IN THE SUPREME COURT OF THE UNITED STATES

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EXXON MOBIL CORPORATION, :

Petitioner :

v. : No. 04-70

ALLAPATTAH SERVICES, INC., :

ET AL.; :

and :

MARIA DEL ROSARIO ORTEGA, :

Petitioner :

v. : No. 04-79

STAR-KIST FOODS, INC. :

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Washington, D.C.

Tuesday, March 1, 2005

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:27 a.m.

APPEARANCES:

CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of the Petitioner in 04-70.

ROBERT A. LONG, JR., ESQ., Washington, D.C.; on behalf of the Respondent in 04-79.

EUGENE E. STEARNS, ESQ., Miami, Florida; on behalf of the Respondents in 04-70.

DONALD B. AYER, ESQ., Washington, D.C.; on behalf of the Petitioner in 04-79.

C O N T E N T S

P R O C E E D I N G S

(10:27 a.m.)

JUSTICE STEVENS: We will now hear argument in two different cases: Exxon Mobil against Allapattah and Ortega against Star-Kist Foods.

Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE PETITIONER IN 04-70

MR. PHILLIPS: Thank you, Justice Stevens, and may it please the Court:

This Court 32 years ago in Zahn v. International Paper affirmed that a class action could not proceed under 28 U.S.C., section 1332, the diversity statute, if it was clear that some of the unnamed members of that class do not satisfy the amount-in-controversy requirement.

The question in this case is whether Congress in 1990 overturned this Court's ruling in Zahn and its interpretation of section 1332 not by amending section 1332 but, instead, by enacting a supplemental jurisdiction statute, section 1367. The answer to that question, Your Honors, is no.

Plaintiffs in the lower courts that have felt constrained to conclude that the language of section 1367 requires the conclusion that Zahn and, candidly, also this Court's decision in Strawbridge were overruled by 1367 do

so by gliding past the express language in 1367(a) that is the primary basis upon which our argument stands.

In the appendix 246a to the petition, there's -- the central language is in (a). It says, in any civil action, of which the district courts have original jurisdiction. That language by its terms and -- clearly indicates that Congress did not mean to make any adjustments in the background law that exists that defined diversity jurisdiction or Federal court jurisdiction, Federal question jurisdiction as a condition to going forward. So what the Congress says is, look at the law as it exists in 1990, as it's been interpreted by this Court, and then determine whether or not there's Federal jurisdiction, either for diversity or Federal question, and if there is, then you proceed forth from that point.

And what we know is that there are two situations that will not satisfy original jurisdiction under those circumstances.

The first one is in the Zahn situation. Where you have both satisfying and unsatisfying plaintiffs in the unnamed -- who are in the unnamed members of the class, this Court said you cannot proceed forth under the diversity jurisdiction.

The second one is the classic sort of joinder situation, and what the Court held in Strawbridge is that

simply because you have a plaintiff who satisfies the amount-in-controversy requirement and satisfies the complete diversity requirement does not mean that you're allowed to join under rule 20 an additional plaintiff who does not satisfy both of those requirements. And if you bring someone in under those circumstances, that defeats jurisdiction at the beginning before you ever took to trying to decide what the scope of section 1367(a) and (b) mean from that point forward.

So then the question is, if that's the correct interpretation of 1367(a)'s predicate language, then what work does 1367(a) and 1367(b) do, and does our interpretation do any violence to the structure of the statute? And the answer to that is clearly no.

Here we start by looking at what was Congress' clear intent, manifested primarily in the last language of 1367(a), where it says supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties. Here --

JUSTICE GINSBURG: Mr. Phillips, before you proceed to going on to (b), the -- you have set up a dichotomy between a Federal question case where, as long as you have a Federal question claim in the case, you qualify within those words, of which the district courts have original jurisdiction. But you say that in a

diversity case, that's not so if you have people not of the same citizenship -- of the same citizenship on both sides of the party line, so that you have to have a totally qualifying action on the diversity side to come within -- to -- to be within 1367(a).

But we have had at least two cases where the starting lineup did not satisfy the complete diversity rule. One was Caterpillar and the other was Newman-Green, and the Court said, yes, on the day one there wasn't complete diversity, but that's curable later on, in the one case before the case was tried, in the other in the court of appeals. So don't at least those two cases suggest that you can have a diversity case legitimately in the Federal court even though at the outset you don't have -- fill all the requirements?

MR. PHILLIPS: I -- I don't think that's the right conclusion to draw from those cases, Justice Ginsburg, because what happened is by the time that -- those cases got to this Court, the jurisdictional problems had been solved and the Court was faced with a question -- with what I perceive to be purely a remedial question, is what do you do in terms of trying to put the omelette back into the egg at that point when the litigation has gone forward. And the Court, as a matter of judicial efficiency, decided essentially to ignore the

jurisdictional problem.

Here, by contrast, this jurisdictional problem existed on day one, and the complaint was filed --

JUSTICE GINSBURG: I thought the Court said that --

MR. PHILLIPS: -- and continues --

JUSTICE GINSBURG: I thought the Court didn't say they were ignoring it. I thought they said it was curable.

MR. PHILLIPS: Well, it -- it's curable in the sense that you can eventually excise out portions of the case, but what you cannot do is -- is allow the case to go -- it remains still jurisdictionally barred to proceed forth with parties who are not properly before the court. That's -- that's what this Court said specifically in -- in Zahn itself. It said the problem is that you cannot simply go forward with the Federal claim and with the State claims in that -- in that format. You surely can excise portions of them, but then you start over again. Once you excise them, that's a new complaint. It's a new case. That's the fundamental difference.

JUSTICE GINSBURG: They didn't start over in Caterpillar.

MR. PHILLIPS: I'm sorry.

JUSTICE GINSBURG: The Caterpillar didn't start

over and Newman-Green wasn't detected till appeal, but the appeals court didn't say start over.

MR. PHILLIPS: No, I understand that the Court's ultimate remedy in both of those cases was not to do a do-over, but you also have to remember -- I mean, I think there are two questions here. One is do you ignore the jurisdictional problem. And what I'm proposing to you is this Court has never ignored the jurisdictional problem. It always solves the jurisdictional problem somehow, whether it dismisses the case, as it did in -- in Grupo Dataflux, whether it dismisses the case, as it -- as it proposed would have to happen in Zahn if they didn't excise one of the parties, or whether it makes an adjustment. The Court always takes account of the jurisdictional problem and finds a method of fixing it. So that's the --

JUSTICE STEVENS: But why can't it make an adjustment in this case, Mr. Phillips.

MR. PHILLIPS: I'm sorry, Justice Stevens.

JUSTICE STEVENS: Why can't it make an adjustment in this case?

MR. PHILLIPS: The -- well, the -- and the question is what adjustment should it make. And the -- and -- and our argument is at a minimum you have to dismiss all of the class claims.

JUSTICE STEVENS: But why is that the minimum? Wouldn't the minimum be just to dismiss those parties who don't have the aggregate -- the necessary jurisdictional amount?

MR. PHILLIPS: And that takes you back to what the district court ruled in Zahn and -- and, in effect, what this Court affirmed in Zahn, which is that there's a fundamental difference between sort of finding a single, individual plaintiff and saying, you know, this person, if you could just excise that claim, drop it under rule -- that person under rule 21, that fixes it. There's a fundamental difference.

I mean, the question here is what's the civil action because there are res judicata, collateral estoppel --

JUSTICE STEVENS: Well, but you do have cases where a complaint is filed seeking to be a class action and then the district judge does not certify the class and the case, nevertheless, goes forward. Now, why couldn't you do that here?

MR. PHILLIPS: Well, that would -- one of the alternatives on the table -- I think it is appropriate -- is for the Court to excise the class action allegations --

JUSTICE STEVENS: Right.

MR. PHILLIPS: -- and dismiss the entirety of

the class and proceed forth solely in the name of the four individual plaintiffs.

JUSTICE STEVENS: Well, maybe. Why isn't it permissible just to dismiss those parties who don't have the requisite jurisdictional amount? That's what I -- where I stumble with this.

MR. PHILLIPS: I think the Court has the authority to do that. I think the practical implications of that are overwhelming and should be -- and should be rejected for that reason because in order to be able to have res judicata/collateral estoppel effects, you have to know what the civil action is. And with a class of unnamed members, who are, in many instances, unknowable in -- in some respects, we don't know what the res judicata or collateral estoppel effects are if your solution is to try to excise those who do not satisfy the amount-in-controversy requirement.

JUSTICE GINSBURG: I don't -- I don't follow that entirely, Mr. Phillips, because the -- Exxon lost at -- at this trial, and preclusion doctrines -- that means that Exxon had one full and fair opportunity to defend. So Exxon is going to be bound by that -- by the determination. Somebody who was not in the litigation and might say, well, I want more, say, somebody who had opted out --

JUSTICE KENNEDY: In other words, you'd have the same issue of preclusion problems if you had done the case from the beginning the way you contend it ought to have been done.

MR. PHILLIPS: Well, I -- I think the case should never have been allowed to go forward except with the named plaintiffs. Okay.

JUSTICE KENNEDY: But I mean, Justice Ginsburg's point is you -- you -- even with a -- a few properly named defendants, you're going to have the same issue preclusion problem.

MR. PHILLIPS: Well, not -- but -- but it's a much more complicated issue preclusion problem because the question is, is there jurisdiction? This is a judgment that's been entered without jurisdiction.` The court doesn't have proper jurisdiction here --

JUSTICE O'CONNOR: Well, if it's under the language of section 1367, I think it makes more sense to say the court has original jurisdiction over the action, but lacks original jurisdiction over the defective claims. I mean, that meets what 1367 seems to say on its face.

MR. PHILLIPS: I -- I would --

JUSTICE O'CONNOR: And I hope you will address the fact that Congress very recently has enacted legislation that makes all this in the future at least

non-objectionable.

MR. PHILLIPS: Well, it doesn't eliminate it completely, Justice O'Connor. The Class Action Fairness Act only applies to claims where there are plaintiffs who exceed the number of 100, plaintiffs over 100, and -- and the $5 million amount-in-controversy --

JUSTICE O'CONNOR: Right, and it's not retroactive.

MR. PHILLIPS: But it's not retroactive. But even prospectively, there will be situations where this precise issue will arise in the future. So there is reason for the Court to go ahead and resolve this question that has so badly divided the courts.

But, Justice O'Connor, to answer your first question, I would have -- I would have thòught the conclusion was exactly the opposite, that what -- what -- the statute says you don't have jurisdiction over civil actions over which you didn't have jurisdiction prior to 1990, but you do have jurisdiction over claims that then can be appended to those for which you have jurisdiction in 1990.

So I would have thought the more sensible way, at least from my perspective, to read this case -- to read this statute is to say, is this a claim that could have been brought in 1990? And the answer from Zahn is

absolutely no, it couldn't. And similarly with the -- with the joinder cases. They could not have been brought --

JUSTICE O'CONNOR: Unless 1367 effectively overturned Zahn.

MR. PHILLIPS: And --

JUSTICE O'CONNOR: It was enacted later.

MR. PHILLIPS: It clearly was enacted later, but my point here is that I think the language -- when the Congress both in (a) and (b) harkens back to in any civil action of which the district courts have original jurisdiction, it's clearly not trying to amend 1331 or 1332.

JUSTICE BREYER: Well, it's not -- the weakness in your point, I think, as I -- as I understand it, which is a very optimistic assumption, given the complexity here --

MR. PHILLIPS: I hope that's not a criticism of the writing.

JUSTICE BREYER: -- is -- is that you want to read (a) as if it applies to arising-under jurisdiction and not to diversity jurisdiction. Very simple. Arising-under jurisdiction, you do maintain jurisdiction over the original action. You can add a claim, but as long as there's one good claim arising under, there's original

jurisdiction. Diversity, there isn't.

MR. PHILLIPS: No.

JUSTICE BREYER: If you add that plaintiff, you don't get the original -- that's not right?

MR. PHILLIPS: No, that's not right, Justice Breyer.

JUSTICE BREYER: All right.

MR. PHILLIPS: The -- the -- you know, the traditional case. You're from one State, I'm from another State, I have a claim against you for at least $50,000, I sue you in diversity jurisdiction.

JUSTICE BREYER: Yes.

MR. PHILLIPS: That is a civil action of which district courts have original jurisdiction.

So I've sued you. You have an insurer who's going -- who -- who lives in the same State I live.

JUSTICE BREYER: Yes.

MR. PHILLIPS: You bring in the insurer in a third party -- in a third party claim under rule 14. Okay? That claim doesn't satisfy the $75,000, whatever the amount-in-controversy requirement is that applies, because you've got a -- a retention. Okay? Then -- and so your -- your claim against them is only for $50,000. That wouldn't satisfy the amount-in-controversy requirement but it does satisfy the supplemental

jurisdiction over claims brought separately.

JUSTICE BREYER: So -- so, in -- in other words, in that situation, it's a third party claim by the defendant against another person.

MR. PHILLIPS: Yes. That would be one easy --

JUSTICE BREYER: So that's then -- that does fall within (a).

MR. PHILLIPS: Absolutely falls within (a).

JUSTICE BREYER: And then (b) knocks it out insofar as the plaintiff wants to assert a claim.

MR. PHILLIPS: Exactly.

JUSTICE BREYER: But that person can assert a claim against a plaintiff.

MR. PHILLIPS: Exactly. That would be precisely how it operates.

JUSTICE BREYER: So that, you say, is the answer to what I was going to ask --

MR. PHILLIPS: Which is?

JUSTICE BREYER: -- which is why didn't they just use the word 1331. And the reason they didn't just use the word 1331 is there is a subset of diversity claims that also have to fall within (a).

MR. PHILLIPS: Right. I picked one.

JUSTICE BREYER: All right.

MR. PHILLIPS: There's another one that fits --

JUSTICE BREYER: So the other thing, of course, is if these three professors who wrote this had -- had figured this out so well, why in heaven's name didn't they at least write an article about it so we'd know what we were doing?

(Laughter.)

MR. PHILLIPS: Well, my guess is if they did, you probably wouldn't want to rely on it as the authoritative source for interpreting the language of the statute in any event.

JUSTICE GINSBURG: What you're saying, Mr. Phillips, I think is that 1367 does nothing with regard to what was in the old days at least 1367(a), what was called ancillary jurisdiction. It changed pendent jurisdiction to overrule the Finley case.

MR. PHILLIPS: Pendent party jurisdiction.

JUSTICE GINSBURG: So -- so you could have appendant parties, but what was once known as ancillary jurisdiction, applicable in diversity case, was not changed at all by 1367(a). I think that's what you're saying.

MR. PHILLIPS: Well, no. Actually what I'm saying is that 1367(a), in effect, codifies both aspects of the Kroger -- of this Court's decision in Kroger. In Kroger, the Court said you would have ancillary

jurisdiction over the third party claim that I identified for Justice Breyer, and that that would fall within 1367(a) under my interpretation of it, but that 1367(b) would not allow the plaintiff then to bring a subsequent action against the third party defendant.

JUSTICE GINSBURG: But whether you -- whether you call it codify or anything else, there would be no change. 1367, as you read it, made no change. 1367(a) on the Federal question side certainly did. It overruled Finley. Before, you could have pendent party jurisdiction. Now you can. But Kroger was unchanged. I think what you're -- you're telling us is that except for some difference in (b), 1367(a) leaves ancillary jurisdiction as it found it. It doesn't make any change.

MR. PHILLIPS: The only way I would just -- you know, the only point I would make with respect to that is that I do think that in Finley this Court's opinion cast some doubt on the entire pendent and ancillary jurisdiction doctrines, and I think that 1367(a) is clearly designed to -- to eliminate that issue going forward because it says there is a role. There is now a -- an express provision from Congress to the courts of supplemental jurisdiction. And then the question is under what circumstances does it apply.

So to go back to the Owen case, you know, we all

assumed that there was ancillary jurisdiction over the third party claim. This statute makes it absolutely clear that there is jurisdiction over the third party claim because it -- it extends to that claim. And we know that by the express language of the provision.

It wouldn't have changed anything if you accept the idea that the Court had inherent authority to do that. If you question that, then this is the basis on which that jurisdictional grant is provided. And so that is an important part of 1367(a) that affects --

JUSTICE GINSBURG: So what -- what is the language in 1367(a) that effects any -- any change in diversity jurisdiction, what was once called ancillary jurisdiction? I don't see that there's any change.

MR. PHILLIPS: Well, I -- I would go back --

JUSTICE GINSBURG: You may -- you may say that there's a confirmation of what was, but there's no change.

MR. PHILLIPS: Well, it just depends on whether you accept as a given that the third party claim and other multi-party litigation was clearly going to fall within the Court's ancillary jurisdiction without the benefit of an express statutory provision granting that authority. If you accept that, then this makes a fundamental change.

If I could --

JUSTICE GINSBURG: I thought that's what Kroger

was about. It said, yes, that you could do it -- that the plaintiff then couldn't turn around and sue the third party defendant.

MR. PHILLIPS: Right.

JUSTICE GINSBURG: But that you did not need diversity between the defendant and the third party defendant.

MR. PHILLIPS: Right, but the -- the question is what was the statutory authority for that part of -- for the first part of ancillary jurisdiction, which is the bringing in of the third party defendant. And that's what 1367(a) does in the diversity context.

If I could reserve the balance of my time, Justice Stevens.

JUSTICE STEVENS: Mr. Long. Mr. Long, you represent the respondent in the second case. Is that right?

ORAL ARGUMENT OF ROBERT A. LONG, JR.

ON BEHALF OF THE RESPONDENT IN 04-79

MR. LONG: Yes, Justice Stevens.

Justice Stevens, and may it please the Court:

I have three basic points.

First, section 1367 does not alter the requirements of section 1332 for original jurisdiction in a civil diversity action, and therefore, the plain

language of section 1367 does not alter the complete diversity requirement or the requirement that each plaintiff in a diversity action must have more than $75,000 in controversy.

Second, there is no sound basis for distinguishing between the two jurisdictional requirements of section 1332, and therefore, if section 1367 alters the matter-in-controversy rule of Zahn and Clark, it also alters the complete diversity rule of Strawbridge.

And third, the best interpretation of section 1367 and the one that causes the least harm is that it overturns the result in Finley and otherwise, with a few exceptions, codifies the pre-Finley understanding of supplemental jurisdiction.

Now, our -- our primary argument has already been addressed, and I don't want to waste time on it but it is crucial, critical to our argument. And that is, that the language of 1367(a) is that supplemental jurisdiction is conferred but only in a civil action, of which the district courts have original jurisdiction.

JUSTICE KENNEDY: And then you say the civil action has to give -- be diverse as to all claims.

MR. LONG: Well, yes. I mean, basically each -- as to each plaintiff, they must be diverse from each defendant and each --

JUSTICE KENNEDY: Over every claim -- every claim in the class.

MR. LONG: Yes.

JUSTICE KENNEDY: Now, in -- in City of Chicago, we did not give that meaning to the term civil action. Now, then you would say, well, City of Chicago is a Federal question case.

MR. LONG: Exactly.

JUSTICE KENNEDY: But then I would say then you're asking us to interpret civil action differently in two statutes.

MR. LONG: No, I don't think so. I think what the plain language -- and -- and here we are, I think -- we can rely on plain language. What 1367(a) says is that in each case you must look to some other statute that confers original jurisdiction. It can be 1331. It can be 1332. And of course, although those statutes use the same term, original jurisdiction, there are -- there's decisional law that comes along --

JUSTICE KENNEDY: No, but they also use the term, civil action, and it seems to me that your interpretation of the two differs if -- if the City of Chicago --

MR. LONG: Well --

JUSTICE KENNEDY: -- is -- is correct.

MR. LONG: Well, but I think it's the same answer. Original jurisdiction and civil action are found -- each of those terms is found in 1331 and 1332. And I do think it comes out of this Court's decisions that if you have a Federal question -- so you're claiming original jurisdiction under 1331 -- then yes, that is sufficient to give original jurisdiction over the action. That is what the Court held in the City of Chicago case.

But it really can't be the same in a diversity case if, for example, there's going to be complete diversity. What -- what the courts have said that have thought that the plain language of 1367 compels this result that Zahn and -- and also Strawbridge go, they say look, the only way we can read this is if there's original jurisdiction of -- of one claim by one plàintiff against one defendant, then we've got original jurisdiction over the civil action. Then we're into supplemental jurisdiction and all we ask is -- is that within the same case of controversy, and then there are some exceptions in (b).

But --

JUSTICE GINSBURG: Then what you're saying is that this statute, as far as class actions go, changed nothing.

MR. LONG: Well, of course, our case is not a

class action, but -- but we would say that --

JUSTICE GINSBURG: Or party joinder, which is your case.

MR. LONG: Or -- yes, exactly. It carries forward the rules of party joinder under 1332. Strawbridge is an interpretation of what is now 1332, the requirements for original jurisdiction. There has to be complete diversity. You can't simply look at one plaintiff and one defendant --

JUSTICE KENNEDY: Strawbridge has become less hallowed in light of the new congressional enactment. What's it called? The Sunshine in Class Action? What is it?

MR. LONG: I didn't bring --

JUSTICE GINSBURG: Class Action Fairness Act.

MR. LONG: Class Action Fairness Act.

Well, but I think that in -- in a way it -- it shows what Congress -- when Congress means to amend section 1332 and make exceptions to these requirements for original jurisdiction under 1332 --

JUSTICE KENNEDY: Well, I understand in 2005 Congress doesn't necessarily express what was before, but it -- it seems to me there's an institutional judgment that Strawbridge is not that hallowed a -- a principle.

MR. LONG: Well, I -- I think you could fairly

say the -- the new statute reflects a judgment by Congress that in these class actions of national importance, which meet certain requirements, minimal diversity should be sufficient. And, of course, that's constitutionally permissible. But I don't think there's been any suggestion that in the -- the more run-of-the-mill cases there ought to be simply minimal diversity.

I mean, there -- there are millions, literally millions, of civil actions filed in State courts each year. About 60,000 end up in the Federal courts on the diversity side of the docket. If even 1 percent of those cases moves over to Federal court, that's going to be a doubling of the Federal courts' diversity docket, which is about half the trials.

So -- and I don't think there's been any suggestion by Congress -- and, of course, complete diversity and matter-in-controversy are the two rules that keep that from happening. Now, the -- the class actions will be a sufficient -- a significant additional burden on the Federal courts, and to my knowledge, there aren't any additional resources to do that.

JUSTICE BREYER: What -- what is the -- can you -- this is something I should know, but I don't know. All right. It's very elementary. If you have two parties from different States, diversity claim, they're in court

perfectly properly. Now, if somebody intervenes under, say -- say, rule 24 or suppose it's rule 19, a necessary party, and that destroys the diversity, does the -- does the Federal court still have jurisdiction? It does, I gather, under rule 14 if the defendant impleads or brings his own lawsuit --

MR. LONG: Yes, but that --

JUSTICE BREYER: -- against a third party. What -- what happens under -- that doesn't destroy it, rule 14. Right?

MR. LONG: The way -- the way this was understood to work --

JUSTICE BREYER: Yes.

MR. LONG: -- and it's in -- and this is the answer to the point that, well, there can never be any supplemental jurisdiction on our view in a -- in a diversity case. Yes, there can because in a variety of situations -- and -- and you've named where there's a rule 14 third party claim and that's by a defendant --

JUSTICE BREYER: I understand that. What about 19 and 24?

MR. LONG: Well, before -- this -- this is exactly an excellent example because it's one of the few things that was clearly changed by 1367, and it was changed in the direction of narrowing the -- the

jurisdiction. The understanding was that you could -- if a party came in on its own under rule 24, said I -- I can intervene of right --

JUSTICE BREYER: Yes.

MR. LONG: -- but they were coming in on their own -- that was allowed. I mean, this could potentially be a problem under this rationale of Kroger.

JUSTICE BREYER: Okay. So you mean by allowed that plaintiff is -- one -- he's from the same State and destroys the diversity.

MR. LONG: Yes. It would otherwise --

JUSTICE BREYER: He can do it, though.

MR. LONG: It -- it would be allowed. That was allowed before.

JUSTICE BREYER: And what about under rule 19?

MR. LONG: Under rule 19, the rule was that you couldn't do it even if --

JUSTICE BREYER: You could not?

MR. LONG: You could not, and the idea was this was getting too close to the Kroger problem --

JUSTICE BREYER: And rule 20 you could not?

MR. LONG: Could not. It was --

JUSTICE BREYER: And rule 24 you could.

MR. LONG: The Kroger problem is if you -- you certainly couldn't put in these nondiverse parties in the

initial complaint. And of course, Kroger worried about, well, the plaintiff leaves them out and then they come in in a second stage, and that's an evasion of completed diversity.

But we can see very clearly from subsection (b), this is -- this is one part of the statute that is clear -- that the -- it has now been changed so that claims by persons proposed to be joined as plaintiffs under rule 19 or rule 24 will not be permitted unless they can satisfy the requirements of section 1332, that is, complete diversity and matter-in-controversy.

So this was the kind of thing that was being thought about in the statute. The fact that this was actually not permitted, clearly not permitted, shows that this statute is very concerned about preserving the requirements of complete diversity and matter-in-controversy. So I think that's actually a good example to focus on.

Another one -- sometimes examples help. In -- in the Owen --

JUSTICE BREYER: The difficulty, I guess, is that I'm having is let's imagine rule 19 or 24.

MR. LONG: Okay.

JUSTICE BREYER: Now, you're saying that is an instance where, if you bring the party in and he destroys

diversity, you're out. That was true before this statute.

MR. LONG: Well, what would happen is -- I mean, you wouldn't get to that stage, Justice Breyer, because you wouldn't let the -- the court would not let the party in.

JUSTICE BREYER: Okay.

MR. LONG: And sometimes you have to dismiss the case --

JUSTICE BREYER: So there -- before this statute, there never is going to be a circumstance in which you bring in a person under rule 19 and diversity is destroyed.

MR. LONG: Right, because you won't let them in. Now, sometimes you'll have to dismiss the entire case.

JUSTICE BREYER: Okay. Now -- now, this is one of the things that mixes me up here.

JUSTICE SCALIA: I don't understand what you mean, sometimes you'll have to dismiss the entire case.

MR. LONG: If -- if it turns out that the party is indispensable under rule 19.

JUSTICE SCALIA: Oh, is indispensable.

JUSTICE BREYER: Then -- then what's confuse -- now, we look at 1367(b) and it says the district court shall not have supplemental jurisdiction over a claim by the plaintiff against a rule 19 person who is brought on

the defense side.

MR. LONG: Right. Right.

JUSTICE BREYER: Where the inconsistent -- i.e., it would be nondiverse, but you said there couldn't be such a situation.

MR. LONG: Well, I -- I may have misspoken. What -- what is happening here in (b) is that it's possible for parties to come in under rules 14, 19, 20, or 24. We think the reading of that is that Congress wanted to allow that. So it's not impermissible, but then if plaintiffs want to turn around and assert a claim against them, it's got to be one that satisfies complete diversity and matter-in-controversy. And that's to protect the Owen Equipment rationale. But then --

JUSTICE BREYER: Michigan plaintiff against Iowa defendant, necessary party, Michigan defendant, rule 19. Now we bring him in. And you're saying before this statute, not going to come in because it will wreck jurisdiction. Right?

MR. LONG: I think that -- well, I think that's correct, if the -- at least if the plaintiff was trying to bring it in. You may have got me to a point where I'm not going to be able to --

JUSTICE BREYER: All right. Well, then I'm going to stop asking --

MR. LONG: -- give you the exactly right --

JUSTICE BREYER: -- because it's very easy to me to reach the outer limit of my understanding.

MR. LONG: Well, it would be easy for you to reach it with me.

But -- but the -- the gist of it is certainly if -- if the -- if the party is coming in under rule 19 as a plaintiff or you can come in as a defendant -- maybe that's the answer. That's -- that's permissible. You can join parties as to plaintiffs or defendants.

JUSTICE BREYER: You could have before this statute.

MR. LONG: Right. Let me -- let me try another simpler example. Maybe this one will work better.

There are a number of cases that are actually cited in the Court's opinion in Owen Equipment, and they give a sort of brief summary of these situations in which you could actually bring in extra parties and claims in a diversity case and the extra parties or claims would not be satisfying complete diversity or matter-in-controversy, and yet the original jurisdiction of section 1332 would not be destroyed.

Footnote 18 of Owen Equipment cites one of these cases. It's called Scott against Fancher. It was a Fifth Circuit case. There was an accident with three trucks.

One of the drivers was from Texas and the other two were from Oklahoma. So the -- their case was brought in Texas against the two. The Texas drivers sued the two Oklahoma drivers, so there was complete diversity. It did meet the matter-in-controversy.

So one defendant filed a compulsory counterclaim. That was one of the examples, and this is all mentioned in Owen Equipment. And that was okay. Of course, the citizenship would be the same, but no question about whether the amount in controversy was -- was up to the required level.

And they also filed a -- a cross claim against the other defendant, and that was also allowed. And again, no -- of course, now you have two citizens from Oklahoma. So that would not be complete diversity, but that -- that was allowed. And again, it's because the defendants are bringing in -- this is the language that the Court used in Owen Equipment, that when a defendant is hailed into court against its will, then some of these ancillary claims are going to be permitted.

JUSTICE GINSBURG: But not all. You couldn't have a -- if I remember right, a permissive counterclaim.

MR. LONG: Yes.

JUSTICE GINSBURG: The defendant --

MR. LONG: Yes.

JUSTICE GINSBURG: -- can have a --

MR. LONG: And I'm thinking again this all -- I think this all traces back to Owen Equipment in this rationale that we're not going to allow evasion of the requirements of complete diversity in matter-in-controversy by the plaintiff.

And I think there's textual evidence in 1367 that this is what Congress was doing. I mean, if you look in subsection (b), you can find textual evidence for this interpretation. I mean, first of all, it refers to this rule 14 situation, the impleader of a third party defendant. That was exactly the situation that was at issue in Owen Equipment against Kroger.

And then it uses this somewhat strange language, this language of claims by plaintiffs against persons made parties under these rules. This is what Justice Breyer was getting me tripped up on a minute ago. But the -- the point here is that these people can come in. I mean, this language doesn't make a lot of sense if they can't come in at all.

JUSTICE BREYER: No. They could at least come in if the defendant --

MR. LONG: Yes.

JUSTICE BREYER: -- under rule 14 joined another person.

MR. LONG: Yes.

JUSTICE BREYER: And then person X wanted to join --

MR. LONG: Yes.

JUSTICE BREYER: -- that part of the action --

MR. LONG: Yes.

JUSTICE BREYER: -- that could be a 19, 20, or 24.

MR. LONG: Exactly. Exactly.

That's -- and so there is work to be done in subsection (b) even in a diversity case.

The only other point I'll make here is that counterclaims and cross claims come in under rule 13 of the Federal Rules of Civil Procedure, and there is actually rule 13(h) which says very specifically that parties may be brought in -- additional parties may be brought in under rules 19 and 20, once you get a counterclaim or a cross claim going. So that is -- could explain why there are these references to rules 19 and 20, as well as 14 and 24, in subsection (b).

I do want to get to the argument that's made by -- or the petitioners in our case, which is really -- as I understand their argument, they accept that there must be original jurisdiction over the entire civil action, and they accept that that means that there must be complete

diversity. But then they say, well, matter-in-controversy is really different. It should be treated differently. It really doesn't go to whether the court has jurisdiction over the civil action. It only goes to whether it has jurisdiction over a particular claim.

And we don't think that's tenable. And -- and here would rely on statutory language, and it's the language of section of 1332, which sets out the two requirements for original jurisdiction of a civil action. Strawbridge is an interpretation of that requirement. To have original jurisdiction over the civil action, there must be complete diversity. Petitioners agree with that. The decisions like Zahn and Clark are an interpretation of the other requirement to have -- to meet the matter-in-controversy requirement, and to have original jurisdiction over the civil action, each plaintiff must meet that requirement. So --

JUSTICE GINSBURG: If we descend from the level of parsing the -- the statute to what's going on in these cases, in your cases I take it there was an injury to a child.

MR. LONG: Yes.

JUSTICE GINSBURG: And that qualifies under the amount-in-controversy.

MR. LONG: Yes.

JUSTICE GINSBURG: And her mother or sister and, I think, father wanted to come in and -- and bring claims that were entirely derivative of the injured child's claim.

MR. LONG: That's correct.

JUSTICE GINSBURG: And on your reading of 1367, there's the -- the -- there's no accommodation for that. So you'd either have to have the whole lawsuit in the courts of Puerto Rico or you'd have -- let the child sue in the Federal court and the parents would have to bring a separate suit?

MR. LONG: Well, I mean, it's not -- it's -- that is the rule of Zahn and Clark that has been the rule for many decades. Yes, the problem can be cured by dropping some of the plaintiffs. That's à possibility, but you cannot have this piggy-backing, bringing in additional claims that are jurisdictionally insufficient. You can't get around Strawbridge and complete diversity that way, and you can't get around the matter-in-controversy that way either. They -- they are parallel in the language of 1332.

JUSTICE GINSBURG: Well, what a legislature might think, well, now this Finley has -- we've been -- taken care of that. And your case looks very much the same in terms of breaking up a lawsuit into two when it

makes sense to try it all together. So we think that -- that old case should go just the way Finley went.

And the same thing with Zahn because, after all, Zahn doesn't fit very well with Ben Hur. If you're saying that the Strawbridge rule -- I mean, what really counts is diversity, and -- and Ben Hur says the only named representative citizenship counts and yet the amount-in-controversy, the lesser thing in your view -- every single member of the class has to meet that amount, but only the named representatives have to be of diverse citizenship.

MR. LONG: Well, you've made a number of points. I wouldn't agree that the matter-in-controversy is the lesser requirement. I mean, indeed, in the class action situation, because of Ben Hur, that's the only rule that keeps out additional plaintiffs.

JUSTICE GINSBURG: But if you -- does it make sense to have a rule that says we're going to ignore the citizenship of the members of the class for diversity purposes, for diversity of citizenship? Only the named representative counts. Well, then why shouldn't only the named representative count for amount-in-controversy? That would have been a rational thing for Congress if they wanted to fix that.

MR. LONG: Well, in -- in the class action context -- and again, my case is not a class action -- I

frankly can't explain how you reconcile Ben Hur and Zahn. I think those -- the cases -- for the same -- if -- if the rationale of Ben Hur is that the class members are not really parties in the full sense and so we don't need to worry about their citizenship, I would think you could make the same type of argument as to matter-in-controversy that as long as the representatives satisfy it, they're the parties in the full or true sense and so that's all that counts.

But the Court decided Zahn. There was really no doubt about that. Congress never indicated that it had any -- any difficulties with that decision, and it's now well established.

And I think -- the final point I'd just make very briefly is that if you were to interpret 1367 to have this broad effect of opening up diversity actions to unlimited joinder of plaintiffs, nondiverse plaintiffs, plaintiffs with -- who don't have the requisite amount in controversy, it -- it really would be absurd, not in the sense that doing that on its own is absurd. I don't contend that. But it -- it is not -- it would not be rational for Congress to go to all this trouble that it went to in subsection in (b) to rule out all these sort of indirect situations where the plaintiffs leave out a party in the initial complaint and then wait for the party to

come in some other way -- I mean, things that frankly are not likely to happen in a lot of cases -- but then say, oh, but the -- the doors are -- are wide open under rule 20, bring in as many plaintiffs as you want right at the outset or later on if you'd prefer, don't worry about diversity, don't worry about the amount in controversy. Those two things just -- just don't go together.

There are -- there are other things about subsection (b) that don't make good sense under the petitioner's view. I mean, for example, this is just one of them. If you just look at the language of subsection (b), it says you shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under -- a list of rules -- and then one of them is rule 20.

Well, whenever you have more than one defendant in a case just named in the complaint, you use rule 20 get in more than one defendant. So read literally, that says if you had this broad view, plaintiffs can bring in as many additional plaintiffs as they like under rule 20. But on the defendant's side, as soon as you've got a second defendant in the case, suddenly all this supplemental jurisdiction goes away. Now, that makes sense under our view because plaintiffs are not supposed to be asserting these kinds of claims anyway. Whether

there's one defendant or two, it's the rationale of Owen Equipment.

Thank you.

JUSTICE STEVENS: Thank you, Mr. Long.

Mr. Stearns, we'll hear from you.

ORAL ARGUMENT OF EUGENE E. STEARNS

ON BEHALF OF THE RESPONDENTS IN 04-70

MR. STEARNS: Justice Stevens, and may it please the Court:

I believe what's at stake here is whether this Court was serious in the Finley decision, and it's interesting that it was a 5 to 4 decision, in which four of you concluded that pendent party jurisdiction was a logical extension of Gibbs and five among you concluded that it was not up for this Court to make that determination, that only Congress could make that determination, and in the 200 years of history of the Federal courts that had preceded Finley, that the track record of this Court and the lower courts in expanding Federal jurisdiction had been a rocky one. But you weren't going to do it anymore.

Now, that wasn't the first time this Court had said those words, we're not going to do it anymore, but it was said in a way that got somebody's attention. And if there was a surprise, it was within a year Congress did

precisely what you asked them to do. They adopted 1367, and they did it in the way that Congress does things. It's better not to watch. They don't necessarily explain it carefully. They don't do it in an organized and comprehensive way. It is a matter that was of great interest to a small number of people and of no interest to the great body politic. Let's face it. Diversity jurisdiction is of great interest to you and me; it's of little interest to the people until they're hauled into court and find that only part of their case can be there.

And when we look at the history of Federal jurisprudence, what do we see? We see that the history of this Court has been largely to allow defendants hauled into court to ignore rules that we once thought were sacrosanct, for example, the notion of destruction of jurisdiction. And in law school we all learned about destruction of jurisdiction. It doesn't apply. When a defendant is brought into court, we ignore Strawbridge. We did because this Court and other circuit courts said you could. And incidentally, when they're brought into court, they're brought into the same civil action as any plaintiff or defendant in the original complaint.

JUSTICE GINSBURG: Are you talking about a claim mover? I'm not --

MR. STEARNS: Any claim, Your Honor, that's

brought in in a third party practice, any claim that's brought in an additional party claim is part of the same civil action. There's only one form of action. All the claims are in that one form of action.

The importance of this, incidentally, is that their entire argument depends on interpretation of the two words, civil action. Does the district court have original jurisdiction over a civil action if the civil action includes claims over which there's clearly original jurisdiction and claims where there is not?

Now, historically -- incidentally, Exxon has to basically make new law, and they do it by saying that Zahn stands for the proposition that there's no jurisdiction over a class action which includes smaller claimants. I -- I dare you to read Zahn and find those words. They don't exist. All Zahn says, all Snyder said, which preceded it, is that every class member's claim must be viewed individually. Now, that's a very interesting conclusion. In other words, it doesn't say there's no jurisdiction over the class action. It simply says the claims of the absent class members who don't meet the jurisdictional amount should be dismissed.

Now, interesting, look at the language in 1332. It says the district courts shall have original jurisdiction of all civil actions where the matter in

controversy exceeds the sum or value of $75,000. Well, when we read that statute and we apply Zahn and Snyder, we say civil action doesn't mean the aggregate of all claims. There we say what it means is we must evaluate each individual claim to determine if each individual claim within the civil action meets the jurisdictional minimum of the diversity statute.

JUSTICE BREYER: I imagine that if you filed a claim and the plaintiff was a class and the class contained a number of people who did not meet the jurisdictional minimum and they file a claim against a defendant in a diversity suit, I imagine the first thing the judge would say would be, I've read Zahn and we don't have jurisdiction over this action.

MR. STEARNS: Indeed. That was prior to the --

JUSTICE BREYER: Yes, that was prior to the statute.

So -- so they say, well, that's what the judge would have said, and moreover, if you had not a class action and you had three plaintiffs and one of them was from a different State than the defendant and the other two were not, the first thing the judge would say is, I'm very sorry. There is not complete diversity. I do not have jurisdiction over this action.

And so I take it their point is by coincidence

or not, that's what this statute says.

MR. STEARNS: I'd --

JUSTICE BREYER: And since that's what the statute says, that's what it means.

MR. STEARNS: Well --

JUSTICE BREYER: It means that this kind of a situation does not fall within 1367(a) because there was not jurisdiction over that action.

So I agree with you that those words are what their claim depends upon, but what is the answer to that contention?

MR. STEARNS: Isn't it interesting, Your Honor, that what drove 1367 was this Court's decision in Finley? And what's interesting about the argument that Exxon makes here is that Finley discussed the words civil action. And in fact, what Finley said in civil action is rejected, the very argument Exxon makes here --

JUSTICE BREYER: No, no. Finley happened to be an arising-under case, and in an arising-under case, as long as there is one claim that arises under, there is jurisdiction over the action.

MR. STEARNS: Justice Breyer, I -- I agree that --

JUSTICE BREYER: All right. Well, if you agree -- and I'm -- when I'm saying these things in such a

definite tone of voice, they reflect deep insecurity because I --

(Laughter.)

MR. STEARNS: Let -- let me tell you --

JUSTICE BREYER: But -- but I -- I want to know what is the answer to that point.

MR. STEARNS: Well, I -- I was going to agree and disagree. I agree that Finley was a Federal question case. That, however, doesn't go to the point of what this Court said about the words, civil action. What you said was the 1948 recodification came relatively soon after the adoption of the Federal Rules of Civil Procedure, which provide that there shall be one form of action to be known as civil action. Consistent with this new terminology, the '48 revision inserted the expression, `civil action, throughout the provisions governing district court jurisdiction. And what the Court held is there's no meaning to those words, especially when the revision is more naturally understood as stylistic. So the words, civil action -- and when you look at 1332, which is what Zahn is based on, if their interpretation of the words, civil action, was correct, then Zahn was wrongly decided and Snyder was wrongly decided.

JUSTICE GINSBURG: Mr. Stearns, there's a difference. It's not just style. There's a difference

between a claim and a civil action. A civil action can bundle several claims.

MR. STEARNS: Indeed, Your Honor, but if their argument was correct, that the civil action bundled the claims, as they suggest, then Zahn was wrongly decided. Then the amount in controversy in Zahn was the totality of all the claims. In other words, to preserve Zahn, which concluded that the civil action word means an individual analysis of every claim within it, to preserve that conclusion, they have to argue the opposite conclusion that the words, civil action, mean all the claims are aggregated. The problem with that argument is that the historical practice of this Court --

JUSTICE GINSBURG: I think they -- what -- the argument that I heard was not that all the claims have to be aggregated, but that they can't get in the door.

MR. STEARNS: Their -- well, Your Honor, respectfully, Congress created two doors. And they have a -- a door which is the door that existed under the Constitution, which is Article III jurisdiction. You can come in as a diversity plaintiff into -- into the courthouse. Now, Congress says there's another door. Congress went through and cleaned up 200 years of Federal court jurisprudence.

And incidentally, it is anathema to law

professors who have written books and tomes and lectured to law students, Your Honor, who don't understand what they're reading. The notion that in 1367 in one page, Congress could write down everything you needed to know about supplemental jurisdiction is horrifying to a host of law professors --

JUSTICE BREYER: But I don't see -- where I'm starting from this -- because at some point I'd like you to get to the -- the virtue of their position in my mind at the moment is, one, it is consistent with the language, which says civil action, not claim. Two, it is consistent with the only instruction I read that any legislator gave to the people who were writing this, staff, namely, write something that's noncontroversial. And third, I can, on their interpretation at least, I believe at least late at night, make sense out of all the words in these three different sections.

MR. STEARNS: Well --

JUSTICE BREYER: So at some point, I would appreciate your addressing that.

MR. STEARNS: Well, and I appreciate that, Your Honor, because let me start with the first premise.

Three law professors didn't write this article -- didn't write this language. That's incorrect. The article is written by a subcommittee of the Federal Courts

Study Committee that was chaired by Judge Posner. Judge Posner is the author of one of the decisions that affirms the -- has the same view as the Eleventh Circuit. Judge Posner had a member of his subcommittee, Mr. Kastenmeier, who was a Representative who just so happened to be chairman of the Senate Judiciary subcommittee that presented this language.

What happened --

JUSTICE GINSBURG: The Federal -- the Federal Study Committee was divided on Zahn issues.

MR. STEARNS: But --

JUSTICE BREYER: They -- they didn't make a recommendation one way or another on it.

MR. STEARNS: That's partially correct, but significantly incorrect, Your Honor. The subcommittee specifically said Zahn was wrong and wrote language to overrule Zahn.

JUSTICE GINSBURG: Yes, and the whole committee said we do not want to take a position on Zahn.

MR. STEARNS: Respectfully, Your Honor, you have to follow it through. The subcommittee said we intend to overrule Zahn. The words in this statute were written by the people who said we intend to overrule Zahn.

JUSTICE STEVENS: I thought the --

MR. STEARNS: It goes to the full committee.

JUSTICE STEVENS: -- I thought the committee report said we do not intend to overrule Zahn.

MR. STEARNS: No. Actually the subcommittee report said we did, of the Federal Courts Study Committee.

JUSTICE STEVENS: Did not the House committee report say we do not intend to overrule Zahn?

MR. STEARNS: What the House committee --

JUSTICE STEVENS: Did it? Am I correct or incorrect?

MR. STEARNS: The House report --

JUSTICE STEVENS: Am I correct or --

MR. STEARNS: -- yes, said we do not intend to overrule Zahn, Your Honor.

JUSTICE STEVENS: Right, and that was also the same report that was filed in the Senate proceedings as well.

MR. STEARNS: Well, it is the report that was filed in the Senate. It has a footnote that says we don't intend to overrule Zahn or Ben Hur --

JUSTICE STEVENS: Right.

MR. STEARNS: -- which I think everybody has concluded are mutually exclusive positions, but that's what it said.

But, Your Honor, respectfully, we now know, because they've all written Law Review articles, that the

people that wrote the House report, because they've said it, wrote those law -- wrote those words because they knew that the language did overrule Zahn and they didn't want to achieve that outcome.

JUSTICE STEVENS: I think -- I think you're overstating what they say in the article.

MR. STEARNS: Well, Your Honor, respectfully, what we do have is undisputed fact here because if you see Judge Weis' conclusion, for example, Judge Weis is one of the people who has adopted one of the opinions opposing our view of -- of this position.

JUSTICE GINSBURG: He was the chair of the --

MR. STEARNS: He was. And Judge Weis, even in his own opinion, acknowledges that his subcommittee that wrote the language intended to overrule Zàhn. And so what he says is --

JUSTICE STEVENS: Are you sure he said that?

MR. STEARNS: He does, Your Honor, and what he says is --

JUSTICE STEVENS: Where did he say that?

MR. STEARNS: He says it in a footnote, and he says he was --

JUSTICE STEVENS: In a footnote to what?

MR. STEARNS: To his opinion in this -- in the decision. It will take me a second to find it. His

opinion in the Meritcare v. St. Paul. In a footnote, he acknowledges -- what he says is he was upset that --

JUSTICE STEVENS: That's in an opinion written after the statute was adopted. Right?

MR. STEARNS: Yes, sir. Yes, Your Honor. What he says --

JUSTICE BREYER: When he did this thing -- when he was trying to write this statute, he seemed fixated on one thing, Kroger, and -- and (b) seems to reflect an effort to make -- put in statutory form Kroger.

MR. STEARNS: To put it in context, the subcommittee of the Federal Courts Study Committee says Zahn is bad law and doesn't make any sense, which by the way, respectfully, I think it is.

So then you go to the full committee. The full committee -- Judge Weis doesn't like diversity jurisdiction at all. He wants to abolish all diversity jurisdiction. They make no recommendations.

JUSTICE BREYER: No, but they do say in no event should the enclosed materials be construed as having been adopted by the committee.

MR. STEARNS: Precisely. That's the point he makes in his footnote. He acknowledges what the subcommittee did. But it's -- it's important to know Representative Kastenmeier was a member of this

subcommittee. The Federal Courts Study Committee is not Congress. It's merely an advisory body.

JUSTICE GINSBURG: Mr. Stearns, one of the things that we do know was that Congress intended to make a modest change. They had their eye on Finley. They wanted to overrule that. And if there's an ambiguity, isn't a court well advised to make the least change?

MR. STEARNS: Well, let's take those points. The answer is you make the change that Congress says in the statute you should make. And so when you have an --

JUSTICE GINSBURG: Well, if -- if you have a statute with a clear meaning, I agree with you, but this statute seems to be a bit of a muddle. And if you could read it in two different ways, then why don't you say, well, I'll pick -- if they're both plausible, I'll pick the one that doesn't introduce any radical change, that just makes a minor change?

MR. STEARNS: Your Honor, respectfully, if we look at the changes that were adopted in 1367, not a single one of the ones you're hearing argued today anybody can seriously argue are significant. For example, the Zahn issue. Zahn has no material significance on litigation in the Federal courts. And why is that? It's because most plaintiffs don't want to be in Federal court. These plaintiffs are different.

And incidentally, by the way, this is not --

JUSTICE GINSBURG: It -- it does -- to the extent that Strawbridge is involved, it -- it is --

MR. STEARNS: Your Honor, respectfully, this Court has been looking the other way on Strawbridge for 200 years, and what Congress did was ratify some of your previous abrogations of Strawbridge and they made another minor adjustment. And you know what it -- what did they did is, again, consistent with 200 years of friendliness to defendants in Federal court. The whole notion of diversity jurisdiction --

JUSTICE BREYER: Wait. On your last statement, I -- you -- something that I hadn't focused on.

MR. STEARNS: The whole --

JUSTICE BREYER: Can you just -- you said it doesn't make any difference. I thought it's the defendants who want to be in Federal court.

MR. STEARNS: Indeed.

JUSTICE BREYER: But they can't remove the action unless it could have been there in the first place.

MR. STEARNS: Precisely.

JUSTICE BREYER: And therefore, this interpretation, if you're overruling Zahn, would have made a big difference because it would have meant the defendants could have brought a lot of cases into Federal

court by the removal, and you would have seen the plaintiffs bar up in arms if, in fact, this provision would have allowed for easier removal.

MR. STEARNS: Your Honor, respectfully --

JUSTICE GINSBURG: As -- as indeed they were in the Class Action Fairness --

MR. STEARNS: Yes. I was going to get there, Your Honor, but in fact, Your Honor, respectfully, I hate to disagree with Your Honor, but I believe you're incorrect. Is that what you see in the Class Action Fairness Act, for example -- and we filed it in our brief -- the House and Senate committee reports which discussed this case and the fact that the majority of circuits of the circuit courts have agreed with our view -- there has been no class actions of any materiality filed. In fact, they made the note in 1999 or '97 more class actions were certified in one county in Illinois than filed and certified in the entire Federal system.

And the reason they said that is because most plaintiffs lawyers, notwithstanding Zahn -- it isn't -- Zahn isn't the issue. Snyder was the issue. It's aggregation that's the issue. All plaintiffs lawyers had to do to avoid removal is simply put named plaintiffs that don't meet the jurisdictional standards for diversity, create imperfect diversity, have amounts in controversy of

less than the amount in controversy required, and then they could never be removed. So Zahn is simply a footnote, and it got it -- all the billing of Zahn, Zahn, Zahn -- the reality is the predecessor to Zahn, which is Snyder that says that you can't aggregate under 1332 the amount in controversy, that was the significant decision.

And what Congress has now done a few weeks ago is to take up the Snyder case and has overruled Snyder. And what they've done is to say, when there's an aggregate claim of more than $5 million, it goes into Federal court. But look at what Congress has said. Look at --

JUSTICE GINSBURG: They haven't overruled Snyder. They said in this class action context if you meet the standards that they set, you can aggregate.

MR. STEARNS: But Snyder was a class action case that says you cannot aggregate claims under 1332. And so what Snyder says is because -- because the Class Action Fairness Act is restricted to diversity cases or diversity type cases, what it says is that -- and, therefore, is an amendment to 1332. What it does is add a new section to create original jurisdiction in diversity cases involving class claims.

And incidentally, the significance of that in this case is -- Justice O'Connor, you said is it retroactive. The answer is yes and no. It's applicable

to all cases filed after its effective date, which is already effective as of a couple weeks ago. If Exxon gets dismissal of this claim and gets it refiled, we will be applicable to the Class Action Fairness Act and be right back in Federal court where we started. And so what you're left with is all they're really looking for here now is a new trial, and this is just a procedural game to come back.

But there's very -- one important point I want to make to you. You said in Finley we're going to not make -- do this with jurisdiction anymore. We're going to ask Congress to do it. And Congress did it. And so you read 1367 and, respectfully, it is clear. Every court that read it at a certain point said it was clear, and the only ambiguity is created by a House report that says, notwithstanding what it says, we meant something else. That's -- the ambiguity is not created by the statute, but by an --

JUSTICE STEVENS: That's not a direct quote of the House report, I might find out.

(Laughter.)

MR. STEARNS: I'm sorry?

JUSTICE STEVENS: I say that's not a direct quote of the House report.

MR. STEARNS: I paraphrased, Your Honor.

(Laughter.)

MR. STEARNS: What we're left with here in this circumstance is that -- that what -- by the way, what you clearly have in the legislative history is -- for example, they obviously made a comment, a joke about what this Court will do when you look at the plain language of the statute and the history that they put in it.

And by the way, these three gentlemen did not write the statute. It should be perfectly clear. They were there observing what was going on when it was going on.

JUSTICE STEVENS: Do you think they were being intellectually honest in their Law Review or do you think -- accuse them of something other than honesty in what they said?

MR. STEARNS: Justice Stevens, I think whether it is or not, it demonstrates the mistake of relying upon something other than what's in the plain language of a statute because once you begin to encourage that kind of game to be played, then how would you have a trial over whether these professors were being honest or not? What do we know? They did write Law Review articles and they did pretty much admit what they did. Now, I may have a different take on it than someone else.

But what are we doing here? These -- these

plaintiffs filed this lawsuit in Federal court. They didn't go to Madison County, Illinois to sue one of the largest companies in the world. They didn't go to a friendly State court forum. They read 1367 to say, okay, we got original jurisdiction here under 1332 of the civil action, and we read civil action, because we just read Finley and Finley says civil action are just words of art. It doesn't mean what they say it means. So we filed in the Federal court and through the second door come these supplemental claims.

And the supplemental claims are -- are -- incidentally, so it's perfectly clear, in a class action context under rule 23, the named plaintiffs represent themselves and they assert their own claims, all of which were within the jurisdictional minimum, and they represent the claims of unnamed class members who they have jurisdiction over those claims through the exercise of supplemental jurisdiction.

Any way you cut it, this case -- all it is is come back again and try it again. It's been in the Federal courts for 14 years. 14 years. Enough. It's over. They were found guilty. Judgment should be entered.

And incidentally, that last point. They want to reverse a judgment. There is no judgment.

JUSTICE STEVENS: But do you agree that if they're right on the interpretation of 1367, the judgment has to be reversed?

MR. STEARNS: There is no judgment, Your Honor, because the district court was well aware of the issue that existed here, notwithstanding his disagreement with some other courts, and he refused to enter judgment until the claims process went through where it was determined whether each claimant was above or below the jurisdictional amount. And so what he did in doing that was to -- there is no judgment entered and he said, I'm not going to enter final judgment until this process is over. And every single case --

JUSTICE STEVENS: Let me modify the question. Do you agree that if they're correct, the entire action has to be dismissed?

MR. STEARNS: There's no case that is -- that would support that outcome, including the cases they cite.

JUSTICE STEVENS: Your answer is no, I gather.

MR. STEARNS: The answer is no.

Newman-Green doesn't say that. Caterpillar doesn't say that. No reported case says that. No reported case has ever found jurisdiction destruction in a jurisdictional amount case ever in the annals of Federal jurisprudence.

And when people -- you invite people to look at a statute, you invite Congress to write one, and people look at it and read it, they ought to be able to rely upon it and not what some staff person put in the back door in a legislative report that's inconsistent with the words of the statute itself.

Thank you.

JUSTICE STEVENS: Thank you, Mr. Stearns.

Mr. Ayer, we'll hear from you.

ORAL ARGUMENT OF DONALD B. AYER

ON BEHALF OF THE PETITIONER IN 04-79

MR. AYER: Justice Stevens, and may it please the Court:

We have a little bit different view I think of the statute than the other counsel arguing this morning. We -- we believe that the statute actually makes quite a lot of sense, and we also believe emphatically that it does not reverse the complete diversity requirement.

I think the clearest indication of the incorrectness of Mr. Phillips' and Mr. Long's position is the comparative treatment under their reading of the Federal question case that is in Federal court and the diversity case. Under their reading, it's perfectly clear -- and I think everyone agrees -- that -- that when additional claims, as in the City of Chicago case, are

joined with a Federal question case and they are -- they relate to the same subject matter, that it will, in fact -- they will be within the supplemental jurisdiction. Most importantly, for purposes of this comparison, they will not destroy the original jurisdiction over a civil action even though they are claims that are not themselves within the original jurisdiction.

Somehow or other, the argument is advanced that when you have a diversity case in Federal court where all parties are diverse and there is the jurisdictional amount satisfied and you bring in other parties who do not destroy complete diversity and therefore do not destroy the jurisdiction of the court over the initial matter that was before it -- somehow or other the argument is advanced that the jurisdiction over the civil action in that situation is destroyed even though it is not destroyed in the Federal --

JUSTICE SCALIA: I -- I don't know what you mean when you say they -- they don't destroy complete diversity. You mean that the original plaintiff and the original defendant are still who they used to be?

MR. AYER: No, no. No, I'm sorry, Your Honor. I -- I must have misspoke. What I mean to say is that -- that in the case where a -- a diverse additional plaintiff comes in to bring a claim --

JUSTICE SOUTER: You're talking about geographical diversity --

MR. AYER: Yes.

JUSTICE SOUTER: -- not jurisdictional.

MR. AYER: Correct. I'm -- I'm drawing -- effectively what -- the point I'm making is that this distinction between the Federal question case joined with cases that are not within the original jurisdiction and the diversity case, which is clearly within the original jurisdiction, because all parties are diverse, but it is joined with claims that are below the jurisdictional amount, so that they are not within the diversity jurisdiction.

JUSTICE GINSBURG: But I don't understand the distinction that you're making between diversity of citizenship and amount in controversy since 1332 includes both. To qualify for diversity from the very beginning, you have to be of the opposite -- you have to be from a different State than your opponent and the matter in controversy must be X. And that's always been part of the diversity -- diversity jurisdiction. There were two components. One was the citizenship of the parties. Two was the amount in controversy.

MR. AYER: Correct, Your Honor. The -- the question -- I think the difference is that the concept of

complete diversity, which this Court for 200 years has articulated as in the statute that grants diversity jurisdiction is a relational concept. In order to determine whether you have jurisdiction over any parties in a case, you must look at all of the parties in the case.

With regard to amount in controversy, it's perfectly clear, and -- and 1367 changes nothing about the fact that 1332 jurisdiction requires meeting the amount in controversy. But if 1367 has conferred, as it has, supplemental, additional jurisdiction, then the question that has to be asked is, does the fact that a party coming in with what is otherwise a supplemental claim -- does -- does the presence of that party destroy the original jurisdiction that exists where the new party coming in is diverse but doesn't meet the jurisdictional amount?

JUSTICE BREYER: Well, they're saying what's sauce for the goose is sauce for the gander. If it does in the amount, it does so in the -- if it's -- if -- you're trying to drive a wedge between the geographical diversity and amount.

MR. AYER: Correct, Your Honor.

JUSTICE BREYER: And they say you can't do that under the statute. If you're prepared to say that bringing in a new plaintiff from the same State as the

defendant does destroy diversity over the original action, you must also be prepared to say that bringing in a new plaintiff who only has $3 at issue destroys the original jurisdiction because there's no way, in terms of the original jurisdiction and the wording of 1332, to make that distinction.

MR. AYER: Well --

JUSTICE BREYER: Now, you respond to that what?

MR. AYER: I -- I will. Well, I will. I'll respond in terms of the City of Chicago. City of Chicago is a case where you have issues, claims within the Federal question jurisdiction. Additional claims in the case arise under State law. They are not within the Federal question jurisdiction, but they are related to the same case or controversy. The Court said, with no difficulty, both for purposes of 1367 and for purposes of 1441, that is a case within the original jurisdiction. It's a civil action. In both statutes, the same language. It's a civil action within the original jurisdiction. And -- and if that is the case, in a Federal question case -- I think I want to -- I'm going to get to the important point here.

This Court has many, many decisions and many other courts have many decisions saying emphatically that when you add a party or when there is a party in a case who destroys complete diversity, the court loses

jurisdiction over the entire matter. To my knowledge, the last time the Court said it as a holding was in the Schacht case a few years ago. There are, I think, dozens of cases from this Court. We cite about five of them on page 24 and 25 of our blue brief.

That is a fundamental principle and it is because the concept of complete diversity is a relational concept. It depends on who the parties are in the case. As has been said many times, the requirement of amount in controversy is individual. The fact that a party submits a complaint and the complaint has one party, as in our case, whose claim comes within the diversity jurisdiction and includes other parties who we agree their claims do not come within the original jurisdiction -- does the fact that those claims are all put on the same piece of a paper, put on a complaint, does that mean the court, the trial court, lacks jurisdiction over the first claim as to which all the requirements are met?

There are no nondiverse parties here. We have complete diversity. We have a claimant who meets the jurisdictional amount. We have a civil -- a civil action within the original jurisdiction.

JUSTICE SCALIA: Well, you -- you could say the same thing about -- about a -- a second claim that destroys diversity. You could say the same thing. Does

that -- does that -- does the absence of diversity in this second claim destroy the diversity that existed in the first claim?

MR. AYER: Well, it does, Your Honor.

JUSTICE SCALIA: I mean, no, I doesn't. I mean, the diversity that existed in the first claim is still there.

MR. AYER: Well, I'll -- I'll give you an example of a situation that is often trotted out as a problem under our reading of the statute, and we think -- the irony of it is, I think, none of the parties actually think it's a problem, and I certainly don't, and that is, the problem of a rule 20 plaintiff who is not listed in (b).

But let's just say a -- a plaintiff comes in and files a -- a complaint. There is complete diversity. Clever plaintiff says, aha, here I am. I've gotten through (a). We're in court. Now, I'm in (b) and I am -- I'm a rule 20. I'm going to add some rule 20 plaintiffs, and I've got these folks who are not diverse and we're going to bring them in.

Well, we -- we have cited cases, I think on page 33 of our brief, where it's perfectly clear that no court, I think, in its right mind is going to turn around 2 weeks later and say, oh, you got me. You know, we're going to

have to let these nondiverse plaintiffs in. We're going to have to go forward with this case because you did it in the right order. If you had filed it all in one complaint, you'd be out of court, but you're a clever guy and you filed it in two different steps. So supplemental jurisdiction. You come in.

JUSTICE BREYER: Exactly, but that's the reason for saying that -- look, as I understand it -- and this is -- the -- the thing that got me thinking they may have a point here is A, B, and C are dealing with three separate problems. The first problem is how to overrule Finley without affecting anything else like Zahn or any of the others.

MR. AYER: Well, we -- we disagree with that.

JUSTICE BREYER: The second problem B is simply Kroger. B is how to make statutory Kroger.

And C is United Mine Workers v. Pennington to make sure they have discretion to get rid of supplemental jurisdiction.

Now, once you see it as three separate problems -- I know they wanted me to see it this way, but once you see it as three separate problems, the words fall into place as long as you do interpret that word, civil action, to mean, well, there is no jurisdiction over the civil action where what's happened is you've simply added as a

defendant a nondiverse party or you've added as a plaintiff a nondiverse party or a party that doesn't meet the jurisdictional amount.

Now, I spell all that out because I hope in the next 15 minutes you will tell me why that's wrong.

MR. AYER: Well, I -- we agree entirely with the first part of what -- what Your Honor has said. We -- we agree completely that the complete diversity requirement, which has been articulated so many times, means that when you bring in a -- a nondiverse party, it destroys jurisdiction. There is not a single case from this Court or that I know of any other court that states that the jurisdiction over the original action is destroyed.

One of the things that was said here very -- somewhat cleverly this morning is that in Zahn the -- the case was not allowed to go forward because of the presence of these other parties. That isn't what they said. Three different times in Zahn the Court said these parties must be dismissed. There is no jurisdiction over these parties whose claims are small. They are out. No one ever said, oh, my goodness, we're going to lose jurisdiction over the case. Every time this issue arises in the context of -- of complete diversity, the court says, oh, my goodness, we don't have jurisdiction. We can't hear any part of this.

JUSTICE SOUTER: Mr. Ayer, let -- maybe I'm

going to oversimplify to the point of the absurd but let me try it.

The argument that you're answering is the argument that there is no textual basis in (a) to distinguish the geographical diversity requirement from the amount-in-controversy requirement. Your answer is, I think, that when the drafters in (a) refer to action and jurisdiction, those terms have to be understood historically as we have understood them, and the significance of a -- a geographical problem, which does destroy jurisdiction traditionally, is different from an amount-in-controversy problem which is -- which does not and is dealt with more simply. Is that your --

MR. AYER: That is correct, Your Honor.

JUSTICE SOUTER: Okay.

MR. AYER: That is correct.

And -- and I would just like to go on and say one other thing, and that is, this Court has written how many hundreds I don't know, but hundreds of cases articulating nuances -- and -- and I've learned how remarkable they are, the nuances -- of law under 1332 and under what amounts to a case within -- it's incredible how complex the law that this Court has spelled out is under 1332.

Our view of the statute is that that body of law

has been preserved and it's been preserved in two places. It has been preserved in the first clause of 1367(a), which is really all that's at issue right here, and it's also been -- been preserved in the last clause of 1367(b) which says that -- that as to the list of enumerated exceptions -- in essence, (b) says if you've got a case within the original jurisdiction, then it says, with regard to plaintiffs' claims against parties joined under 14, 19, 20, and 24 and with regard to claims brought by persons to be joined under 19 or 24, then you don't have supplemental jurisdiction if to do so would be inconsistent with the requirements of jurisdiction under 1332.

What does that mean? That means that those excepted claims may not come in if they could not have been brought in the case originally without destroying original jurisdiction under 1332. It can't possibly mean, as our opponents I think read it, that the only time you have supplemental jurisdiction over these claims is when you already have 1332 jurisdiction over these claims. That isn't supplemental jurisdiction. It would make absolutely no sense to read the statute that way.

So how do we read it? We read it to say if these are claims whose presence in the case at the beginning would have destroyed the anchor that gets us

into court, which is a case under 1332, then the whole thing goes out the window.

And furthermore, I would say -- and again, this is not an easy point to spell out in all of its nuances, but at any point in the case, which will not be many and won't be often -- but at any point in the case where this Court's cases would say that you just lost jurisdiction under 1332 -- and I say that's not often because basically there's a time of filing rule and there are many, many, as you all know better than I -- there are many nuances as to what exceptions exist to that and what don't. But the bottom line is if the case falls out of 1332 jurisdiction, such as when the clever plaintiff tries to join a rule 20 compadre to come in and bring a nondiverse claim, goodbye. You're out of court because --

JUSTICE BREYER: See, that -- that's what I thought was their view of -- of (b). To go to (b), you understand (b), you have to go back before Kroger. And Kroger was worried about some clever plaintiff, as you say --

MR. AYER: Right.

JUSTICE BREYER: -- getting a defendant. He knows this defendant is going to bring a third party complaint against Smith from the same State, and he says, ha, I'll sue this defendant.

And analogous things happen with rule 19 and 24, not really with 20 they said, but 19 and 24. And then Kroger says, hey, you can't do that.

MR. AYER: Right.

JUSTICE BREYER: And so (b) was Judge Weis' effort to make sure that was codified. It wasn't really meant so much as some kind of exception from (a).

MR. AYER: Right.

JUSTICE BREYER: It was meant to have an independent basis there.

So I didn't see, if you give it an independent basis, how anything odd happens --

MR. AYER: Well --

JUSTICE BREYER: -- by giving it their reading.

MR. AYER: Well, I -- I just think that the whole statute makes a very great deal of sense. I mean, one question is, does the first clause of (a) -- is -- is that a gate you have to get through and once you get through it, you're done? I think the answer is no. I think -- I think clearly you've got to have a case within the original jurisdiction under 1332, and if you lose it, the supplemental jurisdiction is a tail that falls off. It -- it goes away.

JUSTICE GINSBURG: Mr. -- Mr. Ayer, may I ask you a question on your interpretation? I think you were

-- your position is that Clark against Paul Gray has been overruled, and whatever one may say about the attention that was focused on Zahn, Clark against Paul Gray has been on the books since 1939. And it seems unlikely that Congress would have overruled that without even making a peep to that effect.

MR. AYER: Well, Clark, of course, is a Federal question case. Clark is a case at -- at the time when there was an amount-in-controversy requirement.

JUSTICE GINSBURG: Yes. It's about an amount-in-controversy rule.

MR. AYER: Right. I -- I understand, Your Honor. I -- I think -- I mean, I -- I would -- it seems to me that at the end of the day, we have to say that the statute did what it did, and -- and if -- if it reversed Zahn, it seems to me that it certainly reversed -- reversed Clark, and frankly, we think the conclusion is easier for all of the reasons based in the statute.

One thing I would like to do before -- before the light goes off here is -- is talk a little bit about the legislative history. And of course, our position first -- in the first instance is that there really isn't any reason to consider it because this is not a statute that destroys complete diversity. It doesn't do anything radical. It actually is quite sensible and limited and

clear when you read it. So we don't think you need to go to it.

But if the Court is going to go to it, we would submit that there is a far more sensible way of thinking about the legislative history than grabbing one sentence out of the House report, which I'll talk about in a minute as to what significance it really has anyway.

But essentially the sequence of events here -- and I'll try to go through it quickly -- is that you -- and as Mr. Stearns said, you have basically three versions of this -- of this enactment. The last one got tweaked a little bit at the end.

The first version is the -- is the subcommittee report. And as he indicated, the subcommittee report, which actually appears at page 14 and 15 of our brief, of our yellow brief -- if you read the text of (a), which appears on page 14, what you see is language which on its face clearly does reverse Zahn, and then you have the commentary that went with it in the working papers to the subcommittee, and that commentary could not have been more emphatic of -- of the intent to reverse Zahn.

The second enactment, which we have put in an addendum to our yellow brief because it, frankly, plays little role in the case in -- in thinking through the statute, is the section 120 of House Resolution 5381. And

essentially when Congress -- it's quite correct that the Federal Courts Study Committee did not specifically endorse the subcommittee proposal. It passed it along, saying it wasn't taking a position. When it got to Congress, from somewhere a new enactment came forward onto the floor or onto the committee that was addressing it, and that's this provision in the addendum of our yellow brief. And all I'm going to say about that is that when you look at that, number one, it looks entirely different. Number two, it actually does a much poorer job of preserving complete diversity, and it does, in fact, explicitly overrule Owen Equipment v. Kroger.

Judge Weis came in and testified and said, that's bad, don't do that. You know, you've got to show more respect for complete diversity, and -- and you shouldn't do that. That got put into the ash can. So that's the end of 120.

And the next thing he did, attached to his same testimony, was -- was submit a proposal, which is in our yellow brief at page 16. And this -- this is what we said we think you should enact. If you compare the language of (a) with the language of (a) in the enactment on page 14, you will see that it's a couple lines longer. It has a few more embellishments and words, but it is substantively indistinguishable, the provision in (a). And so what we

have is Judge Weis putting forward a proposal that can't be substantively distinguished from the one that the subcommittee said, clearly correctly, would reverse Zahn.

The last question here is what happened then, and what happened then to provision (a) -- there are essentially three things that happened to this whole provision that I'm aware of. One is they took out the words, on a claim, and that's the argument that's principally advanced here. They took those. So it's civil action on a claim. They took out on a claim. They also changed the last clause of (b) and they also changed the reference in the supplemental jurisdiction from case or -- from -- what is the -- the transaction or occurrence to case or controversy. And those are all the changes.

We would submit that there is nò basis to infer from any of those things, and particularly not the first one that dealt with (a), that they meant by dropping on a claim to somehow say, oh, my goodness, you've got to have jurisdiction over all of the claims before you.

Again, that is inconsistent with the Court's opinion in City of Chicago. You can't come out the same way in City of Chicago if the presence of a nonjurisdictional claim destroys original jurisdiction over the civil action.

The last thing I -- I want to say about the --

the jurisdiction which the other side relies upon -- essentially it's a sentence that says there was no intent to, quote, affect the jurisdictional requirements of 1332 in diversity-only class actions. And then there's a cite, a footnote to Zahn and Ben Hur. That's pretty much what there is that they talk about.

Well, number one, as has been said, the authors -- apparently the authors of that language, the ones who put it in conceded that this legislative history was an attempt to correct an oversight in the statute, which it would have been better to have corrected in the statute. We think that's significant.

But I would go beyond that and say that if you just look at this language, no -- no intent to affect the jurisdictional requirements of 1332 in diversity-only class actions, number one, most importantly, we don't think there's been a change in the requirements under 1332. As I've said before, this statute engrafted this Court's entire body of 1332 jurisprudence in the first line of -- of clause (a) and in the last line of clause (b), and so it's all there. No one has changed 1332. This is supplemental jurisdiction additional to it.

And secondly, this is not a class action. There's nothing in our case that relates to a class action. That's an issue, if you think this is relevant,

you have to deal with in -- in the other case, but you don't have to deal with it in our case.

I guess the last thing I would say about legislative history is that we think probably the most important legislative history here, other than the tracking of these provisions, which we think is quite indicative, is -- is that the -- the House report, among other things, also said that what they were trying to do was to provide, quote, a practical arena for the resolution of an entire controversy. And we think that in the context of our case, as -- as has been pointed out here already by Justice Ginsburg, it makes very little sense to resolve our case by splitting it in two and sending it to different courts.

Thank you very much.

JUSTICE STEVENS: Thank you, Mr. Ayer.

Mr. Phillips, you have another 4 minutes, and I see that will be adjournment time, I will let everyone else know.

REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE PETITIONER IN 04-70

MR. PHILLIPS: Thank -- thank you, Justice Stevens, and I'd just like to make a few points.

First of all, Justice Kennedy, you asked about the City of Chicago case, and Justice Ginsburg said this

sort of feels like a Finley type case in the -- in -- in how it applies in the diversity context. But the fundamental point here is that there is a very different approach and there has always been a very different approach to Federal question jurisdiction and to diversity jurisdiction. Federal question jurisdiction has always been claims-driven. Diversity jurisdiction has always been party-driven. And the Congress that enacted 1367 in 1990 had to have understood that. It's been the law for as long as -- as we've had -- for the 200 years that Strawbridge has been around, that distinction has -- has existed.

And so we're not asking the Court to interpret civil action differently in this particular statute. We're asking the Court to focus on civil actions of which the district court has jurisdiction. That incorporates all of the requirements of 1331 and 1332.

Second, Justice Breyer, I'm a little reluctant to get into this rule 19, rule 24 to try -- but I think I can help at least clarify at least some aspects of it.

Rule 19 by its terms excludes situations that defeat jurisdiction. So it says in the rule that if you're bringing in a necessary party -- remember, this is the defendant who is bringing in a necessary party -- if it would defeat jurisdiction, you can't do it, and if it

still is indispensable, you have to dismiss the entirety of the case, which is precedent for the notion that sometimes you have to dismiss the entirety of the case in situations where you don't have jurisdiction over a particular party.

But the -- the second question, rule 24. I think the standard is that you could bring in a rule 24 party within supplemental jurisdiction that doesn't defeat anything with respect to the original civil action. I think that was the rule prior to 1367. But to the extent it was or wasn't, I think 1367(a) and (b) combine to allow that to happen. (b) then says that if someone intervenes as a party, the plaintiff cannot bring a claim against that -- that intervening party.

Justice Souter, you asked about the different treatment between the amount-in-controversy requirement and the geography requirement. If there is a distinction -- and I don't think this provision allows any kind of meaningful distinction between the two as it applies in the 1367 context -- it is that the amount-in-controversy requirement is more important. That's what Zahn held. You can dispense with the geography requirement in Ben Hur, but you cannot dispense with the amount-in-controversy requirement. And the reason --

JUSTICE GINSBURG: This didn't make a whole lot

of sense.

MR. PHILLIPS: Well, except it does because the -- the amount-in-controversy requirement keeps a lot of smaller cases out of Federal court that otherwise would be in there. It is a protection of this Court's docket and all the Federal courts' dockets, and that's important. And that's also a distinction between the Federal question cases and the diversity cases.

If you resolve diversity in favor of driving cases to State court, you are promoting federalism interests because State courts should decide law. If you drive more cases into Federal courts under Federal question, that's right because you think Federal courts are, in general, better suited to resolve Federal courts -- Federal questions.

And then finally, with respect to the remedy, Justice Ginsburg, Newman-Green says you can simply excise some parties if there is no prejudice. And what I submit to you is we have a case that has been litigated from day one without jurisdiction involving more than 1,000 plaintiffs.

JUSTICE GINSBURG: That -- this point was not -- would be you're asking us to decide it in the first instance. You, I would expect, make argument to the district judge when you go back.

MR. PHILLIPS: Well, except that this Court in Dataflux didn't send it back. This Court in Dataflux decided that the right -- in Grupo Dataflux that the right answer is that the remedy for this mistake is the dismissal certainly of the class, but I think frankly the dismissal of the entirety of the case.

JUSTICE GINSBURG: Well, that's because the Court conceived of there -- there being one entity, so you couldn't -- you couldn't change -- split that one entity into two fictitious persons.

MR. PHILLIPS: Well, that's -- and that's what the district court held in Zahn, which is the reason the district court didn't allow this case to come -- didn't allow this to go forward as a class action. And that's important to remember. This Court didn't say you dismiss out anything in Zahn. Zahn came up without it being a class action. The district court dismissed the class action. It came up trying to reinstate it. This Court said you can't reinstate it.

Thank you, Your Honor.

JUSTICE STEVENS: Thank you, Mr. Phillips.

This -- these cases are submitted.

(Whereupon, at 11:57 a.m., the case in the above-entitled matter was submitted.)