No. 07-1527

In the Supreme Court of the United States

THE CITY OF GARLAND, TEXAS
Petitioner,

v.

ROY DEARMORE, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL LEAGUE OF CITIES, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE TEXAS MUNICIPAL LEAGUE, AND THE TEXAS CITY ATTORNEYS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

EVELYN W. NJUGUNA
Counsel of Record
TEXAS MUNICIPAL LEAGUE
1821 RUTHERFORD LANE, SUITE 400
AUSTIN, TX 78754
(512) 231-7400
Counsel for Amici Curiae
The National League of Cities
The International Municipal Lawyers Association
The Texas Municipal League
The Texas City Attorneys Association

July, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL LEAGUE OF CITIES, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE TEXAS MUNICIPAL LEAGUE, AND THE TEXAS CITY ATTORNEYS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, the National League of Cities, the International Municipal Lawyers Association, the Texas Municipal League, and the Texas City Attorneys Association hereby request leave to file the accompanying *amicus curiae* brief. This brief is submitted in support of the petition for writ of certiorari to the Court of Appeals for the Fifth Circuit. Petitioner, City of Garland, Texas has consented to the filing of this brief. Respondents have not granted consent, thereby making this motion necessary.

As set forth in the accompanying brief, the National League of Cities, the International Municipal Lawyers Association, the Texas Municipal League, and the Texas City Attorneys Association are membership associations of cities and attorneys who represent cities. These organizations share a keen interest in the proper interpretation and application of attorney's fees because of the critical impact that liability for attorney's fees can have on a city.

For these reasons, the National League of Cities, the International Municipal Lawyers Association, the Texas Municipal League, and the Texas City Attorneys Association respectfully request leave to file the accompanying *amicus curiae* brief.

Respectfully submitted,

EVELYN W. NJUGUNA
Legal Counsel
Counsel of Record
TEXAS MUNICIPAL LEAGUE
1821 Rutherford Lane, Suite 400
Austin, Texas 78754
(512) 231-7400

Attorney for Amici Curiae
The National League of Cities
The International Municipal Lawyers Association
The Texas Municipal League
The Texas City Attorneys Association

July, 2008

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTEREST OF AMICI CURIAE

The *amici* submit this brief in support of Petitioner, the City of Garland, Texas.[1] The National League of Cities (NLC) is the country's largest and oldest organization serving municipal government, with more than 1,600 direct member cities and 49 state municipal leagues that collectively represent more than 18,000 United States communities. Founded in 1924, NLC strengthens local government through research, information sharing, and advocacy on behalf of hometown America. The International Municipal Lawyers Association (IMLA) is a nonprofit, nonpartisan professional organization consisting of more than 1,400 members. The membership is comprised of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. Since its establishment in 1935, IMLA has advocated for the rights and privileges of local governments and the attorneys who represent them through its Legal

---

[1] The consent of the attorney for the petitioner was requested and obtained. The consent of the attorney for respondents was requested but refused. Thus, a motion requesting leave to file the instant brief precedes this brief. Counsel of Record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. Rule 37.2 (b). In accordance with Rule 37.6, *amici* state that no counsel for a party has authored this brief, in whole or in part, and that no person or entity, other than *amici* or their members, have made a monetary contribution to the preparation or submission of this brief.

Advocacy Program. IMLA has appeared as *amicus curiae* on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts. The Texas Municipal League (TML) is a non-profit association of over 1,090 incorporated cities. TML provides legislative, legal, and educational services to its members. The Texas City Attorneys Association (TCAA), an affiliate of TML, is an organization of more than 400 attorneys who represent Texas cities and city officials in the performance of their duties. The *amici* collectively work to better local governments.

SUMMARY OF THE ARGUMENT

This case concerns the proper construction of the term "prevailing party" in establishing whether a plaintiff is eligible for attorney's fees under 42 U.S.C. §1988(b). Specifically, the question presented is whether the term includes a party that has gained a preliminary injunction, but has failed to obtain a final decision on the merits for a claim for permanent injunctive relief. This question was expressly reserved by this Court in *Sole v. Wyner*, _ U.S. _ (2007), and this case presents an occasion for the Court to provide much-needed guidance on this unsettled issue. The resolution of this issue is of substantial importance to local governments because of the significant implications that liability for attorney's fees presents.

ARGUMENT

I. A Plaintiff Who Obtains a Preliminary Injunction Without a Final Decision on the Merits for a Claim for Permanent Injunctive Relief is Not a Prevailing Party.

In an action under Section 1983, a court "in its discretion, may allow the prevailing party . . . reasonable attorney's fees ..." 42 U.S.C. §1988(b). Not every favorable ruling during the course of litigation will confer prevailing party status. Rather, "[t]he touchstone of the prevailing party inquiry" is "the material alteration of the legal relationship between the parties in a manner which Congress sought to promote in the fee statute." *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-73 (1989). An award for attorney's fees is appropriate "only in th[e] event that there [has] been a determination of the 'substantial rights of the parties,' which Congress determined was a necessary foundation for departing from the usual rule in this country that each party is to bear the expense of his own attorney." *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) (quoting H.R. Rep. No. 94-1558, at 5 (1976)). This Court has found that a "prevailing party" is one who has obtained either an "enforceable judgment[] on the merits" or a "court-ordered consent decree[]." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res.*, 532 U.S. 598, 604 (2001). A "judgment on the merits" embodies the kind of "material alteration of the legal relationship of the parties necessary to permit an award of attorney's fees." *Id.* (quoting *Tex. State Teachers Ass'n.* 489 U.S. 782 at 792-93).

To qualify for attorney's fees, the respondents must show that they have achieved a victory on the merits of their claim for permanent injunctive relief. They have not. All that the respondents obtained was a preliminary injunction. A preliminary injunction without more is not a "material alteration of the legal relationship of the parties," and does not confer prevailing party status.

II. A Preliminary Injunction Is Not a Meritorious Judgment That Changes the Legal Relationship Between The Parties.

Under this Court's precedents, a plaintiff's *likelihood* of prevailing is perhaps the most important factor in determining whether the plaintiff can obtain a preliminary injunction. *See, e.g., Sole, _ U.S. at _* (discussing probability of success factor); *Aschroft v. ACLU*, 542 U.S. 656, 666 (2004) (discussing likelihood of prevailing on the merits). In determining whether a plaintiff is entitled to a preliminary injunction, a court is called upon to assess the probability of the plaintiff's ultimate success on the merits, and whether the plaintiff will suffer irreparable harm. *Id.; Doran v. Salem Inn, Inc.*, 442 U.S. 992, 931 (1975). A preliminary injunction only serves to preserve the relative positions of the parties until a trial on the merits can be held. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Customarily, preliminary injunctions are "granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Id.* They are not based on "findings of fact and conclusions of law" and a party is not "required to prove his case at a preliminary-injunction hearing." *Id.* (citing *Progress Dev. Corp. v.*

Mitchell, 286 F.2d 222, 233 (7th Cir. 1961) and *Indus. Bank of Wash. v. Tobriner*, 405 F.2d 1321, 1324 (D.C. Cir. 1968).

The Fifth Circuit hinges its decision on the fact that the respondents' preliminary injunction was "based upon an *unambiguous* indication of probable success on the merits." *Dearmore v. City of Garland*, 519 F.3d 517, 524 (5th Cir. 2008) (emphasis added). This holding incorrectly equates "probable success" with "success." The district court's ruling is rooted on the probability of success, and not on the merits of the case. The district court granted the preliminary injunction without any notice to the parties that it was considering the injunction. It did not hold a preliminary injunction hearing, and it accepted the pleaded facts of the respondents' complaints as true. Accordingly, the respondents' preliminary injunction is not a meritorious judgment that changes the relationship between itself and the city, and it does not confer prevailing party status.

III. The "Catalyst Theory" Is Not a Permissible Basis for the Award of Attorney's Fees.

The Fifth Circuit found that the respondents were a prevailing party because their obtaining a preliminary injunction "cause[d] the defendant to moot the action." *Dearmore*, 519 F.3d at 524. That holding necessarily implicates the "catalyst theory," which this Court invalidated in *Buckhannon*. The "catalyst theory" posits that a plaintiff is a prevailing party because the plaintiff's lawsuit was the catalyst for bringing about change in the defendant's action. In *Buckhannon*, this Court rejected the "catalyst theory"

because it "allows an award where there is no judicially sanctioned change in the legal relationship of the parties." *Buckhannon*, 532 U.S. at 605. In reaching this conclusion, the Court explained that "a defendant's *voluntary* change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change" to confer prevailing party status. *Id.*

The "catalyst theory" is inconsistent with the spirit of fee-shifting statutes, such as Section 1988(b). It does not require a determination that the plaintiff's claims were in fact meritorious and that the relief that the plaintiff obtained was necessary to vindicate federally protected rights. Instead, the "catalyst theory" merely relies on whether a plaintiff "got his way." The city's voluntary alteration of its ordinance, while mooting the respondents' claim, is insufficient under *Buckhannon's* analysis to make the respondents a prevailing party.

Allowing a plaintiff to recover attorney's fees whenever a local government *voluntarily* changes its conduct not only undermines the purpose of Section 1988(b), but it would have a chilling effect on the ability of local governments to change their policies or ordinances due to the threat of incurring attorney's fees. The "catalyst theory" acts as a deterrent for a local government to voluntarily change its conduct – conduct that may not be illegal – because it could possibly be assessed attorney's fees. A local government's potential liability for litigation fees can be as significant as, and sometimes even more significant than, the potential liability on the merits.

See, e.g. Rivera v. Riverside, 763 F.2d 1580, 1581-83 (9th Cir. 1985), *aff'd,* 474 U.S. 917 (1985) (city ordered to pay civil rights plaintiffs $245,456.25 following a trial in which they recovered a total of $33,350 in damages); *Cunningham v. City of McKeesport*, 753 F.2d 262, 269 (3rd Cir 1985), *vacated by,* 478 U.S. 1015 (1986) (city ordered to pay $35,000 in attorney's fees in a case in which judgment for the plaintiff was entered in the amount of $17,000); *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980), (en banc) ($160,000 attorney's fees awarded for obtaining $33,000 judgment); *Skoda v. Fontani*, 646 F.2d 1193, 1194 (7th Cir. 1981) ($6,086.12 attorney's fees awarded to obtaining $1 recovery).

Liability for attorney's fees under Section 1988 has significant implications for local government budgeting and delivery of services. Funds that must be allocated to the payment of attorney's fees are unavailable for other public purposes. Local governments live within budgets and lack the ability to confront fiscal shortfalls. When faced with financial shortfalls, they must rely upon measures that either raise taxes or detrimentally affect the essential services of government upon which the population relies. A rule that permits civil rights plaintiffs to recover attorney's fees even in cases where the merits of the case have not been assessed can only burden local governments with unwarranted liability for attorney's fees and costs of defending such litigation.

CONCLUSION

Amici fully acknowledge their obligation to pay attorney's fees under Section 1988(b) when a plaintiff

is a prevailing party. But to revive the "catalyst theory" and elevate a party who does not obtain a "judgment on the merits" to prevailing party status would obliterate this Court's jurisprudence. Accordingly, *amici* ask this Court to confine Section 1988 liability to its proper scope – cases in which plaintiffs obtain a meritorious judgment that their rights have been violated. For the above reasons, *amici* respectfully request this Court grant the City's Petition for Writ of Certiorari.

Respectfully submitted,

Evelyn W. Njuguna
Legal Counsel
Counsel of Record

Texas Municipal League
1821 Rutherford Lane, Suite 400
Austin, Texas 78754
Tel: (512) 231-7400
Fax: (512) 231-7490
Attorney for Amici Curiae

The National League of Cities,
The International Municipal Lawyers Association,
The Texas Municipal League, and
The Texas City Attorneys Association