Notes

PRELIMINARY INJUNCTIONS PREVAIL THROUGH THE WINTER OF BUCKHANNON

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ABSTRACT—The Civil Rights Attorney’s Fees Awards Act of 1976 allows courts to award attorneys’ fees to the “prevailing party” in any “action or proceeding” enforcing several civil rights-related statutes. Yet, this statute fails to define the term “prevailing party,” leaving the courts to define it over time. The Supreme Court’s piecemeal, vague definitions of “prevailing party” have only complicated the legal landscape and caused more uncertainty for potential plaintiffs and their prospective attorneys. Without the relief offered by recovery of attorneys’ fees, private litigants may be dissuaded from pursuing meritorious litigation due to overwhelming costs of representation, and attorneys may face a choice between accepting or denying an otherwise successful case solely due to a prospective client’s ability to pay. In Sole v. Wyner, the Supreme Court held that a plaintiff who is awarded a preliminary injunction is not considered a prevailing party if “the merits of the case are ultimately decided against her.” In deciding Sole, the Court declined to answer a separate but important question: Is a plaintiff a prevailing party if their case is mooted after obtaining a preliminary injunction?

Courts attempting to answer this question struggle to find tangible guidance from the Supreme Court following its decision in Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources, resulting in inconsistencies, overly complicated analyses, and in some cases, misguided rejection of prevailing party status. The legal analysis behind prevailing party status must be streamlined to preserve this critical and necessary litigation. This Note explores how, in the aftermath of Winter v. Natural Resources Defense Council, Inc., a plaintiff whose case is mooted after obtaining a preliminary injunction is a prevailing party within the framework of Buckhannon.

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**INTRODUCTION**

If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.”

—Senator John V. Tunney†

Litigation is costly.¹ Under the traditional American rule, each party pays its own attorney’s fees regardless of the outcome.² For the everyday person, lawyers’ steep hourly fees can create a hefty burden that is difficult,

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¹ S. REP. NO. 94-1011, at 6 (1976).

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if not impossible, to pay. Without the relief offered by recovery of attorneys’ fees, private litigants are more likely to be dissuaded from pursuing meritorious litigation due to overwhelming costs of representation. In cases for damages, contingency fee arrangements—in which a lawyer is paid a percentage of the settlement or damages award only if he or she prevails—can provide an alternative for cost-limited plaintiffs. But such arrangements do not resolve the financial concerns surrounding civil rights cases. Many civil rights plaintiffs do not seek damages, meaning there is no monetary award from which a plaintiff might pay contingency fees at the end of a successful trial. As a result, attorneys in civil rights cases may be forced to decide whether to take an otherwise meritorious and successful case because of uncertainty surrounding the prospective client’s ability to pay. Civil rights cases have too great a societal impact to abandon because of litigation costs, so the private attorney general doctrine was developed to offset the risk of this chilling effect.

Created by courts, the private attorney general doctrine awards attorneys’ fees to successful plaintiffs who “[engage] in litigation beneficial to the public and, in effect, [act] as a private attorney general.” However, in 1975, the Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society* held that federal courts lacked jurisdiction to award attorneys’ fees under the private attorney general doctrine without statutory authorization. The following year, Congress responded to *Alyeska* by enacting the Civil Rights Attorney’s Fees Awards Act of 1976. This statute authorizes federal courts to award attorneys’ fees to the “prevailing party” in any “action or proceeding” enforcing a number of civil rights statutes.

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3 See Woodland Hills Residents Ass’n, Inc. v. City Council, 593 P.2d 200, 208 (Cal. 1979).


6 See Albert A. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792, 798 (1966) (“[T]he chance of recovering counsel fees, however modest, from the losing opponent, is a strong inducement for the lawyer to take on a meritorious case without regard to his client’s affluence and thus greatly to increase the number of those served by the legal profession.”).

7 20 C.J.S. Costs § 148 (2023) (“The private attorney general doctrine acts as an incentive to pursue public interest litigation that might otherwise have been too costly to bring.”).

8 Id.

9 421 U.S. 240, 269 (1975). This holding is specific to federal courts, so state courts can still utilize the private attorney general doctrine. Wooster, supra note 2. However, states are mixed in their application of the doctrine. Id.


history demonstrates Congress’s intent to preserve the private attorney general doctrine, but gaps in the statute’s language have presented challenges to the doctrine’s subsequent application. Specifically, the statute fails to define the term “prevailing party,” leaving the courts to construct a definition over time.

The Supreme Court’s vague, piecemeal definitions of “prevailing party” have complicated the legal landscape and caused more uncertainty for potential plaintiffs and their prospective attorneys. In 1992, the Court held in *Farrar v. Hobby* that a plaintiff qualifies as a prevailing party “when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.” Fifteen years later, the Court held in *Sole v. Wyner* that a plaintiff awarded a preliminary injunction is not considered a prevailing party “if the merits of the case are ultimately decided against her.” In deciding *Sole*, the Court declined to answer a separate but important question: Is a plaintiff a prevailing party if their case is mooted after obtaining a preliminary injunction? This question has important implications because of the nature of civil rights-based litigation. Such suits often challenge laws that are repealed or changed during the pendency of the case, subsequently mooting them.

In a suit for damages, mootness would not preclude the plaintiff from moving forward with their case. Yet, “many [civil rights] suits do not include damages, either because the governmental actors are immune to claims for

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12 For the purpose of this Note, I will only be discussing prevailing party status as the plaintiff. The Supreme Court has defined prevailing party status for defendants differently. See generally CRST Van Expedited, Inc. v. EEOC, 578 U.S. 419 (2016) (discussing the qualifications for prevailing party status as a defendant).


15 *Id.* (“We express no view on whether, in the absence of a final decision on the merits of a claim . . . success in gaining a preliminary injunction may sometimes warrant an award of counsel fees.”). Mootness occurs when the controversy of a matter no longer exists, leaving “a case that presents only an abstract question that does not arise from existing facts or rights.” *Moot Case*, BLACK'S LAW DICTIONARY (11th ed. 2019).

16 See Austin Deramo, *Manufactured Mootness: How the Supreme Court’s Decision in New York State Rifle & Pistol Association Highlights the Need for Congress to Define the Term “Prevailing Party,”* 16 LIBERTY U. L. REV. 273, 291, 293 (2022) (“[C]ivil rights plaintiffs often seek nonmonetary relief, such as institutional reform or a change in policy . . . . Evidence shows that government defendants employ [midlitigation changes in the law] with some frequency.”).

17 Steuer, *supra* note 5, at 62.
As a result, many civil rights plaintiffs seek solely equitable relief. Such relief can be provided entirely through the government’s voluntary change in the law, mooting the issue and denying the plaintiff attorneys’ fees.

While the legal profession is no stranger to grey areas, civil rights cases are too essential to subject to a half-baked private attorney general system. The legal analysis behind prevailing party status must be streamlined to preserve this critical and necessary litigation. Yet, lower courts are left to resolve the complexities of this analysis on their own. Currently, courts do find that a plaintiff whose case is mooted after obtaining a preliminary injunction can be a prevailing party, but the line is often blurred as to when this very specific set of circumstances can result in prevailing party status. Courts struggle to find tangible guidance from the Supreme Court following its 2001 decision in Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources, which rejected the “catalyst theory” and created additional hurdles in the analysis. Subsequent cases have resulted in inconsistencies, overly complicated analyses, and in some cases, misguided rejection of prevailing party status. The legal analysis behind prevailing party status must be streamlined to preserve this critical and necessary litigation. The Supreme Court’s decision in Winter v. Natural Resources Defense Council, Inc., which set the current preliminary injunction standard, provides a path forward for accomplishing a streamlined prevailing party analysis.

On August 7, 2023, the Fourth Circuit delivered a landmark decision for prevailing party status in Stinnie v. Holcomb. The Fourth Circuit is the first circuit to correctly acknowledge the material change that Winter v. Natural Resources Defense Council, Inc. brings to the prevailing party analysis. This Note is the first piece of legal scholarship to explore the connection between Winter and prevailing party status. Further, this Note explains why a plaintiff whose case is mooted after obtaining a preliminary injunction is a prevailing party within the framework of Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources.

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18 Id.
19 See Stinnie v. Holcomb, 77 F.4th 200, 216 (4th Cir. 2023) (“[T]here are some differences in the way [federal courts of appeals] assess prevailing party status and frame their inquiries in this context.”).
20 See discussion infra Part IV. The catalyst theory “posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Hum. Res., 532 U.S. 598, 601 (2001).
21 See discussion infra Part IV.
23 77 F.4th at 208–09.
24 Id. (citing Winter, 555 U.S. at 32).
Part I addresses the necessity of preserving prevailing party status for civil rights litigants. When a preliminary injunction is the only relief provided, courts pay close attention to the approach used in granting such relief. As such, Part II discusses the varying approaches among the circuits and argues that the correct interpretation of Winter calls for a "sequential test” when awarding preliminary injunctions. A sequential test is a necessary requisite for preliminary injunctions to reach prevailing party status, and Part III demonstrates that, after Winter, the awarding of a preliminary injunction alone is sufficient to establish the merits requirement of prevailing party status. Finally, Part IV advocates for a narrow interpretation of Buckhannon that permits a preliminary injunction to satisfy the remaining requisites for prevailing party status.

I. THE IMPORTANCE OF PRESERVING PREVAILING PARTY STATUS

The private attorney general doctrine awards attorneys’ fees to private litigants who enforce public rights in lawsuits. This doctrine is essential to protecting civil rights: It warms both the plaintiff and their attorney to the idea of taking on important civil rights litigation by easing concerns over cost. Without this safeguard, civil rights litigation may face a chilling effect. Absent the doctrine, a holdout is created in which any individual victim may find it easier and cheaper to wait for someone else to bring suit first. Under these circumstances, “[t]oo few victims will bring suit to establish rights that are uncertain at the moment of injury.” The doctrine is “essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions” because promoting private action is a fundamental part of “vindicat[ing] expressions of congressional or constitutional policy.” Without the private litigant, government legislation and regulation

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25 Wooster, supra note 2, § 2(a) (describing public rights which qualify under the private attorney general doctrine as “a right that: (1) benefits a large number of people; (2) requires private enforcement; and (3) is of societal importance” (citing Carl Cheng, Comment, Important Rights and the Private Attorney General Doctrine, 73 CALIF. L. REV. 1929, 1929 (1985))).
26 Keith N. Hylton, Fee Shifting and Incentives to Comply with the Law, 46 VAND. L. REV. 1069, 1104 (1993).
27 Id. at 1105. The plaintiff’s rights are “uncertain” by virtue of the nature in which existing laws are constitutionally challenged, not because of any indication of the case’s merits.
28 Woodland Hills Residents Ass’n v. City Council, 593 P.2d 200, 208 (Cal. 1979).
would go unchallenged, which contradicts a core premise of our democracy. By providing plaintiffs with meritorious claims some assurance that they will recover their attorneys’ fees, the private attorney general doctrine combats the incentive problem that exists for civil rights litigation under the traditional American rule that each party pays its own attorney’s fees regardless of the outcome.

Yet, in *Alyeska Pipeline Service Co. v. Wilderness Society*, the Supreme Court prohibited federal courts from applying the private attorney general doctrine without statutory authorization, holding that it was solely within Congress’s discretion to determine which causes of action may give rise to fee shifting. Congress responded to *Alyeska* by passing the Civil Rights Attorney’s Fees Awards Act of 1976. Legislative history makes clear that Congress intended for 42 U.S.C. § 1988 to cement the private attorney general doctrine within the federal judiciary regardless of whether the doctrine’s name actually appears in the statutory text. The House Report noted that testimony at the subcommittee hearings “indicated that civil rights litigants were suffering very severe hardships because of the *Alyeska* decision.” The Senate Report explicitly references the private attorney general doctrine, recognizing that “Congress has commonly authorized attorneys’ fees in laws under which ‘private attorneys general’ play a significant role in enforcing our policies.”

Moreover, the Senate Report is filled with compelling evidence that Congress not only wanted to codify the private attorney general doctrine, but also fully appreciated the importance of its preservation. The Senate classified these fee awards as “ancillary and incident to securing compliance with [civil rights] laws” and “an integral part of the remedies necessary to obtain such compliance.” Congress recognized the relief that fee awards may provide civil rights claims from a potential cost-related chilling effect.

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30 James Madison “famously justified the Constitution’s system of checks and balances with the observation that we are governed by mere ‘men,’ not ‘angels.’” Joseph C. Davis & Nicholas R. Reaves, *The Point Isn’t Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine*, 129 YALE L.J.F. 325, 326 (2019) (quoting THE FEDERALIST NO. 51, at 31 (James Madison) (Williams & Whiting 1810)). “For ‘if angels were to govern men, neither external nor internal controls on government would be necessary.’” Id. (quoting THE FEDERALIST NO. 51 (James Madison) (Williams & Whiting 1810)).

31 421 U.S. at 269.


35 Id. at 5.

36 See id. at 2 (“All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.”).
Most notably, the Senate Report states that the purpose of passing the Civil Rights Attorney’s Fees Awards Act was, in part, “to achieve consistency in our civil rights laws.” Yet, the courts have done little to maintain consistency in deciding prevailing party status.

Despite language in the Senate Report “[instruct]ing the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws,” the definition of when a litigant is considered a prevailing party has continually narrowed and is anything but clear for the civil rights plaintiff. So much of prevailing party status is fact-specific due to the various paths any given lawsuit can take, and avoiding the judicially created landmines surrounding prevailing party status is not a one-size-fits-all solution. Amidst this minefield, however, one aspect to this ongoing clarity issue is apparent: a plaintiff has received sufficient relief to qualify as a prevailing party if their case is mooted after obtaining a preliminary injunction. The next Part addresses the first hurdle in proving this conclusion.

II. The Preliminary Injunction Standard

In granting a preliminary injunction, a court goes through certain analyses that could later be the focal point of a prevailing party determination. As such, understanding the preliminary injunction standard is necessary to understand the prevailing party analysis. A preliminary injunction is an equitable remedy, which courts consider to be “extraordinary” and “never awarded as of right.” This is largely due to the nature of preliminary injunctions. A preliminary injunction commands a litigant to act or refrain from acting before a case is ultimately decided, and it is awarded entirely within the court’s discretion. Federal Rule of Civil Procedure 65 governs the procedure for requesting and granting a preliminary injunction, but offers no substantive insight into determining when a preliminary injunction is appropriate. Accordingly, courts have developed and been guided by a common law standard. There are four factors courts look to when awarding a preliminary injunction: (1) the

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37 Id. at 1.
38 Id. at 3.
41 Denlow, supra note 39, at 498–99.
43 FED. R. CIV. P. 65.
movant’s likelihood of success on the merits, (2) the movant’s likelihood of irreparable harm in the absence of preliminary relief, (3) whether the balance of equities tip in the movant’s favor, and (4) whether an injunction is in the public’s interest.44

Without guidance from Rule 65 of the Federal Rules of Civil Procedure, courts’ opportunity for discretion created considerable variation in how these factors were applied, often resulting in a sliding-scale approach.45 The Supreme Court’s ruling in Winter v. Natural Resources Defense Council, Inc. should have resolved these discrepancies, since the Court addressed lower courts’ applications of the factors. Yet, following Winter, courts continue to disagree over the correct preliminary injunction standard, and three different methods are used today: a sequential test, a sliding scale, and a hybrid approach.46

The sequential test requires that the movant establish each factor individually, and is used by the Fourth, Fifth, Tenth, and Eleventh Circuits.47 The sliding-scale approach examines each factor, but ultimately weighs the factors against each other through a balancing test, which can leave room for a lower acceptable threshold on the merits.48 The Second, Sixth, Seventh, Ninth, and D.C. Circuits use a sliding scale.49 Lastly, the hybrid test—or the

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45 See Rachel A. Weisshaar, Hazy Shades of Winter: Resolving the Circuit Split over Preliminary Injunctions, 65 VAND. L. REV. 1011, 1025–27, 1029 (2012) (discussing the inconsistencies within Supreme Court cases and the effect they had on different circuits).
47 Id.; see e.g., Real Truth About Obama, Inc. v. FEC, 575 F.3d 342, 346–47 (4th Cir. 2009) (recognizing that “Winter articulates four requirements, each of which must be satisfied as articulated”); Janvey v. Alguire, 647 F.3d 585, 595 (5th Cir. 2011) (referring to the four factors as “elements” that the plaintiff “must establish”); Diné Citizens Against Ruining Our Env’t v. Jewell, 839 F.3d 1276, 1282 (10th Cir. 2016) (applying the sequential test and holding that “any modified test which relaxes one of the prongs for preliminary relief and thus deviates from the standard test is impermissible”); Bloedorn v. Grube, 631 F.3d 1218, 1229 (11th Cir. 2011) (holding that a plaintiff must “clearly establish all of the . . . requirements”). The Fifth Circuit used the sequential test prior to Winter, while the Fourth Circuit adopted the sequential test based on their reading of Winter. Compare Miss. Power & Light Co. v. United Gas Pipe Line Co., 760 F.2d 618, 621 (5th Cir. 1985), with Real Truth About Obama, 575 F.3d at 347.
48 Payne, supra note 46, at 51.
49 See, e.g., Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 38 (2d Cir. 2010) (holding that Winter did not “abrogate the more flexible standard for a preliminary injunction”); S. Glazer’s Distrib. of Ohio, LLC v. Great Lakes Brewing Co., 860 F.3d 844, 849 (6th Cir. 2017) (describing the four factors as “factors to be balanced, not prerequisites to be met”); Hoosier Energy Rural Elec. Cooper., Inc. v. John Hancock Life Ins. Co., 582 F.3d 721, 725 (7th Cir. 2009) (“How strong a claim on the merits is enough depends on the balance of harms: the more net harm an injunction can prevent, the weaker the plaintiff’s claim on the merits can be while still supporting some preliminary relief.”); All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134 (9th Cir. 2011) (recognizing a sliding-scale approach as permissible after Winter); Sherley v. Sebelius, 644 F.3d 388, 398 (D.C. Cir. 2011) (“Under the sliding-scale approach, however, we must go on to determine whether the other three factors
gateway-factor test—requires the movant to demonstrate the first two factors, a likelihood of success on the merits and irreparable harm, before balancing the equities and public interest.\textsuperscript{50} The First, Third, and Eighth Circuits use the hybrid test.\textsuperscript{51}

The sequential test is not only the correct reading of \textit{Winter}, but it is also vital to a prevailing party analysis. Without the sequential test, a preliminary injunction may be awarded without proper assessment of the case’s merits. In turn, the court may decide that the plaintiff did not receive “actual relief on the merits” as required to qualify as a prevailing party. Section II.A briefly summarizes \textit{Winter} and its importance to informing the correct test for preliminary injunctions, and Section II.B breaks down why the sequential test is the correct reading of \textit{Winter} and discusses how other approaches to \textit{Winter} fall short.

**A. Winter v. Natural Resources Defense Council, Inc.**

In 2007, environmental activist groups sought to protect marine mammals from harm and enjoin the U.S. Navy from using midfrequency active sonar during its training exercises along the coast of Southern California.\textsuperscript{52} The U.S. District Court for the Central District of California awarded the preliminary injunction because plaintiffs demonstrated a “probability” of success and at least a “possibility” of irreparable harm to the environment.\textsuperscript{53} On appeal, the Ninth Circuit affirmed, reinforcing that a likelihood of success on the merits need only be coupled with the possibility of irreparable harm, consistent with a sliding-scale approach.\textsuperscript{54} The Supreme Court rejected the Ninth Circuit’s holding, calling it “too lenient.”\textsuperscript{55} The Court stated: “Issuing a preliminary injunction based only on a possibility of

\textsuperscript{50} See, e.g., Reilly v. City of Harrisburg, 858 F.3d 173, 176 (3d Cir. 2017) (holding that the district court “should balance [the] four factors so long as the party seeking the injunction meets the threshold on the first two”); Sierra Club v. U.S. Army Corps of Eng’rs, 645 F.3d 978, 992–93 (8th Cir. 2011) (noting the first two factors as necessary); Gonzalez-Droz v. Gonzalez-Colon, 573 F.3d 75, 79 (1st Cir. 2009) (designating the first two factors as the most important); see also Payne, \textit{supra} note 46, at 54–55.

\textsuperscript{51} Payne, \textit{supra} note 46, at 54–55.


\textsuperscript{53} \textit{Id.} at 17.

\textsuperscript{54} See \textit{id.} at 21. The entire procedural history of this case is much more complex and adequately relayed in the opinion. See \textit{id.} at 15–20.

\textsuperscript{55} \textit{Id.} at 22.
irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” Such analysis suggests that the Court rejected the sliding-scale approach.

The Court also stressed the importance of considering the public interest and the balance of equities, noting that the plaintiff’s likelihood of success on the merits and likelihood of irreparable injury would still be outweighed by those considerations. “Outweigh,” however, does not suggest a sliding-scale approach. Instead, it suggests that the four factors are a sequential test, and the lack or absence of any given factor will “outweigh” a sufficient showing of the other three. The Court acknowledged possible injury to marine mammals, but it concluded that the Navy would suffer greater injury if it could not adequately train its fleet. This rationale does not reflect balancing interests as a sliding scale, but instead reflects a standalone factor: balancing the equities. Thus, the balance of the equities “outweighed” any success the plaintiffs had in demonstrating the other factors—evidencing a sequential test.

Some scholars point to Justice Ruth Bader Ginsburg’s dissent as evidence that Winter did not reject the sliding-scale approach. She did not believe that the majority rejected the sliding-scale approach in Winter. While the majority did not make note to disagree with this notion, documented disagreement was not necessary. In her dissent, Justice Ginsburg failed to explain how the majority’s reasoning was consistent with the sliding-scale approach. She concludes that she would have affirmed the judgment of the Ninth Circuit based on “the likely, substantial harm . . . almost inevitable success on the merits . . . and the public interest.” While she does not directly include the remaining factor—that the balance of equities was tipped in the plaintiffs’ favor—Justice Ginsburg’s reasoning nonetheless suggests that she simply came to a different conclusion when individually determining each factor’s presence, as opposed to applying a sliding-scale approach. The foundation of her analysis is in line with the majority’s opinion of using a sequential test.

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56 Id. (citing Mazurek v. Armstrong, 520 U.S. 968, 972 (1997)).
57 Id. at 26.
58 Id. at 23–24.
59 Id. at 26.
60 Payne, supra note 46, at 40–41 (using Justice Ginsburg’s dissent in Winter to support that the sliding-scale test should be applied when awarding preliminary injunctions).
61 555 U.S. at 51 (Ginsburg, J., dissenting) (“This Court has never rejected that [sliding-scale] formulation, and I do not believe it does so today.”).
62 Id. at 53.
B. The Sequential Test

Under Winter, courts should apply a sequential test when considering the propriety of a preliminary injunction. The Supreme Court stated that the movant must establish each factor and joined the factors together with the conjunction “and.” Thus, the sequential test offers the most natural and appropriate reading of Winter. However, the rationale for the sequential test does not end at plain language. Carefully examining some of the factors independently—and understanding the implications of their applications—further establishes that Winter requires the sequential test. Section II.B.1 discusses the likelihood of success on the merits factor, and Section II.B.2 discusses the balance of equities factor.

1. Likelihood of Success on the Merits

The first factor, the likelihood of success on the merits, “is an important, perhaps the most important, factor in determining whether the plaintiff can obtain preliminary relief.” In Nken v. Holder, the Court referred to this factor as being among “the most critical.” The Court even emphasizes that “[t]he chance of success on the merits be ‘better than negligible.’” While Nken addressed a stay and not a preliminary injunction, the Court acknowledged the significant overlap in the methods used for granting both. Correctly designating a percentage to the “likelihood of success” of any given case is difficult, if not impossible, so the individual factor is not given such a precise quantification. Black’s Law Dictionary defines likelihood of success on the merits as “[t]he rule that a litigant who seeks a preliminary injunction . . . must show a reasonable probability of success in the litigation or appeal.” What constitutes “a reasonable probability” would depend on the nature of the case as some suits are naturally more complex than others. As such, the likelihood of success on

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63 Id. at 20.
64 Because the Court in Winter explicitly rejected lowering the likelihood of irreparable harm factor, it will not be discussed at more length in the proceeding analysis as it is unaffected by the various tests. Further, the public interest factor is less at issue in the discourse of which approach to take and will not be addressed.
67 Id.
68 Id. (“There is substantial overlap between these and the factors governing preliminary injunctions, not because the two are one in the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined.” (citation omitted)).
69 Likelihood-of-Success-on-the-Merits Test, BLACK’S LAW DICTIONARY, supra note 15.
the merits factor in and of itself is somewhat flexible without needing a sliding scale.\textsuperscript{70} One proponent of the sliding-scale approach argues that “serious questions on the merits” should be sufficient to satisfy a likelihood of success on the merits “as long as the movant also makes strong showings on the other three prongs.”\textsuperscript{71} Lowering the threshold for the likelihood of success on the merits directly contradicts Winter’s holding. Winter held that a “possibility” of irreparable harm was insufficient; there must be a showing of a “likelihood” of irreparable harm.\textsuperscript{72} The merits factor contains that same “likelihood” language, implying that it too must be met where the factor is without any modification to the phrasing or threshold adjustment.

Contrary to likelihood of success on the merits, “possibility” means “being conceivable in theory or in practice” or “the chance that something is or might be true, or that something might or will happen.”\textsuperscript{73} The Supreme Court’s rejection of a “possibility” as an adequate threshold showing for likelihood of success on the merits makes sense because any plaintiff might win any lawsuit they bring. Thus, while there is a logical floor for what it means to satisfy this factor, there remains considerable flexibility within the factor itself, rendering the lessening to “serious questions” unnecessary.

Further, courts do not award preliminary injunctions as of right, so they cannot award a preliminary injunction without a party’s showing of a reasonable expectation of success on the merits.\textsuperscript{74} Adopting a sequential test post-Winter does not raise the bar for preliminary injunctions. Instead, doing so simply conforms with the Court’s instructions for awarding this extraordinary remedy. Using the sequential test does not eliminate a court’s flexibility in awarding a preliminary injunction, but it does more clearly lay the proper foundation and create certainty that awarding the preliminary injunction was sufficiently based on the merits.

If the court applies a sliding-scale approach and lessens the threshold of success on the merits to less than “likely,” then it becomes more difficult to justify a litigant as the prevailing party who received actual relief on the

\textsuperscript{70} Relatedly, Black’s Law Dictionary defines “likely” as “showing a strong tendency” or “reasonably expected,” suggesting a similar rationale. Likely, BLACK’S LAW DICTIONARY, supra note 15.


\textsuperscript{72} 555 U.S. 7, 22 (2008) (“We agree with the Navy that the Ninth Circuit’s ‘possibility’ standard is too lenient. Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction.”).

\textsuperscript{73} Possibility, BLACK’S LAW DICTIONARY, supra note 15.

\textsuperscript{74} Munaf v. Geren, 553 U.S. 674, 689–90 (2008).
merits. Naturally, the predictive nature of the preliminary injunction lacks certainty that a plaintiff will succeed. However, a preliminary injunction is an extraordinary remedy, so it follows that there should be a high bar in obtaining such relief. The longstanding use of a likelihood of success on the merits factor indicates that showing a “likelihood” is sufficient to meet such a high bar. Yet, when courts apply the sliding-scale approach and give less weight to the merits of the case, they in turn provide less weight to the plaintiff’s future case for prevailing party status. As such, it is imperative that this circuit split be resolved in favor of a sequential test—not only because it is the correct reading of Winter but also to streamline prevailing party determination.

2. **Balance of the Equities Tips in the Movant’s Favor**

Some proponents of the sliding-scale test argue that Winter did not abrogate it. These commentators believe the third factor, balance of the equities, creates a sliding scale regardless of which formal approach is applied. However, this argument conflates looking at each factor individually, such as in the sequential test, with balancing the factors in toto, such as the sliding-scale approach. The balance of the equities is a standalone factor and not synonymous with an overall sliding scale. The balance of the equities can cause the movant to fail the preliminary injunction test when all three other factors are met, but the equities factor alone cannot alter a plaintiff’s demonstration of the other three factors. While it may be that the other factors aid in assessing the balance of equities, they are not entirely dispositive. For example, a finding of a likelihood of irreparable harm for the movant, satisfying the second factor, does not necessarily negate the possibility of a worse irreparable harm for the nonmovant. In that case, a sequential test would reject the preliminary injunction due to the balance of equities leaning in the nonmovant’s favor, but not because of any weighing

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75 See Higher Taste, Inc. v. City of Tacoma, 717 F.3d 712, 716 (9th Cir. 2013) (“[A] preliminary injunction satisfies the judicial imprimatur requirement if it is based on a finding that the plaintiff has shown a likelihood of success on the merits.”); Kan. Jud. Watch v. Stout, 653 F.3d 1230, 1238 (“First, and most fundamental, in order for a preliminary injunction to serve as the basis for prevailing-party status, the injunction must provide at least some relief on the merits of the plaintiff’s claim(s).”).

76 Balance of the equities compares the hardship to the nonmovant if the preliminary injunction is granted against the hardship to the movant if the preliminary injunction is not granted. See Antonyuk v. Hochul, 635 F. Supp. 3d 111, 125 (N.D.N.Y. 2022) (“A balance of equities tipping in favor of the party requesting a preliminary injunction means a balance of the hardships against the benefits.” (internal quotation marks omitted)); Payne, supra note 46, at 79–82 (“To the extent that the third element of the Winter test is ‘balancing of the equities,’ all three tests are balancing tests.”).
of the factors against each other. *Winter* itself is a good example of such circumstances.\(^{77}\)

There also appears to be some discrepancy between a true sliding-scale approach, explicitly lowering the threshold for one factor in favor of the others,\(^{78}\) and the “sliding scale” used by some of the circuits, which passively lowers what it means to meet a factor’s threshold based on a strong showing of another factor.\(^{79}\) These seemingly conflicting interpretations create unnecessary confusion and variation among the circuits. All the confusion and uncertainty surrounding the many variations of sliding-scale and hybrid tests could be easily resolved with the adoption of the correct test—the sequential test. This, in turn, will enhance uniformity within the courts so civil rights plaintiffs in all jurisdictions are afforded the same rights and opportunities when holding the government accountable. With a sequential test adopted, it becomes clear that a plaintiff who obtains a preliminary injunction qualifies for prevailing party status. Part III next discusses why preliminary injunctions alone are sufficient relief for prevailing party status.

### III. THE MERITS OF PRELIMINARY INJUNCTIONS IN PREVAILING PARTY STATUS

A plaintiff is considered a prevailing party “when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.”\(^{80}\) This analysis can be split into three parts: *first*, a foundational requirement of actual relief on the merits; *second*, a threshold requirement of a material alteration in the legal relationship between the parties; and *third*, modification of the defendant’s behavior in a way that directly benefits the plaintiff.\(^{81}\) The first requirement, actual relief on the merits, presents a foundational question because if the relief is not merits-based then there is no need to determine the effects of that relief. Section III.A discusses why

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\(^{77}\) 555 U.S. at 33 (“We do not discount the importance of plaintiffs’ ecological, scientific, and recreational interests in marine mammals. Those interests, however, are plainly outweighed by the Navy’s need to conduct realistic training exercises to ensure that it is able to neutralize the threat posed by enemy submarines.”).

\(^{78}\) Sherley v. Sebelius, 644 F.3d 388, 398 (D.C. Cir. 2011) (“Under the sliding-scale approach, however, we must go on to determine whether the other three factors so much favor the plaintiffs that they need only have raised a serious legal question on the merits.” (internal quotation marks omitted)).

\(^{79}\) Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co., 582 F.3d 721, 725 (7th Cir. 2009) (“How strong a claim on the merits is enough depends on the balance of harms: the more net harm an injunction can prevent, the weaker the plaintiff’s claim on the merits can be while still supporting the preliminary relief.”).


\(^{81}\) Part IV discusses the last requirement, modification of the defendant’s behavior in a way that directly benefits the plaintiff, separately.
preliminary injunctions satisfy this foundational requirement and serve as actual relief on the merits. The second requirement, a material alteration in the legal relationship between the parties, is the necessary threshold for the weight behind the relief. Section III.B discusses why preliminary injunctions satisfy this requirement.

A. Actual Relief on the Merits

When courts decide that a plaintiff whose case is mooted after obtaining a preliminary injunction is considered a prevailing party for the purposes of attorneys’ fees, they usually qualify the decision with the caveat that the preliminary injunction must be based on the merits.\(^2\) In applying Winter’s sequential test, the requirement for a preliminary injunction—a showing of likelihood of success on the merits—negates the need for this qualification. Before a court can award a preliminary injunction, it must assess the merits, albeit on a limited record. The Fourth Circuit upheld this logic in Stinnie v. Holcomb, stating that post-Winter “we may expect all preliminary injunctions to be solidly merits-based.”\(^3\)

However, in Singer Management Consultants, Inc. v. Milgram, the Third Circuit held that preliminary injunctions are not often sufficient for prevailing party status.\(^4\) The court cited the “likelihood of success on the merits” requirement as insufficient for a merits-based “resolution.”\(^5\) This deviates from the Supreme Court’s guidance, because the Supreme Court requires only that a prevailing party receive “relief,” not a “resolution.”\(^6\) Black’s Law Dictionary defines “relief” as “[t]he redress or benefit, esp[ecially] equitable in nature (such as an injunction or specific performance), that a party asks of a court” and considers “remedy” a

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\(^2\) E.g., Haley v. Pataki, 106 F.3d 478, 483 (2nd Cir. 1997) (“When a party receives a stay or preliminary injunction but never obtains a final judgment, attorney’s fees are proper if the court’s action in granting the preliminary injunction is governed by its assessment of the merits.”); Kan. Jud. Watch v. Stout, 653 F.3d 1230, 1238 (10th Cir. 2011) (“[A] preliminary injunction does not provide relief on the merits if the district court does not undertake a serious examination of the plaintiff’s likelihood of success on the merits . . . .”).


\(^4\) 650 F.3d 223, 229 (3d Cir. 2011); cf. Stinnie, 977 F.4th at 217 (describing Singer as “requiring a heightened showing on the merits”).

\(^5\) Singer, 650 F.3d at 229.

\(^6\) Farrar v. Hobby, 506 U.S. 103, 111–12 (1992) (“[A] plaintiff ‘prevails’ when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff . . . . [A] plaintiff who wins nominal damages is a prevailing party under § 1988. When a court awards nominal damages, it neither enters judgment for defendant on the merits nor declares the defendant’s legal immunity to suit.”).
synonym for “relief.” Thus, it follows that when a final resolution is impossible due to mootness, the relief already granted may serve as a sufficient foundation for the prevailing party analysis.

A successful showing of the “likelihood of success on the merits” requirement for receiving a preliminary injunction also sufficiently proves “actual relief on the merits” for prevailing party status. After Winter, a court cannot issue a preliminary injunction without a showing of likelihood of success on the merits. One commentator argued that “[a] likelihood of success on the merits is simply not the same as success on the merits.” However, prevailing party status, as the commentator later concedes, has an “arbitrary” foundational requirement for relief on the merits. The Supreme Court has only recognized a requirement of “actual relief on the merits,” not complete relief on the merits. Thus, a preliminary injunction and its preliminary approval on the merits, while not complete, are sufficient to qualify as “actual relief on the merits.” That the relief may be less than complete relief is supported by the Supreme Court’s recognition of interim attorneys’ fees awarded pending litigation.

Further, the amount of relief necessary to gain prevailing party status has never been quantified, so there is nothing requiring the quantification of how much judicial recognition of the merits is required to constitute prevailing party status. Courts should give credence to the lack of any quantified requirement because showing a likelihood of success on the merits requires “[m]ore than a mere ‘possibility’ of relief” being granted. This requirement for the likelihood of success on the merits, coupled with the long-held notion that preliminary injunctions are “never awarded as of right,” demonstrates that a plaintiff awarded this relief did not receive it lightly. As such, courts should place considerable weight on a decision to award a preliminary injunction. When relief in the form of a preliminary injunction is granted, courts can easily determine whether the preliminary injunction provided actual relief on the merits without jumping through the

87 Compare Relief, BLACK’S LAW DICTIONARY, supra note 15, with Resolution, BLACK’S LAW DICTIONARY, supra note 15 (“A court’s solemn judgment or decision.”). Awarding a preliminary injunction provides relief on the merits, but not a judgment on the merits.
89 Id. (“[N]othing in the prevailing party statutes suggests what the threshold should be, and no particular threshold is more logical than another.”).
90 Farrar, 506 U.S. at 111–12. In this context, complete relief could be a permanent injunction or declaratory judgment at the end of a trial, which would require ultimate success on the merits.
hoops of an overly extensive legal analysis. Recognizing the legitimacy of preliminary injunctions as actual relief on the merits creates efficiency and consistency for civil rights plaintiffs and courts alike.

B. Status Quo and Material Alteration of the Legal Relationship

For a plaintiff to be considered a prevailing party, the Supreme Court has explicitly required actual relief on the merits of the plaintiff’s claim. On the surface, this requirement would seem to encompass all preliminary injunctions under a sequential-test reading of Winter. If a likelihood of success on the merits in the preliminary injunction analysis always provides actual relief on the merits in the prevailing party status analysis, then every preliminary injunction would warrant prevailing party status. However, this blanket rule raises the concern that attorneys’ fees will be authorized based on every preliminary injunction in mooted cases.

Due to the nature of some areas of litigation, status quo preliminary injunctions act to preserve evidence necessary for a trial rather than provide necessary relief as requested by parties. Sometimes, the preliminary injunction “requires” the defendant to act or not act, but the practical effect is minimal. At first glance, the existence of these preliminary injunctions appears in conflict with Winter’s sequential test. Under the sequential test, plaintiffs must still show a likelihood of success on the merits for all preliminary injunctions. If one believes that status quo preliminary injunctions are the same as “actual relief,” then awarding attorneys’ fees based solely on preserving the status quo would be excessive and contrary to the idea that a plaintiff is a prevailing party. This concern, however, is a false conflict.

This conflict is self-correcting because not all preliminary injunctions provide the type of relief required for prevailing party status: relief that

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95 See Rick Richmond, Christopher S. Lindsay & Calvin Mohammadi, Use of Provisional Remedies Under the Defend Trade Secrets Act, 30 INTELL. PROP. & TECH. L.J. 13, 14 (2018) (noting that preliminary injunctions are sometimes used to preserve evidence). Additionally, some statutory provisions mandate a stay-put order which serves entirely to maintain the status quo. For example, the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415(j), requires a child to stay in the child’s then-current educational placement during the pendency of any proceedings related to the IDEA. This would certainly not rise to the level of prevailing party status due to the court having no choice but to award such preliminary relief, eliminating the common law requirement of a merits-based analysis. In J.O. ex rel. C.O. v. Orange Township Board of Education, the Third Circuit agreed, finding that the IDEA provision amounted to a stay-put order which acted as an “automatic preliminary injunction” and did not rise to the threshold necessary for granting prevailing party status. 287 F.3d 267, 272 (3d Cir. 2002).
96 See discussion supra notes 65–75 and accompanying text.
materially alters the legal relationship. The Supreme Court held that purely technical or de minimis “success” in a proceeding is insufficient to justify prevailing party status. Instead, success on “any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit” is sufficient to satisfy the second requirement for a determination of prevailing party status. This resolves the underlying conflict between the merit-based requirement of the Winter analysis, the “actual relief on the merits” requirement for prevailing party status, and issuing status quo preliminary injunctions. A good example of this in action can be seen by comparing the Fifth Circuit’s holdings in Dearmore v. City of Garland and Petteway v. Henry:

1. Dearmore v. City of Garland

In 2005, plaintiffs filed a complaint against the City of Garland, challenging the constitutionality of an ordinance related to inspection procedures in rental properties. The plaintiffs challenged the ordinance as violating the Fourth Amendment by authorizing warrantless searches of private homes and sought a declaratory judgment, injunctive relief, and attorneys’ fees. The district court issued a preliminary injunction enjoining the City from enforcing the ordinance provision requiring owners to allow inspections of their rental properties in order to receive a permit, finding that such a provision violated the Fourth Amendment. Following the preliminary injunction, the City advised that it planned to amend the ordinance, and did so a few days later. As a result of this change in the ordinance, the case was dismissed as moot and plaintiffs were awarded attorneys’ fees as a prevailing party under 42 U.S.C. § 1988(b). The City appealed.

The City argued, in part, that the plaintiffs were not a prevailing party because the preliminary injunction only “maintained the status quo until

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98 Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792–93 (1989) (“The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.”).
99 Id.
101 Dearmore v. City of Garland, 519 F.3d 517, 526 (5th Cir. 2008); Petteway v. Henry, 738 F.3d 132, 137 (5th Cir. 2013).
102 Dearmore, 519 F.3d at 519.
103 Id.
104 Id.
105 Id. at 520.
106 Id.
107 Id.
trial.” 108 The Fifth Circuit held otherwise. The Court reasoned that the preliminary injunction was awarded based upon the plaintiffs’ likelihood of success on the merits. 109 The district court “provided [plaintiffs] with the interim judicial relief that [they] requested—it blocked the City from enforcing the portion of the Ordinance that violated the Fourth Amendment. Because of [the] injunction, the City could not conduct warrantless searches or impose criminal penalties for noncompliance.” 110 Thus, the Fifth Circuit held that the plaintiffs were prevailing parties entitled to attorneys’ fees. 111

2. Petteway v. Henry

In 2011, Galveston County drafted new election maps and submitted the redistricting plan to the DOJ for preclearance. 112 A month after submission, plaintiffs filed a complaint challenging the redistricting plans as violating the Constitution and the Voting Rights Act. 113 Shortly thereafter, the DOJ requested additional information about the redistricting plans and their potential effect on minority voters. 114 Arguing that this signaled a decreased likelihood of preclearance, the plaintiffs sought a preliminary injunction enjoining the County from enforcing the uncleared plans. 115 The court granted the injunctive relief despite the County’s assurance that it would not implement the plans without preclearance. 116 The dispute over the appropriate map was resolved when the County and the DOJ worked together to create a new precleared set of maps. 117 The court ordered these maps be used for the elections and permanently enjoined the County from implementing uncleared plans. 118 As a result, the plaintiffs moved for attorneys’ fees, which the district court granted. 119 The County appealed. 120

On appeal, the County argued that the relief received was de minimis because “the injunction only required that the County continue its previously established conduct—refraining from implementing any unprecleared redistricting plans.” 121 The Fifth Circuit agreed, stating that there was no

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108 Id. at 524.
109 Id. at 524–25.
110 Id. at 526.
111 Id.
113 Id. at 135.
114 Id.
115 Id.
116 Id.
117 Id. at 136.
118 Id.
119 Id.
120 Id.
121 Id. at 137.
material effect on the County’s conduct given their compliance with the Voting Rights Act requirements prior to the filing of the lawsuit. As a result, the plaintiffs were not awarded prevailing party status.\textsuperscript{122}

C. Resolving the Conflict

In \textit{Dearmore}, the preliminary injunction materially altered the litigants’ legal relationship—it prohibited the defendant from enforcing an ordinance that would have otherwise been enforced, and the plaintiff was considered a prevailing party. Whereas, in \textit{Petteway}, the preliminary injunction was superficial. The preliminary injunction only cemented the action already taken by the defendants and reinforced what was already required by the Voting Rights Act. Nothing about the preliminary injunction changed the defendant’s conduct, so the plaintiff was not considered a prevailing party. This distinction demonstrates two points. First, it demonstrates that preliminary injunctions are capable of materially altering the litigants’ legal relationship. Second, it demonstrates that \textit{Winter}’s sequential test can coexist harmoniously with prevailing party status without giving rise to unnecessary awards of attorneys’ fees.

A preliminary injunction based on the \textit{Winter} factors cannot be classified as one that is not based on the merits. The Fifth Circuit relied on the lower court’s finding of a likelihood of success on the merits when determining prevailing party status. If the lower court had adopted a sliding-scale approach, the Fifth Circuit would not have had this assessment of the merits to rely on. Further, requiring a material alteration in the legal relationship between the two parties sufficiently eradicates status quo preliminary injunctions from qualifying a plaintiff as a prevailing party. As such, courts can safely welcome preliminary injunctions as a foundation for prevailing party status without concern over frivolously awarding such relief.

IV. The Judicial Imprimatur of Preliminary Injunctions: \textit{Buckhannon} and the Catalyst Theory

The remaining part of the three-part prevailing party status analysis is the requirement of a modification of the defendant’s behavior in a way that directly benefits the plaintiff. In \textit{Farrar v. Hobby}, the Supreme Court qualified that a material alteration in the legal relationship, as required for prevailing party status, must be relief that directly benefits the plaintiff and

\textsuperscript{122} \textit{Id.} at 138–39.
\textsuperscript{123} \textit{Id.} at 141.
in turn affects the defendant’s behavior towards the plaintiff.\textsuperscript{124} By that time, almost every circuit recognized the catalyst theory as a means for achieving prevailing party status.\textsuperscript{125} The catalyst theory “posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.”\textsuperscript{126} Under this theory, it was clear that prevailing party status could be awarded to a civil rights plaintiff who received a preliminary injunction against the government for a case that became moot when the defendant altered legislation. Less, if any, consideration was given to preliminary injunctions as a result since prevailing party status could be accomplished with far less relief. The Supreme Court ultimately rejected the catalyst theory in \textit{Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources}, creating a greater need for scrutiny of whether preliminary injunctions allow a plaintiff to qualify for prevailing party status.\textsuperscript{127}

In 1997, Buckhannon Board and Care Home, Inc. (Buckhannon Board) received cease and desist orders requiring closure of their assisted-living home, which was found to be in violation of a West Virginia law.\textsuperscript{128} Buckhannon Board filed suit in the U.S. District Court for the Northern District of West Virginia, challenging a specific requirement of the law as violating the Fair Housing Amendments Act of 1988 and the Americans with Disabilities Act of 1990.\textsuperscript{129} The defendants—the State of West Virginia, two West Virginia agencies, and eighteen individuals—agreed to stay enforcement of the cease and desist orders until the litigation could be resolved.\textsuperscript{130} In 1998, West Virginia enacted additional legislation to remove the challenged requirement, and the district court subsequently dismissed the case as moot.\textsuperscript{131}

Buckhannon Board sought attorneys’ fees as the prevailing party under the catalyst theory, but both the district court and the Fourth Circuit declined the request.\textsuperscript{132} The Supreme Court explicitly rejected the catalyst theory,

\begin{itemize}
\item \textsuperscript{127} \textit{Id.} at 605.
\item \textsuperscript{128} \textit{Id.} at 600.
\item \textsuperscript{129} \textit{Id.} at 600–01.
\item \textsuperscript{130} \textit{Id.} at 601.
\item \textsuperscript{131} \textit{Id.}
\item \textsuperscript{132} \textit{Id.} at 601–02.
\end{itemize}
holding that “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties.”\(^\text{133}\) The Court reasoned that a change brought by the defendant’s voluntary conduct lacked the “judicial imprimatur” necessary for prevailing party status.\(^\text{134}\) The only examples provided for adequate judicial imprimatur were “enforceable judgments on the merits and court-ordered consent decrees.”\(^\text{135}\) Courts have interpreted this list as illustrative and not exhaustive.\(^\text{136}\)

Further, a factual distinction leaves room for a narrow interpretation of *Buckhannon* that opens the door for preliminary injunctions. In *Buckhannon*, a preliminary injunction was not granted before the case was mooted by a change in the law.\(^\text{137}\) The only action taken after filing the complaint was a voluntary agreement to stay enforcement of cease and desist orders.\(^\text{138}\) Both the illustrative list and this factual distinction provide ample room for interpreting *Buckhannon* to still allow preliminary injunctions in mooted cases to demonstrate prevailing party status. Courts should embrace this interpretation for two reasons: (1) the Court placed too much emphasis on the voluntary-cessation doctrine and (2) the legislative history of the Civil Rights Attorney’s Fees Award Act of 1976 supports a narrow reading of *Buckhannon*. Section IV.A discusses a doctrinal justification for a narrow reading: the voluntary-cessation doctrine. Section IV.B discusses a second reason, the significance of the legislative history, that counsels the same. Section IV.C concludes by illustrating how preliminary injunctions fit into a narrow reading of *Buckhannon*.

### A. The Voluntary-Cessation Doctrine

*Buckhannon* Board argued that rejecting the catalyst theory would open the door for defendants to change their conduct in order to skirt responsibility for attorneys’ fees.\(^\text{139}\) The Court was not persuaded by this argument, citing the voluntary-cessation doctrine as an already-established resolution to this
The voluntary-cessation doctrine requires defendants who conduct changes mid-litigation to prove that it is "absolutely clear" that the conduct will not resume if the case is mooted. However, government entities often seek a change in the law during litigation in order to moot a case, and at least six circuits have allowed a lighter burden on the government when applying the voluntary-cessation doctrine. This is especially important to note because, in many instances of litigation involving "prevailing party" statutes, the defendant is the government. Given the new information that has come to light regarding the use of the voluntary-cessation doctrine, it is appropriate to read *Buckhannon* narrowly.

The Fourth Circuit noted the same concerns in *Stinnie* that were raised by *Buckhannon* and did not use the voluntary-cessation doctrine as a scapegoat. In addressing the issue, the court noted that "[t]he predictable outcome of this gamesmanship is fewer attorneys willing to represent civil rights plaintiffs in even clearly meritorious actions – particular those whose urgent situations call for interim relief." Civil rights cases are crucial to protecting the individual rights and autonomy embraced by our democracy. Yet, courts continue to narrow the scope of prevailing party status while offering more opportunities for the government to skirt the issue of attorneys’ fees altogether, disincentivizing prospective litigants. It is ultimately unlikely that *Buckhannon* would ever be overruled due to stare decisis and its widespread use, but the litigation history following *Buckhannon* should serve as persuasive authority for courts to adopt a very narrow reading.

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140 Id. at 609 (dismissing concerns over mootness because "[i]t is well settled that a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice unless it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur" (internal quotation marks omitted) (quoting *Friends of Earth, Inc.* v. *Laidlaw Env’t Sers.* (TOC), Inc., 528 U.S. 167, 189 (2000))).

141 Davis & Reaves, *supra* note 30, at 326.

142 Id. at 332–35 (discussing how the voluntary-cessation doctrine is underenforced with government defendants).

143 See generally *id.* at 337 ("[G]overnment defendants are repeat litigants, to a much greater extent than most private defendants. Indeed, one study estimated ‘that the U.S. government has been involved in over half the published decisions by the U.S. Courts of Appeals’ between 1946 and 1988.’" (quoting Donald R. Songer, Reginald S. Sheehan & Susan Brodie Haire, *Do the “Haves” Come Out Ahead over Time? Applying Galanter’s Framework to Decisions of the U.S. Courts of Appeals, 1925–1988*, 33 LAW & SOC’Y REV. 811, 830 (1999))).


145 Id.

146 For a more in-depth discussion surrounding the negative effects of *Buckhannon*, see Deramo, *supra* note 16, at 299–301, which argues for Congress to statutorily define "prevailing party" following the aftermath of *Buckhannon*.
B. The Legislative History of the Civil Rights Attorney’s Fees Award Act of 1976

Courts should also adopt a very narrow reading of Buckhannon because of the legislative history behind the Civil Rights Attorney’s Fees Award Act of 1976. In the House Report for this Act, Congress states that prevailing party status “include[s] a litigant who succeeds even if the case is concluded prior to a full evidentiary hearing before a judge or jury.” Moreover, Congress stated that attorneys’ fees should still be awarded when no formal relief is needed, and they recognized the possibility of a defendant voluntarily ceasing the unlawful practice following filing of a complaint. The Senate Report states that “parties may be considered to have prevailed when they vindicate rights ... without formally obtaining relief.” The Report also cites Parham v. Southwestern Bell Telephone Co., which awarded attorneys’ fees on the basis of the catalyst theory.

The Court in Buckhannon acknowledged at least part of this legislative history, referring to it as “at best ambiguous.” It is unclear how a direct reference to the circumstances behind the catalyst theory, coupled with cited precedent recognizing the legitimacy of the catalyst theory, can be ambiguous. One scholar referred to the Buckhannon decision as one of the “most preposterous decision[s] of the Term.” Another pointed out that the decision “undersubsidizes meritorious cases and creates uncertainty for plaintiffs by linking the availability of fees to a procedural hurdle only weakly correlated with a case’s merits.” In generous terms, it’s clear the Supreme Court got it wrong. Nonetheless, the Supreme Court decided, and the catalyst theory must be rejected unless Buckhannon is overruled. However, that does not mean that Buckhannon cannot be narrowly interpreted.

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148 Id. ("A 'prevailing' party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed.").
150 Id.
151 433 F.2d 421, 429–30 (8th Cir. 1970).
The majority in *Buckhannon* only used the phrase “judicial imprimatur” once throughout their opinion.\(^{155}\) Yet, it has been used as the guidepost for which avenues of relief survive *Buckhannon*.\(^{156}\) Black’s Law Dictionary defines “imprimatur” as “[a] general grant of approval; commendatory license or sanction.”\(^{157}\) Alone, this definition is vague. When prefaced with “judicial,” it remains vague. The majority also characterizes the type of relief necessary as “judicially sanctioned,” which offers some clarification, but still leaves much to the courts’ discretion.\(^{158}\) Given the existing framework, or lack thereof, courts should feel comfortable implementing a narrow interpretation of *Buckhannon* that only applies to cases involving the specific circumstances outlined in the opinion: a plaintiff files a complaint and a change in the law moots the case or a private settlement is reached.\(^{159}\) There is sufficient legislative history to support the courts in using their discretion to apply *Buckhannon* narrowly and find that a preliminary injunction holds the necessary judicial imprimatur for prevailing party status.

**C. Applications of Preliminary Injunctions Within Buckhannon**

There is considerable uncertainty surrounding whether a preliminary injunction alone could be sufficient for prevailing party status. One commentator argued that preliminary injunctions could still qualify for prevailing party status under a means-based approach to the prevailing party analysis.\(^{160}\) The means-based approach centers around identifying whether a party’s desired result was achieved by a judicially sanctioned change.\(^{161}\) However, the commentator suggests that a preliminary injunction is only sometimes sufficient.\(^{162}\) He argues that if a preliminary injunction is granted, and subsequently “some third party (like a legislature) forces the desired change, the plaintiff must depend on the catalyst theory despite having won

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155 *Buckhannon*, 532 U.S. at 605. Justice Ginsburg calls out the majority’s use of this phrase, stating “that in determining whether fee shifting is in order, the Court in the past has placed greatest weight not on any ‘judicial imprimatur,’ but on the practical impact of the lawsuit.” Id. at 641. (Ginsburg, J., dissenting) (citation omitted). She goes on to note that the Court’s “relief on the merits” precedent in *Hanrahan v. Hampton* does not require judicial imprimatur. Id. at 642 n.14 (citing *Hanrahan v. Hampton*, 446 U.S. 754 (1980)).

156 E.g., *Walker v. Calumet City*, 565 F.3d 1031, 1037 (7th Cir. 2009) (“The dismissal of the case for mootness did not impose a judicial imprimatur that would permit awarding attorney fees under *Buckhannon*.”); *Jones v. City of Los Angeles*, 555 F. App’x 659, 661 (9th Cir. 2014) (“[O]ur approval of the settlement agreement was sufficient judicial imprimatur.”).

157 *Imprimatur*, BLACK’S LAW DICTIONARY, supra note 15.

158 *Buckhannon*, 532 U.S. at 605.

159 See id. at 601, 604 n.7.

160 Forsyth, supra note 88, at 932, 957.

161 Id. at 957.

162 See id. at 957–59.
a preliminary injunction.”

Nothing in *Buckhannon* requires this conclusion.

In *Buckhannon*, the Court held: “We cannot agree that the term ‘prevailing party’ authorizes federal courts to award attorney’s fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the ‘sought-after destination’ without obtaining any judicial relief.”

A preliminary injunction is sufficient to be “any” judicial relief. The Fourth Circuit agrees, holding that “a preliminary injunction has provided the plaintiff with precisely the merits-based relief she needs for precisely as long as she needs it . . . . [M]ootness means that the material and concrete preliminary relief awarded cannot be superseded by a contrary final judgment on the merits in the same case.”

Other circuits have also embraced a similarly narrow interpretation of *Buckhannon*. In *Select Milk Producers, Inc. v. Johanns*, the D.C. Circuit upheld a determination of prevailing party status, discussing *Buckhannon*, but noting that “this is not a case in which the Government voluntarily changed its ways before judicial action was taken.”

The Court reasoned that “the District Court’s injunction, not the [defendant’s] voluntary change in conduct, afforded [plaintiffs] the relief they sought.” While a preliminary injunction is by no means an accurate prediction for the outcome of a case, it does signal to the defendant that the suit is not only not frivolous but also has at least some merit if such an extraordinary remedy is awarded.

A preliminary injunction’s material alteration of the legal relationship between the parties, namely the government’s inability to enforce a challenged rule or law, affords plaintiffs the relief they seek. The government’s “voluntary” conduct in changing the rule or law maintains this relief indefinitely in the same way a permanent injunction could have if the case had not been mooted. Withholding prevailing party status because the plaintiff’s opportunity to seek permanent relief was undercut by the defendant’s voluntary action contradicts the premise of the private attorney general doctrine that fee-shifting, prevailing-party statutes were modeled

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163 Id. at 958.
164 *Buckhannon*, 532 U.S. at 606 (emphasis added).
166 See, e.g., Higher Taste, Inc. v. City of Tacoma, 717 F.3d 712, 716 (9th Cir. 2013) (“[A] preliminary injunction satisfies the judicial imprimatur requirement if it is based on a finding that the plaintiff has shown a likelihood of success on the merits.”); Watson v. County of Riverside, 300 F.3d 1092, 1096 (9th Cir. 2002) (“A preliminary injunction issued by a judge carries all the ‘judicial imprimatur’ necessary to satisfy *Buckhannon*.”).
167 400 F.3d 939, 949 (D.C. Cir. 2005).
168 Id.
after. The government should not be required to wait out litigation in order to make changes to laws that violate an individual’s civil rights, but that does not mean the civil rights plaintiff ought to be robbed of their attorneys’ fees because of this pre-final judgment change. Thus, not only is a preliminary injunction sufficient for prevailing party status, but it is also necessary to protect equal access to these essential causes of action. The hands of the courts are ultimately tied on the catalyst theory, but that does not stop the courts from embracing a cohesive and consistent approach to finding prevailing party status following a preliminary injunction.

CONCLUSION

Shortly after the Supreme Court’s decision in *Alyeska*, Congress went to great lengths to preserve the private attorney general doctrine by enacting the Civil Rights Attorney’s Fees Award Act of 1976.\(^{169}\) Given Congress’s intent for such preservation, it ought to be clear what the enacting Congress intended by leaving “prevailing party” undefined in the statute—a codification of the pre-*Alyeska* private attorney general doctrine. Instead of following clear congressional intent in defining the statutory term, the Supreme Court took the opportunity to disrupt what was once a clearly understood and widely accepted legal concept. In his *Alyeska* dissent, Justice Thurgood Marshall rejected the majority’s suggestion “that the policy questions bearing on whether to grant attorneys’ fees in a particular case are not ones that the Judiciary is well equipped to handle, and that fee shifting under the private-attorney-general rationale would quickly degenerate into an arbitrary and lawless process.”\(^{170}\) Even with the preservation of the private attorney general doctrine through fee-shifting statutes, the judiciary’s inadequate definition of prevailing party status has itself heralded the arbitrary and lawless process the Court supposedly denounced in *Alyeska*.

After *Winter*, courts have continued to muddy what it means to be awarded a preliminary injunction and whether it is merit-based, an issue resolved by adopting the proper sequential test for preliminary injunctions. In *Buckhannon*, the Supreme Court ignored almost every circuit, disregarded the clear legislative intent, and essentially promoted a huge tool for the government to dodge paying plaintiffs’ attorneys’ fees: mooting a case before a final judgment. As a result, the average civil rights litigant is left with excessive caution and uncertainty. Private action is instrumental in government accountability, but the institution designed to check the powers

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of the Executive and Legislative Branches has alternatively hindered this important principle within our democracy. The current legal landscape surrounding prevailing party status is imprecise, and it is imperative that steps are taken to maintain the broadest range of prevailing party opportunities for the civil rights plaintiff. An easy first step is affirmatively answering the question reserved by the Supreme Court in Sole: a plaintiff whose case is mooted after obtaining a preliminary injunction is a prevailing party for the purpose of attorneys’ fees.

A preliminary injunction provides actual relief on the merits of the case, materially changes the legal relationship between the parties, and has sufficient judicial imprimatur for prevailing party status. Following Winter, a preliminary injunction should not be granted without a finding of likelihood of success on the merits. Further, a likelihood of success on the merits is sufficient to demonstrate actual relief on the merits. The extraordinary nature of the remedy “never awarded as of right” further evinces that a preliminary injunction materially alters the legal relationship between the parties. Requiring a litigant to perform a certain action, or refrain from performing an action they otherwise would perform, satisfies the necessary threshold of material alteration.

Finally, a preliminary injunction contains the judicial imprimatur necessary to comply with the Supreme Court’s decision in Buckhannon. While the Supreme Court did reject the catalyst theory and create uncertainty surrounding exactly what relief is sufficient for prevailing party status, a narrow reading of the opinion and a close look at the legislative history behind the Civil Rights Attorney’s Fees Award Act of 1976 more than endorse the preliminary injunction as relief that meets the necessary requisite under Buckhannon. Preserving a broad implementation of prevailing party status contributes to the effectuation of our civil rights laws through the ordinary person. An efficient and predictable way to do so is by unambiguously including preliminary injunctions as an adequate foundation for authorizing prevailing party status, shifting the chilling effect away from the civil rights plaintiff and onto the government’s exploitation of loopholes.
