

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CITY OF CHICAGO, ET AL., Petitioners v.
INTERNATIONAL COLLEGE OF SURGEONS, ET AL.

CASE NO: 96-910

PLACE: Washington, D.C.

DATE: Tuesday, October 14, 1997

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CITY OF CHICAGO, ET AL., :

4 Petitioners :

5 v. : No. 96-910

6 INTERNATIONAL COLLEGE OF :

7 SURGEONS, ET AL. :

8 - - - - -X

9 Washington, D.C.

10 Tuesday, October 14, 1997

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 1:00 p.m.

14 APPEARANCES:

15 BENNA RUTH SOLOMON, ESQ., Chief Assistant Corporation
16 Counsel, Chicago, Illinois; on behalf of the
17 Petitioners.

18 RICHARD J. BRENNAN, ESQ., Chicago, Illinois; on
19 behalf of the Respondents.

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1 PROCEEDINGS

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 96-910, the City of Chicago v. The
5 International College of Surgeons.

6 Ms. Solomon.

7 ORAL ARGUMENT OF BENNA RUTH SOLOMON

8 ON BEHALF OF THE PETITIONERS

9 MS. SOLOMON: Mr. Chief Justice and may it
10 please the Court:

11 Respondent International College of Surgeons
12 owns two of the last seven remaining mansions reflecting
13 an illustrious part of history around the turn of the
14 century in the City of Chicago. ICS sought permission to
15 demolish all but the facades of the landmark four-story
16 buildings and to build a 41-story condominium in its
17 place.

18 The city's Landmark Commission refused both the
19 demolition permits and the subsequent requests for
20 hardship exceptions, and ICS challenged both decisions in
21 State court. The city removed the complaints to Federal
22 court --

23 QUESTION: That's a little odd, isn't it? Why
24 did the city want to take it out of State court?

25 MS. SOLOMON: Your Honor, we find that on

1 Federal questions the Federal courts have more expertise
2 with the questions, they tend to see them more often, and
3 we find that that gives us greater predictability as we
4 try to assess litigation risks.

5 When there is case law in the Federal courts, as
6 there was on all of the Federal claims that ICS pled in
7 this case, we can review that case law, and we can make a
8 determination whether we should litigate or whether we
9 should settle.

10 In State court, because the cases are not so
11 frequently litigated there, there's a paucity of case law
12 on some subjects.

13 QUESTION: Well, this was a mix of issues.
14 There was a -- Chicago wanted presumably to -- well, the
15 respondents, I guess, had sought administrative review of
16 the decision.

17 MS. SOLOMON: Respondents sought a variety of
18 things, Your Honor. Respondents sought to have the
19 ordinance declared -- the landmarks ordinance declared
20 unconstitutional, to have the specific ordinance
21 delegating ICS's property as a landmark declared
22 unconstitutional, to have a variety of State law claims
23 litigated in the first instance, they had takings claims,
24 nondelegation claims, vested rights -- they had five State
25 law claims. They also had two claims that were presented

1 on the administrative record, so there were a variety of
2 claims.

3 QUESTION: But to the extent this was brought as
4 a review of a municipal agency decision, to the extent
5 that this was a review of the decision of the Landmarks
6 Commission, I was struck by the comment that the Ninth
7 Circuit made in its recent decision that the prospect of a
8 Federal court sitting as an appellate court over State
9 administrative proceedings is rather jarring. Indeed,
10 it's so jarring that I don't know of any instance of a
11 court other than this Court sitting in direct review of a
12 State court proceeding.

13 MS. SOLOMON: Justice Ginsburg, the Ninth
14 Circuit case, like the Armistead case and the Fairfax
15 County case that were also recently decided in the courts
16 of appeals, are diversity cases. They are unlike this
17 case. Of all the recent courts of appeals cases only this
18 one was removed to the Federal court on the basis of
19 Federal questions.

20 QUESTION: But my question was the function of
21 lower appellate courts vis-a-vis State agencies, and even
22 in the Federal question domain, I know of no precedent
23 where a district court, or even a court of appeals, sits
24 as an appellate reviewer as distinguished from -- a case
25 might come up, say on habeas, on collateral review, but to

1 my knowledge only this Court, from the highest court of
2 the State, acts in the direct review line, so I don't know
3 any precedent for this Court, for a lower court, for a
4 district court sitting in direct review of a decision of a
5 State agency.

6 MS. SOLOMON: Our argument on that, Your Honor,
7 is in two parts. It is first that the district court had
8 original jurisdiction over the civil claim, over the
9 portion of ICS's complaint that fell within the district
10 court's original jurisdiction. ICS pled numerous Federal
11 constitutional violations, and on the strength of those
12 Federal constitutional violations, we removed the case to
13 district court.

14 QUESTION: But when one challenges an agency
15 action, say, a liquor license or funeral home license, one
16 challenges a State or local agency decision and normally
17 brings up all possible arguments. It violates the State
18 law. It violates the State constitution. It violates the
19 Federal Constitution.

20 My question really is, isn't the implication of
21 the argument you're making today that every decision of
22 every licensing board in every city can become -- can have
23 a right of initial access to a Federal forum?

24 MS. SOLOMON: Our argument, Your Honor, rests on
25 the plain language of section 1441, which permits --

1 QUESTION: Well, do I follow -- I followed your
2 argument and it seemed to me that was right. Looking at
3 1441(c), which requires the case to be within the original
4 jurisdiction of the district court, then all of these
5 cases could start out -- you're removing, but you can't
6 remove what couldn't start there, so am I correct that as
7 you read the statute any agency decision at the State
8 level, so long as there is a Federal claim stuck in there
9 by the plaintiff, could be begun in the Federal court?

10 MS. SOLOMON: Your Honor is correct. We
11 certainly make no distinction between a case that could be
12 begun in the Federal district court, or a case that could
13 be removed to the district court. The language of 1331
14 and 1441 are certainly the same. But we don't think that
15 that opens the floodgates, for a variety of reasons.
16 First of all, as Your Honor points out, there has to be at
17 least a substantial Federal question in the case,
18 something that would make it a civil action.

19 Now, we rely on the presence of the substantial
20 Federal claims in this case to say that this was a civil
21 action within original jurisdiction. We then turn to
22 section 1367, the supplemental jurisdiction statute, which
23 provides the district court with additional supplemental
24 jurisdiction over all other claims that are related to the
25 claim within the original jurisdiction of the district

1 court.

2 Now, in the other cases, the other courts of
3 appeals cases that went -- that were removed on the basis
4 of diversity, that element might well be lacking. We
5 don't make an argument here about the diversity cases.
6 Our argument is that, under the plain terms of section
7 1441, the Federal allegations in this complaint were a
8 civil action within original jurisdiction --

9 QUESTION: At what point did it become a civil
10 action? Was it such when it was still in the hands of the
11 commission?

12 MS. SOLOMON: We don't make that argument,
13 Justice O'Connor.

14 QUESTION: Well, what is your answer?

15 MS. SOLOMON: Our answer is --

16 QUESTION: Was it a civil action at that stage?

17 MS. SOLOMON: It was not. It was a civil action
18 when a complaint was filed in the Circuit Court of Cook
19 County. It was -- under the terms of the administrative
20 review law at that point, it was a proceeding to review a
21 final decision, and the Illinois supreme court has made
22 clear, and the Seventh Circuit discloses this in its
23 opinion, that under Illinois law additional claims may be
24 brought to the circuit court along with the claims for
25 administrative review.

1 QUESTION: So it becomes a civil action at the
2 first time that it goes to a State court of general
3 jurisdiction? I mean, is that what we --

4 MS. SOLOMON: At a minimum, Your Honor, yes.

5 QUESTION: Well, isn't the term civil action
6 kind of a word of art? You find it in a particular
7 section of the Federal jurisdiction statute, and it may
8 not have counterparts in State law.

9 MS. SOLOMON: Well, the term civil action, as we
10 describe in our brief, is a historical term. The
11 components civil and action are well-described in this
12 Court's cases. Civil is used only in contradistinction to
13 something that is criminal, so the case was clearly a
14 civil action. It was clearly civil. Let me say that.

15 It was also an action, as the Court described,
16 for example, in the Upshur case and a variety of the other
17 cases. An action is one before a judicial tribunal,
18 between the parties, seeking a remedy that is provided by
19 law. There is no question that in the Circuit Court of
20 Cook County this was a civil action.

21 QUESTION: So that, to follow up on Justice
22 Ginsburg's earlier questions, and she indicated that this
23 was jarring, in California as in some other States there
24 are certain agencies whose findings are conclusive, and
25 review is then in the State court of appeals, so that's

1 the point at which, when the aggrieved party goes to the
2 State court of appeals, there could be an action in United
3 States district -- it could be removed to the United
4 States district court?

5 MS. SOLOMON: Justice Kennedy, it might be
6 different in some other situations, but what we have here
7 in this case was a complaint filed in the Circuit Court of
8 Cook County, and at that point we filed a notice of
9 removal to --

10 QUESTION: What about the instance I explained,
11 where you go from the agency directly to the three-judge
12 court of appeals in California.

13 MS. SOLOMON: I --

14 QUESTION: It's State system, and as I
15 understand your argument, at that point the defendant
16 could remove to a United States district court.

17 MS. SOLOMON: I would see no basis for saying
18 that that was something other than a civil action. If
19 it's civil as opposed to criminal, and if it is an action,
20 as the Court has described, as I said, in a variety of
21 cases --

22 QUESTION: So you can remove.

23 MS. SOLOMON: I would see no reason why it could
24 not be, but of course that is not this case. This case
25 was a straightforward removal from the Circuit Court of

1 Cook County --

2 QUESTION: But it would be just as
3 straightforward. So your point is, you could remove
4 whether the State puts its review in the middle tier or in
5 the court of first instance. They're equally removable.

6 MS. SOLOMON: Our point, Your Honor, yes, is
7 that any -- by the plain terms of section 1441, a statute
8 that Congress wrote providing for the removal
9 jurisdiction, a civil action within the original
10 jurisdiction of the --

11 QUESTION: Stop right there, because there in
12 your prior statement seems to put you out of the 1441
13 territory, a civil action that could originally be
14 commenced in the Federal court.

15 You have said that it wasn't a civil action
16 before the Landmarks Commission. It didn't become a civil
17 action until it was commenced in a State court.
18 Therefore, doesn't it follow that it could not have been
19 commenced originally in the Federal court? It must be
20 commenced in the State court.

21 MS. SOLOMON: We don't see that, Justice
22 Ginsburg. What we see is that at the point that ICS was
23 attempting to decide how to obtain judicial review of the
24 Landmark Commission's decisions denying it demolition
25 permits and denying it hardship exceptions in part on the

1 grounds that they alleged that it violated the Takings
2 Clause, the Equal Protection Clause, the Due Process
3 Clause, that the landmarks ordinance was unconstitutional
4 on its face, it was unconstitutional as applied, at the
5 point that they were deciding how to obtain judicial
6 review, they could have drafted the complaint that appears
7 in the joint appendix in this case, they could have walked
8 down the street to the Federal district court, and they
9 could have filed that complaint there invoking the Federal
10 district court's original jurisdiction over the Federal
11 claims.

12 QUESTION: But you just said it doesn't become a
13 Federal case until it's first filed in a State court.

14 MS. SOLOMON: Right.

15 QUESTION: You now seem to be saying they could
16 have gone from the Landmarks Commission directly into
17 Federal court, passing any State court forum.

18 MS. SOLOMON: I'm sorry if I was unclear,
19 Justice Ginsburg. What I intended to say is that at the
20 point where the action is going to be filed in court, it
21 is at a minimum at that point a civil action. It is civil
22 in nature, and it is an action between the parties. It is
23 seeking a remedy from a judicial tribunal. These are the
24 factors that the Court has historic --

25 QUESTION: But you're not saying that someone

1 seeking review of the Landmarks Commission could file
2 directly in Federal court before it had gone to the State
3 court, have you -- are you? Because that's contrary to
4 our Stude case.

5 MS. SOLOMON: Your Honor, we do take that
6 position, and I don't think it's counter to the Stude
7 case, if I could explain.

8 QUESTION: Yes.

9 MS. SOLOMON: The Stude case, as you are aware,
10 had two portions, one seeking an original filing in the
11 district court and the other seeking removal on the basis
12 of diversity.

13 As for the removal portion, the Court indicated
14 it could not be removed because under Federal law,
15 regardless of how Iowa labeled the parties, under Federal
16 law the railroad was the plaintiff, and the plaintiff
17 could not remove.

18 As for the other portion, the portion originally
19 filed within -- filed as a diversity action in the
20 district court, the Court indicated that the defect in
21 that case was simply that the railroad was attempting to
22 obtain review only of the question of damages. It was
23 attempting to separate the question of damages from the
24 underlying liability.

25 And the Court is very clear about this, because

1 in the first portion of the Court's opinion it says, in
2 terms, it could have been removed by the defendant if it
3 had really been by the defendant, and that dicta in Stude,
4 of course, became the holding of Horton, that a Federal
5 defendant -- I'm sorry, a defendant on a Federal ques --
6 in a diversity case -- excuse me again -- can remove a
7 State administrative action.

8 That was the holding of Horton. Filed -- it
9 could file it in the district court invoking diversity
10 jurisdiction, that it would be a civil action within the
11 original jurisdiction of the district --

12 QUESTION: Horton was filed initially in the
13 Federal court, right? It wasn't --

14 MS. SOLOMON: Horton was filed -- I misspoke,
15 Your Honor. It was a diversity case.

16 QUESTION: And the Court there said, under that
17 Texas scheme, the administrative procedure, it's as though
18 it didn't exist, because you start it all over in Federal
19 court, so it wasn't a review of any administrative
20 decision.

21 MS. SOLOMON: That is correct, Your Honor, and
22 that is --

23 QUESTION: That's how -- go ahead.

24 MS. SOLOMON: That is why the parties here
25 agree --

1 QUESTION: And that's how it's distinguished
2 from Stude, was it not?

3 MS. SOLOMON: This case is the first case to
4 come before the Court seeking either removal or an
5 original filing of a case that includes, as one
6 component -- and I want to be very clear about that. It
7 includes, as one component, a portion that could -- that
8 by State law is reviewed on the record.

9 QUESTION: It --

10 QUESTION: But as to that portion, I guess the
11 supplemental jurisdiction statute, section 1367 of title
12 28, would enable the Federal district court, if, in fact,
13 this is removable there, to decline to exercise
14 supplemental jurisdiction over the administrative review
15 claims.

16 MS. SOLOMON: That is, of course, correct, Your
17 Honor. Our point is simply that it was a civil action
18 within the meaning of 1441. It was removable because of
19 that provision. Once removed, the district court obtained
20 supplemental jurisdiction over all related State claims.

21 ICS does not argue that it's administrative
22 review claims were not claims. It does not argue that
23 they were not related to the Federal claims, and the plain
24 terms of section 1367 contain no qualifier for de novo or
25 original claims.

1 QUESTION: Do we have the abstention issue
2 before us?

3 MS. SOLOMON: I don't believe you do, Your
4 Honor, but the abstention in any event -- abstention
5 doctrine recognizes jurisdiction. The Seventh Circuit's
6 holding, of course, was that Federal district court lacked
7 jurisdiction over the action, because --

8 QUESTION: Because it could not have
9 originally -- because a proceeding to review an agency
10 decision, in the views of the Seventh Circuit, could not
11 originally have been commenced in the Federal court.

12 MS. SOLOMON: I think more precisely, Your
13 Honor, it is that because one portion of the complaint
14 would not be reviewed de novo --

15 QUESTION: To the extent that it was a
16 proceeding to review the Landmarks Commission decision, it
17 could not have been brought in the Federal court. That
18 was the view of the Seventh Circuit.

19 MS. SOLOMON: And as a result, none of it could.
20 The Seventh Circuit's view was that this was not a civil
21 action within original jurisdiction because of the mere
22 presence within the case of one portion that would be
23 reviewed on the record, and we think that is faulty for a
24 variety of reasons.

25 QUESTION: If you were concerned about having

1 access to the Federal forum on the Federal question, the
2 due process question, could you not have done before the
3 State court something comparable to what was done in the
4 England case? That is to say, State court, decide the
5 State law questions.

6 They're prior anyway, aren't they, because you
7 would not reach a due process question unless you said
8 that under the State Landmarks Commission law, or under
9 the city law, you couldn't do this, so couldn't you say --
10 preserve your interest in having the Federal question in
11 Federal court by saying, State court, don't reach the
12 Federal question, we want to preserve that ultimately to
13 bring in Federal court?

14 MS. SOLOMON: Your Honor, as I understand the
15 England reservation, it is a basis to avoid decision of
16 the Federal claims of -- if the State claims are remanded,
17 not as an original matter within the State court, but --

18 QUESTION: I don't mean that, precisely that
19 pattern. I mean the technique of saying, if you want the
20 Federal claim in Federal court, but the State claims are
21 logically prior.

22 MS. SOLOMON: There are a variety of techniques
23 that are available to the district courts to avoid
24 deciding the State law claims. The abstention doctrines
25 are always available. Section 13 --

1 QUESTION: Well, I understood Justice Ginsburg
2 to be interested in what the State court could do to go
3 ahead and resolve State issues and not decide the Federal
4 law questions, but I suppose the State court wouldn't have
5 to refrain.

6 MS. SOLOMON: I think that's right, Justice
7 O'Connor. I do not know any way of saying to the State
8 court, although these claims are present before you, and
9 although they have not been removed --

10 QUESTION: There's no Federal rule that says,
11 State court you have to lay off because the City of
12 Chicago doesn't want you to hear it.

13 MS. SOLOMON: Nor even any requirement like the
14 Pullman doctrine that the State courts should not decide
15 constitutional questions first.

16 QUESTION: Ms. Solomon, in the Stude opinion at
17 page 581 the Court says, the United States District Court
18 for the Southern District of Iowa does not sit to review
19 on appeal action taken administratively or judicially in a
20 State proceeding.

21 Now, do you agree with that, or do you want us
22 to repudiate that?

23 QUESTION: We certainly agree with it in the
24 context in which it was written. My only point is that it
25 does not prevent the Federal district court from hearing

1 the State administrative review claims in this case, and I
2 say that for two reasons.

3 First of all, because Stude was a de novo
4 proceeding, whatever that language means -- and we
5 indicate in our brief what we think it means. We think it
6 means, cannot separate the question of damages, but
7 whatever that language means, the Court could not have
8 been referring to a case within deferential review,
9 because that was not what the Stude case was.

10 Stude was a case about de novo review, and the
11 Court subsequently made clear in Horton that any case that
12 does require de novo review is within the original
13 jurisdiction.

14 QUESTION: Yes, but the opposite part of that
15 was that Horton --

16 QUESTION: Yes --

17 QUESTION: The fair reading of Horton, it seems
18 to me, if it required deferential review there would not
19 have been original jurisdiction. I -- would you say that
20 that's a permissible reading of Horton?

21 MS. SOLOMON: I would until you get to Califano
22 v. Sanders, Your Honor, and Califano v. Sanders clearly
23 holds that Federal administrative review actions under the
24 Administrative Procedure Act, which in the vast, vast
25 majority of cases require deferential review, are civil

1 actions within original jurisdiction under 1331.

2 That's the holding of Califano v. Sanders, and
3 if that is incorrect, as the Court held in Califano, there
4 simply is no basis under which to review --

5 QUESTION: But it was really en passant in
6 Sanders, wasn't it, because the main thing that was held
7 there was that you didn't have 1331 review in these social
8 security cases and, as I recall, didn't the Chief write
9 separately to say there was no need to discuss 1331 at
10 all, because the review route under the Social Security
11 Act was 205?

12 MS. SOLOMON: The question in Califano, Your
13 Honor, as we understand it was, is there jurisdiction
14 under the Administrative Procedure Act itself, and in that
15 sense the Court did kind of back into the discussion on
16 1331. Perhaps that's what you mean by en passant.

17 QUESTION: Well, but --

18 MS. SOLOMON: The whole --

19 QUESTION: -- what I meant was that Sanders was
20 a social security review case, right?

21 MS. SOLOMON: That was the factual situation,
22 Your Honor.

23 QUESTION: And the Court said -- the holding was
24 you don't have 1331 available there, because you have only
25 205.

1 MS. SOLOMON: The holding as we understand it,
2 Your Honor, is that you don't have administrative
3 jurisdiction directly under the Administrative Procedure
4 Act, and that was the question the Court granted
5 certiorari on because it was a conflict in the circuits on
6 that question.

7 And the Court says, well, you know, we actually
8 don't have to decide that any more, because since we
9 granted certiorari the Congress has amended 1331 to delete
10 the jurisdictional amount, and whatever impediment there
11 might have been before, there isn't now, we read section
12 31 as conferring jurisdiction on the district courts to
13 hear these administrative review cases, and --

14 QUESTION: Well, I don't want to quibble about
15 what Sanders held versus what it says en passant, because
16 you're unquestionably right that under the APA 1331 now,
17 without the amount --

18 MS. SOLOMON: Right, and --

19 QUESTION: -- controversy, works, but do you
20 think that the part when it was talking about review of
21 Federal agency decisions had in mind at all that every
22 municipal agency, every county agency, every State agency
23 by virtue of that decision was going to come into Federal
24 court initially as a civil action?

25 MS. SOLOMON: Well, of course, the Court was

1 construing the statute there, and we are attempting to do
2 that here as well. We're attempting to construe the words
3 in section 1331 which said, civil action within original
4 jurisdiction.

5 QUESTION: But if it doesn't, if, as Strude-
6 said -- and maybe Strude got this point wrong -- if it
7 doesn't become a civil action until it's lodged in a State
8 court, then it could not have been commenced originally.
9 It would have to be commenced originally in the State
10 court.

11 MS. SOLOMON: I hope I haven't confused the --
12 our argument here. The -- what the cases say, and Upshur
13 is one of the best expositions of it, is that there comes
14 a point in the proceeding where something is a civil
15 action, and it -- at the point where it would be filed in
16 court it could be filed in Federal court, it could be
17 filed in State court and removed.

18 We certainly make no argument that 1331 and 1341
19 should not be read as two sides of the same coin. Our
20 point is that, under 1331, we know the district courts are
21 jurisdictionally competent to hear deferential review
22 actions. They hear them every day of the week.

23 QUESTION: Well, but may I interrupt you there?
24 They are competent at least on the assumptions that
25 Califano was making, but the one feature here that

1 Califano didn't have, and the one -- I guess the feature
2 which is perhaps more jolting to me than others, is that
3 even though the review is deferential, it's still a
4 deferential review which ultimately turns on making value
5 judgments on State policy, aesthetic judgments about the
6 character of the neighborhood here, economic judgments
7 about hardship.

8 And if, in fact, that is going to be a constant
9 feature of the cases in the class that we're talking about
10 here, so that there would be a good argument, for example,
11 for abstention of those particular -- on those particular
12 issues, why wouldn't that be a good reason for us to
13 recognize a different meaning for civil action so that we
14 would not constantly be dragging these State review cases
15 into the court only to be faced with an abstention claim?

16 MS. SOLOMON: I think, Your Honor, the simple
17 answer is because the language won't allow it. The
18 language says, a civil action within original
19 jurisdiction. It makes no difference --

20 QUESTION: Why? The same words mean different
21 things in different contexts. Take arising under. It
22 means different things in the statute than it means when
23 those very same words are used in the Constitution.

24 MS. SOLOMON: But these are two jurisdictional
25 statutes, 1331 and 1341, and if ever there is a reason and

1 a place to be clear about the meaning, it is in the
2 jurisdictional statutes, otherwise you have people
3 litigating to judgment only to find out they were in the
4 wrong court.

5 We don't resist the abstention doctrines as far
6 as they go. Our point about them is simply that it is not
7 a denial of jurisdiction in those cases. Abstention will
8 come into play in appropriate cases, perhaps the vast
9 majority of the cases, but --

10 QUESTION: When you talk about abstention, are
11 you talking about exercise -- about declining to exercise
12 supplemental jurisdiction --

13 MS. SOLOMON: I am.

14 QUESTION: -- under section 1367?

15 MS. SOLOMON: As well as the -- as other
16 abstention doctrines.

17 And with that I'll reserve the balance of my
18 time.

19 QUESTION: Very well, Ms. Solomon.

20 Mr. Brennan, we'll hear from you.

21 ORAL ARGUMENT OF RICHARD J. BRENNAN

22 ON BEHALF OF THE RESPONDENTS

23 MR. BRENNAN: Mr. Chief Justice, and may it
24 please the Court:

25 In view of the questions the Court has put to

1 counsel, it strikes me that the best place for me to begin
2 is with the city's landmark ordinance, which in its
3 specific provision of 2-120-810 says that final
4 administrative decisions shall be appealable to the
5 Circuit Court of Cook County under the Illinois
6 Administrative Review Act, and what the respondents did in
7 this case was exactly to follow that ordinance, and we
8 filed a one-count -- I mean, no count. The complaint was
9 simply a complaint for administrative review, and the
10 elements of that were very, very simple.

11 We had to file two complaints for administrative
12 review, one from the decision of the commission denying
13 the demolition permit, the second from the commission's
14 decision denying the economic hardship exception, and we
15 also had to file a third action from the decision of the
16 Chicago Plan Commission denying our application under the
17 Chicago and Lake Michigan lake front protection ordinance,
18 so we had three cases that we had to go to court with at
19 that point.

20 We were well aware that we might have exercised
21 our Federal constitutional rights by marching down to the
22 Federal court and filing an action under 1983. We chose
23 not to do that, very deliberately.

24 QUESTION: May I ask, is it your position that
25 the complaint for administrative review that you just

1 did -- that you did file, if you just changed the caption
2 of it as -- called it civil action in Federal court under
3 1983, or something like that, that had exactly the same
4 allegations in it, could you have filed it originally in
5 the United States district court?

6 MR. BRENNAN: No, we could not have, Your
7 Honor --

8 QUESTION: Why not?

9 MR. BRENNAN: -- and the reason we could not
10 have is because that cause of action arises out of a final
11 decision of an administrative agency, and therefore that
12 case, if we tried to file it --

13 QUESTION: Even the aspects of it in which you
14 allege the ordinances are unconstitutional under both the
15 Federal and State constitution on their face?

16 MR. BRENNAN: If they were combined together, if
17 that cause of action had sought review of both the
18 adminis -- the final decision and also had a count under
19 1983, that --

20 QUESTION: No, I'm assuming the complaint is
21 word-for-word the same, except the jurisdictional
22 allegation's a little different. Say this arises under
23 Federal law --

24 MR. BRENNAN: Right.

25 QUESTION: -- and so forth and so on.

1 MR. BRENNAN: And we could not have filed that
2 because this lawsuit, this dispute is not a civil action
3 within the original jurisdiction of the district court
4 because it comes out of, it arises out of a final decision
5 of an administrative agency, and so the terms in the
6 statutes, in the removal statute and the jurisdictional
7 statute, which speak in terms of a civil action of which
8 the court has original jurisdiction, this is not that kind
9 of a case. It's -- it --

10 QUESTION: Why should a precisely identical case
11 involving the Federal agency be a civil action, whereas
12 this is not a civil action? It seems to me its actionness
13 is exactly the same --

14 MR. BRENNAN: Sure.

15 QUESTION: -- in the two situations. You may
16 appeal to some principle of -- I don't know, States ought
17 to review their own agencies, but I don't know how you can
18 say that they're not equivalently civil actions.

19 MR. BRENNAN: Your Honor, I think the answer is
20 very clear and is very simple, and it's found in Califano.

21 In Califano this Court found that there was
22 jurisdiction to review decisions of Federal agencies under
23 1331 because Congress had amended 1331 by explicitly
24 providing that the then-required jurisdictional amount was
25 not necessary to bring an action against a Federal agency.

1 There is a Federal statute that says in Califano
2 that actions can be brought under 1331 challenging
3 decisions of Federal administrative agencies. Ours is a
4 State agency.

5 QUESTION: I'm sorry, 1331 says that actions can
6 be brought challenging decisions of Federal agencies?

7 MR. BRENNAN: I think that's the import of the
8 holding in Califano.

9 QUESTION: What it says in 1331 is that district
10 courts shall have original jurisdiction of all civil
11 actions --

12 QUESTION: That's all it says.

13 QUESTION: -- arising under the Constitution.

14 MR. BRENNAN: Correct.

15 QUESTION: And so I think the question was, or
16 at least mine would be, which I think is the same, how can
17 it be a civil action if what you're asking for is to
18 review a Federal administrative agency, but suddenly it
19 isn't a civil action when what you're asking for is to
20 review a State agency?

21 MR. BRENNAN: And I believe the answer to that
22 is that you have to look at the entire jurisdictional
23 language, which is a civil action arising under the
24 original --

25 QUESTION: Oh, absolutely you're quite correct

1 that a State agency is a civil action not arising under
2 the Constitution. That is not what -- or the laws of the
3 United States.

4 MR. BRENNAN: No, it says --

5 QUESTION: It would be in court because it is a
6 civil action which is removable because it is, in fact, a
7 claim so related to claims in the action that they're part
8 of the same case or controversy. That's why it would come
9 in, not under 1331.

10 MR. BRENNAN: Well, I think that's a 1441(c)
11 analogy, but I think in either case the conclusion and the
12 analysis, the correct analysis and the bar is that this
13 civil action is not an action of which the district court
14 has original jurisdiction because it comes out of a final
15 decision of an administrative agency.

16 QUESTION: And then now the question is, why
17 does that make a difference?

18 MR. BRENNAN: Because all of the jurisdictional
19 statutes use the phrase, a civil action of which the
20 district court has original jurisdiction, and --

21 QUESTION: Are you relying on what the Strude
22 case said about, it doesn't become a civil action until
23 it's lodged in State court. Justice Minton thought that
24 at that point it could be removed, but if it's -- if it
25 doesn't become a civil action until it must be commenced

1 in State court, then it would not qualify as an action
2 that could originally be brought?

3 MR. BRENNAN: Justice Ginsburg, as I read Stude
4 and Horton and the four circuit courts of appeals that
5 have addressed this issue, it seems to me that the initial
6 inquiry all four of those courts have made is, what is the
7 nature of the action, and when the action arises to
8 challenge a decision of a State administrative agency, it
9 then becomes in nature an appellate case, and is not
10 within the original jurisdiction of the --

11 QUESTION: But you just said you could have --
12 you could have forgotten all about the State review
13 proceeding, and you could have brought a 1983 action.

14 MR. BRENNAN: That's correct.

15 QUESTION: And then you could have gone into
16 Federal court. So suppose you just split up this
17 complaint and you have one complaint that you want review
18 of the land law decision. You bring that in the Cook
19 County court. And then the other complaint is that you're
20 denied due process, and you bring that in the Federal
21 court. That you could have done, couldn't you have?

22 MR. BRENNAN: I don't believe I could have
23 combined the two of them at all, Your Honor. I believe
24 that by virtue of the fact that the action that we're
25 complaining about, the final decision of the Landmarks

1 Commission is a final decision which is being attacked in
2 a lawsuit which challenges that decision, that that makes
3 it a review, an appellate review, a deferential review of
4 the decision of the Landmarks Commission, and so the 1983
5 action, of which the Federal district court might arguably
6 have jurisdiction if we file that separately, would be a
7 de novo action. It is then an -- it is a civil action of
8 which the Court has original jurisdiction.

9 QUESTION: Mr. Brennan --

10 MR. BRENNAN: But this case is purely a
11 complaint for administrative review that seeks solely and
12 exclusively deferential review of the final decision of
13 the Landmark --

14 QUESTION: Well, is that true of the
15 constitutional issues that are raised?

16 MR. BRENNAN: Yes, it is, Justice O'Connor.

17 QUESTION: How is that?

18 MR. BRENNAN: Because the constitutional issues
19 still arise out of the decision and the ordinance and the
20 statutes under which that decision is made.

21 Under Illinois administrative review law, when
22 the -- when that -- those constitutional issues, State or
23 Federal, get to the Circuit Court of Cook County, they are
24 entitled to be reviewed by a de novo standard of review,
25 but nevertheless, the action itself is not a de novo

1 action. The nature of the action is one which is --

2 QUESTION: No, but those constitutional law
3 issues are resolved de novo. We just don't know how the
4 administrative review part is going to come out.

5 Now, why couldn't the Federal court, if the case
6 is removed to Federal court why can't the Federal court
7 judge decline to exercise jurisdiction over these related
8 State claims?

9 MR. BRENNAN: Because he does not have
10 jurisdiction to hear the constitutional claims, and the
11 reason for that is that the nature of the complaint, the
12 nature of the lawsuit that is filed, the essential facts
13 and elements of it, are --

14 QUESTION: Well, I know that's your position,
15 but if you're wrong, presumably the district court judge
16 could simply decline to exercise jurisdiction over these
17 State law matters.

18 MR. BRENNAN: Theoretically he could, Your
19 Honor, but -- but I guess what I'm really saying, I mean,
20 reduced to its simplest terms, is that the fact that when
21 the plaintiff comes to court, and in their complaint
22 they're complaining about this final decision of an
23 administrative agency, that's the lawsuit that's filed
24 following that action.

25 The nature of the lawsuit, whatever caption it's

1 put under, whether it's in one count or two count, whether
2 it includes 1983 claims or not, it is nevertheless a cause
3 of action that arises out of a final decision of an
4 administrative agency, and for that fact and that fact
5 alone it then is not within the original jurisdiction --

6 QUESTION: If that's your view, I'd like you to
7 expand, if you would, please, on your response to Justice
8 O'Connor. You said the word theoretically, sort of
9 underlining theoretically, and I thought that was
10 important because I think one of the problems is whether
11 this would lead to a flood of reviews of State court
12 administrative cases in Federal court.

13 And what I'd like you to respond to is the
14 suggestion, no, because the State administrative claims
15 can be remanded in any instance where a judge has decided
16 the Federal question, where they predominate, or for any
17 other fairly good reason, and by the way, if the judge in
18 the Federal court needs to know the answer to the State
19 question before he can answer the Federal one, Pullman
20 abstention with an England reservation if necessary, or if
21 it's really going to mix up the State court system --

22 MR. BRENNAN: Yes.

23 QUESTION: -- Burford abstention.

24 So we have Burford, Pullman, England, and three
25 clauses in the supplemental jurisdiction --

1 MR. BRENNAN: Right.

2 QUESTION: We can make up another one, if
3 necessary. I mean, it's --

4 (Laughter.)

5 QUESTION: That's why I picked up on your word
6 theoretically, because it seems more than theoretically.

7 MR. BRENNAN: And thank you for raising that,
8 because it really gets to what I think is the important
9 opportunity that the Court has in this case, and that is
10 an opportunity to avoid, if you will, all of the
11 litigation that comes under the arising under cases, as to
12 whether or not this is an action arising under, and the
13 abstention cases.

14 The much better rule as a matter of judicial
15 policy that I think this Court should adopt is the rule
16 that says, we do not have -- Federal district courts do
17 not have appellate jurisdiction to review final decisions
18 of administrative agencies.

19 QUESTION: So --

20 MR. BRENNAN: So that jurisdictional rule to the
21 practitioners is very clear. We don't get into all the
22 arguments that we can in abstention cases.

23 QUESTION: Well, we can't hold that as you just
24 put it, because we have held that we have jurisdiction to
25 review administrative agencies.

1 MR. BRENNAN: Excuse me.

2 QUESTION: Federal administrative --

3 MR. BRENNAN: State -- thank you.

4 QUESTION: And now --

5 QUESTION: Yes, but then you have to tell me why
6 Federal versus State makes one be an action whereas the
7 other isn't an action, or makes one be civil whereas the
8 other isn't civil. I mean, we have to squeeze this theory
9 within the text of the statute, and you haven't given me
10 a, you know, a gimmick to do that.

11 MR. BRENNAN: Well --

12 QUESTION: So I'd -- it's easier to invent a new
13 abstention.

14 (Laughter.)

15 MR. BRENNAN: There is no gimmick in the
16 statute, because when you're looking at the jurisdictional
17 issue you're necessarily looking for where is jurisdiction
18 found, where is jurisdiction conferred on the district
19 court in the first instance.

20 Limited jurisdiction. Burden is on the
21 plaintiff who's attempting -- the party who's attempting
22 to get into Federal court to show that there is Federal
23 court jurisdiction. Those are all well-settled
24 principles.

25 QUESTION: But --

1 MR. BRENNAN: And the --

2 QUESTION: But the district court does have
3 jurisdiction over a civil action. We have held that an
4 appeal from a Federal administrative agency to the
5 district court is a civil action. You're saying it should
6 be different if it's a State admin -- now, say why, just
7 directly, if you would.

8 MR. BRENNAN: Because there is no statutory
9 authority for the district court's to have jurisdiction
10 over State administrative --

11 QUESTION: But there was no specific
12 jurisdiction for them to have jurisdiction over appeals
13 from Federal agencies. That was found to be a civil
14 action, was it not?

15 MR. BRENNAN: It was found to be a civil action
16 in Califano when the court found that the 1976 amendments
17 to 1331, in essence in the legislative history, and it's
18 set forth clearly, I think, in footnote 4 of the opinion
19 to Califano, basically says Congress amended the statute
20 and took -- and added a provision which says that actions
21 under 1331 can be filed as arising under actions against
22 Federal agencies because they removed the prior --

23 QUESTION: So the legislative history causes
24 1331 to have in it some imaginary language, this applies
25 only to Federal --

1 MR. BRENNAN: No.

2 QUESTION: -- a review of Federal administrative
3 action.

4 MR. BRENNAN: The existing jurisdictional
5 statutes, any one of the three first provisions of 1441,
6 the removal statute, never speak to the issue and never
7 have any -- do not have any language in them that supports
8 the idea that district courts have jurisdiction over civil
9 actions within their original jurisdiction where there are
10 State appellate reviews involved.

11 QUESTION: The question was, in Califano was
12 review or not, not review which court, because if it was
13 going to be any court it was going to be the Federal
14 court.

15 MR. BRENNAN: Well, exactly, because it was the
16 action of a Federal agency, and the suit was filed against
17 the Social Security Administration.

18 QUESTION: But you conceded that if you had
19 divided up your complaint -- you want review of the land
20 law commission in State court, you want your Federal
21 questions in Federal court -- that you could have done
22 that, so why can't the city remove at least to the extent
23 that you have a divisible complaint?

24 MR. BRENNAN: Well --

25 QUESTION: And then say to the district court,

1 we can remove the part that's pure Federal, and for the
2 rest, the State claims, district court you can either
3 exercise supplemental jurisdiction or remand those. Why
4 couldn't the city say, at least to the extent that there
5 are Federal claims here, it's removable?

6 MR. BRENNAN: Because 1441(c) says whenever a
7 separate and independent claim or a cause of action within
8 the jurisdiction conferred by section 1331 is joined with
9 a nonremovable action, and you don't -- we never pass the
10 first test. This is never an action under 1331, because
11 under 1331 it must be a civil action within the original
12 jurisdiction of the district court.

13 QUESTION: Moreover, isn't it true, as I read
14 the complaint, that most of your Federal claims are --
15 overlap State law claims that would be based on precisely
16 the same factual disputes?

17 MR. BRENNAN: Yes, that is true, Justice
18 Stevens.

19 QUESTION: So that you couldn't really say
20 there's a series of Federal claims involving facts A, B,
21 and C, and State claims involving D, E, and F. The same
22 facts are going to be involved in both the State and
23 Federal claims. Is that not right?

24 MR. BRENNAN: That's true.

25 QUESTION: Mr. Brennan, let me try another way

1 of getting where you want to go, which seems to me more
2 feasible.

3 This case is a -- these State administrative
4 proceedings are appealable to State courts under a State
5 statute.

6 MR. BRENNAN: Correct.

7 QUESTION: Which says they will be appealable to
8 a State court.

9 MR. BRENNAN: The city's ordinance expressly
10 provides for that.

11 QUESTION: Federal review of Federal
12 administrative action is conducted under statutes -- the
13 APA -- that give Federal courts review, or under special
14 appeals statutes that give Federal courts review, or under
15 mandamus, and injunction before the APA. We used to
16 review them just under our general mandamus authority.

17 But I don't -- did we ever have mandamus
18 authority to mandamus State officers? I doubt it. So
19 maybe what we're talking about here is not so much a
20 jurisdictional defect as a lack of cause of action that
21 the State law created this cause of action against the
22 State agency, and it limited the bringing of that cause of
23 action to State courts.

24 Now, normally a State cannot do that. If you
25 create a cause of action I'm sure it can be -- you can

1 bring it in Federal as well as in State courts, but
2 perhaps a different rule should apply where the cause of
3 action is a cause of action for review of, effectively
4 mandamus review of State officers. That's what's going on
5 here.

6 MR. BRENNAN: I think that analysis is sound,
7 Justice Scalia, and I think it's sound because it begins
8 with the point that this cause of action arises in a State
9 statute in a city ordinance, and for us to have marched
10 down to Federal court and tried to file it there, most
11 judges in the Northern District of Illinois would have
12 dismissed it sua sponte on the grounds that this is not a
13 Federal case. There is no Federal jurisdictional statute
14 that --

15 QUESTION: Are you suggesting that in Sanders,
16 which had its own jurisdictional provision, the 1331 was
17 for cases where there was -- the nonstatutory review
18 cases, cases where there was not a specific statute that
19 said, for example, Railroad Retirement Board decisions go
20 to the D.C. Circuit, not the district court? No specific
21 statute.

22 But here you're saying you do have a specific
23 statute, only it's a State statute, so therefore the 1331
24 does not supplant a specific provision any more than it
25 supplanted 205 in the social security case.

1 MR. BRENNAN: I think I'm saying two things,
2 Justice Ginsburg. The first thing I'm saying is that in
3 Califano the Court found that there was jurisdiction to
4 review the Federal agency because of the amendment that
5 was made in 1976 to 1331.

6 The Court did not address at all the issue of
7 whether the Federal courts have original jurisdiction over
8 State administrative agency actions, and my basic point is
9 that there is no Federal statute that one can point to
10 which clearly intends to give the district courts
11 appellate jurisdiction over final decisions of State
12 administrative agencies, and that would include those
13 cases where there is some Federal constitutional claim in
14 them.

15 Another reason why that rule makes a great deal
16 of sense is that in all these administrative review cases,
17 whether they come out of liquor agencies or aviation
18 authorities or zoning authorities, the Federal
19 constitutional questions should not be addressed until the
20 plaintiff has failed to prevail on any of the State law
21 issues.

22 QUESTION: I -- that's -- I don't know if
23 Justice Scalia's idea is so sound. The -- I think what
24 you're trying to do is to carve out some kind of special
25 box for State administrative law cases, and I don't know

1 how you do it.

2 You're talking about the word appeal, as if that
3 might do it. Then you talk about discretionary review as
4 if that might do it. But a State could have a law saying
5 all State laws applicable to State government officials
6 are always determined through an appeal to a court, so it
7 can't just be the word appeal. It would then be possible
8 to immunize every State government action.

9 MR. BRENNAN: But --

10 QUESTION: It can't just be the question of
11 discretionary review, because I don't even know what that
12 is, discretionary review.

13 I mean, you're trying to simplify it, but it
14 seems to me you're going to complexify, if there is such a
15 word.

16 MR. BRENNAN: Well, Stude stands for the
17 proposition --

18 QUESTION: Yes.

19 MR. BRENNAN: -- that State legislatures cannot
20 enact laws that will confer jurisdiction on Federal
21 courts, and I don't think there's any dispute about that.

22 QUESTION: No dispute about that.

23 MR. BRENNAN: The -- it seems to me that the
24 correct jurisdictional analysis is, what Federal statutes
25 gives the Federal court --

1 QUESTION: Right, and they're saying what does
2 it is 13 --

3 MR. BRENNAN: -- jurisdiction over this
4 complaint for administrative --

5 QUESTION: 1441, 1367. That's the answer.

6 MR. BRENNAN: Right, and 1367, which the city
7 curiously relies on, not on 1441(c).

8 QUESTION: Both. No, (b) -- (a). Go ahead.
9 Sorry.

10 MR. BRENNAN: It doesn't do it for them because
11 you can't get over the original hurdle in 1367, which is
12 that the Federal court -- it must be a civil action of
13 which the district courts have original jurisdiction,
14 and --

15 QUESTION: Has the Congress provided, under the
16 Education with -- for Disabilities Act, review from State
17 administrative agencies in the United States district
18 courts?

19 MR. BRENNAN: I don't know, Justice --

20 QUESTION: That's a wholly Federal law scheme,
21 and the States are used -- State offices are used to
22 administer it, but the law is Federal.

23 MR. BRENNAN: Yes, and in the Ninth Circuit's
24 opinion in Shamrock Motors they cite two RTC cases which
25 get into this whole area of what happens when legislatures

1 might deliberately, if you will, attempt to confer
2 jurisdiction, and I think under the communications law
3 somebody told me there are some of those. But I --

4 QUESTION: But they -- it seemed to me that
5 might help you in one sense, that if Congress wants this
6 sort of scheme, whether it's Federal law or State law or a
7 combination, it can -- it can provide so by specific
8 exemption, and that would follow your legislative history
9 argument with reference to Califano.

10 MR. BRENNAN: That's --

11 QUESTION: I don't know if that gets you there.

12 MR. BRENNAN: Well, that's true, Justice
13 Kennedy, but I still contend that the point that gets me
14 there that says that the district court does not have
15 jurisdiction in this case is that there is no provision in
16 the U.S. Code in the removal statute or in the
17 jurisdictional statutes which says or suggests, directly
18 or indirectly, that district courts have jurisdiction.

19 QUESTION: Well, but you really --

20 MR. BRENNAN: -- to review appellate decisions
21 of State administrative agencies.

22 QUESTION: It seems to me your argument really
23 begs the question. It doesn't necessarily mean you're
24 wrong, but the question as I see it is whether this is a
25 civil action arising under the Constitution and laws and

1 so forth of the United States.

2 And it seems to me you might arguably take the
3 position that there's a distinction between civil actions
4 arising, et cetera, on the one hand and Federal claims on
5 the other, and it may well be that an action that arises
6 under a State statute like this, even though it includes
7 Federal claims, does not arise under the Federal, so forth
8 and so on, within the meaning of that provision.

9 If you don't take that position, I don't know
10 how you get to your destination.

11 MR. BRENNAN: Well, I get to my destination by
12 saying that 1331 speaks about the district courts having
13 original jurisdiction --

14 QUESTION: Right --

15 MR. BRENNAN: -- of civil actions, and this is
16 not a case involving original jurisdiction, and going back
17 to Stude, and Horton, and the four cases that have been
18 decided by the four circuits, it seems to me what the
19 court in each one of those cases has done, as well as
20 other cases that are cited in the brief, is they look at
21 what they characterize as the nature of the action, and
22 nature of the action as it's used there is, does this case
23 come out of a dispute which grows out of a final decision
24 of a State administrative agency? Is it an appellate
25 decision of its nature, or is it a de novo decision?

1 QUESTION: How do you distinguish Sanders in
2 that event, because surely there was a final agency action
3 there.

4 MR. BRENNAN: Sure, and I don't think -- it
5 doesn't appear to me that Sanders as filed was necessarily
6 an appellate action.

7 There are two reasons that I think Sanders is
8 distinguishable. The first is that while there was a
9 decision of the Social Security Administration, the action
10 that was filed was really a de novo action that challenged
11 that decision, secondly in Sanders is distinguishable,
12 because there you're talking about Federal court
13 jurisdiction over Federal administrative agencies, and I'm
14 not troubled by that, and I don't think the Court is
15 troubled by that.

16 That's not our case. Our case is review of
17 State administrative agencies.

18 QUESTION: Yes, but it's one thing to say the
19 facts are different here, but you also have to say that --
20 and it makes some difference that the facts are different.
21 Just to point out to a difference that doesn't really
22 make -- a distinction that doesn't make much difference I
23 don't think gets you there, and so if you're relying on
24 the fact that this is an appellate proceeding in the
25 district court, I think you have to distinguish Sanders in

1 a way that you haven't.

2 If you're relying on the definition of civil
3 action or something else, that needn't bother you.

4 MR. BRENNAN: Well, if -- I guess what I would
5 suggest, Mr. Chief Justice, is that Sanders does not in
6 any way support the proposition that the city is arguing
7 here that State -- that Federal district courts should
8 have jurisdiction over cases which are of their very
9 nature appeals from State administrative agencies.

10 QUESTION: Yes, but your key distinction should
11 not be the distinction between appellate and original, but
12 rather between arising under Federal law on the one hand
13 and arising under State law on the other.

14 It seems to me you might make a colorable
15 argument that this case, notwithstanding the presence of
16 Federal claims, really arises under the State
17 administrative review statute, and therefore it doesn't
18 come within 1331.

19 MR. BRENNAN: That's true, Justice Stevens, and
20 that's the second point in our brief, and we make that
21 point, that if you -- that if this Court were to hold that
22 for some reason the court does have jurisdiction, then it
23 doesn't arise under, and if we lose on that, then we
24 get --

25 QUESTION: If it doesn't arise under, they don't

1 have jurisdiction.

2 MR. BRENNAN: Right.

3 If there are no further questions --

4 QUESTION: Thank you, Mr. Brennan.

5 Ms. Solomon, you have 3 minutes remaining.

6 REBUTTAL ARGUMENT OF BENNA RUTH SOLOMON

7 ON BEHALF OF THE PETITIONERS

8 MS. SOLOMON: Thank you, Mr. Chief Justice. I'd
9 like to make two brief points in rebuttal.

10 The first is that our primary submission here is
11 in reliance on section 1441, which allows for removal of
12 any civil action within original jurisdiction, and with
13 the reference to the Federal constitutional allegations in
14 the complaints which would be reviewed de novo as to the
15 law and fact in the Circuit Court of Cook County.

16 As ICS concedes, that portion, at least, they
17 could have filed in Federal court.

18 QUESTION: I believe their position was that it
19 wouldn't satisfy -- at least that was the implication, I
20 think, of Justice Stevens' question, that it wouldn't
21 satisfy a separate and independent claim. If they're
22 right about the State part being nonremovable by itself --

23 MS. SOLOMON: We --

24 QUESTION: -- then the -- there is no separate,
25 separation between those two because they're so tied

1 together by the facts.

2 MS. SOLOMON: 1441(c) we think comes into play
3 only if 1441(a) is not sufficient, and we think 1441(a) is
4 sufficient. Civil action within original jurisdiction
5 coupled with supplemental jurisdiction under 1367, and
6 that --

7 QUESTION: What's your response to my argument?
8 Do you understand it?

9 MS. SOLOMON: Arising under --

10 QUESTION: My suggested reading, that although
11 the claim is a Federal claim, that the viewing the action
12 as a whole as distinguished from claims in the
13 supplemental jurisdiction statute -- you use the word
14 claims, not actions -- that the action itself didn't arise
15 under the Federal law.

16 MS. SOLOMON: Our response to that quite simply
17 is the Gully test, the Gully test of arising under any
18 right or immunity as in the claims that ICS alleged in
19 this case, the Federal constitutional claims would be
20 decided solely by reference to the Federal Constitution.
21 They're not decided as a matter of State law.

22 The arising under cases, where a court considers
23 a State cause of action and finds that it does not arise
24 under, as we read the cases are limited to two
25 circumstances, first where the plaintiff actually forgoes

1 any Federal claims, and ICS did nothing if not plead
2 numerous Federal constitutional claims.

3 The second is the situation in Merrell Dow,
4 where Federal law intentionally precluded a right of
5 action, or there was no Federal right of action, and there
6 was a Federal right of action for each and every
7 constitutional allegation that ICS pled in its complaint.

8 The only basis on which the court of appeals
9 dismissed the entire case was that the mere presence in
10 the complaint of some few claims that would be reviewed on
11 the record required it to remand the entire case. Even
12 ICS does not embrace that theory of contagion, and for
13 good reason, because the Federal claims were within the
14 district court's original jurisdiction, and the State law
15 claims were within the district court's supplemental
16 jurisdiction, and they were all properly decided in the
17 district court.

18 Thank you.

19 CHIEF JUSTICE REHNQUIST: Thank you,
20 Ms. Solomon.

21 The case is submitted.

22 (Whereupon, at 1:58 p.m., the case in the above-
23 entitled matter was submitted.)

24

25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

CITY OF CHICAGO, ET AL., Petitioners v. INTERNATIONAL COLLEGE OF SURGEONS, ET AL.

CASE NO: 96-910

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Don Nanni Federico

(REPORTER)