SUPREME COURT OF THE UNITED STATES

No. 06–531

MICHAEL W. SOLE, SECRETARY, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL., PETITIONERS *v.* T. A. WYNER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 4, 2007]

JUSTICE GINSBURG delivered the opinion of the Court.

For private actions brought under 42 U. S. C. §1983 and other specified measures designed to secure civil rights, Congress established an exception to the "American Rule" that "the prevailing litigant is ordinarily not entitled to collect [counsel fees] from the loser." *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 247 (1975). That exception, codified in 42 U. S. C. §1988(b), authorizes federal district courts, in their discretion, to "allow the prevailing party . . . a reasonable attorney's fee as part of the costs." This case presents a sole question: Does a plaintiff who gains a preliminary injunction after an abbreviated hearing, but is denied a permanent injunction after a dispositive adjudication on the merits, qualify as a "prevailing party" within the compass of §1988(b)?

Viewing the two stages of the litigation as discrete episodes, plaintiffs below, respondents here, maintain that they prevailed at the preliminary injunction stage, and therefore qualify for a fee award for their counsels' efforts to obtain that interim relief. Defendants below, petition-

ers here, regard the case as a unit; they urge that a preliminary injunction holds no sway once fuller consideration yields rejection of the provisional order's legal or factual underpinnings. We agree with the latter position and hold that a final decision on the merits denying permanent injunctive relief ordinarily determines who prevails in the action for purposes of §1988(b). A plaintiff who achieves a transient victory at the threshold of an action can gain no award under that fee-shifting provision if, at the end of the litigation, her initial success is undone and she leaves the courthouse emptyhanded.

I

In mid-January 2003, plaintiff-respondent T. A. Wyner notified the Florida Department of Environmental Protection (DEP) of her intention to create on Valentine's Day, February 14, 2003, within John D. MacArthur Beach State Park, an antiwar artwork. The work would consist of nude individuals assembled into a peace sign. By letter dated February 6, DEP informed Wyner that her peace sign display would be lawful only if the participants complied with the "Bathing Suit Rule" set out in Florida Administrative Code §62D–2.014(7)(b) (2005). That rule required patrons, in all areas of Florida's state parks, to wear, at a minimum, a thong and, if female, a bikini top.[1]

To safeguard the Valentine's Day display, and future expressive activities of the same order, against police interference, Wyner filed suit in the United States District Court for the Southern District of Florida on February 12, 2003. She invoked the First Amendment's protection of expressive conduct, and named as defendants the Secre-

---

[1] The rule reads: "In every area of a park including bathing areas no individual shall expose the human, male or female genitals, pubic area, the entire buttocks or female breast below the top of the nipple, with less than a fully opaque covering." Fla. Admin. Code Ann. §62D–2.014(7)(b) (2005).

tary of DEP and the Manager of MacArthur Beach Park.[2] Her complaint requested immediate injunctive relief against interference with the peace sign display, App. 18, and permanent injunctive relief against interference with "future expressive activities that may include non-erotic displays of nude human bodies," *id.*, at 19. An exhibit attached to the complaint set out a May 12, 1995 Stipulation for Settlement with DEP. *Id.*, at 22–23. That settlement had facilitated a February 19, 1996 play Wyner coordinated at MacArthur Beach, a production involving nude performers. A term of the settlement provided that Wyner would "arrange for placement of a bolt of cloth in a semi-circle around the area where the play [would] be performed," *id.*, at 23, so that beachgoers who did not wish to see the play would be shielded from the nude performers.

The day after the complaint was filed, on February 13, 2003, the District Court heard Wyner's emergency motion for a preliminary injunction. Although disconcerted by the hurried character of the proceeding, see *id.*, at 37, 93, 95, the court granted the preliminary injunction. "The choice," the court explained, "need not be either/or." *Wyner* v. *Struhs*, 254 F. Supp. 2d 1297, 1303 (SD Fla. 2003). Pointing to the May 1995 settlement laying out "agreed-upon manner restrictions," the court determined that "[p]laintiff['s] desired expression and the interests of the state may both be satisfied simultaneously." *Ibid.* In this regard, the court had inquired of DEP's counsel at the preliminary injunction hearing: "Why wouldn't the curtain or screen solve the problem of somebody [who] doesn't want to see . . . nudity? Seems like that would solve [the]

---

[2] Wyner was joined by coplaintiff George Simon, who served as a videographer for expressive activities Wyner previously organized at MacArthur Beach. See App. 13. For convenience, we refer to the coplaintiffs collectively as Wyner or plaintiff.

problem, wouldn't it?" App. 86. Counsel for DEP responded: "That's an option. I don't think necessarily [defendants] would be opposed to that . . . ." *Ibid.;* see *id.*, at 74 (testimony of Chief of Operations for Florida Park Service at the preliminary injunction hearing that the Service's counsel, on prior occasions, had advised: "[I]f they go behind the screen and they liv[e] up to the agreement then it's okay. If they don't go behind the screen and they don't live up to the agreement then it's not okay.").

The peace symbol display took place at MacArthur Beach the next day. A screen was put up, apparently by the State, as the District Court anticipated. See *id.*, at 108. See also *id.*, at 94 (District Judge's statement at the conclusion of the preliminary injunction hearing: "I want to make it clear . . . that the [preliminary] injunction doesn't preclude the department, if it chooses, from using . . . some sort of barrier . . . ."). But the display was set up outside the barrier, and participants, once disassembled from the peace symbol formation, went into the water in the nude. See *id.*, at 108; Deposition of T. A. Wyner in Civ. Action No. 03–80103 (SD Fla., Nov. 14, 2003), pp. 99–100.

Thereafter, Wyner pursued her demand for a permanent injunction. Her counsel represented that on February 14, 2004, Wyner intended to put on another production at MacArthur Beach, again involving nudity. See App. 107. After discovery, both sides moved for summary judgment. At the hearing on the motions, held January 21, 2004, the District Court asked Wyner's counsel about the screen put up around the preceding year's peace symbol display. Counsel acknowledged that the participants in that display ignored the barrier and set up in front of the screen. *Id.*, at 108.

A week later, having unsuccessfully urged the parties to resolve the case as "[they] did before in [the 1995] settlement," *id.*, at 143, the court denied plaintiff's motion for

summary judgment and granted defendants' motion for summary final judgment. The deliberate failure of Wyner and her coparticipants to remain behind the screen at the 2003 Valentine's Day display, the court concluded, demonstrated that the Bathing Suit Rule's prohibition of nudity was "no greater than is essential . . . to protect the experiences of the visiting public." *Wyner* v. *Struhs*, Case No. 03–80103–CIV (SD Fla., Jan. 28, 2004) (Summary Judgment Order), App. to Pet. for Cert. 42a. While Wyner ultimately failed to prevail on the merits, the court added, she did obtain a preliminary injunction prohibiting police interference with the Valentine's Day 2003 temporary art installation, *id.*, at 45a, and therefore qualified as a prevailing party to that extent, see *Wyner* v. *Struhs*, Case No. 03–80103–CIV (SD Fla., Aug. 16, 2004) (Omnibus Order), App. to Brief in Opposition 5a–13a. The preliminary injunction could not be revisited at the second stage of the litigation, the court noted, for it had "expired on its own terms." *Id.*, at 4a. So reasoning, the court awarded plaintiff counsel fees covering the first phase of the litigation.

The Florida officials appealed, challenging both the order granting a preliminary injunction and the award of counsel fees. Wyner, however, pursued no appeal from the final order denying a permanent injunction. The Court of Appeals for the Eleventh Circuit held first that defendants' challenges to the preliminary injunction were moot because they addressed "a finite event that occurred and ended on a specific, past date." *Wyner* v. *Struhs*, 179 Fed. Appx. 566, 567, n. 1 (2006) *(per curiam)*. The court then affirmed the counsel fees award, reasoning that plaintiff had gained through the preliminary injunction "the primary relief [she] sought," *i.e.*, the preliminary order allowed her to present the peace symbol display unimpeded by adverse state action. *Id.*, at 569.

Wyner would not have qualified for an award of counsel fees, the court recognized, had the preliminary injunction

rested on a mistake of law. *Id.*, at 568, 569–570. But it was "new developments," the court said, *id.*, at 569, not any legal error, that accounted for her failure "to achieve actual success on the merits at the permanent injunction stage," *id.*, at 569, n. 7. Plaintiff and others participating in the display, as Wyner's counsel admitted, did not stay behind the barrier at the peace symbol display, *id.*, at 569; further, the court noted, "a fair reading of the record show[ed] that [p]laintif[f] had no intention of remaining behind a [barrier] during future nude expressive works," *ibid.* The likelihood of success shown at the preliminary injunction stage, the court explained, *id.*, at 569, n. 7, had been overtaken by the subsequent "demonstrat[ion] that the less restrictive alternative," *i.e.*, a cloth screen or other barrier, "was not sufficient to protect the government's interest," *id.*, at 569. But that demonstration, the court concluded, did not bar an award of fees, because the "new facts" emerged only at the summary judgment stage. *Ibid.* We granted certiorari, *Struhs* v. *Wyner*, 549 U. S. ___ (2007), and now reverse.

II

"The touchstone of the prevailing party inquiry," this Court has stated, is "the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teachers Assn.* v. *Garland Independent School Dist.*, 489 U. S. 782, 792–793 (1989). See *Hewitt* v. *Helms*, 482 U. S. 755, 760 (1987) (plaintiff must "receive at least some relief on the merits of his claim before he can be said to prevail"); *Maher* v. *Gagne*, 448 U. S. 122, 129 (1980) (upholding fees where plaintiffs settled and obtained a consent decree); cf. *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health and Human Resources*, 532 U. S. 598, 605 (2001) (precedent "counsel[s] against holding that the term 'prevailing party' authorizes an award of attorney's fees

without a corresponding alteration in the legal relationship of the parties").[3] The petitioning state officials maintain that plaintiff here does not satisfy that standard for, as a consequence of the final summary judgment, "[t]he state law whose constitutionality [Wyner] attacked [*i.e.*, the Bathing Suit Rule,] remains valid and enforceable today." Brief for Petitioners 3. The District Court left no doubt on that score, the state officials emphasize; ordering final judgment for defendants, the court expressed, in the bottom line of its opinion, its "hope" that plaintiff would continue to use the park, "albeit not in the nude." Summary Judgment Order, App. to Pet. for Cert. 46a.

Wyner, on the other hand, urges that despite the denial of a permanent injunction, she got precisely what she wanted when she commenced this litigation: permission to create the nude peace symbol without state interference. That fleeting success, however, did not establish that she prevailed on the gravamen of her plea for injunctive relief, *i.e.*, her charge that the state officials had denied her and other participants in the peace symbol display "the right to engage in constitutionally protected expressive activities." App. 18. Prevailing party status, we hold, does not

---

[3] *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health and Human Resources*, 532 U. S. 598, 600 (2001), held that the term "prevailing party" in the fee-shifting provisions of the Fair Housing Amendments Act of 1988 and the Americans with Disabilities Act of 1990 does not "includ[e] a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." The dissent in *Buckhannon* would have deemed such a plaintiff "prevailing," not because of any *temporary* relief gained (in that case, a consent stay pending litigation), but because the lawsuit caused the State to amend its laws, terminating the controversy between the parties, and *permanently* giving plaintiff the real-world outcome it sought. See *id.,* at 622, 624–625 (opinion of GINSBURG, J.). Our decision today is consistent with the views of both the majority and the dissenters in *Buckhannon*.

attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case.[4]

At the preliminary injunction stage, the court is called upon to assess the probability of the plaintiff's ultimate success on the merits. See, *e.g.*, *Ashcroft* v. *American Civil Liberties Union*, 542 U. S. 656, 666 (2004); *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 931 (1975). The foundation for that assessment will be more or less secure depending on the thoroughness of the exploration undertaken by the parties and the court. In some cases, the proceedings prior to a grant of temporary relief are searching; in others, little time and resources are spent on the threshold contest.

In this case, the preliminary injunction hearing was necessarily hasty and abbreviated. Held one day after the complaint was filed and one day before the event, the timing afforded the state officer defendants little opportunity to oppose Wyner's emergency motion. Counsel for the state defendants appeared only by telephone. App. 36. The emergency proceeding allowed no time for discovery, nor for adequate review of documents or preparation and presentation of witnesses. See *id.*, at 38–39. The provisional relief immediately granted expired before appellate review could be gained, and the court's threshold ruling would have no preclusive effect in the continuing litigation. Both the District Court and the Court of Appeals considered the preliminary injunction a moot issue, not fit for reexamination or review, once the display took place. See Summary Judgment Order, App. to Pet. for Cert. 34a; Omnibus Order, App. to Brief in Opposition 3a–4a; 179 Fed. Appx., at 567, n. 1; cf. *Lewis* v. *Continental Bank*

---

[4] In resolving Wyner's claim for counsel fees, we express no opinion on the dimensions of the First Amendment's protection for artworks that involve nudity.

Corp., 494 U. S. 472, 477–479 (1990). In short, the provisional relief granted terminated only the parties' opening engagement. Its tentative character, in view of the continuation of the litigation to definitively resolve the controversy, would have made a fee request at the initial stage premature.

Of controlling importance to our decision, the eventual ruling on the merits for defendants, after both sides considered the case fit for final adjudication, superseded the preliminary ruling. Wyner's temporary success rested on a premise the District Court ultimately rejected. That court granted preliminary relief on the understanding that a curtain or screen would adequately serve Florida's interest in shielding the public from nudity that recreational beach users did not wish to see. See *supra*, at 3–4; 254 F. Supp. 2d, at 1303 (noting that the parties had previously agreed upon "a number of . . . manner restrictions that are far less restrictive than the total ban on nudity"). At the summary judgment stage, with the benefit of a fuller record, the District Court recognized that its initial assessment was incorrect. Participants in the peace symbol display were in fact unwilling to stay behind a screen that separated them from other park visitors. See Summary Judgment Order, App. to Pet. for Cert. 42a. See also App. 108 (acknowledgment by Wyner's counsel that participants in the February 14, 2003 protest "in effec[t] ignored the screen"). In light of the demonstrated inadequacy of the screen to contain the nude display, the District Court determined that enforcement of the Bathing Suit Rule was necessary to "preserv[e] park aesthetics" and "protect the experiences of the visiting public." Summary Judgment Order, App. to Pet. for Cert. 41a, 42a.

Wyner contends that the preliminary injunction was not undermined by the subsequent adjudication on the merits because the decision to grant preliminary relief was an "as applied" ruling. In developing this argument, she asserts

that the officials engaged in impermissible content-based administration of the Bathing Suit Rule. But the District Court assumed, "for the purposes of [its initial] order," the content neutrality of the state officials' conduct. See 254 F. Supp. 2d, at 1302. See also 179 Fed. Appx., at 568, and n. 4 (reiterating that, "for the sake of the preliminary injunction order," the District Court "assumed content neutrality"). That specification is controlling. See Fed. Rule Civ. Proc. 65(d) (requiring every injunction to "set forth the reasons for its issuance" and "be specific in terms"). See also *Schmidt* v. *Lessard*, 414 U. S. 473, 476 (1974) *(per curiam)* (Rule 65(d) "was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders.").

The final decision in Wyner's case rejected the same claim she advanced in her preliminary injunction motion: that the state law banning nudity in parks was unconstitutional as applied to expressive, nonerotic nudity. At the end of the fray, Florida's Bathing Suit Rule remained intact, and Wyner had gained no enduring "chang[e] [in] the legal relationship" between herself and the state officials she sued. See *Texas State Teachers Assn.*, 489 U. S., at 792.

III

Wyner is not a prevailing party, we conclude, for her initial victory was ephemeral. A plaintiff who "secur[es] a preliminary injunction, then loses on the merits as the case plays out and judgment is entered against [her]," has "[won] a battle but los[t] the war." *Watson* v. *County of Riverside*, 300 F. 3d 1092, 1096 (CA9 2002). We are presented with, and therefore decide, no broader issue in this case.

We express no view on whether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction may

sometimes warrant an award of counsel fees. We decide only that a plaintiff who gains a preliminary injunction does not qualify for an award of counsel fees under §1988(b) if the merits of the case are ultimately decided against her.

* * *

For the reasons stated, the judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.