NO. 21-299

IN THE
Supreme Court of the United States

MONTGOMERY COUNTY, MARYLAND,
Petitioner,

v.

YASMIN REYAZUDDIN,
Respondent.

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

MOTION FOR LEAVE TO FILE AND BRIEF OF AMICUS CURIAE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The International Municipal Lawyers Association (IMLA), by its undersigned counsel, hereby moves the Court for an order granting leave to file an amicus curiae brief before the Court's consideration of Montgomery County's Petition for a Writ of Certiorari, pursuant to Supreme Court Rule 37. Respondent Yasmin Reyazuddin has withheld consent to the filing of the amicus curiae brief. Additionally, IMLA also respectfully moves this Court for leave to grant this amicus curiae brief because IMLA's request for consent was less than 10 days before the brief was filed. However, Respondent waived its right to file a response more than 10 days before IMLA's brief was filed and there would therefore be no prejudice to Respondent in granting the requested relief.

As detailed below, IMLA regularly advocates for fair and even application of federal law for local governments both before this Court and in the federal appellate courts. Amicus requests the opportunity to present an amicus curiae brief in this case because its members are keenly interested in the possible negative ramifications if the circuit split is left to stand, particularly because the Fourth Circuit's decision will disincentivize parties from reaching settlements in disability litigation and because the decision will have especially onerous impacts on smaller local governments.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE[1]

IMLA has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

This case is of significant concern to the nearly 40,000 local governments nationwide as the circuit split creates an uneven application of the award of attorney's fees for local governments in identical situations that varies simply due to geography. By disregarding this Court's precedent and splitting from eight other circuits, the Fourth Circuit's rule will also create a disincentive to resolve disability related claims as good-faith efforts to do so could result in a court's application of a significant award of attorney's fees. These attorney's fee awards are problematic for all local governments, but smaller jurisdictions will be

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae and its counsel made a monetary contribution to its preparation or submission. The parties received notice of the filing of this brief. Petitioner consents to the filing of this brief, however, the Respondent has indicated that she does not consent to the filing of this brief.

especially burdened by the Fourth Circuit's ruling unless this Court grants certiorari.

SUMMARY OF ARGUMENT

As the Petition for Certiorari sets forth, the Fourth Circuit creates a circuit-split over the reading of this Court's opinion in *Farrar v. Hobby*, 506 U.S. 103 (1992), and conflicts with this Court's precedent in *Buckhannon Bd. and Care Home, Inc. v. West Va. Dept. of Health and Human Resources*, 532 U.S. 598 (2001). *See* Petition for Certiorari, pp. 11-19. Amicus agrees with the Petitioner that these reasons alone, justify granting certiorari in this case. Amicus submits there are several other important reasons to grant certiorari in this case.

First, if left to stand, the Fourth Circuit's rule will disincentivize employers from offering accommodations to disabled employees or from otherwise settling lawsuits lest they be considered to cede "prevailing party" status to the other side, bringing with that status the significant burden of high attorney's fees. This result would undermine the very purpose of the American's with Disabilities Act (ADA) and the Rehabilitation Act, harming disabled employees and employers alike. Second, the Fourth Circuit's decision not only disregards this Court's precedent, but also violates the separation of powers by legislating where Congress chose not to. Finally, this case is important to all local governments in this country given the need for uniformity in the law as to how a "prevailing party" is determined, not just under

the Rehabilitation Act, but in over 100 other statutes as well.

ARGUMENT

I. The Fourth Circuit's decision not only sharply diverges from other circuits and contravenes this Court's opinions, but it also disincentives voluntary resolution of claims.

The circuit split in this case creates an uneven playing field as to which defendants in this country pay attorney's fees under identical circumstances. Local governments on the Fourth Circuit's side of the split will be faced with a Catch-22 in trying to accommodate employees under the Rehabilitation Act and the ADA: follow through on the Acts' purposes in continuing the interactive process and searching for a reasonable accommodation that does not create an undue hardship, but in the process, risk high fee awards if an accommodation is deemed to confer "prevailing party" status for the other side; or withhold possible accommodations and continue to litigate claims long after they need to be litigated to avoid the designation of "prevailing party" status on the other side. The result is that the Fourth Circuit's decision will undermine efforts to voluntarily resolve certain claims for local governments and other defendants, contrary to this Court's decisions, particularly where, as discussed in Part III *infra,* attorney's fee awards can often outstrip actual damages in these cases.

Farrar held that, for purposes of determining a prevailing party, there must be a material alteration in the legal relationship between the parties. *Farrar*, 506 U.S. at 112. While a jury's award of just one-dollar meets that threshold, an award of no damages by the jury—*i.e.*, essentially a declaration by the jury—does not. As the Court explains in *Farrar*:

> To be sure, a judicial pronouncement that the defendant has violated the Constitution, unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party. Of itself, 'the moral satisfaction that results from any favorable statement of law' cannot bestow prevailing party status… A judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay.

Farrar, 506 U.S. at 112-13 (internal citations omitted), *quoting*, *Hewitt v. Helms*, 482 U.S. 755, 762, 107 S.Ct. 2672, 2676, 96 L.Ed.2d 654 (1987).

Furthermore, this Court in *Buckhannon*, resolved the very circuit-split the Fourth Circuit revives here and squarely rejected the circuits which had held that settlements provided a form of relief sought by the underlying lawsuit and could, therefore, confer prevailing party status on the plaintiff. *See*, *Buckhannon*, 532 U.S. at 604-05. Unlike ordinary settlements, *Buckhannon* specifically preserved

consent decrees as providing prevailing party status because, "[a]lthough a consent decree does not always include an admission of liability by the defendant… it nonetheless is a ***court-ordered*** 'change in the legal relationship between the plaintiff and the defendant'." *Id*., at 604, *quoting*, *Maher v. Gagne*, 448 U.S. 122, 126, n. 8, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980). (Emphasis added.)

At no time below did the trial court order a change in the legal relationship between the Petitioner and the Respondent. Rather, after the unenforceable jury verdict, the County voluntarily offered an accommodation to the Respondent—an accommodation, which she was *still* not satisfied by. Instead, Respondent sought declaratory and injunctive relief in an effort to create a judicial mandate changing the legal relationship between the parties as the jury verdict had not done. *See*, *Reyazuddin v. Montgomery Cty., Md.*, 754 F. App'x 186 (4th Cir. 2018) ("*Reyazuddin II*").[2] That relief was denied, and the trial court's order was affirmed by the Fourth Circuit. The Fourth Circuit noted in *Reyazuddin II* that, "[g]iven our holding, the parties' dispute over whether Reyazuddin 'prevailed' in the

[2] Respondent appealed thrice to the Fourth Circuit in this matter. Prior to the unenforceable jury verdict, *Reyazuddin II*, and the instant appeal, the County secured summary judgment from the district court on both counts against it, whereas Respondent's motion for summary judgment was denied. Resopndent appealed the grant of summary judgment to the County, and this Court reversed the district court on one count, but affirmed on another. *See*, *Reyazuddin v. Montgomery Cty., Md.*, 789 F.3d 407 (4th Cir. 2015) ("*Reyazuddin I*").

district court is irrelevant." *Reyazuddin II*, 754 F. App'x. at 192, n.8.

Thus, the Fourth Circuit's conclusion that Respondent was a prevailing party after all, even before *Reyazuddin II* was decided, directly contradicts another portion of *Buckhannon* preserving *court-ordered* changes in the legal relationship, which occur through "enforceable judgments on the merits and court-ordered consent decrees…" *Buckhannon*, 532 U.S. at 604.

Moreover, the Fourth Circuit's decision also undermines the rationale in *Buckhannon,* which promotes settlement between the parties. The *Buckhannon* Court explains that:

> …a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice… If a case is not found to be moot, and the plaintiff later procures an enforceable judgment, the court may of course award attorney's fees. ***Given this possibility, a defendant has a strong incentive to enter a settlement agreement***, where it can negotiate attorney's fees and costs.

Id. at 609 (Emphasis added.)

Here, as the Fourth Circuit itself noted in *Reyazuddin II*, there was never a dispute by the County that it had to accommodate the Respondent —

the dispute was the manner of the reasonable accommodation.[3]

Instead, after being reasonably accommodated, Respondent sought the enforceable judgment contemplated by *Buckhannon* and failed to procure one—a failure, which was affirmed by the Fourth Circuit in *Reyazuddin II*. The Fourth Circuit's later decision, then, that Respondent prevailed in this case directly contravenes *Buckhannon* and will disincentive defendants from resolving cases through reasonable accommodation in the future.

That the Fourth Circuit's decision regarding what constitutes a "prevailing party" has ramifications in over 100 statutes and directly conflicts with decisions from this Court and other circuit courts is reason enough to grant certiorari. But the decision will also have startling consequences if left undisturbed. If a defendant's provision of a reasonable accommodation to a plaintiff during litigation threatens to allow a plaintiff to collect attorneys' fees, there is a two-fold hazard: (i) a defendant has a strong and perverse incentive to refuse to accommodate after the commencement of litigation; and (ii) a plaintiff has a strong and perverse incentive to continue litigating despite being reasonably accommodated. These perverse incentives will only raise litigation costs on

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[3] As the court below points out, "[t]he County made several accommodations without a court order. It offered Reyazuddin a new job before the jury trial, moved her to MC311 and spent money and time on accommodations before the bench trial, and fixed the aux code problem during the bench trial." *Reyazuddin II*, 754 F. App'x at 192.

taxpayers in local communities grappling with complying in good faith with the law.

Moreover, by disincentivizing reasonable accommodations and the interactive process, the Fourth Circuit's decision undermines the purpose of the ADA and Rehabilitation Act. *See* 29 U.S.C. § 701(b)(2) (setting forth purpose of Rehabilitation Act is to "maximize opportunities for individuals with disabilities … for competitive integrated employment"). Fundamental to both statutes is that employers must provide reasonable accommodations to qualified disabled employees unless doing so would create an undue hardship. 42 U.S.C. § 12112(b)(5); 29 C.F.R. § 1630.9.2. The statutes contemplate that reasonable accommodations may require several attempts and iterations and employers and employees must therefore engage in an interactive dialogue to determine which accommodations will work and which will not. 29 C.F.R. § 1630.2(o)(3); *Kleiber v. Honda of Am. Mfg., Inc.,* 485 F.3d 862, 871 (6th Cir. 2007) (explaining "[e]ven though the interactive process is not described in the [ADA's] text, the interactive process is mandatory, and both parties have a duty to participate in good faith"). This is precisely what happened in this case. *See* Petition p. 5-7. The Fourth Circuit's decision threatens to shut down the interactive process, favoring litigation over accommodation. This Court should grant certiorari to safeguard the interactive process under the ADA and Rehabilitation Act.

II. By reviving the catalyst theory, the Fourth Circuit legislates a "*Buckhannon* Fix" to the Rehabilitation Act that Congress chose not to add, Violating the Separation of Powers.

After the Court's 2001 decision in *Buckhannon*, Congress reinstated the catalyst theory for claims made under the Freedom of Information Act (FOIA), but notably not, for Rehabilitation Act or other claims. In the OPEN Government Act of 2007, FOIA was amended to confer prevailing party status where "the complainant has obtained relief through either—(I) a judicial order, or an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial." 5 U.S.C. § 552(a)(4)(E)(ii); see also PL 110-175, 121 Stat 2524 (Dec. 31, 2007).

This selective reinstatement of the catalyst theory by Congress was described in a recent opinion of the United States Court of Appeals for the District of Columbia Circuit in *Grand Canyon Trust v. Bernhardt*, 947 F.3d 94 (D.C. Cir. 2020). The D.C. Circuit specifically addressed the legislative intent of the Open Government Act of 2007 as overturning *Buckhannon*, but only specifically as to FOIA claims. *Grand Canyon Trust*, 947 F.3d at 96 ("As we have recounted several times, the purpose and effect of [the Open Government Act of 2007] was to change the 'eligibility' prong back to its pre-*Buckhannon* form… and thus to reinstate the catalyst theory in FOIA Actions." (Internal quotations and citations omitted.))

Buckhannon did not directly address FOIA, but rather "the comparable [fee-shifting] language of the Americans with Disabilities Act and the Fair Housing Amendments Act." *Grand Canyon Trust*, 947 F.3d at 96. This comparable fee-shifting language applies to the Rehabilitation Act as well. *See Buckhannon*, 532 U.S. at 603, n. 4 ("We have interpreted these fee-shifting provisions consistently… and do so approach the nearly identical provisions at issue here.") (internal citations omitted); *cf. Marek v. Chesny,* 473 U.S. 1, 43-51, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985) (Appendix to opinion of Brennan, J., dissenting).

Because "Congress has the plenary power to regulate commerce among the States, it may at any time replace such judicial rules with legislation of its own." *See S. Dakota v. Wayfair, Inc.* 138 S.Ct. 2080 (2018) (Roberts, C.J. dissenting) (internal citations omitted). But Congress chose not to replace *Buckhannon* in Rehabilitation Act claims as it has elected to do in FOIA claims. The Fourth Circuit's opinion nevertheless confers the same prevailing party status in Rehabilitation Act claims that Congress chose to provide in FOIA claim. *See* 5 U.S.C. § 552(a)(4)(E)(ii)(II) ("a voluntary or unilateral change in position by the [entity]…"). If Congress intended to amend the Rehabilitation Act to revive the catalyst theory, Congress has the authority to do so and plainly knows how. The Fourth Circuit cannot overrule this Court's opinion in *Buckhannon,* nor can it amend the Rehabilitation Act. This Court should grant certiorari to foreclose the continued separation of powers violation that stems from the Fourth Circuit's decision.

III. Local governments are uniquely vulnerable to federal fee-shifting statutes.

Local governments, even smaller cities and counties, are often among the largest employers—public or private—in their jurisdiction. Additionally, local governments engage most directly with their residents on a day-to-day basis. Local governments are responsible for everything from garbage collection to police, fire, and medic services. Some administer school systems, some administer utilities, some administer parks, and most perform all these roles and more. Based on their role as employer and role as public service provider, local governments are uniquely vulnerable to federal fee-shifting statutes, particularly in an era where compensatory damages are already available.

Smaller local governments are often the ones most seriously impacted by any *de facto* relaxation of the prevailing party standard to include a party who has not discernibly prevailed given their limited resources and budgets. Furthermore, local governments do not enjoy immunities or other liability-limiting protections afforded to federal or state authorities under federal law or, at the other end, individuals acting under color of law.

This is particularly problematic because attorney's fee awards are significant and can often be higher than the damages themselves that the plaintiff is awarded in discrimination claims. For example, even after reducing the fee award in an employee's disability discrimination claim against Wal-Mart

Stores, Inc., the district court awarded $601,355 in attorney's fees in a case where the plaintiff's award for damages was reduced to $300,000. *Brady v. Wal-Mart Stores, Inc.,* 455 F. Supp. 2d 157, 216 (E.D.N.Y. 2006), *aff'd*, 531 F.3d 127 (2d Cir. 2008); *see also Montone v. City of Jersey City*, No. 2-06-CV-3790 (SRC), 2020 WL 7041570, at *2 (D.N.J. Dec. 1, 2020), *appeal dismissed*, No. 21-1266, 2021 WL 3626461 (3d Cir. Mar. 2, 2021) (awarding three law firms nearly $3.5 million in attorney's fees after a jury awarded eight plaintiffs an average award of $236,451 (totally $1,891,608) in damages based on a claim of failure to promote on account of their political affiliation); *Trawick v. Carmike Cinemas, Inc.,* 430 F. Supp. 3d 1354, 1359 (M.D. Ga. 2019) (granting motion for $659,433.27 in attorney's fees after judgment entered in favor of the plaintiff in her sex discrimination case in the amount of $367,117.79); *Hurd v. Cardinal Logistics Mgmt. Corp.*, No. 7:17-CV-00319, 2019 WL 6718111, at *9 (W.D. Va. Dec. 10, 2019*), aff'd,* 829 F. App'x 620 (4th Cir. 2020) (awarding $110,036.40 in attorney's fees even after lodestar reduction despite award in plaintiff's favor only resulting in $45,000 in damages). Moreover, high attorney's fee awards are present even when the court factors in the public fisc in cases brought against public entities. *See Est. of Allen v. Baltimore Cty., Maryland,* No. CV CCB-13-3075, 2019 WL 1410974, at *6 (D. Md. Mar. 28, 2019) (noting "[w]hen attorneys' fees are being paid out of public funds, courts have a special responsibility to ensure that taxpayers are required to reimburse prevailing parties for only those fees and expenses actually needed to achieve the favorable result" but nevertheless awarding attorney's

fees in the amount of $158,181.40 after the trial court ordered $32,871.59 in damages in favor of the plaintiff) (internal citations and quotations omitted).

The amount of the possible award is not the only problem for local government employers. The uncertainty as to whether providing a reasonable accommodation will result in prevailing party status and therefore attorney's fees will make it difficult in many cases for public entities to assess potential liability with any degree of certainty. Fiscal planning for litigation is difficult in the best of circumstances, with local entities having to set reserves against potential liability and for defense costs at the early stages of a case, but uncertainty as to something so fundamental as to whether an accommodation will result in significant attorney's fees, makes the task infinitely harder. Additionally, uncertainty in the litigation budget negatively impacts the budgeting process as a whole, and that necessarily affects municipal decision-making across the broad spectrum of public services. It follows that funds that must be reserved for potential liability are necessarily unavailable for providing fire protection, road maintenance, building inspection and the like. And the smaller the municipality, the less able it is to absorb these high attorney's fee awards, thereby negatively impacting the public. This is true whether an accommodation would result in prevailing party status and therefore attorney's fees for the plaintiff or simply because the local government is unable to discern whether an accommodation would result in the application of attorney's fees and therefore needs to reserve funds for such a possibility.

Congress was mindful of the impact that fee-shifting would have on local governments. In debating a fee-shifting amendment to the ADA, Senator Armstrong articulated a concern about local governments and small businesses: "I am worried about a typical case involving small public entities, small companies." 135 Cong. Rec. S10734-02 at S10755, 1989 WL 183115 (1989). This comment was in the context of an assurance from colleagues that fee awards would only be applied in "egregious cases." 135 Cong. Rec. S10734-02 at S10754, 1989 WL 183115 (1989). However, the Fourth Circuit's resurrection of the catalyst theory has turned the notion of fee-shifting only be warranted in "egregious cases" on its head. Without this Court's intervention, thousands of local governments will be subject to unwarranted attorney's fees awards in the Fourth Circuit, while their counterparts throughout the country are not.

CONCLUSION

For the foregoing reasons, the Amicus respectfully requests that the Court grant certiorari in this case.

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