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P R O C E E D I N G S

(11:20 a.m.)

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

Mr. Rhodes.

ORAL ARGUMENT OF GLENN W. RHODES

ON BEHALF OF THE PETITIONER

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

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

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

Those two grounds are a remand that's based

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

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

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

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

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

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

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

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

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

1 remand is for lack of subject matter jurisdiction, wrong  
2 or right, no review; but if it's a discretionary  
3 exercise -- I could keep this, but I choose not to --  
4 that that is reviewable.

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

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

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

23           But here, in our particular case -- and  
24 maybe -- let me back up a minute. Maybe we should look  
25 at that in a different way, because even though you may

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

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

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

21 JUSTICE GINSBURG: But wouldn't it be -- I  
22 mean, here the district judge said: I got rid of the  
23 RICO claim; all that's left are State law claims, and  
24 there's no Federal interest in this case anymore.  
25 They're all State law claims, they belong in State

1 court, good-bye. I could keep it, I choose not to,  
2 because it isn't a sound use of the resources of the  
3 Federal court.

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

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

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

1                   Why would a court of appeals overturn such a  
2 judgment?

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

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

20                   JUSTICE GINSBURG: But that -- because you'd  
21 would have to retread the same ground in the State court  
22 that had already been covered in the Federal court, but  
23 that's not the kind of case that was presented here. I  
24 know the case has lingered for a long time, but there  
25 was no processing of those State law claims. The judge

1 concentrated on RICO, threw it out, and said, the rest  
2 of the claims I'm not interested in.

3 So it's not a case like the Fifth Circuit  
4 where there was a large investment of Federal court  
5 energy and time, and sending it back would mean going  
6 over once again what had already transpired in the  
7 Federal court.

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

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

25 JUSTICE GINSBURG: Could you explain why

1 that is a Federal question? It's a dispute over the  
2 ownership of this invention, right? So it's not a  
3 question of the validity of a patent or infringement of  
4 a patent? It's just the invention is like any res, and  
5 two parties are disputing about ownership. Why does --  
6 why does that become a Federal case?

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

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

24 JUSTICE STEVENS: May I just ask one sort of  
25 a preliminary question? If we just applied the plain

1 language of 1447(d), then this case was properly  
2 remanded, and it was -- the remand order is not subject  
3 to review. Is that correct?

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

6 JUSTICE STEVENS: And what really prevents  
7 us --

8 MR. RHODES: -- seems to be what it says.

9 JUSTICE STEVENS: -- from reaching that  
10 decision in this case? Because actually it's an open  
11 question because you are both arguing about it here and  
12 you certainly disagree. Why couldn't we just simply  
13 say, for this particular category of remand orders,  
14 we'll just apply the plain language of 1447(d)?

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

19 JUSTICE STEVENS: I understand. It would be  
20 a modification of the dicta in Thermtron, but why  
21 wouldn't that be a simple solution to this case?

22 MR. RHODES: I'm not sure that would be a  
23 simple solution to this case, Justice Stevens, and the  
24 reason for that is that if we -- if the Court decides to  
25 do that, then we return to those areas where total chaos

1 could really break out, and the reason for that is that  
2 we would be in a situation where district courts can --  
3 can dress up in language that is lack of subject matter  
4 jurisdiction and remand cases, knowing that there is not  
5 going to be any review.

6 JUSTICE STEVENS: No, no. That wouldn't --  
7 that wouldn't avoid the plain language of the statute.  
8 Pretextual district court orders wouldn't avoid the  
9 plain language of the statute.

10 JUSTICE GINSBURG: There are --

11 CHIEF JUSTICE ROBERTS: But there'd be no  
12 need to dress up anything. I mean, that's Justice  
13 Stevens's point. You wouldn't have to dress up  
14 anything; if you send it back, it's not reviewable.

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

17 JUSTICE GINSBURG: How could we do that in  
18 light of *Thermtron*? *Thermtron* went against the clear  
19 text of the statute that says remands are not  
20 reviewable, period; and in *Thermtron* the Court said,  
21 yes, they are sometimes, if we think it's so outrageous  
22 for a district judge to say: Yes, I've got jurisdiction  
23 over this case, but my docket is so crowded, and this is  
24 a -- this is a small-change case; it belongs in State  
25 court.

1           The Court, I think, was outraged by a  
2 district court thinking that it could dump a case simply  
3 because it was too busy with more important things.  
4 That was -- that was the setting of Thermtron, and to  
5 reach the result that the Court reached, the Court had  
6 to go against the language of the statute which -- which  
7 read in absolute terms.

8           But anyway, the Court did that, and then  
9 they gave a rationale for what the new test was going to  
10 be. It was no longer going to be remands are no longer  
11 -- remands are not reviewable; it's going to be -- that  
12 applies only to the cases where -- what was it,  
13 subsections (c) and (d) of 1447? That -- it -- the  
14 Court read the statute to say less than it in fact did.  
15 That's what Thermtron did.

16           MR. RHODES: That is the exact holding of  
17 Thermtron, that they were not going to construe that so  
18 woodenly to allow a district court to abdicate its  
19 mandatory jurisdiction.

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

1                   MR. RHODES: Mr. Chief Justice, it could,  
2 but --

3                   CHIEF JUSTICE ROBERTS: And it would  
4 solve the problem Justice Ginsburg pointed out earlier,  
5 that this way you don't get to appeal big things like no  
6 subject matter jurisdiction, but you do get to appeal  
7 picayune things.

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

21                   And I think it would be a large departure to  
22 go back and try to modify what all the circuit courts of  
23 appeal, except for maybe the Federal Circuit, has  
24 adopted as a workable framework in order to solve these  
25 kinds of problems.

1 JUSTICE GINSBURG: Well, the only -- one  
2 clear way to do it would be to overrule Thermtron, but  
3 neither party has asked for that. You haven't asked for  
4 it, and the other side hasn't asked for it.

5 MR. RHODES: That's correct, Justice  
6 Ginsburg.

7 JUSTICE STEVENS: You just have to  
8 distinguish Thermtron. You don't have to overrule it.  
9 It still applies on its facts.

10 That's a very different problem. When the  
11 judge says, I'm too busy to hear this, I'm going to send  
12 it back to State court, that's what Thermtron resolves.

13 JUSTICE GINSBURG: But --

14 JUSTICE STEVENS: And here this is not --  
15 that's not involved here.

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

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

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

22 JUSTICE SCALIA: Throw that overboard, too?

23 MR. RHODES: We would have to overthrow that  
24 as well, and the reason for that is because Quackenbush  
25 was a remand based upon abstention -- abstention-based

1 remand under Burford, and in that case, this Court found  
2 that abstention-based remands did not fall within either  
3 prong of 1447(c). So -- in fact, this Court gave that  
4 very little attention in Quackenbush before it moved on  
5 to the 1291 issue.

6 CHIEF JUSTICE ROBERTS: You thought the  
7 Respondents asked us to overrule Thermtron. On page 22,  
8 you say, "Respondents' implicit request for this Court  
9 to overrule Thermtron should be rejected."

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

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

18 MR. RHODES: Given the fact that Congress  
19 has twice amended 1447(c) after Thermtron, it seems that  
20 they have actually ratified this Court's statutory  
21 construction under Thermtron, and have agreed to it --

22 CHIEF JUSTICE ROBERTS: So this gets a lot  
23 of attention across the street? The reviewability of  
24 remand orders gets --

25 (Laughter.)

1 CHIEF JUSTICE ROBERTS: I mean, in one of  
2 those provisions, they said this was only technical  
3 amendments, and if they're just doing technical  
4 amendments, that doesn't mean they have to look at it  
5 and approve the whole thing.

6 MR. RHODES: No, if -- Mr. Chief Justice, if  
7 they wanted to get rid of Thermtron they could have done  
8 it in a very direct way.

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

11 (Laughter.)

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

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

20 (Laughter.)

21 MR. RHODES: Actually, Mr. Chief Justice,  
22 that was going to be my next point, about the Federal  
23 Circuit, but -- it does, again, provide a workable  
24 framework for dealing with these issues, and it seems to  
25 be a very large departure to go back and wipe out the

1 last 30 years of case law that has been developed to  
2 handle these issues. It would be a large departure.

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

5 JUSTICE STEVENS: Let me just make one  
6 comment on the large departure: Would it be a large  
7 departure if we just said, in the very narrow category  
8 of cases where there has been a remand on the basis of  
9 -- the district judge doesn't want to exercise  
10 supplementary jurisdiction over State law claims, that's  
11 not appealable, period? Just say that's a slight  
12 exception from Thermtron?

13 MR. RHODES: Well, Mr. Chief Justice --  
14 sorry -- Justice Stevens, that would be an exception  
15 under Thermtron that doesn't seem to be called for  
16 because the way it's been interpreted, it has to be --  
17 and the way even the amendments in '88 and again in '96  
18 -- it's only barred if it's for a lack of subject matter  
19 jurisdiction, and plainly here a discretionary remand is  
20 not for that basis.

21 JUSTICE STEVENS: They're not amendments of  
22 subsection (d), and subsection (d) is what has the  
23 language that really reads right on this case.

24 MR. RHODES: Well, I think the other -- the  
25 other problem with that is the whole doctrine of -- of

1 supplemental jurisdiction that was first laid out in  
2 Carnegie-Mellon and United Mine Workers, where the  
3 difference between remands under 1367(c) seem not to  
4 overlap with the remands under 1447(d) and 1441. So if  
5 we made that an exception and we pulled this into  
6 1447(d), it -- I'm not sure what the consequences would  
7 be from doing that.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 Mr. Allison.

10 ORAL ARGUMENT OF THEODORE S. ALLISON

11 ON BEHALF OF THE RESPONDENTS

12 MR. ALLISON: Mr. Chief Justice, and may it  
13 please the Court:

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

21 I know that the Court is familiar with the  
22 late Chief Justice Rehnquist's dissenting opinion when  
23 he was an Associate Justice in the Thermtron case, and  
24 Justice Rehnquist at that time wrote that there had been  
25 no cases since the review bar was put into place in 1887

1 -- no cases where exceptions to review had been  
2 recognized. He believed that it was a plenary bar on  
3 review.

4 JUSTICE GINSBURG: But that was a dissenting  
5 opinion, and that was how many years ago? How many  
6 years?

7 MR. ALLISON: Justice Ginsburg, it -- it was  
8 a dissenting opinion, and it was in 1976, and we  
9 certainly would not cite it as authoritative except for  
10 our confidence in Justice Rehnquist's review of the law  
11 as it existed at that time.

12 JUSTICE GINSBURG: But you have a majority  
13 rationale that says, although 1447(d) reads in absolute  
14 terms, in fact the only remands that it -- that it  
15 covers are those based on a defect in the removal or  
16 lack of subject matter jurisdiction. So you can't --  
17 you can't say, well, Thermtron had a result that we can  
18 limit to Thermtron's own unusual facts, because the  
19 Court gave a rationale. But I mean, courts give reasons  
20 for what they do. And the Court drastically limited  
21 1447(d) when it said 1447(d) has to be read consonant  
22 with 1447(c), and 1447(c) deals with only two kinds of  
23 remands, one for defective removal and the other for  
24 lack of subject matter jurisdiction.

25 MR. ALLISON: That is -- that is correct,

1 Justice Ginsburg. And, in fact, to harken to your  
2 earlier question -- to Your Honor's earlier question, we  
3 are not asking for Thermtron to be overruled, but I  
4 think, in effect, to be updated.

5 The Court in Thermtron did give a rationale,  
6 and the rationale that it gave was that it viewed -- the  
7 opinion for the Court by Justice White -- viewed 1447(c)  
8 as being the sole source of Federal remand power. And  
9 as the Court knows in the ensuing 30, 40 -- excuse  
10 me -- yes, 40-odd years, there have been a number of  
11 other sources of remand power recognized.

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

21 JUSTICE SOUTER: Okay. But no matter -- no  
22 matter what adjective or what verb you use, that's  
23 overruling a very clear rule in Thermtron. And we  
24 normally operate on the theory that when a conventional  
25 statute is construed by this Court, it stays construed

1 until Congress changes it.

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

6           MR. ALLISON: It's -- it's an essential  
7 question, Justice Souter. And I think the way we  
8 harmonize it is to say that Thermtron has indeed been  
9 pared back by the Court's subsequent decisions. And, of  
10 course, it is our second argument that the Court do  
11 something with the rule in Thermtron.

12           Our primary argument gets to the question of  
13 the statutory language and whether a Cohill remand falls  
14 within it. But our secondary argument is to say,  
15 certainly, it's well recognized that Cohill disapproved  
16 and pared down that portion of Thermtron that held that  
17 the only remand power is the remand power expressed in  
18 1447(c).

19           In a -- in a later case, in Quackenbush, the  
20 question of whether mandamus or appeal was the  
21 appropriate vehicle for challenging remand orders. And  
22 in that case, again, the Court said that we are -- we  
23 are disavowing Thermtron's sweeping statement that  
24 mandamus is the only vehicle for challenging a remand  
25 order.

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

3 MR. ALLISON: Indeed, the Court did not.  
4 And we suggest again only -- it is only a suggestion in  
5 our brief that the Court might wish to look at the  
6 ensuing history since Thermtron and make a similar  
7 limiting statement that recognizes that a lot of remand  
8 authority has been established since Thermtron in a  
9 number of statutes and by, of course -- by the Court's  
10 holding in Cohill.

11 JUSTICE GINSBURG: What in addition to the  
12 civil rights provision?

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

25 JUSTICE GINSBURG: Then that's a specific

1 statute that would prevail over the general provision.

2 MR. ALLISON: It's a little bit -- Justice  
3 Ginsburg, a little bit different than the Court's  
4 decision in Osborn, in which the much more specific  
5 Westfall Act Provision was held to prevail over 1447.

6 In Things Remembered, it was simply the fact  
7 that the review bar was held to apply to a remand, even  
8 according -- under another statute, and, of course,  
9 recognizing that there are now other statutory bases for  
10 remand. The interesting thing about 1452 -- and Justice  
11 Ginsburg, I believe that you wrote the concurrence on  
12 this -- is that 1452 provides for remand on any  
13 equitable ground and that such remands are not subject  
14 to review by appeal or otherwise.

15 So 1452, again, expresses, I think, a trend  
16 in the thinking of Congress, if there is such a thing as  
17 the thinking of Congress, that -- that the review bar  
18 will be expanded and will even include such  
19 discretionary decisions by a district court as any  
20 equitable ground.

21 JUSTICE GINSBURG: But Things Remembered, I  
22 think, was phrased very carefully, just to say that the  
23 question that's before the Court now has not been  
24 decided before, the precise question here --

25 MR. ALLISON: Yes.

1 JUSTICE GINSBURG: -- of discretionary  
2 remand?

3 MR. ALLISON: That is --

4 JUSTICE GINSBURG: So I think -- I looked  
5 again at Things Remembered, and it turned out to be just  
6 as I remembered it --

7 (Laughter.)

8 JUSTICE GINSBURG: -- that it was neutral,  
9 colorless. It just said we haven't been confronted with  
10 this issue. And I think Powerex said the same thing,  
11 although it said it in more definite terms -- it is far  
12 from clear.

13 MR. ALLISON: That is true, and that is what  
14 the Federal Circuit said -- meant when it said that  
15 Powerex made the question precedential. Because,  
16 certainly, if Things Remembered had decided the issue  
17 that's before the Court today, I think the issue  
18 wouldn't be before the Court today. And that, of  
19 course, is why we're here.

20 But the Thermtron -- the Thermtron issue  
21 really is our second argument, and it -- it is a very  
22 gentle argument that the Court -- and if the Court  
23 certainly wishes to continue discussing that, that is --  
24 that is very profitable for what we're doing here today.

25 But the first argument is that, harkening

1 back to your original questions, Justice Ginsburg, why  
2 shouldn't a remand when only State law claims remain in  
3 a case, as in Cohill and as in 1367(c)(3) -- why should  
4 that not come within the language of 1447(c), what I'll  
5 call the jurisdictional clause, because it clearly is a  
6 matter that is only of concern to State courts? And I  
7 think that the Court in United Mine Workers v. Gibbs  
8 made clear that when all State -- all the Federal claims  
9 have left the case and only State law claims remain,  
10 that it's almost presumptive that those should be sent  
11 back --

12 JUSTICE STEVENS: Yes, but your opponent's  
13 argument is that the -- the claims that remain do  
14 include a Federal claim.

15 MR. ALLISON: That's true, Justice Stevens.  
16 That is his argument, and I think what's important about  
17 that argument is the inconsistency it sets up. It  
18 essentially casts a net that draws in these supplemental  
19 jurisdiction cases. And what the net does is it allows  
20 the courts of appeals to review some artful pleading  
21 issues, which is essentially what we have here. We have  
22 State law claims, and our opponents are suggesting that  
23 these are, in fact, disguised Federal claims that must  
24 be heard in Federal court.

25 JUSTICE STEVENS: What about the ruling on

1 the RICO claim itself? That was clearly a Federal  
2 issue.

3 MR. ALLISON: Yes. The RICO claim was  
4 what -- was what gave the district court jurisdiction  
5 over the case in the first place. And it's interesting  
6 that in the -- in the district court's decision, it made  
7 me think -- it made me think a little bit of the Waco  
8 case, because in the district court's decision, the  
9 district court very clearly said, first, I have no  
10 jurisdiction over these State law claims, and I'm going  
11 to remand them, and now I will turn to the RICO claim  
12 which creates a conundrum that I'm not sure --

13 JUSTICE GINSBURG: Where did the -- maybe  
14 the district judge did say that. Maybe you can point  
15 me to the place where it did. But if it did say it,  
16 it's flatly wrong, because there is -- that's what  
17 supplemental jurisdiction is. It says you have  
18 jurisdiction. It's a huge difference between you have  
19 no jurisdiction, you are powerless --

20 MR. ALLISON: Yes.

21 JUSTICE GINSBURG: -- and you have power,  
22 but it's up to you to exercise it or not.

23 MR. ALLISON: Justice Ginsburg, that's why  
24 we didn't -- we didn't press that point because I think  
25 -- I think that even we can see that the court exercised

1 its jurisdiction to decide and dismiss the RICO claim,  
2 although it's reminiscent of -- of -- of the decision  
3 in Kircher --

4 JUSTICE GINSBURG: It -- it wasn't a  
5 discretionary decision about RICO. RICO -- there was no  
6 Federal claim stated. That's out of it.

7 MR. ALLISON: Right.

8 JUSTICE GINSBURG: What the district court  
9 has jurisdiction over are the supplemental claims, which  
10 it can choose not to exercise, but it can say, "I don't  
11 have jurisdiction," because Congress has given  
12 supplemental jurisdiction but then left it to the court  
13 to remand on stated conditions.

14 But you -- you seem to conflate the absence  
15 of subject matter jurisdiction with a discretionary  
16 decision not to exercise subject matter jurisdiction  
17 that the court undoubtedly has.

18 MR. ALLISON: Justice Ginsburg, I have  
19 made every effort not to conflate those two -- those two  
20 concepts, and in fact we did say that when -- when a  
21 court acquires supplemental jurisdiction in a case, that  
22 that is a species of subject matter jurisdiction. At  
23 that point -- as the Court held in *City of Chicago v.*  
24 *International College of Surgeons*. At that point the  
25 court does have a mandatory discretion to -- or

1 mandatory jurisdiction to exercise power over the entire  
2 Article III case.

3           But we then argue when the Federal claims  
4 leave the case, that jurisdiction changes. That  
5 jurisdiction changes from a mandatory one that the  
6 Court, as in *Thermtron*, would certainly be concerned if  
7 a district court abjured its jurisdiction that's  
8 mandatory. But it changes by operation of 1367 from  
9 mandatory to discretionary. And when Congress passed  
10 1367 in 1990, Congress intended to codify the existing  
11 law right up through *Cohill* on the subject of  
12 supplemental jurisdiction, combining ancillary and  
13 pendent in the --

14           CHIEF JUSTICE ROBERTS: So your idea is  
15 there is jurisdiction, but when the Federal claims fall  
16 out, then there's no jurisdiction?

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

18           CHIEF JUSTICE ROBERTS: Okay, but that seems  
19 to me to echo the fundamental misperception that if you  
20 have Federal jurisdiction based on a particular event --  
21 let's say, if you're dumping chemicals in the water,  
22 that gives you a Federal cause of action; you have  
23 Federal jurisdiction; there's a trial. It turns out you  
24 weren't dumping chemicals -- you don't then say, there  
25 was no jurisdiction; there was jurisdiction before, but

1 once the finding is made that the facts didn't support  
2 it, then there was no jurisdiction. You say, there was  
3 jurisdiction all the time, and you lose.

4 MR. ALLISON: There was -- there was indeed  
5 jurisdiction. And what we argue is that the nature of  
6 the change, when it goes from mandatory, the concern of  
7 Thermtron, to discretionary, which gives -- virtually  
8 pushes out of the Federal court to the State courts  
9 anytime up until trial -- the nature of that  
10 jurisdiction changes, and we believe that that is not  
11 what Congress intended by the words "subject matter  
12 jurisdiction" in 1447(c).

13 So if we come back to the words of the  
14 statute, the words of the statute should be construed  
15 broadly in order to serve the purposes of -- of remand.  
16 The Court has made clear that concerns of comity and  
17 federalism say that we should construe 1447 in favor of  
18 remand, and I believe that that should extend to the  
19 whole concept of delay and shuttling.

20 JUSTICE GINSBURG: But then -- then what you  
21 are doing is that you are using the label "subject  
22 matter jurisdiction" in a way that seems to me odd, that  
23 is, there are many categories that could be ambiguous at  
24 the edges, but not subject matter jurisdiction. Subject  
25 matter jurisdiction means, court, you have no power,

1 period. There's no diversity, there's no Federal  
2 question, there's no other basis for the Federal court  
3 to exercise jurisdiction. And to say, well, we can  
4 extend the label "subject matter jurisdiction" to  
5 include a case where the district court chooses not to  
6 hear certain claims, even though it has jurisdiction  
7 over them, I think is a -- is a -- a misapplication of  
8 the notion subject matter jurisdiction.

9 MR. ALLISON: It is -- it is a difficult --  
10 a difficult conundrum. I think maybe all conundra are  
11 difficult, but this one particularly. And, Justice  
12 Ginsburg, in the opinion that you wrote for the Court in  
13 the Arbaugh case, you very clearly pointed out that the  
14 word "jurisdiction" is used in a variety of ways by  
15 legal scholars, by --

16 JUSTICE GINSBURG: Yes, but not subject  
17 matter jurisdiction. Jurisdiction is personal  
18 jurisdiction, subject matter jurisdiction. What I did  
19 in Arbaugh was to explain that all kinds of things, like  
20 time limits on when you can sue, have been labeled  
21 jurisdictional and mandatory when in fact they are not.  
22 They are simply statutes of limitation.

23 MR. ALLISON: That -- that is correct, but  
24 that's the same -- that is the nature -- that's the  
25 nature of the problems that the Court confronted in

1 Kircher and Powerex. Again, this is by analogy only.  
2 We are not concerned about -- about labels like that, if  
3 the district court believed that it was remanding the  
4 case because it lacked jurisdiction.

5 But I'm coming back now to subject matter  
6 jurisdiction, and I have found no case in this Court  
7 that has given a definition -- City of Chicago with its  
8 mandatory language was the closest I was able to find.

9 The Koffski case, out of the Seventh  
10 Circuit, is the one case I was able to find from a  
11 higher court that said that supplemental jurisdiction is  
12 technically a form of subject matter jurisdiction. And  
13 what we argue --

14 JUSTICE GINSBURG: Why is it only technical?  
15 It says, court, you can exercise power. Subject matter  
16 jurisdiction is the power that the court has to hear a  
17 given controversy, and under supplemental jurisdiction,  
18 there is undoubted power in the district court to hear  
19 those claims.

20 MR. ALLISON: In its -- certainly, in its, I  
21 think -- in its -- in its textbook sense, that is what  
22 subject matter -- when the world is divided between  
23 subject matter and personal and then the third,  
24 territorial, which I think is a relation -- has a  
25 relation to personal -- when the world is divided along

1 those lines, then subject matter takes on the broadest  
2 possible meaning, but we have conflicting broad  
3 policies. On the one hand, we have a broad definition  
4 of subject matter definition; on the other hand, we have  
5 a statute that should be construed to favor remand at  
6 almost all lawful costs.

7           And -- and subject matter, if we step back  
8 from our -- our dichotomy, personal and subject matter,  
9 subject matter also means, as -- as Your Honor said at  
10 the beginning of this argument, something that is --  
11 that is a subject with which the Federal courts should  
12 be concerned, and on which they should expend their  
13 resources. And we now have the circuit courts hearing  
14 appeals from decisions -- discretionary decisions  
15 because they are technically within the realm of subject  
16 matter jurisdiction.

17           But clearly, State law claims are not the  
18 subject matter with which the Federal courts should  
19 routinely be concerned, and that's why United Mine  
20 Workers -- and Cohill echoed it -- said, these claims  
21 should be sent back, and Cohill even -- well, I think  
22 both cases even said that the propriety of remanding the  
23 claims should be reviewed at every stage in the  
24 litigation. That -- that I think presents us a pretty  
25 strong policy by this Court that remand is to be

1 indulged at almost any lawful cost.

2 JUSTICE GINSBURG: You -- you put it in  
3 terms in your brief -- if I understood your position  
4 correctly -- yes, there is subject matter jurisdiction  
5 over supplemental claims, but once the district court  
6 chooses not to exercise that jurisdiction, it -- and  
7 these were the words you used -- "it divests itself of  
8 jurisdiction."

9 MR. ALLISON: Yes. The -- the argument --  
10 and I was attempting to make a technical argument in the  
11 brief, and I think today I'm speaking in slightly more  
12 global terms -- but the technical argument is that when  
13 a district court makes a decision, in the words of  
14 Gibbs, that it would be inappropriate to exercise  
15 jurisdiction over those claims, then the claims are to  
16 be remanded --

17 JUSTICE ALITO: What if the court changes  
18 its mind? What if it grants a motion for  
19 reconsideration? Then it reacquires the jurisdiction?

20 MR. ALLISON: Well, Justice Alito, the  
21 question of whether it changes its mind I think is  
22 intricately bound up in this question of reviewability  
23 because the cases that we found that -- that talked  
24 about reconsideration talked about reconsideration only  
25 because there was the potential for review of these

1 orders.

2 I think the norm for a remanded case is that  
3 the order of remand is entered, and the order of remand  
4 is certified and mailed to the State court, and the  
5 district court no longer has jurisdiction at that point.

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

12 JUSTICE GINSBURG: The discretionary --

13 JUSTICE SOUTER: But your --

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

21 MR. ALLISON: And I think -- I think that  
22 the -- again, the purpose of the review bar as it's been  
23 expressed for over a hundred years has been to trust  
24 district judges to make these decisions and then get the  
25 case where it needs to be to be resolved on its merits.

1 So to say that the court chooses not to hear the case,  
2 it -- it suggests something a little bit less grave than  
3 the decision that I believe the court would make when it  
4 decides that it's inappropriate to hear the case, in the  
5 words of Gibbs.

6 JUSTICE SOUTER: You -- you think that  
7 choosing not to hear is distinguishable from a decision  
8 that it is inappropriate to hear?

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

20 JUSTICE GINSBURG: Well, that would argue  
21 for a highly deferential standard of review, respecting  
22 the district judge's determination that it's not worth  
23 -- it hasn't invested any time in these questions, and it  
24 shouldn't because they are purely State-law questions.  
25 That's -- but that's something quite different from --

1 from a -- the -- the terminology that you used is  
2 troublesome because a court doesn't have power to divest  
3 itself of jurisdiction.

4 If Congress gives it jurisdiction, it has  
5 it, and the court can't divest itself of that. It can,  
6 if Congress permits it, decline to exercise  
7 jurisdiction, but a court is not capable of divesting  
8 itself of jurisdiction.

9 MR. ALLISON: I believe -- well -- and --  
10 and this is a mechanical argument, but I believe that  
11 when the court makes the decision and then -- and then  
12 executes the remand, that that is divesting itself of  
13 jurisdiction. And perhaps it was -- perhaps it was a  
14 poor -- a poor word choice.

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

21 The -- the premise for the declaration that  
22 it does not have jurisdiction is a premise that even on  
23 your argument does not arise until following the remand.  
24 So there's no way you can fit it, it seems to me, into  
25 the category of -- of remanding because at the point of

1 deciding to remand it has no jurisdiction. That, in  
2 fact, is false.

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

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

18 But I -- I do -- I do see that there is  
19 power. And if the case is going to turn on power, as  
20 the Court -- some of the language in Powerex suggested  
21 that it might, then I don't know that we -- I don't know  
22 that we make much headway.

23 But I -- I -- I see 1447(c), lacks subject  
24 matter jurisdiction, as being broad enough to  
25 comfortably take in the situation where the State-law

1 claims, not really within the subject matter of the  
2 district court's power, are determined inappropriate for  
3 that court to hear and sent back. And it would bring us  
4 that much closer to realizing the purpose of the review  
5 bar that has existed since 1887, taking a category of  
6 cases out of the jurisdiction of the circuit courts.

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

18 If there are no further questions --

19 CHIEF JUSTICE ROBERTS: Thank you, counsel,

20 MR. ALLISON: -- I will stop now. Thank

21 you.

22 CHIEF JUSTICE ROBERTS: Thank you.

23 Mr. Rhodes, you have four minutes remaining.

24 REBUTTAL ARGUMENT OF GLENN W. RHODES

25 ON BEHALF OF THE PETITIONER

1                   MR. RHODES: I just had a few quick points  
2 that I'd like to bring up.

3                   First, I would just like to reiterate that  
4 when Congress enacted 1367, that gave it Article III  
5 jurisdiction in those matters, just as 1331 and 1332 do.

6                   I would also like to reiterate that -- that  
7 stare decisis should be maintained over this statutory  
8 interpretation because it has proved to be workable,  
9 rather than not workable.

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

18                  CHIEF JUSTICE ROBERTS: I suppose, though,  
19 if it would be an abuse of discretion for the district  
20 court to retain jurisdiction, then maybe there is --  
21 there never was jurisdiction, right? You said they have  
22 discretion to exercise or not. Well, if it turns out  
23 they don't have discretion to exercise -- you know,  
24 because it's a huge State claim and a tiny Federal claim  
25 -- why wouldn't that properly be regarded as an absence

1 of jurisdiction?

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

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

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 The case is submitted.

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

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