

1           IN THE SUPREME COURT OF THE UNITED STATES

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3   MICHAEL W. SOLE, SECRETARY,           :

4   FLORIDA DEPARTMENT OF               :

5   ENVIRONMENTAL PROTECTION, ET AL.,   :

6                   Petitioners               :

7                   v.                               :   No. 06-531

8   T.A. WYNER, ET AL.                   :

9   - - - - - x

10   Washington, D.C.

11   Tuesday, April 17, 2007

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

16 APPEARANCES:

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

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

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

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P R O C E E D I N G S

(11:20 a.m.)

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

Ms. Seitz.

ORAL ARGUMENT OF VIRGINIA A. SEITZ  
ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

1 in the past, but this is political or this looks political,  
2 which suggests that there was a content basis going on.

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

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

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

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

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

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

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

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

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

20 JUSTICE SOUTER: That was 2001 order, was it?  
21 She applied, I think it was in --

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

24 JUSTICE SOUTER: Yes.

25 MS. SEITZ: -- under the same terms that she

1 had under the stipulated settlement from 1998. The  
2 State denied her request in a letter indicating that the  
3 nudity ban would be enforced against the play.

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

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

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

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

1 preliminary prediction, the injunction was issued to  
2 prevent content-based discrimination.

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

5 MS. SEITZ: That was not proved out on  
6 summary --

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

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

25 JUSTICE KENNEDY: But -- but in many cases



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

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

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

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

25 JUSTICE GINSBURG: Does that have to judge

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

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

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

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

24 MS. SEITZ: To prevail you must prevail on a  
25 legal claim.

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

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

8 JUSTICE BREYER: It is not?

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

12 JUSTICE BREYER: What about the legal claim  
13 we are under the law entitled to a preliminary injunction?

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

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

18 MS. SEITZ: It is --

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

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

24 JUSTICE BREYER: Fine, fine, I just -- where  
25 does it say that in the statute that you have to have that

1 particular kind of a claim?

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

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

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

24 CHIEF JUSTICE ROBERTS: Well, there may be a  
25 point to pursuing it but I'm not sure it's one that the

1 local governments -- I mean if you ask them the  
2 question, would you rather be liable for attorney's fees  
3 where you lose in a preliminary injunction but then the  
4 case becomes moot, or would you rather have to face  
5 individual officer liability to prevent the case from  
6 becoming moot? Or would you rather face ongoing  
7 litigation to prevent the case from becoming moot  
8 because there's too much invested in the attorney's fees,  
9 they might choose the former.

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

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

20 MS. SEITZ: There are significant  
21 countervailing considerations, and one is that under the  
22 rule you're proposing, State and local Governments will  
23 be fearful about enforcing perfectly valid laws in  
24 emergency situations for fear of being penalized with  
25 fees. Then they have no fair chance --

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

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

21 JUSTICE BREYER: What do you think, when  
22 this was enacted -- make up an example that it is as  
23 horrifying as I can think, where the Ku Klux Klan was  
24 riding in the South, and a group of civil rights  
25 demonstrators wanted to make certain they could have

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

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

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

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

23 JUSTICE GINSBURG: But why should a  
24 plaintiff do that when the plaintiff's position is we  
25 got precisely what we wanted; this is not going to be --

1 this is a one-time-only demonstration. We're not going  
2 to repeat this.

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

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

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

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

24 MS. SEITZ: I don't believe the student has  
25 prevailed within the meaning of section 1988. The



1 student has been predicted to be likely to prevail and  
2 has received an interim fairness -- an interim  
3 adjustment based on considerations of fairness.

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

7 MS. SEITZ: In that situation, I think the  
8 benefit of capable-of-repetition-but-evading review or  
9 of utilizing the class action --

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

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

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

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

20 JUSTICE GINSBURG: Oh. Yes.

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

23 JUSTICE SCALIA: Well, I mean, what if --  
24 what if there's nothing else he can do? What -- what  
25 horrible does he face? He faces the horrible of having to

1 pay for his own litigation, just like the rest of us do.

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

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

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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

12 ORAL ARGUMENT OF PATRICIA A. MILLETT,

13 ON BEHALF OF UNITED STATES,

14 AS AMICUS CURIAE SUPPORTING PETITIONERS

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

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

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

24 (Laughter.)

25 CHIEF JUSTICE ROBERTS: Is it -- can a

1 preliminary injunction never be the basis for an award  
2 of attorney's fees?

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

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

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

1 think that's an unusual situation and what's critical is  
2 that when --

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

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

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

17 JUSTICE BREYER: Just give me the case on  
18 this; it's right on the point. I sometimes get mixed up  
19 in my dissents, and waht the law is.

20 (Laughter.)

21 JUSTICE BREYER: What is the law in respect  
22 to this, which is right on the point you're arguing,  
23 that two parties have this kind of suit and the  
24 Government party -- they settle it, and giving  
25 everything that the plaintiff conceivably wants, but at

1 the end they say: We don't admit we violated the law.  
2 Can you get attorney's fees there or not?

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

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

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

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

23 MS. MILLETT: I mean, I think -- I think that  
24 in reality it certainly -- a party can say, I'm not  
25 entering into a consent decree if we're either not going to

1 resolve attorney's fees now or if we're going to have a  
2 fight over them. So they certainly have that power  
3 because it's largely a contract, although one enforced by  
4 courts. I'm only trying to be candid with this Court's  
5 precedent, which is also recognized in Maher versus  
6 Gagne. For some reason, maybe they reserved the  
7 question there to be disputed in court whether you'd be  
8 responsible for attorney's fees.

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

17           JUSTICE SOUTER: Okay, but the argument is  
18 undercut, as you yourself say, by the settlement rule.  
19 Don't we have the settlement rule simply because we want  
20 to promote settlements? We don't want litigation to go  
21 on and on and on simply because somebody wants to  
22 establish a right to attorney's fees. And doesn't that  
23 same reasoning apply here when there is a preliminary  
24 injunction and that's all the person wants. By the same  
25 reasoning that we accept a settlement, why shouldn't we

1 accept the preliminary injunction as being a sufficient  
2 determination of rights to justify fees because we don't  
3 want it to go on and on and on when nobody has any issue  
4 of substance involved, but is just litigating for the  
5 sake of establishing a right to fees later?

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

11 JUSTICE SOUTER: But the only attorney's  
12 fees that would be assessed would be attorney's fees  
13 attributable to the preliminary injunction.

14 MS. MILLETT: That's right, but they have a  
15 right not to pay anything if they haven't done anything  
16 wrong.

17 JUSTICE SOUTER: They have been found  
18 subject to a preliminary injunction. The playing field  
19 is no longer even.

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

25 JUSTICE SOUTER: But the point is --

1 JUSTICE SCALIA: You wouldn't mind putting  
2 that on a resume, you have been subjected to a  
3 preliminary injunction.

4 MS. MILLETT: No, it's certainly --

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

7 MS. MILLETT: No.

8 JUSTICE SCALIA: You haven't violated any  
9 Federal law.

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

11 JUSTICE SOUTER: But it does mean, it does  
12 mean that somebody with a burden to establish an  
13 entitlement to the injunction has carried the burden.

14 MS. MILLETT: Well, the statutory test is  
15 prevailing-party, not the substantially-likely-to-  
16 prevail-party. And the other reason --

17 JUSTICE SOUTER: Then let's not have it in  
18 the settlement case.

19 MS. MILLETT: Well, those -- again  
20 settlements can be dealt with through the settlement,  
21 as part of the settlement process. But I think --

22 JUSTICE SCALIA: They are voluntary, these  
23 settlements, aren't they? So you could at least say  
24 that the innocent person who gets socked with attorney's  
25 fees for settling gets what he asked for, right? It's



1 voluntary.

2 MS. MILLETT: Well, that's why I tried to  
3 explain to Justice Breyer, they have agreed --

4 JUSTICE SCALIA: That may be, but that's not  
5 the way the statute is written.

6 JUSTICE STEVENS: Would this case be  
7 different if the defendants had consented to the entry of  
8 a preliminary injunction?

9 MS. MILLETT: No, I don't think so, and I  
10 don't think courts as a matter of judicial economy want  
11 to tell the Government every time we agree not to  
12 oppose, to stay the removal of an alien, that we somehow  
13 would get a -- to prevail.

14 JUSTICE STEVENS: So if this had been, if  
15 they had entered into a consent decree covering just the  
16 one event on the front burner, that would have been  
17 different?

18 MS. MILLETT: A consent decree is a final  
19 resolution of a claim that legally obligates the  
20 defendant to -- relief that runs in favor of the  
21 plaintiff.

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

25 MS. MILLETT: Because it is not a final

1 resolution. Preliminary injunctions are important.  
2 They're of value to parties. But there's a trade-off in  
3 getting it. The reason courts can give them is they  
4 aren't committed to final relief. They aren't committed  
5 to final obligations, and they can decide them in a --

6 JUSTICE STEVENS: No, but they were able to go  
7 ahead with their one demonstration that precipitated the  
8 litigation, and they would have been able to do it the  
9 same way if they had a consent decree instead of having  
10 the other side not fight very vigorously in opposition  
11 to the preliminary.

12 MS. MILLETT: The defendant who's been fully  
13 vindicated at the end of the case shouldn't have to  
14 write checks to two attorneys instead of just their own.  
15 There's a fundamental fairness element here.

16 But also on the judicial economy, defendants  
17 are going to --

18 JUSTICE STEVENS: But then why isn't that true  
19 in a consent -- if there were a consent decree? I don't  
20 understand the difference.

21 MS. MILLETT: No -- because the defendant's in  
22 the control of the fairness issue in the consent decree and  
23 is not in this situation.

24 But the other situation -- concern -- concern  
25 about judicial economy. And there's arguments in the

1 amicus briefs on the other side that preliminary  
2 injunctions are common. But remember, this is -- the  
3 central justification is that the plaintiff is a private  
4 attorney general who doesn't just do what they want to  
5 do, but either resolves the issue of law or obtains  
6 enduring changes in defendant's behavior that are of  
7 utility to the community at large. Structuring civil  
8 rights --

9 JUSTICE KENNEDY: We have when election  
10 season comes many, many requests for injunctions, and  
11 after the election is over the case just goes away.  
12 Nobody is interested.

13 MS. MILLETT: That is not --

14 JUSTICE KENNEDY: Under your position, all  
15 of these matters must be -- contested until final  
16 judgment before attorney's fees are available.

17 MS. MILLETT: That is not the United States  
18 Government's experience when it's been involved in a lot  
19 of voting cases. Lots of them get fought until the end,  
20 and this Court's decision in Brown versus Chote recognized  
21 that these are capable of repetition, yet evading  
22 review. Now, if the private plaintiff doesn't want to  
23 do the work of a private attorney general, that's their  
24 choice. No one says you have to stay. It's just, if  
25 you want attorney's fees, you have to accept a

1 preliminary injunction for what it is. It's very  
2 beneficial, but it is not a resolution on the merits  
3 that obligates a defendant to provide a form of final  
4 relief, not interim relief, to you.

5 And this Court itself has expressed  
6 significant concerns about having voting cases being run  
7 up on preliminary injunctions at the last minute and the  
8 impact that can have on voting, and we shouldn't  
9 encourage that.

10 CHIEF JUSTICE ROBERTS: Ms. Millett, did I  
11 hear your legal test awhile ago is an enduring change  
12 in the defendant's behavior? Is that your standard?

13 MS. MILLETT: Enduring more in -- not in the  
14 transient sense of preliminary injunction. Obviously,  
15 things change in the outside world. But in the form of  
16 final relief and permanent relief, and that's what this  
17 Court's cases have said time and again. Not only must  
18 a defendant be a violator of Federal law, but in  
19 *Farrar*, in *Texas Teachers versus Garland*, in *Hanrahan*  
20 and *Hewitt*, the Court has made clear that it is final, a  
21 resolution of a dispute, a final judgment, the settling  
22 of a problem that makes someone a prevailing-party. And  
23 "prevailing-party," as this Court explained in  
24 *Buckhannon*, is a term of art. As we say on pages 11 to  
25 12 of our brief, "That term of art, as defined in the

1 relevant dictionaries at the time, was not just that you  
2 won something, but that you won at the end of the suit."

3 And that's a question of basic fundamental  
4 fairness to plaintiffs. Remember, there's going to be  
5 countervailing judicial economy concerns. If you tell  
6 governmental entities that they're going to have to  
7 take -- may I finish -- have to take emergency appeals  
8 from every interlocutory order and resist stays to  
9 avoid liability for attorney's fees.

10 Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 Ms. Millett.

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

14 ORAL ARGUMENT OF SETH M. GALANTER

15 ON BEHALF OF THE RESPONDENTS

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

18 Respondents went into Federal court because  
19 State officials told them their protest would be illegal  
20 and they left Federal court with a preliminary  
21 injunction that prohibited State interference with their  
22 protest.

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

25 MR. GALANTER: Well, Your Honor, 20-some

1 months later they lost on another component of their  
2 case, where they were seeking permanent relief to enjoin  
3 the facial applicability of the regulations.

4 CHIEF JUSTICE ROBERTS: Their legal, their  
5 legal claim was that these regulations were invalid  
6 under the First Amendment. And they lost on that legal  
7 claim.

8 MR. GALANTER: At the end of the case, Your  
9 Honor, yes. But at the preliminary-injunction stage,  
10 one -- their claim for relief was a violation of the  
11 First Amendment and there was evidence at the  
12 preliminary-injunction stage that --

13 CHIEF JUSTICE ROBERTS: Well, they succeeded  
14 in filing their complaint as well, but they don't get  
15 attorney's fees for that, because they were successful  
16 at the filing complaint stage.

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

20 JUSTICE SCALIA: What if they got a TRO  
21 instead of a preliminary injunction?

22 MR. GALANTER: We're not suggesting that  
23 TROs --

24 JUSTICE SCALIA: I know you aren't. Why  
25 not?

1           MR. GALANTER: Well, there are structural  
2 differences between the two.

3           JUSTICE SCALIA: What are the two? I mean,  
4 they prevailed. They have a TRO here, something of  
5 value.

6           MR. GALANTER: There was not the  
7 adversariness that exists in a preliminary injunction.  
8 And I think the distinction --

9           JUSTICE SCALIA: But it's just prevails. If  
10 you think "prevails" means you come out of there with  
11 anything that's worth something that has a contempt  
12 citation behind it, I don't see why a TRO wouldn't  
13 qualify.

14          MR. GALANTER: We're not suggesting that as  
15 the basic rule. What we are suggesting is that if you  
16 obtain a preliminary injunction, in part because  
17 Congress recognized the difference between TROs,  
18 preliminary injunctions and placed preliminary  
19 injunctions and permanent injunctions together as the  
20 kinds of orders that had --

21          JUSTICE ALITO: What if you get a  
22 preliminary-injunction and then at the permanent  
23 injunction stage the basis for the preliminary  
24 injunction is reversed? Let's say the preliminary  
25 injunction here was based on the ground that the

1 decision was content-based, a factual decision, and at  
2 the permanent-injunction stage the court finds that it  
3 was not content-based.

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

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

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

19 MR. GALANTER: That's correct. But if there  
20 were an intervening fact, if they permitted a performance  
21 of "Hair" and then said, but we'll enforce the nudity  
22 prohibition against your protest, then we would be able  
23 to come back.

24 The final judgment in this case does not  
25 preclude future as-applied challenges, either



1 content-based or arbitrary, and the district court  
2 recognized that when it made very clear that it did not  
3 reverse or repudiate its preliminary-injunction ruling  
4 simply because we lost the permanent injunction.

5 JUSTICE GINSBURG: I thought the court  
6 said -- and correct me if I'm wrong -- that you wanted  
7 to put on a demonstration that would be like the plays,  
8 that would be hidden from public view because you have a  
9 curtain or whatever around it. And then the judge said,  
10 wow, that's not what they wanted; they didn't want it  
11 to be hidden from view, they wanted people to see  
12 their demonstration, so if that's what they want to do,  
13 they don't have any First Amendment protection.

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

25 But I think all this just goes to the point

1 for that this case presents some interesting issues, but  
2 that the per se rule that the Petitioners press, that  
3 you can never get -- become a prevailing party --

4 JUSTICE GINSBURG: Let's just stay with this case  
5 because your interest is in getting fees in this case.  
6 Suppose you had lost the preliminary injunction and then  
7 you won at the end of the line. Certainly you would be  
8 prevailing throughout, right?

9 MR. GALANTER: We would obviously be a  
10 prevailing-party. But under Hensley --

11 JUSTICE GINSBURG: Even though you lost on  
12 the preliminary injunction?

13 MR. GALANTER: Yes. Under Hensley versus  
14 Eckerhart, this Court has made clear you can win on some  
15 claims, lose in others.

16 CHIEF JUSTICE ROBERTS: But you would get  
17 attorney's fees for the preliminary-injunction work,  
18 even though you lost on that?

19 MR. GALANTER: We would get attorney's fees  
20 for the reasonable work that ended up leading to the  
21 success. District courts have for decades now parsed  
22 through these legal records, subject to review by the  
23 court of appeals.

24 JUSTICE GINSBURG: That parsing, is there  
25 any doubt that if you won on the main, in the main bout,

1 that you would get your fees for your entire  
2 representation?

3 MR. GALANTER: Yes, there is doubt, Your  
4 Honor. The court does look for whether these fees are  
5 reasonable. And if we're, for example --

6 JUSTICE GINSBURG: Not that. But would you  
7 not get -- would the judge say you don't get a penny for  
8 the effort you made to achieve the preliminary  
9 injunction because you lost, you lost it, even though in  
10 hindsight I could see that that was the wrong decision,  
11 you should have had it?

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

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

23 MR. GALANTER: We would hope a court would  
24 find that an as-applied challenge and a facial challenge  
25 were sufficiently related that we'd be entitled to fees

1 for both. But what I have to stress --

2 JUSTICE SCALIA: Even though you lost on the  
3 preliminary injunction? The fees that you reasonably  
4 expended in seeking a preliminary injunction, even  
5 though you lost, you'd be able to charge to the other  
6 side?

7 MR. GALANTER: What I would --

8 JUSTICE SCALIA: If I won the final -- yes or  
9 no? I think you can answer yes or no.

10 MR. GALANTER: Yes.

11 JUSTICE SCALIA: Okay.

12 MR. GALANTER: But I would like to caution  
13 that that would be eligible for fees, but the court  
14 would go through it and say how much of this related  
15 to your final win --

16 JUSTICE SCALIA: Was it reasonable? No. No.  
17 No. How much of it related to the preliminary -- you mean  
18 anything that related only to the preliminary injunction  
19 you would be denied?

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

23 MR. GALANTER: Well, with -- no, Your Honor,  
24 because those very things are also needed at a permanent  
25 injunction.

1 JUSTICE ALITO: But you have five hours  
2 billed -- you bill for five hours to write the brief  
3 that you submit at the preliminary-injunction stage.  
4 You could get those fees later if you won at the  
5 permanent-injunction stage, could you not?

6 MR. GALANTER: Probably. And we certainly  
7 would get the money we did for writing the complaint.  
8 And one of our counts for the complaint here was exactly  
9 for the preliminary injunction that we obtained.

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

22 MR. GALANTER: Well, two things, Your Honor.  
23 As I think I made clear to Justice Alito, if the  
24 decision is reversed or repudiated by the district  
25 court, there would now -- we would not be prevailing

1 parties. We would simply have gotten this benefit. But  
2 --

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

5 MR. GALANTER: Yes.

6 JUSTICE SCALIA: Is repudiated by the  
7 district -- how is it repudiated? What do you envision?

8 MR. GALANTER: Well, in the hypothetical  
9 where the same facts, the same law, and the district  
10 court says I was wrong, that would be the kind of  
11 repudiation.

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

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

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

24 MR. GALANTER: No, Your Honor, it's not.  
25 And here, in fact he said the opposite. He said I

1 wasn't wrong, these were based on different legal  
2 theories. And --

3 JUSTICE GINSBURG: Where -- can you -- I  
4 thought what he said was: I thought they wanted a  
5 demonstration that was going to be secure from public  
6 view, and instead I understand now that's not -- that  
7 wasn't what they wanted from the start.

8 So on the premise on which I was operating,  
9 I was right, that they were going to do it just like the  
10 plays. But what they really planned to do, and did do,  
11 I was wrong because those facts were not before me. Had  
12 those facts been before me, they would have lost on the  
13 preliminary injunction.

14 MR. GALANTER: I don't believe that that's  
15 the fairest reading of the district court's subsequent  
16 orders in this case. What the district court made clear  
17 was that his as-applied holding, that the plays and the  
18 war protests were being treated differently. Remember  
19 that it's --

20 JUSTICE STEVENS: Yes, but assume the  
21 district court thought he was right at the preliminary  
22 injunction, and ruled otherwise at the permanent  
23 injunction. But what if the court of appeals when it  
24 reviews the fee application, thinks he was wrong both  
25 times?

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

4           JUSTICE STEVENS: Is the district court.

5           MR. GALANTER: Yes, Your Honor.

6           JUSTICE STEVENS: But maybe the court of  
7 appeals is in the best position to determine whether  
8 they made an error of law or not.

9           MR. GALANTER: Yes. And obviously they  
10 review errors of law -- questions of law, de novo.

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

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

16          JUSTICE STEVENS: No, there's no reverse.  
17 It's too late. They've had the demonstration so it's  
18 all over. But in reviewing the fee application, the  
19 court of appeals concludes that the district judge --  
20 the decision rested on an incorrect premise of law and  
21 therefore, he did make an error. Would that control or  
22 would the district judge's view of the validity of his  
23 own decision control?

24          MR. GALANTER: We would suggest the latter,  
25 Your Honor, in part to avoid the fees-on-fees litigation



1 problems. I mean, other than the per se rule of --

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

4 MR. GALANTER: No, Your Honor. It's not  
5 wrong. It's consistent with the text and the policies  
6 underlying section --

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

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

20 JUSTICE SCALIA: I thought the hypothetical  
21 was different, was, the case proceeds to final judgment  
22 on the merits; and at that point -- okay -- at that  
23 point, the issue of whether the preliminary injunction  
24 was valid or not comes up, not in a direct appeal from  
25 the preliminary injunction.

1 MR. GALANTER: I --

2 JUSTICE SCALIA: Let's assume you win on the  
3 merits.

4 JUSTICE STEVENS: It's a direct appeal on  
5 the fee issue.

6 MR. GALANTER: Yes, Your Honor. What my --  
7 if I may, I agree with Justice Breyer's hypothetical  
8 that if you're appealing the merits and the court of  
9 appeals says something which shows that the -- the  
10 preliminary injunction should not have been issued,  
11 we're not a prevailing-party. I agree with  
12 Justice Scalia that if you're appealing from the  
13 preliminary injunction and the court of appeals  
14 reverses, then you're not a prevailing-party. But  
15 Justice Stevens, what I was suggesting to you and to  
16 Justice Kennedy was, we shouldn't be adjudicating  
17 whether the preliminary injunction was correctly entered  
18 at the fees stage. If there is --

19 JUSTICE BREYER: Is there any authority for  
20 that? Because it does seem to me wrong, that where a  
21 person has got a preliminary injunction and it's legally  
22 unsupportable, and then he gets the fee but then they  
23 appeal that and the court of appeals determines it's  
24 legally unsupportable, he never should have gotten it,  
25 I'd be surprised if there is a case that awards the fee

1 in those circumstances, but maybe there is. What is it?

2 MR. GALANTER: Well, I mean, the courts of  
3 appeals have adopted different standards. I can't point  
4 to one --

5 JUSTICE BREYER: What is the case? Is there  
6 any case you can think of that under those circumstances  
7 let's him have the attorney's fees?

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

9 JUSTICE BREYER: No, I would be surprised.

10 MR. GALANTER: But the --

11 JUSTICE BREYER: The other thing that I  
12 wonder about this case is, are you the prevailing-party?  
13 And the reason I ask that is when I looked through  
14 the record it seemed to me your clients are very  
15 interesting. They have their point of view. And their  
16 point of view, one of their points of view was that the  
17 State said you can have this demonstration, just wear a  
18 skimpy swimming suit. No. Well, you can have the  
19 demonstration maybe, I'm not sure on this, but we're  
20 going to put up a cloth so other people who don't want  
21 to see you don't have to see you. And there your client  
22 said, we won't pay any attention to the cloth. At least  
23 we didn't in the past. And then looking at that I  
24 thought, well, maybe what they got was, they got a  
25 preliminary injunction or a TRO, whatever you want to

1 call it, but it didn't stop the State from putting up  
2 the cloth. It was pretty clear the State would, and it  
3 should have been pretty clear that they were going to  
4 ignore it, which they did.

5 And why is this any different than having  
6 won an injunction to say okay, you can demonstrate, but  
7 in your swimming suit? In other words, they didn't want  
8 this. They didn't want what they got. Now, what's the  
9 response to that?

10 MR. GALANTER: They did get what they  
11 wanted. They wanted to be nude. They wanted to make  
12 sure they weren't escorted off the beach or arrested.  
13 And that's exactly what happened. They had an order  
14 that protected that.

15 Now, the screen was there, and there's  
16 material disputes of fact about what they were told  
17 about the screen by whom. But the court's order did not  
18 say stay behind the screen. They were not in violation  
19 of the court order.

20 But I think this goes to the more general  
21 point, how can you tell when someone prevails, and this  
22 Court has already established that. You obtain some  
23 relief through a court award that materially changes the  
24 relationship.

25 CHIEF JUSTICE ROBERTS: Did the court order

1 provide for a screen?

2 MR. GALANTER: The court order said -- no.  
3 The court order said that the State was not prohibited  
4 from using the means it had in the past. So it  
5 clarified what the State was not prohibited from doing.  
6 It did not impose any requirement on the plaintiffs.

7 JUSTICE SCALIA: That included a screen.

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

10 JUSTICE SCALIA: But your people didn't want  
11 a screen.

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

13 JUSTICE SCALIA: So they didn't get what  
14 they asked for.

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

18 JUSTICE SCALIA: Well, that's only because,  
19 I guess the other side didn't take the action that they  
20 could have taken if they didn't -- if they didn't apply  
21 the screen.

22 MR. GALANTER: Your Honor, when you obtain  
23 the court award, just as if you obtain a court award to  
24 get on a ballot or to hold a parade, or to wear a tee  
25 shirt, I mean, you get that --

1 JUSTICE SCALIA: Did they conduct the  
2 demonstration with a screen or without a screen?

3 MR. GALANTER: I'm sorry?

4 JUSTICE SCALIA: Did they conduct the  
5 demonstration with or without a screen?

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

7 JUSTICE SCALIA: And since they didn't use  
8 a screen, the State was not prohibited from arresting  
9 them; is that correct?

10 MR. GALANTER: That's correct.

11 JUSTICE SCALIA: So they did not get what  
12 they asked for. Mainly a prohibition against the State  
13 interfering with the kind of demonstration they wanted,  
14 which was one without a screen. You say they didn't get  
15 that.

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

21 JUSTICE SCALIA: The State had no problem  
22 with that. In the past the State had let them do that,  
23 as long as they had the screen.

24 MR. GALANTER: It wouldn't let them do that  
25 this time even with the screen. It sent them a letter

1 saying you may not appear on the beach nude. And I  
2 mean, obviously, at some times you don't get --

3 CHIEF JUSTICE ROBERTS: So the State  
4 prevailed to some extent as well. They prevailed to the  
5 extent of getting in the order that they can do what  
6 they had done, which is erect a screen.

7 MR. GALANTER: They -- yes. They  
8 narrowed --

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

15 MR. GALANTER: With respect, even if we had  
16 sought this and obtained a permanent injunction that  
17 allowed us to protest but not behind the screen, we would  
18 be a prevailing-party, although the defendants by their  
19 successful advocacy would have narrowed the scope of the  
20 injunction.

21 JUSTICE STEVENS: Let me ask you this. Is  
22 it correct that an underlying principle of law that  
23 justified your claim for relief and your actual relief  
24 was that there's some First Amendment right to  
25 demonstrate in the nude?

1           MR. GALANTER: Yes, Your Honor, that was  
2 underlying a part of it.

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

5           MR. GALANTER: Well, I think this Court's  
6 cases in Barnes, the nude dancing cases suggest that  
7 expressive activity combined with nudity is protected by  
8 the First Amendment. Judge Calabresi in the Second  
9 Circuit wrote an extensive opinion in a case called  
10 Tunick versus Safir, where he surveys this Court's  
11 cases, and finds that occasionally there may be for  
12 artistic or political reasons a right to be nude as part  
13 of more expressive conduct. But I'd like to maybe --

14           JUSTICE GINSBURG: But that was also a  
15 preliminary -- that was the demonstration or the show  
16 arrangement under the -- was it the Brooklyn Bridge or  
17 the Williamsburg Bridge?

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

20           JUSTICE GINSBURG: At 6 a.m.

21           MR. GALANTER: Yes, Your Honor. But to take  
22 this back just one step, to the notion that we neither  
23 not need something that's sort of enduring or merits  
24 based in order to obtain relief. Maher versus Gagne  
25 suggested a court doesn't need to resolve the merits in



1 order for a party to be prevailing.

2 JUSTICE SCALIA: But see, it's so  
3 extraordinary for somebody to make the other side pay  
4 for his attorney. We don't even do that -- we don't  
5 even do that for guilty people when they -- when the  
6 other side wins. So they have violated the law. We  
7 still don't make them pay the other side's attorney's  
8 fees. Now you want us to pay your client's attorney's  
9 fees even though you're not dealing with a guilty party,  
10 because ultimately the court found no, there really,  
11 this person didn't violate the law.

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

23 JUSTICE STEVENS: Well maybe it's not the  
24 question of -- but what Congress intended when they wrote a  
25 statute authorizing these fees.

1 JUSTICE SCALIA: I assume that Congress  
2 doesn't often do things that are grossly unfair.

3 (Laughter.)

4 JUSTICE SCALIA: And if there are various  
5 interpretations, one of which is not grossly unfair,  
6 that's the one we should --

7 JUSTICE STEVENS: And these trump the  
8 literal language very definitely.

9 (Laughter.)

10 MR. GALANTER: Speaking of the language, we  
11 have here when Congress enacted in 1970 -- in 1988 -- in  
12 1976, just two years before this Court had interpreted  
13 another civil rights attorney's fees statute. In that  
14 one, however, Congress had actually required a final  
15 order before attorney's fees could be awarded.

16 JUSTICE BREYER: Well, before you leave  
17 that, I wonder if -- there's one other thing floating  
18 around in my mind. I might as well bring it up. The  
19 word is "prevailing," and if I go with you on the ground  
20 that it's flexible and can apply to all kinds of things,  
21 at least you have to really be prevailing, and is there a  
22 good faith element in that? That is to say, if your  
23 clients when they went in to get this order and they got  
24 it, and at that time they had no intention of following  
25 what they had to do. Rather, they had every intention

1 of going out and tearing down the curtain. Does that  
2 enter into the determination of whether they are really  
3 a prevailing-party who ought to get their attorney's  
4 fees, if you're bringing the ethical element into it?

5 MR. GALANTER: I think, Your Honor, that --  
6 well, first of all, the preliminary injunction itself  
7 was an equitable remedy. Unclean hands could have gone  
8 into that question, and yes, in determining the amount  
9 of fees, again, equity can be considered. The good  
10 faith of the parties, just as the complete bad faith of  
11 a plaintiff, this Court has held, permits fees to be  
12 awarded for the defendants.

13 CHIEF JUSTICE ROBERTS: You can't go into  
14 court with the objective of just getting preliminary  
15 relief, can you? I mean, you have to have an underlying  
16 claim of illegality and, that seeks permanent relief,  
17 right?

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

20 CHIEF JUSTICE ROBERTS: Knowing that --

21 MR. GALANTER: -- you're only going to be  
22 getting --

23 CHIEF JUSTICE ROBERTS: -- preliminary  
24 injunction.

25 MR. GALANTER: And everyone here -- excuse

1 me. And everyone here knew that absent an appeal, this  
2 was the final word on the February 14th --

3 CHIEF JUSTICE ROBERTS: On the February  
4 14th, but your client sought further relief.

5 MR. GALANTER: Yes. But it also sought it  
6 as a discrete claim for relief in the complaint, this  
7 very injunction.

8 JUSTICE GINSBURG: You get costs? The  
9 phrase is "attorney's fees as part of costs." So, do  
10 you get costs for up to the preliminary injunction?

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

14 JUSTICE GINSBURG: So you would split the  
15 costs?

16 MR. GALANTER: He found we were both  
17 prevailing parties in the case. And that's also  
18 consistent with this Court's decision in Hensley, which  
19 says you look at a case and the unrelated claims; you  
20 can find that the plaintiffs are prevailing parties on  
21 some, the defendants are prevailing parties on others,  
22 and order cross awards of attorney's fees.

23 JUSTICE GINSBURG: So this defendant, having  
24 succeeded in being the winner in the whole case, didn't  
25 get costs for the whole case; is that what you're

1 telling me?

2 MR. GALANTER: They were awarded -- they  
3 sought and were awarded all their costs for the entire  
4 case, or they sought their costs for the entire case.  
5 It was reduced by the district court as a matter of  
6 equity. But they -- not because -- not parsing it out  
7 among various parties to the case.

8 JUSTICE GINSBURG: So they were entitled to  
9 costs for the entire case?

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

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

13 MR. GALANTER: Yes, Your Honor.

14 JUSTICE GINSBURG: So if you're not entitled  
15 to costs, if the defendant got the full costs, then how  
16 do you get entitled to attorney's fees when the statute  
17 puts them together? Because attorney's fees are part of  
18 costs.

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

22 JUSTICE GINSBURG: But this wasn't?

23 MR. GALANTER: No.

24 JUSTICE GINSBURG: You told me -- you told me  
25 that the State got all of its costs from your client?

1           MR. GALANTER: Yes. And our client got  
2 costs from the State. There were counter awards --  
3 cross awards of costs, which is not unusual in civil  
4 litigation with multiple claims.

5           But more importantly, I think, when we go  
6 back and we look at the purposes, not only do we have  
7 the language here, we also have the recognition, I think  
8 as I was mentioning to the Chief Justice, that there's  
9 going to be a lot of situations where core 1983 rights,  
10 core constitutional rights are at stake where you know  
11 you're not going to be able to obtain a permanent  
12 injunction. You may even, as my friends on the other  
13 side say, ask that the two be consolidated.

14           JUSTICE ALITO: What if that's not the case,  
15 but the plaintiff after getting a preliminary injunction  
16 just voluntarily dismisses the case? Do they still get  
17 costs for the preliminary injunction?

18           MR. GALANTER: Oh, I think the answer is  
19 yes. And I think that that's actually something that  
20 should be encouraged. In this case, the preliminary  
21 injunction was relatively cheap, as litigation goes. To  
22 encourage them to continue, particularly since the core  
23 relief they sought had become moot. Yes, there was  
24 additional relief they sought, or it could, in a  
25 hypothetical could seek. But absent an appeal, that

1 part of the case is over and there's no real need to  
2 continue to litigate it.

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

7 MR. GALANTER: We think that Congress's  
8 distinction, putting preliminary injunctions  
9 and permanent injunctions in one category and TROs in  
10 another for purposes of appealability, reflects kind of a  
11 congressional judgment about which is -- which mechanism  
12 is intended to alter the kind of substantial rights.  
13 And absent the right to appeal, absent the  
14 adversariness, the heavier focus on irreparable  
15 injury, unlike at the preliminary-injunction stage,  
16 those are all things that we think make TROs generally  
17 ineligible to affect prevailing-party status.

18 JUSTICE SOUTER: Because the TRO case,  
19 characteristically the other side isn't heard, so you  
20 haven't prevailed.

21 MR. GALANTER: That is one way to view it,  
22 Your Honor. Without the adversariness at the hearing,  
23 there really was no one to prevail over. Whereas  
24 here --

25 CHIEF JUSTICE ROBERTS: Well, I thought you

1 prevailed in the sense that you secured relief. That's  
2 how you articulated it up to this point.

3 MR. GALANTER: Well, this Court has  
4 certainly described some relief as the threshold of  
5 prevailing. I'm simply suggesting that there may be  
6 other kinds of orders, as this Court suggested in  
7 Hanrahan versus Hampton, that are just not sufficiently  
8 -- they don't have a sufficient change in the legal  
9 relationship between the parties to warrant prevailing-  
10 party status, even though they do benefit the  
11 plaintiffs.

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

15 MR. GALANTER: No, Your Honor. What I'm  
16 suggesting --

17 JUSTICE SCALIA: So you're a prevailing  
18 party whether there's an adversary on the other side or  
19 not.

20 MR. GALANTER: But what I'm saying is that the  
21 TRO anticipates that, which is in part why we're not  
22 suggesting TROs are --

23 JUSTICE STEVENS: Yes. But in this very  
24 case, if you had gotten a TRO instead of a preliminary  
25 injunction, you'd have exactly the same practical



1 situation.

2 MR. GALANTER: Yes, Your Honor, but we were  
3 -- we did have a preliminary injunction. The State  
4 therefore did have a right to appeal, and a lot of other  
5 consequences flow from the fact that it was a --

6 CHIEF JUSTICE ROBERTS: The State did make  
7 the point that they were kind of -- this was short notice  
8 and they were doing the best they could on short notice.  
9 I mean, they showed up but only sort of.

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

17 CHIEF JUSTICE ROBERTS: The regulations  
18 told you you weren't allowed to protest nude.

19 MR. GALANTER: Your Honor, those same  
20 regulations had been in effect the four previous times  
21 she had protested nude. And it was consistent with the  
22 stipulation they had entered into that her nudity was  
23 protected by the First Amendment. So again, she was  
24 certainly entitled to negotiate as she tried to do with  
25 the State. She was told one week before that she

1 wouldn't be allowed to do this. She went to court. She  
2 got the very relief that she sought and she was able to  
3 protest in the nude.

4           Now in the other cases, you're going to get  
5 someone who just finds they were denied the right to  
6 register or to get on the ballot, and that's going to be  
7 disposed of immediately. It won't be capable of  
8 repetition by evading review because the person is now  
9 registered, the election is now over. Maybe that  
10 candidate won't run again. So we have a whole core of  
11 First Amendment cases that will be affected if  
12 Petitioner's per se rule that preliminary injunction is  
13 never enough goes into play, because then States have  
14 the unfortunate incentive of pushing the decisions very  
15 close to the actual event deadline so that even if they  
16 lose in court, they won't have to pay attorney's fees.

17           And I would add that in terms of the broader  
18 notion, here we have a mid-level State official sending a  
19 letter to an individual saying we don't think you have  
20 any First Amendment rights, and if you come, you'll be  
21 violating a law that's subject to criminal arrest, if  
22 you come and you're naked, you're going to be subject to  
23 criminal arrest. Absent section 1988, it would be  
24 incredibly difficult for persons in Ms. Wyner's  
25 situation to find attorneys.

1 Thank you, Your Honor.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
3 Ms. Seitz, you have three minutes remaining.

4 REBUTTAL ARGUMENT BY VIRGINIA A. SEITZ  
5 ON BEHALF OF THE PETITIONERS

6 JUSTICE GINSBURG: Ms. Seitz, would you  
7 clarify that point about costs? Did your client have to  
8 pay costs?

9 MS. SEITZ: The plaintiffs were awarded  
10 costs incurred on the preliminary injunction. My client  
11 was awarded a right to costs on the remainder of the  
12 litigation. Those costs were reduced to mirror the  
13 precise costs that the plaintiff was awarded on  
14 preliminary injunction, so in the end no one received  
15 any costs. But costs were allocated for plaintiffs for  
16 the preliminary injunction, defendants for the  
17 remainder of the case.

18 I just want to make one point about the  
19 timing. The time prior to the 2003 demonstration, in  
20 2000 she wrote a letter requesting the right to protest  
21 nude and received a denial letter in response, similar  
22 to the one she received in 2003. So she was on notice  
23 as of 2000 that we were enforcing the nudity ban against  
24 her activities.

25 Second, I want to say that the district

1 court itself characterized its holding on summary  
2 judgment, quote, "as plaintiffs are unable to show  
3 actual success on the merits," page 34a of the appendix.  
4 So there's no doubt that what even the court understood  
5 its own holding to be was that the prediction in the  
6 preliminary injunction had failed to materialize when  
7 the court considered the full case on the merits.

8           And finally, I want to say that awarding  
9 fees, conferring fees for a plaintiff for obtaining a  
10 preliminary injunction essentially requires the State  
11 treasury to pay its opponents when, in fact, the State  
12 has done nothing but enforce a valid law. And we know  
13 that in this case because the case ended up getting  
14 litigated to conclusion. But simply because we don't  
15 know that in other cases involving preliminary  
16 injunctions doesn't mean it isn't true, and that's why  
17 it's fundamentally unfair to impose fees on State  
18 defendants and local governments that haven't had a full  
19 and fair opportunity to defend their legal position.

20           Thank you.

21           CHIEF JUSTICE ROBERTS: Thank you, counsel.  
22 The case is submitted.

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

25

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