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IN THE SUPREME COURT OF THE UNITED STATES

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JOSEPH C. ROELL, PETRA :
GARIBAY, AND JAMES REAGAN, :
Petitioners :

v. : No. 02-69

JON MICHAEL WITHROW :

- - - - -X

Washington, D. C.
Wednesday, February 26, 2003

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:08 a.m

APPEARANCES:

LISA R. ESKOW, ESQ., Deputy Solicitor General, Austin,
Texas; on behalf of the Petitioners.

AMANDA FROST, ESQ., Washington, D. C.; on behalf of the
Respondent.

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

2 (10:08 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 02-69, Joseph Roell, Petra
5 Garibay, and James Reagan versus John Michael Withrow.

6 Ms. Eskow.

7 ORAL ARGUMENT OF LISA R. ESKOW

8 ON BEHALF OF THE PETITIONERS

9 MS. ESKOW: Good morning, Mr. Chief Justice, and
10 may it please the Court:

11 When parties knowingly and voluntarily proceed
12 to trial before a magistrate judge, they consent within
13 the meaning of 28 U.S.C. section 636(c)(1). The plain
14 language of the statute confers case-dispositive authority
15 on full-time magistrate judges upon the consent of the
16 parties. Congress did not specify in section 636 what
17 form that consent should take. It did not include
18 adjectives such as express or written, and the omission of
19 such qualifiers is significant.

20 QUESTION: How about Rule 73(b)?

21 MS. ESKOW: Yes, Your Honor, Mr. Chief Justice,
22 Rule 73 does require that the parties execute a consent
23 form filed with the court, and it did not occur in this
24 case.

25 However, a violation of that rule did not divest

1 the magistrate judge of authority to preside over the
2 case, and that is because the authority emanates from the
3 statute, specifically the requirement that the consent be
4 voluntary in 636(c)(1), and although it was error not to
5 follow the Federal Rule of Civil Procedure or the local
6 rules for the Southern District of Texas, which may have
7 had writing requirements, these rules were related to
8 procedural safeguards to protect the voluntariness of the
9 parties. They are not the consent requirement themselves,
10 and it is the voluntariness of the agreement that gives a
11 magistrate judge authority to preside, not compliance with
12 technicalities of statutory referral procedures.

13 QUESTION: Do you agree that the consent has to
14 precede the action of the magistrate?

15 MS. ESKOW: Yes, Justice Stevens, we do.

16 QUESTION: So that there had to have been
17 consent before he took any -- the magistrate took any
18 action in the case?

19 MS. ESKOW: Any case-dispositive actions under
20 section 636(c) --

21 QUESTION: Yes.

22 MS. ESKOW: -- yes, that would have to be with
23 the consent of the parties.

24 QUESTION: So that an hour into the trial,
25 somebody hands counsel a note that says, Your Honor, we've

1 made a mistake, our office said we can't consent to this,
2 the trial, the magistrate should say, too late, you've
3 appeared, you've been deemed to have given consent?

4 MS. ESKOW: Yes. Yes, Justice Kennedy.

5 QUESTION: So it's like double jeopardy when
6 this first witness is sworn, or something like that?

7 MS. ESKOW: Well, certainly, consent in our view
8 is predicated on two things, and first it's notice that
9 the magistrate judge is proceeding in this case-
10 dispositive authority, and notice that the party has an
11 opportunity to decline to consent to that procedure.

12 QUESTION: So the first dispositive motion that
13 he rules on?

14 MS. ESKOW: Certainly, that would be a signal,
15 and yes, if a party did not object at that point, after
16 being on notice that the magistrate judge was exercising
17 case-dispositive authority.

18 QUESTION: Well, then, we need a whole
19 jurisprudence parallel to the simple rules that you all
20 didn't follow.

21 MS. ESKOW: I'm sorry, Your Honor? The --

22 QUESTION: We need a whole jurisprudence that's
23 parallel to the simple rule. The -- the object of the
24 rule was structural, in a sense. It was to bring home to
25 the parties that they had a choice, to make them consider

1 the choice, to make sure that the choice was not in any
2 way forced on them or suggested to them, and it seems to
3 me that your rule defeats all of that.

4 MS. ESKOW: We would respectfully disagree,
5 Justice Kennedy. Absolutely, the rule is designed to
6 protect the voluntariness of the parties' consent and to
7 ensure that they aren't coerced into agreeing to a
8 procedure and into relinquishing their right to an
9 Article III judge when it's not something that they
10 voluntarily choose to do, but those are merely the
11 procedures to protect the consent.

12 The consent itself is the predicate for the
13 exercise of the authority, and although there was a
14 departure from the local rules, and in this instance, it
15 was not merely on the part of two defendants who neglected
16 to file a form but on the part of plaintiff Wi throw, who
17 neglected to obtain all parties' consent, as was his
18 responsibility under the local rules --

19 QUESTION: Was he represented at the trial,
20 Wi throw?

21 MS. ESKOW: No, Justice Ginsburg. He -- he was
22 pro -- he was pro se at that time.

23 QUESTION: So -- so your rule is that a pro se
24 defendant has to tell the State of Texas how to comply
25 with the Federal rules?

1 MS. ESKOW: No, Justice Kennedy. Certainly,
2 that was just an indication of the various mishaps that
3 can happen because of the nature of the varying local
4 requirements that exist in different districts. You also
5 had in this instance a district judge who referred the
6 case to the magistrate before the defendants had even been
7 served, much less had an opportunity to consent, and the
8 magistrate judge did not comply with local practice of
9 confirming on the record all parties' consent --

10 QUESTION: But she was -- she --

11 QUESTION: Well, can -- can local rules in one
12 district produce a different result than another district
13 which didn't have that local review with respect to this
14 sort of consent?

15 MS. ESKOW: Absolutely not, Mr. Chief Justice.
16 In -- in this circumstance, certainly that authority
17 emanates from the statute itself, and a local rule can't
18 determine the authority of the magistrate judge. That
19 would apply nationally, and in every court, but --

20 QUESTION: This local rule did require
21 express -- it required consent in writing before the --
22 the proceeding, didn't it?

23 MS. ESKOW: Yes, before even the case could be
24 referred the local requirement existed, but that was
25 departed from both by the clerk, who provided a form to

1 the district judge before it had been signed by the
2 parties, and by the district judge himself, who referred
3 the case without waiting for all parties' consent, or even
4 all parties' service.

5 QUESTION: Do -- do we know how this came about,
6 because the magistrate, she was certainly aware of it.

7 MS. ESKOW: Absolutely.

8 QUESTION: And she asked the State, do you
9 consent, and whoever was representing the State said,
10 well, I have no authority to do that today.

11 MS. ESKOW: That was at a preliminary
12 proceeding, Justice Ginsburg, a Spears hearing, that was to
13 determine whether or not plaintiff Withrow's claim should
14 even be permitted to proceed, or whether he should be
15 permitted to proceed in forma pauperis and whether service
16 would be affected. No defendant had been served at that
17 point. It was an evaluation under section 1915(a) of
18 whether this prisoner suit should be allowed to proceed,
19 and at that time there was a representative of the
20 Attorney General's Office present at the hearing, merely
21 in an informational capacity, but none of the defendants
22 had been served, and they were not yet represented, so she
23 indicated at that hearing that she could not consent on
24 their behalf.

25 Later on, after that hearing, when it was

1 determined that some claims could proceed, there was
2 service on the defendants, and that was effected on a
3 different Attorney General, who in turn assigned it to the
4 Attorney General -- the Assistant Attorney General who did
5 represent the defendants at trial and filed answers on
6 their behalf, and -- and that attorney did neglect to file
7 the required forms.

8 However, at the time of service, the case had
9 already been referred, and he did not go back to confirm
10 whether previously the forms were on file, but everyone in
11 this proceeding was assuming that all the parties
12 consented because the case was already before the
13 magistrate judge, and everyone was acting in accordance
14 with a section 636(c)(1) referral. Indeed, in the
15 referral order that the district judge signed that sent
16 the case to the magistrate judge, it specified that if the
17 defendants did not consent, they merely needed to indicate
18 that to the court and it would go back to the district
19 judge, so certainly there was an awareness that the case
20 was proceeding pursuant to the dispositive, case-
21 dispositive provisions in subsection (c).

22 QUESTION: And one of the defendants did put in
23 a form

24 MS. ESKOW: Yes, who was represented by separate
25 counsel, and that counsel did follow the instructions from

1 the court and -- and did comply, and that was not complied
2 with by the attorney who was representing the two
3 defendants at trial in this case, but everything that that
4 attorney did was consistent with and demonstrated the
5 parties' consent in this instance, including filing a
6 dispositive motion with the -- the court that the
7 magistrate judge could grant only if she had authority
8 under subsection (c), and only if she had the parties'
9 consent, and when she denied that motion and made that
10 adverse ruling, that she could only do with the parties'
11 consent, these defendants never once objected, they did
12 not dispute that they consented, instead, they asked her
13 to reconsider the merits of their summary judgment motion.

14 QUESTION: Ms. Eskow, the statute, 636(c)(2),
15 deals with the clerk of the court shall notify the parties
16 of the availability of a magistrate, and then it goes on
17 to say, the decision of the parties shall be communicated
18 to the clerk of the court. Does the use of communicated
19 to the clerk suggest that it be express? What is that
20 requirement? How does that enter in?

21 MS. ESKOW: Certainly, communicated to -- to the
22 clerk suggests that -- that the clerk will be informed of
23 the decision. When the parties filed a dispositive motion
24 that invoked, affirmatively invoked the case-dispositive
25 authority, that was before the clerk and would have

1 notified the clerk that they were --

2 QUESTION: And satisfied that requirement?

3 MS. ESKOW: It would, and moreover, it's
4 subsection (1) that discusses the authority of the
5 magistrate judge --

6 QUESTION: Yes.

7 MS. ESKOW: -- and speaks only of consent that
8 is the provision of the statute in which Congress gave
9 this grant of authority.

10 QUESTION: Yes.

11 MS. ESKOW: Subsection (2) is a procedural
12 mechanism for ensuring the voluntariness, that's the
13 requirement under subsection (1).

14 QUESTION: And was it complied with here fully,
15 do you think --

16 MS. ESKOW: With subsection --

17 QUESTION: -- subsection (2)?

18 MS. ESKOW: Subsection (2), in this instance,
19 no. Because of the local procedures that are requested
20 the district courts develop under subsection (2), they
21 were not complied with by any of the parties or any of the
22 judges in this case, so there was a departure, but because
23 there was full compliance of subsection (1), in that the
24 parties all voluntarily agreed, absolutely there was
25 authority to proceed.

1 QUESTION: May I just ask you a technical
2 question about the local rule? I -- as I recall, wherever
3 it was referred to, it was referred to not as rule, but as
4 order. Does everybody in the case agree that whatever
5 this order was, it had the status of a local rule for
6 purposes of this case?

7 MS. ESKOW: Yes, Justice Souter. That is not
8 disputed by any of the parties. That is just the
9 mechanism by which the Southern District of Texas
10 implemented it as a general order. It is printed in
11 writing, it is signed by the judges of the court, the
12 chief judge of the court, and it's something that is
13 respected by all parties as being the local rule in that
14 case.

15 Congress' intent not to require any specified
16 form of consent is evidenced by the language in (c)(1)
17 itself, where the first provision is -- for full-time
18 magistrate judges does not require any form of written
19 consent, it merely speaks to consent. In the very next
20 sentence of the statute, which is on page 3a of the
21 appendix in the petitioners' brief on the merits, the
22 statute specifies that for part-time magistrate judges,
23 there has to be a specific written request by the parties
24 in order for the magistrate judge to exercise case-
25 dispositive authority, and the fact that Congress in the

1 very next sentence chose to insert and to require a
2 written consent indicates that Congress did not intend to
3 make the same sort of requirement with respect to
4 full-time magistrate judges, because that adjective is --
5 is lacking, and the Court should not engraft terms onto
6 the statute that Congress chose not to include.

7 QUESTION: I take it from your argument this
8 morning you would say that these defendants -- suppose
9 they lost. Suppose the plaintiff won. They could not
10 then say, magistrate, you never had any authority because
11 we did not give you in advance written permission to
12 proceed. They could not -- they would be bound. Is that
13 your view?

14 MS. ESKOW: Yes, Justice Ginsburg, if the court
15 were to adopt an inferred consent rule and -- and
16 determine consent based on the parties' voluntary conduct
17 beforehand, and there was notice, and there was a clear
18 indication of conforming to 636(c) --

19 QUESTION: But I'm not asking the question
20 hypothetically. I'm asking, in this case.

21 MS. ESKOW: In this case? Yes, my understanding
22 is that no party had -- had even thought, it had not
23 crossed any party's mind that consent was lacking and that
24 all parties were intending to be bound by the judgment.

25 QUESTION: But if the defendants, having lost

1 instead of having prevailed, then said, aha, now we can
2 get out of it because we never formalized our consent,
3 you -- you are saying that they could not have -- that on
4 these, on the facts of this case they could not have bowed
5 out if they lost?

6 MS. ESKOW: Yes, Your Honor. We believe that
7 that is the -- the correct approach. Certainly, in the
8 Seventh and Eleventh Circuits, where those courts require
9 express post judgment consent separate and apart from
10 looking at the underlying conduct, in those situations
11 there is not an effective judgment if the parties refuse
12 to put express consent on the record after the fact.

13 That is certainly one approach to the statute.
14 It's one approach that we believe is valid, because
15 requiring that express consent at some point in the
16 proceedings to confirm the earlier conduct is something
17 that -- that would protect the voluntariness concerns
18 Congress had, but we don't believe that it's required
19 in -- in terms of the authority, that the authority comes
20 from the voluntary agreement that's evidenced from how the
21 parties proceeded, and certainly, if the Court wished to
22 avoid the gaming concerns that the Fifth Circuit expressed
23 under the type of post judgment consent rule that the
24 Seventh and Eleventh Circuits adopted, then adopting an
25 inferred consent rule would eliminate that by requiring

1 parties to be bound by the bargain they struck.

2 QUESTION: Ms. Eskow, I take it all of the
3 courts of appeals that have addressed this question have
4 found express consent required?

5 MS. ESKOW: Yes, Justice O'Connor, that's
6 absolutely true, but there's nothing in the statute that
7 makes that requirement. Indeed, another provision of the
8 Federal Magistrates Act, the provision governing
9 misdemeanor trial authority, that's in 18 U.S.C. section
10 3401(b), requires not -- it used to require written
11 consent. In 1996, Congress amended the act to require
12 only oral consent, but it specified that it could be oral
13 or written, but that it needed to be express. The words,
14 expressly consents, are in that provision, and certainly
15 neither the word express, nor the word oral or written,
16 exist in 636(c)(1).

17 QUESTION: You suggested earlier that the second
18 sentence of -- of (c) -- of (c)(1) contains the written --
19 the writing request, whereas the first second -- sentence
20 doesn't.

21 MS. ESKOW: Yes.

22 QUESTION: But the writing request in the second
23 sentence is a request for the -- the magistrate to
24 participate, rather than the consent itself. It says,
25 upon the consent of the parties pursuant to this specific

1 written request. There's no requirement of writing with
2 respect to the request in the first sentence, but that
3 doesn't necessarily disavow the need for writing in the --
4 to evidence the consent itself.

5 MS. ESKOW: We would read the statute
6 differently, Justice Stevens, that the fact that it says,
7 upon the consent of the parties pursuant to their specific
8 request, would indicate that the consent of the parties
9 has to be pursuant to their written request.

10 QUESTION: That's right, but there doesn't have
11 to be a written request with respect to the first
12 sentence. There just has to be -- if one reads it the
13 other -- the way your opponent does it, there just has to
14 be a writing evidencing the consent itself.

15 MS. ESKOW: We would respectfully disagree.

16 QUESTION: Yes.

17 MS. ESKOW: That the writing requirement only
18 exists with respect to the part-time magistrate judge, and
19 that that goes to the consent as well.

20 QUESTION: That's not expressed. I'm saying,
21 that's not expressed, but I'm just saying that it's not --
22 it's not -- the two -- the writing requirement that is
23 referred to in the second sentence is not an exact
24 parallel of what they contend the -- the writing
25 requirement is in the first sentence.

1 MS. ESKOW: Well, certainly respondent has a
2 variety of writing requirements, and one that they deem to
3 be dictated by the local rules as well, which is something
4 that's not spoken to in subsection (c)(1). Certainly,
5 the -- the statute in (c)(1) imposes no sort of express or
6 written requirement with respect to consent or with
7 respect to requesting a magistrate judge --

8 QUESTION: Well, of course, that's the issue.

9 MS. ESKOW: -- in any form

10 QUESTION: Yes, that's the issue.

11 MS. ESKOW: And the absence of that we believe
12 is significant because -- in these other provisions
13 because in the misdemeanor trial authority, it requires
14 consent, and is probably the closest analogy to the trial
15 authority in subsection (c)(1). There is both express
16 consent required, and it specifies that it can be oral or
17 written.

18 QUESTION: The obvious reading of a statute like
19 this I would think, and you tell me why I'm not right, but
20 it just means consent in such form as the judicial
21 conference or local rules provide. I mean, Congress is
22 perfectly aware in these procedural statutes that judges
23 have rulemaking authority and that they elaborate the
24 statute through rule.

25 MS. ESKOW: Certainly, Congress is aware of

1 common sense meaning of consent, and in substance --

2 QUESTION: Well, it's also aware that they're
3 writing a statute for the judiciary that's implemented
4 through rule, and where you have a term like this, that is
5 implemented through rule, that everybody would think it
6 would be implemented through rule, the word consent in the
7 statute means consent in the form that the rules provide.

8 Does Congress have to add that every time in -- I mean,
9 isn't it obvious? Or perhaps it isn't, but why isn't it?

10 MS. ESKOW: We don't believe it's obvious,
11 Justice Breyer, because if it was the form of the local
12 rules, or the form of consent prescribed by local rules
13 that determined the authority, you would have magistrate
14 judges with different authority in a variety of
15 jurisdictions across the country.

16 QUESTION: So what's wrong with that? I mean,
17 if the local rule is okay, what's wrong with that, I mean,
18 if that's what the rule authorities want to do?

19 MS. ESKOW: Certainly it may be a good idea as a
20 matter of policy --

21 QUESTION: No, no, it's a matter of law.

22 MS. ESKOW: -- to require.

23 QUESTION: It's a matter of law. Very often,
24 Congress legislates, and they use words like consent, and
25 so forth, and those are implemented. I don't want to just

1 repeat the point. I want to be -- I want to see what you
2 can --

3 MS. ESKOW: Certainly, our view is that because
4 Congress specified the requirements for local rules in a
5 separate subsection than the consent requirement itself,
6 it was anticipating that there would be some need to
7 protect the voluntariness, but that it is the
8 voluntariness that's the cornerstone, and that it would be
9 a matter of administrative discretion on the local level.

10 QUESTION: Assume you lose on that, just for the
11 sake of argument.

12 MS. ESKOW: Yes.

13 QUESTION: Then I guess the other question is
14 whether you can cure the violation by not objecting on
15 appeal.

16 MS. ESKOW: That certainly is the question.

17 QUESTION: And what is your answer to that?

18 MS. ESKOW: The -- yes, absolutely.

19 QUESTION: Because?

20 MS. ESKOW: Because the underlying voluntary
21 consent is there through the parties' conduct, and to the
22 extent the court construes the statute --

23 QUESTION: No, no, I'm saying, suppose that
24 there is not consent. Suppose I were to believe that the
25 word consent in the statute picks up the method of the

1 rule, at least it rules out implied consent, so suppose I
2 held against you on that point, then still you'd say, we
3 win anyway, because we can waive this requirement by just
4 not objecting on appeal.

5 When -- when the other side appeals it we say,
6 we don't care, or when you appeal it the other side says,
7 we don't care. We consent now. We consent now to what
8 happens then?

9 MS. ESKOW: Well, certainly --

10 QUESTION: Now what, about that?

11 MS. ESKOW: Assuming there is a violation of --
12 of the rule, and that their consent is not lacking, the
13 question is, what is the consequence for noncompliance
14 with the rule, and certainly the failure to comply with
15 these procedures, for that to be an automatic grounds for
16 reversal would be a deviation from accepted practice,
17 which is a party has to object to a proceeding, has to
18 preserve error, and here, no party objected, and it is
19 their personal right to the Article III judge. It is
20 their personal consent --

21 QUESTION: But the argument is --

22 MS. ESKOW: -- that is at stake.

23 QUESTION: -- of course, that you can't cure a
24 basic jurisdictional problem. You -- both parties could
25 not go out on the street, pick the third person whom you

1 see and say, you decide our case, and then you appeal his
2 decision, and when somebody says, who's that person, you
3 say, we waive all the claims that he isn't a judge.

4 MS. ESKOW: Well, certainly, if Congress had not
5 provided for a scheme that existed, and the parties
6 randomly invoked the authority of a person on the street,
7 that would be a problem, but here, you have a magistrate
8 judge who has been specifically assigned by Congress to
9 perform this function and has been designated by the
10 district judge of the court, and the only question is,
11 have the parties agreed, and if -- and if no party objects
12 to that and the magistrate judge enters the final
13 judgment, even if there's been noncompliance with the
14 rules, the question is, what is the harm, and even --

15 QUESTION: So you say basically this isn't
16 jurisdictional in the strict sense of the word?

17 MS. ESKOW: No. No, Your Honor, absolutely not.
18 It's not a question of subject matter jurisdiction. The
19 term, jurisdiction, solely is a question of authority of
20 the powers of the magistrate judge to act.

21 QUESTION: Do you think it's like personal
22 jurisdiction, or more -- it's more like personal
23 jurisdiction or subject matter --

24 MS. ESKOW: It's more --

25 QUESTION: Because if you say personal, then you

1 have on your side the rule that a general appearance,
2 general -- as a --

3 MS. ESKOW: Absolutely.

4 QUESTION: -- as a rule waives deficiencies.

5 MS. ESKOW: And that it can be waived
6 inadvertently, even by failing to timely assert the
7 person --

8 QUESTION: My question is why, because the
9 argument that it is like a person on the street is that a
10 magistrate who is not an Article III judge is going to
11 preside over a jury trial, and the result of that trial
12 will have all the trappings and -- and dignity and
13 enforcement power of a judgment of a court of the United
14 States, and the only way this could possibly occur is if
15 the parties consent, particularly since it's a jury trial,
16 and where they don't consent, he really is like a person
17 off the street, because of the importance of what the
18 parties are giving up in order to obtain his judgment
19 rather than that of an Article III judge.

20 All right, now that's the other side's argument.
21 Now, I want to know how you respond.

22 MS. ESKOW: Well, certainly in Peretz versus
23 United States this Court considered a circumstance where,
24 in a felony trial, a magistrate judge was supervising the
25 voir dire, and the defendant's counsel did not make any

1 objection to that when it went on, and this Court
2 determined, both from a personal litigant Article III
3 perspective, as well as from a structural perspective,
4 that there was no infirmity in that procedure, and that a
5 defendant who does not assert his right to an Article III
6 judge has no cognizable right that he can enforce, and
7 that would be the same circumstance here, for the same
8 reasons why the felony voir dire was permissible without
9 objection of the defendant in Peretz versus United States.

10 Here, without objection from the parties, with
11 their fully informed knowledge of the nature of the
12 proceedings, and their proceeding through judgment
13 affirmatively invoking the authority of the judge, it is
14 directly parallel to the situation in Peretz versus United
15 States, and certainly the litigants waived their personal
16 Article III right to a district judge, and the same
17 structural protections that this Court deemed sufficient
18 in Peretz also would exist here, because the magistrate
19 judge is appointed, or direct -- referred the case only by
20 the district judge, the district judge can at any point in
21 time, sua sponte, for good cause, take the referral back
22 from the magistrate judge, and -- and supervises the
23 process. That insulates it from separations of powers
24 concerns that --

25 QUESTION: One of -- one of the insulating

1 features in the suggested form and the rules of civil
2 procedure makes it express that the consent form is not to
3 be communicated to the judge or the magistrate in order to
4 protect the attorneys who don't consent so that the
5 magistrate or the judge doesn't know which party doesn't
6 consent, and your rule completely destroys that.

7 MS. ESKOW: No, Your Honor. We -- in this
8 instance, certainly if the parties are voluntarily
9 proceeding with knowledge, a magistrate judge would be
10 aware that they were going forward and that there are
11 rules that inferred consent is what satisfies the statute,
12 then yes, a magistrate judge would know when a party, upon
13 notice both of their right to object and of the nature of
14 proceeding, invoked the affirmative authority, yes, the
15 magistrate judge at that time would know that the parties
16 have made the dissent.

17 QUESTION: Well, no, but you -- you presume a
18 regime in which the magistrate said, I'm ready to proceed,
19 and you -- somebody stands up and says, well, I don't
20 consent. I mean, that's -- that's the regime you want us
21 to adopt, so that -- that destroys the confidentiality.

22 MS. ESKOW: Well, certainly in many
23 circumstances the -- the local rules do provide for the
24 communication to the clerk, and that is what Rule 73
25 provides.

1 As a matter of practice, however, in 1990,
2 Congress relaxed the consent provisions to permit
3 discussions between the district judge and the magistrate
4 judge about consent, that they could remind the parties
5 that they could consent to a magistrate judge, and that
6 that was a topic that could be discussed in -- in the
7 courtroom provided that there was no coercion to consent.
8 If --

9 QUESTION: Where did -- where did the Congress
10 do that? You say the Congress did that?

11 MS. ESKOW: In 1990, Congress amended subsection
12 (c)(2) to loosen the consent requirements, and certainly
13 it still anticipated that the decision is going to go to
14 the clerk of court, but magistrate judges and district
15 judges are not prohibited from discussing the matter of a
16 referral with the parties, and if a party failed to sign
17 the requisite form, certainly there'd be no -- no
18 prejudice by proceeding to inform the judge at the time
19 that the issue came up that they did consent, and
20 certainly, to -- to wait until the eve of trial, when
21 every indication was that they had consented, and to
22 withdraw it at that point, an inferred consent rule would
23 be more consistent with holding the parties to the benefit
24 of their bargain.

25 QUESTION: May I just make one -- ask you one

1 clarifying question for me? Is it your position that
2 it -- it is not necessary either to consent in advance, or
3 to have the consent in writing?

4 MS. ESKOW: No, Justice Stevens. We believe
5 that you do have to consent. You have to voluntarily
6 agree before the magistrate judge can act.

7 QUESTION: But -- but wasn't there a finding
8 that that did not occur in this case?

9 MS. ESKOW: No, Your Honor, the -- only a
10 finding that they did not expressly consent. The
11 magistrate judge expressed -- actually did find that they
12 clearly had implied their consent by their conduct, but
13 deemed implied consent insufficient. The only piece that
14 was missing was an express memorialization of the
15 voluntary agreement that did exist.

16 QUESTION: The statutory provision that you --
17 that you cited, which provides for subsequent discussions,
18 is predicated on the fact that consent has first been
19 communicated to the clerk of the court.

20 MS. ESKOW: Well --

21 QUESTION: So Congress basically talked about
22 this discussion process against the backdrop of a consent
23 form that had already been communicated to the clerk.

24 MS. ESKOW: We would disagree, Justice Kennedy.
25 The legislative history actually indicates that the -- the

1 provision was intended to enable the district judge and
2 the magistrate judges to inform --

3 QUESTION: But that's not what the statute says.

4 MS. ESKOW: -- to inform the parties of the
5 availability, irrespective of whether they had actually
6 already consented, because too many magistrate judges and
7 district judges believed that they -- they could not go on
8 record.

9 QUESTION: Do you want to reserve the remainder
10 of your time, Ms. Eskow?

11 MS. ESKOW: Thank you.

12 QUESTION: Ms. Frost, we'll hear from you.

13 ORAL ARGUMENT OF AMANDA FROST

14 ON BEHALF OF THE RESPONDENT

15 MS. FROST: Mr. Chief Justice, and may it please the
16 Court:

17 All parties must expressly consent before a
18 magistrate may exercise jurisdiction under section 636(c).
19 First and foremost, this is because the text of the
20 Magistrates Act and Rule 73(b) require express consent.
21 In addition --

22 QUESTION: Oh, the text does not require express
23 consent. I beg to differ.

24 MS. FROST: I'd like to --

25 QUESTION: It does not. I think that's how you

1 want us to interpret it, but I don't think the word is
2 there, is it?

3 MS. FROST: The word, express, is not there,
4 Your Honor. It is in Rule 73(b), and in addition, I'd
5 like to point Your Honor -- Your Honor to some of the
6 provisions of 636(c) which strongly indicate that the
7 consent must be expressed.

8 QUESTION: What part of 73(b) uses the word
9 express?

10 MS. FROST: 73(b) refers -- it does not use the
11 word express, Your Honor.

12 QUESTION: So then neither the statute nor the
13 rule use the term express, as you suggested earlier.

14 MS. FROST: Neither use the term, express. Rule
15 73(b) refers to the -- that the parties shall execute and
16 file a consent form. That is a written form of consent
17 that obviously must be express. It couldn't -- wouldn't
18 be possible to file in writing a consent without that
19 being express. It is our position here that written
20 consent is required, and I used the word express only
21 because this Court need not go that far in this case,
22 because these -- the petitioners here not only failed to
23 file their consent in writing, as 73 requires, but they
24 also failed to articulate consent at all, and -- and so
25 there is no need to reach the -- the question of whether a

1 consent must be in writing.

2 QUESTION: Well, it could be implied. That's
3 the question of whether the consent, if it is required, as
4 it appears to be, could be implied, and if there ever were
5 a case for implying consent, this is that case.

6 MS. FROST: I -- I respectfully disagree, Your
7 Honor. For example, I think that everything that these
8 petitioners did was as consistent with an intent to
9 withhold consent as to give consent, and I'd like to show
10 you as an example the motion for summary judgment that was
11 filed in this case that petitioners have pointed to as
12 being evidence of clear consent. It's captioned, To the
13 Honorable Judge of the District Court, and it was
14 submitted to the clerk. In addition, a magistrate may
15 review a motion for summary judgment under 636(b) without
16 the parties' consent, so nothing that the petitioners did
17 by submitting this motion indicated their -- their intent
18 to consent to these proceedings.

19 QUESTION: But wasn't there a trial?

20 MS. FROST: Yes, there certainly was, Your
21 Honor.

22 QUESTION: They -- they did participate in the
23 trial.

24 MS. FROST: Yes.

25 QUESTION: So even if filing that motion did not

1 give implied consent, perhaps it could be argued that
2 simply participating in the trial gave it.

3 MS. FROST: Yes, Your Honor, that is
4 petitioners' argument, and the reason I think that
5 argument cannot be -- is not in accord with the language
6 of the Magistrates Act is, first of all, consent is used
7 consistently throughout the act to be -- to mean an
8 express statement. For example, in 636(h), a retired
9 magistrate may come out of retirement and serve again upon
10 the consent of the -- of the chief judge of the district
11 court, and I don't think even petitioners would argue that
12 that consent could be implied in the sense that the chief
13 judge never said or wrote that the retired judge --

14 QUESTION: But it's used in a little bit
15 different sense there. It requires basically the
16 permission of the chief judge, which you know, I think
17 you're quite right in saying that that would not be
18 satisfied by simply doing nothing, but in -- in a case
19 where you're talking about an agreement, I -- I think
20 it's -- the law is different in some -- in some respects.

21 MS. FROST: Well, I respectfully disagree, Your
22 Honor, because both provisions, 636(h) and 636(c)(1) use
23 the term, upon consent, and I think that where Congress
24 used the same term throughout the statute, it should be
25 interpreted to have the same meaning, but that's not the

1 only provision I rely on.

2 There's the fact that the Congress thought
3 consent would be communicated to the parties. There's the
4 fact that Congress said, upon consent, meaning consent
5 must come first. It makes no sense to say, consent must
6 come first, if what Congress meant was, simply by showing
7 up once the magistrate starts exercising that authority,
8 we are going to consider you to have consented.

9 QUESTION: Why not? If -- Justice Kennedy
10 brought up the analogy to personal jurisdiction. If one
11 makes a general appearance just by showing up in court,
12 then any question of whether the court would otherwise
13 have jurisdiction is gone, because there is jurisdiction,
14 personal jurisdiction by consent, just by making a general
15 appearance, so why isn't showing up in that magistrate's
16 courtroom, going to trial without objecting, why isn't
17 that equivalent to a general appearance?

18 MS. FROST: Justice Ginsburg, the answer to your
19 question is that there is in the Federal Rules of Civil
20 Procedure Rule 12, which says that showing up will be
21 waiving your right, and here we have a statute that
22 requires consent, and it's important to look at why
23 Congress wanted that. Congress was clearly very concerned
24 that consent be voluntary, willing, and knowing.
25 Petitioners agree, and the question is, what is the best

1 way to protect that? Express consent protects the consent
2 and ensures that it is voluntary.

3 QUESTION: I could understand that in the
4 abstract. In the concrete, as applied to this case, if
5 the plaintiff, the pro se plaintiff didn't consent and
6 then lost, I could see an argument there, but this is the
7 State Attorney General, and when they show up and they go
8 to trial, it seems to me it's reasonable to imply that
9 they have consented.

10 MS. FROST: I think not, Your Honor, for a few
11 reasons. First of all, there is nothing that would have
12 stopped these parties from -- from arguing after the fact
13 that they hadn't intended to consent, and there's no
14 evidence as a result of the fact that the counsel
15 failed to specifically consent --

16 QUESTION: Well, how -- how could they have made
17 that argument in this case, say, well, we just forgot
18 about the rule, we didn't know, or --

19 MS. FROST: The argument they would make is --

20 QUESTION: I -- I just can't imagine what the
21 State Attorney General would say, after having
22 participated in a trial and say, well you know, I really
23 didn't consent.

24 MS. FROST: I think that what the State Attorney
25 General would say was, I had not realized that my -- I had

1 not realized that I had not checked with my clients, that
2 I had not -- because the State Attorney General took this
3 case over, he -- he could say, I had not realized that my
4 clients had not already agreed to do this, they have a
5 right to an Article III judge.

6 QUESTION: Well, but it -- I mean, who -- who is
7 the Attorney General's client except State officials?

8 MS. FROST: Well, I think, Your Honor -- that's
9 true, Your Honor, but these questions go to the question
10 of whether Congress intended different consent standards
11 for different parties, and also to the question of whether
12 Congress would want this kind of satellite litigation on
13 the question of consent.

14 I think it is telling that these -- that the
15 petitioners in this case, when asked whether they
16 consented, said they could not, never consented, the
17 documents they submitted to the district court were
18 captioned to the district court, they did not indicate
19 that they intended to go before a magistrate. Would
20 Congress have wanted courts to have to deal with the
21 satellite litigation of parties arguing whether they did
22 or didn't consent?

23 QUESTION: But Ms. Frost --

24 QUESTION: Well, once this --

25 QUESTION: -- you're asking them to engage in

1 much more than satellite litigation over consent. The
2 result of your position is that there will be a whole new
3 trial, so it's going to engage the court much more than
4 making a determination whether, in fact, the State
5 officials consented by appearing before the magistrate,
6 so --

7 MS. FROST: Yes, Justice Ginsburg, that is true
8 in this case, but if the rule is explicit consent rather
9 than inferred consent, and if that is established as the
10 rule, then there will be far fewer occasions on which
11 mistakes are made.

12 QUESTION: But it was the -- but it was the
13 local rule.

14 MS. FROST: Yes.

15 QUESTION: And it -- and -- so we're dealing
16 with only the consequences, and I could see if this were a
17 big question of subject matter jurisdiction, you'd say
18 that the parties can't waive that, but this kind of rule
19 is at a much lower level.

20 MS. FROST: Well, I respectfully disagree, Your
21 Honor. I think that, both throughout the Magistrates Act
22 and the legislative history, Congress referred to section
23 636(c) as an expansion of the magistrate's jurisdiction to
24 act, and that jurisdiction can only be invoked upon the
25 consent of the parties.

1 QUESTION: No, but if you're saying that that
2 jurisdiction is on the level, as I think you are, on the
3 level with subject matter jurisdiction --

4 MS. FROST: Yes.

5 QUESTION: -- then it seems to me you've proved
6 too much, because if it were -- if Congress were assuming
7 it was on that level, Congress wouldn't have done this in
8 the first place. You can't consent to subject matter
9 jurisdiction, and you can't consent to it by filing
10 written forms before trial, so we've got to make the
11 assumption, just as Justice Ginsburg did in her question,
12 that we're dealing with an interest which Congress viewed
13 at a very lower level.

14 MS. FROST: I respectfully disagree, Justice
15 Souter, and here's why. It's not a question of consenting
16 to subject matter jurisdiction, it's a question of what
17 did Congress say are the limits of the magistrate's --

18 QUESTION: No, but I mean, we -- I'll -- I'll
19 grant you that -- I mean, I read the statute, this -- and
20 the rule the same way you do. Of course, what Congress
21 had in mind was consent beforehand, and I think you're
22 right, consent in -- in written form

23 The question is, if -- if that consent is not
24 given, and a whole trial is held, did Congress regard the
25 subject of the consent as being on the same level as

1 subject matter jurisdiction so that it could not possibly
2 either be satisfied by -- by an -- an inferred consent or
3 corrected afterwards, and if it were on the level of
4 subject matter jurisdiction, then there couldn't have been
5 consent in the first place, so we've got to assume that
6 Congress regarded the interest here as something less
7 significant than, say, subject matter jurisdiction.

8 MS. FROST: I would not put it quite in those
9 terms, in terms of less significant. I think what
10 Congress did was establish thresholds to the magistrate's
11 exercise of jurisdiction, and this is separate and apart
12 from saying this is a Federal question case. Of course,
13 we agree with that. This case was properly in Federal
14 court.

15 The question is, were the two prerequisites to
16 the magistrate's exercise of authority met? One is the
17 designation by the district court, and the other is
18 consent.

19 QUESTION: 630 -- 636(c), as you point out,
20 talks about the consent of the parties. Now, supposing an
21 attorney for a party comes in, signs a consent form, and
22 then the -- he loses the case. Can the client later come
23 in and say, I never authorized the attorney to sign that
24 consent form?

25 MS. FROST: First notice -- that's, I think, a

1 question that's -- it's arguable, but I would think that
2 the argument would be that no, the client at that point is
3 bound by the attorney's representation, just as clients
4 are bound by their attorney's representations in many
5 other situations.

6 QUESTION: But they aren't bound by their
7 attorney's representations in some criminal cases. I
8 mean, the -- the client must make the decision. You don't
9 think this is one of them?

10 MS. FROST: I -- I think the -- it's arguable,
11 but the answer I think is no, because there are many very
12 important decisions that counsel -- they're supposed to
13 consult with their client and, indeed, it would be a
14 violation of the Rules of Professional Responsibility if
15 they didn't in this instance on this question of consent,
16 but if for some reason the counsel made an error,
17 frequently litigants are at the mercy of their counsel.

18 QUESTION: I -- I thought they were going to
19 ask -- I agree, Peretz is not in point, because it's an
20 issue where they did consent, but the -- the -- there is a
21 doctrine called the de facto officer doctrine, and that
22 means that if it's a fairly unimportant error, it can be
23 waived. For example, if a judge sat in the wrong
24 district, or the judge was designated to sit while the
25 other judge was sick, and then the other judge died, so he

1 wasn't just sick. I mean, and these were all errors, and
2 the court said, well, they do not go to jurisdiction,
3 they're waivable.

4 Now, why isn't this case like that, at least if
5 we assume there was real consent given, it was just
6 implied. It violates the statute all right, but no real
7 harm is done, if they want to waive it, they can?

8 MS. FROST: Yes, well, Justice Breyer, the first
9 response to the de facto officer doctrine is that that is
10 supposed to apply to minor errors, and --

11 QUESTION: That's right. They'll say, this is
12 sort of minor.

13 MS. FROST: And --

14 QUESTION: Because after all it's not that
15 important, given the fact they gave the consent anyway.
16 At least, they showed up for trial.

17 MS. FROST: I was going to say, it's not that
18 important considering the fact that they expressly
19 consented after the fact of the trial, but that, of
20 course, cannot be what this Court relies on, or --

21 QUESTION: No, but I'm asking you really to
22 answer, why isn't it trivial? Why is it important? Why
23 isn't it small enough that it could be waived? Why is it
24 grand enough that it implicates what we call
25 jurisdictional error, the parties can't cure it, they

1 can't waive it?

2 MS. FROST: Justice Breyer, the answer to your
3 question is first that Congress created it as a
4 jurisdictional threshold, second, that Congress was very
5 aware of the constitutional issues that arise when you
6 delegate Article III powers to non-Article III actors, and
7 for that reason, Congress repeatedly stated it wanted
8 consent to be voluntary, knowing, and willing. It was
9 concerned that less-advantaged litigants might be coerced,
10 or might not realize that they have a right to an
11 Article III judge. For this reason, Congress --

12 QUESTION: But then, if it's jurisdictional as
13 you say --

14 MS. FROST: Uh-huh.

15 QUESTION: -- then why doesn't 1653 control?
16 Title 28, 1653 reads, defective allegations of
17 jurisdiction may be amended upon terms in the trial
18 appellate court. A provision like that would take care of
19 the pro se person, because the court could say, on terms
20 it's not fair to hold this person, this pro se litigant to
21 consent that that person didn't give, but that it's
22 perfectly appropriate to hold the State Attorney General,
23 so even if we grant that it was jurisdiction, why doesn't
24 60 -- 1653 take care of it, saying defective allegations
25 of jurisdiction may be amended even in the appellate

1 court?

2 MS. FROST: I think that would not be
3 sufficient, Your Honor, because it would change the
4 language of the statute, and in addition it would -- the
5 question would have to arise, what would happen if the
6 Attorney General came in at the end of this process and
7 said, I didn't consent, and I think that there would be a
8 strong basis on this record for the Attorney General to
9 proceed on that argument successfully.

10 The rule in the Fifth Circuit that the Attorney
11 General was supposed to be familiar with was that all the
12 parties must submit written consent before trial, so the
13 fact that they didn't would be strong evidence they had
14 not intended to consent.

15 Then you have the fact that all their pleadings
16 are captioned to the district court, you have the fact
17 that there was some switching off of counsel so it's not
18 clear whether the individuals, individual defendants here
19 had ever been consulted, or ever had an opportunity to
20 object.

21 QUESTION: Is the customary way in the Southern
22 District of Texas to caption a pleading, Before the
23 Magistrate Judge, if the magistrate judge is presiding?

24 MS. FROST: I do not know the customary way that
25 pleadings are captioned. I do know that, from looking

1 through the record in this case, that later pleadings,
2 once the issue had come up that the magistrate -- that
3 there was never explicit consent before the trial, and
4 later pleadings did not have that caption, so it had been
5 taken out, and I guess my point in --

6 QUESTION: What did the later pleadings have?

7 MS. FROST: Nothing. There was -- there was not
8 in -- in the summary judgment motion that I appealed there
9 is in all caps, a line that says, to the Honorable Judge
10 of the District Court, and in the later pleadings that
11 line was simply removed. There was nothing there.

12 But my point, Your Honor, is not -- yes, that
13 may have been a form caption. I don't dispute that. My
14 point is that there is nothing, from their submitting of a
15 motion for summary judgment, that indicates their consent.

16 QUESTION: What happens with our -- suppose you
17 have a defective diversity suit, and you get up to the
18 court of appeals and suddenly discover that one of the
19 defendants is from the same State, that there are many
20 defendants, and so the party says, oh, don't worry, we'll
21 drop him out, so they drop him out at the appellate stage.
22 Does that rescue the whole case, or do you have to do it
23 all over again? What happens? I don't know.

24 MS. FROST: This Court's decision in the
25 Caterpillar case held that as long as there is the -- as

1 long as diversity is met at the time of the entry of
2 judgment, then that is acceptable, but that isn't your
3 hypothetical.

4 QUESTION: Entry of which judgment, of the lower
5 court's --

6 MS. FROST: The district court, the lower
7 court's judgment.

8 QUESTION: The district court, so you'd say if
9 we're doing it by analogy, you win?

10 MS. FROST: Yes. Yes, Your Honor.

11 QUESTION: Who do you suppose was intended to be
12 protected by these congressional requirements? The point
13 of my question is, wasn't the point to protect people who
14 didn't want to be tried by a magistrate judge, and if that
15 is the answer, why is someone in your position, or your
16 client's position, in a position to object at all here?
17 Your client gave consent.

18 MS. FROST: No. There are two answers to that,
19 Justice Souter. The first is that there are both
20 structural protections and personal protections in the
21 consent requirement. As this Court said in *CFTC v. Schor*,
22 when Congress requires consent, or when consent is
23 required, that serves as a break on the delegation of
24 Article III authority, and that preserves the separation
25 of powers required by the Constitution.

1 QUESTION: Okay, but if -- if we say, this does
2 not rise to the level of structural problems, which is
3 what we were getting at --

4 MS. FROST: Yes.

5 QUESTION: -- earlier when we were saying, well,
6 it doesn't rise to the level of personal jurisdiction, so
7 if we say, that's not really involved here, then it's
8 merely a personal protection, and I suppose it's a
9 personal protection for the purpose who -- for the person
10 who can give or refuse consent, and as long as your client
11 said, fine with me to be tried by a magistrate judge, why
12 isn't the end of it, that the end of it for you?

13 MS. FROST: Because my client never consented to
14 what happened here, which is that the Attorney General, by
15 failing to consent --

16 QUESTION: Well, you're saying my client never
17 consented that they could get by without giving a written
18 consent, but that -- I mean, that, it seems to me, is
19 turning the whole premise on its head.

20 MS. FROST: I have a slightly different point
21 I'm trying to make, Justice Souter, which is --

22 QUESTION: Okay. I should let you give your
23 answer, okay.

24 (Laughter.)

25 MS. FROST: Which is that at the end of this

1 proceeding, if the Attorney General's Office had said, oh,
2 we made a -- we didn't mean to consent, we're not filing a
3 written consent form, and we can't consent here, then
4 there would have been a new trial, and of course they were
5 only going to do that if they lost at trial, so when I
6 said my client didn't consent, my point was, my client
7 didn't consent to go through a proceeding where his
8 adversary had the opportunity to decide at the end of the
9 case whether they --

10 QUESTION: But if you're wrong about, that --
11 that the State Attorney General could have done that, and
12 if, as the petitioners' counsel said, they would have been
13 stuck. They went to trial. It's just like making a
14 general appearance. If you're wrong about that, then I
15 gather that you would lose, because then you would have,
16 if the defendants couldn't get out at the end of it by
17 saying, sorry, we never consented, if they couldn't get
18 out, then I think you must lose.

19 MS. FROST: I disagree, Your Honor, and here's
20 why, because the Magistrates Act establishes consent as
21 one of the vital thresholds to the parties, to the
22 magistrate's exercise of authority, and I do not believe
23 that the provision that you're reading from would apply in
24 a situation where Congress said, before a magistrate can
25 take over that Article III authority there must be both

1 designation and consent. I think if -- if the district
2 court here had not designated this magistrate, that is
3 also an error that could not be overlooked.

4 QUESTION: No, but I think you're answering a
5 different objection. I said, why isn't your consent
6 sufficient so that once you give it, you have no further
7 objection, and you said, the answer is, I didn't consent
8 to a trial in which they can sit back and wait and see
9 what happens and then say, oh, we didn't consent,
10 rendering the entire thing a waste of time.

11 Justice Ginsburg says, yeah, but if we say, they
12 don't have the right to pull their consent if they sat
13 there and implicitly consented, then you don't have that
14 problem at all, and that would be the end of the argument,
15 and I don't think you've answered that.

16 MS. FROST: Yes, I agree, and let me answer --
17 you're very right, Justice Souter, and let me answer the
18 question that I think you both are posing, which is, could
19 a harmless error standard be applied here? In other
20 words, if it is true that the only right is my client's,
21 and --

22 QUESTION: Well, that's another question, too,
23 but --

24 MS. FROST: Oh, I saw them as related, because
25 I -- if I understood your question correctly, what I

1 thought you were asking was --

2 QUESTION: Your answer was, I consented, so far
3 as I was concerned, to be tried. I didn't consent to give
4 them an option to go through an entire trial and then pull
5 the rug out if they didn't like the result. Justice
6 Ginsburg's suggestion and my suggestion is, if we -- this.
7 If we find that an implicit consent on their part is
8 sufficient, they can't pull the rug out, and that would be
9 the end of the issue so far as self protection is
10 concerned, and I don't --

11 MS. FROST: I agree.

12 QUESTION: I don't see a way around that.

13 MS. FROST: Yes, I -- I was -- I agree with Your
14 Honor, and that was why I was turning to the question --

15 QUESTION: That was why you were going to
16 another subject. No, I --

17 (Laughter.)

18 QUESTION: I'd do it, too. Okay.

19 (Laughter.)

20 MS. FROST: Well, respectfully, Your Honor, I
21 think this is related, because what I was trying to say is
22 that while I agree with you that once you say, if these
23 people go forward at trial, they're stuck, then there is
24 no question about, did my client get a raw deal here,
25 because everyone's bound, and they would have been bound

1 if they had lost, so that is why I am going on to the next
2 argument, which is harmless error, and whether or not that
3 would legitimately be something that a court could apply
4 in this situation, and this Court has said, in both it's
5 magistrate judge jurisprudence and also in its Article III
6 jurisprudence --

7 QUESTION: May I just interrupt with this
8 question? If you took Justice Ginsburg's suggestion that
9 just participation in the trial is enough to establish the
10 consent, that would mean that the consent need not be
11 given in advance of the beginning of the proceeding.

12 MS. FROST: Yes, and I think that --

13 QUESTION: And the statute's rather clear that
14 it has to come first, isn't it?

15 MS. FROST: Exactly, yes, Your Honor.

16 QUESTION: Well, is -- don't they give the
17 consent, though, when the magistrate judge sits down and
18 says, let's go, and -- and the -- I realize consent is not
19 failure to object. There's a distinction there, but if
20 the party sits there and the trial begins --

21 QUESTION: But may I ask, does he even have the
22 authority to say, let's go, before consent has been given?

23 (Laughter.)

24 MS. FROST: That is my argument, Justice
25 Stevens, which is that because the statute says upon

1 consent, the consent must come first, and therefore simply
2 by --

3 QUESTION: No, but the magistrate can say the
4 words, let's go -- I mean, he's got that First Amendment
5 right, and if he --

6 (Laughter.)

7 QUESTION: If the magistrate does say that, and
8 everybody sits there, as it were, with a smile on their
9 face, I would suppose that that was a consent at that
10 point. I mean, isn't -- couldn't you infer the consent at
11 that point?

12 MS. FROST: I agree that consent could be
13 inferred at that point, but I would disagree strongly that
14 Congress intended inaction to equal consent.

15 QUESTION: Of course, the statute says that
16 consent has to be communicated to the clerk.

17 MS. FROST: Yes, exactly. I agreed that consent
18 could be inferred from the parties' conduct, but that does
19 not meet the requirement of the statute.

20 QUESTION: There's one dysjunction, and you have
21 stressed, and I think rightly, that why was Congress doing
22 this? It didn't want parties to be coerced into getting a
23 magistrate instead of an Article III judge, it wanted to
24 assure voluntariness, and those two concerns are not
25 present in this case. I mean, nobody is suggesting the

1 State Attorney General is being coerced, or didn't do this
2 voluntarily, so the reasons for the provision don't exist,
3 don't match this case.

4 MS. FROST: I agree with you, Your Honor, but
5 then the question is, well, did Congress intend for some
6 different standard for consent to be applied in different
7 cases? The Congress --

8 QUESTION: Well, I think we could take notice,
9 couldn't we, that State Attorney Generals might not want
10 to antagonize magistrates. They're going to be -- they're
11 institutional litigants, will appear there all of the
12 time, and they might -- and they might be reluctant to
13 withhold consent, unless they could do it under the
14 anonymous basis provided for in the rules.

15 MS. FROST: Yes, I agree with that, Justice
16 Kennedy, and that would be another reason to say yes,
17 Congress' concerns actually do apply to the State Attorney
18 Generals, but in any case I think that what's relevant
19 here as well is the fact that Congress clearly -- and it
20 couldn't be more clear, both from the use of the word
21 jurisdiction in the statute, and from the fact that in the
22 legislative history Congress expressed these concerns
23 about voluntariness, that consent must be expressed.

24 The counsel for the petitioners, when she was
25 arguing, repeatedly referred to the fact that the local

1 rules and Rule 73(b) protect the voluntariness concerns.
2 They serve that purpose, and that is our point. That is
3 what Congress said consent is for, and that is why
4 Congress said consent cannot be something that simply is
5 implied as you go along.

6 Consent must be something you communicate to the
7 clerk. It must be something clear, and that is why eight
8 courts of appeals, we respectfully submit, have already
9 reached the conclusion there must be express consent.
10 They've reached the conclusion that without it, the court
11 has no jurisdiction, and both -- and all of these
12 decisions came before amendments to the Magistrates Act in
13 1990, in '96.

14 If Congress had an issue with both the consent
15 requirement being read as express consent and with courts
16 concluding they had no jurisdiction without it, then
17 Congress could have take action, taken action, and because
18 it didn't, I believe that that is a sign that Congress
19 meant what it said in the Magistrates Act.

20 QUESTION: Thank you, Ms. Frost.

21 Ms. Eskow, you have 3 minutes left.

22 REBUTTAL ARGUMENT OF LISA R. ESKOW

23 ON BEHALF OF THE PETITIONERS

24 MS. ESKOW: Because the statute was designed to
25 protect the voluntariness of the parties, and the local

1 rules and the Federal rules also serve that purpose, and
2 here you have no party suggesting that they were coerced
3 or involuntarily dragged before a magistrate judge rather
4 than an Article III judge, to reverse in these
5 circumstances, as the Fifth Circuit did, to sua sponte
6 investigate consent when there is no question, where no
7 one is claiming to have been involuntarily dragged before
8 the magistrate judge, would be to import some sort of
9 automatic, per se, plain error, subject matter
10 jurisdictional principle into a context that is not based
11 on subject matter jurisdiction but, rather, the
12 particularities of a particular officer presiding and, as
13 Justice Breyer noted, the de facto officer doctrine exists
14 to insulate judgments from attack that have a technical
15 deficiency, for example, not signing a consent form

16 And because all parties voluntarily proceeded in
17 this fashion, their consent should not have been
18 questioned after the judgment was entered, and there is no
19 basis to find any sort of harm to any of the parties when
20 their Article III rights were not violated in any respect,
21 and for these reasons we would ask that you reverse the
22 judgment of the Fifth Circuit.

23 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Eskow.

24 The case is submitted.

25 (Whereupon, at 11:03 a.m., the case in the

1 above-entitled matter was submitted.)

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