No. 11-782

In The
Supreme Court of the United States

MARINA POINT DEVELOPMENT CO., et al.,

Petitioners,

v.

CENTER FOR BIOLOGICAL DIVERSITY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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The panel majority in this case affirmed a fee award of more than $1.1 million based on an ESA claim that accomplished nothing for the bald eagle and was *predictably* dismissed as moot. Although claiming to be "hamstrung" by Ninth Circuit precedent to so hold, both majority judges recognized the unfairness of their own decision, describing it as "disquieting" and questioning the "wisdom" of their decision. Pet. App. 33, 35. Judge Kleinfeld, writing in dissent, went even further, stating that the panel majority's holding "makes no sense." Pet. App. 41. Such a case plainly warrants this Court's review, particularly since – as Marina Point demonstrated – the result would have been different in virtually every other circuit that has addressed the question presented here. Pet. 21. As set forth below, CBD's arguments in opposition lack merit. For all these reasons, Marina Point's petition for writ of certiorari should be granted.

1. Initially, CBD attempts to restate the question presented as: "Should this Court require appellate courts to vacate all fee awards in moot appeals, regardless of the language and purpose of the relevant statute and regardless of what was accomplished before the appeal was mooted?" Opp. i. That is not the question presented at all, nor is that how other lower courts have resolved the issue. As Marina Point demonstrated, lower courts apply a variety of tests, including "empty handed," "favorable material alteration," "contextual and case specific," and "catalyst" tests. Pet. 11-16. This matter thus presents a

timely and critical opportunity to review these disparate legal standards and provide essential guidance and direction to lower courts that continue to struggle with these issues. It may well be that an award of fees is "appropriate" in some cases that become moot on appeal. But it should be clear that such an award is both inappropriate and unjust in a case, like this one, where the lawsuit accomplished nothing, the reviewing court expressly recognized that the plaintiff's claims lacked merit, and the plaintiff filed the lawsuit knowing that the fee-shifting claim at issue would soon become moot.

Nor has the question presented in this matter been answered, as CBD also claims. Opp. 13. Citing *Buckhannon*, CBD argues that "the question posed by the *Lewis* court certainly does not remain unaddressed by this Court." Opp. 13 (internal quotation marks omitted). In *Buckhannon*, the Court *vacated* the district court's fee award because the fee-shifting claim became moot at the *district court level* and therefore could not properly support a fee award. 532 U.S. at 605. Here, in contrast, the matter became moot after judgment was entered and while the case was on appeal, and the panel majority below reluctantly *affirmed* the district court's fee award on that basis. While *Buckhannon* is instructive on how the Court may choose to answer the question presented, it did not decide the issue left open in *Lewis*: whether a plaintiff is entitled to an award of fees "even though its judgment was mooted after being rendered but before the losing party could challenge its validity on

appeal." *Lewis*, 494 U.S. at 483. Contrary to CBD's assertion, the question left open in *Lewis* remains unresolved by this Court.

2. CBD's assertion that Marina Point "conflates" or "jumbles together" various fee-shifting statutes to "fabricate an alleged circuit split" (Opp. 14) is equally without merit. Marina Point carefully explained in its Petition that for purposes of the question presented there is no meaningful distinction between statutes that authorize courts to award fees when "appropriate" and those that authorize awards to "prevailing parties." Pet. 18. Indeed, the panel majority below identified no such distinction and instead relied exclusively on prevailing party cases, explaining that the use of the word "appropriate" in the ESA "must be taken to mean and be limited to an award of fees to parties who prevail." Pet. App. 31-32. Judge Kleinfeld, writing in dissent, likewise relied on opinions that involved prevailing party statutes. Pet. App. 38-40. Thus, Marina Point did not "conflate" or "jumble together" unrelated statutes. To the contrary, the mootness inquiry transcends *all* fee-shifting statutes and so too would the Court's opinion in this matter.

CBD nevertheless presses this asserted distinction. Citing this Court's opinion in *Hardt*, CBD claims that "prevailing party precedents do not govern fee awards under statutes analyzed under *Ruckelshaus* such as the ESA." Opp. 2. This argument is wrong because the Court in *Hardt* did not address mootness or whether the impact of mootness is the same or different under statutes that authorize prevailing party

fee awards or instead limit such awards to "appropriate" cases. CBD's argument regarding *Hardt* is also self-defeating. If *Hardt* were interpreted as CBD suggests, then cases involving prevailing party fee statutes would be irrelevant to the lower court's analysis. But as noted above, that is not what the panel majority in this case held and is not how other lower courts have approached the issue.

For similar reasons, CBD is wrong in asserting that no real inter-circuit conflict is presented here. This is little more than wishful thinking. The conflict is well demonstrated in the cases cited in Marina Point's petition. For example, the Fourth Circuit in *S-1 and S-2 v. State Bd. of Educ.* answered the *Lewis* question for plaintiffs that prevailed in the district court prior to mootness by holding that "the dismissal on appeal . . . for prudential reasons as moot . . . prevents the plaintiffs from being found prevailing parties." 21 F.3d 49, 51 (4th Cir. 1994). In the case below, the panel majority reached the opposite result when the case became moot on appeal, answering the *Lewis* question by holding that CBD was the prevailing party despite mootness. Pet. App. 31-32. When, as here, two circuit courts reached the opposite results on the same legal issue, there should be no doubt that a conflict exists.

CBD's efforts to distinguish *S1 and S2* are not credible. Without mentioning the holding of *S1 and S2*, CBD's only response to this case is that it is "a pre-*Buckhannon* case and also involves the inapplicable catalyst theory." Opp. 18. But as explained

above, *Buckhannon* dealt with a slightly different issue: holding that a party could not recover fees under a catalyst theory when the case became moot prior to judgment in the district court. Consistent with that holding, the Fourth Circuit in *S1 and S2* held that a party cannot recover fees when a case becomes moot *after judgment in the district court but before appeal on any grounds* including the catalyst theory. Thus, neither *Buckhannon* nor the "catalyst theory" provides grounds for reconciling the conflict between the Ninth and Fourth Circuits.

In addition to discussing the conflict between the Ninth Circuit and the Fourth Circuit, Marina Point established in its petition that other lower courts have likewise adopted disparate and inconsistent standards for deciding whether to award fees in cases that become moot on appeal. These standards range from categorical denial to categorical grant to more nuanced "empty handed" or "catalyst" standards. Pet. 11-16. In addition, some circuits limit their analysis to a single step, whereas other circuits apply a second step that also varies from circuit to circuit. Pet. 14. Equally significant, Marina Point established that this inter-circuit conflict is well recognized by both jurists and commentators. Pet. 21-22. CBD has not refuted that point – nor can it.

3. Also without merit is CBD's assertion that Marina Point is necessarily asking this Court to direct lower courts to "assess the merits of a moot claim to determine whether an attorney fee award is warranted." Opp. 1. There are many possible ways to answer the "question of some difficulty" left open by

Lewis, including: (1) an award of fees is always upheld when a case becomes moot on appeal; (2) an award of fees is always vacated when a case becomes moot on appeal; and (3) a more nuanced analysis, such as the "contextual and case-specific inquiry" adopted by the Sixth Circuit in *McQueary* or the "empty handed" test adopted by the Fifth Circuit in *Foreman*. Pet. 13. Contrary to CBD's assertion, none of these approaches would require lower courts to assess the merits of a moot claim to determine whether an attorney fee award is warranted.

But that is not to say that such a review would be wholly improper under any and all possible circumstances. At bottom, the question presented here is whether a reviewing court must *blindly* accept – without independent analysis – a district court's merits decision and affirm an award of fees that it knows to be erroneous or unjust. Although it may not always be appropriate to conduct a searching merits inquiry, it does not follow that a reviewing court should be required to ignore patent errors in the district court's decision or other circumstances that make an award of fees inappropriate. Whether such an analysis requires *some* review of the merits remains to be seen. It is an issue that the Court should decide so that the precise limits of that inquiry can be clearly stated.

Against this background, CBD is flatly wrong when it claims that "this case is a particularly poor vehicle" to review the question left open by *Lewis*. Opp. 2. On the contrary, this case presents a unique

opportunity to address these thorny issues on a *complete* decisional record – including a unanimous lower court decision holding that "the district court's judgment in favor of [CBD] would have to have been reversed, even if the claim had not become moot." Pet. App. 66. This critical holding, whether or not properly vacated on rehearing, shows very clearly that the district court's fee award is manifestly unjust. This case, therefore, is an excellent vehicle to decide whether and to what extent lower courts may properly consider the merits of a moot claim to determine whether a fee award is warranted.

4. CBD also attempts to justify the district court's fee award by claiming that it "protected the bald eagle and preserved its habitat for three years." Opp. i. This assertion ignores the fact that the Ninth Circuit on review "carefully reviewed the record" and unanimously determined that "the evidence cannot support a determination that Marina Point caused or would have caused a take of a bald eagle." Pet. App. 63-64. That holding should be self-evident given the underlying facts: (1) Marina Point did not conduct work during times when the bald eagle was present in the Big Bear Lake region; (2) the property was not suitable bald eagle habitat; and (3) the USFWS concluded that the project would have no impact on the bald eagle. Pet. App. 14-15. CBD, therefore, did nothing to protect the bald eagle.

CBD nevertheless attempts to show harm to the bald eagle, citing to supposed "deep concerns" by the USFWS and the fact that Marina Point never

obtained a "take" permit under the ESA. Opp. 4-5. Yet CBD neglects to mention that (1) all work was monitored by a USFWS authorized biologist; (2) no documents issued by the USFWS ever identified or even alleged any harm to the bald eagle or even suggested that a "take" permit was required; (3) Marina Point conducted more than 900 hours of monitoring around its property to address the "deep concerns" of the USFWS, and that monitoring revealed zero bald eagle activity at the site; and (4) the "take" permit CBD claims was required is legally unavailable when, as here, the USFWS "has no rational basis to conclude that a take will occur incident to the otherwise lawful activity." *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1242 (9th Cir. 2001). Thus, CBD's strained allegations do nothing to bolster the propriety of the fee award.

Moreover, while Marina Point recognizes that litigants commonly utilize environmental statutes to cloak their true interests, it is disingenuous for CBD to ignore the underlying purpose of the lawsuit. CBD's lawsuit was not about protecting bald eagles but rather about stopping a local-, state-, and federally-approved project that could potentially interfere with the use and enjoyment of neighboring property – what is commonly referred to as a "not in my backyard" approach to new development. Tellingly, CBD offers no response to the arguments of *amicus curiae* Pacific Legal Foundation that an award of fees in this case would merely encourage more "meritless challenges to disfavored building projects under the ESA."

PLF Amicus Br. 9. In short, CBD's baseless lawsuit neither helped the bald eagle nor advanced the purposes of the ESA. But even if it did, that is not a reason to deny Marina Point's petition as the inter-circuit conflict exists regardless of any such benefit.

Nor does it matter, as CBD also claims, that it took time for USFWS to delist the bald eagle as an endangered species and that USFWS could have reversed course. Opp. 22. Those facts, even if true, do not make CBD's lawsuit any less imprudent. The data supporting the proposal showing the recovery of the bald eagle did not change in the intervening years, and CBD cites no examples where USFWS has *ever* changed its mind about a decision to delist. As such, CBD knew that the case was likely to become moot at any point and yet chose to pursue its claims nonetheless to delay the project under construction at significant cost to Marina Point and without risk that Marina Point would ultimately recover its own legal fees from CBD. Under these circumstances, an award of fees is plainly not appropriate. To the contrary, as Pacific Legal Foundation notes, "[w]hen the lower court acknowledges the unfairness of its own decision imposing ruinous attorney's fees and costs on a party . . . this Court has ample reason to grant review." PLF Amicus Br. 8.

5. Finally, CBD claims that the issue presented in this case is unlikely to recur because delisting has occurred only 26 times and could occur again at most 1,387 times. Opp. 20. Even if this numerical analysis made sense (which it does not), delisting is not the

only circumstance in which a claim may become moot on appeal. As Marina Point's petition demonstrated, mootness on appeal can and does occur in a wide variety of situations, and lower courts have been grappling with this "question of some difficulty" (*Lewis*, 494 U.S. at 483) for more than 30 years. Pet. 18. For this reason too, the question presented is sufficiently important to warrant this Court's review.

It is hardly surprising, therefore, that prominent jurists and litigants alike have recognized the need for this Court's guidance. As Marina Point established (Pet. 21-22), such jurists and litigants include Justice William Rehnquist, Justice Byron White, the United States Solicitor General, and Judge Rymer (a member of the panel majority below). Judge Rymer's plea is especially significant. To paraphrase the Pacific Legal Foundation's amicus brief, when the lower court states that it is "hamstrung" by existing case law and asks this Court to accept review, the Court has ample reason to grant such review. Marina Point respectfully requests that the Court so rule.

Respectfully submitted,

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