

## Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

## SUPREME COURT OF THE UNITED STATES

## Syllabus

SOLE, SECRETARY, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL. *v.* WYNER ET AL.

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

No. 06–531. Argued April 17, 2007—Decided June 4, 2007

In private actions under 42 U. S. C. §1983, federal district courts may “allow the prevailing party . . . a reasonable attorney’s fee as part of the costs.” §1988(b). Plaintiff-respondent Wyner notified the Florida Department of Environmental Protection (DEP), in mid-January 2003, of her intention to create on Valentine’s Day, within MacArthur State Beach Park, an antiwar artwork consisting of nude individuals assembled into a peace sign. Responding on February 6, DEP informed Wyner that her display would be lawful only if the participants complied with Florida’s “Bathing Suit Rule,” which requires patrons of state parks to wear, at a minimum, a thong and, if female, a bikini top. To safeguard her display, and future nude expressive activities, against police interference, Wyner and a coplaintiff (collectively Wyner or plaintiff) sued Florida officials in the Federal District Court on February 12. Invoking the First Amendment’s protection of expressive conduct, Wyner requested immediate injunctive relief against interference with the peace sign display and permanent injunctive relief against interference with future activities similarly involving nudity. An attachment to the complaint set out a 1995 settlement with DEP permitting Wyner to stage a play with nude performers at MacArthur Beach provided the area was screened off to shield beachgoers who did not wish to see the play. Although disconcerted by the hurried character of the proceeding, the District Court granted Wyner a preliminary injunction on February 13, suggesting that a curtain or screen could satisfy the interests of both the State and Wyner. The peace symbol display that took place the next day was set up outside a barrier apparently put up by the State. Once disassembled from the peace symbol formation, participants went

## Syllabus

into the water in the nude. Thereafter, Wyner pursued her demand for a permanent injunction, noting that she intended to put on another Valentine's Day production at MacArthur Beach, again involving nudity. After discovery, both sides moved for summary judgment. At a January 21, 2004 hearing, Wyner's counsel acknowledged that the peace symbol display participants had set up in front of the barrier. 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 stay behind the screen at the 2003 Valentine's Day display, the court concluded, demonstrated that the Bathing Suit Rule's prohibition of nudity was essential to protect the visiting public. While Wyner ultimately failed to prevail on the merits, the court added, she did obtain a preliminary injunction, and therefore qualified as a prevailing party to that extent. Reasoning that the preliminary injunction could not be revisited at the second stage of the litigation because it had expired, the court awarded plaintiff counsel fees covering the first phase of the litigation. The Florida officials appealed, challenging both the preliminary injunction and the counsel fees award. The Eleventh Circuit held first that defendants' challenges to the preliminary injunction were moot. The court then affirmed the counsel fees award, reasoning that the preliminary order allowed Wyner to present the peace symbol display unimpeded by adverse state action.

*Held:* Prevailing party status does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case. Pp. 6–11.

(a) "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. At the preliminary injunction stage, the court is called upon to assess the probability of the plaintiff's ultimate success on the merits. 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 this case, the preliminary injunction hearing was necessarily hasty and abbreviated. There was no time for discovery, nor for adequate review of documents or preparation and presentation of witnesses. The provisional relief granted expired before appellate review could be gained, and the court's threshold ruling would have no preclusive effect in the continuing litigation, as both the District Court and the Court of Appeals considered the preliminary injunction moot once the display took place. The provisional relief's tentative character, in view of the continuation of the litigation to definitively resolve the controversy,

## Syllabus

would have made a fee request at the initial stage premature. Of controlling importance, 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 understanding that a curtain or screen would adequately serve Florida’s interest in shielding the public from nudity—that the District Court, with the benefit of a fuller record, ultimately rejected. Wyner contends that the preliminary injunction was not undermined by the subsequent merits adjudication because the decision to grant preliminary relief was an “as applied” ruling based on the officials’ impermissible content-based administration of the Bathing Suit Rule. But the District Court assumed content neutrality for purposes of its preliminary order. 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. 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. Pp. 6–10.

(b) Wyner is not a prevailing party, for her initial victory was ephemeral. This Court expresses 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. It decides 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. Pp. 10–11.

179 Fed. Appx. 566, reversed and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court.