

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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GERALD F. LACKEY, IN HIS OFFICIAL)
CAPACITY AS THE COMMISSIONER OF THE)
VIRGINIA DEPARTMENT OF MOTOR)
VEHICLES,)
Petitioner,)
v.) No. 23-621
DAMIAN STINNIE, ET AL.,)
Respondents.)
- - - - -

Pages: 1 through 91

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5 VIRGINIA DEPARTMENT OF MOTOR)
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7 Petitioner,)
8 v.) No. 23-621
9 DAMIAN STINNIE, ET AL.,)
10 Respondents.)
11 - - - - -

12
13 Washington, D.C.
14 Tuesday, October 8, 2024
15

16 The above-entitled matter came on for
17 oral argument before the Supreme Court of the
18 United States at 11:23 a.m.
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8 BRIAN D. SCHMALZBACH, ESQUIRE, Richmond, Virginia; on
9 behalf of the Respondents.
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1 P R O C E E D I N G S

2 (11:23 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 23-621, Lackey versus
5 Stinnie.

6 Ms. Maley.

7 ORAL ARGUMENT OF ERIKA L. MALEY

8 ON BEHALF OF THE PETITIONER

9 MS. MALEY: Mr. Chief Justice, and may
10 it please the Court:

11 The prevailing party is the party who
12 wins the lawsuit, obtaining a final judgment in
13 its favor, or at least a party who obtains a
14 ruling that the defendant is liable on the
15 merits of one or more claims, such as a summary
16 judgment or a judgment as a matter of law.

17 A preliminary injunction is neither a
18 final judgment nor a determination that the
19 defendant is liable on the merits for violating
20 federal law. It is simply a threshold
21 prediction of the likelihood of success based on
22 a truncated record and an initial, often hasty
23 assessment of the law that may well prove to be
24 faulty as the case proceeds. It provides no
25 enduring relief. By its nature, it is a

1 temporary procedural order that dissolves upon
2 final judgment.

3 A preliminary injunction, therefore,
4 does not make a plaintiff a prevailing party
5 within the meaning of that legal term of art,
6 and, thus, no statutory exception to the default
7 American rule applies.

8 Legal dictionaries at the time
9 Congress enacted Section 1988 defined
10 "prevailing party" based on whether the party
11 had successfully maintained its claim, looking
12 to the end of the suit, not on its degree of
13 success at earlier stages.

14 This Court's precedent similarly
15 provides that liability for fees and liability
16 on the merits go hand in hand. The Court should
17 therefore adopt a bright-line rule serving the
18 critical interest in ready administrability that
19 a preliminary injunction does not make a
20 plaintiff the prevailing party.

21 I look forward to this Court's
22 questions.

23 JUSTICE THOMAS: You -- can a consent
24 decree or a default judgment support a
25 prevailing party?

1 MS. MALEY: Yes, I think so, Justice
2 Thomas. Under this Court's precedent, the Court
3 held in Maher that a consent decree qualifies.
4 And it suggested in Kirtsaeng that a default
5 judgment would also qualify. And -- and a
6 default judgment and a consent decree are
7 similar in that they're both situations where
8 the court has not ruled on the merits, but,
9 because the defendant has waived or forfeited a
10 challenge to the merits, the court nonetheless
11 enters a final judgment in the plaintiff's
12 favor.

13 JUSTICE THOMAS: But I thought your
14 argument hinged on a court ruling in favor of --
15 on the merits in favor of the prevailing party?

16 MS. MALEY: For an interlocutory
17 ruling, that's correct, Justice Thomas. But
18 it's either an interlocutory ruling or a
19 favorable final judgment.

20 If a -- a party has a favorable final
21 judgment, it has won the lawsuit, and, thus, it
22 falls within the definition of a "prevailing
23 party" for that reason.

24 CHIEF JUSTICE ROBERTS: What do you do
25 with the formulation by your friend which is the

1 question is whether they got as much relief as
2 they needed? I wonder why that doesn't fit
3 under the "prevailing party" language.

4 MS. MALEY: I don't --

5 CHIEF JUSTICE ROBERTS: In other
6 words, I don't know what that would be. Like,
7 they're -- they want to do a parade tomorrow.
8 They get a preliminary injunction. The parade
9 goes forward. And they haven't gotten a final
10 judgment, but they don't need a final judgment.

11 MS. MALEY: A couple of responses to
12 that, Mr. Chief Justice.

13 First, it's not sufficient for an
14 interlocutory order because there's been no
15 determination that the defendant has violated
16 federal law or that the plaintiff's claim is
17 actually succeeds on the merits.

18 And, second, at least certainly in a
19 situation such as this one, the plaintiffs got
20 what they wanted, but, ultimately, they got what
21 they wanted because the Virginia legislature
22 repealed the statute. So they didn't ultimately
23 get the relief that they wanted from the court.
24 And --

25 JUSTICE SOTOMAYOR: Oh, but they did.

1 They got interim relief. They had their
2 licenses restored, and they had it restored
3 without paying a fee, and they drove around,
4 despite the existence of the statute, for I
5 think 16 or 18 months, whatever it was.

6 So it was -- it was final. It was
7 never reversed, dissolved, or otherwise undone
8 by a final decision, which is all that Sole
9 said. And we have never required a final
10 judgment. In at least two cases, Hanrahan and
11 Texas State Teachers, we said you can award
12 interim fees.

13 So final judgment has never been
14 required. All that's required is did you get a
15 judgment in your favor -- or relief in your
16 favor that hasn't been reversed, dissolved, or
17 otherwise undone.

18 MS. MALEY: A couple of points in
19 response to that, Justice Sotomayor.

20 First, Hanrahan did say that in --
21 interim fees could be available, but it said
22 only when a party has prevailed on the merits of
23 at least some of his claims because only in that
24 circumstance has there been a determination of
25 the substantial rights of the parties, which

1 Congress concluded was necessary to --

2 JUSTICE SOTOMAYOR: But I don't know
3 why your preliminary injunction doesn't do that
4 because, under Winter, we have recently said
5 that there has to be a finding of a likelihood
6 of success on the merits. So there's been a
7 finding of likely success on the merits, and
8 there's been relief granted.

9 MS. MALEY: Under --

10 JUSTICE SOTOMAYOR: So that's the only
11 thing that's required by law to get that relief.
12 That's winning on the merits of a -- preliminary
13 injunction.

14 MS. MALEY: Under Winter, a party does
15 have to show a likelihood of success on the
16 merits, but, as the Court said in Camenisch,
17 it's improper to equate a likelihood of success
18 on the merits with actual success on the merits
19 both because substantively it's -- it's simply a
20 lower standard and also significantly because of
21 the procedural differences between a preliminary
22 injunction and an actual determination of the
23 merits. For instance, a court can consider
24 inadmissible evidence at a preliminary
25 injunction.

1 JUSTICE KAGAN: Well, it's -- it's
2 true that it's only a likelihood of success,
3 but, you know, a likelihood of success is better
4 than an unlikelihood of success, and we have to
5 decide who's going to pay these fees.

6 And -- this -- these parties were --
7 they got the likelihood-of-success judgment and
8 they got everything that they wanted in the
9 interim before the legislature asked and --
10 acted, and when the legislature did act, I mean,
11 it's almost -- this goes back to Justice
12 Thomas's first question -- it was almost in the
13 nature of a unilateral settlement. It's kind of
14 like a "we give up," right?

15 So you have all those things. You
16 have the likelihood-of-success finding. You
17 have the fact that they get everything that they
18 need and want in the interim period. And then
19 the whole thing is brought to a close by the
20 legislature saying essentially "we give up" in
21 the same way that it would in a consent decree
22 case, even without the final imprimatur of the
23 court.

24 Put all of that together, I mean, why
25 shouldn't fees go the other way here?

1 MS. MALEY: I -- I disagree with that,
2 Justice Kagan, for a number of reasons.

3 And -- and, first of all, I don't
4 think it's correct to say that if a legislature
5 changes a law when a lawsuit is pending, that's
6 equivalent to a legislature giving up or
7 agreeing to a consent decree.

8 A legislature may choose to change a
9 statute for a number of reasons, including
10 because it concludes that the statute is simply
11 poor policy, and the -- that determination
12 should not make the government subject to an
13 award of attorney's fees. Indeed, in --
14 awarding --

15 JUSTICE JACKSON: But it's not that
16 determination that's making them subject to the
17 attorney's fees, right? I mean, what -- what's
18 making them subject, I think, is the fact that
19 before that determination, in this situation,
20 they presented their arguments to the court as
21 to why they believed that they were entitled to
22 relief, and they received that relief.

23 I mean, you -- you -- you talked about
24 the standard of what is a prevailing party, and
25 you originally asserted that it was a party who

1 wins a lawsuit. But the Court has spoken in --
2 I don't know how to pronounce this case -- is it
3 Lefemine -- that a plaintiff prevails when a
4 court order grants him actual relief on the
5 merits of his claim that materially alters the
6 legal relationships between the parties by
7 modifying the defendant's behavior in a way that
8 directly benefits the plaintiff.

9 And, like Justice Sotomayor, I don't
10 understand why a preliminary injunction couldn't
11 satisfy that standard.

12 MS. MALEY: Because a preliminary
13 injunction is not a determination on the
14 merits --

15 JUSTICE JACKSON: But it is.

16 MS. MALEY: -- of a claim.

17 JUSTICE JACKSON: When you think about
18 the difference between merits determination and
19 non-merits determinations, we're talking about
20 determinations of, you know, preliminary
21 threshold issues like jurisdiction, right? A
22 jurisdictional determination is not a
23 determination on the merits. That's what we've
24 said.

25 But, to the extent that under Winter

1 the preliminary injunction touches on what the
2 court thinks about the merits of the actual
3 legal claim, it is making a determination. Now
4 it's not a final determination on the merits,
5 but it is a determination on the merits.

6 MS. MALEY: It touches on the merits,
7 certainly, Justice Jackson --

8 JUSTICE JACKSON: Yes.

9 MS. MALEY: -- but it's not a
10 determination of the merits.

11 JUSTICE JACKSON: But you got relief
12 based on the court's initial determination on
13 the merits.

14 MS. MALEY: No, but the essential
15 purpose of a preliminary injunction is not to
16 provide a remedy for a violation of a law but to
17 protect the court's ability to grant effective
18 relief at the close of the case.

19 JUSTICE JACKSON: What about the Chief
20 Justice's example? In that situation, the
21 absolute purpose is: The parade is tomorrow,
22 and what I want to do is I want to be in it,
23 says this group. I need a PI.

24 MS. MALEY: Certainly, in that
25 circumstance, if a party chose to seek a

1 consolidation of the merits with a preliminary
2 injunction under Rule 65(a)(2), then there would
3 be an actual determination about whether the
4 defendant had or hadn't violated federal law,
5 and that could then qualify.

6 But, otherwise, if you imagine in
7 Sole, for instance, that the plaintiff there had
8 only wanted to hold the one demonstration, then,
9 under that theory, the plaintiff would have been
10 the prevailing party. She wanted to --

11 JUSTICE JACKSON: But didn't Sole
12 open -- leave open that -- that very question?
13 I thought Sole was about whether parties can be
14 divested of their prevailing party status if,
15 eventually, it goes on and the court says no,
16 you did not win. But, in the interim, you know,
17 if they win the preliminary injunction, at that
18 moment, they're a prevailing party and they
19 continue to be unless and until they are
20 reversed in a sense by the final judgment?

21 MS. MALEY: Sole did leave that
22 question open, Justice Jackson, but it also said
23 that the temporary, fleeting relief was
24 insufficient and that enduring relief was
25 necessary.

1 And when that's combined with
2 Buckhannon, which holds that that enduring
3 relief has to come from the court, then a
4 preliminary injunction that's dissolved because
5 a case is mooted by a non-judicial alteration,
6 here, the Virginia legislature deciding to
7 repeal the statute, does not qualify to make the
8 plaintiff a prevailing party.

9 JUSTICE ALITO: Suppose that in -- the
10 litigation on the issue of a preliminary
11 injunction is very -- is very extensive, lots
12 and lots of attorney hours are -- are burned up,
13 and at the end of all that, the -- the district
14 court issues a preliminary injunction and makes
15 factual findings that are going to be hard to
16 reverse on appeal. And then the government
17 says: Wow, we've -- you know, we're facing the
18 potential of a really heavy hit of attorney's
19 fees, so let's just throw in the towel and
20 change the rule or whatever is being challenged.

21 MS. MALEY: In a lot of cases, Justice
22 Alito, the -- the case is not going to become
23 moot for a number of reasons. Even if the
24 government changes its conduct prospectively,
25 the voluntary cessation of the challenged

1 conduct is not typically going to moot a case
2 under the voluntary cessation exception to
3 mootness.

4 And if the government wants to
5 overcome that, it has to meet a demanding
6 standard, as this Court recently held in the
7 Fikre case. In many instances, civil rights
8 suits, the plaintiffs can also seek damages, and
9 that is also not going to be mooted by a change
10 in the rule going forward.

11 So a lot of the time, the defendant
12 may well, after a preliminary injunction, if it
13 concludes that its further factual development,
14 further legal development is unlikely to change
15 that analysis, the defendant may well then say:
16 Well, I better settle or the fees are going to
17 simply keep accruing.

18 But it's not the case that a
19 government can simply decide at any stage of a
20 case that it wants to moot it and --

21 JUSTICE KAGAN: Well, didn't the
22 statute render the case moot?

23 MS. MALEY: The statute did render the
24 case moot.

25 JUSTICE KAGAN: And -- and -- and

1 couldn't a state do that, you know, on -- with
2 respect to all kinds of different cases?

3 I mean, we had a case a couple of
4 years ago, New York State gun regulation. You
5 can imagine that sort of thing. It -- it wasn't
6 the case in that that a preliminary injunction
7 was issued, but imagine that it had been, and
8 then New York State changes its gun law and it
9 leaves everybody kind of high and dry, even
10 though they've won the only thing that's been at
11 issue and maybe after very extensive litigation,
12 as Justice Alito suggested?

13 MS. MALEY: A few responses to that,
14 Justice Kagan.

15 First, a legislature's decision to
16 repeal a statute shouldn't be considered a form
17 of gamesmanship. Among other things, the
18 legislature is not the defendant in a civil
19 rights suit. The defendant is an executive
20 official. The legislature is a separate and
21 independent branch of government. And the
22 defendant has no control over whether the
23 legislature decides to act or when the
24 legislature decides to act.

25 In addition, even a legislative change

1 is not always going to moot a case. Indeed,
2 the -- the dissenting justices in the New York
3 rifle case set forth a number of reasons to
4 believe that case as a whole was not moot,
5 including the availability of damages and the
6 fact that the legislative change may not have
7 completely resolved the plaintiffs' claims
8 there, even though this Court found it more
9 appropriate to remand given the way the
10 legislative change had changed the questions
11 presented that the Court had initially granted.

12 JUSTICE SOTOMAYOR: I -- I think the
13 problem that I'm having is with your evading the
14 essence of the question, which is that the money
15 has been spent, and the issue is who bears the
16 cost of that expenditure.

17 And why should it be a plaintiff who
18 has received relief, all the relief that he or
19 she wanted, and is now stuck with paying for
20 that when it was the other side and one of its
21 agents, whether agents or co-legislative body or
22 executive body, who gives up and changes a
23 regulation, decides to make a change?

24 Why shouldn't the plaintiff receive
25 some recompense, assuming, by the way, that they

1 have done enough to receive it? I mean, one of
2 the things about prevailing party is that it's
3 not automatically granted. There's discretion
4 in the courts, and the courts decide how much
5 effort you really put into this and adjust the
6 fees according to those factors.

7 MS. MALEY: A few responses to that,
8 Justice Sotomayor.

9 First, it's not correct to say that
10 the plaintiffs received all the relief they
11 wanted from the court. They received all the
12 relief they wanted from the legislature's repeal
13 of the statute from the --

14 JUSTICE SOTOMAYOR: No, they --
15 they -- but we've -- we've said that you can get
16 a dollar in nominal damages. So you didn't get
17 all the relief you wanted in a lawsuit, and
18 you're still a prevailing party.

19 So, when I use the word "all," I mean
20 all that they wanted in this particular
21 proceeding. This preliminary injunction, they
22 wanted their license back, and they wanted to
23 keep driving their cars without paying a fee to
24 do that, and they got that pending the
25 litigation.

1 MS. MALEY: Fundamentally, it is a
2 problem with the nature of the relief rather
3 than the amount of the relief. And the problem
4 is simply that there's been no actual
5 determination on the merits, and there's been no
6 determination --

7 JUSTICE SOTOMAYOR: But we -- you
8 started by answering Justice Thomas by saying
9 default judgments and consent decrees are not
10 determinations on the merits. So that, we have
11 already said, is not necessary.

12 MS. MALEY: Is not necessary in the
13 context of a final judgment, Justice Sotomayor.
14 But, as Hanrahan says, in the context of an
15 interlocutory order, a party must have prevailed
16 on the merits of at least one of his claims.

17 And a preliminary injunction is not
18 that because it requires no determination that
19 the defendant has violated federal law.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Just briefly, is your position -- does
23 it encourage wasteful litigation? In other
24 words, if you're the -- you get your preliminary
25 injunction, but you have a lot of attorney's

1 fees, don't you have an incentive to go forward
2 for a permanent injunction even though, I -- I
3 don't know if there would be mootness issues or
4 standing issues, but isn't that a bad
5 consequence of the position you're advocating?

6 MS. MALEY: Ultimately, Mr. Chief
7 Justice, I think Petitioner's rule is the more
8 judicially efficient one. Respondents' rule
9 will create a number of perverse incentives,
10 including incentives on defendants to avoid
11 mootness by freezing challenged rules in place.

12 And while it's true that Petitioner's
13 rule may lead plaintiffs to try and avoid
14 mootness, if a defendant concludes that further
15 factual or legal development is unlikely to lead
16 to a change in the preliminary injunction
17 analysis, the defendant's going to have a very
18 strong incentive to settle after the preliminary
19 injunction so it doesn't continue to accrue the
20 fees.

21 CHIEF JUSTICE ROBERTS: Thank you.
22 Justice Thomas?
23 Justice Alito?

24 JUSTICE ALITO: If there is very
25 strong evidence that the government changed the

1 law primarily to avoid the payment of fees,
2 could a court, as a matter of equity, award
3 fees?

4 MS. MALEY: You know, under a bad
5 faith theory, I think, if it was a -- a change,
6 a legislative change, again, that's -- that's
7 not the defendant, and it usually hasn't been
8 attributed to the defendant.

9 If you're talking about, say, a city
10 changing in its ordinance when the city is the
11 defendant and the court concludes it's done in
12 bad faith, then perhaps that equitable
13 exception, aside from the statutory exception,
14 could apply.

15 JUSTICE ALITO: Okay. One -- one
16 other question. As I understand that, your
17 position is that a prevailing party must obtain
18 a conclusive ruling on the merit or -- merits or
19 a final judgment in its favor. What is the
20 difference between those two categories?

21 MS. MALEY: In most cases, there won't
22 be a difference between those two categories,
23 but a difference can arise particularly in
24 complex remedial disputes.

25 And Bradley, which is discussed -- and

1 Hanrahan is a -- a good example of this --
2 Bradley was a school desegregation case, and at
3 the time the court awarded interim fees, there
4 had been a determination that the defendant had
5 violated the Fourteenth Amendment, and a
6 permanent injunction had been entered, but the
7 court had actually retained jurisdiction for
8 further proceedings to see if modifications
9 could be necessary after it saw how the
10 permanent injunction operated in practice.

11 JUSTICE ALITO: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Sotomayor, anything further?

14 Justice Kagan?

15 Justice Gorsuch?

16 Justice Kavanaugh?

17 Justice Barrett?

18 JUSTICE BARRETT: Just one question
19 about your answer to Justice Alito.

20 What would be the basis for that
21 equitable jurisdiction? I mean, I understood
22 your position to be formalist and kind of
23 focusing on the language of the statute, and the
24 two definitions that you just offered kind of go
25 to that formal definition of conclusiveness and

1 that there might be reasons why we treat a
2 consent decree as the equivalent. But where
3 does this equitable authority come to it? It
4 seems like it pretty significantly undercuts
5 your argument.

6 MS. MALEY: It -- it would not be a
7 fee award under Section 1988 at that point,
8 Justice Barrett, but, as discussed in Alyska
9 Pipeline, prior to the enactment of the
10 fee-shifting statutes, there were common law --
11 very limited common law grounds for fee shifting
12 recognized, one of which was a party acting in
13 bad faith.

14 JUSTICE BARRETT: Thank you.

15 JUSTICE JACKSON: I -- I read your
16 brief as asking for categorical preclusion. In
17 other words, you're saying PIs can never as
18 opposed to sometimes. Is that right?

19 MS. MALEY: That is correct, Justice
20 Jackson.

21 JUSTICE JACKSON: Even though -- has
22 any court ever held that? I thought all the
23 courts said maybe, sometimes.

24 MS. MALEY: The Fourth Circuit rule
25 prior to this case was a bright-line rule.

1 JUSTICE JACKSON: But then they
2 changed it.

3 MS. MALEY: But then they changed it.

4 JUSTICE JACKSON: For those of us who
5 think about legislative history, what -- what do
6 you do with the fact that in Hanrahan, we -- we
7 said that the legislative history demonstrates
8 that a plaintiff may sometimes prevail without
9 having obtained a favorable final judgment? And
10 we were looking at the House report that seemed
11 to say that.

12 MS. MALEY: We agree under our rule
13 that a final judgment is not always going to be
14 necessary under the statute, but there has to be
15 a determination of liability on the merits on at
16 least one claim. And that may not be a final
17 judgment, for instance, in a case where
18 liability proceedings have been bifurcated from
19 remedial proceedings.

20 JUSTICE JACKSON: Right, but I think,
21 in this report, they weren't comparing final
22 judgments to these other scenarios. They were
23 saying you could do it as an interim matter.
24 So -- the House seemed to contemplate that you
25 could have interlocutory prevailing party

1 status.

2 MS. MALEY: Well, Hanrahan notes that
3 the -- the legislative history discusses interim
4 fees with regards to two cases, one of which was
5 Bradley, which I discussed, and the other of
6 which was Mills, which involved this Court
7 holding that partial summary judgment on
8 liability should have been granted in the
9 plaintiffs' favor.

10 So I don't think that the --

11 JUSTICE JACKSON: You don't think it
12 counts, okay. Thanks.

13 CHIEF JUSTICE ROBERTS: Thank you.

14 Mr. Yang.

15 ORAL ARGUMENT OF ANTHONY A. YANG

16 FOR THE UNITED STATES, AS AMICUS CURIAE,

17 SUPPORTING THE PETITIONER

18 MR. YANG: Mr. Chief Justice, and may
19 it please the Court:

20 "Prevailing party" is a longstanding
21 term of art that means the party for whom
22 judgment is entered, which turns on whether, at
23 the end of the suit, the plaintiff has
24 successfully maintained at least one claim for
25 relief. This Court has repeatedly determined

1 that liability on the merits and liability for
2 fees go hand in hand such that the plaintiffs --
3 plaintiff must obtain at least some relief on
4 the merits of his claim to be a prevailing
5 party.

6 A preliminary injunction reflects a
7 preliminary determination, not a final
8 determination, that rests on a finding of a
9 likelihood of success on the merits, not actual
10 success on those merits. Sole versus Wyner thus
11 determined that a preliminary injunction's
12 tentative character makes a fee request at that
13 preliminary initial stage premature. And after
14 that, in this case, the case became moot due to
15 legislative action that Buckhannon teaches does
16 not confer prevailing party status.

17 Now, while a plaintiff whose case is
18 dismissed might not lose on the merits, Section
19 1988 does not award fees to non-losing parties.
20 It requires prevailing party status.

21 I welcome the Court's questions.

22 JUSTICE THOMAS: Do you think that the
23 statutes in which Congress requires that there
24 be a final order before you can -- before you
25 can have a prevailing party, do you think that's

1 just simply superfluous?

2 MR. YANG: No. No, I don't -- I
3 don't. There's only one statute, by the way,
4 that predates Section 1988. It's Section 1617,
5 which is discussed by the Court in Bradley. All
6 that does is clarifies that you don't need a --
7 a true final judgment that ends the case. A --
8 a final judgment normally is one that resolves
9 all claims and ceases to terminate -- terminates
10 the case.

11 In the context of -- of Section 1617,
12 that's in the context of school desegregation
13 injunctive orders, and in that context, you
14 often will have a final order, which could --
15 is a -- you know, even if it doesn't resolve all
16 claims, but it's final, it's on the merits,
17 you're granting relief on the merits, but the
18 injunction may need to be tweaked as we go along
19 because just any kind of complicated
20 institutional injunction is going to have to be
21 tweaked.

22 That's all Section 1617 requires. It
23 does not depart -- it does not change the normal
24 understanding of "prevailing party," which a
25 prevailing party is one who succeeds at the end

1 of the case because they obtain judgment on at
2 least one claim.

3 JUSTICE SOTOMAYOR: Counsel --

4 CHIEF JUSTICE ROBERTS: Well, you say,
5 if I understand it, you don't have to get final
6 judgment on all the claims, right? You just
7 need to prevail on one. Now, if you prevail on
8 one, can you get the attorney fees that are
9 associated with 2, 3, and 4?

10 MR. YANG: No. The question --
11 there's multiple questions in attorney's fees
12 cases. The first is whether you're a prevailing
13 party. You have to succeed on at least one
14 claim on the merits to be prevailing.

15 CHIEF JUSTICE ROBERTS: Right.

16 MR. YANG: The question then goes to
17 how much fees. That's a -- usually, it's a
18 reasonable fee award. And the reasonableness of
19 the fees, you -- you would look more granularly
20 to determine whether the case -- the -- the
21 issues were intertwined or not. If they're
22 completely separate issues and you lost on them,
23 generally, no, you don't get fees for those.

24 JUSTICE SOTOMAYOR: What do you do
25 with the case that Justice Jackson posed, which

1 is common? I want to -- I want to participate
2 in this protest, this parade --

3 MR. YANG: Mm-hmm.

4 JUSTICE SOTOMAYOR: -- and only the
5 passage of time moots the case. You've gotten
6 all your relief. Nothing you've done or someone
7 else has done has changed it. You got all the
8 relief you really wanted. I wanted to protest.

9 MR. YANG: Well, you did not get
10 relief on the merits. Now I -- I think a lot of
11 the questions have --

12 JUSTICE SOTOMAYOR: We -- we keep
13 going back to the operative question here, which
14 is we repeatedly said you don't need a final
15 judgment. You don't need a determination of the
16 merits. You can have a consent judgment. You
17 can have this. There has to be --

18 MR. YANG: I don't think that's
19 quite --

20 JUSTICE SOTOMAYOR: -- a different
21 sense.

22 MR. YANG: -- I don't think that's
23 quite right. The legislative history says you
24 don't need a final judgment following a full
25 trial on the merits. That means you can get a

1 final judgment at an earlier stage through
2 summary judgment before you go to trial,
3 through, for instance, a --

4 JUSTICE SOTOMAYOR: That's not a final
5 judgment. You get a judgment --

6 MR. YANG: Yes, summary judgment is a
7 final judgment.

8 JUSTICE SOTOMAYOR: Not until you
9 appeal it. Not until the whole case is
10 litigated. You get a judgment but not final
11 judgment.

12 MR. YANG: If sum -- if a court grants
13 summary judgment, it is a final judgment if it's
14 on all the claims.

15 JUSTICE SOTOMAYOR: That's the --

16 MR. YANG: If it's summary judgment on
17 part of the claims, then it's subject to
18 revision, so it's not truly final. If it's --
19 if it's injunctive and you grant summary
20 judgment and then award injunctive relief, well,
21 that's final because you're actually awarding
22 merits relief at that point.

23 JUSTICE GORSUCH: So, for example, the
24 Chief -- Chief Justice's hypothetical, after the
25 parade -- I could ask for a trial on the merits

1 in -- in accompanying the PI and a final
 2 judgment could be issued at that time?
 3 MR. YANG: That's correct.
 4 JUSTICE GORSUCH: That happens all the
 5 time -- it happens from --
 6 MR. YANG: It -- it happens --
 7 JUSTICE GORSUCH: And -- and --
 8 MR. YANG: -- but sometimes it doesn't
 9 because it's the court --
 10 JUSTICE GORSUCH: -- and sometimes it
 11 doesn't because I might want to go ahead and
 12 litigate it because I'm concerned about the same
 13 thing in the future and I might want, for
 14 example, a declaratory judgment, and I -- I
 15 could issue -- I could --
 16 MR. YANG: Or the parade may be
 17 annual.
 18 JUSTICE GORSUCH: It may be annual.
 19 MR. YANG: A lot of these parades are
 20 annual parades.
 21 JUSTICE GORSUCH: And I want a
 22 prospective injunction going forward.
 23 MR. YANG: Yeah.
 24 JUSTICE GORSUCH: And then we would
 25 have a final judgment on the merits --

1 MR. YANG: Right.

2 JUSTICE GORSUCH: -- on at least that
3 claim on which you would be prevailing, right?

4 MR. YANG: Correct. Right. Correct.
5 And I -- and I also want to address just a more
6 general point, which is some of the questions
7 were like: Well -- the fees have been incurred,
8 we've got to allocate them. You know, who do we
9 allocate them to? Well, that's answered by the
10 American rule.

11 The American rule is each party, win
12 or lose, bears their own fees. And this Court
13 has made clear that you need express statutory
14 authority to depart from that rule. And the
15 statutory --

16 JUSTICE JACKSON: And -- and isn't
17 that the statute we're talking about here?
18 Right?

19 MR. YANG: Yes, the statute uses a
20 term of art that's existed in statutes since at
21 least -- the American statute since at least
22 1853.

23 JUSTICE JACKSON: Right, but it is --
24 it is addressing -- it is trying, Congress, to
25 give us an exception to the American rule, and

1 the question is what is the scope of that
2 exception.

3 MR. YANG: But Congress didn't go all
4 the way. Congress adopted a term of art which
5 had --

6 JUSTICE JACKSON: Prevailing party.

7 MR. YANG: -- a settled meaning.

8 JUSTICE JACKSON: Can I just ask about
9 Justice Gorsuch's example? What if I don't want
10 to spend the time and additional money to
11 litigate this through to a declaratory judgment
12 or a future? What if I just want to march in
13 the parade tomorrow?

14 I'm a religious organization, for
15 example. I don't -- you know, I agree with
16 traditional marriage, and tomorrow is the LGBTQ
17 parade and I want to march in it. I want to be
18 able to be there. I -- I'm not making a whole
19 thing out of it.

20 MR. YANG: Yeah.

21 JUSTICE JACKSON: I -- I get that. I
22 go to court and I argue the merits of my
23 entitlement --

24 MR. YANG: Mm-hmm.

25 JUSTICE JACKSON: -- to be able to do

1 that.

2 MR. YANG: Right.

3 JUSTICE JACKSON: And the court says,
4 as a preliminary matter, we don't have a whole
5 trial yet, I think you're going to win, so I'm
6 giving you an injunction and you get to march in
7 the parade.

8 MR. YANG: Mm-hmm.

9 JUSTICE JACKSON: And I do.

10 MR. YANG: Mm-hmm.

11 JUSTICE JACKSON: And then I'm done.
12 I say the case is mooted because, really, the
13 relief that I wanted was the ability to march in
14 the parade tomorrow. But I did have to pay an
15 attorney to be able to convince you, court, to
16 give me the relief that I requested.

17 I -- I guess I don't understand why,
18 under our formulation of the test for a
19 prevailing party in the Lefemine case, what we
20 say --

21 MR. YANG: That was a permanent
22 injunction, and --

23 JUSTICE JACKSON: I understand it was
24 a permanent injunction in that case, but I'm
25 asking you, we set up a test for when you are a

1 prevailing party, and the question is why
2 doesn't that test also cover preliminary
3 injunctions like the one that I talked about.

4 MR. YANG: Part of that test is a
5 judgment on the merits, and a judge -- this is
6 not -- a preliminary injunction is a tentative
7 determination that does not control anything
8 later in the suit. It's only for the PI stage,
9 only to adjust the parties' relationships during
10 the suit.

11 JUSTICE KAGAN: Mr. Yang, does any --

12 JUSTICE KAVANAUGH: Mr. --

13 MR. YANG: And this is important.

14 JUSTICE KAGAN: Ms. Maley said that
15 she didn't know of a circuit that it accepted --
16 that had accepted this categorical position, if
17 it's a preliminary injunction, there are no
18 fees. Do you know of any circuit that's
19 accepted this categorical -- position?

20 MR. YANG: Well, that was the Smyth
21 rule prior to.

22 JUSTICE KAGAN: Yeah, prior to it
23 being changed, and -- and so now --

24 MR. YANG: Well, but this Court
25 granted cert on unanimous --

1 JUSTICE KAGAN: -- so now there's --
2 there's a uniform rule. You don't know of
3 anything -- any court that's gone the other way.
4 And you know what? It -- it's an interesting
5 thing. It seems that this comes up all the
6 time, and it seems as though it's come up
7 frequently -- in just in recent years.

8 When I was talking to my clerks about
9 this, you know, several had confronted this
10 issue with respect to COVID litigation, where
11 people went to courts and they asked for
12 injunctions from various kinds of COVID
13 policies, and then, you know, in the end, those
14 policies were changed or were scrapped or were
15 abandoned in some way.

16 So it seems as though there's quite a
17 lot of recent law that cuts against you here
18 from circuits, like, pretty much all across the
19 U.S.

20 MR. YANG: Well, the circuits are not
21 uniform. Some of them look to -- for instance,
22 the Fifth Circuit looks to why the -- the
23 mooted event occurred, but my -- my point --
24 I -- I want to make two points.

25 One, this Court already addressed the

1 strategic mootness question in Buckhannon and --
2 and -- and addressed that in four different
3 factors. There's two other factors. I want to
4 address two of those first and then I'll go to
5 Buckhannon.

6 One is that Congress has struck a
7 balance here, that there is reason for caution
8 before abandoning what this Court has described
9 as the crucial connection between liability for
10 a violation of federal law on the merits,
11 finding on the merits that you violated federal
12 law, and attorney's fees, and there's reason
13 to -- to give pause before doing that. Congress
14 has sometimes been more generous with the
15 government, but these -- this case -- this
16 statute covers both private individuals and
17 non-federal actors.

18 Secondly, going to Buckhannon, the
19 cost -- there's a cost of deterring federal --
20 government action from being voluntarily changed
21 when it may be lawful. Litigation often puts a
22 spotlight on a practice that might not be the
23 best policy even though it's lawful, and the
24 Court in Buckhannon recognized there is a cost
25 to deterring that kind of good government

1 change.

2 Secondly --

3 JUSTICE KAGAN: Okay. I -- I don't
4 think that that's what I was asking about. I
5 was asking really, you know, do you have any law
6 out there on your side?

7 MR. YANG: We have a term of art that
8 has gone back --

9 JUSTICE KAVANAUGH: Well, what --

10 MR. YANG: -- in this Court's
11 decisions, and -- and I think that the -- the
12 courts of appeals just have not been faithful to
13 this Court's decisions.

14 JUSTICE KAVANAUGH: Well, that -- that
15 raises the question for me, why -- why do you
16 think they've been not seeing the light?

17 MR. YANG: Well, I think sometimes
18 there's -- as a policy matter, you might decide,
19 hey, you know, this -- this -- I don't like this
20 outcome. I think some of the courts -- and --
21 and I acknowledge that there might be some cases
22 like that. But that type of policy call is for
23 Congress to make.

24 So, in Buckhannon, when the Court
25 rejected the catalyst theory, Justice Ginsburg

1 dissented and said: Hey, look, there's one
2 specific area that's really problematic, FOIA.
3 Congress reacted and -- and did a targeted
4 response to FOIA.

5 This really goes to the -- the
6 appropriate separation of powers here. Congress
7 adopts a statute that has a term of art that
8 goes back quite some time. This Court has
9 repeatedly determined that merits determination
10 on, you know, a determination of liability on
11 the merits is crucial to then make -- making the
12 defendant liable for fees.

13 CHIEF JUSTICE ROBERTS: Thank you.

14 MR. YANG: Congress --

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Thomas, anything further?

18 Justice Alito?

19 JUSTICE ALITO: The Respondents argue
20 that there is a historical background of a
21 venerable equitable tradition of awarding
22 interim costs, including for a preliminary
23 injunction, and that, if accepted, would perhaps
24 undercut your historical argument.

25 Do you want to say something about

1 that?

2 MR. YANG: There's two points I would
3 love to make about that.

4 First, this -- this Court already
5 resolved that argument in Alyeska Pipeline.
6 There was a -- and it was actually Justice
7 Marshall's dissent, which was based on equitable
8 principles.

9 But what the Court decided in Alyeska
10 Pipeline is that the American rule is each party
11 bears its own costs. There are certain discrete
12 common law exceptions that have evolved. At
13 equity, for instance, the common fund exception,
14 you get a fund. It would be unjustly -- you
15 would unjustly enrich the people who benefit
16 unless they pay your fees. That's a
17 fee-sharing, not fee-shifting.

18 Bad faith attorney's fees is another
19 one. Contempt fees is another exception. But
20 the Court did not say equity, you know, it's
21 all -- you know, whatever you think is
22 equitable. The Court recognized that there are
23 very discrete limits.

24 And I think that's illustrated by the
25 only case that they cite, the only case that

1 they cite as -- as supporting a PI fee award,
2 and that's Clancy versus Geb. In that case, it
3 was not based on the temporary injunction that
4 was issued on the day the suit was filed. The
5 court said it was based on the trial on the
6 merits that sustained the cause of action for an
7 injunction.

8 Now, after the trial on the merits,
9 the court didn't grant further injunctive
10 relief, and that might be a problem, but it
11 certainly does not stand for the proposition
12 that a TRO or, you know -- or a PI gets you
13 prevailing party status. There was a final
14 adjudication on the merits of the -- of the
15 cause of action.

16 JUSTICE ALITO: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Sotomayor?

19 JUSTICE SOTOMAYOR: Just to be clear,
20 Buckhannon, there was no court-ordered relief
21 whatsoever, correct?

22 MR. YANG: That's true. That's true.

23 JUSTICE SOTOMAYOR: And, as I read the
24 decision, that was mostly the focus of the
25 decision?

1 MR. YANG: Well, certainly, the
2 catalyst theory was --

3 JUSTICE SOTOMAYOR: It was the prime
4 focus.

5 MR. YANG: -- but the catalyst --

6 JUSTICE SOTOMAYOR: All right.

7 MR. YANG: -- theory does not -- we're
8 not escaping the catalyst theory here because
9 the catalyst theory is embedded in this case.
10 It is the second -- it is what happened with
11 this case after --

12 JUSTICE SOTOMAYOR: No, but you're --
13 you're -- you're claiming there is no catalyst
14 theory because you're saying the legislature
15 acted -- or the other side is saying it acted
16 independently, so it -- it has nothing to do --
17 it --

18 MR. YANG: Well, the catalyst theory
19 was rejected in Buckhannon.

20 JUSTICE SOTOMAYOR: They're saying it
21 doesn't matter why the case ends. It just ended
22 with a judgment, dismissal of the action. It
23 could be for mootness. It could be because the
24 other side gave up. I got what I came for at
25 least in part. I got my license back. I drove

1 for 16 months. I didn't have to pay anybody to
2 get my license back. I won for those -- that
3 part of my relief. And it's never been
4 dissolved, reversed.

5 MR. YANG: But that's not what the
6 term "prevailing party" has been understood,
7 either by this Court or by the dictionary
8 definitions that date back from before the --
9 the -- the 20th Century. That has required a
10 final adjudication --

11 JUSTICE SOTOMAYOR: Well, that's the
12 problem. No, it's never required a final
13 adjudication. It's required a judgment but not
14 a final one.

15 MR. YANG: Well, it has. I mean,
16 even -- even the legislative history -- this
17 Court in Hanrahan discussed the legislative
18 history. It's all in dicta, but it discussed
19 the legislative history of Section 1988, and
20 what -- the conclusion the Court drew was that
21 interim fees, meaning before the case is finally
22 over, only -- were available only when the party
23 has prevailed on the merits of at least some of
24 its claims.

25 And that happens when you get a final

1 determination, maybe not a final judgment
2 because you're not resolving all claims or maybe
3 because there's some ongoing litigation about
4 the nature of the injunctive relief.

5 JUSTICE SOTOMAYOR: Thank you,
6 Mr. Yang. We -- we have a difference of opinion
7 on what finality means. If all you're seeking
8 is a preliminary injunction, that's final for
9 that purpose.

10 MR. YANG: You don't --

11 JUSTICE SOTOMAYOR: That -- that's the
12 problem we're having.

13 MR. YANG: -- file suits for
14 preliminary injunctions. You file suits for
15 equitable relief, a judgment at the end of the
16 suit. A preliminary injunction is a preliminary
17 matter that protects the parties while the suit
18 is adjudicated.

19 JUSTICE SOTOMAYOR: Thank you,
20 counsel.

21 CHIEF JUSTICE ROBERTS: Justice Kagan?
22 Justice Gorsuch?

23 JUSTICE GORSUCH: Let me see if I've
24 got it. So a PI can't be the basis for a --
25 a -- an award of fees under this statute because

1 Sole basically says you have to look at what
2 happens afterwards. And for all the reasons you
3 just gave, a PI is a PI. It's preliminary.
4 It's not -- okay. All right. Fine.

5 Now -- so we have to look what
6 happened afterwards. And, here, what happened
7 afterwards is plaintiffs may well have convinced
8 the Virginia state legislature to change their
9 mind in a catalyst sort of way.

10 MR. YANG: Mm-hmm.

11 JUSTICE GORSUCH: The problem is
12 Buckhannon says that doesn't work either.

13 MR. YANG: Correct.

14 JUSTICE GORSUCH: All right. But
15 Justice Ginsburg in Buckhannon says, hey,
16 Congress should fix that.

17 MR. YANG: Mm-hmm.

18 JUSTICE GORSUCH: And Congress did fix
19 it in FOIA --

20 MR. YANG: Yep.

21 JUSTICE GORSUCH: -- and said
22 involuntary -- voluntary cessation and changes,
23 you still get fees. But --

24 MR. YANG: So long as it's not an
25 insubstantial claim.

1 JUSTICE GORSUCH: Right.

2 MR. YANG: So quite generous, with the
3 government's money, of course. You know, it's
4 quite different when we're talking about private
5 litigants and non-federal. I think Congress
6 might be more reticent to creating such a
7 generous departure from even the prevailing
8 party standard, but it could.

9 JUSTICE GORSUCH: It could.

10 MR. YANG: It could.

11 JUSTICE GORSUCH: And it hasn't here.

12 MR. YANG: No.

13 JUSTICE GORSUCH: End of case. That's
14 your theory of the case?

15 MR. YANG: That's our theory.

16 JUSTICE GORSUCH: All right. Got it.

17 CHIEF JUSTICE ROBERTS: Justice
18 Kavanaugh?

19 JUSTICE KAVANAUGH: I think, when the
20 red light went on, you were in the middle of a
21 really brilliant answer about Buckhannon.

22 (Laughter.)

23 JUSTICE KAVANAUGH: And do you want to
24 finish that answer?

25 MR. YANG: Like a -- like a

1 preliminary injunction, it was fleeting.

2 (Laughter.)

3 MR. YANG: And I'm not sure that I
4 recall the brilliance that was --

5 JUSTICE KAVANAUGH: Well, I will look
6 at the transcript and fill it in, so thank you.

7 MR. YANG: Well, the -- you know, I
8 was just going to try to talk about strategic
9 mootness maybe a little bit. Maybe that's where
10 we were going. And, you know --

11 JUSTICE KAVANAUGH: Sure.

12 MR. YANG: -- strategic mootness, as
13 my -- my -- my colleague has already answered,
14 you've got a voluntary cessation barrier, which,
15 you know, in your decision in Fikre, Justice
16 Gorsuch, it's a pretty formidable burden.

17 JUSTICE GORSUCH: I hope so.

18 (Laughter.)

19 MR. YANG: It -- it -- it's a
20 formidable burden. Damages awards, never going
21 to moot out. And it's entirely speculative what
22 effect this is going to have. That's what
23 Buckhannon said. Like, it's not speculative
24 whether it's going to deter counsel or not.

25 And I think this illustrates that.

1 There's no data to show this. This case was
2 started when Smyth was the rule. They had no
3 reason to expect any attorney's fees from a PI,
4 but they took the case. So it's a little hard
5 to say, like, there's this compelling case that,
6 like, we're going to have a -- a -- a crash in
7 civil rights, civil rights era.

8 And there's a real cost, again, to
9 determining -- to deterring the government from
10 changing course when the action might be lawful
11 but bad policy.

12 JUSTICE KAVANAUGH: Okay. That's good
13 enough. Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Barrett?

16 JUSTICE BARRETT: No.

17 CHIEF JUSTICE ROBERTS: Justice
18 Jackson?

19 JUSTICE JACKSON: So here's the
20 problem that I'm having with your statement of
21 the case as you summarized with Justice Gorsuch.
22 It's that it begins with Sole says that a PI
23 doesn't count because you have to look at what
24 happens afterwards.

25 I'm reading from Sole. "We express no

1 view on whether, in the absence of a final
2 decision on the merits of a claim for permanent
3 relief, success in gaining a preliminary
4 injunction may sometimes warrant an award of
5 counsel fees."

6 MR. YANG: True.

7 JUSTICE JACKSON: So I don't know how
8 you can start your case with the premise that
9 Sole stands for the proposition that if you win
10 a preliminary injunction, you have to get to
11 final judgment in order to be entitled to --

12 MR. YANG: Well, it's -- it's true --

13 JUSTICE JACKSON: -- counsel fees.

14 MR. YANG: -- that the Court reserved
15 that, but the Court also did say that it
16 recognized that a preliminary injunction was
17 just the initial salvo. As I stated it's -- in
18 my intro, it's -- the tentative character makes
19 a fee request at that initial stage premature.

20 JUSTICE JACKSON: It did not say
21 "premature."

22 MR. YANG: It -- it --

23 JUSTICE JACKSON: It says, "Wyner is
24 not a prevailing party, we conclude, for her
25 initial victory was ephemeral." And it was

1 ephemeral in that case because it happened to go
2 on and get reversed.

3 MR. YANG: It's on page 84 of the
4 Court's opinion.

5 JUSTICE JACKSON: Okay.

6 MR. YANG: "The tentative character
7 would have made the fee request at this initial
8 stage premature."

9 JUSTICE JACKSON: "The tentative
10 character" --

11 MR. YANG: Of the PI.

12 JUSTICE JACKSON: -- "would have
13 made" -- yes, but it also says: "We express no
14 view as to whether or not that tentative
15 character in PI is enough to make you a
16 prevailing party."

17 MR. YANG: Agreed, but I think it goes
18 halfway there, and Buckhannon closes the door on
19 that --

20 JUSTICE JACKSON: Thank you.

21 MR. YANG: -- because --

22 JUSTICE JACKSON: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 MR. YANG: Thank you.

1 CHIEF JUSTICE ROBERTS:

2 Mr. Schmalzbach.

3 ORAL ARGUMENT OF BRIAN D. SCHMALZBACH

4 ON BEHALF OF THE RESPONDENTS

5 MR. SCHMALZBACH: Mr. Chief Justice,
6 and may it please the Court:

7 The winner of an unreversed favorable
8 judgment and tangible relief from the court is a
9 prevailing party under Section 1988. That is
10 the test which -- we agree with the United
11 States that that is the appropriate test. It is
12 most consistent with the statutory text,
13 context, and precedent. And, under that test,
14 the winner of an unrepudiated preliminary
15 injunction can qualify as a prevailing party.

16 This Court should affirm for three
17 reasons. First is the text. We do encourage
18 the Court to consult those contemporaneous legal
19 dictionaries which do say that the party in
20 whose favor a judgment is awarded is a
21 prevailing party. It does not require a final
22 judgment.

23 And, Your Honors, if you consult the
24 statutes that were in effect right before
25 Section 1988 was enacted, that includes 20

1 U.S.C. Section 1617, which did require a final
2 order, not merely a naked prevailing party.

3 And my friend on the other side said
4 that was the only such statute. It was not.
5 The legislative history of Section 1988 also
6 references the Communications Act of 1934, which
7 requires not just a prevailing party but a party
8 that finally prevails.

9 Congress knew how to require that sort
10 of finality when it wanted to in fee-shifting
11 statutes. It did not do it in Section 1988.

12 Second, precedent. Under this Court's
13 precedent, the touchstone of prevailing party
14 status is the material alteration of the legal
15 relationship between the parties.

16 Justice Thomas, to your question, why
17 is a consent decree enough to make you a
18 prevailing party? Buckhannon answers that
19 question, and Buckhannon says that what makes
20 the winner of a consent decree a prevailing
21 party is that consent decree accomplishes that
22 material alteration, just like a preliminary
23 injunction can.

24 Buckhannon does clarify that the
25 prevailing party has to be one who is "awarded

1 some relief by the court." That is exactly what
2 a preliminary injunction can do, and that is
3 exactly what our preliminary injunction did
4 here. It forced the Commissioner at gavel point
5 to provide the relief that we requested.

6 Third, Mr. Chief Justice, to your
7 point, Petitioner's solution, let injunctions
8 become moot, is unworkable because it would
9 force parties to slog in the many cases where no
10 damages are at issue all the way through trial
11 solely for the purpose of winning nominal
12 damages.

13 But, when plaintiffs have already won
14 the injunctive relief worth fighting about,
15 courts shouldn't have to referee shut -- such
16 fights over farthings.

17 CHIEF JUSTICE ROBERTS: Well, it does
18 seem to me that the courts then have to figure
19 out, if prevailing is not going to mean final
20 judgment on -- on the merits for at least one
21 claim, then it must be a pretty ambiguous thing
22 where you -- what constitutes prevailing?

23 Now you say, well, in a preliminary
24 injunction case, where there's nothing going on
25 beyond the time when the preliminary injunction

1 does its work, maybe that's easy. But there are
2 all sorts of other ways. If "prevailing"
3 doesn't mean you actually have to win, I mean,
4 what falls short of that?

5 MR. SCHMALZBACH: So, Your Honor, I
6 agree that those cases where a preliminary
7 injunction provides a hundred percent of the
8 relief that you went to court to get, those are
9 easy cases. But the only difference between a
10 case like that and a case like this is that we
11 were awarded only some of the relief that we
12 went to court to get. But, under Garland, that
13 doesn't matter. Garland doesn't require that we
14 win everything the way a -- a parade preliminary
15 injunction might. It only requires that you win
16 some of the benefits sought that drew you to
17 court in the first place. And --

18 JUSTICE KAGAN: Well, yes -- I'm
19 sorry. I don't want to interrupt you.

20 MR. SCHMALZBACH: Please. Please,
21 Justice Kagan.

22 JUSTICE KAGAN: Yes and no. I mean,
23 you know, if you -- let me give you a
24 hypothetical and -- and let's take it out of
25 this state context. Let's just say there are

1 two neighbors, and one of them is pouring
2 pollutants into a stream that goes onto the
3 other neighbor's property, right?

4 And so the injured neighbor sues and
5 he sues for a permanent injunction, but, first,
6 he sues for a preliminary injunction. And a
7 preliminary injunction is gotten, all right? He
8 gets -- he gets -- and -- and -- and for the
9 next three years, while the court decides the
10 case, he has a very valuable thing, which is the
11 neighbor has not been able to pour pollutants
12 into his stream anymore, right?

13 But then the court changes its mind
14 and the court says we're not going to grant the
15 permanent injunction, right? And -- and the --
16 the plaintiff says, well, I got something really
17 significant. I got three years' worth of a --
18 of a preliminary injunction and that was
19 fantastic. So I should get fees for that, the
20 same way I get fees for winning one claim out of
21 three, right?

22 Does he get fees?

23 MR. SCHMALZBACH: It -- not if he's
24 lost on the merits, Justice Kagan.

25 JUSTICE KAGAN: No. So that's Sole,

1 right?

2 MR. SCHMALZBACH: That's Sole.

3 JUSTICE KAGAN: And -- and even
4 though, like, Sole does say -- I mean, I take
5 the point that Sole reserved this question. But
6 Sole does sort of say: You can split things up
7 by claims, but we're not so keen on where -- on
8 splitting things up temporally.

9 Like, if you lost the permanent
10 injunction, the fact that you've gotten three
11 years of excellent relief is just not going to
12 get you any fees at all, right?

13 MR. SCHMALZBACH: That's right.

14 JUSTICE KAGAN: Okay. Now let's say
15 there is no permanent injunction because the
16 neighbor dies or, you know, the stream goes dry,
17 all right, and so all that's left is the
18 preliminary injunction.

19 The court could have done the same
20 thing, you know, if it had gotten to the
21 permanent injunction, which is to say no, but
22 something just sort of fortuitous has happened
23 to stop the case.

24 Why does the -- why does the analysis
25 change?

1 MR. SCHMALZBACH: Because that -- that
2 plaintiff has gotten the relief that he went to
3 court to get, Your Honor.

4 And -- and this connects to Justice
5 Alito's question about the equitable --

6 JUSTICE KAGAN: Well, he hasn't,
7 because he did go to court to get the permanent
8 thing. I mean, the preliminary injunction was a
9 kind of way station on the way to getting the
10 permanent thing. But what he really wanted --
11 this is not the single parade, right? What he
12 really wanted was for you never -- for that
13 stream that -- those pollutants never to bother
14 him.

15 And, essentially, what Sole says is:
16 Because you didn't get that, you don't get that
17 way station relief, right?

18 And so -- so I'm just sort of
19 suggesting that take out the final determination
20 and just say: We never get to the final
21 determination because of some fortuity. Why
22 does all of a sudden he get the award for the
23 way station?

24 MR. SCHMALZBACH: Your Honor, what
25 Sole suggests is that it is losing that judicial

1 imprimatur from the preliminary injunction that
2 cause -- in the final order that causes the
3 plaintiff to lose that prevailing party status.

4 And so, in Sole, you actually have a
5 loser on the merits. And what Sole says is that
6 preliminary injunction is superseded. The legal
7 and factual foundation of it has been destroyed
8 by the final order.

9 But that's not the case if the case
10 just becomes moot. Nothing about that
11 preliminary injunction has been superseded. It
12 hasn't been rejected on the merits. It -- it
13 remains in effect, except insofar as no -- no
14 relief is needed.

15 JUSTICE GORSUCH: Well, how -- how --
16 how is that? I mean, the river runs dry. I
17 came to court, on Justice Kagan's hypothetical,
18 to seek an order against my neighbor to stop him
19 from doing things, and I got a preliminary
20 injunction, but then the river ran dry, and so
21 the court dismissed it as moot.

22 Now the -- the court has not
23 adjudicated in a final way anybody's rights with
24 respect to anything. And I didn't get the
25 relief I came to court seeking. It was denied

1 to me in the end in the final judgment.

2 And we normally think of all
3 preliminary orders in a case as merging into and
4 superseded by the final judgment. And I think
5 that's what Sole is driving at too.

6 So help -- help me out. I'm -- I'm
7 stuck where Justice Kagan is.

8 MR. SCHMALZBACH: So, Your Honor,
9 it -- you -- you have not lost the foundation of
10 that order. It's just not needed anymore.
11 That's the distinction that Sole draws in
12 reserving the question whether -- this case,
13 where it becomes moot. In reserving that
14 question, Sole says what is important is that
15 the foundation, the legal and factual foundation
16 of the preliminary injunction is destroyed in
17 the case where you lose on the merits.

18 But, in a case where the court doesn't
19 need and, indeed, under Article III cannot award
20 any further relief, there's no holding that that
21 preliminary injunction was improperly granted.

22 JUSTICE GORSUCH: And no holding that
23 it was proper. It's just gone.

24 MR. SCHMALZBACH: But, while it's in
25 effect --

1 JUSTICE GORSUCH: It's moot.

2 MR. SCHMALZBACH: -- while it's in
3 effect, it grants all that relief that was
4 needed at the time. It grants all the relief
5 that you came to court --

6 JUSTICE GORSUCH: And then, at --

7 MR. SCHMALZBACH: -- to get for as
8 long as you needed it.

9 JUSTICE GORSUCH: -- and then, at --
10 and then, at the end, it disappears. It's
11 withdrawn. It's moot. It's gone.

12 So, yes, for a period of time, after
13 the three weeks when he was still alive and the
14 river was still running, I had my -- my nice
15 order against him and it made me happy.

16 But -- but, at the end of the day --
17 and when we think about "prevailing parties,"
18 you know, all the dictionary definitions are
19 "when the matter is finally set at rest," "when
20 the decision or verdict is rendered and the
21 judgment entered."

22 And the judgment in the hypothetical
23 here is there's no case.

24 MR. SCHMALZBACH: So, Your Honor, two
25 things.

1 One, we -- we are still prevailing
2 when the -- when the matter is set at rest. We
3 have not been told that we are not entitled to
4 relief. We're just told that we don't need more
5 relief.

6 But I would also encourage you to --
7 to look at the related statutes that were in
8 effect when Congress drafted Section 1988, which
9 shows that when Congress wants to have a statute
10 that requires you to get all the way to that
11 final order, to that finally prevailing status,
12 it knows how to do it. But Congress pointedly
13 did not do that in Section 1988.

14 JUSTICE GORSUCH: Well, we also have
15 after Buckhannon a pretty -- pretty pointed
16 example of them saying just the opposite, right?
17 That if we're going to depart from the American
18 rule and allow attorney's fees -- and, you know,
19 one can be a -- a fan of the American rule or
20 not, it doesn't really matter, but there it is.

21 Congress spoke very clearly after
22 Buckhannon to vindicate what Justice Ginsburg
23 thought was appropriate in the FOIA context
24 against the federal government. And, as the
25 federal government points out, mightn't we

1 expect Congress to be at least as clear when
2 it's authorizing fees against other parties,
3 including states?

4 MR. SCHMALZBACH: So, Justice Gorsuch,
5 what Buckhannon did is not what we are doing
6 here. I want to be very clear. We reject the
7 catalyst theory. What makes us a prevailing
8 party is that a court gave us the relief that we
9 sought.

10 JUSTICE GORSUCH: Yes, but we've just
11 been through that, that it -- it -- it -- yes,
12 it granted you relief, but it could go away,
13 and -- and, under Sole, you could lose it and
14 still not be entitled to fees.

15 So we have to look at not just what
16 happened with the PI but what happened after,
17 and I -- I guess that is -- you know, it's
18 pretty hard to say that your argument really
19 isn't a catalyst theory, but I -- I -- I take
20 your point.

21 JUSTICE BARRETT: Counsel, I'd like to
22 talk about the prevailing party for a minute.

23 I mean, when you get a PI, you're not
24 the prevailing party. The court has made a
25 predictive judgment that you'll probably be the

1 prevailing party, you know, and some circuits
2 are still using this sliding scale. You know,
3 you can't disregard the merits under Winter,
4 but, you know, you might have gotten the
5 preliminary injunction because the equities were
6 really strong, because maybe the pollution is
7 running onto your property.

8 And, I mean, I have not been a
9 district judge, but, as someone who's dealt with
10 our emergency docket, you know, you are making
11 those kinds of preliminary judgments in a -- in
12 a very compressed time frame and it's like a
13 51 percent, like, as you showed, a reasonable
14 likelihood of success.

15 Why is that prevailing because a
16 district court has made that judgment on a PI?

17 MR. SCHMALZBACH: Your Honor, because
18 what this Court has said is that is the relief
19 that you earn that makes you prevailing or not.
20 It is specifically not prevailing on the merits.

21 That was the legal proposition that
22 Maher v. Gagne considered and rejected. You do
23 not have to have full litigation of the issues.
24 You do not have to have a judicial determination
25 that one party's rights have been violated.

1 JUSTICE BARRETT: And everything turns
2 on your answer to Justice Gorsuch. You know,
3 Justice Gorsuch was pressing you and saying:
4 But that's not the relief that you're seeking
5 because you're really seeking a preliminary
6 injunction.

7 So, if I disagree with you about that,
8 then that means that you lose because a
9 preliminary injunction is not the relief that
10 you were seeking. It's like a way station, it's
11 a Band-Aid, it's something, like, on the way to
12 what you really want.

13 MR. SCHMALZBACH: Your Honor, the
14 relief that we were seeking was an order
15 compelling the Commissioner to remove the
16 statutory suspension from our clients' drivers
17 licenses, and that is what we won, and it
18 remained in effect for 16 months. And the
19 Commissioner was never told that he could
20 resuspend their licenses under that statute.

21 JUSTICE BARRETT: Couldn't you have
22 asked under Rule 65 to speed that up?

23 MR. SCHMALZBACH: We could have asked,
24 Your Honor, but our clients had the relief at
25 that point that they came to court to get.

1 And Rule 65 isn't a cure-all for this
2 problem. That -- that will require fuller
3 proceedings, which we were trying to get the
4 court to undertake, but --

5 JUSTICE SOTOMAYOR: I'd forgotten that
6 they did a --

7 JUSTICE BARRETT: Had you -- did you
8 have a motion -- oh, sorry, just one last
9 question.

10 Did you have a motion for summary
11 judgment pending? I just don't know the answer
12 to that from --

13 MR. SCHMALZBACH: Yes, Your Honor.
14 Both sides had fully briefed motions for summary
15 judgment pending, which the Commissioner asked
16 the district court not to resolve, rather, to
17 stay the case so that it would become moot once
18 the legislation was passed.

19 JUSTICE SOTOMAYOR: That was the
20 point. You did ask for it to be speeded up, and
21 the Respond -- and the Petitioners asked them to
22 wait for the legislature to act, correct?

23 MR. SCHMALZBACH: That's exactly
24 right, Justice Sotomayor.

25 JUSTICE JACKSON: I don't --

1 JUSTICE KAVANAUGH: Can you -- go
2 ahead.

3 JUSTICE JACKSON: I don't know why
4 asking them to speed it up and have more process
5 is the solution in an attorney's fees case. I
6 mean, aren't you incurring more fees if we're
7 going to have additional process?

8 And it -- it just seems odd to me that
9 we'd be in a world in which, to avoid having
10 attorney's fees on the lesser victory, we are
11 encouraging additional litigation.

12 MR. SCHMALZBACH: I think that's
13 exactly right, Justice Jackson, and it goes to
14 the Chief Justice's question about what sort of
15 litigation incentives is this going to create.

16 I don't think we should assume that
17 state and local defendants are like gamblers on
18 tilt who are going to be committed to litigating
19 a case all the way through when a district court
20 has already told them: You are likely to lose
21 on the merits.

22 I -- we -- we give them the
23 presumption of regularity, and that's
24 inconsistent with assuming that they're going to
25 behave in that irrational way.

1 JUSTICE ALITO: Suppose you had
2 requested nominal damages. Then what would have
3 happened?

4 MR. SCHMALZBACH: Your Honor, our
5 nominal damages request would have been thrown
6 out of court because the defendant has sovereign
7 immunity even from nominal damages claims.

8 So that's not a solution to this
9 problem of avoiding mootness when there's a
10 state defendant.

11 JUSTICE ALITO: All right. When
12 there's not a state defendant then and you had a
13 claim -- and the party has a claim for nominal
14 damages, but what it really wants is a
15 preliminary injunction?

16 It gets the preliminary injunction,
17 and then the case is litigated on the issue of
18 whether the party's entitled to nominal damages.
19 And at that point, the court changes its mind
20 and says: My interpretation of the law was
21 incorrect when I issued the preliminary
22 injunction. Then what happens?

23 MR. SCHMALZBACH: Your Honor, at that
24 point, we would be the loser. We would not be
25 the prevailing party. And the judicial

1 imprimatur underlying the order that gave us the
2 relief for drivers' licenses, that would be
3 dissolved at that point because we had been
4 declared the loser on the merits.

5 JUSTICE KAVANAUGH: Would you --

6 JUSTICE ALITO: Do you think your
7 client under those circumstances would be very
8 depressed? Well, I got the preliminary
9 injunction, but what I really wanted was a
10 dollar in nominal damages?

11 MR. SCHMALZBACH: Your Honor,
12 whether -- whether they're depressed or not,
13 what's important is that, up to that point, they
14 had gotten the relief that they needed to that
15 point.

16 JUSTICE KAVANAUGH: Can you address
17 the idea that the American rule should be a firm
18 background principle and should -- we should
19 require Congress to speak especially clearly
20 when it wants to deviate from that and including
21 the scope of how much Congress wants to deviate?

22 MR. SCHMALZBACH: Well, Your Honor, I
23 was with you until you got to the scope because
24 I -- I agree the American rule is the background
25 rule, but, once Congress has put into place this

1 prevailing party rule, that changes the
2 background rule.

3 And what this Court has done in the
4 past --

5 JUSTICE KAVANAUGH: Well, why is that?
6 Lots of times, we -- we will say, with
7 background principles of statutory
8 interpretation, to the extent, not just any
9 deviation. So why couldn't you here too say to
10 the extent Congress is deviating from the
11 American rule, the background American rule, it
12 needs to be clear?

13 MR. SCHMALZBACH: So two things,
14 Justice Kavanaugh.

15 One is that that is not what this
16 Court has said. So, for example, Garland says
17 that our -- our test for prevailing party, we're
18 going to use a generous formulation. We're
19 going to look to any material alteration of the
20 relationship. That's inconsistent with saying
21 we're going to construe the American rule in a
22 stingy way as to this statute.

23 But also, I think it's strange as a
24 matter of divining congressional intent to look
25 to a statute where Congress says we reject the

1 American rule in this context and then to say,
2 well, but we'll still construe it narrowly
3 because that must have been what Congress had in
4 mind. That -- that's not a faithful way of
5 implementing that intent.

6 JUSTICE KAVANAUGH: And then,
7 relatedly, I guess, what about the separation of
8 powers principle that Justice Gorsuch referred
9 to and Mr. Yang referred to, which is we should
10 really leave -- when there's doubt, we should
11 leave this to Congress to fix this? In part,
12 the court of appeals story, while helpful to you
13 in some respects, I think is unhelpful in the
14 respect there are all sorts of different tests
15 out there because they're just completely at sea
16 in trying to figure out how to handle this. Do
17 you just want to respond to that argument?

18 MR. SCHMALZBACH: I -- I think they're
19 more similar than they are different, Your
20 Honor. Each of them rejects the categorical
21 rule that the Petitioner proposes here.

22 And so what -- one of the important
23 results of that unanimous rejection is that we
24 do know what the world looks like where
25 preliminary injunction winners can be recognized

1 as prevailing parties. If -- if it were a
2 endless parade of horrors, we would have seen
3 that in the briefs, in the amicus briefs, and,
4 you know, we -- we have a trickle of things that
5 they don't like. We don't have that parade of
6 horrors.

7 But I -- I also want to point out,
8 back to Justice Alito's question about the
9 equitable background, the equitable background
10 is not just some "anything goes" rule. The
11 equitable background, as Wright-Miller discusses
12 in Section 2665, is actually the rule in Rule
13 54(d) that the winner -- that the prevailing
14 party is presumptively entitled to shifting
15 subject to the district court's discretion not
16 to shift fees.

17 And what Wright-Miller says is that is
18 the equitable rule. And the equitable rule, of
19 course, recognizes that winning interim relief
20 can make you a prevailing party. So it would be
21 odd to look at a statute that plugs right into
22 Rule 54(d), which was in existence when Section
23 1988 was enacted, and say we're not going to use
24 the equitable rule that underlies this statute
25 that we're plugging into; instead, we're going

1 to do something else.

2 The -- the equitable background
3 confirms the rule that all of the courts of
4 appeals have adopted insofar as they recognize
5 preliminary injunction relief as prevailing
6 parties.

7 CHIEF JUSTICE ROBERTS: Well, what --
8 what if you get a preliminary injunction and,
9 under you -- your rule, you get attorney's fees,
10 okay, but then the case continues on and you
11 lose at the permanent -- you don't get a
12 permanent injunction? Do you have to give back
13 the attorney's fees?

14 MR. SCHMALZBACH: Your Honor, what
15 Sole says is that attorney's fees should not be
16 awarded at that preliminary stage. Sole does
17 say that we would wait until the end of the case
18 to award those fees.

19 And that makes sense because a
20 preliminary injunction may, as in Sole, be
21 undercut by the final judgment that rejects the
22 premise of that preliminary injunction.

23 CHIEF JUSTICE ROBERTS: Well, if
24 that's the case, doesn't it make -- doesn't that
25 undermine your argument? In other words, it's a

1 recognition that, of course, the preliminary
2 injunction is not final and, therefore, the
3 award of attorney's fees shouldn't be final.

4 MR. SCHMALZBACH: No, Your Honor,
5 because our -- our argument is that that
6 finality is not required. We don't require
7 finality the way we would in the Communications
8 Act of 1934. We don't require the sort of
9 finality that was required in the statute at
10 issue in Bradley.

11 So, when the legislative history is
12 addressing Bradley, it's addressing a -- a very
13 different statute that does require this sort of
14 finality from the --

15 CHIEF JUSTICE ROBERTS: So, when the
16 statute says "prevailing party," it's really
17 saying including temporarily prevailing party?

18 MR. SCHMALZBACH: Your Honor, I would
19 say it -- it means prevailing party, and when
20 Congress doesn't want the full scope of
21 prevailing parties to be entitled to fees, as it
22 did in Section 1617, then it knows how to say
23 so. It knows how to require a sort of finality.

24 JUSTICE JACKSON: Is -- is another way
25 to address the Chief Justice's question that

1 what we're looking for is whether you are
2 entitled to prevailing party status and that you
3 can be deemed a prevailing party, you -- in your
4 view, based on a preliminary injunction when you
5 can -- maybe sometimes you can't, you're --
6 you're -- you're not saying you always are --
7 you're just saying reject the statement that you
8 can never be.

9 So sometimes a preliminary win can
10 confer prevailing party status, but the actual
11 award of the fees that you would get happens
12 when the case is over. At the end of the day,
13 then the court goes back and we look how much
14 attorney's time was put into it. As Justice
15 Sotomayor points out, it's a -- you know, was it
16 a reasonable fee request for that work that went
17 into the PI?

18 MR. SCHMALZBACH: That's just right,
19 Justice Jackson.

20 JUSTICE JACKSON: And -- and you can
21 be divested. The reason why you wait until the
22 end in part is because, even though you might
23 have had prevailing party status in our view,
24 your view, early on as a result of the PI, if
25 the case continues and it's reversed, the -- the

1 judgment that -- on the merit that made you a
2 prevailing party to begin with, then, at the end
3 of the day, when we're doing the calculation, we
4 say, nope, you don't get prevailing party status
5 at that point?

6 MR. SCHMALZBACH: That's right,
7 Justice Jackson. You can be divested if you win
8 a preliminary injunction but lose on final
9 judgment. You could be divested if you win
10 partial summary judgment, which my friends on
11 the other side suggest is sufficient for
12 prevailing party status.

13 JUSTICE JACKSON: And your argument --

14 CHIEF JUSTICE ROBERTS: What --
15 what --

16 JUSTICE JACKSON: -- is that if it's
17 mooted, if nothing else happens, you retain your
18 prevailing party status on the basis of that
19 win?

20 MR. SCHMALZBACH: That's right,
21 because the premise of your win has not been
22 undermined. But, Justice Jackson --

23 CHIEF JUSTICE ROBERTS: But --

24 MR. SCHMALZBACH: -- you can also lose
25 prevailing party status if you have a final

1 judgment and you lose on appeal. It's the sort
2 of thing that can be divested.

3 CHIEF JUSTICE ROBERTS: We've -- we've
4 talked about preliminary injunction as a way in
5 which you may be a prevailing party, even though
6 you -- not -- not final, but what about a
7 discovery dispute? What about the case turns on
8 whether you can get access to particular
9 documents, and you win on that? You don't get a
10 preliminary injunction. You obviously don't get
11 a final injunction. But you won, you got the
12 documents, and then the case goes away,
13 whatever, for whatever reason.

14 Could you be awarded fees on that?
15 You won a very significant motion.

16 MR. SCHMALZBACH: No, Mr. Chief
17 Justice, because what this Court has said in
18 describing what counts as a material alteration
19 is it has to be winning the sort of relief that
20 you went to court to get. So it's --

21 CHIEF JUSTICE ROBERTS: You wanted
22 those documents. That was the whole reason. I
23 mean, obviously, it's -- there's not a statute
24 that says you have a right to these documents,
25 whatever the statute is, but the key to your win

1 was access to those documents.

2 MR. SCHMALZBACH: But getting that --
3 getting those documents in -- in any case I can
4 think of doesn't change the legal relationship
5 between the parties outside of court. And so
6 a -- a good example of something that's not the
7 sort of relief you went to court to get,
8 consider Shohei Ohtani's, you know, 50/50 home
9 run ball. There's an ownership dispute over it.
10 One side files a lawsuit. The plaintiff says, I
11 want a preliminary injunction to prevent you
12 from selling that ball, from auctioning it off,
13 until this ownership dispute is hammered out.

14 So winning that preliminary injunction
15 is not the relief sought in the complaint, which
16 is a declaration of ownership and the return of
17 possession. It's just something that will allow
18 the court to award relief later. That is not
19 enough for prevailing party status in the same
20 way that your hypothetical is not.

21 JUSTICE JACKSON: And, of course,
22 that's why you're saying sometimes a -- a PI may
23 not confer prevailing party status? That's an
24 example?

25 MR. SCHMALZBACH: That's an example.

1 JUSTICE JACKSON: Okay.

2 MR. SCHMALZBACH: That's right, Your
3 Honor.

4 CHIEF JUSTICE ROBERTS: So your
5 position is simply PI, it's either going to be a
6 permanent injunction or it's going to be a
7 preliminary injunction, and those are the only
8 two things that could entitle you to attorney's
9 fees?

10 MR. SCHMALZBACH: Those -- those two
11 things would entitle you to attorney's fees --

12 CHIEF JUSTICE ROBERTS: Well,
13 certainly, the permanent --

14 MR. SCHMALZBACH: -- subject to
15 meeting the -- the other requirements of the --

16 CHIEF JUSTICE ROBERTS: Any other type
17 of relief doesn't count as prevailing?

18 MR. SCHMALZBACH: I -- Your Honor, I
19 go back to the same question of whether the
20 order has provided -- has created a material
21 alteration between the parties.

22 CHIEF JUSTICE ROBERTS: Well, in the
23 one case -- I guess I still don't have --
24 understand the answer. The alter -- material
25 alteration in my hypothetical is you have access

1 to the documents. That's a material alteration.

2 But that doesn't entitle you to
3 attorney's fees?

4 MR. SCHMALZBACH: So, if -- if the
5 lawsuit is about ownership, possession of those
6 documents, if you've sued for return of the
7 documents --

8 CHIEF JUSTICE ROBERTS: No, no, it's
9 not, but that's an -- that -- that's going to
10 determine the case. It's a very important piece
11 of evidence for whatever the underlying
12 litigation is about.

13 And the court rules: You can get the
14 documents. And then, for whatever reason, the
15 case goes away, you don't get a preliminary
16 injunction, you don't get a permanent one, you
17 don't really need it. You wanted to make these
18 documents public, the Pentagon papers or
19 whatever.

20 MR. SCHMALZBACH: Right.

21 CHIEF JUSTICE ROBERTS: Does that
22 entitle you to attorney's fees?

23 MR. SCHMALZBACH: No, Your Honor.
24 That -- that's equivalent to the grant of a
25 motion for a new trial, which this Court has

1 said doesn't create that real-world material
2 change in the legal relationship between the
3 parties.

4 That's just discover -- that's
5 addressing in-court conduct that's not going to
6 grant the relief ultimately sought in the
7 complaint. That's the key, is the relief
8 ultimately sought.

9 JUSTICE GORSUCH: Counsel, you keep
10 coming to the material alteration of the
11 parties' relationship in responding to the Chief
12 Justice and others.

13 I would have thought that that was
14 exactly the argument made in *Sole* and in our
15 hypothetical that Justice Kagan and I discussed.
16 For a period of time, there was a material
17 alteration in the relationship between the
18 parties, but that's not enough. It's got to be
19 a final, at the -- when the matter comes to
20 rest, that -- that's the implication of a
21 prevailing party as traditionally understood, is
22 the one who wins in the end, not temporarily.

23 And -- and so are you really just
24 asking -- are you fighting with *Sole*, which says
25 even a material alteration temporarily that is

1 subsequently withdrawn doesn't count, right?

2 MR. SCHMALZBACH: No, Your Honor,
3 we're not fighting with Sole. We're --

4 JUSTICE GORSUCH: So it can't be just
5 a material alteration. There has to be
6 something more. And why isn't that something
7 more the final judgment?

8 MR. SCHMALZBACH: What Sole says is
9 the foundation of that preliminary injunction
10 has to be unreversed. That foundation can't be
11 superseded by a late order.

12 JUSTICE GORSUCH: At the end -- so we
13 do have to look at the end of the case and see
14 what the court said at the end of the case,
15 right?

16 MR. SCHMALZBACH: In the same way that
17 we would with a permanent injunction.

18 JUSTICE GORSUCH: Yeah.

19 MR. SCHMALZBACH: We have to see is
20 that permanent injunction rejected on a motion
21 for reconsideration --

22 JUSTICE GORSUCH: Okay. And, here, at
23 the end of the --

24 MR. SCHMALZBACH: -- is it reversed on
25 appeal.

1 JUSTICE GORSUCH: -- case, what the
2 court said -- forget about what happened in the
3 world. What the court said is moot, I dismissed
4 the case. I provide no relief to anybody.

5 MR. SCHMALZBACH: No, Your Honor.
6 What the court said is -- implicitly is --

7 JUSTICE GORSUCH: No, no, no, no, no,
8 no. No implication. I'm looking at the
9 judgment because I'm supposed to look at the
10 judgment, the final judgment, prevailing party.
11 Who wins at the end? The court says case
12 dismissed.

13 MR. SCHMALZBACH: Your Honor, what a
14 dismissal for mootness means is that there is no
15 more relief that the court can provide.

16 JUSTICE GORSUCH: Some --

17 MR. SCHMALZBACH: It doesn't mean that
18 the relief they already provided loses its
19 judicial imprimatur because it, at that point,
20 that preliminary injunction order remains good
21 law. It's just that the court can't order any
22 additional relief because there's no need for
23 it.

24 JUSTICE GORSUCH: All right. Thank
25 you.

1 JUSTICE SOTOMAYOR: What do you do
2 with a dismissal that's Munsingwear that vacates
3 the preliminary injunction?

4 MR. SCHMALZBACH: So, Your Honor, a --
5 a Munsingwear vacatur might affect a preliminary
6 injunction in the same way that it might affect
7 a final judgment. The -- I don't think
8 Munsingwear is -- is on the right track for
9 what's going on here. Munsingwear --

10 JUSTICE SOTOMAYOR: No. There wasn't
11 one here. And so that's my point, which is, if
12 a district court is unsure of whether the law is
13 good or -- or should continue the preliminary
14 injunction, it could vacate it.

15 MR. SCHMALZBACH: It -- it could, Your
16 Honor. I would suggest that in this case in
17 particular, Munsingwear would be inappropriate
18 because what United States v. Munsingwear itself
19 says is that this is not a remedy for a party
20 that has slept on its rights and failed to take
21 advantage of review where it's available.

22 And that's exactly what happened here,
23 Your Honor. The preliminary injunction that was
24 entered was immediately appealable under Section
25 1292(a). That's why it's a judgment for Rule

1 54(a) purposes. And the Commissioner chose not
2 to appeal.

3 The Commissioner also chose to avoid
4 resolution of its fully briefed pending motion
5 for summary judgment. So this isn't a
6 Munsingwear case --

7 JUSTICE SOTOMAYOR: I don't --

8 MR. SCHMALZBACH: -- even if it were
9 relevant.

10 JUSTICE SOTOMAYOR: I -- I'm not
11 saying that. I'm just asking the question,
12 which is, if a court doesn't believe that you --
13 that it should continue an injunction, it'll
14 vacate it, correct?

15 MR. SCHMALZBACH: It --

16 JUSTICE SOTOMAYOR: A preliminary
17 injunction.

18 MR. SCHMALZBACH: Yes. And -- and the
19 court could, of course, decide that it's not
20 appropriate to have it for legal or factual
21 reasons, and at that point, you would lose that
22 prevailing party status.

23 JUSTICE GORSUCH: Well, when you
24 dismiss a case, the PI disappears. What's the
25 difference? It's merged into the final

1 judgment. Do I need to say I withdraw my PI?
 2 No. A district judge says case dismissed.
 3 MR. SCHMALZBACH: Your Honor, because
 4 I keep coming back to the touchstone, which is
 5 that material alteration.
 6 JUSTICE GORSUCH: Yes --
 7 MR. SCHMALZBACH: You -- you went to
 8 court --
 9 JUSTICE GORSUCH: -- but we went
 10 through that. It has to be at the end of the
 11 day a material alteration. It can't be the
 12 temporary one because Sole tells us it can't be
 13 because what happens matter -- what happens
 14 later matters. And so it has to be a material
 15 alteration at the end of the case.
 16 MR. SCHMALZBACH: Your Honor --
 17 JUSTICE GORSUCH: Right?
 18 MR. SCHMALZBACH: -- that --
 19 JUSTICE GORSUCH: Do we agree on that
 20 much?
 21 MR. SCHMALZBACH: We do.
 22 JUSTICE GORSUCH: Okay.
 23 MR. SCHMALZBACH: We do look to the
 24 end of the case because you can lose that
 25 prevailing party status, but I suggest that it

1 is not the case that a party who has won a
2 hundred percent of the relief you went to court
3 to get is not a prevailing party. And that's
4 the implication, is that if you only look to
5 mootness without more and that's the end of the
6 game, then a party who has -- the football coach
7 who has been -- who's gotten a preliminary
8 injunction letting him pray at the championship
9 game only, he's the prevailing party under any
10 meaning of that term and should be recognized as
11 such here.

12 CHIEF JUSTICE ROBERTS: Counsel, I see
13 your red light is on.

14 Justice Kavanaugh, anything?

15 (Laughter.)

16 CHIEF JUSTICE ROBERTS: Justice
17 Thomas?

18 JUSTICE THOMAS: Just as a recap,
19 what's your definition of "prevailing party"?

20 MR. SCHMALZBACH: Your Honor, it's the
21 winner of a favorable judgment and tangible
22 relief from the court and the unreversed
23 favorable judgment that's never repudiated.

24 JUSTICE THOMAS: So I still don't
25 understand then your answer when the neighbor

1 dies. It's still unreversed, right?

2 MR. SCHMALZBACH: Yes. And that
3 neighbor has gotten the relief he went to court
4 to get, not all of it. And, to be clear, the
5 fact that you're only a partial winner must be
6 considered when the district court is deciding
7 the amount of reasonable fees.

8 But, yes, as long as you are the
9 winner of the relief you went to court to get
10 and the district court or the court of appeals
11 never says that you are the loser, you're the
12 prevailing party.

13 JUSTICE THOMAS: Is there any other
14 interlocutory relief that could support a
15 prevailing party other than preliminary
16 injunction?

17 MR. SCHMALZBACH: Your Honor, it's --
18 it's possible if a -- if an appealable order, a
19 judgment, such as a -- in -- in rare
20 circumstances, stays can be appealable if they
21 are changing the parties' legal relationship in
22 the way that this does, but Congress really did
23 single out preliminary injunctions in Section
24 1292(a) for this special treatment because they
25 can have such a big effect on the parties'

1 rights. So that -- that is why they are the
2 primary form of relief that the court -- courts
3 of appeals have dealt with.

4 JUSTICE THOMAS: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice Alito?

6 Justice Kavanaugh?

7 Justice Gorsuch?

8 Justice Kavanaugh?

9 Justice Jackson?

10 Thank you, counsel.

11 MR. SCHMALZBACH: Thank you.

12 CHIEF JUSTICE ROBERTS: Rebuttal?

13 REBUTTAL ARGUMENT OF ERIKA L. MALEY

14 ON BEHALF OF THE PETITIONER

15 MS. MALEY: Thank you, Mr. Chief

16 Justice.

17 I'd like to start with your point that
18 once you depart from a bright-line rule that a
19 final judgment or a conclusive determination on
20 the merits of at least one claim is what's
21 required, then the rule becomes extremely
22 ambiguous as to what could potentially qualify
23 for prevailing party status.

24 A lot of interlocutory orders can be
25 appealable and can be said in some sense to give

1 some benefit to the plaintiff, and yet those
2 orders do not fall within any understand --
3 typical understanding of the legal term of art
4 prevailing party.

5 I think you can also see the ambiguity
6 looking at what is going on now in the circuits.
7 As Justice Kavanaugh put it, the circuits really
8 are at sea on this question. And the sheer
9 number of published court of appeals cases
10 grappling with these scenarios shows that the
11 tests the circuits have adopted are not readily
12 administrable. They're fact-intensive and
13 unpredictable, and they're frequently sparking a
14 second major litigation over the availability of
15 fees, which in and of itself is highly
16 judicially inefficient.

17 Second, I'd like to discuss Justice
18 Kagan's point that a preliminary injunction is
19 really a way station and not the final
20 destination, not what a party is seeking in
21 bringing suit. And they often occur in a very
22 compressed time frame without full development
23 of the record or the legal arguments such that
24 the final judgment might be different.

25 Of course, the final judgment might

1 not be different, but, when that final judgment
2 is never reached, there's no way to tell what
3 the court ultimately would have held on the
4 merits of the claim.

5 And, third, I'd just like to agree
6 with Justice Gorsuch's point that the
7 combination of the principles that this Court
8 set forth in *Sole* and *Buckhannon* really do
9 answer this case. *Sole* provides that the Court
10 must look to the end of the case to determine
11 the prevailing party, and *Buckhannon* provides
12 that a non-judicial alteration, such as a
13 government's decision to change the law, does
14 not make a party the prevailing party.

15 And, under those principles, the
16 plaintiffs are not the prevailing party here.
17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel. The case is submitted.

20 (Whereupon, at 12:41 p.m., the case
21 was submitted.)

22

23

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