IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

VANESSA COLLEY,	§	
	§	
Respondent-Appellant,	§	Case No.: M2021-00731-SC-R11-CV
	§	
v.	§	Case No.: M2021-00731-COA-R3-CV
	§	
JOHN S. COLLEY, III,	§	Davidson County Circuit Court
	§	Case No.: 12D-314
Petitioner-Appellee.	§	

BRIEF OF APPELLANT VANESSA COLLEY (TURNER) IN RESPONSE TO BRIEF OF AMICUS CURIAE THE STATE OF TENNESSEE

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ORAL ARGUMENT REQUESTED

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A. BECAUSE MS. TURNER HAD ALREADY SECURED PREVAILING PARTY STATUS BY OBTAINING COURT-ORDERED MERITS RELIEF AND A JUDICIALLY SANCTIONED CHANGE IN THE PARTIES' LEGAL RELATIONSHIP DURING THE PARTIES' ORIGINAL LITIGATION, MS. TURNER WINS EVEN UNDER THE FEDERAL STANDARD THAT THE GOVERNMENT ASKS THIS COURT TO ADOPT.

1. The Government has briefed a materially different question than the one presented here.

As *amicus curiae*, the State of Tennessee ("the Government") has encouraged this Court to adopt what it claims[1] is the federal approach to prevailing party status for defendants who are sued unsuccessfully. But the provision of Tenn. Code Ann. § 36-5-103(c) at issue here—which allows a prevailing party to recover fees in a proceeding "to **enforce, alter, change, or modify** any decree of alimony," *see id.* (emphasis added)—is narrowly concerned with *post*-judgment proceedings that follow *earlier* litigation in which a judicially sanctioned change in the legal relationship between the parties has *already* been secured. Thus, by the time a proceeding affected by this provision of Tenn. Code Ann. § 36-5-103(c) is initiated, one party will already have won a court-ordered "decree of alimony" from the other in earlier litigation. *Id.*

This distinction matters. It also renders most of the Government's brief—which is devoted to the different question of whether defendants in *original* litigation prevail when plaintiffs nonsuit—immaterial to the question presented here, which instead concerns post-judgment lawsuits

[1] Contrary to the Government's implication otherwise, federal law is not unified even as to the materially different and broader issue that the Government has briefed. *See infra* at 19–24.

that "seek[] to modify" earlier "court-ordered" decrees.[2]

The Government appears to recognize that the distinction between those procedural postures—post-judgment litigation to modify an earlier decree versus original litigation—matters, too. Thus, the Government waits until the last page of its brief to concede that, even under the federal standard that it encourages this Court to adopt, "'an earlier judicially sanctioned change in the parties' legal relationship through a consent decree can be the basis' for prevailing party status moving forward[.]" *See* Government's Br. at 21 (quoting *Binta B. ex rel. S.A. v. Gordon*, 710 F.3d 608, 625 (6th Cir. 2013)). As detailed below, that (accurate) acknowledgement is also controlling here. In particular, if the federal standard is adopted and applied correctly, then Ms. Turner would be considered a pre-existing prevailing party even under federal law, and she would not be required to reestablish her prevailing party status anew.

2. <u>The Government wrongly asserts that court-ordered merits relief and a consent decree that orders one spouse to pay alimony to another do not constitute "an earlier judicially sanctioned change in the parties' legal relationship."</u>

In a single breezy sentence unburdened by either citations or reasoning, the Government follows its concession about federal law's approach to "an earlier judicially sanctioned change in the parties' legal

[2] *See* Appellant's Principal Br. at 11 ("1. Is a defendant who successfully defends against a lawsuit that seeks to modify a court-ordered Marital Dissolution Agreement and who secures a judgment of dismissal, without prejudice, following the plaintiff's voluntary nonsuit a 'prevailing party' within the meaning of Tenn. Code Ann. § 36-5-103(c)?").

relationship" by declaring that "[h]ere, unlike in *Binta*, the Marital Dissolution Agreement does no such thing, so Ms. Turner has no prior prevailing-party status on which to rely." *See id.* That is spectacularly wrong, though. Nor is the matter subject to reasonable dispute. Instead, the Government's attempt to apply federal law is simply incompetent.

Here, during the Parties' original litigation, the trial court affirmatively "sustained" Ms. Turner's cause of action on the merits and granted her "an absolute divorce."[3] Thus, as a plaintiff, Ms. Turner won "an 'enforceable judgment on the merits.'" *Accord CRST Van Expedited, Inc. v. E.E.O.C.*, 578 U.S. 419, 422 (2016) ("The Court has explained that, when a plaintiff secures an 'enforceable judgmen[t] on the merits' or a 'court-ordered consent decre[e],' that plaintiff is the prevailing party because he has received a 'judicially sanctioned change in the legal relationship of the parties.'") (cleaned up). Ms. Turner's earlier-secured judicial decree also awarded her alimony.[4]

To be clear: these circumstances do not just arguably qualify as "an earlier judicially sanctioned change in the parties' legal relationship" under federal law. *See Binta*, 710 F.3d at 625. Instead, they necessarily and *inarguably* qualify as such a change under the exact federal standard that the Government urges this Court to adopt. *See id.*; *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res.*, 532 U.S.

[3] Supp. R. at 27 ("the Court affirmatively finds that the allegations of [Ms. Turner's] Complaint are sustained by the proof in that there exist such irreconcilable differences between the parties as would entitle the Plaintiff to an absolute divorce").
[4] Supp. R. at 31–32.

598, 603 (2001) ("a 'prevailing party' is one who has been awarded some relief by the court").

The fact of Ms. Turner's earlier-secured prevailing party status is also doubly incontrovertible where, as here, the relief that Ms. Turner won was a product of a judicially-approved "consent decree." *Id.* at 604 ("In addition to judgments on the merits, we have held that settlement agreements enforced through a consent decree may serve as the basis for an award of attorney's fees."). Here, Ms. Turner secured a judicially-approved consent decree that ordered Mr. Colley to act (by paying Ms. Turner alimony and purchasing a $500,000 life insurance policy that named her as its beneficiary[5]) in a manner that was not previously required of him. As *Buckhannon* explains: "Although a consent decree does not always include an admission of liability by the defendant, . . . it nonetheless is a court-ordered 'chang[e][in] the legal relationship between [the plaintiff] and the defendant.'" *Id.* (cleaned up). Thus, Ms. Turner's earlier-secured merits judgment and consent decree easily—and unmistakably—conferred pre-existing prevailing party status under the applicable federal standard. *See id.*

Because, as *amicus curiae*, the Government purports to offer its expertise regarding the applicable federal standard, the Government's ignorance of these elementary matters of federal prevailing party law is troubling. That notwithstanding, *Buckhannon* itself makes plain that merits relief—such as an enforceable judgment—or a consent decree like the one that Ms. Turner secured *necessarily* confer prevailing party

[5] *Id.*

status.[6] *See id.*; *see also id.* ("court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees."); *Lamar Advert. Co. v. Charter Twp. of Van Buren*, 178 F. App'x 498, 499 (6th Cir. 2006) ("Because the consent decree changed the legal relationship of the parties, the media companies were prevailing plaintiffs entitled to attorney's fees under § 1988.").

Tennessee law, for its part, holds the same. *See, e.g., Fannon v. City of LaFollette*, 329 S.W.3d 418, 430–31 (Tenn. 2010) ("a prevailing party 'is one who has been awarded some relief by the court.'" . . . This type of 'judicially sanctioned' relief most often comes in the form of 'enforceable judgments on the merits and court-ordered consent decrees.'") (cleaned up) (internal citations omitted); *Qualls v. Camp*, No. M2005-02822-COA-R3CV, 2007 WL 2198334, at *6 (Tenn. Ct. App. July 23, 2007) ("a plaintiff is a 'prevailing party' when actual relief on the merits of his or her claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff").

With the above context in mind, the point is this: at the time Mr.

[6] To the extent that the Government's lawyers actually doubt that a court-ordered alimony award qualifies as judicially-sanctioned relief that modifies litigants' legal relationship, the Appellant also has a simple proposal for them: Each should submit to a judicially approved, enforceable consent decree that obligates them to pay Ms. Turner "$48,000 . . . in monthly installments of $2,000 over a period of twenty-four (24) months" and then "$5,000 a month for a period of eight (8) years" after that, which is the judicially-sanctioned alimony award that the Appellant won here. *See* Supp. R. at 31. The Appellant suspects that the Government's counsel may quickly come to realize that such a judicially-sanctioned award constitutes a more material change than they imagined.

Colley initiated the post-judgment alimony modification proceeding at issue here, Ms. Turner's pre-existing prevailing party status arising from her court-ordered merits judgment and consent-decree-produced alimony award was secure *even under the federal standard that the Government urges this Court to adopt*. That is because under the federal approach to prevailing party status, merits relief and a court order to pay alimony—especially when secured as a result of a consent decree—necessarily confer prevailing party status, since merits relief always supports a prevailing party determination and consent decrees qualify as a material change in the parties' legal relationship in their own right. *See Buckhannon.*, 532 U.S. at 604. Thus, when Mr. Colley returned to court; initiated a new proceeding attempting to "alter, change, or modify [the earlier] decree of alimony," Tenn. Code Ann. § 36-5-103(c); and then nonsuited his post-judgment claim before it was adjudicated, the federal approach to prevailing party status would not treat Mr. Colley's post-judgment proceeding as if it were original litigation. Instead, federal law would treat Ms. Turner as having successfully defended and opposed modification of an existing consent decree in a manner that maintained her earlier-secured prevailing party status. *See, e.g., Pottinger v. City of Miami*, 805 F.3d 1293, 1299 (11th Cir. 2015) ("attorneys' fees can be awarded **for defending**, enforcing, **opposing the modification of**, or monitoring compliance with an existing consent decree.") (emphases added).

As the Appellant has explained, *see* Appellant's Principal Br. at 34–35—and as the Government itself concedes, *see* Government's Br. at 21—

such a scenario warrants a fee award under even the federal standard that the Government advocates that this Court adopt. Tennessee law specific to Tenn. Code Ann. § 36-5-103(c) embraces this view as well. *See, e.g., Hansen v. Hansen*, No. M2008-02378-COA-R3-CV, 2009 WL 3230984, at *3 (Tenn. Ct. App. Oct. 7, 2009) ("[Tenn. Code Ann. § 36-5-103(c)] has been interpreted as allowing for the award of attorney's fees to a party defending an action to change a prior order on the theory that the defending party is enforcing the prior order." (citing *Shofner v. Shofner,* 232 S.W.3d 36, 40 (Tenn.Ct.App.2007); *Scofield v. Scofield,* No. M2006-00350-COA-R3-CV, 2007 WL 624351, at *7 (Tenn.Ct.App. Feb.28, 2007)). Thus, because that is the scenario presented here, Ms. Turner wins even if this Court adopts federal law's approach to prevailing party determinations. As such, even under the Government's proposed standard, the trial court properly determined that Ms. Turner was a prevailing party under Tenn. Code Ann. § 36-5-103(c), and its judgment awarding Ms. Turner her attorney's fees should be reinstated.

B. THE GOVERNMENT MISSTATES TENNESSEE LAW'S RELIANCE ON FEDERAL LAW, AND IT INACCURATELY PORTRAYS THE FEDERAL STANDARD AS UNIFIED.

1. Tennessee law does not wholly embrace federal law's approach to prevailing party determinations.

Arguing that this Court should embrace federal law's approach to prevailing party determinations, the Government posits that, "[g]iven the similarities between the state and federal fee-shifting regimes, it comes as no surprise that 'Tennessee courts have turned to [the] United States Supreme Court['s] interpretations of 'prevailing party' for guidance." *See* Government's Br. at 12 (citing *Williams v. Williams*, No.

M2013-01910-COA-R3-CV, 2015 WL 412985, at *15 (Tenn. Ct. App. Jan. 30, 2015) (McBrayer, J., dissenting)). Judge McBrayer's dissenting opinion in *Williams*—which the Government quotes for the proposition—is a "dissenting" opinion for a reason, though. *Id.* More specifically, it is a dissenting opinion because *Williams*' majority opinion awarded fees to a litigant in a moot contempt case that had never resulted in a court-ordered judgment or consent decree—thereby embracing a view of prevailing party determinations that federal law famously disallows. *See Williams*, 2015 WL 412985, at *10–13.

Put another way: the Government is wrong to suggest that Tennessee law's approach to prevailing party status turns on the U.S. Supreme Court's view of the matter. It does not, as the majority opinion in the Government's own cited case makes clear. *See id.* A Tennessee-specific approach to the question presented in this appeal has also been part of Tennessee's statutory law for centuries. *See* Tenn. Code Ann. § 20-12-110 ("In cases of nonsuit, dismissal, . . . or discontinuance, the defendant is the successful party, within the meaning of § 20-12-101.").

There are also good reasons *not* to adopt, in its entirety, federal law's approach to prevailing party determinations—either for plaintiffs *or* defendants. Contract claims, in particular, demonstrate why.

Suppose a contract term obligates a litigant to do something—for instance, to pay for furnished goods and services. Suppose, also, that after receiving goods and services from another party, the obligor (the "Breaching Party") refuses to pay, hoping that the expense or stress of litigation will deter the obligee (the "Non-Breaching Party") from suing.

Under these circumstances, the Non-Breaching Party has two options available: (1) allow the breach to pass without suing, or else, (2) incur legal expenses and file suit. If the Non-Breaching Party decides not to sue, the Breaching Party obviously wins, having profited from breaching his obligations. If the amount in controversy is less than the likely expense of litigation and fee-shifting is not assured, this unacceptable result is also effectively guaranteed.

If the Non-Breaching Party *does* decide to sue, though, then the Non-Breaching Party will still lose under federal prevailing party law. The reason why is simple: the Breaching Party can always evade meaningful consequences—including fee-shifting—just by paying what he was obligated to pay to begin with. Doing so will instantly moot the Non-Breaching Party's claim. Further, given the absence of a court-ordered merits judgment or consent decree, the Non-Breaching Party will not be considered a prevailing party under federal law, since neither a merits judgment nor a court-ordered consent decree was secured. As a result, the Breaching Party will circumvent meaningful accountability for his breach. Meanwhile, the Non-Breaching Party will merely receive what she was entitled to receive to begin with—minus unreimbursed legal expenses that she should never have had to incur at all.

This imperfect framework may make sense in civil-rights cases, where the government—in other words, taxpayers—is the party required to pay using limited funds that would otherwise be used to "provide vital public services." *See Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 559, (2010) ("attorney's fees awarded under § 1988 are not paid by the individuals responsible for the constitutional or statutory violations on

which the judgment is based. Instead, the fees are paid in effect by state and local taxpayers, and because state and local governments have limited budgets, money that is used to pay attorney's fees is money that cannot be used for programs that provide vital public services."). But it makes far less sense in the context of litigation between private parties, where concerns about taxpayer money are not present, and where there are strong reasons not to incentivize abusive defendants' intentional wrongdoing by immunizing it from meaningful consequences. *See, e.g., Williams*, 2015 WL 412985, at *10–13 (ordering fees in moot contempt case where contemnor willfully failed to comply with court order until being sued, then complied before an adverse judgment issued).

By the same token, misbehaving *plaintiffs* should not be incentivized to impose litigation expenses and attempt to extract concessions by maintaining bogus litigation. By ensuring that bad-faith claims may always be nonsuited without consequence notwithstanding a fee-shifting provision, though, both the Government's and the Appellee's proposed standards would do exactly that. Under their proposed regimes, contract terms and court orders would be chronically underdefended as a result, because the reward for incurring legal expenses and defending—successfully—against a bogus claim would be a pre-trial nonsuit order and unreimbursed legal expenses. *Accord Fraser v. ETA Ass'n, Inc.*, 41 Conn. Supp. 417, 419–20, 580 A.2d 94, 96 (Super. Ct. 1990) ("There are decided benefits to interpreting the statute so that defendants in cases withdrawn by plaintiffs can recover their legal expenses. Not only will this discourage frivolous suits, but it will place the burden where it belongs—on the party with the poorly thought out

complaint or the hastily conceived writ. It will also discourage vexatious litigation and the use of pretrial discovery and depositions to harass defendants.").

That outcome is not desirable. *See id.* *Accord Pounders v. Pounders*, No. W2010-01510-COA-R3CV, 2011 WL 3849493, at *5 (Tenn. Ct. App. Aug. 31, 2011) ("One of the benefits of section 36–5–103(c) is that awarding attorney's fees to the custodial parent 'discourages vexatious petitions by the noncustodial parent.'") (quoting Janet Leach Richards, Richards on Tennessee Family Law, § 14–3(a)(3) (2d ed.2004)). Thus, this Court should reject the Government's invitation to unthinkingly adopt what the Government asserts is federal law's approach to prevailing party status. Federal law's approach to the question is principally concerned with litigation against governmental defendants. *See Perdue*, 559 U.S. at 559. Such cases involve considerations that are not present in state-law disputes between private parties, and there are serious consequences to treating these dissimilar circumstances the same way. Thus, Tennessee law not only *does* not wholesale embrace federal prevailing party law, *see Williams*, 2015 WL 412985, at *10–13; it *should* not do so, either.

Notably, federal law also contemplates an identity between the term "prevailing party" for cost-shifting purposes and fee-shifting purposes. *See B.E. Tech., LLC v. Facebook, Inc.*, No. 212CV02769JPMTMP, 2018 WL 3825226, at *1 (W.D. Tenn. Aug. 10, 2018), *aff'd sub nom. B.E. Tech., L.L.C. v. Facebook, Inc.*, 940 F.3d 675 (Fed. Cir. 2019) ("Although *CRST* did not involve cost-shifting under

Rule 54, it required the Supreme Court to interpret the term 'prevailing party.' 136 S.Ct. at 1646. '[I]t has been the Court's approach to interpret the term [prevailing party] in a consistent manner.' *Id.* Accordingly, the Supreme Court's interpretation of 'prevailing party' for the purposes of the fee-shifting statute at issue in *CRST* applies likewise to the term 'prevailing party' in Rule 54(d).''). The Government's proposed holding here would result in different "prevailing party" definitions for purposes of cost-shifting and fee-shifting under Tennessee law, though, given that Tennessee law is settled—both as a statutory and common law matter—regarding the issue of post-nonsuit cost-shifting. *See* Tenn. Code Ann. § 20-12-110 ("In cases of nonsuit, dismissal, . . . or discontinuance, the defendant is the successful party, within the meaning of § 20-12-101."); *see also Freeman v. CSX Transp., Inc.*, 359 S.W.3d 171, 180 (Tenn. Ct. App. 2010) ("Tennessee courts have held that a defendant is a prevailing party when a plaintiff voluntarily dismisses her suit . . . regardless of whether the plaintiff has re-filed her suit, or intends to."). In this respect, then, the Government's proposed standard would place Tennessee law *out of step with* federal law. It would unnecessarily result in different interpretations of the same phrase—in the same context—for no good reason, too.

2. <u>Federal law is split in three directions on the issue of whether defendants are prevailing parties when a plaintiff takes a voluntary dismissal.</u>

Regardless of the merits of adopting federal law's approach to prevailing party determinations, federal law is not even settled regarding the inapposite question that the Government has briefed here. Instead,

federal law is fractured on the matter in at least three directions.

The Government wrongly implies that the U.S. Supreme Court decided the issue presented here in *CRST Van Expedited, Inc.*, 578 U.S. at 431. *CRST* did not address the question presented in this appeal, though. Instead, what the U.S. Supreme Court held in *CRST* was that defendants—unlike plaintiffs—can be prevailing parties even without a merits judgment. *Id.* As grounds for that conclusion, the *CRST* Court explained:

> Common sense undermines the notion that a defendant cannot "prevail" unless the relevant disposition is on the merits. Plaintiffs and defendants come to court with different objectives. A plaintiff seeks a material alteration in the legal relationship between the parties. A defendant seeks to prevent this alteration to the extent it is in the plaintiff's favor. The defendant, of course, might prefer a judgment vindicating its position regarding the substantive merits of the plaintiff's allegations. The defendant has, however, fulfilled its primary objective whenever the plaintiff's challenge is rebuffed, irrespective of the precise reason for the court's decision. The defendant may prevail even if the court's final judgment rejects the plaintiff's claim for a nonmerits reason.

Id.

To be sure, this reasoning—which emphasizes both that "the precise reason for the court's decision" does not matter and that Congress intended "'to deter **the bringing of** lawsuits without foundation'"—supports the conclusion that defendants *are* prevailing parties when a plaintiff nonsuits. *See id.* at 432 (emphasis added) (quoting *Christiansburg Garment Co. v. Equal Emp. Opportunity Comm'n*, 434 U.S. 412, 420 (1978) ("allowance of awards to defendants would serve 'to

deter the bringing of lawsuits without foundation,' 'to discourage frivolous suits,' and 'to diminish the likelihood of unjustified suits being brought.'")). Otherwise, "the precise reason" for a dismissal order *would* matter, and the deterrent value of defendant-side fee-shifting would be eliminated, because plaintiffs who "bring[ ] lawsuits without foundation" could simply nonsuit before judgment to evade consequences. *See id.*

The issue was not presented in *CRST*, though, so it was not decided there. The U.S. Supreme Court also has not considered it since. Thus, whether defendants who benefit from voluntary dismissals are prevailing parties remains an open and unresolved question under federal law. Lower courts attempting to apply *CRST*'s holding have also reached at least three irreconcilably conflicting conclusions about it, two of which are incompatible with the position that the Government advocates here.

The first post-*CRST* approach is to treat defendants as prevailing parties when plaintiffs voluntarily dismiss or otherwise discontinue litigation. *See, e.g., Matter of Herrera*, 912 N.W.2d at 471 (Iowa 2018) ("*CRST* did not deal with a voluntary dismissal. But we find its reasoning applies here. Rodriguez sought to prevent the State from taking permanent possession of his vehicle. He fulfilled his primary objective of getting his vehicle back after months of contested litigation against the State. On this record, we hold that Rodriguez is a prevailing party even though the district court did not expressly find that he was an 'innocent owner.' The district court erred by ruling that Rodriguez was not a prevailing party."). This approach parallels the one that Ms. Turner has advocated, but it is incompatible with the approach that the

Government urges.

The second post-*CRST* approach is to treat defendants as prevailing parties when plaintiffs voluntarily dismiss litigation *with prejudice*. *See, e.g., Internet Media Interactive Corp. v. Shopify Inc.*, No. CV 20-416 (MN), 2020 WL 6196292, at *3 (D. Del. Oct. 22, 2020) ("this Court concludes that Plaintiff's voluntary dismissal with prejudice under Rule 41(a)(1)(A)(i) rendered Defendant a prevailing party in this case. Although the dismissal here did not require the Court's approval (or any action by the Court) . . . , the import of 'with prejudice' is that Defendant can no longer be subject to the particular claim of infringement asserted in Plaintiff's Complaint."). This approach, too, is incompatible with the approach that the Government has advocated here, given that the Government insists that relief awarded "*by the court*" is "indispensable" to a prevailing party determination. *Compare id.* at n.4 (holding that it is "difficult to imagine how this dismissal with prejudice would have any more legal force with some type of judicial approval or action."), *with* Government's Br. at 15 (arguing that "[t]he presence of 'judicial imprimatur' remains indispensable. It is not enough that a party achieve relief through the other party's voluntary change in conduct. '[A] "prevailing party" is one who has been awarded some relief *by the court*.'") (emphasis the Government's) (citation omitted).

Finally, the third post-*CRST* approach is the one that the Government has briefed, albeit without disclosing conflicting federal authority on the matter or the fact that federal law's approach to the issue addressed by its briefing is unsettled. That approach interprets

CRST as requiring that *a court* award a dismissal to a party—even if it is not a merits dismissal—to confer prevailing party status. *See id.* (citing *United States v. $70,670.00 in U.S. Currency*, 929 F.3d 1293 (11th Cir. 2019)). Under this theory, relief borne of some kind of a judicial determination is necessary, because only judicially-ordered—as opposed to judicially-approved—relief carries the requisite "'judicial imprimatur.'" *See id.* *But see CRST*, 578 U.S. at 431 (holding that "the precise reason for the court's decision" does not control whether the defendant "fulfilled its primary objective").

At this juncture, it is not necessary for this Court to wade into this unresolved controversy and determine which line of authority attempting to apply *CRST* to voluntary dismissals is correct under federal law. Instead, what matters is that, even after *CRST*, "[f]ederal courts are divided on whether a party can be a prevailing party when the opposing party voluntarily dismisses the case." *See Matter of Herrera*, 912 N.W.2d at 471 (collecting cases). As a result, by incorrectly suggesting that there is a unified federal standard that this Court should reflexively embrace as its own, the Government's Brief adds little value here.

At most, the Government can say that one line of federal authority precludes voluntary dismissals from conferring prevailing party status. Even that line of federal authority would give way under circumstances where—as here—a litigant who previously secured prevailing party status maintains that status by "opposing the modification of . . . an existing consent decree[,]" though. *See Pottinger*, 805 F.3d at 1299. That fact thus renders the Government's submission in this case completely

valueless, because under federal law, this appeal would be resolved on the narrower ground of Ms. Turner's pre-existing prevailing party status, so the broader issue that the Government has briefed would not be considered. *See, e.g., Allen v. Ferguson*, 791 F.2d 611, 615 (7th Cir.1986) ("in keeping with the notions of judicial restraint, federal courts should not reach out to resolve complex and controversial questions when a decision may be based on a narrower ground"); *Air Courier Conf. of Am. v. Am. Postal Workers Union AFL-CIO*, 498 U.S. 517, 531 (1991) (Stevens, J., concurring) ("Faithful adherence to the doctrine of judicial restraint provides a fully adequate justification for deciding this case on the best and narrowest ground available."); *Michel v. INS*, 206 F.3d 253, 260 n.4 (2d Cir.2000) ("Where . . . no harm results from our failing to answer a question, we believe that the 'doctrine of judicial restraint provides a fully adequate justification for deciding [the] case on the best and narrowest ground available.'") (quoting *Air Courier Conference of Am.*, 498 U.S. at 531 (Stevens, J., concurring in judgment)); *United States v. Roberts*, 229 F. App'x 172, 179 (3d Cir. 2007) (Jordan, J., concurring) ("Long-standing and sound jurisprudential practice dictates that decisions be made on the narrowest grounds available . . . ."). *Accord Commonwealth v. White*, 293 Va. 411, 419, 799 S.E.2d 494, 498 (2017) ("As we have often said, '[t]he doctrine of judicial restraint dictates that we decide cases 'on the best and narrowest grounds available.'") (cleaned up).

C. THE GOVERNMENT MISAPPLIES THE ONLY TEXTUAL CANON IT INVOKES.

The Government observes that "the General Assembly did not add the 'prevailing party' language [to Tenn. Code Ann. § 36-5-103(c)] until

2018[.]" *See* Government's Br. at 13. According to the Government, that means that:

> [T]he General Assembly added "prevailing party" *after* this Court and others interpreted that term based on U.S. Supreme Court precedent. Of course, "the General Assembly is presumed to know the 'state of the law' when enacting legislation, including 'the manner in which the courts have construed the statutes it has enacted.'" *In re Bonding*, 599 S.W.3d 17, 22 (Tenn. 2020) (quotation omitted). And by adding "prevailing party" after that term had been defined based on federal jurisprudence, the General Assembly incorporated those federal principles into § 36-5-103(c). *See Lawson v. Hawkins County*, 661 S.W.3d 54, 59 (Tenn. 2023) ("When a statute uses a common-law term without defining it, we assume the enacting legislature adopted the term's common-law meaning 'unless a different sense is apparent from the context, or from the general purpose of the statute.'" (quotation omitted)).

Id.

With even modest scrutiny, though, this reasoning fails at multiple levels.

First, "the state of the law" that the General Assembly would have been presumed to know under these circumstances would not be *federal* law's (unsettled) approach to prevailing party status. Instead, the General Assembly would be presumed to know *Tennessee* law, which had specifically, repeatedly, and unambiguously held at the time of the 2018 amendment to Tenn. Code Ann. § 36-5-103(c):

1. That defending spouses may recover when a plaintiff non-suits in post-judgment litigation, *see Pounders*, 2011 WL 3849493, at *5;

2. That a defendant "is a prevailing party when a plaintiff

voluntarily dismisses [its] suit." *See Freeman*, 359 S.W.3d at 180 ("Tennessee courts have held that a defendant is a prevailing party when a plaintiff voluntarily dismisses her suit . . . regardless of whether the plaintiff has re-filed her suit, or intends to."); *JPMorgan Chase Bank v. Franklin Nat. Bank*, No. M2005-02088-COA-R3-CV, 2007 WL 2316450, at *8 (Tenn. Ct. App. Aug. 13, 2007) ("For the purpose of Tenn. R. Civ. P. 54.02(2), FNB was the prevailing party because Chase voluntarily dismissed its suit."); *Est. of Burkes ex rel. C.T.A. v. St. Peter Villa, Inc.*, No. W2006-02497-COA-R3-CV, 2007 WL 2634851, at *7 (Tenn. Ct. App. Sept. 12, 2007) ("It makes more sense to simply hold, as did the Court in *JP Morgan*, that a defendant in a case that is voluntarily dismissed is necessarily the 'prevailing party' simply because the plaintiff 'voluntarily dismissed its suit.'") (quoting *JP Morgan*, 2007 WL 2316450, at *8); *see also* Tenn. Code Ann. § 20-12-110 ("In cases of nonsuit, dismissal, . . . or discontinuance, the defendant is the successful party, within the meaning of § 20-12-101."); and

3. That in post-judgment litigation between divorced parties, a second court-ordered judgment is not a prerequisite to prevailing party status. *See Williams*, 2015 WL 412985, at *13.

Thus, if the General Assembly incorporated the then-existing "state of the law" into Tenn. Code Ann. § 36-5-103(c), it would have done so by incorporating standards that are incompatible with the (version of federal law's) approach that the Government encourages this Court to adopt.

<u>Second</u>, the function of the 2018 amendment was to expand the

scenarios—especially as to alimony—in which fees could be recovered, and to permit recoveries by suing and defending parties alike (as opposed to only post-judgment plaintiff-spouses). Thus, the statute expanded from allowing "*[t]he plaintiff spouse* [to] recover ... reasonable attorney fees incurred in enforcing any decree for alimony," Tenn. Code Ann. § 36-5-103(c) (2017), to allowing "[a] *prevailing party* [to] recover reasonable attorney's fees ... in any ... proceeding *to enforce, alter, change, or modify* any decree of alimony." *Friesen v. Friesen*, No. E2017-00775-COA-R3-CV, 2018 WL 5791954, at *5 n.1 (Tenn. Ct. App. Nov. 5, 2018) (McBrayer, J., concurring) (quoting 2018-2 Tenn. Code Ann. Adv. Legis. Serv. 236 (ch. 905) (LexisNexis) (amending Tenn. Code Ann. § 36-5-103(c)).

With this context in mind, what the 2018 amendment actually did, and what it was intended to do, was codify a long line of Court of Appeals authority that had, to that point, allowed successful defendants—*including those who had prevailed due to nonsuits*, *see Pounders*, 2011 WL 3849493, at *5—to recover attorney's fees under Tenn. Code Ann. § 36-5-103(c), notwithstanding the statute's earlier reference to a "plaintiff spouse" alone. As noted, the pre-2018 version of Tenn. Code Ann. § 36-5-103(c) referred to only a "plaintiff spouse" and did not expressly allow for successfully defending spouses to recover. Nevertheless, the Court of Appeals had repeatedly interpreted Tenn. Code Ann. § 36-5-103(c) "as allowing for the award of attorney's fees to a party defending an action to change a prior order on the theory that the defending party is enforcing the prior order." *See Hansen*, 2009 WL 3230984, at *3 (citing *Shofner*, 232 S.W.3d at 40 ("By successfully enforcing the earlier custody decree, Father is entitled to recover reasonable attorney fees pursuant to Tenn.

Code Ann. § 36-5-103(c)."); *Scofield*, 2007 WL 624351, at *8 ("We, therefore, find no error in the trial court's decision to award Mother her attorney's fees for successfully defending the petition.")).

That is "the state of the law"—a series of Tennessee decisions that addressed and interpreted the specific statute being amended in 2018—that the General Assembly had in mind when it formalized an existing line of Court of Appeals authority through the 2018 amendment to Tenn. Code Ann. § 36-5-103(c). *See In re Bonding*, 599 S.W.3d 17, 22 (Tenn. 2020) ("the General Assembly is presumed to know the 'state of the law' when enacting legislation, including 'the manner in which the courts have construed the statutes it has enacted.'") (cleaned up). *See also Carter v. Bell*, 279 S.W.3d 560, 564 (Tenn. 2009) ("We must presume that the General Assembly is aware of prior . . . decisions of the courts when enacting legislation."). By contrast, the Government's claim—that the General Assembly was amending Tenn. Code Ann. § 36-5-103(c) to embrace a generic federal prevailing party standard, rather than Tennessee jurisprudence interpreting Tenn. Code Ann. § 36-5-103(c) specifically, because from time to time, "this Court and others" had cited federal law as persuasive authority in fee-shifting cases—is ridiculous. *See* Government's Br. at 13.

Nor *could* the General Assembly have had the Government's proffered version of federal prevailing party law concerning voluntary dismissals in mind when it enacted the 2018 amendment, for a simple reason. As noted above: *federal law is not settled on the matter even today*. *See supra* at 19–24. Every single one of the cases that the

Government identifies on pages 17–18 of its briefing in support of its position here—which represent one of three lines of federal authority attempting to interpret the U.S. Supreme Court's 2016 decision in *CRST* in cases of voluntary dismissal—also *post*-dates the 2018 amendment at issue. Thus, it is not possible, even theoretically, for the General Assembly to have had any of these (out of jurisdiction) cases in mind.

By contrast, the General Assembly actually could have had federal law's (uniform, long-established) recognition that "'an earlier judicially sanctioned change in the parties' legal relationship through a consent decree can be the basis' for prevailing party status moving forward" in mind at the time of the 2018 amendment. Government's Br. at 21. Given that Tenn. Code Ann. § 36-5-103(c)'s provisions are nearly all concerned with circumstances involving an attempt to modify a previously-awarded judicial decree,[7] one can also reasonably assume that it did.

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[7] Tenn. Code Ann. § 36-5-103(c) addresses three distinct situations, two of which necessarily require a previously-secured judicial decree, and the third of which usually involves one. The first situation is a "criminal or civil contempt action," *see id.*, which necessarily requires an earlier decree because contempt claims turn on a previous lawful order. *See Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 355 (Tenn. 2008) ("The threshold issue in any contempt proceeding is whether the order alleged to have been violated is 'lawful.'"). The second situation is the one at issue here: cases involving a subsequent "proceeding to enforce, alter, change, or modify any [earlier] decree of alimony, child support, or provision of a permanent parenting plan order[.]" *See* Tenn. Code Ann. § 36-5-103(c). The third situation is a "suit or action concerning the adjudication of the custody or change of custody of any children, both upon the original divorce hearing and at any subsequent hearing." Tenn. Code Ann. § 36-5-103(c). Such efforts to modify custody typically involve an earlier judicial decree, *see generally*

Given this context, the Government should not be pretending that textual canons support implementing its preferred line of a fractured federal standard (and even then, doing so without regard to the way federal law treats unsuccessful post-judgment efforts to modify earlier decrees). It is fine for the Government to identify its preferred standard and to encourage this Court to embrace that standard for other reasons. But to suggest that the 2018 amendment to Tenn. Code Ann. § 36-5-103(c) incorporated a unified determination of federal law that was not settled in 2018 and still remains unsettled today—and to compound that claim with an outright misrepresentation that Ms. Turner would not be considered an earlier-prevailing party after winning a merits judgment and securing a consent decree in the Parties' original litigation—is dishonest. If anything, the Tennessee-specific authority that existed at the time of the 2018 amendment—which supports Ms. Turner's position in this case—also instructs that the General Assembly had a different approach in mind.

D. *HIMMELFARB* HAS NO APPLICATION HERE; THE FEDERAL STANDARD THAT THE GOVERNMENT ASKS THIS COURT TO EMBRACE REJECTS EXTENDING *HIMMELFARB'S* "TERMINATION ON THE MERITS" STANDARD TO DEFENDANT-SIDE PREVAILING PARTY DETERMINATIONS; AND THE GOVERNMENT'S BRIEF SEEKS TO INJECT A NEW AND DIFFERENT CLAIM INTO THIS APPEAL IN CONTRAVENTION OF PARTY-PRESENTATION RULES.

The approach adopted by the Panel below "applied the *Himmelfarb*

Tenn. Code Ann. § 36-6-101, et. seq., though they do not uniformly do so, given that custody can also be decreed as an original matter by statute, *see* Tenn. Code Ann. § 36-2-303 ("Absent an order of custody to the contrary, custody of a child born out of wedlock is with the mother.").

holding" to prevailing party questions, thereby requiring a defendant to secure "'an adjudication of the merits'" to be considered a prevailing party for purposes of fee-shifting. *See Colley v. Colley*, No. M2021-00731-COA-R3-CV, 2022 WL 17009222, at *6 (Tenn. Ct. App. Nov. 17, 2022), *appeal granted*, No. M2021-00731-SC-R11-CV, 2023 WL 2471006 (Tenn. Mar. 9, 2023) (cleaned up). The federal standard that the Government asks this Court to embrace flatly rejects that approach, though. It also does so as a matter of "[c]ommon sense."[8] *See CRST*, 578 U.S. at 431 ("Common sense undermines the notion that a defendant cannot 'prevail' unless the relevant disposition is on the merits.").

The Panel's *Himmelfarb*-based "favorable termination on the merits" approach is the one that the Appellee has asked this Court to adopt, though. *See, e.g.,* Br. of Appellee at 15, 19, 23, 31. *See also id.* at 24 (arguing that "[i]n order for there to be a 'prevailing party' within the meaning of Tenn. Code Ann. §36-5-103, the case must have been heard and decided on the merits"). As a result, the Appellee's briefing does not

[8] This fact notwithstanding, the Government bizarrely insists that "Ms. Turner has not and cannot persuasively distinguish *Himmelfarb*." *See* Government's Br. at 20, n.3. She can, of course, and without difficulty. *Himmelfarb* was a malicious prosecution case—not a prevailing party case—and accordingly, it adjudicated a fundamentally different question than the one presented here. Further, as to the prevailing party standard, the very federal approach that the Government asks this Court to adopt rejects *Himmelfarb*'s holding that "a favorable termination on the merits" is required to prevail. *Compare Himmelfarb v. Allain*, 380 S.W.3d 35, 38 (Tenn. 2012) (holding that a merits judgment is required), *with CRST*, 578 U.S. at 431 ("Common sense undermines the notion that a defendant cannot 'prevail' unless the relevant disposition is on the merits.").

even address—much less contest—Ms. Turner's earlier-secured prevailing party status arising from her court-ordered merits relief and judicially-approved consent decree. *See generally* Br. of Appellee. The reason why the Appellee has neglected to brief the matter is also a simple one: under *Himmelfarb*'s standard—which is the standard that the Appellee asks this Court to adopt—an additional merits adjudication would be required, so Ms. Turner's earlier-secured prevailing party status would be irrelevant.

This context matters, because it means that the Government's Brief does not so much "present[] and analyze[] precedent that has not otherwise been presented to the Court and highlight[] arguments on the proper interpretation of 'prevailing party'" as it does seek to raise a new and different claim—at the latest possible stage in litigation—that no party to this case has advocated. *See* Government's Amended Motion for Leave to File *Amicus* Brief at 2. The Government also does so under circumstances when the intent of the parties at the time of contracting (in 2012)—which could not have contemplated the fractured line of post-*CRST* (2016 and afterward) line of federal authority that the Government prefers—is dispositive of this case on a different ground.

This is impermissible. It is one thing for *amicus curiae* to advocate positions that differ from the Parties' positions with respect to claims that are presented in a case. But seeking to inject new and fact-specific claims—by way of a brief that addresses a fundamentally different and broader issue than the one presented in this appeal—is something else entirely. Certainly, it is not the proper function of a friend of the court.

See Adkisson v. Jacobs Eng'g Grp., Inc., 36 F.4th 686, 697 (6th Cir. 2022) (noting "the general rule that a court ought not consider an argument raised solely in an amicus brief"); *PPL Corp. v. Comm'r of Internal Revenue*, 133 S.Ct. 1897, 1907 n.6 (2013) (declining to consider argument that a party admitted it had not preserved for review). As then-Judge Gorsuch explained under similar circumstances:

> We see two difficulties here. In the first place, Dr. Genova hasn't pursued the argument for himself. Though we have the discretion to address an argument developed only by an amicus rather than a party, we will typically exercise that discretion only when (1) a party has done something to incorporate the argument "by reference" in its own brief, or (2) "the issue involves a jurisdictional question or touches upon an issue of federalism or comity that could be considered sua sponte." *Tyler v. City of Manhattan*, 118 F.3d 1400, 1404 (10th Cir.1997); *see also Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1422 (10th Cir.1990). Neither of these conditions is met here.
>
> Beyond that, there quickly appears a good reason why Dr. Genova didn't attempt the argument.

See Genova v. Banner Health, 734 F.3d 1095, 1103 (10th Cir. 2013). *Cf. Tyler v. City of Manhattan*, 118 F.3d 1400, 1403 (10th Cir. 1997) ("Despite the fact that Tyler did not raise the issue, amicus curiae, the United States, argues that Tyler is entitled to seek compensatory damages for violations of Title II of the ADA without alleging intentional discrimination. We choose not to address this argument because it was not raised by a party to this appeal. It is instead an attempt by amicus to frame the issues on appeal, a prerogative more appropriately restricted to the litigants.").

To the extent that the State of Tennessee had an interest in this case that warranted raising its own claim, it was obliged to intervene years ago when the issues in this case were first presented. *See* Tenn. R. Civ. P. 24.02. By contrast, attempting to parachute into this litigation as a non-party in an effort to raise a new, different, broader, and fact-specific claim unique to the Parties after this dispute reached its highest stage of appellate review—and even then, only after the Parties' principal briefing was filed—impairs the orderly presentation of claims, violates intervention rules, and interferes with fundamental party-presentation principles. *See State v. Bristol*, 654 S.W.3d 917, 923–24 (Tenn. 2022) (the party-presentation principle "rests on the premise that **the parties** 'know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.'") (emphasis added).

This is not a trivial complaint, either. In light of the Government's Brief, this appeal now presents a situation where only *amicus curiae*—but not the Appellee himself—has asserted that Ms. Turner was not already a prevailing party by virtue of her earlier-secured merits judgment and consent decree. *Compare* Br. of Appellee (never making that argument), *with* Government's Br. at 21 (making that argument by misapplying federal law to the facts of the Parties' original litigation). The Government's single-sentence, unsupported, and skeletal argument that Ms. Turner was not an earlier-prevailing party[9] is also so undeveloped that even if the Government were a party here, its claim on

[9] *See* Government's Br. at 21 ("Here, unlike in *Binta*, the Marital Dissolution Agreement does no such thing, so Ms. Turner has no prior prevailing-party status on which to rely.")

the matter would be waived. *See Sneed v. Bd. of Pro. Resp. of Supreme Ct.*, 301 S.W.3d 603, 615 (Tenn. 2010) ("where a party fails to develop an argument in support of his or her contention or merely constructs a skeletal argument, the issue is waived."). The additional facts that the Government's brief: (1) wrongly—and inexplicably—posits that a court-ordered merits judgment and a consent-decree-enabled judicial alimony order would not qualify for prevailing party status under federal law, *see supra* at 9–14; and (2) inaccurately suggests that federal law is unified on the materially different issue addressed by its briefing when it is not, *see supra* at 19–24, do not help matters. For all of these reasons, though, the Government's Brief offers little in the way of value regarding either the actual issue presented by this appeal or the claims that are properly before this Court as presented by the Parties.

IV. CONCLUSION

For the foregoing reasons, Ms. Turner was a pre-existing prevailing party under the applicable federal standard, having secured an earlier judicially-sanctioned change in the parties' legal relationship by winning court-ordered merits relief and securing a consent decree. Thus, Ms. Turner wins even under the federal standard that the Government urges this Court to adopt. *See Pottinger*, 805 F.3d at 1299 ("attorneys' fees can be awarded for defending, enforcing, opposing the modification of, or monitoring compliance with an existing consent decree."). The Government's brief misapplies federal law on this narrower and case-dispositive issue. The Government also erroneously asserts that Tennessee's prevailing party law mirrors the federal standard; it misapplies the only textual canon of construction it identifies in support

of its position; and it wrongly implies that federal law is unified on the broader and materially different question that the Government briefs when it is not. Worst of all, the Government encourages this Court to apply a standard that differs materially from the one that the Appellee himself proposes, leaving *amicus curiae* as the only litigant in this case to contest—however wrongly—Ms. Turner's pre-existing prevailing party status in contravention of party presentation rules. For all of these reasons, the Government's brief offers no value; this Court should not even reach the materially different and inapposite question that the Government has briefed; and the trial court's judgment should be reinstated even under the federal standard that the Government asks this Court to adopt.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Pursuant to this Court's Order dated June 15, 2023, this Response[10] brief (Sections III–IV) contains 7,823 words pursuant to § 3.02(a)(1)(a), excluding excepted sections, as calculated by Microsoft Word, and it was prepared using 14-point Century Schoolbook font pursuant to § 3.02(a)(3).

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[10] Because the Court's order allows a "Response" brief—one of two principal brief types, *see* Tenn. R. App. P. 27(c) (distinguishing between "reply" and "response" briefs)—Ms. Turner has assumed that there is a 15,000-word limit associated with this brief. If that assumption is incorrect, though, Ms. Turner is happy to refile in compliance with whatever alternative word limit the Court specifies.

CERTIFICATE OF SERVICE

I hereby certify that on this the 29th day of June, 2023, a copy of the foregoing was served via the Court's electronic filing system upon:

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