

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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

Pages: 1 through 91  
Place: Washington, D.C.  
Date: October 8, 2024

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5   VIRGINIA DEPARTMENT OF MOTOR       )  
6   VEHICLES,                               )  
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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1 APPEARANCES:

2 ERIKA L. MALEY, Solicitor General, Richmond, Virginia;  
3 on behalf of the Petitioner.

4 ANTHONY A. YANG, Assistant to the Solicitor General,  
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6 United States, as amicus curiae, supporting the  
7 Petitioner.

8 BRIAN D. SCHMALZBACH, ESQUIRE, Richmond, Virginia; on  
9 behalf of the Respondents.

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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 think  
4 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. And this  
5 -- these parties were -- they got the  
6 likelihood-of-success judgment and they got  
7 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 a  
12 unilateral settlement. It's kind of like a "we  
13 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 from? 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 that PIs can never as  
17 opposed to 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 in  
24 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 to be able to do that.

21 MR. YANG: Right.

22 JUSTICE JACKSON: And the court says,  
23 as a preliminary matter, we don't have a whole  
24 trial yet, I think you're going to win, so I'm  
25 giving you an injunction and you get to march in

1 the parade.

2 MR. YANG: Mm-hmm.

3 JUSTICE JACKSON: And I do.

4 MR. YANG: Mm-hmm.

5 JUSTICE JACKSON: And then I'm done.

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

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

15 MR. YANG: That was a permanent  
16 injunction, and --

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

23 MR. YANG: Part of that test is a  
24 judgment on the merits, and a judgment -- this  
25 is not -- a preliminary injunction is a

1 tentative determination that does not control  
2 anything later in the suit. It's only for the  
3 PI stage, only to adjust the parties'  
4 relationships during the suit.

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

6 MR. YANG: And this is important.

7 JUSTICE KAGAN: Ms. Maley said that  
8 she didn't know of a circuit that it accepted --  
9 that had accepted this categorical position, if  
10 it's a preliminary injunction, there are no  
11 fees.

12 Do you know of any circuit that's  
13 accepted this categorical position?

14 MR. YANG: Well, that was the Smyth  
15 rule prior to.

16 JUSTICE KAGAN: Yeah, prior to it  
17 being changed, and -- and so now --

18 MR. YANG: Well, but this Court  
19 granted cert on unanimous --

20 JUSTICE KAGAN: -- so now there's --  
21 there's a uniform rule. You don't know of  
22 anything -- any court that's gone the other way.  
23 You know what? It's an interesting thing. It  
24 seems that this comes up all the time, and it  
25 seems as though it's come up frequently just in

1 recent years.

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

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

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

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

25           One is that Congress has struck a

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

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

21 Secondly --

22 JUSTICE KAGAN: Okay. I don't think  
23 that that's what I was asking about. I was  
24 asking really, you know, do you have any law out  
25 there on your side?

1           MR. YANG: We have a term of art that  
2 has gone back --

3           JUSTICE KAVANAUGH: Well, what --

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

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

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

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

24          This really goes to the appropriate  
25 separation of powers here. Congress adopts a



1 statute that has a term of art that goes back  
2 quite some time. This Court has repeatedly  
3 determined that merits determination, you know,  
4 a determination of liability on the merits is  
5 crucial to then making the defendant liable for  
6 fees.

7 CHIEF JUSTICE ROBERTS: Thank you.

8 MR. YANG: Congress --

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Justice Thomas, anything further?

12 Justice Alito?

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

19 Do you want to say something about  
20 that?

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

23 First, this -- this Court already  
24 resolved that argument in Alyeska Pipeline.  
25 There was a -- and it was actually Justice

1 Marshall's dissent, which was based on equitable  
2 principles.

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

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

18           And I think that's illustrated by the  
19 only case that they cite, the only case that  
20 they cite as -- as supporting a PI fee award,  
21 and that's Clancy versus Geb. In that case, it  
22 was not based on the temporary injunction that  
23 was issued on the day the suit was filed. The  
24 court said it was based on the trial on the  
25 merits that sustained the cause of action for an

1 injunction.

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

10 JUSTICE ALITO: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice  
12 Sotomayor?

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

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

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

20 MR. YANG: Well, certainly, the  
21 catalyst theory was --

22 JUSTICE SOTOMAYOR: It was the prime  
23 focus.

24 MR. YANG: -- but the catalyst theory  
25 does not -- we're not escaping the catalyst

1 theory here because the catalyst theory is  
2 embedded in this case. It is the second -- it  
3 is what happened with this case after --

4 JUSTICE SOTOMAYOR: But you're --  
5 you're -- you're claiming there is no catalyst  
6 theory because you're saying the legislature  
7 acted or the other side is saying it acted  
8 independently, so it -- it has nothing to do --

9 MR. YANG: Well, the catalyst theory  
10 was rejected in Buckhannon.

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

21 MR. YANG: But that's not what the  
22 term "prevailing party" has been understood,  
23 either by this Court or by the dictionary  
24 definitions that date back from before the --  
25 the -- the 20th Century. That has required a

1 final adjudication --

2 JUSTICE SOTOMAYOR: Well, that's the  
3 problem. No, it's never required a final  
4 adjudication. It's required a judgment but not  
5 a final one.

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

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

21 JUSTICE SOTOMAYOR: Thank you,  
22 Mr. Yang. We -- we have a difference of opinion  
23 on what finality means. If all you're seeking  
24 is a preliminary injunction, that's final for  
25 that purpose.

1 MR. YANG: You don't --

2 JUSTICE SOTOMAYOR: That -- that's the  
3 problem we're having.

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

10 JUSTICE SOTOMAYOR: Thank you,  
11 counsel.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?  
13 Justice Gorsuch?

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

21 Now -- so we have to look what  
22 happened afterwards. And here what happened  
23 afterwards is plaintiffs may well have convinced  
24 the Virginia state legislature to change their  
25 mind in a catalyst sort of way.

1 MR. YANG: Mm-hmm.

2 JUSTICE GORSUCH: The problem is  
3 Buckhannon says that doesn't work either.

4 MR. YANG: Correct.

5 JUSTICE GORSUCH: All right. But  
6 Justice Ginsburg in Buckhannon says, hey,  
7 Congress should fix that.

8 MR. YANG: Mm-hmm.

9 JUSTICE GORSUCH: And Congress did fix  
10 it in FOIA.

11 MR. YANG: Yep.

12 JUSTICE GORSUCH: And said involuntary  
13 -- voluntary cessation and changes, you still  
14 get fees. But --

15 MR. YANG: So long as it's not an  
16 insubstantial claim.

17 JUSTICE GORSUCH: Right.

18 MR. YANG: So quite generous, with the  
19 government's money, of course. You know, it's  
20 quite different when we're talking about private  
21 litigants and non-federal. I think Congress  
22 might be more reticent to creating such a  
23 generous departure from even the prevailing  
24 party standard, but it could.

25 JUSTICE GORSUCH: It could.

1 MR. YANG: It could.

2 JUSTICE GORSUCH: And it hasn't here.

3 MR. YANG: No.

4 JUSTICE GORSUCH: End of case. That's  
5 your theory of the case?

6 MR. YANG: That's our theory.

7 JUSTICE GORSUCH: All right. Got it.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Kavanaugh?

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

13 (Laughter.)

14 JUSTICE KAVANAUGH: And do you want to  
15 finish that?

16 MR. YANG: Like a -- like a  
17 preliminary injunction it was fleeting.

18 (Laughter.)

19 MR. YANG: And I'm not sure that I  
20 recall the brilliance.

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

23 MR. YANG: Well, it -- I was just  
24 going to try to talk about strategic mootness  
25 maybe a little bit. Maybe that's where we were



1 going. And, you know --

2 JUSTICE KAVANAUGH: Sure.

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

8 JUSTICE GORSUCH: I hope so.

9 (Laughter.)

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

16 And I think this illustrates that.  
17 There's no data to show this. This case was  
18 started when Smyth was the rule. They had no  
19 reason to expect any attorney's fees from a PI,  
20 but they took the case. So it's a little hard  
21 to say, like, there is this compelling case  
22 that, like, we're going to have a -- a -- a  
23 crash in civil rights, civil rights era.

24 And there's a real cost, again, to  
25 determining -- to deterring the government from

1 changing course when the action might be lawful  
2 but bad policy.

3 JUSTICE KAVANAUGH: Okay, that's good  
4 enough. Thank you.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Barrett?

7 JUSTICE BARRETT: No.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Jackson?

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

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

22 MR. YANG: True.

23 JUSTICE JACKSON: So I don't know how  
24 you can start your case with the premise that  
25 Sole stands for the proposition that if you win

1 a preliminary injunction, you have to get to  
2 final judgment in order to be entitled to --

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

4 JUSTICE JACKSON: -- counsel fees.

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

11 JUSTICE JACKSON: It did not say  
12 "premature."

13 MR. YANG: It --

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

19 MR. YANG: It's on page 84 of the  
20 Court's opinion.

21 JUSTICE JACKSON: Okay.

22 MR. YANG: The tentative character  
23 would have made the fee request at this initial  
24 stage premature.

25 JUSTICE JACKSON: The tentative

1 character --

2 MR. YANG: Of the PI.

3 JUSTICE JACKSON: -- would have made  
4 -- yes, but it also says we express no view as  
5 to whether or not that tentative character in PI  
6 is enough to make you a prevailing party.

7 MR. YANG: Agreed, but I think it goes  
8 halfway there, and Buckhannon closes the door on  
9 that --

10 JUSTICE JACKSON: Thank you.

11 MR. YANG: -- because --

12 JUSTICE JACKSON: Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 MR. YANG: Thank you.

16 CHIEF JUSTICE ROBERTS:

17 Mr. Schmalzbach.

18 ORAL ARGUMENT OF BRIAN D. SCHMALZBACH

19 ON BEHALF OF THE RESPONDENTS

20 MR. SCHMALZBACH: Mr. Chief Justice,  
21 and may it please the Court:

22 The winner of an unreversed favorable  
23 judgment and tangible relief from the court is a  
24 prevailing party under Section 1988. That is  
25 the test which -- we agree with the United

1 States that that is the appropriate test. It is  
2 most consistent with the statutory text,  
3 context, and precedent. And under that test,  
4 the winner of an unrepudiated preliminary  
5 injunction can qualify as a prevailing party.

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

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

18 My friend on the other side said that  
19 was the only such statute. It was not. The  
20 legislative history of Section 1988 also  
21 references the Communications Act of 1934, which  
22 requires not just a prevailing party, but a  
23 party that finally prevails.

24 Congress knew how to require that sort  
25 of finality when it wanted to in fee-shifting

1 statutes. It did not do it in Section 1988.

2 Second, precedent. Under this Court's  
3 precedent, the touchstone of prevailing party  
4 status is the material alteration of the legal  
5 relationship between the parties.

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

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

21 Third, Mr. Chief Justice, to your  
22 point, Petitioner's solution that injunctions  
23 become moot is unworkable because it would force  
24 parties to slog, in the many cases where no  
25 damages are at issue, all the way through trial

1 solely for the purpose of winning nominal  
2 damages.

3 But when plaintiffs have already won  
4 the injunctive relief worth fighting about,  
5 courts shouldn't have to referee such fights  
6 over farthings.

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

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

20 MR. SCHMALZBACH: So, Your Honor, I  
21 agree that those cases where a preliminary  
22 injunction provides 100 percent of the relief  
23 that you went to court to get, those are easy  
24 cases. But the only difference between a case  
25 like that and a case like this is that we were

1 awarded only some of the relief that we went to  
2 court to get. But under Garland, that doesn't  
3 matter. Garland doesn't require that we win  
4 everything the way a -- a parade preliminary  
5 injunction might. It only requires that you win  
6 some of the benefits sought that drew you to  
7 court in the first place. And --

8 JUSTICE KAGAN: Well -- I'm sorry. I  
9 don't want to interrupt you.

10 MR. SCHMALZBACH: Please. Please,  
11 Justice Kagan.

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

19 And so the injured neighbor sues and  
20 he sues for a permanent injunction, but first he  
21 sues for a preliminary injunction. And a  
22 preliminary injunction is gotten, all right? He  
23 gets -- he gets and -- and for the next three  
24 years, while the court decides the case, he has  
25 a very valuable thing, which is the neighbor has



1 not been able to pour pollutants into his stream  
2 anymore, right?

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

12 Does he get fees?

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

15 JUSTICE KAGAN: No. So that's Sole,  
16 right?

17 MR. SCHMALZBACH: That's Sole.

18 JUSTICE KAGAN: And -- and even  
19 though, like, Sole does say -- I mean, I take  
20 the point that Sole reserved this question. But  
21 Sole does sort of say: You can split things up  
22 by claims, but we're not so keen on where -- on  
23 splitting things up temporally.

24 Like, if you've lost the permanent  
25 injunction, the fact that you've gotten three

1 years of excellent relief is just not going to  
2 get you any fees at all, right?

3 MR. SCHMALZBACH: That's right.

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

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

14 Why does the -- why does the analysis  
15 change?

16 MR. SCHMALZBACH: Because that -- that  
17 plaintiff has gotten the relief that he went to  
18 court to get, Your Honor.

19 And -- and this connects to Justice  
20 Alito's question about the equitable --

21 JUSTICE KAGAN: Well, he hasn't,  
22 because he did go to court to get the permanent  
23 thing. I mean, the preliminary injunction was a  
24 kind of way station on the way to getting the  
25 permanent thing. But what he really wanted --

1 this is not the single parade, right? What he  
2 really wanted was for you never -- for that  
3 stream that -- those pollutants never to bother  
4 him.

5 And, essentially, what Sole says is:  
6 Because you didn't get that, you don't get that  
7 way station relief, right?

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

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

19 And so, in Sole, you actually have a  
20 loser on the merits. And what Sole says is that  
21 preliminary injunction is superseded. The legal  
22 and factual foundation of it has been destroyed  
23 by the final order.

24 But that's not the case if the case  
25 just becomes moot. Nothing about that

1 preliminary injunction has been superseded. It  
2 hasn't been rejected on the merits. It -- it  
3 remains in effect, except insofar as no relief  
4 is needed.

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

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

17 And we normally think of all  
18 preliminary orders in a case as merging into and  
19 superseded by the final judgment. And I think  
20 that's what Sole is driving at too.

21 So help -- help me out. I'm -- I'm  
22 stuck where Justice Kagan is.

23 MR. SCHMALZBACH: So, Your Honor, you  
24 -- you have not lost the foundation of that  
25 order. It's just not needed anymore. That's

1 the distinction that Sole draws in reserving the  
2 question whether -- this case, where it becomes  
3 moot. In reserving that question, Sole says  
4 what is important is that the foundation, the  
5 legal and factual foundation of the preliminary  
6 injunction is destroyed in the case where you  
7 lose on the merits.

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

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

14 MR. SCHMALZBACH: But, while it's in  
15 effect --

16 JUSTICE GORSUCH: It's moot.

17 MR. SCHMALZBACH: -- while it's in  
18 effect, it grants all that relief that was  
19 needed at the time. It grants all the relief  
20 that you came to court --

21 JUSTICE GORSUCH: And then, at --

22 MR. SCHMALZBACH: -- to get for as  
23 long as you needed it.

24 JUSTICE GORSUCH: -- and then, at --  
25 and then, at the end, it disappears. It's

1 withdrawn. It's moot. It's gone.

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

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

12 And the judgment in the hypothetical  
13 here is there's no case.

14 MR. SCHMALZBACH: So, Your Honor, two  
15 things.

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

21 But I would also encourage you to --  
22 to look at the related statutes that were in  
23 effect when Congress drafted Section 1988, which  
24 shows that when Congress wants to have a statute  
25 that requires you to get all the way to that

1 final order, to that finally prevailing status,  
2 it knows how to do it. But Congress pointedly  
3 did not do that in Section 1988.

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

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

19 MR. SCHMALZBACH: So, Justice Gorsuch,  
20 what Buckhannon did is not what we are doing  
21 here. I want to be very clear. We reject the  
22 catalyst theory. What makes us a prevailing  
23 party is that a court gave us the relief that we  
24 sought.

25 JUSTICE GORSUCH: Yes, but we've just

1     been through that, that it -- it -- it -- yes,  
2     it granted you relief, but it could go away, and  
3     -- and, under Sole, you could lose it and still  
4     not be entitled to fees.

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

11                   JUSTICE BARRETT: Counsel, I'd -- I'd  
12    like to talk about the prevailing party for a  
13    minute.

14                   I mean, when you get a PI, you're not  
15    the prevailing party. The court has made a  
16    predictive judgment that you'll probably be the  
17    prevailing party.

18                   And, you know, some circuits are still  
19    using this sliding scale. You know, you can't  
20    disregard the merits under Winter, but, you  
21    know, you might have gotten the preliminary  
22    injunction because the equities were really  
23    strong, because maybe the pollution is running  
24    onto your property.

25                   And, I mean, I have not been a



1 district judge, but, as someone who's dealt with  
2 our emergency docket, you know, you are making  
3 those kinds of preliminary judgments in a -- in  
4 a very compressed time frame and it's like a  
5 51 percent, like, as you showed, a reasonable  
6 likelihood of success.

7 Why is that prevailing because the  
8 district court has made that judgment on a PI?

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

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

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

25 So, if I disagree with you about that,

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

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

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

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

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

23 JUSTICE SOTOMAYOR: I'd forgotten that  
24 they did a --

25 JUSTICE BARRETT: Did you have a

1 motion -- oh, sorry, just one last question.

2 Did you have a motion for summary  
3 judgment pending? I just don't have the answer  
4 to that.

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

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

15 MR. SCHMALZBACH: That's exactly  
16 right, Justice Sotomayor.

17 JUSTICE JACKSON: I don't --

18 JUSTICE KAVANAUGH: Can you -- go  
19 ahead.

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

25 And it -- it just seems odd to me that

1 we'd be in a world in which, to avoid having  
2 attorney's fees on the lesser victory, we are  
3 encouraging additional litigation.

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

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

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

18 JUSTICE ALITO: Suppose you had  
19 requested nominal damages. Then what would have  
20 happened?

21 MR. SCHMALZBACH: Your Honor, our  
22 nominal damages request would have been thrown  
23 out of court because the defendant has sovereign  
24 immunity even from nominal damages claims.

25 So that's not a solution to this

1 problem of avoiding mootness when there's a  
2 state defendant.

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

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

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

22 JUSTICE ALITO: Do you think your  
23 client under those circumstances would be very  
24 depressed? Well, I got the preliminary  
25 injunction, but what I really wanted was a

1 dollar and nominal damages?

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

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

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

19 And what this Court has done in the  
20 past --

21 JUSTICE KAVANAUGH: Well, why is that?  
22 Lots of times, we -- we will say, with  
23 background principles of statutory  
24 interpretation, to the extent not just any  
25 deviation. So why couldn't you here, too, say

1 to the extent Congress is deviating from the  
2 American rule, the background American rule; it  
3 needs to be clear?

4 MR. SCHMALZBACH: So two things,  
5 Justice Kavanaugh. One is that that is not what  
6 this Court has said. So, for example, Garland  
7 says that our -- our test for prevailing party,  
8 we're going to use a generous formulation.  
9 We're going to look to any material alteration  
10 of the relationship. That's inconsistent with  
11 saying we're going to construe the American rule  
12 in a stingy way as to this statute.

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

21 JUSTICE KAVANAUGH: And then,  
22 relatedly, I guess, what about the separation of  
23 powers principle that Justice Gorsuch referred  
24 to and Mr. Yang referred to, which is we should  
25 really leave -- when there's doubt, we should

1 leave this to Congress to fix this? In part,  
2 the court of appeals story, while helpful to you  
3 in some respects, I think is unhelpful in the  
4 respect there are all sorts of different tests  
5 out there because they're just completely at sea  
6 in trying to figure out how to handle this. Do  
7 you just want to respond to that argument?

8 MR. SCHMALZBACH: I -- I think they're  
9 more similar than they are different, Your  
10 Honor. Each of them rejects the categorical  
11 rule that the Petitioner proposes here.

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

22 But I -- I also want to point out,  
23 back to Justice Alito's question about the  
24 equitable background, the equitable background  
25 is not just some "anything goes" rule. The



1 equitable background as Wright and Miller  
2 discusses in Section 2665 is actually the rule  
3 in Rule 54(d), that the winner -- that the  
4 prevailing party is presumptively entitled to  
5 shifting, subject to the district court's  
6 discretion not to shift fees.

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

17           The -- the equitable background  
18 confirms the rule that all of the courts of  
19 appeals have adopted insofar as they recognize  
20 preliminary injunction relief as prevailing  
21 parties.

22           CHIEF JUSTICE ROBERTS: Well, what --  
23 what if you get a preliminary injunction, and  
24 under your rule, you get attorney's fees, okay,  
25 but then the case continues on and you lose at

1 the -- you don't get a permanent injunction? Do  
2 you have to give back the attorney's fees?

3 MR. SCHMALZBACH: Your Honor, what  
4 Sole says is that attorney's fees should not be  
5 awarded at that preliminary stage. Sole does  
6 say we would wait until the end of the case to  
7 award those fees.

8 And that makes sense, because a  
9 preliminary injunction may, as in Sole, be  
10 undercut by the final judgment that rejects the  
11 premise of that preliminary injunction.

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

18 MR. SCHMALZBACH: No, Your Honor,  
19 because our -- our argument is that that  
20 finality is not required. We don't require  
21 finality the way we would in the Communications  
22 Act of 1934. We don't require the sort of  
23 finality that was required in the statute at  
24 issue in Bradley.

25 So when the legislative history is

1 addressing Bradley, it's addressing a -- a very  
2 different statute that does require this sort of  
3 finality from --

4 CHIEF JUSTICE ROBERTS: So when the  
5 statute says "prevailing party," it's really  
6 saying including temporarily prevailing party?

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

13 JUSTICE JACKSON: Is -- is another way  
14 to address the Chief Justice's question that  
15 what we're looking for is whether you are  
16 entitled to prevailing party status and that you  
17 can be deemed a prevailing party, you -- in your  
18 view, based on a preliminary injunction when you  
19 can -- maybe sometimes you can't, you're --  
20 you're not saying you always are -- you're just  
21 saying reject the statement that you can never  
22 be.

23 So sometimes a preliminary win can  
24 confer prevailing party status, but the actual  
25 award of the fees that you would get happens

1 when the case is over. At the end of the day,  
2 then the court goes back and we look how much  
3 attorney's time was put into it. As Justice  
4 Sotomayor points out, it's a -- you know, was it  
5 a reasonable fee request for that work that went  
6 into the PI?

7 MR. SCHMALZBACH: That's just right,  
8 Justice Jackson.

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

20 MR. SCHMALZBACH: That's right,  
21 Justice Jackson. You can be divested if you win  
22 a preliminary injunction but lose on final  
23 judgment. You could be divested if you win  
24 partial summary judgment, which my friends on  
25 the other side suggest is sufficient for

1 prevailing party --

2 JUSTICE JACKSON: And your argument --

3 CHIEF JUSTICE ROBERTS: What -- what

4 --

5 JUSTICE JACKSON: -- is that if it's  
6 mooted, if nothing else happens, you retain your  
7 prevailing party status on the basis of that  
8 win?

9 MR. SCHMALZBACH: That's right,  
10 because the premise of your win has not been  
11 undermined. But, Justice Jackson --

12 CHIEF JUSTICE ROBERTS: But --

13 MR. SCHMALZBACH: -- you can also lose  
14 prevailing party status if you have a final  
15 judgment and you lose on appeal. It's the sort  
16 of thing that can be divested.

17 CHIEF JUSTICE ROBERTS: We've -- we've  
18 talked about preliminary injunction as a way in  
19 which you may be a prevailing party, even though  
20 you -- not -- not final, but what about a  
21 discovery dispute? What about the case turns on  
22 whether you can get access to particular  
23 documents, and you win on that? You don't get a  
24 preliminary injunction. You at least don't get  
25 a final injunction. But you won, you got the

1 documents, and then the case goes away,  
2 whatever, for whatever reason.

3           Could you be awarded fees on that?  
4 You won a very significant motion.

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

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

16           MR. SCHMALZBACH: But getting that,  
17 getting those documents in -- in any case I can  
18 think of doesn't change the legal relationship  
19 between the parties outside of court. And so a  
20 -- a good example of something that's not the  
21 sort of relief you went to court to get,  
22 consider Shohei Ohtani's, you know, 50/50 home  
23 run ball. There's an ownership dispute over it.  
24 One side files a lawsuit. The plaintiff says I  
25 want a preliminary injunction to prevent you

1 from selling that ball, from auctioning it off,  
2 until this ownership dispute is hammered out.

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

10 JUSTICE JACKSON: And, of course,  
11 that's why you're saying sometimes a -- a PI may  
12 not confer prevailing party status? That's an  
13 example?

14 MR. SCHMALZBACH: That's an example,  
15 that's right, Your Honor.

16 CHIEF JUSTICE ROBERTS: So your  
17 position is simply PI, it's either going to be a  
18 permanent injunction or it's going to be a  
19 preliminary injunction, and those are the only  
20 two things that could entitle you to attorney's  
21 fees?

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

24 CHIEF JUSTICE ROBERTS: Well,  
25 certainly a permanent --

1 MR. SCHMALZBACH: -- subject to  
2 meeting the -- the other requirements of the --

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

5 MR. SCHMALZBACH: Your Honor, I go  
6 back to the same question of whether the order  
7 has provided -- has created a material  
8 alteration between the parties.

9 CHIEF JUSTICE ROBERTS: Well, in the  
10 one case -- I guess I still don't have --  
11 understand the answer. The alter -- the  
12 material alteration in my hypothetical is you  
13 have access to the documents. That's a material  
14 alteration.

15 But that doesn't entitle you to  
16 attorney's fees?

17 MR. SCHMALZBACH: So if -- if the  
18 lawsuit is about ownership, possession of those  
19 documents, if you've sued for return on --

20 CHIEF JUSTICE ROBERTS: No, no, it's  
21 not, but that's an -- that's going to determine  
22 the case. It's a very important piece of  
23 evidence for whatever the underlying litigation  
24 is about.

25 And the court rules: You can get the



1 documents. And then for whatever reason, and  
2 the case goes away, you don't get a preliminary  
3 injunction, you don't get a permanent one, you  
4 don't really need it. You wanted to make these  
5 documents public, the Pentagon papers or  
6 whatever.

7 MR. SCHMALZBACH: Right.

8 CHIEF JUSTICE ROBERTS: Does that  
9 entitle you to attorney's fees?

10 MR. SCHMALZBACH: No, Your Honor.  
11 That -- that's equivalent to the grant of a  
12 motion for new trial, which this Court has said  
13 doesn't create that real-world material change  
14 in the legal relationship between the parties.

15 That's just -- that's addressing  
16 in-court conduct that's not going to grant the  
17 relief ultimately sought in the complaint.  
18 That's the key is the relief ultimately sought.

19 JUSTICE GORSUCH: Counsel, you keep  
20 coming to the material alteration of the  
21 parties' relationship in responding to the Chief  
22 Justice and others.

23 I would have thought that that was  
24 exactly the argument made in Sole, and in our  
25 hypothetical that Justice Kagan and I discussed.

1 For a period of time there was a material  
2 alteration in the relationship between the  
3 parties, but that's not enough. It's got to be  
4 a final, at the -- when the matter comes to  
5 rest, that's the implication of a prevailing  
6 party as traditionally understood is the one who  
7 wins in the end, not temporarily.

8 And -- and so are you really just  
9 asking -- are you fighting with Sole, which says  
10 even a material alteration temporarily that is  
11 subsequently withdrawn doesn't count, right?

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

14 JUSTICE GORSUCH: So it can't be a  
15 material alteration. There has to be something  
16 more. And why isn't that something more the  
17 final judgment?

18 MR. SCHMALZBACH: What Sole says is  
19 the foundation of that preliminary injunction  
20 has to be unreversed. That foundation can't be  
21 superseded by a late order.

22 JUSTICE GORSUCH: At the end -- so we  
23 do have to look at the end of the case and see  
24 what the court said at the end of the case,  
25 right?

1                   MR. SCHMALZBACH: In the same way that  
2 we would with a permanent injunction. We have  
3 to see is that permanent injunction rejected on  
4 a motion for reconsideration --

5                   JUSTICE GORSUCH: And here at the end  
6 of the --

7                   MR. SCHMALZBACH: -- is it reversed on  
8 appeal.

9                   JUSTICE GORSUCH: -- case, what the  
10 court said -- forget about what happened in the  
11 world -- what the court said is moot, I  
12 dismissed the case. I provide no relief to  
13 anybody.

14                   MR. SCHMALZBACH: No, Your Honor.  
15 What the court said is -- implicitly is --

16                   JUSTICE GORSUCH: No, no, no, no, no,  
17 no. No implication. I'm looking at the  
18 judgment because I'm supposed to look at the  
19 judgment, the final judgment, prevailing party.  
20 Who wins at the end? The court says case  
21 dismissed.

22                   MR. SCHMALZBACH: Your Honor, what a  
23 dismissal for mootness means is that there is no  
24 more relief that the court can provide.

25                   JUSTICE GORSUCH: Some --

1           MR. SCHMALZBACH: It doesn't mean that  
2 the relief they have already provided loses its  
3 judicial imprimatur because at that point that  
4 preliminary injunction order remains good law.  
5 It's just that the court can't order any  
6 additional relief because there's no need for  
7 it.

8           JUSTICE GORSUCH: All right. Thank  
9 you.

10          JUSTICE SOTOMAYOR: What do you do  
11 with a dismissal that's Munsingwear that vacates  
12 the preliminary injunction?

13          MR. SCHMALZBACH: So, Your Honor, a --  
14 a Munsingwear vacatur might affect a preliminary  
15 injunction in the same way that it might affect  
16 a final judgment. The -- I don't think  
17 Munsingwear is -- is on the right track for  
18 what's going on here. Munsingwear --

19          JUSTICE SOTOMAYOR: No. There wasn't  
20 one here. And so that's my point, which is if a  
21 district court is unsure of whether the law is  
22 good or -- or should continue the preliminary  
23 injunction, it could vacate it.

24          MR. SCHMALZBACH: It -- it could, Your  
25 Honor. I would suggest that in this case, in

1 particular, Munsingwear would be inappropriate  
2 because what United States v. Munsingwear itself  
3 says is that this is not a remedy for a party  
4 that has slept on its rights and failed to take  
5 advantage of review where it's available.

6 And that's exactly what happened here,  
7 Your Honor. The preliminary injunction that was  
8 entered was immediately appealable under Section  
9 1292(a). That's why it's a judgment for Rule  
10 54(a) purposes. And the Commissioner chose not  
11 to appeal.

12 The Commissioner also chose to avoid  
13 resolution of its fully-briefed pending motion  
14 for summary judgment. So this isn't a  
15 Munsingwear case --

16 JUSTICE SOTOMAYOR: I don't --

17 MR. SCHMALZBACH: -- even if it were  
18 relevant.

19 JUSTICE SOTOMAYOR: I -- I'm not  
20 saying that. I'm just asking the question,  
21 which is if a court doesn't believe that you --  
22 that it should continue an injunction, it'll  
23 vacate it, correct?

24 MR. SCHMALZBACH: It --

25 JUSTICE SOTOMAYOR: A preliminary

1 injunction.

2 MR. SCHMALZBACH: Yes. And the court  
3 could, of course, decide that it's not  
4 appropriate to have it for legal or factual  
5 reasons. And at that point you would lose that  
6 prevailing party status.

7 JUSTICE GORSUCH: Well, when you  
8 dismiss a case, the PI disappears. What's the  
9 difference? It's merged into the final  
10 judgment. Do I need to say I withdraw my PI?  
11 No. A district judge says case dismissed.

12 MR. SCHMALZBACH: Your Honor, because  
13 I keep coming back to the touchstone, which is  
14 that material alteration.

15 JUSTICE GORSUCH: Yes --

16 MR. SCHMALZBACH: You went to court --

17 JUSTICE GORSUCH: -- but we went  
18 through that. It has to be at the end of the  
19 day the material alteration. It can't be the  
20 temporary one because Sole tells us it can't be  
21 because what happens matter -- what happens  
22 later matters.

23 And so it has to be material  
24 alteration at the end of the case.

25 MR. SCHMALZBACH: Your Honor --

1 JUSTICE GORSUCH: Right?

2 MR. SCHMALZBACH: -- that --

3 JUSTICE GORSUCH: Do we agree on that  
4 much?

5 MR. SCHMALZBACH: We do.

6 JUSTICE GORSUCH: Okay.

7 MR. SCHMALZBACH: We do look to the  
8 end of the case because you can lose that  
9 prevailing party status, but I suggest that it  
10 is not the case that a party who has won  
11 100 percent of the relief you went to court to  
12 get is not a prevailing party. And that's the  
13 implication is that if you only look to mootness  
14 without more and that's the end of the game,  
15 then a party who has -- the -- the football  
16 coach who has gotten a preliminary injunction  
17 letting him pray at the championship game only,  
18 he's the prevailing party under any meaning of  
19 that term and should be recognized as such here.

20 CHIEF JUSTICE ROBERTS: Counsel, I see  
21 your red light is on.

22 Justice Kavanaugh, anything?

23 (Laughter.)

24 CHIEF JUSTICE ROBERTS: Justice  
25 Thomas?

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

3 MR. SCHMALZBACH: Your Honor, it's the  
4 winner of a favorable judgment and tangible  
5 relief from the court and the unreversed  
6 favorable judgment that's never repudiated.

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

10 MR. SCHMALZBACH: Yes. And that  
11 neighbor has gotten the relief he went to court  
12 to get, not all of it. And to be clear, the  
13 fact that you're only a partial winner must be  
14 considered when the district court is deciding  
15 the amount of reasonable fees.

16 But, yes, as long as you are the  
17 winner of the relief you went to court to get  
18 and the district court or the court of appeals  
19 never says that you were the loser, you're the  
20 prevailing party.

21 JUSTICE THOMAS: Is there any other  
22 interlocutory relief that could support a  
23 prevailing party other than preliminary  
24 injunction?

25 MR. SCHMALZBACH: Your Honor, it's --



1 it's possible if a -- if an appealable order, a  
2 judgment, such as a -- in -- in rare  
3 circumstances stays can be appealable, if they  
4 are changing the parties' legal relationship in  
5 the way that this does, but Congress really did  
6 single out preliminary injunctions in Section  
7 1292(a) for this special treatment because they  
8 can have such a big effect on the parties'  
9 rights.

10 So that -- that is why they are the  
11 primary form of relief that the court -- courts  
12 of appeals have dealt with.

13 JUSTICE THOMAS: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice Alito?

15 Justice Kavanaugh?

16 Justice Gorsuch?

17 Justice Kavanaugh?

18 Justice Jackson?

19 Thank you, counsel.

20 MR. SCHMALZBACH: Thank you.

21 CHIEF JUSTICE ROBERTS: Rebuttal?

22 REBUTTAL ARGUMENT OF ERIKA L. MALEY

23 ON BEHALF OF THE PETITIONER

24 MS. MALEY: Thank you, Mr. Chief

25 Justice.

1           I'd like to start with your point that  
2           once you depart from a bright-line rule that a  
3           final judgment or a conclusive determination on  
4           a merits of at least one claim is what's  
5           required, then the rule becomes extremely  
6           ambiguous as to what could potentially qualify  
7           for prevailing party status.

8           A lot of interlocutory orders can be  
9           appealable and can be said in some sense to give  
10          some benefit to the plaintiff, and yet those  
11          orders do not fall within any understanding --  
12          typical understanding of the legal term of art  
13          prevailing party.

14          I think you can also see the ambiguity  
15          looking at what is going on now in the circuits.  
16          As Justice Kavanaugh put it, the circuits really  
17          are at sea on this question. And the sheer  
18          number of published court of appeals cases  
19          grappling with these scenarios shows that the  
20          tests the circuits have adopted are not readily  
21          administrable. They are fact-intensive and  
22          unpredictable. And they are frequently sparking  
23          a second major litigation over the availability  
24          of fees, which in and of itself is highly  
25          judicially inefficient.

1           Second, I'd like to discuss Justice  
2 Kagan's point that a preliminary injunction is  
3 really a waystation and not the final  
4 destination, not what a party is seeking in  
5 bringing suit. And they often occur in a very  
6 compressed time frame without full development  
7 of the record or the legal arguments, such that  
8 the final judgment might be different.

9           Of course, the final judgment might  
10 not be different, but when that final judgment  
11 is never reached, there's no way to tell what  
12 the court ultimately would have held on the  
13 merits of the claim.

14           And, third, I'd just like to agree  
15 with Justice Gorsuch's point that the  
16 combination of the principles that this Court  
17 set forth in *Sole* and *Buckhannon* really do  
18 answer this case. *Sole* provides that the Court  
19 must look to the end of the case to determine  
20 the prevailing party, and *Buckhannon* provides  
21 that a non-judicial alteration, such as a  
22 government's decision to change the law, does  
23 not make a party the prevailing party.

24           And under those principles, the  
25 plaintiffs are not the prevailing party here.

1 Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel. The case is submitted.

4 (Whereupon, at 12:41 p.m., the case  
5 was submitted.)

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