IN THE SUPREME COURT OF THE UNITED STATES

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CARLSBAD TECHNOLOGY, INC., : Petitioner : v. : No. 07-1437

HIF BIO, INC., ET AL. :

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Washington, D.C.

Tuesday, February 24, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:20 a.m.

APPEARANCES:

GLENN W. RHODES, ESQ., San Francisco, Cal.; on behalf of the Petitioner.

THEODORE S. ALLISON, ESQ., Washington, D.C.; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:20 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 07-1437, Carlsbad Technology v. HIF Bio, Inc.

Mr. Rhodes.

ORAL ARGUMENT OF GLENN W. RHODES

ON BEHALF OF THE PETITIONER

MR. RHODES: Mr. Chief Justice, and may it please the Court:

The single issue presented in this case is whether the bar to review under 1447(d) is applicable to a district court's discretionary decision to decline the exercise of supplemental jurisdiction. In this case, after the district court dismissed Respondents' Federal RICO claim, the district court remanded the remaining State law claims under 1367(c). That was not a remand based upon a lack of subject matter jurisdiction because jurisdiction was specifically conferred upon the court by 1367(a).

It's been the rule for some 30 years that the bar of 1447(d) is limited to the specific grounds set forth in 1447(c). And for reference the statutes are on page 2 and 3 of Petitioner's blue brief.

Those two grounds are a remand that's based

upon a lack of subject matter jurisdiction and a remand that is based upon any defect other than a lack of subject matter jurisdiction if it's raised by a timely motion for remand filed within 30 days of the notice of removal. The only prong of 1447(c) that's applicable in this case is whether this remand is one that's based upon a lack of subject matter jurisdiction.

Now, Congress clearly conferred jurisdiction on the district courts in 1367(a), where the case contains a Federal claim and related State law claims, and a remand based upon a court's discretion to decline to exercise supplemental jurisdiction is not a remand that's based upon the court's lack of subject matter jurisdiction.

Jurisdiction either exists or it does not. A district court's power to hear a case and its power to decline the exercise of jurisdiction are part and parcel of the same thing. Absent the power to hear a case, a district court cannot decline to exercise that -- or cannot exercise discretion to decline to exercise that jurisdiction.

Now, in the -- this Court's Osborn v. Haley case, it made reference back to Carnegie-Mellon and also United Mine Workers v. Gibbs, that even if only State law claims are remaining in the case after the Federal

claim has been resolved, the district court has discretion consistent with Article III to retain jurisdiction over that cause of action.

Now, this is inconsistent with the Federal Circuit's analysis in this case, that a remand based upon 1367(c) is a remand based upon a lack of subject matter jurisdiction because in its view an independent basis for that jurisdiction is lacking.

JUSTICE GINSBURG: Isn't there something odd about saying if it's really fundamental like the presence or absence of subject matter jurisdiction, that is not reviewable? It's not disputed, right? That if the district court says, I lack subject matter jurisdiction over, let's say, the RICO claim, as wrong as that might be, that would not be reviewable, right?

MR. RHODES: Justice Ginsburg, I agree with that, because if the court does say that I am remanding this because, either rightly or wrongly, I lack subject matter jurisdiction, then that would fall squarely within 1447(c) and (d).

JUSTICE GINSBURG: Though that could be a very grave error and yet, on a matter of discretion, that that would be reviewable. And I appreciate your statutory argument, but it just seems odd to think that Congress would want to be firm that if the -- if the

remand is for lack of subject matter jurisdiction, wrong or right, no review; but if it's a discretionary exercise -- I could keep this, but I choose not to -- that that is reviewable.

That doesn't make a whole lot of sense to say the judge who could keep it or remand it, that that action is reviewable, but the action of saying I don't have jurisdiction, when indeed the court did have jurisdiction, is just totally immune from review.

MR. RHODES: I agree with you, Justice Ginsburg, that that seems rather confusing. I would address my answer in this way: The review ban of 1447(d) arose in the situations where apparently Congress wanted to -- to inhibit the abuse by those seeking only to delay the case by filing a motion for remand.

For example, a case that is filed in State court that clearly expresses no Federal question or diversity issue, yet the defendant, in order to delay the case, will then remove it to Federal court. In those situations, Congress wants to prevent those kinds of frivolous removals to Federal court.

But here, in our particular case -- and maybe -- let me back up a minute. Maybe we should look at that in a different way, because even though you may

have a legitimate basis for removing the case to Federal court and the district court disagrees with you, perhaps the better policy is that those types of remands should not be reviewable, even though sometimes a district court is going to get them wrong.

But in this particular case, there was a Federal RICO claim asserted against us in State court, and as a defendant we were not removing that case on some frivolous basis. We were removing it because we were entitled to be in Federal court.

It was only after the district judge dismissed the Federal RICO count -- and there was no motion for remand on this case filed by Respondents -- the district court sua sponte decided that he was not going to exercise his power to hear this case because he thought there were legitimate State law claims and he remanded on that basis. Now, that's a discretionary remand, and normally we would be arguing that where discretion is exercised by a district court, it should be reviewable for an abuse of discretion.

JUSTICE GINSBURG: But wouldn't it be -- I mean, here the district judge said: I got rid of the RICO claim; all that's left are State law claims, and there's no Federal interest in this case anymore. They're all State law claims, they belong in State

court, good-bye. I could keep it, I choose not to, because it isn't a sound use of the resources of the Federal court.

Now, even if you're right that this is a discretionary decision, so you can't say no jurisdiction because the discretion implies that there is power, isn't it 99 cases out of 100 that the court of appeals, assuming reviewability, will say, we should defer to the district judges on questions of this nature, the district judge's decision that this isn't worth the time of the Federal court?

MR. RHODES: I'm not sure about the number of -- percentage of cases that -- that there is going to be a decision by the appellate court to say we shouldn't interfere in that, Justice Ginsburg.

JUSTICE GINSBURG: But wouldn't you -- as a practical judgment, the Federal claim is gone, there is pendent jurisdiction -- or it's now supplemental jurisdiction -- over the State claim, but the district court is told by Congress: It's your call; it's a matter of discretion. And the judge gives one of the reasons that's enumerated, that reason being that the State claims are overwhelming in this case, the RICO claim is dismissed, thinking it was worthless, so it's a State case.

Why would a court of appeals overturn such a judgment?

MR. RHODES: I think, Justice Ginsburg, I can give you an answer to that because there is a recent case that's in our brief, the Brookshire case from the Fifth Circuit, where the district court exercised jurisdiction over Federal and supplemental claims, and did that for quite a while and ruled on a number of dispositive motions; and then basically on the eve of trial, after resolving the Federal claim, remanded it back to State court.

The Fifth Circuit, because it had the ability to review that, under the statutory construction, was able to review that on the basis of an abuse of discretion and said that the district court had definitely abused its discretion. After retaining jurisdiction for that length of time and then returning it to State court, that was a waste of judicial resources.

JUSTICE GINSBURG: But that -- because you'd would have to retread the same ground in the State court that had already been covered in the Federal court, but that's not the kind of case that was presented here. I know the case has lingered for a long time, but there was no processing of those State law claims. The judge

concentrated on RICO, threw it out, and said, the rest of the claims I'm not interested in.

So it's not a case like the Fifth Circuit where there was a large investment of Federal court energy and time, and sending it back would mean going over once again what had already transpired in the Federal court.

MR. RHODES: That is true. This case is different because what the -- what the district court had labeled as legitimate State law claims as to, for example, inventorship, we argued are within the exclusive jurisdiction of the Federal court, and that is why we appealed to the Federal Circuit in order to have that issue resolved.

Here, if we went back to State court, we would be in the position of having to argue to the State court that the State court lacked jurisdiction to hear that claim because it was something that was within the exclusive jurisdiction of the Federal court. It seems that in this particular situation it would be better to have the Federal Circuit to pass upon the exclusivity of the inventorship issue under the patent laws rather than have to go back to State court and work back up through the State court system to have that resolved.

JUSTICE GINSBURG: Could you explain why

that is a Federal question? It's a dispute over the ownership of this invention, right? So it's not a question of the validity of a patent or infringement of a patent? It's just the invention is like any res, and two parties are disputing about ownership. Why is -- why does that become a Federal case?

MR. RHODES: It became a Federal question because in our view it arose under the patent laws because when they filed their complaint, even though they couched it in terms of purely State law claims, they did allege that we had falsely claimed to be the inventors; and the basis for that claim that we falsely claimed to be the inventors was the oath and declaration that was filed in connection with our patent applications at the U.S. Patent and Trademark Office.

So what they were raising was an issue with respect to our ability to claim to be the inventors of what we claimed in our U.S. patent applications. Therefore, since that falls squarely under our entitlement to -- to inventorship, of what we claim to be the inventors, under Article I, section 8, it seemed to us that that clearly fell within the exclusive jurisdiction of the Federal court.

JUSTICE STEVENS: May I just ask one sort of a preliminary question? If we just applied the plain

language of 1447(d), then this case was properly remanded, and it was -- the remand order is not subject to review. Is that correct?

MR. RHODES: Yes. If we just read 1447(d) on its face, that's --

JUSTICE STEVENS: What really prevents us --

MR. RHODES: -- seems to be what it says.

JUSTICE STEVENS: -- from reaching that decision in this case? Because actually it's an open question because you are both arguing about it here and you certainly disagree. Why couldn't we just simply say, for this particular category of remand orders, we'll just apply the plain language of 1447(d)?

MR. RHODES: That would be going against the rule that was set out in Thermtron, that 1447(d) was limited to only the specified grounds of 1447(c), which are lack of --

JUSTICE STEVENS: I understand. It would be a modification of the dicta in Thermtron, but why wouldn't that be a simple solution to this case?

MR. RHODES: I'm not sure that would be a simple solution to this case, Justice Stevens, and the reason for that is that if we -- if the Court decides to do that, then we return to those areas where total chaos could really break out, and the reason for that is that

we would be in a situation where district courts can -- can dress up in language that is lack of subject matter jurisdiction and remand cases, knowing that there is not going to be any review.

JUSTICE STEVENS: No, no. That wouldn't -- that wouldn't avoid the plain language of the statute. Pretextual district court orders wouldn't avoid the plain language of the statute.

JUSTICE GINSBURG: But the --

CHIEF JUSTICE ROBERTS: There'd be no need to dress up anything. I mean, that's Justice Stevens's point. You wouldn't have to dress up anything; if you send it back, it's not reviewable.

MR. RHODES: If we were to read 1447(d), just plainly on its face without --

JUSTICE GINSBURG: How could we do that in light of Thermtron? Thermtron went against the clear text of the statute that says remands are not reviewable, period; and in Thermtron the Court said, yes, they are sometimes, if we think it's so outrageous for a district judge to say: Yes, I've got jurisdiction over this case, but my docket is so crowded, and this is a -- this is a small-change case; it belongs in State court.

The Court, I think, was outraged by a

district court thinking that it could dump a case simply because it was too busy with more important things. That was -- that was the setting of Thermtron, and to reach the result that the Court reached, the Court had to go against the language of the statute which -- which read in absolute terms.

But anyway, the Court did that, and then they gave a rationale for what the new test was going to be. It was no longer going to be remands are no longer -- remands are not reviewable; it's going to be -- that applies only to the cases where -- what was it, subsections (c) and (d) of 1447? That -- it -- the Court read the statute to say less than it in fact did. That's what Thermtron did.

MR. RHODES: That is the exact holding of Thermtron, that they were not going to construe that so woodenly to allow a district court to abdicate its mandatory jurisdiction.

CHIEF JUSTICE ROBERTS: Well, "woodenly" is a bit much. I mean, they're going to read it not to say what it says. And Thermtron involved the court saying: I'm not going to take this because I'm too busy with other things. I mean, it could be limited to that unusual situation, couldn't it?

MR. RHODES: Mr. Chief Justice, it could,

but --

CHIEF JUSTICE ROBERTS: I think it would solve the problem Justice Ginsburg pointed out earlier, that this way you don't get to appeal big things like no subject matter jurisdiction, but you do get to appeal picayune things.

MR. RHODES: Again, I'm not sure how we would divide those up between big things and picayune things. But I think, to answer your question, we have 30 years of this particular rule under Thermtron being uniformly applied by all the circuit courts of appeal, and they have found this to be a workable statutory interpretation to give them a framework to handle these kinds of cases. And it's not a situation where the circuit courts of appeal have run away from situations like this, where remands have been based upon declining to exercise discretionary power to send it back to State court. They have seemed to want to work within the statutory framework to review those kinds of cases.

And I think it would be a large departure to go back and try to modify what all the circuit courts of appeal, except for maybe the Federal Circuit, has adopted as a workable framework in order to solve these kinds of problems.

JUSTICE GINSBURG: Well, the only -- one

clear way to do it would be to overrule Thermtron, but neither party has asked for that. You haven't asked for it, and the other side hasn't asked for it.

MR. RHODES: That's correct, Justice Ginsburg.

JUSTICE STEVENS: You just have to distinguish Thermtron. You don't have to overrule it. It still applies on its facts.

That's a very different problem. When the judge says, I'm too busy to hear this, I'm going to send it back to State court, that's what Thermtron resolved.

MR. RHODES: And yet --

JUSTICE STEVENS: And this is not -- that's not involved here.

JUSTICE GINSBURG: But your concern is what was the Court's reasoning, and you could apply the Court's reasoning, its interpretation of 1447.

JUSTICE SCALIA: You have to get rid of Quackenbush, too, don't you?

MR. RHODES: Yes, Quackenbush is a --

JUSTICE SCALIA: Throw that overboard, too?

MR. RHODES: We would have to overthrow that as well, and the reason for that is because Quackenbush was a remand based upon abstention -- abstention-based remand under Burford, and in that case, this Court found

that abstention-based remands did not fall within either prong of 1447(c). So -- in fact, this Court gave that very little attention in Quackenbush before it moved on to the 1291 issue.

CHIEF JUSTICE ROBERTS: You thought the Respondents asked us to overrule Thermtron. On page 22, you say, "Respondents' implicit request for this Court to overrule Thermtron should be rejected."

MR. RHODES: Yes, we did say that, and I'm not sure that they -- they expressly said you should overrule Thermtron, but the strong suggestion in their brief was perhaps you should.

JUSTICE ALITO: Well, isn't it -- isn't it also the case that Congress has amended the relevant provisions of 1447 since Thermtron and they have not seen fit to overrule or change those provisions?

MR. RHODES: Given the fact that Congress has twice amended 1447(c) after Thermtron, it seems that they have actually ratified this Court's statutory construction under Thermtron, and have agreed to it --

CHIEF JUSTICE ROBERTS: So this gets a lot of attention across the street? The reviewability of remand orders gets --

(Laughter.)

CHIEF JUSTICE ROBERTS: I mean, in one of

those provisions, they said this was only technical amendments, and if they're just doing technical amendments, that doesn't mean they have to look at it and approve the whole thing.

MR. RHODES: No, Mr. Chief Justice, if they wanted to get rid of Thermtron they could have done it in a very direct way.

JUSTICE SCALIA: Well, that's right, but what if we want to get rid of it?

(Laughter.)

MR. RHODES: I can't suggest what the Court might finally decide other than to say that -- that, again, the circuit courts of appeal have uniformly applied this. They seem to be --

CHIEF JUSTICE ROBERTS: Well, they don't have a choice, right? They can't say, I don't like the Supreme Court rule so I'm not going to apply it, other than the Federal Circuit.

(Laughter.)

MR. RHODES: Actually, Mr. Chief Justice, that was going to be my next point, about the Federal Circuit, but -- it does, again, provide a workable framework for dealing with these issues, and it seems to be a very large departure to go back and wipe out the last 30 years of case law that has been developed to

handle these issues. It would be a large departure.

If there's no other questions, I'll reserve the remainder of my time for rebuttal.

JUSTICE STEVENS: Let me just make one comment on the large departure: Would it be a large departure if we just said, in the very narrow category of cases where there has been a remand on the basis of -- the district judge doesn't want to exercise supplementary jurisdiction over State law claims, that's not appealable, period? Just say that's a slight exception from Thermtron?

MR. RHODES: Well, Mr. Chief Justice -- sorry -- Justice Stevens, that would be an exception under Thermtron that doesn't seem to be called for because the way it's been interpreted, it has to be -- and the way even the amendments in '88 and again in '96 -- it's only barred if it's for a lack of subject matter jurisdiction, and plainly here a discretionary remand is not for that basis.

JUSTICE STEVENS: They're not amendments of subsection (d), and subsection (d) is what has the language that really reads right on this case.

MR. RHODES: Well, I think the other -- the other problem with that is the whole doctrine of -- of supplemental jurisdiction that was first laid out in

Carnegie-Mellon and United Mine Workers, where the difference between remands under 1367(c) seem not to overlap with the remands under 1447(d) and 1441. So if we made that an exception and we pulled this into 1447(d), it -- I'm not sure what the consequences would be from doing that.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Allison.

ORAL ARGUMENT OF THEODORE S. ALLISON

ON BEHALF OF THE RESPONDENTS

MR. ALLISON: Mr. Chief Justice, and may it please the Court:

Let me begin with Petitioner's counsel's last remark, and that is that we don't know what the consequences would be, except that we do know that by applying the review bar to supplemental jurisdiction remands, it would bring us closer to achieving the purpose that has been expressed in the statutes of Congress since 1887.

I know that the Court is familiar with the late Chief Justice Rehnquist's dissenting opinion when he was an Associate Justice in the Thermtron case, and Justice Rehnquist at that time wrote that there had been no cases since the review bar was put into place in 1887 -- no cases where exceptions to review had been

recognized. He believed that it was a plenary bar on review.

JUSTICE GINSBURG: But that was a dissenting opinion, and that was how many years ago? How many years?

MR. ALLISON: Justice Ginsburg, it -- it was a dissenting opinion, and it was in 1976, and we certainly would not cite it as authoritative except for our confidence in Justice Rehnquist's review of the law as it existed at that time.

JUSTICE GINSBURG: But you have a majority rationale that says, although 1447(d) reads in absolute terms, in fact the only remands that it -- that it covers are those based on a defect in the removal or lack of subject matter jurisdiction. So you can't -- you can't say, well, Thermtron had a result that we can limit to Thermtron's own unusual facts, because the Court gave a rationale. I mean, courts give reasons for what they do. And the Court drastically limited 1447(d) when it said 1447(d) has to be read consonant with 1447(c), and 1447(c) deals with only two kinds of remands, one for defective removal and the other for lack of subject matter jurisdiction.

MR. ALLISON: That is -- that is correct, Justice Ginsburg. And, in fact, to harken to your

earlier question, to Your Honor's earlier question, we are not asking for Thermtron to be overruled, but I think, in effect, to be updated.

The Court in Thermtron did give a rationale, and the rationale that it gave was that it viewed -- the opinion for the Court by Justice White -- viewed 1447(c) as being the sole source of Federal remand power. And as the Court noticed in the ensuing 30, 40 -- excuse me -- yes, 40-odd years, there have been a number of other sources of remand power recognized.

And we see no reason why the holding in Thermtron should not be overruled but be updated to recognize that -- that the spirit of what the Court held in that case would be served and would be harmonized with the review bar as it has existed lo these 120 odd-years, would be served by expanding the -- excuse me, contracting the reach of Thermtron so that it is not simply 1447(c) remands, but any remand authorized by statute.

JUSTICE SOUTER: Okay. But no matter -- no matter what adjective or what verb you use, that's overruling a very clear rule of Thermtron. And we normally operate on a theory that when a conventional statute is construed by this Court, it stays construed until Congress changes it.

And I don't -- I don't see how you can follow the line of reasoning that you're proposing, even though you talk about updating and harmonizing, without violating that basic stare decisis rule.

MR. ALLISON: It's -- it's an essential question, Justice Souter. And I think the way we harmonize it is to say that Thermtron has indeed been pared back by the Court's subsequent decisions. And, of course, it is our second argument that the Court do something with the rule in Thermtron.

Our primary argument gets to the question of the statutory language and whether a Cohill remand falls within it. But our secondary argument is to say, certainly, it's well recognized that Cohill disapproved and pared down that portion of Thermtron that held that the only remand power is the remand power expressed in 1447(c).

In a -- in a later case, in Quackenbush, the question of whether mandamus or appeal was the appropriate vehicle for challenging remand orders. And in that case, again, the Court said that we are -- we are disavowing Thermtron's sweeping statement that mandamus is the only vehicle for challenging a remand order.

JUSTICE SOUTER: We did -- we did not

disavow the relationship between (c) and (d).

MR. ALLISON: Indeed, the Court did not. And we suggest again only -- it is only a suggestion in our brief that the Court might wish to look at the ensuing history since Thermtron and make a similar limiting statement that recognizes that a lot of remand authority has been established since Thermtron in a number of statutes and by, of course -- by the Court's holding in Cohill.

JUSTICE GINSBURG: What in addition to the civil rights provision?

MR. ALLISON: Well, indeed in Things Remembered, the Court was considering whether a 1447 -- whether 1447's review bar applied to a remand under 1452. 1452 is another statute that deals with remands in the context of cases associated with bankruptcy issues. And in that case, there was a remand for failing to follow a removal procedure, and the Court held, citing -- citing Rice, United States versus Rice, based on Congress's awareness of the universality of the review ban, that when another statute comes into place that provides for remand, the review bar applies whether or not -- of course --

JUSTICE GINSBURG: Then that's a specific statute that would prevail over the general provision.

MR. ALLISON: It's a little bit -- Justice Ginsburg, a little bit different than the Court's decision in Osborn, in which the much more specific Westfall Act Provision was held to prevail over 1447.

In Things Remembered, it was simply the fact that the review bar was held to apply to a remand, even according -- under another statute, and, of course, recognizing that there are now other statutory bases for remand. The interesting thing about 1452 -- and Justice Ginsburg, I believe that you wrote the concurrence on this -- is that 1452 provides for remand on any equitable ground and that such remands are not subject to review by appeal or otherwise.

So 1452, again, expresses, I think, a trend in the thinking of Congress, if there is such a thing as the thinking of Congress, that -- that the review bar will be expanded and will even include such discretionary decisions by a district court as any equitable ground.

JUSTICE GINSBURG: But Things Remembered, I think, was raised very carefully, just to say that the question that's before the Court now has not been decided before, the precise question here --

MR. ALLISON: Yes.

JUSTICE GINSBURG: -- of discretionary

remand?

MR. ALLISON: That is --

JUSTICE GINSBURG: So I think -- I looked again at Things Remembered, and it turned out to be just as I remembered it --

(Laughter.)

JUSTICE GINSBURG: -- that it was neutral, colorless. It just said we haven't been confronted with this issue. And I think Powerex said the same thing, although it said it in more definite terms -- it is far from clear.

MR. ALLISON: That is true, and that is what the Federal Circuit said -- meant when it said that Powerex made the question precedential. Because, certainly, if Things Remembered had decided the issue that's before the Court today, I think the issue wouldn't be before the Court today. And that, of course, is why we're here.

But the Thermtron -- the Thermtron issue really is our second argument, and it -- it is a very gentle argument that the Court -- and if the Court certainly wishes to continue discussing that, that is -- that is very profitable for what we're doing here today.

But the first argument is that, harkening back to your original questions, Justice Ginsburg, why

shouldn't a remand when only State law claims remain in a case, as in Cohill and as in 1367(c)(3) -- why should that not come within the language of 1447(c), what I'll call the jurisdictional clause, because it clearly is a matter that is only of concern to State courts? And I think that the Court in United Mine Workers v. Gibbs made clear that when all State -- all the Federal claims have left the case and only State law claims remain, that it's almost presumptive that those should be sent back --

JUSTICE STEVENS: Yes, but your opponent's argument is that the -- the claims that remain do include a Federal claim.

MR. ALLISON: That's true, Justice Stevens. That is his argument, and I think what's important about that argument is the inconsistency it sets up. It essentially casts a net that draws in these supplemental jurisdiction cases. And what the net does is it allows the courts of appeals to review some artful pleading issues, which is essentially what we have here. We have State law claims, and our opponents are suggesting that these are, in fact, disguised Federal claims that must be heard in Federal court.

JUSTICE STEVENS: What about the ruling on the RICO claim itself? That was clearly a Federal

issue.

MR. ALLISON: Yes. The RICO claim was what -- was what gave the district court jurisdiction over the case in the first place. And it's interesting that in the -- in the district court's decision, it made me think -- it made me think a little bit of the Waco case, because in the district court's decision, the district court very clearly said, first, I have no jurisdiction over these State law claims, and I'm going to remand them, and now I will turn to the RICO claim which creates a conundrum that I'm not sure --

JUSTICE GINSBURG: Where did the -- maybe the district judge didn't say that. Maybe you can point me to the place where it did. But if it did say it, it's flatly wrong, because there is -- that's what supplemental jurisdiction is. It's says you have jurisdiction. It's a huge difference between you have no jurisdiction, you are powerless --

MR. ALLISON: Yes.

JUSTICE GINSBURG: -- and you have power, but it's up to you to exercise it or not.

MR. ALLISON: Justice Ginsburg, that's why we didn't -- we didn't press that point because I think -- I think that even we can see that the court exercised its jurisdiction to decide and dismiss the RICO claim,

although it's reminiscent of -- of -- of the decision in Kircher --

JUSTICE GINSBURG: It -- it wasn't a discretionary decision about RICO. RICO -- there was no Federal claim stated. That's out of it.

MR. ALLISON: Right.

JUSTICE GINSBURG: What the district court has jurisdiction over are the supplemental claims, which it can choose not to exercise, but it can say, "I don't have jurisdiction," because Congress has given supplemental jurisdiction but then left it to the court to remand on stated conditions.

But you -- you seem to conflate the absence of subject matter jurisdiction with a discretionary decision not to exercise subject matter jurisdiction that the court undoubtedly has.

MR. ALLISON: Well, Justice Ginsburg, I have made every effort not to conflate those two -- those two concepts, and in fact we did say that when -- when a court acquires supplemental jurisdiction in a case, that that is a species of subject matter jurisdiction. At that point -- as the Court held in City of Chicago v. International College of Surgeons. At that point the court does have a mandatory discretion to -- or mandatory jurisdiction to exercise power over the entire

Article III case.

But we then argue when the Federal claims leave, the case that jurisdiction changes. That jurisdiction changes from a mandatory one that the Court, as in Thermtron, would certainly be concerned if a district court abjured its jurisdiction that's mandatory. But it changes by operation of 1367 from mandatory to discretionary. And when Congress passed 1367 in 1990, Congress intended to codify the existing law right up through Cohill on the subject of supplemental jurisdiction, combining ancillary and pendent in the --

CHIEF JUSTICE ROBERTS: So your idea is there is jurisdiction, but when the Federal claims fall out, then there's no jurisdiction?

MR. ALLISON: Yes, Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: Okay, but that seems to me to echo the fundamental misperception that if you have Federal jurisdiction based on a particular event -- let's say, if you're dumping chemicals in the water, that gives you a Federal cause of action; you have Federal jurisdiction; there's a trial. It turns out you weren't dumping chemicals -- you don't then say, there was no jurisdiction; there was jurisdiction before, but once the finding is made that the facts didn't support

it, then there was no jurisdiction. You say, there was jurisdiction all the time, and you lose.

MR. ALLISON: There was -- there was indeed jurisdiction. And what we argue is that the nature of the change, when it goes from mandatory, the concern of Thermtron, to discretionary, which gives -- virtually pushes out of the Federal court to the State courts anytime up until trial -- the nature of that jurisdiction changes, and we believe that that is not what Congress intended by the words "subject matter jurisdiction" in 1447(c).

So if we come back to the words of the statute, the words of the statute should be construed broadly in order to serve the purposes of -- of remand. The Court has made clear that concerns of comity and federalism say that we should construe 1447 in favor of remand, and I believe that that should extend to the concept of the whole delay and shuttling.

JUSTICE GINSBURG: But then -- then what you are doing is that you are using the label "subject matter jurisdiction" in a way that seems to me, that is, there are many categories that could be ambiguous at the edges, but not subject matter jurisdiction. Subject matter jurisdiction means, court, you have no power, period. There's no diversity, there's no Federal

question, there's no other basis for the Federal court to exercise jurisdiction. And to say, well, we can extend the label "subject matter jurisdiction" to include a case where the district court chooses not to hear certain claims, even though it has jurisdiction over them, I think is a -- is a -- a misapplication of the notion subject matter jurisdiction.

MR. ALLISON: It is -- it is a difficult -- a difficult conundrum. I think maybe all conundra are difficult, but this one particularly. And, Justice Ginsburg, in the opinion that you wrote for the Court in the Arbaugh case, you very clearly pointed out that the word "jurisdiction" is used in a variety of ways by legal scholars, by --

JUSTICE GINSBURG: Yes, but not subject matter jurisdiction. Jurisdiction is personal jurisdiction, subject matter jurisdiction. What I did in Arbaugh was to explain that all kinds of things, like time limits on when you can sue, have been labeled jurisdictional and mandatory when in fact they are not. They are simply statutes of limitation.

MR. ALLISON: That -- that is correct, but that's the same -- that is the nature -- that's the nature of the problems that the Court confronted in Kircher and Powerex. Again, this is by analogy only.

We are not concerned about -- about labels like that, if the district court believed that it was remanding the case because it lacked jurisdiction.

But I'm coming back now to subject matter jurisdiction, and I have found no case in this Court that has given a definition -- City of Chicago with its mandatory language was the closest I was able to find.

The Koffski case, out of the Seventh Circuit, is the one case I was able to find from a higher court that said that supplemental jurisdiction is technically a form of subject matter jurisdiction. And what we argue --

JUSTICE GINSBURG: Why is it only technical? It says, court, you can exercise power. Subject matter jurisdiction is the power that the court has to hear a given controversy, and under supplemental jurisdiction, there is undoubted power in the district court to hear those claims.

MR. ALLISON: In its -- certainly, in its, I think -- in its -- in its textbook sense, that is what subject matter -- when the world is divided between subject matter and personal and then the third, territorial, which I think is a relation -- has a relation to personal -- when the world is divided along those lines, then subject matter takes on the broadest

possible meaning, but we have conflicting broad policies. On the one hand, we have a broad definition of subject matter definition; on the other hand, we have a statute that should be construed to favor remand at almost all lawful costs.

And -- and subject matter, if we step back from our -- our dichotomy, personal and subject matter, subject matter also means, as -- as Your Honor said at the beginning of this argument, something that is -- that is a subject with which the Federal courts should be concerned, and on which they should expend their resources. And we now have the circuit courts hearing appeals from decisions -- discretionary decisions because they are technically within the realm of subject matter jurisdiction.

But clearly, State law claims are not the subject matter with which the Federal courts should routinely be concerned, and that's why United Mine Workers -- and Cohill echoed it -- said, these claims should be sent back, and Cohill even -- both cases even said that the propriety of remanding the claims should be reviewed at every stage in the litigation. That -- that I think presents us a pretty strong policy by this Court that remand is to be indulged at almost any lawful cost.

JUSTICE GINSBURG: You -- you put it in terms in your brief -- if I understood your position correctly -- yes, there is subject matter jurisdiction over supplemental claims, but once the district court chooses not to exercise that jurisdiction, it -- and these were the words you used -- "it divests itself of jurisdiction."

MR. ALLISON: Yes. The -- the argument -- and I was attempting to make a technical argument in the brief, and I think today I'm speaking in slightly more global terms -- but the technical argument is that when a district court makes a decision, in the words of Gibbs, that it would be inappropriate to exercise jurisdiction over those claims, then the claims are to be remanded --

JUSTICE ALITO: What if the court changes its mind? What if it grants a motion for reconsideration? Then it reacquires the jurisdiction?

MR. ALLISON: Well, Justice Alito, the question of whether it changes its mind I think is intricately bound up in this question of reviewability because the cases that we found that -- that talked about reconsideration talked about reconsideration only because there was the potential for review of these orders.

I think the norm for a remanded case is that the order of remand is entered, and the order of remand is certified and mailed to the State court, and the district court no longer has jurisdiction at that point.

Now, certainly it could reconsider as it's engaged in its decision process. It could go back and forth, and reconsider before it signs the order. But that's no different than -- than many other cases in which the court can make a discretionary decision that it has no jurisdiction. The only --

JUSTICE GINSBURG: The discretionary --

JUSTICE SOUTER: But your --

JUSTICE GINSBURG: The discretionary decision is that it chooses not to hear the case. It's not -- there's no discretion there. There's nothing discretionary about saying we have no jurisdiction. "We have no jurisdiction" means we have no power. So the -- the two are just at odds with each other. No power, yes power, but we choose not to exercise it.

MR. ALLISON: And I think -- I think that the -- again, the purpose of the review bar as it's been expressed for over a hundred years has been to trust district judges to make these decisions and then get the case where it needs to be to be resolved on its merits. So to say that the court chooses not to hear the case,

it -- it suggests something a little bit less gray than the decision that I believe the court would make when it decides that it's inappropriate to hear the case, in the words of Gibbs.

JUSTICE SOUTER: You -- you think that choosing not to hear is distinguishable from a decision that it is inappropriate to hear?

MR. ALLISON: I -- I meant only to suggest that it is not a -- it is not a choice. It's a -- it is not an ill-considered choice. Certainly, there's a choice involved in the decision that it would be inappropriate. But I don't see -- and I -- I wanted to resist a rhetorical question, but then I don't see how anyone could say when a court is faced with -- with only State-law claims that it could either decide or not, and it decides it would be inappropriate to retain jurisdiction over those claims, that somehow it should retain jurisdiction over those claims.

JUSTICE GINSBURG: Well, that would argue for a highly deferential standard of review, respecting the district judge's determination that it's not what -- it hasn't invested any time in these questions, and it shouldn't because they are purely State-law questions. That's -- but that's something quite different from -- from a -- the -- the terminology that you used is

troublesome because a court doesn't have power to divest itself of jurisdiction.

If Congress gives it jurisdiction, it has it, and the court can't divest itself of that. It can, if Congress permits it, decline to exercise jurisdiction, but a court is not capable of divesting itself of jurisdiction.

MR. ALLISON: I believe -- well -- and -- and this is a mechanical argument, but I believe that when the court makes the decision and then -- and then executes the remand, that that is divesting itself of jurisdiction. And perhaps it was -- perhaps it was a poor -- a poor word choice.

JUSTICE SOUTER: But even -- even on your analysis it seems to me that the -- the cart is before the horse, because it is -- it is not remanding because it does not have jurisdiction. What you are saying is that after it remands, it loses jurisdiction, and those are two very distinct categories.

The -- the premise for the declaration that it does not have jurisdiction is a premise that even on your argument does not arise until following remand. So there's no way you can fit it, it seems to me, into the category of -- of remanding because at the point of deciding to remand it has no jurisdiction. That, in

fact, is false.

MR. ALLISON: It is simply a question, I think, of -- of the choice of the word "divest" and what that means. I would -- I would analogize in order to perhaps make it seem more -- more accurate -- I would analogize to what a district court now can do under section 1447(e), where it makes a decision applying the law, using its discretion, to allow joinder of a nondiverse party that would then destroy diversity and require the case to be remanded.

And I would say in that case that the court makes a decision that divests it of jurisdiction, and it is very technical to say that -- that, yes, it lacks jurisdiction as soon as it enters the order admitting that party to the case. But that may very well be the same order that remands the case to the State court.

But I -- I do -- I do see that there is power. And if the case is going to turn on power, as the Court -- some of the language in Powerex suggested that it might, then I don't know that we -- I don't know that we make much headway.

But I -- I -- I see 1447(c), lacks subject matter jurisdiction, as being broad enough to comfortably take in the situation where the State-law claims, not really within the subject matter of the

district court's power, are determined inappropriate for that court to hear and sent back. And it would bring us that much closer to realizing the purpose of the review bar that has existed since 1887, taking a category of cases out of the jurisdiction of the circuit courts.

I -- I had wanted to offer the Court some statistics, as maybe law professors might, about the number of cases that are heard on this type of appeal. I can say that the cases that we found in our footnotes 18 through 20 represent something close to the universe of cases in which discretion was found to be abused. And that abuse of discretion is nowhere near as egregious as the legal errors that a district court might commit in making erroneous judgments that it has no jurisdiction which were nonetheless subjected to the review bar in Kircher and Powerex.

If there are no further questions --

CHIEF JUSTICE ROBERTS: Thank you, counsel,

MR. ALLISON: -- I will stop now. Thank you.

CHIEF JUSTICE ROBERTS: Thank you.

Mr. Rhodes, you have four minutes remaining.

REBUTTAL ARGUMENT OF GLENN W. RHODES

ON BEHALF OF THE PETITIONER

MR. RHODES: I just had a few quick points

that I'd like to point out.

First, I would just like to reiterate that when Congress enacted 1367, that gave it Article III jurisdiction in those matters, just as 1331 and 1332 do.

I would also like to reiterate that -- that stare decisis should be maintained over this statutory interpretation because it has proved to be workable, rather than not workable.

Again, the circuit courts -- even though as Mr. Chief Justice has iterated that they have to follow this, they have found it to be a workable framework. And, again, as the Court expressed in Powerex, they agree that in Quackenbush that Thermtron was not altered. And Congress has -- has seemingly ratified this Court's interpretation in Thermtron, and as it has been applied in Quackenbush.

CHIEF JUSTICE ROBERTS: I suppose, though, if it would be an abuse of discretion for the district court to retain jurisdiction, then maybe there is -- there never was jurisdiction, right? You said they have discretion to exercise or not. Well, if it turns out they don't have discretion to exercise -- you know, because it's a huge State claim and a tiny Federal claim -- why wouldn't that properly be regarded as an absence of jurisdiction?

MR. RHODES: My response to that, Mr. Chief Justice, is that until a court decides that it was an abuse of discretion, the district court had jurisdiction under 1367(c) to either exercise that power or not exercise that power.

And unless there's any further questions for me, I ask that the -- this be remanded to the Federal Circuit to decide on the merits of the appeal.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:17 p.m., the case in the above-entitle matter was submitted.)