No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents the question expressly reserved by this Court in *Sole v. Wyner,* __ U.S. __ (2007) – 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. It is a question that has split and indeed confounded the circuit courts. In this case, the Fifth Circuit held that the fleeting modicum of victory represented by a subsequently mooted preliminary injunction is sufficient. The Fourth and Eighth circuits disagree, relying on this Court's disavowal of the "catalyst theory" in *Buckhannon Board & Care Home v. West Virginia Dept. of Health,* 532 U.S. 598 (2001) as authority for their positions. Still other circuit courts answer the question either "yes" or "sometimes" (or both "yes" and "no") based upon differing tests devised by those circuits, none of which is entirely consistent with the tests created by the other circuits.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, the City of Garland, Texas (the "City") is a home-rule municipality created under the constitution and laws of the State of Texas, thus Rule 29.6 does not apply.

Respondents, Roy Dearmore, A.C. Blair, and Marie Combs, (collectively, "Dearmore") were plaintiffs in the district court and appellees in the court of appeals. Dearmore and the others filed suit individually and as putative representatives of a purported class of property owners, property managers, and tenants. No such class or classes were ever certified by the district court, and no appeal was taken from that ruling, so the Respondents are in this Court as individuals only.

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The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. A) is published at 519 F.3d 517 (5th Cir. 2008). The order of the district court (Pet. App. E) granting Dearmore a preliminary injunction is reported at 400 F. Supp. 2d 894 (N.D. Tex. 2005). The order of the district court dismissing Dearmore's suit as moot, but nonetheless finding Respondents to be prevailing parties is unreported. (Pet. App. D). The district court's order denying the City's motion to amend that holding is reported at 237 F.R.D. 573 (N.D. Tex. 2006). (Pet. App. C).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 10, 2008. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of that judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED IN THE CASE

The relevant portion of 42 U.S.C. § 1988 provides:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000

> [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

42 U.S.C. § 1988(b)

PRELIMINARY STATEMENT

Dearmore filed a civil action against the City challenging an ordinance passed by the Garland City Council that imposed certain minimum housing standards on single family and multifamily residential rental properties. The ordinance further required inspections of those residences to ensure compliance with the minimum housing standards. The district court dismissed most of Dearmore's claims related to the minimum housing standards. At the same time - but without notice to the parties or a preliminary injunction hearing - the district court granted a preliminary injunction against the City on the sole remaining issue, a provision relating to a residential rental inspection program created by the ordinance. The district court enjoined that provision because, according to the district court, it could imagine hypothetical circumstances in which that provision could be enforced in a manner contrary to the

restraints of the Fourth Amendment. Inasmuch as the City did not intend to implement the inspection program in the manner hypothesized by the district court, the City Council amended the ordinance to address the district court's stated concerns. Thereafter, the case was dismissed as moot. However, in the order dismissing the case, the district court determined that, based on the preliminary injunction, Dearmore was a "prevailing party." The district court then awarded Dearmore attorney's fees and costs. The City appealed that determination and the award of attorney's fees. The Fifth Circuit Court of Appeals affirmed. *Dearmore v. City of Garland,* 519 F.3d 517 (5th Cir. 2008).

STATEMENT OF THE CASE

On June 16, 2005, Dearmore filed an original complaint under 42 U.S.C. § 1983 requesting temporary, preliminary, and permanent injunctive relief challenging Garland Ordinance No. 5895 relating to the maintenance of rental properties within the City. The complaint alleged that various minimum housing standards made applicable by the ordinance to residential rental property, such as requiring working air conditioners and window screens for windows, and ensuring that windows could be opened and used as an exit in the event of a fire, lacked a rational basis and were, therefore, unconstitutional. Dearmore also alleged that the ordinance permitted the warrantless searches of rental units in contravention of the Fourth Amendment of the United States Constitution. Contemporaneously with the filing of the original complaint, Dearmore filed a motion for a temporary restraining order, seeking to

enjoin the City from enforcing the ordinance on Fourth and Fifth Amendment grounds.

The district court considered the motion for temporary restraining order and issued a Memorandum Opinion and Order denying the motion. (Pet. App. F). Dearmore then filed an amended motion for temporary restraining order and a motion to reconsider the district court's denial of the previous motion. Alternatively, Dearmore requested an expedited hearing on his request for a preliminary injunction. The motion *did not* request the district court to issue a preliminary injunction at that time, but rather, only asked the district court to either issue a temporary restraining order, or alternatively, establish an expedited *schedule* for discovery and a hearing on a preliminary injunction. The district court set the motion for a hearing on July 7, 2005.

The day before that hearing, the City filed a motion to dismiss, seeking to dismiss Dearmore's claims pursuant to Federal Rule of Civil Procedure 12(b)(6). On July 7, 2005, the district court held a hearing on Dearmore's motion, after which it issued an order requiring Dearmore to file a response to the City's motion to dismiss by July 13, 2005. In apparent response to what transpired at the hearing and the City's motion to dismiss, Dearmore amended his pleadings, abandoning a number of his claims.

On November 3, 2005, without conducting any other hearings and with no other notice relating to its intentions regarding Dearmore's request for a *hearing* on a preliminary injunction, the district court issued a Memorandum Opinion and Order and Preliminary

Injunction. (Pet. App. E). In that order, the district court granted, for the most part, the City's motion to dismiss. In addition, though, the district court issued a preliminary injunction enjoining the City from enforcing an isolated provision of the challenged ordinance relating to a non-resident owner's consent to inspection of unoccupied single family rental properties. The order continued the preliminary injunction until a trial could be conducted on the merits. The order dismissed all of Dearmore's remaining claims except the provision enjoined. On the same date, the district court issued a scheduling order setting the case for trial on October 2, 2006, and setting a schedule for discovery and other pre-trial preparations.

On November 15, 2005, the Garland City Council amended the ordinance to change the provision called into question by the district court, that is, the portion of the ordinance related to a non-resident owner's consent to inspection of single family rental properties. Because the only issue remaining in the case involved the provision of the ordinance changed by the amendment, the City immediately notified the district court that the ordinance had been amended, and moved to dismiss the case as moot. Dearmore did not oppose the City's request to dismiss the case as moot.

On November 30, 2005, the district court granted the City's motion to dismiss as moot. (Pet. App. D). The order granting the motion, however, found that Dearmore was a "prevailing party" because he had obtained a preliminary injunction. In the accompanying judgment, the district court dismissed the action with prejudice, taxed costs against the City,

and purported to dissolve the injunction – which the district court noted had not become effective in any event (Pet. App. D).[1]

On December 12, 2005, the City filed a motion to amend, requesting that the district court amend the judgment to reflect that Dearmore was not a prevailing party in the litigation and asking the court to re-tax costs against the party incurring same. On August 29, 2006, the district court denied the motion to amend the judgment. (Pet. App. C). On September 6, 2006, following stipulation by the parties as to the amount of fees only, the district court awarded attorney's fees to Dearmore. (Pet. App. B). The City timely appealed. The Fifth Circuit Court of Appeals affirmed.

REASONS FOR GRANTING THE PETITION

A. The Circuit Courts of Appeal Are in Conflict Whether a Preliminary Injunction Constitutes "Relief on the Merits" to Permit "Prevailing Party" Status under Federal Fee Shifting Statutes.

The circuit courts of appeal are in disagreement as to whether a party who obtains only preliminary injunctive relief is a prevailing party for purposes of an

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[1] The district court noted in both the order granting the City's motion to dismiss as moot, and the accompanying judgment, that the injunction had never become effective "because Plaintiff Dearmore never posted the bond as ordered by the Court." (Pet. App. D at 44a, 46a).

award of attorney's fees under federal fee-shifting statutes. The Fourth Circuit Court of Appeals in *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 277 (4th Cir. 2002), *cert. denied* 537 U.S. 825 (2002), held that a preliminary injunction can never form the basis of prevailing party status to support an award for attorney's fees. In sharp contrast, the Fifth Circuit Court of Appeals in this case held that such preliminary relief is sufficient to afford prevailing party status. *Dearmore v. City of Garland*, 519 F.3d 517, 524 (5th Cir. 2008). Other circuits have likewise breathed new life into the "catalyst theory" rejected by this Court in *Buckhannon Bd. Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001) by devising various tests (that differ from circuit to circuit) to find that preliminary injunctive relief may, under some circumstances, form the basis for prevailing party status.

1. The Court of Appeals for the Fourth Circuit has completely rejected preliminary injunctive relief as the basis for awarding attorney's fees under federal fee shifting statutes.

In *Smyth*, the court of appeals held that a preliminary injunction could not meet the prerequisite for prevailing party status under 42 U.S.C. § 1988. *Smyth*, 282 F.3d at 277. The court explained that "[t]he preliminary injunction inquiry, because of the preliminary, incomplete examination of the merits involved and the incorporation (if not the predominance) of equitable factors, is ill-suited to guide the prevailing party determination regardless of how it is formulated." *Id.* at p. 277, n.8.

Smyth involved recipients of the Aid to Families with Dependent Children (AFDC) program who challenged a new policy requiring an applicant to identify the father of the child for whom benefits were sought, or to list the first and last names of all individuals who might be the father. *Id.* at 271. Some of the applicants for AFDC benefits were unable to identify the fathers of their children, and as a result of the deemed inability to "cooperate," their benefits under the AFDC program were reduced or eliminated. *Id.* The district court entered a preliminary injunction barring the State from enforcing the policy against the plaintiffs. *Id.* at 272. Thereafter, the federal government changed its regulation by relaxing the standard for obtaining a waiver of the identification requirement and modifying its policy to make identification of the fathers prospective only. *Id.* at 273. As a result of the government's changes to the policy, the district court dismissed plaintiffs' claims as moot. *Id.* at 273.

Plaintiffs filed a motion for attorney's fees and costs, which was granted. *Id.* The district court found that because the plaintiffs obtained a preliminary injunction, they had prevailed, and were entitled to attorney's fees. *Id.* The district court awarded the plaintiff nearly $200,000 in fees, and the State appealed the award of fees. *Id.*

The Court of Appeals for the Fourth Circuit found that "[w]hile granting such an injunction does involve an inquiry into the merits of a party's claim, ... the merits inquiry in the preliminary injunction context is necessarily abbreviated." *Id.* at 276. Examining the standard for granting a preliminary injunction, the

court explained that a party is not required to succeed on the merits of their claim at that stage. "The fact that a preliminary injunction is granted in a given circumstance, then, by no means represents a determination that the claim in question will or ought to succeed ultimately; that determination is to be made upon the 'deliberate investigation' that follows the granting of the preliminary injunction." *Id.* at 276.

The Fourth Circuit noted that to prevail at the preliminary injunction stage, a plaintiff must only demonstrate a strong showing or a substantial likelihood of success by clear and convincing evidence to obtain relief. *Id.* at 276. In addition, in the preliminary injunction context, the court is required to weigh other factors in addition to the merits inquiry, that is, irreparable harm to the plaintiff, public policy considerations, and the balance of harm to plaintiff weighed against harm to the defendant. *Id.* at 276-277. The Fourth Circuit observed that the "interplay of these equitable and legal considerations and the less stringent assessment of the merits of claims that are part of the preliminary injunction context belie the assertion that the district court's decision to grant a preliminary injunction was an 'enforceable judgment[] on the merits' or something akin to one for prevailing party purposes." *Id.* at 277, citing *Buckhannon*, 532 U.S. at 604, and therefore disallowed an award of attorney's fees to the plaintiffs.

Thus, the Fourth Circuit, recognizing the limited nature of review and other considerations inherent in a decision to grant a preliminary injunction, correctly found that such a decision is not a decision on the merits within the meaning of *Buckhannon* and does

not confer prevailing party status. In contrast, the Fifth Circuit's decision in the instant case, with which other circuit courts generally agree, holds instead that preliminary injunctive relief may be relief on the merits for purposes of evaluating prevailing party status. *Dearmore*, 519 F.3d at 524.

2. The Court of Appeals for the Fifth Circuit has held that preliminary injunctive relief, without relief on the merits, is sufficient to establish prevailing party status under federal fee shifting statutes.

In the instant case, the district court awarded attorney's fees to Dearmore because Dearmore obtained a preliminary injunction order despite having failed to obtain final relief on the merits of his claims. *Id.* at 526. The district court found that the order granting preliminary relief afforded Dearmore prevailing party status, and that he was thus entitled to attorney's fees. *Id.* at 524. The Fifth Circuit recognized that the issue had not been decided by this Court and that the circuit courts have applied less than uniform standards in deciding the question. *Id.* at 521. Nevertheless, the Fifth Circuit affirmed the district court's order and determined that Dearmore was a "prevailing party" within the meaning of 42 U.S.C. § 1988. *Id.* at 526. In affirming, the Fifth Circuit created a three part test to determine "prevailing party" status. The plaintiff:

> (1) must win a preliminary injunction, (2) based upon an unambiguous indication of probable success on the merits of the plaintiff's claims as opposed to a mere balancing of the equities in

> favor of the plaintiff, (3) that causes the defendant to moot the action, which prevents the plaintiff from obtaining final relief on the merits.

Id. at 524.

In allowing Dearmore to be a prevailing party, the Fifth Circuit disregarded this Court's recognition in *University of Texas v. Camenisch,* 451 U.S. 390 (1981), of the necessarily abbreviated nature of a preliminary injunction hearing. The decision of the Fifth Circuit would effectively convert a proceeding that by its very nature is not intended to result in a final judgment into the equivalent of a trial on the merits. This is particularly true where, as here: (1) the district court did not notify the parties that it was considering a preliminary injunction, (2) the district court did not hold a preliminary injunction hearing, and (3) the district court accepted the well pleaded facts of Dearmore's complaint as true.

3. Treatment of this issue by the other circuit courts of appeals is equally inconsistent.

Several other circuit courts of appeal have considered the question presented in this case. Those courts are split both as to whether a preliminary injunction is sufficient to confer such status and, even amongst those that have ruled a preliminary injunction may sometimes be enough, they differ in their reasoning as to when and why.

For example, the Eighth Circuit, in *Advantage Media, L.L.C. v. City of Hopkins,* 511 F.3d 833, 838

(8th Cir. 2008), *cert. denied*, __ U.S. __, 76 U.S.L.W. 3557 declined to find a party who had obtained a preliminary injunction, followed by a change in the municipal ordinance which mooted the case, to be a "prevailing party" under federal fee shifting statutes. In that case, the district court granted a preliminary injunction against the enforcement of a municipal sign ordinance, finding that plaintiff had demonstrated a "substantial likelihood of success on the merits. . ." *Advantage Media, L.L.C. v. City of Hopkins*, 379 F. Supp. 2d 1030, 1046 (D. Minn. 2005). In response to the injunction the city enacted a new permanent sign ordinance. *Advantage Media*, 511 F.3d at 835. The new sign ordinance cured the constitutional infirmities that formed the basis of Advantage's lawsuit. *Id.* Following resolution of plaintiff's other claims, the district court denied plaintiff's motion for attorney's fees. *Id.* The plaintiff appealed, and the Eighth Circuit held that the plaintiff was not a prevailing party entitled to attorney's fees. *Id.* at 839. The court reasoned that, although the lawsuit resulted in the city's alteration of several potentially unconstitutional provisions of the sign ordinance, that alone was insufficient under this Court's opinion in *Buckhannon* to make the plaintiff a prevailing party. *Id.* at 838.

Other circuit courts have held that a party that obtains a preliminary injunction may be a "prevailing party" where the injunction itself acts to render the case moot. For example, in *Watson v. County of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002), *cert. denied*, 538 U.S. 923 (2003), the Ninth Circuit granted attorney's fees in a case where the injunction sought by the plaintiff granted him all of the relief he would have obtained after trial by a final judgment on the

merits. In that case, the plaintiff, a deputy sheriff, sought to enjoin the County of Riverside from using a report against him in an administrative termination proceeding on the ground that the report had allegedly been obtained unlawfully. *Id.* at 1094. The district court granted the preliminary injunction and the administrative termination proceeding was held without the report. *Id.* All of the remaining issues in the case were disposed of, and the case became moot once the administrative hearing had been held in the manner sought by plaintiff. *Id.*

The Ninth Circuit found that the plaintiff was entitled to attorney's fees because the relief he obtained as a result of the court's order – an administrative hearing without the use of the report – was the precise relief he sought in the lawsuit. *Id.* Indeed, the court specifically noted that the county did not "voluntarily" decide not to use the report in the administrative proceeding - it was prevented from doing so because the district judge said it could not. *Id.* at 1096 ("In this case, the County was prohibited from introducing Watson's report at the termination hearing for one reason only: because Judge Timlin said so.") The court pointed out that the plaintiff, "obtained significant, court-ordered relief that accomplished one of the main purposes of his lawsuit." *Id.*

In *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939 (D.C. Cir. 2005), the plaintiff brought an action against the Secretary of Agriculture regarding a separate price class for certain dairy products. The plaintiff obtained a preliminary injunction halting the implementation of the regulations and the Department of Agriculture changed the regulations, thereby

mooting the case. *Id.* at 943. The D.C. Circuit, in allowing the award of attorney's fees to the plaintiff, gleaned a three prong test from the *Buckhannon* decision. *Id.* at 946-947. The court explained that "*Buckhannon* embraces three core principles for construing the term 'prevailing party' in federal fee shifting statutes: . . ." *Id.* The three principles are that: (1) plaintiff must show a change in the legal relationship; (2) judgment must be rendered in the party's favor; and, (3) there must be some judicial relief as opposed to merely a judicial pronouncement. *Id.* The D.C. Circuit Court further explained,

> "In short, the holding in *Buckhannon* embraces the possibility that, under certain circumstances, a preliminary injunction, like a consent decree, may result in a court-ordered change in the legal relationship between the parties that is sufficient to make a plaintiff a 'prevailing party' under a fee shifting statute like the EAJA. Therefore, *Buckhannon* surely does not endorse a per se rule that a preliminary injunction can never transform a party in whose favor the injunction is issued into a 'prevailing party' under the EAJA."

Id. at 945.

In applying the three prong test discussed above, the circuit court focused on the district court's finding that Milk Producers "undoubtedly would have succeeded on the merits." *Id.* at 948. "Milk Producers secured a preliminary injunction in this case largely because their likelihood of success on the merits was never seriously in doubt." *Id.* In other words, the

court's prediction of success on the merits at the preliminary injunction stage was sufficient to confer prevailing party status.

In *Haley v. Patacki*, 106 F.3d 478, 483 (2d Cir. 1997), the Second Circuit Court of Appeals adopted the approach that a decision to award a preliminary injunction can establish prevailing party status if the determination is made on the merits. In that case, legislative employees brought an action against the governor and state of New York, claiming that their constitutional and statutory rights were violated by the governor's withholding of their biweekly salary payments from an appropriations bill pending passage of the state budget. *Id.* at 480. The district court issued a preliminary injunction requiring the payments to continue during the pendency of the action. *Id.* Before the case could be decided on the merits, the state passed a budget thereby mooting the case. *Id.* The district court found that the plaintiffs were prevailing parties and awarded attorney's fees based upon their success in obtaining a preliminary injunction. *Id.* at 481. The governor appealed. The Second Circuit, in allowing the award of attorney's fees held that, "we do not automatically require a denial of attorney's fees when a party receives a stay or preliminary injunction but never obtains final judgment. . ." *Id.* at 483. "Instead, a decision to award attorney's fees requires an analysis of whether the party's relief, whether by injunction or stay, resulted from a determination on the merits." *Id.* Moreover, the court explained that "[a] determination of whether a court's action is governed by its assessment of the merits 'requires close analysis of the decisional circumstances and reasoning underlying the grant of

preliminary relief.'" *Id.* at 483, (quoting *LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir. 1994)).

Although a determination of entitlement to preliminary relief can include an examination of the merits, a preliminary injunction may be granted by the mere showing of a likelihood of success on the merits. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004). According to some circuit courts of appeal, with the exception of the Fourth and possibly Eighth circuits, if a party prevails even on the lesser standard of "likelihood of success," the party may, nonetheless, be considered a prevailing party entitled to attorney's fees. That standard is inconsistent with this Court's previous holdings that the standard must be success on the merits. *Buckhannon*, 532 U.S. at 604; *Hewitt v. Helms*, 482 U.S. 755, 107 S.Ct. 2672 (1987).

B. The Courts That Have Held Success on a Preliminary Injunction Alone to be Sufficient to Make the Recipient of the Injunction a Prevailing Party Have Resurrected the "Catalyst Theory" Abandoned by this Court in *Buckhannon*.

To see how the Fifth Circuit's decision in *Dearmore* merely revives the catalyst theory, the Court need look no further than the judicially enforceable result that Dearmore took from the courthouse and compare that result with the result in *Buckhannon*. Dearmore, like the plaintiffs in *Buckhannon*, left the courthouse at the end of the day with nothing. The problem with the catalyst theory, as recognized by this Court in *Buckhannon*, is that the plaintiff in such cases has not truly "prevailed" because the plaintiff lacks the means

of ensuring by judicial imprimatur the change in law brought about by the lawsuit. *See Buckhannon* at 605 ("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.") Dearmore is in the identical position; he left the courthouse – as did the plaintiffs in *Buckhannon* – without any means of enforcing the City Council's voluntary change in conduct. Unlike *Buckhannon*, however, the ordinance that Dearmore wanted stricken down was, for the most part, still very much intact.

The resurrection of the catalyst theory in any form creates the very sort of problems that led this Court to disavow that doctrine in *Buckhannon*. The City in this case did what it thought was reasonable and right, and what was fair to the district court, the plaintiff, and the taxpayers who foot the bills for the City: instead of waging a fight over the validity of the provision the district court found to be constitutionally suspect, the City changed that provision - a provision that was a small part of a larger, comprehensive ordinance, a provision that the City never intended to implement in the manner hypothesized by the district court in any event. In short, the City believed that it could modify the ordinance in a manner that would address the district court's concerns without doing violence to its single family rental program, and thereby save the time, effort, and expense that continued litigation would have entailed.

Opinions like the Fifth Circuit's decision in *Dearmore* will remove that option, forcing defendants to litigate to the bitter end something that may be of

absolutely no moment to the defendant. This Court's decision in *Buckhannon* acknowledged that very mischief by recognizing the disincentive that the "catalyst theory" would have on a defendant's decision to voluntarily change its conduct. *See Id.* at 608 (noting that a defendant's potential liability for attorney's fees may be as significant as, if not more than, potential liability on the merits, and acknowledging that the possibility of being assessed attorney's fees may well *deter* a defendant from altering its conduct in the manner sought by the plaintiff). To the extent the abandonment of the catalyst theory was meant to encourage a defendant to give the plaintiff at least some of the relief the plaintiff seeks, the same holds true with any form of relief short of a judgment on the merits or a consent decree. Whatever the form of "catalyst," whether it be the mere filing of a lawsuit or a preliminary opinion of a district court, if a defendant finds itself facing an inevitable award of attorney's fees by capitulating even a little, it has no alternative but to continue a battle over something it would otherwise have never contested. That sort of fight is the type of needless, collateral litigation this Court has cautioned against creating in *Buckhannon* and other cases. *See Buckhannon* at 609 ("We have accordingly avoided an interpretation of the fee-shifting statutes that would have 'spawn[ed] a second litigation of significant dimension.'")(quoting *Texas State Teacher's Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 791 (1989)).

The effective revival of the catalyst theory by the Fifth Circuit and other courts not only invites that sort of needless litigation, it compels it. In its opinion, the

Fifth Circuit noted that "when a defendant moots an action in response to the district court's preliminary injunction order, the defendant will have generally acceded to the order and thus will not have appealed. *This lack of appeal by a defendant has been noted by this Court and others to be a factor favoring a finding of prevailing party status.*" *Dearmore*, 519 F.3d at 524, n.3 (emphasis added). Thus, in order to avoid any sort of implication that the defendant somehow concedes prevailing party status for the plaintiff, the defendant must continue what is otherwise an unwanted fight through every level. Indeed, the Fifth Circuit would apparently have required the City to engage in full-fledged combat in the district court, then on appeal of the preliminary injunction, and then, quite possibly, on appeal again from the district court's final order – all arising from the hypothetical application of a provision of an ordinance which was neither material or necessary to protect the goals of the ordinance as originally intended.

CONCLUSION

Since this Court's opinion in *Buckhannon*, the circuit courts have wrestled with the question of whether, and under what circumstances, a preliminary injunction, without a final judgment, can serve as the basis for prevailing party status under federal fee shifting statutes. It is a recurring problem that has not only created a split in the circuits as to the "yes" or "no" of the question, but inconsistencies, as well, among those circuits that allow a preliminary injunction to satisfy *Buckhannon's* requirement of a "final judgment or consent decree."

Moreover, those circuits that allow a preliminary injunction to confer prevailing party status have strayed from this Court's holding in *Buckhannon* by allowing a party that leaves the courthouse with only preliminary relief – without having obtained a final judgment or court ordered consent decree – to nevertheless receive attorney's fees as a prevailing party. As was aptly observed by Judge Henderson in his dissent in *Select Milk Producers*, "[t]he words 'preliminary' and 'prevailing' are not ones that easily fit together." *Select Milk Producers*, 400 F.3d at 962 (Henderson, J., dissenting). The Court should not allow the catalyst theory rejected in *Buckhannon* to reappear in the form created in some of the circuit courts by equating the words "preliminary" and "prevailing."

This petition for a writ of certiorari should be granted.

Respectfully Submitted,

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