

IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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Case No. 11-2482

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ROGERS GROUP, INC.

Plaintiff-Appellee

vs.

CITY OF FAYETTEVILLE, ARKANSAS

Defendant-Appellant

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**BRIEF OF APPELLANT**

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF ARKANSAS

The Honorable Jimm L. Hendren, United States District Judge

CITY OF FAYETTEVILLE, ARKANSAS

Defendant-Appellant

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## **SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT**

Fayetteville citizens residing near Rogers Group's rock quarry who were being adversely affected by the quarry petitioned the City Council for help. The City Council had earlier helped stop a racetrack's adverse effects on Fayetteville citizens by regulating it as a nuisance. When the racetrack owner challenged the constitutionality of that nuisance-abating ordinance because the racetrack was slightly outside the city limits, the State Circuit Court upheld the legality and constitutionality of the ordinance.

Based upon this judicial holding, the City Council began to draft an ordinance to regulate nuisance activities of rock quarries close to the city limits. After months of public hearings and modifications of the ordinance to accommodate requests by Rogers Group, the City Council passed the ordinance. Rogers Group sued the City asserting diversity jurisdiction for its federal declaratory judgment action and sought a preliminary injunction. The District Court granted a preliminary injunction based solely upon Rogers Group's federal declaratory judgment claim, which was affirmed by the Eighth Circuit. The City voluntarily amended its ordinance to remove its extraterritorial application. The District Court then dismissed all of Rogers Group's claims as moot, and awarded attorney's fees to Rogers Group. The City requests oral argument.

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## JURISDICTIONAL STATEMENT

Rogers Group, Inc.'s complaint asserted jurisdiction pursuant to 28 U.S.C. § 1332 *Diversity* for its declaratory judgment claim based upon 28 U.S.C. §§ 2201-02 *Declaratory Judgments*. Rogers Group, Inc.'s complaint also asserted jurisdiction of 28 U.S.C. § 1331 *Federal question* for its 42 U.S.C. § 1983 claims. Rogers Group's complaint never asserted that it was relying upon 28 U.S.C. § 1367 *Supplemental jurisdiction*.

28 U.S.C. §§ 1291 and 1294(1) vest this Court with jurisdiction over this appeal from a final post-dismissal order dated June 17, 2011, by the United States District Court for the Western District of Arkansas, Fayetteville Division, Honorable Judge Jimm L. Hendren, presiding, granting attorney's fees and costs to Rogers Group pursuant to 42 U.S.C. § 1988. Appellant timely filed its Notice of Appeal on July 7, 2011, as required by Federal Rule of Appellate Procedure 4(a)(1)(A).

## STATEMENT OF THE ISSUES

*The District Court erred and abused its discretion in awarding attorney's fees to Rogers Group, Inc. in that mere allegations in a complaint of civil rights violations are insufficient to support an award of attorney fees pursuant to 42 U.S.C § 1988.*

*Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dept. of Health & Human Res.*, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)

*Sole v. Wyner*, 551 U.S. 74, 127 S. Ct. 2188, 167 L. Ed. 2d 1069 (2007)

*Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993)

*Singleton v. Cecil*, 176 F.3d 419 (8<sup>th</sup> Cir. 1999)

## STATEMENT OF THE CASE

Citizens living near rock quarries operating within a mile of the city limits petitioned the Fayetteville City Council for help in reducing the nuisance activities of those quarries. Based upon a previous Arkansas Circuit Court decision finding a Fayetteville ordinance to regulate the nuisance activities of a business whose racetrack was outside the city limits to be legal and constitutional (Add. 31-33, 37-39, App. 537, 541-42, 534-36), the City Council held months of public hearings, modified its ordinance to accommodate Rogers Group's suggestions, and enacted a rock quarry ordinance to abate quarry nuisance activities within or near the city limits. Add. 7-8, App. 877-78.

Prior to the Rock Quarry Ordinance going into effect, Rogers Group, Inc. sued the City for a federal declaratory judgment based upon diversity, seeking a preliminary and permanent injunction. Add. 1, App. 871. Rogers Group also sued pursuant to 42 U.S.C. § 1983 for damages and attorneys fees claiming Due Process violation. Add. 2, App. 872. Even though the ordinance had never taken effect, Rogers Group also sued for inverse condemnation and (without exhausting its state remedies) also sued for a Fifth Amendment Taking. Add. 1-2, App. 871-72.

The District Court quickly granted a Preliminary Injunction based solely upon Rogers Group's federal declaratory judgment claim that the City of Fayetteville misinterpreted and exceeded state law when enacting the ordinance.

Add. 2, 4, 7, 27, App. 872, 874, 877, 669. The Court expressly found “it likely that RGI will prevail on the merits of its claim, based on lack of jurisdiction on the part of the City to legislate as to quarry activity outside its city limits....” Add. 29, App. 418.

The Eighth Circuit Court of Appeals affirmed the granting of the Preliminary Injunction, agreeing with the District Court that the federal declaratory judgment claim would likely succeed on the merits based upon the City’s misinterpretation of state law when enacting the ordinance. Add. 3, App. 873.

The City of Fayetteville voluntarily amended its rock quarry ordinance to remove its extraterritorial reach in order to preserve this ordinance’s viability throughout the City and to prevent additional legal expense. Add. 3-4, App. 873-74. The District Court then determined that all of Rogers Group, Inc.’s claims were moot, did not rule on the pending cross-motions for summary judgment, and dismissed the complaint. Add. 6, App. 876.

Rogers Group moved for attorney’s fees and costs claiming it was the “prevailing party” and was entitled to fees because it had won the Preliminary Injunction on its federal declaratory judgment claim (before the Court because of diversity) and had alleged in its complaint a claim pursuant to 42 U.S.C. § 1983. Add. 6-7, App. 876-77. Although the City opposed such motion, the District Court

granted attorney's fees of over \$75,000.00 to Rogers Group. Add. 7-9, App. 877-79. The City has appealed this judgment.

## STATEMENT OF THE FACTS

In 2002, the City of Fayetteville enacted the Motor Vehicle Racing Facility Ordinance in an attempt to abate the nuisance activities of such a facility even though its actual racetrack was outside the city limits. Add. 37-39, App. 534-36. The legality and constitutionality of this ordinance was challenged by the racetrack's owner in the Fourth Judicial District of the Arkansas Circuit Court. In 2003, Circuit Judge Storey held that Fayetteville could legally and constitutionally regulate the nuisance activities of the racetrack even outside its city limits. Add. 31-33, App. 537, 541-42.

In early 2009, citizens living near Rogers Group's rock quarry petitioned the City Council for help to abate nuisance activities of rock quarries operating near the city limits. Add. 29, App. 418. The City of Fayetteville believed it had such statutory power based not only upon its analysis of state law, but also upon the Circuit Judge's ruling in 2003. Add. 31, App. 537.

The City of Fayetteville began the process of drafting and enacting an ordinance to provide for licensing and regulation of quarries in early 2009 and presented a draft outlining an ordinance on September 1, 2009, at the City Council meeting. App. 64-82. Some of the Rogers Group's quarry is located within a half mile of the north corporate limits of Fayetteville. App. 342. Under the ordinary democratic process employed by the City of Fayetteville, opinions and suggestions

of citizens and interested parties, including Rogers Group, Inc., regarding the proposed regulations were heard in regular public meetings from September 1 – October 20, 2009. App. 64-272. In drafting the provisions of the Ordinance, the City considered specific recommendations from appellee Rogers Group. Add. 30, App. 419. The City gave due consideration of the necessities and hours of Rogers Group's operations, and specifically considered Rogers Group's blasting schedule for the previous 6 months, which indicated an average of 2 1/3 blast events per month. App. 450.

In its final version, Ordinance 5280 provided for licensing and regulation of quarries, including limitations of two blasting events per month, and ending dump truck tailgate banging during early morning and after 4:30 p.m. App. 22-27. The Ordinance limited quarry operations to 60 hours a week, which had been exactly as requested by Rogers Group. App. 22-27, 334-35. Quarry operators were required to obtain annual, no-fee licenses that could be suspended or revoked for violation of the ordinance. App. 22-27. Operation without a license or any other violation of this ordinance would have to be prosecuted in the Fayetteville District Court and could result only in a small fine. App. 22-27. Rogers Group admitted that the restrictions enacted by the ordinance would allow for their then-current profitable operations, but believed that such restrictions would inhibit growth of the business. App. 349-50.

The Ordinance allowed blasting between the hours of 10:00 a.m. and 3:00 p.m. on the first and third Wednesday of each month (App. 22-27) so that neighbors could better plan their activities (such as horse riding) for safety and so both quarries would blast on the same days. The Ordinance provided for variances on holidays or days when blasting may not be feasible, as requested by Rogers Group. App. 22-27, 336. The twice-monthly blasting day limit was similar to Rogers Group's previous blasting operations when not regulated by the ordinance. App. 351. The Ordinance was enacted October 20, 2009. Add. 1, App. 871. The Ordinance was enjoined by preliminary injunction of the District Court before enforcement began. Add. 2, App. 872.

Prior to a decision on the merits, the Fayetteville City Council amended the Rock Quarry Ordinance to remove its extra-territorial application. Add. 25, App. 664. The District Court held this had mooted all of Rogers Group, Inc.'s claims and dismissed the complaint. Add. 27-28, App. 669-70.

## SUMMARY OF THE ARGUMENT

*The District Court erred and abused its discretion in awarding attorney's fees to Rogers Group, Inc. in that mere allegations in a complaint of civil rights violations are insufficient to support an award of attorney fees pursuant to 42 U.S.C § 1988.*

Rogers Group, Inc. obtained only a preliminary injunction based upon its declaratory judgment claim (based upon diversity jurisdiction) involving only the interpretation of a state statute. This preliminary injunction was “dissolved or otherwise undone” when the District Court dismissed this claim as moot and thus could not satisfy the United States Supreme Court’s test to make Rogers Group, Inc. a prevailing party. *Sole v. Wyner*, 551 U.S. 74, 83 (2007).

The District Court erred by awarding attorneys fees pursuant to 42 U.S.C. § 1988 for a claim not to protect federal or constitutional rights, but only on an issue of state statutory interpretation. “Congress enacted 42 U.S.C. § 1988 in order to ensure that **federal** rights are adequately enforced.” *Perdue v. Kenny A. ex rel. Winn*, \_\_\_ U.S. \_\_\_ 130 S. Ct. 1662, 1671, 176 L. Ed. 2d 494 (2010) (citation omitted, emphasis added).

The District Court erred when awarding attorney fees “under § 1988 even though the Court never reached the constitutional claims because the allegations in the complaint raised a substantial constitutional claim....” Add. 16, App. 886. The United State Supreme Court had expressly rejected the “catalyst” theory that allegations in the complaint could be sufficient to justify attorney’s fees under §

1988. *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dept. of Health & Human Res.*, 532 U.S. 598, 605, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001).

Although the declaratory judgment action was filed pursuant to diversity jurisdiction, even if this state statutory interpretation claim had been pendent and if a permanent injunction on the merits had been issued, unless Rogers Group, Inc. had been entitled to relief under its § 1983 claims, it could not be entitled to relief under § 1988. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 285, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993). [W]hen no relief can be awarded pursuant to § 1983, no attorney's fees can be awarded under § 1988. *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 592, 115 S. Ct. 2351, 2357, 132 L. Ed. 2d 509 (1995).

Rogers Group, Inc. could not have recovered under its Due Process claim because the Court recognized “that the City Council did not act in haste, instead considering the Ordinance over the course of several meetings, and that the representatives of RGI were able to have considerate input in the development of the Ordinance. This is to be commended in the enactment of laws and regulations....” Add. 29-30, App. 418-19. This Court has recognized that a due process claim requires “egregious conduct” and “conduct intended to injure in some way unjustifiable by any governmental interest....” *Omni Behavior Health v. Miller*, 285 F.3d 646, 651-652 (8<sup>th</sup> Cir. 2002). The City of Fayetteville relied upon

the State Circuit Judge's previous ruling sustaining its extra-territorial nuisance abatement powers as legal and constitutional. Add. 31-33, 37-39, App. 537, 541-42, 534-36.

The Arkansas Attorney General also agreed that the City had such power. Add. 34-36, App. 464-66. Since "due process claims should be limited to 'truly irrational' governmental actions" (*Singleton v. Cecil*, 176 F.3d 419, 433 (8<sup>th</sup> Cir. 1999)), Rogers Group's Due Process claim could not succeed.

Rogers Group, Inc.'s Fifth Amendment Takings claim must also fail as Rogers Group failed to exhaust its adequate state remedies. *Cormack v. Settle-Beshears*, 474 F.3d 528 (8<sup>th</sup> Cir. 2007).

Since Rogers Group could not recover under its § 1983 claims, it cannot be awarded attorney's fees under § 1988.

## ARGUMENT AND STANDARD OF REVIEW

*The District Court erred and abused its discretion in awarding attorney's fees to Rogers Group, Inc. in that mere allegations in a complaint of civil rights violations are insufficient to support an award of attorney fees pursuant to 42 U.S.C § 1988.*

We review de novo the legal issues related to the award of attorney's fees and costs and review for abuse of discretion the actual award of attorney's fees and costs.

*Fuller v. Fiber Glass Sys., LP*, 618 F.3d 858, 868 (8th Cir. 2010) (citation omitted).

We review de novo whether a litigant is a prevailing party.

A “prevailing party” is one that obtains a judicially sanctioned, material alteration of the legal relationship of the parties.

*Coates v. Powell*, 639 F.3d 471, 474 (8th Cir. 2011) (citations omitted).

The Eighth Circuit in *Coates* denied Ms. Coates attorney's fees and referred to its earlier decision in *Christina A. ex rel. Jennifer A. v. Bloomberg*, 315 F.3d 990 (8<sup>th</sup> Cir. 2003), in which the District Court had approved a settlement agreement as “fair, reasonable and adequate” and retained enforcement jurisdiction over the settlement agreement as insufficient to award attorney fees in her § 1983 case. In the case at bar, Rogers Group, Inc. won only a preliminary injunction based not on 42 U.S.C. § 1983, but on a stand-alone (diversity) federal declaratory judgment count. This preliminary injunction and all the remainder of Rogers Group's claims were dismissed as moot in the Court's Order of March 31, 2011. Add. 28, App.

670. Unfortunately, the District Court later erred by awarding over \$75,000.00 in attorney's fees supported only by a dissolved preliminary injunction issued pursuant to a federal declaratory judgment claim and based solely upon interpretation of a state statute with no federal right or constitutional implications.

Rogers Group, Inc. sued the City of Fayetteville asserting "diversity jurisdiction pursuant to 28 U.S.C. § 1332...." (Complaint ¶ 3; App. 1) and never asserted pendent state jurisdiction which would have been unavailable and improper for Count I because it pled for **federal**, not state, declaratory judgment relief in its declaratory judgment claim. "Rogers requests declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201-2202." Complaint ¶ 31; App. 11. Therefore, this was not a state claim even though it concerned interpretation only of state law. Since the federal declaratory judgment claim could not be a pendent state claim, it cannot form the basis for an award of attorney's fees pursuant to 42 U.S.C. § 1985. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 285 (1993).

The general rule in our legal system is that each party must pay its own attorney's fees and expenses, but Congress enacted 42 U.S.C. § 1988 in order to ensure that **federal** rights are adequately enforced.

*Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662, 1671, 176 L. Ed. 2d 494 (2010) (emphasis added, citation omitted).

**Federal** rights were never considered or adjudicated in this case. Although the City filed a motion for summary judgment against both Count II (Due Process) and Count IV, (Fifth Amendment Takings), the District Court refused to rule on the City's motion and decide these meritless counts on which the city deserved summary judgment. Add. 28, App. 670. Thus, Congress' very purpose of enacting 42 U.S.C. § 1988, "**to ensure federal rights**", has been subverted to allow attorney's fees for a declaratory judgment decision that a city misinterpreted state law yielding a partially invalid ordinance with no federal constitutional implications.

Even when a permanent injunction was awarded based upon a pendent state law claim, the United States Supreme Court has denied an award of attorney fees when no relief was awarded pursuant to 42 U.S.C. § 1983. *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 115 S.Ct. 2351, 132 L. Ed 2d 509 (1995). The Supreme Court put it succinctly: "when no relief can be awarded pursuant to § 1983, no relief can be awarded under § 1988." *Id.* at 592.

Later, the United States Supreme Court held that although pendent state claims including an injunction had been granted, "(b)ecause respondents were not entitled to relief under § 1985(3), they were also not entitled to attorney's fees and costs under 42 U.S.C. § 1988." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 285, 113 S.Ct. 753, 133 L. Ed 2d 34 (1993). Thus, even if Count I had

been a pendent state claim, Rogers Group would not be entitled to attorney's fees if it was not entitled to relief pursuant to § 1983.

Rogers Group, Inc. was not a "prevailing party" even on its federal declaratory judgment cause of action. However, even if Rogers has obtained full relief on the merits with a permanent injunction, it would not be entitled to attorney's fees because its Due Process and Fifth Amendment claims were never properly considered nor disposed of by the District Court. *Kimbrough v. Arkansas Activities Association*, 574, F.2d 423 (8<sup>th</sup> Cir. 1978) is the only cited authority by the Court to justify its award of attorney's fees for a non-fee claim. This most critical issue in the District Court's 24-page Judgment was handled in one sentence:

17. The Court finds that RGI is entitled to a fee award under § 1988 even though the Court never reached the constitutional claims because the **allegations in the compliant** raised a substantial constitutional claim sufficient to confer **jurisdiction**, which is sufficient to support an award of fees under § 1988. *See Kimbrough v. Arkansas Activities Assoc....*

Order, Add. 16 App. 886 (emphasis added).

Rogers Group, Inc.'s Due Process and Takings claims did not confer **jurisdiction** for Rogers Group, Inc.'s federal declaratory judgment action expressly brought pursuant to diversity, not supplemental, jurisdiction. Rogers Group, Inc.'s federal declaratory action stood on its own with no need or

justification that the District Court “make a threshold determination that a substantial federal claim, arising from the same nucleus of operative fact, is raised by the allegation of the complaint.” *Kimbrough, supra* at 427. Therefore, it was improper and fatal error for the District Court to bootstrap civil rights attorney’s fees onto a federal declaratory judgment action based upon diversity jurisdiction and decided solely as a matter of state statutory interpretation.

The weak test requiring a District Court to only “make the threshold determination that a substantial federal claim, arising from the same nucleus of operative fact, is raised by the allegations of the complaint,” is probably no longer valid after the much stricter attorney’s fees standard announced by the United States Supreme Court in *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dept. of Health & Human Res.*, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001). While rejecting the “catalyst theory” to support an award of attorney’s fees which had been adopted by the Eighth Circuit and virtually all other Circuit Courts (and appears to have been mistakenly now applied against the City), the Supreme Court said: “Our ‘respect for ordinary language requires that a plaintiff receive at least some relief **on the merits of his claim** before he can be said to prevail.” *Id.* at 603 (citation omitted, emphasis added).

Even more germane to the District Court’s and *Kimbrough*’s reliance on **mere allegations in the complaint** to support an award of attorney’s fees pursuant

to § 1988 is the United States Supreme Court's explanation of what would **not justify** such award of attorney's fees.

We think, however, the 'catalyst theory' falls on the other side of the line from these examples. It allows an award where there is no judicially sanctioned change in the legal relationship of the parties. Even under a limited form of the 'catalyst theory,' a plaintiff could recover attorney's fees if it established that the **'complaint had sufficient merit to withstand a motion to dismiss for lack of jurisdiction or failure to state a claim on which relief may be granted.'** **This is not the type of legal merit that our prior decisions, based upon plain language and congressional intent, have found necessary.**

*Id.* at 605 (citation omitted, emphasis added).

Pleadings alone have thus been expressly rejected by the United States Supreme Court as giving any authority to award attorney's fees pursuant to 42 U.S.C. § 1988. The District Court's reliance upon the 33-year-old *Kimbrough* case that "even though the Court never reached the constitutional claim ... the allegations in the complaint... [are] sufficient to support an award of fees under § 1988," (Add. 16, App. 886) is untenable and contrary to the express reasoning and holding of the United States Supreme Court in *Buckhannon*.

Even if *Kimbrough* was still good law, the Federal District Court failed to follow its requirements.

To the extent a plaintiff joins a claim under one of the statutes enumerated in (the Act) with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the

purpose of awarding counsel fees. In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve **if the nonconstitutional claim is dispositive**.

*Kimbrough, supra* at 426. (emphasis added).

It is clear that enjoining enforcement of the ordinance or amending it to remove its extra-territorial application is **not dispositive** of Rogers Group, Inc.'s Count II Due Process claim which focused directly upon the City Council's enactment of the ordinance with alleged arbitrary terms and the "City's lack of rational basis for the Ordinance...." (Complaint ¶ 50; App. 14). If Rogers Group, Inc. suffered any Due Process violation, it suffered such injury **upon enactment of the ordinance** even if it may have suffered only nominal damages. "[T]he denial of procedural due process should be actionable for nominal damages without proof of actual injury." *Farrar v. Hobby*, 506 U.S. 103, 112, 113 S.Ct. 566, 121 L. Ed. 2d 494 (1992). A preliminary injunction entered more than a month after an ordinance's enactment against enforcement of the ordinance or its much later amendment might terminate **additional** damages, but they would not undo the Due Process violation of a city council enacting an ordinance that violates a plaintiff's Due Process rights.

The District Court noted in its March 31, 2011 Order dismissing Rogers Group's Complaint that Rogers Group's Count II seeking "damages RGI had allegedly suffered as a result of a claim for the alleged violation of RGI's due

process rights **due to the enactment of the Ordinance** – based upon RGI’s claim that the City lacked a rational basis for the **enactment** of Ordinance #5280.” Add. 25, App. 664; emphasis added.

The Court also stated that Rogers Group’s Count IV for an unconstitutional taking was “again **due to the enactment of Ordinance #5280.**” Add. 25, App. 664, emphasis added. Obviously, the District Court realized and held that Rogers Group’s federal civil rights claims were both based upon the enactment of the ordinance and not upon its administration or continued application to plaintiff Rogers Group.

It is clear that the City’s amendment of the ordinance more than a year after enactment was **not dispositive** to Rogers Group’s asserted Due Process claim which was ripe upon the City Council’s initial enactment. Rogers Group, Inc.’s Due Process allegations did not allege violations in the administration of the ordinance, but in its **enactment**. Neither the initial preliminary injunction nor later amendment could nullify whatever Due Process violations might have occurred in its enactment.

Therefore, even if *Kimbrough* is still good law, the District Court failed to properly apply it to our facts because the federal declaratory judgment action was not a non-federal pendent claim, but a non-fee federal claim based upon diversity and wholly independent of the Due Process or Takings claims. Additionally,

neither the resolution of the declaratory judgment claim (which was dismissed and not decided on the merits) nor the City's amendment of its Ordinance could be dispositive to the federal civil rights claims also dismissed by the District Court.

Even if Rogers Group, Inc. had been fully successful on its declaratory judgment claim and even if this claim had not been a federal declaratory judgment claim based upon diversity, Rogers Group would still not be entitled to attorney's fees under § 1988 if it did not prevail on its federal civil rights claims.

[P]laintiffs who do not prevail on their federal claims but achieve success on supplemental state law claims are not prevailing parties under § 1988, and are therefore not entitled to an award under that statute.

*Robles v. Prince George's County, Md*, 302 F.3d 262, 272 (4<sup>th</sup> Cir. 2002).

The District Court erred and abused its discretion when awarding attorney's fees and costs without even considering the constitutional claims of Rogers Group, Inc., which are the only claims that can support an award of attorney's fees and costs. *See Lowry v. Watson Chapel School District*, 540 F.3d 752, 765 (8<sup>th</sup> Cir. 2008).

Federal Circuit Courts are split in their analysis of whether a preliminary injunction based upon federal civil rights claim is ever enough to authorize the granting of attorney's fees and costs. The District Court adopted the "prevailing" party test of the two judge majority in *Select Milk Producers, Inc. v. Johanns*, 400

F3d 939 (D.C. Cir. 2005). The dissenting D.C. Circuit Court Judge in *Johanns* pointed out this “test” was almost “a *per se* rule for *no* preliminary injunction can be granted without a showing of likelihood of success on the merits.” *Id.* at 962.

The District Court even made that almost *per se* test even easier by removing the majority’s requirement that the relief be “concrete and irreversible.” *Id.* Of course, the most important difference for our case is that the D.C. case, as virtually all the Circuit Court cases asserting that preliminary injunctions can support an award of attorney fees is considering a **preliminary injunction based upon a civil rights** or other fee-based federal statute, not as in our case a non-fee declaratory judgment concerning the interpretation of state law with no constitutional issues.

Some Circuits are clear that preliminary injunctions are insufficient to award attorney’s fees.

The Preliminary Injunction is an insufficient basis on which to award attorney's fees... because it is interim relief not based on the merits...

*John T. ex rel. Paul T. v. Delaware County Intermediate Unit*, 318 F.3d 545, 558 (3d Cir. 2003).

[W]e hold that the preliminary injunction entered by the district court does not satisfy the prevailing party standard...

*Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 277 (4th Cir. 2002).

This Court has largely agreed that the weakness of the preliminary injunction, which is not an “on the merits” decision, cannot support an award of attorney’s fees even if the preliminary injunction is on a constitutional claim. For example, *N. Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1086 (8th Cir. 2006) interpreted *Buckhannon* to hold that granting a preliminary injunction would be insufficient to constitute “a judicially sanctioned material alteration of the parties’ legal relationship within the meaning of *Buckhannon*.” Its review of the other Circuits revealed that “virtually every circuit court to consider the question has concluded that a preliminary injunction granting temporary relief that merely maintains the status quo does not confer prevailing party status.” *Id.*

The District Court’s Order cites dicta in *N. Cheyenne* and *Advantage Media, L.L.C. v. City of Hopkins, Minn.*, 511 F.3d 833, 837 (8th Cir. 2008), for the proposition that “a preliminary injunction can in some instances carry the judicial imprimatur required by *Buckhannon* to convey prevailing party status.” Add. 12, App. 882. Since both *N. Cheyenne* and *Advantage Media* denied plaintiffs any attorney’s fees, this statement is pure dictum. Once again, it is vital to note that the preliminary injunctions in both cases were based on civil rights/attorney fees authorizing federal statutes, not a non-fee declaratory judgment action decided on state statute interpretation grounds in a case in which the District Court admits it “never reached the constitutional claims.” Add. 16, App. 886.

The preliminary injunction Advantage Media obtained based upon the First Amendment “compelled the City to cure the ordinance’s constitutional defects....” *Advantage* at 836. This Court correctly still held that “[a]lthough Advantage’s lawsuit resulted in alteration of several potentially unconstitutional provisions of the Hopkins sign ordinance, the Supreme Court has rejected the ‘catalyst’ theory of fee recovery as a means of attaining prevailing party status.” *Advantage* at 838.

Even though some Circuits may be edging closer to a reborn “catalyst” rule for preliminary injunctions that precede what plaintiffs claim are favorable results justifying an attorney’s fees award, the United States Supreme Court remains clearer than ever that a defendant’s change in conduct not accompanied with a judgment on the merits, a court ordered consent decree or similar judicial relief on a civil rights or other fee authorizing statutory claim **will not support an award of attorney’s fees**. The Supreme Court would be shocked that a District Court would try to award § 1988 attorney’s fees based upon a dismissed preliminary injunction concerning non-fee declaratory judgment action to determine whether a city properly interpreted a state statute when enacting a nuisance abatement ordinance when the District Court never reached the constitutional claims and based attorney’s fees on mere allegations in the complaint. That seems very far from the Supreme Court’s holding in *Buckhannon*:

Congress intended to permit the interim award of counsel fees only when a party has **prevailed on the merits** of at

least some of his claims. Our ‘[r]espect for ordinary language requires that a plaintiff receive at least some relief **on the merits** of his claim before he can be said to prevail.’

*Buckhannon*, 532 U.S. 598, 603, 121 S. Ct. 1835, 1839-40, 149 L. Ed. 2d 855 (2001) (emphasis added).

In *Buckhannon* as in the present case, after the plaintiff sued and obtained a stay (or in our case a preliminary injunction on the declaratory judgment claim), the legislative body amended the law to remove sections attacked by plaintiff which the Court found had mooted the stayed or enjoined action. This was termed “voluntary” by the United States Supreme Court in rejecting the “catalyst” theory in *Buckhannon*, but found “not voluntary decisions taken for reasons unrelated to this lawsuit” by the District Court here. Add. 16, App. 886. This decision by the District Court has spawned exactly the type of “second major litigation” that the United State Supreme Court sought to prevent by rejecting the “catalyst” theory in *Buckhannon*.

We have also stated that “[a] request for attorney's fees should not result in a second major litigation, and have accordingly avoided an interpretation of the fee-shifting statutes that would have “spawn[ed] a second litigation of significant dimension.” Among other things, a “catalyst theory” hearing would require **analysis of the defendant's subjective motivations in changing its conduct**, an analysis that “will likely depend on a highly factbound inquiry and may turn on reasonable inferences from the nature and timing of the defendant's change in conduct. Although we do not doubt the ability of district courts to perform the nuanced “three thresholds” test required by the “catalyst theory”—whether the claim was colorable rather than groundless;

whether the lawsuit was a substantial rather than an insubstantial cause of the defendant's change in conduct; whether the defendant's change in conduct was motivated by the plaintiff's threat of victory rather than threat of expense—it is clearly not a formula for “ready administrability.”

*Buckhannon*, 532 U.S. 598, 609-10, 121 S. Ct. 1835, 1843, 149 L. Ed. 2d 855 (2001) (citations omitted, emphasis added).

**Given the clear meaning of “prevailing party” in the fee-shifting statutes, we need not determine which way these various policy arguments cut. In *Alyeska*, we said that Congress had not “extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted.”** To disregard the clear legislative language and the holdings of our prior cases on the basis of such policy arguments would be a similar assumption of a “roving authority.” For the reasons stated above, we hold that the “catalyst theory” is not a permissible basis for the award of attorney's fees under the FHAA, 42 U.S.C. § 3613(c)(2), and ADA, 42 U.S.C. § 12205.

*Id.*, 532 U.S. 598, 610, 121 S. Ct. 1835, 1843, 149 L. Ed. 2d 855 (2001) (citations omitted, emphasis added).

The City informed the District Court that it amended its rock quarry ordinance to remove its extra-territorial application for two very important reasons:

- (1) to ensure the vast majority of the land covered by this ordinance (all land within the city limits) would continue to be protected by its nuisance abatement regulations; and
- (2) to prevent further litigation expenses.

The City does not believe nor did it inform the District Court that Rogers Group, Inc.'s Due Process claim would be necessarily mooted by its amendment of the ordinance. The District Court's analysis of the City's "subjective motivations" should never have occurred after the *Buckhannon* decision. Indeed, a concurring Justice Scalia could not have been clearer that a defendant's intent or motivation in changing challenged conduct is totally irrelevant for the issue of "prevailing" party and the award of § 1988 attorney fees.

But when "**prevailing party**" is used by courts or legislatures in the context of a lawsuit, it is a **term of art**. It has traditionally—and... *invariably*—meant the party that wins the suit or obtains a finding (or an admission) of liability. Not the party that ultimately gets his way because his adversary dies before the suit comes to judgment; not the party that gets his way because circumstances so change that a victory on the legal point for the other side turns out to be a practical victory for him; and **not the party that gets his way because the other side ceases (for whatever reason) its offensive conduct**.

*Buckhannon*, 532 U.S. 598, 615, 121 S. Ct. 1835, 1846, 149 L. Ed. 2d 855 (2001)

Although some Circuits seem reluctant to understand that the results-oriented "catalyst" theory is no longer good law, a unanimous Supreme Court tried to remind us all what *Buckhannon* held when the Court rejected a preliminary injunction winner's claim of attorney's fees for her "concrete and irreversible" victory of staging a nude protest while the state's rules were enjoined.

*Buckhannon* held that the term “prevailing party” in the fee-shifting provisions of the Fair Housing Amendments Act of 1988 and the Americans with Disabilities Act of 1990 does not “includ[e] a party that has failed to secure **a judgment on the merits or a court-ordered consent decree**, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct.” The dissent in *Buckhannon* would have deemed such a plaintiff “prevailing,” not because of any temporary relief gained (in that case, a consent stay pending litigation), but because the lawsuit caused the State to amend its laws, terminating the controversy between the parties, and permanently giving plaintiff the real-world outcome it sought.

*Sole v. Wyner*, 551 U.S. 74, 83 (fn. 3), 127 S. Ct. 2188, 2195, 167 L. Ed. 2d 1069 (2007) (citations omitted; emphasis added).

The dissenters in *Buckhannon* thought that *Buckhannon*'s filing of the lawsuit, which caused an amendment of the law and gave *Buckhannon* the real-world outcome it sought, created an entitlement to attorney's fees. They **lost**. A District Court may not consider factors rejected by the majority in *Buckhannon* and endorsed by the dissenters, which appears to be what happened to the City of Fayetteville in this case. The final unanimous holding in *Sole* supports Justice Scalia's concurrence in *Buckhannon* and the City's position in this appeal.

Prevailing party status, we hold, does not attend achievement of a preliminary injunction that is reversed, **dissolved, or otherwise undone** by the final decision in the same case.

*Id.*, 551 U.S. 74, 83, 127 S. Ct. 2188, 2195, 167 L. Ed. 2d 1069 (2007).

When the case was dismissed, the preliminary injunction was no more. It was probably “dissolved,” but is certainly was “undone”. Thus, Rogers Group, Inc. cannot achieve prevailing party status (even if this preliminary injunction had been based upon a civil rights claim). Therefore attorney’s fees may not be awarded.

Although the District Court stated “the allegations in the complaint raised substantial constitutional claim sufficient to confer jurisdiction,” (Add. 16, App. 886) Rogers Group’s allegations actually failed to meet the standards required to recover for a Due Process claim. Although Rogers Group contended that the enactment of the ordinary was arbitrary, unreasonable, and without rational basis, those allegations were not only false, but also below the truly egregious, conscience-shocking standard required for a Due Process violation.

The Court is concerned, and with good reason, about the breadth of this concept. If substantive due process is interpreted without a high degree of discretion and restraint, it will in due course engulf the whole world of the law. For this reason, both the Supreme Court and this Court have emphasized the necessity of great judicial restraint. **In order to violate the Due Process Clause, governmental action must be more than merely “arbitrary” in some general or logical sense, more than merely “arbitrary and capricious” in the commonly accepted administrative-law sense of that phrase.** The action must be “arbitrary in the *constitutional* sense,” (emphasis supplied). “[F]or half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience.... [T]he substantive component of the Due Process Clause is violated by executive action only when it

‘can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.’

This Court has made the same point several times. In the zoning context, for example, we have distinguished between what might be called ordinary administrative-law allegations that a certain governmental action is arbitrary and capricious, and decisions that are truly irrational:

**[S]ubstantive-due-process claims should be limited to “truly irrational” governmental actions. An example would be attempting to apply a zoning ordinance only to persons whose names begin with a letter in the first half of the alphabet.**

*Singleton v. Cecil*, 176 F.3d 419, 432-33 (8th Cir. 1999) (citations omitted, emphasis added).

This Court sets forth a two-part test to determine if a Due Process violation has occurred. The challenged governmental action must both inflict a “grievous wrong” and be “utterly lacking in rational basis.”

[G]overnmental action which inflicts upon the citizen any grievous wrong is unconstitutional under the Due Process Clause of the Fourteenth Amendment if it is utterly lacking in rational basis or fundamentally unfair for some other reason.

*Id.*, 176 F.3d 419, 433 (8th Cir. 1999).

This Court has rejected any negligent infliction of harm by a government as able to sustain a Due Process violation. Only “egregious conduct” could support a Due Process claim. The Court held that the two-part test of an intent to injure and lack of any justifiable government interest was needed for a Due Process violation.

The Supreme Court has cautioned that the Due Process Clause “does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm.” *Lewis* described the spectrum of conduct that can give rise to different types of liability and reasoned that constitutional liability requires egregious conduct on the part of a government official:

We have ... rejected the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct, and have held that the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process. It is, on the contrary, behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim; **conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.**

*Omni Behavioral Health v. Miller*, 285 F.3d 646, 651-52 (8th Cir. 2002) (citations omitted, emphasis added).

Although the District Court interpreted the state statute differently from the State Court Judge and Arkansas Attorney General, the City Council’s decision to enact the ordinance could not be found egregious or truly irrational, and thus there was no merit whatsoever in the Rogers Group, Inc.’s § 1983 Due Process claim.

Indeed, the District Judge himself, while disagreeing with the City Council’s and State Judge’s interpretation of the state statute (Add. 31-33, 37-39, App. 537, 541-42, 534-36), acknowledged the commendable legislative process the City

Council went through when carefully crafting the ordinance. The District Judge noted in his Order granting the Preliminary Judgment:

The City expresses its concern about the public interest by saying that affected citizens have taken part in a 'careful democratic process' which will be 'thwarted' if an injunction issues. There was evidence that the City Council did not act in haste, instead considering the Ordinance over the course of several meetings, and that representatives of RGI were able to have considerable input in the development of the Ordinance. This is to be commended in the enactment of laws and regulations...

District Court's Order granting Preliminary Injunction, November 30, 2009, Add. 29-30, App. 418-19.

This statement within the District Judge's Order establishes that even if there was a misinterpretation of the State statute authorizing a city council to abate a nuisance within a mile of the city limits, such a mistake did not rise to the truly irrational level needed for a Due Process violation. The Ordinance was obviously not conscience-shocking, truly irrational, or intended to injure without any justifiable government interest. The City already had an ordinance regulating an outside the city limits nuisance (as determined by the City Council) which had been found constitutional by a State Circuit Court Judge. Add. 31, App. 537. It would be very reasonable to conclude that the Circuit Judge's interpretation of State law was correct. **The City could reasonably rely on this existing judicial interpretation.**

During the litigation over whether the City had the statutory right to enact the rock quarry ordinance, a state senator asked the Arkansas Attorney General for his opinion about a city council's power to enact this ordinance. The Arkansas Attorney General said yes, city councils have that power. Add. 34, App. 464. Even though the federal courts do not have to follow or agree with the Arkansas Attorney General's Opinion, his interpretation also shows that the City Council enactment was reasonable and seemingly authorized by Arkansas law. Thus, the City Council's enactment was far from the "truly irrational" conduct necessary for a Due Process violation.

Rogers Group, Inc.'s other constitutional claim of a Fifth Amendment Taking is also clearly without any merit and was invalid and meritless when pled because Rogers Group cannot assert such a claim until after it has **exhausted** its state remedy. This was explained to the District Court in the City's brief supporting its motion for summary judgment against Rogers Group's Takings claim.

A property owner's Fifth Amendment regulatory takings claim challenging a city ordinance prohibiting the sale of fireworks was barred because of the property owner's failure to exhaust his inverse takings claim in state court under Arkansas law. *Cormack v. Settle-Beshears*, 474 F. 3d 528 (8<sup>th</sup> Cir. 2007). **Federal courts are barred from considering the merits of a Fifth Amendment takings claim**

**until a private litigant exhausts state remedies.** *Id.* A commercial property owner's § 1983 takings claims against the State of Arkansas were not ripe for adjudication in federal court until the owners exhausted their state just compensation remedies. *Willis Smith and Co., Inc. v. Arkansas*, 548 F.3d 638 (8<sup>th</sup> Cir. 2008).

Rogers Group chose not to seek state remedies in a state court (which had already considered and ruled that a municipal nuisance abatement ordinance was constitutional as applied to a business located outside the Fayetteville city limits). Therefore, its § 1983 federal takings claim is clearly barred and should be dismissed. Indeed, clear, consistent, and long standing federal court authority establishes such claim was totally unfounded and should not have been made. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 173, 105 S. Ct. 3108, 3110, 87 L. Ed. 2d 126 (1985).

Rogers Group, Inc. cannot be awarded attorney fees if it cannot succeed on the merits on the only claims that could authorize § 1988 attorney's fees and costs. As the United States Supreme Court held in *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, *supra* at 592: "when no relief can be awarded pursuant to § 1983, no attorney's fees can be awarded under § 1988."

## CONCLUSION

Allowing award of attorney's fees and costs in this case would be more than turning *Buckhannon* on its head, as the only possible "prevailing" party status Rogers Group could have obtained was on a non-fee federal declaratory judgment diversity action interpreting a state statute on non-constitutional grounds. § 1983 attorney's fees awards were enacted "to ensure **federal** rights are adequately enforced," *Perdue v. Kenny A., supra*, and "were never intended to 'produce windfalls to attorneys.'" *Farrar v. Hobby, supra* at 103. Granting attorney fees of over \$75,000.00 to Rogers Group, Inc. without giving Fayetteville taxpayers the right to their day in Court on the § 1983 claims is improper and not allowed by *Buckhannon*.

Respectfully Submitted,

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## CERTIFICATES

### Certificate of Service

The undersigned hereby certify that two true and correct copies of the foregoing brief and following addendum, along with a computer CD-ROM disc containing a copy of the full text thereof, were served on the following by placing them in the U.S. Mail, properly addressed and postage prepaid, the 30<sup>th</sup> day of August, 2011.

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### Certificate of CM/ECF Filing and Service

The undersigned hereby certify that the foregoing brief and following addendum were filed and served upon all parties using the CM/ECF electronic filing and service system of the U.S. Circuit Court of Appeals for the 8<sup>th</sup> Circuit, and notice of such filing and service is simultaneously sent to all parties registered with such system, this 29<sup>th</sup> day of August, 2011.

### Certification of Virus Scan

The undersigned hereby certify that, Pursuant to Rule 28A(h)(2) of the Local Rules of the United States Court of Appeals for the Eighth Circuit, the filed and served electronic versions of the appellant's brief, addendum, and appendix have been scanned for viruses using <http://www.kapersky.com/virusscanner>, and are virus-free. The brief was created using Microsoft Word for Mac 2011, version 14.1.2.

Dated this 29<sup>th</sup> day of August, 2011.

Certificate of Compliance with Type-Volume Limitation,  
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume requirements of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7946 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
  
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface with serifs using Microsoft Word for Mac 2011, version 14.1.2, in 14-point Times New Roman.

Dated this 29<sup>th</sup> day of August, 2011.

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*The district court opinion on review is contained in the appellant's Addendum,  
attached hereto.*