No. 07-1527

In The
Supreme Court of the United States

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

PETITIONER'S REPLY BRIEF

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In *Sole v. Wyner,* __ U.S. __ (2007), this Court saved for another day the question whether a party who obtains a preliminary injunction in the absence of a final decision on the merits of a claim for permanent injunctive relief is entitled to prevailing party status so as to permit the award of attorney's fees under federal fee shifting statutes. This case squarely presents that very issue. Respondents' brief in opposition fails to even mention *Sole*, much less tell the Court why the issue this Court itself acknowledged in that case is not important enough to warrant the attention of the Court now. Additionally, Respondents' brief dismisses without meaningful analysis the existence of an irreconcilable conflict between the lower courts that have addressed the issue, and fails to explain how this case does anything other than effect a post-*Buckhannon* revitalization of the catalyst theory. Because the issue presented in this case is recurring and important, this Court should grant certiorari to address it and to resolve the conflict among the lower courts.

A. The decisions of the lower courts that have considered the issue presented here cannot be squared in a manner consistent with one another or with this Court's abandonment of the catalyst theory in *Buckhannon Bd. Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001).

In the instant case, the Fifth Circuit established a rule that "an unambiguous indication of probable

success on the merits" in a preliminary injunction is sufficient judicial imprimatur to serve as the basis for an award of attorney's fees without running afoul of the now-abandoned catalyst theory. *Dearmore v. City of Garland*, 519 F.3d 517, 524 (5th Cir. 2008). Whether the terms "unambiguous", "indication", and "probable" can logically coexist within the same rule without creating a legal oxymoron is a question best left for briefs on the merits. Nonetheless, the Fifth Circuit's decision in *Dearmore* cannot be reconciled with the manner in which the Fourth Circuit addressed the issue in *Smyth v. Rivero,* 282 F.3d 268 (4th Cir. 2002). For that matter, *Dearmore* cannot be reconciled with the decisions of other courts that *have* given prevailing party status (or that say they would, under the right circumstances) to a party that obtains only a preliminary injunction, nor with this Court's decision in *Buckhannon.* Hence, the intervention of this Court to resolve those conflicts is necessary.

1. The Fifth Circuit's decision in *Dearmore* cannot be reconciled with the Fourth Circuit's decision in *Smyth*.

Respondents' assertion that the Fourth and Fifth Circuits are not split is based on the premise that the preliminary injunction considered by the Fourth Circuit in *Smyth* was merely the result of a balancing of the equities in that case, whereas the preliminary injunction in this case was somehow exclusively dependent on the merits of Respondents' arguments. Both assertions are demonstrably incorrect and both ignore the plain text of the district court's opinions in those cases.

Although not mentioned in Respondents' analysis of *Smyth*, in deciding the preliminary injunction, the district court in *Smyth* made a specific and unambiguous finding that Smyth would likely succeed on the merits of her claim. *Smyth v. Carter,* 168 F.R.D. 28, 32 (W.D. Va., 1996). In considering the merits of the plaintiffs' claims in that case, the district court carefully reviewed the applicable federal regulations, compared them against the policy challenged by the plaintiffs, and found the regulations and that policy "impossible" to reconcile. *Id.* ("Given the clear meaning of the regulations, impossible to square with [defendant's] contrary policy, the court finds that plaintiff likely will succeed on the merits on its statutory claim.")

In its subsequent decision granting the *Smyth* plaintiffs' request for attorney's fees, the district court reiterated the basis of its decision for issuing the preliminary injunction: "Th[is] court *primarily* based its decision to grant the plaintiffs' motion for a preliminary injunction on the plaintiffs' probability of success on the merits of their statutory claim. The court analyzed the defendant's policy in great detail, and found that it [violated] the applicable federal regulations." *Smyth v. Carter,* 2000 WL 1567168 (W.D. Va., 2000)(emphasis added). It is difficult to imagine how the district court in *Smyth* could have been more emphatic or unambiguous in articulating the reason it issued the preliminary injunction.

Respondents' discussion of the district court's basis for granting a preliminary injunction in this case is likewise misleading. Respondents errantly suggest that the preliminary injunction granted in this case

was based primarily on the district court's determination of their probable success on the merits, not on a traditional form of balancing test that assesses the various factors that typically govern whether a preliminary injunction should be issued. The district court's opinion granting the preliminary injunction demonstrates otherwise. In its *sua sponte* opinion granting the preliminary injunction, the district court stated that it had employed the Fifth Circuit's balancing test, saying:

> ". . . Plaintiff must demonstrate: (i) a substantial likelihood of success on the merits; (ii) a substantial threat of immediate and irreparable harm, for which he has no adequate remedy at law; (iii) that greater injury will result from denying the temporary restraining order than from its being granted; and (iv) that a temporary restraining order will not disserve the public interest."

Dearmore v. City of Garland, 400 F. Supp. 2d 894, 898 (N.D. Tex. 2005).

In then applying the balancing test, the district court stated:

> "Dearmore has further demonstrated that granting a preliminary injunction will subject the City to minimal harm, if any, while protecting him from irreparable harm which could not otherwise be adequately remedied at law. The City, with minimal effort, may amend its ordinance to include the owner's right of refusal of an inspection and include a warrant

> requirement upon that refusal. The court determines that the effect, if any, on the City's regulatory scheme would be negligible. Finally, Dearmore has demonstrated that a preliminary injunction will not disserve the public interest . . . ."

Id. at 905-06.

Respondents' dismissive attempt to reconcile the Fourth Circuit's opinion in *Smyth* with the Fifth Circuit's opinion in this case disregards reality; the district court in *Smyth* considered the merits of the plaintiffs' claims as much as, if not more than, the district court did in this case.

2. The Fifth Circuit's decision in *Dearmore* cannot be reconciled with the post-*Buckhannon* decisions from other circuit courts in which a preliminary injunction was held to be sufficient to confer prevailing party status.

Respondents claim that there is no split in the circuits because the other circuit courts that have reached the issue have awarded attorney's fees based on a preliminary injunction in the same manner as the Fifth Circuit. In fact, none of the post-*Buckhannon* cases cited by Respondents, except the Fifth Circuit, permit the award of attorneys' fees when the only "relief" obtained is a voluntary decision on the part of the defendant motivated by the issuance of a preliminary injunction.

Respondents point to two post-*Buckhannon* opinions of the circuit courts in which a plaintiff was awarded attorney's fees as a prevailing party based on having obtained a preliminary injunction. Unlike this case, in each of those cases the plaintiff received tangible, irreversible relief as a result of an order of the court. In neither of those cases was the plaintiff held to be a prevailing party merely because of a voluntary change in conduct by the defendant.

In *Watson v. County of Riverside*, 300 F.3d 1092 (9th Cir. 2002), *cert. denied,* 538 U.S. 923 (2003), for example, the Ninth Circuit allowed the recovery of attorney's fees because the plaintiff received a preliminary injunction. *Watson*, 300 F.3d at 1096. When read in depth, though, *Watson* reveals that the plaintiff received much more than passing relief in the form of a subsequently mooted preliminary injunction. In fact, the plaintiff there received virtually everything he wanted from the suit in what effectively became, due to the change of events created by the preliminary injunction, a permanent and unalterable form of relief.

Watson involved a disciplinary proceeding against a deputy sheriff who sought to enjoin the County of Riverside from using a report the deputy had prepared without first receiving warnings that the statement could be used for disciplinary purposes against him. *Id.* at 1093. The district court enjoined the County of Riverside from using the disputed report in the disciplinary proceedings against the deputy. *Id.* at 1094. Following his disciplinary hearing, the case was rendered moot. *Id.* As a result of the injunction, the plaintiff received precisely the relief he sought in the suit – a disciplinary proceeding without the use of the

offending report. *See id.* The plaintiff received that relief not because of some voluntary action on the part of the County, but rather because the district court ordered that relief. *See id.*

Select Milk Producers, Inc. v. Johanns, 400 F.3d 939 (D.C. Cir. 2005), likewise involved a case in which the plaintiffs were awarded attorney's fees because they obtained a preliminary injunction. Like the plaintiff in *Watson*, though, the plaintiffs in *Select Milk Producers* received concrete and irreversible relief as a result of the district court's order, not because of a voluntary change in conduct due to the district court's merit-based ruling on the plaintiffs' request for a preliminary injunction. *See, Select Milk Producers, Inc.,* 400 F.3d at 943.

That case involved a retroactive rule issued by the Secretary of Agriculture. *Id.* at 941. The rule, if imposed, would have resulted in an immediate loss of $5,000,000.00 to the plaintiffs. *Id.* The district court granted the plaintiffs' motion for a preliminary injunction enjoining the Secretary from imposing the rule. *Id.* Thereafter, the Secretary issued a new rule which did not impose that loss on the plaintiffs, and the case became moot. *Id.* Thus, as a result of the district court's injunction, plaintiffs avoided a loss of $5,000,000.00. *See id.* at 943. Plaintiffs avoided that loss not because of the voluntary actions of the Secretary but because the district court enjoined enforcement of the offending rule. *See id.* Indeed, the court of appeals noted that the "preliminary injunction provided concrete and irreversible judicial relief to Milk Producers. . ." *Id.* at 948.

Dearmore is inconsistent with those cases because it permits the recovery of attorney's fees without corresponding concrete and irreversible relief. In that regard, the opinion of the Fifth Circuit also conflicts with the other post-*Buckhannon* opinions cited by Respondents. Specifically, in both *Northern Cheyenne Tribe v. Jackson*, 433 F.3d 1083 (8th Cir. 2006), and *Advantage Media, L.L.C. v. City of Hopkins*, 511 F.3d 833 (8th Cir. 2008) *cert. denied*, __ U.S. __, 76 U.S.L.W. 3557, the Eighth Circuit refused to allow attorney's fees based on a preliminary injunction where the plaintiff did not obtain the sort of concrete and irreversible relief that the plaintiffs in *Watson* and *Select Milk Producers* received.

Northern Cheyenne involved an injunction against the Secretary of Housing and Urban Development preventing the Secretary from disbursing funds to the State of South Dakota for construction of a shooting range. *Northern Cheyenne Tribe*, 433 F.3d at 1083. Ultimately, the case was resolved when HUD determined that the state was not entitled to the funds for the shooting range and the project was cancelled. *Id.* at 1084-85. Although the district court found that the plaintiff was likely to prevail on the merits, *id.* at 1084, the Eighth Circuit found that alone to be insufficient to permit the award of attorney's fees. *Id.* at 1086. Instead, the court noted in *dictum* that only those injunctions that provide some relief to the plaintiff might be sufficient to permit the award of attorney's fees. *See id.* (". . . the grant of a preliminary injunction should confer prevailing party status if it alters the course of a pending administrative proceeding and the party's claim for permanent injunction is rendered moot by the impact of the

preliminary injunction . . . That type of preliminary injunction functions much like the grant of an irreversible partial summary judgment on the merits.")(internal citations omitted). The Eighth Circuit, however, has never ruled on such a case.

In *Advantage Media,* the district court enjoined the enforcement of a sign ordinance on the grounds that it was facially unconstitutional in a number of respects. *Advantage Media L.L.C. v. City of Hopkins*, 379 F. Supp. 2d 1030, 1048-49 (D. Minn. 2005). In so doing, the district court analyzed the ordinance and found that the plaintiff had demonstrated a strong likelihood of success on the merits of their claim, all as detailed by the district court in its discussion of the probable merits of the plaintiff's claims. *Id.* at 1046. Thereafter, the City of Hopkins amended its sign ordinance to remove the offending provisions. *Advantage Media, L.L.C. v. City of Hopkins*, 511 F.3d 833, 835 (8th Cir. 2008). Following a jury trial in which the plaintiff failed to demonstrate that the offending ordinance caused it any damages, the plaintiff sought attorney's fees alleging that it was a prevailing party based upon the preliminary injunction and the court's finding that the ordinance was unconstitutional. *Id.* The district court denied the request, and the Eighth Circuit affirmed. *Id.* at 839. The court of appeals acknowledged that, "Advantage's lawsuit resulted in alteration of several potentially unconstitutional provisions of the Hopkins sign ordinance . . .", *id.* at 838, but determined that "a judicial pronouncement that the defendant has violated the Constitution, without more, does not make a plaintiff a prevailing party." *Id.* (quoting *Peter v. Jax*, 187 F.3d 829, 837 (8th Cir. 1999)).

As did the plaintiff in *Advantage Media*, Respondents in this case obtained, at best, a judicial pronouncement that they would likely prevail on their claims that the challenged ordinance violated the Constitution. In both *Dearmore* and *Advantage Media*, the challenged ordinance was voluntarily changed by the defendant to remove the challenged provisions. Advantage received all the relief that Respondents received in the instant case, yet the Eighth Circuit determined that Advantage was not entitled to an award of attorney's fees as a prevailing party.

Thus, the Fifth Circuit's opinion in *Dearmore* creates a multiple split in the circuits. As is set out above, it is inconsistent with the Fourth Circuit which declined entirely to award attorney's fees based upon a preliminary injunction. Likewise, Respondents' award of attorney's fees without obtaining concrete and irreversible relief from the district court makes the Fifth Circuit's opinion inconsistent with the D.C. Circuit, the Eighth Circuit, and the Ninth Circuit.

3. A rule that deems a party who obtains no judicially-sanctioned relief other than a subsequently mooted preliminary injunction to be a "prevailing party" for an award of attorney's fees cannot be reconciled with this Court's decision in *Buckhannon*.

In their response, the Respondents incorrectly describe the Fifth Circuit's test as to a prevailing party as being one who obtains an "unambiguous indication of inevitable [*sic*] success on the merits" of a request

for a preliminary injunction. Response to Petition for Certiorari, p.6. Ironically, Respondents' misstatement of the rule the Fifth Circuit actually announced in *Dearmore* illustrates just how much the *Dearmore* decision and others like it have given a rebirth to the "catalyst theory" this Court repudiated in *Buckhannon*. Even if the measure of the district court's assessment of success on the merits was one of inevitability – rather than probability – there is still nothing to distinguish the result in *Dearmore* from the result in the ordinary pre-*Buckhannon* catalyst theory case. A determination of "inevitable success on the merits" still falls short of the "concrete and irreversible relief" that other courts have found sufficient to make the recipient of a preliminary injunction a prevailing party, and it is far, far less than an actual determination of the merits made after the parties have had an opportunity to present their best case in something at least akin to a trial.

The incontrovertible truth is that, at the end of the day, Respondents left the district court empty-handed. All the district court did in this case was determine that the Respondents' pleadings could survive a motion to dismiss for failure to state a claim, perform an ordinary balancing of the equities, and then make a finding that the Respondents had shown a probability of success on the merits. *Dearmore v. City of Garland,* 400 F. Supp. 2d 894 (N.D. Tex. 2005). Even if the district court had done something more, even if it had indeed characterized Respondents' eventual success as inevitable, when it was all said and done, Respondents obtained nothing more than an order declaring the entire controversy moot (an order the Respondents did not challenge). While the district

court's opinion may well have motivated Petitioner to do exactly what the district court itself suggested (that is, amend the challenged ordinance so that the ordinance would no longer contain the defects the district court perceived it suffered), no matter how strong the district court's suggestion was or could have been, the fact remains that Petitioner was under no judicial *compulsion* whatsoever to change its ordinance at the time it did so. To the extent the Respondents ultimately obtained a bit of what they originally sought, what they got was due solely to a voluntary decision on the part of Petitioner. Petitioner simply took (it was thought at the time) the wiser course, the path of least resistance, a path that would save the district court, the Petitioner's taxpayers, and even the Respondents from the time, effort, money, and agony of battling over something that Petitioner decided was irrelevant to the overall effectiveness of a program of which the challenged ordinance provision was but a small part.

Therein lies the fundamental problem with *Dearmore:* At essence, *Dearmore* makes judicial *motivation* the equivalent of judicial *imprimatur*. In doing so, it pulls the catalyst theory from the grave dug for it by this Court in *Buckhannon* and creates from the corpse a new form of monster, one whose dangers are yet to be realized.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari.

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