

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JAY ASHCROFT, in his official capacity as Secretary
of State for the State of Missouri, *et al.*,

Plaintiffs-Appellants,

v.

JOSEPH BIDEN, in his official capacity as President
of the United States, *et al.*,

Defendants-Appellees.

No. 24-3236

RESPONSE TO MOTION TO DISMISS APPEAL AS MOOT

The federal government respectfully responds to plaintiffs' motion for voluntary dismissal under Fed. R. App. P. 42(b).

In this appeal, plaintiffs sought interlocutory review of the denial of their motion for preliminary injunction against implementation of Executive Order 14,019. As plaintiffs acknowledge in their motion, that Executive Order has since been rescinded. The government agrees that, in light of that rescission, this appeal has become moot and should be dismissed.

The government objects, however, to plaintiffs' request that the costs of appeal be taxed against the government. The Federal Rules of Appellate Procedure contemplate that "if an appeal is dismissed, costs are taxed *against the appellant*, unless the parties agree otherwise." Fed. R. App. P. 39(a)(1)

(emphasis added). Here, the government is prepared to agree that each party should bear its own costs. But nothing in the rule suggests that costs should be taxed against the appellee when an appeal is voluntarily dismissed.

That principle aligns with the particular rule applicable to claims involving the United States, which forecloses any award of costs here. “Costs for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law.” Fed. R. App. P. 39(b). The relevant statute is 28 U.S.C. § 2412(a), which generally provides that “a judgment for costs ... may be awarded *to the prevailing party in any civil action* brought by or against the United States or any agency or any official of the United States acting in his or her official capacity.” 28 U.S.C. § 2412(a) (emphasis added).

Plaintiffs are not prevailing parties within the meaning of § 2412(a). “A party ‘prevails’ when a court conclusively resolves his claim by granting enduring relief on the merits that alters the legal relationship between the parties.” *Lackey v. Stinnie*, 604 U.S. ___, 2025 WL 594737, at *8 (U.S. Feb. 25, 2025). Plaintiffs have obtained no such judicial relief.¹ Their request for an award of costs against the United States is accordingly without legal basis.

¹ Indeed, plaintiffs would not even have qualified as prevailing parties under two erstwhile theories rejected by the Supreme Court. There is no evidence that this litigation did anything to motivate rescission of the Executive Order, and plaintiffs never won even preliminary relief: the district

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CONCLUSION

For the foregoing reasons, plaintiffs' motion to dismiss their appeal as moot should be granted, but costs should not be taxed against the government.

Respectfully submitted,

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court denied their motion for preliminary injunction and this Court denied their motion for an injunction pending appeal. *Cf. Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598, 600 (2001) (rejecting “catalyst” theory, under which a plaintiff could be deemed to prevail if it provoked a “voluntary change in the defendant’s conduct”); *Lackey*, 2025 WL 594737, at *8 (rejecting theory that plaintiff prevails if it wins preliminary relief in a case that later becomes moot, holding that a “preliminary injunction ... does not render a plaintiff a ‘prevailing party’”).

CERTIFICATE OF COMPLIANCE

I certify that this response complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 510 words.

/s/ Jeffrey E. Sandberg
Jeffrey E. Sandberg
Counsel for Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2025, I electronically filed the foregoing response with the Clerk of Court by using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jeffrey E. Sandberg
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