

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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
Place: Washington, D.C.
Date: October 8, 2024

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3 GERALD F. LACKEY, IN HIS OFFICIAL)
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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

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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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P R O C E E D I N G S

(11:23 a.m.)

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

Ms. Maley.

ORAL ARGUMENT OF ERIKA L. MALEY

ON BEHALF OF THE PETITIONER

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

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

A preliminary injunction is neither a final judgment nor a determination that the defendant is liable on the merits for violating federal law. It is simply a threshold prediction of the likelihood of success based on a truncated record and an initial, often hasty assessment of the law that may well prove to be faulty as the case proceeds. It provides no 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 a default
6 judgment and a consent decree are similar in
7 that they're both situations where the court has
8 not ruled on the merits, but, because the
9 defendant has waived or forfeited a challenge to
10 the merits, the court nonetheless enters a final
11 judgment in the plaintiff's favor.

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

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

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

23 CHIEF JUSTICE ROBERTS: What do you do
24 with the formulation by your friend which is the
25 question is whether they got as much relief as

1 they needed? I wonder why that doesn't fit
2 under the "prevailing party" language.

3 MS. MALEY: I don't --

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

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

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

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

24 JUSTICE SOTOMAYOR: Oh, but they did.
25 They got interim relief. They had their

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

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

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

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

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

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

8 MS. MALEY: Under --

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

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

25 JUSTICE KAGAN: Well, it's -- it's

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

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

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

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

25 MS. MALEY: I -- I disagree with that,

1 Justice Kagan, for a number of reasons.

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

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

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

22 I mean, you -- you -- you talked about
23 the standard of what is a prevailing party, and
24 you originally asserted that it was a party who
25 wins a lawsuit. But the Court has spoken in --

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

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

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

14 JUSTICE JACKSON: But it is.

15 MS. MALEY: -- of a claim.

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

24 But, to the extent that under Winter
25 the preliminary injunction touches on what the

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

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

7 JUSTICE JACKSON: Yes.

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

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

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

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

23 MS. MALEY: Certainly, in that
24 circumstance, if a party chose to seek a
25 consolidation of the merits with a preliminary

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

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

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

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

25 And when that's combined with

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

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

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

1 under the voluntary cessation exception to
2 mootness.

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

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

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

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

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

24 JUSTICE KAGAN: And -- and -- and
25 couldn't a state do that, you know, on -- with

1 respect to all kinds of different cases?

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

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

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

24 In addition, even a legislative change
25 is not always going to moot a case. Indeed, the

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

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

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

23 Why shouldn't the plaintiff receive
24 some recompense, assuming, by the way, that they
25 have done enough to receive it? I mean, one of

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

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

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

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

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

25 MS. MALEY: Fundamentally, it is a

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

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

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

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

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Just briefly, is your position -- does
22 it encourage wasteful litigation? In other
23 words, if you're the -- you get your preliminary
24 injunction, but you have a lot of attorney's
25 fees, don't you have an incentive to go forward

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

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

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

20 CHIEF JUSTICE ROBERTS: Thank you.

21 Justice Thomas?

22 Justice Alito?

23 JUSTICE ALITO: If there is very
24 strong evidence that the government changed the
25 law primarily to avoid the payment of fees,

1 could a court, as a matter of equity, award
2 fees?

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

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

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

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

24 And Bradley, which is discussed -- and
25 Hanrahan is a good example of this -- Bradley

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

10 JUSTICE ALITO: Thank you.

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

13 Justice Kagan?

14 Justice Gorsuch?

15 Justice Kavanaugh?

16 Justice Barrett?

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

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

1 consent decree as the equivalent. But where
2 does this equitable authority come to it? It
3 seems like it pretty significantly undercuts
4 your argument.

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

13 JUSTICE BARRETT: Thank you.

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

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

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

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

25 JUSTICE JACKSON: But then they

1 changed it.

2 MS. MALEY: But then they changed it.

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

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

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

25 MS. MALEY: Well, Hanrahan notes that

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

8 So I don't think that the --

9 JUSTICE JACKSON: You don't think it
10 counts, okay. Thanks.

11 CHIEF JUSTICE ROBERTS: Thank you.

12 Mr. Yang.

13 ORAL ARGUMENT OF ANTHONY A. YANG
14 FOR THE UNITED STATES, AS AMICUS CURIAE,
15 SUPPORTING THE PETITIONER

16 MR. YANG: Mr. Chief Justice, and may
17 it please the Court:

18 "Prevailing party" is a longstanding
19 term of art that means the party for whom
20 judgment is entered, which turns on whether, at
21 the end of the suit, the plaintiff has
22 successfully maintained at least one claim for
23 relief. This Court has repeatedly determined
24 that liability on the merits and liability for
25 fees go hand in hand such that the plaintiffs --

1 plaintiff must obtain at least some relief on
2 the merits of his claim to be a prevailing
3 party.

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

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

19 I welcome the Court's questions.

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

25 MR. YANG: No. No, I don't -- I

1 don't. There's only one statute, by the way,
2 that predates Section 1988. It's Section 1617,
3 which is discussed by the Court in Bradley. All
4 that does is clarifies that you don't need a
5 true final judgment that ends the case. A final
6 judgment normally is one that resolves all
7 claims and ceases to terminate -- terminates the
8 case.

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

19 That's all Section 1617 requires. It
20 does not depart -- it does not change the normal
21 understanding of "prevailing party," which a
22 prevailing party is one who succeeds at the end
23 of the case because they obtain judgment on at
24 least one claim.

25 JUSTICE SOTOMAYOR: Counsel --

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

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

12 CHIEF JUSTICE ROBERTS: Right.

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

21 JUSTICE SOTOMAYOR: What do you do
22 with the case that Justice Jackson posed, which
23 is common? I want to -- I want to participate
24 in this protest, this parade --

25 MR. YANG: Mm-hmm.

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

6 MR. YANG: Well, you did not get
7 relief on the merits. Now I think a lot of the
8 questions have --

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

15 MR. YANG: I don't think that's quite
16 --

17 JUSTICE SOTOMAYOR: -- a different
18 sense.

19 MR. YANG: -- I don't think that's
20 quite right. The legislative history says you
21 don't need a final judgment following a full
22 trial on the merits. That means you can get a
23 final judgment at an earlier stage through
24 summary judgment before you go to trial,
25 through, for instance, a --

1 JUSTICE SOTOMAYOR: That's not a final
2 judgment. You get a judgment --

3 MR. YANG: Yes, summary judgment is a
4 final judgment.

5 JUSTICE SOTOMAYOR: Not until you
6 appeal it. Not until the whole case is
7 litigated. You get a judgment but not final
8 judgment.

9 MR. YANG: If sum -- if the court
10 grants summary judgment, it is a final judgment
11 if it's on all the claims.

12 JUSTICE SOTOMAYOR: That's the --

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

20 JUSTICE GORSUCH: So, for example, the
21 Chief -- Chief Justice's hypothetical, after the
22 parade, I could ask for a trial on the merits in
23 -- in accompanying the PI and a final judgment
24 could be issued at that time?

25 MR. YANG: That's correct.

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

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

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

13 JUSTICE JACKSON: And -- and isn't
14 that the statute we're talking about here?
15 Right?

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

20 JUSTICE JACKSON: Right, but it is --
21 it is addressing -- it is trying, Congress, to
22 give us an exception to the American rule, and
23 the question is what is the scope of that
24 exception.

25 MR. YANG: But Congress didn't go all

1 the way. Congress adopted a term of art which
2 had --

3 JUSTICE JACKSON: Prevailing party.

4 MR. YANG: -- a settled meaning.

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

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

17 MR. YANG: Yeah.

18 JUSTICE JACKSON: I -- I get that. I
19 go to court and I argue the merits of my
20 entitlement --

21 MR. YANG: Mm-hmm.

22 JUSTICE JACKSON: -- to be able to do
23 that.

24 MR. YANG: Right.

25 JUSTICE JACKSON: And the court says,

1 as a preliminary matter, we don't have a whole
2 trial yet, I think you're going to win, so I'm
3 giving you an injunction and you get to march in
4 the parade.

5 MR. YANG: Mm-hmm.

6 JUSTICE JACKSON: And I do.

7 MR. YANG: Mm-hmm.

8 JUSTICE JACKSON: And then I'm done.

9 I say the case is mooted because, really, the
10 relief that I wanted was the ability to march in
11 the parade tomorrow. But I did have to pay an
12 attorney to be able to convince you, court, to
13 give me the relief that I requested.

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

18 MR. YANG: That was a permanent
19 injunction, and --

20 JUSTICE JACKSON: I understand it was
21 a permanent injunction in that case, but I'm
22 asking you, we set up a test for when you are a
23 prevailing party, and the question is why
24 doesn't that test also cover preliminary
25 injunctions like the one that I talked about.

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

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

9 MR. YANG: And this is important.

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

16 MR. YANG: Well, that was the Smyth
17 rule prior to.

18 JUSTICE KAGAN: Yeah, prior to it
19 being changed, and -- and so now --

20 MR. YANG: Well, but this Court
21 granted cert on unanimous --

22 JUSTICE KAGAN: -- so now there's --
23 there's a uniform rule. You don't know of
24 anything -- any court that's gone the other way.
25 You know what? It's an interesting thing. It

1 seems that this comes up all the time, and it
2 seems as though it's come up frequently just in
3 recent years.

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

12 So it seems as though there's quite a
13 lot of recent law that cuts against you here
14 from circuits, like, pretty much all across the
15 U.S.

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

21 One, this Court already addressed the
22 strategic mootness question in *Buckhannon* and --
23 and -- and addressed that in four different
24 factors. There's two other factors. I want to
25 address two of those first and then I'll go to

1 Buckhannon.

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

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

23 Secondly --

24 JUSTICE KAGAN: Okay. I don't think
25 that that's what I was asking about. I was

1 asking really, you know, do you have any law out
2 there on your side?

3 MR. YANG: We have a term of art that
4 has gone back --

5 JUSTICE KAVANAUGH: Well, what --

6 MR. YANG: -- in this Court's
7 decisions, and -- and I think that the courts of
8 appeals just have not been faithful to this
9 Court's decisions.

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

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

20 So, in *Buckhannon*, when the Court
21 rejected the catalyst theory, Justice Ginsburg
22 dissented and said: Hey, look, there's one
23 specific area that's really problematic, FOIA.
24 Congress reacted and did a targeted response to
25 FOIA.

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

9 CHIEF JUSTICE ROBERTS: Thank you.

10 MR. YANG: Congress --

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Thomas, anything further?

14 Justice Alito?

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

21 Do you want to say something about
22 that?

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

25 First, this -- this Court already

1 resolved that argument in Alyeska Pipeline.
2 There was a -- and it was actually Justice
3 Marshall's dissent, which was based on equitable
4 principles.

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

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

20 And I think that's illustrated by the
21 only case that they cite, the only case that
22 they cite as -- as supporting a PI fee award,
23 and that's Clancy versus Geb. In that case, it
24 was not based on the temporary injunction that
25 was issued on the day the suit was filed. The

1 court said it was based on the trial on the
2 merits that sustained the cause of action for an
3 injunction.

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

12 JUSTICE ALITO: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Sotomayor?

15 JUSTICE SOTOMAYOR: Just to be clear,
16 Buckhannon, there was no court-ordered relief
17 whatsoever, correct?

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

19 JUSTICE SOTOMAYOR: And, as I read the
20 decision, that was mostly the focus of the
21 decision?

22 MR. YANG: Well, certainly, the
23 catalyst theory was --

24 JUSTICE SOTOMAYOR: It was the prime
25 focus.

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

2 JUSTICE SOTOMAYOR: All right.

3 MR. YANG: -- theory does not -- we're
4 not escaping the catalyst theory here because
5 the catalyst theory is embedded in this case.
6 It is the second -- it is what happened with
7 this case after --

8 JUSTICE SOTOMAYOR: But you're --
9 you're -- you're claiming there is no catalyst
10 theory because you're saying the legislature
11 acted -- or the other side is saying it acted
12 independently, so it -- it has nothing to do --

13 MR. YANG: Well, the catalyst theory
14 was rejected in Buckhannon.

15 JUSTICE SOTOMAYOR: They're saying it
16 doesn't matter why the case ends. It just ended
17 with a judgment, dismissal of the action. It
18 could be for mootness. It could be because the
19 other side gave up. I got what I came for at
20 least in part. I got my license back. I drove
21 for 16 months. I didn't have to pay anybody to
22 get my license back. I won for those -- that
23 part of my relief. And it's never been
24 dissolved, reversed.

25 MR. YANG: But that's not what the

1 term "prevailing party" has been understood,
2 either by this Court or by the dictionary
3 definitions that date back from before the --
4 the -- the 20th Century. That has required a
5 final adjudication --

6 JUSTICE SOTOMAYOR: Well, that's the
7 problem. No, it's never required a final
8 adjudication. It's required a judgment but not
9 a final one.

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

20 And that happens when you get a final
21 determination, maybe not a final judgment
22 because you're not resolving all claims or maybe
23 because there's some ongoing litigation about
24 the nature of the injunctive relief.

25 JUSTICE SOTOMAYOR: Thank you,

1 Mr. Yang. We -- we have a difference of opinion
2 on what finality means. If all you're seeking
3 is a preliminary injunction, that's final for
4 that purpose.

5 MR. YANG: You don't --

6 JUSTICE SOTOMAYOR: That -- that's the
7 problem we're having.

8 MR. YANG: -- file suits for
9 preliminary injunctions. You file suits for
10 equitable relief, a judgment at the end of the
11 suit. A preliminary injunction is a preliminary
12 matter that protects the parties while the suit
13 is adjudicated.

14 JUSTICE SOTOMAYOR: Thank you,
15 counsel.

16 CHIEF JUSTICE ROBERTS: Justice Kagan?
17 Justice Gorsuch?

18 JUSTICE GORSUCH: Let me see if I've
19 got it. So a PI can't be the basis for a -- a
20 -- an award of fees under this statute because
21 Sole basically says you have to look at what
22 happens afterwards. And for all the reasons you
23 just gave, a PI is a PI. It's preliminary.
24 It's not -- okay. All right. Fine.

25 Now -- so we have to look what

1 happened afterwards. And, here, what happened
2 afterwards is plaintiffs may well have convinced
3 the Virginia state legislature to change their
4 mind in a catalyst sort of way.

5 MR. YANG: Mm-hmm.

6 JUSTICE GORSUCH: The problem is
7 Buckhannon says that doesn't work either.

8 MR. YANG: Correct.

9 JUSTICE GORSUCH: All right. But
10 Justice Ginsburg in Buckhannon says, hey,
11 Congress should fix that.

12 MR. YANG: Mm-hmm.

13 JUSTICE GORSUCH: And Congress did fix
14 it in FOIA --

15 MR. YANG: Yep.

16 JUSTICE GORSUCH: -- and said
17 involuntary -- voluntary cessation and changes,
18 you still get fees. But --

19 MR. YANG: So long as it's not an
20 insubstantial claim.

21 JUSTICE GORSUCH: Right.

22 MR. YANG: So quite generous, with the
23 government's money, of course. You know, it's
24 quite different when we're talking about private
25 litigants and non-federal. I think Congress

1 might be more reticent to creating such a
2 generous departure from even the prevailing
3 party standard, but it could.

4 JUSTICE GORSUCH: It could.

5 MR. YANG: It could.

6 JUSTICE GORSUCH: And it hasn't here.

7 MR. YANG: No.

8 JUSTICE GORSUCH: End of case. That's
9 your theory of the case?

10 MR. YANG: That's our theory.

11 JUSTICE GORSUCH: All right. Got it.

12 CHIEF JUSTICE ROBERTS: Justice
13 Kavanaugh?

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

17 (Laughter.)

18 JUSTICE KAVANAUGH: And do you want to
19 finish that answer?

20 MR. YANG: Like a -- like a
21 preliminary injunction, it was fleeting.

22 (Laughter.)

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

25 JUSTICE KAVANAUGH: Well, I will look

1 at the transcript and fill it in, so okay.

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

6 JUSTICE KAVANAUGH: Sure.

7 MR. YANG: -- strategic mootness, as
8 my -- my -- my colleague has already answered,
9 you've got a voluntary cessation barrier, which,
10 you know, in your decision in Fikre, Justice
11 Gorsuch, it's a pretty formidable burden.

12 JUSTICE GORSUCH: I hope so.

13 (Laughter.)

14 MR. YANG: It -- it -- it's a
15 formidable burden. Damages awards, never going
16 to moot out. And it's entirely speculative what
17 effect this is going to have. That's what
18 Buckhannon said. Like, it's not speculative
19 whether it's going to deter counsel or not.

20 And I think this illustrates that.
21 There's no data to show this. This case was
22 started when Smyth was the rule. They had no
23 reason to expect any attorney's fees from a PI,
24 but they took the case. So it's a little hard
25 to say, like, there's this compelling case that,

1 like, we're going to have a -- a -- a crash in
2 civil rights, civil rights era.

3 And there's a real cost, again, to
4 determining -- to deterring the government from
5 changing course when the action might be lawful
6 but bad policy.

7 JUSTICE KAVANAUGH: Okay. That's good
8 enough. Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Barrett?

11 JUSTICE BARRETT: No.

12 CHIEF JUSTICE ROBERTS: Justice
13 Jackson?

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

20 I'm reading from Sole. "We express no
21 view on whether, in the absence of a final
22 decision on the merits of a claim for permanent
23 relief, success in gaining a preliminary
24 injunction may sometimes warrant an award of
25 counsel fees."

1 MR. YANG: True.

2 JUSTICE JACKSON: So I don't know how
3 you can start your case with the premise that
4 Sole stands for the proposition that if you win
5 a preliminary injunction, you have to get to
6 final judgment in order to be entitled to --

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

8 JUSTICE JACKSON: -- counsel fees.

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

15 JUSTICE JACKSON: It did not say
16 "premature."

17 MR. YANG: It -- it --

18 JUSTICE JACKSON: It says, "Wyner is
19 not a prevailing party, we conclude, for her
20 initial victory was ephemeral." And it was
21 ephemeral in that case because it happened to go
22 on and get reversed.

23 MR. YANG: It's on page 84 of the
24 Court's opinion.

25 JUSTICE JACKSON: Okay.

1 MR. YANG: "The tentative character
2 would have made the fee request at this initial
3 stage premature."

4 JUSTICE JACKSON: "The tentative
5 character" --

6 MR. YANG: Of the PI.

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

11 MR. YANG: Agreed, but I think it goes
12 halfway there, and Buckhannon closes the door on
13 that --

14 JUSTICE JACKSON: Thank you.

15 MR. YANG: -- because --

16 JUSTICE JACKSON: Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 MR. YANG: Thank you.

20 CHIEF JUSTICE ROBERTS:
21 Mr. Schmalzbach.

22 ORAL ARGUMENT OF BRIAN D. SCHMALZBACH
23 ON BEHALF OF THE RESPONDENTS

24 MR. SCHMALZBACH: Mr. Chief Justice,
25 and may it please the Court:

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

10 This Court should affirm for three
11 reasons. First is the text. We do encourage
12 the Court to consult those contemporaneous legal
13 dictionaries which do say that the party in
14 whose favor a judgment is awarded is a
15 prevailing party. It does not require a final
16 judgment.

17 And, Your Honors, if you consult the
18 statutes that were in effect right before
19 Section 1988 was enacted, that includes 20
20 U.S.C. Section 1617, which did require a final
21 order, not merely a naked prevailing party.

22 And my friend on the other side said
23 that was the only such statute. It was not.
24 The legislative history of Section 1988 also
25 references the Communications Act of 1934, which

1 requires not just a prevailing party but a party
2 that finally prevails.

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

6 Second, precedent. Under this Court's
7 precedent, the touchstone of prevailing party
8 status is the material alteration of the legal
9 relationship between the parties.

10 Justice Thomas, to your question, why
11 is a consent decree enough to make you a
12 prevailing party? Buckhannon answers that
13 question, and Buckhannon says that what makes
14 the winner of a consent decree a prevailing
15 party is that consent decree accomplishes that
16 material alteration, just like a preliminary
17 injunction can.

18 Buckhannon does clarify that the
19 prevailing party has to be one who is "awarded
20 some relief by the court." That is exactly what
21 a preliminary injunction can do, and that is
22 exactly what our preliminary injunction did
23 here. It forced the Commissioner at gavel point
24 to provide the relief that we requested.

25 Third, Mr. Chief Justice, to your

1 point, Petitioner's solution, let injunctions
2 become moot, is unworkable because it would
3 force parties to slog in the many cases where no
4 damages are at issue all the way through trial
5 solely for the purpose of winning nominal
6 damages.

7 But, when plaintiffs have already won
8 the injunctive relief worth fighting about,
9 courts shouldn't have to referee shut -- such
10 fights over farthings.

11 CHIEF JUSTICE ROBERTS: Well, it does
12 seem to me that the courts then have to figure
13 out, if prevailing is not going to mean final
14 judgment on -- on the merits for at least one
15 claim, then it must be a pretty ambiguous thing
16 where you -- what constitutes prevailing?

17 Now you say, well, in a preliminary
18 injunction case, where there's nothing going on
19 beyond the time when the preliminary injunction
20 does its work, maybe that's easy. But there are
21 all sorts of other ways. If "prevailing"
22 doesn't mean you actually have to win, I mean,
23 what falls short of that?

24 MR. SCHMALZBACH: So, Your Honor, I
25 agree that those cases where a preliminary

1 injunction provides a hundred percent of the
2 relief that you went to court to get, those are
3 easy cases. But the only difference between a
4 case like that and a case like this is that we
5 were awarded only some of the relief that we
6 went to court to get. But, under Garland, that
7 doesn't matter. Garland doesn't require that we
8 win everything the way a -- a parade preliminary
9 injunction might. It only requires that you win
10 some of the benefits sought that drew you to
11 court in the first place. And --

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

14 MR. SCHMALZBACH: Please. Please,
15 Justice Kagan.

16 JUSTICE KAGAN: Yes and no. I mean,
17 you know, if you -- let me give you a
18 hypothetical and -- and let's take it out of
19 this state context. Let's just say there are
20 two neighbors, and one of them is pouring
21 pollutants into a stream that goes onto the
22 other neighbor's property, right?

23 And so the injured neighbor sues and
24 he sues for a permanent injunction, but, first,
25 he sues for a preliminary injunction. And a

1 preliminary injunction is gotten, all right? He
2 gets -- he gets -- and -- and -- and for the
3 next three years, while the court decides the
4 case, he has a very valuable thing, which is the
5 neighbor has not been able to pour pollutants
6 into his stream anymore, right?

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

16 Does he get fees?

17 MR. SCHMALZBACH: Not if he's lost on
18 the merits, Justice Kagan.

19 JUSTICE KAGAN: No. So that's Sole,
20 right?

21 MR. SCHMALZBACH: That's Sole.

22 JUSTICE KAGAN: And -- and even
23 though, like, Sole does say -- I mean, I take
24 the point that Sole reserved this question. But
25 Sole does sort of say: You can split things up

1 by claims, but we're not so keen on where -- on
2 splitting things up temporally.

3 Like, if you lost the permanent
4 injunction, the fact that you've gotten three
5 years of excellent relief is just not going to
6 get you any fees at all, right?

7 MR. SCHMALZBACH: That's right.

8 JUSTICE KAGAN: Okay. Now let's say
9 there is no permanent injunction because the
10 neighbor dies or, you know, the stream goes dry,
11 all right, and so all that's left is the
12 preliminary injunction.

13 The court could have done the same
14 thing, you know, if it had gotten to the
15 permanent injunction, which is to say no, but
16 something just sort of fortuitous has happened
17 to stop the case.

18 Why does the -- why does the analysis
19 change?

20 MR. SCHMALZBACH: Because that -- that
21 plaintiff has gotten the relief that he went to
22 court to get, Your Honor.

23 And -- and this connects to Justice
24 Alito's question about the equitable --

25 JUSTICE KAGAN: Well, he hasn't,

1 because he did go to court to get the permanent
2 thing. I mean, the preliminary injunction was a
3 kind of way station on the way to getting the
4 permanent thing. But what he really wanted --
5 this is not the single parade, right? What he
6 really wanted was for you never -- for that
7 stream that -- those pollutants never to bother
8 him.

9 And, essentially, what Sole says is:
10 Because you didn't get that, you don't get that
11 way station relief, right?

12 And so -- so I'm just sort of
13 suggesting that take out the final determination
14 and just say: We never get to the final
15 determination because of some fortuity. Why
16 does all of a sudden he get the award for the
17 way station?

18 MR. SCHMALZBACH: Your Honor, what
19 Sole suggests is that it is losing that judicial
20 imprimatur from the preliminary injunction that
21 cause -- in the final order that causes the
22 plaintiff to lose that prevailing party status.

23 And so, in Sole, you actually have a
24 loser on the merits. And what Sole says is that
25 preliminary injunction is superseded. The legal

1 and factual foundation of it has been destroyed
2 by the final order.

3 But that's not the case if the case
4 just becomes moot. Nothing about that
5 preliminary injunction has been superseded. It
6 hasn't been rejected on the merits. It -- it
7 remains in effect, except insofar as no -- no
8 relief is needed.

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

16 Now the -- the court has not
17 adjudicated in a final way anybody's rights with
18 respect to anything. And I didn't get the
19 relief I came to court seeking. It was denied
20 to me in the end in the final judgment.

21 And we normally think of all
22 preliminary orders in a case as merging into and
23 superseded by the final judgment. And I think
24 that's what Sole is driving at too.

25 So help -- help me out. I'm -- I'm

1 stuck where Justice Kagan is.

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

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

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

18 MR. SCHMALZBACH: But, while it's in
19 effect --

20 JUSTICE GORSUCH: It's moot.

21 MR. SCHMALZBACH: -- while it's in
22 effect, it grants all that relief that was
23 needed at the time. It grants all the relief
24 that you came to court --

25 JUSTICE GORSUCH: And then, at --

1 MR. SCHMALZBACH: -- to get for as
2 long as you needed it.

3 JUSTICE GORSUCH: -- and then, at --
4 and then, at the end, it disappears. It's
5 withdrawn. It's moot. It's gone.

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

10 But -- but, at the end of the day --
11 and when we think about "prevailing parties,"
12 you know, all the dictionary definitions are
13 "when the matter is finally set at rest," "when
14 the decision or verdict is rendered and the
15 judgment entered."

16 And the judgment in the hypothetical
17 here is there's no case.

18 MR. SCHMALZBACH: So, Your Honor, two
19 things.

20 One, we -- we are still prevailing
21 when the -- when the matter is set at rest. We
22 have not been told that we are not entitled to
23 relief. We're just told that we don't need more
24 relief.

25 But I would also encourage you to --

1 to look at the related statutes that were in
2 effect when Congress drafted Section 1988, which
3 shows that when Congress wants to have a statute
4 that requires you to get all the way to that
5 final order, to that finally prevailing status,
6 it knows how to do it. But Congress pointedly
7 did not do that in Section 1988.

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

15 Congress spoke very clearly after
16 Buckhannon to vindicate what Justice Ginsburg
17 thought was appropriate in the FOIA context
18 against the federal government. And, as the
19 federal government points out, mightn't we
20 expect Congress to be at least as clear when
21 it's authorizing fees against other parties,
22 including states?

23 MR. SCHMALZBACH: So, Justice Gorsuch,
24 what Buckhannon did is not what we are doing
25 here. I want to be very clear. We reject the

1 catalyst theory. What makes us a prevailing
2 party is that a court gave us the relief that we
3 sought.

4 JUSTICE GORSUCH: Yes, but we've just
5 been through that, that it -- it -- it -- yes,
6 it granted you relief, but it could go away, and
7 -- and, under Sole, you could lose it and still
8 not be entitled to fees.

9 So we have to look at not just what
10 happened with the PI but what happened after,
11 and I -- I guess that is -- you know, it's
12 pretty hard to say that your argument really
13 isn't a catalyst theory, but I -- I -- I take
14 your point.

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

17 I mean, when you get a PI, you're not
18 the prevailing party. The court has made a
19 predictive judgment that you'll probably be the
20 prevailing party, you know, and some circuits
21 are still using this sliding scale. You know,
22 you can't disregard the merits under Winter,
23 but, you know, you might have gotten the
24 preliminary injunction because the equities were
25 really strong, because maybe the pollution is

1 running onto your property.

2 And, I mean, I have not been a
3 district judge, but, as someone who's dealt with
4 our emergency docket, you know, you are making
5 those kinds of preliminary judgments in a -- in
6 a very compressed time frame and it's like a
7 51 percent, like, as you showed, a reasonable
8 likelihood of success.

9 Why is that prevailing because a
10 district court has made that judgment on a PI?

11 MR. SCHMALZBACH: Your Honor, because
12 what this Court has said is that it is the
13 relief that you earn that makes you prevailing
14 or not. It is specifically not prevailing on
15 the merits.

16 That was the legal proposition that
17 Maher v. Gagne considered and rejected. You do
18 not have to have full litigation of the issues.
19 You do not have to have a judicial determination
20 that one party's rights have been violated.

21 JUSTICE BARRETT: And everything turns
22 on your answer to Justice Gorsuch. You know,
23 Justice Gorsuch was pressing you and saying:
24 But that's not the relief that you're seeking
25 because you're really seeking a preliminary

1 injunction.

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

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

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

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

21 And Rule 65 isn't a cure-all for this
22 problem. That -- that will require fuller
23 proceedings, which we were trying to get the
24 court to undertake, but --

25 JUSTICE SOTOMAYOR: I'd forgotten that

1 they did a --

2 JUSTICE BARRETT: Had you -- did you
3 have a motion -- oh, sorry, just one last
4 question.

5 Did you have a motion for summary
6 judgment pending? I just don't know the answer
7 to that from --

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

14 JUSTICE SOTOMAYOR: That was the
15 point. You did ask for it to be speeded up, and
16 the Respond -- and the Petitioners asked them to
17 wait for the legislature to act, correct?

18 MR. SCHMALZBACH: That's exactly
19 right, Justice Sotomayor.

20 JUSTICE JACKSON: I don't --

21 JUSTICE KAVANAUGH: Can you -- go
22 ahead.

23 JUSTICE JACKSON: I don't know why
24 asking them to speed it up and have more process
25 is the solution in an attorney's fees case. I

1 mean, aren't you incurring more fees if we're
2 going to have additional process?

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

7 MR. SCHMALZBACH: I think that's
8 exactly right, Justice Jackson, and it goes to
9 the Chief Justice's question about what sort of
10 litigation incentives is this going to create.

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

17 I -- we -- we give them the
18 presumption of regularity, and that's
19 inconsistent with assuming that they're going to
20 behave in that irrational way.

21 JUSTICE ALITO: Suppose you had
22 requested nominal damages. Then what would have
23 happened?

24 MR. SCHMALZBACH: Your Honor, our
25 nominal damages request would have been thrown

1 out of court because the defendant has sovereign
2 immunity even from nominal damages claims.

3 So that's not a solution to this
4 problem of avoiding mootness when there's a
5 state defendant.

6 JUSTICE ALITO: All right. When
7 there's not a state defendant then and you had a
8 claim -- and the party has a claim for nominal
9 damages, but what it really wants is a
10 preliminary injunction?

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

18 MR. SCHMALZBACH: Your Honor, at that
19 point, we would be the loser. We would not be
20 the prevailing party. And the judicial
21 imprimatur underlying the order that gave us the
22 relief for drivers' licenses, that would be
23 dissolved at that point because we had been
24 declared the loser on the merits.

25 JUSTICE ALITO: Do you think your

1 client under those circumstances would be very
2 depressed? Well, I got the preliminary
3 injunction, but what I really wanted was a
4 dollar in nominal damages?

5 MR. SCHMALZBACH: Your Honor, whether
6 -- whether they're depressed or not, what's
7 important is that, up to that point, they had
8 gotten the relief that they needed to that
9 point.

10 JUSTICE KAVANAUGH: Can you address
11 the idea that the American rule should be a firm
12 background principle and should -- we should
13 require Congress to speak especially clearly
14 when it wants to deviate from that and including
15 the scope of how much Congress wants to deviate?

16 MR. SCHMALZBACH: Well, Your Honor, I
17 was with you until you got to the scope because
18 I -- I agree the American rule is the background
19 rule, but, once Congress has put into place this
20 prevailing party rule, that changes the
21 background rule.

22 And what this Court has done in the
23 past --

24 JUSTICE KAVANAUGH: Well, why is that?
25 Lots of times, we -- we will say, with

1 background principles of statutory
2 interpretation, to the extent, not just any
3 deviation. So why couldn't you here too say to
4 the extent Congress is deviating from the
5 American rule, the background American rule, it
6 needs to be clear?

7 MR. SCHMALZBACH: So two things,
8 Justice Kavanaugh.

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

17 But also, I think it's strange as a
18 matter of divining congressional intent to look
19 to a statute where Congress says we reject the
20 American rule in this context and then to say,
21 well, but we'll still construe it narrowly
22 because that must have been what Congress had in
23 mind. That -- that's not a faithful way of
24 implementing that intent.

25 JUSTICE KAVANAUGH: And then,

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

12 MR. SCHMALZBACH: I -- I think they're
13 more similar than they are different, Your
14 Honor. Each of them rejects the categorical
15 rule that the Petitioner proposes here.

16 And so what -- one of the important
17 results of that unanimous rejection is that we
18 do know what the world looks like where
19 preliminary injunction winners can be recognized
20 as prevailing parties. If -- if it were a
21 endless parade of horrors, we would have seen
22 that in the briefs, in the amicus briefs, and,
23 you know, we -- we have a trickle of things that
24 they don't like. We don't have that parade of
25 horrors.

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

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

21 The -- the equitable background
22 confirms the rule that all of the courts of
23 appeals have adopted insofar as they recognize
24 preliminary injunction relief as prevailing
25 parties.

1 CHIEF JUSTICE ROBERTS: Well, what --
2 what if you get a preliminary injunction and,
3 under your rule, you get attorney's fees, okay,
4 but then the case continues on and you lose at
5 the permanent -- you don't get a permanent
6 injunction? Do you have to give back the
7 attorney's fees?

8 MR. SCHMALZBACH: Your Honor, what
9 Sole says is that attorney's fees should not be
10 awarded at that preliminary stage. Sole does
11 say that we would wait until the end of the case
12 to award those fees.

13 And that makes sense because a
14 preliminary injunction may, as in Sole, be
15 undercut by the final judgment that rejects the
16 premise of that preliminary injunction.

17 CHIEF JUSTICE ROBERTS: Well, if
18 that's the case, doesn't it make -- doesn't that
19 undermine your argument? In other words, it's a
20 recognition that, of course, the preliminary
21 injunction is not final and, therefore, the
22 award of attorney's fees shouldn't be final.

23 MR. SCHMALZBACH: No, Your Honor,
24 because our -- our argument is that that
25 finality is not required. We don't require

1 finality the way we would in the Communications
2 Act of 1934. We don't require the sort of
3 finality that was required in the statute at
4 issue in Bradley.

5 So, when the legislative history is
6 addressing Bradley, it's addressing a -- a very
7 different statute that does require this sort of
8 finality from the --

9 CHIEF JUSTICE ROBERTS: So, when the
10 statute says "prevailing party," it's really
11 saying including temporarily prevailing party?

12 MR. SCHMALZBACH: Your Honor, I would
13 say it -- it means prevailing party, and when
14 Congress doesn't want the full scope of
15 prevailing parties to be entitled to fees, as it
16 did in Section 1617, then it knows how to say
17 so. It knows how to require a sort of finality.

18 JUSTICE JACKSON: Is -- is another way
19 to address the Chief Justice's question that
20 what we're looking for is whether you are
21 entitled to prevailing party status and that you
22 can be deemed a prevailing party, you -- in your
23 view, based on a preliminary injunction when you
24 can -- maybe sometimes you can't, you're --
25 you're -- you're not saying you always are --

1 you're just saying reject the statement that you
2 can never be.

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

12 MR. SCHMALZBACH: That's just right,
13 Justice Jackson.

14 JUSTICE JACKSON: And -- and you can
15 be divested. The reason why you wait until the
16 end in part is because, even though you might
17 have had prevailing party status in our view,
18 your view, early on as a result of the PI, if
19 the case continues and it's reversed, the -- the
20 judgment that -- on the merit that made you a
21 prevailing party to begin with, then, at the end
22 of the day, when we're doing the calculation, we
23 say, nope, you don't get prevailing party status
24 at that point?

25 MR. SCHMALZBACH: That's right,

1 Justice Jackson. You can be divested if you win
2 a preliminary injunction but lose on final
3 judgment. You could be divested if you win
4 partial summary judgment, which my friends on
5 the other side suggest is sufficient for
6 prevailing party status.

7 JUSTICE JACKSON: And your argument --

8 CHIEF JUSTICE ROBERTS: What -- what
9 --

10 JUSTICE JACKSON: -- is that if it's
11 mooted, if nothing else happens, you retain your
12 prevailing party status on the basis of that
13 win?

14 MR. SCHMALZBACH: That's right,
15 because the premise of your win has not been
16 undermined. But, Justice Jackson --

17 CHIEF JUSTICE ROBERTS: But --

18 MR. SCHMALZBACH: -- you can also lose
19 prevailing party status if you have a final
20 judgment and you lose on appeal. It's the sort
21 of thing that can be divested.

22 CHIEF JUSTICE ROBERTS: We've -- we've
23 talked about preliminary injunction as a way in
24 which you may be a prevailing party, even though
25 you -- not -- not final, but what about a

1 discovery dispute? What about the case turns on
2 whether you can get access to particular
3 documents, and you win on that? You don't get a
4 preliminary injunction. You obviously don't get
5 a final injunction. But you won, you got the
6 documents, and then the case goes away,
7 whatever, for whatever reason.

8 Could you be awarded fees on that?
9 You won a very significant motion.

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

15 CHIEF JUSTICE ROBERTS: You wanted
16 those documents. That was the whole reason. I
17 mean, obviously, it's -- there's not a statute
18 that says you have a right to these documents,
19 whatever the statute is, but the key to your win
20 was access to those documents.

21 MR. SCHMALZBACH: But getting that --
22 getting those documents in -- in any case I can
23 think of doesn't change the legal relationship
24 between the parties outside of court. And so a
25 -- a good example of something that's not the

1 sort of relief you went to court to get,
2 consider Shohei Ohtani's, you know, 50/50 home
3 run ball. There's an ownership dispute over it.
4 One side files a lawsuit. The plaintiff says, I
5 want a preliminary injunction to prevent you
6 from selling that ball, from auctioning it off,
7 until this ownership dispute is hammered out.

8 So winning that preliminary injunction
9 is not the relief sought in the complaint, which
10 is a declaration of ownership and the return of
11 possession. It's just something that will allow
12 the court to award relief later. That is not
13 enough for prevailing party status in the same
14 way that your hypothetical is not.

15 JUSTICE JACKSON: And, of course,
16 that's why you're saying sometimes a -- a PI may
17 not confer prevailing party status? That's an
18 example?

19 MR. SCHMALZBACH: That's an example.

20 JUSTICE JACKSON: Okay.

21 MR. SCHMALZBACH: That's right, Your
22 Honor.

23 CHIEF JUSTICE ROBERTS: So your
24 position is simply PI, it's either going to be a
25 permanent injunction or it's going to be a

1 preliminary injunction, and those are the only
2 two things that could entitle you to attorney's
3 fees?

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

6 CHIEF JUSTICE ROBERTS: Well,
7 certainly, the permanent --

8 MR. SCHMALZBACH: -- subject to
9 meeting the -- the other requirements of the --

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

12 MR. SCHMALZBACH: Your Honor, I go
13 back to the same question of whether the order
14 has provided -- has created a material
15 alteration between the parties.

16 CHIEF JUSTICE ROBERTS: Well, in the
17 one case -- I guess I still don't have --
18 understand the answer. The alter -- material
19 alteration in my hypothetical is you have access
20 to the documents. That's a material alteration.

21 But that doesn't entitle you to
22 attorney's fees?

23 MR. SCHMALZBACH: So, if -- if the
24 lawsuit is about ownership, possession of those
25 documents, if you've sued for return of the

1 documents --

2 CHIEF JUSTICE ROBERTS: No, no, it's
3 not, but that's an -- that -- that's going to
4 determine the case. It's a very important piece
5 of evidence for whatever the underlying
6 litigation is about.

7 And the court rules: You can get the
8 documents. And then, for whatever reason, the
9 case goes away, you don't get a preliminary
10 injunction, you don't get a permanent one, you
11 don't really need it. You wanted to make these
12 documents public, the Pentagon papers or
13 whatever.

14 MR. SCHMALZBACH: Right.

15 CHIEF JUSTICE ROBERTS: Does that
16 entitle you to attorney's fees?

17 MR. SCHMALZBACH: No, Your Honor.
18 That -- that's equivalent to the grant of a
19 motion for a new trial, which this Court has
20 said doesn't create that real-world material
21 change in the legal relationship between the
22 parties.

23 That's just discover -- that's
24 addressing in-court conduct that's not going to
25 grant the relief ultimately sought in the

1 complaint. That's the key, is the relief
2 ultimately sought.

3 JUSTICE GORSUCH: Counsel, you keep
4 coming to the material alteration of the
5 parties' relationship in responding to the Chief
6 Justice and others.

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

17 And -- and so are you really just
18 asking -- are you fighting with Sole, which says
19 even a material alteration temporarily that is
20 subsequently withdrawn doesn't count, right?

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

23 JUSTICE GORSUCH: So it can't be just
24 a material alteration. There has to be
25 something more. And why isn't that something

1 more the final judgment?

2 MR. SCHMALZBACH: What Sole says is
3 the foundation of that preliminary injunction
4 has to be unreversed. That foundation can't be
5 superseded by a late order.

6 JUSTICE GORSUCH: At the end -- so we
7 do have to look at the end of the case and see
8 what the court said at the end of the case,
9 right?

10 MR. SCHMALZBACH: In the same way that
11 we would with a permanent injunction.

12 JUSTICE GORSUCH: Yeah.

13 MR. SCHMALZBACH: We have to see is
14 that permanent injunction rejected on a motion
15 for reconsideration --

16 JUSTICE GORSUCH: And, here, at the
17 end of the --

18 MR. SCHMALZBACH: -- is it reversed on
19 appeal.

20 JUSTICE GORSUCH: -- case, what the
21 court said -- forget about what happened in the
22 world. What the court said is moot, I dismissed
23 the case. I provide no relief to anybody.

24 MR. SCHMALZBACH: No, Your Honor.
25 What the court said is -- implicitly is --

1 JUSTICE GORSUCH: No, no, no, no, no,
2 no. No implication. I'm looking at the
3 judgment because I'm supposed to look at the
4 judgment, the final judgment, prevailing party.
5 Who wins at the end? The court says case
6 dismissed.

7 MR. SCHMALZBACH: Your Honor, what a
8 dismissal for mootness means is that there is no
9 more relief that the court can provide.

10 JUSTICE GORSUCH: Some --

11 MR. SCHMALZBACH: It doesn't mean that
12 the relief they already provided loses its
13 judicial imprimatur because, at that point, that
14 preliminary injunction order remains good law.
15 It's just that the court can't order any
16 additional relief because there's no need for
17 it.

18 JUSTICE GORSUCH: All right. Thank
19 you.

20 JUSTICE SOTOMAYOR: What do you do
21 with a dismissal that's Munsingwear that vacates
22 the preliminary injunction?

23 MR. SCHMALZBACH: So, Your Honor, a --
24 a Munsingwear vacatur might affect a preliminary
25 injunction in the same way that it might affect

1 a final judgment. The -- I don't think
2 Munsingwear is -- is on the right track for
3 what's going on here. Munsingwear --

4 JUSTICE SOTOMAYOR: No. There wasn't
5 one here. And so that's my point, which is, if
6 a district court is unsure of whether the law is
7 good or -- or should continue the preliminary
8 injunction, it could vacate it.

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

16 And that's exactly what happened here,
17 Your Honor. The preliminary injunction that was
18 entered was immediately appealable under Section
19 1292(a). That's why it's a judgment for Rule
20 54(a) purposes. And the Commissioner chose not
21 to appeal.

22 The Commissioner also chose to avoid
23 resolution of its fully briefed pending motion
24 for summary judgment. So this isn't a
25 Munsingwear case --

1 JUSTICE SOTOMAYOR: I don't --

2 MR. SCHMALZBACH: -- even if it were
3 relevant.

4 JUSTICE SOTOMAYOR: I -- I'm not
5 saying that. I'm just asking the question,
6 which is, if a court doesn't believe that you --
7 that it should continue an injunction, it'll
8 vacate it, correct?

9 MR. SCHMALZBACH: It --

10 JUSTICE SOTOMAYOR: A preliminary
11 injunction.

12 MR. SCHMALZBACH: Yes. And -- and the
13 court could, of course, decide that it's not
14 appropriate to have it for legal or factual
15 reasons, and at that point, you would lose that
16 prevailing party status.

17 JUSTICE GORSUCH: Well, when you
18 dismiss a case, the PI disappears. What's the
19 difference? It's merged into the final
20 judgment. Do I need to say I withdraw my PI?
21 No. A district judge says case dismissed.

22 MR. SCHMALZBACH: Your Honor, because
23 I keep coming back to the touchstone, which is
24 that material alteration.

25 JUSTICE GORSUCH: Yes --

1 MR. SCHMALZBACH: You -- you went to
2 court --

3 JUSTICE GORSUCH: -- but we went
4 through that. It has to be at the end of the
5 day a material alteration. It can't be the
6 temporary one because Sole tells us it can't be
7 because what happens matter -- what happens
8 later matters. And so it has to be a material
9 alteration at the end of the case.

10 MR. SCHMALZBACH: Your Honor --

11 JUSTICE GORSUCH: Right?

12 MR. SCHMALZBACH: -- that --

13 JUSTICE GORSUCH: Do we agree on that
14 much?

15 MR. SCHMALZBACH: We do.

16 JUSTICE GORSUCH: Okay.

17 MR. SCHMALZBACH: We do look to the
18 end of the case because you can lose that
19 prevailing party status, but I suggest that it
20 is not the case that a party who has won a
21 hundred percent of the relief you went to court
22 to get is not a prevailing party. And that's
23 the implication, is that if you only look to
24 mootness without more and that's the end of the
25 game, then a party who has -- the football coach

1 who has been -- who's gotten a preliminary
2 injunction letting him pray at the championship
3 game only, he's the prevailing party under any
4 meaning of that term and should be recognized as
5 such here.

6 CHIEF JUSTICE ROBERTS: Counsel, I see
7 your red light is on.

8 Justice Kavanaugh, anything?

9 (Laughter.)

10 CHIEF JUSTICE ROBERTS: Justice
11 Thomas?

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

14 MR. SCHMALZBACH: Your Honor, it's the
15 winner of a favorable judgment and tangible
16 relief from the court and the unreversed
17 favorable judgment that's never repudiated.

18 JUSTICE THOMAS: So I still don't
19 understand then your answer when the neighbor
20 dies. It's still unreversed, right?

21 MR. SCHMALZBACH: Yes. And that
22 neighbor has gotten the relief he went to court
23 to get, not all of it. And, to be clear, the
24 fact that you're only a partial winner must be
25 considered when the district court is deciding

1 the amount of reasonable fees.

2 But, yes, as long as you are the
3 winner of the relief you went to court to get
4 and the district court or the court of appeals
5 never says that you are the loser, you're the
6 prevailing party.

7 JUSTICE THOMAS: Is there any other
8 interlocutory relief that could support a
9 prevailing party other than preliminary
10 injunction?

11 MR. SCHMALZBACH: Your Honor, it's --
12 it's possible if a -- if an appealable order, a
13 judgment, such as a -- in -- in rare
14 circumstances, stays can be appealable if they
15 are changing the parties' legal relationship in
16 the way that this does, but Congress really did
17 single out preliminary injunctions in Section
18 1292(a) for this special treatment because they
19 can have such a big effect on the parties'
20 rights. So that -- that is why they are the
21 primary form of relief that the court -- courts
22 of appeals have dealt with.

23 JUSTICE THOMAS: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice Alito?
25 Justice Kavanaugh?

1 Justice Gorsuch?

2 Justice Kavanaugh?

3 Justice Jackson?

4 Thank you, counsel.

5 MR. SCHMALZBACH: Thank you.

6 CHIEF JUSTICE ROBERTS: Rebuttal?

7 REBUTTAL ARGUMENT OF ERIKA L. MALEY

8 ON BEHALF OF THE PETITIONER

9 MS. MALEY: Thank you, Mr. Chief
10 Justice.

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

18 A lot of interlocutory orders can be
19 appealable and can be said in some sense to give
20 some benefit to the plaintiff, and yet those
21 orders do not fall within any understand --
22 typical understanding of the legal term of art
23 prevailing party.

24 I think you can also see the ambiguity
25 looking at what is going on now in the circuits.

1 As Justice Kavanaugh put it, the circuits really
2 are at sea on this question. And the sheer
3 number of published court of appeals cases
4 grappling with these scenarios shows that the
5 tests the circuits have adopted are not readily
6 administrable. They're fact-intensive and
7 unpredictable, and they're frequently sparking a
8 second major litigation over the availability of
9 fees, which in and of itself is highly
10 judicially inefficient.

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

19 Of course, the final judgment might
20 not be different, but, when that final judgment
21 is never reached, there's no way to tell what
22 the court ultimately would have held on the
23 merits of the claim.

24 And, third, I'd just like to agree
25 with Justice Gorsuch's point that the

1 combination of the principles that this Court
2 set forth in Sole and Buckhannon really do
3 answer this case. Sole provides that the Court
4 must look to the end of the case to determine
5 the prevailing party, and Buckhannon provides
6 that a non-judicial alteration, such as a
7 government's decision to change the law, does
8 not make a party the prevailing party.

9 And, under those principles, the
10 plaintiffs are not the prevailing party here.
11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel. The case is submitted.

14 (Whereupon, at 12:41 p.m., the case
15 was submitted.)

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Official - Subject to Final Review

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