

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MICHAEL W. SOLE, SECRETARY, :

4 FLORIDA DEPARTMENT OF :

5 ENVIRONMENTAL PROTECTION, ET AL., :

6 Petitioners :

7 v. : No. 06-531

8 T.A. WYNER, ET AL. :

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10 Washington, D.C.

11 Tuesday, April 17, 2007

12

13 The above-entitled matter came on for oral  
14 argument before the Supreme Court of the United States  
15 at 11:20 a.m.

16 APPEARANCES:

17 VIRGINIA A. SEITZ, ESQ., Washington, D.C.; on behalf of  
18 Petitioners.

19 PATRICIA A. MILLETT, ESQ., Assistant to the Solicitor  
20 General, Department of Justice, Washington, D.C.; on  
21 behalf of the United States, as amicus curiae,  
22 supporting Petitioners.

23 SETH M. GALANTER, ESQ., Washington, D.C.; on  
24 behalf of Respondents.

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P R O C E E D I N G S

(11:20 a.m.)

CHIEF JUSTICE ROBERTS: We'll next hear Case  
06-531, Sole versus Wyner.

Ms. Seitz.

ORAL ARGUMENT OF VIRGINIA A. SEITZ

ON BEHALF OF THE PETITIONERS

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

The court of appeals held that plaintiffs  
who obtain a preliminary injunction are prevailing  
parties entitled to fees, even though the district court  
concluded that the State's nudity ban does not violate  
the Constitution, that plaintiffs were not entitled to  
any permanent relief, and that final judgment should be  
entered against the plaintiffs.

This Court's cases have found plaintiffs to  
be prevailing parties in only two situations, when they  
win judgment on the merits or enter into a consent  
decree. And this Court has declined to confer  
prevailing party status based on interim rulings in  
ongoing litigation.

JUSTICE SCALIA: Ms. Seitz, I'd be curious  
to get your reaction to one of the points made by  
opposing counsel, which is that there were really sort

1 of two different pieces of litigation at issue here,  
2 that it was an as-applied challenge that produced the  
3 preliminary injunction, and what was rejected in the  
4 final decision was a facial challenge. Is there  
5 anything to that?

6 MS. SEITZ: No, I don't think there is. In  
7 the preliminary injunction, the district court predicted  
8 that it would find the nudity ban significantly  
9 infringed free expression and that the State had less  
10 restrictive alternatives. That's at page 18a and 19a.  
11 In the summary judgment decision, the court held that  
12 the nudity plan's effect on free impression was de  
13 minimis and it had, that the State had no less  
14 restrictive alternative. So in both instances the  
15 underlying legal claim was that as applied to nude  
16 expression the nudity ban was unconstitutional.

17 JUSTICE SOUTER: What do we make of what I  
18 understand was the court's post hoc statement that what  
19 was -- the reason for issuing the temporary injunction  
20 was the perception that there was a content basis at  
21 work? And what do we make of it in light of the fact --  
22 I think this is of record; you correct me if I'm wrong.  
23 what do we make of that in light of the fact that I  
24 believe it is in the record that I forget the  
25 appropriate State official said, well, it's true we've

1 let you do this in the past, but this is political or  
2 this looks political, which suggests that there was a  
3 content basis going on?

4 What do we make of the court's statement and  
5 the record statement by the official in deciding whether  
6 there really was in effect a separate kind of order  
7 involved in the preliminary injunction from the order  
8 that was denied at the end of the case?

9 MS. SEITZ: There's a factual answer to that  
10 and a legal answer, and I'll start with the legal  
11 answer, which is that the preliminary injunction itself  
12 states that it is assuming content --

13 JUSTICE SOUTER: Oh, I know that. I know  
14 that.

15 MS. SEITZ: And as a legal matter --

16 JUSTICE SOUTER: Because that's why I asked,  
17 what do we make of the court's statement subsequently?

18 MS. SEITZ: I think we, as the court of  
19 appeals did, have to disregard those statements because  
20 under Rule 65 of the Federal Rules of Civil Procedure,  
21 the preliminary injunction itself is the operative  
22 document, and the bases that it states for the issuance  
23 of the preliminary injunction are the bases that must  
24 govern both on judicial review of the injunction and as  
25 a matter of notice to the parties of the operative

1 effect and basis for the injunction.

2 JUSTICE SOUTER: Is that so when there is  
3 some evidence in the record that a content basis  
4 actually was the criterion?

5 MS. SEITZ: And that's the factual part of  
6 my response, which is that this testimony that was  
7 relied on which we quote in full in our reply brief, was  
8 testimony by the State, a State official who did not  
9 make the decision so was not actually aware of why the  
10 decision was made, and was testimony only to the effect  
11 that the demonstration envisioned on February 14th might  
12 be different than her previous plays, because more  
13 people might be expected.

14 Now the court drew from that telephonic  
15 testimony a possibility that the reason for the State's  
16 denial on February 14 was the content; but in fact,  
17 although the court didn't recognize it, it also had  
18 before it a decision by the State in 2000 denying her  
19 permission to put on her play based on its decision to  
20 enforce its nudity ban against her at that time.

21 JUSTICE SOUTER: Now the 2001 order was it  
22 -- was it? She applied, I think it was in --

23 MS. SEITZ: She wrote a letter in 2000  
24 requesting permission to perform her play --

25 JUSTICE SOUTER: Yeah.

1 MS. SEITZ: Under the same terms that she  
2 had under the stipulated settlement from 1998. The  
3 State denied her request in a letter indicating that the  
4 nudity ban would be enforced against the play.

5 JUSTICE SOUTER: So the factual answer in  
6 effect is there isn't enough fact to support the  
7 distinction?

8 MS. SEITZ: And -- and I guess there's in  
9 addition a legal elaboration on that factual record,  
10 which was this was all occurring in a preliminary  
11 injunction hearing that took place 24 hours before the  
12 demonstration, telephonic testimony of an ill-prepared  
13 State witness. It was never followed up, even though  
14 that claim remained live through summary judgment,  
15 because the plaintiffs continued to have a claim against  
16 an individual defendant for damages.

17 JUSTICE SOUTER: Yeah. But when you got to  
18 the summary judgment stage, the particular peace  
19 demonstration performance was -- was behind them. So  
20 they're, I'm not sure that it would have been expected  
21 to be reinjected into the case.

22 MS. SEITZ: The challenge continued because  
23 there was a claim for individual damages from the park  
24 manager. So in order to determine that individual claim  
25 for damages, of course, the plaintiffs could have put in

1 evidence that, in fact, rather than just as a  
2 preliminary prediction, the injunction was issued to  
3 prevent content-based discrimination.

4 JUSTICE SOUTER: So it wasn't moot after the  
5 demonstration.

6 MS. SEITZ: That was not mooted out.

7 CHIEF JUSTICE ROBERTS: That's one of the  
8 things that concerns me. I mean in many of these cases  
9 you have fairly elaborate proceedings over the  
10 preliminary injunction and the event takes place. I  
11 would not want to get to a situation where people feel  
12 the need to artificially keep a case alive simply to  
13 ensure their entitlement to attorney's fees. So how do  
14 you protect against that?

15 MS. SEITZ: We -- the purpose of the  
16 attorney's fees provision is to encourage and reward  
17 meritorious litigation. And at the point at which you  
18 only have a preliminary injunction, no matter how long  
19 that preliminary injunction has been in effect, what you  
20 have is a prediction of success on the merits, a  
21 balancing of equitable factors that determine interim  
22 fairness, but you do not have a decision that the  
23 defendant has violated the Constitution or any Federal  
24 law.

25 JUSTICE KENNEDY: But in, but in many cases



1 the case will become moot after a period of time and the  
2 Chief Justice and I have the same concern. The question  
3 is directed to do we just keep this litigation alive for  
4 the -- for the ancillary issue of attorney's fees?

5 MS. SEITZ: There are significant  
6 consequences to a finding of liability. And to  
7 conferring preliminary -- or fees for preliminary  
8 injunction when you do not have a final determination of  
9 violation by the State, you're essentially ordering the  
10 State and local governments who have not been judged  
11 violators of law or had a full or fair opportunity to  
12 defend as a matter of law --

13 JUSTICE KENNEDY: Well, we're asking about  
14 what rule you propose we adopt and the submission to you  
15 is that if we have a rule there can never be attorneys  
16 fees in this instance, that will then create pressure to  
17 continue the litigation when it's for all practical  
18 purposes of no real importance to the parties, other  
19 than to just establish attorney's fees. And that seems  
20 a waste of resources.

21 MS. SEITZ: And but the -- the situation --  
22 that situation will also obtain if you confer attorney's  
23 fees and prevailing party status on a plaintiff who only  
24 has a preliminary injunction.

25 JUSTICE GINSBURG: But do we have to judge

1 all preliminary and judgments alike? I mean, in some  
2 cases, the preliminary injunction is the thing. For  
3 example, suppose in this case, the demonstrators had  
4 said yeah, we went in with a -- with a broad challenge  
5 but we knew all we wanted was that peace demonstration,  
6 and we got it; so we're -- that's enough. We're not  
7 going to fight on.

8 MS. SEITZ: The fact that a plaintiff gets  
9 his or her way temporarily based on a preliminary  
10 junction does not mean that the defendant has violated  
11 that plaintiff's constitutional rights or that that  
12 would be the resolution of the --

13 JUSTICE BREYER: Who -- who -- where does it  
14 say you have to have done that? My statute here says in  
15 any action to enforce a provision of 1983 -- the TRO or  
16 whatever was such an action. It says the court in its  
17 discretion may allow the prevailing party an attorneys'  
18 fee. Well, did they prevail fail or not? They got what  
19 they wanted. And it was such an action. Doesn't say  
20 anything about whether you have been declared horrible  
21 or wonderful or violator or not a violator. It says did  
22 they get what they want in the action? Answer, yes.  
23 End of matter.

24 Now what's wrong with reading it that way?

25 MS. SEITZ: To prevail you must prevail on a

1 legal claim.

2 JUSTICE BREYER: Yeah, they got the legal  
3 claim. The legal claim is we want to have our  
4 demonstration on February 14; we have a right to do it  
5 and therefore issue an order. You said no, don't issue  
6 the order, because they don't. And therefore, they won.

7 MS. SEITZ: Respectfully, that's not a legal  
8 claim.

9 JUSTICE BREYER: It is not?

10 MS. SEITZ: The underlying legal claim is  
11 that the State's denial of the permit was  
12 unconstitutional.

13 JUSTICE BREYER: Yeah. But what about the  
14 legal claim we are under the law entitled to a  
15 preliminary injunction.

16 MS. SEITZ: That is a type of relief you are  
17 seeking but it's based on an underlying legal claim.

18 JUSTICE SCALIA: It is not a determination,  
19 is it, that they have a right to hold a demonstration?

20 MS. SEITZ: It is --

21 JUSTICE SCALIA: It is just a determination  
22 that we don't know at this point enough to say that you  
23 don't have a right.

24 MS. SEITZ: It is a product of an equitable  
25 balancing that determines interim fairness --

1 JUSTICE BREYER: Well I thought, where it  
2 say that in the statute that you have to have that  
3 particular kind of a claim?

4 MS. SEITZ: I think this Court's cases have  
5 interpreted the word prevail and prevailing parties to  
6 mean you must prevail on the merits of a legal claim.  
7 The only instance in which that is not true is in a  
8 consent decree scenario and in a consent decree what you  
9 have is a defendant assuming legal responsibility for  
10 providing relief on the merits that resolves a claim.

11 CHIEF JUSTICE ROBERTS: So what do you do in  
12 a situation of mootness where there's -- you know,  
13 they'd be happy to pursue the claim to establish that  
14 they prevail on a permanent junction as well as a  
15 preliminary one, but the case has become moot. Are they  
16 automatically disentitled to attorneys' fees in that  
17 case?

18 MS. SEITZ: A claim that is never resolved  
19 cannot be the basis of prevailing party status. And  
20 that's what your hypothetical poses. And I also think  
21 it's not correct to say there is no point in continuing  
22 with litigation in that setting. In a private attorney  
23 general setting, there is a value to having at the end  
24 of litigation a decision --

25 CHIEF JUSTICE ROBERTS: Well, there may be a

1 pint to pursuing it but I'm not sure it's one that the  
2 locality governments -- I mean if you ask them the  
3 question, would you rather be liable for attorney's fees  
4 where you lose in a preliminary injunction but then the  
5 case becomes moot, or would you rather have to face  
6 individual officer liability to prevent the case from  
7 becoming moot? Or would you rather face ongoing  
8 litigation to prevent the case from becoming moot  
9 because there's too much invested in the fees -- they  
10 might choose the former.

11 MS. SEITZ: Well in this case, of course,  
12 the State officials decided to defend the  
13 constitutionality of their nudity ban to the end. It  
14 was important to them.

15 CHIEF JUSTICE ROBERTS: Well, the plaintiffs  
16 decided to challenge it to the end. But I'm suggesting  
17 that if they know they might -- it might result in a  
18 loss of attorneys fees, when all they really wanted was  
19 a particular demonstration, others might pursue it  
20 differently.

21 MS. SEITZ: There are significant  
22 countervailing considerations, and one is that under the  
23 rule you're proposing, state and local governments would  
24 be fearful about enforcing perfectly valid laws in  
25 emergency situations for fear of being penalized with

1 fees. Then they have no fair chance --

2 JUSTICE KENNEDY: Well, you are saying the  
3 Chief Justice is proposing a rule. I think he was  
4 asking you -- you want to just give us all or nothing.  
5 And we're suggesting that it just doesn't make systemic  
6 good sense to insist that every preliminary injunction  
7 be carried through to a final adjudication for  
8 attorney's fees. And we are asking is there some midway  
9 ground. And you, you've so far -- you can structure the  
10 argument the way you want, but you so far are -- in  
11 effect telling me absolutely not.

12 MS. SEITZ: I -- I think that because of the  
13 rule I distill from this Court's case which is that you  
14 can't prevail on a claim that's not decided, it's hard  
15 for me to see what the middle ground would be. We do of  
16 course have the alternative ground for decision in this  
17 case which is that a claim, a preliminary junction  
18 that's issued in ongoing litigation whose prediction on  
19 the merits is later essentially proven to be false by  
20 subsequent litigation, can't be the basis for prevailing  
21 party --

22 JUSTICE BREYER: So what do you think, when  
23 this was enacted, to make up an example that it is as  
24 horrifying as I can think, where the Ku Klux Klan was  
25 riding in the South, and a group of civil rights

1 demonstrators wanted to make certain they could have  
2 their demonstration outside the jail and they go to the  
3 judge and says the sheriff is involved in this, the  
4 whole town is; we want an injunction tomorrow.  
5 Tomorrow. Right now. So -- and we don't really care  
6 that much about the end of it, but we'll -- we'll go  
7 ahead and litigate it if you want. Now they get their  
8 injunction. They have the demonstration; it's over. I  
9 would have thought if there was a situation for which  
10 1983 was written, it's that one.

11 MS. SEITZ: And if in fact it is clear that  
12 there is no issue law in that setting.

13 JUSTICE BREYER: Oh, there is. The other  
14 side has a lot of arguments. And they each have  
15 arguments. There are plenty of issues of law.

16 MS. SEITZ: Then you just articulated why  
17 that plaintiff should not be considered a prevailing  
18 party without taking the position that that is capable  
19 of repetition, but evading review situation, arguing  
20 that in effect the judgment is based totally on law and  
21 converting it essentially to a judgment on the merits,  
22 or otherwise coming to a final judgment on a claim, so  
23 that the plaintiff would have --

24 JUSTICE GINSBURG: But why should a  
25 plaintiff do that when the plaintiff's position is we

1 got precisely what we wanted; this is not going to be --  
2 this is a one-time only demonstration. We're not going  
3 to repeat this.

4 Why force litigation, especially when we can  
5 say in this case, you lost on the merits? The judge  
6 made a prediction. Turned out that -- that that was  
7 wrong.

8 MS. SEITZ: To -- to impose attorney's fees  
9 on a defendant, it's not simply about what the plaintiff  
10 gets, whether the plaintiff gets what he wants, but it  
11 is also about what the justification is for forcing the  
12 state and local government to pay fees.

13 And the purpose of the Civil Rights Act is  
14 to impose such fees against violators of civil rights  
15 and for the benefit of victims of similar rights  
16 violation, and not simply on those whom it is predicted  
17 will have a substantial likelihood of success on the  
18 merits.

19 JUSTICE GINSBURG: So you get a case that  
20 involves a student. And -- and something like the  
21 DeFunis case. The student is admitted to the law school  
22 event. They have much controversy over this affirmative  
23 action program. The student graduates. And -- but the  
24 student has prevailed up until that time.

25 MS. SEITZ: I don't believe the student has



1 prevailed within the meaning of Section 19(a). The  
2 student has been predicted to be likely to prevail and  
3 has received an interim fairness -- an interim  
4 adjustment based on considerations of fairness.

5 JUSTICE GINSBURG: But can't fight on  
6 because first, the student had gotten everything that he  
7 wanted and the case is moot. The student has graduated.

8 MS. SEITZ: In that situation, I think the  
9 benefit is capable of repetition for debating review or  
10 of utilizing the class action --

11 JUSTICE GINSBURG: On if you had a class  
12 action. He had a single action, and he's graduated.

13 MS. SEITZ: But there are tools a plaintiff  
14 can use to prevent this kind of case from becoming moot  
15 where there is an important need to have an issue  
16 decided.

17 JUSTICE GINSBURG: Apart from the class  
18 action, what -- what else is there?

19 MS. SEITZ: 65(a)(3) which allows  
20 consolidation of a merits determination.

21 JUSTICE GINSBURG: Oh. Yeah.

22 MS. SEITZ: I reserve the reminder of my  
23 time?

24 JUSTICE SCALIA: Well, I mean, what if --  
25 what if there's nothing else he can do? What -- what

1 horrible does he face? He faces a horrible of having to  
2 pay for his own litigation, just like the rest of us do.

3 I mean this is an extraordinary benefit  
4 we're talking about here, getting -- getting your  
5 attorney's fees paid. I -- it doesn't seem to me that  
6 we're casting this, this person into the underworld.

7 MS. SEITZ: And there's no basis for  
8 awarding fees against the innocent state and local  
9 government not determined to have committed a violation.  
10 May I reserve the balance?

11 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

12 We'll hear from Ms. Millett. Ms. Millett.

13 ORAL ARGUMENT OF PATRICIA A. MILLETT,

14 ON BEHALF OF UNITED STATES,

15 AS AMICUS CURIAE SUPPORTING PETITIONERS

16 MS. MILLETT: Mr. Chief Justice, and may it  
17 please the Court.

18 This Court has held repeatedly that  
19 liability for attorney's fees and liability for  
20 violation of Federal law go hand in hand. A preliminary  
21 injunction does not determine that there has been a  
22 violation of Federal law.

23 CHIEF JUSTICE ROBERTS: Are you on the all  
24 or nothing team this morning?

25 (Laughter.)

1 CHIEF JUSTICE ROBERTS: Is it -- can a  
2 preliminary injunction never be the basis for an award  
3 of attorney's fees?

4 MS. MILLETT: I won't say never in this  
5 narrow circumstance. And that is when, when a  
6 preliminary injunction results in a definitive and  
7 determinative ruling of law such as Thornburgh versus  
8 Obstetricians -- College of Obstetricians and  
9 Gynecologists, or the steel mill seizure case from this  
10 Court. It came up on a preliminary injunction but this  
11 Court made a dispositive and controlling ruling of  
12 constitutional law. And assuming that that declaration  
13 is then followed up by a change in behavior by the  
14 defendant compelled as result of the ruling, that would  
15 be enough. But --

16 JUSTICE SCALIA: Excuse me. How can that  
17 be, that a preliminary injunction resolves a dispositive  
18 question of law? Does that happen?

19 MS. MILLETT: Well it happened -- it  
20 happened in this Court and -- and -- and there were  
21 dissenters. But there -- it happened in this Court's  
22 case in the Thornburgh case. It came up on a  
23 preliminary junction. This Court determined there were  
24 no disputed questions of fact and it was only a contest  
25 of law what the Court said is that when they have done

1 that we can make dispositive ruling of law. But I think  
2 that's an unusual situation and what's critical is that  
3 when --

4 JUSTICE SCALIA: But it wasn't the issuance  
5 of the preliminary injunction that resolved it, it was  
6 the appeal to this Court where we -- we resolved a  
7 question of law.

8 MS. MILLETT: This Court resolved a question  
9 of law on the merits. The debate in that opinion  
10 between the majority and the dissents was that the --  
11 the dissent said majority should only decide whether it  
12 was an abuse of discretion to issue the preliminary  
13 injunction.

14 And, I mean -- it, it, it can become sort of  
15 the same thing if an error in law is necessarily an  
16 abuse of discretion, but when -- when a superior court's  
17 made a definitive --

18 JUSTICE BREYER: What is the law in respect  
19 to this, which is right on the point you're arguing,  
20 that two parties have this kind of suit and the  
21 government party -- they settle it, and giving  
22 everything that the plaintiff conceivably wants, but at  
23 the end they say: We don't admit we violated the law.  
24 Can you get attorney's fees there or not.

25 MS. MILLETT: If it's a consent decree.

1 JUSTICE BREYER: It's a consent decree, but  
2 no admission of a violation of law.

3 MS. MILLETT: No, that's right. This  
4 Court, while repeatedly stating, including unanimously  
5 just two years ago, that the central justification for  
6 attorney's fees is that the defendant is a violator of  
7 Federal law, has found that it will also permit  
8 attorney's fees in the consent decree situation, but  
9 that's because there you have a defendant who is not  
10 fighting and continuing to resist any form of final  
11 relief, has instead agreed to provide final relief that  
12 runs to a plaintiff, in favor of a plaintiff, and that  
13 advances the purpose of Federal law.

14 CHIEF JUSTICE ROBERTS: I have never  
15 understood why that's an issue. Can't the parties -- it  
16 seems to me an exception that isn't consistent with the  
17 theory. Why can't the parties just agree on attorney's  
18 fees in the settlement agreement and the consent decree  
19 and then it wouldn't have to be an issue?

20 MS. MILLETT: I think, I think that in  
21 reality certainly a party can say, I'm not entering into  
22 a consent decree if we're not going to resolve  
23 attorney's fees now or if we're going to have a fight  
24 over them. So they certainly have that power because  
25 it's largely a contract, although one enforced by

1 courts. I'm only trying to be candid with this Court's  
2 precedent, which is also recognized in Mayer versus  
3 Gagne. For some reason, maybe they reserved the  
4 question there to be disputed in court whether you'd be  
5 responsible for attorney's fees.

6 But I do think That's much more of a side  
7 show because that can all be dealt with through the  
8 contract elements of the consent agree. And really what  
9 you're talking about when a court is coercively imposing  
10 attorney's fees on a defendant is that the defendant has  
11 a right to not pay those unless they have been found to  
12 be a violator of Federal law or have agreed to through  
13 contract to deal with that issue.

14 JUSTICE SOUTER: Okay, but the argument is  
15 undercut, as you yourself say, by the settlement rule.  
16 Don't we have the settlement rule simply because we want  
17 to promote settlements? We don't want litigation to go  
18 on and on and on simply because somebody wants to  
19 establish a right to attorney's fees. And doesn't that  
20 same reasoning apply here when there is a preliminary  
21 injunction and that's all the person wants. By the same  
22 reasoning that we accept a settlement, why shouldn't we  
23 accept a preliminary injunction as being a sufficient  
24 determination of rights to justify fees because we don't  
25 want it to go on and on and on when nobody has any issue

1 of substance involved, but is just litigating for the  
2 sake of establishing a right to fees later?

3 MS. MILLETT: I have three answers to that.  
4 First of all, there are two parties here. The defendant  
5 has a right not to be assessed attorney's fees, which  
6 are a form of final relief not interim relief, without a  
7 final decision that they violated on the merits.

8 JUSTICE SOUTER: But the only attorney's  
9 fees that would be assessed would be attorney's fees  
10 attributable to the preliminary injunction.

11 MS. MILLETT: That's right, but they have a  
12 right not to pay anything if they haven't done anything  
13 wrong.

14 JUSTICE SOUTER: They have been found  
15 subject to a preliminary injunction. The playing field  
16 is no longer even.

17 MS. MILLETT: They haven't been found to be  
18 -- there may be a Presumption or a substantial  
19 likelihood they're going to lose, but that doesn't  
20 always come out. And there's not even always a  
21 substantial likelihood --

22 JUSTICE SCALIA: The point is you wouldn't  
23 mind putting that on a resume, that you have been  
24 subjected to a preliminary injunction.

25 MS. MILLETT: No --

1 JUSTICE SCALIA: It's not a black mark on  
2 your name, is it?

3 MS. MILLETT: No.

4 JUSTICE SCALIA: You haven't violated any  
5 Federal law.

6 MS. MILLETT: This is a case in point.

7 JUSTICE SOUTER: But it does mean, it does  
8 mean that somebody with a burden to establish an  
9 entitlement to the injunction has carried the burden.

10 MS. MILLETT: Well, the test is the  
11 prevailing party, not the substantially likely to  
12 prevail party. And the other reason --

13 JUSTICE SOUTER: Then let's not have it in  
14 the settlement case.

15 MS. MILLETT: Well, again settlements can be  
16 dealt with through the settlement, as part of the  
17 settlement process. But I think --

18 JUSTICE SCALIA: They are voluntary, these  
19 settlements, aren't they? So you could at least say  
20 that the innocent person who gets stuck with attorney's  
21 fees for settling gets what he asked for, right? It's  
22 voluntary.

23 MS. MILLETT: Well, that's what I tried to  
24 explain to Justice Breyer.

25 JUSTICE SCALIA: That may be, but that's not



1 the way the statute is written.

2 JUSTICE STEVENS: Would this case be  
3 different if the defendant had consented to the entry of  
4 a preliminary injunction?

5 MS. MILLETT: No, I don't think so, and I  
6 don't think courts as a matter of judicial economy want  
7 to tell the government every time we agree not to  
8 oppose, to stay the removal of an alien, that we somehow  
9 would get a bill.

10 JUSTICE STEVENS: So if this had been, if  
11 they had entered into a consent decree covering just the  
12 one event on the front burner, that would have been?

13 MS. MILLETT: A consent decree is a final  
14 resolution of a claim that legally obligates the  
15 defendant, final relief that runs in favor of the  
16 plaintiff.

17 JUSTICE STEVENS: But if they consented to  
18 the entry of a preliminary injunction, why wouldn't that  
19 be equally binding?

20 MS. MILLETT: Because it is not a final  
21 resolution. Preliminary injunctions are important.  
22 They're of value to the parties. But there's a  
23 trade-off in getting it. The reason courts can give  
24 them is they aren't committed to final relief. They  
25 aren't committed to final obligation, and they can

1 decide when --

2 JUSTICE STEVENS: Well, they were able to go  
3 ahead with their one demonstration that precipitated the  
4 litigation, and they would have been able to do it the  
5 same way if they had a consent decree instead of having  
6 the other side not fight very vigorously in opposition  
7 to the preliminary.

8 MS. MILLETT: The defendant who'S been fully  
9 vindicated at the end of the case shouldn't have to  
10 write checks to two attorneys instead of just their own.  
11 There's a fundamental fairness element here.

12 But also on the judicial economy --

13 JUSTICE STEVENS: But then why isn't the  
14 attorney -- if there were a consent decree -- I don't  
15 understand the difference.

16 MS. MILLETT: Because the defendant's in the  
17 control of the fairness issue in the consent decree and  
18 is not in this situation.

19 But the other situation, concern, is concern  
20 about judicial economy. And there's arguments in the  
21 amicus briefs on the other side that preliminary  
22 injunctions are common. But remember, this is -- the  
23 central justification is that the plaintiff is a private  
24 attorney general who doesn't just do what they want to  
25 do, but either resolves the issue of law or obtains

1 enduring changes in defendant's behavior that are of  
2 utility to the community at large. Contrary to --

3 JUSTICE KENNEDY: We have when election  
4 season comes many, many requests for injunctions, and  
5 after the election is over the case just goes away.  
6 Nobody is interested.

7 MS. MILLETT: That is not --

8 JUSTICE KENNEDY: Under your position, all  
9 of these matters must be contested until final judgment  
10 before attorney's fees are available.

11 MS. MILLETT: That is not the United States  
12 Government's experience when it's been involved in a lot  
13 of voting cases. Lots of them get fought until the end,  
14 and this Court's decision in Brown versus Choate  
15 recognizes these are capable of repetition, yet evading  
16 review. Now, if the private plaintiff doesn't want to  
17 do the work of a private attorney general, that's their  
18 choice. No one says you have to stay. It's just, if  
19 you want attorney's fees, you have to accept a  
20 preliminary injunction for what it is. It's very  
21 beneficial, but it is not a resolution on the merits  
22 that obligates the defendant to provide a form of final  
23 relief, not interim relief, to you.

24 And this Court itself has expressed  
25 significant concerns about having voting cases being run

1 up on preliminary injunctions at the last minute and the  
2 impact that can have on voting, and we shouldn't  
3 encourage that.

4 CHIEF JUSTICE ROBERTS: Ms. Millett, did I  
5 hear your legal test a while ago is an enduring change  
6 in the defendant's behavior? Is that your standard?

7 MS. MILLETT: Enduring more in -- not in the  
8 transient sense of preliminary injunction. Obviously,  
9 things change on the outside world. But in the form of  
10 final relief and permanent relief, and that's what this  
11 Court's cases have said time and again. Not only must  
12 the defendant be a violator of Federal law, but in  
13 Ferrari, in Texas Teachers versus Darwin, in Hanrahan  
14 and Hewitt, the Court has made clear that it is final, a  
15 resolution of a dispute, a final judgment, the settling  
16 of a problem that makes someone a prevailing party. And  
17 "prevailing party," as this Court explained in  
18 Buckhannon, is a term of art. As we say on pages 11 to  
19 12 of our brief, "That term of art, as defined in the  
20 relevant dictionaries at the time, was not just that you  
21 won something, but that you won at the end of the suit."

22 And that's a question of basic fundamental  
23 fairness to plaintiffs. Remember, there's going to be  
24 countervailing judicial economy concerns. If you tell  
25 governmental entities that they're going to have to

1 take -- may I finish -- - have to take emergency appeals  
2 from every interlocutory order and revisit stays to  
3 avoid liability for attorney's fees.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 Ms. Millett.

7 Now we'll hear from you, Mr. Galanter.

8 ORAL ARGUMENT OF SETH M. GALANTER

9 ON BEHALF OF THE RESPONDENTS

10 MR. GALANTER: Mr. Chief Justice and may it  
11 please the Court:

12 Respondents went into Federal court because  
13 State officials told them their protest would be illegal  
14 and they left Federal court with a preliminary  
15 injunction that prohibited State interference with their  
16 protest.

17 CHIEF JUSTICE ROBERTS: No, no. They left  
18 Federal court having lost on the permanent injunction.

19 MR. GALANTER: Well, Your Honor, 20-some  
20 months later they lost on another component of their  
21 case, where they were seeking permanent relief to enjoin  
22 the facial applicability of the regulations.

23 CHIEF JUSTICE ROBERTS: Their legal, their  
24 legal claim was that these regulations were invalid  
25 under the First Amendment. And they lost on that legal

1 claim.

2 MR. GALANTER: At the end of the case, Your  
3 Honor, yes. But at the preliminary injunction stage,  
4 one -- their claim for relief was a violation of the  
5 First Amendment and there was evidence at the  
6 preliminary injunction stage that --

7 CHIEF JUSTICE ROBERTS: Well, they succeeded  
8 in filing their complaint as well, but they don't get  
9 attorney's fees for that, because they were successful  
10 at the filing complaint stage.

11 MR. GALANTER: That's true, Your Honor. But  
12 what they obtained on February 13, 2003, was the relief  
13 they sought.

14 JUSTICE SCALIA: What if they got a TRO  
15 instead of a preliminary injunction?

16 MR. GALANTER: We're not suggesting that  
17 TROs --

18 JUSTICE SCALIA: I know you aren't. Why  
19 not?

20 MR. GALANTER: Well, there are structural  
21 differences between the two.

22 JUSTICE SCALIA: What are the two? I mean,  
23 they prevailed. They have a TRO here, something of  
24 value.

25 MR. GALANTER: There was not the adversaries

1 that exists in a preliminary injunction. And I think  
2 the distinction --

3 JUSTICE SCALIA: But it's just prevails. If  
4 you think "prevails" means you come out of there with  
5 anything that's worth something that has a contempt  
6 citation behind it, I don't see why a TRO wouldn't  
7 qualify.

8 MR. GALANTER: We're not suggesting that as  
9 the basic rule. What we are suggesting is that if you  
10 obtain a preliminary injunction, in part because  
11 Congress recognized the difference between TROs and  
12 preliminary injunctions and placed preliminary  
13 injunctions and permanent injunctions together as the  
14 kinds of orders that had --

15 JUSTICE ALITO: What if you get a  
16 preliminary injunction and then at the permanent  
17 injunction stage the basis for the preliminary  
18 injunction is reversed. Let's say the preliminary  
19 injunction here was based on the ground that the  
20 decision was content-based, a factual decision, and at  
21 the permanent injunction stage the court finds that it  
22 was not content-based.

23 MR. GALANTER: Then we would not be  
24 prevailing. But I have to point out the district court  
25 in this case expressed --

1 JUSTICE GINSBURG: Even though you got what  
2 you wanted? You got to put on the show.

3 I thought that at the end of the line, the  
4 judge said your First Amendment rights have not been  
5 violated, the nudity ordinance can be enforced. If you  
6 had come back again, say the next week, and said, we  
7 want to do another peace symbol, after the court has  
8 ruled on the permanent injunction and you lost, you  
9 certainly couldn't prevail when you're coming back with  
10 another as-applied, when the court has said this  
11 ordinance is good and doesn't violate the First  
12 Amendment.

13 That's correct. But if there were an  
14 intervening fact, if they permitted a performance of  
15 "Hair" and then said, but we'll enforce the nudity  
16 prohibition against your protest, then we would be able  
17 to come back.

18 The final judgment in this case does not  
19 preclude future as-applied challenges, either  
20 content-based or arbitrary, and the district court  
21 recognized that when it made very clear that it did not  
22 reverse or repudiate its preliminary injunction ruling  
23 simply because we lost the permanent injunction.

24 JUSTICE GINSBURG: I thought this court  
25 said, and correct me if I'm wrong, that you wanted to



1 put on a demonstration that would be like the plays,  
2 that would be hidden from public view because you have a  
3 curtain or whatever around it. And then the judge said,  
4 oh no, that's not what they wanted, they didn't want it  
5 to be hidden from you view, they wanted people to see  
6 their demonstration, so if that's what they want to do,  
7 they don't have any First Amendment protection.

8 MR. GALANTER: That is what was at the end.  
9 I would just point out that at the preliminary  
10 injunction stage, you have to remember Ms. Weyer had  
11 been permitted to put on her play, not hiding it,  
12 several years before. There was testimony suggesting  
13 that one of the differences in the result, the refusal  
14 to allow the anti-war protest, was because it was an  
15 anti-war protest. And the district court makes it  
16 clear, in our brief in opposition appendix at page 4a.  
17 He says: "The court did not revisit or reverse its  
18 earlier decision regarding the same legal issue.

19 But I think all this just goes to the point  
20 for that this case presents some interesting issues, but  
21 that the per se rule that the Petitioners press, that  
22 you can never get --

23 JUSTICE GINSBURG: Let's stay with this case  
24 because your interest is in getting fees in this case.  
25 Suppose you had lost the preliminary injunction and then

1 you won at the end of the line. Certainly you would be  
2 prevailing throughout, right?

3 MR. GALANTER: We would obviously be a  
4 prevailing party. But under Hensley --

5 JUSTICE GINSBURG: Even though you lost on  
6 the preliminary injunction?

7 MR. GALANTER: Yes. Under Hensley versus  
8 Eckert, this Court has made clear you can win on some  
9 claims, lose in others.

10 JUSTICE STEVENS: But you would get  
11 attorney's fees for the preliminary injunction work,  
12 even though you lost on that?

13 MR. GALANTER: We would get attorney's fees  
14 for the reasonable work that ended up leading to the  
15 success. District courts have for decades now parsed  
16 through these legal records, subject to review by the  
17 court of appeals.

18 JUSTICE GINSBURG: That parsing, is there  
19 any doubt that if you won on the main, in the main bout,  
20 that you would get your fees for your entire  
21 representation?

22 MR. GALANTER: Yes, there is doubt, Your  
23 Honor. The court does look for whether these fees are  
24 reasonable.

25 JUSTICE GINSBURG: Not that. But would you

1 not get -- would the judge say you don't get a penny for  
2 the effort you made to achieve the preliminary  
3 injunction because you lost, you lost it, even though in  
4 hindsight I could see that that was the wrong decision,  
5 you should have had it?

6 MR. GALANTER: Well, Your Honor, under  
7 Hensley you look to see whether they're related or  
8 unrelated claims. This Court has adopted --

9 JUSTICE GINSBURG: They're obviously  
10 related. It's the same thing. I need -- I have a short  
11 time to answer the preliminary injunction. The judge  
12 said: You haven't shown probability of success on the  
13 merits, or denies it. You win. I thought that there  
14 wasn't any doubt that you could get your fees for the  
15 successful result from the time you filed the complaint  
16 until the final judgment.

17 MR. GALANTER: We would hope a court would  
18 find that an as-applied challenge and a facial challenge  
19 were sufficiently related that we'd be entitled to fees  
20 for both. But what I have to stress --

21 JUSTICE SCALIA: Even though you lost on the  
22 preliminary injunction? The fees that you reasonably  
23 expended in seeking a preliminary injunction, even  
24 though you lost, you'd be able to charge to the other  
25 side?

1 MR. GALANTER: If I had won the final --

2 JUSTICE SCALIA: Yes or no? I think you can  
3 answer yes or no.

4 MR. GALANTER: Yes.

5 JUSTICE SCALIA: Okay.

6 MR. GALANTER: But I would like to caution  
7 that that would be eligible for fees, but the court  
8 would go through it and say how much of this were rated  
9 to your final win, was it reasonable.

10 JUSTICE SCALIA: No. No. No. How much of  
11 it related to the preliminary -- you mean anything that  
12 related only to the preliminary injunction you would be  
13 denied?

14 CHIEF JUSTICE ROBERTS: All the work you did  
15 to show irreparable harm, balance of the equities, not  
16 on the merits, you're saying that's off the table?

17 MR. GALANTER: Well, it -- no, Your Honor,  
18 because those very things are also needed at a permanent  
19 injunction.

20 JUSTICE ALITO: But you've got five hours  
21 billed -- you bill for five hours to write the brief  
22 that you submit at the preliminary injunction stage.  
23 You could get those fees later if you won at the  
24 permanent injunction stage, could you not?

25 MR. GALANTER: Probably. And we certainly

1 would get the money we did for writing the complaint.  
2 And one of our counts for the complaint here was exactly  
3 for the preliminary injunction that we obtained.

4 CHIEF JUSTICE ROBERTS: Counsel, your  
5 approach, just as there are problems from the judicial  
6 economy perspective with your friend's approach, but  
7 doesn't your approach require the States to fight tooth  
8 and nail on the preliminary injunction because they're  
9 running the risk if they lose there, they're going to  
10 pay fees even if they prevail later? As opposed to, as  
11 is often the case, they might say, you know, we consent  
12 to the entry of the preliminary injunction or we  
13 don't -- you know, we're going to save our energy.  
14 Doesn't it require them to fight every possible stage,  
15 including appeal and so on?

16 MR. GALANTER: Well, two things, Your Honor.  
17 As I think I made clear to Justice Alito, if the  
18 decision is reversed or repudiated by the district  
19 court, there would now -- we would not be prevailing  
20 parties. We would simply have gotten this benefit. But  
21 --

22 JUSTICE SCALIA: I don't know what you mean,  
23 if the decision on what? On the preliminary injunction?

24 MR. GALANTER: Yes.

25 JUSTICE SCALIA: Is repudiated by the

1 district -- how is it repudiated? What do you envision?

2 MR. GALANTER: Well, in the hypothetical  
3 where the same facts, the same law, and the district  
4 court says I was wrong, that would be the kind of  
5 repudiation.

6 JUSTICE SCALIA: In a later case, you mean?

7 MR. GALANTER: In the course of the  
8 proceedings in the same case, Your Honor. But --

9 CHIEF JUSTICE ROBERTS: Well, he doesn't  
10 have to say he's wrong. What often happens is as it is  
11 here, he say's I've got 24 hours, I don't have a brief  
12 from the other side, I kind of make the best guess I  
13 can. And then later on after an adversary presentation  
14 and an evidentiary hearing, he issues a different  
15 ruling. As here, he doesn't have to say I was wrong on  
16 my 24-hour off-the-cuff guess. It's just that I'm  
17 better informed. Is that repudiation or not?

18 MR. GALANTER: No, Your Honor, it's not.  
19 And here, in fact he said the opposite. He said I  
20 wasn't wrong, these were based on different legal  
21 theories. And --

22 JUSTICE GINSBURG: Where -- can you -- I  
23 thought what he said was -- I thought they wanted a  
24 demonstration that was going to be secure from public  
25 view, and instead I understand now that's not -- that

1 wasn't what they wanted from the start.

2           So on the premise on which I was operating,  
3 I was right, that they were going to do it just like the  
4 plays. But what they really planned to do, and did do,  
5 I was wrong because those facts were not before me. Had  
6 those facts been before me, they would have lost on the  
7 preliminary injunction.

8           MR. GALANTER: I don't believe that that's  
9 the fairest reading of the district court's subsequent  
10 orders in this case. What the district court made clear  
11 was that his as-applied holding, that the plays and the  
12 war protests were being treated differently. Remember  
13 that it's --

14           JUSTICE STEVENS: Yes, but assume the  
15 district court thought he was right at the preliminary  
16 injunction, and ruled otherwise at the permanent  
17 junction. But what if the court of appeals when it  
18 reviews the fee application, thinks he was wrong both  
19 times?

20           MR. GALANTER: Well, Your Honor, we would  
21 suggest that the person in the best position to  
22 understand what the district court was doing --

23           JUSTICE STEVENS: Is the district court.

24           MR. GALANTER: Yes, Your Honor.

25           JUSTICE STEVENS: But maybe the court of

1 appeals is in the best position to determine whether  
2 they made an error of law or not.

3 MR. GALANTER: Yes. And obviously they  
4 review errors of law, questions of law --

5 JUSTICE STEVENS: And if they think he made  
6 an error of law, what should they do?

7 MR. GALANTER: If he had made an error of  
8 law in the preliminary injunction ruling that, on  
9 de novo review, and reversed, then --

10 JUSTICE STEVENS: No, there's no reverse.  
11 It's too late. They've had the demonstration so it's  
12 all over. But in reviewing the fee application, the  
13 court of appeals concludes that the district judge --  
14 the decision represented an incorrect premise of law and  
15 therefore, he did make an error. Would that control or  
16 would the district judge's view of the validity of his  
17 own decision control?

18 MR. GALANTER: We would suggest the latter,  
19 Your Honor, in part to avoid the fees on fees litigation  
20 problems. I mean, other than the per se rule of --

21 JUSTICE KENNEDY: In other words, to avoid  
22 fees on fees, we do something that's wrong?

23 MR. GALANTER: No, Your Honor. It's not  
24 wrong. It's consistent with the text and the policies  
25 underlying --



1 JUSTICE BREYER: I thought that it -- am I  
2 wrong about that? I thought that if, A, he goes in, he  
3 gets a preliminary injunction, he says the law is da,  
4 da, da, the judge says you're right, that's what it is,  
5 preliminary injunction. And now it's continued up on  
6 appeal, the appellate court says you're wrong about the  
7 law. You got it, you had the event, but you're  
8 absolutely wrong, the law did not support you. I  
9 thought under those circumstances you were not  
10 prevailing and you couldn't get it. Is that the law or  
11 not?

12 MR. GALANTER: It is the law, Your Honor.  
13 What I'm suggesting, though, is that --

14 JUSTICE SCALIA: I thought the hypothetical  
15 was different, was, the case proceeds to final judgment  
16 on the merits; and at that point -- okay -- at that  
17 point, the issue of whether the preliminary injunction  
18 was valid or not comes up, not in the direct appeal from  
19 the preliminary injunction.

20 MR. GALANTER: I --

21 JUSTICE SCALIA: Assume you win on the  
22 merits.

23 JUSTICE STEVENS: It's a direct appeal on  
24 the fee issue.

25 MR. GALANTER: Yes, Your Honor. What my --

1 if I may, I agree with Justice Breyer's hypothetical  
2 that if you're appealing the merits and the court of  
3 appeals says something which shows that the -- the  
4 preliminary injunction should not have been issued,  
5 we're not a prevailing party. I agree with  
6 Justice Scalia that if you're appealing from the  
7 preliminary injunction and the court of appeals  
8 reverses, then you're not the prevailing party. But  
9 Justice Stevens, what I would suggest to you and to  
10 Justice Kennedy was, we shouldn't be adjudicating  
11 whether the preliminary injunction was correctly entered  
12 at the fees stage. If there is --

13 JUSTICE BREYER: Is there any authority for  
14 that? Because it does seem to me wrong, that where a  
15 person has got a preliminary injunction and it's legally  
16 unsupportable, and then he gets the fee but then they  
17 appeal that and the court of appeals determines it's  
18 legally unsupportable, he never should have gotten it,  
19 I'd be surprised if there is a case that awards the fee  
20 in those circumstances, but maybe there is. What is it?

21 MR. GALANTER: Well, I mean, the courts of  
22 appeals have adopted different standards. I can't point  
23 to one --

24 JUSTICE BREYER: Is there any case you can  
25 think of that under those circumstances let's him have

1 the attorney's fees?

2 MR. GALANTER: I can't point to one.

3 JUSTICE BREYER: No, I would be surprised.

4 MR. GALANTER: But the --

5 JUSTICE BREYER: The other thing that I  
6 wonder about this case is, are you the prevailing party?  
7 And the reason I ask that is because when I look through  
8 the record it seems to me your clients are very  
9 interesting. They have their point of view. And their  
10 point of view, one of their points of view was that the  
11 state said you can have this demonstration, just wear a  
12 skimpy swimming suit. No. Well, you can have the  
13 demonstration maybe, I'm not sure of this, but we're  
14 going to put up a cloth so other people who don't want  
15 to see you don't have to see you. And there your client  
16 said, we won't pay any attention to the cloth. At least  
17 we didn't in the past. And then looking at that I  
18 thought, well, maybe what they got was, they got a  
19 preliminary injunction or a TRO, whatever you want to  
20 call it, but it didn't stop the State from putting up  
21 the cloth. It was pretty clear the State would, and it  
22 should have been pretty clear that they were going to  
23 ignore it, which they did.

24 And why is this any different than having  
25 won an injunction to say okay, you can demonstrate, but

1 in your swimming suit? In other words, they didn't want  
2 this. They didn't want what they got. Now, what's the  
3 response to that?

4 MR. GALANTER: They did get what they  
5 wanted. They wanted to be nude. They wanted to make  
6 sure they weren't escorted off the beach or arrested.  
7 And that's exactly what happened. They had an order  
8 that protected that.

9 Now, the screen was there, and there's  
10 material disputes of fact about what they were told  
11 about the screen by whom. But the court's order did not  
12 say stay behind the screen. They were not in violation  
13 of the court order.

14 But I think this goes to the more general  
15 point, how can you tell when someone prevails, and this  
16 Court has already established that. You obtain some  
17 relief through a court award that materially changes the  
18 relationship.

19 CHIEF JUSTICE ROBERTS: Did the court order  
20 provide for a screen?

21 MR. GALANTER: The court order that -- no.  
22 The court order said that the State was not prohibited  
23 from using the means it had in the past. So it  
24 clarified what the State was not prohibited from doing.  
25 It did not impose any requirement on the plaintiffs.

1 JUSTICE SCALIA: That included a screen.

2 MR. GALANTER: It did, Your Honor, but it  
3 didn't order the screen.

4 JUSTICE SCALIA: But your people didn't want  
5 a screen.

6 MR. GALANTER: That's correct, Your Honor.

7 JUSTICE SCALIA: So they didn't get what  
8 they asked for.

9 MR. GALANTER: They didn't get removed from  
10 the beach or arrested for being nude either, Your Honor,  
11 so they did get what they wanted.

12 JUSTICE SCALIA: Well, that's only because,  
13 I guess the other side didn't take the action that they  
14 could have taken if they didn't -- if they didn't apply  
15 the screen.

16 MR. GALANTER: Your Honor, when you obtain  
17 the court award, just as if you obtain a court award to  
18 get on a ballot or to hold a parade, or to wear a tee  
19 shirt, I mean, you get that --

20 JUSTICE SCALIA: Did they conduct the  
21 demonstration with a screen or without a screen?

22 MR. GALANTER: I'm sorry?

23 JUSTICE SCALIA: Did they conduct the  
24 demonstration with or without a screen?

25 MR. GALANTER: They did not use the screen.

1 JUSTICE SCALIA: And since they didn't use  
2 the screen, the State was not prohibited from arresting  
3 them; is that correct?

4 MR. GALANTER: That's correct.

5 JUSTICE SCALIA: So they did not get what  
6 they asked for. Mainly a prohibition against the state  
7 interfering with the kind of demonstration they wanted,  
8 which was one without a screen. You say they didn't get  
9 that.

10

11 MR. GALANTER: They didn't get that, but  
12 they got something more than they had when they went in,  
13 which was, they got the right to be naked on the beach,  
14 which would have otherwise subjected them to arrest.  
15 And, I mean --

16 JUSTICE SCALIA: The state had no problem  
17 with that. In the past the State had let them do that,  
18 as long as they had the screen.

19 MR. GALANTER: It wouldn't let them do that  
20 this time even with the screen. It sent them a letter  
21 saying you may not appear on the beach nude. And I  
22 mean, obviously, at some times you don't get --

23 CHIEF JUSTICE ROBERTS: So the State  
24 prevailed to some extent as well. They prevailed to the  
25 extent of getting in the order that they can do what

1 they had done, which is erect a screen.

2 MR. GALANTER: They -- yes. They  
3 narrowed --

4 CHIEF JUSTICE ROBERTS: So they're entitled  
5 to some -- I mean, if -- this is not a reciprocal  
6 switching thing, but I mean, it does go to the question  
7 of whether or not you are the prevailing party when your  
8 opponents have prevailed to a significant extent as  
9 well.

10 MR. GALANTER: With respect, even if we had  
11 sought and obtained a permanent injunction that allowed  
12 us to protest but not behind the screen, we'd be a  
13 prevailing party, although the defendants by their  
14 successful advocacy would have narrowed the scope of the  
15 injunction.

16 JUSTICE STEVENS: Let me ask you this. Is  
17 it correct that an underlying principle of law that  
18 justified your claim for relief and your actual relief  
19 was that there's some First Amendment right to  
20 demonstrate in the nude?

21 MR. GALANTER: Yes, Your Honor, that was an  
22 underlying part of that.

23 JUSTICE STEVENS: And what is the support in  
24 our cases for that proposition, if any?

25 MR. GALANTER: Well, I think this Court's

1 cases in Barnes, the nude dancing cases suggest that  
2 expressive activity combined with nudity is protected by  
3 the First Amendment. Judge Calabrese in the Second  
4 Circuit wrote an extensive opinion in a case called  
5 Tunic versus Zapper, where he surveys this Court's  
6 cases, and finds that occasionally there may be for  
7 artistic or political reasons a right to be nude as part  
8 of more expressive conduct. But I'd like to maybe --

9 JUSTICE GINSBURG: But that was also a --  
10 that was the demonstration or the show arrangement under  
11 the -- was it the Brooklyn Bridge or the Williamsburg  
12 Bridge?

13 MR. GALANTER: It was on the streets of New  
14 York, Your Honor, yes.

15 JUSTICE GINSBURG: At 6 a.m.

16 MR. GALANTER: Yes, Your Honor. But to take  
17 this back just one step, to the notion that we either  
18 not need something that's sort of enduring or merits  
19 based in order to obtain relief. Maher versus Gagne  
20 suggested, a court doesn't need to resolve the merits in  
21 order for a party to be prevailing.

22 JUSTICE SCALIA: But see, it's so  
23 extraordinary for somebody to make the other side pay  
24 for his attorney. We don't even do that -- we don't  
25 even do that for guilty people when they -- when the



1 other side wins. So they have violated the law. We  
2 still don't make them pay the other side's attorney's  
3 fees. Now you want us to pay your client's attorney's  
4 fees even though you're not dealing with a guilty party,  
5 because ultimately the court found no, there really,  
6 this person didn't violate the law.

7 That is -- you know, that's double  
8 indemnity. I mean, it's multiplying the extraordinary  
9 departure from our usual practice, which is that each  
10 side pays his own. It's one thing to say well, if  
11 you're a bad actor, in certain circumstances, civil  
12 rights cases, we'll make you pay the other side. But  
13 it's another thing to say if you're -- if you're not a  
14 bad actor in a civil rights case but you're unlucky  
15 enough to get hit with a preliminary injunction, we'll  
16 make you pay for the other side. It just grates  
17 that that -- it ain't fair.

18 JUSTICE STEVENS: It's not just a question  
19 of weaker, but what Congress intended when they wrote a  
20 statute authorizing these fees.

21 JUSTICE SCALIA: I assume that Congress  
22 doesn't often do things that are grossly unfair. And if  
23 there are various interpretations, one of which is not  
24 grossly unfair, that's the one we should --

25 JUSTICE STEVENS: And these trump the

1 literal language very definitely.

2 MR. GALANTER: Speaking of the language, we  
3 have here when Congress enacted in 1970 -- in 1998 -- in  
4 1976, just two years before this Court had interpreted  
5 another civil rights attorney's fees statute. In that  
6 one, however, Congress had actually required a final  
7 order before attorney's fees would be awarded.

8 JUSTICE BREYER: Well, before you leave  
9 that, I wonder if -- there's one other thing floating  
10 around in my mind. I might as well bring it up. The  
11 word is prevailing, and if I go with you on the ground  
12 that it's flexible and can apply to all kinds of things,  
13 at least you have to really be prevailing, is there a  
14 good faith element in that? That is to say, if your  
15 clients when they went in to get this order and they got  
16 it, and at that time they had no intention of following  
17 what they had to do. Rather, they had every intention  
18 of going out and tearing down the curtain. Does that  
19 enter into the determination of whether they are really  
20 a prevailing party who ought to get their attorney's  
21 fees, if you're bringing the ethical element into it?

22 MR. GALANTER: I think, Your Honor, that --  
23 well, first of all, the preliminary injunction itself  
24 was an equitable remedy. Unclean hands could have gone  
25 into that question, and yes, in determining the amount

1 of fees, again, equity can be considered. The good  
2 faith of the parties, just as the complete bad faith of  
3 a plaintiff, this Court has held, permits fees to be  
4 awarded for the defendants.

5 CHIEF JUSTICE ROBERTS: You can't go into  
6 court with the objective of just getting preliminary  
7 relief, can you? I mean, you have to have an underlying  
8 claim of illegality and, that seeks permanent relief,  
9 right?

10 MR. GALANTER: That's true, Your Honor.  
11 Although you can go into court knowing that --

12 CHIEF JUSTICE ROBERTS: Knowing that --

13 MR. GALANTER: -- you're only going to be  
14 getting --

15 CHIEF JUSTICE ROBERTS: -- preliminary  
16 injunction.

17 MR. GALANTER: And everyone here -- excuse  
18 me. And everyone here knew that absent an appeal, this  
19 was the final word on the February 14th --

20 CHIEF JUSTICE ROBERTS: On the February  
21 14th, but your client sought further relief.

22 MR. GALANTER: Yes. But it also sought it  
23 as a discrete claim for relief in the complaint, this  
24 very injunction.

25 JUSTICE GINSBURG: You get costs? The

1 phrase is "attorney's fees as part of costs". So, do  
2 you get costs for up to the preliminary injunction?

3 MR. GALANTER: Yes, Your Honor. The  
4 district court in this case awarded us costs and also  
5 awarded the other side costs. And that's actually --

6 JUSTICE GINSBURG: So you would split the  
7 costs?

8 MR. GALANTER: He found we were both  
9 prevailing parties in the case. And that's also  
10 consistent with this Court's decision in Hensley, which  
11 says you look at a case and the unrelated claims; you  
12 can find that the plaintiffs are prevailing parties on  
13 some, the defendants are prevailing parties on others,  
14 and order cross awards of attorney's fees.

15 JUSTICE GINSBURG: So this defendant, having  
16 succeeded in being the winner in the whole case, didn't  
17 get costs for the whole case; is that what you're  
18 telling me?

19 MR. GALANTER: They were awarded -- they  
20 sought and were awarded all their costs for the entire  
21 case, or they sought their costs for the entire case.  
22 It was reduced by the district court as a matter of  
23 equity. But they -- not because -- not parsing it out  
24 among various parties to the case.

25 JUSTICE GINSBURG: So they were entitled to

1 costs for the entire case?

2 MR. GALANTER: Yes, they were, Your Honor.

3 JUSTICE GINSBURG: And attorney's fees under  
4 the statute are to be awarded as part of costs?

5 MR. GALANTER: Yes, Your Honor.

6 JUSTICE GINSBURG: So if you're not entitled  
7 to costs, if the defendant got the full costs, then how  
8 do you get entitled to attorney's fees when the statute  
9 puts them together? Because attorney's fees are part of  
10 costs.

11 MR. GALANTER: That's correct. And there  
12 are many cases where both parties end up getting awarded  
13 costs. Hensley was one that suggested it was possible.

14 JUSTICE GINSBURG: But this wasn't --

15 MR. GALANTER: No.

16 JUSTICE GINSBURG: This was one that the  
17 state got all of its costs from your client?

18 MR. GALANTER: Yes. And our client got  
19 costs from the state. There were counter awards --  
20 cross awards of cost, which is not unusual in civil  
21 litigation with multiple claims.

22 But more importantly, I think, when we go  
23 back and we look at the purposes, not only do we have  
24 the language here, we also have the recognition, I think  
25 as I was mentioning to the Chief Justice, that there's

1 going to be a lot of situations where core 1983 rights,  
2 core constitutional rights are at stake where you know  
3 you're not going to be able to obtain a permanent  
4 injunction. You may even, as my friends on the other  
5 side say, ask that the two be consolidated.

6 JUSTICE ALITO: What if that's not the case,  
7 but the plaintiff after getting a preliminary injunction  
8 just voluntarily dismisses the case? Do they still get  
9 costs for the preliminary injunction?

10 MR. GALANTER: Oh, I think the answer is  
11 yes. And I think that that's actually something that  
12 should be encouraged. In this case, the preliminary  
13 junction was relatively cheap, as litigation goes. To  
14 encourage them to continue, particularly since the core  
15 relief they sought had become moot. Yes, there was  
16 additional relief they sought, or it could, in a  
17 hypothetical could seek. But absent an appeal, that  
18 part of the case is over and there's no real need to  
19 continue to litigate it.

20 CHIEF JUSTICE ROBERTS: I know you were  
21 asked this question and your answer may have just  
22 slipped by me. Why, if you had asked for a TRO, why  
23 would you not be entitled to fees on that?

24 MR. GALANTER: We think that Congress's  
25 distinction as far as putting preliminary injunctions

1 and permanent injunctions in one category and TROs in  
2 another for purposes of appealability, reflect kind of a  
3 congressional judgment about which is -- which mechanism  
4 is intended to alter the kind of substantial rights.  
5 And absent the rights to appeal, absent the  
6 adversariness, the heavier focus on irreparable  
7 injuries, unlike at the preliminary injunction stage,  
8 those are all things that we think make TROs generally  
9 ineligible to affect prevailing party status.

10 JUSTICE SOUTER: Because the TRO case,  
11 characteristically the other side isn't heard, so you  
12 haven't prevailed.

13 MR. GALANTER: That is one way to view it,  
14 Your Honor. Without the adversariness at the hearing,  
15 there really was no one to prevail over. Whereas  
16 here --

17 CHIEF JUSTICE ROBERTS: No. I thought you  
18 prevailed in the sense that you secured relief. That's  
19 how you articulated it up to this point.

20 MR. GALANTER: Well, this Court has  
21 certainly described some relief as the threshold of  
22 prevailing. I'm simply suggesting that there may be  
23 other kinds of orders, as this Court suggested in  
24 Hanrahan versus Hampden, that are just not sufficiently  
25 -- they don't have a sufficient change in the legal

1 relationship between the parties to warrant prevailing  
2 party status, even though they do benefit the  
3 plaintiffs.

4 JUSTICE SCALIA: Well, you surely wouldn't  
5 say that the fact that the other side never shows up  
6 means that you can't get your attorney's fees.

7 MR. GALANTER: No, Your Honor. What I'm  
8 suggesting --

9 JUSTICE SCALIA: So you're a prevailing  
10 party whether there's an adversary on the other side or  
11 not.

12 MR. GALANTER: What I'm saying is that the  
13 TRO anticipates that, which is in part why we're not  
14 suggesting TROs are --

15 JUSTICE STEVENS: Yes. But in this very  
16 case, if you had gotten a TRO instead of a preliminary  
17 injunction, you'd have exactly the same practical  
18 situation.

19 MR. GALANTER: Yes, Your Honor, but we were  
20 -- we did have a preliminary injunction. The State  
21 therefore did have a right to appeal, and a lot of other  
22 consequences flow from the fact that there --

23 CHIEF JUSTICE ROBERTS: The State did make a  
24 point, that they were kind of -- this was short notice  
25 and they were doing the best they could on short notice.



1 I mean, they showed up but only sort of.

2 MR. GALANTER: With three attorneys, Your  
3 Honor. And yes -- and we both have our stories about  
4 why there was short notice. Ours is they only told us a  
5 week before they weren't going to allow her to protest  
6 nude. And so we moved as quickly as we could. And this  
7 is what often happens in election cases, demonstrations,  
8 parades, religious exercise.

9 CHIEF JUSTICE ROBERTS: But the regulations  
10 told you weren't allowed to protest nude.

11 MR. GALANTER: Your Honor, those same  
12 regulations had been in effect the four previous times  
13 she had protested nude. And it was consistent with the  
14 stipulation they had entered into that her nudity was  
15 protected by the First Amendment. So again, she was  
16 certainly entitled to negotiate as she tried to do with  
17 the State. She was told one week before that she  
18 wouldn't be allowed to do this. She went to court. She  
19 got the very relief that she sought and she was able to  
20 protest in the nude.

21 Now in the other cases, you're going to get  
22 someone who just finds they were denied the right to  
23 register or to get on the ballot, and that's going to be  
24 disposed of immediately. It won't be capable of  
25 repetition by evading review because the person is now

1 registered, the election is now over. Maybe that  
2 candidate won't run again. So we have a whole core of  
3 First Amendment cases that will be affected if  
4 Petitioner's per se rule that preliminary injunction is  
5 never enough goes into play, because then States have  
6 the unfortunate incentive of pushing the decisions very  
7 close to the actual event deadline so that even if they  
8 lose in court, they won't have to pay attorney's fees.

9           And I would add that in terms of the broader  
10 notion, here we have a midlevel state official sending a  
11 letter to an individual saying we don't think you have  
12 any First Amendment rights, and if you come, you'll be  
13 violating a law that's subject to criminal arrest, if  
14 you come and you're naked, you're going to be subject to  
15 criminal arrest. Absent Section 1998, it would be  
16 incredibly difficult for persons in Ms. Wyner's  
17 situation to find attorneys.

18           Thank you, Your Honor.

19           CHIEF JUSTICE ROBERTS: Thank you, counsel.  
20 Ms. Seitz, you have three minutes remaining.

21           REBUTTAL ARGUMENT BY VIRGINIA A. SEITZ

22           ON BEHALF OF THE PETITIONERS

23           JUSTICE GINSBURG: Ms. Seitz, would you  
24 clarify that point about costs? Did your client have to  
25 pay costs?

1 MS. SEITZ: The plaintiffs were awarded  
2 costs incurred on the preliminary injunction. My client  
3 was awarded a right to costs on the remainder of the  
4 litigation. Those costs were reduced to mirror the  
5 precise costs that the plaintiff was awarded on  
6 preliminary injunction, so in the end no one received  
7 any costs. But costs were allocated for plaintiffs for  
8 the preliminary injunction, and defendants for the  
9 remainder of the case.

10 I just want to make one point about the  
11 timing. The time prior to the 2003 demonstration, in  
12 2000 she wrote a letter requesting the right to protest  
13 nude and received a denial letter in response, similar  
14 to the one she received in 2003. So she was on notice  
15 as of 2000 that we were enforcing the nudity ban against  
16 her activities.

17 Second, I want to say that the district  
18 court itself characterized its holding on summary  
19 judgment, quote, "as plaintiffs are unable to show  
20 actual success on the merits," page 34a of the appendix.  
21 So there's no doubt that what even the court understood  
22 its own holding to be was that the prediction in the  
23 preliminary injunction had failed to materialize when  
24 the court considered the full case on the merits.

25 And finally, I want to say that awarding

1 fees, conferring fees for a plaintiff for obtaining a  
2 preliminary injunction essentially requires the State  
3 treasury to pay its opponents when, in fact, the State  
4 has done nothing but enforce a valid law. And we know  
5 that in this case because the case ended up getting  
6 litigated to conclusion. But simply because we don't  
7 know that in other cases involving preliminary  
8 injunctions doesn't mean it isn't true, and that's why  
9 it's fundamentally unfair to impose fees on State  
10 defendants and local governments that haven't had a full  
11 and fair opportunity to defend their legal position.

12 Thank you.

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

15 (Whereupon, at 12:19 p.m., the case in the  
16 above-entitled matter was submitted.)

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