

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CARLSBAD TECHNOLOGY, :

4 INC., :

5 Petitioner :

6 v. : No. 07-1437

7 HIF BIO, INC., ET AL. :

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9 Washington, D.C.

10 Tuesday, February 24, 2009

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

15 APPEARANCES:

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

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

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P R O C E E D I N G S

(11:20 a.m.)

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

Mr. Rhodes.

ORAL ARGUMENT OF GLENN W. RHODES
ON BEHALF OF THE PETITIONER

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

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

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

Those two grounds are a remand that's based

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

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

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

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

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

4 Now, this is inconsistent with the Federal
5 Circuit's analysis in this case that a remand based upon
6 1367(c) is a remand based upon a lack of subject matter
7 jurisdiction because in its view an independent basis
8 for that jurisdiction is lacking.

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

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

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

1 lack of subject matter jurisdiction, wrong or right, no
2 review, but it was a discretionary exercise, I could
3 keep this, but I choose not to, that that is reviewable.

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

9 MR. RHODES: I agree with you, Justice
10 Ginsburg, that that seems rather confusing. I would
11 address my answer in this way: The review ban of
12 1447(d) arose in the situations where apparently
13 Congress wanted to -- to inhibit the abuse by those
14 seeking only to delay the case by filing a motion for
15 remand.

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

22 But here in, our particular case -- and
23 maybe -- let me back up a minute. Maybe we should look
24 at that in a different way, because even though you may
25 have a legitimate basis for removing the case to Federal

1 court and the district court disagrees with you, perhaps
2 the better policy is that those types of remands should
3 not be reviewable, even though sometimes a district
4 court is going to get them wrong.

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

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

20 JUSTICE GINSBURG: But wouldn't it be --
21 here the district judge said: I got rid of the RICO
22 claim; all that's left are State law claims, and there's
23 no Federal interest in this case any more. They're all
24 State law claims, they belong to State court, good-bye.
25 I could keep it, I choose not to, because it isn't a

1 sound use of the resources of the Federal court.

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

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

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

23 Why would a court of appeals overturn such a
24 judgment?

25 MR. RHODES: I think, Justice Ginsburg, I

1 can give you an answer to that because there is a recent
2 case that's in our brief, the Brookshire case from the
3 Fifth Circuit, where the district court exercised
4 jurisdiction over Federal and supplemental claims, and
5 did that for quite a while and ruled on a number of
6 dispositive motions; and then basically on the eve of
7 trial, after resolving the Federal claim, remanded it
8 back to the State court.

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

17 JUSTICE GINSBURG: But that was because we
18 would have to retread the same ground in the State court
19 that had already been covered in the Federal court, but
20 that's not the kind of case that was presented here. I
21 know the case has lingered for a long time, but there
22 was no processing of those State law claims. The judge
23 concentrated on RICO, threw it out, and said "the rest
24 of the claims I'm not interested in."

25 So it's not a case like the Fifth Circuit

1 where there was a large investment of Federal court
2 energy and time and sending it back would mean going
3 over once again what had already transpired in the
4 Federal court.

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

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

23 JUSTICE GINSBURG: Could you explain why
24 that is a Federal question? It's a dispute over the
25 ownership of this invention, right? So it's not a

1 question of the validity of a patent or infringement of
2 a patent? It's just the invention is like any res, and
3 two parties are disputing about ownership. Why is --
4 why does that become a Federal case?

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

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

22 JUSTICE STEVENS: May I just ask one sort of
23 a preliminary question? If we just applied the plain
24 language of 1447(d), then this case was properly
25 remanded; the remand order is not subject to review. Is

1 that correct?

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

4 JUSTICE STEVENS: What really prevents us
5 from reaching that decision in this case? Because
6 actually it's an open question because you were both
7 arguing about it here and you certainly disagree. Why
8 couldn't we just simply say for this particular category
9 of remand orders, we'll just apply the plain language of
10 1447(d)?

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

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

18 MR. RHODES: I'm not sure that would be a
19 simple solution to this case, Justice Stevens, and the
20 reason for that is that if we -- if the Court decides to
21 do that, then we return to those areas where total chaos
22 could really break out, and the reason for that is that
23 we would be in a situation where district courts can --
24 can dress up in language that is lack of subject matter
25 jurisdiction and remand cases, knowing that there is not

1 going to be any review.

2 JUSTICE STEVENS: No, no, that wouldn't
3 avoid the plain language of the statute. Pretextual
4 district court orders wouldn't avoid the plain language
5 of the statute.

6 JUSTICE GINSBURG: But the --

7 CHIEF JUSTICE ROBERTS: I think there's no
8 need to dress up anything. I mean, as Justice Stevens
9 point, you wouldn't have to dress up anything; if you
10 send it back, it's not reviewable.

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

13 JUSTICE GINSBURG: How could we do that in
14 light of Thermtron? Thermtron went against the clear
15 text of the statute that says remands are not
16 reviewable, period; and in Thermtron the Court said, yes
17 they are sometimes, if we think it's so outrageous for a
18 district judge to say: Yeah, I've got jurisdiction over
19 this case, but my docket is so crowded, and this is a --
20 this is a small-change case; it belongs in State court.
21 The court, I think, was outraged by a district court
22 thinking that it could dump a case simply because it was
23 too busy with more important things.

24 That was the setting of Thermtron, and to
25 reach the result that the court reached, the court had

1 to go against the language of the statute when read in
2 absolute terms. But anyway, the court did that, and
3 then they gave a rationale for what the new test was
4 going to be. It was no longer going to be remands are
5 no longer -- remands are not reviewable; it's going to
6 be -- that applies only to the cases where -- what was
7 it, subsections (c) and (d) of 1447? The -- it -- the
8 court read the statute to say less than it in fact did.
9 That's what Thermtron did.

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

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

20 MR. RHODES: Mr. Chief Justice, it could,
21 but --

22 CHIEF JUSTICE ROBERTS: And it would solve
23 the problem Justice Ginsburg pointed out earlier, that
24 this way you don't get to appeal big things like no
25 subject matter jurisdiction, but you do get to appeal

1 picayune things.

2 MR. RHODES: Again, I'm not sure how we
3 would divide those up between big things and picayune
4 things. But I think, to answer your question, we have
5 30 years of this particular rule under Thermtron being
6 uniformly applied by all the circuit courts of appeal,
7 and they have found this to be a workable, statutory
8 interpretation to give them a framework to handle these
9 kinds of cases. And it's not a situation where the
10 circuit courts of appeal have run away from situations
11 like this, where remands have been based upon declining
12 to exercise discretionary power to send it back to State
13 court. They have seemed to want to work within the
14 statutory framework to review those kinds of cases.

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

20 JUSTICE GINSBURG: Well, one clear way to do
21 it would be to overrule Thermtron, but neither party has
22 asked for that. You haven't asked for it and the other
23 side hasn't asked for it.

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

1 JUSTICE STEVENS: You just have to
2 distinguish Thermtron. You don't have to overrule it.
3 You'd still apply it on its facts.

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

8 MR. RHODES: And yet --

9 JUSTICE STEVENS: That's not involved here.

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

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

15 MR. RHODES: Yes, Quackenbush is a --

16 JUSTICE SCALIA: Throw that overboard, too?

17 MR. RHODES: We would have to overthrow that
18 as well, and the reason for that is because Quackenbush
19 was a remand based upon -- an abstention-based remand
20 under Burford, and in that case, this Court found that
21 abstention-based remands did not fall within either
22 prong of 1447(c). So -- in fact, this Court gave that
23 very little attention in Quackenbush before it moved on
24 to the 1291 issue.

25 CHIEF JUSTICE ROBERTS: You thought the

1 Respondents asked us to overrule Thermtron. On page 22,
2 you say, "Respondents' implicit request for this Court
3 to overrule Thermtron should be rejected."

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

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

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

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

19 (Laughter.)

20 CHIEF JUSTICE ROBERTS: I mean, in one of
21 those provisions they said this was only technical
22 amendments, and if they're just doing technical
23 amendments that doesn't mean they have to look at it and
24 approve the whole thing.

25 MR. RHODES: No, Mr. Chief Justice, if they

1 wanted to get rid of Thermtron they could have done it
2 in a very direct way.

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

5 (Laughter.)

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

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

14 (Laughter.)

15 MR. RHODES: Actually, Mr. Chief Justice,
16 that was going to be my next point. Not the Federal
17 Circuit -- but it does, again, provide a workable
18 framework for dealing with these issues, and it seems to
19 be a very large departure to go back and wipe out the
20 last 30 years of case law that has been developed to
21 handle these issues. It would be a large departure.

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

24 JUSTICE STEVENS: Let me just make one
25 comment on the large departure: Would it be a large

1 departure if we just said, in the very narrow category
2 of cases where there has been a remand on the basis of
3 -- the district judge doesn't want to exercise
4 supplementary jurisdiction over State law claims, that's
5 not appealable, period? Just say that's a slight
6 exception from Thermtron?

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

14 JUSTICE STEVENS: -- not for that basis?
15 They're not amendments of subsection (d), and subsection
16 (d) is what has the language that really reads right on
17 this case.

18 MR. RHODES: Well, I think the other -- the
19 other problem with that is the whole doctrine of -- of
20 supplemental jurisdiction that was first laid out in
21 Carnegie-Mellon and United Mine Workers, where the
22 difference between remands under 1367(c) seem not to
23 overlap with the remands under 1447(d) and 1441. So if
24 we made that an exception and we pulled this into
25 1447(d), it -- I'm not sure what the consequences would

1 be from doing that.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Allison.

4 ORAL ARGUMENT OF THEODORE S. ALLISON

5 ON BEHALF OF THE RESPONDENTS

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

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

15 I know that the Court is familiar with the
16 late Chief Justice Rehnquist's dissenting opinion when
17 he was an Associate Justice in the Thermtron case and
18 Justice Rehnquist at that time wrote that there had been
19 no cases since the review bar was put into place in
20 1887, no cases where exceptions to review had been
21 recognized. He believed that it was a plenary bar on
22 review.

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

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

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

19 MR. ALLISON: That is correct, Justice
20 Ginsburg. And, in fact, to harken to your earlier
21 question, to Your Honor's earlier question, we are not
22 asking for Thermtron to be overruled, but I think, in
23 effect, to be updated.

24 The Court in Thermtron did give a rationale,
25 and the rationale that it gave was that it viewed, the

1 opinion for the Court by Justice White viewed 1447(c) as
2 being the sole source of Federal remand power. And as
3 the Court noticed in the ensuing 30, 40 -- excuse me --
4 yes, 40-odd years, there have been a number of other
5 sources of remand power recognized.

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

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

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

25 MR. ALLISON: It's an essential question,

1 Justice Souter. And I think the way we harmonize it is
2 to say that Thermtron has indeed been pared back by the
3 Court's subsequent decisions. And, of course, it is our
4 second argument that the Court do something with the
5 rule in Thermtron.

6 Our primary argument gets to the question of
7 the statutory language and whether a Cohill remand falls
8 within it. But our secondary argument is to say,
9 certainly, it's well recognized that Cohill disapproved
10 and pared down that portion of Thermtron that held that
11 the only remand power is the remand power expressed in
12 1447(c).

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

19 JUSTICE SOUTER: We did -- we did not
20 disavow the relationship between (c) and (d).

21 MR. ALLISON: Indeed, the Court did not.
22 And we suggest again only -- it is only a suggestion in
23 our brief that the Court might wish to look at the
24 ensuing history since Thermtron and make a similar
25 limiting statement that recognizes that a lot of remand

1 authority has been established since *Thermtron*, and a
2 number of statutes by the Court's -- by the Court's
3 holding in *Cohill*.

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

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

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

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

24 In *Things Remembered*, it was simply the fact
25 that the review bar was held to apply to a remand, even

1 according -- under another statute, and, of course,
2 recognizing that there are now other statutory bases for
3 remand. The interesting thing about 1452 -- and Justice
4 Ginsburg, I believe you wrote the concurrence on this --
5 is that 1452 provides for remand on any equitable
6 ground, and that such remands are not subject to review
7 by appeal or otherwise.

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

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

17 MR. ALLISON: Yes.

18 JUSTICE GINSBURG: -- discretionary remand?

19 MR. ALLISON: That is --

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

23 (Laughter.)

24 JUSTICE GINSBURG: -- that it was neutral,
25 colorless. It just said we haven't been confronted with

1 this issue. And I think Powerex said the same thing,
2 although it said it in more definite terms, it is far
3 from clear.

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

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

16 But the first argument is that, harkening
17 back to your original questions, Justice Ginsburg, why
18 shouldn't a remand when only state law claims remain in
19 a case, and -- Cohill 1367(c)3 why should that not come
20 within the language of 1447(c), what I'll call the
21 jurisdictional clause, because it clearly is a matter
22 that is only of concern to state courts -- and I think
23 that the Court in United Mine Workers v. Gibbs made
24 clear that when all State -- all the federal claims have
25 left the case and only State law claims remain, that

1 it's almost presumptive that those should be sent back.

2 JUSTICE STEVENS: Yes, but your opponent's
3 argument is that the claims that remain do include a
4 federal claim.

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

15 JUSTICE STEVENS: What about the ruling on
16 the RICO claim itself? That was clearly a federal
17 issue.

18 MR. ALLISON: Yes. The RICO claim was
19 what -- was what gave the district court jurisdiction
20 over the case in the first place. And it's interesting
21 that in the district court's decision, it made me
22 think -- it made me think a little bit of the Waco case,
23 because in the district court's decision, the district
24 court very clearly said, first, I have no jurisdiction
25 over these State law claims, and I'm going to remand

1 them, and now I will turn to the RICO claim which
2 creates a conundrum that I'm not sure --

3 JUSTICE GINSBURG: Maybe the district judge
4 didn't say that. Maybe you can point me to the place
5 where it did. But if it did say it, it's flatly wrong,
6 because there is -- that's what supplemental
7 jurisdiction is. It's says you have jurisdiction, it's
8 a huge difference between you have no jurisdiction, you
9 are powerless, and you have power, but it's up to you to
10 exercise it or not.

11 MR. ALLISON: Justice Ginsburg, that's why
12 we didn't -- we didn't press that point because I think
13 -- I think that even we can see that the court exercised
14 its jurisdiction to decide and dismiss the RICO claim,
15 although it's reminiscent of -- of -- of the decision
16 in Kircher --

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

20 MR. ALLISON: Right.

21 JUSTICE GINSBURG: What the district court
22 has jurisdiction over are the supplemental claims, which
23 it can choose not to exercise, but it can say, "I don't
24 have jurisdiction," because Congress has given
25 supplemental jurisdiction, but then left it to the court

1 to remand on stated conditions.

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

6 MR. ALLISON: Well, Justice Ginsburg, I have
7 made every effort not to conflate those two -- those two
8 concepts, and in fact we did say that when -- when a
9 court acquires supplemental jurisdiction in a case, that
10 that is a species of subject matter jurisdiction at that
11 point, as the Court held in *City of Chicago v*
12 *International College of Surgeons*.

13 At that point the court does have a
14 mandatory discretion -- or mandatory jurisdiction to
15 exercise power over the entire Article III case; but we
16 then argue when the Federal claims leave the case that
17 jurisdiction changes. That jurisdiction changes from a
18 mandatory one that the court, as in *Thermtron*, would
19 certainly be concerned if the district court had -- if
20 jurisdiction that's mandatory. But it changes by
21 operation of 1367 from mandatory to discretionary; and
22 when Congress passed 1367 in 1990, Congress intended to
23 codify the existing law right up through *Cohill* on the
24 subject of supplemental jurisdiction, combining
25 ancillary and intended in those --

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

4 MR. ALLISON: Yes, Mr. Chief Justice.

5 CHIEF JUSTICE ROBERTS: Okay, but that seems
6 to me to echo the fundamental misperception that if you
7 have Federal jurisdiction based on a particular event --
8 let's say if you're dumping chemicals in the water; that
9 gives you a Federal cause of action; you have Federal
10 jurisdiction, there's a trial; it turns out you weren't
11 dumping chemicals with it. You don't then say "there is
12 no jurisdiction; there was jurisdiction before, but once
13 the finding is made that the facts didn't support it,
14 then there was no jurisdiction." You say, "there was
15 jurisdiction all the time and you lose."

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

25 So if we come back to the words of the

1 statute, the words of the statute should be construed
2 broadly in order to serve the purposes of -- of remand.
3 The Court has made clear that concerns of comity and
4 federalism say that we should construe 1447 in favor of
5 remand and I believe that that should extend to the
6 concept of the whole delay of concept and shuttling.

7 JUSTICE GINSBURG: Then -- when what you are
8 doing is that you are using the label "subject manager
9 jurisdiction" in a way that seems to me, that -- there
10 are many categories that -- could be ambiguous at the
11 edges, but not subject matter jurisdiction. Subject
12 matter jurisdiction means court, you have no power,
13 period. There's no diversity, there's no Federal
14 question, there's no other basis for the Federal Court
15 to exercise jurisdiction; and to say, "Well, we can
16 extend the label subject matter jurisdiction to include
17 a case where the district court chooses not to hear
18 several claims, even though it has jurisdiction over
19 them." I think is a -- is a -- a misapplication of the
20 notion subject matter jurisdiction.

21 MR. ALLISON: It is -- it is a difficult, a
22 difficult conundrum. I think maybe all conundra are
23 difficult, but this one particularly. And, Justice
24 Ginsburg, in the opinion that you wrote for the Court in
25 the RBOC case, you very clearly pointed out that the

1 word "jurisdiction" is used in a variety of ways by
2 legal scholars --

3 JUSTICE GINSBURG: Yes, but not subject
4 matter jurisdiction. Jurisdiction -- personal
5 jurisdiction, subject matter jurisdiction. When I did
6 in -- what I did in -- Arbaugh was explain that all
7 kinds of things like time limits on when you can sue,
8 have been labeled jurisdictional and mandatory, when
9 they are not. They are simply statutes of limitation.

10 MR. ALLISON: That -- that is correct, but
11 that is -- that is the nature of the problem -- that is
12 the nature of the problems that this Court confronted in
13 Kircher and Powerex -- again this is by analogy only.
14 We are not concerned about labels like that, if the
15 district court believes that it was remanding the case
16 because it lacked jurisdiction.

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

21 The Koffski case out of the Seventh Circuit
22 is the one case I was able to find from a higher court
23 that said that supplemental jurisdiction is technically
24 a form of subject matter jurisdiction. What we argue --

25 JUSTICE GINSBURG: Why is it only technical?

1 It says court, you can exercise power. Subject matter
2 jurisdiction is defined as the court has to hear a given
3 controversy, and under supplemental jurisdiction, there
4 is undoubted power in the district court to hear those
5 claims.

6 MR. ALLISON: In a -- certainly I think in a
7 textbook sense, that is what subject matter -- when the
8 world is divided between subject matter and personal and
9 third, territorial, which I think is a relation -- has
10 relation to personal -- when the world is divided along
11 those lines, then subject matter takes on the broadest
12 possible meaning, but we have conflicting broad
13 policies. On the one hand, we have a broad definition
14 of subject matter definition; on the other hand we have
15 a statute which should be construed to favor remand at
16 almost all lawful cost.

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

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

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

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

25 JUSTICE ALITO: What about if it changes its

1 mind?

2 MR. ALLISON: Justice Alito, the question of
3 whether a -- question of reviewability because the cases
4 that we found that -- that talked about reconsideration
5 talked about reconsideration only because there was the
6 potential for review of these orders.

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

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

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

25 MR. ALLISON: And I think -- I think that

1 the -- again, the purpose of the review bar as it's been
2 expressed for over a hundred years has been to trust
3 district judges to make these decisions and then get the
4 case where it needs to be to be resolved on its merits.
5 So to say that the court chooses not to hear the case,
6 it -- it suggests something a little bit less gray than
7 the decision that I believe the court would make when it
8 decides that it's inappropriate to hear the case, in the
9 words of Gibbs.

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

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

24 JUSTICE GINSBURG: Well, that would argue
25 for a highly deferential standard of review, respecting

1 the district judge's determination that it's not what --
2 it hasn't invested any time in these questions, and it
3 shouldn't because they are purely state-law questions.
4 That's -- but that's something quite different from --
5 from a -- the -- the terminology that you used is
6 troublesome because a court doesn't have power to divest
7 itself of jurisdiction.

8 If Congress conferred jurisdiction, it has
9 it, and the Court can't divest itself of that. It can,
10 if Congress permits it, decline to exercise
11 jurisdiction, but a court is not capable of divesting
12 itself of jurisdiction.

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

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

25 The -- the premise for the declaration that

1 it does not have jurisdiction is a premise that even on
2 your argument does not arise until a following
3 agreement. So there's no way you can fit it, it seems
4 to me, into the category of -- of remanding because at
5 the point of deciding to remand it has no jurisdiction.
6 That, in fact, is false.

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

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

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

1 don't know that we make much headway. But I -- I -- I
2 see 1447(c) lacks subject-matter jurisdiction as being
3 broad enough to comfortably take in the situation where
4 the State law claims not really within the subject
5 matter of the district court's power are determined
6 inappropriate for that court to hear and sent back.

7 And it would bring us that much closer to
8 realizing the purpose of the review bar that has existed
9 since 1887, taking a category of cases out of the
10 jurisdiction of the circuit courts.

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

22 If there are no further questions, I will
23 stop now.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.
25 Thank you. Mr. Rhodes, you have four minutes remaining.

1 REBUTTAL ARGUMENT OF GLENN W. RHODES
2 ON BEHALF OF THE PETITIONER

3 MR. RHODES: I just had a few quick points I
4 would like to bring up.

5 First, I would just like to reiterate that
6 when Congress enacted 1367, that gave it Article III
7 jurisdiction in those matters, just as 1331 and 1332 do.
8 I would also like to reiterate that -- that stare
9 decisis should be maintained over this statutory
10 interpretation because it has proved to be workable
11 rather than not workable.

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

20 CHIEF JUSTICE ROBERTS: I suppose, though,
21 if it would be an abuse of discretion for the district
22 court to retain jurisdiction, then maybe there is --
23 there never was jurisdiction, right? You said they have
24 discretion to exercise or not. If it turns out they
25 don't have discretion to exercise, you know, because

1 it's a huge State claim and a tiny Federal claim, why
2 wouldn't that properly be regarded as an absence of
3 jurisdiction?

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

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

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 The case is submitted.

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

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