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IN THE SUPREME COURT OF THE UNITED STATES

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SYNGENTA CROP PROTECTION, :  
INC. , ROBERT BABB, EDEE :  
TEMPLET, AND KENNETH A. :  
DEVUN, :  
Petitioners :

v. : No. 01-757

HURLEY HENSON. :

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Washington, D. C.  
Tuesday, October 15, 2002

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
10:05 a.m

APPEARANCES:

HENRY B. ALSOBROOK, JR. , ESQ. , New Orleans, Louisiana; on  
behalf of the Petitioners.

DAVID J. BEDERMAN, ESQ. , Atlanta, Georgia; on behalf of  
the Respondent.

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21  
22  
23  
24  
25

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
HENRY B. ALSOBROOK, JR. , ESQ.	
On behalf of the Petitioners	3
DAVID J. BEDERMAN, ESQ.	
On behalf of the Respondent	22
REBUTTAL ARGUMENT OF	
HENRY B. ALSOBROOK, JR. , ESQ.	
On behalf of the Petitioners	33

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

2 (10:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in No. 01-757, Syngenta Crop Protection, Inc. v.  
5 Hurley Henson.

6 Mr. Alsobrook.

7 ORAL ARGUMENT OF HENRY B. ALSOBROOK, JR.

8 ON BEHALF OF THE PETITIONERS

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

11 In Kikkonen v. Guardian Life, this Court  
12 hypothesized the very situation that we have before you  
13 this morning because here we have a nationwide class  
14 action settlement where the court specifically by judgment  
15 retained jurisdiction to manage the settlement as well as  
16 enforce it. A critical part of that settlement was the  
17 dismissal of this case. However, when class counsel went  
18 to dismiss the case, as the Eleventh Circuit pointed out  
19 and as the district court pointed out, his efforts were  
20 thwarted and the case was not dismissed.

21 QUESTION: Mr. Alsobrook, I see you've changed  
22 the question presented from the time in your certiorari  
23 petition to your opening brief. And the question  
24 presented, when we granted, referred to 28 U.S.C., section  
25 1441, and now you have dropped your reference to that.

1 Does that mean you're abandoning reliance on 1441 or  
2 simply broadening the question?

3 MR. ALSOBROOK: No, sir. We -- we're saying  
4 that under 1441 that because the district court retained  
5 jurisdiction, that that was original jurisdiction to  
6 remove the matter, and that actually, Your Honor, when we  
7 removed this, they -- the majority of circuit courts of  
8 appeals, namely the second, sixth, seventh, and eighth,  
9 had said that the proper vehicle to remove this was the  
10 All Writs Act. And that is what we are claiming today, as  
11 well as 28 U.S.C. 1367 ancillary jurisdiction, and we have  
12 set that out in our brief.

13 QUESTION: But you have no right to remove under  
14 1441 because there wasn't complete diversity in the  
15 Louisiana suit. Isn't that right?

16 MR. ALSOBROOK: That is correct.

17 QUESTION: So you can't rely on 1441 and that's  
18 conceded.

19 MR. ALSOBROOK: We -- we can -- our reliance on  
20 1441 was based on the fact that the Alabama court retained  
21 original jurisdiction and --

22 QUESTION: But that's not -- nothing in 41 rests  
23 on that. It has to be a case that would qualify for  
24 original jurisdiction, and you don't have that.

25 MR. ALSOBROOK: Yes, Your Honor, but we -- we

1 construed that as being a venue rather than a -- a --  
2 because the Alabama court had original jurisdiction.

3 And certainly under 1651 --

4 QUESTION: What did you construe as being venue?

5 MR. ALSOBROOK: The -- the fact that we had to  
6 take it to a Federal court in the district where the State  
7 court suit lay, and then it was immediately transferred to  
8 the -- to the Alabama court.

9 QUESTION: Yes, you -- you can't remove a case  
10 to a Federal court outside of the district in which the  
11 State court sat, is my understanding.

12 MR. ALSOBROOK: That's right, Your Honor.

13 We took -- we took our road map from Agent  
14 Orange Product Liability. There they had a Texas --

15 QUESTION: Who is they?

16 MR. ALSOBROOK: There, there was a --

17 QUESTION: What court are you talking about?

18 MR. ALSOBROOK: We're talking about the Second  
19 Circuit. And --

20 QUESTION: Initially the Eastern District of New  
21 York, Judge Weinstein's --

22 MR. ALSOBROOK: Yes.

23 QUESTION: -- order, which was in no way based  
24 on 1441. It was based on 1651.

25 MR. ALSOBROOK: But, Your Honor, also in that

1 case was the case of Ryan, and in Ryan, it was brought by  
2 to class members in the State court in Texas. And it was  
3 removed to the Federal court in Texas and then transferred  
4 to the Eastern District of New York. And that was our  
5 road map for getting this case to -- back to Alabama.

6 QUESTION: But that was all done under the All  
7 Writs Act or what they thought was the authority granted  
8 by 1651.

9 MR. ALSOBROOK: Yes, and we also, Your Honor --  
10 in our removal petition, we pled the All Writs Act, as  
11 well as ancillary jurisdiction under 1367.

12 QUESTION: Well, what is your theory under the  
13 All Writs Act? Is your theory that removal is itself --  
14 comes under the All Writs Act?

15 MR. ALSOBROOK: We contend that -- that in order  
16 for the Court --

17 QUESTION: Can't you answer the question yes or  
18 no?

19 MR. ALSOBROOK: Oh, I'm sorry. I'm sorry. Yes.

20 QUESTION: I thought the All Writs Act required  
21 the existence of some sort of a common law writ like  
22 certiorari or prohibition or injunction or something like  
23 that. There -- there never was a common law writ of  
24 removal.

25 MR. ALSOBROOK: That is correct, Your Honor.

1                   But the jurisprudence, particularly the Agent  
2 Orange case --

3                   QUESTION: Well, but can you cite any of our  
4 cases that support you in this respect?

5                   MR. ALSOBROOK: Well, I can cite the New York  
6 Telephone case where the Court said that -- that removal  
7 was -- not removal, but a writ under the All Writs Act was  
8 -- was proper to avoid the frustration of judgment, and  
9 that was -- that was certainly the situation here.

10                  QUESTION: But -- but that was a different --  
11 that was an existing writ. Here -- here you're saying, in  
12 effect, that removal is -- is itself a writ. And I simply  
13 don't see how the cases support you there.

14                  MR. ALSOBROOK: I agree with that, Your Honor.

15                  QUESTION: Do you agree that the All Writs Act  
16 is not a source of original jurisdiction?

17                  MR. ALSOBROOK: Yes, ma'am Yes, Your Honor, by  
18 the --

19                  QUESTION: Why -- why then didn't you try to get  
20 an injunction in the district court in Alabama?

21                  MR. ALSOBROOK: There were two reasons, Justice  
22 O'Connor. First is that an injunction would not dismiss  
23 the case. An injunction would enjoin the -- the State  
24 court suit from going forward.

25                  QUESTION: Yes.

1           MR. ALSOBROOK: And we would have had -- our  
2 client would have had to carry this as a liability on  
3 their books ad infinitum

4           QUESTION: Well, couldn't the injunction have  
5 ordered the party to dismiss the case?

6           MR. ALSOBROOK: Yes, they did -- they could,  
7 Your Honor, and --

8           QUESTION: But then why -- why wouldn't that be  
9 sufficient?

10          MR. ALSOBROOK: I suppose it would have been.

11          QUESTION: But if that's so, then why don't --  
12 why are we trying to read into 1441 language that isn't  
13 there and read requirements out of 1651, requirements that  
14 are there, when there was another way, totally consistent  
15 with the words, the statute, everything else, that you  
16 could have achieved any legitimate objective that you had?

17          MR. ALSOBROOK: Well, Justice Breyer, at the  
18 time that we did this, as I said earlier, there was -- the  
19 majority of Federal circuit courts said that the proper  
20 vehicle was to remove the case and get it before the court  
21 where -- that had issued the judgment. Today with the  
22 number of class action settlements that are going on,  
23 there must be some kind of way by which a Federal court  
24 who issues a judgment can enforce that judgment across  
25 State lines.



1           QUESTION: There is. Isn't that just in your  
2 answer to Justice O'Connor and Justice Kennedy? You  
3 provided the way.

4           MR. ALSOBROOK: Yes.

5           QUESTION: The -- the only loose end, it seems  
6 to me, that -- that you have left, after your answers to  
7 Justices O'Connor and Kennedy, is the problem you say your  
8 client would have in carrying liability on the books until  
9 the second action was somehow finally terminated. But  
10 isn't the answer to that that once you had gotten either  
11 the injunction or simply the -- the order to the parties  
12 under the retained jurisdiction, you then could have gone  
13 into court in the second suit and said, they cannot  
14 prosecute the suit? It has been enjoined. Therefore,  
15 please dismiss it. Wouldn't you have gotten your  
16 dismissal and wouldn't that have taken the -- the  
17 liability off the book?

18          MR. ALSOBROOK: I don't know, Your Honor.

19          QUESTION: Well, I -- I guess why wouldn't that  
20 have been the appropriate course?

21          MR. ALSOBROOK: I -- I presume that the State  
22 court under those circumstances would dismiss it, but we  
23 don't know that as a matter of fact.

24          QUESTION: I -- I was thinking about different  
25 writs, and you've researched this more thoroughly than I,

1 I suspect. I thought the closest thing here was a writ of  
2 certiorari. This is like a writ of certiorari, but a writ  
3 of certiorari is from a superior court to an inferior  
4 court. And I -- I don't think that's the way we treat  
5 State courts and Federal courts.

6 MR. ALSOBROOK: That is correct, Your Honor.

7 And another reason --

8 QUESTION: And -- and -- which -- and so that  
9 the absence of that kind of -- of writ indicates to me  
10 that the safer course, the more prudent course is to rely  
11 on the standard equitable remedies such as injunction that  
12 we've been discussing.

13 MR. ALSOBROOK: That is correct, Your Honor.

14 QUESTION: Except that a lot of other lawyers  
15 had -- had relied on the course that you relied on.

16 MR. ALSOBROOK: That's correct, and a lot of --

17 QUESTION: You were following what had been a  
18 successful course in the past.

19 MR. ALSOBROOK: And not only that, a lot of  
20 judges.

21 QUESTION: Well, to be sure.

22 MR. ALSOBROOK: And so there were a plethora of  
23 district court cases that allowed the removal under the  
24 All Writs Act and took jurisdiction where they had  
25 jurisdiction originally under the cases of NAACP, under

1 the Agent Orange case, and the Sixth and Seventh Circuit  
2 cases.

3 QUESTION: Were there any cases under the  
4 relitigation exception to the Anti-Injunction Act that  
5 used that device, the antisuit injunction, to accomplish  
6 the same thing?

7 MR. ALSOBROOK: Well, Your Honor, no. The Tenth  
8 Circuit had ruled that the -- that the All Writs Act could  
9 not be used in this -- in the method that we used it. We  
10 are not unmindful of Rivet v. Regions, but we -- our  
11 situation there -- our situation in this case is much  
12 different --

13 QUESTION: But that was -- that was a question  
14 of fighting it out in the State court, and it's not the  
15 antisuit injunction that we're discussing now. Rivet said  
16 it's an -- preclusion is an affirmative defense. You can  
17 raise it in the State court that prior Federal litigation  
18 precludes this case.

19 The other way to go is to ask the court that  
20 entered the judgment, the class action judgment, the  
21 nationwide class action, to enjoin the party who was  
22 supposed to have settled the claim from proceeding in the  
23 -- in the original case when part of the bargain was to  
24 dismiss it. So I -- I'm just curious why you didn't  
25 attempt that route.

1                   MR. ALSOBROOK: We didn't attempt that, Your  
2 Honor, because the majority of the circuits at the time  
3 approved the All Writs Act as the vehicle with which to  
4 remove the case and to get it back before the district  
5 court.

6                   Additionally, we felt that it -- State courts  
7 have cases removed all the time to Federal court. And we  
8 thought it would be less onerous to the State court judge  
9 to have it removed rather than being enjoined by a Federal  
10 court.

11                  QUESTION: I don't understand that because right  
12 -- built right into the removal provision is a command  
13 that the State court shall proceed no further. So the  
14 removal petition acts as -- as a -- an injunction against  
15 the State court proceeding further.

16                  MR. ALSOBROOK: Well, the removal petition --  
17 actually the court loses jurisdiction of it at that time  
18 because they -- it -- it is removed to -- to the Federal  
19 court. And there again, Justice Ginsburg, the -- we felt  
20 that it was less onerous and there was some jurisprudence  
21 or some dicta and some legal writing that indicated that  
22 it would be less onerous to the State court judge to have  
23 it removed rather than have it enjoined.

24                  QUESTION: May I ask this question? Looking at  
25 the language of the All Writs Act, which authorizes all

1 courts established by act of Congress to issue writs  
2 necessary or appropriate in aid of their respective  
3 jurisdictions and so forth.

4 Now, in this case, you removed from the Federal  
5 -- to the Federal court in Louisiana in order to protect  
6 the jurisdiction of the Federal court in Alabama.

7 MR. ALSOBROOK: Yes, sir.

8 QUESTION: How do you square that with the  
9 language, respective jurisdictions?

10 MR. ALSOBROOK: Well, Your Honor, there again we  
11 had to rely on Agent Orange.

12 QUESTION: You don't rely on the statute,  
13 though.

14 MR. ALSOBROOK: Well, we relied on the statute  
15 because it says in the aid of their respective  
16 jurisdiction, and --

17 QUESTION: Don't you think that refers to the  
18 court to which removal would take -- would occur? And  
19 here it's the Louisiana Federal court, not the Alabama  
20 Federal court.

21 MR. ALSOBROOK: Yes, sir, and we -- it was our  
22 position that there -- there respective jurisdiction  
23 related to the Alabama court. That is our position.

24 QUESTION: Even though you removed to the  
25 Louisiana court.

1           MR. ALSOBROOK: We had to, Your Honor. That --  
2 under 1441, we had no alternative but to remove it. We  
3 couldn't have removed it from the Louisiana court to the  
4 Alabama court because 1441 by venue says that it has to go  
5 to the Federal district court in the -- of the district  
6 where the case lies.

7           QUESTION: But 1441 wasn't available to you. So  
8 as long as something new is being created in -- under  
9 1651, why not say that -- that the court that has  
10 jurisdiction over the class action can issue orders to  
11 stop inconsistent litigation?

12           MR. ALSOBROOK: That could be done under the  
13 Anti-Injunction Act, Your Honor. There's no doubt about  
14 that. And as -- as --

15           QUESTION: But do -- as far as -- you're  
16 creating a removal that doesn't exist by statute. So not  
17 -- why not go all the way and say, under the All Writs  
18 Act, we can remove to the -- from the Louisiana State  
19 court to the Alabama court? Why touch base with 1441 when  
20 1441 is inapplicable?

21           MR. ALSOBROOK: Because 14 -- we didn't know of  
22 any other vehicle that would allow us to remove it from  
23 Louisiana to Alabama. Even the All Writs Act would not  
24 allow us to remove it across State lines or even out of  
25 the district. Certainly if this case had been brought in

1 Mobile, then we wouldn't be here today because the -- the  
2 court in Mobile would have authority to -- to remove it to  
3 that district. But it was brought -- brought across State  
4 lines. And again, we followed the road map that had been  
5 set out for us in Agent Orange.

6 QUESTION: But you still have problems even if  
7 it were to the Middle District of Alabama, because you  
8 don't have complete diversity in the Louisiana action.  
9 Therefore, 1441 doesn't apply. You would still have to  
10 use your All Writs Act theory even if the case were  
11 pending -- if the Federal and State court were in the same  
12 State.

13 MR. ALSOBROOK: Well, Your Honor, we feel that  
14 -- that under -- under the hypothet set out in Kikkonen  
15 that the Alabama court would have had jurisdiction to take  
16 that case.

17 QUESTION: Mr. Alsobrook, what is -- what is  
18 this writ called? I mean, Lyndon Johnson is -- is once  
19 supposed to have asked somebody in the Justice Department  
20 to get him a writ of fixitatis.

21 (Laughter.)

22 QUESTION: What -- what is this writ called? A  
23 writ of removal?

24 MR. ALSOBROOK: This could be a -- well, there  
25 is no writ for this, Judge -- Justice. There isn't any

1 writ for this.

2 QUESTION: Well -- well, then how can you do it  
3 under the All Writs Act?

4 MR. ALSOBROOK: Because in other cases, the All  
5 Writs Act has been used to -- to remove cases to avoid a  
6 State court case from thwarting a Federal judgment.

7 QUESTION: Certiorari I guess is the closest.  
8 Historically you could have sent certiorari -- a court to  
9 any other court and to any administrative agency. I guess  
10 that would be the closest historically. Would it?

11 MR. ALSOBROOK: Well, I think Justice Kennedy  
12 brought that up and --

13 QUESTION: Yes. As we've come to limit it, it's  
14 -- it's higher to lower, but if you go back into history,  
15 it wasn't, I don't think. I mean, has it come down to  
16 saying, look, you were in a situation where you thought  
17 that the signer of the stipulation was flat out violating  
18 it, and you didn't know what to do, so you read the  
19 precedent, and there was precedent that suggested, under  
20 the lower court precedent, that this was the right thing  
21 to do. So you did it.

22 MR. ALSOBROOK: Yes, sir.

23 QUESTION: Okay. Now, if you turn out to be  
24 wrong, what should we do next, assuming you're right about  
25 the stipulation? They just flat-out wouldn't follow it.



1 And -- and suppose you were wrong about the route. Have  
2 you any suggestion for us as to what to do? Do we -- I  
3 guess we'd have to dismiss -- order this case dismissed  
4 without prejudice to your going to the Alabama court and  
5 -- and asking them to enjoin? Or what is your suggestion  
6 about what we should do --

7 MR. ALSOBROOK: Well --

8 QUESTION: -- if you're right on the merits of  
9 this thing?

10 MR. ALSOBROOK: If we're right on the merits,  
11 Your Honor, what I suggest you should do is reverse the  
12 Eleventh Circuit.

13 QUESTION: I don't mean the merits of the  
14 procedural issue. Suppose that you're wrong about that,  
15 hypothetically, but you're right about your basic  
16 instinct, that they signed a piece of paper saying, we  
17 promise to dismiss this case in the State court and then  
18 they didn't. They just didn't do it. That was your view  
19 of this. Right?

20 MR. ALSOBROOK: Yes, sir.

21 QUESTION: All right. So have you any  
22 suggestion for us about how we might help you achieve that  
23 ultimate objective, and by us, I don't mean this Court  
24 particularly. I mean the law. The law should provide a  
25 way that you get that objective if you're right.

1                   MR. ALSOBROOK: I would -- the alternative I  
2 would suggest is to remand the matter to the Federal  
3 district court in Mobile with instructions for them to  
4 file an injunction or a contempt proceeding against the  
5 party --

6                   QUESTION: But that would be up to you to -- I  
7 mean, the court doesn't initiate an injunction. You'd  
8 have to ask for it. And I assume you would be free to do  
9 it. If all this Court would decide, if it decided against  
10 you, was that the All Writs Act is not available for this  
11 purpose, that would leave you as though you had never  
12 pursued that route and you could pursue another.

13                   There's something curious about this case, and  
14 maybe you can -- you can help me understand it. When the  
15 plaintiff's class counsel in Price went into the Louisiana  
16 court and said, Louisiana court, drop that case, dismiss  
17 that case, the defense counsel wasn't there.

18                   MR. ALSOBROOK: No.

19                   QUESTION: Why not?

20                   MR. ALSOBROOK: Your Honor, this is not in the  
21 record but I was that counsel, and I had talked with the  
22 class counsel days before, and he assured me that he would  
23 take care of it and there would be no problem. We didn't  
24 anticipate this happening because the language of the  
25 stipulation of settlement, which the respondent signed,

1 was so specific that we couldn't imagine that the State  
2 court judge would not dismiss it on the motion of class  
3 counsel.

4 QUESTION: So you were relying on plaintiff's  
5 counsel --

6 MR. ALSOBROOK: Yes, ma'am

7 QUESTION: -- to do -- to do that job for you  
8 and felt you didn't need to appear in the State court.

9 MR. ALSOBROOK: He actually told us we didn't  
10 have to appear, that he would take care of it.

11 QUESTION: Mr. Alsobrook, if we disagree with  
12 you and reverse the -- and affirm the Eleventh Circuit, we  
13 would be affirming a decision that says in its conclusion,  
14 we accordingly vacate the district court's order  
15 dismissing Henson and remand with instructions for the  
16 court to remand Henson to Louisiana State court.

17 We do not, however -- this is part of what it  
18 said -- we do not, however, imply that the district court  
19 may not by injunction force Henson's dismissal. So, you  
20 know, we wouldn't have to say that -- that our decision  
21 here was without prejudice. The decision of the Eleventh  
22 Circuit was said to be without prejudice. So you -- you'd  
23 be able to, as far as the Eleventh Circuit opinion is  
24 concerned, get -- get the injunction.

25 MR. ALSOBROOK: Yes, sir, but the --

1 QUESTION: I wonder why it wasn't -- wasn't more  
2 efficient for you to seek the injunction instead of coming  
3 up here.

4 MR. ALSOBROOK: Well --

5 QUESTION: I guess -- I guess --

6 MR. ALSOBROOK: -- Justice Scalia --

7 QUESTION: -- your answer is better to have two  
8 bites at the apple than one. Right?

9 MR. ALSOBROOK: Yes, sir. And --

10 QUESTION: Even if you lose here, you can then  
11 seek the injunction.

12 MR. ALSOBROOK: And also because the majority of  
13 the circuits have approved the procedures that we followed  
14 in this case. You have the Second Circuit; you have the  
15 Sixth, Seventh, and Eighth. And --

16 QUESTION: Well, what was the reasoning of those  
17 circuits?

18 MR. ALSOBROOK: The reasoning of those circuits  
19 were that they had retained jurisdiction to enforce their  
20 judgments. For example, if you take NAACP II -- rather,  
21 NAACP I, the court remanded the case to the circuit court.  
22 NAACP II, the court said that because they had retained  
23 jurisdiction in an order, that they could go forward under  
24 the All Writs Act.

25 QUESTION: And what -- did they specify what

1 kind of a writ it was they were talking about?

2 MR. ALSOBROOK: No, sir.

3 QUESTION: I should think that might have made  
4 you a little hesitant to rely.

5 MR. ALSOBROOK: Well --

6 QUESTION: It's a good defense to a malpractice  
7 action.

8 MR. ALSOBROOK: Well, we had to rely on what the  
9 courts were telling us, Your Honor -- I mean, Mr. Chief  
10 Justice.

11 QUESTION: Were those cases in which there were  
12 two -- two different districts involved?

13 MR. ALSOBROOK: The Agent Orange case, there  
14 were two different districts, yes.

15 QUESTION: But all of them were not, were they?

16 MR. ALSOBROOK: No.

17 QUESTION: Weren't some of them -- yes.

18 It seems to me it's quite different if you're  
19 remanding to the court where the problem arose than  
20 remanding to a different court.

21 MR. ALSOBROOK: That's right.

22 QUESTION: Yes. Or removing, rather.

23 MR. ALSOBROOK: That's right.

24 QUESTION: Do you wish to save the --

25 MR. ALSOBROOK: Yes, sir.

1 QUESTION: -- remainder of your time for  
2 rebuttal?

3 MR. ALSOBROOK: Thank you.

4 QUESTION: Very well.

5 Mr. Bederman.

6 ORAL ARGUMENT OF DAVID J. BEDERMAN

7 ON BEHALF OF THE RESPONDENT

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

10 The All Writs Act may not be relied upon to  
11 remove an otherwise unremovable case. It is Congress's  
12 province to define the limits of removal, and chief of  
13 these is the requirement of original jurisdiction in  
14 Federal court.

15 QUESTION: Mr. Bederman, I just asked your --  
16 your friend to -- to explain why he was up here. Why are  
17 you up here? Because even if you win, the case will --  
18 you know, don't you think that an injunction will issue?

19 MR. BEDERMAN: Very likely Mr. Alsobrook will  
20 apply, as the Eleventh Circuit invited them to, for an  
21 injunction. Such an injunction could proceed because  
22 under this Court's decision in Parsons Steel, the State  
23 court has yet to issue a conclusive ruling about  
24 preclusive effect. And therefore, they're at liberty to.  
25 We are, by no means, conceding the -- the substantive

1 merits of the injunction motion whether they would have a  
2 substantial likelihood of success on the merits, but we  
3 would certainly agree that they have the ability to file  
4 an injunction immediately.

5 QUESTION: Why -- why -- okay. What -- what is  
6 at issue on the merits?

7 MR. BEDERMAN: The issue on the merits would be  
8 presumably the proper construction of the settlement  
9 agreement --

10 QUESTION: Of the settlement agreement?

11 MR. BEDERMAN: That's right. And, of course,  
12 whether an injunction, narrowly tailored to the parties,  
13 would, as -- as the Justices have already indicated, be  
14 properly addressed to the parties to order dismissal of  
15 the case.

16 QUESTION: Okay. So you -- you would -- you  
17 would contest the injunction just as you're --

18 MR. BEDERMAN: We would contest the merits of  
19 the injunction. We would not context the ability of them  
20 to file for the --

21 QUESTION: You can say in a sentence -- as I  
22 read this, it says, class counsel hereby stipulates that  
23 the related case, including any and all claims, will be  
24 dismissed. And then it defines related case to refer to  
25 Hurley Henson by number in the State of Louisiana.

1 MR. BEDERMAN: That's right, Justice Breyer.

2 QUESTION: So I'm just curious what the defense  
3 would be.

4 MR. BEDERMAN: The only defense that -- that I  
5 could imagine is the ambiguity in that provision, as you  
6 were reading, at 38a of the joint appendix, that the  
7 concern about whether including any and all claims,  
8 including without any limitation any claims defined  
9 herein. And what has not been made clear is that there  
10 were subsequent amendments to the stipulation, which made  
11 clear that certain classes of claims were excluded.

12 QUESTION: Well, I guess that isn't before us  
13 here --

14 QUESTION: It's not before us.

15 QUESTION: -- is it?

16 MR. BEDERMAN: Certainly not, Justice O'Connor.  
17 What's before this Court is what is the proper procedural  
18 mechanism to be used here.

19 QUESTION: And several circuits have allowed the  
20 All Writs Act to be used in this fashion, do you think?

21 MR. BEDERMAN: In this fashion? Yes, Justice  
22 O'Connor. That clearly this is what I would characterize  
23 as a newfangled procedural device that was launched by the  
24 Second Circuit after the Yonkers and Agent Orange cases;  
25 that it has developed, as I think Mr. Alsobrook fairly



1 characterizes, a momentum of its own in the court of  
2 appeals.

3 QUESTION: In the Yonkers case, the United  
4 States Government urged the court to take that position,  
5 didn't it? So it wasn't something newfangled that the  
6 court dreamed up on its own when it was the Department of  
7 Justice urging it.

8 MR. BEDERMAN: That is true, but my recollection  
9 of -- of the procedural background with the Yonkers case  
10 was that there was some concern about how Judge Sand  
11 drafted the consent decree in that case. He -- as was  
12 later acknowledged, Judge Sand had been perhaps misled by  
13 certain representations made by the Archdiocese of New  
14 York and therefore he did not include a provision that  
15 would allow for a subsequent injunction or -- or a  
16 retention of jurisdiction. That may have led the court in  
17 that circumstance to invoke All Writs Act.

18 But there, again, the complete alternative was  
19 an injunction that could have issued in these New York  
20 land use proceedings that were pending in State court. So  
21 even in Yonkers, which presents, I think, analytically a  
22 very different context here, not a preclusion case, not a  
23 case that turns on the construction of an earlier Federal  
24 court judgment or settlement, there was the availability  
25 of injunctive relief. In that case, the Second Circuit

1 bypassed that -- that reasoning and went straight towards  
2 an All Writs Act basis --

3 QUESTION: But you said you would defend against  
4 injunctive relief on the ground that the settlement was  
5 narrower than --

6 MR. BEDERMAN: We would defend essentially on  
7 the merits, is that an injunction should not issue because  
8 our construction of -- of the settlement is --

9 QUESTION: Well, why didn't you seek that  
10 construction from the court that issued -- that -- that  
11 entered the settlement? Why go to another Federal court?  
12 Louisiana doesn't know anything about this case -- instead  
13 of saying, Alabama Federal District Judge, please clarify  
14 the scope of the settlement so that we can either go on  
15 with our case or know that we can't?

16 MR. BEDERMAN: We believe that the proper course  
17 is -- in view of the precise enumeration of the -- of the  
18 case in State court, that the proper course was to amend  
19 the petition and seek a resolution.

20 Mr. Henson and his counsel could have very well  
21 initiated an entirely new case and evaded the terms of --  
22 of the settlement in that fashion. They agreed and  
23 decided that the proper course, the more forthright course  
24 was to seek leave to amend the petition to make clear that  
25 certain claims were dropped by virtue of the earlier

1 settlement, but there were remaining claims in play. And  
2 it was believed that this was the most forthright approach  
3 to -- to use here.

4 I would credit, Justice Ginsburg, that it may  
5 have been equally appropriate to go back to the Federal  
6 court, seek a declaratory judgment or some kind of  
7 decision in that fashion. But I believe that this course  
8 was certainly honest and forthright on the part of counsel  
9 below.

10 I -- I hardly think it may be necessary to  
11 indicate that the All Writs Act does not confer  
12 jurisdiction under 1441, as was already made clear in  
13 certainly the questioning and certainly in view of  
14 petitioners' discussion. Original jurisdiction has always  
15 been required and has been upheld in countless cases. And  
16 moreover, the All Writs Act textually demands that Federal  
17 courts issue writs, quote, "in aid of their respective  
18 jurisdiction."

19 Petitioners' argument essentially would read out  
20 "respective" from that provision in the All Writs Act in  
21 section 1651. Clearly the All Writs Act does not  
22 independently grant original jurisdiction, and this has  
23 been consistently upheld by this Court for nearly 200  
24 years from the McIntire decision in 1813 to as recently as  
25 Clinton v. Goldsmith in 1999.

1           Moreover, issuance of writs under the All Writs  
2 Act is certainly conditioned by the statutory requirement  
3 that such be necessary or appropriate. And as this Court  
4 indicated in Pennsylvania Bureau of Corrections, this is  
5 essentially a threshold requirement for invocation of the  
6 All Writs Act. And in the Goldsmith case, as recently as  
7 3 or 4 years ago, this Court made clear that the All Writs  
8 Act can't be used as a form of cure-all to -- to fix what  
9 would otherwise be the availability of other statutory  
10 mechanisms which are not otherwise complied with.

11           QUESTION: What would be wrong with the Eleventh  
12 Circuit saying in substance it's the same thing? What  
13 we're trying to do is to stop this litigation from going  
14 forward in Louisiana. So even though the defendants used  
15 the wrong device, we'll treat it as though it had been in  
16 application for an antisuit injunction?.

17           MR. BEDERMAN: Well, if -- if, of course, the  
18 Eleventh Circuit had construed petitioners' filings in  
19 that way and -- and had indicated that injunction was the  
20 proper mode and essentially substituted, as they -- as  
21 they seem to invite in their closing lines of their  
22 decision, I think that would be appropriate. But there is  
23 certainly a difference in form and in content between a  
24 removal and a narrowly tailored injunction, and I think  
25 the Eleventh Circuit was correct.

1           And other courts of appeals that have so held  
2 have indicated that there are profound federalism concerns  
3 that are implicated in allowing essentially a common law  
4 writ of removal to be used to evade what is Congress's  
5 role in dictating the mechanism for removal and -- and  
6 patrolling the boundary and the balance of authority  
7 between State courts and Federal courts in this country.

8           There is, as -- as the Court indicated, no such  
9 thing as a -- as a common law writ of removal. There was  
10 no analogy in English common law at the time of the  
11 founding. The -- a writ of certiorari, as Justice Breyer  
12 indicated, would have been -- could have been potentially  
13 directed, I would agree, to -- to courts. But in no  
14 circumstance was there analogy in English common law for  
15 the court of one sovereign to remove cases from -- from  
16 another sovereign. And unless we delve into a kind of  
17 obscurantist legal history, I think that would be clear.  
18 But there was, in fact, no analogy for that. And in  
19 truth, there's no such thing as a writ of removal --

20           QUESTION: Administrative agencies.

21           MR. BEDERMAN: I presume that in English common  
22 law, to the extent that administrative agencies existed,  
23 the ones I'm aware of, of course, were quite inchoate.  
24 It's potential that you --

25           QUESTION: Sewer commissioners, I think is --

1           MR. BEDERMAN: That's right. Or -- or sanitary  
2 commissions in London. One might imagine that.

3           But again, at issue here is -- is removal, which  
4 this Court has always indicated is a creature of statute  
5 because of the profound federalism concerns.

6           And essentially what -- what petitioners would  
7 have this Court do is allow, by use of the All Writs Act  
8 or analogous theories of ancillary enforcement  
9 jurisdiction, to achieve what is otherwise unavailable by  
10 statute. And as this Court clearly said in the  
11 Pennsylvania Bureau of Corrections case, although the All  
12 Writs Act empowers Federal courts to fashion extraordinary  
13 remedies when the need arises, it does not authorize them  
14 to issue ad hoc writs whenever compliance with statutory  
15 procedures appears inconvenient or less appropriate.

16           If I can say just a word or two about ancillary  
17 enforcement jurisdiction, to the extent to which  
18 petitioners appear to be relying on it. This Court has  
19 said very clearly in both Kikkonen, where the Court  
20 indicated that ancillary enforcement jurisdiction may be  
21 used in view of what courts require to perform their  
22 functions, and in Peacock, where the Court made very clear  
23 that ancillary enforcement jurisdiction is a creature of  
24 necessity, there can be no showing of necessity here by  
25 virtue of the availability of alternate mechanisms,

1 whether in the form of an injunction properly issued  
2 against the parties and consistent with the relitigation  
3 exception under the Anti-Injunction Act, or even,  
4 preferably, recourse to State courts to properly rule on  
5 the preclusive effect of earlier Federal court judgments  
6 and settlements, as this Court made clear.

7 QUESTION: What about contempt? I suppose you  
8 could have been -- your client could have been held in  
9 contempt in that court, couldn't it? I mean, assuming  
10 you're wrong -- that he's right --

11 MR. BEDERMAN: In the -- in the Federal court.  
12 And of course, obviously sanctions were imposed below by  
13 the Federal district court, and that's, of course, not --  
14 no longer at issue before this Court, but that court has  
15 that power.

16 So certainly there are a variety of mechanisms  
17 to ensure compliance with -- with court orders. It is not  
18 respondent's submission to suggest that we take an  
19 important tool out of the toolbox of Federal courts in  
20 order to maintain the dignity and the enforcement of their  
21 judgments. But --

22 QUESTION: A number of courts that have allowed  
23 the 1651 All Writs removal have said that they thought  
24 that that was less offensive. That was more faithful to  
25 the federalism concern, that -- that issuing an antisuit

1 injunction was more offensive to the State than this  
2 removal device.

3 MR. BEDERMAN: I would respectfully disagree  
4 with that characterization. The assumption seems to be  
5 that the injunction would somehow issue to the State  
6 court, and as of course we all know, that would never be  
7 the case. That truly would be offensive. The -- the  
8 injunction would issue to the parties, however, with  
9 instructions to -- to dismiss or an even maybe even more  
10 narrowly tailored instrument.

11 QUESTION: Well, it may be that a particular  
12 remedy in a particular situation might be less offensive  
13 to federalism, but that's a concern that should be  
14 addressed by Congress, isn't it --

15 MR. BEDERMAN: Absolutely.

16 QUESTION: -- in view of this statute?

17 MR. BEDERMAN: Absolutely. It is -- if Congress  
18 wishes to address the availability of removal in this  
19 class action context -- and there is pending legislation  
20 today to that effect -- Congress is free to do so.

21 QUESTION: And -- and if Congress wants to be  
22 more offensive, it presumably can.

23 (Laughter.)

24 MR. BEDERMAN: I wouldn't speak to the  
25 propensity of Congress in those circumstances, but they



1 could also amend the Anti-Injunction Act to also change  
2 the balance of power between State courts and Federal  
3 courts. We take no issue with that.

4 Your Honors, unless there are any further  
5 questions.

6 QUESTION: Thank you, Mr. Bederman.

7 Mr. Alsobrook, you have 7 minutes remaining.

8 REBUTTAL ARGUMENT OF HENRY B. ALSOBROOK, JR.

9 ON BEHALF OF THE PETITIONERS

10 MR. ALSOBROOK: Excuse me. Mr. Chief Justice,  
11 and may it please the Court:

12 I think Justice Breyer was correct when he  
13 pointed out that the stipulation that was entered into is  
14 really not ambiguous. The Eleventh --

15 QUESTION: That's not -- I don't think that's  
16 before us, Mr. Alsobrook.

17 MR. ALSOBROOK: All right.

18 QUESTION: I mean, I don't think whether or not  
19 you might be entitled to an injunction, should you seek  
20 one, is -- is presented by the -- your question.

21 MR. ALSOBROOK: Yes, sir.

22 Well, Your Honor, I would say that at the time  
23 that we removed this also we relied on NAACP II, and there  
24 the Court said that if there are two alternatives that --  
25 and they also pointed out a footnote 3 in the Kikkonen

1 case which said that an injunction could be issued where  
2 there are two alternatives that -- that you can choose  
3 between one or the other, and that the -- the  
4 Anti-Injunction Act does not preclude the remedy under the  
5 All Writs Act.

6           So we realize that the Court is not a  
7 legislative body and that it has been brought out here  
8 that Congress is the one that can -- can dictate the  
9 jurisdictional bounds of Federal courts. But by the same  
10 token, Your Honor, we have a great number of class action  
11 settlements that are pending in this country that have  
12 been already consummated in this country, and we face a  
13 situation where the settling party who has settled a  
14 national class action must have some kind of remedy to  
15 stop suits in State courts that attempt to thwart that  
16 class action settlement. And so we would ask the Court to  
17 consider that in its -- in its deliberations.

18           If there any further questions?

19           QUESTION: Thank you, Mr. Alsobrook.

20           MR. ALSOBROOK: Thank you, Your Honor.

21           CHIEF JUSTICE REHNQUIST: The case is submitted.

22           (Whereupon, at 10:43 a.m., the case in the  
23 above-entitled matter was submitted.)

24

25