

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: NATIONAL PRIVATE TRUCK COUNCIL, INC.,
ET AL., Petitioner v. OKLAHOMA TAX COMMISSION,
ET. AL.

CASE NO: No. 94-688

PLACE: Washington, D.C.

DATE: Tuesday, April 18, 1995

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 NATIONAL PRIVATE TRUCK :
4 COUNCIL, INC., ET AL., :
5 Petitioners, :
6 v. : No. 94-688
7 OKLAHOMA TAX COMMISSION, :
8 ET. AL. :

9 - - - - -X

10 Washington, D.C.

11 Tuesday, April 18, 1995

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 1:08 p.m.

15 APPEARANCES:

16 RICHARD A. ALLEN, ESQ., Washington, D.C.; on behalf of
17 the Petitioners.

18 STANLEY P. JOHNSTON, ESQ., Deputy General Counsel,
19 Oklahoma Tax Commission, Oklahoma City, Oklahoma; on
20 behalf of the Respondent.

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

2 (1:08 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 94-688, The National Private Truck Council,
5 Inc., v. The Oklahoma Tax Commission.

6 Mr. Allen.

7 ORAL ARGUMENT OF RICHARD A. ALLEN

8 ON BEHALF OF THE PETITIONERS

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

11 The issue in this case is whether State courts
12 may refuse to enforce remedies under two Federal statutes,
13 sections 1983 and 1988 of title 42, in cases challenging
14 State taxes when State courts and State procedures provide
15 an adequate remedy for the underlying claim.

16 The Oklahoma supreme court in this case held
17 that State courts may refuse to enforce remedies under
18 sections 1983 and 1988 in such cases. It based that
19 conclusion entirely on what it termed principles of comity
20 in federalism, which it perceived to be embodied in the
21 Federal Tax Injunction Act, which prohibits Federal courts
22 from enjoining State taxes in cases where a plain, speedy,
23 and efficient remedy may be had in the courts of such
24 State.

25 The main consequence of that ruling in this case

1 is to deny petitioners a right to recover their attorney's
2 fees that they would otherwise have under section 1988.

3 QUESTION: Mr. Allen, there are other
4 consequences upholding that the State courts have to
5 entertain section 1983 action in State court, and I'd like
6 you to address in the course of your argument how you
7 think this would play out, if you're right, that they have
8 to entertain a 1983 action.

9 What if the State has administrative claims
10 procedures in any case involving ultimately declaration or
11 injunction of State taxes that you have to make this
12 administrative claim first?

13 MR. ALLEN: Justice O'Connor, there may be --
14 there may well be other consequences to the conclusion
15 that section 1983 applies. None of those questions are
16 presented in this case or really properly --

17 QUESTION: I know. I'm asking you, though, what
18 you think about a State's administrative claims procedure,
19 if you're right.

20 MR. ALLEN: If a State has a procedure requiring
21 exhaustion of administrative remedies in a tax case,
22 which, by the way, Oklahoma does not, but if it did, this
23 Court's previous decisions would indicate that in the 1983
24 action those exhaustion of administrative remedy
25 requirements are -- ordinarily cannot be enforced in the

1 Federal procedure.

2 QUESTION: Well, in the tax area that can be
3 very troublesome, and there -- something else occurs to
4 me. We have said in McKesson and like cases that a State
5 does not have to have a predeprivation remedy for tax
6 relief if there is a clear and certain and prompt
7 postdeprivation remedy.

8 Now, to allow the 1983 action would mean in
9 every instance, I guess, a plea deprivation determination.

10 MR. ALLEN: Not necessarily, Justice O'Connor.
11 I don't see any reason why, in a section 1983 action -- I
12 don't see why it would be implied in a 1983 action that
13 you necessarily had a predeprivation remedy.

14 QUESTION: Well, you're coming in claiming the
15 right to declaratory and/or injunctive relief -- State,
16 you can't get these taxes. Now, that is in the nature, I
17 think, of a predeprivation remedy.

18 MR. ALLEN: Well, let me simply repeat that
19 that's not an issue in this case.

20 I think that the probable outcome, if that was -
21 - if the issue was squarely presented, the logic would
22 probably be that a person who filed a 1983 action
23 challenging a State tax in State court before he paid the
24 tax, and if the State court made a final adjudication that
25 the State tax was unconstitutional, I do believe that

1 section 1983 would entitle the taxpayer in that
2 circumstance to injunctive or declaratory relief which
3 would in effect preclude the State from --

4 QUESTION: And that's -- you know, that's
5 precisely what this Court has been careful to say the
6 States don't have to do, that they can at least require
7 people to pay their taxes and litigate later and follow
8 certain claims procedures in doing so --

9 MR. ALLEN: Well --

10 QUESTION: -- and I think you have a strong
11 argument, but it does seem to me that if you're right, and
12 if no adjustments are appropriate here, that it would have
13 a rather dramatic effect on established law in this area.

14 MR. ALLEN: Well, you raise a very pertinent
15 question, but I think we have to be very careful here,
16 because the point you just made was that the Court has
17 been careful to preserve the right of States to -- or at
18 least the constitutional right of States, putting apart
19 the requirements of any Federal statute, the
20 constitutional rights of States to require people to pay
21 their taxes before they litigate the ultimate question.

22 But what I am saying is that in my view, under
23 section 1983, if you filed an action and there was a
24 litigation that finally determined that the tax was
25 unconstitutional -- in other words, you had done your

1 litigation, then it seems to me --

2 QUESTION: Well, you file 1983, you get a
3 preliminary injunction.

4 MR. ALLEN: Well, there's --

5 QUESTION: That's the way it works, and there
6 you are. There the State is, can't collect the tax.

7 MR. ALLEN: There's a very important
8 distinction, I think, for these purposes, between a
9 preliminary injunction and a permanent injunction.

10 The point I was making earlier was that when you
11 have filed your action and it's come to a final judgment
12 in the trial court, and the final judgment is that the
13 State is -- that the tax is unconstitutional, I believe
14 that under 1983 you would be entitled to a permanent
15 injunction against the collection of the tax.

16 QUESTION: What if a State had a requirement
17 just like the Federal Government does now that there
18 simply shall not be injunctions issued enjoining the
19 collection of a tax.

20 MR. ALLEN: I think in those cases, Mr. Chief
21 Justice, the State scheme has to yield to the Federal
22 remedy, and I think --

23 QUESTION: So the Federal remedy requires the
24 States to do something that Congress has said the Federal
25 Government can't be required to do.

1 MR. ALLEN: I think that's correct, Your Honor,
2 but let me return to --

3 QUESTION: Then what sense does that make in
4 terms of the Tax Injunction Act? You said the concern is
5 you don't want the Federal courts to be telling the
6 States. Isn't it so much worse to be telling the States,
7 but you've got to do it. You've got to be the one to say
8 you can't have your own constitutional --

9 MR. ALLEN: Well, I think that's right, Justice
10 Ginsburg. Let me give you an example. I think that the
11 Federal scheme under section 1983 gives taxpayers, State
12 taxpayers a right to equitable relief when a State tax is
13 unconstitutional. A good example would be, in my view, a
14 poll tax, which this Court has held to be -- to violate
15 the Equal Protection Clause.

16 If a State had a poll tax that required poor
17 people to pay \$20 before they could vote, if a State also
18 had a statute that said, but you've got to pay your tax
19 before you can litigate the validity of it, I submit to
20 you that the taxpayer in that situation would have a
21 right, under section 1983, to an injunction enjoining the
22 enforcement of that poll tax, because --

23 QUESTION: Against whom? Who would you sue
24 here? If you sue the State, you can't sue the State under
25 1983, can you?

1 MR. ALLEN: No. In my example against the
2 official --

3 QUESTION: Who are you suing here? Who are you
4 suing here in this case, the official?

5 MR. ALLEN: The official.

6 QUESTION: Can you sue the official in his
7 official capacity under 1983?

8 MR. ALLEN: Yes, you can, Justice Scalia.

9 QUESTION: Have we said that?

10 MR. ALLEN: Yes, you have.

11 QUESTION: For an injunction --

12 MR. ALLEN: For an injunction --

13 QUESTION: -- and declaratory relief.

14 MR. ALLEN: For injunctive and declaratory
15 relief.

16 QUESTION: Not for damages.

17 MR. ALLEN: That's exactly right.

18 So in my example of the poll tax, you would sue
19 the election official who was seeking to make the
20 individual pay the tax, and you would get an injunction
21 prohibiting him from enforcing that poll tax.

22 QUESTION: Where have we said --

23 MR. ALLEN: That seems to me the logical and
24 appropriate result.

25 QUESTION: Where have we said that you may sue

1 him under 1983 for an injunction?

2 MR. ALLEN: In the Will v. Michigan State
3 Police, footnote 10, is where you have distinguished --
4 you reaffirmed the well-established distinction --

5 QUESTION: That's an old Eleventh Amendment
6 rule, yes. I have no doubt under the Eleventh Amendment
7 injunctive actions against officials in their official
8 capacity are not deemed to be against the State, but that
9 doesn't mean that section 1983, the word "person" in 1983
10 has to be read the same way, does it?

11 MR. ALLEN: Well, Will was a section 1983 case,
12 and in that case, in footnote 10 --

13 QUESTION: Footnote 10 in Will is the only
14 authority you have?

15 MR. ALLEN: Footnote 10 in Will I think clearly
16 established that under section 1983 -- and really
17 reaffirmed the distinction between prospective and damage
18 relief, that under section 1983 one may obtain injunctive
19 and declaratory relief against State official --

20 QUESTION: Well, let me ask you this.
21 Injunctive and declaratory relief are, by their nature,
22 equitable?

23 MR. ALLEN: That's true.

24 QUESTION: And I assume, then, that it is
25 possible that the notion that States can provide adequate

1 postdeprivation remedies at law could be a principle that
2 would enable the State court to say, we will deny
3 equitable relief, because there's a plain, speedy remedy
4 at law here, no equitable relief. How would that work?

5 MR. ALLEN: Well, I'm not sure I understand the
6 question, if --

7 QUESTION: Well, if the remedy sought in the
8 State court is essentially an equitable one, would it not
9 be open to the State court to deny an injunction or
10 declaratory relief on the grounds that we have in this
11 State a plain, a speedy, an adequate remedy at law?

12 MR. ALLEN: I don't believe so, Your Honor, not
13 under section 1983. To return to my poll tax example, I
14 don't think in that example the State court could say, the
15 man can sue and get a refund of his poll tax after he
16 litigates the validity of --

17 QUESTION: Well, because that's obviously not a
18 plain, adequate remedy if you can't vote without paying
19 the tax. I mean, that wouldn't satisfy the Tax Injunction
20 Act requirement, would it, to sue afterward? You have to
21 come up with the money first and then that's what prevents
22 people from voting? I mean, nobody's ever suggested the
23 Tax Injunction Act would prevent a suit to enjoin the
24 payment of a poll tax.

25 MR. ALLEN: Well, I don't know why one would

1 not.

2 QUESTION: Because it's not -- the State doesn't
3 provide an adequate remedy when it says you can't vote,
4 which is what would be the effect of that.

5 MR. ALLEN: Well, I really don't -- that may be
6 true, but I really don't see the distinction between that
7 and any other constitutional tax. You can't operate your
8 trucks in the State of Oklahoma without paying this tax.
9 You've got to pay the tax and litigate later.

10 QUESTION: Yes, but those, there's nothing at
11 stake except the interest in not having to pay the amount
12 of money. Nothing like the right to vote is implicated in
13 any of these other cases.

14 MR. ALLEN: Well, the right to engage in
15 interstate commerce in the State of Oklahoma.

16 QUESTION: You mean you don't -- you can't
17 afford to engage and pay the tax on the assumption --

18 MR. ALLEN: Well, you might decide -- if you're
19 Mr. Griffiths here, you might decide instead of operating
20 in Oklahoma, I'm going to operate in Arkansas, where I
21 don't have to pay this tax. It's a burden. It's a very
22 significant burden. But --

23 QUESTION: But it's a burden, in any case, it's
24 a burden that can economically be redressed. After the
25 election is over, you can't go back and vote again. I

1 mean, there's no economic equivalence there, whereas in
2 the trucking case there is.

3 MR. ALLEN: Well, the question was, I believe
4 the question was it is open to a State court who has
5 determined that a tax is unconstitutional, is it open to
6 that State court to say, you've still got to pay it and
7 then go for your refund later, and I submit that under the
8 scheme of section 1983 that's simply not open to the State
9 court.

10 QUESTION: Well, except that I suppose that
11 isn't what the court would do. The court wouldn't go
12 through a prepayment adjudication. The court would simply
13 say, we don't enjoin. If you want to challenge this tax,
14 you've got to pay it, and we'll adjudicate it then.

15 MR. ALLEN: Well, that's why --

16 QUESTION: It wouldn't say you're going to win
17 your case before it's heard it.

18 MR. ALLEN: That's why I think it's important to
19 understand and draw a careful distinction between a
20 request for preliminary injunctive relief and a request
21 for final injunctive relief.

22 Now, if we're talking about a request for
23 preliminary injunctive relief, then I submit that whether
24 you're filing under section 1983 or any other statute, the
25 courts can and properly do impose upon the claimant a very

1 high showing.

2 He has to show irreparable injury, he has to
3 show a strong likelihood of success on the merits, and all
4 the rest of it, and I have no dispute with the proposition
5 that when you're requesting preliminary relief before
6 there's been an adjudication of the merits the courts can
7 properly deny it if you haven't met those high standards,
8 and in fact in this very case, we sought preliminary
9 injunctive relief, and the trial judge --

10 QUESTION: Yes, but that doesn't go -- it seems
11 to me -- I agree with you, but that doesn't go to the
12 point of the hypothetical. The point of the hypothetical
13 is, if you have an adequate remedy of law after the fact,
14 you, the petitioner for the relief, are not entitled to a
15 prepayment adjudication.

16 MR. ALLEN: Well, you're not entitled to -- you
17 may not be entitled to preliminary relief, and I wouldn't
18 dispute that. As I was about to say, in this case the
19 trial judge denied our request for preliminary relief even
20 though he said you're probably going to win on the merits,
21 and we didn't dispute that.

22 But the proposition that we're facing is,
23 what -- putting aside the question for preliminary relief,
24 there's been a full adjudication and the trial judge says,
25 hey, I'm persuaded that this tax is unconstitutional, and

1 that --

2 QUESTION: Sure, but if you win in this case, is
3 the implication that the judge would have had to do
4 something different at the preliminary stage?

5 MR. ALLEN: No.

6 QUESTION: And so you --

7 MR. ALLEN: My answer is no.

8 QUESTION: You agree that if, in fact, there is
9 a postdeprivation remedy, even if the court is required to
10 entertain at least some claim for relief under 1983, it
11 would not have to provide a predeprivation remedy?

12 MR. ALLEN: It would not have to provide a
13 preliminary injunctive -- injunction.

14 QUESTION: Well, it wouldn't have to provide a
15 remedy to your petitioner before your petitioner paid the
16 tax. Do you agree?

17 MR. ALLEN: I agree with part of that question,
18 but let me try to explain my answer. I agree that he
19 wouldn't be entitled to preliminary injunctive relief, but
20 if we're at the stage where there's been a full
21 adjudication and the Court has decided this tax is
22 unconstitutional, obviously unconstitutional, as the
23 supreme court of Oklahoma said here, then I submit that
24 the petitioner would be entitled to injunctive relief --

25 QUESTION: But then he doesn't need it, because

1 the Court said the tax is unconstitutional.

2 MR. ALLEN: He may not need it, and therefore
3 we're really arguing about something that has no
4 significant impact on the States, but I submit to you that
5 if the tax collector nevertheless threatened a levy on his
6 property, that he would be entitled under --

7 QUESTION: But how could he -- how could --

8 MR. ALLEN: -- section 1983 to injunctive
9 relief. Excuse me. I'm sorry.

10 QUESTION: Mr. Allen, you just said the State
11 court has said this tax is unconstitutional, and once the
12 State court said that, how can any State tax collector go
13 out and levy on the property?

14 MR. ALLEN: Most of them won't, but sometimes
15 they will.

16 The point is that injunctive relief is, in those
17 situations where the tax collector would threaten to levy
18 on the property, injunctive relief is not only
19 appropriate --

20 QUESTION: Well --

21 MR. ALLEN: -- but I submit required by section
22 198 --

23 QUESTION: -- yes, but Mr. Allen, the reality is
24 the State court is going to want to say we're not going to
25 litigate this to finality because there is a plain,

1 speedy, adequate remedy at law. You pay your taxes, and
2 then you litigate it, and you're not going to decide the
3 merits of this case in the present posture.

4 Now, that's what a State court would like to
5 say --

6 MR. ALLEN: I --

7 QUESTION: -- and it seems to me that faced with
8 the notion that we have recognized an equitable defense,
9 if you will, to injunctive or equitable relief, that that
10 might be perfectly proper.

11 MR. ALLEN: Well, I have to only respectfully
12 submit that in some circumstances I don't think it would
13 be. Let's take a case where the State enacts a tax --
14 what is it now, April, and they're going to impose a
15 million-dollar tax on me next January 1 that is -- applies
16 only to black people, let's say, and I go into Federal
17 court -- I go into State court and say, enjoin that tax,
18 because it's clearly unconstitutional.

19 QUESTION: I would think you would have no
20 standing in that case.

21 (Laughter.)

22 MR. ALLEN: Putting aside the standing
23 question -- a tax only on -- I don't know --

24 QUESTION: Gray hair.

25 MR. ALLEN: Gray-haired white men, right.

1 (Laughter.)

2 MR. ALLEN: I think I could go into State court
3 and say, enjoin that tax, and I don't think the State
4 court could, under our scheme of 1983, say, sorry, you've
5 got to pay the tax and litigate later.

6 QUESTION: In this case, if all you were
7 entitled to under some of the earlier suppositions was a
8 future injunction, are your attorney's fees just limited
9 to that?

10 MR. ALLEN: I'm sorry, I'm not --

11 QUESTION: Well, if there were adequate remedies
12 under State law, and all you're saying is that you -- your
13 argument earlier was, at least you're entitled to a future
14 injunction.

15 MR. ALLEN: Yes.

16 QUESTION: Are your attorney's fees limited to
17 just the value of obtaining the future injunction?

18 MR. ALLEN: Well, I don't know how you would
19 value attorney's fees --

20 QUESTION: Neither do I. That's why I asked the
21 question.

22 MR. ALLEN: -- unless it's by the value of
23 the -- I think you're entitled -- if you're entitled to
24 any relief under section 1983 you're entitled to your
25 reasonable attorney's fees.

1 QUESTION: Once the State --

2 QUESTION: But just for the reasonable
3 attorney's fees for the future injunction, because you
4 have your other relief under the other cause of action?

5 MR. ALLEN: Well, I don't know. That's a
6 good -- I frankly don't know. I mean, it --

7 QUESTION: Back up and explain to me how you
8 would ever get injunctive relief once you've had complete
9 adequate remedy at law. You've gotten the refund back
10 with whatever interest is due. What injunction would you
11 then get?

12 MR. ALLEN: Well, in this case, for example, and
13 typically in many of these cases, you get a final judgment
14 on the merits, and the judgment reads, tax commission
15 shall refund, and furthermore we permanently enjoin the
16 tax commission from enjoining the tax. It's all done at
17 the same time. The judgments in these cases typically
18 include --

19 QUESTION: We're talking about the judgment of a
20 State court --

21 MR. ALLEN: Yes.

22 QUESTION: -- in a case like this.

23 MR. ALLEN: Yes..

24 QUESTION: And if it makes the injunction, it
25 would make it under what law?

1 MR. ALLEN: Well, normally they don't specify.
2 They just say, the final judgment for the plaintiffs, and
3 here -- it is ordered as follows, and then --

4 QUESTION: Is that -- I didn't realize that was
5 the case. I assumed that the State would assume the good
6 faith of its tax commission and would just say refund and
7 not say, and we enjoin the tax commission.

8 MR. ALLEN: Sometimes they do and sometimes they
9 don't. In fact, the fact of the matter is, I think as
10 some of the justices have pointed out, once there's been a
11 final determination of unconstitutionality, whether or not
12 a formal injunction is entered or not is largely pro
13 forma, and in many -- but in many cases the courts do
14 issue injunctions, and in some cases they say we don't
15 need to issue an injunction here.

16 QUESTION: Well, the place where it makes a
17 difference I think is between -- is what has to happen
18 between the time you first challenge the tax and the time
19 there's an ultimate adjudication. Are you entitled to at
20 least ask for and perhaps get a preliminary injunction, or
21 can the State say, we just don't issue injunctions in this
22 kind of case, you've got to pay first, and then we'll
23 adjudicate your claim?

24 MR. ALLEN: I think they can impose the normal
25 requirements that are imposed on persons seeking

1 preliminary injunctions.

2 QUESTION: Well, can they impose a special rule
3 on anybody who seeks to enjoin the collection of a tax?

4 MR. ALLEN: No, I don't believe they can. I
5 think under section 198 -- I think under the Federal
6 scheme, if it's a federally unconstitutional tax, then --
7 and there's been a -- I don't think they can --

8 QUESTION: Well, nobody knows when you start out
9 whether it's a federally unconstitutional tax or not.
10 That's something that's -- you're ultimately entitled to a
11 determination of somewhere in the State court system, but
12 what is the interim status quo?

13 MR. ALLEN: Well, if you seek a preliminary
14 injunction, the court looks at whether there's irreparable
15 injury and the degree of the likelihood of success and all
16 the rest of those --

17 QUESTION: And adequate legal remedies, and the
18 point of the Chief Justice's question, I thought, at least
19 to me, was why are you entitled to an injunction under
20 normal, equitable principles, and why cannot we elaborate
21 those equitable principles as a matter of Federal law in
22 tax injunction suits under 1983?

23 MR. ALLEN: Well, I think under normal,
24 equitable principles, when you get to the point where
25 there's been a final determination of unconstitutionality,

1 under --

2 QUESTION: Well, now, but the Chief Justice's
3 question pertained to a preliminary injunction.

4 MR. ALLEN: Under a preliminary -- under a
5 preliminary injunction, at the preliminary injunction
6 stage, I don't think the -- in my view, I don't think that
7 States can say, as a blanket matter, when you're
8 challenging a State tax as unconstitutional, as a blanket
9 matter we're not going to issue preliminary injunctions.

10 I think that they can impose on litigants the
11 normal standards of preliminary injunctions, but I don't
12 think they can erect a special standard that would apply
13 to people challenging unconstitutional State taxes, and I
14 would also point out that preliminary injunctions,
15 although you have to meet a high burden, are not unknown
16 in this area.

17 We've cited in our reply brief an instance a few
18 years ago involving an Arkansas truck tax where Justice
19 Blackmun issued, in effect, a form of preliminary
20 injunctive relief when he required the State to put the
21 taxes in an escrow fund. That is a form of preliminary
22 injunctive relief.

23 QUESTION: But all of this turns, I take it, on
24 there being no exhaustion requirement, which in essence
25 this would be. Is that the basis for your argument?

1 MR. ALLEN: When you say no exhaustion
2 requirement, I'm not sure what you mean. Administrative
3 exhaustion?

4 QUESTION: Well, as an adequate -- I suppose you
5 can look at an adequate remedy of law as being a base that
6 has to be touched, and if there is an adequate remedy of
7 law, you wouldn't be entitled to any injunctive relief
8 unless that remedy for some peculiar reason is denied to
9 you, and I took it that what you were arguing was, there's
10 no exhaustion requirement in 1983. If you impose the
11 adequacy of the legal remedy criterion you in effect are
12 imposing an exhaustion requirement, and that is
13 inconsistent with the 1983 cases. Maybe I misunderstood
14 you.

15 MR. ALLEN: Well, I think --

16 QUESTION: If that is not your argument, then I
17 guess I don't understand what your argument is based on.

18 MR. ALLEN: Well, I think the question of
19 whether or not States can require you to exhaust some
20 administrative remedy is a somewhat different question
21 here than the one we've been addressing, which is, what
22 can States do when you seek a preliminary injunction in
23 court, so maybe I'm not understanding your question
24 correctly.

25 I think that also with respect to State

1 requirements that you exhaust some administration remedy
2 that you go through the tax commission when you have a
3 claim of unconstitutional taxes, I think that under the
4 scheme of section 1983, those would probably also not be
5 able to be imposed, but --

6 QUESTION: May I ask you a more basic question
7 for a moment?

8 Do you think a State could say, we have State
9 procedures that vindicate both State and Federal
10 constitutional rights, and they include exhaustion and
11 lots of other things. We are simply not going to
12 entertain any 1983 actions. There's nothing in the
13 Federal statute that requires that remedy to be enforced
14 in any court except a Federal court. Could a State --

15 MR. ALLEN: I don't think -- no. I think
16 clearly States could not do that.

17 QUESTION: Why? What's your authority for that?

18 MR. ALLEN: Well, there are lots of cases that
19 say that -- *Howlett v. Rose*, for example, that says that
20 States cannot refuse to enforce section 19 --

21 QUESTION: They cannot interpose a sovereign
22 immunity defense in a Federal case if they were not
23 imposed in the State case.

24 MR. ALLEN: That's right.

25 QUESTION: They didn't hold they must entertain

1 1983 cases ab initio.

2 MR. ALLEN: Well, that gets back to a very basic
3 question of what the obligations of State courts are, and
4 we submit that --

5 QUESTION: There may be an obligation to enforce
6 the substantive Federal constitutional right, but that's
7 quite different from saying they must enforce the
8 procedural remedy that Congress has provided for Federal
9 courts in 1983.

10 MR. ALLEN: Well, 1983 is what Congress has
11 applied not only for Federal courts but also for State
12 courts, and it's well-established that --

13 QUESTION: But wasn't --

14 QUESTION: It authorized --

15 QUESTION: -- the whole purpose of that
16 legislation to give you a cause of action in Federal
17 court, because the State courts, the concern was at that
18 time, would not enforce your Federal rights?

19 MR. ALLEN: No, Justice Ginsburg. It's well
20 settled that 1983 is enforceable in State courts as well
21 as Federal courts.

22 QUESTION: But that wasn't the history of 1983.
23 Wasn't the very reason it was created was that the State
24 courts were not trusted to handle these civil rights
25 cases, and so a Federal remedy was created?

1 MR. ALLEN: Well, that may be true, but the
2 Court has nevertheless held that State courts are --

3 QUESTION: State courts are --

4 MR. ALLEN: -- that it's as much law in the
5 States as it is in the Federal court.

6 QUESTION: They may entertain 1983 cases. We've
7 never held they must.

8 MR. ALLEN: No, but you have held in many, many
9 cases that Federal -- that State courts have an
10 obligation, a fundamental obligation to enforce an implied
11 Federal law, that -- you said in Howlett v. Rose for
12 example --

13 QUESTION: Federal substantive law.

14 MR. ALLEN: Federal substantive law, but section
15 1988 is certainly Federal substantive law. It entitles --

16 QUESTION: It's part of the 1983 remedy.

17 MR. ALLEN: Yes, it's part of the Federal --
18 it's an important part, I might add, but it's also -- it
19 is also substantive law. It imposes an obligation on
20 States in these kinds of cases.

21 QUESTION: Mr. Allen, I'm still struggling with
22 some doubt as to whether you should be able to bring a
23 1983 action against an officer for injunction anyway.
24 I've gone back and checked on Will, and it's the clearest
25 dictum in Will. We have no holding on point on whether

1 you can bring a 1983 action against a State officer in his
2 official capacity for injunctive relief.

3 MR. ALLEN: Well, certainly Will indicates that
4 that's the case, and I think Will --

5 QUESTION: It more than indicates. It says it
6 flat out.

7 MR. ALLEN: Yes.

8 QUESTION: But it's dictum in the case, and the
9 only reason it says it is because that's what we've held
10 with respect to Eleventh Amendment law, but this is a
11 statute, it's not the Eleventh Amendment, and it's
12 certainly open to us to interpret the statute simply not
13 to allow a 1983 suit against an officer acting in his
14 official capacity.

15 MR. ALLEN: Well, that would undo -- it seems to
16 me that would undo an awful lot of section 1983
17 jurisprudence.

18 QUESTION: That's what I wanted to ask you.
19 What harm would be done? What catastrophes would befall?

20 MR. ALLEN: There are lots of instances outside
21 the tax area where injunctive relief against a State
22 officer acting in violation of the Constitution is
23 essential.

24 QUESTION: And would not be available otherwise
25 than under 1983?

1 MR. ALLEN: Well, I don't know whether it would
2 be available otherwise, but in --

3 QUESTION: You've certainly held otherwise here.

4 MR. ALLEN: But in cases -- I'm not sure whether
5 it would or would not be available, but let's take a case
6 where a State official is enforcing some blatantly
7 racially discriminatory policy, and you want him to stop.
8 It seems to me under section 1983 you can get an
9 injunction, and under section 1988 you're entitled to --

10 QUESTION: Personally, certainly you could, but
11 you're seeking an injunction against him in his official
12 capacity.

13 MR. ALLEN: Yes, even if he was acting in good
14 faith and believed with some reason that what he was doing
15 was constitutional, I think you can get an injunction
16 against him under section 1988, and I think you can get
17 attorney's fees under section 1988.

18 QUESTION: Do you ask in the prayer for relief
19 against the officer as a named officer?

20 MR. ALLEN: Yes.

21 QUESTION: Well, in your complaint on page 26
22 you ask for injunction against the Oklahoma Tax
23 Commission. It's at page 26 of the joint appendix. Just
24 as a matter of pleading, aren't you supposed to name the
25 officer --

1 MR. ALLEN: Well --

2 QUESTION: -- to come within the Ex Parte
3 Young --

4 MR. ALLEN: We did name the officers in the
5 complaint and in the -- in the style of the complaint --

6 QUESTION: Not in the prayer for relief.

7 MR. ALLEN: -- and in the -- and in the body of
8 the complaint we named them all.

9 Just to finish answering your question, I notice
10 that we did not in that particular prayer for relief in
11 that paragraph specify the officers, but certainly
12 throughout this case, and as the Oklahoma supreme court
13 held, we have made clear that we were suing the
14 individuals here in their official capacity for injunctive
15 relief.

16 QUESTION: Thank you, Mr. Allen.

17 Mr. Johnston, we'll hear from you.

18 ORAL ARGUMENT OF STANLEY P. JOHNSTON

19 ON BEHALF OF THE RESPONDENTS

20 MR. JOHNSTON: Mr. Chief Justice, and may it
21 please the Court:

22 I think a very important question that is before
23 the Court that has to be answered is, did Congress intend
24 to impose on State courts the obligation to apply Federal
25 remedies under 1983 or 1988 or otherwise in State tax

1 challenges when a plain, speedy, and efficient remedy is
2 available and may be had under State law? I submit that
3 Congress had no such intention and did not accomplish that
4 with 1983.

5 The nature of this case is more than just an
6 injunction. The lawsuit was brought under the State
7 statute that provided that anyone who wishes to challenge
8 the constitutionality of a tax statute or the -- or its
9 violation under a Federal statute must give notice after
10 it has been assessed or proposed to be assessed, must give
11 notice, pay the tax under protest, and then may file a
12 lawsuit in district court, the State's trial court, for
13 its recovery.

14 Now, the statute, of course, does not provide
15 for injunction. Oklahoma does not, as do some States,
16 have any specific statute prohibiting enjoining a State
17 tax, although Oklahoma case law has on several occasions
18 prohibited it.

19 Declaratory relief has been allowed under
20 Oklahoma case law against a tax if the tax is not yet due.
21 Once the tax is due and proposed to be assessed, however,
22 the Oklahoma statutes provide basically two remedies. One
23 is the administrative hearing remedy, which also can be
24 used at the taxpayer's option to challenge a proposed
25 assessment on any grounds, including grounds of

1 constitu -- State or constitutional questions or violation
2 of Federal law.

3 In addition to that remedy -- by the way, in the
4 administrative hearing procedure the hearing was held
5 before the tax commission as an agency, and its order is
6 directly the appealable to the Oklahoma supreme court.

7 As an alternative, and this is what was used in
8 this case, Oklahoma law provides that instead of filing an
9 administrative protest, that the taxpayer can pay the
10 taxes under protest, file suit in district court for the
11 recovery. That is what has happened in this case.

12 However --

13 QUESTION: So here the taxpayer did comply with
14 Oklahoma procedures, or at least in that respect.

15 MR. JOHNSTON: That is true, and for the access
16 to the courts under this, and this is title 68, section
17 226 of the Oklahoma statutes, under the action 226 which
18 this was brought, there is no need, other than giving
19 notice of intent and paying the taxes under protest within
20 30 days, that is the only exhaustion requirement that is
21 necessary, that the Oklahoma courts have declared
22 necessary.

23 QUESTION: This taxpayer complied with all of
24 that?

25 MR. JOHNSTON: Yes, they did. Yes, Your Honor.

1 The --

2 QUESTION: So your claim is limited to just
3 saying, but no 1983 action will lie at all?

4 MR. JOHNSTON: The decision below, and it is our
5 position in support of that decision, that where there is
6 a plain, adequate remedy available under State law, and we
7 submit that there is such a remedy under section 226, that
8 although this Court has obviously said that State courts
9 may entertain 1983 actions, we believe it is consistent
10 with Congress' policy that the State courts need not
11 exercise the jurisdiction, or to entertain a 1983 action
12 to accomplish the exact same thing that they can
13 accomplish under State law where in fact they can
14 accomplish more.

15 For instance, the State law under which this
16 case arose provides for refunds. They could not get
17 refunds under 1983 --

18 QUESTION: Yes, but --

19 MR. JOHNSTON: Even if we --

20 QUESTION: But of course, if the petitioners are
21 right, they get attorney's fees, and I guess attorney's
22 fees would not be available under State law.

23 MR. JOHNSTON: That is correct. That's the only
24 thing that they can't get under State law that they might
25 get under 1983 and its attendant section, 1988, because

1 State law does not provide for attorney's fees.

2 QUESTION: But you're looking at it from the
3 point of view, as everyone is, of tax law, but forgetting
4 tax law for the moment, isn't it normal that the 1983
5 remedy is treated as, if State law gives a plaintiff all
6 the remedies that 1983 gives them but attorney's fees,
7 still they recover attorney's fees under 1983?

8 Isn't that the normal rule, because you could
9 have two causes of action get you to the same result, but
10 Congress wanted to give these civil rights plaintiffs
11 attorney's fees. And then the question becomes, well, why
12 should you make an exception here?

13 MR. JOHNSTON: I certainly can't -- as I -- I
14 will accept that because my expertise, if any there is
15 with 1983, certainly doesn't go much beyond the tax area,
16 but I accept that as a basic statement, but I believe that
17 the difference is, and why not in this case, is because
18 when Congress enacted 1983 and then they were aware, for
19 instance, that in the tax area it was common that the only
20 right that anyone had to challenge a State tax was in the
21 nature of an action in, was to pay it and sue to recover
22 it.

23 More importantly, when the attorney's fee
24 provision was enacted, Congress had already, in 1937, I
25 believe, had already provided that -- their restrictions

1 against the Federal courts from interfering in State tax
2 matters.

3 QUESTION: Well, that, it seemed to me, which is
4 a very strong argument, would argue for an exception to
5 the no exhaustion principle. You see, that's -- the no
6 exhaustion principle is read into 1983-88 via this Court's
7 decision in Patsy v. Regents, and there were strong policy
8 reasons for doing that, and reading that, and you have
9 very strong policy reasons as to not to interfere.

10 But don't -- I mean, maybe the -- I'm not
11 suggesting this is a conclusion. The policy reasons might
12 read out the no exhaustion, and if they read out the no
13 exhaustion, then the main policy objection to applying it
14 is gone but for attorney's fees, and yet we have a basic
15 congressional decision that you get your attorney's fees
16 when something violates the Civil Rights Act as well as
17 violating State law.

18 That's what I'd appreciate a reaction to.

19 MR. JOHNSTON: I think that the -- probably the
20 answer to that is, if we take that approach, and you say
21 well, we will -- we could extend 1983, it's application to
22 State tax matters, but we'll change our interpretation so
23 that there's no --- that you can have an exhaustion
24 remedy.

25 However, if you do that, I think that you're

1 then going back and disregarding what the purpose of 1983
2 was, and whether or not it was ever intended to apply in
3 such cases in the first place.

4 QUESTION: Well, is there some reason it wasn't
5 intended to apply in -- for violations of the Commerce
6 Clause, whereas it was intended to apply for violations of
7 the Fourteenth Amendment?

8 In other words, the thing that's worrying me
9 about this entire case is the -- not this area, but what
10 the impact is on some other area, and whether it's
11 possible to create an exception here, and why would you?

12 MR. JOHNSTON: If I understand the concern, I
13 don't think that what we're talking about is creating an
14 exception here, but recognizing that it never did apply in
15 the first place.

16 Because I believe that Congress, when it enacted
17 the Tax Injunction Act clearly expressed an attitude and a
18 policy of Federal noninterference and nonintrusion in the
19 State tax area with one requirement, of course, that there
20 be a plain, speedy, and adequate remedy available.

21 QUESTION: But that assumed -- that assumed that
22 1983 would apply.

23 MR. JOHNSTON: It could well assume that, but
24 I --

25 QUESTION: Well, didn't it -- I mean, wouldn't

1 it have been pointless if it had not assumed that?

2 MR. JOHNSTON: I think not, Your Honor, because
3 in the times when the Tax Injunction Act was enacted, as I
4 understand historically you had usually the situation
5 where interstate businesses or taxpayers were challenging
6 State tax laws, not on the basis of 1983, but usually
7 seeking injunctions pending the litigation and often
8 causing the States, because of their ability and the
9 taxpayer's ability to either have to give up the case or
10 to accept something less than what was owed, or else have
11 their entire collecting mechanism, at least to that
12 extent, disrupted during the litigation, and Congress
13 perceived that as an evil, and I don't recall that 1983
14 remedies were involved in that, but they, in proceeding --

15 QUESTION: I guess what's -- I guess what I'm --
16 what perplexes me is 1983 was not required to authorize
17 the Federal courts to give those remedies. Why was 1983
18 required to give the Federal courts authority to provide
19 remedies in Fourteenth Amendment cases?

20 MR. JOHNSTON: Well, as I understand the
21 historical basis of 1983, it was perceived that either
22 there were no State law remedies, or they may have been on
23 the books, but they were not being enforced, so that a
24 Federal forum and a Federal remedy were provided.

25 Of course, 1983 in its application had expanded

1 far beyond the civil rights scope.

2 QUESTION: Because of the way it's written.

3 MR. JOHNSTON: Because of the way it's written
4 and the continuing situations that come before the courts,
5 but I submit that it was never intended -- and although it
6 is very, very broadly worded, it is so broadly worded as
7 to cover probably situations that I can't conceive of
8 today, but I do not believe that considering the history
9 and the knowledge, presumed knowledge of Congress when
10 both 1983, the Ku Klux Act, was passed and also when
11 the -- years later when 1988 was added to it, I do not
12 believe Congress ever supposed or intended, nor do I
13 believe the wording goes or requires this Court to apply
14 those remedies, the Federal remedies in State tax actions.

15 QUESTION: Mr. Johnston, if you're right, then
16 wasn't the end of the road in the Dennis case wrong?

17 That is, there was -- when that case was
18 remanded there was an award of counsel fees under 1988, is
19 that correct?

20 MR. JOHNSTON: I believe that to be true, Your
21 Honor. I am -- I will -- if I am incorrect I will
22 apologize, but I do not believe that this argument was
23 made or even considered, even on remand. I think it just
24 was taken as --

25 QUESTION: But consider -- let's assume you're

1 right about that, that it wasn't even considered. If one
2 considers it, how must one rule, and accepting your
3 argument, can, in that Dennis case there be, at the end of
4 the line, counsel fees under 1988?

5 MR. JOHNSTON: If I understand the question, I
6 believe, if they had considered the question that is
7 present in this case --

8 QUESTION: Yes.

9 MR. JOHNSTON: -- that the State would have been
10 justified in accepting, as the court below did, yes, we
11 are now told, and we understand that the Commerce Clause
12 will provide a basis for 1983 actions.

13 However, the State law provides a full remedy,
14 and therefore we are justified under principles of
15 federalism and comity, considering the policy of Congress,
16 in not entertaining that, because I don't believe -- this
17 Court's decision in Dennis didn't consider it. If it had
18 been considered, I think we would have a different
19 situation. It's a fact they did award attorney's fees,
20 but I think they stopped with the Court's decision in
21 Dennis and did not consider the next question, which is
22 the question that we have here today.

23 If petitioners are right, following up on an
24 earlier question, I believe that, well, why shouldn't we
25 do it? What harm would it do? Why don't we require

1 States to give the Federal remedies?

2 Well, where do you stop? Do you have to start
3 creating specific exceptions, or grants, or so forth,
4 because, for instance, although under an action in --
5 under Oklahoma statute 226, the suit for recovery,
6 exhaustion of the administrative remedies are not
7 required, I believe other States do have those
8 requirements, that before you can go to court, you have to
9 have -- follow certain administrative processes.
10 Generally speaking, under 1983 those are not -- had not
11 been required by the court.

12 Statutes of limitations, for instance.
13 Generally, the statute of limitations under 1983 has been
14 held to be the general tort statute under the State.
15 However, States typically have much, much shorter statutes
16 of limitations notice requirements, notice of claim
17 requirements for tax challenges.

18 Now, all of these requirements that the States
19 typically have, have of course been approved by the court,
20 and have been observed to be constitutional and allowable
21 and also very necessary to the State's interest in
22 protecting, controlling, and administering the public
23 fisc.

24 If the petitioners are right, then it's not just
25 a matter of a preliminary injunction. If the petitioners'

1 position is accepted, then all the possible remedies under
2 1983. Now, what's involved in this case between these
3 parties, of course, is attorney's fees, but the
4 implications of this case and the questions go much
5 farther than that.

6 And I would submit that allowing -- not only
7 allowing. We've already allowed States to entertain them,
8 which they may do if they want, but requiring them to
9 enforce Federal remedies in situations where Congress has
10 said those same Federal remedies we withhold in Federal
11 court I think is truly anomalous indeed.

12 QUESTION: May I ask you a question about, sort
13 of the way the case developed? The complaint, as I read
14 it, doesn't say what provisions they're relying on until
15 they get to Count 3 and they say they're relying on 1983.

16 The Oklahoma supreme court in its opinion said,
17 we allowed a refund to plaintiff based upon the refund
18 procedures in 68 O.S. 1981 section 226.1, and so forth. I
19 don't understand that the plaintiffs relied on those
20 refund procedures in their pleadings. Did they, or am I
21 mistaken?

22 MR. JOHNSTON: Yes, Your Honor. As a matter of
23 fact, in reading from the joint appendix at page 20, which
24 is a part of the petition, the plaintiff's petition or
25 complaint in this case --

1 QUESTION: Right.

2 MR. JOHNSTON: Where they cite jurisdiction,
3 they cite that this Court has jurisdiction of this cation
4 under 68 O.S. 1981 section 226, and title 12, 1651. 1651
5 of title 12 --

6 QUESTION: Oh, I see. You're right.

7 MR. JOHNSTON: -- is the Declaratory Judgments
8 Act, and so they specifically invoked the court's
9 jurisdiction to entertain this action under 226.

10 QUESTION: And you're in effect saying that they
11 pleaded in the alternative a State remedy and a Federal
12 remedy, and it was within the power of the State court to
13 say we'll grant the State relief and we just won't grant
14 the other relief.

15 MR. JOHNSTON: Actually, I have a little bit
16 sharper position than that. I think they didn't plead in
17 the alternative, they just appended a 1983 statement in
18 order to claim attorney's fees because they weren't
19 allowed under State law --

20 QUESTION: Well, it's their -- their Count 3,
21 when they -- I mean, you're right about the jurisdictional
22 provision, but when they get around to asking for relief
23 they seem to rely -- I thought they had relied, and I
24 misread it, I see, on the Federal statute only.

25 But supposing they had just pleaded the Federal

1 statute, say the court of general jurisdiction -- we're
2 not going to ask you to apply your refund procedures, but
3 we're going to ask you as a matter of Federal law for
4 precisely the same relief that we could get under State
5 law, but we want it under the Federal statute.

6 MR. JOHNSTON: I believe that they would have
7 a -- I think they would have a problem.

8 QUESTION: And they just never cited the refund
9 procedures.

10 MR. JOHNSTON: Because I don't think that
11 basically would be available under 1983. First, if they
12 were not concerned about refunds, they're either going to
13 be in a position of simply suing to declare the statute
14 unconstitutional.

15 QUESTION: No, no, I'm saying they say the
16 relief we want is, we're going to pay the taxes now, so
17 you won't have the normal -- we think that's a fair
18 requirement. We're going to -- and we're going to pay the
19 taxes. We merely want a refund, and after we get a
20 refund, an injunction against future imposition of taxes,
21 which we think we're entitled to as a matter of Federal
22 law, and it doesn't interfere with any State policy except
23 your unwillingness to pay attorney's fees.

24 MR. JOHNSTON: Well, I would submit that it's --
25 not that -- what they're asking for in your scenario would

1 not be provided for under Federal law, because they would
2 be in a position of saying we want a refund under Federal
3 law, but you're suing the State for the refund. That is
4 an action against the State, notwithstanding the --

5 QUESTION: But we're doing it in State court.
6 We're doing it in State court.

7 MR. JOHNSTON: We're doing it in State court,
8 but if the only basis --

9 QUESTION: There's no Eleventh Amendment
10 problem.

11 MR. JOHNSTON: -- for a refund is 1983, it
12 doesn't authorize one, at least according to the cases,
13 because that in effect is a suit for refund against the
14 State under 1983, and the State is a person. I don't
15 think that 1983 actions, there is no Federal remedy or
16 Federal cause of action under 1983 for a refund of State
17 taxes.

18 QUESTION: Well, why not? The language of 1983
19 is pretty broad about any, you know -- I can't quote it to
20 you, but it's pretty broad, and if there's been a
21 collection of taxes in violation of constitutional rights,
22 why -- I don't understand.

23 MR. JOHNSTON: Because the language of the
24 statute itself says that it has to be an action against a
25 person, and the refund action is against the State.

1 QUESTION: You're asking us to reject the
2 footnote that Justice Scalia was addressing himself to a
3 little earlier. Is that part of your case?
4 QUESTION: No, only for damages, you're saying.
5 The footnote --
6 MR. JOHNSTON: Yes.
7 QUESTION: -- went to injunctive relief.
8 MR. JOHNSTON: Yes.
9 QUESTION: Oh, I see.
10 MR. JOHNSTON: And so I was talking about if
11 they say, we want a refund under Federal law, it's not
12 there, because 1983 doesn't provide it because an action
13 for refunds is against the State.
14 QUESTION: Yes, but -- but so what? I mean, why
15 isn't it an action --
16 MR. JOHNSTON: Because an action against the
17 State for damages, for refunds, is not -- has not been
18 permitted under 1983.
19 QUESTION: And that was the holding of Will.
20 QUESTION: But not under --
21 MR. JOHNSTON: I believe so.
22 QUESTION: Not under -- but that was an Eleventh
23 Amendment case, wasn't it?
24 MR. JOHNSTON: I am not aware --
25 QUESTION: Wasn't that an Eleventh Amendment --

1 MR. JOHNSTON: -- for any purpose that -- and,
2 of course, I don't think petitioner --

3 QUESTION: Your position is that our footnote in
4 Will was not confined or controlled by the Eleventh
5 Amendment. It was just an interpretation of the meaning
6 of "person" under 1983.

7 MR. JOHNSTON: I read it as simply for what it
8 says, is that persons -- and I read it for being -- for
9 purposes of 1983.

10 QUESTION: And a State is not a person.

11 MR. JOHNSTON: A State is not a person, and
12 therefore I believe an action for damages in the nature of
13 refunds I do not believe would be permissible under 1983,
14 so my answer, I think, to your question is that they would
15 not be successful if they just disregarded State law,
16 because their only right to a refund is provided by State
17 law.

18 QUESTION: But they would have succeeded in one
19 of their objectives, which was to get the State law
20 declared unconstitutional.

21 MR. JOHNSTON: They would have.

22 QUESTION: All right, so under normal 1983 law
23 they would be a prevailing party entitled to attorney's
24 fees, and the only way I guess you can avoid it is if the
25 State has a right not to put 1983 in State court in tax

1 matters. I can't think of any other way to avoid it, and
2 then the only way --

3 QUESTION: Well, they're not entitled to
4 attorney's fees anyway, are they? I mean, as I read 1988
5 it says the court in its discretion may allow the
6 prevailing -- why don't you just argue that it would be an
7 abuse of discretion for Federal courts in cases like this
8 to allow the attorney's fees -- for State courts? Yes.

9 MR. JOHNSTON: Well, for one reason I don't
10 believe that we need to take that position. I don't think
11 we are required under Federal law to argue that after the
12 trial is completely over. I think we can argue the
13 question of whether or not we have to apply any -- or
14 grant any Federal remedies.

15 We can argue that in the first instance, and
16 that is our position, that where you have complete
17 remedies under State law that we need not entertain a 1983
18 action to a part of the same --

19 QUESTION: Right, and is that just in tax cases,
20 or is that also in a case where there is State laws of
21 assault and battery and all kinds of other laws, and the
22 person under the Fourteenth Amendment makes exactly the
23 same claim for attorney's fees, and does this rule apply
24 there, too?

25 MR. JOHNSTON: I'm suggesting it is only in

1 State tax --

2 QUESTION: And the reason it's only -- the only
3 way, I guess -- I'm not arguing with you as much as I'm
4 trying to think it through, to tell you the truth. But
5 the only basis you have for saying that is because of the
6 Tax Injunction Act, and now the Tax Injunction Act, you'd
7 have to look into the policies underlying that.

8 And then once I get to the policies underlying
9 it, that's why I came back to the idea which is only
10 experimental about the possibility that that act justifies
11 doing away with the exhaustion requirement, but that's the
12 structure of the argument. There isn't some other problem
13 that's caused, or some other reason.

14 MR. JOHNSTON: That is the structure of the
15 argument, and the argument is that both 19 -- 1983 and its
16 attendant 1988 and section 1341, the Tax Injunction, of
17 course they are both expressions of policy. Every act of
18 Congress is, and at the same time, we had a Congress
19 wanting to make sure that there were substantive remedies
20 available and usable for persons whose rights, substantive
21 rights under the Constitution and Federal laws had been
22 violated.

23 They wanted to make sure that those people had a
24 remedy, and of course when it initially was passed, even
25 if the remedy was on the books, often it wasn't enforced

1 till they provided a Federal forum and a Federal remedy.
2 They certainly provided a Federal remedy now even if it's
3 enforced in the State court.

4 But at the same time, that danger did not then,
5 and certainly does not now exist in the area, the realm of
6 State taxes, and that same Congress who expressed the
7 policy under 1983 has also expressed a policy under 1341
8 that the Federal Government, including Federal remedies,
9 should stay out of State tax matters basically only so
10 long as there is an adequate remedy, to the contrary of
11 what 1983 started out to be.

12 QUESTION: But that seems to undermine, at least
13 in part, the Dennis case, because isn't -- if you're right
14 about the bottom line in Dennis being no counsel fees,
15 wasn't that kind of a Pyrrhic victory?

16 MR. JOHNSTON: I suggest that the only question
17 that was really presented in Dennis is whether or not the
18 Commerce Clause granted rights and privileges which would
19 be -- a violation of which would be protected, or a remedy
20 given under 1983, and I can envision, possibly, violations
21 by State actors of the Commerce Clause in areas that have
22 nothing to do with taxation.

23 QUESTION: But that case itself happened to be a
24 tax case.

25 MR. JOHNSTON: That case itself is certainly a

1 tax case. It was one that -- Oklahoma and Nebraska were
2 two of the seven States that were all sued on the same day
3 by the same people for the same thing. This is part of
4 it, Dennis and this case.

5 But I suggest that Dennis, when it came back on
6 remand to the State courts, I understand that attorney's
7 fees were awarded. I am not aware that the question of
8 whether or not they needed to be for reasons, not whether
9 the Commerce Clause provides a basis for 1983, but whether
10 or not State remedies are adequate and therefore the State
11 may not even entertain 1983 in the first place I don't
12 believe were ever argued or considered in Dennis.

13 So in that respect, if I am right and it had
14 been considered, then I think your answer would -- could
15 be yes, it would have been a Pyrrhic victory. It didn't
16 happen, and so I can't tell exactly, but I do believe that
17 the danger to the States and their ability to plan and
18 administer their taxes is quite substantial, and could be
19 substantial if the Court were to open up 1983 to the point
20 that it says Congress intended that you must apply any
21 remedies that might be available under 1983 even though
22 you otherwise have adequate remedies.

23 It could cause, I believe, a great disruption in
24 State administration of their own tax affairs. I do not
25 believe that was the policy or intent of Congress, and I

1 believe they showed that policy when they prohibited the
2 very same thing, prohibited the Federal courts from doing
3 the same thing.

4 So I would suggest that if we accept the
5 petitioner's argument, it is to accept the concept that
6 Congress intended to prohibit the Federal courts from
7 interfering or supplying Federal remedies in State tax
8 matters, and then at the same time, without ever saying
9 so, they intended to mandate that State courts apply those
10 Federal remedies. I do not believe that was the intent of
11 Congress, and I believe that the decision below should be
12 affirmed.

13 CHIEF JUSTICE REHNQUIST: Thank you,
14 Mr. Johnston.

15 The case is submitted.

16 (Whereupon, at 2:06 p.m., the case in the above-
17 entitled matter was submitted.)
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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:

NATIONAL PRIVATE TRUCK, COUNCIL, INC., ET AL., Petitioner, v. OKLAHOMA TAX COMMISSION, ET. AL.

CASE NO.: 94-688

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

BY *Don Mani Federico*

(REPORTER)

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