IN THE SUPREME COURT OF THE UNITED STATES

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GERALD T. MARTIN, ET UX., :

Petitioners :

v. : No. 04-1140

FRANKLIN CAPITAL CORPORATION, :

ET AL. :

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Washington, D.C.

Tuesday, November 8, 2005

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:09 a.m.

APPEARANCES:

SAMUEL H. HELDMAN, ESQ., Washington, D.C.; on behalf of the Petitioners.

JAN T. CHILTON, ESQ., San Francisco, California; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

[10:09 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Martin versus Franklin Capital Corporation.

Mr. Heldman.

ORAL ARGUMENT OF SAMUEL H. HELDMAN

ON BEHALF OF PETITIONERS

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

Section 1447(c) provides for fee -- for a fee award -- allows a fee award when a case is remanded to State court. There is, by contrast, no statute providing for a fee award to a defendant who removes, and successfully defends against, a motion to remand. There is no statute providing for a fee award against a plaintiff who wrongly invokes the original jurisdiction in Federal District courts.

This indication that there is something peculiarly troublesome and problematic about an incorrect removal is borne out in the case law of this Court and other courts and in the experience, I submit, of every practicing lawyer, that incorrect removals have detrimental effects, both private and systemic, yet Respondents would read section 1447(c)

in a way that would leave it essentially without practical effect in the world of litigation. It would give no -- it would not effect litigation behavior to any perceptible degree. But both the text of the statute, when read in context, and in light of the legal landscape, and the large objectives and equitable considerations at stake here, weigh in favor of a standard that would, as the Seventh Circuit put it, make fee awards the norm in cases of improper removal.

Turning, first, to the text of the statute, the statute is notable, in that, unlike many fee-shifting statutes, it runs only in one direction. That is to say, it allows for fees only when the case is remanded. This is a good textual indicium of remanding, for two reasons. First of all, it shows that the concern was with the incorrect removals, and the problems they cause in deterring them, rather than a more general concern about mitigation about questions of jurisdiction. That is, a defendant cannot get a fee award even if the plaintiff's motion to remand was not very strong.

The second thing that the one-way nature tells us is that this, the statute, would be

practically meaningless if read as the Solicitor General suggests, and as Respondents suggest, in all but a little sliver, to allow fees only when the removal is unreasonable. If that would not be a precise duplicate of Rule 11, it would at least be close enough to a precise duplicate of Rule 11.

JUSTICE O'CONNOR: Well, Rule 11 is about frivolous arguments and motions, is it not?

MR. HELDMAN: It is -- yes, Your Honor, that's the shorthand of Rule 11.

JUSTICE O'CONNOR: Yes. And Christiansburg Garment is about unreasonable arguments. I suppose that not every unreasonable argument could be deemed to be a frivolous one.

MR. HELDMAN: I would -- I agree with you, Your Honor, there is that -- there is a possible sliver of a distinction, but I -- and, I submit, any lawyer advising a client and any lawyer advising himself or herself -- would have a hard time differentiating between the two standards, in practice, so as actually --

JUSTICE O'CONNOR: Don't you think you know it when you see it?

[Laughter.]

MR. HELDMAN: I try to avoid all of them,

Your Honor, the frivolous and the unreasonable, both. And I think we all do.

CHIEF JUSTICE ROBERTS: But, when Congress passed this language, the scope of Rule 11 was not as well defined and understood as it is now. So, the overlap argument you're making may not really go to what Congress had in mind.

MR. HELDMAN: The overlap may not have been perfect, at least, among other things, in the sense that some courts were still under the misimpression that there was a subjective element to Rule 11, as well. So, the Solicitor General is correct in saying that there is that logically possible reason for the enactment of the statute, in that there is not a perfect overlay. We submit that, in light of the other available textual indicia and the policy reasons, that logically possible hypothesis is not the most reasonable hypothesis. We have --

CHIEF JUSTICE ROBERTS: When you talk about the text, though -- and I understand that the "may" language here has been read by the Court in very different ways, depending upon the statute -- but you have a statute that literally alternates sentences between "shall/may," "shall/may," and it

seems to me that if your rule is closer to "shall" than "may," it seems that it was an odd choice of words for Congress to employ.

MR. HELDMAN: I think the reason why I would disagree with that, respectfully, Your Honor, is, we are not suggesting that it means "shall" in all instances in which a case is remanded. The rule we are -- or standard we are advocating for deals with that set of cases in which a plaintiff has successfully sought remand. Now, that may constitute most of the cases that are remanded, but there is still the -- a separate category of cases, at least one -- the case is remanded sua sponte. I could well envision that those would not be governed by a "shall" rule for an award of expenses and fees. The --

JUSTICE SOUTER: But that -- it could be remanded sua sponte for any number of reasons, so -- so, you're saying not that there is some wiggle room to allow "may" to operate, you're simply saying it depends on the party that initiates the remand. And I guess my question is, Could you give us an example, or examples, of a remand on a party's motion, on a plaintiff's motion, in which the fees would not be allowed?

MR. HELDMAN: Yes, Your Honor. I think the classic example would be if a plaintiff's complaint, for whatever reasons of negligence or error, misalleges the plaintiff's State of residence; thus, making the defendant reasonably believe that there is complete diversity, defendant removes, plaintiff then submits affidavits and property records and everything showing it really was a mistake. And --

JUSTICE GINSBURG: What about the plaintiff who waits over a year to move for remand when it appears as though the case is going in the defendant's favor? Doesn't "may" give a district court discretion to say, "I'm not going to reward a plaintiff, who wants to go back to State court only when he was on the brink of losing in Federal court, with fees."

MR. HELDMAN: I think, even in that hypothetical case, which I will say, next, is not this case -- even in that hypothetical case, it is still the plaintiff who has the cleanest hands of all. The plaintiff's hands are cleaner than those of the defendant --

JUSTICE GINSBURG: Just -- you say that your presumptive fees are included would cover that

case. It, in part, is -- resembles your case, because you didn't move to remand until the case was pending in the Federal District court for over a year.

MR. HELDMAN: That's correct, Your Honor. And if the Court would like, I could explain a little bit more about why that occurred.

When the case was removed -- the plaintiffs in this case, unlike plaintiffs in many cases, did not have a preference for State court. There was no attempt to plead around removal. And the case was removed, and it was an arguably correct removal. And plaintiffs' counsel were then in the position, unfortunately, due to --

JUSTICE O'CONNOR: Well, indeed, wasn't there a change in the law after the case was removed?

MR. HELDMAN: There were relevant changes in law in some circuits, Your Honor. There was -- I don't believe any dispositive change in Tenth Circuit law --

JUSTICE O'CONNOR: Well, the Tenth Circuit, I thought, held that the district court was within its discretion to deny the award, because, at the time of the removal, the defendants had

objectively reasonable grounds to believe that removal was proper.

MR. HELDMAN: Yes, Your Honor. And we do not dispute that standard, because there were out-of-circuit cases, though later overruled by those own circuits. We've suggested that punitive damages could be aggregated. And that was the -- that was one of the bases for removal, but not the only one.

So, when plaintiffs removed the case, plaintiffs had no incentive, by virtue of 1447(c), in the way it had been interpreted in the Tenth Circuit, to make remand their first order of business, given plaintiffs' experience that these battles can be long and hard and unrewarding. And the removal was arguably correct.

Now, by a year later, that had changed. That calculus of the plaintiffs' counsel had changed when defendant -- one of the defendants -- put in an affidavit suggesting that the named plaintiffs had no damages. At this point, the plaintiffs' calculus changed, because there was, at this point, a very real risk that if plaintiffs ignored the problem now and proceeded to a victory in the district court, then that victory could be vacated at the defendant's interest -- instance, by claiming a lack

of jurisdiction. And this, then, was a risk that the plaintiffs could not take at that point.

JUSTICE KENNEDY: Well, you stated, at the outset -- and, I think, properly so -- that we're interested in what incentives --

MR. HELDMAN: Yes, Your Honor.

JUSTICE KENNEDY: -- are put in place by whatever rule we adopt. I'm not sure about the incentives in -- on the facts of this case, or in other cases, based on your rule. The defendant has only 30 days to decide whether to remove. That's a Federal right that should be given some due consideration. You, in effect, want to make the removing defendant an insurer against improper removal. And I just don't know why that should be the policy.

MR. HELDMAN: I -- my basic answer as to why that would be the policy, Your Honor, are, again, the textual reasons and the large objective reasons. Let me go back to the -- finishing up the textual reasons, if that is satisfactory.

The statute previously had said -- had included the word "improvidently." Back when only costs could be awarded, and not fees, the statute had used the word "improvidently." Now, many courts -

- and I don't vouch for this interpretation, but I note that it was prevalent -- many courts then said costs may be awarded, or should be awarded, only when the removal was improvident, in the sense of being worse than merely incorrect. And the Congress deleted that word, "improvident" -- "improvidently."

Now, this, I submit, is a good indication that the Congress did not mean for there to be a standard of "worse than incorrectness." Had Congress meant for that to be the standard, then Congress would not have deleted the word that had gotten many courts there, or Congress would have put in some other textual reason.

JUSTICE GINSBURG: Was it a big issue when the provision did not provide for counsel fees?

MR. HELDMAN: I'm sorry --

JUSTICE GINSBURG: When it --

MR. HELDMAN: -- Your Honor, I didn't --

JUSTICE GINSBURG: -- when the statute provided for costs --

MR. HELDMAN: Yes, Your Honor.

JUSTICE GINSBURG: -- which, in our system, do not include counsel fees, was it a big issue when all that was included was costs?

MR. HELDMAN: It was a big enough issue to

be the subject of comment among many courts over the decades. It was a big enough issue to be covered in the treatises -- the expense was not great, but it was a recurring mitigated issue.

JUSTICE STEVENS: May I ask a question? I never had one of these problems when I was in practice, so it's all new to me. But, "an order remanding the case may require payment of just costs and any actual expenses, including attorneys fees, incurred as a result of the removal," does that mean that if, after the removal there are substantial proceedings in the trial court, in an appeal, and so on, and then you suddenly discover that the -- there was a mistake and you remand -- you can get fees for all the litigation work that took place in the interim? It could be a very large sum of money, couldn't it? It's not just fees incident to the fight over whether removal was proper.

MR. HELDMAN: I believe that's correct, Your Honor. I believe that -- to me, the most natural reading of that language is that the district court, at least in the first instance, will have fact-finding authority as to what fees and other expenses were --

JUSTICE STEVENS: And that --

MR. HELDMAN: -- incurred as --

JUSTICE STEVENS: And that would --

MR. HELDMAN: -- a result of the removal.

JUSTICE STEVENS: -- conceivably, could include all sorts of discovery and arguments on motions and so forth that might actually save time in the subsequent proceeding, if it goes back to the State court.

MR. HELDMAN: My anticipation would be that most courts would use their factfinding authority to try to figure out what work would have to be reduplicated in the State court, to compensate that work, or the work that only arose by virtue of it being in Federal court.

JUSTICE STEVENS: So, the judge's discretion includes both whether or not to include any fees, and he also has quite a bit of discretion on what to include in the fee award, I suppose.

MR. HELDMAN: I think that's right, Your Honor. Whether you call it "discretion" or "factfinding authority," I think that's right. That is a separate question from what we have here. But I think the district court would have the first-line authority and the main --

JUSTICE KENNEDY: But --

MR. HELDMAN: -- authority.

JUSTICE KENNEDY: -- shouldn't we know what the rule is with reference to the extensive fees Justice Stevens requires? Shouldn't we know that, as part of the background for what we're going to do in this case? And if you say -- and you seem to indicate, "Well, it's going to be up to the discretion of the judge." Well, if we know what the rule is, then it's not part of the discretion.

MR. HELDMAN: Yes, Your Honor. I've proposed what I suggest would be the standard, which is, going back to the text, "what expenses were incurred as a result of," and I think that naturally means "what were in -- what costs and fees were incurred that would not have been recur -- incurred, or would not have been incurred again, had the case been left in State court." Now I --

JUSTICE SOUTER: Well, why doesn't -- why doesn't that also go for counsel fees? I mean, there are expenses in discovery, but there -- there's counsel time in discovery. So, wouldn't the same rule apply?

MR. HELDMAN: Yes, Your Honor, that is -- that is what I'm suggesting, that the same rule would apply. Now, I would add --

JUSTICE BREYER: I want to know what it is you're arguing for. That is, I -- when I get through all these words in the attorneys-fees cases, I've got it in my mind that, like the civil rights statute, they say, "You normally get fees, unless you shouldn't." All right? That means you're normally gonna to get them.

MR. HELDMAN: Yes.

JUSTICE BREYER: The plaintiff, anyway. All right? Then we have a case with a copyright. The copyright says it's all the way up to the district court, really, which means a grab-bag, and what the particular judge thinks is fair in the instance. And I guess you could have a rule saying, "You hardly ever get fees." So, in my mind, I got it, "Well, who knows?" and, "No, you almost always do," or, "No, you almost always don't." Now, is that a good characterization? And what -- which one of those three are you arguing for?

MR. HELDMAN: I --

JUSTICE BREYER: I know you're not arguing for "You always don't."

[Laughter.]

MR. HELDMAN: I think that is a good characterization, Your Honor.

JUSTICE BREYER: All right. Then, which one do you want? Do you want the thing --

MR. HELDMAN: Of those three --

JUSTICE BREYER: Yes.

MR. HELDMAN: -- Your Honor, we would prefer the "almost always."

JUSTICE BREYER: All right. Now, if you want "you always get them," in the civil liberties cases there is a good policy reason, according to the court, underlying that judgment of how Congress wanted to give this to people to vindicate civil liberties. I've never heard of a policy of closing the Federal court door, because if, in fact, you were to have that rule in this case, it would simply discourage people from removing it in cases where they think they have a good claim to remove it, because they'd have to pay huge costs if they were wrong. So, I'm not aware of any closing doors of Federal court policy.

MR. HELDMAN: First of all, Your Honor, I would suggest that it is not we who would close the doors of Federal court. It is, by definition in these cases, the Congress that has closed the doors of --

JUSTICE BREYER: Now I --

MR. HELDMAN: -- Federal court.

JUSTICE BREYER: -- unfortunately, I guess, from your position, I don't know what Congress meant here.

MR. HELDMAN: No, Your Honor --

JUSTICE BREYER: Therefore, I'm trying to figure it out in terms of the policy --

MR. HELDMAN: Yes, Your Honor. I'm --

JUSTICE BREYER: -- as well as the language. Okay, in terms of the policy, I'm simply saying that I don't know why you have a better claim than a copyright plaintiff, and I can think of why you don't have as good a claim as a civil rights plaintiff, the reason I said. So, what is your response to that?

MR. HELDMAN: First of all, Your Honor, I apologize for not being clear enough. When I say it is not we, but the Congress, that has closed the doors of the Federal court, I mean on the substantive question of whether the case was removable. We are dealing here, only by definition, with the cases that were incorrectly removed. So, the real question, I think, when we get down to the policies, is, there is some concern that defendants, under the rule I propose, would have an incentive to

remove somewhat fewer cases. They would reserve the questionable removals only for the cases in which they could convince themselves and their clients that the argument was good enough, and the stakes high enough, to justify the cost.

Now, I submit to you, that's exactly the same sort of situation we have now. It is merely that, now, when making that cost-benefit analysis, the defendant is thinking only of its own fees that it will incur. But, still, that is a cost. And the Congress, notably, has not seen fit to alleviate that cost at all. So, some questionable removals are already deterred by expense under the rule I propose; some, more would be. On the same -- by the same token, the rule I propose would give good incentives to the plaintiffs' lawyers to be aware of the jurisdictional issues, to mitigate them, and mitigate them well.

Now, why do I suggest to you that --

JUSTICE GINSBURG: Why? Under your rule, there's a presumption. I thought that the rule you're asking us to approve is the one that's applicable in the Seventh Circuit, which is that you presume there will be counsel fees when a case is remanded to the State court, unless there are

extraordinary circumstances that would overcome the presumption. Now, that's what you're -- that's the rule you're asking for?

MR. HELDMAN: I don't know, Your Honor, whether the Seventh Circuit would follow up its presumption language by saying the presumption can only be overcome in extraordinary circumstances. That is, I don't know whether the Seventh Circuit sees its standard as the Piggie Park standard or as something slightly towards the middle from the Piggie Park standard. I think, in this case, we would win either way, but I would suggest that there is a systemic benefit from not having a multiplicity of standards, from having at least most attorneys-fee-shifting disputes be resolvable by, is it "almost always," is it "who knows," or is it "never, unless unreasonable"?

I think there's a benefit to having nessatavite litigation over --

JUSTICE GINSBURG: But there's such a different in the context. The Title VII plaintiff gets fees after a defendant has been found a law-violator. And, here, a defendant has a right to access to a Federal court. And the statute -- you are emphasizing text. If one looks at the Omnibus

Act out of which this provision came, we see two removal-friendly pieces in it, right? Because, no longer do you have to verify a removal petition; you just do a simple notice. And that's one. And there was another. Oh, yes. Yes, you don't have to put up a bond anymore if you want to remove.

MR. HELDMAN: That's correct, Your Honor. Rather than characterizing those as "removal-friendly," I would characterize them as "resource-friendly." I think all of this can be -- can be understood as a congressional effort, overall, to reduce the amount of resources that are put into jurisdictional issues. And the rule we're proposing would further that goal; that is, by somewhat deterring the, by definition, incorrect removal.

Now, on -- every incorrect removal not only harms the plaintiff -- harms the plaintiff a good bit -- the delay, the expense -- And there's been some concern I've heard voiced about the great expense that this might impose on defendants -- it imposes a great expense on defendants only precisely in as much as the defendant has imposed a great expense on the plaintiff by its incorrect action.

Now, it is true that fees --

CHIEF JUSTICE ROBERTS: Well, but that's a

general -- you're -- you seem to be arguing more generally for the British rule, rather than the American rule. And I read our decision in Fogerty to say that when we're confronted with language like this, "may," you don't assume that Congress intended to overrule the basic American rule and apply the British one.

MR. HELDMAN: In that aspect of Fogerty, Your Honor, the Court had already gotten to the point of saying, "The standard is the same for prevailing plaintiff and prevailing defendant." And then, in the -- in the passage we're talking about, the Court was looking at the "one size" argument. Okay. And that same standard for both should be "usually" or "nearly always." And it was in that context, in which there would be a "shall" or "nearly always," running both ways, that the Court said, "That would be a rare bird in American law," the "both ways" British rule that -- which is my understanding of the British rule -- "That's such a rare bird, we would want to see some clearer indication of that."

In this case, I submit, we don't have a rare bird at all. It is not unusual to have a -- to have "may" interpreted in a statute as meaning

"usually should," in some class of cases. Piggie Park did it. Many cases in other contexts, following Piggie Park. So, it's not such a rare bird.

CHIEF JUSTICE ROBERTS: Those were all the, you know, private attorneys-general-type cases, where you're -- where the view is that the plaintiff is carrying out a mission of ferreting out and enforcing the law. But that's -- this is a quite different context.

MR. HELDMAN: I don't think so, Your Honor, because, first of all, it is true that usually you're awarding fees against a violator of Federal law. But that is because most fee statutes involve Federal causes of action. This is unusual and notable, in that it is a fee-shifting statute for a procedural violation. Therefore, to say, "Yes, but they didn't violate Federal law," proves too much, I think. And so, we shouldn't make such a distinction between the private attorney-general cases and this case, because the plaintiff -- every plaintiff who successfully seeks remand is furthering systemic values, as well as the plaintiff's own values, is furthering the value of comity, federalism, State sovereignty, the Federal

docket load, and helping to avoid the --

CHIEF JUSTICE ROBERTS: Every party who prevails on a motion to admit evidence or to exclude evidence is promoting the policies and the rules of evidence, but we don't think that those motions should result in a -- in fee shifting.

MR. HELDMAN: That is largely because, Your Honor, the Congress does not pass statutes allowing for fee shifting. And, second, removal is different. Removal has federalism concerns, as this Court has noted, going back into the '40s. Removal -- jurisdiction being an unwaivable thing, these cases -- wrong removal possibly leading to the disaster in which the case goes to trial in Federal court, judgment is entered, and it has to be vacated on appeal and done all over again, because nobody recognized the jurisdictional issue. By encouraging plaintiffs to challenge these more effectively, and by encouraging defendants to reserve their questionable efforts only for the cases that really deserve it, I think we would be -- we would be serving public ends, as well as private ones.

Now, I would love to reserve the remainder of my time, unless there are further questions.

CHIEF JUSTICE ROBERTS: Thank you, Mr.

Heldman.

MR. HELDMAN: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Mr. Chilton, we'll hear now from you.

ORAL ARGUMENT OF JAN T. CHILTON

ON BEHALF OF RESPONDENTS

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

Since the first Judiciary Act of 1789, Congress has given defendants the right to remove cases to Federal court. Respondents did so properly in this case, and there's no dispute about that. The -- both lower courts found that we had reasonable grounds for removal, on two bases -- based on the only circuit court decisions then extant on aggregating punitive damages and attorneys fees. Petitioners conceded that fact here this morning and also in the trial court, district court, before they moved to remand, a year after removal and after the district court in the same hearing had indicated its tentative decision to rule against them on the merits of a dismissal motion.

So, the issue before the Court today is whether 1447(c) requires a district court to impose a substantial penalty in the form of attorneys fees

on Respondents for what is concededly in this case a reasonable, but ultimately unsuccessful, exercise of their statutory right to remove.

And we think the answer to that answer to that question is clearly no, for two reasons. The first is that Section 1447(c) is not a fee-shifting statute at all. Like its predecessor, Section 5 of the Act of March 3, 1875, Section 1447(c) just confirms the district court's power to award fees, as well as costs, when it lacks subject-matter jurisdiction and, therefore, must remand the case. There was a prior contrary common-law rule, and the Act of March 3, 1875 abrogated it.

JUSTICE SCALIA: You're saying that it allows Rule 11 fees to be imposed --

MR. CHILTON: Yes, Your Honor.

JUSTICE SCALIA: -- which otherwise wouldn't be imposable. It seems to me that what cuts against that interpretation is the fact that it does try to set some standard. It says, "An order remanding the case may require payment of just cause -- just costs and any actual expenses, including attorneys fees." Especially the "just costs," that's a standard. It's not saying, "You can use Rule 11 and apply whatever standard Rule 11

contains." What's your response to that?

MR. CHILTON: My response would be that, as the questioning already today in the Court has revealed, there are two questions on a fee motion. One is entitlement, the other is amount. "Just costs" refers to amount, not entitlement.

JUSTICE O'CONNOR: But I'm -- I don't -- I'm not sure that I agree with you that Rule 11 applies. It really deals with frivolous actions. And here, we're talking about the imposition of reasonable costs, are we not? Just costs.

MR. CHILTON: Just costs and expenses, including attorneys fees, yes. It is --

JUSTICE O'CONNOR: I think the standard is different than that, under Rule 11.

MR. CHILTON: Well, if the Court interprets --

JUSTICE O'CONNOR: I mean, why --

MR. CHILTON: You --

JUSTICE O'CONNOR: -- is it in your interest to ask us to apply Rule 11? You're hoping that, in future cases, it will be less likely that these are awarded?

MR. CHILTON: Well, we're proposing our first argument, because we think it's textually

correct and historically correct. It leads to the same result, in our case, a point I was about to make. Our second argument is that, even if you construe this statute as a fee-shifting statute, the standard under the fee-shifting statute should be the one that Your Honor just mentioned, which is, it's a multifactor test, but the primary factor is whether the ground for removal is objectively reasonable. And under that standard, we win.

JUSTICE O'CONNOR: Now, the Solicitor General, I guess, suggests that the Christiansburg Garment standard is the appropriate one.

MR. CHILTON: That is true, he does.

JUSTICE O'CONNOR: And do you disagree with that?

MR. CHILTON: Well, our two standards, I believe, are relatively close. We both focus on the objective reasonableness of the removal. Now, the Solicitor General, I believe, is a little bit less -- leaves a little bit less discretion to the district court than we would. We believe that Congress, in using the word "may," in using, if you wanted to look at this as a fee-shifting statute, the word "just," meant to leave district courts with considerable range of discretion to deal with cases

that come up that are unusual in the way a party can "game the system," if you will, in respect to removal. For example, in this case, waiting as long as the plaintiff did before seeking a remand. Obviously a plaintiff --

JUSTICE O'CONNOR: Well, but there had been case-law changes, hadn't there?

MR. CHILTON: There had been, but that was not the reason for their delayed motion for remand. As they explained in the trial court, the reason they suddenly became aware, supposedly, of the right to remand was this declaration saying that they, the plaintiffs, hadn't paid any money for collateral protection insurance, a fact of which they must have been aware at the time they filed their complaint. Furthermore, in the Tenth Circuit, you cannot look to any document, other than the complaint or notice of removal, to establish the facts for removal jurisdiction. Therefore, the declaration could not possibly have justified a motion to remand.

But, in any case, my more general point, apart from the facts of this case, is that there are cases in which one party or the other uses remand to basically avoid a -- an adverse decision on the substance, and when that party does, whether it's

the defendant or the plaintiff, we feel that the district court ought to have discretion to award fees.

CHIEF JUSTICE ROBERTS: I thought a comparative advantage of the Solicitor General's approach, and, by the same token, of the Petitioner's contrary approach, is that it avoids a lot of litigation over a collateral issue, like which court you ought to be in. As soon as you get into a multifactor analysis, then you get briefs on both sides arguing their factors and the other side's factors, and the judge has to decide. If there's a presumption that applies in most cases, you don't waste time over jurisdictional squabbles like this.

MR. CHILTON: Well, first you have the jurisdictional dispute, of course, resolved. It's only when there's a remand that you get to the fee issue. But, your more general point is, yes, obviously a categorical rule will have less litigation than a multifactor test. The question is, What did Congress want? -- not, What will reduce litigation costs? And we believe Congress would have wanted, in this situation, and did want, to allow for discretion to be exercised. Now, it's a

limited discretion under our test, because if -- in general, if the removal is objectively reasonable, as ours was, we believe Congress would not have allowed an award of fees, except in those circumstances, as I've mentioned, where the system is being gamed by one party or another.

JUSTICE BREYER: It's hard to have three different kinds of standards with attorneys-fees statutes. I mean, there are quite a few of them, and -- I can understand saying some of those statutes mean you almost always should get it, because of special policies reflected in the history of the statute, et cetera. That's Christianson. And I can imagine Fogerty, where you say, "As to an ordinary one, it's ordinary." "Ordinary" means it's up to the discretion of the district judge. And there may be many reasons. Do we want a third one, where --

MR. CHILTON: Well --

JUSTICE BREYER: -- let's say they pass this -- and it's "unusual"? I mean, we're going to get several categorizations and shadings of statutes. I don't have an answer. I'm not suggesting a point of view on this. I'm curious what you think.

JUSTICE GINSBURG: I --

MR. CHILTON: No --

JUSTICE GINSBURG: -- think we do have three, if you count Fogerty, because you have the Christianson, which is the most defendant-friendly. And then you have Piggie Park, which is the most plaintiff-friendly. And then you have Fogerty, which is been -- has been called the multifactor --

MR. CHILTON: You're --

JUSTICE GINSBURG: -- test.

MR. CHILTON: -- quite correct, in our view, Justice Ginsburg. We believe Petitioners are requesting the Piggie Park standard. We believe the Solicitor General is proposing the Christiansburg Garment standard. And we think we're smack in the middle, with Fogerty. Now --

JUSTICE SCALIA: You know, it would really improve the dignity of this Court if we referred to "Piggie Park" as "Newman."

[Laughter.]

MR. CHILTON: I have no response to that remark, Your Honor.

[Laughter.]

MR. CHILTON: To pick up the train of my argument --

[Laughter.]

MR. CHILTON: -- we believe that discretion is not only the better part of valor, but what Congress enacted in this statute. And that's what Fogerty said -- "may" means "may," it doesn't mean "must" -- it connotes discretion -- and that an automatic rule for the award of fees on remand, or even the contrary rule, would pretermit that discretion, so that when, as in this case, there are not overriding public-policy -- public policies that are enforced by one party -- for example, in the civil rights cases, where it is the plaintiff who is the private attorney general enforcing what this Court has said, or Congress's most important policies -- when that's not present, as in this case, then "may" means "may." Particularly, that's so when, as in this case, the defendant is not a violator of Federal law, has done nothing that impinges or removes rights from the defendant -- or, excuse me, the plaintiff -- but, in fact, serves Federal interest in seeking removal. That --

JUSTICE SCALIA: I suppose that one could assume that to be the congressional intent, if Congress often has such an intent for such substantial imposition of financial liability. Do

you have any other examples of where Congress has essentially left it up to the district judge, with a broad, virtually nonreviewable -- I guess it's reviewable, but -- to some extent -- but multifactor test, whatever the district judge considers important?

MR. CHILTON: Yes, Your Honor, I do --

JUSTICE SCALIA: What are --

MR. CHILTON: -- as a matter of fact.

JUSTICE SCALIA: -- what are some other examples where Congress has allowed this degree of financial liability to be subjected to the discretion of a district judge?

MR. CHILTON: The Freedom of Information Act, Your Honor, which was passed in 1974, which, interestingly, I think, undermines the Petitioner's argument that, in using the word "may," Congress somehow incorporated the "Newman" standard.

[Laughter.]

MR. CHILTON: The -- in 1974, in adopting the Freedom of Information Act, Congress specifically considered adopting -- and it was in the Senate bill -- a four-factor test. It was removed from the bill, and the -- both conference reports on that bill explained that it was removed

not to require a district court to award fees automatically in any case, but, rather, because the existing law was following, in fact, a multifactor analysis, and Congress wished to preserve it and felt that the four-factor test, which had been in the Senate bill, was too restrictive.

Now, there is another example, as well, in the -- in ERISA. The cases under ERISA -- other than the special case of trust funds seeking delinquent contributions from employers; those are treated differently -- but for cases simply of suits by trustees against beneficiaries, beneficiaries against employers, beneficiaries against trustees, the courts have, in fact, employed a multifactor test.

JUSTICE SCALIA: And this is liability for what? In -- for --

MR. CHILTON: Denying benefits, for example.

JUSTICE STEVENS: Why isn't Fogerty an example. Isn't the -- what is the standard that Fogerty announces? It rejects the British rule, and that it rejects the one favoring -- one party over the other? What is the standard you get out of Fogerty, other than pure discretion of the district

court?

MR. CHILTON: Well, Your Honor, I believe it's not pure discretion. The footnote at the end of the opinion says that district courts may follow the Third Circuit standard, looking first at whether the argument of the losing party was frivolous, unreasonable, et cetera, and then looking at other factors that are indicated by the particular concerns of the Copyright Act. And, yes, I quite -- you're, of course, right that the -- Fogerty did adopt the multifactor test under the Copyright Act.

JUSTICE GINSBURG: Well, as it was just mentioned, "multifactor," in a footnote, it said it would be neutral. I think the big point in Fogerty was that it was going to apply in both directions, be neutral as between plaintiff and defendant.

MR. CHILTON: That much is true, but the footnote does say that, in applying the neutral standard, the district courts are free to follow --

JUSTICE GINSBURG: You've given us, in your multifactor test, you said, "objectively reasonable basis to remove." And another factor might be that the plaintiff delayed in moving to remand. What other factors, besides the "objectively reasonable basis to remove" and the

plaintiff's delay?

MR. CHILTON: Well, we outlined several in our brief, Your Honor, at page -- let me see -- page 41. In addition, I think the case of Gardner versus Allstate Indemnity, 147 F.2d 1257 indicates another. There, the defendant moved successfully to remand after receiving a -- an adverse decision on the merits. It may have had an objectively reasonable ground for removal. In that case, it actually didn't, but, I mean, you can conceive of a situation in which they would have had one. And, obviously, after the merits decision went against it, it wanted a second chance. Now, in that situation, I believe a district court might, despite the objectively reasonable basis for removal, decide that the defendant should pay costs and fees.

CHIEF JUSTICE ROBERTS: What is your position on what fees we're talking about. Do you agree with your friend that money that's spent, that's going to have to be spent anyway in the State court proceeding, though, is not wasted, that that's not recoverable?

MR. CHILTON: I absolutely do not agree, Your Honor. I think that "incurred by reason of the removal" refers to fees and costs that are

specifically directed to the jurisdictional issue, and that only; no other fees or costs in the litigation at all. Of course, that question isn't presented here, because we had no -- or the lower courts decided that -- the Petitioner is --

JUSTICE KENNEDY: Have the lower courts addressed that issue?

MR. CHILTON: Not to my knowledge, Your Honor.

JUSTICE KENNEDY: Are there -- are there instances, under your view of the statute, in -- under the standard you propose, where costs would be awarded, but not fees?

MR. CHILTON: Well, if you view 1447(c) as an -- a power-enabling bill, not a fee-shifting statute, the answer is yes. I believe if the -- if it's viewed as a fee-shifting statute, the answer would be no, although, of course, the court has discretion to decide how much to award, and, in that sense, could award either no fees and all costs, or some --

JUSTICE KENNEDY: And, once --

MR. CHILTON: -- combination.

JUSTICE KENNEDY: -- again, can you advise us of their practice or lower-court opinions

addressing that issue?

MR. CHILTON: I cannot, but there certainly are lower-court decisions that allow fees on remand in very small amounts that could not possibly have been sufficient to compensate for the work done.

JUSTICE KENNEDY: Because we think of costs as really a matter of course. As Justice Scalia points out, it says "just costs," which -- I take it "just" modifies just the cost and not the actual --

MR. CHILTON: Well, as the statute is written, that's true.

JUSTICE STEVENS: May I return to Fogerty for a minute? As I read the footnote at the end of the opinion, which you - because say referred to the Third Circuit rule, it talks about, "nonexclusive factors are permissible." It doesn't say the factors used by the Third Circuit are the -- you know, set any particular standard. As I read it, it leaves the discretion entirely up to the district court to apply whatever reasonable and appropriate factors seem correct in the particular case.

MR. CHILTON: Well, that may be, Your Honor. I read the decision, and perhaps --

JUSTICE STEVENS: But you're --

MR. CHILTON: -- incorrectly --

JUSTICE STEVENS: -- but you're --

MR. CHILTON: -- as steer --

JUSTICE STEVENS: -- the part of the decision on which you rely is the footnote at the end of the opinion, is that right?

MR. CHILTON: Yes.

JUSTICE STEVENS: Yes.

JUSTICE SCALIA: If the -- the broader discretion we give to the district court, the less litigation there is likely to be on this subject.

MR. CHILTON: That is certainly true. Fewer appeals, at any rate. And as long as we're talking about litigation expense, I think, to bring us back to one of Petitioner's arguments, they contend that their standard would reduce the amount of costs invested in jurisdictional issues. But, in the same breath, they also say that the standard that they propose would encourage plaintiffs to move for remand. The two cannot coexist. If -- not every remand motion is meritorious. So, by encouraging plaintiffs to move for remands, you're, in fact, increasing the amount of jurisdictional litigation and the amount of costs incurred at --

over jurisdictional issues.

I wanted, if I could, to answer one question that Justice Ginsburg asked in the beginning about the Omnibus Act. Justice Ginsburg mentioned that it contained removal-friendly provisions. And it does. They're not only the two that were mentioned -- lack of -- or abolition of the verification doctrine and deletion of the removal bond -- but much more significant expansions of removal jurisdiction. The -- for us from California, in particular, the 1988 Act said that you could disregard the citizenship of "Doe," or fictitiously named, defendants in deciding whether there was diversity -- complete diversity in a case. That was huge for us in California, because virtually every State court complaint in California contains "Doe" defendants. And prior to that amendment, their citizen -- you had to guess at their citizenship, and it prevented removal of virtually all State court complaints, on diversity grounds. So, to say that this 1988 Act was designed to discourage removals plainly goes against the text of the Act.

Furthermore, removal furthers not only the private interest of the defendant, but the

Government's interest, the Federal interest, the interest of the people of the United States, in many cases. And that's precisely why Congress has given us the right to remove in a whole series of areas, not only in diversity, but, of course, in Federal question. An interesting example, because it arose for the first time in 1875, in the same Act of March 3, 1875, from which this cost provision comes, an Act that was passed by the lame-duck radical Republicans at the same time they passed the Civil Rights Act of 1875, for the purpose of allowing Federal courts to enforce the new Federal rights that Congress felt were not being adequately addressed in State courts. So, the State courts, particularly the South, were thought to be hostile to the new Federal rights.

Similarly, just this year, in the Class Action Fairness Act, Congress allowed defendants to remove multi-State class actions, not for the benefit of the defendants, but for the benefit of the entire Nation. It -- the Senate report, at page 9, specifically points out that it is those cases which most affect the interstate commerce of this Nation, and, for that reason, they belong in Federal court. Now, why would Congress choose to discourage

defendants from removing those very cases by adopting a plaintiff-friendly --

CHIEF JUSTICE ROBERTS: Well, it's not those very cases. By definition, this issue only comes up when the case should not have been removed.

MR. CHILTON: The --

CHIEF JUSTICE ROBERTS: So, it's not the cases that Congress wanted to be removed that we're talking about.

MR. CHILTON: But, as this Court explained in Piggie -- no, excuse me, Christiansburg Garment, Your Honor-- the imposition of fees discourages activity when it's a Federal right that's being enforced, saying that fees are imposed whenever there's a near miss, a reasonable case that's brought to enforce the Federal right. You discourage the very thing that Congress intended people to enforce. That's my point here.

Yes, it's true, fees would only be awarded in those cases where the defendant is unsuccessful and the case is remanded. But, for example, in the Class Action Fairness Act, that can happen even when there's a perfectly, not just reasonable, but exactly proper ground of removal, because the Class Action Fairness Act, among other things, says that

when there's more than one-third, and less than two-thirds, the citizens in the State in which the complaint was originally filed, they're in the class, then the district court has discretion to remand the case, even if it's properly brought in Federal court, removed to Federal court.

So, my general point is that Congress has enacted these removal statutes to promote Federal policy, and that it would be counter to that policy to discourage defendants from removing cases, particularly if the amount of fees that could be awarded would include all the fees incurred in Federal court. I mean, we're talking about very substantial fee awards, in that event. And they would be a significant deterrent from exercising the very rights that Congress has said defendants should have for the benefit of the public.

Furthermore, as already pointed out, State court plaintiffs never enforce congressional policy; otherwise, they'd be in Federal court, under Federal-question jurisdiction. The defendant has not violated Federal law, so neither of the exceptional circumstances --

JUSTICE STEVENS: I wonder if that's a correct statement. It seems to me there are a lot

of cases in State courts. In 1983, cases are subject to State court jurisdiction, where the plaintiffs are trying to enforce a Federal right.

MR. CHILTON: Yes, but those can be removed, Your Honor.

JUSTICE STEVENS: Oh, I just thought you said the State court would never be enforcing a Federal -- I may --

MR. CHILTON: Well --

JUSTICE STEVENS: -- I may have misunderstood your point --

MR. CHILTON: I --

JUSTICE STEVENS: -- I'm sorry.

MR. CHILTON: -- I, perhaps, was overgeneralizing. What I meant to say was, in cases that are remanded because of lack of Federal jurisdiction, it is never the case that the plaintiff is enforcing a Federal right, because, if he were, there would be Federal-question jurisdiction.

JUSTICE STEVENS: In other words, it was an improperly removed case.

MR. CHILTON: That's right.

In any event, if the Court has no further questions, I am through.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

Mr. Heldman, you have four and a half minutes remaining.

REBUTTAL ARGUMENT OF SAMUEL H. HELDMAN

ON BEHALF OF PETITIONERS

MR. HELDMAN: First, regarding the continued insinuation of some manipulative intent by the timing of the -- of the removal, there was, in this case, no finding by the district court, no suggestion by the district court, that there was any such intent, or that that was a reason to deny fees, no suggestion by either of the lower courts to that effect. Absent that, I think it might be that a delay in removal could, in an appropriate case, be something that went into the calculus of what expenses and fees were incurred as a result of the removal. That may well go into the "amount" question. But, absent a manipulative intent, it is still the case that it is the plaintiff who successfully sought remand, whenever it happened, that has the cleanest hands in the courtroom.

Second, Respondents describe their proposal as a middle ground. There is no middle ground in this case, unless it is, "Eh, who knows?"

Their proposal is not middle ground, because their proposal says, "There shall be no award of fees, in general," as the most important factor, where there was a reasonable basis for removal. That cannot be described as a middle ground. That tilts it in one way. We tilt it in the other way. And, as I say, a middle ground only gets you perhaps to Fogerty. And it -- and, as we show on page 30 of our blue brief, in the footnote, the district -- there has been a lot of litigation, after Fogerty, still trying to figure out what the standard is -- not only district court litigation, but appellate litigation, and the circuits are all over the map as to even what the copyrights standard is. I urge the Court, for the benefit of the practicing bar, as well as the bench, not to go down that road.

Now, the road made some sense in Fogerty, and multifactor tests makes some sense in the -- FOIA and ERISA, because, in those instances, there are very weighty public interests on both sides of the litigation. When an ERISA claimant sues the ERISA fund, it's not a -- it's not that one is the particular favorite of the law; they are both favorites ---

JUSTICE GINSBURG: Why --

MR. HELDMAN: -- of the law.

JUSTICE GINSBURG: -- not, then, just say "objectively reasonable basis to remove"? That's a one -- one standard.

MR. HELDMAN: That standard is appropriate, as in Christiansburg, Your Honor, where the party who is potentially subject to the award is the favorite of the law in question. That is, where there is a special reason not to seek to over-deter that person, to encourage that person to litigate creatively and aggressively the reasonable, though ultimately wrong, propositions. And so, I think the case reduces, in a large sense, to: Does Federal law encourage the creative aggressive litigation of questionable removals? And among the ways we know that it does not is that this Court has said, for 60-something years, that removal is strictly construed, as every circuit has understood that to mean. That means doubts are resolved in favor of remand. If Congress wanted to encourage the removal of questionable cases and get it all hashed out and make the defendants -- they would, first of all, abrogate that rule, and, second, they would remove the rule in Section 1447(d) precluding reviews of remand orders. Because as we have it now, except

for special cases where the Congress decides otherwise, like the recent Class Action Act, where we have, otherwise, the substantive law is bent towards remand, bent against the creative and aggressive advocacy of perfectly reasonable, but wrong, propositions.

JUSTICE GINSBURG: If the law was so anti-removal, then one would expect there would be some kind of threshold check once you get to district court. But the removal process is: you file your notice that you're removing. That's it. There it goes. And the district court doesn't do any kind of initial screening to let it in. It just gets there --

MR. HELDMAN: My experience --

JUSTICE GINSBURG: -- by rapid transit.

MR. HELDMAN: I'm sorry, Your Honor. My experience in the district courts is that they do do an initial screening, as they should, in order to limit themselves on their own motion to their own proper jurisdiction. This court, unfortunately -- the district court -- did not. But my experience in the district courts is that some of them do, but a lot of -- at least a substantial number of cases slip through the cracks.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

MR. HELDMAN: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: The case is submitted.

[Whereupon, at 11:06 a.m., the case in the above-entitled matter was submitted.]