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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: GERALD A. LEWIS, ETC., Appellant, v.

CONTINENTAL BANK CORPORATION, ET AL.

CASE NO: 87-1955

PLACE: Washington, D.C.

DATE: November 28, 1989

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 GERALD A. LEWIS, ETC., :
4 Appellant :
5 v. : No. 87-1955
6 CONTINENTAL BANK CORPORATION, :
7 ET AL. :
8 -----x

9 Washington, D.C.

10 Tuesday, November 28, 1989

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:52 a.m.

14 APPEARANCES:

15 MR. ARTHUR E. WILMARTH, JR., ESQ, Washington, D.C.; on
16 behalf of the Appellant.

17 MR. ANDREW L. GORDON, ESQ., Miami, Florida; on behalf of
18 the Appellees.

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1 below should be reversed for three reasons.

2 First, this case has become moot by reason of a
3 1987 amendment to the Federal Bank Holding Company Act.
4 Second, Section 664.02 of the Florida statutes, which
5 prohibits the issuance of any further ISB charters to any
6 person, represents a non-discriminatory exercise of
7 Florida's authority over the chartering of local banking
8 institutions. The statute is therefore lawful under the
9 Commerce Clause. And, as the court of appeals found, the
10 statute would thereby moot the case by precluding any
11 relief to Continental. Third, Continental's claims under
12 the dormant Commerce Clause do not vindicate any right
13 secured by the Constitution that is cognizable under 42
14 U.S.C. 1983. Accordingly, Continental cannot recover
15 attorneys fees under Section 1988.

16 I will first, very briefly, touch on the mootness
17 issue. It is undisputed, as shown by the briefs, that
18 Continental cannot now open the ISB for which it applied,
19 which was an FDIC insured ISB. In 1987 Congress amended
20 the Bank Holding Company Act and expanded the definition
21 of bank to include all FDIC insured institutions.

22 Continental is an Illinois bank holding company.
23 Under the Douglas Amendment, Continental cannot acquire a
24 bank in Florida, unless Florida gives specific
25 authorization for Illinois bank holding companies to do

1 so. Again, it is undisputed that Florida has not
2 permitted Illinois bank holding companies to acquire banks
3 in Florida.

4 QUESTION: Mr. Wilmarth, suppose instead of filing
5 an application for a particular bank, as they had done,
6 the plaintiffs here had brought a, simply brought a
7 declaratory judgment action prior to filing that
8 application, it being clear that the application would be
9 denied under the law in question, and asserted that the
10 law in question was unconstitutional? Would that
11 declaratory judgment action properly lie?

12 MR. WILMARTH: I do not believe so, Justice Scalia,
13 because there would have been both a standing problem, in
14 my view, and perhaps a rightness problem. If they had no
15 application pending under the statute, or in fact could
16 not show to this Court's satisfaction or the trial court's
17 satisfaction that they intended to open an ISB under the
18 statute, then obviously it would be merely a hypothetical,
19 speculative case, and would be asking only for an advisory
20 opinion, which is not within just issuability grounds.
21 And that is really the situation that we have --

22 QUESTION: Under the amended federal act, what is
23 left of this case?

24 MR. WILMARTH: The only thing that is left, Justice
25 White, is whether or not Continental now actually intends

1 to go forward and open an uninsured industrial savings
2 bank. They cannot open an FDIC insured bank. They have
3 had numerous opportunities to do so. They have never made
4 an unequivocal, absolute commitment that they will apply
5 for an ISB that is uninsured if they win this case. They
6 have --

7 QUESTION: Do you know if there are a lot of
8 institutions that accept deposits that aren't insured?

9 MR. WILMARTH: I think we have said in our opening
10 brief that in our banking institutions today, less than
11 one half of one percent of deposits are uninsured. That
12 everyone understands that federal deposit insurance is --

13 QUESTION: That may be one reason there hasn't been
14 some unequivocal announcement.

15 MR. WILMARTH: I think that is right, Your Honor.
16 In fact, as we mentioned, Continental has been the subject
17 of the largest FDIC bailout in history. It is highly
18 unlikely, in our view, that they could convince the
19 public, or would try to convince the public, to put
20 uninsured deposits on account in one of their
21 subsidiaries. I think the public would justifiably be
22 very skeptical about doing so. But in the absence of an
23 unequivocal --

24 QUESTION: But does that make the case moot really?

25 MR. WILMARTH: I -- Yes, it is our position that

1 that makes the case moot, and that the decision of the
2 court of appeals should be vacated and remanded on the
3 grounds of mootness.

4 QUESTION: Well, of course, in cases like that
5 Granite Rock case from California, there was no absolute
6 assurance that the mining interests were going to
7 continue. They just said well, if economic conditions are
8 such that we can, we would like to continue. And that is
9 very much like the kind of allegation the bank is making
10 here.

11 MR. WILMARTH: I would like to distinguish that, if
12 I could, Justice O'Connor, because I thought your opinion
13 in that case was very helpful. You said that the mining
14 company in that case said we have valuable mining claims
15 here, and we intend to pursue them, so long as that is
16 economically viable. In other words, unless it becomes
17 economically unviable, we will pursue them. Continental
18 is exactly the opposite. Continental says well, if we win
19 this case, and if we then decide that perhaps we could
20 succeed in an operation, we will apply. I think that is a
21 very different kind of commitment. They are not saying,
22 yes, we will go ahead unless we find out later that it is
23 just not viable. They certainly have not said that.

24 QUESTION: Well, I thought their statement was
25 pretty much to the effect that they do intend to file for

1 this uninsured permit or license, provided the economic
2 circumstances justify it.

3 MR. WILMARTH: Yes, that is in fact the statement.
4 But it is my view that that is sort of saying we don't
5 absolutely commit at this time to go ahead, but we may go
6 ahead in the future if we decide that that is economically
7 viable.

8 QUESTION: Is there anything that has prevented
9 Continental from applying in the past?

10 MR. WILMARTH: Not to my knowledge, Your Honor.
11 The application has been stayed by the Florida
12 administrative authorities pending this Court, but we do
13 not know of anything that would have prevented them from
14 filing an amended application if they had desired to do
15 so. I am not aware of any administrative bar.

16 If I might, I would then proceed to the Commerce
17 Clause issue. It is our belief that Section 664.02 is
18 entirely non-discriminatory both on its face and in its
19 impact. The statute is neutral on its face. It simply
20 says that no one can now obtain an ISB charter, that
21 Comptroller Lewis is barred from granting any more
22 charters. Now, the court of appeals found this was
23 discriminatory but we should examine what that finding was
24 resting upon. The court of appeals said we find that non-
25 southeastern bank holding companies, that cannot enter

1 Florida under the Douglas Amendment and cannot acquire
2 full service banks, would wish to acquire ISBs because
3 they can't acquire full service banks.

4 We find that southeastern bank holding companies
5 probably wouldn't be interested in opening an ISB, because
6 they can acquire a full service bank. What that really
7 amounts to is, they are saying a non-southeastern bank
8 holding company cannot acquire a full service bank. A
9 southeastern bank holding company can. But, of course,
10 that is the Douglas Amendment. The Douglas Amendment
11 establishes that discrimination, and in Northeast Bancorp
12 this Court found that that discrimination was entirely
13 authorized by Congress under the Commerce Clause.

14 Section 60, 60 -- I am sorry, 664.02, has no
15 independent discriminatory impact. If the Douglas
16 Amendment did not exist, there would be no case, because --

17 -
18 QUESTION: Well, do we, in determining whether
19 there is a discriminatory effect, do we look at the
20 statute independently of the Douglas Amendment, or in
21 tandem with it?

22 MR. WILMARTH: What I would say the test might be,
23 Justice O'Connor, is does this statute add any
24 discrimination that does not already exist by virtue of
25 the Douglas Amendment. It is our view that it does not,

1 because it equally withdraws ISB charters from everyone.
2 It does not add any discrimination, any differential
3 treatment.

4 QUESTION: Well, how do you get around that Lewis
5 case against --

6 MR. WILMARTH: I think --

7 QUESTION: -- BT --

8 MR. WILMARTH: BT Investment.

9 QUESTION: -- Investment which held that plugging a
10 loophole in the Douglas Amendment violated the Commerce
11 Clause.

12 MR. WILMARTH: I think that was a different case in
13 this respect. In BT Investment, Florida said that we are
14 barring only out-of-state bank holding companies from
15 acquiring investment advisory subsidiaries. We are going
16 to permit Florida bank holding companies to continue
17 buying these things or establishing them. So there you
18 had a discriminatory statute on its face and in its
19 impact, because they said we're only applying this statute
20 to out-of-state bank holding companies. Here, Lewis said,
21 yes, we find, and the statutory legislative history on
22 page 31 of the joint appendix shows, that Lewis -- I am
23 sorry, the state legislature, understood that these ISBs
24 were being applied for by Bank of America, Citicorp, and
25 Continental, for the very purpose of circumventing the

1 Douglas Amendment, for circumventing restrictions on
2 interstate banking. And the Florida legislature made a
3 principle decision that they did not want to see their
4 regional banking program and the Douglas Amendment
5 undermined by these non-bank banks.

6 QUESTION: What did you do about your ISBs that
7 were already in existence?

8 MR. WILMARTH: Uh, we grandfathered the three
9 existing ISBs --

10 QUESTION: Doesn't, isn't that a, sort of a
11 substantial consideration? You say you have treated
12 everybody the same. Well, you haven't. You've got ISBs
13 operating in Florida.

14 MR. WILMARTH: Not any longer, I would point out,
15 Justice White. They have now all converted into other
16 types of institutions. There were three small
17 institutions. We would think this case is similar to
18 Minnesota versus Clover Leaf Creamery or New Orleans
19 versus Dukes.

20 QUESTION: What would you say if they hadn't been
21 converted to some other type of institution?

22 MR. WILMARTH: Well, I would still take the same
23 position that Clover Leaf Creamery said that a state
24 legislature does not have to strike at all evils at once.
25 That there the state legislature decided to withdraw --

1 QUESTION: Well, it wouldn't be striking at an
2 evil, it would be --

3 MR. WILMARTH: Well, with respect --

4 QUESTION: -- preserving a, preserving a local
5 preference.

6 MR. WILMARTH: With respect, I think, as far as
7 Lewis was concerned, this was a very dangerous
8 development, because this meant that Florida could no
9 longer preserve a competitive and unconcentrated banking
10 environment that would be responsive to the needs of its
11 local consumers and businesses. And it is interesting, I
12 think, in retrospect, that Congress actually agreed with
13 Florida and in 1987 plugged the non-bank bank loop-hole,
14 finding that, exactly the same thing, that the non-bank
15 banks were undermining the states' abilities to choose
16 under the Douglas Amendment.

17 QUESTION: But suppose the statute said in its
18 preamble, in order to prevent states from outside the,
19 banks from outside the southeast region, from establishing
20 ISBs in the State of Florida, and to protect the existing
21 competitive environment within the State of Florida, we
22 hereby enact the following. Any, any difference in that
23 case?

24 MR. WILMARTH: I think that is essentially, as I
25 understand the policies that are clearly either stated or

1 implicit on joint appendix 31, that Florida is saying we
2 just passed a regional banking program last month. We
3 want to preserve this first experimental step toward full
4 interstate banking. We don't want to see it undermined by
5 forces outside our control. Congress has given us control
6 over our banking structure, and so we are making a choice
7 that we are going to withdraw this charter option from
8 everyone, in-state as well as out-of-state. That is the
9 cost of plugging the loophole. In other words, Florida --

10 QUESTION: Well, answer my question. Suppose that
11 were in the preamble. Would the case be the same?

12 MR. WILMARTH: I, I believe so. I don't think
13 there, I think that would be the same, in my view, that
14 the, I think the legislative history, plus the implied
15 knowledge of legislature, what they had done a month
16 before, seems to me to amount to what you have just said.
17 That we have decided that we are going to maintain our
18 regional banking program by not letting non-southeastern
19 people in to open non-bank banks, and we find that the
20 reason we are doing this is to preserve a competitive,
21 unconcentrated banking environment.

22 We cited in our main brief that their regional
23 banking statute had been based on very extensive studies
24 and reports to the Governor and to the state legislature.
25 And those were the purposes articulated in those staff

1 reports, that what Florida is doing by establishing a
2 regional banking program is to preserve a competitive,
3 unconcentrated banking environment, and to provide for the
4 credit needs of local businesses and consumers.

5 QUESTION: But at the time they did not have the
6 right to protect their regional banking scheme from, from
7 ISBs.

8 MR. WILMARTH: Well, that, that of course was in
9 1984, and it is our view that the Commerce Clause did not
10 prevent them from taking a non-discriminatory step toward
11 withdrawing the option from everyone. That that is really
12 equivalent, I think, to what the Maryland legislature did
13 in Exxon Corp. versus Governor of Maryland, or in a sense
14 what Minnesota Clo --

15 QUESTION: Well, that, that may be a valid
16 argument, but it seems to me it doesn't respond to Justice
17 Kennedy's point, that the motivation was perfectly okay.

18 MR. WILMARTH: Well --

19 QUESTION: You're, you're -- because the motivation
20 wasn't perfectly okay if they did not have a right to
21 preserve their regional, their regional system, against a
22 particular type of bank.

23 MR. WILMARTH: Well, I think that the way I would
24 respond to that, Justice Scalia, is that the Douglas
25 Amendment did allow them to choose a regional approach.

1 QUESTION: Yes, but didn't, but didn't allow them
2 to insulate it against one type of bank, which may have
3 been a mistake, but that was the federal law.

4 MR. WILMARTH: Well, our --

5 QUESTION: And you are saying that their motivation
6 was we want to insulate it even against this kind of bank.
7 And, now maybe what they did was objectively okay, but
8 that's a different question. We are just talking about
9 whether the motivation is on its face a thoroughly
10 federally justified motivation. I suggest it isn't.

11 MR. WILMARTH: I see. Well, I think that, to the
12 extent that legislators are presumed to know the law, one
13 could certainly presume that they understood that the
14 Commerce Clause allowed for non-discriminatory exercises
15 of authority over chartering. That that has not been --
16 for example, Section 7 of the Bank Holding Company Act as
17 interpreted in BT Investment, said that the states could
18 legitimately enact regulations of bank holding companies
19 and subsidiaries on a non-discriminatory, even-handed
20 basis. They were more restrictive than federal law. And,
21 for example, there have been cases holding that you can
22 deny an entire type of non-banking subsidiary to bank
23 holding companies, so long as you do it even-handedly.
24 That is, that is not discrimination.

25 QUESTION: But the question is whether you are

1 doing it even-handedly, when you grandfather in the
2 existing local institutions.

3 MR. WILMARTH: Well, again I would say there that
4 it seems to me in two cases, the Clover Leaf Creamery and
5 the Dukes case, that you allowed very limited
6 grandfathering, where you found that the limited, the
7 grandfathering of the paperboard, the pulp, the pulp type
8 of paperboard milk cartons in Minnesota, did not strike
9 you as inherently discriminatory, or the preservation of
10 the three push cart vendors in New Orleans did not strike
11 you as, inherently as discriminatory.

12 QUESTION: Well, that wasn't a Commerce Clause
13 case. That was an equal protection case.

14 MR. WILMARTH: Yes, Dukes was. Clover Leaf
15 Creamery was both, equal protection and Commerce Clause.
16 I also would say that I don't understand that in any of
17 your cases you have found, that even if you found a
18 discriminatory intent, that that was the case. That in
19 all the cases that I have read, for example, Philadelphia
20 versus New Jersey, Lewis versus BT Investment, and other
21 cases, Hunt versus Washington Apple Advertising
22 Commission, where you thought there was some indication of
23 protectionist intent, you always went further and said
24 well, the main test is what is the impact of the statute.
25 Is the statute discriminatory in its impact?

1 And, for the reasons I have suggested, this statute
2 is not discriminatory in its impact. It had an even-
3 handed impact upon both in-state and out-of-state holding
4 companies, because, apart from the Douglas Amendment,
5 there would be no, there would be no argument of
6 discriminatory treatment here. The statute itself
7 withdraws the option equally.

8 If I might then proceed at this time to the Section
9 1983 issue. We take the position that both the plain
10 language and the evident purposes of both the Commerce
11 Clause and the 1983 establish that the claim of violation
12 of the dormant Commerce Clause does not vindicate any
13 right secured by the Constitution, which, of course, is
14 the predicate for finding a Section 1983 remedy.

15 Preliminarily I would say that we have also shown
16 that, of course, 1983 fees would not be available here
17 unless Continental actually obtained some meaningful
18 relief. And if you find the case to be moot, based upon
19 the federal law change I have mentioned, or if you find it
20 to be moot because Section 664.02 is valid and therefore
21 prohibits the granting of the charter, then, in that case,
22 Continental has obtained no relief here, and under the
23 case such as Hewitt versus Helms and your Garland case
24 last term, there would be no relief, and therefore no
25 fees.

1 But going to the merits of the 1983 issue, the
2 Commerce Clause itself does not guarantee or grant any
3 rights to market participants. The Commerce Clause says
4 that Congress shall have power to regulate commerce among
5 the states. There is no mention of any rights granting or
6 rights guaranteeing provision in that constitutional
7 provision. It is very different from other provisions,
8 such as the privileges -

9 QUESTION: That is a good argument against the
10 dormant Commerce Clause, but that argument has been made
11 and lost. We, for many years, have said that that
12 provision not only confers power upon Congress, but, in
13 and of itself, prevents people from, prevents states from
14 doing certain things, which means it, in and of itself,
15 gives individuals the right not to have states do certain
16 things. Doesn't that follow? It seems to me it does.

17 MR. WILMARTH: Justice Scalia, the way we approach
18 the dormant Commerce Clause is that it does prohibit state
19 discrimination against interstate commerce, but it does so
20 as an allocation of power between the federal and state
21 governments. It denies to the states the power to
22 discriminate. But, of course, as you have recognized in
23 cases such as Northeast Bancorp, Congress can restore the
24 power to discriminate.

25 QUESTION: But then I guess only the federal

1 government can sue when a state violates it.

2 MR. WILMARTH: Well, no, we take the position --

3 QUESTION: But that's not the case. Private
4 individuals can sue and say you have violated this
5 allocation of power.

6 MR. WILMARTH: Yes, we acknowledge that Continental
7 certainly has standing to complain of a violation of the
8 Commerce Clause, so that this is a case arising under the
9 federal Constitution within 1331, and they have standing
10 as a party aggrieved. But that is different --

11 QUESTION: How can you have standing to assert a
12 right that is not yours? Isn't that rather strange?

13 MR. WILMARTH: Well, I think in, for example cases
14 such as Clarke versus Securities Industry Association, you
15 have said that an indirect beneficiary of a statute, for
16 example, can assert a claim, even though they are not the
17 direct beneficiary.

18 QUESTION: Well, that's right. Because that
19 indirect beneficiary is a beneficiary and has a right.

20 MR. WILMARTH: Well, again, we think that the
21 notion of right as used in 1983 is a very, is a particular
22 meaning of right. And that is, does this person have a
23 constitutionally guaranteed right to engage in interstate
24 commerce. And really, in four cases this Court has said
25 the contrary. That in Clover Leaf, Exxon, and CTS, this

1 Court has said that the Commerce Clause protects the
2 market. It does not protect particular participants in
3 that market. That it protects the national interest in
4 having economic uniformity and an absence of commercial
5 hostility among the states. But it does not protect
6 individual participants, because Congress, for example as
7 in the Glass-Steagall Act, can entirely prohibit
8 interstate commerce, or, as in the case of the Douglas
9 Amendment, it can delegate to the states the opportunity
10 to restrict interstate commerce. So this is not a right
11 of the same kind as the Equal Protection Clause or the Due
12 Process Clause.

13 I think it was put most strongly in the
14 Metropolitan Life Insurance case, upon which Continental
15 relies. In that case Justice Powell said that the
16 interstate -- I am sorry, the Commerce Clause and the
17 Equal Protection Clause perform different functions. The
18 Commerce Clause protects interstate commerce. The Equal
19 Protection Clause protects persons from unconstitutional
20 discrimination by the states. And that is really the
21 heart of our argument. The clause itself is not a grant
22 or guarantee of any constitutional right to engage in
23 interstate commerce, and therefore it is important to draw
24 a distinction between 1983, which says any right secured
25 by the Constitution, and, for example, Section 1331, which

1 says any right arising under the Constitution.

2 QUESTION: Why would you say that 1983 doesn't
3 authorize a suit for, by a private party, based on the
4 Commerce Clause?

5 MR. WILMARTH: It is our view that first of all
6 Continental would have to show that they have a
7 constitutionally guaranteed right to engage in interstate
8 commerce. And that is certainly contrary to this Court's
9 decisions.

10 QUESTION: Well, why should it be able to bring any
11 suit at all? I thought you said that they can bring a
12 suit.

13 MR. WILMARTH: Oh. They could bring a suit, they
14 have standing to bring a suit under the federal question
15 statute, 1331 --

16 QUESTION: Well, why? Why? Based on what? The
17 Commerce Clause?

18 MR. WILMARTH: Well, again, this would be --

19 QUESTION: Based on the Commerce Clause?

20 MR. WILMARTH: Right. Yes, on the dormant Commerce
21 Clause. This Court's decisions have given them --

22 QUESTION: You mean they could, it wouldn't be
23 subject automatically to dismissal for failure to state
24 the cause of action?

25 MR. WILMARTH: No. No, it is our view that this

1 Court, in cases since Ex parte Young, have said that there
2 is an implied federal action for prospective injunctive
3 relief to prevent a violation of the Constitution, and
4 that, for example in Hunt, a three judge --

5 QUESTION: You mean you can bring, you can bring a
6 federal, you can say the federal cause of action directly
7 under the Commerce Clause?

8 MR. WILMARTH: Yes.

9 QUESTION: But you cannot state one under a 1983.

10 MR. WILMARTH: That is our position.

11 QUESTION: That is -- and why not under a 1983?

12 MR. WILMARTH: Because, to find the 1983 you must
13 find that this is, they are vindicating their rights
14 secured by the Constitution --

15 QUESTION: Oh I know, but you say that, if you just
16 allege, if you just proceed under 1331, you can sustain,
17 you can not be subject to automatic dismissal.

18 MR. WILMARTH: Yes. Because, again --

19 QUESTION: Because you have got a right.

20 MR. WILMARTH: Well, that you --

21 QUESTION: A guaranteed constitutional right.

22 MR. WILMARTH: No, I don't believe that is the
23 case. I think what you were saying is the state has
24 violated a provision of the Constitution, and we are
25 aggrieved by that violation. We do have economic

1 interests that are being adversely affected. And Ex parte
2 Young says --

3 QUESTION: And that the plaintiff has been hurt.

4 MR. WILMARTH: Yes. We agree that they are
5 adversely effected.

6 QUESTION: The plaintiff has been hurt, and he has
7 a right not to be hurt.

8 MR. WILMARTH: Well, that he has a right -- I am
9 sorry. He has an entitlement to sue --

10 QUESTION: And an entitlement to, in that suit, to
11 damages, I suppose. Or do you say he can only have
12 injunctive relief?

13 MR. WILMARTH: Under Ex parte Young he only has
14 prospective injunctive relief against the state. That, he
15 also has attorneys fees under the Hutto versus Finney
16 decision, but he has nothing more. And he, of course,
17 sued Lewis in his official capacity, so under Will versus
18 Michigan he would not have damages.

19 Lastly I would say that the legislative history of
20 1983 is completely barren of any suggestion that Commerce
21 Clause actions were to be included within this rights
22 secured by the Constitution. That Continental has shown
23 no legislative history that suggests that, and the one
24 piece of legislative history, Representative
25 Shellabarger's comment --

1 QUESTION: It doesn't refer to statutes
2 specifically either.

3 MR. WILMARTH: That was added later, you are right,
4 Justice White.

5 QUESTION: It was not added in the statute, it was
6 --

7 QUESTION: Added in this Court, yes, over some
8 dissent.

9 MR. WILMARTH: But, Representative Shellabarger
10 said there are two types of constitutional provisions.
11 There are those that allocate powers between the state and
12 the federal government, and there are those that secure
13 particular rights to individuals. And he made reference
14 to the Supreme Court's case of Prigg versus Pennsylvania,
15 which we may have referred to, I am neglecting, in our
16 brief. But, in Prigg versus Pennsylvania the Court said
17 that under the Fugitive Slave Clause, a slave holder had a
18 right that he could vindicate under the Constitution.
19 Now, Shellabarger seemed to draw a distinction between
20 those types of constitutionally guaranteed rights, which
21 he said would be vindicable under the Civil Rights Act
22 of 19 -- 1871, and the allocation of powers provisions,
23 which he certainly implied would not be included within
24 1983.

25 I would like to preserve the remainder of my time

1 for rebuttal, please.

2 QUESTION: Thank you, Mr. Wilmarth. Mr. Gordon. I
3 hope sometime, Mr. Gordon, you will tell us exactly what
4 the position of your client is with respect to pursuing an
5 application in Florida now.

6 ORAL ARGUMENT OF ANDREW L. GORDON

7 ON BEHALF OF THE APPELLEES

8 MR. GORDON: Mr. Chief Justice, and may it please
9 the Court:

10 I would like to start with that. First of all,
11 what the department is doing here is raising two separate
12 mootness claims. One is a claim that we have some sort of
13 compulsion to update our application. There is a second
14 mootness claim that has to do with the present inability
15 to obtain FDIC insurance. And there is sort of a pea and
16 shell game going on here between those two mootness
17 claims, and what I would like to do is address the two of
18 them separately.

19 QUESTION: Well, you agree that the application
20 that you now have on file is not very consistent with the
21 federal law?

22 MR. GORDON: What we agree is that --

23 QUESTION: That particular application --

24 MR. GORDON: The application speaks for itself.

25 QUESTION: Florida does not have to grant that

1 application under the present federal law.

2 MR. GORDON: Well, if we are going to be --

3 QUESTION: Is that right or not?

4 MR. GORDON: If we are going to be technical --

5 QUESTION: Is that right or not?

6 MR. GORDON: I would disagree with that. If we are
7 going to be technical, what the application states is that
8 we will seek FDIC insurance to the extent permitted by
9 law. In this particular case, as a result, you know, nine
10 years later, the extent is no extent. So, being
11 technical, we are not going to be able to get FDIC
12 insurance. There is nothing in this record which should
13 indicate that the FDIC will ever grant insurance for an
14 entity that would thereby become illegal. There is no
15 reason to believe that we would ever apply --

16 QUESTION: So you say, you say that your
17 application really amounts to an application to, for an
18 uninsured, to establish a bank that would receive
19 uninsured deposits.

20 MR. GORDON: What I think is really going on here
21 is that this is an application that was filed nine years
22 ago, and circumstances have changed. And I really would
23 address Mr. Scalia's comment or question about our ability
24 to simply independently file a declaratory judgment.

25 Let me first, let me just specifically address the

1 lack of insurance. We have unequivocally stated in our
2 brief, page 20 of our brief, that we do not believe that
3 the lack of FDIC insurance is any obstacle here to our
4 application. We believe that we can go forward and have a
5 profitable, successful industrial savings bank without
6 FDIC insurance. What we have as support, obviously there
7 is no direct record support here since this is an issue
8 which arose after the trial court, we cited to the court
9 statistics showing that there are hundreds and hundreds
10 and billions of dollars of uninsured deposits in this
11 country.

12 Mr. Wilmarth referred to special circumstances
13 regarding Continental Bank that, because of Continental's
14 status that it would be unable to have uninsured deposits.
15 Continental has an Edge Act bank. Edge Act banks, under
16 federal law, are not permitted to have FDIC insurance.

17 QUESTION: Mr. Gordon, the issue isn't whether you
18 can. I mean, I can too, but -- you know, establish a bank
19 without insurance. But I don't have standing to sue. The
20 issue isn't whether you can, but whether you intend to.

21 MR. GORDON: That's --

22 QUESTION: And all you have brought before us is an
23 application that on its face indicates an intent to
24 establish a bank with the insurance. Now, why do we have
25 any special reason to believe that this matters to you

1 anymore, except for the attorneys fees that are at stake
2 here?

3 MR. GORDON: Justice, that is the second part of
4 what I am wanting to address in terms of the fact that we
5 have not filed another application. Since 1984 Florida
6 law has prohibited us from filing an application, or
7 prohibited the grant of an application. I suppose we
8 could have put one in the mail, and it would have just
9 been sent back. There is, this application proceeding has
10 been stayed on motion by the department since 1982.

11 We are representing here that we intend to go
12 forward with our ISB application. Continental has a
13 present intention to go forward with ISB applications.
14 Continental actually is considering going in more than one
15 location in Florida. The reservation that we have stated
16 in our brief is limited to solely the following
17 circumstance, that we cannot predict what the case will be
18 six months from now, nine months from now, two years from
19 now. The department is seeking remand for further
20 factual development --

21 QUESTION: You mean the case in the sense of
22 strictly economic considerations, that a business would
23 take into consideration.

24 MR. GORDON: That is correct. We, at the present
25 time, know of no consideration that would preclude us from

1 going forward.

2 QUESTION: Why haven't you filed an amendment to
3 your application?

4 MR. GORDON: Under Florida law, what is required in
5 an application is a whole series of different items. For
6 example, we have to precisely designate the location of
7 the facility. We have to include a copy of the lease. We
8 have to enter into that lease, or have a lease option. I
9 submit, for example, that mootness does not require us for
10 nine years to pay rent solely to keep a live application.
11 Under the application procedure we have to designate who
12 our officers are going to be. They have to be kept
13 available, as soon as the application is approved, to go
14 in and open the business. That is an obvious
15 impossibility here with this kind of litigation that lasts
16 this long amount of time.

17 QUESTION: I don't understand. Do you have that
18 -- have you done that for the current application?

19 MR. GORDON: That was all done in the current
20 application.

21 QUESTION: So why can't you just amend that
22 provision and use the same locations and the same
23 facilities? That's what I don't --

24 MR. GORDON: Well, it's just nine years later, and
25 there are changes. We can amend, but I guess what I am

1 saying is that there is also a substantial amount of that
2 application that is time sensitive. In other words, that
3 application, within six months or nine months or a year of
4 being amended, would itself become stale. People leave
5 the bank, there would be new officers, we end up going to
6 a different location. What the department essentially is
7 saying here is that we have the obligation once a year to
8 update our application. And what our contention is is
9 that there is no decision of this Court that has ever
10 required that for nine years we have to continue to
11 maintain a current application to test the validity of an
12 absolute prohibition against going in --

13 QUESTION: Yes, but -- but, Mr. Gordon, there is
14 another thing that normally is done in litigation. You
15 have said this in your brief, in pages 19 and 20. Have
16 you filed any kind of a formal pleading or is there any
17 evidence, anything in the record that supports what you
18 are saying?

19 MR. GORDON: We would be happy to submit an
20 affidavit.

21 QUESTION: Well, I am not asking you what you are
22 be happy to do. I am asking you whether you did amend
23 your pleadings --

24 MR. GORDON: No, no, Sir.

25 QUESTION: -- in any way, saying that you intend to

1 go forward with the modified application. That is
2 normally the way a lawyer makes the record he needs to
3 avoid mootness, not by saying things in his brief.

4 MR. GORDON: Justice, the litigation here was not
5 directed at the contents of the application. They simply
6 refused to accept our application. So there is nothing in
7 our complaint that isn't still applicable. What we are
8 seeking here is simply the right to have them accept our
9 application for processing. The contents of the
10 application, in a technical way, are really irrelevant to
11 the right that Continental is seeking to obtain here, and
12 that is to have an application by an out-of-state bank
13 holding company considered on the merits, irrespective of
14 the location or the headquarters of the applicant. And
15 that --

16 QUESTION: Well, I suppose that if the state had
17 just, when the federal law was amended, if the state had
18 just dismissed your application, the case would be moot
19 unless you filed an amendment.

20 MR. GORDON: Or we in some other way demonstrated
21 our intention to go forward. Because what we have here is
22 an absolute prohibition by state law against the issuance
23 of a charter. And what we are seeking to do here is
24 obtain the right to go forward in the face of that
25 absolute prohibition.

1 The mootness issue here obviously is essential to
2 our case. And if there are any questions regarding the
3 nature of Continental's intentions, you know, I would be
4 happy and be pleased to expand on what I have just said.

5 QUESTION: There have been questions on this for a
6 long time. I share Justice Stevens' perplexity. This
7 mootness issue didn't just pop up yesterday. It has been
8 here for a long time, and it would have been very easy to
9 have some clear assurance in the record that the bank is
10 serious about going into business here, of course subject
11 to, you know, inter -- subsequent change in economic
12 conditions. But there isn't any assurance in the record
13 except, except an application that indicates an intent to
14 go ahead with an insured bank.

15 MR. GORDON: Justice Scalia, this issue --

16 QUESTION: And that is no longer possible.

17 MR. GORDON: This issue arose in the court of
18 appeals after complete briefing and argument, I guess
19 about a week before the court of appeals decision.

20 QUESTION: And you won on that issue.

21 MR. GORDON: And we prevailed both, we prevailed
22 both --

23 QUESTION: Initially and on moot.

24 MR. GORDON: Correct.

25 QUESTION: The court of appeals said it was not

1 moot.

2 MR. GORDON: Correct.

3 QUESTION: Because they accepted your --

4 MR. GORDON: Essentially, yes, Sir. But, again,
5 just so that the record is completely clear, any
6 reservation that we are making here is simply the
7 reservation that we made as a matter of common sense by
8 any business that is going to be asked to spend an awful
9 lot of money to put together an application, invest
10 millions of dollars in banks in more than one location, at
11 an unknown point in the future. We, I submit, meet every
12 criteria of the test that this Court looked at in Granite
13 Rock. It's not dissimilar to the kind of thing that was
14 in Super Tire, where there were employers who were going
15 to face a future problem with unemployment compensation in
16 labor law.

17 QUESTION: Mr. Wilmarth, just so I am clear about
18 it, is your representation to this Court that Continental
19 currently proposes to open a bank?

20 MR. GORDON: Yes, Sir.

21 QUESTION: That that is its current intention.

22 MR. GORDON: Yes, Sir.

23 QUESTION: But simply that that intention may
24 change in the future because of economic --

25 MR. GORDON: For reasons that are unknown at this

1 time.

2 QUESTION: Okay. But it is your representation
3 that it is your client's current intention to go forward.

4 MR. GORDON: Yes, Sir.

5 QUESTION: With an uninsured ISB.

6 MR. GORDON: Yes, Sir. We simply -- the things
7 that we can check include the lack of FDIC insurance.
8 FDIC insurance is something that we, Continental can talk
9 to its marketing people, and is able to determine, to the
10 extent that it can do so at the present time, that FDIC
11 insurance is not a problem. FDIC insurance is not what is
12 causing any reservation by Continental. That we are
13 saying unequivocally, also.

14 QUESTION: Well, if we were satisfied that without
15 such insurance that it would be absurd, as a practical
16 matter, to even consider opening it, do we take that into
17 account in determining whether this case is moot?

18 MR. GORDON: Justice, the additional point I think
19 that I would like to note here is that there is an
20 application procedure. And that application procedure is
21 to determine whether the proposed applicant has a
22 reasonable promise of successful operation. That is the
23 statutory criteria. The application process itself will
24 decide whether we can operate. And that is what we are
25 seeking to have. We are seeking to have an application

1 process that is free of the discrimination which has
2 existed now for nine years.

3 Let me turn to the Commerce Clause issue. This
4 Court repeatedly has held that discriminatory motive or
5 discriminatory effect is sufficient to invalidate
6 protectionist state action. I would cite to the Court
7 both the Bacchus case and the Minnesota versus Clover Leaf
8 Creamery. Mr. Wilmarth --

9 QUESTION: Discriminatory intent, which has no
10 adverse impact?

11 MR. GORDON: The Court's decisions can be read to
12 say that. I think in this case we have both effect and
13 intent. But, let me just begin at least with intent. In
14 Clover Leaf Creamery, this Court said, in finding that
15 there was no discriminatory intent, that it was going to
16 rely on the statements of the legislature. And what we
17 have here is a flat statement by the legislature that this
18 statute was enacted for the purpose of depriving
19 Continental of an effective means of gaining access to
20 Florida deposits. That is the quote from the legislative
21 history. There is no doubt here as to the motive of the
22 legislature. There is a history here that goes back 17
23 years as to the motive of the legislature.

24 In 1980, in the Lewis case, this Court held
25 unconstitutional Florida's prohibitions against the

1 acquisition of non-banking subsidiaries by out-of-state
2 bank holding companies. The Florida legislature, three
3 weeks later, reenacted the statute, verbatim. The acts of
4 the Florida legislature here are nothing more than acts of
5 defiance of this Court.

6 The legislature further, when we received a
7 preliminary injunction in this case, proceeded to impose a
8 moratorium. After the moratorium expired and we received
9 summary judgment, the department came up with an
10 administrative policy. Their administrative policy was
11 that Continental had to act as a "bank" under the bank
12 holding company act, and thus be barred under the Douglas
13 Amendment. That administrative policy itself was illegal
14 under Florida's very strict adherence to the doctrine of
15 improper delegation of legislative authority. The Florida
16 APA follows that very strictly, much more so than the
17 federal APA.

18 It further had a problem, the department's policy,
19 because we took the deposition of the director of the
20 Division of Banking. He didn't know this policy existed.
21 We finally showed him the pleading filed in this case to
22 show that the policy existed. He was unable to say when
23 it was formed. He was unable to say what its scope was.
24 He was unable to give any details regarding how this
25 policy came into being, how it operated, or how it would e

1 effect Continental.

2 Following that deposition, which I submit made it
3 fairly clear to all the parties that this administrative
4 policy wasn't going to prevent Continental from going
5 forward, is when the Florida legislature enacted the 1984
6 statute which is being challenged here, which completely
7 barred any out-of-state -- excuse me, which completely
8 barred any ISB chartering authority in the future. That
9 statute, as the Court has noted, grandfathered the
10 existing Florida ISBs. It further had its, unlike the
11 rest of the banking legislation, had its effective date
12 accelerated. It, as I said earlier, in its legislative
13 history makes clear that it was expressly directed at
14 Continental's application, and was enacted because
15 Continental obtained summary judgment in this case.

16 QUESTION: Mr. Gordon, you say that the statute,
17 the Florida statute in 1984 grandfathered existing Florida
18 ISBs. Were there any other ISBs that could have been
19 grandfathered, but weren't?

20 MR. GORDON: No. They grandfathered the existing
21 ISBs.

22 QUESTION: So they grandfathered all the ISBs that
23 were.

24 MR. GORDON: There were a number of applications
25 pending, and those applications by out-of-state bank

1 holding companies effectively were cut off.

2 QUESTION: Yes, but when you are talking about
3 grandfathering, your argument could be read to suggest
4 that they grandfathered the Florida ISBs, but that there
5 were others similarly situated that weren't.

6 MR. GORDON: No --

7 QUESTION: But, there were only Florida ISBs, and
8 they were grandfathered. Is that what it amounted to?

9 MR. GORDON: Yes, Sir. I may have been imprecise
10 in some language.

11 QUESTION: And they're no longer in existence
12 either.

13 MR. GORDON: The department has offered them bank
14 charters and they apparently have all accepted. In
15 addition to motive, which I submit here is, the record is
16 overwhelming, despite the denials by the department, the
17 effects here are also plain. What we have here is an
18 absolute prohibition against engaging in business. This
19 Court has never required, in circumstances of an absolute
20 prohibition, that there be some specific record evidence
21 of an effect, for the reason that it is impossible to show
22 effect when there is a complete prohibition against
23 engaging in the interstate commerce.

24 QUESTION: Well, in that respect, do you challenge
25 the constitutional validity of 658.74 and 664.07, which

1 say that only a bank or an ISB may provide these banking
2 services? I mean, isn't that really what causes the
3 discrimination that concerns you here?

4 MR. GORDON: No, Sir. The -- we have two areas
5 here. We have the Section 3(d), as to which Congress has
6 authorized discrimination. We have Section 4(c)(8)
7 subsidiaries as to which Congress has not authorized
8 subsidiary -- excuse me, have not authorized
9 discrimination, as this Court held in Lewis, in Lewis one.
10 There are all sorts of different kinds of Section 4(c)(8)
11 subsidiaries which engage in many of the same activities
12 that Section 3(d) banks engage in. But this is what
13 Congress decided. This was the line that Congress drew.

14 QUESTION: Well, but -- but given the Florida
15 scheme, wouldn't it make just as much sense for you to be
16 attacking as unconstitutional because of a violation of
17 the Commerce Clause, the Florida provisions which say that
18 only a bank can engage in certain kinds of services? I
19 mean, that is really the nub of the problem, isn't it?

20 MR. GORDON: It -- there is probably no shortage of
21 Florida statutes that are unconstitutional, or that could
22 be attacked from the constitutional basis. So long,
23 though, as the entity is a Section 3(d) entity, we have no
24 complaint. Congress has drawn that line. And Congress,
25 instead of drawing the line, you know, in terms of a

1 market, has drawn the line in terms of a particular
2 corporate structure.

3 QUESTION: Well, I take it that Florida could
4 permit these banking services to be rendered by non-bank
5 institutions if it chose, quite without regard to the
6 federal legislation. Or am I incorrect about that?

7 MR. GORDON: Florida certainly would have freedom
8 to have financial services delivered in any number of
9 ways.

10 QUESTION: Well, why isn't that the
11 unconstitutional statute here, rather than the statute
12 which concerns chartering of ISBs?

13 MR. GORDON: Well, I am not sure I understand your
14 question, Justice.

15 QUESTION: Well, you want to engage in banking
16 services. That's -- you don't want an ISB, you don't care
17 really about an ISB. You want to engage in these
18 ancillary banking services. Isn't that the point?

19 MR. GORDON: Well, but Congress has drawn a line,
20 and we -- you know, Congress's power over interstate
21 commerce is plenary, and it has drawn the line as to
22 Section 3(d) banks. And so long as the statute is
23 applicable --

24 QUESTION: But it isn't Congress. It is the
25 Florida statute which says that only a bank can offer

1 these services. That is the only reason you want the ISB.
2 So, isn't that really the causative statute which denies
3 you the right to engage in business that you choose, that
4 you are seeking?

5 MR. GORDON: Justice, I suppose that we could have
6 a argument in a particular factual context, which I don't
7 know that we have here, where a statute of that sort might
8 be unconstitutional, if it had the purpose and effect of
9 discriminating against interstate commerce. I am not sure
10 that the Florida statute, as presently written, there
11 either could be a factual record that could support that,
12 or, you know, that there would be those sorts of effects.

13 Let me turn to the -- let me, I guess, give one
14 more response there. I think that what the department is
15 trying to do here is to take the aura of Section 3(d) and
16 transport it, or transpose it, into other kinds of
17 activities that are Section 4(c)(8). And what they have
18 done is take the same argument that was rejected by this
19 Court in Lewis, and dressed it up in different clothes in
20 this case. In Lewis, what, in the first Lewis case, what
21 the department tried to say was that Section 3(d), by its
22 nature, in order to be effective, constituted
23 congressional authorization for discrimination as to
24 Section 4(c)(8).

25 QUESTION: Well, Mr. Gordon, could Florida just

1 say, have said, as an initial proposition, we are not
2 going to have ISBs in Florida. Period.

3 MR. GORDON: Before all this came up?

4 QUESTION: Sure.

5 MR. GORDON: Certainly.

6 QUESTION: Well, in effect that is what they are
7 saying now.

8 MR. GORDON: Well, the distinction --

9 QUESTION: How can, how do you have a right to
10 compel them to charter a certain kind of corporation?

11 MR. GORDON: There are a number of responses.
12 First of all, there is just a right way to do things and a
13 wrong way to do things. And what the state has done here
14 is act with discriminatory intent and discriminatory
15 effect. And that is what the Constitution prohibits.
16 They could, on a different record, they might be able to
17 do entirely the same thing.

18 The -- Justice Holmes once remarked that even a dog
19 can distinguish between being stumbled over and being
20 kicked. There is a difference between when there is a
21 discriminatory motive, and when it is being done for
22 appropriate, proper, regulatory reasons.

23 QUESTION: You are saying, in effect, that a
24 discriminatory motive will invalidate an enactment which,
25 so far as impact is concerned, is perfectly permissible

1 under the Commerce Clause?

2 MR. GORDON: Well, this Court --

3 QUESTION: I know, I mean what is your position?

4 And then tell me, if you will, well what supports it.

5 MR. GORDON: The normal presumption is that
6 statutes will have the effects intended by the
7 legislature. So looking to discriminatory motive, and
8 finding that sufficient, is simply another way of saying
9 that this Court will assume that legislation will have the
10 effects that are intended by the legislature. And that, I
11 submit, is an appropriate way to protect the interests in
12 national union, which are the foundation --

13 QUESTION: What is -- what do you think is your
14 best case from this Court that says discriminatory intent
15 alone, without any consideration of impact, violates the
16 Commerce Clause?

17 MR. GORDON: Well, Bacchus and Minnesota versus
18 Clover Leaf Creamery. They both -- Minnesota says that.
19 Bacchus is more along those lines.

20 QUESTION: Not quite.

21 MR. GORDON: What?

22 QUESTION: Not quite.

23 MR. GORDON: There is at least language in both
24 decisions that lend themselves to that. Certainly there
25 has been many suggestions that discriminatory motive,

1 discriminatory intent, is the focus of this Court's
2 Commerce Clause doctrine and juris prudence.

3 QUESTION: We probe the heart of the states, that
4 is what this is really about.

5 MR. GORDON: Well, the state has announced --

6 QUESTION: Evil states, we punish them, whether
7 they do harm or not. We want to stop bad motivations out
8 there.

9 MR. GORDON: Well --

10 QUESTION: That doesn't seem -- I never knew we did
11 that.

12 MR. GORDON: It turns on whether, you know, we
13 assume that legislatures are competent, and that
14 legislation will have the effects that they desire. And
15 this legislation certainly has had the effect of keeping
16 out-of-state bank holding companies out of the State of
17 Florida now for, as to this particular issue, for nine
18 years.

19 Let me turn, finally, to the attorneys fee issue.
20 First of all, as we set forth in our brief, there is, at
21 least in this record, a substantial basis to assume that
22 attorneys fees were imposed as sanctions. There is
23 obviously complete silence on the part of the eleventh
24 circuit as to why they imposed attorneys fees, but there
25 is more than enough, particularly in a situation where the

1 state does not even bother responding to a motion for
2 attorneys fees, to assume that attorneys fees here are
3 proper.

4 QUESTION: Did you cite alternate bases for the
5 award of attorneys fees on your request to the court of
6 appeals?

7 MR. GORDON: Yes, Sir. Justice Kennedy, my feeling
8 that this is an award for sanctions basically relates to
9 events at oral argument, where the eleventh circuit
10 expressed its displeasure with the litigation. There is
11 nothing in particular in the record that shows just what
12 it is that the eleventh circuit was doing.

13 But turning to the core 1983 issue, 1988 issue, our
14 position, very briefly, is that there is nothing in the
15 legislative history which has sufficient clarity to
16 restrict the plain statutory language in 1983. 1983
17 provides a cause of action for any deprivation of any
18 right, privilege or immunity. That language is as broad
19 as Congress could imagine. It is, the language itself is
20 broader than the language contained in the Fourteenth
21 Amendment. The Fourteenth Amendment contains no reference
22 to rights, solely to privileges and immunities.

23 The legislative history has been exhaustively
24 analyzed by this Court. I don't think I need to go
25 through it, but this Court, in a number of decisions, has

1 made clear that there is nothing in that legislative
2 history that justifies extending less than all of the
3 rights conferred by the Constitution on litigants in
4 federal courts.

5 If the Court has no further questions.

6 QUESTION: I have just one for you. I am sorry to
7 trouble you with it again, but I thought you gave me a
8 categorical answer last time, but then you went on to say
9 the bank has not yet considered the effects of inability
10 to get insurance or what not?

11 MR. GORDON: No, Sir. I didn't mean to in any way
12 qualify what I said.

13 QUESTION: The bank has considered its inability to
14 get insurance by reason of the new legislation, and
15 nonetheless has made the determination to proceed with
16 this application.

17 MR. GORDON: Right. As to that issue, the bank
18 presently can evaluate, presumably there is not going to
19 be a lot of difference between the inability to have
20 insurance now and the inability to have insurance a year
21 from now, or two years from now. It is a number of other
22 economic possibilities that you just, you can't predict
23 what is going to happen.

24 QUESTION: Thank you, Mr. Gordon. Mr. Wilmarth,
25 you have four minutes remaining.

1 REBUTTAL ARGUMENT OF ARTHUR E. WILMARTH, JR.

2 ON BEHALF OF THE APPELLANT

3 MR. WILMARTH: Thank you, Mr. Chief Justice.

4 First, with regard to the assertion that the court of
5 appeals could have based attorneys fees on a sanction for
6 bad faith conduct, as we indicated in our reply brief at
7 page 5, footnote 9, the Roadway Express versus Piper case
8 makes clear that in the absence of a finding of bad faith
9 conduct by the court of appeals, or by the district court,
10 there can be no upholding of attorneys fees based on a
11 sanction. And Continental has admitted that there was no
12 finding by the court of appeals of bad faith conduct, nor
13 was there any finding by the district court of bad faith
14 conduct. In fact, the district court denied attorneys
15 fees on that basis.

16 Continental's motion for attorneys fees was simply
17 a two sentence motion which incorporated its earlier
18 appellate brief, and Lewis had replied to that appellate
19 brief. So the motion added nothing, rather than just
20 incorporating.

21 With the question about whether unconstitutional
22 motivation is enough to strike down a state statute, or
23 indeed a federal statute, I think there are two decisions
24 of this Court that are relevant. Palmer versus Thompson
25 in 403 U.S. 217, which was an equal protection case, and

1 the United States versus O'Brien, 391 U.S. 367, which was
2 a First Amendment case involving a congressional statute
3 about burning draft cards. And in both cases this Court
4 said that there, it was disinclined to strike down a
5 statute based only on allegations of unconstitutional
6 motivation, because it is often very hard to determine
7 exactly what motivates each and every legislature. So I
8 think that those cases really repudiate the notion that
9 unconstitutional motivation, without any showing of
10 unconstitutional impact, is enough.

11 I think that the questions of Justice O'Connor and
12 Justice Kennedy indicated what we have been expressing,
13 which is that there is no showing that Florida was obliged
14 to open loopholes in the Douglas Amendment, that Florida
15 was somehow constitutionally required to open loopholes so
16 the Douglas Amendment wouldn't bite upon out-of-state bank
17 holding companies. And if that is true, and the United
18 States indicated that they agreed with that position in
19 their jurisdictional brief at page 17, then we say for the
20 same reason it can't be a violation of the Commerce Clause
21 for Florida even-handedly to withdraw a chartering option
22 from everyone. That that is the price they paid for
23 taking that option away.

24 Lastly, with regard to the question of 1983 versus
25 the federal question statute 1331, we have cited Bowman

1 versus Chicago and Northwestern Railway Company, an 1885
2 case, on page 46 of our principal brief. And, I think
3 that that case, when carefully read, indicates that the
4 Court was there confronted with a Commerce Clause claim,
5 and the Court found that that claim might be one arising
6 under the Constitution, but it did not involve any right
7 secured by the Constitution. That was a case only ten
8 years after the federal question statute was passed, only
9 14 years after 1983 was passed. So I think the Court, at
10 that time, understood the distinction between the broad
11 arising under language and the more narrow secured, rights
12 secured by language.

13 and If there are no other questions, I will conclude
14 the argument.

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wilmarth.
16 The case is submitted.

17 (Whereupon, at 11:50 a.m., the case in the above-
18 entitled matter was submitted.)

19
20 LEONA H. MAY

(NAME OF REPORTER - TYPED)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

GERALD A. LEWIS, ETC., Appellant, v. CONTINENTAL BANK

CORPORATION ET AL. CASE No. 87-1955

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Leona M. May
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