1 IN THE SUPREME COURT OF THE UNITED STATES
2 - x
3 DART CHEROKEE BASIN :
4 OPERATING COMPANY, LLC, :
5 ET AL., :
6 Petitioners :
7 v. : No. 13-719
8 BRANDON W. OWENS. :
9 - x
10 Washington, D.C.
11 Tuesday, October 7, 2014
12
13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 11:03 a.m.
16 APPEARANCES:
17 NOWELL D. BERRETH, ESQ., Atlanta, Ga.; on behalf of
18 Petitioners.
19 REX A. SHARP, ESQ., Prairie Village, Kan.; on behalf of
20 Respondent.
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1 P R O C E E D I N G S

2 (11:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 next in Case 13-719, Dart Cherokee Basin Operating

5 Company v. Owens.

6 Mr. Berreth.

7 ORAL ARGUMENT OF NOWELL D. BERRETH

8 ON BEHALF OF THE PETITIONERS

9 MR. BERRETH: Mr. Chief Justice, and may it

10 please the Court:

11 In Section 1446(a) Congress established a

12 pleading standard for the notice of removal, not a

13 demand for proof. The plain language in Section 1446(a)

14 tells us this. The plain language of Section 1446(a)

15 provides that a notice of removal shall contain a short

16 and plain statement of the grounds for removal.

17 And that mirrors language that has been used

18 in Rule 8 for more than 80 years and that has never been

19 held to require evidence with the complaint.

20 JUSTICE SCALIA: Well, how do we know that

21 the reason the court of appeals did -- did not -- or

22 sustained the refusal to take it, how do we know that

23 the reason was that they disagree with you on what the

24 standard -- what the court of appeals' reason was? How

25 can we --

1 MR. BERRETH: Well, we know that the court
2 of appeals let stand a district court decision.
3 JUSTICE SCALIA: Right, and so your --
4 your -- your job is to argue that that was an abuse of
5 discretion, because the statute says that they may,
6 right? They may take it--
7 MR. BERRETH: Well, an abuse of
8 discretion -- an abuse of discretion is not necessary to
9 be shown here. It can be shown here, because what the
10 circuit court did here was let stand a decision that did
11 many things.
12 And it's an unusual situation in the law,
13 Justice Scalia. It let stand a decision of the district
14 court that flouted the plain language of the statute.
15 JUSTICE KENNEDY: Is it always an abuse of
16 discretion for the court of appeals to let an erroneous
17 decision stand?
18 MR. BERRETH: Not necessarily always. In a
19 case like this, however, when the decision that was
20 let -- let to stand flouted the plain language of the
21 statute, is a situation where if it's not corrected by
22 this Court, it may never be corrected. And what the --
23 the problem that will never be corrected is this lack of
24 uniformity among the circuits on a matter that's so
25 clearly established by Congress.

1 Congress does not require there to be
2 evidence in a notice of removal. And defendants in
3 Florida or defendants in California don't have to
4 include evidence within 30 days in their notice of
5 removal. Defendants in the six States at issue in this
6 case do. They are treated differently.
7 JUSTICE KAGAN: Well, that seems a little
8 extreme to say it may never be corrected. I mean, this
9 was a decision that was made by eight judges. There are
10 now twelve judges. Maybe the additional four will make
11 a difference. Maybe even those eight will think twice
12 about it the next time around. I mean, in fact we just
13 don't know, right, because we don't know why they acted
14 the way they acted.
15 It might have been because they thought that
16 the district court's decision was right, or it might
17 have been because they thought it -- that -- that
18 question is better -- was better decided in some other
19 context, or it might be because they were just feeling
20 too busy that day.
21 And -- and an abuse of discretion standard
22 would go, you know, to the -- just the decision whether
23 to take it, not knowing what that decision was based on.
24 MR. BERRETH: Well, Justice Kagan, in this
25 situation, given what the Tenth Circuit has done and

1 given that the case has made it this far, as Judge Hartz
2 pointed out in his dissent below, it's highly unlikely
3 that a situation like this would arise again. It's --
4 it takes an unusual confluence of circumstances to have
5 a case get here in the first place.
6 But now that we are here, lawyers in the
7 Tenth Circuit are more unlikely than ever to -- to allow
8 this problem to happen in the future, to allow this
9 to -- to re -- recur.
10 And so that is a main part of why this is an
11 unusual situation. It's not a garden variety decision
12 by the court of appeals that we are faced with.
13 CHIEF JUSTICE ROBERTS: I'm not sure you're
14 joining issue with the question Justice Kagan asked. Do
15 we really not know why the Tenth Circuit did what it did
16 in this case?
17 MR. BERRETH: Well, the Tenth Circuit did
18 not explain the reasons for its decision.
19 CHIEF JUSTICE ROBERTS: But the dissenters
20 in the case thought -- explain why they thought it was
21 wrong. Don't you think if the Tenth Circuit relied on a
22 different reason they would have said so?
23 MR. BERRETH: Well, they may have, they may
24 not have. They're not required to. But they're not
25 allowed to insulate their decisions from review simply

1 by -- by not explaining them, especially in a situation
2 like this involving the unusual situation and involving
3 a circuit that -- that is -- that is wayward, a circuit
4 that is not applying the plain language of Section
5 1446(a).
6 JUSTICE SOTOMAYOR: I mean, I'm not sure
7 what --
8 JUSTICE ALITO: Go ahead. Has there been
9 any suggestion at any point in this case -- in the
10 district court, in the court of appeals, in the papers
11 that have been filed here -- that the decision was based
12 on anything other than the reasoning of the district
13 court? Any other reason been given?
14 MR. BERRETH: There has not been another
15 reason that's been given, and the reason that the
16 district court gave was clearly erroneous. The district
17 court clearly thought that she was constrained to ignore
18 evidence that all parties agreed is sufficient to
19 establish removal of jurisdiction in this case.
20 This is a case where there's no dispute
21 about whether all of the elements necessary for Federal
22 court jurisdiction exist. The only impediment to
23 Federal jurisdiction right now is that the district
24 court felt constrained to ignore that evidence solely
25 because of -- of a timing restriction that is not found

1 in the plain language of the statute. And when --
2 JUSTICE KENNEDY: I'm -- I'm wondering in
3 some later case, could attorneys who want to remove
4 within the 30-day period seek mandate from the Tenth
5 Circuit to mandate the judge not to require the
6 evidence?
7 MR. BERRETH: Well, they could -- I suppose
8 they could try something like that. I think that
9 they're not required to. Congress has told us that
10 they're not required to go to such extreme measures.
11 Congress has told us that what defendants are supposed
12 to do is, within 30 days of receiving the complaint or
13 another paper, either of which would put them on notice
14 that -- that there is the amount in controversy in play
15 here, that they are required to file their notice of
16 removal.
17 And in the Tenth Circuit, they have to go
18 get affidavits. Perhaps the CEO of the company is in
19 Hawaii or something. And frequently, lawyers aren't
20 even hired for a couple of weeks after a complaint is
21 filed.
22 And so you can have a situation where, in
23 the Tenth Circuit, unlike in other circuits, maybe
24 there's only 10 days to go find the CEO to get the
25 affidavit that thought – that is thought to be necessary,

1 when that requirement simply does not exist in the plain
2 language of the statute. And it doesn't exist -- it's
3 not enforced in any of the other circuits.
4 JUSTICE KAGAN: Mr. Berreth, I -- I
5 apologize for going back to this not merits question,
6 but on the question of why the Tenth Circuit did what it
7 did, Judge Hartz, who was, of course, dissenting from
8 denial, made reference to the fact -- and I'm just
9 quoting here -- that the judges were very busy, and the
10 appeal presented a knotty matter that requires a
11 decision in short order.
12 So even he, who was trying to suggest that
13 an appeal should have been taken, was not suggesting
14 that the court did what it did because the court agreed
15 with the trial court.
16 MR. BERRETH: Well, in a case like this
17 where all parties agree that there's a case in the court
18 of appeals, so that there is jurisdiction under Section
19 1254, the Forsyth v. Hammond case confirms that this
20 Court has the power, the certiorari power to -- to look
21 to the whole case, to look to any aspects of the case.
22 JUSTICE GINSBURG: But I thought Hohn, which
23 I think you used as explaining why the case is in the
24 court of appeals, but Hohn said the only thing that you
25 can review is the COA, certificate of appealability.

1 You can't use that handle to get to the merits.
2 So the only question is whether the
3 certificate was improperly denied and not the merits.
4 MR. BERRETH: Well, Justice Ginsburg, the
5 difference in that case was that the government conceded
6 error. Government conceded that the merits question was
7 not in dispute. So this Court didn't need to go ahead
8 and reach the merits. This Court has reached the merits
9 in a similar situation in the Nixon v. Fitzgerald case.
10 JUSTICE KENNEDY: But I thought -- are you
11 saying that all parties concede that this case is in the
12 court of appeals, both with respect to the proper
13 exercise of the court's jurisdiction in taking the case
14 and as to the merits?
15 MR. BERRETH: That's right. Once the case
16 is in the court of appeals, under Section 1254, Forsyth
17 confirms that this Court has the power to review any
18 aspect of the decision --
19 JUSTICE KENNEDY: Well, I -- I think that's
20 contrary to Hohn, as Justice Ginsburg has just
21 indicated.
22 MR. BERRETH: Well, Hohn did not purport to
23 overrule Nixon v. Fitzgerald --
24 JUSTICE KENNEDY: All right. And one's a
25 COA, and then the other's -- is the statute

1 there. There may be a difference there’s, but I don't
2 see the difference.
3 MR. BERRETH: Justice Kennedy, this -- this
4 case presents different issues than were in play in
5 Hohn. And a case that presented issues very similar to
6 this is Nixon v. Fitzgerald. And in that case, the
7 court did both steps. The court took both steps.
8 The court, number one, confirmed that it had
9 jurisdiction under Section 1254, which exists here; all
10 parties agree. And number two, the court in Nixon v.
11 Fitzgerald went ahead and addressed the merits question,
12 which is what we asked the Court to do in this case,
13 because if the Court doesn't go ahead and address the
14 merits question in this case, there is a high likelihood
15 that the merits question won't be addressed, and that
16 we'll have one circuit alone that has this requirement
17 out there that flouts congressional intent.
18 JUSTICE GINSBURG: The reason is that any
19 careful lawyer in the Tenth Circuit will -- will know
20 that we -- we'd better put the evidence in the notice of
21 removal. So a lawyer is not going to risk failing to do
22 that to make -- to correct the Tenth Circuit's error.
23 MR. BERRETH: That's right. And -- and this
24 sort of belt and suspenders approach is not what
25 Congress tells us defendants have to do.

1 JUSTICE SCALIA: But the district court's
2 opinion is not -- certainly not circuit law, so I think
3 you exaggerate when you say it establishes bad law for
4 the circuit. It just doesn't.
5 MR. BERRETH: Well, the --
6 JUSTICE SCALIA: The circuit let the
7 district court decision stand, but that doesn't make the
8 district court decision circuit law.
9 MR. BERRETH: The district court was relying
10 on circuit law in making its decisions.
11 JUSTICE SCALIA: And maybe it was wrong.
12 MR. BERRETH: Well, the circuit law, which
13 started this, the Laughlin case from 1995, is wrong, we
14 would submit. And that is the case that got the Tenth
15 Circuit off on this track.
16 JUSTICE SCALIA: I see. You're just not
17 relying on this case; you're relying on the fact that
18 the district court relied on an earlier case.
19 MR. BERRETH: That's right. This -- this
20 so-called Tenth Circuit rule, which came into effect in
21 about 1995, what set this circuit off its -- off track,
22 and this is the case that can bring this circuit back on
23 track.
24 And to -- to not require the district courts
25 to feel constrained as the district court here felt --

1 the district court here felt that she was constrained by
2 Laughlin and by a couple of other cases in the Tenth
3 Circuit that established this Tenth Circuit rule.
4 And based on that constraint, which, again,
5 finds no basis in the text of the statute, she refused
6 to consider evidence that all parties agree establishes
7 the amount in controversy. The amount in controversy in
8 this case as established is more than four times the
9 amount in the statute.
10 JUSTICE SOTOMAYOR: All right. How -- how
11 would you answer this question: How did the circuit
12 abuse its discretion?
13 MR. BERRETH: The circuit abused its
14 discretion by letting stand a decision that so plainly
15 violated the plain language of the statute that exists
16 in a case in which further review is highly unlikely, so
17 that if it's not corrected now it may never be
18 corrected. And in doing so, it -- it -- it ran counter
19 to this Court's desire for uniformity among the circuits
20 in the law, especially uniformity in a matter this
21 important and this -- and in which Congress has spoken
22 as clearly as it has.
23 JUSTICE BREYER: To put it more simply, you
24 think that the circuit abused its discretion by relying
25 upon an improper legal reason.

1 MR. BERRETH: We do believe it.
2 JUSTICE BREYER: That's classic, right?
3 MR. BERRETH: We do. We don't believe --
4 JUSTICE BREYER: Now, it isn't quite clear
5 that they did, because they didn't say . But you
6 think there's a good chance they did. So then I guess
7 that you would like us to say, if that was your reason,
8 it's improper and wrong.
9 Now, we'll send it back to see if there is
10 some other reason.
11 MR. BERRETH: That's right.
12 JUSTICE BREYER: That's your position.
13 MR. BERRETH: That's right. And this Court
14 reviews --
15 JUSTICE BREYER: There is nothing more to it
16 than that.
17 MR. BERRETH: This Court reviews judgments,
18 not rulings.
19 JUSTICE BREYER: No, no. That's a different
20 point.
21 MR. BERRETH: And --
22 JUSTICE BREYER: What we reviewed is the
23 word "denied," and the question of the word "denied" is
24 we're not certain why, but we have a good suspicion. Is
25 that -- I mean, that's the argument. Is there anything

1 else to it?

2 MR. BERRETH: What else is in the argument

3 is that this Court is not required to find an abuse of

4 discretion to rule in our favor in this case. Because

5 this Court's certiorari power is broad enough so that

6 this Court doesn't even have to wait for a circuit court

7 to act. So if this Court doesn't have to wait for a

8 circuit court to act, it shouldn't be restricted from

9 doing what is right merely by a circuit court's decision

10 not to explain its reasoning.

11 JUSTICE SOTOMAYOR: In other words, you win

12 either way. We say they abused their discretion if they

13 relied on the wrong law, or we go right to the law

14 because we have that power to do it.

15 MR. BERRETH: That's right, Justice

16 Sotomayor. We ask you to review the Tenth Circuit's

17 decision. There is choices the Court can make in how to

18 handle this. We think the most logical way for the

19 Court to handle it is to review the Tenth Circuit's

20 decision, and in doing so, to look through that, to what

21 the Tenth Circuit did. And when you do that, you find

22 this clear error of law, this failure to appreciate

23 Congress's plain language, this failure to appreciate

24 the fact that this is not a case that's likely to come

25 up for review in the future.

1 JUSTICE SCALIA: We don't know what the
2 Tenth Circuit did. You say the Tenth Circuit's
3 decision. The Tenth Circuit made no decision. It
4 declined to take the case, didn't it? It may -- the
5 statute says it may, and it said we won't. And we don't
6 know why they said that. Even the dissenters in the
7 petition for en banc didn't say, oh, the court was wrong
8 to stand by our earlier decision which you - which you
9 complain about. No, they said, you know, this was an
10 important issue and we should have taken it. Now, you're
11 saying we are going to review that decision as an abuse of
12 discretion that you should have taken it. Right?
13 MR. BERRETH: I'm saying that once the
14 application for an appeal was filed, there is a case in
15 the court of appeals, therefore, this Court's power is
16 so extensive it can review any aspect of a decision.
17 It's not hampered by a lack of an explanation for the
18 decision by the Tenth Circuit.
19 JUSTICE SCALIA: Is that right? It seems to
20 me the statute gives the power to the court of appeals.
21 It says the court of appeals may decline to take it. We
22 can't override their judgment not to take it unless
23 there is something unlawful about that judgment. You
24 give us too much credit, you know, we don't have total
25 power to make decisions, the courts of appeals are

1 supposed to make.

2 MR. BERRETH: Justice Scalia, under Forsyth,

3 though, this Court does have the power to not be

4 constrained by the district court's --

5 JUSTICE BREYER: I thought your answer would

6 be, of course, he is right. But there is something

7 unlawful about this decision. Suppose the decision had

8 rested on his religion. Unlawful, wouldn't it have

9 been? Suppose they didn't tell us but the dissent told

10 us. So the question is you're arguing, yes, there was

11 something unlawful. The unusual thing about the case is

12 the person who tells us what they were doing is the

13 dissent.

14 Now, I don't know why the dissent says that

15 was a reason -- as I read the dissent. Maybe other

16 people read it differently, but as I read the dissent,

17 the dissenter was telling us that that was a significant

18 factor in their decision. All right. As found in the

19 other case, we find out what they did by reading the

20 dissent, it doesn't sound to me to be totally unusual.

21 JUSTICE SCALIA: Do you agree with that

22 description of the dissent? Do you think the dissent

23 said that that was the reason?

24 MR. BERRETH: The dissent said that the

25 district court felt constrained by this pre-existing

1 Tenth Circuit precedent to refuse to consider the
2 evidence.
3 JUSTICE SCALIA: Yes. But the dissent
4 didn't say why the court of appeals refused to take the
5 case, did it? It didn't say the court of appeals
6 refused to take it because it agreed with that prior
7 decision. It didn't say that, did it?
8 MR. BERRETH: It did not explain that.
9 That's right.
10 JUSTICE BREYER: You have different judges
11 who possibly read different language in the dissent to
12 suggest what the dissent is thinking. So he doesn't say
13 it literally, but when I read it, I thought that's what
14 he means.
15 MR. BERRETH: But based on what happened
16 here, there is just simply no way that the Tenth
17 Circuit's decision can satisfy an abuse of discretion
18 standard.
19 JUSTICE ALITO: Let me give you an example
20 of something that happens quite frequently and maybe you
21 can tell me if this situation is any different from
22 that.
23 A district court has to make a decision on
24 something as to which the district court has discretion.
25 A party urges the district court to make a particular

1 decision based on one ground. And the one ground is
2 based on a legal error. The district court rules in
3 favor of that party but says absolutely nothing. Now
4 the issue is raised on appeal, the argument is that the
5 trial judge abused his or her discretion.
6 Now, would that be insulate it from review
7 for abuse of discretion on the ground that, well, we
8 really don't know why the judge did what the judge did?
9 The judge didn't say anything. So the judge might not
10 have based the decision on this one -- on this legal
11 error, the only ground that was urged upon the court.
12 It might have been based on something else.
13 MR. BERRETH: No --
14 JUSTICE ALITO: What would be -- is that
15 different from this situation?
16 MR. BERRETH: It's not very different from
17 the situation. A classic abuse of discretion is an
18 error of law. And there was an error of law here
19 because the district court felt constrained --
20 JUSTICE KAGAN: Mr. Berreth, that assumes
21 that when an appeals court decides whether to take an
22 appeal, all they are doing is making a merits
23 determination. And if that's all that appeals courts
24 were doing when they decide whether to take an appeal,
25 then you would be right. But, in fact, we know from

1 everything we do every day that when a court decides to
2 take something or not to take something, they are not
3 just making a merits evaluation. They are doing a
4 thousand other things as well about how they think it's
5 best to arrange their docket. And what we don't know is
6 whether the Tenth Circuit here did one of those things.
7 MR. BERRETH: I believe that what we do
8 know, what we can glean from this, though, is that by
9 failing to correct this clear error of law, that was an
10 abuse of discretion.
11 I don't believe an abuse of discretion was
12 necessary here because this Court isn't constrained
13 under the Forsyth case by what the district -- by what
14 the circuit court did because this Court can act before
15 the circuit court acts. But an abuse of discretion is
16 shown here. We can show abuse of discretion. It's the
17 classic abuse of discretion, of a clear error of law.
18 But there isn't a floodgates problem here, I think, with
19 respect to every time a circuit court commits a clear
20 error of law that it has to be appealable.
21 JUSTICE SCALIA: Well, I guess it's an abuse
22 of discretion whenever we fail to correct a clear error
23 of law on a petition for certiorari. Right? And I'm
24 not going to mention any names, but is that the case?
25 It's an abuse of discretion. I thought we just had the

1 power to say we don't feel like taking it.
2 MR. BERRETH: I don't believe it would be an
3 abuse of discretion for this Court. This Court's power
4 is different than the circuit courts'. The circuits
5 courts do not have the benefit of the broad, nearly
6 unlimited power of Forsyth --
7 JUSTICE KAGAN: But this statute gives the
8 appellate courts tremendous discretion on this area. It
9 says it may take an appeal, it may not take an appeal.
10 Think of the thousand things that you want to think
11 about, not anything invidious, not anything permissible,
12 but, you know, whether to take an appeal. And that's
13 the only thing we know about it.
14 Here's a question for you, because I
15 sympathize with you. Because the next half-hour is
16 going to reveal that, actually, most of us agree with
17 you on the merits. Right?
18 JUSTICE ALITO: That might be a little
19 premature.
20 JUSTICE KAGAN: All right. I will limit it,
21 I agree with you on the merits. All right? But I just
22 don't see how to get around this. Here's my suggestion.
23 Would it be sufficient for your purposes,
24 you're worried about the sort of continuing effect of
25 this, to just sort of get rid of this case, dismiss this

1 case, but to -- we often explain why we dismiss cases
2 and to suggest that we are dismissing it because we
3 don't know whether the Tenth Circuit made a decision on
4 the merits. And if and to the extent that the Tenth
5 Circuit wants in the next case to make a decision on the
6 merits, and if and to the extent that the Tenth Circuit
7 wants in the next case to make a decision on the merits
8 when it denies an appeal, it should say so, so as not to
9 insulate that decision from review.
10 That seems like a fair thing to say to the
11 Tenth Circuit. Don't insulate your merits decisions
12 from review. But it also seems to be, you know, to
13 reflect what is true about this case, which is that we
14 don't know whether it made a merits decision.
15 MR. BERRETH: Well, this Court doesn't need
16 to know whether the Circuit Court made a merits decision
17 to reverse in this case. This Court's discretionary
18 power, this Court's certiorari power, once there's a
19 case of the court of appeals doesn't require this Court
20 to know why the circuit court did what it did.
21 CHIEF JUSTICE ROBERTS: Do you think it's
22 appropriate for this Court to dismiss certiorari, in
23 other words, the case is not before us, and then opine
24 on the merits of the case?
25 JUSTICE KAGAN: No. No. No. I was not

1 suggesting that we opine on the merits of the case. I
2 would think that that would be not appropriate.
3 CHIEF JUSTICE ROBERTS: I thought the
4 suggestion was that we tell the Tenth Circuit that this
5 was wrong?
6 JUSTICE KAGAN: No. No. No. That is not
7 my suggestion, it might be your suggestion.
8 CHIEF JUSTICE ROBERTS: Well, if we simply
9 dismiss certiorari, what do you think we have the
10 authority to say other than the reasons for dismissing
11 certiorari?
12 MR. BERRETH: Well, I think number one, you
13 have the power to rule in favor of my client in this
14 case. I think you have the power perhaps to remand the
15 case to the Tenth Circuit, this case, and require the
16 Tenth Circuit to consider the appropriate factors.
17 I don't think it would be appropriate, given
18 where we are, given how far we've come, given the fact
19 that all parties agree there's a case in the court of
20 appeals, given that Forsyth teaches us that this Court
21 need not know why the circuit court did what it did to
22 find abuse of discretion, if an abuse of discretion is
23 necessary, I would submit at a minimum, that this Court
24 would remand the case to the Tenth Circuit for an
25 appropriate balancing of the factors.

1 But I don't believe that that is necessary
2 because I believe that because of Forsyth and because of
3 this Court's power, this Court has the power to reverse
4 this case similar to what happened in the Standard Fire
5 case.
6 CHIEF JUSTICE ROBERTS: How can -- how can
7 we remand for an appropriate consideration of the
8 factors if we don't say that what took place was
9 inappropriate?
10 MR. BERRETH: That's -- a decision on the
11 merits would cover all those bases, Mr. Chief Justice.
12 A decision on the merits here would correct the error;
13 it would correct the error in this case, and it would
14 correct -- keep any errors from happening in future
15 cases in the Tenth Circuit.
16 JUSTICE KENNEDY: Is the only way that we
17 can do that is by granting cert before judgment?
18 MR. BERRETH: I don't believe that that's
19 the only way that that can be done. I think that it
20 happened in --
21 JUSTICE KENNEDY: Well, let's assume that we
22 think the case that Hohn controls and this case is in
23 the -- in the court of appeals only for the purpose of
24 determining whether the appeal should be taken. If we
25 make that assumption, then isn't the only way for us to

1 reach the merits to grant cert before judgment?
2 MR. BERRETH: Justice Kennedy, the Court's
3 certiorari power is broader than that, I believe. So I
4 don't believe a cert grant before judgment is the only
5 way because this Court does not need to wait for the
6 circuit courts to act. But if this Court does wait for
7 the circuit court --
8 JUSTICE KENNEDY: Well, do we grant it on
9 the ground that it's interesting? I mean, I don't know
10 what your -- what your standard is.
11 MR. BERRETH: You grant cert on cases of
12 national importance, on cases in which there is one
13 wayward circuit that's so flouting the plain language of
14 the -- of the statute that it -- that it -- that it
15 should -- needs to be corrected, that defendants in the
16 heartland of the country, in these six states, should
17 have the same benefits as defendants in those other
18 states.
19 JUSTICE KENNEDY: In other words, we grant
20 cert to the district court?
21 MR. BERRETH: This Court can grant cert to
22 the district court in very rare circumstances.
23 JUSTICE KENNEDY: And that's the only way we
24 can do it, it seems to me, if you assume that the case
25 is in the court of appeals only for the purpose of

1 determining whether to take an appeal.
2 MR. BERRETH: Well, the Nixon v. Fitzgerald
3 case, though, confirms that the court is not so
4 constrained.
5 JUSTICE SCALIA: Well, but we would sort of
6 frustrate the statute, wouldn't we? The statute gives
7 the court of appeals the discretion to decide whether
8 there will be an appeal or not. And you're saying, oh,
9 no, if they decide there won't be you -- you just reach
10 in, and you have cert before judgment. I think that's a
11 real frustration of the purpose of this statute, which
12 says these matters, you know, are not all that
13 significant. So it doesn't come to federal court. It
14 stays in state court, who cares? We trust our state
15 courts.
16 I mean, the whole purpose of the statute is
17 to make this, you know, a quick and dirty judgment.
18 That's why they don't have to state reasons. They just
19 say no appeal, or appeal.
20 And you're saying, oh, no. It suddenly
21 becomes laden with -- with all sorts of requirements
22 that if they're not observed, we -- we grant cert before
23 judgment. I wouldn't think of doing that, well, with
24 this statute anyway.
25 MR. BERRETH: Well, when Congress provides

1 in 1453 for appellate jurisdiction over the remand
2 orders, Congress is providing for jurisdiction in this
3 Court because Congress didn't legislate to the contrary.
4 When -- when Congress wants to prevent this
5 Court from having the ability to take up a writ of
6 certiorari, it does so, as it did in the AEDPA context,
7 when it explicitly restricted this Court from hearing a
8 petition for a writ of certiorari or granting one.
9 Congress didn't so legislate here. This
10 Court has full power to address both the -- address the
11 merits question in this case.
12 I'd like to reserve the balance of my time.
13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 Mr. Sharp.
15 ORAL ARGUMENT OF REX A. SHARP
16 ON BEHALF OF RESPONDENT
17 MR. SHARP: Mr. Chief Justice, and may it
18 please the Court:
19 The remand order should stand for at least
20 two reasons. First, 1447(d) bars this Court's
21 jurisdiction to review this case at all, on appeal or
22 otherwise, because the Tenth Circuit did not accept the
23 remand appeal under 1453.
24 Consequently, this Court has no jurisdiction
25 at all to review this matter on appeal or certiorari or

1 any other way.

2 CHIEF JUSTICE ROBERTS: So -- so if the

3 court of appeals said we are not accepting this petition

4 because of the race of the person seeking removal,

5 that's just too bad? We can't review that?

6 MR. SHARP: If they give a reason, I think

7 this Court can review a reason. But if it doesn't give

8 a reason, it just simply does as this Court sometimes

9 does with a petition for certiorari -- denied -- there's

10 nothing to review.

11 CHIEF JUSTICE ROBERTS: So if every case in

12 which parties seek removal, a particular race of a

13 person seeking removal, their case is denied 100 out of

14 100 cases. We still don't have any basis and they know,

15 gosh, the one thing we -- we can't do is say why we are

16 doing it. They have a blank check? They can do that

17 forever without any review by this Court?

18 MR. SHARP: No. I don't think you have a

19 blank check, because at the time it goes back to state

20 court, then comes up on final judgment, and this Court

21 would review the final judgment on whether the remand

22 was proper.

23 JUSTICE GINSBURG: But it was just pointed

24 out that lawyers in the Tenth Circuit are not going to

25 take that risk. The Tenth Circuit precedent, which the

1 district court followed, says you must produce in the
2 notice of appeal evidence.
3 So what lawyer is going to say to his
4 client, now, we can easily do that, but I won't because
5 I want to test whether the Tenth Circuit precedent is
6 wrong.
7 As a practical matter, this will be
8 unreviewable because the lawyers will simply conform to
9 what the Tenth Circuit says is the law.
10 MR. SHARP: Your Honor, I think that's what
11 the dissent pointed out, is that, what lawyer would not
12 put on evidence after having that Tenth Circuit rule set
13 forth as it has been for the last 20 years. But yet, we
14 do have this case where evidence wasn't presented. Why
15 their evidence was not presented, no one knows, but it
16 was clear that Dart had the evidence to present at the
17 time of this notice of removal but didn't present it.
18 Perhaps it wanted to challenge this issue to
19 the Tenth Circuit --
20 JUSTICE GINSBURG: Maybe -- maybe because it
21 thought there wouldn't be any controversy. Maybe they
22 thought the defendant thought the plaintiff would agree
23 that the amount was over the jurisdictional order.
24 MR. SHARP: That's a good point, Your Honor,
25 and that's entirely possible. That, as it turns out,

1 would not be this case, because as we get deeper into
2 the evidence in this particular case, this one doesn't
3 meet $5 million. It's not going to get close to meeting
4 $5 million.
5 JUSTICE BREYER: You actually started out by
6 saying 1447(d), which I thought had nothing to do with
7 this case. That is, I thought that they -- they were
8 going -- the relevant statute is 1453(c)(1), which says
9 a court of appeals may accept an appeal, notwithstanding
10 Section 1447(d), from an order of the district court
11 granting or denying a motion to remand. All right?
12 So we are not talking about 1447(d); we are
13 talking about 1453(c)(1).
14 Now, what they did is they said they have an
15 order, and the order says, no, we won't accept it. And
16 the question is, is that order reviewed in this Court?
17 I didn't think there was disagreement that it is
18 reviewable.
19 If they had said, We will not accept it
20 because if we think that it only applies to stoppage in
21 transitu cases, they would have their reason. Their
22 reason would have been wrong, and I guess we could
23 review it. Is that right or not?
24 MR. SHARP: Well, Your Honor --
25 JUSTICE BREYER: Yes or no?

1 MR. SHARP: No, Your Honor.

2 JUSTICE BREYER: No, we can't review any

3 case when they turn it down, no matter what their

4 reason. Do you have any authority for that proposition?

5 MR. SHARP: 1450 -- as you pointed out,

6 1453(c) and 1453 in total adopts the entirety of 1446

7 and 1447, with limited exception.

8 JUSTICE BREYER: No. It doesn't adopt it.

9 It says notwithstanding Section 1447(d), a court of

10 appeals may accept an appeal. So please accept my

11 appeal; court of appeals says no.

12 My question to you is, does this Court have

13 the authority to review the order that says no?

14 MR. SHARP: And my answer is still --

15 JUSTICE BREYER: No, it doesn't --

16 MR. SHARP: -- still the same --

17 JUSTICE BREYER: No matter how terrible the

18 reason, it doesn't. That's your answer?

19 MR. SHARP: No. My answer is because they

20 did not accept the appeal, then you go back to

21 1447(d) --

22 JUSTICE BREYER: No, no. I'm saying my

23 hypothetical is they do not accept the appeal.

24 MR. SHARP: As in this case.

25 JUSTICE BREYER: They say we do not accept

1 the appeal because 1453 only applies to stoppage in
2 transitu. Okay? A totally wrong reason.
3 Now, are you saying we do not have the
4 jurisdictional authority to review that order which says
5 "denied"?
6 MR. SHARP: Denied for some clearly improper
7 reason?
8 JUSTICE BREYER: Yes, denied for some
9 clearly improper reason. Are you saying that? And if
10 so, I'd like to know the authority for that because we
11 have plenty of cases that go with the analogous
12 certificate of appeal in habeas cases -- cases where we
13 take it.
14 MR. SHARP: I understand, Your Honor, and I
15 don't think I have any cases, but --
16 JUSTICE BREYER: All right. If you don't
17 have any cases, we might file the other way. If you
18 agree, and you don't -- all right, I don't know where to
19 go from here because if you're going to say we can't
20 take authority where they absolutely can't hear the
21 case, where it's absolutely clear they're wrong, then I
22 don't know where to go.
23 MR. SHARP: Well, let me see if I can --
24 JUSTICE BREYER: I don't do that, but, I
25 mean, but I'm not going to get you to say anything more.

1 MR. SHARP: Let me see if I can address it,
2 Your Honor. Hohn and Miller L. are not remand cases and
3 Nixon was not a remand case. 1447(d) expressly deals
4 with remand cases and Section 1453(c)(1) says when there
5 is an accepted appeal under 1453, then 1447(d), it
6 doesn't apply. But all the rest of 1447(d) applies and
7 all of 1447 applies if the appeal is not accepted.
8 That puts you right back into the 1440(c)(d)
9 realm and 1447(d) says this Court doesn't have any
10 jurisdiction under Gravitt. This is a similar case to
11 like Kircher v. Putnam Funds where this Court basically
12 said the district court got it wrong, but we don't have
13 jurisdiction to hear it.
14 JUSTICE SCALIA: Do you think it's -- it's
15 constitutional for Congress to say that certain minor
16 issues or what it regards as minor issues shall not be
17 appealable for any reason whatever? So even if it's
18 decided you're going to do it for a plainly improper
19 reason, like religion or race or something, still and
20 all it ain't -- it ain't worth our trouble, right?
21 Could Congress do that?
22 MR. SHARP: Your Honor, I don't think
23 Congress can -- no, I don't think Congress --
24 JUSTICE SCALIA: You don't think Congress
25 did that here.

1 MR. SHARP: I don't think they did that
2 here. I think they made a --
3 JUSTICE SCALIA: I think you're going to
4 lose then.
5 MR. SHARP: I think they made a simple
6 declaration in 1447(d) that remand orders are not worth
7 the time of the Court to handle on review, and with
8 respect to class actions, we're going to let the court
9 of appeals make that choice of whether it makes -- if it
10 merits any attention on appeal. And if the court of
11 appeals says it does --
12 JUSTICE GINSBURG: Do you pay any attention
13 at all to the obvious purpose of the Class Action
14 Fairness Act, which was to get cases out of the State
15 courts and into the Federal courts? Usually, we don't
16 have that strong Federal policy of having the
17 adjudication in the Federal court.
18 MR. SHARP: Yes, Your Honor. CAFA, I think,
19 made clear that certain larger cases, interstate type
20 cases, belong in Federal court. This isn't that kind of
21 a case, but if it was, you also have --
22 JUSTICE GINSBURG: You said that you would
23 argue that the amount in controversy was not satisfied
24 and it seems to me that most plaintiffs who are bringing
25 class actions are not going to be argued, oh, we can't

1 prove $500,000.

2 MR. SHARP: Your Honor, as much as my client

3 would like to see this be a bigger case than it really

4 is, this particular case, as the Court knows, when the

5 original allegation was made on a conclusory basis of

6 $8.2 million, that was made on the basis of all of the

7 potential damages for all of the royalty owners.

8 But in this oil and gas context, about 62

9 percent of all of the oil and gas leases were express

10 deduction leases; in other words, they expressly

11 authorized the deductions that we complained about.

12 There goes about 40 percent of our damages right there

13 as a matter of law.

14 The second thing is that it turns out, as we

15 get deeper into this case, that Dart doesn't have all of

16 the working interest in this particular oil and gas

17 patch. They have more along the lines of half. There

18 goes another half of our damages. Now we're down to 20

19 to 25 percent of the total damages.

20 JUSTICE GINSBURG: You had alleged in your

21 complaint that the damages that you were seeking were

22 under $500,000. If that's what you thought, then you

23 would be --

24 MR. SHARP: We -- we had no idea at that

25 time, Your Honor. We didn't know how much. We just

1 didn't have any information whatsoever at that time.
2 JUSTICE GINSBURG: But when they -- when
3 they did allege in the notice of removal that the amount
4 in controversy was met, you didn't contest that.
5 MR. SHARP: We didn't need to at that time.
6 We already had taken on the issue long before any
7 evidence was presented to us that they had not proffered
8 any evidence with the notice of removal. Under -- under
9 the JCV's -- the JVCA --
10 JUSTICE GINSBURG: But what you didn't say
11 is that there is no such evidence and that our damages
12 are less than $500,000.
13 MR. SHARP: We -- we didn't know -- we
14 didn't have any evidence at all as to what the amount in
15 controversy was so we didn't allege it in our petition.
16 And when that was removed without anything other than an
17 allegation that it was worth 8.2 million, we couldn't do
18 anything other than say how do we know? Where's your
19 evidence? We have nothing.
20 JUSTICE GINSBURG: But there's a peculiar --
21 this State doesn't require the complaint to state the
22 amount in controversy. But if you were bringing this
23 case in the Federal court in the first instance would
24 you have said as plaintiff, the damages that we seek are
25 under 5,000 -- 500,000?

1 MR. SHARP: In -- if I had been in -- in
2 the -- in the know at the time this case was filed, I
3 would have alleged what the amount of damages were. I
4 also may have alleged the case in a completely different
5 way than I did. But I didn't have that evidence. So
6 consequently, when the removal was made without any
7 evidence at all from which we could determine what the
8 amount in controversy really was, we said let's remand
9 this case because you haven't come up with the actual
10 evidence.
11 They should have waited and presented all of
12 the damage evidence and waited for another paper, like
13 most of the -- other defendants do, but they didn't.
14 They wanted to jump the gun and get it into Federal
15 court and they didn't come with their evidence like they
16 were supposed to. The JVCA is not governed by --
17 JUSTICE GINSBURG: If there's only one
18 circuit then, I mean, that is so antithetical with the
19 whole notion of the Federal rules that you don't plead
20 evidence. Plain statement doesn't include evidence and
21 it is quite an extreme interpretation and counter to the
22 whole thrust of the Federal rules, which you make a
23 plain statement and then the evidence comes later.
24 MR. SHARP: Well, the -- the way I read the
25 JVCA in 1446(a) is that the grounds must be just plainly

1 stated, just like a regular pleading. The grounds are
2 diversity. The grounds are a Federal question. And
3 then (c)(2) specifically addresses the amount in
4 controversy. (A) does not say anything about the amount
5 in controversy. (C) and (c)(2) addresses the amount in
6 controversy. And (c)(2)
7 says --
8 JUSTICE SOTOMAYOR: I just have never -- I'm
9 a little hard-pressed to understand why the district
10 court would be without power to decide this question.
11 They came in with evidence afterwards. Why couldn't you
12 have come in with evidence and the district court decide
13 which one is right?
14 MR. SHARP: Certainly, that could have been
15 done if they had gotten over the procedural hurdle to
16 begin with. The Tenth Circuit rule is pretty simple and
17 it also follows the JVCA, which basically says if you
18 want to jump the gun into Federal court and you're not
19 going to wait on the plaintiff to virtually admit their
20 way into Federal court, then you're going to have to put
21 on some evidence. In the Tenth Circuit, they require
22 prima facie evidence. If plaintiff looks at that prima
23 facie evidence and does nothing, under Wilson, you're
24 in. There's nothing more that need be done.
25 JUSTICE KAGAN: But I don't see where you

1 get that. You know, you say (c)(2), which is the
2 preponderance standard, but that's just a standard that
3 the court is going to use to make the determination
4 about whether to be in Federal court or not.
5 But it seems to me that the statute is best
6 read -- is really only read to comport as Justice
7 Ginsburg said, with the rest of the Federal rules. It's
8 notice pleading, then the original plaintiff has a
9 choice. The original plaintiff can contest the -- the
10 removal and present evidence and in that case, the
11 defendant comes back with evidence and the defendant
12 bears the burden of proof and the court makes its
13 decision on the basis of that two sets of evidence.
14 But why one should think of the original
15 notice as needing to contain evidence is just -- I guess
16 I don't understand where that comes from.
17 MR. SHARP: Well, the reason for that, I
18 think, is that the original notice is not a pleading.
19 It is not like plaintiff originating the case in Federal
20 court. It's not a pleading. It's actually a motion.
21 And as with most motions, you generally have to submit
22 your evidence, you have to prove a motion, and you
23 usually have to submit your evidence with the motion.
24 JUSTICE GINSBURG: But this is -- this is a
25 provision for removal. It tracks the language of Rule

1 8(a). And so you're asking for -- oh, even though it
2 copies Rule 8(a), which certainly doesn't require that
3 you plead evidence, we do have to do it for notice of
4 removal.
5 MR. SHARP: You have to for the notice of
6 removal because (c)(2) does a couple of things. (C)(2)
7 says if plaintiff alleges something less than the amount
8 in controversy, that's golden and conclusive. It
9 doesn't matter that defendant thinks it's different or
10 that it's higher and would meet the Federal
11 jurisdictional amount. It's done.
12 But under (c)(2)(a), if there's a silent
13 petition in the State court, defendant can jump the gun
14 and say, you know what, I want to allege. I want to say
15 how much I think is at issue. You can allege that under
16 (a). But that's not conclusive. There's nothing in
17 (c)(2)(a) that says what defendant says is conclusive.
18 JUSTICE GINSBURG: If -- if the plaintiff
19 wanted to challenge that, I could understand your
20 position and then you would have the respective parties
21 putting in their evidence.
22 But if the defendant makes an allegation
23 amount in controversy is met and the plaintiff doesn't
24 say no, doesn't say that we don't have the amount in
25 controversy.

1 MR. SHARP: Justice Ginsburg, in this case
2 as in most class actions, plaintiffs have no evidence
3 that they could possibly put on. They couldn't dispute
4 anything that the defendant actually said. But this
5 particular issue as to when the -- when the evidence
6 must be presented, the reason it's done with the notice
7 of removal is so that the evidence is out there for the
8 court to make a sua sponte decision if the court wants
9 to or plaintiff to make --
10 JUSTICE GINSBURG: But when you bring a
11 class action, you're looking for big bucks and the
12 likelihood that it's going to be controverted, that the
13 plaintiff who's brought a class action in the State
14 court is going to say, oh, no, we can't -- we can't make
15 the amount in controversy, that sounds very strange to
16 me. Most class action plaintiffs are not going to
17 contest that their claim is worth at least $500,000.
18 MR. SHARP: Well, in this particular case,
19 this case really isn't worth $5 million. So there was
20 nothing -- no way, though, at that point for us to
21 contest one way or another. If the plaintiff is going
22 to make any kind of a contest, there has to be some
23 presentation of evidence to begin with. There's not
24 going to be anything other than a plaintiff saying if --
25 if the simple allegation is, well, it's worth more than

1 $5 million, plaintiff has nothing.
2 JUSTICE GINSBURG: Well, I don't follow that
3 because ordinarily a plaintiff would state what the
4 plaintiff's damages are.
5 MR. SHARP: Plaintiff in a class action
6 generally does not have the evidence of how many class
7 members there are or how much they've been damaged.
8 It's the defendant that deals with all of the class
9 members on a class-wide or company-wide basis. The
10 plaintiff generally does not have that information
11 available, defendant does, and it usually has to be
12 determined through a discovery process which usually
13 occurs in State court, at which point the defendant
14 sends a request for admissions or ask at a deposition.
15 JUSTICE GINSBURG: In -- in the -- let's
16 take a case in the Federal court, a class action case.
17 Plaintiffs don't state what the amount in controversy
18 is?
19 MR. SHARP: If they know what the amount in
20 controversy is, they could state what the amount of
21 controversy is. But they generally do not. I certainly
22 did not in this particular case. And in most class
23 actions that get filed that I'm aware of, plaintiff
24 doesn't know what their damages are before they filed
25 the suit.

1 JUSTICE GINSBURG: But you would say that
2 all that the plaintiff would say is we meet the amount
3 in controversy?
4 MR. SHARP: They could say the amount in
5 controversy is 5 million or it's 7 million or whatever
6 it may be. Whether that has any validity at all after
7 this Court's ruling in Knowles v. Standard Fire, I don't
8 know. It's clear that you can't allege something lower
9 to try to stay under the limit. I don't know whether
10 you can say something over. I'm not sure that you have
11 the authority to bind the class until you're already a
12 class representative, have already been appointed as
13 class counsel.
14 Nonetheless, these particular cases end up
15 in which the defendant has the evidence, plaintiff does
16 not, and this particular case and this particular
17 statute shows that that evidence has to come in at the
18 time of removal. If it doesn't come in at the time of
19 removal, their suggestion is it comes in at the time of
20 remand. If that were the case, you would find this
21 evidentiary requirement in the text under 1447 where the
22 remand rules are found, not in the removal of 1446. You
23 wouldn't find it at all there. You'd find it --
24 JUSTICE KAGAN: I'm sorry. I just -- you
25 said if it doesn't come in at the time of removal, it

1 comes in at the time of remand. But there's an
2 alternate position, which is the notice of removal is
3 just the allegation, if the plaintiff wants to contest
4 that, the plaintiff can contest that, and then the
5 defendant has to come forward with something because the
6 defendant has the burden of proof.
7 Likewise, if the court thinks that the
8 allegation is not appropriate, the court can sua sponte
9 say, you know, you have to show me more because I'm not
10 sure I have jurisdiction over this.
11 But either way, it all happens in the
12 Federal court after the notice of removal, which is
13 merely an allegation, is filed. And that makes perfect
14 sense. It means that most allegations will just be
15 accepted as is and the only ones that everybody will
16 have to come forward with evidence are when there's some
17 reason to contest it, when either the plaintiff or the
18 court has some serious doubt about it.
19 MR. SHARP: Well, plaintiff usually has
20 absolutely no idea what the allegation may be. For
21 instance, when they came forward and said the amount of
22 damages is 8.2 million, we had no way to contest that
23 with any evidence of any kind.
24 Now, if all we had to do to contest it was
25 say, we contest it, we don't think it's worth $8.2

1 million, prove it, every plaintiff would say: Show me
2 your hand; you've got to show your cards.
3 JUSTICE BREYER: Not necessarily. I mean,
4 it's the same as a complaint. They allege paragraph 1,
5 paragraph 2, paragraph 3, and the defendant comes in and
6 says admitted, denied; admitted, denied; not enough
7 information. All right. So you do the same thing.
8 What's the problem?
9 MR. SHARP: It -- it could be -- if 1446 was
10 written such that 1446(a) was the end of it and there
11 was no further part of the statute, then all they would
12 have to do is make an allegation and that would be the
13 end of it. And under 1447 --
14 JUSTICE BREYER: They have to allege the
15 facts. They have to allege facts. They have to say the
16 allegation is and so forth. And you say they're not.
17 MR. SHARP: Yeah. And that was part of the
18 district court's opinion. There were two parts. One
19 was that there wasn't any evidence; and the second part
20 was that it was conclusory, that there were no facts.
21 All you said was 8.2 million. And so both of those were
22 possible --
23 JUSTICE BREYER: Isn't that a fact?
24 MR. SHARP: Excuse me, Your Honor?
25 JUSTICE BREYER: Isn't 8.2 million a fact?

1 MR. SHARP: It's a conclusory fact.
2 JUSTICE BREYER: Well, it's a fact. They
3 said in their view --
4 MR. SHARP: It's a conclusion.
5 JUSTICE BREYER: All right. I don't know
6 what a conclusory fact is as opposed to a regular fact.
7 That seems like a lot of money to me, but I --
8 MR. SHARP: I would agree with Your Honor.
9 And it sometimes is difficult, but I think we deal with
10 those a lot now that Twombly has been adopted by this
11 Court. Conclusory -- conclusions are not sufficient in
12 terms of pleading for the plaintiff. And if this
13 particular Court were going to find that evidence is not
14 required under 1446, we urge the Court to at least say
15 go -- go the distance and -- and treat the 1446
16 allegation like a Twombly allegation and conclusory
17 would not be sufficient.
18 That's what the district court found, both that you
19 should have put on some evidence, if you had it you
20 should have put it on; and secondly, that what you did
21 say was conclusory.
22 But let me -- let me draw back to this --
23 JUSTICE GINSBURG: Where -- where was that
24 said about conclusory? I thought that the district
25 court's position was, sorry, you're too late; I won't

1 entertain anything about 8.2 million or whatever it was.
2 MR. SHARP: The district court did both,
3 Your Honor. You are exactly correct. It said: I see
4 you've got some evidence, but you didn't put it on when
5 you were supposed to; and secondly, she said the 8.2 was
6 not sufficient by itself because it was conclusory.
7 That's consistent with Tenth Circuit law and I think she
8 followed the Tenth Circuit law.
9 What the Tenth Circuit ultimately decided I
10 have absolutely no idea. They simply denied it. We
11 don't know whether they denied it for constitutional
12 grounds, whether they denied it because their docket was
13 too busy, they denied it because they didn't think this
14 was a clean vehicle to -- to change their Tenth Circuit
15 rule.
16 CHIEF JUSTICE ROBERTS: Well, one thing we
17 know is that they denied it upon careful consideration
18 of the parties' submissions as well as the applicable
19 law. Was there anything in the parties' submissions
20 other than the question on which we granted cert?
21 MR. SHARP: The -- no, I don't think so,
22 Your Honor. I think the issues that were provided to
23 the court there in the Tenth Circuit were very similar
24 to what you see here in this Court, with the exception
25 of whether this Court has jurisdiction under either

1 1447(d) or, as this Court has suggested, maybe under
2 Hohn; and under Hohn, then, that this Court would have
3 some type of review of whether that was an abuse of
4 discretion to simply say, denied.
5 But no one has come to this Court and said,
6 we want certiorari granted on -- what should be the
7 factors, what should the Court decide, when it says
8 we're not going to take that appeal under 1453.
9 JUSTICE GINSBURG: Do I remember it wrong
10 in -- in thinking that in your briefing you didn't raise
11 this question? You just argued what the notice of
12 removal must contain and it wasn't until there was one
13 green brief Public Citizen that brought up this
14 question. So you were content until a friend of the
15 court made the suggestion to argue this case on the
16 merits.
17 MR. SHARP: Your Honor, I'm comfortable and
18 have argued this case on the merits as -- as you know,
19 but nonetheless, I think I'm duty bound, as all the
20 parties are, to determine whether this Court has
21 jurisdiction and what the extent of that jurisdiction
22 is. You are correct that the amicus first raised the
23 issue of jurisdiction. In the reply brief, they had the
24 opportunity to say what they thought was the
25 jurisdictional issue which they believed was under

1 Nixon. I don't believe Nixon or Hohn, either one of
2 those cases, govern here because neither of those cases
3 are remand cases. I think 1447(d) controls on the
4 remand side only because of the limited exception, not
5 because of the --
6 JUSTICE BREYER: Briefly, the Court has
7 jurisdiction of cases in the court of appeals.
8 MR. SHARP: Certainly, Your Honor.
9 JUSTICE BREYER: All right. Now, when in
10 fact a party appeals a district court's remand, he files
11 that appeal paper in the court of appeals. The case is
12 there. Before they decide it, we could take it. After
13 they decide it, and if they affirm it, or if they decide
14 to hear it, we could take it. It's there.
15 But suppose they say no. Does that remove
16 it from the court of appeals? If the answer to that
17 question, which is your position that you're arguing, is
18 now this Court can't take it, then it can't take
19 anything. It can't take the same things down in the --
20 in the habeas cases. It can't take the attorney's fees
21 things. It can't take anything, I would guess because
22 it would say where a court has discretion and says, no,
23 we are not taking it, it's not reviewable in this Court
24 because it's no longer in the court of appeals.
25 Now, what's -- is that your position? You

1 can see I don't think it's a very good position from my
2 tone of voice. But if there's something else, maybe
3 there's a better one.
4 MR. SHARP: Well, then I won't take that
5 position, Your Honor.
6 JUSTICE BREYER: Well, no, you -- I mean,
7 I'm often wrong in these things.
8 MR. SHARP: But the position I would take is
9 that there is a clear distinction in 1447(d) that
10 addresses remand and has nothing to do with Hohn or
11 Miller L or Nixon. And so this Court was not wrong in
12 Miller L or Hohn or Nixon because, of course, those
13 cases, as the Court points out, were in fact in.
14 But so was Gravitt and so was Kircher.
15 Those cases were in fact in the court of appeals when
16 the Court granted certiorari.
17 JUSTICE ALITO: Maybe you answered this
18 before, but is it your position that under the Class
19 Action Fairness Act the court of appeals has absolute
20 discretion, unlimited discretion, to decide whether to
21 take an appeal or not?
22 MR. SHARP: I believe that's correct, Your
23 Honor.
24 JUSTICE ALITO: Any reason whatsoever is
25 okay?

1 MR. SHARP: Any reason whatsoever is okay,
2 as long as -- I would guess, as I think Justice Scalia
3 pointed out, as long as it's not a constitutional
4 violation.
5 JUSTICE ALITO: So what if the court of
6 appeals says, we are not taking this because we just
7 don't like the Class Action Fairness Act. We think it's
8 bad public policy; we are never going to take one of
9 these. That's okay?
10 MR. SHARP: I don't know if that would be a
11 constitutional violation, Your Honor. I think if it's
12 not a constitutional violation, I think it probably
13 would be okay. But if it is a constitutional violation,
14 it probably would not, and I think that's a question
15 that I'm ill prepared to answer.
16 But I do think that there is that discretion
17 and that discretion is -- is relatively absolute. It's
18 not completely absolute because the Tenth Circuit is
19 bound to honor the Constitution before it does any of
20 the congressional issues.
21 JUSTICE ALITO: I was going say -- and this
22 is not certainly true of the Tenth Circuit -- but
23 suppose things change and we get to the point where each
24 judge on the Tenth Circuit is sitting on ten cases a
25 year, and so they can have a ten- month vacation. And

1 they say, well, we don't want to take this, because, you
2 know, we may not have a ten-month vacation, we'll have a
3 nine-month vacation. Would that be all right?
4 MR. SHARP: Again, I think it -- it's that
5 line of what -- when the judge is doing his job, when he
6 is not doing his job, and whether there's a
7 constitutional violation. But that's the necessary evil
8 with respect to discretion in an -- in an appeal. You
9 have that discretion and that discretion is fairly
10 absolute. There are no -- in 1453 there's no --
11 JUSTICE ALITO: Well, all the Class Action
12 Fairness Act says is, I believe, is that the court may
13 take the case. It doesn't -- it doesn't specify the
14 scope of discretion. It doesn't say it's absolute.
15 MR. SHARP: It doesn't, Your Honor. You are
16 absolutely correct. It doesn't provide any parameters
17 whatsoever as to whether that is an absolute discretion
18 or how that discretion is to be exercised. And so
19 consequently, the circuit courts have no -- they have no
20 direction from Congress and at this point no direction
21 from this Court as to how much discretion they have
22 under 1453 when they deny that particular appeal, and
23 whether this Court then has anything from which it can
24 say, well, I've seen why you denied it and we would like
25 to review that.

1 JUSTICE ALITO: Outside of the Class Action
2 Fairness Act, may a district court -- is a court of
3 appeals barred from reviewing a decision of the district
4 court to remand the case based on docket control?
5 MR. SHARP: Not under Thermtron as it exists
6 at this point, Your Honor.
7 JUSTICE ALITO: Can we infer anything from
8 that as to whether Congress thought that that would be a
9 proper reason under the Class Action Fairness Act?
10 MR. SHARP: Your Honor, I see my time is up.
11 CHIEF JUSTICE ROBERTS: You can't escape
12 that easily.
13 MR. SHARP: Thank you, Your Honor.
14 I think that indicates that it's not
15 absolute. I know that this Court has suggested perhaps
16 Thermtron needs to be revisited, but nonetheless
17 Thermtron is the law of the land as we stand today,
18 which indicates it's not absolute and that discretion
19 probably is not absolute, but how to review that without
20 something more is not clear.
21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 MR. SHARP: Thank you.
23 CHIEF JUSTICE ROBERTS: Mr. Berreth, you
24 have three minutes remaining.
25 REBUTTAL ARGUMENT OF NOWELL D. BERRETH

1 ON BEHALF OF THE PETITIONERS
2 MR. BERRETH: It's -- it's simply improper
3 to allow courts of appeals to insulate their decisions
4 from review by not giving reasons for -- for their
5 decisions. If -- if Congress wants to prevent this
6 Court from exercising its power to review decisions,
7 Congress can. It knows how to do it. It did it in
8 AEDPA, as I mentioned before. And it didn't do it here.
9 Instead, through 1453 Congress enacted a statute that is
10 a grant of jurisdiction to this Court.
11 It's one of the unusual -- the rare
12 instances where Congress granted jurisdiction over
13 remand issues. And the Forsyth case answers a lot of
14 questions in this case. It provides that the power of
15 this Court, the certiorari power of this Court, after
16 the Court has jurisdiction of a case, which it does
17 here, the certiorari power of this Court may be
18 exercised before or after any decision by that Court and
19 irrespective of any ruling or determination therein,
20 irrespective of any determination or ruling therein.
21 This Court's power is comprehensive and it
22 should result in a reversal in this case.
23 If there are not any more questions, thank
24 you.
25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 The case is submitted.
2 (Whereupon, at 12:02 p.m., the case in the
3 above-entitled matter was submitted.)
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