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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in case 05-85, Powerex Corporation versus Reliant Energy Services.

Mr. Frederick.

ORAL ARGUMENT OF DAVID C. FREDERICK,
ON BEHALF OF PETITIONER

MR. FREDERICK: Thank you, Mr. Chief Justice, and may it please the Court.

In 1988, the Government of British Columbia created Powerex to perform a variety of public functions including the marketing of surplus hydropower generated by development of the Province's natural resources pursuant to bilateral agreements with the United States.

The Ninth Circuit, however, denied Powerex its rightful status as an organ of a foreign State entitled to remove this case from State court to Federal court.

Before addressing the appellate jurisdiction issue, I'd like to highlight briefly the two key errors by the Ninth Circuit in rejecting Powerex's organ status. First, the court articulated the wrong test for determining an entity's status as an organ of a foreign State. The factors the Ninth Circuit found dispositive

1 are inconsistent with the FSIA; and second, the court
2 overlooked crucial evidence of Powerex's public
3 functions that are the best indication of its sovereign
4 status. The British Columbia Government receives and
5 distributes the proceeds from Powerex's operations,
6 supervises Powerex through BC Hydro, subjects Powerex to
7 provincial laws not applicable to private companies and
8 grants Powerex special benefits including exemption from
9 taxation.

10 JUSTICE SOUTER: Mr. Frederick, are you
11 going to get to the 1447(d) problem?

12 MR. FREDERICK: Yes. Let me address that
13 now. The court's -- the district court's remand order
14 was appealable because it was not issued under 1447(c).

15 JUSTICE GINSBURG: The district court
16 thought it was and one we did, the district court said I
17 have no authority in -- under -- over any of these
18 people. So back it goes.

19 MR. FREDERICK: The district court made two
20 mutually exclusive statements, that remand was proper
21 and that it lacked subject matter jurisdiction. Because
22 of that inconsistency, the court of appeals --

23 JUSTICE SCALIA: Removal. Removal was--

24 JUSTICE GINSBURG: -- talking that -- where
25 are these statements?

1 JUSTICE SCALIA: You said remand was proper.
2 That's the --

3 MR. FREDERICK: Sorry. That removal was
4 proper under the sovereign removal provisions of 1441(d)
5 and 1442(a). It also then said it lacked subject matter
6 jurisdiction.

7 JUSTICE SOUTER: But at the point it was
8 acting it was remanding, and its basis for remanding was
9 not that it thought the removal had been proper; the
10 basis for its remanding was that it said it lacked
11 jurisdiction over three of the other cross defendants.

12 MR. FREDERICK: But immunity was the basis
13 of the district court's thinking that it had to remand.

14 JUSTICE SOUTER: It may have been, leaving
15 aside the question of whether it was right or wrong, it
16 may have been wrong. But what it thought it was doing
17 it seems to me is fairly clearly remanding for a
18 jurisdictional reason.

19 MR. FREDERICK: And what this Court's cases
20 say, Justice Souter, is that the remand has to be a
21 ground cognizable under 1447(c).

22 CHIEF JUSTICE ROBERTS: Those cases are all
23 -- all based on Thermtron. You don't have any doubt
24 that Thermtron would come out the other way today, do
25 you?

1 MR. FREDERICK: I certainly do --

2 CHIEF JUSTICE ROBERTS: -- in light of, in
3 light of the statutory language as it exists now?

4 MR. FREDERICK: Mr. Chief Justice, the
5 Thermtron rule has been reaffirmed no less than four
6 times by this Court, notwithstanding two statutory
7 amendments. It has been reaffirmed and stare decisis on
8 the basis of statute is the strongest form of stare
9 decisis. So I do --

10 CHIEF JUSTICE ROBERTS: But stare decisis on
11 the basis of statute is kind of a weak basis when the
12 statute's been changed.

13 MR. FREDERICK: Mr. Chief Justice, the
14 Thermtron rule was reaffirmed earlier this term in the
15 Osborn case, has been reaffirmed in prior cases lead --
16 from the time it was decided even through statutory
17 amendments. Our submission is that if Congress intended
18 to change that rule, it could have done so clearly. And
19 we note that the Respondents here don't ask for
20 Thermtron to be overruled, and it is clear from the
21 amicus on their side, that the only way you could rule
22 in favor of the Respondents in this case would be to
23 overrule Thermtron.

24 JUSTICE GINSBURG: But Thermtron was such a
25 far cry from this case. In Thermtron the district judge

1 said yes, I have jurisdiction but I'm just too busy, so
2 I'm going to toss this case back to the State court.

3 MR. FREDERICK: But here, Justice Ginsburg,
4 the court did have jurisdiction because removal was
5 properly effectuated once the entities that we moved
6 were identified correctly as sovereigns, either foreign
7 sovereigns in the case of BC Hydro, or Federal
8 sovereigns in the case of BPA.

9 JUSTICE SCALIA: But we go into that
10 question all the time, 1447(b) is a nullity. I mean, if
11 in every case you're going to be able to appeal whether
12 indeed there was lack of jurisdiction, you're going to
13 be able to appeal every case.

14 MR. FREDERICK: No, you're not,
15 Justice Scalia, and here's why. Immunity is not a
16 ground for remand because it is not a precondition for a
17 removal by a sovereign. It is a separate freestanding
18 issue. It is a status determination that determines
19 whether removal is proper by those sovereigns.

20 JUSTICE SCALIA: That would be fine if
21 1447(d) said that there is no appeal so long as the
22 basis for removal was proper, but that's not what it
23 says.

24 MR. FREDERICK: But if in Thermtron the
25 court, the district court had said my docket is too

1 busy, I therefore lack subject matter jurisdiction and
2 remand under 1447(c), I don't think there's any doubt
3 that the courts would look beyond the label given.

4 JUSTICE GINSBURG: I don't think the court
5 said in *Thermtron*, so therefore, I have no subject
6 matter jurisdiction.

7 MR. FREDERICK: I'm speaking hypothetically,
8 Justice Ginsburg. My point is that the label the
9 district court attached here was the wrong label, and
10 that's why the court of appeals to satisfy --

11 JUSTICE GINSBURG: Why? Why was it wrong
12 when with respect to the sovereign parties, the district
13 court said I have -- these people are totally immune
14 from suit; therefore, I have no jurisdiction over them.

15 MR. FREDERICK: Because it is inconsistent
16 with the notion that remand orders have no preclusive
17 effect to remand a case on the ground that the
18 sovereigns are immune, and force them to relitigate
19 their immune status in State court. That is precisely
20 why Congress enacted these sovereign removal provisions.

21 JUSTICE SOUTER: Then what you are really
22 arguing for is, in effect, a separate rule, and that is
23 that 1447(d) has an exception when we are dealing with
24 foreign sovereign immunities.

25 MR. FREDERICK: That's our backup

1 submission, Justice Souter. You do not need to reach
2 that if you agree with our principal submission and --

3 JUSTICE SOUTER: But the trouble with the
4 principal submission, it seems to me, is that we have
5 said that even if the district court has come to an
6 erroneous conclusion about jurisdiction, if it
7 understands that it is making a jurisdictional ruling,
8 that is not appealable.

9 MR. FREDERICK: But Justice Souter, it did
10 so. The case -- the cases in which the Court has said
11 so have always been grounds -- jurisdictional grounds
12 cognizable under 1447(c). Immunity from suit is not
13 such a ground, because the purpose of having the removal
14 provision on the basis of status is to allow the Federal
15 courts to decide the immunity status. If the court
16 sends the case back to State court on immunity grounds,
17 it does not have preclusive effect in the State courts.
18 The State courts will be obliged to relitigate sovereign
19 immunity status and there will be no recourse except
20 through appeal through the State court --

21 JUSTICE SCALIA: Well, you're into your
22 backup argument now.

23 MR. FREDERICK: No.

24 JUSTICE SCALIA: The backup argument that
25 you're now making, that not your principal argument.

1 MR. FREDERICK: No, Justice Scalia, that's
2 not our backup argument. Our point is that in this
3 case, the district court had jurisdiction by virtue of
4 the successful removals, which everybody conceded were
5 correct, that the label that it attached, immunity is
6 subject matter jurisdiction, is not a label for a ground
7 recognized in 1447(c). So it was appropriate for the
8 court of appeals to exercise appellate jurisdiction to
9 determine whether or not the remand was a mandatory
10 remand under 1447(c) or a discretionary one of the type
11 this Court has recognized in the Cohill case.

12 JUSTICE GINSBURG: Did you request -- when
13 the question of Powerex -- authority over Powerex was
14 before the district court, did you request that the
15 district court give you a 1292(b) order before the court
16 remanded the case, so that you could have gotten the
17 case -- the question up on appeal?

18 MR. FREDERICK: I don't believe that we did,
19 Justice Ginsburg. This case was remanded. A motion --
20 motions for clarification were subsequently brought.
21 But a 1292(b) order was not requested by Powerex.

22 JUSTICE GINSBURG: Because that would have
23 taken care of it if the district judge agreed to delay
24 the remand to allow this question of law to be
25 determined by the court of appeals.

1 MR. FREDERICK: It is certainly the case
2 that in searching through the docket entries, you'll
3 discover that there was a holding by the district court
4 of the remand, which is in itself an unusual procedure.

5 But the point that is important here is that
6 even apart from that, when the court had jurisdiction
7 pursuant to the removal provisions, it did not lose
8 subject matter jurisdiction by finding the immunity
9 claims upon the part of the Federal and foreign
10 sovereigns. And it is their theory that the district
11 court never had subject matter jurisdiction, and that
12 has to be wrong because it conflicts with the purposes
13 behind the removal provision to give the sovereigns the
14 opportunity to litigate their immunity defenses in
15 Federal court.

16 JUSTICE SCALIA: They don't care whether it
17 had subject matter jurisdiction or not. It's not an
18 essential part of their case. Their case is even if it
19 did, it mistakenly thought it didn't, and remand it, end
20 of case.

21 MR. FREDERICK: Their submission in this
22 Court, however, is that there was no subject matter
23 jurisdiction.

24 JUSTICE SCALIA: That's their backup
25 argument, I think.

1 MR. FREDERICK: Well, their backup argument
2 should be rejected by the Court as wrong.

3 JUSTICE BREYER: If in fact it goes back to
4 the State court and you litigate it, you lost, can you
5 raise as a point of appeal that you did not receive two
6 things the statute guaranteed you? One was a
7 determination in the Federal court that you're an organ
8 of a Federal State, and second, a bench trial?

9 MR. FREDERICK: Justice Breyer, there's no
10 provision --

11 JUSTICE BREYER: No, but could you?

12 MR. FREDERICK: By the time the appeals in
13 the State court would have been exhausted, the very
14 benefits --

15 JUSTICE BREYER: No, I'm just asking could
16 you, yes or no. I --

17 MR. FREDERICK: We would certainly make the
18 argument.

19 JUSTICE BREYER: Yes, okay. Now if you lost
20 in the State court, could you then use that as a basis
21 for asking this Court to accept jurisdiction? And if
22 they -- if we did, we took it and we heard the case,
23 reverse, and send it back for the proper tribal under
24 the statute?

25 MR. FREDERICK: Justice Breyer, I would not

1 want to foreclose any arguments that we might try to
2 make; but let me point out to you that in the years that
3 it would take to march through the State court system,
4 Powerex, as a sovereign, would be denied its right to
5 have a bench trial --

6 JUSTICE BREYER: See, what I'm getting at is
7 whenever there's an erroneous remand, the practical
8 problems that you raise are present. And they're awful.
9 I don't deny them. I mean, they're right there in the
10 statute, it foresees them. So I wonder, is there any
11 difference in this case from every case where the remand
12 is erroneous?

13 MR. FREDERICK: I do think foreign
14 sovereigns are different, and Congress intended to treat
15 --

16 JUSTICE BREYER: In terms of the legal right
17 to get the trial to which the law entitles you on your
18 view of the law, there is no difference.

19 MR. FREDERICK: The foreign sovereign is
20 entitled to a bench trial. It is entitled to other
21 procedural protections with respect to treatment of
22 garnishment, other --

23 JUSTICE BREYER: And you would get those
24 eventually, it would just have to happen.

25 MR. FREDERICK: It would be after -- it

1 would be --

2 CHIEF JUSTICE ROBERTS: But that's purely --
3 pure question begging. I mean, the whole issue on the
4 merits is whether it's a foreign sovereign or not. And
5 you can't assume that you're correct when the remand
6 provision or the provision barring appeal when it's been
7 remanded doesn't care whether you're correct. The idea
8 is, you can get a correct determination in State court
9 through up to review by this Court eventually, as you
10 can in Federal court. There's no reason to assume that
11 the Federal court is the only place you would get a
12 correct determination.

13 MR. FREDERICK: But Mr. Chief Justice, the
14 point of having Congress enact these removal provisions
15 and to ensure jurisdiction in the federal court for
16 sovereigns on the basis of their status is entirely to
17 vindicate those rights and interests. If Powerex were
18 sued for not --

19 JUSTICE SCALIA: It's -- it's the same with
20 diversity jurisdiction. You can make the same argument.
21 There's nothing distinctive here. This statute says
22 that in a foreign sovereign immunity case you have a
23 right to be tried in Federal court. Fine. But the
24 statute also says that if you're a defendant in a
25 diversity suit, you have a right to trial in federal

1 court.

2 And I don't know why this is any more
3 demanding of an exception to 1447(d) than is ordinary
4 diversity jurisdiction, where Congress has said you're
5 entitled to trial in federal court.

6 MR. FREDERICK: Diversity is different,
7 Justice Scalia, and here's why.

8 When a case is removed on diversity grounds,
9 the court of appeals -- the district court is obliged to
10 examine the bases of diversity. That is what the
11 court's removal duty is. When a foreign sovereign
12 removes a case, the district court's duty is to
13 determine is this a foreign State within the meaning of
14 the FSIA. If it is, I have jurisdiction.

15 JUSTICE STEVENS: Mr. Frederick, may I just
16 follow up on Justice Breyer's question? It seems to me
17 that your answer suggests that you have two bites at the
18 apple because you -- all the way along, you might win.
19 And if you won, then it wouldn't matter. If you lose,
20 you always have the argument that you've made here,
21 let's go back and start over again.

22 MR. FREDERICK: Justice Stevens, I don't
23 think we would win at all in that circumstance because
24 we would be forced as a foreign State to litigate in
25 State court contrary to Congress's will.

1 JUSTICE STEVENS: Yes, but --

2 MR. FREDERICK: Whatever arguments that may
3 be preserved --

4 JUSTICE STEVENS: But you might win that
5 litigation. It's not impossible, is it?

6 MR. FREDERICK: It is certainly not
7 impossible, but the point --

8 JUSTICE STEVENS: And if you lose, you
9 always have a point on appeal and may start all over
10 again later on.

11 MR. FREDERICK: It is unclear to me, and I'm
12 not sure that I've seen any of this Court's cases that
13 would suggest that the denial of that kind of procedural
14 right would be grounds for reversing a State court
15 judgment. And our position is that Congress intended to
16 protect the bench trial right, the immunity defenses of
17 a foreign sovereign, because the organ status
18 questioned --

19 JUSTICE GINSBURG: Did anybody in this
20 case -- did any of the Defendants in this case request a
21 trial by jury?

22 MR. FREDERICK: I don't recall whether the
23 Defendants do, but it is clear that the Plaintiffs would
24 be entitled to a jury trial --

25 JUSTICE GINSBURG: And have they asked for

1 it? Has any party asked for a jury trial? If not, that
2 part of the case seems academic.

3 MR. FREDERICK: Well, the case has settled,
4 Justice Ginsburg, prior to the formal invocation of
5 trial procedures, and so --

6 JUSTICE GINSBURG: The case is settled?

7 MR. FREDERICK: As explained in the cert
8 petition papers, the case is on appeal in the State
9 court system on objections to the settlement, and it
10 will not be mooted during the course of this Court's
11 action on the case.

12 But the invocation of jury that would be
13 done normally just before trial has not been an issue
14 that's been presented.

15 JUSTICE GINSBURG: Well, that's different
16 than it is in the Federal courts. You have to -- can't
17 wait to the eve of trial to demand a jury.

18 MR. FREDERICK: Well, what the Plaintiffs
19 here assert is that they would be denied their right to
20 jury trial, and I presume that that means they intend to
21 ask for one and to perpetuate that request. Our
22 position, as we explain in a footnote in our reply
23 brief, is that they have a jury trial right as against
24 Duke and Reliant; they do not as against the foreign
25 sovereigns that they have sued.

1 So at root, the case is about the kind of
2 comity and dignity that the courts of the United States
3 will accord to foreign sovereigns. If Powerex were sued
4 on the basis of non-commercial acts, it would not be
5 entitled to have its immunity defense vindicated if the
6 district court is held to have no jurisdiction,
7 notwithstanding the proper removal under 1441(d).

8 I'd like to save the reminder of my time for
9 rebuttal, please.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 Mr. Frederick.

12 Mr. Hallward-Driemeier.

13 ORAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER

14 ON BEHALF OF THE UNITED STATES

15 AS AMICUS CURIAE SUPPORTING THE PETITIONER

16 MR. HALLWARD-DRIEMEIER: Mr. Chief Justice,
17 and may it please the Court:

18 This Court has recognized repeatedly that
19 the bar on appellate review in 1447(d) applies only to
20 remands under 1447(c). This Court has held that the
21 courts of appeals have authority to decide whether a
22 remand order was, in fact, one within the authority of
23 1447(c). In fact, just this term in *Osborn*, the
24 district court remanded the case on the basis of 1447(c)
25 for purported lack of subject matter jurisdiction.

1 JUSTICE GINSBURG: Osborn made it very clear
2 that was an extraordinary case where Congress had
3 explicitly ordered two conflicting things. One, it said
4 no remand of a case of this type, and then it said no
5 review of remands. So the Court was as clear as it
6 could be that only when you have those conflicting
7 signals does that court -- does that case have any
8 application.

9 MR. HALLWARD-DRIEMEIER: Your Honor is
10 absolutely correct. Osborn concerned a particular kind
11 of categorical exception from 1447(c). Our argument is
12 that as a categorical matter, the basis of remand in
13 this case was not one within the scope of 1447(c). That
14 although the District Court termed the sovereign
15 immunity of the defendant's jurisdictional, it was not
16 jurisdictional in the relevant sense. And this Court
17 held precisely that in the Oliver American trading case.
18 There, a case removed by Mexico was dismissed by the
19 district court on the basis of its immunity and the
20 district court certified that holding as a
21 jurisdictional decision immediately appealable to this
22 Court.

23 Yet this Court looked beyond that label
24 attached by the district court and held that sovereign
25 immunity is not jurisdictional in the relevant sense

1 because it does not limit the authority of the Federal
2 courts qua Federal courts but rather is a general rule
3 that would preclude suit in State court as well.
4 Likewise, under 1447(c) it is not a basis to remand that
5 the defendant is immune.

6 When Congress authorized sovereign
7 defendants to remove cases to Federal court to vindicate
8 their immunity, it did not intend that when the district
9 court upheld that immunity, it would be remanded to
10 State court which would be free to disregard the Federal
11 court's decision.

12 JUSTICE BREYER: One technical question.
13 The same one. I would to be -- imagine it is a
14 diversity case. Imagine that a Federal court
15 erroneously remands it. A trial gets up to this Court.
16 And we say it was diverse. It shouldn't have been
17 remanded. Now what's -- is that like -- can that
18 happen? I guess. And is the remedy then wipe out the
19 State proceedings, go back to Federal court? What
20 happens? Has that have ever been a case like that?

21 MR. HALLWARD-DRIEMEIER: Yes.

22 JUSTICE BREYER: What happened?

23 MR. HALLWARD-DRIEMEIER: The Missouri
24 Pacific Railway case holds that even this Court, on
25 review of a State court judgment following remand cannot

1 review the remand order itself. It can review issues of
2 Federal law that were decided by the State courts on
3 remand but --

4 JUSTICE BREYER: And it is called, the case,
5 Missouri --

6 MR. HALLWARD-DRIEMEIER: Missouri Pacific
7 Railway case.

8 CHIEF JUSTICE ROBERTS: Counsel, what --
9 what do you do about 1447(e) which says that if after
10 removal joinder might defeat subject matter
11 jurisdiction, the court can deny joinder or permit
12 joinder and remand the action. In other words, you have
13 got subject matter jurisdiction but the statute
14 contemplates it may -- later -- later you may lose
15 subject matter jurisdiction and you can remand it there.
16 And I suppose that that needs to be interpreted in pari
17 materia with (c) so that the remands would not be
18 subject to review. It seems to me the same situation
19 here. You have got allegedly subject matter
20 jurisdiction. It is later defeated, and it is remanded.
21 Why shouldn't that be covered by (c)?

22 MR. HALLWARD-DRIEMEIER: What, what's
23 notable is that Congress enacted 1447(e) at the same
24 time that it amended 1447(c). It provided in 1447(e)
25 for an authority to remand in a particular instance

1 where the court lost subject matter jurisdiction
2 post-removal. It had of course been the rule since this
3 Court's decision in *St. Paul Mercury Indemnity*, that
4 post-removal events did not defeat the removal court's
5 jurisdiction; and in the statute it was made explicit
6 that 1447(c) authorized remand only when the case was
7 removed improvidently and without jurisdiction.

8 And when Congress amended the language in
9 1998 to make clear that non-jurisdictional defects in
10 removal had to be raised immediately or were forfeited,
11 it at the same time -- and added the language, or
12 changed the language in the second sentence that raises
13 problems for our argument; at the same time, it added
14 1447(e) to provide, as I said, a particular authority to
15 remand based on post-removal events that would have been
16 unnecessary if, as Respondents urge, 1447(c) was
17 intended to confer general authority to remand on the
18 basis of post-removal events.

19 CHIEF JUSTICE ROBERTS: But you don't have
20 any doubt that a remand under 1447(e) would be covered
21 by 1447(d), do you?

22 MR. HALLWARD-DRIEMEIER: No. And the courts
23 of appeals that have considered that question likewise
24 hold that a remand under 1447(e) is right in *pari*
25 *materia* with (d) although the courts seem to be split on

1 whether the decision to allow the joinder is a separable
2 decision appealable under Waco or not. But -- but that
3 issue is not presented.

4 But what is significant is that had Congress
5 intended by the amendment of 1447(c) to authorize for
6 the first time remand on the basis of post-removal
7 events, 1447(e) would have been unnecessary; and yet,
8 the legislative history, the 1447(e), makes clear that
9 Congress believed that in the absence of that provision,
10 the Court would have been limited to two alternatives.
11 Authorize the joinder -- or deny the joinder, or dismiss
12 the case.

13 JUSTICE SCALIA: How is that relevant here?
14 Where is the post-removal event?

15 MR. HALLWARD-DRIEMEIER: The post-removal
16 event here is the recognition of the defendant's
17 sovereign immunity.

18 JUSTICE SCALIA: Well, that's not an event.
19 That's -- that's an epiphany, it's not an event.

20 (Laughter.)

21 MR. HALLWARD-DRIEMEIER: Well, according --
22 well, apparently the district court viewed it as a
23 post-removal event that deprived it, or defeated,
24 divested --

25 JUSTICE SCALIA: Very strange meaning of

1 event.

2 MR. HALLWARD-DRIEMEIER: Well, I -- Your
3 Honor --

4 JUSTICE SCALIA: I mean the sovereign
5 immunity didn't exist from the outset. Nothing changed.

6 MR. HALLWARD-DRIEMEIER: But -- but the
7 district court's order is clear. And it is absolutely
8 correct in this regard that removal jurisdiction existed
9 at the outset. So the court does not lack removal
10 jurisdiction. The reference in 1447(c), second sentence
11 to "lacks subject matter jurisdiction," refers to lacks
12 removal jurisdiction. And in fact, this Court used that
13 shorthand repeatedly in the Kircher decision to describe
14 1447(c), lacks removal jurisdiction. This Court --

15 JUSTICE SCALIA: When did it say that? I
16 really find it very hard to accept that argument, when
17 its says -- you know -- it doesn't use lacks removal
18 jurisdiction, that's what it means. It is such an easy
19 thing to say.

20 MR. HALLWARD-DRIEMEIER: Well, the Court has
21 to go back to the history of the statute, how it's
22 evolved. Clearly pre-1998, authority to remand was only
23 if it was removed without jurisdiction. And so the
24 question is when Congress changed the language to lacks
25 subject matter jurisdiction, did it mean lacks removal

1 jurisdiction? Which it --

2 JUSTICE GINSBURG: Under the -- under the
3 district court's view, would there have been original
4 jurisdiction against Powerex?

5 MR. HALLWARD-DRIEMEIER: No, it would not
6 have. But that's because of the peculiarities of the
7 difference between original jurisdiction under the FSIA,
8 section 1330(a), and removal jurisdiction under the
9 FSIA. Whereas original jurisdiction depends upon a
10 conclusion that the defendant is not immune, Congress
11 conferred removal jurisdiction whenever a foreign
12 sovereign is defended.

13 JUSTICE KENNEDY: Then can you --

14 MR. HALLWARD-DRIEMEIER: Likewise in
15 1442(a), which was about the Federal --

16 JUSTICE KENNEDY: Can, can you tell me, if
17 the Petitioner does not prevail here, the case goes back
18 to the State court. Can the immunity argument be raised
19 in the State court?

20 MR. HALLWARD-DRIEMEIER: The immunity
21 argument could be raised in State court. That's what
22 this Court held in Kircher. But the defendant would be
23 forever denied its right to a bench trial under Federal
24 law. That right is limited to suits in the Federal
25 courts by its term; 1441(d) --

1 JUSTICE KENNEDY: In other words the State
2 court couldn't say well you know, this district court
3 was wrong; there's really immunity under the Federal
4 statute. The State court can't hold that?

5 MR. HALLWARD-DRIEMEIER: The State --

6 JUSTICE KENNEDY: Because then you'd have
7 constant -- eternal shuttling back and forth, that's
8 why.

9 MR. HALLWARD-DRIEMEIER: The State court
10 could reconsider Powerex's status as a foreign
11 sovereign, but it wouldn't have many, if any,
12 implications in the State court because Powerex isn't
13 claiming immunity in this case. It's only invoking the
14 procedural benefits of the FSIA which include that the
15 case be litigated in the Federal court before a judge
16 rather than a jury. And it would be forever denied the
17 benefits, those important procedural benefits of the
18 statute if this Court doesn't uphold review of the --

19 JUSTICE GINSBURG: Well, we don't know --

20 JUSTICE KENNEDY: In other words, the -- the
21 Federal determination bars the State court from
22 redetermining that there's immunity? That the State
23 court can't say, "Federal court, you're wrong?"

24 MR. HALLWARD-DRIEMEIER: The issue of
25 immunity of Powerex was never raised in this case. It

1 can review the question of whether it is an organ of the
2 State it but it cannot review the remand determination
3 that Powerex can never be granted the procedures
4 benefits of Federal foreign order bench trial. Thanks,
5 Your Honor.

6 The Court: Thank you, Counsel.

7 Mr. Simon.

8 ORAL ARGUMENT OF LEONARD B. SIMON,

9 ON BEHALF OF RESPONDENTS

10 MR. SIMON: Mr. Chief Justice, and may it
11 please the Court.

12 There are two reasons, independent and
13 sufficient reasons why there is in appellate
14 jurisdiction in this case. The first most narrow and
15 simple reason to vacate the decision below for lack of
16 jurisdiction, is to follow this Court's precedents which
17 accept the district court's remand order for what it is
18 and what it says it is, a remand for lack of subject
19 matter jurisdiction under 1447(c), unremovable under
20 1447(d). That is a simple direct route to that result.

21 There is a second approach suggested by a
22 lot of the briefing and some of the argument Your Honors
23 have heard this morning. And I want to lay it out
24 briefly for the Court.

25 And it is that, as the law professor amici

1 have suggested, there is some amount of confusion in the
2 lower courts, I might say with due respect, evasion of
3 1447(d) in the lower courts, by judge-made exceptions to
4 1447(d), created by some but not all of the courts of
5 appeal.

6 And the Court could clear out some of this
7 underbrush, mooting many of the issues that
8 Mr. Frederick and the that Solicitor General have
9 raised. Thermtron after Carnegie Mellon, addressing the
10 question Justice Kennedy raised in his concurring
11 opinion, in Things Remembered versus Petrarca, Thermtron
12 does not say what many of the lower courts think it
13 does. Thermtron does not say what my adversaries say it
14 does, because Thermtron has been partially overruled by
15 Carnegie Mellon. The notion that the only proper remand
16 is a 1447(c) remand is ancient history after Carnegie
17 Mellon, and therefore the notion that the only remand
18 covered by 1447(d) is a remand under 1447(c) is also
19 ancient history.

20 Congress has given us a simple and strong
21 message, which is when we're disputing the forum, when
22 the parties in a case are legitimately and in good faith
23 disputing forum, State court versus Federal court,
24 Congress has said take one shot at it, let an Article
25 III judge determine whether the forum is State court or

1 Federal court, and move on to the merits.

2 JUSTICE BREYER: Well, what, what reason
3 would Congress have for wanting a system that says --
4 and there are many, many, many people in the United
5 States who would like to sue Pakistan. They would like
6 to sue China. They would like to sue Russia. There are
7 all kinds of places they would like to sue. And why
8 would Congress want to have a system that says to those
9 countries, you can come into Federal court and get your
10 claim adjudicated, whether it is really you, China a;
11 but by the way, if the Federal judge makes a mistake,
12 there you are in Mississippi, Alabama, Illinois, any one
13 of 50 different states? In front of juries, the very
14 thing that we gave you this statute so you wouldn't have
15 to do.

16 Now what would their theory be?

17 MR. SIMON: It --

18 JUSTICE SCALIA: Can I, -- I'm not sure it
19 is even that he made a mistake. It is even worse than
20 that. If he gets it right and finds that you are a
21 sovereign --

22 MR. SIMON: Let me try to answer it --

23 JUSTICE SCALIA: -- you can go back to State
24 court. I mean, that's even worse. He gets it right.

25 MR. SIMON: Let me try to answer both

1 questions. The problem is whether he gets it right or
2 wrong, we spend two years in a court of appeals. But
3 Your Honor, you're assuming there's an immunity issue in
4 this case. With due respect, my adversaries are arguing
5 someone else's case. There is no immunity claim in this
6 case by Powerex. There is one petition, one petitioner.

7 JUSTICE BREYER: They were saying they were
8 an organ of --

9 MR. SIMON: They were saying they were an
10 organ.

11 JUSTICE BREYER: Yeah, and therefore they
12 are immune unless -- unless they fall within an
13 exception. And it may be they do.

14 Is that not right?

15 MR. SIMON: No. They conceded that they
16 fell within the exception.

17 JUSTICE BREYER: Well, I'm saying, that's
18 how the statute works.

19 MR. SIMON: Right.

20 JUSTICE BREYER: But I take it if you win
21 this, it's precisely the same, in respect to a person
22 who has total immunity.

23 MR. SIMON: No.

24 JUSTICE BREYER: Why not?

25 MR. SIMON: I would disagree Your Honor.

1 JUSTICE BREYER: Why not?

2 MR. SIMON: A party who has total immunity

3 --

4 JUSTICE BREYER: Yeah.

5 MR. SIMON: Would have removed the case the
6 same way --

7 JUSTICE BREYER: Yeah. Yeah.

8 MR. SIMON: And it would have presented two
9 arguments to the district court. It would have argued
10 number one, we are a foreign sovereign; maybe it wins,
11 maybe it loses. And number two. We are immune.

12 JUSTICE BREYER: Yes.

13 MR. SIMON: There is a solid line of cases
14 that suggests the decision on immunity -- first of all
15 let me say, I think it is somewhat far-fetched that a
16 party that would actually be immune, say the King of
17 Saudi Arabia, would end up being in this third lowest
18 category of foreign -- purported foreign sovereigns and
19 end up in the position Powerex is in.

20 But if it did, in other words we have three
21 categories. We have immunes, we have non-immunes who
22 got Federal court, and then we have would-be foreign
23 sovereigns like Powerex, who end up in State court. And
24 I'm suggesting for a party to fall from the first
25 category to the third in front of an Article III

1 judge --

2 JUSTICE BREYER: And a Judge makes a big
3 mistake --

4 MR. SIMON: Makes a big mistake.

5 JUSTICE BREYER: China comes in --

6 MR. SIMON: Right.

7 JUSTICE BREYER: And says of course you're
8 China. And then it signs a remand order.

9 MR. SIMON: I would submit, Your Honor, the
10 question has never been addressed by this Court. The
11 lower courts suggest that that is a collateral order.
12 The immunity issue, not the remand issue. We actually
13 now have a Waco type case.

14 JUSTICE BREYER: No. Well, after all -- if
15 you're going to say, you say that one is reviewable on
16 appeal.

17 MR. SIMON: The immunity --

18 JUSTICE BREYER: Is it or not, in your view?

19 MR. SIMON: In my view, the immunity issue,
20 but not the remand is reviewable on appeal --

21 JUSTICE BREYER: Fine. And now all they
22 want here is the organ issue reviewed on appeal.

23 MR. SIMON: Right. And the difference is --

24 JUSTICE BREYER: And what's the difference
25 between the one and the other?

1 MR. SIMON: The difference is that the
2 immunity issue is reviewed on appeal because there is a
3 line of court of appeal cases -- a majority, not a
4 unanimous majority, never blessed by this Court -- which
5 suggests that immunity is so important, don't need a
6 lawyer, you don't go to court, you don't say a word, you
7 don't spend a dollar, you walk away -- so important that
8 you are entitled to an immediate --

9 JUSTICE BREYER: Okay, and you agree with
10 that?

11 MR. SIMON: And I agree with that.

12 JUSTICE BREYER: Fine. Then why is it in
13 your opinion that the immunity thing is so important
14 that they get this collateral appeal, but the organ
15 thing is not so important since all, what turns on that
16 is whether they're going to have their non-jury trial.

17 MR. SIMON: Well, I want to come back
18 non-jury trial and answer Justice Ginsburg's question
19 because I don't think she got the right answer. But the
20 reason it's more important is this is, as Justice Scalia
21 said, like a diversity decision, this is a litigation
22 who sells power in the Pacific Northwest and admits that
23 it competes with Enron, Duke, and Reliance, and it is
24 disputing whether it belongs in a State court in San
25 Diego or the Federal court across the street in San

1 Diego, leaving aside the jury issue. And that is
2 precisely the kind of dispute that Congress suggested in
3 1447(d) and its predecessors, which have been on the
4 books for more than 100 years, ought to be done once.
5 What do they say, one and done? Is that what they say
6 in the district court?

7 JUSTICE ALITO: You're saying this all turns
8 on our assessment of the strength of the interest in
9 remaining in Federal court? Is that what it boils down
10 to?

11 MR. SIMON: No, it turns on the strength of
12 getting an immediate decision on the immunity question.
13 The immunity question I think is a question of an
14 entirely different nature than the question of forum.
15 In the --

16 JUSTICE GINSBURG: The immunity question,
17 the immunity question is the same as State or Federal
18 court, because the statute as it's written, any foreign
19 sovereign, China, whatever, is as immune from State
20 court jurisdiction as it is from Federal court
21 jurisdiction because Congress said so.

22 But with respect to the commercial
23 enterprise, Congress said, we're going to give you a
24 Federal court and we're going to give you a judge trial.
25 That doesn't apply to State courts.

1 MR. SIMON: That's correct. But Congress
2 said, we're going to give you a Federal forum and a
3 bench tribal if you convince us that you are an agency
4 or instrumentality of a foreign State. This, this
5 corporation Powerex failed to make that convincing
6 showing. Having failed to make that convincing showing,
7 again, they are debating in the appellate courts and
8 tying litigants up for two, five years over whether this
9 case should be litigated in State court or in Federal
10 court.

11 JUSTICE GINSBURG: There was a sovereign
12 party who said: I'm out of this; I have suit immunity.
13 And that was the B.C. --

14 MR. SIMON: B.C. Hydro.

15 JUSTICE GINSBURG: What happened to B.C.
16 Hydro? Because as I understand the district court sent
17 that party back, too.

18 MR. SIMON: The district court found that
19 they were immune, properly followed the law, but
20 determined because it believed it had no subject matter
21 jurisdiction that it should then stop at that point,
22 that it should just walk away from the case and remand
23 it, over the vehement disagreement of B.C. Hydro and the
24 parallel vehement disagreement of the Bonneville Power
25 Administration. The Ninth Circuit when it erroneously

1 took the appeal on the remand also clarified or
2 straightened out that issue.

3 JUSTICE GINSBURG: Yes, but it couldn't --
4 if you are right, then the Ninth Circuit never should
5 have touched this case. So what happens to the three
6 parties, two U.S. parties, one British Columbia, who are
7 entitled to suit immunity?

8 MR. SIMON: Well, what's happened so far is
9 nothing, which might tell us that in the practical world
10 when a Federal district judge says that B.C. Hydro is
11 immune and then remands a multi-plaintiff,
12 multi-defendant, multi-cross defendant-cross defendant
13 case to San Diego Superior Court, it is exceedingly that
14 the San Diego Superior Court will reconsider the
15 immunity. But if it did --

16 JUSTICE ALITO: But could it?

17 MR. SIMON: I suppose it could, but if it
18 did that matter is subject to appeal and subject to
19 ultimate certiorari review in this Court. So I think
20 we're talking about a frolic.

21 JUSTICE ALITO: I thought the argument you
22 were making a few minutes ago, if I understood it
23 correctly, was that B.C. Hydro would not have been
24 barred by 1447(d) from taking an appeal to contest the
25 remand; is that correct or not.

1 MR. SIMON: I think B.C. Hydro could have
2 taken a collateral order, a collateral order appeal.

3 JUSTICE ALITO: Whether it's a collateral
4 order or not just goes to whether it falls under 1291.
5 It doesn't speak at all to the issue of 1447.

6 MR. SIMON: B.C. Hydro could have attempted
7 to appeal the immunity decision under a series of
8 decisions which suggest that immunity is so important
9 that it ought to be decided right then.

10 JUSTICE ALITO: The difference between that
11 immunity and Powerex's status is what? It's simply the
12 fact that there's a stronger interest in allowing
13 immediate appellate review, Federal appellate review of
14 the determination of the remand of a party that claims
15 to be a sovereign as opposed to Powerex's status as an
16 organ?

17 MR. SIMON: Among several other things.
18 There is a stronger interest in that, and we are not
19 debating about the forum. Again, we have the Kircher
20 case from last term saying State courts are perfectly
21 capable of resolving this issue. That is a quotation
22 actually from the Missouri Pacific case.

23 JUSTICE KENNEDY: If we think that Powerex,
24 that there's a strong interest in having Powerex remain
25 in Federal court if it's entitled To that under the

1 Foreign Sovereign Immunities Act, that would be suffer
2 to get around 1447(d)?

3 MR. SIMON: I think Justice Scalia was
4 correct to say there is just as strong an interest in a
5 diversity case in having a New York corporation trying
6 to escape --

7 JUSTICE KENNEDY: But I'm having, I'm having
8 the same problem as Justice Scalia and Justice Breyer.
9 Can you say in just a few sentences the difference
10 between the case where there is sovereign immunity,
11 China, the China hypothetical, and this case where it's
12 organ immunity?

13 MR. SIMON: Yes, if I could --

14 JUSTICE KENNEDY: You're telling us that one
15 is more important than the other, but there's no textual
16 basis in the statute for us to make that distinction.

17 MR. SIMON: I think there are two
18 differences, so if I could. One is textual and one is
19 important. Let me start with the textual difference.
20 The textual difference is that 1447(d) speaks to
21 remands, and so to the extent the district court
22 remanded the matter to State court the remand is
23 untouchable on appeal or by mandamus because of 1447(d).
24 And if the foreign -- if the foreign relations body,
25 lobby, doesn't like that, if the State Department

1 doesn't like, that they can go to the Capitol and get
2 that fixed quite easily.

3 There are half a dozen exceptions to 1447(d)
4 for class actions, for Native Americans, for civil
5 rights cases, and they can get their own exceptions. So
6 to the extent what the trial court did was remand, it is
7 untouchable. That is my textual answer. It's a remand,
8 i.e. Waco, in which the court says the remand is
9 untouchable, the dismissal of the unnecessary or
10 indispensable party is reviewable. So what I would say
11 is, although the remand is untouchable, the denial of
12 immunity -- and that's why I kept saying collateral
13 order; I apologize if that confused you, Justice Alito.

14 I meant that line of cases about going
15 straight up even though the case was continuing. While
16 the case continues in State court, where it belongs
17 under 1447(d), it would appear under this line of
18 collateral order cases that the denial of immunity
19 per se could go up on its own --

20 JUSTICE KENNEDY: I'm asking why is denial
21 of immunity for sovereign status different from denial
22 of organ status giving you a right to a bench trial,
23 etcetera?

24 MR. SIMON: Possibly, possibly this could
25 would decide that question the other way. But --

1 JUSTICE BREYER: We have this very old judge
2 like me. China is there. And he says: This isn't
3 China; Formosa is China. So he says remand. So there
4 we are, China is now in the Western District State Court
5 for Illinois and they're suing them for a lot of money.
6 Now, you said, I thought, before that where that
7 happened, and they wrongly ly denied immunity, they
8 could, China, appeal in the Federal system. I thought
9 you said that.

10 MR. SIMON: Yes.

11 JUSTICE BREYER: All right.

12 MR. SIMON: But not the remand.

13 JUSTICE BREYER: What?

14 MR. SIMON: But not the remand.

15 JUSTICE BREYER: All they want is a
16 definitive appeal that this is really China, all right.
17 Now, can they do that, yes or no? You said yes.

18 So I thought Justice Kennedy's question was,
19 if they can do that, why can't Powerex appeal in exactly
20 the same way on the question of whether they're an
21 organ. What's the difference?

22 MR. SIMON: The first difference is what I
23 said in response to Your Honor's question was I think
24 they could do that under some cases from the courts of
25 appeal. I know they can't appeal the remand because we

1 have an act of Congress which --

2 JUSTICE BREYER: I don't care. I don't call
3 this an appeal of a remand. What this is, it is an
4 Appeal of the determination precedent to remand that
5 Powerex is not an organ.

6 MR. SIMON: Well, Justice Breyer --

7 JUSTICE BREYER: That would make them just
8 as happy, I believe.

9 MR. SIMON: Justice Breyer, think about a
10 multi-party case and maybe my answer will be clearer to
11 you. In a multi-party case my position is the remand
12 stands, the case goes back to Missouri or Mississippi or
13 wherever your hypothetical was, but at the same time, I
14 do believe that the potentially immune party, which is
15 not here in this courtroom today, the potentially immune
16 party, could seek to review of what is a dispositive
17 ruling.

18 Remember, that's a dispositive ruling. They
19 win the case. That's very different than a venue
20 ruling.

21 JUSTICE SOUTER: Regardless of how they
22 would get up on it, assuming they could get up on the
23 immunity question, our series of questions is why do we
24 draw or why should we draw a distinction between
25 immunity and federal bench trial? And your answer is, I

1 take it, immunity is dispositive; Federal bench tribal
2 is not?

3 MR. SIMON: Immunity is dispositive and
4 Federal bench trial is not -- and is no different from
5 the day to day decisions district courts make all the
6 time about the choice between a State court and a
7 Federal court in the area of remands and removals.

8 JUSTICE GINSBURG: Immunity, suit immunity,
9 is you can't be sued anyplace, not in State court, not
10 in Federal court; you can't be sued, period. But now it
11 is admitted that you can be sued. That's not in dispute
12 in this case, right?

13 MR. SIMON: That's correct.

14 JUSTICE GINSBURG: So the only question is
15 where.

16 MR. SIMON: And that is my core --

17 JUSTICE GINSBURG: The question is if --

18 MR. SIMON: Excuse me. That is my core
19 point, that Congress told us when the only question is
20 where, we stop after one level and we move on to the
21 merits.

22 JUSTICE STEVENS: Can you help me with --

23 MR. SIMON: I would like to answer your
24 question about a jury, but I think I interrupted
25 Justice Stevens.

1 JUSTICE STEVENS: I just want to be sure
2 your position. Assume that there is a remand that was
3 improper and cannot be appealed under your theory and
4 the Powerex argues all along, I was entitled to a
5 Federal forum and a non-jury trial. And the State court
6 says no all the way up. Can they file a petition for
7 certiorari saying, we had a Federal right that was
8 denied us, not the remand but our entitlement to a bench
9 trial? Can they petition for certiorari at the end of
10 the State proceeding in your view.

11 MR. SIMON: Other than the jury question, I
12 think the answer would be no because of 1447(d), because
13 I think 1447(e) would suggest that that's an appeal of a
14 remand. But again, you're asking questions that I
15 believe have not been addressed by this Court or even
16 lower courts.

17 JUSTICE STEVENS: I'm just wondering what
18 your position is.

19 MR. SIMON: A clever enough lawyer I suppose
20 could argue that at that point that we're no longer
21 challenging the remand, the remand has happened and been
22 completed and the trial has taken place; we're now
23 simply challenging the results. And maybe that clever
24 lawyer would win the day.

25 JUSTICE SOUTER: And in effect he would say

1 -- I mean, I assume what the clever lawyer would say is,
2 State court, cannot try me at all. The feds can do what
3 they want about remand and it gets back here. But
4 because I'm entitled to a bench trial, you cannot try me
5 at all. Isn't that the argument?

6 MR. SIMON: Oh, I think in State court a
7 clever litigant could argue all these points over again,
8 because 1447(e) --

9 JUSTICE SCALIA: But his clever opponent
10 would say --

11 (Laughter.)

12 JUSTICE SCALIA: -- that what 1447(d) means
13 is that you can be tried in State courts. That's
14 precisely what it says.

15 JUSTICE SOUTER: And ultimately when the two
16 clever parties got to the State supreme court, they
17 would have these two opposing issues and ultimately if
18 we granted cert this Court would decide it, wouldn't it.

19 MR. SIMON: This Court would ultimately
20 decide it and they would ultimately decide questions
21 such as whether the jury or, to put it the other, the
22 bench trial issue has been preserved.

23 JUSTICE BREYER: Why not say, depending on
24 the clever lawyers, or non-clever as the case may be,
25 why not just say Congress intended that you do get an

1 underlying appeal in the Federal system, for what is at
2 stake is not simply where the case will be tried, but
3 rather significant and important rights attach in the
4 Federal court that do not attach in the State court.
5 And therefore, it is right, the appeal you get when
6 they -- when what is at stake is immune or not, and by
7 doing that we avoid four more years of litigation and
8 the necessity to hire clever lawyers.

9 MR. SIMON: Well, Congress has said --
10 Congress has said the contrary. And there are often
11 important differences between State and Federal courts.
12 Justice Breyer, I think you have some experience in
13 California. We have 9 to 3 jury verdicts. You will
14 have a litigant here next year saying that the
15 difference between a removal and a remand is a unanimous
16 jury verdict or a 9 to 3 jury verdict, and that's really
17 important.

18 Now, I would just briefly like to go back to
19 Justice Ginsburg's question about a jury because I don't
20 think she got the full answer. Let me give it to you,
21 Justice Ginsburg. The jury issue is virtually -- I
22 would say not virtually. The jury issue is out of this
23 case based on my adversary's reply brief. I will tell
24 why you. We did ask for a jury trial in our case and we
25 were upset about the whole notion of this case being

1 removed on a cross-claim we were not involved in -- we
2 never sued Powerex -- losing our right to a jury trial
3 on this important case.

4 Mr. Frederick's reply brief says at footnote
5 4, page 3 -- or footnote 3, page 4; I apologize -- that
6 our right to jury trial is not threatened here and that
7 under certain lower court decisions, which he is correct
8 they do exist -- I'm not sure they're unanimous -- Our
9 right to jury trial would survive even though he would
10 have a right to a bench trial under his theory.

11 Well, there is no right to a jury trial on
12 the cross claim against Mr. Frederick's client. The
13 cross claim in the California court, which got this
14 whole ball of wax rolling, is a cross claim for
15 equitable indemnification and declaratory relief,
16 equitable claims as to which there is no right to a jury
17 trial. So I think we are all now in agreement on a jury
18 trial. We are arguing someone else's case. Some day a
19 litigant will appear in this Court and present the issue
20 of jury trial --

21 JUSTICE GINSBURG: But they raise that there
22 is still the question of Federal forum over State forum.

23 MR. SIMON: There is, and that's the issue
24 that I think Congress has clearly and definitively said,
25 the State courts have pretty good judges, pretty good

1 juries, pretty good systems and certiorari procedures to
2 this Court. In Kircher, the Court's opinion says, "the
3 State courts are perfectly competent to resolve these
4 issues."

5 The cost of this case being frozen for 3 or
6 4 years while we debated these issues -- and these
7 issues are very difficult. I would say, we don't only
8 have a backup position, we have a backup backup
9 position. Because we think, number one, the court
10 should be taken at its word. We think, number two, the
11 court had no subject matter jurisdiction. Removing
12 jurisdiction is not subject matter jurisdiction. If you
13 look at the book, Chapter 89, Section 1441, et cetera,
14 it's titled Removal of Cases From State Courts. You
15 won't find the word "subject matter jurisdiction" in
16 there anywhere.

17 A removal petition removes a case from the
18 State court to the Federal court, where if it's a
19 foreign sovereign immunities case, the Federal court
20 decides if it has subject matter jurisdiction. That's
21 what 1330 says in haec verba. It's what this Court's
22 decision in Verlinden versus Central Bank of Nigeria
23 says in haec verba. Verlinden says every court that
24 gets a foreign sovereign immunities case must determine
25 at the outset whether it has subject matter jurisdiction

1 by determining if the foreign sovereign is immune.

2 Which means that Judge Whaley was correct
3 when he decided that by concluding he had an immune
4 party in front of him, he had no jurisdiction. And it
5 was equally correct for Bonneville, when he determined
6 that United States versus Myers says the same thing, so
7 that he had no subject matter jurisdiction. And in
8 addition, there was a derivative jurisdiction doctrine.

9 This notion of "removal jurisdiction" quote
10 unquote, it's a term we all use. The Court used it in
11 Kircher. I use it. Other people use it. But if you
12 start getting serious about your words, it's meaningless
13 in this context. We have subject matter jurisdiction
14 and it is conferred in the area of 1330, 1331, 1332. It
15 is not conferred in 1441, 1442, or 1443. It's simply
16 not there.

17 So my backup argument is, he was right on
18 every point. And my backup argument beyond that is
19 again, please, reread Carnegie Mellon. Put it next to
20 Thermtron and look at what the lower courts have done.
21 They have found excuse after excuse to take appeals in
22 cases that have no business being in the courts of
23 appeals. They don't have immunity issues. They don't
24 have foreign sovereign issues. They don't have
25 anything.

1 JUSTICE ALITO: Well, the reason why they
2 may have done that is because they've seen case after
3 case where absolute power corrupts absolutely. And
4 because district judges know that remand orders are not
5 reviewable, on occasion they will remand cases for
6 reasons that are clearly improper. That may be the
7 reason.

8 Now on your first argument, you say that
9 what the district judge says is dispositive. You mean
10 if the district judge says I lack subject matter
11 jurisdiction because my docket is crowded, that's not --

12 MR. SIMON: No.

13 JUSTICE ALITO: That's not --

14 MR. SIMON: No, Your Honor. I overstated.
15 Let me say it more clearly. Kircher, decided last term,
16 makes clear the line between what can and can't be done.
17 It discusses precisely this point and it refers to the
18 Ryan versus Contra case and it refers to the Principi
19 case. And it says that when the court is patently wrong
20 about whether the issue it is discussing is subject
21 matter jurisdiction, then this Court may enter into --

22 CHIEF JUSTICE ROBERTS: Counsel, it's a good
23 thing you've got a lot of fallback arguments because you
24 fall back very quickly. I would have thought your
25 answer to Justice Alito would be, the statute says if

1 it's remanded, it's not reviewable on appeal or
2 otherwise. And if it's remanded for a silly reason,
3 that will be corrected on review of the State supreme
4 court by this Court.

5 MR. SIMON: That would be my first answer,
6 and the Chief Justice said it much better than mine,
7 than I have. But I think, Your Honor, looking at
8 Kircher, to be fair, looking at Kircher, I believe that
9 is the position Justice Scalia took, it is concurring
10 opinion. And I didn't want to suggest that
11 Justice Scalia's concurring opinion was the opinion of
12 the Court. The opinion of the Court wrestles with what
13 I thought was Justice Alito's question. What do you do
14 if the trial judge says he has no subject matter
15 jurisdiction and he has not simply made a garden variety
16 jurisdictional error but he has missed what the issue
17 is? It's really failure to state a claim. It's really
18 something else. And we of course have the Steele case
19 which says jurisdiction has many meanings and we often
20 get confused about them. And the Court answered the
21 question by saying, only when the trial court is
22 patently wrong, patently wrong not about the
23 jurisdictional question but as to whether it is even a
24 jurisdictional question, only when the court is patently
25 wrong do we second guess the court.

1 So --

2 CHIEF JUSTICE ROBERTS: That certainly
3 changes the argument. So the notice of appeal that's
4 filed or the brief on appeal says not only was the court
5 wrong, it was patently wrong, and the court of appeals
6 has to consider that before determining whether it has
7 jurisdiction to review the remand order.

8 MR. SIMON: If the court wants to adopt
9 Justice Scalia's view in the prior case, in the Kircher
10 case, my clients would be pleased with the results --

11 JUSTICE SCALIA: I recommend that.

12 (Laughter.)

13 MR. SIMON: But I think, Justice Roberts --
14 I think, Mr. Chief Justice -- I apologize. Because my
15 time is running short, I would say the key point in this
16 case came when we sought to have a prompt dismissal in
17 the Ninth Circuit of the appeal prior to full briefing
18 and argument, and it was denied. That was the point at
19 which if a litigant simply parroted the phrase "this is
20 patently wrong," would likely in most circuits before
21 most panels have lost. And this matter would have gone
22 back to the State court 2-1/2 years before it got
23 affirmed by the Ninth Circuit and five years before
24 today.

25 Unless the Court has any further questions,

1 I think I've completed my comments.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 Mr. Simon.

4 Mr. Frederick, you have three minutes
5 remaining.

6 REBUTTAL ARGUMENT OF DAVID C. FREDERICK
7 ON BEHALF OF THE PETITIONER

8 MR. FREDERICK: Mr. Chief Justice, a
9 non-jury trial is an aspect of sovereign immunity. This
10 Court's cases have recognized that. In footnote 6 of
11 the Government's brief, the Government cites the Lehman
12 case which makes this point clear and argues that the
13 point should be applicable to sovereigns in the context
14 in which we are faced here.

15 The question of whether a foreign entity,
16 and it's more complicated often in the real world,
17 Justice Breyer, as your question's identified not simply
18 with questions but with the kinds of entities that
19 foreign governments create to advance public purposes.
20 The intent of Congress was not to have those kinds of
21 entities tested in State court to determine whether or
22 not they enjoyed the privileges and procedural
23 protections of the FSIA. And it is not simply a
24 question of whether or not an elderly judge might choose
25 to recognize China or Formosa, but rather the kinds of

1 instrumentalities that were created by those governments
2 to advance public purposes, to serve as separate
3 political entities, and who would be performing the
4 kinds of acts that might lead them into litigation, and
5 --

6 JUSTICE GINSBURG: And Congress said, those
7 entities don't get any immunity, they get two things:
8 They get a federal forum and they get a judge trial.
9 That's all that's at stake.

10 MR. FREDERICK: That's not all that's at
11 stake, Justice Ginsburg. There are also rights with
12 respect to foreign states to be free of punitive
13 damages. There are rights to have certain property of
14 the sovereign that would be subject to different
15 attachment rules.

16 The FSIA has a whole string of procedural
17 protections that are afforded to foreign states and
18 their instrumentalities. And this case ultimately is
19 about the fact that Powerex is being subjected to
20 multiple suits in State court, but as a result of the
21 Ninth Circuit's holding in --

22 JUSTICE GINSBURG: Are those -- have they
23 been sued by the plaintiffs in any of these cases or
24 have they always been brought in by defendants?

25 MR. FREDERICK: They have been directly sued

1 by the People of the State of California whom my brother
2 here represents. They have been sued by the California
3 Attorney General. They have been sued by the California
4 Department of Water Resources. And under the Ninth
5 Circuit's precedent in this case which I urge you to
6 overturn, Powerex has been remanded to State court, has
7 not been permitted to appeal the remand order, and is
8 stuck in State court in these cases without any
9 opportunity to test what is a clearly erroneous, and
10 what my brother doesn't make any attempt to defend, the
11 merits of the decision, that Powerex has performed
12 public functions, it's serving at the direction of the
13 Government of British Columbia, and is performing these
14 functions to advance clearly public purposes.

15 And yet, we are now in this Kafkaesque work
16 world between State and Federal court where if we try to
17 litigate all the way up through State court, it is not
18 entirely clear whether we will ever have our organ --
19 our status as a foreign organ ever vindicated. Thank
20 you.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 The case is submitted.

23 (Whereupon, at 11:04 a.m., the case in the
24 above-entitled matter was submitted.)

25

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