

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 PAUL D. LAPIDES, :

4 Petitioner :

5 v. : No. 01-298

6 BOARD OF REGENTS OF THE :

7 UNIVERSITY SYSTEM OF :

8 GEORGIA, ET AL. :

9 - - - - -X

10 Washington, D.C.

11 Wednesday, February 25, 2002

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:05 a.m.

15 APPEARANCES:

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17 the Petitioner.

18 IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.; on
20 behalf of the United States, as amicus curiae,
21 supporting the Petitioner.

22 DEVON ORLAND, ESQ., Assistant Attorney General, Atlanta,
23 Georgia; on behalf of the Respondents.

24 JULIE C. PARSLEY, ESQ., Solicitor General, Austin, Texas;
25 on behalf of Texas, et al., as amicus curiae,

supporting the Respondents.

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

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 01-298, Paul Lapidis v. the Board of Regents
5 of the University System of Georgia.

6 Mr. Bederman.

7 ORAL ARGUMENT OF DAVID J. BEDERMAN

8 ON BEHALF OF THE PETITIONER

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

11 When a State affirmatively invokes the
12 jurisdiction of the Federal court by removing a case, that
13 acts as a waiver of the State's forum immunity to Federal
14 jurisdiction under the Eleventh Amendment. This principle
15 has been confirmed as recently as this Court's decision in
16 the College Savings Bank case where it was indicated that
17 a State may waive Eleventh Amendment immunity by invoking
18 Federal court jurisdiction.

19 This rule also finds support in a long line of
20 decisions holding that where a State enters a Federal
21 proceeding as an actor in any role, that effectively
22 relinquishes any objections to Federal jurisdiction a
23 State may have under the Eleventh Amendment.

24 QUESTION: When you say as an actor in any role,
25 does it ever intervene as a defendant?

1 MR. BEDERMAN: Yes, Justice Scalia. This
2 Court's precedents seem to indicate that wherever the
3 State is cast in the role of plaintiff, defendant,
4 intervenor, or claimant, that the entry into the Federal
5 proceeding submits the State to the jurisdiction of the
6 Federal court.

7 QUESTION: How about the Ford Motor Company
8 case?

9 MR. BEDERMAN: Well, of course, the
10 authorization requirement in Ford Motor -- and that's the
11 particular holding in Ford Motor that I think is of
12 concern to this Court -- need not be reached here because,
13 of course, Ford Motor did not involve a case where a State
14 was actually invoking Federal court jurisdiction. So --

15 QUESTION: So, you think a line can be drawn
16 between the State defendant being drawn in as a respondent
17 or involuntarily as opposed to removing and thereby
18 invoking Federal jurisdiction.

19 MR. BEDERMAN: Yes, Chief Justice. I think the
20 key element here is precisely the invocation of Federal
21 court jurisdiction. And again, this -- that's consistent
22 with this Court's rulings in -- in Gardner and in -- and
23 in Gunter and Clark where it's made clear that where the
24 State actually is invoking Federal court jurisdiction, the
25 proper inquiry is not the authority of the State officer

1 or attorney to waive Eleventh Amendment immunity. The
2 proper inquiry is whether the State officer or attorney
3 had the power to engage in the litigation conduct leading
4 to the invocation of Federal court jurisdiction.

5 QUESTION: In all -- in all those cases, they
6 were cases in which a State really consented to have
7 litigated against it a Federal claim in a Federal court.
8 And it's hardly surprising, once you agree to that, that
9 you also are agreeing to have related things litigated
10 against you.

11 But this isn't that. This is a case where the
12 only reason that the State went into the Federal court was
13 so that the individual defendants would be able to invoke
14 their right to have the matter heard in a Federal court.

15 So, why isn't the obvious solution here -- there
16 are only State claims left against the State which doesn't
17 want these heard in the Federal court. They haven't
18 agreed to have anything heard there against them. So,
19 judge, send it back to the State court. What's it doing
20 here? They don't want it here. Call that pendent
21 jurisdiction, pendent claims, but it's an abuse of
22 discretion, at least, not to send it back.

23 MR. BEDERMAN: If I may make a number of
24 responses to your question, Justice Breyer.

25 First of all, I believe this Court's holdings

1 particularly in -- in Richardson, in Gunter do present a
2 situation where -- where a State is entering the
3 proceeding and -- in the role of a defendant and later
4 decides to regret that -- that casting and tries to
5 extricate itself from the proceeding. So, I think there
6 is authority in this Court's precedents to that extent.

7 To your more general observation in terms of the
8 harm here, in essence, weighing the plaintiff's interest
9 in a single and unitary proceeding in State court, a
10 result which has been the -- this Court's jurisprudence
11 construing 28 U.S.C. 1441(c) for almost a century that --
12 that the removal statute does not entitle defendants to
13 remove and then split up claims --

14 QUESTION: All right. Well, that's exactly --
15 what if it's that? The interest of the plaintiff in
16 having the action against the individuals in the State
17 tried in one place, on the one hand, against the interest
18 of the State having a State matter tried in State court
19 where the State has refused to waive its immunity from
20 Federal jurisdiction. That for me is easy. One is a
21 constitutional right; the other happens to be a right of a
22 plaintiff that he wouldn't have anyway if he had brought
23 his suit in Federal court, which is what removal
24 jurisdiction is about. So, why doesn't the State clearly
25 prevail on that one?

1 MR. BEDERMAN: Well, Justice Breyer, again with
2 respect I think the -- the proper analysis I think closely
3 analyzing the State's professed interests in removing and
4 claiming immunity was, first of all, to engage the
5 expertise of Federal tribunals on questions arising under
6 section 1983 and qualified immunity.

7 QUESTION: May I stop you there? Because you
8 mentioned section 1983, and that makes this case terribly
9 puzzling because I thought States were not persons. So,
10 if you're not subject to suit under 1983 --

11 MR. BEDERMAN: That -- that's --

12 QUESTION: That's the basis of -- you're suing
13 the State and the State is not a person within 1983. So,
14 even if you prevailed 100 percent on your Eleventh
15 Amendment claim that you could remove despite that
16 sovereign immunity claim --

17 MR. BEDERMAN: Justice Ginsburg, I -- I would
18 remind the Court that, of course, there was relief pled
19 for declaratory relief in the complaint, and under this
20 Court's jurisprudence following from *Will*, a declaratory
21 relief claim is properly pled in this kind of proceeding.
22 Of course, *Will* says --

23 QUESTION: Against the State? I thought a State
24 was not a person, period, under 1983. A municipality is,
25 a county is, but a State is not. It doesn't matter

1 whether it's declaratory, injunctive, whatever. They're
2 not subject to suit under 1983. Isn't that right?

3 MR. BEDERMAN: No, Justice Ginsburg. Under I
4 believe the footnote in -- in Will and also in the
5 following case, Arizona's Official English case, it made
6 clear that that interpretation of section 1983 of a person
7 for purposes of suit was for money damages and that
8 declaratory and injunctive relief, in order to keep the
9 symmetry, presumably with Ex parte Young, as I believe
10 this Court indicated, was -- was a permissible pleading --

11 QUESTION: Well, Ex parte Young is something
12 different. You're suing the officer, not the entity.

13 MR. BEDERMAN: That's right, but recall that not
14 only are the regions being sued here but also individuals
15 in their official capacity and as well as in -- in their
16 individual capacity.

17 QUESTION: No. But Justice Ginsburg I think has
18 said the individuals are out of it. Qualified immunity.
19 We're left with the State. She wrote for the Court in
20 Arizona Official English -- she says, the barrier was not,
21 as the Ninth Circuit supposed, Eleventh Amendment immunity
22 which the State could waive. The stopper was that 1983
23 creates no remedy against a State. Now, that's what the
24 Court held. So, 1983 creates no remedy against a State.
25 So, you have no Federal claim against the State, and your

1 other Federal claims are disposed of.

2 So, we're left with a purely State matter in the
3 State court -- in the Federal court, and the State says,
4 remand this, send it back. Now, why shouldn't they?

5 MR. BEDERMAN: Well, again, my response to that
6 would be plaintiffs do have an interest in seeing -- in
7 filing a single, unitary action in State court, as was
8 properly done here. And what the State of Georgia has
9 attempted to accomplish via its removal and claiming
10 immunity tactic is -- is to break the -- break the
11 plaintiff's claim into discrete parts and dispose of them.

12 QUESTION: I don't understand that either.
13 What's very puzzling here is you wanted the case to be in
14 State court, and then it was removed. You moved to
15 remand, didn't you?

16 MR. BEDERMAN: That's correct.

17 QUESTION: And now you're getting just what you
18 want. You're getting the remand and you don't want it.

19 MR. BEDERMAN: Well, it's -- it's the remand
20 apparently with the -- the other consequences of the
21 Federal court decisions to date. That's, of course,
22 unfortunately one of the consequences of litigating
23 Eleventh Amendment immunity is that this was taken as an
24 interlocutory appeal, and other proceedings of course have
25 occurred since then.

1 QUESTION: But there's been no kind of
2 adjudication on the merits against the State -- against
3 the State entity in any way, shape, or form.

4 MR. BEDERMAN: No. You are correct, Justice
5 Ginsburg. To date, there have only been rulings by the
6 district court as affirmed by the court of appeals on the
7 qualified immunity defense as against the -- the
8 private --

9 QUESTION: May I ask why it proceeded -- let me
10 read you something else from one -- a fairly recent
11 opinion. We have routinely addressed, before the question
12 whether the Eleventh Amendment forbids a particular
13 statutory cause of action to be asserted against States,
14 the question whether the statute itself permits the cause
15 of action it creates to be asserted against States. Why
16 didn't the lower courts follow that procedure and -- and
17 decide the 1983 substantive issue of whether the State is
18 liable first?

19 MR. BEDERMAN: I -- I do not know, Justice
20 Scalia. In terms of -- in terms of what I understand is
21 the briefing and argument, the State of Georgia did raise
22 the Will defense in its papers. The district court chose
23 to proceed with the case on another ground, dismissing the
24 section 1983 claims against the private parties in their
25 individual capacities on qualified immunity. Maybe there

1 was some concern about the status of the Board of Regents,
2 but -- but I'm as mystified, frankly, as you are about
3 that disposition.

4 Again, if I may repeat, the concern that
5 petitioner ultimately has about the use of removal and
6 claims of immunity in this context is it splits claims
7 which seems to be a result that's specifically prohibited
8 by the removal statute and this Court --

9 QUESTION: But that seems to be a purely
10 academic question not in this case because the qualified
11 immunity question, as I understand it, was decided against
12 the individual officers. So, what Federal question --
13 this goes back to what Justice Breyer asked. I don't see
14 any Federal question left in this entire case.

15 MR. BEDERMAN: If -- if you're not taking well
16 my point about the availability of declaratory relief --

17 QUESTION: Well, at least the footnote that was
18 read didn't make any distinction based on declaratory
19 judgment. It said a State is not a person for 1983
20 purposes. Period. That's what that footnote said.
21 You're telling me now that I was wrong.

22 MR. BEDERMAN: I would never presume such,
23 Justice Ginsburg.

24 (Laughter.)

25 MR. BEDERMAN: I -- I think maybe the safest

1 result -- of course, this has not been briefed -- is
2 whether this Court's judgment in Will and subsequently in
3 Arizonans for an Official English reaches this precise
4 issue that I'm speaking to. No lower court has addressed
5 Professor Lapedes' request for declaratory relief. No
6 briefing has been accomplished on that, and there's been
7 no --

8 QUESTION: But if you're not right about 1983,
9 assume now that a State is not a person for purposes of
10 1983.

11 MR. BEDERMAN: Yes.

12 QUESTION: Then what Federal element -- what
13 Federal question is left in the case?

14 MR. BEDERMAN: There would be none left.

15 QUESTION: And then with all the Eleventh
16 Amendment jurisprudence in the world, it would make sense
17 for any district judge to hang onto a case that at the
18 threshold had all the Federal elements taken out of it and
19 has nothing but State claims left.

20 MR. BEDERMAN: Certainly after these
21 proceedings, that might be the result that a district
22 court judge in the exercise of -- of its discretion may
23 wish to -- to achieve. Our concern is precisely the one
24 that when Georgia invoked the jurisdiction of the Federal
25 courts for removal, it should have been with the

1 understanding that all claims would move to Federal court,
2 that the State could raise whatever defenses it wished to,
3 in other words, the defenses travel to Federal court. But
4 what is not a permissible result is, in essence, the --
5 the splitting of claims, the disposition to Federal court
6 and then --

7 QUESTION: I don't see how that -- how your
8 client is in any way harmed by any of this because he ends
9 up with what he wanted is his suit in State court.

10 MR. BEDERMAN: Well, if I may make a broader
11 point. The Eleventh Circuit's judgment, from which appeal
12 is sought here, is not entirely clear about this
13 distinction between barred and non-barred claims. That
14 was not, of course, settled in any further proceedings in
15 the district court as to whether now the State claims
16 would proceed by remand back to State court.

17 Of course, the State of Georgia sought the
18 dismissal of the entirety of Professor Lapidés' case under
19 rule 12(b)(6) when it removed the case. So, it's -- it's
20 now -- not entirely clear at the outset what Georgia's
21 intentions were in removing the case and then seeking
22 immunity.

23 Our proposition is simply that, as a matter of
24 not only judicial efficiency but also the integrity of the
25 removal statute and the fair meaning and understanding of

1 this Court's Eleventh Amendment jurisprudence, is that
2 when a State invokes Federal court jurisdiction under the
3 Eleventh Amendment, the entire case then moves to Federal
4 court and that the State cannot, thereafter, claim
5 immunity from the jurisdiction of the Federal courts in
6 those circumstances.

7 If the State does not have the authority -- and
8 this was an earlier question -- under Ford Motor Company
9 to waive the State's Eleventh Amendment immunity via
10 removal, the proper course should have been in this case
11 simply for -- to find the removal was void ab initio and
12 have the entire matter remanded --

13 QUESTION: But that's the end result you're
14 getting. You're getting a remand and you want to have a
15 different label put on it. But the bottom line is you
16 wanted a suit in State court. That was removed. There --
17 there's no Federal element left. I can't imagine a
18 district judge who would hang onto such a case.

19 MR. BEDERMAN: Well, again, I would not presume
20 to anticipate the future proceedings and that may --

21 QUESTION: Well, your legal position is
22 basically that a State should not be able to talk out of
23 both sides of its mouth I guess. It should not be able to
24 remove and then when it gets to Federal court claim
25 Eleventh Amendment immunity. Now, how much of that

1 argument is still valid after what's happened in this case
2 I'm not sure.

3 MR. BEDERMAN: Well, I think even though
4 petitioner is, understandably, reluctant to introduce an
5 idiom of judicial estoppel into these proceedings with --
6 with obviously the clear indication that rules of estoppel
7 tend not to run against the sovereign, but again that is
8 precisely our concern.

9 In the matter of -- of the -- the symmetry and
10 parity that occurs that when a State enters a Federal
11 proceeding, it submits the entire case to the -- to the
12 jurisdiction of the Federal courts.

13 QUESTION: May I ask you, Mr. Bederman? In the
14 brief in opposition to the certiorari petition, did anyone
15 point out the fact that maybe the State was not a person
16 within the meaning of 1983 and that that was the reason
17 not to take the case?

18 MR. BEDERMAN: Well, if I may review quickly.
19 Yes. And I do recall that the State did raise in its op
20 cert at page 10 the argument under Will. I -- yes. They
21 do opine that Will would -- would act against the -- the
22 claims raised for monetary relief by petitioners here.

23 QUESTION: They're only after monetary relief.

24 MR. BEDERMAN: I would not want to put that
25 gloss on -- on the States. I'm reading just an isolated

1 passage on page 10 of their op cert. That -- that is, in
2 essence, the -- the open question.

3 If I could return, Chief Justice Rehnquist, to
4 your -- to your observation. Again, while we don't think
5 it's necessary for the Court to rule on any judicial
6 estoppel principles, clearly this is an appropriate case
7 to draw a bright line rule in terms of States invoking
8 Federal court jurisdiction. Either they have the
9 authority to do so and waive Eleventh Amendment immunity
10 and the entire case proceeds to Federal court or the State
11 officials or lawyers do not have that authority and the
12 proper disposition is remand.

13 If I may reserve the balance of my time.

14 QUESTION: Very well, Mr. Bederman.

15 Mr. Gornstein, we'll hear from you.

16 ORAL ARGUMENT OF IRVING L. GORNSTEIN

17 ON BEHALF OF THE UNITED STATES,

18 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

19 MR. GORNSTEIN: Mr. Chief Justice, and may it
20 please the Court:

21 For four reasons, a State's removal of a case to
22 Federal court waives its forum immunity, permitting
23 adjudication of the claims against the State in Federal --

24 QUESTION: Explain to me whether we've ever
25 bifurcated forum immunity from immunity for suit -- from

1 suit? I just -- do we treat the two differently?

2 MR. GORNSTEIN: They are both protections that
3 are afforded by the Eleventh Amendment. Certainly a State
4 has both of those rights under the Eleventh Amendment.

5 But the question is the State can waive one
6 without waiving the other, and that's what it did here, by
7 selecting a forum, Federal forum, for the adjudication of
8 the claim. But in doing that, it did not give up the
9 defenses that it had in State court. And one of the
10 defenses that it had in State court, and it would also
11 have in Federal court, is a right not to be sued at all on
12 constitutional claims. But what it did give up is the
13 right to proceed in State court, rather than Federal
14 court, on the claims that it already has waived in State
15 court.

16 Now, the principle that justifies -- the -- the
17 State's invocation of Federal court jurisdiction through
18 removal is a particularly clear example of a State
19 voluntarily invoking Federal court jurisdiction.

20 QUESTION: Mr. Gornstein, may I deflect you?
21 Because I got from your brief the notion that this case is
22 academic, and let me read you from page 23, note 8. The
23 question whether a State that removes a case waives its
24 immunity to constitutional claims is largely academic.
25 Section 1983 does not authorize a suit against a State in

1 either State or Federal court. It seems to me that you
2 were telling us in that footnote that whatever is said
3 about the removal, this case goes because the State is not
4 subject to 1983.

5 MR. GORNSTEIN: To the extent that there are
6 constitutional claims against a State, that's correct. To
7 the extent that there are State law claims against the
8 State, that is not correct because the State has waived
9 its forum immunity with respect to the State law claims --

10 QUESTION: Would a district judge be acting
11 reasonably to hold onto a case that has no Federal claim
12 that involves the State tort claims act, that those are --
13 the State claims are under the State's own tort claims
14 act, like the Federal Tort Claims Act. Can you -- could a
15 Federal judge justify sitting to adjudicate a case against
16 a State under the State's tort claims act?

17 MR. GORNSTEIN: Justice Ginsburg, that would be
18 a question for the exercise of the district court's
19 discretion under the supplemental jurisdiction grounds.
20 That -- certainly if the Federal -- all the Federal claims
21 were out of the case, one ground for remanding the rest of
22 the cases under the supplemental jurisdiction statute
23 would be present. It would be a matter, though, for the
24 exercise of the district court's discretion.

25 QUESTION: It was always my understanding that

1 the district court would take into account how far have we
2 gotten into the case --

3 MR. GORNSTEIN: Correct.

4 QUESTION: -- from the Federal --

5 MR. GORNSTEIN: Right.

6 QUESTION: If you drop here, the Federal issue
7 drops out at the very threshold.

8 MR. GORNSTEIN: Correct, and that would argue
9 more strongly in favor of the district court exercising
10 its discretion in that direction, assuming there's no
11 other Federal claim in the case. And let me just address
12 that briefly because it is our understanding that a suit
13 against a State official in his official capacity for
14 injunctive or declaratory relief is not a suit against the
15 State and it is a suit against the person under -- under
16 section 1983. So, if there is a claim -- and I'm unsure
17 of whether the complaint should be read that way, but if
18 there is a claim against the individual defendants in
19 their official capacities for declaratory or injunctive
20 relief --

21 QUESTION: I thought the -- the motion to
22 dismiss as to the individuals was granted on the grounds
23 of qualified immunity.

24 MR. GORNSTEIN: Only as to the claims against
25 them in their personal capacities, not as -- with respect

1 to the claims against them in their official capacities.
2 So, that claim, if it's -- if it was there to start with,
3 it's still there.

4 QUESTION: I don't understand the difference
5 between a claim against the State itself and the claim
6 against the State officer in his or her official capacity.

7 MR. GORNSTEIN: The distinction that the court
8 drew was -- is this -- traces its origins to Ex parte
9 Young, that that is a suit against the officer in his
10 official capacity. There's no allegation that he's done
11 anything in violation of State law, and you're not trying
12 to --

13 QUESTION: What Mr. Lapidés wants -- Mr.
14 Lapidés, as I understand it, wants a money judgment.

15 MR. GORNSTEIN: I think it's -- it's largely
16 true that he wants a money judgment, but there is one
17 allegation in his complaint upon which he relies in saying
18 that he's also seeking declaratory relief against an
19 individual -- an individual officer in his official
20 capacity.

21 QUESTION: So, that's like suing the State. In
22 -- in other words, there is a claim. Under -- under 1983.
23 A State is a person when you ask -- say I want an
24 injunction. The State is a person.

25 MR. GORNSTEIN: I would say -- I don't want to

1 quibble too much with the semantics, but I would just -- I
2 would put it this way. The official is not the State for
3 purposes of --

4 QUESTION: All right. Then that's a different
5 matter. So, what you're saying is there is an action
6 against the official. All right. That's not the issue
7 because they dismissed all the claims against the
8 officials.

9 MR. GORNSTEIN: No, they did not --

10 QUESTION: Oh. So, there's still an action left
11 against the officials. Fine.

12 MR. GORNSTEIN: If it was ever there, Justice
13 Breyer --

14 QUESTION: Fine. Okay, I got it.

15 MR. GORNSTEIN: -- it's still there.

16 QUESTION: Now, if that's so, how could it not
17 be an abuse of discretion? Assuming if that's even there,
18 how could it not be an abuse of discretion to refuse to
19 send this back to the State?

20 MR. GORNSTEIN: Again --

21 QUESTION: A purely State matter.

22 And -- and I'm not, you know, overwhelmingly far
23 out I think in this area, but I don't really see why --
24 why the State here wouldn't have a right to have it sent
25 back on the ground it would --

1 MR. GORNSTEIN: Well --
2 QUESTION: -- be an abuse of discretion not to.
3 MR. GORNSTEIN: It -- it wouldn't have a right
4 to have the case sent back.
5 QUESTION: Why not?
6 MR. GORNSTEIN: It would never -- because it's a
7 matter for the district court --
8 QUESTION: There is an abuse of discretion under
9 certain circumstances.
10 MR. GORNSTEIN: And what I would say --
11 QUESTION: Yes.
12 MR. GORNSTEIN: That would be the question
13 whether there is an abuse of discretion.
14 QUESTION: And why not?
15 MR. GORNSTEIN: And the -- I don't want to argue
16 that part of the case too much, but the reason would be if
17 there are still Federal law claims against -- 1983 *games
18 against the -- individuals and they arise out of a common
19 nucleus of operative facts with the claims against the
20 State, then it would still be fair to try those claims in
21 Federal court because the State made a voluntary choice to
22 bring this case into Federal court. It had an option to
23 leave the entire suit in State court if it wanted to. It
24 exercised the option to bring the case into Federal court.
25 Now, once it did that, under Federal law, the

1 Federal consequence of that is that a Federal court has
2 authority to adjudicate the very claims that the State has
3 brought there. And the principle that --

4 QUESTION: Are you saying that it's a different
5 case because the State removed it than it would have been
6 if the same factual circumstance had occurred in the case
7 originally brought in the district court?

8 MR. GORNSTEIN: I am, Mr. Chief Justice, because
9 under this Court's decision in Pennhurst, if a plaintiff
10 files a suit in Federal court that includes both Federal
11 law claims and State law claims, the State law claims
12 against the State are -- have to be dismissed under
13 Pennhurst.

14 But the situation is different. This plaintiff
15 did just what the Pennhurst opinion suggested that he
16 should do, which is to file his claims against the State
17 under State law in State court. And -- and with that, he
18 added his Federal law claims so that he could have a
19 single lawsuit filed in a single forum.

20 Now, what the removal statute says is that
21 there's only can be removal if there -- you get the
22 consent of all the parties to the removal of the entire
23 case. The removal statute does not allow for State court
24 defendants to divide up a single case or controversy into
25 two different cases in two different forums. And the

1 State is effectively seeking to accomplish that goal.

2 Now, it says it needs to do that because it
3 wants to get the benefit of a Federal forum for its State
4 employees. But the -- just because the State has a
5 difficult choice to make about whether to remove a case to
6 Federal court or not doesn't mean its decision to bring
7 the case to Federal court isn't voluntary. It's still a
8 voluntary decision to bring the case to Federal court.

9 It's also a little surprising to hear the State
10 say that it needs to have a Federal forum for its State
11 officials on Federal law issues when the State has
12 repeatedly and successfully argued to this Court that
13 State courts are fully competent and just as competent as
14 Federal courts to adjudicate Federal law issues.

15 And it's -- it's particularly surprising that
16 the State thinks it's in the State's interest for its
17 employees to get an interlocutory appeal in Federal court
18 when the State's own policy is that they aren't entitled
19 to an interlocutory appeal.

20 QUESTION: Well, the State is certainly entitled
21 to make a tactical judgment --

22 MR. GORNSTEIN: It certainly is.

23 QUESTION: -- that it's better off in Federal
24 court than it is in State court.

25 MR. GORNSTEIN: It absolutely is, Mr. Chief

1 Justice, and all we are saying is once it does that, then
2 it has to accept the consequences of that choice, which is
3 the Federal court then has authority to adjudicate the
4 entire case that has been brought before them -- before
5 it.

6 I wanted to say a word about the -- the Ford
7 Motor Company case because in the Ford Motor Company case,
8 the Court did deem State law authority to consent to be
9 the critical issue. But all other decisions in which the
10 Court has addressed the invocation issue, the Court has
11 held that an individual when -- I mean, when a State
12 invokes Federal court jurisdiction, it waives immunity as
13 a matter of Federal law.

14 QUESTION: Thank you, Mr. Gornstein.

15 Ms. Orland, we'll hear from you.

16 ORAL ARGUMENT OF DEVON ORLAND

17 ON BEHALF OF THE RESPONDENTS

18 MS. ORLAND: Mr. Chief Justice, and may it
19 please the Court:

20 The State, along with its employees, removed
21 this case to Federal court so that its employees could
22 take advantage of a -- in a Federal forum.

23 This does not amount to a waiver for two
24 reasons. First, it is not a clear and unequivocal
25 expression of the State's desire to waive its immunity,

1 and second, the attorney --

2 QUESTION: Is it a waiver of forum immunity as
3 opposed to immunity from suit? Is there such a
4 distinction?

5 MS. ORLAND: Your Honor, this Court has never
6 made such a distinction, and the first I've ever heard of
7 the concept of forum immunity being parceled out from the
8 rest of the immunity was in this case. Apparently there
9 was a recognition at some point by the petitioner in this
10 case that the Federal claims would be barred even in State
11 court, and then they've come up with this forum immunity
12 concept.

13 QUESTION: It's not -- it's -- I mean, the
14 concept has been around. I mean, we've -- we've held that
15 a State does not -- just because a State is willing to be
16 sued in its own courts does not automatically mean that it
17 can therefore be sued in Federal court. Isn't that right?

18 MS. ORLAND: Your Honor, the concept of what --

19 QUESTION: Which -- which means that -- that you
20 can be immune in one forum and not immune in another
21 forum, although you're not immune from the suit entirely.

22 MS. ORLAND: Your Honor, that is exactly what
23 the Court found in Pennhurst, but I would suggest that the
24 Court has also found in Pennhurst that the absence of that
25 choice, that concrete choice, would emasculate the

1 Eleventh Amendment. So, what is being argued is by the
2 exercise of procedural device for the benefit of our
3 employees would cause a State to sacrifice a part of the
4 immunity which the absence of would emasculate --

5 QUESTION: Well, that's -- you know, that's too
6 bad, isn't it?

7 MS. ORLAND: Well, Your Honor --

8 QUESTION: The cost of getting the advantage of
9 Federal courts is that you -- you come into Federal court.
10 It seems to me self-evident.

11 Now, you say I have a good reason for wanting to
12 be in Federal court. Well, you may indeed. But there you
13 are.

14 MS. ORLAND: Your Honor, first of all, I'd like
15 to point out that that cost is just too high. As the
16 zealous advocate on behalf of all of my clients, I have to
17 choose between the individual's right to deal with the law
18 as it is in the State of Georgia, whether that's the State
19 of Georgia's choice or not, but the law in the State of
20 Georgia at the present time is that there is no right to
21 direct appeal. So, as a zealous advocate on behalf of the
22 individual employees, we have a desire to protect the
23 individual employees from the right --

24 QUESTION: But that's a right of the State of
25 Georgia to protect the individual employees, and the State

1 of Georgia has said the right to an interlocutory appeal
2 is not all that important. You have the substantive
3 defense that you just can't because Georgia has its own
4 choice of whether it's better to have this decided after
5 the whole case or in the middle. They think it's better
6 to wait till the case is over. Now, why can't Georgia
7 make that decision?

8 MS. ORLAND: Georgia absolutely can make that
9 decision, Your Honor, through its legislative process, and
10 that's part of the point.

11 QUESTION: Well, why shouldn't that decision
12 also influence the tactical decisions of the attorney
13 general when he's litigating?

14 MS. ORLAND: Because the attorney general
15 represents more than just the State in a lawsuit such as
16 this. The individuals are also being represented by the
17 attorney general, and the State should not be required to
18 sacrifice all or part of its Eleventh Amendment immunity
19 so that the attorney general can zealously advocate --

20 QUESTION: But it's the State of Georgia's
21 legislature who have made the decision that's troubling
22 for the State of Georgia's employees.

23 MS. ORLAND: Your Honor, but the employees have
24 to take the law as it is.

25 QUESTION: Well, and the legislature didn't say

1 that no Georgia employee shall ever have an interlocutory
2 appeal in any court. It had just said they don't happen
3 in Georgia courts.

4 MS. ORLAND: That's correct, and Congress has
5 seen fit to allow for a procedural device for State
6 defendants or any other defendants to take advantage of
7 the procedures available to them. But nowhere did
8 Congress --

9 QUESTION: But you're missing one very key thing
10 here. Congress said in order to remove, all defendants
11 must remove. Those officers could not have been -- could
12 not have removed on their own. They had to have the
13 State's consent. And for the State, after consenting, to
14 say, oh, we're going to accommodate you, we'll join in the
15 removal, but as soon as we get there, we're going to come
16 out, it seems to me that is just the clearest end run
17 around Congress' direction that all defendants have to
18 join in the removal petition. It would be a sham removal
19 if someone were to say, okay, I agree to remove and be in
20 the Federal court, but the minute I get to Federal court,
21 I'm going to say, Federal court, you can't get me.

22 MS. ORLAND: First of all, Your Honor, Congress
23 did not expressly state that all defendants needed to
24 agree. That is a court-created doctrine, and I'm not
25 going to challenge the -- that doctrine.

1 QUESTION: It's a court interpretation of the
2 removal statute.

3 MS. ORLAND: Yes, Your Honor.

4 QUESTION: And -- and you're not going to
5 challenge that. So, it's as good as if it were in the
6 statute, just as the sovereign immunity doctrine, although
7 it's not in the Eleventh Amendment, is there.

8 MS. ORLAND: Your Honor, all that is true. But
9 Congress also contemplated the remand of certain claims.
10 And the only thing the State is asking in this case is for
11 the case to be treated as if it were originally filed in
12 Federal court, which it is our belief is the true intent
13 of the congressional removal statute. They didn't allow
14 partial claims to be brought up, and the reason they
15 didn't allow for it is because of the court's potential
16 exercise of supplemental jurisdiction.

17 But in this case, there can be no exercise of
18 supplemental jurisdiction simply because the legislature
19 for the State of Georgia has not waived its sovereign
20 immunity as to the Georgia Tort Claims Act for actions
21 within the courts of the United States.

22 So, in this case, by the exercise of a
23 procedural device, the attorney general would not be only
24 overriding the very principles established in the concepts
25 of federalism, but would also be overriding the -- the

1 decisions of the State legislature and the Georgia
2 constitution.

3 QUESTION: Ms. Orland, then it seems to me the
4 obvious thing that the zealous representative of the State
5 would say is, sorry, we can't join in the removal
6 petition. This case belongs in State court and we're not
7 going to engage in any subterfuge. We -- it's just as
8 though it were brought originally. It would be no good.
9 So, we are not going to go through the sham of signing our
10 name onto a removal petition only to say that this case
11 can't be brought in Federal court. If the State were
12 zealous in its position that only the State court can
13 adjudicate this, it had no business signing on to any
14 removal petition.

15 MS. ORLAND: Your Honor, I understand the
16 concerns of the Court regarding the concept of saying
17 we're going to Federal court, but no, we're not. The --
18 but the reality of the removal statute is, is it doesn't
19 allow for the removal of some claims, and that's a
20 procedural device available. If there's a remedy to be
21 had, the remedy to be had is with Congress. If there's a
22 problem with the removal statute not allowing certain
23 claims to be brought in Federal court and therefore the
24 whole case can't be removed --

25 QUESTION: There's nothing wrong with the

1 statute. It says all defendants have to join in the
2 removal, and the removal has to be -- it seems to me that
3 the State of Georgia really is playing rather fast and
4 loose with the -- with the Federal court when it says,
5 aha, we're going to bring this to accommodate -- to
6 accommodate two people who couldn't do it on their own.

7 MS. ORLAND: Your Honor --

8 QUESTION: It seems to me that the case on
9 Georgia's own theory is non-removable from day one, and
10 that's the position that Georgia should have taken. This
11 is not a case for a Federal court.

12 MS. ORLAND: Then by very virtue of a sham
13 joinder of the State in a case, which in this case
14 arguably was done by suing the case -- State under 1983
15 and further by attempting to sue the State, for which
16 there has been no waiver of sovereign immunity as to
17 defamation of liable, a plaintiff can shamly decide that
18 individuals won't be entitled to --

19 QUESTION: The plaintiff in this case wanted to
20 be in the State court. It's the State that said Federal
21 court. So, you can't -- this -- that's why this case is
22 so puzzling because it's the plaintiff who wants to be in
23 the Federal court -- in the State court. And -- and the
24 State wants to take it into the Federal court. It really
25 is something that only a lawyer could conceive.

1 (Laughter.)

2 MS. ORLAND: Your Honor, I think that the
3 problem here is, is that by virtue of 1983 litigation,
4 individual employees get sued. And it does create sort of
5 a quandary of issues because the individuals have a
6 desire, quite understandably I'm sure, to get the case
7 resolved, to --

8 QUESTION: But -- but you're asking for a
9 broader principle, which it may well be that in -- in its
10 application to your case there's some -- you can
11 understand why the -- why the State wanted to go into
12 Federal court. But what you're asking for is the general
13 principle that by coming into Federal court, you do not
14 waive State sovereign immunity, and that general principle
15 would have applied even if you had been the only defendant
16 in the State court. And you removed to Federal court, and
17 then having gotten into Federal court, you moved to
18 dismiss on grounds of sovereign immunity, which is absurd.

19 MS. ORLAND: Your Honor, I would agree it's
20 absurd, and that type of behavior could be sanctioned by
21 the court. If a lawyer is going to play those kinds of
22 games, it is certainly within the court -- district
23 court's province to sanction ill-behavior. And that's
24 what is being alleged that we did.

25 But what I would point out is that every --

1 QUESTION: On what -- on what grounds would you
2 sanction the behavior if you're saying that it's lawful.
3 I don't understand that.

4 MS. ORLAND: Your Honor, if it --

5 QUESTION: You're saying, counsel, you have
6 exercised every right that we can give you under the law.
7 We're now sanctioning you for doing that. That -- I don't
8 understand that.

9 MS. ORLAND: I'm sorry if I misspoke. If a
10 lawyer is going to remove a case and do it for the
11 purposes of delay or some other misconceived purpose --

12 QUESTION: Lawyers do all sorts of things for
13 the purposes of delay.

14 (Laughter.)

15 MS. ORLAND: And it's improper.

16 QUESTION: I'm not -- I'm not sure it is. I
17 think in many cases an attorney will look at two different
18 choices, particularly if you're a defendant, and you'll
19 choose the thing that will delay the case's final
20 resolution. And nothing improper about that.

21 MS. ORLAND: There's nothing improper about
22 that, but in the scenario that if it is improper, if it is
23 determined that there is some attempt to elongate
24 litigation for an improper purpose, the court has the
25 discretion to sanction that behavior.

1 Moreover, Congress has the ability to change --

2 QUESTION: Yes, but you're not -- they're not
3 elongating the case. They're trying to terminate it in a
4 hurry in this particular --

5 (Laughter.)

6 QUESTION: And I just don't understand how that
7 could possibly be sanctionable conduct if we say it's a
8 proper usage of the removal statute and it doesn't waive
9 sovereign immunity. They'll do it all the time.

10 MS. ORLAND: Your Honor, I'm not saying we did
11 anything improper. I'm saying that in the event that
12 somebody did do something improper, that's sanctionable.

13 QUESTION: Yes, but the question is whether this
14 particular maneuver is -- is authorized by law or not.
15 And if it's authorized by law, it surely isn't improper.

16 QUESTION: Indeed, it would be improper not to
17 take advantage of it.

18 QUESTION: Sure.

19 QUESTION: You should be sanctioned as
20 incompetent counsel.

21 (Laughter.)

22 MS. ORLAND: Hence, the quandary of being a
23 State litigator, Your Honor. And that's exactly the
24 point. We have several clients here. The -- the attorney
25 general's office represents the individuals as well as the

1 State entity on both State and Federal claims.

2 You're right. All of the Federal claims are
3 gone. Even if you read at joint appendix 17 the
4 plaintiff's assertion that he is seeking declaratory
5 relief, which I would suggest is not a clear statement of
6 declaratory relief -- it is a request for declaratory
7 relief under State law. So, if the Court --

8 QUESTION: It just occurred to me that maybe
9 there is sanctionable conduct here because you have a
10 conflict of interest. Your interest in the employees is
11 definitely directly opposed to your interest representing
12 the State. So, maybe you should have gotten separate
13 counsel.

14 MS. ORLAND: Well, Your Honor, in fact at some
15 point in this litigation we did. But at the initial point
16 of the removal, there was no reason to.

17 And I think this goes to Justice Kennedy's
18 concurrence in Wisconsin, which is if the State is going
19 to be placed in some tactical disadvantage, this rule
20 should not be adopted.

21 The tactical disadvantage in this case is quite
22 simple. The State would be at odds with its employees.
23 The State would not be in a position where there is no
24 Eleventh Amendment protection as to some claims perhaps --
25 or it hasn't been decided yet for ADA Title II claims --

1 to have a Federal court be the first to adjudicate those
2 types of issues and have the fastest course to this Court
3 for a determination --

4 QUESTION: The State would be at odds with its
5 employees because the employees want an interlocutory
6 appeal and they can't get it in the State court?

7 MS. ORLAND: Yes, Your Honor.

8 QUESTION: That -- that sort of thing arises
9 frequently. Do you move for a change of venue or not in a
10 particular case where you've got multiple defendants? And
11 as Justice Stevens said, perhaps a lawyer ought not to
12 have multiple defendants if they're going to have
13 different -- different approaches to the thing.

14 MS. ORLAND: Well, Your Honor, I think that's --
15 that's exactly the point here is -- and also the point as
16 to why the attorney general, as the litigator on behalf of
17 the State and its employees, should not be in a position
18 to make a decision as to waiver. That's why it goes to
19 the legislature.

20 QUESTION: May I interrupt once more? I hate to
21 -- I'm sorry --

22 MS. ORLAND: I'm sorry, Your Honor.

23 QUESTION: -- I'm interrupting so many times.

24 But is it your position that the general rule
25 should be that removal waives the State's sovereign

1 immunity, but there should be an exception when there's a
2 good reason because of a conflict of interest? Or is your
3 -- your position is that it will never waive sovereign
4 immunity?

5 MS. ORLAND: Your Honor, the only time that it
6 could waive sovereign immunity is if the State legislature
7 says I authorize the attorney general --

8 QUESTION: No. Absent a State legislature --
9 you're arguing for a general rule, not just for a rule
10 that will protect you in this particular case.

11 MS. ORLAND: That is correct.

12 QUESTION: Well, a general rule. My goodness.
13 Suppose the State comes in and they have four claims and
14 they -- they wanted -- they say, oh, I have a great idea.
15 I'm going to get this claim litigated over here in the
16 Federal court and there are three related claims. It's a
17 bankruptcy matter, for example, and they just pick and
18 choose. I mean, normally when -- when you have waiver in
19 constitutional law, say the Fifth Amendment, you -- you
20 start waiving answers to one question and related
21 questions are going to be waived too.

22 MS. ORLAND: Well, Your Honor, and that's
23 exactly the point, is there is no clear statement of
24 waiver here by Congress or the State legislature. I don't
25 think you can just pick and choose a waiver.

1 QUESTION: All right. Well, I mean, but Justice
2 Stevens' question is that you're arguing for a general
3 principle that -- that they don't waive anything. Is that
4 right?

5 They -- they come into Federal court. Why did
6 they do it? They came into Federal court in all these
7 others because there was a claim they wanted litigated
8 either for them or against the State. So, I would have
9 thought they would at least have waived all related
10 matters.

11 MS. ORLAND: Your Honor, in all the cases relied
12 upon by the petitioner where the State has come into
13 Federal court, the court's first inquiry was whether the
14 Eleventh Amendment applied. In all of those cases, the
15 court first found that the Eleventh Amendment simply was
16 inapplicable. When the State is acting as a plaintiff or
17 in any form or fashion or entering in as a party, it's not
18 a suit commenced or prosecuted against the State. The
19 petitioner in this case conceded that the act of removal
20 does not translate the State from a defendant to a
21 plaintiff. Yet, they are asserting that the cases where
22 the State has entered in as a plaintiff somehow are
23 applicable, and they are not applicable.

24 QUESTION: But on your theory, even if the State
25 had come in as a plaintiff in the first place, you would

1 have sovereign immunity, wouldn't you? Because the
2 legislature hasn't waived it.

3 MS. ORLAND: Your Honor, the Eleventh Amendment
4 would just simply be inapplicable if the State entered as
5 -- as a plaintiff.

6 QUESTION: I thought you were claiming sovereign
7 immunity. I mean, it -- I mean, sovereign immunity today
8 is something broader than the strict terms of the Eleventh
9 Amendment, and I thought you were making the -- the full
10 claim.

11 MS. ORLAND: Your Honor, I'm sorry. I'm
12 baffled. But I think that sovereign immunity --

13 QUESTION: Well, I have had that problem too in
14 some of the prior cases.

15 (Laughter.)

16 QUESTION: But I -- I haven't agreed with them,
17 but I -- I have to accept what they are. And -- and the
18 -- the principle of sovereign immunity is a principle
19 today that is not limited by the -- by the strict terms of
20 the Eleventh Amendment.

21 MS. ORLAND: As was pointed out I guess in Alden
22 is the Eleventh Amendment has stood for the greater
23 principles of sovereign immunity, and I think that that's
24 what we're talking about here. And I think it's also been
25 concretely held that the Eleventh Amendment in its broader

1 principles perhaps doesn't apply to the State when it
2 enters into an action as a plaintiff. And I think that
3 that's an entirely different -- I'm sorry.

4 QUESTION: No. I -- I want to ask you a -- a
5 kind of question which is subsumed -- a narrower question
6 which is subsumed within the broader one, and that is
7 let's -- let's put this situation aside and assume that we
8 have the -- the conflict-free situation in which the
9 employees have their own counsel and the -- the State is
10 -- is represented simply by -- by separate counsel. The
11 employees want to remove and the State, as -- as a
12 defendant separately represented, agrees to the removal.
13 On your theory, as I understand it, the State would still
14 be able at a later time to claim its immunity because the
15 legislature had not authorized that removal. Is that
16 correct?

17 MS. ORLAND: It's not that the legislature
18 hasn't authorized the removal. It's that the legislature
19 hasn't authorized a waiver of the State's immunity.

20 QUESTION: All right. And -- and so, in -- in
21 that particular case that I -- I posed to you in which we
22 have separately represented defendants, the State consents
23 to the removal. The State still would not have lost its
24 immunity by consenting to the removal.

25 MS. ORLAND: No, it would not, Your Honor, and I

1 think --

2 QUESTION: All right. Now, in that situation
3 then, how do you answer the argument that came up in the
4 briefs that that would give the -- the State the
5 opportunity to sit back and see how things go? And if the
6 -- if the case turns out well for them, they can claim the
7 -- the judgment. If the State doesn't go well for them,
8 they can simply raise the question of immunity not only to
9 escape the judgment, but to escape any estoppel later on.
10 I mean, is -- is there any answer to that, or do you
11 simply say, yup, that's a great position to be in and
12 that's our position?

13 MS. ORLAND: Well, Your Honor, first of all, I
14 would say that that is a different situation. Obviously
15 the Court knows that. But this Court's jurisprudence is
16 consistent with the State being able to assert its
17 Eleventh Amendment immunity at any time. The Court has
18 not differed from that jurisprudence.

19 But what I would point out in this case is the
20 State was very up-front from the beginning. This
21 wasn't --

22 QUESTION: No, I'm not talking about this
23 situation. I'm talking about where your position leads
24 us. And I take it that your position does lead us to the
25 -- to the sort of the options that -- that I've just

1 described.

2 MS. ORLAND: Your Honor, it does but -- and I
3 think that that would be consistent with this Court's
4 jurisprudence. But at the same time, I would suggest that
5 the State has a vested interest in not going to trial at
6 all. So, I would suggest that since Ford, there probably
7 haven't been a lot of situations where the State has been
8 in a position of litigating a case to the end, and it
9 hasn't come up since Ford. So, I think that that's fairly
10 significant.

11 QUESTION: Ms. Orland, what if -- what if your
12 -- your State attorney general brings suit in Federal
13 court?

14 MS. ORLAND: Then the Eleventh Amendment simply
15 doesn't apply.

16 QUESTION: Why? He has no authority to waive
17 sovereign immunity you say.

18 MS. ORLAND: There's no waiver of sovereign
19 immunity --

20 QUESTION: What about a counterclaim by the
21 defendant?

22 MS. ORLAND: There's no dipping into the State's
23 pocket. The counterclaim can go as far as the defense.
24 This Court has repeatedly found that an entry into a forum
25 or the beginning of suit allows the party being sued to

1 defend against the claim. But that's not the same as
2 dipping into the State's pocket.

3 What the petitioner is alleging is that somehow
4 the bifurcation of cases is an unheard of result and that
5 it should be exchanged from the State's -- thank you.

6 QUESTION: Thank you, Ms. Orland.

7 Ms. Parsley, we'll hear from you.

8 ORAL ARGUMENT OF JULIE C. PARSLEY

9 ON BEHALF OF TEXAS, ET AL.,

10 AS AMICUS CURIAE, SUPPORTING THE RESPONDENTS

11 MS. PARSLEY: Thank you, Mr. Chief Justice, and
12 may it please the Court:

13 The decision to waive sovereign immunity and
14 consent to suit traditionally rests with the State's
15 legislature, a body uniquely able to both balance
16 challenges to the public fisc and determine when such a
17 waiver is both in the citizens' will and the public good.

18 QUESTION: Have we inquired, when States bring a
19 suit in Federal court, whether the State attorney general
20 has authority to appear? Because, you know, when you come
21 in Federal court and you're subject to a counterclaim.
22 Have we -- have we asked district judges to inquire
23 whether the State attorney general has authority to waive
24 sovereign immunity?

25 MS. PARSLEY: No, Your Honor, the Court has not.

1 QUESTION: We have not. And -- and is it your
2 position that as soon as a counterclaim is filed, what?
3 The whole suit has to be dismissed or -- or what -- what
4 happens then?

5 MS. PARSLEY: No, Your Honor. Our position
6 would be that as to the -- the specific compulsory
7 counterclaim that may be litigated against the State as a
8 plaintiff, that is permissible to the extent of the res.
9 In other words, when the State comes in as a plaintiff --

10 QUESTION: Excuse me. To the extent -- I didn't
11 hear the word.

12 MS. PARSLEY: The res, the subject matter of the
13 litigation.

14 QUESTION: So, you say the attorney general,
15 even though he has no power to waive State sovereign
16 immunity, can achieve a waiver of State sovereign immunity
17 by bringing suit which is subject to a compulsory
18 counterclaim.

19 MS. PARSLEY: He does have the authority to
20 represent the State, and presumably he has the authority
21 also by the legislature to bring the cause of action that
22 he is asserting with the State as a plaintiff.

23 QUESTION: So, the same here when -- when he
24 doesn't have authority to waive sovereign immunity, but he
25 has authority to remove to Federal court. And if that

1 results in a waiver of sovereign immunity, so be it.

2 MS. PARSLEY: But the two are specifically
3 different because, as a defendant, you're looking at this
4 -- it would be an implied waiver as opposed to an express
5 waiver. As a plaintiff, even the United States, it has
6 been admitted, they are not -- they are also subject to
7 waiver for compulsory counterclaims to the extent of the
8 res. It has been --

9 QUESTION: Why isn't that an implied waiver too?
10 Brings suit -- the -- the State brings suit in Federal
11 court is subject to a counterclaim. And you're saying
12 that the State is -- is subject to adjudication of that
13 counterclaim. Now, there's no express waiver there. It's
14 just an implied waiver from bringing the action in Federal
15 court. Why isn't removal the same?

16 MS. PARSLEY: Well, that is the situation that
17 occurred in Gardner, Your Honor, for the -- for the proof
18 of claim instance with bankruptcy litigation. And that is
19 -- so, it is not -- and it's not been seen as an implied
20 waiver because the State has put in issue the res and the
21 subject matter of the litigation.

22 But in this case --

23 QUESTION: Well, you speak of the res of the
24 litigation. Supposing the State simply wants to collect a
25 bad debt from somebody. There's no res. Maybe he doesn't

1 have anything at all. But it simply wants a money
2 judgment against him for \$100,000.

3 MS. PARSLEY: Yes, Your Honor. That would be --
4 then the State would be able --

5 QUESTION: There's no -- there's no res there.

6 MS. PARSLEY: But it is the subject matter of
7 the litigation; that is, his -- that would be what the
8 State would be adjudicating.

9 In this instant, what distinguishes it is that
10 the State is not transformed from a defendant to a
11 plaintiff when it removes to Federal court, and the
12 literal text of the Eleventh Amendment proscribes cases
13 prosecuted against a State.

14 QUESTION: What happens under State law, say, in
15 Texas if -- it's a tort action. It's against the State.
16 Everybody in your office thinks that there is no sovereign
17 immunity, but just before the jury is about to come in,
18 somebody dredges up a statute and says, oh, my God, we had
19 sovereign immunity. We forgot to make the defense.

20 MS. PARSLEY: The Texas Supreme Court has held
21 that sovereign immunity is subject matter jurisdiction.

22 QUESTION: So, in other words, you can come in
23 in Texas, a jury is about to come in, you're just about to
24 lose the case, the last minute you discover this defense,
25 and just they'll -- they'll dismiss the case?

1 MS. PARSLEY: That actually, to my knowledge,
2 has not happened yet. That case was decided only a couple
3 of years ago.

4 QUESTION: They wouldn't say you had waived it.

5 MS. PARSLEY: No. We -- we would not assert
6 that we have waived --

7 QUESTION: I know you wouldn't assert that. I
8 just wonder what the judge in Texas --

9 MS. PARSLEY: We would hope the judge would
10 agree with us.

11 But that -- and that is. You put your finger on
12 the point that some -- that people dislike about sovereign
13 immunity. It does give the State superior rights in some
14 instances to other litigants, but that is because the
15 State is a sovereign, just like the U.S. is a sovereign.
16 The immunity --

17 QUESTION: I don't -- I don't object to that. I
18 object to -- to a dog in the manger, I mean, to say one
19 thing and then say another thing. And here's the State
20 saying I want to be in Federal court and -- and gets there
21 and the State says, I don't want to be in Federal court.
22 I mean, that -- that's what I object to.

23 MS. PARSLEY: Well --

24 QUESTION: You can have all the sovereign
25 immunity you want. Just -- you know, just decide whether

1 you want it or don't want it.

2 MS. PARSLEY: And all -- all we are really
3 asking for, Justice Scalia, is to have the same defenses
4 that would be available to us if the plaintiff had chosen
5 to file the lawsuit in Federal court. We are just
6 employing a procedural device to bring us into Federal
7 court so that we can adjudicate the claims of our
8 employees and that, if we have defenses, they can be
9 heard.

10 QUESTION: Well, they could be adjudicated in
11 State court, couldn't they? The Federal issues?

12 MS. PARSLEY: They could be. They -- they could
13 be adjudicated in State court.

14 QUESTION: What they don't like here is no
15 interlocutory appeal I gather.

16 MS. PARSLEY: Yes, that is -- that's true.

17 QUESTION: Well, that's the State's own fault.
18 I mean, the State could have an interlocutory appeal if it
19 chose to do so, couldn't it?

20 MS. PARSLEY: They could, but in the Johnson
21 case, of course, this Court stated that the State courts
22 do not have to have a parallel system similar to the
23 Federal courts.

24 QUESTION: I take it the State of Texas is not
25 asserting that its courts are less capable of interpreting

1 Federal law than Federal courts are?

2 MS. PARSLEY: Not -- not at all, Justice
3 Kennedy. Not at all. And we don't mean any disrespect in
4 that regard.

5 QUESTION: In fact, you prefer your
6 interpretation of Federal law, don't you?

7 (Laughter.)

8 QUESTION: It seems to me everything that you've
9 said leads to the conclusion that this was a non-removable
10 case from day one and that the State should not have --
11 should not have joined that removal petition.

12 MS. PARSLEY: Actually that -- we do not agree
13 with that because there's no clear statement in the
14 removal statute indicating that the State would have
15 waived its immunity had it removed. Also, there's no
16 section 5 power on behalf of Congress to actually abrogate
17 the State's immunity. So --

18 QUESTION: I don't get -- I don't get it all.
19 If the State is immune from suit in the Federal court,
20 then it seems to me it follows it has no authority to
21 remove the case to the Federal court. It can't initiate
22 action. It can't say, Federal court, hear this case, and
23 then say, Federal court, you don't have power to hear it.
24 It seems the two go together. If the Federal -- if the
25 State is not amenable to suit in Federal court, the State

1 is not positioned to remove the case to Federal court.

2 MS. PARSLEY: But that would be similar to the
3 -- to the argument they made in Schacht in that you cannot
4 remove a case with barred claims. The removal statute
5 does not prohibit the State -- States from removing --

6 QUESTION: Not barred -- the statute of
7 limitations is a defense. You're saying that the -- the
8 State has not consented to suit. As long as it doesn't
9 consent to suit in Federal court, it seems to me it's in a
10 non-removable position in the State court because either
11 it's going to consent or it's not going to consent. If it
12 doesn't consent, it -- it doesn't have any authority to
13 remove.

14 MS. PARSLEY: Well, it may be a fine
15 distinction, but consenting to the removal, we would argue
16 and is argued in the briefs, is not the same thing as
17 consenting to waive our Eleventh Amendment immunity. The
18 only way we could actually waive our Eleventh Amendment
19 immunity is if we were vested with that power by the
20 legislature. And Texas is not, Georgia is not. And under
21 Ford Motor Company, that's the appropriate analysis that
22 the court would engage in, whether we were --

23 QUESTION: What -- what do you think is at stake
24 now? On the -- I think that you did -- you did bring up
25 the question of 1983 liability, that there -- that this

1 was not a Federal case to begin with. Is that -- is that
2 right?

3 MS. PARSLEY: I believe that -- that Georgia,
4 when they moved -- when they answered, they both raised
5 Will and the Eleventh Amendment in their answer. That is
6 correct.

7 QUESTION: So, it seems to me that we are
8 arguing over an academic question because no matter what,
9 this case is going to return to the Georgia State court.

10 MS. PARSLEY: It's not academic on this -- for
11 this point. This is really a reinvigoration of the
12 implied waiver doctrine that the Court fully rejected in
13 College Savings Bank. This is -- the analogy is parallel
14 to the market participation theory. In the market --
15 market participation theory, the State was held as having
16 waived its immunity because it voluntarily engaged in an
17 activity --

18 QUESTION: Yes, but all those could be very
19 interesting questions. The bottom line, no matter how you
20 look at this case, is it goes back to the State court.
21 So, if -- you -- you had said initially no 1983 liability.
22 Right? And that the Federal court should --

23 MS. PARSLEY: Yes, Your Honor.

24 QUESTION: And I had thought that in the recent
25 case we had said if you have that picture, the Federal

1 court is supposed to deal with the 1983. Wasn't it
2 Vermont Agency?

3 MS. PARSLEY: Yes, Vermont Agency. The
4 statutory question.

5 QUESTION: Yes, right.

6 MS. PARSLEY: That it could be dealt with first,
7 yes.

8 QUESTION: Right.

9 MS. PARSLEY: That is entirely possible, and the
10 district court -- it would have been well advised to have
11 done that, but the district court did not choose to do
12 that. Instead, it ruled on the Eleventh Amendment.

13 QUESTION: But in any -- any way you look at
14 this, the case ends up in -- in the State court. So, it
15 seems to me that you really are arguing an academic
16 question.

17 MS. PARSLEY: Well, to the extent that the
18 petitioner is challenging the Eleventh Circuit's judgment,
19 they do want to remain in Federal court. And so,
20 therefore, they are actually challenging the judgment and
21 not just the opinion. So, there is a justiciable question
22 on appeal.

23 I did want to say quickly that in relation to
24 the implied waiver doctrine, that a State shouldn't have
25 to choose between what is an otherwise legal activity,

1 which is removal, and the forfeiture of its immunity.

2 QUESTION: Thank you, Ms. Parsley.

3 Mr. Bederman, you have 4 minutes left.

4 REBUTTAL ARGUMENT OF DAVID J. BEDERMAN

5 ON BEHALF OF THE PETITIONER

6 MR. BEDERMAN: If I may, Justice Ginsburg, I was
7 not entirely as helpful as I could have been in response
8 to your earlier lines of questioning. If I can be of
9 assistance to the Court.

10 Professor Lapedes, in his complaint, alleged
11 declaratory grounds and declaratory relief at -- at pages
12 -- joint appendix pages 17 and 19.

13 And a review of the district court's first order
14 at petition appendix 27a, while admittedly the -- the
15 holding is not entirely crystal clear, in terms of
16 reserving the claims against individuals in their personal
17 capacity, although no mention is made of the nature of the
18 relief, the cases cited by the district court maybe are
19 indicative that in the district court's mind was the open
20 question of the availability of declaratory relief.

21 QUESTION: Are you talking about paragraph 26 of
22 the complaint?

23 MR. BEDERMAN: Yes, sir, I am.

24 QUESTION: Well, that just says, I want a
25 judicial finding that what Kansas did amounts to

1 defamation. I take it that's a defamation claim under
2 State law. What has that got to do with it?

3 MR. BEDERMAN: Well, I think, of course, all
4 paragraphs in a complaint need to be read together in view
5 of the earlier allegations, in view of this course of
6 conduct interfering with Professor Lapidés'
7 constitutionally granted due process rights at both
8 paragraphs 1 and at paragraph 8 of the complaint. I think
9 when read together, paragraph 26 fairly raises in terms
10 of --

11 QUESTION: Read them together. I just read it.
12 What he says is I want a judicial finding that Kansas
13 State action gives rise to a new -- is defamatory, thereby
14 giving rise to a new cause of action every time the
15 information is published. Okay? Read it together so it
16 states a Federal claim. I'm not saying you can't. I just
17 want to hear it.

18 MR. BEDERMAN: No. I'm not sure on the bare
19 terms of paragraph 26 that the request for declaratory
20 relief is particularly tied to a Federal cause of action.
21 All I can point the Court to is both paragraphs 1 and 8 of
22 the complaint which frame the Federal question.

23 If I may, in terms of -- of a second point,
24 about the concern for tactical disadvantage that the State
25 may be put in, if the Court rules either that removal

1 constitutes waiver, that the Georgia Supreme Court in a
2 1994 decision made clear that denials of qualified
3 immunity defenses are subject to immediate certification
4 for appeal by trial court judges. So, I think it's
5 extravagant to suggest that under Georgia law currently
6 that there is no effective mechanism for the review,
7 immediate review, of -- of denials of qualified immunity
8 defenses. And this is more fully explained at reply brief
9 page 11 filed by the petitioner.

10 If I may make one last point, and that is by no
11 means is petitioner asserting that by virtue of removal,
12 plaintiffs become defendants and defendants become
13 plaintiffs. Instead, our submission is simply that
14 removal is a forum selection, that when the State engages
15 in that forum selection, it is waiving, for purposes of
16 the case and the authority of the Federal courts to
17 adjudicate, the State's forum immunity under the Eleventh
18 Amendment.

19 If there are no other --

20 QUESTION: Well, I don't mean to pursue a red
21 horse. I just don't want to miss something if it's there.
22 Where in paragraph 1 or 8 does it ask for a declaration?

23 MR. BEDERMAN: It does -- neither paragraph 1
24 nor 8 specifically refers to declaratory relief. If you
25 -- if you flip to the prayer for relief at pages 18 and

1 19, of course, most of it is for -- for monetary damages.
2 But, of course, the last prayer is for all relief that the
3 court may deem just and proper.

4 CHIEF JUSTICE REHNQUIST: Thank you. Thank you,
5 Mr. Bederman.

6 The case is submitted.

7 (Whereupon, at 12:06 p.m., the case in the
8 above-entitled matter was submitted.)

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