

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 GERALD T. MARTIN, ET UX., :

4 Petitioners :

5 v. : No. 04-1140

6 FRANKLIN CAPITAL CORPORATION, :

7 ET AL. :

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9 Washington, D.C.

10 Tuesday, November 8, 2005

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 10:09 a.m.

14 APPEARANCES:

15 SAMUEL H. HELDMAN, ESQ., Washington, D.C.; on behalf

16 of the Petitioners.

17 JAN T. CHILTON, ESQ., San Francisco, California; on

18 behalf of the Respondents.

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P R O C E E D I N G S

[10:09 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear
argument first this morning in Martin versus
Franklin Capital Corporation.

Mr. Heldman.

ORAL ARGUMENT OF SAMUEL H. HELDMAN

ON BEHALF OF PETITIONERS

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

Section 1447(c) provides for fee -- for a
fee award -- allows a fee award when a case is
remanded to State court. There is, by contrast, no
statute providing for a fee award to a defendant who
removes, and successfully defends against, a motion
to remand. There is no statute providing for a fee
award against a plaintiff who wrongly invokes the
original jurisdiction in Federal District courts.

This indication that there is something
peculiarly troublesome and problematic about an
incorrect removal is borne out in the case law of
this Court and other courts and in the experience, I
submit, of every practicing lawyer, that incorrect
removals have detrimental effects, both private and
systemic, yet Respondents would read section 1447(c)

1 in a way that would leave it essentially without
2 practical effect in the world of litigation. It
3 would give no -- it would not effect litigation
4 behavior to any perceptible degree. But both the
5 text of the statute, when read in context, and in
6 light of the legal landscape, and the large
7 objectives and equitable considerations at stake
8 here, weigh in favor of a standard that would, as
9 the Seventh Circuit put it, make fee awards the norm
10 in cases of improper removal.

11 Turning, first, to the text of the
12 statute, the statute is notable, in that, unlike
13 many fee-shifting statutes, it runs only in one
14 direction. That is to say, it allows for fees only
15 when the case is remanded. This is a good textual
16 indicium of remanding, for two reasons. First of
17 all, it shows that the concern was with the
18 incorrect removals, and the problems they cause in
19 deterring them, rather than a more general concern
20 about mitigation about questions of jurisdiction.
21 That is, a defendant cannot get a fee award even if
22 the plaintiff's motion to remand was not very
23 strong.

24 The second thing that the one-way nature
25 tells us is that this, the statute, would be

1 practically meaningless if read as the Solicitor
2 General suggests, and as Respondents suggest, in all
3 but a little sliver, to allow fees only when the
4 removal is unreasonable. If that would not be a
5 precise duplicate of Rule 11, it would at least be
6 close enough to a precise duplicate of Rule 11.

7 JUSTICE O'CONNOR: Well, Rule 11 is about
8 frivolous arguments and motions, is it not?

9 MR. HELDMAN: It is -- yes, Your Honor,
10 that's the shorthand of Rule 11.

11 JUSTICE O'CONNOR: Yes. And
12 Christiansburg Garment is about unreasonable
13 arguments. I suppose that not every unreasonable
14 argument could be deemed to be a frivolous one.

15 MR. HELDMAN: I would -- I agree with you,
16 Your Honor, there is that -- there is a possible
17 sliver of a distinction, but I -- and, I submit, any
18 lawyer advising a client and any lawyer advising
19 himself or herself -- would have a hard time
20 differentiating between the two standards, in
21 practice, so as actually --

22 JUSTICE O'CONNOR: Don't you think you
23 know it when you see it?

24 [Laughter.]

25 MR. HELDMAN: I try to avoid all of them,

1 Your Honor, the frivolous and the unreasonable,
2 both. And I think we all do.

3 CHIEF JUSTICE ROBERTS: But, when Congress
4 passed this language, the scope of Rule 11 was not
5 as well defined and understood as it is now. So,
6 the overlap argument you're making may not really go
7 to what Congress had in mind.

8 MR. HELDMAN: The overlap may not have
9 been perfect, at least, among other things, in the
10 sense that some courts were still under the
11 misimpression that there was a subjective element to
12 Rule 11, as well. So, the Solicitor General is
13 correct in saying that there is that logically
14 possible reason for the enactment of the statute, in
15 that there is not a perfect overlay. We submit
16 that, in light of the other available textual
17 indicia and the policy reasons, that logically
18 possible hypothesis is not the most reasonable
19 hypothesis. We have --

20 CHIEF JUSTICE ROBERTS: When you talk
21 about the text, though -- and I understand that the
22 "may" language here has been read by the Court in
23 very different ways, depending upon the statute --
24 but you have a statute that literally alternates
25 sentences between "shall/may," "shall/may," and it

1 seems to me that if your rule is closer to "shall"
2 than "may," it seems that it was an odd choice of
3 words for Congress to employ.

4 MR. HELDMAN: I think the reason why I
5 would disagree with that, respectfully, Your Honor,
6 is, we are not suggesting that it means "shall" in
7 all instances in which a case is remanded. The rule
8 we are -- or standard we are advocating for deals
9 with that set of cases in which a plaintiff has
10 successfully sought remand. Now, that may
11 constitute most of the cases that are remanded, but
12 there is still the -- a separate category of cases,
13 at least one -- the case is remanded sua sponte. I
14 could well envision that those would not be governed
15 by a "shall" rule for an award of expenses and fees.
16 The --

17 JUSTICE SOUTER: But that -- it could be
18 remanded sua sponte for any number of reasons, so --
19 so, you're saying not that there is some wiggle room
20 to allow "may" to operate, you're simply saying it
21 depends on the party that initiates the remand. And
22 I guess my question is, Could you give us an
23 example, or examples, of a remand on a party's
24 motion, on a plaintiff's motion, in which the fees
25 would not be allowed?

1 MR. HELDMAN: Yes, Your Honor. I think
2 the classic example would be if a plaintiff's
3 complaint, for whatever reasons of negligence or
4 error, misalleges the plaintiff's State of
5 residence; thus, making the defendant reasonably
6 believe that there is complete diversity, defendant
7 removes, plaintiff then submits affidavits and
8 property records and everything showing it really
9 was a mistake. And --

10 JUSTICE GINSBURG: What about the
11 plaintiff who waits over a year to move for remand
12 when it appears as though the case is going in the
13 defendant's favor? Doesn't "may" give a district
14 court discretion to say, "I'm not going to reward a
15 plaintiff, who wants to go back to State court only
16 when he was on the brink of losing in Federal court,
17 with fees."

18 MR. HELDMAN: I think, even in that
19 hypothetical case, which I will say, next, is not
20 this case -- even in that hypothetical case, it is
21 still the plaintiff who has the cleanest hands of
22 all. The plaintiff's hands are cleaner than those
23 of the defendant --

24 JUSTICE GINSBURG: Just -- you say that
25 your presumptive fees are included would cover that

1 case. It, in part, is -- resembles your case,
2 because you didn't move to remand until the case was
3 pending in the Federal District court for over a
4 year.

5 MR. HELDMAN: That's correct, Your Honor.

6 And if the Court would like, I could explain a
7 little bit more about why that occurred.

8 When the case was removed -- the
9 plaintiffs in this case, unlike plaintiffs in many
10 cases, did not have a preference for State court.
11 There was no attempt to plead around removal. And
12 the case was removed, and it was an arguably correct
13 removal. And plaintiffs' counsel were then in the
14 position, unfortunately, due to --

15 JUSTICE O'CONNOR: Well, indeed, wasn't
16 there a change in the law after the case was
17 removed?

18 MR. HELDMAN: There were relevant changes
19 in law in some circuits, Your Honor. There was -- I
20 don't believe any dispositive change in Tenth
21 Circuit law --

22 JUSTICE O'CONNOR: Well, the Tenth
23 Circuit, I thought, held that the district court was
24 within its discretion to deny the award, because, at
25 the time of the removal, the defendants had

1 objectively reasonable grounds to believe that
2 removal was proper.

3 MR. HELDMAN: Yes, Your Honor. And we do
4 not dispute that standard, because there were out-
5 of-circuit cases, though later overruled by those
6 own circuits. We've suggested that punitive damages
7 could be aggregated. And that was the -- that was
8 one of the bases for removal, but not the only one.

9 So, when plaintiffs removed the case,
10 plaintiffs had no incentive, by virtue of 1447(c),
11 in the way it had been interpreted in the Tenth
12 Circuit, to make remand their first order of
13 business, given plaintiffs' experience that these
14 battles can be long and hard and unrewarding. And
15 the removal was arguably correct.

16 Now, by a year later, that had changed.
17 That calculus of the plaintiffs' counsel had changed
18 when defendant -- one of the defendants -- put in an
19 affidavit suggesting that the named plaintiffs had
20 no damages. At this point, the plaintiffs' calculus
21 changed, because there was, at this point, a very
22 real risk that if plaintiffs ignored the problem now
23 and proceeded to a victory in the district court,
24 then that victory could be vacated at the
25 defendant's interest -- instance, by claiming a lack

1 of jurisdiction. And this, then, was a risk that
2 the plaintiffs could not take at that point.

3 JUSTICE KENNEDY: Well, you stated, at the
4 outset -- and, I think, properly so -- that we're
5 interested in what incentives --

6 MR. HELDMAN: Yes, Your Honor.

7 JUSTICE KENNEDY: -- are put in place by
8 whatever rule we adopt. I'm not sure about the
9 incentives in -- on the facts of this case, or in
10 other cases, based on your rule. The defendant has
11 only 30 days to decide whether to remove. That's a
12 Federal right that should be given some due
13 consideration. You, in effect, want to make the
14 removing defendant an insurer against improper
15 removal. And I just don't know why that should be
16 the policy.

17 MR. HELDMAN: I -- my basic answer as to
18 why that would be the policy, Your Honor, are,
19 again, the textual reasons and the large objective
20 reasons. Let me go back to the -- finishing up the
21 textual reasons, if that is satisfactory.

22 The statute previously had said -- had
23 included the word "improvidently." Back when only
24 costs could be awarded, and not fees, the statute
25 had used the word "improvidently." Now, many courts -

1 - and I don't vouch for this interpretation, but I
2 note that it was prevalent -- many courts then said
3 costs may be awarded, or should be awarded, only
4 when the removal was improvident, in the sense of
5 being worse than merely incorrect. And the Congress
6 deleted that word, "improvident" -- "improvidently."

7 Now, this, I submit, is a good indication
8 that the Congress did not mean for there to be a
9 standard of "worse than incorrectness." Had
10 Congress meant for that to be the standard, then
11 Congress would not have deleted the word that had
12 gotten many courts there, or Congress would have put
13 in some other textual reason.

14 JUSTICE GINSBURG: Was it a big issue when
15 the provision did not provide for counsel fees?

16 MR. HELDMAN: I'm sorry --

17 JUSTICE GINSBURG: When it --

18 MR. HELDMAN: -- Your Honor, I didn't --

19 JUSTICE GINSBURG: -- when the statute
20 provided for costs --

21 MR. HELDMAN: Yes, Your Honor.

22 JUSTICE GINSBURG: -- which, in our
23 system, do not include counsel fees, was it a big
24 issue when all that was included was costs?

25 MR. HELDMAN: It was a big enough issue to

1 be the subject of comment among many courts over the
2 decades. It was a big enough issue to be covered in
3 the treatises -- the expense was not great, but it
4 was a recurring mitigated issue.

5 JUSTICE STEVENS: May I ask a question? I
6 never had one of these problems when I was in
7 practice, so it's all new to me. But, "an order
8 remanding the case may require payment of just costs
9 and any actual expenses, including attorneys fees,
10 incurred as a result of the removal," does that mean
11 that if, after the removal there are substantial
12 proceedings in the trial court, in an appeal, and so
13 on, and then you suddenly discover that the -- there
14 was a mistake and you remand -- you can get fees for
15 all the litigation work that took place in the
16 interim? It could be a very large sum of money,
17 couldn't it? It's not just fees incident to the
18 fight over whether removal was proper.

19 MR. HELDMAN: I believe that's correct,
20 Your Honor. I believe that -- to me, the most
21 natural reading of that language is that the
22 district court, at least in the first instance, will
23 have fact-finding authority as to what fees and other
24 expenses were --

25 JUSTICE STEVENS: And that --

1 MR. HELDMAN: -- incurred as --

2 JUSTICE STEVENS: And that would --

3 MR. HELDMAN: -- a result of the removal.

4 JUSTICE STEVENS: -- conceivably, could
5 include all sorts of discovery and arguments on
6 motions and so forth that might actually save time
7 in the subsequent proceeding, if it goes back to the
8 State court.

9 MR. HELDMAN: My anticipation would be
10 that most courts would use their factfinding
11 authority to try to figure out what work would have
12 to be reduplicated in the State court, to
13 compensate that work, or the work that only arose by
14 virtue of it being in Federal court.

15 JUSTICE STEVENS: So, the judge's
16 discretion includes both whether or not to include
17 any fees, and he also has quite a bit of discretion
18 on what to include in the fee award, I suppose.

19 MR. HELDMAN: I think that's right, Your
20 Honor. Whether you call it "discretion" or
21 "factfinding authority," I think that's right. That
22 is a separate question from what we have here. But
23 I think the district court would have the first-line
24 authority and the main --

25 JUSTICE KENNEDY: But --

1 MR. HELDMAN: -- authority.

2 JUSTICE KENNEDY: -- shouldn't we know
3 what the rule is with reference to the extensive
4 fees Justice Stevens requires? Shouldn't we know
5 that, as part of the background for what we're going
6 to do in this case? And if you say -- and you seem
7 to indicate, "Well, it's going to be up to the
8 discretion of the judge." Well, if we know what the
9 rule is, then it's not part of the discretion.

10 MR. HELDMAN: Yes, Your Honor. I've proposed
11 what I suggest would be the standard, which is,
12 going back to the text, "what expenses were incurred
13 as a result of," and I think that naturally means
14 "what were in -- what costs and fees were incurred
15 that would not have been recur -- incurred, or would
16 not have been incurred again, had the case been left
17 in State court." Now I --

18 JUSTICE SOUTER: Well, why doesn't -- why
19 doesn't that also go for counsel fees? I mean,
20 there are expenses in discovery, but there --
21 there's counsel time in discovery. So, wouldn't the
22 same rule apply?

23 MR. HELDMAN: Yes, Your Honor, that is --
24 that is what I'm suggesting, that the same rule
25 would apply. Now, I would add --

1 JUSTICE BREYER: I want to know what it is
2 you're arguing for. That is, I -- when I get
3 through all these words in the attorneys-fees cases,
4 I've got it in my mind that, like the civil rights
5 statute, they say, "You normally get fees, unless
6 you shouldn't." All right? That means you're
7 normally gonna to get them.

8 MR. HELDMAN: Yes.

9 JUSTICE BREYER: The plaintiff, anyway.
10 All right? Then we have a case with a copyright.
11 The copyright says it's all the way up to the
12 district court, really, which means a grab-bag, and
13 what the particular judge thinks is fair in the
14 instance. And I guess you could have a rule saying,
15 "You hardly ever get fees." So, in my mind, I got
16 it, "Well, who knows?" and, "No, you almost always
17 do," or, "No, you almost always don't." Now, is
18 that a good characterization? And what -- which one
19 of those three are you arguing for?

20 MR. HELDMAN: I --

21 JUSTICE BREYER: I know you're not arguing
22 for "You always don't."

23 [Laughter.]

24 MR. HELDMAN: I think that is a good
25 characterization, Your Honor.

1 JUSTICE BREYER: All right. Then, which
2 one do you want? Do you want the thing --

3 MR. HELDMAN: Of those three --

4 JUSTICE BREYER: Yes.

5 MR. HELDMAN: -- Your Honor, we would
6 prefer the "almost always."

7 JUSTICE BREYER: All right. Now, if you
8 want "you always get them," in the civil liberties
9 cases there is a good policy reason, according to
10 the court, underlying that judgment of how Congress
11 wanted to give this to people to vindicate civil
12 liberties. I've never heard of a policy of closing
13 the Federal court door, because if, in fact, you
14 were to have that rule in this case, it would simply
15 discourage people from removing it in cases where
16 they think they have a good claim to remove it,
17 because they'd have to pay huge costs if they were
18 wrong. So, I'm not aware of any closing doors of
19 Federal court policy.

20 MR. HELDMAN: First of all, Your Honor, I
21 would suggest that it is not we who would close the
22 doors of Federal court. It is, by definition in
23 these cases, the Congress that has closed the doors
24 of --

25 JUSTICE BREYER: Now I --

1 MR. HELDMAN: -- Federal court.

2 JUSTICE BREYER: -- unfortunately, I
3 guess, from your position, I don't know what
4 Congress meant here.

5 MR. HELDMAN: No, Your Honor --

6 JUSTICE BREYER: Therefore, I'm trying to
7 figure it out in terms of the policy --

8 MR. HELDMAN: Yes, Your Honor. I'm --

9 JUSTICE BREYER: -- as well as the
10 language. Okay, in terms of the policy, I'm simply
11 saying that I don't know why you have a better claim
12 than a copyright plaintiff, and I can think of why
13 you don't have as good a claim as a civil rights
14 plaintiff, the reason I said. So, what is your
15 response to that?

16 MR. HELDMAN: First of all, Your Honor, I
17 apologize for not being clear enough. When I say it
18 is not we, but the Congress, that has closed the
19 doors of the Federal court, I mean on the
20 substantive question of whether the case was
21 removable. We are dealing here, only by definition,
22 with the cases that were incorrectly removed. So,
23 the real question, I think, when we get down to the
24 policies, is, there is some concern that defendants,
25 under the rule I propose, would have an incentive to

1 remove somewhat fewer cases. They would reserve the
2 questionable removals only for the cases in which
3 they could convince themselves and their clients
4 that the argument was good enough, and the stakes
5 high enough, to justify the cost.

6 Now, I submit to you, that's exactly the
7 same sort of situation we have now. It is merely
8 that, now, when making that cost-benefit analysis,
9 the defendant is thinking only of its own fees that
10 it will incur. But, still, that is a cost. And the
11 Congress, notably, has not seen fit to alleviate
12 that cost at all. So, some questionable removals
13 are already deterred by expense under the rule I
14 propose; some, more would be. On the same -- by the
15 same token, the rule I propose would give good
16 incentives to the plaintiffs' lawyers to be aware of
17 the jurisdictional issues, to mitigate them, and
18 mitigate them well.

19 Now, why do I suggest to you that --

20 JUSTICE GINSBURG: Why? Under your rule,
21 there's a presumption. I thought that the rule
22 you're asking us to approve is the one that's
23 applicable in the Seventh Circuit, which is that you
24 presume there will be counsel fees when a case is
25 remanded to the State court, unless there are

1 extraordinary circumstances that would overcome the
2 presumption. Now, that's what you're -- that's the
3 rule you're asking for?

4 MR. HELDMAN: I don't know, Your Honor,
5 whether the Seventh Circuit would follow up its
6 presumption language by saying the presumption can
7 only be overcome in extraordinary circumstances.
8 That is, I don't know whether the Seventh Circuit
9 sees its standard as the Piggie Park standard or as
10 something slightly towards the middle from the
11 Piggie Park standard. I think, in this case, we
12 would win either way, but I would suggest that there
13 is a systemic benefit from not having a multiplicity
14 of standards, from having at least most attorneys-
15 fee-shifting disputes be resolvable by, is it
16 "almost always," is it "who knows," or is it "never,
17 unless unreasonable"?

18 I think there's a benefit to having
19 nessatavite litigation over --

20 JUSTICE GINSBURG: But there's such a
21 different in the context. The Title VII plaintiff
22 gets fees after a defendant has been found a law-
23 violator. And, here, a defendant has a right to
24 access to a Federal court. And the statute -- you
25 are emphasizing text. If one looks at the Omnibus

1 Act out of which this provision came, we see two
2 removal-friendly pieces in it, right? Because, no
3 longer do you have to verify a removal petition; you
4 just do a simple notice. And that's one. And there
5 was another. Oh, yes. Yes, you don't have to put up
6 a bond anymore if you want to remove.

7 MR. HELDMAN: That's correct, Your Honor.

8 Rather than characterizing those as "removal-
9 friendly," I would characterize them as "resource-
10 friendly." I think all of this can be -- can be
11 understood as a congressional effort, overall, to
12 reduce the amount of resources that are put into
13 jurisdictional issues. And the rule we're proposing
14 would further that goal; that is, by somewhat
15 deterring the, by definition, incorrect removal.

16 Now, on -- every incorrect removal not
17 only harms the plaintiff -- harms the plaintiff a
18 good bit -- the delay, the expense -- And there's
19 been some concern I've heard voiced about the great
20 expense that this might impose on defendants -- it
21 imposes a great expense on defendants only precisely
22 in as much as the defendant has imposed a great
23 expense on the plaintiff by its incorrect action.

24 Now, it is true that fees --

25 CHIEF JUSTICE ROBERTS: Well, but that's a

1 general -- you're -- you seem to be arguing more
2 generally for the British rule, rather than the
3 American rule. And I read our decision in Fogerty
4 to say that when we're confronted with language like
5 this, "may," you don't assume that Congress intended
6 to overrule the basic American rule and apply the
7 British one.

8 MR. HELDMAN: In that aspect of Fogerty,
9 Your Honor, the Court had already gotten to the
10 point of saying, "The standard is the same for
11 prevailing plaintiff and prevailing defendant." And
12 then, in the -- in the passage we're talking about,
13 the Court was looking at the "one size" argument.
14 Okay. And that same standard for both should be
15 "usually" or "nearly always." And it was in that
16 context, in which there would be a "shall" or
17 "nearly always," running both ways, that the Court
18 said, "That would be a rare bird in American law,"
19 the "both ways" British rule that -- which is my
20 understanding of the British rule -- "That's such a
21 rare bird, we would want to see some clearer
22 indication of that."

23 In this case, I submit, we don't have a
24 rare bird at all. It is not unusual to have a -- to
25 have "may" interpreted in a statute as meaning

1 "usually should," in some class of cases. Piggie
2 Park did it. Many cases in other contexts,
3 following Piggie Park. So, it's not such a rare
4 bird.

5 CHIEF JUSTICE ROBERTS: Those were all
6 the, you know, private attorneys-general-type cases,
7 where you're -- where the view is that the plaintiff
8 is carrying out a mission of ferreting out and
9 enforcing the law. But that's -- this is a quite
10 different context.

11 MR. HELDMAN: I don't think so, Your
12 Honor, because, first of all, it is true that
13 usually you're awarding fees against a violator of
14 Federal law. But that is because most fee statutes
15 involve Federal causes of action. This is unusual
16 and notable, in that it is a fee-shifting statute
17 for a procedural violation. Therefore, to say,
18 "Yes, but they didn't violate Federal law," proves
19 too much, I think. And so, we shouldn't make such a
20 distinction between the private attorney-general
21 cases and this case, because the plaintiff -- every
22 plaintiff who successfully seeks remand is
23 furthering systemic values, as well as the
24 plaintiff's own values, is furthering the value of
25 comity, federalism, State sovereignty, the Federal

1 docket load, and helping to avoid the --

2 CHIEF JUSTICE ROBERTS: Every party who
3 prevails on a motion to admit evidence or to exclude
4 evidence is promoting the policies and the rules of
5 evidence, but we don't think that those motions
6 should result in a -- in fee shifting.

7 MR. HELDMAN: That is largely because,
8 Your Honor, the Congress does not pass statutes
9 allowing for fee shifting. And, second, removal is
10 different. Removal has federalism concerns, as this
11 Court has noted, going back into the '40s. Removal
12 -- jurisdiction being an unwaivable thing, these
13 cases -- wrong removal possibly leading to the
14 disaster in which the case goes to trial in Federal
15 court, judgment is entered, and it has to be vacated
16 on appeal and done all over again, because nobody
17 recognized the jurisdictional issue. By encouraging
18 plaintiffs to challenge these more effectively, and
19 by encouraging defendants to reserve their
20 questionable efforts only for the cases that really
21 deserve it, I think we would be -- we would be
22 serving public ends, as well as private ones.

23 Now, I would love to reserve the remainder
24 of my time, unless there are further questions.

25 CHIEF JUSTICE ROBERTS: Thank you, Mr.

1 Heldman.

2 MR. HELDMAN: Thank you, Your Honor.

3 CHIEF JUSTICE ROBERTS: Mr. Chilton, we'll
4 hear now from you.

5 ORAL ARGUMENT OF JAN T. CHILTON

6 ON BEHALF OF RESPONDENTS

7 MR. CHILTON: Mr. Chief Justice, and may
8 it please the Court:

9 Since the first Judiciary Act of 1789,
10 Congress has given defendants the right to remove
11 cases to Federal court. Respondents did so properly
12 in this case, and there's no dispute about that.
13 The -- both lower courts found that we had
14 reasonable grounds for removal, on two bases --
15 based on the only circuit court decisions then
16 extant on aggregating punitive damages and attorneys
17 fees. Petitioners conceded that fact here this
18 morning and also in the trial court, district court,
19 before they moved to remand, a year after removal
20 and after the district court in the same hearing had
21 indicated its tentative decision to rule against
22 them on the merits of a dismissal motion.

23 So, the issue before the Court today is
24 whether 1447(c) requires a district court to impose
25 a substantial penalty in the form of attorneys fees

1 on Respondents for what is concededly in this case a
2 reasonable, but ultimately unsuccessful, exercise of
3 their statutory right to remove.

4 And we think the answer to that answer to
5 that question is clearly no, for two reasons. The
6 first is that Section 1447(c) is not a fee-shifting
7 statute at all. Like its predecessor, Section 5 of
8 the Act of March 3, 1875, Section 1447(c) just
9 confirms the district court's power to award fees,
10 as well as costs, when it lacks subject-matter
11 jurisdiction and, therefore, must remand the case.
12 There was a prior contrary common-law rule, and the
13 Act of March 3, 1875 abrogated it.

14 JUSTICE SCALIA: You're saying that it
15 allows Rule 11 fees to be imposed --

16 MR. CHILTON: Yes, Your Honor.

17 JUSTICE SCALIA: -- which otherwise
18 wouldn't be imposable. It seems to me that what
19 cuts against that interpretation is the fact that it
20 does try to set some standard. It says, "An order
21 remanding the case may require payment of just cause
22 -- just costs and any actual expenses, including
23 attorneys fees." Especially the "just costs,"
24 that's a standard. It's not saying, "You can use
25 Rule 11 and apply whatever standard Rule 11

1 contains." What's your response to that?

2 MR. CHILTON: My response would be that,
3 as the questioning already today in the Court has
4 revealed, there are two questions on a fee motion.
5 One is entitlement, the other is amount. "Just
6 costs" refers to amount, not entitlement.

7 JUSTICE O'CONNOR: But I'm -- I don't --
8 I'm not sure that I agree with you that Rule 11
9 applies. It really deals with frivolous actions.
10 And here, we're talking about the imposition of
11 reasonable costs, are we not? Just costs.

12 MR. CHILTON: Just costs and expenses,
13 including attorneys fees, yes. It is --

14 JUSTICE O'CONNOR: I think the standard is
15 different than that, under Rule 11.

16 MR. CHILTON: Well, if the Court
17 interprets --

18 JUSTICE O'CONNOR: I mean, why --

19 MR. CHILTON: You --

20 JUSTICE O'CONNOR: -- is it in your
21 interest to ask us to apply Rule 11? You're hoping
22 that, in future cases, it will be less likely that
23 these are awarded?

24 MR. CHILTON: Well, we're proposing our
25 first argument, because we think it's textually

1 correct and historically correct. It leads to the
2 same result, in our case, a point I was about to
3 make. Our second argument is that, even if you
4 construe this statute as a fee-shifting statute, the
5 standard under the fee-shifting statute should be
6 the one that Your Honor just mentioned, which is,
7 it's a multifactor test, but the primary factor is
8 whether the ground for removal is objectively
9 reasonable. And under that standard, we win.

10 JUSTICE O'CONNOR: Now, the Solicitor
11 General, I guess, suggests that the Christiansburg
12 Garment standard is the appropriate one.

13 MR. CHILTON: That is true, he does.

14 JUSTICE O'CONNOR: And do you disagree
15 with that?

16 MR. CHILTON: Well, our two standards, I
17 believe, are relatively close. We both focus on the
18 objective reasonableness of the removal. Now, the
19 Solicitor General, I believe, is a little bit less -
20 - leaves a little bit less discretion to the
21 district court than we would. We believe that
22 Congress, in using the word "may," in using, if you
23 wanted to look at this as a fee-shifting statute,
24 the word "just," meant to leave district courts with
25 considerable range of discretion to deal with cases

1 that come up that are unusual in the way a party can
2 "game the system," if you will, in respect to
3 removal. For example, in this case, waiting as long
4 as the plaintiff did before seeking a remand.

5 Obviously a plaintiff --

6 JUSTICE O'CONNOR: Well, but there had
7 been case-law changes, hadn't there?

8 MR. CHILTON: There had been, but that was
9 not the reason for their delayed motion for remand.

10 As they explained in the trial court, the reason
11 they suddenly became aware, supposedly, of the right
12 to remand was this declaration saying that they, the
13 plaintiffs, hadn't paid any money for collateral
14 protection insurance, a fact of which they must have
15 been aware at the time they filed their complaint.
16 Furthermore, in the Tenth Circuit, you cannot look
17 to any document, other than the complaint or notice
18 of removal, to establish the facts for removal
19 jurisdiction. Therefore, the declaration could not
20 possibly have justified a motion to remand.

21 But, in any case, my more general point,
22 apart from the facts of this case, is that there are
23 cases in which one party or the other uses remand to
24 basically avoid a -- an adverse decision on the
25 substance, and when that party does, whether it's

1 the defendant or the plaintiff, we feel that the
2 district court ought to have discretion to award
3 fees.

4 CHIEF JUSTICE ROBERTS: I thought a
5 comparative advantage of the Solicitor General's
6 approach, and, by the same token, of the
7 Petitioner's contrary approach, is that it avoids a
8 lot of litigation over a collateral issue, like
9 which court you ought to be in. As soon as you get
10 into a multifactor analysis, then you get briefs on
11 both sides arguing their factors and the other
12 side's factors, and the judge has to decide. If
13 there's a presumption that applies in most cases,
14 you don't waste time over jurisdictional squabbles
15 like this.

16 MR. CHILTON: Well, first you have the
17 jurisdictional dispute, of course, resolved. It's
18 only when there's a remand that you get to the fee
19 issue. But, your more general point is, yes,
20 obviously a categorical rule will have less
21 litigation than a multifactor test. The question
22 is, What did Congress want? -- not, What will reduce
23 litigation costs? And we believe Congress would
24 have wanted, in this situation, and did want, to
25 allow for discretion to be exercised. Now, it's a

1 limited discretion under our test, because if -- in
2 general, if the removal is objectively reasonable,
3 as ours was, we believe Congress would not have
4 allowed an award of fees, except in those
5 circumstances, as I've mentioned, where the system
6 is being gamed by one party or another.

7 JUSTICE BREYER: It's hard to have three
8 different kinds of standards with attorneys-fees
9 statutes. I mean, there are quite a few of them,
10 and -- I can understand saying some of those
11 statutes mean you almost always should get it,
12 because of special policies reflected in the history
13 of the statute, et cetera. That's Christianson.
14 And I can imagine Fogerty, where you say, "As to an
15 ordinary one, it's ordinary." "Ordinary" means it's
16 up to the discretion of the district judge. And
17 there may be many reasons. Do we want a third one,
18 where --

19 MR. CHILTON: Well --

20 JUSTICE BREYER: -- let's say they pass
21 this -- and it's "unusual"? I mean, we're going to
22 get several categorizations and shadings of
23 statutes. I don't have an answer. I'm not
24 suggesting a point of view on this. I'm curious
25 what you think.

1 JUSTICE GINSBURG: I --

2 MR. CHILTON: No --

3 JUSTICE GINSBURG: -- think we do have

4 three, if you count Fogerty, because you have the

5 Christianson, which is the most defendant-friendly.

6 And then you have Piggie Park, which is the most

7 plaintiff-friendly. And then you have Fogerty,

8 which is been -- has been called the multifactor --

9 MR. CHILTON: You're --

10 JUSTICE GINSBURG: -- test.

11 MR. CHILTON: -- quite correct, in our

12 view, Justice Ginsburg. We believe Petitioners are

13 requesting the Piggie Park standard. We believe the

14 Solicitor General is proposing the Christiansburg

15 Garment standard. And we think we're smack in the

16 middle, with Fogerty. Now --

17 JUSTICE SCALIA: You know, it would really

18 improve the dignity of this Court if we referred to

19 "Piggie Park" as "Newman."

20 [Laughter.]

21 MR. CHILTON: I have no response to that

22 remark, Your Honor.

23 [Laughter.]

24 MR. CHILTON: To pick up the train of my

25 argument --

1 [Laughter.]

2 MR. CHILTON: -- we believe that
3 discretion is not only the better part of valor, but
4 what Congress enacted in this statute. And that's
5 what Fogerty said -- "may" means "may," it doesn't
6 mean "must" -- it connotes discretion -- and that an
7 automatic rule for the award of fees on remand, or
8 even the contrary rule, would pretermitt that
9 discretion, so that when, as in this case, there are
10 not overriding public-policy -- public policies that
11 are enforced by one party -- for example, in the
12 civil rights cases, where it is the plaintiff who is
13 the private attorney general enforcing what this
14 Court has said, or Congress's most important
15 policies -- when that's not present, as in this
16 case, then "may" means "may." Particularly, that's
17 so when, as in this case, the defendant is not a
18 violator of Federal law, has done nothing that
19 impinges or removes rights from the defendant -- or,
20 excuse me, the plaintiff -- but, in fact, serves
21 Federal interest in seeking removal. That --

22 JUSTICE SCALIA: I suppose that one could
23 assume that to be the congressional intent, if
24 Congress often has such an intent for such
25 substantial imposition of financial liability. Do

1 you have any other examples of where Congress has
2 essentially left it up to the district judge, with a
3 broad, virtually nonreviewable -- I guess it's
4 reviewable, but -- to some extent -- but multifactor
5 test, whatever the district judge considers
6 important?

7 MR. CHILTON: Yes, Your Honor, I do --

8 JUSTICE SCALIA: What are --

9 MR. CHILTON: -- as a matter of fact.

10 JUSTICE SCALIA: -- what are some other
11 examples where Congress has allowed this degree of
12 financial liability to be subjected to the
13 discretion of a district judge?

14 MR. CHILTON: The Freedom of Information
15 Act, Your Honor, which was passed in 1974, which,
16 interestingly, I think, undermines the Petitioner's
17 argument that, in using the word "may," Congress
18 somehow incorporated the "Newman" standard.

19 [Laughter.]

20 MR. CHILTON: The -- in 1974, in adopting
21 the Freedom of Information Act, Congress
22 specifically considered adopting -- and it was in
23 the Senate bill -- a four-factor test. It was
24 removed from the bill, and the -- both conference
25 reports on that bill explained that it was removed

1 not to require a district court to award fees
2 automatically in any case, but, rather, because the
3 existing law was following, in fact, a multifactor
4 analysis, and Congress wished to preserve it and
5 felt that the four-factor test, which had been in
6 the Senate bill, was too restrictive.

7 Now, there is another example, as well, in
8 the -- in ERISA. The cases under ERISA -- other
9 than the special case of trust funds seeking
10 delinquent contributions from employers; those are
11 treated differently -- but for cases simply of
12 suits by trustees against beneficiaries,
13 beneficiaries against employers, beneficiaries
14 against trustees, the courts have, in fact, employed
15 a multifactor test.

16 JUSTICE SCALIA: And this is liability for
17 what? In -- for --

18 MR. CHILTON: Denying benefits, for
19 example.

20 JUSTICE STEVENS: Why isn't Fogerty an
21 example. Isn't the -- what is the standard that
22 Fogerty announces? It rejects the British rule, and
23 that it rejects the one favoring -- one party over
24 the other? What is the standard you get out of
25 Fogerty, other than pure discretion of the district

1 court?

2 MR. CHILTON: Well, Your Honor, I believe
3 it's not pure discretion. The footnote at the end
4 of the opinion says that district courts may follow
5 the Third Circuit standard, looking first at whether
6 the argument of the losing party was frivolous,
7 unreasonable, et cetera, and then looking at other
8 factors that are indicated by the particular
9 concerns of the Copyright Act. And, yes, I quite --
10 you're, of course, right that the -- Fogerty did
11 adopt the multifactor test under the Copyright Act.

12 JUSTICE GINSBURG: Well, as it was just
13 mentioned, "multifactor," in a footnote, it said it
14 would be neutral. I think the big point in Fogerty
15 was that it was going to apply in both directions,
16 be neutral as between plaintiff and defendant.

17 MR. CHILTON: That much is true, but the
18 footnote does say that, in applying the neutral
19 standard, the district courts are free to follow --

20 JUSTICE GINSBURG: You've given us, in
21 your multifactor test, you said, "objectively
22 reasonable basis to remove." And another factor
23 might be that the plaintiff delayed in moving to
24 remand. What other factors, besides the
25 "objectively reasonable basis to remove" and the

1 plaintiff's delay?

2 MR. CHILTON: Well, we outlined several in
3 our brief, Your Honor, at page -- let me see -- page
4 41. In addition, I think the case of Gardner versus
5 Allstate Indemnity, 147 F.2d 1257 indicates another.

6 There, the defendant moved successfully to remand
7 after receiving a -- an adverse decision on the
8 merits. It may have had an objectively reasonable
9 ground for removal. In that case, it actually
10 didn't, but, I mean, you can conceive of a situation
11 in which they would have had one. And, obviously,
12 after the merits decision went against it, it wanted
13 a second chance. Now, in that situation, I believe
14 a district court might, despite the objectively
15 reasonable basis for removal, decide that the
16 defendant should pay costs and fees.

17 CHIEF JUSTICE ROBERTS: What is your
18 position on what fees we're talking about. Do you
19 agree with your friend that money that's spent,
20 that's going to have to be spent anyway in the State
21 court proceeding, though, is not wasted, that that's
22 not recoverable?

23 MR. CHILTON: I absolutely do not agree,
24 Your Honor. I think that "incurred by reason of the
25 removal" refers to fees and costs that are

1 specifically directed to the jurisdictional issue,
2 and that only; no other fees or costs in the
3 litigation at all. Of course, that question isn't
4 presented here, because we had no -- or the lower
5 courts decided that -- the Petitioner is --

6 JUSTICE KENNEDY: Have the lower courts
7 addressed that issue?

8 MR. CHILTON: Not to my knowledge, Your
9 Honor.

10 JUSTICE KENNEDY: Are there -- are there
11 instances, under your view of the statute, in --
12 under the standard you propose, where costs would be
13 awarded, but not fees?

14 MR. CHILTON: Well, if you view 1447(c) as
15 an -- a power-enabling bill, not a fee-shifting
16 statute, the answer is yes. I believe if the -- if
17 it's viewed as a fee-shifting statute, the answer
18 would be no, although, of course, the court has
19 discretion to decide how much to award, and, in that
20 sense, could award either no fees and all costs, or
21 some --

22 JUSTICE KENNEDY: And, once --

23 MR. CHILTON: -- combination.

24 JUSTICE KENNEDY: -- again, can you advise
25 us of their practice or lower-court opinions

1 addressing that issue?

2 MR. CHILTON: I cannot, but there
3 certainly are lower-court decisions that allow fees
4 on remand in very small amounts that could not
5 possibly have been sufficient to compensate for the
6 work done.

7 JUSTICE KENNEDY: Because we think of
8 costs as really a matter of course. As Justice
9 Scalia points out, it says "just costs," which -- I
10 take it "just" modifies just the cost and not the
11 actual --

12 MR. CHILTON: Well, as the statute is
13 written, that's true.

14 JUSTICE STEVENS: May I return to Fogerty
15 for a minute? As I read the footnote at the end of
16 the opinion, which you - because say referred to the
17 Third Circuit rule, it talks about, "nonexclusive
18 factors are permissible." It doesn't say the factors
19 used by the Third Circuit are the -- you know, set any
20 particular standard. As I read it, it leaves the
21 discretion entirely up to the district court to
22 apply whatever reasonable and appropriate factors
23 seem correct in the particular case.

24 MR. CHILTON: Well, that may be, Your
25 Honor. I read the decision, and perhaps --

1 JUSTICE STEVENS: But you're --
2 MR. CHILTON: -- incorrectly --
3 JUSTICE STEVENS: -- but you're --
4 MR. CHILTON: -- as steer --
5 JUSTICE STEVENS: -- the part of the
6 decision on which you rely is the footnote at the
7 end of the opinion, is that right?
8 MR. CHILTON: Yes.
9 JUSTICE STEVENS: Yes.
10 JUSTICE SCALIA: If the -- the broader
11 discretion we give to the district court, the less
12 litigation there is likely to be on this subject.
13 MR. CHILTON: That is certainly true.
14 Fewer appeals, at any rate. And as long as we're
15 talking about litigation expense, I think, to bring
16 us back to one of Petitioner's arguments, they
17 contend that their standard would reduce the amount
18 of costs invested in jurisdictional issues. But, in
19 the same breath, they also say that the standard
20 that they propose would encourage plaintiffs to move
21 for remand. The two cannot coexist. If -- not
22 every remand motion is meritorious. So, by
23 encouraging plaintiffs to move for remands, you're,
24 in fact, increasing the amount of jurisdictional
25 litigation and the amount of costs incurred at --

1 over jurisdictional issues.

2 I wanted, if I could, to answer one
3 question that Justice Ginsburg asked in the
4 beginning about the Omnibus Act. Justice Ginsburg
5 mentioned that it contained removal-friendly
6 provisions. And it does. They're not only the two
7 that were mentioned -- lack of -- or abolition of
8 the verification doctrine and deletion of the
9 removal bond -- but much more significant expansions
10 of removal jurisdiction. The -- for us from
11 California, in particular, the 1988 Act said that
12 you could disregard the citizenship of "Doe," or
13 fictitiously named, defendants in deciding whether
14 there was diversity -- complete diversity in a case.

15 That was huge for us in California, because
16 virtually every State court complaint in California
17 contains "Doe" defendants. And prior to that
18 amendment, their citizen -- you had to guess at
19 their citizenship, and it prevented removal of
20 virtually all State court complaints, on diversity
21 grounds. So, to say that this 1988 Act was designed
22 to discourage removals plainly goes against the text
23 of the Act.

24 Furthermore, removal furthers not only the
25 private interest of the defendant, but the

1 Government's interest, the Federal interest, the
2 interest of the people of the United States, in many
3 cases. And that's precisely why Congress has given
4 us the right to remove in a whole series of areas,
5 not only in diversity, but, of course, in Federal
6 question. An interesting example, because it arose
7 for the first time in 1875, in the same Act of March
8 3, 1875, from which this cost provision comes, an
9 Act that was passed by the lame-duck radical
10 Republicans at the same time they passed the Civil
11 Rights Act of 1875, for the purpose of allowing
12 Federal courts to enforce the new Federal rights
13 that Congress felt were not being adequately
14 addressed in State courts. So, the State courts,
15 particularly the South, were thought to be hostile
16 to the new Federal rights.

17 Similarly, just this year, in the Class
18 Action Fairness Act, Congress allowed defendants to
19 remove multi-State class actions, not for the
20 benefit of the defendants, but for the benefit of
21 the entire Nation. It -- the Senate report, at page
22 9, specifically points out that it is those cases
23 which most affect the interstate commerce of this
24 Nation, and, for that reason, they belong in Federal
25 court. Now, why would Congress choose to discourage

1 defendants from removing those very cases by
2 adopting a plaintiff-friendly --

3 CHIEF JUSTICE ROBERTS: Well, it's not
4 those very cases. By definition, this issue only
5 comes up when the case should not have been removed.

6 MR. CHILTON: The --

7 CHIEF JUSTICE ROBERTS: So, it's not the
8 cases that Congress wanted to be removed that we're
9 talking about.

10 MR. CHILTON: But, as this Court explained
11 in Piggie -- no, excuse me, Christiansburg Garment,
12 Your Honor-- the imposition of fees discourages
13 activity when it's a Federal right that's being
14 enforced, saying that fees are imposed whenever
15 there's a near miss, a reasonable case that's
16 brought to enforce the Federal right. You
17 discourage the very thing that Congress intended
18 people to enforce. That's my point here.

19 Yes, it's true, fees would only be awarded
20 in those cases where the defendant is unsuccessful
21 and the case is remanded. But, for example, in the
22 Class Action Fairness Act, that can happen even when
23 there's a perfectly, not just reasonable, but
24 exactly proper ground of removal, because the Class
25 Action Fairness Act, among other things, says that

1 when there's more than one-third, and less than two-
2 thirds, the citizens in the State in which the
3 complaint was originally filed, they're in the
4 class, then the district court has discretion to
5 remand the case, even if it's properly brought in
6 Federal court, removed to Federal court.

7 So, my general point is that Congress has
8 enacted these removal statutes to promote Federal
9 policy, and that it would be counter to that policy
10 to discourage defendants from removing cases,
11 particularly if the amount of fees that could be
12 awarded would include all the fees incurred in
13 Federal court. I mean, we're talking about very
14 substantial fee awards, in that event. And they
15 would be a significant deterrent from exercising the
16 very rights that Congress has said defendants should
17 have for the benefit of the public.

18 Furthermore, as already pointed out, State
19 court plaintiffs never enforce congressional policy;
20 otherwise, they'd be in Federal court, under
21 Federal-question jurisdiction. The defendant has
22 not violated Federal law, so neither of the
23 exceptional circumstances --

24 JUSTICE STEVENS: I wonder if that's a
25 correct statement. It seems to me there are a lot

1 of cases in State courts. In 1983, cases are
2 subject to State court jurisdiction, where the
3 plaintiffs are trying to enforce a Federal right.

4 MR. CHILTON: Yes, but those can be
5 removed, Your Honor.

6 JUSTICE STEVENS: Oh, I just thought you said
7 the State court would never be enforcing a Federal -
8 - I may --

9 MR. CHILTON: Well --

10 JUSTICE STEVENS: -- I may have
11 misunderstood your point --

12 MR. CHILTON: I --

13 JUSTICE STEVENS: -- I'm sorry.

14 MR. CHILTON: -- I, perhaps, was
15 overgeneralizing. What I meant to say was, in cases
16 that are remanded because of lack of Federal
17 jurisdiction, it is never the case that the
18 plaintiff is enforcing a Federal right, because, if
19 he were, there would be Federal-question
20 jurisdiction.

21 JUSTICE STEVENS: In other words, it was
22 an improperly removed case.

23 MR. CHILTON: That's right.

24 In any event, if the Court has no further
25 questions, I am through.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 Counsel.

3 Mr. Heldman, you have four and a half
4 minutes remaining.

5 REBUTTAL ARGUMENT OF SAMUEL H. HELDMAN
6 ON BEHALF OF PETITIONERS

7 MR. HELDMAN: First, regarding the
8 continued insinuation of some manipulative intent by
9 the timing of the -- of the removal, there was, in
10 this case, no finding by the district court, no
11 suggestion by the district court, that there was any
12 such intent, or that that was a reason to deny fees,
13 no suggestion by either of the lower courts to that
14 effect. Absent that, I think it might be that a
15 delay in removal could, in an appropriate case, be
16 something that went into the calculus of what
17 expenses and fees were incurred as a result of the
18 removal. That may well go into the "amount"
19 question. But, absent a manipulative intent, it is
20 still the case that it is the plaintiff who
21 successfully sought remand, whenever it happened,
22 that has the cleanest hands in the courtroom.

23 Second, Respondents describe their
24 proposal as a middle ground. There is no middle
25 ground in this case, unless it is, "Eh, who knows?"

1 Their proposal is not middle ground, because their
2 proposal says, "There shall be no award of fees, in
3 general," as the most important factor, where there
4 was a reasonable basis for removal. That cannot be
5 described as a middle ground. That tilts it in one
6 way. We tilt it in the other way. And, as I say, a
7 middle ground only gets you perhaps to Fogerty. And
8 it -- and, as we show on page 30 of our blue brief,
9 in the footnote, the district -- there has been a
10 lot of litigation, after Fogerty, still trying to
11 figure out what the standard is -- not only district
12 court litigation, but appellate litigation, and the
13 circuits are all over the map as to even what the
14 copyrights standard is. I urge the Court, for the
15 benefit of the practicing bar, as well as the bench,
16 not to go down that road.

17 Now, the road made some sense in Fogerty,
18 and multifactor tests makes some sense in the --
19 FOIA and ERISA, because, in those instances, there
20 are very weighty public interests on both sides of
21 the litigation. When an ERISA claimant sues the
22 ERISA fund, it's not a -- it's not that one is the
23 particular favorite of the law; they are both
24 favorites ---

25 JUSTICE GINSBURG: Why --

1 MR. HELDMAN: -- of the law.

2 JUSTICE GINSBURG: -- not, then, just say
3 "objectively reasonable basis to remove"? That's a
4 one -- one standard.

5 MR. HELDMAN: That standard is
6 appropriate, as in Christiansburg, Your Honor, where
7 the party who is potentially subject to the award is
8 the favorite of the law in question. That is, where
9 there is a special reason not to seek to over-deter
10 that person, to encourage that person to litigate
11 creatively and aggressively the reasonable, though
12 ultimately wrong, propositions. And so, I think the
13 case reduces, in a large sense, to: Does Federal
14 law encourage the creative aggressive litigation of
15 questionable removals? And among the ways we know
16 that it does not is that this Court has said, for
17 60-something years, that removal is strictly
18 construed, as every circuit has understood that to
19 mean. That means doubts are resolved in favor of
20 remand. If Congress wanted to encourage the removal
21 of questionable cases and get it all hashed out and
22 make the defendants -- they would, first of all,
23 abrogate that rule, and, second, they would remove
24 the rule in Section 1447(d) precluding reviews of
25 remand orders. Because as we have it now, except

1 for special cases where the Congress decides
2 otherwise, like the recent Class Action Act, where
3 we have, otherwise, the substantive law is bent
4 towards remand, bent against the creative and
5 aggressive advocacy of perfectly reasonable, but
6 wrong, propositions.

7 JUSTICE GINSBURG: If the law was so anti-
8 removal, then one would expect there would be some
9 kind of threshold check once you get to district
10 court. But the removal process is: you file your
11 notice that you're removing. That's it. There it
12 goes. And the district court doesn't do any kind of
13 initial screening to let it in. It just gets there
14 --

15 MR. HELDMAN: My experience --

16 JUSTICE GINSBURG: -- by rapid transit.

17 MR. HELDMAN: I'm sorry, Your Honor. My
18 experience in the district courts is that they do do
19 an initial screening, as they should, in order to
20 limit themselves on their own motion to their own
21 proper jurisdiction. This court, unfortunately --
22 the district court -- did not. But my experience in
23 the district courts is that some of them do, but a
24 lot of -- at least a substantial number of cases
25 slip through the cracks.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 Counsel.

3 MR. HELDMAN: Thank you, Your Honor.

4 CHIEF JUSTICE ROBERTS: The case is
5 submitted.

6 [Whereupon, at 11:06 a.m., the case in the
7 above-entitled matter was submitted.]

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