

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CITY OF RANCHO PALOS VERDES, :

4 CALIFORNIA, ET AL., :

5 Petitioners :

6 v. : No. 03-1601

7 MARK J. ABRAMS. :

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9 Washington, D.C.

10 Wednesday, January 19, 2005

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States at

13 10:03 a.m.

14 APPEARANCES:

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16 the Petitioners.

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18 General, Department of Justice, Washington, D.C.; on

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20 supporting the Petitioners.

21 SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of the

22 Respondent.

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P R O C E E D I N G S

(10:03 a.m.)

JUSTICE STEVENS: We'll now hear argument in the
City of Rancho Palos Verdes against Abrams.

Mr. Lamken.

ORAL ARGUMENT OF JEFFREY A. LAMKEN
ON BEHALF OF THE PETITIONERS

MR. LAMKEN: Thank you, Justice Stevens. May it
please the Court:

This case concerns whether Congress, in enacting
section 332(c)(7) of the Communications Act, intended to
expose local governments and State and local officials to
expansive section 1983 liability with the tens of
thousands of wireless antenna zoning decisions they must
make each year.

Entitled preservation of local zoning authority,
section 332 provides for State and local agencies in the
first instance to implement specific Federal substantive
and procedural requirements, together with preserved State
zoning laws, in passing on applications to build or modify
wireless towers. It then provides a highly distinctive,
independent cause of action for accelerated judicial
review of the decisions, including a short limitations
period and mandatory expedition. That tailored process is
sufficiently comprehensive to evidence Congress' intent

1 for enforcement to occur --

2 JUSTICE O'CONNOR: Well, Mr. Lamken, it's not as
3 comprehensive as other schemes where the Court said, on
4 that basis, we would not find a section 1983 cause of
5 action, is it? I mean, it's -- it's more spare.

6 MR. LAMKEN: It -- it is unusual in its unique
7 focus on private enforcement, but there was a reason for
8 the focus on private enforcement. In other provisions of
9 the Communications Act, the Congress chose -- for example,
10 section 253, Congress chose to eliminate enforcement at --
11 at the FCC level because it was concerned that State and
12 local governments often wouldn't have enough -- excuse me
13 -- local governments in particular --

14 JUSTICE O'CONNOR: Well, what -- what --

15 MR. LAMKEN: -- wouldn't be able to -- I'm
16 sorry.

17 JUSTICE O'CONNOR: What would you think of a
18 case where the plaintiff alleges that the antenna zoning
19 was the -- was caused by racial discrimination against the
20 applicant? Would there be a 1983 cause of action, do you
21 suppose?

22 MR. LAMKEN: Yes. That would still be available
23 because the -- the section 332(c)(7)(B)(v) only provides
24 for a cause of action for violations of the Communications
25 Act. Violations of the Constitution continue to be

1 enforceable directly under section 1983.

2 Section -- section 332(c)(7)(B)(v) is
3 comprehensive in the relevant sense in that for every
4 violation of section 332(c)(7), for every person adversely
5 aggrieved, it provides a mechanism for private judicial
6 enforcement. In addition --

7 JUSTICE O'CONNOR: Well, what about -- it -- it
8 -- section 332 speaks of an award of all appropriate
9 relief. What does that include? Could it include
10 punitive damages? Could it include attorney's fees, do
11 you think?

12 MR. LAMKEN: In that respect, it is
13 indistinguishable -- for example, the statute that was at
14 issue in Smith v. Robinson, and it doesn't specify the
15 precise forms of relief available. In our view in this
16 case, appropriate relief would mean specific relief, the
17 type of relief that is traditionally given on review of
18 zoning decisions and on review of judicial review of
19 agency action. That's supported by a number of
20 considerations.

21 I should point out, in the first instance, that
22 in this case respondent never did seek damages, or
23 punitive damages for that matter, under section
24 332(c)(7)(B)(v) itself.

25 But that's supported by a number of

1 considerations.

2 First is the structure of the act, which
3 presents it as a form of judicial review of agency action.
4 The act is structured much as you have -- much as you
5 would when a Federal agency enforces or implements Federal
6 requirements and are subject to judicial review. The only
7 difference is that Congress swapped in, effectively, State
8 and local agencies with the initial implementers in place
9 of the Federal Government. In that respect, it shares
10 some of the characteristics of sections 251 and 252 of the
11 Communications Act which are also implemented by local --
12 by -- excuse me -- by State governments as opposed to the
13 FCC.

14 JUSTICE GINSBURG: Mr. -- Mr. Lamken, the
15 argument has been made that 4 years before the
16 telecommunications act we're talking about was adopted,
17 Congress adopted the Cable TV Consumer Protection Act.
18 And in that act, it specifically limited the remedies to
19 declaratory and injunctive relief. Here we face silence.
20 Isn't that an indication that when Congress wants to limit
21 relief to declaratory and injunctive, it will say so in
22 the -- in the measure?

23 MR. LAMKEN: Justice Ginsburg, that -- that's an
24 example where Congress, for a broad range of statutes that
25 could be potentially used to enforce the Cable Act, chose

1 to restrict the forms of relief available. And it is an
2 example, in the words of Sea Clammers, where Congress has
3 made its intent explicit in the text of the statute.

4 Congress can also by implication limit the forms
5 of -- excuse me -- limit the mechanism for relief that's
6 available, and that's our position here, that Congress by
7 providing --

8 JUSTICE SOUTER: What's the -- what's the source
9 of the implication?

10 MR. LAMKEN: Pardon?

11 JUSTICE SOUTER: You say by implication.

12 MR. LAMKEN: The implication -- Congress has
13 provided a specific mechanism for judicial relief here,
14 section 332(c)(7)(B)(v) itself, and that is a highly
15 adapted mechanism which includes unique characteristics
16 such as a very short limitations period.

17 JUSTICE SOUTER: So -- so the -- the
18 implication, I -- I guess, is that unless it specifically
19 provides for damages, it implicitly does not.

20 MR. LAMKEN: I'm sorry. In terms of Congress
21 making damages available under 332(c)(7)(B)(v), our view
22 of the damage -- mind you damages are only one of the
23 differences we think that exists here, but our view is
24 supported by a number of considerations, in addition to
25 the structure of the statute. For example, appropriate

1 relief is often -- is the traditional form of relief
2 available. In this context traditional relief was always
3 specific relief. Congress also included a specific
4 savings clause that extends not merely to Federal
5 statutes, but prohibits the impairment --

6 JUSTICE SCALIA: Excuse me. Where -- where are
7 you getting the term, appropriate relief, from?

8 MR. LAMKEN: This -- that comes from this
9 Court's decision in Franklin, that where Congress doesn't
10 specifically identify the specific forms of relief
11 available --

12 JUSTICE SCALIA: All right. But that's --
13 that's not in the -- that's not in the text of this
14 statute, is it?

15 MR. LAMKEN: No, it isn't. It is an inference
16 the Court draws from silence. When the Court -- when
17 Congress provides an express cause of action and does not
18 identify the specific forms of relief available, the Court
19 will infer that Congress intended to provide all
20 appropriate relief. But the term, appropriate relief, is
21 that relief which Congress would have intended, and when
22 the Court is determining that, it takes a look at what the
23 traditional forms of relief are and it will look at things
24 such as the savings clause in 601(c), which expressly says
25 that the statute should not be read, unless it expressly

1 provides, to supersede, impair, or otherwise modify State
2 and local law, as well as Federal law. And in order to
3 put damages into the statute, if it doesn't provide
4 damages expressly, one would have to impair myriad
5 municipal immunity laws that otherwise protect
6 municipalities and State and local officers implementing
7 zoning requirements from liability.

8 Finally, the FCC has --

9 JUSTICE SCALIA: And -- and 1983 is not subject
10 to that limitation.

11 MR. LAMKEN: Well, 1983 is expressly preemptive
12 under this Court's decisions, and it is -- it would
13 preempt the State laws by its own force. But we believe
14 that that also supports Congress' decision not to provide
15 -- or supports the conclusion that Congress did not intend
16 to provide section 1983 relief here because the effect of
17 making the Communications Act enforceable under section
18 1983 would be to expand the categories of claims for which
19 -- that -- those immunities are unavailable, and it would
20 thereby impair those immunities.

21 JUSTICE SCALIA: But are they only immune from
22 damages action or are they immune from suit?

23 MR. LAMKEN: No. They're generally immunities
24 -- immune from damages actions, not from suits.

25 JUSTICE SCALIA: So, I mean, that proves too

1 much because they -- the statute obviously intends to
2 eliminate that immunity. The immunity from suit is -- is
3 clearly --

4 MR. LAMKEN: Oh, I think -- I think you may have
5 misunderstood. The immunity is not from suit. It's an
6 immunity from damages and the impairment would be the
7 immunity from damages. Section 332 is not designed to
8 impair the municipal immunity statutes, and they are not
9 immunities from suit. They are generally from damage
10 liability. The officers are subject to suit because these
11 are subject --

12 JUSTICE SCALIA: Well, it allows suit against
13 either municipalities or States, State or local
14 governments. Right?

15 MR. LAMKEN: Yes.

16 JUSTICE SCALIA: And the States have immunity
17 not just from damages but from suit.

18 MR. LAMKEN: As a constitutional matter, they
19 have an immunity from suit, but --

20 JUSTICE SCALIA: Unless they have chosen to
21 waive it, which --

22 MR. LAMKEN: Right.

23 JUSTICE SCALIA: -- one must assume in this area
24 they haven't.

25 MR. LAMKEN: Right.

1 JUSTICE SCALIA: So you have to regard this
2 provision as intentionally overriding some provisions of
3 State law in -- inasmuch as they apply to -- to immunity.

4 MR. LAMKEN: Well, first of all, I don't think
5 it would be read to -- to override the State's
6 constitutional immunity to suit.

7 JUSTICE SCALIA: No. That's --

8 MR. LAMKEN: But it would be read to -- it would
9 be read to override immunities to suit that exist under
10 State law because otherwise it couldn't be affected.

11 JUSTICE SCALIA: In for a penny, in for a pound.

12 MR. LAMKEN: Right.

13 JUSTICE SCALIA: If they've -- if they've
14 waived --

15 MR. LAMKEN: But I'm not --

16 JUSTICE SCALIA: If -- if you acknowledge that
17 it was intended to affect their immunity from suit, why --
18 why would we suspect that it was not intended to affect
19 their immunity from damages?

20 MR. LAMKEN: Well, because it would be -- it
21 would be a provision with no effect whatsoever if it
22 didn't override immunities to suit.

23 But I'm not sure there are provisions that are
24 providing for -- I mean, that there are myriad damages
25 immunity laws that provide municipalities absolute

1 immunity from suit. It's fairly common, at least under
2 California and other State law, for municipalities to be
3 subject to suit for review of their -- of the actions that
4 they make. And that is the typical fashion that this --
5 this statute simply incorporated that typical fashion of
6 providing judicial review of agency action.

7 Another consideration that supports the view
8 that section 1983 has been displaced is that the act
9 provides an entire process for the implementation of the
10 Federal statutes. It establishes Federal substantive
11 requirements that identifies the agencies to implement
12 them. It provides Federal procedural guarantees, APA-
13 like guarantees, like the requirement of substantial
14 evidence, like the requirement of a written decision, like
15 the requirement of a decision with a reasonable period of
16 time.

17 It then follows up with a mechanism, an adapted
18 mechanism for judicial review. In that sense, it is very
19 much like the statute at issue in Smith v. Robinson.

20 That elaborate process is particularly
21 significant given the pattern of the Communications Act as
22 a whole. The Communications Act repeatedly matches
23 specific regulatory requirements such as, for example, the
24 common carrier requirements in 202 and 203, with
25 corresponding mechanisms for private enforcement, such as

1 an action for suit -- I mean, an action for damages in
2 court or an enforcement action in the commission in
3 sections 206 and 207.

4 JUSTICE SCALIA: Does this action have to be
5 brought in Federal court? It says any court of competent
6 jurisdiction. Could --

7 MR. LAMKEN: Yes. The action can be brought in
8 State court and often is. There are about 50 reported
9 decisions that we have found where the suit has been
10 brought in State court. I haven't seen a particular
11 pattern between the choice, but Congress gave the option.

12 JUSTICE KENNEDY: Would a State court be free to
13 award damages or would that be preempted under the view
14 you take of the statute?

15 MR. LAMKEN: The State -- because there's an
16 express preservation of State law in this context, I think
17 that State -- States would be free to award damages under
18 their own laws. They wouldn't -- whatever relief is
19 available under the Federal statute would be available
20 under the available under the Federal statute, and State
21 courts wouldn't be free to second-guess Congress' judgment
22 as to what relief should be provided under Federal
23 statute.

24 JUSTICE KENNEDY: If the State court allowed
25 damages -- if -- if the State system allowed -- State law

1 allowed damages, would the Federal court, in an action
2 under this section, be allowed to award damages under that
3 -- under the State statute?

4 MR. LAMKEN: Your Honor, I think since the --
5 the provision, the savings clause, says that the statute
6 should not be construed to impair State law -- and there
7 are so many municipal immunity statutes and you would only
8 have one construction of the statute -- I believe that the
9 construction would be an across-the-boards construction,
10 that this act does not provide damages and you would not
11 vary from State to State.

12 JUSTICE STEVENS: What if the State law
13 authorized the recovery of attorney's fees? Would they be
14 recoverable?

15 MR. LAMKEN: Pardon?

16 JUSTICE STEVENS: What if the State law
17 authorized the recovery of attorney's fees?

18 MR. LAMKEN: Well --

19 JUSTICE STEVENS: What would you do then?

20 MR. LAMKEN: If the State law provides for
21 recovery of attorney's fees for State violations, then
22 that would control for State violations. For violations
23 of Federal law, the -- the remedies that Congress chose to
24 provide would control and the States would not be
25 permitted to second-guess the -- the remedies --

1 JUSTICE BREYER: I'm not sure why that would be
2 if you, in fact, see the statute as trying to impose an
3 APA-like structure, saying to the States, you decide the
4 substance, we'll give you minimum elements of form, which
5 helps your position. Then if the minimum elements of form
6 are not specifically stated in the statute, there's no
7 reason to interfere with the States. Let them do what
8 they want. Only those minimum elements are what you can't
9 do. That works perfectly for you.

10 MR. LAMKEN: Justice Breyer --

11 JUSTICE BREYER: It's strongly supported in the
12 history. It may lose your client the money. I don't
13 know.

14 MR. LAMKEN: Well, in fact, California provides
15 a municipal immunity for permitting decisions, and so my
16 client --

17 JUSTICE BREYER: So then you're only --

18 MR. LAMKEN: -- would be fine with your
19 position. But that is a potential inference. My -- the
20 normal view would be that where Congress provides a -- a
21 statute, one would normally presume that Congress intended
22 a particular set of remedies to accompany it. You could
23 say that the silence is meant to -- meant to reflect the
24 fact that Congress knew that these would be enforced in
25 State courts, as well as Federal, and it would allow State

1 courts --

2 JUSTICE BREYER: Congress didn't care.

3 MR. LAMKEN: -- to use whatever --

4 JUSTICE BREYER: Congress wanted to substitute a
5 Federal judgment for the judgment of the States where it
6 said so. And the reason you know that is because that is
7 what is consistent with the purpose of the act and other
8 things are either neutral or negative. Don't interfere
9 with the State unless you have to.

10 MR. LAMKEN: That is one of our principal
11 contentions, Justice Breyer, which is --

12 JUSTICE GINSBURG: And what, Mr. Lamken, would
13 be the normal procedure in the State? You make an
14 application for a permit to a zoning board. What is the
15 standard operating procedure under State law? Suppose we
16 don't have any telecommunications act in the picture.

17 MR. LAMKEN: The normal procedure is either
18 under a uniform State law or California law. If you have
19 a -- an entity which is -- excuse me. If you have either
20 a planning commission or sometimes there's another entity
21 that does the initial review and makes a determination
22 whether to grant the permit. It is then appealable either
23 to a zoning board of adjustment -- that's the -- the model
24 act -- or in California, States -- localities have the
25 option of having the appeal go to the local legislature.

1 That appeal is then reviewed -- is then determined. And
2 finally, once you've gone through that process, under
3 California law it's generally reviewable by a writ of
4 mandate, although other -- other States provide review by
5 writ of certiorari, by mandamus, or by various other
6 procedures, almost always subject to a short limitations
7 period, almost always short -- requiring finality, a final
8 decision, exhaustion through the State process.

9 JUSTICE GINSBURG: And the remedies being
10 injunctive and declaratory.

11 MR. LAMKEN: A -- a form of specific relief.
12 Generally they have the authority to effectively go in and
13 revise the decision below, but the remedies ordinarily do
14 not include monetary or compensatory relief I should say.

15 JUSTICE GINSBURG: Are you saying that it's
16 parallel to what APA review of an agency decision would
17 be?

18 MR. LAMKEN: It's very much like that. The
19 remand rule that this Court normally requires in the APA
20 context is not so strictly observed in the context of --
21 of review of -- judicial review of zoning decisions, but
22 it is very much like APA review. That is what prevails.

23 JUSTICE KENNEDY: It -- it seems to me that the
24 30-day provision is inconsistent with the award of
25 damages, but after I say that, I can't tell you why.

1 (Laughter.)

2 MR. LAMKEN: Well, actually this Court's
3 decision in Burnett v. Grattan actually tells you why, and
4 that is that 30-day provisions, which are typical for on-
5 the-record review of decisions below, are often
6 insufficient to allow somebody to develop a whole new
7 record such as their proof of damages, to make important
8 decisions if they're going to have, for example, a jury
9 trial, or to prepare for discovery. And that's why 30-
10 day provisions are not entirely uncommon in the area of
11 judicial review of agency action, but they're wholly
12 unprecedented, for the most part that I know of, in the
13 area of tort-like remedies like section 1983.

14 If I -- if there are no further questions, I
15 would like to reserve the remainder of my time for
16 rebuttal.

17 JUSTICE STEVENS: Yes, you may.

18 Mr. Feldman.

19 ORAL ARGUMENT OF JAMES A. FELDMAN

20 ON BEHALF OF THE UNITED STATES,

21 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

22 MR. FELDMAN: Justice Stevens, and may it please
23 the Court:

24 Where Congress creates a special cause of action
25 for -- for a violation of a Federal law that necessarily

1 carries with it its own features and incidents, Congress'
2 decisions about the appropriate mechanisms for dealing
3 with that violation of Federal law should not be
4 frustrated or overridden by allowing a 1983 action in
5 addition.

6 In this case, section 332(c)(7)(B)(v), which
7 creates a cause of action for violation of the specific
8 standards in (i) through (iv) is an independent,
9 standalone cause of action. If 1983 didn't exist,
10 332(c)(7)(B)(v) would, undoubtedly, still provide
11 plaintiffs with a mechanism to get into court and attain
12 redress for the legal wrongs that they claim.

13 Where Congress has taken that step and has
14 thought about what the appropriate remedy should be for a
15 violation of a particular Federal statute and has created
16 a judicial remedy, then it would only frustrate --

17 JUSTICE O'CONNOR: But it -- the statute,
18 though, is silent on the question of damages or attorney's
19 fees, isn't it?

20 MR. FELDMAN: It is. It doesn't say anything
21 expressly about either of those things, but I think it has
22 long been --

23 JUSTICE O'CONNOR: Can we infer all appropriate
24 relief? Do we?

25 MR. FELDMAN: As a matter of damages, I think

1 all appropriate relief would be the standard. But as a
2 matter of attorney's fees, I think is a good example of
3 why there shouldn't be a 1983 action here because the law
4 is 100 percent clear, from this Court's decision in
5 Alyeska and other cases, that where Congress hasn't
6 provided for fee-shifting, there simply is no fee-shifting
7 authorized. That's what they intended.

8 JUSTICE SCALIA: Attorney's fees are never
9 appropriate, in other words.

10 MR. FELDMAN: Are never appropriate unless
11 Congress specifically provides for them.

12 JUSTICE STEVENS: But it has provided for them
13 for a 1983 action, and if it's a 1983 action, it takes
14 care of it.

15 MR. FELDMAN: That's right.

16 JUSTICE STEVENS: And this is kind of circular.

17 MR. FELDMAN: I don't think it's circular
18 because I think when Congress created the specific cause
19 of action here in (B) (v), it didn't provide for attorney's
20 fees and therefore intended that attorney's fees not be
21 provided. If respondent's view in this case were
22 accepted, the -- the presumption would be exactly flipped,
23 and Congress would have had --

24 JUSTICE GINSBURG: Mr. Feldman --

25 JUSTICE KENNEDY: Suppose Congress said

1 specifically 1983 applies. That's all it says. Would
2 that carry with it attorney's fees in your view?

3 MR. FELDMAN: Yes, I -- yes, I think it -- I
4 think it would.

5 The question here, though, is where Congress has
6 thought about what kind of remedy it wants for violation
7 of a Federal statute and created a judicial cause of
8 action for every wrong that's -- that -- that can exist
9 under that statute, then the incidents and features of
10 that cause of action should govern, not the incidents and
11 features of 1983 which almost inevitably and in this case
12 are different. And attorney's fees is just the best
13 example of that.

14 If -- under respondent's view -- when Congress
15 was fashioning this statute, it certainly was aware of
16 this Court's decisions that have repeatedly said that
17 attorney's fees are not available unless they're expressly
18 provided for. And indeed, elsewhere in the Communications
19 Act --

20 JUSTICE KENNEDY: Well, I take -- you -- you
21 take the position that 1983 doesn't apply at all. It's
22 not just attorney's fees. It's damages.

23 MR. FELDMAN: That's right. But it's just an
24 illustration. There's other differences between the
25 provision here and 1983, but I think the basic point is

1 that where Congress has given thought to the remedy for a
2 particular violation -- type of violation of Federal law
3 and has provided for a judicial cause of action, with
4 whatever features and incidents it -- it wants, 1983
5 shouldn't be allowed in. It should be assumed that
6 Congress didn't want to have its decisions frustrated by
7 also allowing a 1983 action.

8 JUSTICE SCALIA: What about damages?

9 JUSTICE O'CONNOR: Do you -- do you think that
10 any other provisions of the Communications Act are
11 enforceable under 1983? I mean, we're talking about 332,
12 but it's a big, complicated act. Are any of the other
13 provisions enforceable?

14 MR. FELDMAN: I think -- I think the same rule
15 would apply to any of the provisions where Congress has
16 specifically provided for a cause of action for the same
17 reason, otherwise Congress when -- here, for example, just
18 to return to attorney's fees for a second. When Congress
19 was framing this legislation, they knew that they weren't
20 giving attorney's fees and this 332(c)(7)(B)(v) would be
21 construed not to give attorney's fees, but not --

22 JUSTICE SCALIA: Well, this is really a more
23 general proposition you're urging upon us then, that
24 whenever Congress creates a cause of action that is --
25 what -- in any respect more limited than section 1983, the

1 background action of section 1983 is not available.

2 MR. FELDMAN: That -- I -- I think that's
3 correct.

4 JUSTICE BREYER: No. How could that be?
5 Wouldn't it depend on whether -- when you look at the
6 particular statute, the particular set of remedies that
7 Congress has included in that statute could be absolutely
8 independent of 1983 or dependent upon 1983 or leaning in
9 favor or leaning against. It would depend on the
10 particular statute. Why in general?

11 MR. FELDMAN: I think in -- I think the rule
12 would be in general because, first of all, it's not just
13 remedies. There's other incidents of a cause of action
14 such as statute of limitations, the provision here for
15 expedition, and other things. And really when Congress
16 has given thought to what remedy it wants for a violation
17 here of (i) through (iv), for a violation elsewhere in the
18 Communications Act of other Federal standards, it
19 shouldn't be assumed that they all -- that -- to allow a
20 1983 action would just frustrate Congress' intent in
21 fashioning that particular remedy.

22 JUSTICE GINSBURG: Then how would you ever have
23 a statute that -- 1983 provides for relief when there's a
24 violation of Federal law, statutory or constitutional.
25 One of the briefs in this very case says that your broad

1 reading means that you were doing away with statute as a
2 basis for 1983.

3 MR. FELDMAN: I -- I think that that's
4 completely wrong. When Congress has created -- has
5 recognized a right, as this Court has found is essential
6 for a 1983 action, and it hasn't done anything about
7 providing a remedy for that right, hasn't created a cause
8 of action in court in particular, then that's the function
9 of 1983, is to serve -- it provides a cause of action for
10 people who suffer a violation of that wrong, a statutory
11 violation.

12 But where Congress has given thought to what
13 kind of a relief it wanted and it said we want a cause of
14 action with these such-and-such incidents, no attorney's
15 fees, 30-day statute of limitations, expedition, whatever
16 the other ones are here, then it would just frustrate
17 Congress' intent to say, oh, and also you get a 1983
18 action to undo all of the things that Congress provided
19 for.

20 JUSTICE SCALIA: Well, there -- there are two
21 situations. I mean, one can supplement without
22 frustrating. I mean, you -- you could say that in, you
23 know -- in some respects the 1983 will contradict the
24 action that was provided, but one can conceive of a
25 provided action that -- that grants relief which 1983

1 would not grant.

2 MR. FELDMAN: That's right. And -- and I --
3 whatever -- I guess the general point would be whatever
4 remedial decisions Congress made, those should be
5 respected, but I would add in this case it's not just --
6 it's a question of attorney's fees, which they would have
7 had to -- Congress would have had to do something very
8 unusual here, which is particularly put in this statute no
9 -- there shall be no fee-shifting because otherwise you
10 can always go to 1983 and get it. In fact, even if they
11 had done that in 332(c)(7)(B)(v), respondents would still
12 argue, well, we still have our 1983 action.

13 JUSTICE SCALIA: What -- what about damages? Do
14 -- do you take any position on whether the Communications
15 Act provision enables damages to be collected?

16 MR. FELDMAN: We don't have a position on
17 whether it does. I think there's arguments both ways. I
18 would point out --

19 JUSTICE SCALIA: You think it's unnecessary to
20 decide this case.

21 MR. FELDMAN: I think it is unnecessary, and in
22 fact, I think it shows a problem with -- a reason why our
23 view, which is if Congress creates a cause of action, that
24 should be respected -- why that should be respected.

25 Under other views, you have to look at the 1983

1 action and figure out all of its incidents. You have to
2 look at the 332 action and figure out all of its incidents
3 in the abstract as here, not where -- in connection with a
4 particular claim for damages, and then see whether they're
5 consistent with each other.

6 I think the much better rule would be to say
7 where Congress has created a specific cause of action,
8 that's what it wanted, and whatever you get under that,
9 you get. Whatever you don't get under that, you don't
10 get. But 1983 shouldn't be used to -- to frustrate
11 Congress' intent and give you things that that cause of
12 action wouldn't to give you a longer statute of
13 limitations, which would be, I think, the case here, to
14 give you -- eliminate the provision for mandatory
15 expedition, to have any differences in damages.

16 Another way to put it would be under the Court's
17 decision in Franklin, this statute gives you any
18 appropriate relief. All that 1983 could do here -- it
19 maybe gives you the same thing in which, as far as that
20 goes, it doesn't matter. But all it could do otherwise
21 would be give you inappropriate relief, i.e., relief that
22 Congress didn't want.

23 And instead of construing the two statutes in
24 that way, they should be construed harmoniously and in
25 accord with this Court's decisions which have set forth

1 the line of cases where you have a right to get into court
2 in Wilder -- I'm sorry -- in -- in Sea Clammers and Smith
3 against Robinson and said there we want to take Congress'
4 remedy, however simple or complex it is. It gives you a
5 complete right to get into court and gives you whatever it
6 gives you. And that should govern.

7 And then the other line of cases, which is
8 Wilder where -- and -- where it says -- and the Wright
9 against Roanoke where Congress didn't give you a right to
10 get to court -- get into court. In those cases, that's
11 the function of 1983.

12 The same thing would be true in -- in a number
13 of other this Court's cases that have recognized you have
14 a 1983 action when Congress gave you a right and didn't
15 think at all about the remedy because that's the function
16 that 1983 was supposed to serve.

17 If there's no further questions.

18 JUSTICE STEVENS: Thank you, Mr. Feldman.

19 Mr. Waxman.

20 ORAL ARGUMENT OF SETH P. WAXMAN

21 ON BEHALF OF THE RESPONDENT

22 MR. WAXMAN: Mr. Justice Stevens, and may it
23 please the Court:

24 In -- by its clear text, section 1983 promises
25 redress for the deprivation of any Federal right in any,

1 quote, proper proceeding. And that expansive language,
2 this Court has recognized, dictates a heavy presumption
3 that its remedies apply to all violations of Federal
4 rights, a presumption which this Court has said is
5 rebutted only in the, quote, exceptional case in which the
6 statute that creates the right is accompanied by an
7 enforcement scheme that is, quote, incompatible with or
8 inconsistent with 1983's remedies. That's --

9 JUSTICE SOUTER: Mr. Waxman.

10 MR. WAXMAN: -- the background principle.

11 JUSTICE SOUTER: Mr. Waxman, it seems to me that
12 the -- the best argument we've heard about incompatibility
13 is the one -- or at least I think the best -- is the one
14 that Mr. Lamken touched on at the tail end of his
15 argument, and that is, he said there's -- there's a 30-
16 day provision in there, which in effect says Congress
17 wants this litigation conducted fast and over with fast.
18 And that is incompatible with a damage action because if
19 you get into a damage action, you are going to get into
20 the panoply of -- of damages litigation, including
21 depositions, and -- and the one thing you can guarantee is
22 that it is not going to be over expeditiously.

23 What is your argument? What is your response to
24 that incompatibility argument?

25 MR. WAXMAN: Well, I think that the way this

1 Court has interpreted incompatibility before -- in the two
2 instances in 25 years since Maine v. Thiboutot was
3 decided, the only instances in which this Court has found
4 incompatibility has been where use of 1983 would create an
5 end run around limitations in the statute. That is, in
6 the -- in Sea Clammers and in Smith v. Robinson, you had
7 statutes that forestalled an individual's access to court
8 via an administrative regime and then expressly limited
9 the judicial remedies that would be available once they
10 got there by requiring, for example, only injunctive
11 relief.

12 JUSTICE BREYER: Well, the other word is
13 inconsistent, and is it -- sorry. Were you -- is it
14 inconsistent if Congress didn't want it? And if that's
15 insufficient to be inconsistent, then here, as I look at
16 the statute, to get out my thinking, I think that it
17 sounds like an administrative law statute. If I saw the
18 maintenance and cure words, I'd think it was an admiralty
19 statute.

20 MR. WAXMAN: Okay. I --

21 JUSTICE BREYER: I see an administrative law
22 statute. It sounds like that's the system they're
23 imposing and therefore a system that is not consistent
24 with the administrative law system fails and 1983 seems to
25 fail.

1 MR. WAXMAN: Okay. Now I have two points. I --
2 I don't want to forget these. I have to deal with the --
3 the question of whether a 30-day requirement is
4 inconsistent and whether damages would be inconsistent
5 with what -- with what my colleagues posit as an APA-like
6 administrative review model.

7 A 30-day requirement is simply a reflection of
8 Congress' -- Congress confirming expressly that somebody
9 who -- who is aggrieved under the rights provided to him
10 under 332(c)(7) and wants any judicial remedy, whether
11 it's from 1983 or otherwise, has to go to court promptly.
12 It's precisely what 1983, this Court said in Patsy and
13 Felder, guarantees and requires. It does not require --

14 JUSTICE SOUTER: But it also requires
15 expeditiousness on the part of the court.

16 MR. WAXMAN: It requires that the court proceed
17 expeditiously and courts can proceed expeditiously where
18 damages are sought or are not sought.

19 One of the interesting things about damages --

20 JUSTICE SOUTER: But do you -- do you agree with
21 this much, that if -- if damages, in fact, are going to be
22 allowed, what is going to count as expeditious is going to
23 be a lot slower than what is going to count as expeditious
24 if damages are not allowed.

25 MR. WAXMAN: I don't think that's true. In

1 fact, I think this case is a pretty good example. The
2 court separated it -- I mean, acting under a requirement
3 of expedition at the request of the city. This -- the
4 court didn't even begin to address this case until 18
5 months after it had been filed. But what it said was --

6 JUSTICE SOUTER: Okay. And -- and that --

7 MR. WAXMAN: -- the first issue --

8 JUSTICE SOUTER: -- that was a violation of the
9 statute, wasn't it?

10 MR. WAXMAN: Well, it first issued an order
11 saying, okay, I've construed the statute and I've
12 determined that the statute is violated. Now we will have
13 a separate proceeding. Then the city will conduct itself
14 accordingly. Now we'll have a separate proceeding in
15 order to determine whether damages or attorney's fees are
16 available. And that is available in any of these cases.
17 What --

18 JUSTICE SOUTER: So they turned the damage issue
19 basically just into a separate remedial hearing at the end
20 of the case.

21 MR. WAXMAN: It could or could not be, and there
22 may -- may be many cases when damages aren't appropriate
23 but --

24 JUSTICE GINSBURG: I thought that was just to
25 decide in -- in the -- in the court of first instance --

1 that tail end was not to decide whether in this specific
2 case damages or attorney's fees were due. But the
3 district court was deciding a question of law, that is,
4 whether in this kind of review proceeding anyone could
5 have damages, anyone could have attorney's fees.

6 MR. WAXMAN: What he said, Justice Ginsburg, was
7 we'll deal with what other remedies, if any, are available
8 and to what extent in a separate proceeding. As it turns
9 out, he concluded in an --

10 JUSTICE GINSBURG: But was not making a rule for
11 this case only. He was making a ruling of law.

12 MR. WAXMAN: For sure. He said that I don't
13 think you're entitled to this because I think that the
14 statute doesn't allow it. And therefore, he didn't get to
15 this question.

16 But the point about damages -- I think there are
17 two points that are very important that not be obscured.

18 First of all, the Government -- the fact that
19 the Government and the petitioner can't agree on whether
20 the statute itself provides damages relief under the
21 principle of Bell v. Hood and Franklin v. Gwinnett County
22 certainly shows that Congress did not speak expressly on
23 this subject.

24 JUSTICE SCALIA: They -- they don't necessarily
25 disagree. The Government just says the -- the issue

1 doesn't have to be reached in this case.

2 MR. WAXMAN: Well, I think -- I think that --
3 what the Government says in its papers is they may well be
4 available and what Mr. Feldman -- I don't want to misquote
5 him, but he said that under Franklin -- he agreed, I
6 think, with what Judge Posner wrote for the Seventh
7 Circuit, which is where no remedies -- where no specific
8 remedies are specified -- and that's the case here -- you
9 apply a rule of judicial implication, announced in Bell v.
10 Hood and applied to an implied right of action in
11 Franklin, to apply that all appropriate relief is
12 available. And damages are the paradigm.

13 JUSTICE SCALIA: Mr. Waxman.

14 MR. WAXMAN: And the irony here --

15 JUSTICE SCALIA: Mr. Waxman, how do you -- how
16 do you get a reading of the 30-day limitation, which is
17 applicable to the cause of action under the Communications
18 Act, sucked into the cause of action under section 1983?
19 I mean, if the suit is under 1983, it's under 1983.
20 There's no 30-day limit there.

21 MR. WAXMAN: I have -- I have two different ways
22 to get to that.

23 First of all, section 1983, by its terms,
24 provides redress in any appropriate cause of action. It
25 also supplies a cause of action where no other cause of

1 action is available, but by its express terms, it doesn't
2 exclusively limit its remedies to causes of action that
3 are brought under 1983.

4 JUSTICE SCALIA: No, it doesn't.

5 MR. WAXMAN: But more broadly --

6 JUSTICE SCALIA: It doesn't require you to --
7 to establish a cause of action under some other statute
8 either.

9 MR. WAXMAN: That's right. It provides a --

10 JUSTICE SCALIA: It does not at all. It's --
11 it's self-contained. And do you know any case where we
12 have read into, or indeed, it's even been urged upon us to
13 read into, section 1983 limitations that somehow come from
14 the statute that was violated and which forms the basis
15 for the 1983 action?

16 MR. WAXMAN: Well, I don't, but I do know that
17 this Court -- first of all, Congress has now enacted
18 section 1658 which provides a -- a 4-year Federal default
19 statute of limitations, where -- where a statute like 1983
20 doesn't provide it, but includes an -- an introduction
21 that says, except where otherwise provided by Federal law.
22 And there's certainly nothing in that language that says
23 when you're looking at whether a statute of limitations is
24 otherwise provided by Federal law, you look to the very
25 statute that creates the substantive right that 1983 is

1 enforcing.

2 And even before that, when your -- your decision
3 in Wilson v. Garcia made the point that when you try to
4 figure out what statute of limitations applies to a
5 freestanding 1983 action, there are -- there is a
6 tripartite rule of construction that section 1988 requires
7 you to engage in. And the first part is to see whether
8 there is any, quote, suitable Federal statute of
9 limitations.

10 Now, in constitutional cases, like the one that
11 was at issue in Wilson v. Garcia or under the Social
12 Security Act, which is what was addressed in Maine v.
13 Thiboutot, there were no express causes of action, much
14 less any express statute of limitations. And so this
15 Court said you then go to the second rule, which is what's
16 the most appropriate State limitations, as 1988 requires.

17 But the anomaly of the argument here is we have
18 a background principle that 1983 is available and there is
19 a heavy presumption that it will be available unless it is
20 explicitly incompatible or inconsistent with --

21 JUSTICE BREYER: Well, that's --

22 MR. WAXMAN: -- and --

23 JUSTICE BREYER: -- that's why I'm approaching
24 it differently, and I -- I want to get your view on it.
25 I'm taking the word inconsistent and I'm using that as a

1 guide back into the purpose of the statute. And once I do
2 that, I find Congress here anxious, I think, to engage in
3 what I'd call cooperative federalism. They could have run
4 the whole show, but they said we don't want the FCC. We
5 want each city and town to do what they want, subject to a
6 few minimal procedural requirements.

7 If that's right, that means all these damages
8 questions are open. All kinds of things are open, but --
9 and we'll decide them in a variety of ways, maybe
10 deferring to the State, but one thing is true: 1983
11 doesn't apply because that is a different set of remedies.

12 MR. WAXMAN: Justice Breyer, this is not the APA
13 model. This is not a model of administrative review for a
14 number of reasons.

15 Number one, it is a background -- there -- there
16 -- it is established, for purposes of this case, that this
17 statute creates individual Federal rights and those rights
18 were violated. And the background rule is uniformly --
19 and this Court has -- has -- in *Owens v. City of*
20 *Indianapolis* and many other cases has reinforced the
21 principle that damages are available and 1983 is available
22 where Federal rights are violated by municipalities,
23 whether it's under the Takings Clause or the Due Process
24 Clause or the Equal Protection Clause or in statutory
25 cases. What is more --

1 JUSTICE GINSBURG: Mr. Waxman -- Mr. Waxman, one
2 of these provisions gives you an option to go to the FCC,
3 the one having to do with emissions. Now, if you sought
4 review from the local decision to the FCC, you petition
5 for FCC relief, would the FCC have authority to give you
6 attorney's fees?

7 MR. WAXMAN: The FCC has said that it does not
8 if you do that. In -- in 2000, when the FCC last
9 reported, one person had chosen to go that route rather
10 than go to Federal court. It --

11 JUSTICE GINSBURG: Well, isn't that an
12 incongruity that Congress would say you have your choice?
13 Complainant, you can go to the Federal agency, the FCC, or
14 you can go to court.

15 MR. WAXMAN: You can't go to the -- excuse me.
16 I didn't --

17 JUSTICE GINSBURG: So if -- if you have that
18 choice, when you're dealing with the radio emissions, to
19 go the -- why would any litigant ever do that? Why would
20 any attorney ever do that if you don't get fees at the FCC
21 and you do get fees in court? Wouldn't the presumption be
22 that it would work the same way whether you go to the
23 agency, Federal agency, or Federal or State court, that
24 you're in the same situation as respect to fees?

25 MR. WAXMAN: The -- the FCC alternative for a

1 declaration by the FCC applies to only one of the five
2 rights that are provided here, and even if it applied to
3 all of them, I don't think you could possibly infer
4 that --

5 JUSTICE GINSBURG: Well, let's take the one,
6 that -- that one. Are you saying no attorney's fees there
7 because you couldn't get them at the FCC, therefore you
8 shouldn't get them in court?

9 MR. WAXMAN: Absolutely not. If -- if there
10 were an instance in which a local zoning official said,
11 you know, I know I'm not supposed to take radio
12 frequencies emissions into account, but I'm going to, it's
13 denied, I would have the right either to go to the FCC and
14 say, tell them no, or to file an action under 332 and/or
15 1983 and say that violates my rights. And actually your
16 example --

17 JUSTICE SOUTER: But isn't --

18 MR. WAXMAN: If I just may finish.

19 Your example, I think -- the example of this
20 particular provision points out that what -- the balance
21 of what I was going to explain to Justice Breyer, which is
22 that another reason why this isn't the APA model is that
23 this statute includes in little (i) and little (ii)
24 substantive provisions, not just procedural provisions.
25 You can't discriminate, to give Justice O'Connor's first

1 example, among providers. The -- that was a complaint in
2 this case. There is de novo review, it is clear, on those
3 claims. It's not administrative APA review in any
4 respect. And in fact, the district judge in this very
5 case, Judge Wilson, says it looks like, in fact, you were
6 discriminated against, but I don't need to reach that
7 because it's clear that there was no substantial evidence.

8 JUSTICE SCALIA: They -- they didn't provide for
9 the normal administrative review because they were quite
10 aware that under the State zoning systems, there would
11 always be State administrative review before the issue
12 even comes up.

13 MR. WAXMAN: And this --

14 JUSTICE SCALIA: And so what this provides is
15 what kind of judicial review there will be after the
16 anticipated administrative review before the zoning board
17 and whatever appeal from the zoning board exists.

18 MR. WAXMAN: I -- I have to respectfully
19 disagree. This Court, in -- in Williamson County and
20 Darby and many other cases, has distinguished carefully
21 between final -- final action and exhaustion of
22 administrative review or judicial review. And all this
23 statute requires is that if you are aggrieved by an action
24 or inaction of a State or local government or an
25 instrumentality thereof --

1 JUSTICE SCALIA: Final. Final action or failure
2 to act is what --

3 MR. WAXMAN: That's correct.

4 JUSTICE SCALIA: Final action or failure to.

5 MR. WAXMAN: And final action, this Court has
6 explained, does not import into it exhaustion of either a
7 State administrative or judicial remedies. What it means
8 is that once you have been injured, it's a -- it's a
9 ripeness requirement that's familiar under --

10 JUSTICE SCALIA: You haven't been injured until
11 you've exhausted your --

12 MR. WAXMAN: That is --

13 JUSTICE SCALIA: You -- you really think that
14 when there is a State provision available for review of
15 the zoning board, you can commence an action under 1983
16 without even going through the administrative appeals?

17 MR. WAXMAN: I am entirely certain of that, and
18 in fact, the -- the local ordinance -- I mean, the
19 question of what is final agency action is surely a
20 Federal question, but --

21 JUSTICE SCALIA: This is really respecting the
22 States, which is what the -- the purpose of this -- of
23 this whole provision was.

24 MR. WAXMAN: Justice Scalia, when Congress
25 addressed this problem in 1996, as the Government points

1 out in the very first page of its brief and as the
2 legislative history reflects, it was confronting a
3 situation in which intransigent, entrenched zoning
4 authorities were acting arbitrarily to frustrate the
5 creation of a national wireless network. And it was so
6 concerned about this that the House actually passed a
7 provision that removed this paradigmatic local authority
8 to the FCC. The FCC was --

9 JUSTICE KENNEDY: Which would be more
10 burdensome? That enactment or subjecting municipalities
11 nationwide to damages? Which would be more intrusive and
12 burdensome on federalism --

13 MR. WAXMAN: I think --

14 JUSTICE KENNEDY: -- and the abilities of local
15 governments to function?

16 MR. WAXMAN: Oh, I think the former, for sure.
17 I mean, the notion that zoning decisions, siting decisions
18 would be removed entirely from localities is unbelievably
19 intrusive.

20 And what happened in the conference committee
21 was a compromise was reached whereby Congress' objective
22 was going to be achieved by creating -- by leaving it, in
23 the first instance, Justice Kennedy, to local --

24 JUSTICE KENNEDY: Well, I'm -- I'm not so sure
25 because you're arguing that even the smallest municipality

1 can be liable for hundreds of thousands of dollars of
2 attorney's fees.

3 MR. WAXMAN: Well --

4 JUSTICE KENNEDY: And I --

5 MR. WAXMAN: -- let me just say this, with
6 respect to the --

7 JUSTICE KENNEDY: Plus other -- plus other
8 damages.

9 MR. WAXMAN: I think this case, Justice Kennedy
10 -- I have three things to say about this.

11 Just this case is every bit as -- as paradigmatic
12 as the parade of horrors that they suggest. And here's
13 my proof. It has been since 1997 that courts have been
14 ruling that 1983 and damages are available under this
15 statute. There is no evidence in any of the briefs on the
16 other side or any of their amici that there has either
17 been a flood of litigation or inappropriately large
18 awards.

19 And if that happened, Congress would do -- would
20 be attentive to it in the way that Justice Ginsburg
21 pointed out when the local cable authorities came to --
22 came to the very same committees 4 years before and said,
23 we're being hit -- there's an express right of action in
24 555 of the -- the Communications Act. We're being hit
25 with very large 1983 awards. Please do something about

1 it. And the very same committees 4 years before enacted a
2 provision that said you may get only injunctive and
3 declaratory relief, thereby creating an incompatibility
4 with 1983, as the legislative history expressly provides.

5 JUSTICE SCALIA: Well, cable -- cable media
6 companies may -- may have Congress' ear more readily than
7 -- than -- you know, than the municipality of whatever
8 this is or any --

9 MR. WAXMAN: State and -- than State and local
10 governments? I hope not. But here's -- here's the
11 additional --

12 JUSTICE SCALIA: But I -- I wouldn't put a lot
13 of money on it.

14 (Laughter.)

15 MR. WAXMAN: The point is that Congress --
16 Justice Kennedy, the point is not that Congress was being
17 inattentive to State and local budgets. What it wanted to
18 do what was this -- the point this Court the addressed in
19 -- in Stakura and -- and Owens v. City of Indianapolis,
20 which is to enforce a Federal statute through privately
21 enforceable Federal rights, which would include a damages
22 remedy that both provides a deterrent against conduct that
23 had provided entrenched resistance to a Federal program
24 and provide compensation where reasonable and appropriate.

25 Now, this Court has made clear, with respect to

1 damages, in -- in Carey v. Piphus and other cases, that
2 there may be very many cases in which there's a violation
3 of a procedural right but only nominal damages are
4 available. And in Buckhannon --

5 JUSTICE GINSBURG: But with respect to --

6 MR. WAXMAN: If I may just finish this sentence.
7 And in Buckhannon and Farrar v. Hobby, this Court has --
8 has recognized that in order to get attorney's fees, you
9 have to have substantially prevailed and a court, under
10 1988(b), may award attorney's fees in its -- may award --
11 in its discretion insofar as they are reasonable. And --

12 JUSTICE GINSBURG: Mr. -- Mr. Waxman.

13 MR. WAXMAN: Yes, Justice Ginsburg.

14 JUSTICE GINSBURG: There is in this legislative
15 record a concern expressed by a Senator from California
16 when there was a proposal on the table to make the FCC the
17 Federal review forum. And that was rejected, if I
18 understand correctly, because there was a concern that
19 municipalities would have to travel all the way to
20 Washington, D.C. to defend in the FCC's forum. And
21 Congress did not want to saddle municipalities with the
22 cost of transporting their representative to D.C. Well,
23 that cost would pale compared to attorney's fees that
24 would be awarded.

25 MR. WAXMAN: First of all, Justice Ginsburg, I

1 -- the reference to those two Senators -- what those two
2 Senators were talking about is not, as my colleague's
3 brief suggests, this provision. They were talking about
4 another provision of the Telecom Act. I think it was
5 section 253, but I may be wrong.

6 But even if that's the case, the fact of the
7 matter is that whether it was going to cost them -- I
8 agree. It would cost -- look, a regime in -- which left
9 all of these siting decisions to the FCC is breathtaking,
10 and it certainly would impose lots of costs not only on
11 local municipalities to have to come to Washington to
12 justify these decisions, but certainly on the FCC, which
13 would have to send an army out to example -- I mean, it
14 would sort of like be the -- the television commercial,
15 you know, where the guy is walking around saying, you
16 know, can you hear me now, can you hear me now? The fact
17 is it made great sense to continue to leave the initial
18 decisions with local authorities.

19 But Congress had -- was frustrated, expressly
20 frustrated with the fact that the prior regime, in which
21 they had let local authorities do it under their normal
22 routines and applying the normal remedies, was not getting
23 the job done. That was the imperative of this statute.
24 And in the -- in the absence of any evidence, even now 11
25 years later -- or I guess it's 10 years -- 9 years later.

1 In the absence of any evidence of a flood of litigation or
2 inappropriate awards, I think given the very heavy
3 presumption that this Court has recognized over and over
4 and over again, that 1983 is there.

5 JUSTICE BREYER: That isn't the only --

6 MR. WAXMAN: 1983 is the background principle
7 against which Congress legislates. And this statute
8 either -- neither provides nor excludes any remedies, and
9 all it does is confirm that when you go -- when you are
10 injured, you can go to court. And --

11 JUSTICE BREYER: The other -- the other harm is
12 there any evidence of because it's -- it would also be
13 harmful if local zoning boards, when faced with quite
14 difficult decisions, because the -- the antenna -- they
15 bristle up and you put them in the wrong place. They're
16 environmentally harmful. They -- there are a lot of bad
17 things, as well as good things about them. And of course,
18 it would be a bad impact if we discovered that the zoning
19 boards were erring too much on the side of granting
20 everybody's application, as well as too much on the side
21 of not granting them.

22 MR. WAXMAN: To be sure.

23 JUSTICE BREYER: And so I -- I don't know how --
24 what the -- there won't be evidence. How can we get
25 evidence on such a thing?

1 MR. WAXMAN: The -- the -- you -- the evidence
2 will be either in the decided cases or by local municipal
3 governments coming to Congress and saying, this is too
4 heavy a thumb on the scale. But what we know is that if
5 you afford only prospective relief, which is the -- the
6 ancien regime that Congress was -- that Congress felt
7 wasn't doing the job, it provides no deterrent, no
8 incentive to accomplish what Congress said was --

9 JUSTICE KENNEDY: But I -- I don't think we --

10 MR. WAXMAN: -- a compelling national objective.

11 JUSTICE KENNEDY: I don't think we usually think
12 of -- of judicial review of agency decisions in the
13 ordinary course as being a deterrent.

14 MR. WAXMAN: We --

15 JUSTICE KENNEDY: It's an opportunity to
16 elaborate reasons. It's a safeguard. It's not a
17 deterrent. And you're saying it has to be a deterrent.
18 And as Justice Breyer indicates, it -- it means that
19 there's -- there's another voice in that -- in that
20 administrative hearing room. They're terrified of
21 damages.

22 MR. WAXMAN: Justice Kennedy --

23 JUSTICE KENNEDY: And it's going to skew the
24 decisions.

25 MR. WAXMAN: Justice Kennedy, it -- under their

1 -- under the regulations of this municipality, which is --
2 is perfectly representative, it is final agency action
3 when the city planning commissioner says no, unless you
4 choose to appeal it to the city council.

5 And there is -- not only is there nothing
6 peculiar about applying 1983 damages awards to the
7 violation by a State and local government of an express
8 Federal right, assuming you can prove not only that the
9 right was violated but also that you were really damaged.
10 It's -- I'm not suggesting that -- that Congress had
11 damages in mind specifically and only to deter conduct.
12 You have said in a variety of instances -- I mentioned
13 Stacura in particular -- that 1983 damages do serve as a
14 deterrent to violation of Federal rights by municipal
15 local officials.

16 But what Congress had -- Congress had to come up
17 with some way to confront this problem in which there were
18 sort of local parochial --

19 JUSTICE STEVENS: May I ask this question, Mr.
20 Waxman? I don't know if it's really a legal question
21 exactly, but I have the impression that most of the
22 plaintiffs in this type of litigation are well-financed,
23 large companies rather than the typical 1983 plaintiff.
24 And therefore, you don't need the attorney's fee incentive
25 to be sure these rights are protected. Is that a correct

1 impression or is it incorrect?

2 MR. WAXMAN: I -- I don't know whether it's a
3 correct impression or not. Our brief points the Court to
4 an authority that at least 9,500 of the entities that have
5 -- have created antennas or tower facilities have 10 or
6 fewer facilities.

7 And one thing we know for sure is that when
8 Congress enacted the Telecom Act of 1996, it specifically
9 wanted to encourage small operations, start-up companies.
10 It had specific provisions in the law to give special
11 treatment to small entrepreneurs in order to foster
12 diversity and competition. But in the event that you --

13 JUSTICE SCALIA: I can't imagine -- I can't
14 imagine, Mr. Waxman, that Congress wanted to impose
15 damages plus attorney's fees upon municipalities without
16 even giving the municipalities the chance to correct their
17 mistakes, which is what you're saying.

18 MR. WAXMAN: Well --

19 JUSTICE SCALIA: You're saying the
20 municipalities' appeal system, which is there for people
21 to take advantage of, is just washed out. One mistake at
22 the lowest level and you get damages and you get
23 attorney's fees. That -- that is extraordinary.

24 MR. WAXMAN: Justice Scalia, the -- the -- 1983
25 -- and your jurisprudence shouts this as clearly as it

1 does any other principle -- stands for the proposition
2 that it's there unless, in the explicit language of the
3 statute that creates the right, there is a demonstrated
4 incompatibility. And that's the background rule.

5 There are many instances in the Telecom Act and
6 elsewhere in which Congress has said you can only get
7 injunctive relief. You may not get 1983 damages. I mean,
8 go back to *Adickes v. Kress* where this Court said in title
9 II of the Public Accommodations Act, Congress expressly --
10 expressly precluded damages in order to avoid invocation
11 of 1983.

12 And I'm not saying that Congress had in mind my
13 client, who is an individual, a sole entrepreneur, who was
14 subject to, I think what the record shows is, prolonged
15 and entrenched intransigence by this particular
16 municipality, any more than it had Judge Posner's example
17 in the Seventh Circuit where it was, you know, *Verizon v.*
18 *the Village of Mequon*.

19 But this Court has recognized, as have the lower
20 courts, that you only get damages if you prove that you
21 really have been damaged. And in an instance where
22 there's some procedural violation and a remand to correct
23 it, this may very well be the instance of *Carey v. Piphus*,
24 where the damages are purely nominal. The agency is given
25 the opportunity.

1 In this case, the city never said, give us the
2 opportunity to go back and correct it. And Judge Wilson,
3 a very level-headed district judge, said there's nothing
4 to go back and correct because the only thing -- the only
5 reason that the city gave was it didn't like this antenna
6 and tower in the first place. It -- we concede that it
7 makes no difference to anybody which frequencies are being
8 broadcast from this tower that we approved 10 years ago
9 and have no right to modify. And therefore, there was a
10 substantive violation, not just, you know, you -- you may
11 have had substantial evidence but you didn't lay it all
12 out or you gave your reasons at length and orally but not
13 in writing, I'll give you the opportunity to go back.

14 There's a line of cases this Court has decided
15 under the Social Security Act where there have been
16 remands to correct procedural errors or small errors, and
17 in those instances, *Carey v. Piphus* says you don't get
18 damages. And under *Buckhannon* and *Farrar v. Hobby*, you
19 probably don't get attorney's fees either.

20 If there ever is the sort of parade of horrors
21 that they protest about, even a small parade of horrors,
22 Congress will be as attentive as it was in 1992 when the
23 cable --

24 JUSTICE STEVENS: Thank you, Mr. Waxman.

25 MR. WAXMAN: Thank you.

1 JUSTICE STEVENS: Mr. Lamken, you have about 4
2 minutes left.

3 REBUTTAL ARGUMENT OF JEFFREY A. LAMKEN

4 ON BEHALF OF THE PETITIONERS

5 MR. LAMKEN: I'd like to make only two brief
6 points.

7 First, that the imposition of the -- of damages
8 and fees under section 1983 from a decision in this Court
9 for even good faith mistakes in the implementation of the
10 antenna siting rules, which are often complex and
11 uncertain, would be a welcome mat for extensive and
12 aggressive litigation and the imposition of extensive fees
13 on municipalities which simply cannot afford to enforce
14 their zoning rules, the rules that Congress expressly
15 attempted to preserve in the statute itself.

16 It is -- in this case alone, for example,
17 respondent's most recent estimate of his damages and fees
18 -- and this was before he retained Mr. Waxman, I might add
19 -- is -- is \$15 million, essentially the city's entire
20 budget for a year. And respondent claims to be a
21 relatively small operator. That sort of -- with that sort
22 of liability in an uncertain area of law, very few
23 municipalities could ever afford to stand on their rights
24 to enforce local zoning even when they're relatively
25 certain that they are right.

1 Section 332(c)(7) is entitled and has one of its
2 purposes as the preservation of local authority. It
3 should not be construed to provide for that authority's
4 evisceration.

5 The second point I wanted to hit is that when
6 Congress established the mechanism for review in 332, it
7 provided a very adapted mechanism with an unusual pair of
8 characteristics: a very short limitations period and
9 mandatory expedition. This Court's decisions in Novotny
10 makes it clear that neither of those requirements can be
11 simply transferred over to section 1983. Novotny had very
12 similar language, a 90-day limitations period. The Court
13 did not transfer that over to section 1983. Instead it
14 understood that the general rule, the general Federal
15 principle of law, that in the absence of an express
16 limitations period, that State law would control. Wilson
17 then confirms that rule, as an interpretation of section
18 1988, that the governing Federal principle is that State
19 law controls unless there's an express Federal cause of --
20 statute that addresses that particular cause of action.

21 If there are no further questions, we ask only
22 that the judgment of the Ninth Circuit be reversed. Thank
23 you.

24 JUSTICE STEVENS: Thank you, Mr. Lamken.

25 The case is submitted.

1 (Whereupon, at 11:01 a.m., the case in the
2 above-entitled matter was submitted.)
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