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 A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONSE TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Is a Plaintiff a prevailing party under 42 U.S.C. § 1988(b) if:

1. The Plaintiff wins 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; and

3. That causes the Defendant to moot the action, which prevents the Plaintiff from obtaining final relief on the merits.

The federal circuit courts that have reviewed cases where a preliminary injunction is granted after a careful consideration of the merits and the injunction is not based on a mere balancing of the equities are unanimous in finding prevailing party status.

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I.

STATEMENT OF THE CASE

Garland's statement of the case makes the same omissions that their Statement of the Case to the United States Court of Appeals for the Fifth Circuit made. The first is that Garland did not object to the district court granting the preliminary injunction. There was no complaint about notice or lack thereof for a temporary injunction hearing until Garland filed its Motion to Alter or Amend the Judgment. Therefore, Garland has waived any procedural error in the district court's granting of the preliminary injunction. Second, the merits of the case are not an issue. Garland did not challenge the district court's ruling on the merits, but in response to the court's Order, and for no other reason, amended the Ordinance. Third, Garland notes that the temporary injunction bond was never filed by Dearmore. However, Garland does not explain why the bond was never filed. As found by the district court and the Court of Appeals, the bond was not posted because Garland's legal counsel convinced Dearmore's counsel that no bond was necessary as Garland would amend the ordinance to correct the unconstitutional provision. The district court did not "imagine" hypothetical circumstances in which the Fourth Amendment to the United States Constitution could be violated. The district court found that on its face the City's Ordinance violated the Fourth Amendment. Dearmore obtained the relief he sought, the declaration that the ordinance was unconstitutional. The district court's

preliminary injunction materially altered the legal relationship between the parties. Therefore, Dearmore is a prevailing party.

II.

REASONS FOR DENYING THE PETITION

A. There is no conflict among the circuits that a Plaintiff is a prevailing party where a preliminary Injunction is based upon an unambiguous indication of probable success on the merits of the Plaintiff's claims after more than a brief inquiry as opposed to a mere balancing of the equities in favor of the Plaintiff that causes the Defendant to moot the action, which prevents the Plaintiff from obtaining final relief on the merits.

The federal circuit courts have all looked to *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001) and *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989) to determine prevailing party status. "The touchtone of the prevailing party inquiry is the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 at 792-793. This is a test that will vary depending on the facts of each case and is not subject to a bright line rule.

The Fifth Circuit concluded that a Plaintiff is a prevailing party if the Plaintiff wins a preliminary injunction 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 that causes the Defendant to moot the action, which prevents the Plaintiff from obtaining final relief on the merits. *Dearmore v. Garland*, 519 F.3d 517 at 524 (5th Cir. 2008), *cert. pet. filed* (2008), Petitioner's Appendix 14a.

Smyth v. Romero, 282 F.3d 268 (4th Cir. 2002), *cert. denied*, 537 U.S. 825 (2002), emphasized the necessarily abbreviated inquiry into the merits and the trial court's reliance on a balancing of the equities – weighing the harm to the Plaintiff and to the Defendant when granting or not granting the injunction. 282 F.3d 268 at 276. The Memorandum Order of August 29, 2006 denying Garland's Motion to Amend the Judgment was very clear that the original Order granting the temporary injunction was an unequivocal declaration that the Ordinance violated the Fourth Amendment to the United States Constitution and there were no equitable considerations.

> The court certainly could have used much stronger language, and, in retrospect, it should have, but the court used euphemistic language in part of its ruling to "let the City down easy." If this was a mistake, the court assures the City it will not happen again. Moreover, the language to which the court refers cannot be read in a vacuum. Other

> parts of the court's opinion unequivocally put the City on notice that the Ordinance was constitutionally infirm.

Dearmore v. Garland, 237 F.R.D. 573 at 577 (N.D. Tex. 2006) *affm'd* 519 F.3d 517 (5th Cir. 2008), *cert. pet. filed* (2008), Petitioner's Appendix 32a.

At the time the Court entered the preliminary injunction, the Court had made a final determination on the constitutionality of the ordinance. There were no fact issues left to be decided at that time. The facts were undisputed, and the Court finally decided the legal issue in the case – it just so happens that the procedural vehicle presented to the Court at that time was a Motion for a Preliminary Injunction. However, the Memorandum Opinion and Order and Preliminary Injunction left no doubt as to the resolution of the legal issues in Dearmore's favor. *Dearmore,* 237 F.R.D. at 578-579. Petitioner's Appendix at 35a-36a. The district court decided the case based on the face of Garland's ordinance. There were no additional facts that required adjudication by the district court. The preliminary injunction forecasted Plaintiff's success on the merits. It was not based on a balancing of the equities, or to maintain the status quo. It was clear when the preliminary injunction was granted that the district court believed that the ordinance was unconstitutional on its face.

Faced with this record, a record that the Fourth Circuit has never faced, it is readily apparent that there is no federal circuit court split on this issue ripe for consideration by this Court. Certainly the Eighth Circuit has indicated that many preliminary injunctions are sufficiently akin to final relief on the merits to confer prevailing party status *Northern Cheyenne Tribe v. Jackson*, 433 F.3d 1083 (8th Cir. 2006) at 1086.[1] The Ninth Circuit granted prevailing party status in a case where the injunction sought by Plaintiff granted him all the relief he would have obtained after trial by a final judgment on the merits. *Watson v. County of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002), *cert. denied*, 538 U.S. 923 (2003). The District of Columbia Circuit granted prevailing party status where the Plaintiff showed a change in the legal relationship, the judgment was rendered in the Plaintiff's favor and there was some judicial relief as opposed to merely a judicial pronouncement. *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939 (D.C. Cir. 2005). The Eleventh Circuit granted prevailing party status to a church group that challenged an ordinance requiring solicitation permits, obtained a

[1] *Advantage Media v. Hopkins*, 511 F.3d 833 (8th Cir. 2008), *cert. denied* (2008), was an instance where the preliminary injunction granted did not result in a material alteration of the legal relationship of the parties, because even under the amended ordinance Advantage Media's signs were not approved. The preliminary injunction issued by Judge Lindsey did result in a material alteration of the legal relationship of the parties by declaring a provision of the Ordinance that affected Dearmore unconstitutional.

preliminary injunction and then the city repealed the ordinance, mooting the case. *Taylor v. Ft. Lauderdale,* 810 F.2d 1551 (11th Cir. 1987).

The Second Circuit has also found preliminary injunctions to be sufficient if the decision was on the merits. *Haley v. Patacki*, 106 F.3d 478 (2nd Cir. 1997). The Second Circuit like the D.C. Circuit, Eighth Circuit, Ninth Circuit and Eleventh Circuit said that it does not require an automatic denial of attorney's fees when a party receives a preliminary injunction but never obtains a final decision. The court must look to an analysis of whether the party's relief, whether by injunction or stay, resulted from a determination on the merits. This is the test in *Buckhannon* and *Texas State Teachers Retirement System.* Some preliminary injunctions will have the effect of changing the legal relationship of the parties. Some will not. The Fifth Circuit's decision that a Plaintiff qualifies as a prevailing party when a preliminary injunction is granted based upon an unambiguous indication of inevitable success on the merits of the Plaintiff's claims, as opposed to a mere balancing of the equities in favor of the Plaintiff, and which causes the Defendant to moot the action thereby precluding the Plaintiff from obtaining final relief on the merits does not conflict with the other federal circuit court decisions.

B. No Resurrection of the Catalysis Theory

Garland makes much of the argument that this is merely a resurrection of the catalysis theory of prevailing party status, but does not provide any conflict among the circuits on the discrete issues in this case that are ripe for review.

The Fifth Circuit and the other circuits that have allowed prevailing party status after the granting of a preliminary injunction have not resurrected the "catalysis theory." *Buckhannon* held that the Defendant merely changing its conduct after the filing of a lawsuit was not enough to establish that the plaintiff is a prevailing party. *Buckhannon* clearly stated that a party cannot be deemed to have prevailed unless there has been an enforceable alteration of the legal relationship of the parties. The district court in this case issued a preliminary injunction that was a material, and indeed intended by the Court to be a permanent,[2] alteration of the legal relationship of the parties because it clearly and unambiguously held the Garland ordinance unconstitutional. The preliminary injunction altered the legal relationship of the parties. After the preliminary injunction was issued, Garland was prohibited from enforcing the unconstitutional provisions of the ordinance. Only after the court ruled did Garland amend the ordinance. As

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[2] *Dearmore*, 237 F.R.D. at 577. Petitioner's Appendix at 31a-32a.

stated by Judge Lindsey in his August 29, 2006 Order, " . . . the City did not voluntarily change or amend the Ordinance; it changed the Ordinance because of the court's Memorandum Opinion and Order and Preliminary Injunction." 237 F.R.D. at 577. Petitioner's Appendix at 31a. As the Fifth Circuit stated in affirming Judge Lindsey,

> We note that this is not a case in which the City voluntarily changed its position *before* judicial action was taken. Indeed if the City had mooted the case through amending the Ordinance before the court granted the preliminary injunction, then Dearmore could not qualify as a prevailing party under *Buckhannon* because it would have improperly invoked the "catalysis theory." The City, however, mooted the case *after* and *in direct response to* the district court's preliminary injunction order. There is an obvious direct causal link between the District Court's issuance of the preliminary injunction and the City's subsequent amendment of the ordinance to moot the case.

519 F.3d at 525. Petitioner's Appendix at 17a. The Fifth Circuit ruling will have no effect on a Defendant voluntarily changing its conduct before a court makes a definitive ruling on the Defendant's conduct. This is not a catalysis case.

III.

RESPONSE TO PUBLIC POLICY ARGUMENT BY AMICI CURIAE

The Amici Curiae provide a public policy rationale that local governments, whose budgets are strained, will be subject to fees in cases where the merits of the case have not been assessed and would burden local governments.

However, as found by the Fifth Circuit, this was a merits based decision. Garland could have avoided attorney's fees altogether in this case if Garland had amended the ordinance prior to the district court's ruling. The Petitioner and Amici Curiae want to have a situation of heads we win, tails you lose. If they oppose the preliminary injunction and the court does not grant it, they win. If they oppose the preliminary injunction and lose, they still do not have to pay attorney's fees because they can then change their conduct and moot the case. This is clearly not what Congress intended by passing this fee-shifting statute and is an abuse of scarce judicial resources.

Realistically, in civil rights litigation enforcing constitutional and statutory rights where the plaintiff does not seek damages but only declaratory relief, the entry of a preliminary injunction or even a temporary restraining order in the Plaintiff's favor may effectively resolve the dispute. As in this case, a Defendant who loses an injunction may decide that additional litigation is futile and cease the challenged conduct rather than litigate to a final judgment. This

is not a catalysis theory case like *Buckhannon*, since the Plaintiff obtained a judicially enforceable alteration of the legal rights of the parties that has a judicial imprimatur and can be enforced against the defendant by a contempt proceeding. *Buckhannon*, 532 U.S. at 604. *Select Milk Producers*, *Taylor*, and *Haley* are all examples of where the temporary injunction provided all the relief the Plaintiff sought.

If the Court rules that preliminary injunctions such as the one in this case do not convey prevailing party status, there will be fewer civil rights cases brought seeking only declaratory relief because civil rights attorneys will not take the cases if there is no possibility of obtaining attorney's fees. A ruling as requested by Garland will inevitably require diligent civil rights attorneys to always seek damages in order to avoid a change of conduct by the defendant and subsequent mootness of the case. In such situations, judicial economy will not be enhanced.

Congress passed 42 U.S.C. § 1988 to privatize civil rights enforcement and conserve judicial resources. As noted in the Senate report concerning the passage of 42 U.S.C. § 1988,

> All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important congressional policies which these laws contain. In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has

> little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it cost them to vindicate these rights in court.

Senate Report No. 94-1011 at 2. The Amici Curiae position is a *sub rosa* attempt to gut 42 U.S.C. § 1988 and the clear *public policy underlying the enactment of the fee-shifting statute*. Amici complain of fees, but it was the City that decided to roll the dice regarding a decision by the court. In this case, the City forced the use of scarce judicial resources, forced the plaintiffs to prove their case, and asked the court to decide the issue. The City cannot now be heard to complain that it should not suffer the consequences of its choice to litigate. All cities have the opportunity to correct their conduct prior to a judicial pronouncement. The court should not assist the City in playing a game of heads we win and tails you lose.

IV.

CONCLUSION

The Fifth Circuit decision does not conflict with the Fourth Circuit decision in a way that is ripe for review. The Fifth Circuit and the district court limited their decisions to the facts of the case before it. The Plaintiff must win a preliminary injunction 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 that causes the Defendant to moot the action which prevents the Plaintiff from obtaining final relief on the merits. This follows *Buckhannon* in finding prevailing party status when there is material alteration of the legal relationship between the parties. The Court should deny the Petition for Certiorari.

Respectfully submitted,

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