?

MR. FLETCHER: They cannot seek relief on behalf of these 67 women in this case.

CHIEF JUSTICE ROBERTS: And why -- why isn't that prevailing? Why aren't they prevailing? What -- they may not prevail in another case or -- that's your argument?

MR. FLETCHER: So that -- that's my argument.

CHIEF JUSTICE ROBERTS: Because they have engaged in -- under your theory, they have engaged in an illegal practice. But they -- they prevailed in this case, but they may be sued by somebody else in another case?

MR. FLETCHER: They -- they may be sued by

us in another case. They may be sued by the Commission in another case. They've -- they've secured a dismissal that said the EEOC didn't satisfy the preconditions that it had to satisfy before bringing these claims.

But our view is -- and -- and we think we're right about this, and we -- we think it's supported by Costello -- that leaves the EEOC free to satisfy the precondition --

CHIEF JUSTICE ROBERTS: What -- --

MR. FLETCHER: -- and come back to court.

CHIEF JUSTICE ROBERTS: What do you -- yeah, I -- what do you think the significance of Mach Mining is on this issue?

MR. FLETCHER: So our view is that Mach Mining suggests that this issue shouldn't come up again in future cases. As we read Mach Mining, it suggests that the appropriate remedy for a failure of conciliation like the one here is a stay rather than a dismissal. I don't think --

CHIEF JUSTICE ROBERTS: Then why isn't that -- I mean, if -- if the EEOC doesn't do anything at all -- I mean, under Mach Mining, if they don't conciliate, the remedy is go conciliate.

MR. FLETCHER: Yes.

CHIEF JUSTICE ROBERTS: Wouldn't --

wouldn't you think if the reason they're -- didn't -- it was frivolous for them to bring the suit without conciliation, you know, if somebody said, Well, we've got to conciliate, and they said, Oh, forget about it, go ahead, why wouldn't fees be a perfectly appropriate sanctions?

In other words, there's no -- under some sense, there's no incentive for them to conciliate, because if it turns out they didn't, they have to go conciliate. But if they were subject to fees because they ignored their duty to conciliate, it seems to me that might give them some incentive to get it right the first time.

MR. FLETCHER: So I think I -- I'd like to quibble with the premise. I -- I think, as we explain in our brief, the EEOC has a great incentive to conciliate because it gets a massive number of complaints each year or charges each year. It finds a reasonable cause to believe that there's been a violation of Title VII in a huge number of cases, and has very limited resources. And so it really does, try and actually does, resolve far more cases by conciliation than by litigation; it doesn't rush into court.

CHIEF JUSTICE ROBERTS: So you're not likely

to be subject to this sanction in many cases, which is a good thing.

MR. FLETCHER: Right.

CHIEF JUSTICE ROBERTS: But sometimes -- okay.

MR. FLETCHER: But I take your point, that then the question is, so if the EEOC -- let's -- by hypothesis, should -- unreasonably fails to satisfy its conciliation obligation, and the court finds that to be the case, and then it stays, pursuant to Mach Mining, and sends them off to conciliate, could the court award fees, I take it to be the question.

CHIEF JUSTICE ROBERTS: Right.

MR. FLETCHER: I think the answer is it couldn't do it under this provision because everyone agrees that you have to be a prevailing party to get fees under this provision. And I don't think even Mr. Smith would argue that if all the defendant gets is a stay, the defendant has prevailed. Now, I'll argue that it is dismissal without prejudice to allow for conciliation and then the potential for coming back to court isn't that different from a stay to allow for conciliation as to the same --

JUSTICE SOTOMAYOR: It's hard to imagine that the district court didn't consider this a dismissal

with prejudice when it announced in this very decision you're pointing to that the -- that the Petitioner was a prevailing party entitled to attorneys' fees at the end of the case.

Certainly the district court thought it was imposing a sanction. It was barring you from trying these cases, at least at this trial.

MR. FLETCHER: At -- at least at this trial, I -- I agree with that. And the district court did say in the same order that that made Petitioner a prevailing party. It didn't explain what test it was applying, and it certainly didn't say "dismissed with prejudice." And this gets back to the point that I was making to Justice Breyer about Rule 41, which is that Rule 41 serves exactly this function. It tells you how to read a dismissal.

JUSTICE SOTOMAYOR: Well, the --

MR. FLETCHER: It doesn't specify its effect.

JUSTICE SOTOMAYOR: -- the real problem for you is that any -- the dismissal of the action, even according to this order by the court, would happen at the end of the case. And at the end of this case we had a dismissal with prejudice. One would think that everything would get merged into the final judgment.

MR. FLETCHER: So I -- I disagree with that, that you're talking about the dismissal ultimately entered after remand in 2013. I do want to talk about that, but -- but first I think it's -- it's helpful to just sort of tie down the 2009 dismissal originally.

And just to wrap up the point, it's that under Rule 41, if you have a dismissal that's for lack of jurisdiction, that doesn't count as an adjudication on the merits; it's not with prejudice.

And in this Court's decision in Costello, which courts have followed ever since, jurisdiction there doesn't mean jurisdiction in the sense of jurisdiction over the person or the subject matter. It also includes a failure to satisfy a precondition like it did here.

JUSTICE BREYER: Just simply, No. 279, 10/1/2009, judgment in favor of CSRT against the EEOC?

MR. FLETCHER: I believe so, yes.

JUSTICE BREYER: Okay. Where is it?

MR. FLETCHER: So the -- the judgment that is actually entered is I think not in the Joint Appendix. It's --

JUSTICE BREYER: Well, I mean -- but where do I find it?

MR. FLETCHER: You find it at Docket Entry

No. 279 on the district court's docket.

JUSTICE BREYER: What does it say?

MR. FLETCHER: It says, "Decision by the court. This came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered. It is ordered and adjudged that Plaintiff EEOC takes nothing, and the action is dismissed."

JUSTICE BREYER: The action is dismissed.

MR. FLETCHER: Yes. The action is dismissed. And so then to understand the effect of that dismissal, you look to Rule 41, which says, "A dismissal involuntarily ordinarily operates as an adjudication with prejudice on the merits."

We're not disagreeing with that as to the claims on which the district court passed on the merits and concluded that we didn't have enough evidence to survive a motion for summary judgment.

JUSTICE BREYER: Except -- it has three exceptions: Lack of jurisdiction, improper venue, or failure to join a party.

MR. FLETCHER: Yes.

JUSTICE BREYER: This was not failure to join a party.

MR. FLETCHER: Yes.

JUSTICE BREYER: It is not improper venue.

MR. FLETCHER: Yes.

JUSTICE BREYER: I don't think it's lack of jurisdiction. Is that what it is, lack of jurisdiction?

MR. FLETCHER: It's exactly that because in this Court's decision in Costello, the Court said jurisdiction in Rule 41 doesn't mean lack of jurisdiction over the parties. It also includes failure to satisfy a precondition to bringing suit.

In Costello, that particular precondition was the failure to file an affidavit of good cause before the government brought a denaturalization proceeding. That's a precondition that looks a lot like this one. And, in fact, in Mach Mining, this Court analogized the precondition at issue in Costello to the precondition at issue here in --

JUSTICE KAGAN: Mr. Fletcher, could I -- could I take you back to where you started, which is whether you've waived all of this?

MR. FLETCHER: Yes.

JUSTICE KAGAN: And, you know, you point out that the question presented includes your argument, but clearly it is, as you say, a different argument from the one you litigated below, both in the district court and in the circuit court.

MR. FLETCHER: Yes.

JUSTICE KAGAN: And in the bio that you filed here.

And Mr. Smith has responded to this new argument in less than a page, which is really his every right to do, given that it has sort of sprung from your head at this late date. And I'm wondering why we shouldn't just ignore the whole thing.

MR. FLETCHER: So if I could address it separately. First of all, as to why it wasn't raised below, below this -- both parties litigated this case on the understanding that it was governed by circuit precedent established by an Eighth Circuit decision called Marquardt that made clear that --

JUSTICE KAGAN: Well, you can always file a footnote, you know? I mean --

MR. FLETCHER: Well, that -- that's true, but I guess that -- that argument doesn't do Mr. Smith much good because he didn't make that argument. He didn't challenge beyond the merits rule in the Eighth Circuit. They didn't even do it in their petition for rehearing en banc.

Now, we haven't argued that they've waived it because we think it was within their rights to stay within the confines of circuit precedent and then to

make a broader argument on the same legal question once they're in this Court. But we think we have a equal right to refine our arguments once we're free from the constraints of circuit --

CHIEF JUSTICE ROBERTS: We -- what is the -- I suppose I should know, but, I mean, what is the general practice? I mean, it would be kind of futile to go before the Eighth Circuit and say we think you should overrule your precedent, at least on the panel decision. But that doesn't mean they're not free to raise the argument here. This is where -- where you should go if you want a court of appeals overruled.

MR. FLETCHER: Absolutely. And as I'm saying, I don't fault Mr. Smith for not raising -- challenging me on the merits rule. I'm just saying that there's a good reason why we weren't considering a different argument or considering how we might respond to a challenge to that rule because it just wasn't raised by either party. Both parties should have litigated within the confines of Eighth Circuit precedent.

Now, that also leaves the brief in opposition, Justice Kagan, which you also asked about. There, you're right; we didn't raise this argument. We defended the Eighth Circuit's decision. In part,

frankly, obviously, if we had it to do over again, we'd present the argument that we presented in our merits brief.

But I think it's important to go back and look at the petition. The petition doesn't really develop a developed argument on this point, either. It doesn't say Buckhannon. It doesn't make an extended argument about what it means to be a prevailing party. It mostly focuses on certiorari considerations.

And we did the same thing in our brief in opposition. I think this Court's argument -- or cases about when you waive an argument by failing to -- to include it on -- in the op. Our focus on cases for the argument is about why the question presented isn't really presented or why there's a bar to reaching it, and that's not what this argument is.

JUSTICE KAGAN: Well, regardless of whether there's blame on either part, we're still in a situation where it really has not been briefed by one party, and it hasn't been thought about by the courts below. And usually, you know, we do that -- we're a court of review, not a first view, mine, and we would kick it back.

MR. FLETCHER: Yes. You certainly could do that. We think -- you know, we have presented it. It's

aired in the amicus briefs. And Mr. Smith certainly could have addressed it at greater length in his reply brief. But if that's your view, it's certainly well within the Court's right to kick it back to the Eighth Circuit for consideration of these issues.

JUSTICE GINSBURG: Mr. Fletcher, is it your view that all of this discussion of prevailing parties is really academic because there's no way that the EEOC could satisfy the Christiansburg standard?

MR. FLETCHER: I think I agree with that, Justice Ginsburg. And that's where I was going to go, was to say another option for this Court is to resolve this on the alternative ground that we've raised, which is Christiansburg.

JUSTICE KAGAN: That seems even worse. I mean, nobody has thought about that. It seems to be a complicated factual scenario, you know. There are circumstances in which you could proceed with a class properly and circumstances in which you couldn't, and we know nothing about whether this is the circumstances, one or the other.

MR. FLETCHER: Well, you don't -- you certainly don't have to resolve it on the merits. But I think all you need to do is to say it was not unreasonable for us to think that we had done it here.

And I think the way that you know that is because Judge Murphy, in a very persuasive dissent, concluded that we were not only reasonable, but correct in thinking that we'd satisfied our obligations. And also because not even Petitioner is defending the rule that the district court applied.

The district court said you cannot conciliate a claim on a classwide basis. You have to conciliate on behalf of each and every one of these 67 individuals. That's the rule the Eighth Circuit applied. That's the rule Judge Murphy criticized. And Petitioner doesn't defend it. What Petitioner said instead is that this was all fine as long as we had a pattern-or-practice theory. And it only became not fine when we lost on summary judgment on the pattern-or-practice issue. But I don't think that -- our -- our conciliation can become inadequate only when we lose a summary judgment motion.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Smith, you have three minutes remaining.

REBUTTAL ARGUMENT OF PAUL M. SMITH

ON BEHALF OF THE PETITIONER

MR. SMITH: Thank you, Mr. Chief Justice.

First of all, on the question of Buckhannon

and this idea that we have to show a change in the legal relationship between the parties, the -- the first thing that Buckhannon says is the paradigm of a -- a case where there's been a prevailing party is where a judgment has been entered. It only goes on to talk about this other more complicated stuff about legal relationships when it's talking about things plaintiffs win short of a judgment. But there's nothing in Buckhannon that says a judgment can't be treated as a basis for a prevailing party.

Now, to the extent it matters what the nature of the dismissal here was -- and I don't know that it should, but if it does -- I'd point out that any uncertainty about the nature of the dismissal here arises from the fact that the government never made any argument in the courts below that the distinction made any difference. And, indeed, it contradicted the very point it's now making. It said to the Eighth Circuit -- and this is on page 11 in our reply brief in the footnote -- it said, quote, "The court recognized dismissal as a severe remedy and acknowledged it would result in dozens of potentially meritorious sexual harassment claims never seeing the inside of a courtroom."

JUSTICE GINSBURG: It said it may -- may

result, not would result.

MR. SMITH: No, no. This is -- I'm reading their quote from their brief where they left out the word "may" because they thought that it didn't make a difference. That they knew at the time and understood, or at least believed, she was referring to the fact that these individual women might be able to litigate their own claims. But they recognized over and over again in the courts below that the "may" didn't mean that the EEOC could come back and litigate, that they were precluded. That's why they filed their Rule 60 motion five years later.

Now, to the extent there was an argument that we shouldn't get all these fees, we should maybe get a little bit of fees because we should have raised the issue early on, the problem here precisely was the class action. The two are tied together, and they were both, Judge Reed found, frivolous, the argument that there was a pattern of practice here, and then the argument that they could go on and litigate on behalf of the individuals once the class action washed out. They're -- they're part of a package. But until --

JUSTICE GINSBURG: Did she hold that they would have to investigate and conciliate each individual claim?

MR. SMITH: She said that where there is not a valid pattern or practice. I don't think there's anything in -- in the court's decision that suggests you can never conciliate a class claim. The court so held in General Telephone. She cites the case. I don't know that the judge was intending to -- to second-guess this Court's decision in General Telephone about how pattern and practice cases are litigated. The question is where you don't have any kind of a policy or -- or standard operating procedure. You have a handful of individual stories, or maybe a large number of individual stories. How do you conciliate those? And the answer she gave was you have to conciliate them one by one, just -- or -- or you're bypassing the statutory procedure and the statutory policy.

JUSTICE SOTOMAYOR: What is the rule that you would like us to announce? When is it right to award prevailing defendants attorneys' fees?

MR. SMITH: When they --

JUSTICE SOTOMAYOR: What would be your rule?

MR. SMITH: When they've won a judgment and prevailed, and where the --

JUSTICE SOTOMAYOR: It doesn't matter with or without prejudice?

MR. SMITH: I would -- I would think that

that should not be in the rule, that that ought to be something within the discretion of the district judge for a lot of the reasons we've been discussing here. And where the -- the claim that -- that was dismissed was frivolous or unreasonable or without foundation under Christiansburg. And that that, therefore, caused costs to be incurred as occurred here. And, you know, I don't see any reason why you would want to add additional constraints.

Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:06 a.m., the case in the above-entitled matter was submitted.)

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