

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

LIBRARY  
SUPREME COURT, U.S.  
WASHINGTON, D.C. 20543

**CAPTION:** GOLDEN STATE TRANSIT CORP., Petitioner V. CITY OF  
LOS ANGELES

**CASE NO:** 88-840

**PLACE:** WASHINGTON, D.C.

**DATE:** October 3, 1989

**PAGES:** 1 -- 49

ALDERSON REPORTING COMPANY  
1111 14TH STREET, N.W.  
WASHINGTON, D.C. 20005-5650  
202 289-2260

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

----- x  
GOLDEN STATE TRANSIT CORP., :  
Petitioner :  
v. : No. 88-840  
CITY OF LOS ANGELES :  
----- x

Washington, D.C.  
Tuesday, October 3, 1989

The above-entitled matter came on for oral argument  
before the Supreme Court of the United States at 9:59 a.m.

APPEARANCES:

ZACHARY D. FASMAN, ESQ., Washington, D.C.; on behalf of  
the Petitioner.

JOHN F. HAGGERTY, ESQ., Assistant City Attorney, Los  
Angeles, California; on behalf of the Respondent.

C O N T E N T S

1		
2	<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
3	ZACHARY D. FASMAN, .ESQ.	
4	On behalf of the Petitioner	3
5	JOHN F. HAGGERTY, ESQ.	
6	On behalf of the Respondent	26
7	<u>REBUTTAL ARGUMENT</u>	
8	ZACHARY D. FASMAN, ESQ.	
9	On behalf of the Petitioner	45
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (9:59 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument first  
4 this morning in Number 88-840, Golden State Transit  
5 Corporation v. the City of Los Angeles.

6 Mr. Fasman.

7 ORAL ARGUMENT OF ZACHARY D. FASMAN

8 ON BEHALF OF PETITIONER

9 MR. FASMAN: Mr. Chief Justice, and may it please  
10 the Court:

11 The City of Los Angeles forced Golden State out of  
12 business because we refused to settle a labor dispute with the  
13 Teamsters.

14 This Court held that the city's decision to deny us  
15 a franchise was precluded by the language and legislative  
16 history of the National Labor Relations Act because Congress  
17 intended to allow management and labor full freedom to bargain  
18 and to use economic weapons during a labor dispute without  
19 government sanction. Where Congress decrees that specific  
20 private conduct shall be free from government sanction and  
21 then a sanction is imposed upon that conduct by a city, a  
22 classic case for the application of Section 1983 is presented.

23 This is especially true here, because the improper  
24 destruction of a lawful business is a property injury that has  
25 been recognized in our courts for 200 years as deserving of

1 full compensation. Full recoveries traditionally have been  
2 available against cities who partake of no Eleventh Amendment  
3 immunity from damages.

4 The rule in our courts under Section 1983 is that  
5 cities are fully liable for the consequences of their illegal  
6 actions.

7 QUESTION: Mr. Fasman, are you contending that  
8 merely because there was a Supremacy Clause violation you're  
9 entitled to recover under Section 1983?

10 MR. FASMAN: No, we are not. The test under Section  
11 1983 is whether we were denied rights, privileges and  
12 immunities secured by federal law.

13 Our position is that the traditional Section 1983  
14 tests, repeatedly endorsed by this Court, should govern  
15 whether -- the question of whether we were denied such rights,  
16 privileges and immunities.

17 QUESTION: And so what -- what federal law was it  
18 that protected this right that you say was denied to you?

19 MR. FASMAN: The National Labor Relations Act.

20 QUESTION: The National Labor law.

21 MR. FASMAN: Yes.

22 No, we don't -- we don't contend that all Supremacy  
23 Clause claims arise under Section 1983, as I think we've made  
24 clear in our -- in our papers.

25 The traditional test endorsed by this Court under

1 Section 1983 require a finding that we did -- we were in fact  
2 denied, rights, privileges and immunities under federal law.

3 This Court repeatedly has made clear that rights  
4 enforceable under the statute arise when the constitutional or  
5 a federal statute imposes mandatory obligations upon local  
6 government.

7 QUESTION: Well, Mr. Fasman, would you explain how a  
8 mere finding of preemption by the federal labor law satisfies  
9 the test?

10 MR. FASMAN: Well, I think that in this case the  
11 mere finding of preemption rested upon the proposition that  
12 Congress specifically decreed that private parties shall have  
13 the right to engage in certain conduct; that is, collective  
14 bargaining and the use of economic weapons during a labor  
15 dispute.

16 I think that that is different than the normal type  
17 of finding of -- of preemption that involves, for example,  
18 federal regulatory schemes and more amorphous findings.

19 In this case, we have specific rights that were  
20 granted to us by Congress, and those rights were  
21 obviously -- were obviously denied when we were put out of  
22 business for our -- for our exercising them.

23 It seems to me that -- that what this Court's  
24 initial opinion said was that the -- was that this case  
25 involves mandatory obligations that is -- that are imposed

1 upon the city by federal law. The court's first -- first  
2 ruling in Golden State reaffirm that the language and  
3 legislative history of the National Labor Relations Act  
4 evidence clear Congressional intent to ban all municipal  
5 coercion at the bargaining table, and that's been accepted  
6 federal law since the 1976 ruling in the Machinists case.

7 This is not a case like Pennhurst in which Congress  
8 has exhorted rather than commanded.

9 Equally important, this mandatory ban on municipal  
10 coercion was intended for the especial benefit of unions and  
11 employers like Golden State. We do not stand before the Court  
12 as an incidental beneficiary of the law designed to protect  
13 the general public weal.

14 The preface to the Taft-Hartley Act is specific. It  
15 states that the purpose of the law is to prescribe the  
16 legitimate rights of employers and employees. The National  
17 Labor Relations Act speaks -- speaks in terms of the parties'  
18 rights and obligations. The right to strike is granted to  
19 organized labor. The lockout inheres in management, and  
20 Congress granted both sides full freedom of contract and  
21 the -- the right to resist the other's economic strength  
22 during a labor dispute.

23 These are not generic public rights of equal  
24 interest to all citizens. They are specific entitlements  
25 granted by Congress to the parties in order to allow them a

1 meaningful opportunity to order their own affairs without  
2 government interference.

3 QUESTION: In -- in the Golden State case that we  
4 decided, was that a 1983 case?

5 MR. FASMAN: Yes, this was pleaded under 1983 at the  
6 time.

7 QUESTION: And what was the relief granted?

8 MR. FASMAN: The Court --

9 QUESTION: A judgment or an injunction?

10 MR. FASMAN: A judgment. The Court did not reach  
11 the issue of relief in that case.

12 QUESTION: Was there a prayer for an injunction?

13 MR. FASMAN: There is a prayer for declaratory  
14 relief, injunctive relief and damages, yes.

15 QUESTION: We just -- we just ended up with a  
16 judgment?

17 MR. FASMAN: Yes, that's right, and remanded for  
18 further proceedings not inconsistent.

19 It came before the Court, as I remember --

20 QUESTION: Was there any claim in that case that the  
21 preemption claim was not a proper subject for a 1983 case?

22 MR. FASMAN: That did not come up the last time we  
23 argued the case.

24 QUESTION: It was not -- it was not raised?

25 MR. FASMAN: It was not raised, that's right.



1           QUESTION: But I suppose if it had been raised,  
2 there would be the same sort of an -- would have been a same  
3 sort of an argument then as there is here.

4           MR. FASMAN: Well, that's right. We're still on the  
5 pleadings in this case. That's exact -- that's exactly right.

6           The case, Justice White, the case came up on summary  
7 judgment that was granted to the city, and that summary  
8 judgment, this Court found, was wrong as a matter of law, and  
9 the remedial issue was not -- was not reached in the case.

10          QUESTION: At any point in the proceedings has the  
11 city contested the award of the ancillary damages?

12          MR. FASMAN: Yes. The city -- the city in the  
13 district court opposed the award of ancillary damages and  
14 indicated that they were not -- that ancillary damages were  
15 not properly entered in this case either as a matter of law or  
16 as a matter of fact.

17          QUESTION: Well, I -- I know it's not an issue  
18 before us here. I assume it's not an issue before us here,  
19 but I'm curious to know. What is the authority for the  
20 ancillary damages, because the answer to that might bear upon  
21 the issues we're discussing here today?

22          MR. FASMAN: Well, the -- the authority, Justice  
23 Kennedy, is -- is basically the equitable authority that  
24 inheres in the Court to assure that injunctive relief is  
25 not -- is not a hollow remedy or a nullity. That was the

1 basis upon which the -- the lower court ruled and I believe  
2 the -- the -- I can't recall quite precisely right now what  
3 the name of those cases are.

4 QUESTION: And -- and -- and we have some authority  
5 to address --

6 MR. FASMAN: Yes, there is Supreme Court authority  
7 to that -- to that effect.

8 I have to say that the ancillary damages that --  
9 that the district court awarded in this case, as we pointed  
10 out in the papers, are likely to yield nothing to Golden State  
11 because the Court balanced our tangible assets against our  
12 intangible liabilities, and it's plainly an -- an inadequate  
13 remedy.

14 The question before the Court, it seems -- it seems  
15 to me, and the question raised by the Ninth Circuit below, is  
16 whether there is any warrant for departing from the  
17 traditional Section 1983 tests in this case.

18 We say no. The essential question in every Section  
19 1983 case, preemption or otherwise, is the same: Have  
20 federally guaranteed rights, privileges or immunities have  
21 been denied?

22 If so, and if Congress has not foreclosed access to  
23 Section 1983 by devising an alternative statutory remedy,  
24 Section 1983 is available.

25 None of the briefs before the Court claim that

1 Section 1983 is inapplicable in every preemption case, and the  
2 court below did not so hold.

3 The Supremacy Clause is involved in some way in  
4 every Section 1983 case, statutory or constitutional, because  
5 it alone obliges local governments to obey federal law. Even  
6 in constitutional cases, the Supremacy Clause is violated  
7 because the local government has failed to accord federal law  
8 the priority that it deserves.

9 Thus, it cannot be that Section 1983 never applies  
10 in any preemption case or any case involving the Supremacy  
11 Clause because, by definition, every Section 1983 case in some  
12 way involves the Supremacy Clause.

13 For this reason, all of the briefs before the  
14 Court --

15 QUESTION: That -- that's not -- that goes a little  
16 far, doesn't it? I mean, you -- you -- you can -- you can act  
17 under color of state law even when a state law does not in  
18 fact contradict the federal law. You simply purport to be  
19 acting under state law, and in that case the Supremacy Clause  
20 would not be involved.

21 MR. FASMAN: That -- that --

22 QUESTION: Isn't that right?

23 MR. FASMAN: I do stand corrected. That's right.

24 QUESTION: Yeah. I --

25 MR. FASMAN: The private conduct. That's exactly

1 right. Undertaken -- under color of state law; that is right.

2 QUESTION: Furthermore, the Fourteenth Amendment is  
3 directly applicable to the states.

4 MR. FASMAN: Well, it is --

5 QUESTION: It says no state shall deprive, and  
6 Congress has specific authority under that, under the -- the  
7 fifth clause of the Fourteenth Amendment, to pass legislation  
8 to enforce it.

9 So, I should think if the Constitution did not have  
10 a Supremacy Clause it wouldn't make any difference.

11 MR. FASMAN: I think -- I think this may be a very  
12 nice juridical -- juridical point. I think that may be --  
13 that may be right if there were no Supremacy Clause, but there  
14 is a Supremacy Clause; and whatever the Fourteenth Amendment  
15 says, even if it says no state shall deny, nonetheless, the  
16 point that I'm making is that the Supremacy Clause says that  
17 the state shall obey that amendment.

18 So, it is involved in some way in every -- in every  
19 case, although that -- it is an interesting case, as if there  
20 were no Supremacy Clause.

21 My point is, though, that the dispute before the  
22 Court is not whether Section 1983 applies in some preemption  
23 cases. Everyone seems to agree that it does. The dispute is  
24 what test should be used to determine whether Section 1983  
25 applies.

1           We see absolutely no reason to depart from the  
2 traditional standards used by this Court and by most courts  
3 below in this -- in this or any other Section 1983 case.  
4 Under those standards, whether Congress created rights,  
5 privileges or immunities depends upon the intent of the  
6 legislature.

7           QUESTION: Mr. Fasman, maybe this really isn't a  
8 difference, but the rule you rely on that a preemption based  
9 on the Machinists analysis and so forth, you could really say  
10 that's a judge-made rule of law rather than the clear  
11 statutory directive as we have in most 1983 cases.

12           Do you think that makes any difference?

13           MR. FASMAN: I think the question in all Section  
14 1983 cases goes back to the intent of the legislature. I  
15 think Machinists is based upon a clear read -- reading of the  
16 language, legislative history of the National Labor Relations  
17 Act and, in fact, has a statutory basis.

18           It is true that it was iterated by the Court, but I  
19 think the foundation of Machinists is very clear both in  
20 term -- both in terms of the language and the legislative  
21 history. So I don't think that makes a difference. I think  
22 the test is the same.

23           The question is what did Congress intend, and that's  
24 our basic point here. The Court's already determined in its  
25 ruling what Congress intended. We went back down to the Ninth

1 Circuit and the court below, and they said, well, we don't  
2 have to look at congressional intent. That's not the test.

3 QUESTION: Are you saying that our -- our first  
4 opinion in Golden State three years ago decided this case?

5 MR. FASMAN: I think, in essence, it did. It did  
6 not in so many -- in so many words, because, Mr. Chief  
7 Justice, what the Court said was that -- and reiterated,  
8 actually, that management and labor have these freedoms; that  
9 Congress protected this conduct from government sanction.  
10 That should, in our view, have resolved this matter.

11 QUESTION: Well, what -- what is your response to  
12 the argument of Respondents that the National Labor Relations  
13 Act essentially creates rights in -- in employees and  
14 employers enforceable against one another?

15 MR. FASMAN: Well, the -- the simple answer to that  
16 is that that is directly contrary to the interpretive approach  
17 that this Court has taken in Machinists and H. K. Porter in  
18 the whole second branch of the preemption -- in the preemption  
19 doctrine.

20 The court below -- one of our fundamental points  
21 here is that the court below didn't have the authority to  
22 reinterpret the NLRA in a narrowly-cabined version as they  
23 did.

24 This Court has interpreted Section 8(d) and has  
25 extended the express prohibition on NLRB coercion and

1 bargaining to state and local governments on the basis of  
2 Congressional intent, which that should -- this Court's  
3 rulings along those lines should have resolved that issue.

4 QUESTION: To put it more briefly, your response to  
5 that argument is that we decided otherwise in Golden State  
6 One.

7 MR. FASMAN: Golden State One --

8 QUESTION: Specifically what we decided --

9 MR. FASMAN: That's right. That's exactly right.

10 QUESTION: That you had an enforceable right not  
11 only against the -- not only against the employees but also  
12 against the -- the state.

13 MR. FASMAN: And that's been accepted law at least  
14 since the '76 decision in the Machinists case, where the  
15 Court -- where the Court first -- first declared the second  
16 branch -- second branch of the preemption doctrine.

17 QUESTION: On -- on remand and in Golden State One,  
18 was there an injunction entered?

19 MR. FASMAN: The Court was prepared to enter an  
20 injunction giving us a franchise for four years.

21 QUESTION: But it didn't?

22 MR. FASMAN: Well, we stayed -- this -- this case  
23 comes -- comes before the Court on certification. We stayed  
24 all the proceedings --

25 QUESTION: Oh, I see.

1 MR. FASMAN: -- in -- in the district court so that  
2 we could resolve this issue of compensatory damages or our  
3 right to compensatory damages before proceeding to other  
4 remedial issues.

5 QUESTION: Of course, if there were an injunction  
6 ever entered, it certainly would have been based on the fact  
7 that -- that this preemption, this so-called preemption right  
8 really entitled somebody to an injunction.

9 MR. FASMAN: Well, not only -- not only did the  
10 court -- were the courts below willing to enter an injunction,  
11 but the city admitted that injunctive relief was appropriate  
12 here, thus admitting we have a cause of action --

13 QUESTION: And I suppose that was based a lot on our  
14 decision in Golden State One?

15 (Laughter)

16 MR. FASMAN: I presume that it was directly based on  
17 that decision.

18 But it seems to me that the question and the point  
19 that you raised, Justice White, is -- is exactly -- is exactly  
20 right. Where's the warrant for partial enforcement of these  
21 obligations that the Court imposed upon municipalities?

22 The decision below, the Ninth Circuit said in so  
23 many words that it was free to ignore congressional intent,  
24 and it created an entirely new test that would be applied to  
25 this case that undercuts this Court's ruling in Golden State.



1           The Ninth Circuit concluded that even though  
2 Congress intended to ban the city's conduct, Section 1983  
3 relief was not available, and I quote, because, quote, "The  
4 National Labor Relations Act does not explicitly prohibit the  
5 city from acting in the area of labor relations."

6           This Court's never sanctioned any explicit  
7 prohibition test in any Section 1983 cases. Judge Alarcon  
8 noted in his concurrence below, this Court repeatedly has held  
9 that in deciding whether Congress created rights, privileges  
10 or immunities, the key to the inquiry is the intent of the  
11 legislature.

12           QUESTION: I don't know what we held in Golden State  
13 One if we didn't hold the opposite of that statement.

14           MR. FASMAN: I don't think -- I don't follow your --  
15 your point, Justice Scalia.

16           QUESTION: I -- I'm agreeing with you. I'm saying I  
17 don't know what we --

18           MR. FASMAN: I thought you were.

19           (Laughter)

20           QUESTION: I don't know what we held in Golden State  
21 One if we didn't hold that -- that -- that you don't need an  
22 express indication of congressional intent to create a right  
23 against the municipality.

24           MR. FASMAN: The Ninth Circuit even went further by  
25 saying, based on its express language test, that the NLRA, and

1 I quote again, "imposes obligations only upon an employer and  
2 a labor union."

3 QUESTION: It may be that you -- that -- that the  
4 NLRA created a right to be free from this kind of regulation,  
5 but it doesn't necessarily mean you have a right for damages  
6 -- to damages.

7 MR. FASMAN: I think under the standard accepted  
8 test that the courts applied in Section 1983 cases, we fall  
9 clearly within it.

10 QUESTION: I suppose you could say that Congress may  
11 have intended an injunction but didn't intend any right to  
12 damages, just because the city was doing what it shouldn't  
13 have done.

14 MR. FASMAN: Well, that -- that may be, but I think  
15 the -- I think our essential point is that that would be a  
16 very unusual result if we have rights, privileges or  
17 immunities, and I think under the Court's traditional  
18 standards we do, the proposition that we're entitled only to  
19 injunctive relief would be extraordinarily unusual because  
20 Congress created a broad damage remedy that allows citizens  
21 deprived of rights, privileges and -- and immunities  
22 guaranteed under federal law to sue for damages in the federal  
23 courts, and that's precisely our claim in this case.

24 QUESTION: Of course, there's no express preemption  
25 in -- in NLRA.

1 MR. FASMAN: No.

2 QUESTION: This is a -- this is a court  
3 interpretation of what Congress intended.

4 MR. FASMAN: That's -- that's -- that's absolutely  
5 right.

6 QUESTION: And you could say, I suppose, that this,  
7 all they really intended to do was to protect federal power,  
8 and injunction is enough.

9 MR. FASMAN: Well, Justice White --

10 QUESTION: If you want to -- if we've -- if we've  
11 fashioned this preemption notion when it's -- when it -- even  
12 though a statute is silent, I suppose we still have an  
13 unresolved question of whether -- whether damages are -- are  
14 permissible.

15 MR. FASMAN: Well, Justice White, it seems -- it  
16 seems to me that the premise of your -- of your argument is  
17 that there is no statutory basis for the Machinists doctrine,  
18 and that's just not right. I mean, there's ample statutory  
19 basis for Machinists. There's ample legislative history  
20 supporting it.

21 QUESTION: You mean that's just for preemption?

22 MR. FASMAN: Yes, for preemption.

23 QUESTION: All right, that's fine. But that isn't  
24 my point.

25 My point is, although the statute is -- although the

1 city's action is preempted, are they liable for damages?

2 MR. FASMAN: Well --

3 QUESTION: In addition to an injunction.

4 MR. FASMAN: And the answer to that is it depends on  
5 whether what they have done contravenes rights, privileges or  
6 immunities granted to us.

7 My point is and our point here --

8 QUESTION: Well, not necessarily. You recognize a  
9 right by granting an injunction.

10 MR. FASMAN: Well, but the point is that if we have  
11 a right, privilege or immunity that's enforceable otherwise  
12 under Section 1983, we're entitled to damages for the  
13 infringement of that right.

14 My point is not that it's just preemption but that  
15 we were granted rights, privileges or immunities; that we were  
16 granted the right to bargain free from government sanction;  
17 that we were granted -- labor is granted the right to strike,  
18 we were granted the right to outlast a strike, to use economic  
19 weapons against one another.

20 QUESTION: Well, if you're right, Mr. Fasman, then  
21 although you said earlier in your argument that violation of  
22 the Supremacy Clause is not enough to recover damages under  
23 Section 1983, can you think of any case that would not give  
24 you -- where there was preemption that would not give you  
25 damages, any case where the Supremacy Clause was violated?

1 MR. FASMAN: I think there -- there are many. I  
2 think there are many cases where -- where you can't  
3 justifiably say that the basis of preemption is congressional  
4 or constitutional protection of specific private conduct.

5 QUESTION: What -- what would be an example?

6 MR. FASMAN: Well, for example, a -- a broad  
7 regulatory scheme, a scheme -- and you'll pardon me if I  
8 don't -- if -- if I don't get the -- the precise area  
9 correctly, but if Congress, for example, says we're preempting  
10 the area of nuclear -- transportation of nuclear waste and  
11 says -- says not -- not in an effort to grant rights and not  
12 in an effort to say a specific party shall have the specific  
13 right to do X, Y or Z but just says this is an area of federal  
14 concern and the state takes an action in there, in that area,  
15 that is preempted, that doesn't necessarily sound in damages  
16 because there's no right --

17 QUESTION: Who would sue? Who would sue? How would  
18 you ever get the preemption? If -- if it's not a right on the  
19 part of anybody, who would pronounce the preemption?

20 MR. FASMAN: Well, I presume that someone -- someone  
21 who is --

22 QUESTION: Someone like us.

23 MR. FASMAN: Someone who is --

24 (Laughter.)

25 MR. FASMAN: Someone who is --

1 QUESTION: Let me test that. May I ask you a  
2 question about that?

3 MR. FASMAN: Sure.

4 QUESTION: Supposing they did preempt the delivery  
5 of nuclear waste, and a state passed a law saying you can't  
6 drive through on -- on state highways. The -- that law would  
7 not be enforceable, and the nuclear waste disposal company  
8 would have a federal right to enjoin enforcement of that  
9 statute. It would have federal right. They couldn't get  
10 damages against the state because of this Eleventh Amendment.

11 But supposing a city for -- forbid them from driving  
12 through the suburbs or something like that and that was  
13 preempted. Why wouldn't they have a federal -- if there's a  
14 federal right to drive through the suburbs, why wouldn't they  
15 have a -- a damage action against the municipality for  
16 interfering with their free movement in interstate commerce?

17 MR. FASMAN: Well, they might, and they might  
18 depending upon the nature of why Congress --

19 QUESTION: It seems to me under your theory they  
20 always would, and why wouldn't they? If there's a federal  
21 right based on preemption not to have the state interfere, it  
22 seems to me, under your analysis, the plain language of 1983  
23 would give them a -- a damage remedy.

24 MR. FASMAN: I think the real question in that case  
25 is whether the law was passed for the especial benefit of the

1 people who would transport --

2 QUESTION: For the special benefit of people who are  
3 in the business of hauling nuclear waste around, special  
4 benefit of -- of them as -- just have them regulated by  
5 federal authorities so that they wouldn't be overregulated but  
6 yet they'd be -- there'd be protection.

7 MR. FASMAN: Well, if it's -- if that's a clear  
8 reading of the legislative history of the statute, for  
9 example, if -- if there were history in the statute that says  
10 that the reason that Congress federalized the field was to  
11 protect the right to haul nuclear waste across city lines,  
12 sure. I think that then you meet the especial benefit test,  
13 and you have a mandatory obligation. You meet the normal  
14 Section 1983 test.

15 QUESTION: Well, what -- what if the legislative  
16 history simply said that we're preempting this area because we  
17 don't want a lot of conflicting state and local regulations?

18 MR. FASMAN: That was the point that I was trying to  
19 make. It may not be that the preemption or the basis for  
20 preemption is designed to protect any specific private conduct  
21 --

22 QUESTION: Well --

23 MR. FASMAN: -- and if it isn't --

24 QUESTION: So what happens when -- when the  
25 hypothetical truck driver in Justice Stevens' example drives

1 through the suburbs in violation of the, you know, the  
2 ordinance of Orange County?

3 MR. FASMAN: I think what you're entitled to  
4 is -- is an injunction, but you don't fall under the terms of  
5 Section 1983.

6 QUESTION: Why not?

7 MR. FASMAN: Because the -- the law was not passed  
8 for your especial benefit. You don't fall within --

9 QUESTION: Well, there's nothing in 1983 about laws  
10 being passed for the special benefit of anybody.

11 MR. FASMAN: Well, that's the test that -- that's  
12 one of the tests that the Court traditionally has used to  
13 determine whether there is an enforceable right, privilege or  
14 immunity.

15 QUESTION: But that's in private cause of action  
16 cases, not under --

17 MR. FASMAN: No, I think in this -- in this as well.  
18 I think the Court has applied that especial benefit test under  
19 Section 1983 as well.

20 QUESTION: I thought it was the test we applied to  
21 determine whether you could get an injunction also. I didn't  
22 think that -- that anybody in the world can sue to -- to  
23 enforce federal -- federal laws. Somebody who is not  
24 proximately injured, who is not a person who is thought to be  
25 within -- within the scope of -- of -- of the -- of the



1 benefit conferred by that law, can anybody -- can sue to get  
2 an injunction?

3 MR. FASMAN: Well, you're raising -- it seems to me  
4 that you're raising a standing question as opposed to -- as  
5 opposed to this issue. And it is true. I mean, the -- the  
6 notion of cause of action and standing really do get close to  
7 one another, and it may -- it might --

8 QUESTION: I don't see why I would have a -- a cause  
9 of action for an injunction and not have a cause of action for  
10 damages in -- in -- in any case.

11 MR. FASMAN: In any case. I think it would be a --

12 QUESTION: The situations you've posited don't seem  
13 realistically to -- to be that to me. If the law is -- is a  
14 law under whose wings you -- you come, you're entitled to an  
15 injunction, but you also have a right and, therefore, entitled  
16 to damages.

17 MR. FASMAN: I'm comfortable with that result, of  
18 course.

19 (Laughter)

20 QUESTION: Well, but then you have to retreat  
21 something from your earlier statement that it's not every  
22 preemption case that is going to give you damages under  
23 Section 1983.

24 MR. FASMAN: Well, I think I've tried as best I can  
25 to -- to show how preemption cases under these -- under this

1 especial benefit test that the Court has used, where the  
2 proper -- the proper inquiry is to look and see if a party is  
3 an especial beneficiary of the particular law.

4 QUESTION: When you're talking about the special  
5 benefit test, is that the Cort v. Ash test for a private cause  
6 of action?

7 MR. FASMAN: It's the first prong of Cort v. Ash,  
8 and this Court has held that the first prong is useful in  
9 determining whether a right enforceable under Section 1983  
10 arises here. It's not the full Cort test.

11 QUESTION: In the -- in the City of Roanoke case?

12 MR. FASMAN: Yes. Right. Right.

13 I think the -- the underlying point that we would  
14 like to -- we'd like to leave with the Court is that the Ninth  
15 Circuit's test, this explicit prohibition test, leads us to  
16 completely illogical results. It's illogical to conclude, as  
17 did the Ninth Circuit, that Congress intended to protect  
18 employers and unions from the city's conduct yet  
19 simultaneously intended to deprive them of remedies normally  
20 available in the federal courts.

21 It's similarly ill -- illogical to conclude that the  
22 obligations Congress imposed upon the city are -- are entitled  
23 to less than complete enforcement, merely because this Court  
24 relief on the legislative history before rendering its  
25 decision.

1                   Our injuries are no less real and no less contrary  
2 to the will of Congress because this case involves legislative  
3 history.

4                   With the Court's permission, I'd like to reserve the  
5 remainder of my time for rebuttal.

6                   QUESTION: Thank you, Mr. Fasman.  
7 Mr. Haggerty.

8                   ORAL ARGUMENT OF JOHN F. HAGGERTY  
9                   ON BEHALF OF THE RESPONDENT

10                  MR. HAGGERTY: Honorable Chief Justice and may it  
11 please the Court:

12                  As the -- in -- in response to Justice Scalia's  
13 concern or question, there was, as counsel indicated, a  
14 declaratory relief action pled in this case, and under the  
15 declaratory relief, the Plaintiff could get injunctive relief.

16                  But the question is is the Plaintiff in this case  
17 entitled to damages under 1983.

18                  QUESTION: But he -- but do you say he is entitled  
19 to an injunction under 1983?

20                  MR. HAGGERTY: No, I'm not. I'm saying he's pled a  
21 separate cause of actions under the declaratory relief act,  
22 and under that act, the court granted an injunction.

23                  But just because he received an injunction under  
24 declaratory relief does not mean that the plaintiff's entitled  
25 to damages under 1983, because the court -- when the court

1 engages in a preemption analyses, it's a different analyses  
2 than the court engages in when it engages in a 1983 analyses.

3 QUESTION: How -- how could we give an injunction  
4 unless the individual has a right? And 1983 requires the  
5 deprivation of a right guaranteed by -- by federal law;  
6 correct?

7 Could we possibly give an injunction or even a  
8 declaratory order in any case unless the individual in  
9 question had a right?

10 MR. HAGGERTY: Well, in order to enforce the holding  
11 of this Court in Golden State One, yes, because I -- the --  
12 the type of analyses the court goes into in determining  
13 whether or not there is preemption is a different kind of  
14 analyses that the court has engaged in in the 1983 action.

15 QUESTION: Now, let's not talk about preemption.  
16 Let's just talk about right.

17 Doesn't -- doesn't 1983 refer to deprivation of  
18 rights secured by statutes or laws of the United States?

19 MR. HAGGERTY: That is correct.

20 QUESTION: Rights.

21 Now, is it conceivable that I can get an injunction  
22 with respect to a matter as to which I have no right? Or that  
23 I could get a declaratory judgment when I do not have a right?

24 MR. HAGGERTY: Well, the court in a -- preemption  
25 analyses, as this Court did, did find that there was a right

1 based on a preemption analyses.

2 What I'm saying is just because a court may find  
3 there is a right based on a preemption analyses does not meet  
4 the test that this Court has laid out as to when a person has  
5 a right within the meaning of Section 1983. The kind of  
6 analyses a court engages in, for example, in Wright v.  
7 Roanoke, is a different kind of analyses than this Court has  
8 engaged in in labor preemption cases.

9 In fact, this Court has stated that it is not clear  
10 from the NLRA what rights or what powers have been taken from  
11 the states and what powers have been given to the states. In  
12 fact, the Court even indicates that engaging in such a  
13 preemption analyses, it goes through what the Court refers to  
14 as a delphic process.

15 In other words, the court may take obscure and  
16 ambiguous language and imply from that a right or -- the local  
17 entity has been preempted, whereas in a 1983 cause of action,  
18 this Court has laid out very specific rules, as they did in  
19 Wright v. Roanoke Redevelopment Authority.

20 QUESTION: How did the plaintiff in Golden State One  
21 get into the federal court? What was the jurisdictional  
22 basis?

23 MR. HAGGERTY: Well, there was a whole series of  
24 cause of action. There was violations of the Fourteenth --

25 QUESTION: I'm not -- I'm asking about jurisdiction.

1 MR. HAGGERTY: Oh, they were claiming under 1331  
2 that there was a --

3 QUESTION: All right, and what's the basis for the  
4 cause of action? You need something -- some authority for a  
5 cause of action, too, don't you?

6 MR. HAGGERTY: Yes. They were -- they were claiming  
7 a violation of the Fourteenth Amendment, due process, equal  
8 protection rights. They were claiming cause of action in  
9 1983. They were seeking declaratory relief. They were  
10 seeking injunctive relief.

11 QUESTION: Well, do you think you could have -- do  
12 you think you could have gotten -- they could have gotten into  
13 the federal court without pleading 1983?

14 MR. HAGGERTY: Well, yes, because -- well, they also  
15 had pled violations of the Fourteenth Amendment.

16 QUESTION: Why would that get them in -- into  
17 federal court?

18 MR. HAGGERTY: The Federal Court of Appeals ruled  
19 that they had no cause of action under 14 -- the Fourteenth  
20 Amendment or under the anti -- they also pled antitrust  
21 violations.

22 There has been four court of appeals decisions in  
23 this case, and all the issues have been resolved, except the  
24 question of 1983.

25 The city would submit that the appropriate legal

1 test in this case to determine whether or not this specific  
2 law -- namely, the National Labor Relations Act -- granted the  
3 Plaintiff rights within the meaning of 1983 is whether or not  
4 Congress intended that a statute secures rights within the  
5 meaning of 1983 -- is whether Congress has employed in the law  
6 sufficiently specific and definite statutory language in order  
7 to create rights, at the same time give notice to the relevant  
8 governmental unit of its obligations in relation to such  
9 rights.

10 The key is what is the legislative intent; and I  
11 submit the test, the proposed test that I have just stated, is  
12 supported by this Court's prior decisions.

13 And I will admit this language came from the  
14 district court of appeals decision in Edwards v. District of  
15 Columbia, because the court said in laying -- or stating that  
16 language which I have just given to the Court, that language  
17 was based on that court's reading together the Wright case and  
18 the Pennhurst case.

19 And in Wright, this Court filed that the Brooke  
20 Amendment to the Housing Act relating to rent limitations  
21 could not be clearer as to the maximum rent which could be  
22 charged tenants. This, the Court said, was a mandatory  
23 limitation focusing on the family and its members. The Court  
24 concluded that the benefits Congress intended to confer on  
25 tenants were sufficiently specific and definite to qualify as

1 enforceable rights under Pennhurst in Section 1983.

2 And in Pennhurst, the Court said in order to create  
3 1983 rights, Congress should be expected to speak with a clear  
4 voice.

5 Now, Pennhurst and Wright and Edwards were all  
6 grant-in-aid cases, admittedly, but still the crucial factor,  
7 as even Plaintiff admits, is what is the intent of the  
8 legislature. Did the legislature intend to create rights  
9 within the meaning of 1983?

10 QUESTION: Do you think in any of those cases, if  
11 the Court had not found 1983 rights it could, nevertheless,  
12 have -- have found the ability to gain an injunction on the  
13 part of the individual against the -- against the grant  
14 agencies?

15 MR. HAGGERTY: Well, there was no --

16 QUESTION: Do you know any case where we've drawn  
17 that distinction, where we say you have a right? That is to  
18 say, the government can't behave in this way towards you. You  
19 have personally a right to come into court and to sue and get  
20 an injunction, but you don't have a right to get damages under  
21 1983.

22 Do you know any -- any case that would support that  
23 proposition: right to an injunction but no right to damages?

24 MR. HAGGERTY: I know -- I know of no case in this  
25 Court, no.



1 QUESTION: That may be what this case is all about.

2 MR. HAGGERTY: That's correct.

3 But the reason I believe that the language in the  
4 statute should be clear and unambiguous, as Pennhurst  
5 indicates, in order to find a legislative intent to create  
6 rights within the meaning of 1983, because, to digress a  
7 moment, in a preemption case this Court is trying to further  
8 some kind of national policy or promote some type of national  
9 goal. That is not the issue in a 1983 case.

10 The issue in a 1983 case focuses on whether or not  
11 Congress intended to grant rights to the specific individual  
12 who is asserting it. And it's certainly to be presumed, if  
13 Congress intends to create substantive rights to -- of others  
14 engage in such action or forbearance of those rights demand,  
15 that Congress will use in the particular statute such  
16 unambiguous language so as to command such action or  
17 forbearance.

18 In other words, to put such persons on notice as  
19 what is expected from them, because, after all, the reason  
20 that Congress creates rights is to have others honor those  
21 rights.

22 Now, looking at the statutory language of 8(d) as  
23 amended in the -- the NLRA and its legislative history, it  
24 indicate that that was not Congress' intent.

25 What does 8(d) say as amended? All 8(d) says is

1 that the obligation to bargain in good faith does not compel a  
2 party to reach an agreement. All that language expressly  
3 provides that the failure to reach an agreement in a  
4 bargaining environment does not subject that person to a  
5 charge of an unfair labor practice.

6 The section is very clear. The only benefit  
7 is -- it provides is what I have just stated. Unlike --

8 QUESTION: So, Golden State One was wrong. I mean,  
9 that's a very good argument for -- for the proposition that  
10 Golden State One was decided incorrectly.

11 MR. HAGGERTY: No. Again, as I said, Golden State  
12 One was a preemption case, and in -- in a preemption case the  
13 court is focusing on what needs to be done to further a  
14 national policy. In a 1983 case, the court is focusing on  
15 whether or not Congress intended to create individual rights  
16 in the particular plaintiff who is asserting it.

17 QUESTION: We didn't find in Golden State -- in  
18 Golden State One that the employer had a right against the  
19 state not to be impeded in the way the state impeded it?

20 MR. HAGGERTY: Yes, the Court did find --

21 QUESTION: We did find -- a right.

22 MR. HAGGERTY: Yes, but I would say that is a right  
23 in a preemption -- preemptive sense. Just because the word  
24 "right" is used, it has to be looked at in the context in  
25 which it is used, just like in the Pennhurst case.

1           In Pennhurst, Congress had set out what they called  
2 a bill of rights for the -- the disabled; but despite of that  
3 this Court did not find that the plaintiff in Pennhurst had a  
4 right within the meaning of 1983.

5           Now, as far as the legislative history of the  
6 National Labor Relations Act, counsel makes reference to the  
7 fact that the Act talks in terms of the rights of the employer  
8 and employee. But what the Act says in 29 U.S.C. 141, it  
9 talks about the legitimate rights of these parties in their  
10 relations with each other, and the purpose is, according to  
11 141 of the National Labor Relations Act, is to avoid  
12 industrial strike.

13           You look at the declared purpose of the National  
14 Labor Relations Act, and all it speaks of is the obligations  
15 to the parties in reference to each other.

16           And as far as 8(d) itself is concerned, that  
17 amendment -- or, rather, it was amended in 1947 to provide  
18 what is a relevant language in this case, namely, the refusal  
19 to make a concession does not come within -- is -- is not a  
20 requirement in order to bargain in good faith.

21           And as far as that specific language is concerned,  
22 the congressional Service, discussing the House bill and the  
23 Senate bill as to that language, said that the reason for that  
24 language was that the board was requiring employers to make  
25 concessions to show that they were bargaining in good faith.

1 That language had a very specific purpose, because the  
2 legislature felt that the National Labor Relations Board was,  
3 in effect, going too far in putting pressure on an employer in  
4 its bargaining with the union.

5 And, in fact, this Court in Porter Company v.  
6 National Labor Relations Board, in talking about that specific  
7 language, pointed out the reason for it is that unless  
8 Congress writes into the law guides for the board to follow,  
9 the board may attempt to carry this process still further and  
10 seek to control more and more of the terms of collecting  
11 bargaining agreements.

12 I submit the reason for that language was not meant  
13 to give an employer, as in this case, rights against a third  
14 party, but it was meant to, in effect, control what the  
15 legislature saw as an abuse of power by the board.

16 In looking at --

17 QUESTION: He does have rights against a third party  
18 to get an injunction?

19 MR. HAGGERTY: Again, based on the preemption  
20 analyses, that is correct.

21 QUESTION: Based on any analysis, what you just said  
22 is not true, insofar as an injunction is concerned. He does  
23 acquire under the statute a right to get an injunction.

24 It's clear enough that we'll give him an injunction,  
25 but it's not clear enough that we'll give him damages.

1 Is -- is -- is that the argument you're making?

2 MR. HAGGERTY: Well, what --

3 QUESTION: Before we'll give him damages, it has to  
4 be really clear, but if it's just sort of clear we'll only  
5 give him an injunction. Is -- is that the sort of line you're  
6 asking us to draw in 1983?

7 MR. HAGGERTY: Well, what I'm saying is that in  
8 order to secure rights within 1983, there should be  
9 some -- again, the Court has always indicated it's a question  
10 of legislative intent. Did the legislature intend to confer  
11 rights on this particular party --

12 QUESTION: Rights, not did he -- did it intend to  
13 confer 1983 rights. 1983 operates by itself. It's a statute  
14 out there which says if you have a right, you get damages.

15 Surely you're not arguing that each time Congress  
16 enacts a statute, it must affirmatively say, moreover, the  
17 rights under this statute can be sued on under 1983. That's  
18 that your position.

19 MR. HAGGERTY: No, that's not my position.

20 What my position is that the language of the statute  
21 in some way has to, as in Wright v. City of Roanoke, has to  
22 compel the particular defendant of what they have to do.

23 Now --

24 QUESTION: But we found that, didn't we, that it  
25 does compel the city here to refrain from doing what it did?

1 MR. HAGGERTY: But again, it was not the express  
2 language of the statute as a right. The court implied from  
3 the National Labor Relations Act --

4 QUESTION: Right.

5 MR. HAGGERTY: -- that the city had such an  
6 obligation.

7 QUESTION: So it was not clear enough. It was sort  
8 of clear, clear enough to get an injunction but not really  
9 clear so you can get the damages action, is what you're  
10 saying?

11 MR. HAGGERTY: That is what I'm saying because I  
12 think there's a distinction in the type of analyses and the  
13 purpose of preemption, as opposed to a 1983 cause of action.

14 QUESTION: Would the case be any different if ten  
15 years ago Congress had taken a look at our Machinists  
16 preemption case and that line of cases and passed a statute  
17 saying we agree -- we affirm the holding of the Supreme Court  
18 in -- in the Machinists preemption case? Would that change  
19 the -- the case?

20 MR. HAGGERTY: Well, you mean if the Congress  
21 expressly stated that --

22 QUESTION: Expressly stated we think that  
23 the -- that the free play of economic forces is protected by  
24 the statute as interpreted in Machinists, and we hereby ratify  
25 and endorse the rule of Machinists. Would that --

1 MR. HAGGERTY: No, it would not, I -- I don't  
2 believe, because, again, in the Machinists case and as far as  
3 the National Labor Relations Act is concerned, its purpose is  
4 to promote industrial peace and define the relationship of the  
5 parties, labor, management and the board, in reference to each  
6 other.

7 It has -- there is nothing at the -- in the Act --

8 QUESTION: But also and to prevent third-party  
9 interference with the bargaining process.

10 MR. HAGGERTY: Well, the Act doesn't say that. That  
11 is the way the court has interpreted --

12 QUESTION: In Machinists. Then I'm saying what if  
13 the Act went ahead and said that. Would it be any different?  
14 If the --

15 MR. HAGGERTY: Well --

16 QUESTION: If the Act had specifically said  
17 everything we put in the Machinists opinion, if that had all  
18 been written out in advance instead of -- would that make any  
19 difference?

20 MR. HAGGERTY: Well, again, I -- it's a question  
21 whether or not they would say -- well, I would tend to say  
22 yes, that -- that probably would be the situation  
23 if -- provided -- if -- if there was expressly stated and  
24 created some kind of obligation on the part of -- of the city  
25 -- if the statute said that, if the law said that.

1 QUESTION: See, but -- but -- but when the court  
2 interprets a hole in a statute like that, it's in effect  
3 saying, well, this is what Congress really didn't meant and  
4 they just didn't articulate it clearly enough.

5 MR. HAGGERTY: No, but again, I -- in making  
6 it -- and I don't wish to repeat myself but I guess I'm sorry  
7 if I do, that I believe in a preemption analyses. The court  
8 again is trying to further, as I said, some type of national  
9 policy, in this case a promotion of industrial peace, and  
10 that's the bases for its preemption -- its conclusions in  
11 reference to preemption.

12 It's based on the Supremacy Clause, namely, to give  
13 priority to federal bulls.

14 QUESTION: You're saying, I guess, that a law  
15 that -- a federal statute that preempts state law does not  
16 give any individual the right not to have state laws enacted?

17 The -- the preemption, the federal preemption does  
18 not create rights in anybody. It just somehow or other erases  
19 state law. That seems to be your position.

20 MR. HAGGERTY: Well, or to prevent the state law  
21 from being --

22 QUESTION: Enforced or --

23 MR. HAGGERTY: Enforced. Well, it could be express  
24 preemption -- expression -- express preemption, where there  
25 could be explicit language in the statute.--



1 QUESTION: Well, would it be --

2 MR. HAGGERTY: -- which compels certain actions on  
3 the part of a governmental agency.

4 QUESTION: But would it be different if there were a  
5 federal statute that said no state legislature or municipality  
6 shall enact any legislation that interferes with the  
7 bargaining process?

8 If it said -- and it's a little broad, but if that's  
9 what they'd said, would that -- would that then give the --  
10 the cab company a right in this case?

11 MR. HAGGERTY: I think if there -- if it's expressed  
12 in the statute, that's correct because, as 1983 says, we're  
13 talking about --

14 QUESTION: But then your distinction is not between  
15 preemption and other kind of laws. It's between expressly  
16 enacted statutes by Congress and judicially interpreted  
17 statutes. That's your distinction, I guess.

18 MR. HAGGERTY: Well, my distinction is whether or  
19 not the statute, looking at the express language or in the  
20 legislative intent, does create such a right in an individual.

21 And what I'm saying here is that both the  
22 legislative intent of -- in 1947 when they enacted this  
23 amendment and the express language does not indicate any such  
24 right in the plaintiff. It has no language which in any way  
25 mandates or compels the city to do anything.

1 In fact, drawing an analogy from the implied right  
2 of action cases, which the court has referred to in analyzing  
3 1983 actions and in the Cannon case, the -- the court has used  
4 the first test, whether or not Congress intends to create a  
5 right in this particular plaintiff.

6 And in the Cannon case, it points out that in  
7 talking in terms of an implied right of action case the  
8 question is whether or not the person to be charged  
9 disregarded a command of the statute.

10 And when the first test talks about whether or not  
11 the -- the first prong of the test of the implied right of  
12 action cases talks about whether or not the plaintiff is an  
13 especial beneficiary of that statute, I believe you have to  
14 look at that in terms or relationship to what the statute  
15 provides.

16 And in this case the statute, by its language, does  
17 not provide any benefit as to an employer against a third-  
18 party such as the city. It only creates a benefit as against  
19 the National Labor Relations Board by preventing them from  
20 bringing a unfair labor practice charge.

21 Now, I believe there is also good policy for the  
22 test the city is laying out. As fact, as the Plaintiff  
23 himself admits, that labor law is a very complex area which  
24 the lower courts often misunderstand. And if there's this  
25 apparent uncertainty as to when government actions may be

1 preempted by the National Labor Relations Act, then there's a  
2 problem that local entities, not knowing when they may be  
3 liable under 1983, may refrain from engaging in what otherwise  
4 may be important and significant regulatory types of actions.

5 Now one other point I would like to make --

6 QUESTION: Mr. Haggerty --

7 MR. HAGGERTY: Yes.

8 QUESTION: -- before you leave that, would you tell  
9 me again what is the that you propose? And I know -- I know  
10 I'm probably asking you to repeat yourself, but I want to be  
11 sure I understand.

12 MR. HAGGERTY: Yes. The test is -- the test, the  
13 city submits, is for determining whether or not Congress  
14 intends that a statute secure rights within the meaning of  
15 Section 1983 is whether Congress has employed in the law  
16 sufficiently specific and definite statutory language in order  
17 to create rights and at the same time give notice to the  
18 relevant governmental unit of its obligations in relation to  
19 such rights.

20 And as I said, that language does come from a  
21 district court of appeals decision, Edwards v. District of  
22 Columbia, and the court said that they utilized that language  
23 by their reading together the Wright case and the Pennhurst  
24 case, because in Wright the Court -- this Court specifically  
25 said in finding that there were 1983 rights that the

1 Congress -- that the -- the Congress intended these  
2 benefits -- the benefits which Congress intended to confer on  
3 the tenants were sufficiently specific and definite to qualify  
4 as enforceable rights under Pennhurst and Section 1983.

5 QUESTION: Mr. Haggerty, that -- that -- that has  
6 some -- some intuitive appeal, that test, when one thinks of  
7 the poor municipality that doesn't know that it's violating  
8 the federal law and -- and, therefore, you shouldn't give  
9 it -- subject it to damages unless it's clearly enough stated.

10 As I say, that has an intuitive appeal up until the  
11 point where there is a court decision that says, yes, cities  
12 cannot do this; employers do have a right even against the  
13 city to continuing negotiating, and the city cannot -- impair  
14 that. At that point, your argument does not have any  
15 intuitive appeal.

16 Why isn't it enough if -- if -- if -- why isn't it  
17 enough to say either the statute is clear on its face or there  
18 has been a Supreme Court decision that says that the employer  
19 clearly has that right? Surely, at that point the city knew  
20 that it -- that it shouldn't be able to do this thing.

21 MR. HAGGERTY: Well, the city knew at that point,  
22 but, of course, at that point they had already had done --

23 QUESTION: Yeah, but -- but what you're arguing now  
24 applies to all cities in the future.

25 MR. HAGGERTY: That's correct.

1 QUESTION: You're saying no city in the future will  
2 ever have a cause of action under 1983 for violating what we  
3 said the law is in -- in -- in Golden State One.

4 MR. HAGGERTY: Yes, because that --

5 QUESTION: Why does that make any sense?

6 MR. HAGGERTY: Because, again, it's a question of  
7 whether or not the city has violated or acted in disregard of  
8 the law, and the law in this case does not command the city in  
9 any way to do what the Plaintiff is asserting it should do so  
10 as to get 1983 damages.

11 And the reason that I'm saying -- saying that the  
12 city should have notice, it's not because they can claim,  
13 well, they didn't -- some kind of good-faith defense, which  
14 the Court, of course, has already rejected.

15 The question is if you're looking at legislative  
16 intent, does the legislature intend to create these  
17 enforceable rights in a plaintiff? It's fair to say that the  
18 Congress can speak in a very clear way to so indicate to the  
19 defendant or to the governmental entity what they are expected  
20 to do.

21 One other point I would like to make that if -- it  
22 was pointed out in the brief of the amicus that the question  
23 in this case does -- does not really address the issue that is  
24 really involved here.

25 As I said, the issue in this case is whether or not

1 the law -- namely, the National Labor Relations Act -- created  
2 the -- the kind of rights that plaintiff is asserting. And  
3 the issue in this case only relates to that particular law,  
4 this particular statute.

5 It's not a question, as the question presented by  
6 the Court, is whether or not the state action was preempted or  
7 not. The question is whether or not this law creates that  
8 kind of rights.

9 And it's fair to say that, if the question is  
10 presented in that way that the NLRB may have come into the  
11 case as an amicus to give their expertise as to whether or not  
12 this particular statute does create such rights.

13 In fact, this Court in Owens v. City of Independence  
14 said in determining whether or not a 1983 action lies will  
15 look to see whether or not the municipality has conformed to  
16 the requirements of the federal Constitution and statutes.  
17 And in this case there is -- the way, again, the way the  
18 statute is worded, the city did not in any way disregard any  
19 command of Section 8(d).

20 That's all I have. Thank you.

21 QUESTION: Thank you, Mr. Haggerty.

22 Mr. Fasman, do you have rebuttal? You have four  
23 minutes remaining.

24 REBUTTAL ARGUMENT OF ZACHARY D. FASMAN  
25 ON BEHALF OF THE PETITIONER

1 MR. FASMAN: Just one or two points, Mr. Chief  
2 Justice.

3 The legislative intent underlying the National Labor  
4 Relations Act was fully revealed in Golden State and before it  
5 in Machinists, and I think it's important for the Court to  
6 bear in mind the broad context of the federal labor laws in  
7 which this case arises.

8 This Court repeatedly has recognized that free  
9 collective bargaining is the cornerstone of the federal labor  
10 scheme. Bargaining can't be free and unfettered as intended  
11 by Congress if management or labor can be punished for their  
12 stance at the bargaining table.

13 QUESTION: Mr. Fasman, isn't this case almost unique  
14 in NLRA preemption cases that have been decided by this Court  
15 in that a municipal corporation or some governmental body was  
16 a defendant, as opposed to employer versus an employee?

17 MR. FASMAN: Well, the employer versus employee --  
18 branch of the preemption document deals with the -- deals with  
19 a different issue.

20 QUESTION: But even Machinists preemption, those  
21 cases prior to this one have almost always involved employee  
22 versus employer, haven't they?

23 MR. FASMAN: That's exactly right. And that's  
24 why --

25 QUESTION: So -- so isn't my statement correct?

1 MR. FASMAN: It is generally correct. But that's  
2 why this case is so clearly antithetical to the intent of  
3 Congress.

4 The National Labor Relations Act was passed, we  
5 federalized the law of labor relations to ensure that just  
6 this wouldn't happen. The first third of the century, this is  
7 what cities did. They put -- they put -- usually against  
8 labor, but they put people in jail. They applied the  
9 antitrust laws. They prevented union organizing. They  
10 prevented strikes.

11 I mean, this is the classic -- this, if anything,  
12 this is more of a Machinists case than Machinists, and that's  
13 my fundamental point. Bargaining can't go on if you can be  
14 put out of business because of your stance at -- stance at the  
15 table.

16 QUESTION: Could you have maintained your action  
17 under -- in -- in Golden State One without resorting to 1983?  
18 Could you have just --

19 MR. FASMAN: Certainly.

20 QUESTION: -- just pled the National Labor Relations  
21 Act?

22 MR. FASMAN: We could have pled just a violation of  
23 the Supremacy Clause in a federal question. I think we could  
24 have.

25 QUESTION: And -- and -- and would have had a cause



1 of action under the Supremacy Clause or a -- a cause of action  
2 under the labor law, or both?

3 MR. FASMAN: There's a question as to whether you  
4 have an implied right of action under the -- under the labor  
5 laws or under the Supremacy Clause as such.

6 QUESTION: And -- and if you hadn't have used 1983,  
7 would you have gone through the Cort v. Ash --

8 MR. FASMAN: In an implied right of action?

9 QUESTION: Yes.

10 MR. FASMAN: I presume we would have, yes. But the  
11 point is that we did plead it under Section 1983, and so I  
12 think that gets us right to --

13 QUESTION: Do you think that if, even though you  
14 might not have had a cause of action under Cort or whatever  
15 the formula is for implied causes of action, you nevertheless  
16 would have it under 1983?

17 MR. FASMAN: I think we have one under Cort as well.  
18 I don't -- I don't agree with that characterization, but I  
19 think we're well past -- we're well past that. There's no  
20 question that we have -- that we have a -- a cause of action,  
21 jurisdiction, standing.

22 We've got a remediable wrong and an admission that  
23 injunctive relief is appropriate here. We've left Cort v. Ash  
24 a long -- a long -- a long way back, it seems to me.

25 The message that's -- that's imposed by the Ninth

1 Circuit decision, it seems to me, is completely inconsistent  
2 with Machinists, with Golden State, with free and unfettered  
3 bargaining and inconsistent with this Court's repeated efforts  
4 to protect the bargaining process and the parties to that  
5 process from government coercion.

6 The problem with the decision below is not just that  
7 it ignores congressional intent but that it stands  
8 congressional intent on its head, and that decision should not  
9 be allowed to stand.

10 Thank you.

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Fasman. The  
12 case is submitted.

13 (Whereupon, at 10:56 a.m., the case in the  
14 above-entitled matter was submitted.)

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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:

No. 88-840 GOLDEN STATE TRANSIT CORP., Petitioner V. CITY OF LOS ANGELES

---

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

BY

Lena M. May

(REPORTER)

RECEIVED  
SUPREME COURT, U.S.  
MAINTENANCE OFFICE

'89 OCT 11 A8:59