

IN THE SUPREME COURT OF THE UNITED STATES

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DART CHEROKEE BASIN :

OPERATING COMPANY, LLC, :

ET AL., :

Petitioners :

V. : No. 13-719

BRANDON W. OWENS. :

— — — — — x

Washington, D.C.

Tuesday, October 7, 2014

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

NOWELL D. BERRETH, ESQ., Atlanta, Ga.; on behalf of  
Petitioners.

REX A. SHARP, ESQ., Prairie Village, Kan.; on behalf of  
Respondent.

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1 P R O C E E D I N G S

2 (11:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next in Case 13-719, Dart Cherokee Basin Operating  
5 Company v. Owens.

6 Mr. Berreth.

7 ORAL ARGUMENT OF NOWELL D. BERRETH

8 ON BEHALF OF THE PETITIONERS

9 MR. BERRETH: Mr. Chief Justice, and may it  
10 please the Court:

11 In Section 1446(a) Congress established a  
12 pleading standard for the notice of removal, not a  
13 demand for proof. The plain language in Section 1446(a)  
14 tells us this. The plain language of Section 1446(a)  
15 provides that a notice of removal shall contain a short  
16 and plain statement of the grounds for removal.

17 And that mirrors language that has been used  
18 in Rule 8 for more than 80 years and that has never been  
19 held to require evidence with the complaint.

20 JUSTICE SCALIA: Well, how do we know that  
21 the reason the court of appeals did -- did not -- or  
22 sustained the refusal to take it, how do we know that  
23 the reason was that they disagree with you on what the  
24 standard -- what the court of appeals' reason was? How  
25 can we --

1           MR. BERRETH:           Well, we know that the court  
2 of appeals let stand a district court decision.

3           JUSTICE SCALIA:       Right, and so your --  
4 your -- your job is to argue that that was an abuse of  
5 discretion, because the statute says that they may,  
6 right? They may take it--

7           MR. BERRETH:           Well, an abuse of  
8 discretion -- an abuse of discretion is not necessary to  
9 be shown here. It can be shown here, because what the  
10 circuit court did here was let stand a decision that did  
11 many things.

12          And it's an unusual situation in the law,  
13 Justice Scalia. It let stand a decision of the district  
14 court that flouted the plain language of the statute.

15          JUSTICE KENNEDY:       Is it always an abuse of  
16 discretion for the court of appeals to let an erroneous  
17 decision stand?

18          MR. BERRETH:           Not necessarily always. In a  
19 case like this, however, when the decision that was  
20 let -- let to stand flouted the plain language of the  
21 statute, is a situation where if it's not corrected by  
22 this Court, it may never be corrected. And what the --  
23 the problem that will never be corrected is this lack of  
24 uniformity among the circuits on a matter that's so  
25 clearly established by Congress.

1 Congress does not require there to be  
2 evidence in a notice of removal. And defendants in  
3 Florida or defendants in California don't have to  
4 include evidence within 30 days in their notice of  
5 removal. Defendants in the six States at issue in this  
6 case do. They are treated differently.

7 JUSTICE KAGAN: Well, that seems a little  
8 extreme to say it may never be corrected. I mean, this  
9 was a decision that was made by eight judges. There are  
10 now twelve judges. Maybe the additional four will make  
11 a difference. Maybe even those eight will think twice  
12 about it the next time around. I mean, in fact we just  
13 don't know, right, because we don't know why they acted  
14 the way they acted.

15 It might have been because they thought that  
16 the district court's decision was right, or it might  
17 have been because they thought it -- that -- that  
18 question is better -- was better decided in some other  
19 context, or it might be because they were just feeling  
20 too busy that day.

21 And -- and an abuse of discretion standard  
22 would go, you know, to the -- just the decision whether  
23 to take it, not knowing what that decision was based on.

24 MR. BERRETH: Well, Justice Kagan, in this  
25 situation, given what the Tenth Circuit has done and

1 given that the case has made it this far, as Judge Hartz  
2 pointed out in his dissent below, it's highly unlikely  
3 that a situation like this would arise again. It's --  
4 it takes an unusual confluence of circumstances to have  
5 a case get here in the first place.

6 But now that we are here, lawyers in the  
7 Tenth Circuit are more unlikely than ever to -- to allow  
8 this problem to happen in the future, to allow this  
9 to -- to re -- recur.

10 And so that is a main part of why this is an  
11 unusual situation. It's not a garden variety decision  
12 by the court of appeals that we are faced with.

13 CHIEF JUSTICE ROBERTS: I'm not sure you're  
14 joining issue with the question Justice Kagan asked. Do  
15 we really not know why the Tenth Circuit did what it did  
16 in this case?

17 MR. BERRETH: Well, the Tenth Circuit did  
18 not explain the reasons for its decision.

19 CHIEF JUSTICE ROBERTS: But the dissenters  
20 in the case thought -- explain why they thought it was  
21 wrong. Don't you think if the Tenth Circuit relied on a  
22 different reason they would have said so?

23 MR. BERRETH: Well, they may have, they may  
24 not have. They're not required to. But they're not  
25 allowed to insulate their decisions from review simply

1 by -- by not explaining them, especially in a situation  
2 like this involving the unusual situation and involving  
3 a circuit that -- that is -- that is wayward, a circuit  
4 that is not applying the plain language of Section  
5 1446(a).

6 JUSTICE SOTOMAYOR: I mean, I'm not sure  
7 what --

8 JUSTICE ALITO: Go ahead. Has there been  
9 any suggestion at any point in this case -- in the  
10 district court, in the court of appeals, in the papers  
11 that have been filed here -- that the decision was based  
12 on anything other than the reasoning of the district  
13 court? Any other reason been given?

14 MR. BERRETH: There has not been another  
15 reason that's been given, and the reason that the  
16 district court gave was clearly erroneous. The district  
17 court clearly thought that she was constrained to ignore  
18 evidence that all parties agreed is sufficient to  
19 establish removal of jurisdiction in this case.

20 This is a case where there's no dispute  
21 about whether all of the elements necessary for Federal  
22 court jurisdiction exist. The only impediment to  
23 Federal jurisdiction right now is that the district  
24 court felt constrained to ignore that evidence solely  
25 because of -- of a timing restriction that is not found

1 in the plain language of the statute. And when --

2 JUSTICE KENNEDY: I'm -- I'm wondering in  
3 some later case, could attorneys who want to remove  
4 within the 30-day period seek mandate from the Tenth  
5 Circuit to mandate the judge not to require the  
6 evidence?

7 MR. BERRETH: Well, they could -- I suppose  
8 they could try something like that. I think that  
9 they're not required to. Congress has told us that  
10 they're not required to go to such extreme measures.  
11 Congress has told us that what defendants are supposed  
12 to do is, within 30 days of receiving the complaint or  
13 another paper, either of which would put them on notice  
14 that -- that there is the amount in controversy in play  
15 here, that they are required to file their notice of  
16 removal.

17 And in the Tenth Circuit, they have to go  
18 get affidavits. Perhaps the CEO of the company is in  
19 Hawaii or something. And frequently, lawyers aren't  
20 even hired for a couple of weeks after a complaint is  
21 filed.

22 And so you can have a situation where, in  
23 the Tenth Circuit, unlike in other circuits, maybe  
24 there's only 10 days to go find the CEO to get the  
25 affidavit that thought - that is thought to be necessary,



1 when that requirement simply does not exist in the plain  
2 language of the statute. And it doesn't exist -- it's  
3 not enforced in any of the other circuits.

4 JUSTICE KAGAN: Mr. Berreth, I -- I  
5 apologize for going back to this not merits question,  
6 but on the question of why the Tenth Circuit did what it  
7 did, Judge Hartz, who was, of course, dissenting from  
8 denial, made reference to the fact -- and I'm just  
9 quoting here -- that the judges were very busy, and the  
10 appeal presented a knotty matter that requires a  
11 decision in short order.

12 So even he, who was trying to suggest that  
13 an appeal should have been taken, was not suggesting  
14 that the court did what it did because the court agreed  
15 with the trial court.

16 MR. BERRETH: Well, in a case like this  
17 where all parties agree that there's a case in the court  
18 of appeals, so that there is jurisdiction under Section  
19 1254, the Forsyth v. Hammond case confirms that this  
20 Court has the power, the certiorari power to -- to look  
21 to the whole case, to look to any aspects of the case.

22 JUSTICE GINSBURG: But I thought Hohn, which  
23 I think you used as explaining why the case is in the  
24 court of appeals, but Hohn said the only thing that you  
25 can review is the COA, certificate of appealability.

1 You can't use that handle to get to the merits.

2 So the only question is whether the  
3 certificate was improperly denied and not the merits.

4 MR. BERRETH: Well, Justice Ginsburg, the  
5 difference in that case was that the government conceded  
6 error. Government conceded that the merits question was  
7 not in dispute. So this Court didn't need to go ahead  
8 and reach the merits. This Court has reached the merits  
9 in a similar situation in the Nixon v. Fitzgerald case.

10 JUSTICE KENNEDY: But I thought -- are you  
11 saying that all parties concede that this case is in the  
12 court of appeals, both with respect to the proper  
13 exercise of the court's jurisdiction in taking the case  
14 and as to the merits?

15 MR. BERRETH: That's right. Once the case  
16 is in the court of appeals, under Section 1254, Forsyth  
17 confirms that this Court has the power to review any  
18 aspect of the decision --

19 JUSTICE KENNEDY: Well, I -- I think that's  
20 contrary to Hohn, as Justice Ginsburg has just  
21 indicated.

22 MR. BERRETH: Well, Hohn did not purport to  
23 overrule Nixon v. Fitzgerald --

24 JUSTICE KENNEDY: All right. And one's a  
25 COA, and then the other's -- is the statute

1     there.  There may be a difference there's, but I don't  
2     see the difference.

3           MR. BERRETH:           Justice Kennedy, this -- this  
4     case presents different issues than were in play in  
5     Hohn.  And a case that presented issues very similar to  
6     this is Nixon v. Fitzgerald.  And in that case, the  
7     court did both steps.  The court took both steps.

8           The court, number one, confirmed that it had  
9     jurisdiction under Section 1254, which exists here; all  
10    parties agree.  And number two, the court in Nixon v.  
11    Fitzgerald went ahead and addressed the merits question,  
12    which is what we asked the Court to do in this case,  
13    because if the Court doesn't go ahead and address the  
14    merits question in this case, there is a high likelihood  
15    that the merits question won't be addressed, and that  
16    we'll have one circuit alone that has this requirement  
17    out there that flouts congressional intent.

18          JUSTICE GINSBURG:       The reason is that any  
19    careful lawyer in the Tenth Circuit will -- will know  
20    that we -- we'd better put the evidence in the notice of  
21    removal.  So a lawyer is not going to risk failing to do  
22    that to make -- to correct the Tenth Circuit's error.

23          MR. BERRETH:           That's right.  And -- and this  
24    sort of belt and suspenders approach is not what  
25    Congress tells us defendants have to do.

1 JUSTICE SCALIA: But the district court's  
2 opinion is not -- certainly not circuit law, so I think  
3 you exaggerate when you say it establishes bad law for  
4 the circuit. It just doesn't.

5 MR. BERRETH: Well, the --

6 JUSTICE SCALIA: The circuit let the  
7 district court decision stand, but that doesn't make the  
8 district court decision circuit law.

9 MR. BERRETH: The district court was relying  
10 on circuit law in making its decisions.

11 JUSTICE SCALIA: And maybe it was wrong.

12 MR. BERRETH: Well, the circuit law, which  
13 started this, the Laughlin case from 1995, is wrong, we  
14 would submit. And that is the case that got the Tenth  
15 Circuit off on this track.

16 JUSTICE SCALIA: I see. You're just not  
17 relying on this case; you're relying on the fact that  
18 the district court relied on an earlier case.

19 MR. BERRETH: That's right. This -- this  
20 so-called Tenth Circuit rule, which came into effect in  
21 about 1995, what set this circuit off its -- off track,  
22 and this is the case that can bring this circuit back on  
23 track.

24 And to -- to not require the district courts  
25 to feel constrained as the district court here felt --

1 the district court here felt that she was constrained by  
2 Laughlin and by a couple of other cases in the Tenth  
3 Circuit that established this Tenth Circuit rule.

4 And based on that constraint, which, again,  
5 finds no basis in the text of the statute, she refused  
6 to consider evidence that all parties agree establishes  
7 the amount in controversy. The amount in controversy in  
8 this case as established is more than four times the  
9 amount in the statute.

10 JUSTICE SOTOMAYOR: All right. How -- how  
11 would you answer this question: How did the circuit  
12 abuse its discretion?

13 MR. BERRETH: The circuit abused its  
14 discretion by letting stand a decision that so plainly  
15 violated the plain language of the statute that exists  
16 in a case in which further review is highly unlikely, so  
17 that if it's not corrected now it may never be  
18 corrected. And in doing so, it -- it -- it ran counter  
19 to this Court's desire for uniformity among the circuits  
20 in the law, especially uniformity in a matter this  
21 important and this -- and in which Congress has spoken  
22 as clearly as it has.

23 JUSTICE BREYER: To put it more simply, you  
24 think that the circuit abused its discretion by relying  
25 upon an improper legal reason.

1 MR. BERRETH: We do believe it.

2 JUSTICE BREYER: That's classic, right?

3 MR. BERRETH: We do. We don't believe --

4 JUSTICE BREYER: Now, it isn't quite clear  
5 that they did, because they didn't say . But you  
6 think there's a good chance they did. So then I guess  
7 that you would like us to say, if that was your reason,  
8 it's improper and wrong.

9 Now, we'll send it back to see if there is  
10 some other reason.

11 MR. BERRETH: That's right.

12 JUSTICE BREYER: That's your position.

13 MR. BERRETH: That's right. And this Court  
14 reviews --

15 JUSTICE BREYER: There is nothing more to it  
16 than that.

17 MR. BERRETH: This Court reviews judgments,  
18 not rulings.

19 JUSTICE BREYER: No, no. That's a different  
20 point.

21 MR. BERRETH: And --

22 JUSTICE BREYER: What we reviewed is the  
23 word "denied," and the question of the word "denied" is  
24 we're not certain why, but we have a good suspicion. Is  
25 that -- I mean, that's the argument. Is there anything

1 else to it?

2 MR. BERRETH: What else is in the argument  
3 is that this Court is not required to find an abuse of  
4 discretion to rule in our favor in this case. Because  
5 this Court's certiorari power is broad enough so that  
6 this Court doesn't even have to wait for a circuit court  
7 to act. So if this Court doesn't have to wait for a  
8 circuit court to act, it shouldn't be restricted from  
9 doing what is right merely by a circuit court's decision  
10 not to explain its reasoning.

11 JUSTICE SOTOMAYOR: In other words, you win  
12 either way. We say they abused their discretion if they  
13 relied on the wrong law, or we go right to the law  
14 because we have that power to do it.

15 MR. BERRETH: That's right, Justice  
16 Sotomayor. We ask you to review the Tenth Circuit's  
17 decision. There is choices the Court can make in how to  
18 handle this. We think the most logical way for the  
19 Court to handle it is to review the Tenth Circuit's  
20 decision, and in doing so, to look through that, to what  
21 the Tenth Circuit did. And when you do that, you find  
22 this clear error of law, this failure to appreciate  
23 Congress's plain language, this failure to appreciate  
24 the fact that this is not a case that's likely to come  
25 up for review in the future.

1 JUSTICE SCALIA: We don't know what the  
2 Tenth Circuit did. You say the Tenth Circuit's  
3 decision. The Tenth Circuit made no decision. It  
4 declined to take the case, didn't it? It may -- the  
5 statute says it may, and it said we won't. And we don't  
6 know why they said that. Even the dissenters in the  
7 petition for en banc didn't say, oh, the court was wrong  
8 to stand by our earlier decision which you -- which you  
9 complain about. No, they said, you know, this was an  
10 important issue and we should have taken it. Now, you're  
11 saying we are going to review that decision as an abuse of  
12 discretion that you should have taken it. Right?

13 MR. BERRETH: I'm saying that once the  
14 application for an appeal was filed, there is a case in  
15 the court of appeals, therefore, this Court's power is  
16 so extensive it can review any aspect of a decision.  
17 It's not hampered by a lack of an explanation for the  
18 decision by the Tenth Circuit.

19 JUSTICE SCALIA: Is that right? It seems to  
20 me the statute gives the power to the court of appeals.  
21 It says the court of appeals may decline to take it. We  
22 can't override their judgment not to take it unless  
23 there is something unlawful about that judgment. You  
24 give us too much credit, you know, we don't have total  
25 power to make decisions, the courts of appeals are



1 supposed to make.

2 MR. BERRETH: Justice Scalia, under Forsyth,  
3 though, this Court does have the power to not be  
4 constrained by the district court's --

5 JUSTICE BREYER: I thought your answer would  
6 be, of course, he is right. But there is something  
7 unlawful about this decision. Suppose the decision had  
8 rested on his religion. Unlawful, wouldn't it have  
9 been? Suppose they didn't tell us but the dissent told  
10 us. So the question is you're arguing, yes, there was  
11 something unlawful. The unusual thing about the case is  
12 the person who tells us what they were doing is the  
13 dissent.

14 Now, I don't know why the dissent says that  
15 was a reason -- as I read the dissent. Maybe other  
16 people read it differently, but as I read the dissent,  
17 the dissenter was telling us that that was a significant  
18 factor in their decision. All right. As found in the  
19 other case, we find out what they did by reading the  
20 dissent, it doesn't sound to me to be totally unusual.

21 JUSTICE SCALIA: Do you agree with that  
22 description of the dissent? Do you think the dissent  
23 said that that was the reason?

24 MR. BERRETH: The dissent said that the  
25 district court felt constrained by this pre-existing

1 Tenth Circuit precedent to refuse to consider the  
2 evidence.

3 JUSTICE SCALIA: Yes. But the dissent  
4 didn't say why the court of appeals refused to take the  
5 case, did it? It didn't say the court of appeals  
6 refused to take it because it agreed with that prior  
7 decision. It didn't say that, did it?

8 MR. BERRETH: It did not explain that.  
9 That's right.

10 JUSTICE BREYER: You have different judges  
11 who possibly read different language in the dissent to  
12 suggest what the dissent is thinking. So he doesn't say  
13 it literally, but when I read it, I thought that's what  
14 he means.

15 MR. BERRETH: But based on what happened  
16 here, there is just simply no way that the Tenth  
17 Circuit's decision can satisfy an abuse of discretion  
18 standard.

19 JUSTICE ALITO: Let me give you an example  
20 of something that happens quite frequently and maybe you  
21 can tell me if this situation is any different from  
22 that.

23 A district court has to make a decision on  
24 something as to which the district court has discretion.  
25 A party urges the district court to make a particular

1 decision based on one ground. And the one ground is  
2 based on a legal error. The district court rules in  
3 favor of that party but says absolutely nothing. Now  
4 the issue is raised on appeal, the argument is that the  
5 trial judge abused his or her discretion.

6 Now, would that be insulate it from review  
7 for abuse of discretion on the ground that, well, we  
8 really don't know why the judge did what the judge did?  
9 The judge didn't say anything. So the judge might not  
10 have based the decision on this one -- on this legal  
11 error, the only ground that was urged upon the court.  
12 It might have been based on something else.

13 MR. BERRETH: No --

14 JUSTICE ALITO: What would be -- is that  
15 different from this situation?

16 MR. BERRETH: It's not very different from  
17 the situation. A classic abuse of discretion is an  
18 error of law. And there was an error of law here  
19 because the district court felt constrained --

20 JUSTICE KAGAN: Mr. Berreth, that assumes  
21 that when an appeals court decides whether to take an  
22 appeal, all they are doing is making a merits  
23 determination. And if that's all that appeals courts  
24 were doing when they decide whether to take an appeal,  
25 then you would be right. But, in fact, we know from

1 everything we do every day that when a court decides to  
2 take something or not to take something, they are not  
3 just making a merits evaluation. They are doing a  
4 thousand other things as well about how they think it's  
5 best to arrange their docket. And what we don't know is  
6 whether the Tenth Circuit here did one of those things.

7 MR. BERRETH: I believe that what we do  
8 know, what we can glean from this, though, is that by  
9 failing to correct this clear error of law, that was an  
10 abuse of discretion.

11 I don't believe an abuse of discretion was  
12 necessary here because this Court isn't constrained  
13 under the Forsyth case by what the district -- by what  
14 the circuit court did because this Court can act before  
15 the circuit court acts. But an abuse of discretion is  
16 shown here. We can show abuse of discretion. It's the  
17 classic abuse of discretion, of a clear error of law.  
18 But there isn't a floodgates problem here, I think, with  
19 respect to every time a circuit court commits a clear  
20 error of law that it has to be appealable.

21 JUSTICE SCALIA: Well, I guess it's an abuse  
22 of discretion whenever we fail to correct a clear error  
23 of law on a petition for certiorari. Right? And I'm  
24 not going to mention any names, but is that the case?  
25 It's an abuse of discretion. I thought we just had the

1 power to say we don't feel like taking it.

2 MR. BERRETH: I don't believe it would be an  
3 abuse of discretion for this Court. This Court's power  
4 is different than the circuit courts'. The circuits  
5 courts do not have the benefit of the broad, nearly  
6 unlimited power of Forsyth --

7 JUSTICE KAGAN: But this statute gives the  
8 appellate courts tremendous discretion on this area. It  
9 says it may take an appeal, it may not take an appeal.  
10 Think of the thousand things that you want to think  
11 about, not anything invidious, not anything permissible,  
12 but, you know, whether to take an appeal. And that's  
13 the only thing we know about it.

14 Here's a question for you, because I  
15 sympathize with you. Because the next half-hour is  
16 going to reveal that, actually, most of us agree with  
17 you on the merits. Right?

18 JUSTICE ALITO: That might be a little  
19 premature.

20 JUSTICE KAGAN: All right. I will limit it,  
21 I agree with you on the merits. All right? But I just  
22 don't see how to get around this. Here's my suggestion.

23 Would it be sufficient for your purposes,  
24 you're worried about the sort of continuing effect of  
25 this, to just sort of get rid of this case, dismiss this

1 case, but to -- we often explain why we dismiss cases  
2 and to suggest that we are dismissing it because we  
3 don't know whether the Tenth Circuit made a decision on  
4 the merits. And if and to the extent that the Tenth  
5 Circuit wants in the next case to make a decision on the  
6 merits, and if and to the extent that the Tenth Circuit  
7 wants in the next case to make a decision on the merits  
8 when it denies an appeal, it should say so, so as not to  
9 insulate that decision from review.

10 That seems like a fair thing to say to the  
11 Tenth Circuit. Don't insulate your merits decisions  
12 from review. But it also seems to be, you know, to  
13 reflect what is true about this case, which is that we  
14 don't know whether it made a merits decision.

15 MR. BERRETH: Well, this Court doesn't need  
16 to know whether the Circuit Court made a merits decision  
17 to reverse in this case. This Court's discretionary  
18 power, this Court's certiorari power, once there's a  
19 case of the court of appeals doesn't require this Court  
20 to know why the circuit court did what it did.

21 CHIEF JUSTICE ROBERTS: Do you think it's  
22 appropriate for this Court to dismiss certiorari, in  
23 other words, the case is not before us, and then opine  
24 on the merits of the case?

25 JUSTICE KAGAN: No. No. No. I was not

1 suggesting that we opine on the merits of the case. I  
2 would think that that would be not appropriate.

3 CHIEF JUSTICE ROBERTS: I thought the  
4 suggestion was that we tell the Tenth Circuit that this  
5 was wrong?

6 JUSTICE KAGAN: No. No. No. That is not  
7 my suggestion, it might be your suggestion.

8 CHIEF JUSTICE ROBERTS: Well, if we simply  
9 dismiss certiorari, what do you think we have the  
10 authority to say other than the reasons for dismissing  
11 certiorari?

12 MR. BERRETH: Well, I think number one, you  
13 have the power to rule in favor of my client in this  
14 case. I think you have the power perhaps to remand the  
15 case to the Tenth Circuit, this case, and require the  
16 Tenth Circuit to consider the appropriate factors.

17 I don't think it would be appropriate, given  
18 where we are, given how far we've come, given the fact  
19 that all parties agree there's a case in the court of  
20 appeals, given that Forsyth teaches us that this Court  
21 need not know why the circuit court did what it did to  
22 find abuse of discretion, if an abuse of discretion is  
23 necessary, I would submit at a minimum, that this Court  
24 would remand the case to the Tenth Circuit for an  
25 appropriate balancing of the factors.

1           But I don't believe that that is necessary  
2       because I believe that because of Forsyth and because of  
3       this Court's power, this Court has the power to reverse  
4       this case similar to what happened in the Standard Fire  
5       case.

6           CHIEF JUSTICE ROBERTS:           How can -- how can  
7       we remand for an appropriate consideration of the  
8       factors if we don't say that what took place was  
9       inappropriate?

10          MR. BERRETH:           That's -- a decision on the  
11       merits would cover all those bases, Mr. Chief Justice.  
12       A decision on the merits here would correct the error;  
13       it would correct the error in this case, and it would  
14       correct -- keep any errors from happening in future  
15       cases in the Tenth Circuit.

16          JUSTICE KENNEDY:           Is the only way that we  
17       can do that is by granting cert before judgment?

18          MR. BERRETH:           I don't believe that that's  
19       the only way that that can be done. I think that it  
20       happened in --

21          JUSTICE KENNEDY:           Well, let's assume that we  
22       think the case that Hohn controls and this case is in  
23       the -- in the court of appeals only for the purpose of  
24       determining whether the appeal should be taken. If we  
25       make that assumption, then isn't the only way for us to



1 reach the merits to grant cert before judgment?

2 MR. BERRETH: Justice Kennedy, the Court's  
3 certiorari power is broader than that, I believe. So I  
4 don't believe a cert grant before judgment is the only  
5 way because this Court does not need to wait for the  
6 circuit courts to act. But if this Court does wait for  
7 the circuit court --

8 JUSTICE KENNEDY: Well, do we grant it on  
9 the ground that it's interesting? I mean, I don't know  
10 what your -- what your standard is.

11 MR. BERRETH: You grant cert on cases of  
12 national importance, on cases in which there is one  
13 wayward circuit that's so flouting the plain language of  
14 the -- of the statute that it -- that it -- that it  
15 should -- needs to be corrected, that defendants in the  
16 heartland of the country, in these six states, should  
17 have the same benefits as defendants in those other  
18 states.

19 JUSTICE KENNEDY: In other words, we grant  
20 cert to the district court?

21 MR. BERRETH: This Court can grant cert to  
22 the district court in very rare circumstances.

23 JUSTICE KENNEDY: And that's the only way we  
24 can do it, it seems to me, if you assume that the case  
25 is in the court of appeals only for the purpose of

1 determining whether to take an appeal.

2 MR. BERRETH: Well, the Nixon v. Fitzgerald  
3 case, though, confirms that the court is not so  
4 constrained.

5 JUSTICE SCALIA: Well, but we would sort of  
6 frustrate the statute, wouldn't we? The statute gives  
7 the court of appeals the discretion to decide whether  
8 there will be an appeal or not. And you're saying, oh,  
9 no, if they decide there won't be you -- you just reach  
10 in, and you have cert before judgment. I think that's a  
11 real frustration of the purpose of this statute, which  
12 says these matters, you know, are not all that  
13 significant. So it doesn't come to federal court. It  
14 stays in state court, who cares? We trust our state  
15 courts.

16 I mean, the whole purpose of the statute is  
17 to make this, you know, a quick and dirty judgment.  
18 That's why they don't have to state reasons. They just  
19 say no appeal, or appeal.

20 And you're saying, oh, no. It suddenly  
21 becomes laden with -- with all sorts of requirements  
22 that if they're not observed, we -- we grant cert before  
23 judgment. I wouldn't think of doing that, well, with  
24 this statute anyway.

25 MR. BERRETH: Well, when Congress provides

1 in 1453 for appellate jurisdiction over the remand  
2 orders, Congress is providing for jurisdiction in this  
3 Court because Congress didn't legislate to the contrary.

4 When -- when Congress wants to prevent this  
5 Court from having the ability to take up a writ of  
6 certiorari, it does so, as it did in the AEDPA context,  
7 when it explicitly restricted this Court from hearing a  
8 petition for a writ of certiorari or granting one.

9 Congress didn't so legislate here. This  
10 Court has full power to address both the -- address the  
11 merits question in this case.

12 I'd like to reserve the balance of my time.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
14 Mr. Sharp.

15 ORAL ARGUMENT OF REX A. SHARP

16 ON BEHALF OF RESPONDENT

17 MR. SHARP: Mr. Chief Justice, and may it  
18 please the Court:

19 The remand order should stand for at least  
20 two reasons. First, 1447(d) bars this Court's  
21 jurisdiction to review this case at all, on appeal or  
22 otherwise, because the Tenth Circuit did not accept the  
23 remand appeal under 1453.

24 Consequently, this Court has no jurisdiction  
25 at all to review this matter on appeal or certiorari or

1 any other way.

2 CHIEF JUSTICE ROBERTS: So -- so if the  
3 court of appeals said we are not accepting this petition  
4 because of the race of the person seeking removal,  
5 that's just too bad? We can't review that?

6 MR. SHARP: If they give a reason, I think  
7 this Court can review a reason. But if it doesn't give  
8 a reason, it just simply does as this Court sometimes  
9 does with a petition for certiorari -- denied -- there's  
10 nothing to review.

11 CHIEF JUSTICE ROBERTS: So if every case in  
12 which parties seek removal, a particular race of a  
13 person seeking removal, their case is denied 100 out of  
14 100 cases. We still don't have any basis and they know,  
15 gosh, the one thing we -- we can't do is say why we are  
16 doing it. They have a blank check? They can do that  
17 forever without any review by this Court?

18 MR. SHARP: No. I don't think you have a  
19 blank check, because at the time it goes back to state  
20 court, then comes up on final judgment, and this Court  
21 would review the final judgment on whether the remand  
22 was proper.

23 JUSTICE GINSBURG: But it was just pointed  
24 out that lawyers in the Tenth Circuit are not going to  
25 take that risk. The Tenth Circuit precedent, which the

1 district court followed, says you must produce in the  
2 notice of appeal evidence.

3 So what lawyer is going to say to his  
4 client, now, we can easily do that, but I won't because  
5 I want to test whether the Tenth Circuit precedent is  
6 wrong.

7 As a practical matter, this will be  
8 unreviewable because the lawyers will simply conform to  
9 what the Tenth Circuit says is the law.

10 MR. SHARP: Your Honor, I think that's what  
11 the dissent pointed out, is that, what lawyer would not  
12 put on evidence after having that Tenth Circuit rule set  
13 forth as it has been for the last 20 years. But yet, we  
14 do have this case where evidence wasn't presented. Why  
15 their evidence was not presented, no one knows, but it  
16 was clear that Dart had the evidence to present at the  
17 time of this notice of removal but didn't present it.

18 Perhaps it wanted to challenge this issue to  
19 the Tenth Circuit --

20 JUSTICE GINSBURG: Maybe -- maybe because it  
21 thought there wouldn't be any controversy. Maybe they  
22 thought the defendant thought the plaintiff would agree  
23 that the amount was over the jurisdictional order.

24 MR. SHARP: That's a good point, Your Honor,  
25 and that's entirely possible. That, as it turns out,

1 would not be this case, because as we get deeper into  
2 the evidence in this particular case, this one doesn't  
3 meet \$5 million. It's not going to get close to meeting  
4 \$5 million.

5 JUSTICE BREYER: You actually started out by  
6 saying 1447(d), which I thought had nothing to do with  
7 this case. That is, I thought that they -- they were  
8 going -- the relevant statute is 1453(c)(1), which says  
9 a court of appeals may accept an appeal, notwithstanding  
10 Section 1447(d), from an order of the district court  
11 granting or denying a motion to remand. All right?

12 So we are not talking about 1447(d); we are  
13 talking about 1453(c)(1).

14 Now, what they did is they said they have an  
15 order, and the order says, no, we won't accept it. And  
16 the question is, is that order reviewed in this Court?  
17 I didn't think there was disagreement that it is  
18 reviewable.

19 If they had said, We will not accept it  
20 because if we think that it only applies to stoppage in  
21 transitu cases, they would have their reason. Their  
22 reason would have been wrong, and I guess we could  
23 review it. Is that right or not?

24 MR. SHARP: Well, Your Honor --

25 JUSTICE BREYER: Yes or no?

1 MR. SHARP: No, Your Honor.

2 JUSTICE BREYER: No, we can't review any  
3 case when they turn it down, no matter what their  
4 reason. Do you have any authority for that proposition?

5 MR. SHARP: 1450 -- as you pointed out,  
6 1453(c) and 1453 in total adopts the entirety of 1446  
7 and 1447, with limited exception.

8 JUSTICE BREYER: No. It doesn't adopt it.  
9 It says notwithstanding Section 1447(d), a court of  
10 appeals may accept an appeal. So please accept my  
11 appeal; court of appeals says no.

12 My question to you is, does this Court have  
13 the authority to review the order that says no?

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

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

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

17 JUSTICE BREYER: No matter how terrible the  
18 reason, it doesn't. That's your answer?

19 MR. SHARP: No. My answer is because they  
20 did not accept the appeal, then you go back to  
21 1447(d) --

22 JUSTICE BREYER: No, no. I'm saying my  
23 hypothetical is they do not accept the appeal.

24 MR. SHARP: As in this case.

25 JUSTICE BREYER: They say we do not accept

1 the appeal because 1453 only applies to stoppage in  
2 transitu. Okay? A totally wrong reason.

3 Now, are you saying we do not have the  
4 jurisdictional authority to review that order which says  
5 "denied"?

6 MR. SHARP: Denied for some clearly improper  
7 reason?

8 JUSTICE BREYER: Yes, denied for some  
9 clearly improper reason. Are you saying that? And if  
10 so, I'd like to know the authority for that because we  
11 have plenty of cases that go with the analogous  
12 certificate of appeal in habeas cases -- cases where we  
13 take it.

14 MR. SHARP: I understand, Your Honor, and I  
15 don't think I have any cases, but --

16 JUSTICE BREYER: All right. If you don't  
17 have any cases, we might file the other way. If you  
18 agree, and you don't -- all right, I don't know where to  
19 go from here because if you're going to say we can't  
20 take authority where they absolutely can't hear the  
21 case, where it's absolutely clear they're wrong, then I  
22 don't know where to go.

23 MR. SHARP: Well, let me see if I can --

24 JUSTICE BREYER: I don't do that, but, I  
25 mean, but I'm not going to get you to say anything more.



1           MR. SHARP:           Let me see if I can address it,  
2   Your Honor.   Hohn and Miller L. are not remand cases and  
3   Nixon was not a remand case.   1447(d) expressly deals  
4   with remand cases and Section 1453(c)(1) says when there  
5   is an accepted appeal under 1453, then 1447(d), it  
6   doesn't apply.   But all the rest of 1447(d) applies and  
7   all of 1447 applies if the appeal is not accepted.

8           That puts you right back into the 1440(c)(d)  
9   realm and 1447(d) says this Court doesn't have any  
10   jurisdiction under Gravitt.   This is a similar case to  
11   like Kircher v. Putnam Funds where this Court basically  
12   said the district court got it wrong, but we don't have  
13   jurisdiction to hear it.

14          JUSTICE SCALIA:          Do you think it's -- it's  
15   constitutional for Congress to say that certain minor  
16   issues or what it regards as minor issues shall not be  
17   appealable for any reason whatever?   So even if it's  
18   decided you're going to do it for a plainly improper  
19   reason, like religion or race or something, still and  
20   all it ain't -- it ain't worth our trouble, right?  
21   Could Congress do that?

22          MR. SHARP:           Your Honor, I don't think  
23   Congress can -- no, I don't think Congress --

24          JUSTICE SCALIA:          You don't think Congress  
25   did that here.

1           MR. SHARP:           I don't think they did that  
2 here. I think they made a --

3           JUSTICE SCALIA:       I think you're going to  
4 lose then.

5           MR. SHARP:           I think they made a simple  
6 declaration in 1447(d) that remand orders are not worth  
7 the time of the Court to handle on review, and with  
8 respect to class actions, we're going to let the court  
9 of appeals make that choice of whether it makes -- if it  
10 merits any attention on appeal. And if the court of  
11 appeals says it does --

12          JUSTICE GINSBURG:       Do you pay any attention  
13 at all to the obvious purpose of the Class Action  
14 Fairness Act, which was to get cases out of the State  
15 courts and into the Federal courts? Usually, we don't  
16 have that strong Federal policy of having the  
17 adjudication in the Federal court.

18          MR. SHARP:           Yes, Your Honor. CAFA, I think,  
19 made clear that certain larger cases, interstate type  
20 cases, belong in Federal court. This isn't that kind of  
21 a case, but if it was, you also have --

22          JUSTICE GINSBURG:       You said that you would  
23 argue that the amount in controversy was not satisfied  
24 and it seems to me that most plaintiffs who are bringing  
25 class actions are not going to be argued, oh, we can't

1 prove \$500,000.

2 MR. SHARP: Your Honor, as much as my client  
3 would like to see this be a bigger case than it really  
4 is, this particular case, as the Court knows, when the  
5 original allegation was made on a conclusory basis of  
6 \$8.2 million, that was made on the basis of all of the  
7 potential damages for all of the royalty owners.

8 But in this oil and gas context, about 62  
9 percent of all of the oil and gas leases were express  
10 deduction leases; in other words, they expressly  
11 authorized the deductions that we complained about.  
12 There goes about 40 percent of our damages right there  
13 as a matter of law.

14 The second thing is that it turns out, as we  
15 get deeper into this case, that Dart doesn't have all of  
16 the working interest in this particular oil and gas  
17 patch. They have more along the lines of half. There  
18 goes another half of our damages. Now we're down to 20  
19 to 25 percent of the total damages.

20 JUSTICE GINSBURG: You had alleged in your  
21 complaint that the damages that you were seeking were  
22 under \$500,000. If that's what you thought, then you  
23 would be --

24 MR. SHARP: We -- we had no idea at that  
25 time, Your Honor. We didn't know how much. We just

1 didn't have any information whatsoever at that time.

2 JUSTICE GINSBURG: But when they -- when  
3 they did allege in the notice of removal that the amount  
4 in controversy was met, you didn't contest that.

5 MR. SHARP: We didn't need to at that time.  
6 We already had taken on the issue long before any  
7 evidence was presented to us that they had not proffered  
8 any evidence with the notice of removal. Under -- under  
9 the JCV's -- the JVCA --

10 JUSTICE GINSBURG: But what you didn't say  
11 is that there is no such evidence and that our damages  
12 are less than \$500,000.

13 MR. SHARP: We -- we didn't know -- we  
14 didn't have any evidence at all as to what the amount in  
15 controversy was so we didn't allege it in our petition.  
16 And when that was removed without anything other than an  
17 allegation that it was worth 8.2 million, we couldn't do  
18 anything other than say how do we know? Where's your  
19 evidence? We have nothing.

20 JUSTICE GINSBURG: But there's a peculiar --  
21 this State doesn't require the complaint to state the  
22 amount in controversy. But if you were bringing this  
23 case in the Federal court in the first instance would  
24 you have said as plaintiff, the damages that we seek are  
25 under 5,000 -- 500,000?

1           MR. SHARP:           In -- if I had been in -- in  
2     the -- in the know at the time this case was filed, I  
3     would have alleged what the amount of damages were. I  
4     also may have alleged the case in a completely different  
5     way than I did. But I didn't have that evidence. So  
6     consequently, when the removal was made without any  
7     evidence at all from which we could determine what the  
8     amount in controversy really was, we said let's remand  
9     this case because you haven't come up with the actual  
10    evidence.

11           They should have waited and presented all of  
12    the damage evidence and waited for another paper, like  
13    most of the -- other defendants do, but they didn't.  
14    They wanted to jump the gun and get it into Federal  
15    court and they didn't come with their evidence like they  
16    were supposed to. The JVCA is not governed by --

17           JUSTICE GINSBURG:        If there's only one  
18    circuit then, I mean, that is so antithetical with the  
19    whole notion of the Federal rules that you don't plead  
20    evidence. Plain statement doesn't include evidence and  
21    it is quite an extreme interpretation and counter to the  
22    whole thrust of the Federal rules, which you make a  
23    plain statement and then the evidence comes later.

24           MR. SHARP:           Well, the -- the way I read the  
25    JVCA in 1446(a) is that the grounds must be just plainly

1    stated, just like a regular pleading. The grounds are  
2    diversity. The grounds are a Federal question. And  
3    then (c) (2) specifically addresses the amount in  
4    controversy. (A) does not say anything about the amount  
5    in controversy. (C) and (c) (2) addresses the amount in  
6    controversy. And (c) (2)  
7    says --

8           JUSTICE SOTOMAYOR:           I just have never -- I'm  
9    a little hard-pressed to understand why the district  
10   court would be without power to decide this question.  
11   They came in with evidence afterwards. Why couldn't you  
12   have come in with evidence and the district court decide  
13   which one is right?

14          MR. SHARP:           Certainly, that could have been  
15   done if they had gotten over the procedural hurdle to  
16   begin with. The Tenth Circuit rule is pretty simple and  
17   it also follows the JVCA, which basically says if you  
18   want to jump the gun into Federal court and you're not  
19   going to wait on the plaintiff to virtually admit their  
20   way into Federal court, then you're going to have to put  
21   on some evidence. In the Tenth Circuit, they require  
22   prima facie evidence. If plaintiff looks at that prima  
23   facie evidence and does nothing, under Wilson, you're  
24   in. There's nothing more that need be done.

25          JUSTICE KAGAN:           But I don't see where you

1 get that. You know, you say (c)(2), which is the  
2 preponderance standard, but that's just a standard that  
3 the court is going to use to make the determination  
4 about whether to be in Federal court or not.

5 But it seems to me that the statute is best  
6 read -- is really only read to comport as Justice  
7 Ginsburg said, with the rest of the Federal rules. It's  
8 notice pleading, then the original plaintiff has a  
9 choice. The original plaintiff can contest the -- the  
10 removal and present evidence and in that case, the  
11 defendant comes back with evidence and the defendant  
12 bears the burden of proof and the court makes its  
13 decision on the basis of that two sets of evidence.

14 But why one should think of the original  
15 notice as needing to contain evidence is just -- I guess  
16 I don't understand where that comes from.

17 MR. SHARP: Well, the reason for that, I  
18 think, is that the original notice is not a pleading.  
19 It is not like plaintiff originating the case in Federal  
20 court. It's not a pleading. It's actually a motion.  
21 And as with most motions, you generally have to submit  
22 your evidence, you have to prove a motion, and you  
23 usually have to submit your evidence with the motion.

24 JUSTICE GINSBURG: But this is -- this is a  
25 provision for removal. It tracks the language of Rule

1 8(a). And so you're asking for -- oh, even though it  
2 copies Rule 8(a), which certainly doesn't require that  
3 you plead evidence, we do have to do it for notice of  
4 removal.

5 MR. SHARP: You have to for the notice of  
6 removal because (c)(2) does a couple of things. (C)(2)  
7 says if plaintiff alleges something less than the amount  
8 in controversy, that's golden and conclusive. It  
9 doesn't matter that defendant thinks it's different or  
10 that it's higher and would meet the Federal  
11 jurisdictional amount. It's done.

12 But under (c)(2)(a), if there's a silent  
13 petition in the State court, defendant can jump the gun  
14 and say, you know what, I want to allege. I want to say  
15 how much I think is at issue. You can allege that under  
16 (a). But that's not conclusive. There's nothing in  
17 (c)(2)(a) that says what defendant says is conclusive.

18 JUSTICE GINSBURG: If -- if the plaintiff  
19 wanted to challenge that, I could understand your  
20 position and then you would have the respective parties  
21 putting in their evidence.

22 But if the defendant makes an allegation  
23 amount in controversy is met and the plaintiff doesn't  
24 say no, doesn't say that we don't have the amount in  
25 controversy.



1           MR. SHARP:           Justice Ginsburg, in this case  
2   as in most class actions, plaintiffs have no evidence  
3   that they could possibly put on. They couldn't dispute  
4   anything that the defendant actually said. But this  
5   particular issue as to when the -- when the evidence  
6   must be presented, the reason it's done with the notice  
7   of removal is so that the evidence is out there for the  
8   court to make a sua sponte decision if the court wants  
9   to or plaintiff to make --

10          JUSTICE GINSBURG:          But when you bring a  
11   class action, you're looking for big bucks and the  
12   likelihood that it's going to be controverted, that the  
13   plaintiff who's brought a class action in the State  
14   court is going to say, oh, no, we can't -- we can't make  
15   the amount in controversy, that sounds very strange to  
16   me. Most class action plaintiffs are not going to  
17   contest that their claim is worth at least \$500,000.

18          MR. SHARP:           Well, in this particular case,  
19   this case really isn't worth \$5 million. So there was  
20   nothing -- no way, though, at that point for us to  
21   contest one way or another. If the plaintiff is going  
22   to make any kind of a contest, there has to be some  
23   presentation of evidence to begin with. There's not  
24   going to be anything other than a plaintiff saying if --  
25   if the simple allegation is, well, it's worth more than

1     \$5 million, plaintiff has nothing.

2             JUSTICE GINSBURG:             Well, I don't follow that  
3     because ordinarily a plaintiff would state what the  
4     plaintiff's damages are.

5             MR. SHARP:             Plaintiff in a class action  
6     generally does not have the evidence of how many class  
7     members there are or how much they've been damaged.  
8     It's the defendant that deals with all of the class  
9     members on a class-wide or company-wide basis. The  
10    plaintiff generally does not have that information  
11    available, defendant does, and it usually has to be  
12    determined through a discovery process which usually  
13    occurs in State court, at which point the defendant  
14    sends a request for admissions or ask at a deposition.

15            JUSTICE GINSBURG:            In -- in the -- let's  
16    take a case in the Federal court, a class action case.  
17    Plaintiffs don't state what the amount in controversy  
18    is?

19            MR. SHARP:            If they know what the amount in  
20    controversy is, they could state what the amount of  
21    controversy is. But they generally do not. I certainly  
22    did not in this particular case. And in most class  
23    actions that get filed that I'm aware of, plaintiff  
24    doesn't know what their damages are before they filed  
25    the suit.

1 JUSTICE GINSBURG: But you would say that  
2 all that the plaintiff would say is we meet the amount  
3 in controversy?

4 MR. SHARP: They could say the amount in  
5 controversy is 5 million or it's 7 million or whatever  
6 it may be. Whether that has any validity at all after  
7 this Court's ruling in Knowles v. Standard Fire, I don't  
8 know. It's clear that you can't allege something lower  
9 to try to stay under the limit. I don't know whether  
10 you can say something over. I'm not sure that you have  
11 the authority to bind the class until you're already a  
12 class representative, have already been appointed as  
13 class counsel.

14 Nonetheless, these particular cases end up  
15 in which the defendant has the evidence, plaintiff does  
16 not, and this particular case and this particular  
17 statute shows that that evidence has to come in at the  
18 time of removal. If it doesn't come in at the time of  
19 removal, their suggestion is it comes in at the time of  
20 remand. If that were the case, you would find this  
21 evidentiary requirement in the text under 1447 where the  
22 remand rules are found, not in the removal of 1446. You  
23 wouldn't find it at all there. You'd find it --

24 JUSTICE KAGAN: I'm sorry. I just -- you  
25 said if it doesn't come in at the time of removal, it

1 comes in at the time of remand. But there's an  
2 alternate position, which is the notice of removal is  
3 just the allegation, if the plaintiff wants to contest  
4 that, the plaintiff can contest that, and then the  
5 defendant has to come forward with something because the  
6 defendant has the burden of proof.

7 Likewise, if the court thinks that the  
8 allegation is not appropriate, the court can sua sponte  
9 say, you know, you have to show me more because I'm not  
10 sure I have jurisdiction over this.

11 But either way, it all happens in the  
12 Federal court after the notice of removal, which is  
13 merely an allegation, is filed. And that makes perfect  
14 sense. It means that most allegations will just be  
15 accepted as is and the only ones that everybody will  
16 have to come forward with evidence are when there's some  
17 reason to contest it, when either the plaintiff or the  
18 court has some serious doubt about it.

19 MR. SHARP: Well, plaintiff usually has  
20 absolutely no idea what the allegation may be. For  
21 instance, when they came forward and said the amount of  
22 damages is 8.2 million, we had no way to contest that  
23 with any evidence of any kind.

24 Now, if all we had to do to contest it was  
25 say, we contest it, we don't think it's worth \$8.2

1 million, prove it, every plaintiff would say: Show me  
2 your hand; you've got to show your cards.

3 JUSTICE BREYER: Not necessarily. I mean,  
4 it's the same as a complaint. They allege paragraph 1,  
5 paragraph 2, paragraph 3, and the defendant comes in and  
6 says admitted, denied; admitted, denied; not enough  
7 information. All right. So you do the same thing.  
8 What's the problem?

9 MR. SHARP: It -- it could be -- if 1446 was  
10 written such that 1446(a) was the end of it and there  
11 was no further part of the statute, then all they would  
12 have to do is make an allegation and that would be the  
13 end of it. And under 1447 --

14 JUSTICE BREYER: They have to allege the  
15 facts. They have to allege facts. They have to say the  
16 allegation is and so forth. And you say they're not.

17 MR. SHARP: Yeah. And that was part of the  
18 district court's opinion. There were two parts. One  
19 was that there wasn't any evidence; and the second part  
20 was that it was conclusory, that there were no facts.  
21 All you said was 8.2 million. And so both of those were  
22 possible --

23 JUSTICE BREYER: Isn't that a fact?

24 MR. SHARP: Excuse me, Your Honor?

25 JUSTICE BREYER: Isn't 8.2 million a fact?

1 MR. SHARP: It's a conclusory fact.

2 JUSTICE BREYER: Well, it's a fact. They  
3 said in their view --

4 MR. SHARP: It's a conclusion.

5 JUSTICE BREYER: All right. I don't know  
6 what a conclusory fact is as opposed to a regular fact.  
7 That seems like a lot of money to me, but I --

8 MR. SHARP: I would agree with Your Honor.  
9 And it sometimes is difficult, but I think we deal with  
10 those a lot now that Twombly has been adopted by this  
11 Court. Conclusory -- conclusions are not sufficient in  
12 terms of pleading for the plaintiff. And if this  
13 particular Court were going to find that evidence is not  
14 required under 1446, we urge the Court to at least say  
15 go -- go the distance and -- and treat the 1446  
16 allegation like a Twombly allegation and conclusory  
17 would not be sufficient.

18 That's what the district court found, both that you  
19 should have put on some evidence, if you had it you  
20 should have put it on; and secondly, that what you did  
21 say was conclusory.

22 But let me -- let me draw back to this --

23 JUSTICE GINSBURG: Where -- where was that  
24 said about conclusory? I thought that the district  
25 court's position was, sorry, you're too late; I won't

1 entertain anything about 8.2 million or whatever it was.

2 MR. SHARP: The district court did both,  
3 Your Honor. You are exactly correct. It said: I see  
4 you've got some evidence, but you didn't put it on when  
5 you were supposed to; and secondly, she said the 8.2 was  
6 not sufficient by itself because it was conclusory.  
7 That's consistent with Tenth Circuit law and I think she  
8 followed the Tenth Circuit law.

9 What the Tenth Circuit ultimately decided I  
10 have absolutely no idea. They simply denied it. We  
11 don't know whether they denied it for constitutional  
12 grounds, whether they denied it because their docket was  
13 too busy, they denied it because they didn't think this  
14 was a clean vehicle to -- to change their Tenth Circuit  
15 rule.

16 CHIEF JUSTICE ROBERTS: Well, one thing we  
17 know is that they denied it upon careful consideration  
18 of the parties' submissions as well as the applicable  
19 law. Was there anything in the parties' submissions  
20 other than the question on which we granted cert?

21 MR. SHARP: The -- no, I don't think so,  
22 Your Honor. I think the issues that were provided to  
23 the court there in the Tenth Circuit were very similar  
24 to what you see here in this Court, with the exception  
25 of whether this Court has jurisdiction under either

1 1447(d) or, as this Court has suggested, maybe under  
2 Hohn; and under Hohn, then, that this Court would have  
3 some type of review of whether that was an abuse of  
4 discretion to simply say, denied.

5 But no one has come to this Court and said,  
6 we want certiorari granted on -- what should be the  
7 factors, what should the Court decide, when it says  
8 we're not going to take that appeal under 1453.

9 JUSTICE GINSBURG: Do I remember it wrong  
10 in -- in thinking that in your briefing you didn't raise  
11 this question? You just argued what the notice of  
12 removal must contain and it wasn't until there was one  
13 green brief Public Citizen that brought up this  
14 question. So you were content until a friend of the  
15 court made the suggestion to argue this case on the  
16 merits.

17 MR. SHARP: Your Honor, I'm comfortable and  
18 have argued this case on the merits as -- as you know,  
19 but nonetheless, I think I'm duty bound, as all the  
20 parties are, to determine whether this Court has  
21 jurisdiction and what the extent of that jurisdiction  
22 is. You are correct that the amicus first raised the  
23 issue of jurisdiction. In the reply brief, they had the  
24 opportunity to say what they thought was the  
25 jurisdictional issue which they believed was under



1     Nixon. I don't believe Nixon or Hohn, either one of  
2     those cases, govern here because neither of those cases  
3     are remand cases. I think 1447(d) controls on the  
4     remand side only because of the limited exception, not  
5     because of the --

6             JUSTICE BREYER:             Briefly, the Court has  
7     jurisdiction of cases in the court of appeals.

8             MR. SHARP:             Certainly, Your Honor.

9             JUSTICE BREYER:             All right. Now, when in  
10    fact a party appeals a district court's remand, he files  
11    that appeal paper in the court of appeals. The case is  
12    there. Before they decide it, we could take it. After  
13    they decide it, and if they affirm it, or if they decide  
14    to hear it, we could take it. It's there.

15            But suppose they say no.             Does that remove  
16    it from the court of appeals? If the answer to that  
17    question, which is your position that you're arguing, is  
18    now this Court can't take it, then it can't take  
19    anything. It can't take the same things down in the --  
20    in the habeas cases. It can't take the attorney's fees  
21    things. It can't take anything, I would guess because  
22    it would say where a court has discretion and says, no,  
23    we are not taking it, it's not reviewable in this Court  
24    because it's no longer in the court of appeals.

25            Now, what's -- is that your position?             You

1 can see I don't think it's a very good position from my  
2 tone of voice. But if there's something else, maybe  
3 there's a better one.

4 MR. SHARP: Well, then I won't take that  
5 position, Your Honor.

6 JUSTICE BREYER: Well, no, you -- I mean,  
7 I'm often wrong in these things.

8 MR. SHARP: But the position I would take is  
9 that there is a clear distinction in 1447(d) that  
10 addresses remand and has nothing to do with Hohn or  
11 Miller L or Nixon. And so this Court was not wrong in  
12 Miller L or Hohn or Nixon because, of course, those  
13 cases, as the Court points out, were in fact in.

14 But so was Gravitt and so was Kircher.  
15 Those cases were in fact in the court of appeals when  
16 the Court granted certiorari.

17 JUSTICE ALITO: Maybe you answered this  
18 before, but is it your position that under the Class  
19 Action Fairness Act the court of appeals has absolute  
20 discretion, unlimited discretion, to decide whether to  
21 take an appeal or not?

22 MR. SHARP: I believe that's correct, Your  
23 Honor.

24 JUSTICE ALITO: Any reason whatsoever is  
25 okay?

1           MR. SHARP:           Any reason whatsoever is okay,  
2   as long as -- I would guess, as I think Justice Scalia  
3   pointed out, as long as it's not a constitutional  
4   violation.

5           JUSTICE ALITO:       So what if the court of  
6   appeals says, we are not taking this because we just  
7   don't like the Class Action Fairness Act. We think it's  
8   bad public policy; we are never going to take one of  
9   these. That's okay?

10          MR. SHARP:        I don't know if that would be a  
11   constitutional violation, Your Honor. I think if it's  
12   not a constitutional violation, I think it probably  
13   would be okay. But if it is a constitutional violation,  
14   it probably would not, and I think that's a question  
15   that I'm ill prepared to answer.

16          But I do think that there is that discretion  
17   and that discretion is -- is relatively absolute. It's  
18   not completely absolute because the Tenth Circuit is  
19   bound to honor the Constitution before it does any of  
20   the congressional issues.

21          JUSTICE ALITO:       I was going say -- and this  
22   is not certainly true of the Tenth Circuit -- but  
23   suppose things change and we get to the point where each  
24   judge on the Tenth Circuit is sitting on ten cases a  
25   year, and so they can have a ten- month vacation. And

1 they say, well, we don't want to take this, because, you  
2 know, we may not have a ten-month vacation, we'll have a  
3 nine-month vacation. Would that be all right?

4 MR. SHARP: Again, I think it -- it's that  
5 line of what -- when the judge is doing his job, when he  
6 is not doing his job, and whether there's a  
7 constitutional violation. But that's the necessary evil  
8 with respect to discretion in an -- in an appeal. You  
9 have that discretion and that discretion is fairly  
10 absolute. There are no -- in 1453 there's no --

11 JUSTICE ALITO: Well, all the Class Action  
12 Fairness Act says is, I believe, is that the court may  
13 take the case. It doesn't -- it doesn't specify the  
14 scope of discretion. It doesn't say it's absolute.

15 MR. SHARP: It doesn't, Your Honor. You are  
16 absolutely correct. It doesn't provide any parameters  
17 whatsoever as to whether that is an absolute discretion  
18 or how that discretion is to be exercised. And so  
19 consequently, the circuit courts have no -- they have no  
20 direction from Congress and at this point no direction  
21 from this Court as to how much discretion they have  
22 under 1453 when they deny that particular appeal, and  
23 whether this Court then has anything from which it can  
24 say, well, I've seen why you denied it and we would like  
25 to review that.

1 JUSTICE ALITO: Outside of the Class Action  
2 Fairness Act, may a district court -- is a court of  
3 appeals barred from reviewing a decision of the district  
4 court to remand the case based on docket control?

5 MR. SHARP: Not under Thermtron as it exists  
6 at this point, Your Honor.

7 JUSTICE ALITO: Can we infer anything from  
8 that as to whether Congress thought that that would be a  
9 proper reason under the Class Action Fairness Act?

10 MR. SHARP: Your Honor, I see my time is up.

11 CHIEF JUSTICE ROBERTS: You can't escape  
12 that easily.

13 MR. SHARP: Thank you, Your Honor.

14 I think that indicates that it's not  
15 absolute. I know that this Court has suggested perhaps  
16 Thermtron needs to be revisited, but nonetheless  
17 Thermtron is the law of the land as we stand today,  
18 which indicates it's not absolute and that discretion  
19 probably is not absolute, but how to review that without  
20 something more is not clear.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 MR. SHARP: Thank you.

23 CHIEF JUSTICE ROBERTS: Mr. Berreth, you  
24 have three minutes remaining.

25 REBUTTAL ARGUMENT OF NOWELL D. BERRETH

1           ON BEHALF OF THE PETITIONERS

2           MR. BERRETH:           It's -- it's simply improper  
3   to allow courts of appeals to insulate their decisions  
4   from review by not giving reasons for -- for their  
5   decisions. If -- if Congress wants to prevent this  
6   Court from exercising its power to review decisions,  
7   Congress can. It knows how to do it. It did it in  
8   AEDPA, as I mentioned before. And it didn't do it here.  
9   Instead, through 1453 Congress enacted a statute that is  
10  a grant of jurisdiction to this Court.

11          It's one of the unusual -- the rare  
12  instances where Congress granted jurisdiction over  
13  remand issues. And the Forsyth case answers a lot of  
14  questions in this case. It provides that the power of  
15  this Court, the certiorari power of this Court, after  
16  the Court has jurisdiction of a case, which it does  
17  here, the certiorari power of this Court may be  
18  exercised before or after any decision by that Court and  
19  irrespective of any ruling or determination therein,  
20  irrespective of any determination or ruling therein.

21          This Court's power is comprehensive and it  
22  should result in a reversal in this case.

23          If there are not any more questions, thank  
24  you.

25          CHIEF JUSTICE ROBERTS:           Thank you, counsel.

1 The case is submitted.

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

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