

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   THE STANDARD FIRE INSURANCE                   :

4   COMPANY,   :

5                                 Petitioner                         :   No. 11-1450

6                         v.   :

7   GREG KNOWLES   :

8   - - - - - x

9   Washington, D.C.

10   Monday, January 7, 2013

11

12                                 The above-entitled matter came on for oral  
13   argument before the Supreme Court of the United States  
14   at 11:06 a.m.

15   APPEARANCES:

16   THEODORE J. BOUTROUS, JR., ESQ., Los Angeles,  
17         California; on behalf of Petitioner.

18   DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf of  
19         Respondent.

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

2 (11:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument next in Case 11-1450, the Standard Fire  
5 Insurance Company v. Knowles.

6 Mr. Boutrous.

7 ORAL ARGUMENT OF THEODORE J. BOUTROUS, JR.,

8 ON BEHALF OF THE PETITIONER

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

11 Congress enacted the Class Action Fairness  
12 Act of 2005, CAFA, to expand Federal diversity  
13 jurisdiction and to protect defendants and absent class  
14 members against the kind of State court class action  
15 abuses that are occurring in Miller County, Arkansas.  
16 Congress directed that in calculating the amount in  
17 controversy, "courts shall aggregate the claims of the  
18 individual class members." That's 28 U.S.C. Section  
19 1332(d)(6), it's quoted in full at page 2 of our blue brief.

20 Congress's express focus on the claims of  
21 the individual class members in the text of the statute,  
22 rather than on the amount being sought by the would-be  
23 class representative, is dispositive of the question  
24 presented and requires reversal in this case.

25 CHIEF JUSTICE ROBERTS: Would your position

1 be the same if the issue were not the amount sought but  
2 rather the substantive claims? Say there are two  
3 different claims the class member -- the class could  
4 raise. One would yield damages of \$4,900,000. The  
5 other would yield damages of \$10 million. Do you have  
6 the same objection in a case in which the prospective  
7 representative only pleads the first claim?

8 MR. BOUTROUS: Not necessarily, Your Honor.  
9 We are not arguing that here. There are cases that this  
10 Court has decided going back to Barry v. Edmunds in 1886  
11 where there are allegations in a complaint that might,  
12 for example, yield a punitive damage claim, but it's not  
13 explicitly pled, and the courts then look and say,  
14 punitive damages could be recovered here and say the  
15 amount in controversy clearly exceeds the -- the  
16 necessary amount.

17 But we're not saying that in every case the  
18 courts need to look through and see every claim that  
19 could be in play.

20 CHIEF JUSTICE ROBERTS: Well, but you do  
21 seem to have a difficulty with your position about how  
22 far it goes. You make the point in your briefs about  
23 the statute of limitations question. In other words,  
24 it's not just how much they claim, but where they decide  
25 to cut off the statute of limitations and so forth.

1           It seems to me that it's a bit of a slippery  
2 slope if you start saying we're going to look at what  
3 the class could -- could recover in deciding whether or  
4 not, not simply whether or not this representative is  
5 adequate, but whether or not it's below or above, above  
6 or below \$5 million.

7           MR. BOUTROUS: That's really how it's been  
8 done, Your Honor, from day one. Under the traditional  
9 diversity statute, the courts look and see what's the  
10 maximum amount the plaintiff on his or her best day  
11 could recover based on the factual allegations in the  
12 complaint and the causes of action that could arise from  
13 the factual allegations --

14          JUSTICE SCALIA: Yes, but under the  
15 traditional -- you surely don't want us to apply the  
16 rules of the traditional diversity statute to this case  
17 because it's clear that under the traditional diversity  
18 statute, you -- you can waive excessive damages, right?

19          MR. BOUTROUS: That's correct, Your Honor.  
20 The individual --

21          JUSTICE SCALIA: So you don't want us to  
22 apply that rule here.

23          MR. BOUTROUS: I don't want you to apply  
24 that rule, Your Honor, because that rule applies to the  
25 individual who brings his own case in court and can say,

1 I want to come into court and collect less than the  
2 amount that would give Federal jurisdiction. It's much  
3 different when Mr. Knowles has come to court and said, I  
4 want to represent these other individuals in Arkansas.

5 JUSTICE SOTOMAYOR: Well, why doesn't -- why  
6 doesn't the normal class certification process protect  
7 adequately the absent class members? First of all,  
8 counsel has to prove he or she is adequate. So doesn't  
9 that mean that if they enter a stipulation that is  
10 grossly unfair to the class that the judge is not going  
11 to certify that case?

12 MR. BOUTROUS: It wouldn't protect it --  
13 protect from the problems and abuses that Congress was  
14 concerned about, Your Honor, and that are occurring  
15 here.

16 JUSTICE SOTOMAYOR: You haven't answered.  
17 If -- if the court finds the stipulation inadequate for  
18 the class, is that class going to be certified?

19 MR. BOUTROUS: It could be, Your Honor. And  
20 another class representative could come in and could  
21 seek more than \$5 million. That's why --

22 JUSTICE SOTOMAYOR: And then they would get  
23 removed to the Federal court, which is what the statute  
24 was intended to do.

25 MR. BOUTROUS: But what Congress was

1 concerned about in the text of the statute, and the  
2 Senate report make this very clear, that with all the  
3 abuses that occur in the interim, discovery that has  
4 nothing to do with the case -- the discovery here goes  
5 back 10 years. The -- this case --

6 JUSTICE SOTOMAYOR: Well, discovery  
7 vis-a-vis the certification of the class is going to  
8 happen anyway. My point is that much of your argument  
9 in your brief is centered around binding the absent  
10 class members. What I'm getting to is that if the  
11 stipulation is grossly unfair, there may not be a class  
12 at all, or the Plaintiffs who have claims greater than  
13 those in the aggregate might opt -- will get notice and  
14 opt out.

15 And there is due process challenges if a  
16 settlement is entered that is so grossly unfair that it  
17 violates due process. So I don't know why the process  
18 itself doesn't protect the interests of -- of Congress.

19 MR. BOUTROUS: Your Honor -- excuse me. The  
20 Congress was very concerned that cases were being kept  
21 in the State courts through abuses and manipulations of  
22 the amount in controversy. It's very clear in the  
23 Senate report, Congress talks about this because, for  
24 example, in this case the defendants can never get a  
25 class certification hearing in Miller County.

1           They can never get a ruling on the merits.  
2   And in the meantime, the kind of abuses that Congress  
3   was concerned about, the lack of the Rule 23 protection,  
4   the application of those standards to protect the class  
5   members --

6           JUSTICE KAGAN:   But Mr. Boutrous, you say what  
7   Congress is concerned about and point to the Senate report.  
8   You know, usually we look to the text and the text makes  
9   very clear that Congress was concerned about many things  
10   and it did many things.  It got -- it really -- it  
11   raised the matter in controversy threshold.  It  
12   eliminated the Zahn anti-aggregation rule.  It  
13   eliminated the complete diversity requirement.  It  
14   eliminated the one-year limit on removal.

15           Here's one thing it didn't eliminate.  It  
16   didn't eliminate the St. Paul master of your complaint  
17   rule.  So -- so I guess where in the text do you see  
18   this?  You point to claim, the word "claim."  Is that  
19   the only thing that you are resting on in the text?

20           MR. BOUTROUS:   Your Honor, I think the text  
21   does take away the St. Paul rule that an individual can  
22   control what he seeks and go where he desires and do  
23   what he wants -- or she -- because it points to the  
24   claims of the individual class members and the text  
25   Congress could expect --



1 JUSTICE KAGAN: Well, if I said to you,  
2 Mr. Boutrous, "Is your claim for over \$100,000," what  
3 would you think I mean? Would you think I mean some  
4 sort of abstract version of the best claim you could  
5 bring, or would you think I mean what I demanded, what I  
6 asked for?

7 MR. BOUTROUS: Well, Your Honor, I would  
8 think that I would answer you that it's worth as much as  
9 I can possibly obtain in court if I was seeking to  
10 adequately represent the class. But in terms of valuing  
11 the claims here --

12 JUSTICE KAGAN: Do you think that the word  
13 "claim" is not -- when you say Joe made a claim for  
14 \$100,000, a claim is not what he asked for, but is  
15 instead some kind of law professor's view of what the  
16 best thing that he could have asked for?

17 MR. BOUTROUS: Your Honor, we've cited the  
18 Tohono O'odham Nation case, where the Court interpreted  
19 the word "claim" and said when a statute uses the word  
20 "claim" regarding claims that have not been brought,  
21 it's the operative facts and the right to recovery, not  
22 the demand. That's exactly what we have here.

23 JUSTICE GINSBURG: Mr. Boutrous, I thought  
24 at least as an alternative argument, you're saying: The  
25 statute itself is silent. It doesn't deal with this

1 question of amount in controversy. However, the  
2 individual, the named plaintiff, who has said, I'm not  
3 going to seek more than the \$5 million, cannot speak for  
4 the members of the class who are absent. He can't  
5 stipulate that they will take under 5,000.

6 I thought that was the central part of your  
7 argument, not based on the statute itself, but on the  
8 notion that a named plaintiff, unless and until he is --  
9 he is certified to represent the class - doesn't  
10 represent them.

11 He can represent himself, but he can't bind  
12 the people who -- who have not been certified as part of  
13 a class. I thought that was part of your argument.

14 MR. BOUTROUS: Yes, Justice Ginsburg, that's  
15 absolutely right. And because the statute focuses on  
16 the claims of the individual class members, Mr. Knowles  
17 has no power to affect those claims. He's not the  
18 master --

19 JUSTICE KAGAN: But he doesn't have power to  
20 affect those claims before the certification has  
21 happened.

22 MR. BOUTROUS: Exactly.

23 JUSTICE KAGAN: Before the certification has  
24 happened, they can do whatever they want. They can go  
25 bring their own claim for \$6 million. And that's why

1 Smith v. Bayer, which you so happily rely on, does not  
2 have much to do with this case. Smith v. Bayer is the  
3 question of can an -- can a person be precluded by a  
4 judgment when that person was not part of a class.  
5 There's no question that this person is going to be  
6 precluded. This person can go do whatever he or she  
7 wants before class certification and judgment.

8 MR. BOUTROUS: Your Honor, that's --  
9 Smith v. Bayer says the plaintiff can't bind the class.  
10 Plaintiffs have now conceded that. So what we have  
11 here, the district court found on an uncontradicted  
12 record that the claims of the individual class members  
13 exceed \$5 million. That means there's Federal  
14 jurisdiction.

15 Back to Justice Ginsburg's point, that is  
16 exactly our point, Your Honor. The -- a named plaintiff  
17 cannot affect or jeopardize or undermine the claims of  
18 absent individuals.

19 JUSTICE BREYER: This is what I -- could you  
20 go back --

21 MR. BOUTROUS: Yes.

22 JUSTICE BREYER: -- to Justice Kagan's first  
23 question? I was looking at the words of the statute.  
24 And if I look at 1332, which has been on the books a  
25 long time, it says, "The district court shall have

1 original jurisdiction of all civil actions where the  
2 matter in controversy exceeds the sum or value of  
3 \$75,000, exclusive of interest, of costs, and" -- et  
4 cetera, okay?

5 Then I look here, and it says, "The district  
6 court shall have jurisdiction of any civil action in  
7 which the manner in controversy exceeds the sum or value  
8 of \$5 million, exclusive of interest and costs," et  
9 cetera, okay? So the words seem identical.

10 Now, in respect to the first, we know that a  
11 lawyer can file a binding stipulation that says, I don't  
12 care what this is about, I am not asking for more than  
13 \$75,000, and the Federal court does not have  
14 jurisdiction. Given that's true in the first statute,  
15 and given that the second statute is almost identically  
16 worded, at least in that part, why can't he do the same  
17 thing with the \$5 million?

18 And it can't be the words I quoted that  
19 stopped him from doing it, so what is the word that  
20 stops him from doing it?

21 MR. BOUTROUS: Your Honor, it's the other  
22 part that is extremely important, section 1332(d)(6).  
23 You were quoting from section 1332(d)(2). Unlike  
24 section 1332(a), Congress in CAFA explicitly added  
25 subsection (6), which says "In any class action, the

1 claims of the individual class member shall be  
2 aggregated to determine" --

3 JUSTICE BREYER: Yes, as to what that looks  
4 like, "shall be aggregated," again from the language, is  
5 it's simply to make certain that Zahn does not require  
6 the individual -- thing to approach -- to count. In  
7 other words, you aggregate rather than just looking at  
8 the individual members, which is Zahn, which has nothing  
9 to do with the issue before us.

10 MR. BOUTROUS: Well, Justice Breyer,  
11 Congress could have said we're just getting rid of Zahn,  
12 or it could have said the aggregate amount being sought  
13 by the named plaintiff is going to control. But if  
14 you took that away --

15 JUSTICE BREYER: No, they rarely pass a  
16 statute that says, let's just get rid of case X.  
17 Normally they look to the holding of case X, and then  
18 they pass the statute that says the opposite. So the  
19 holding of Zahn was that you could not aggregate the  
20 individual members' claims in a class. So to get rid of  
21 Zahn, what we do is we pass a statute that says you can  
22 aggregate.

23 And indeed, nobody objects here to the  
24 aggregation. It's the total amount of the claims being  
25 limited by a stipulation that is the issue here, and

1 that's why I had trouble finding your argument in the  
2 word "aggregation."

3 MR. BOUTROUS: It's really not the word  
4 "aggregation," Your Honor. It's the word "individual"  
5 and it's with the word "claims." If Congress had done  
6 what you are suggesting, Justice Breyer, it could have  
7 said the aggregate amount being sought by the named  
8 plaintiff, or the total amount, or the demand of the  
9 plaintiff. In the Venue Clarification Act, which was  
10 passed in 2011, which applies to 1332(a), Congress said  
11 the sum demanded will control.

12 But here, to protect the legitimate claims,  
13 Congress defining, as I urged the Court --

14 JUSTICE KAGAN: Mr. Boutrous, that form of  
15 argument -- Congress could have said -- does seem to me  
16 to be much worse for your position. If Congress had  
17 wanted to get rid of the St. Paul master of your  
18 complaint rule, it could have said, we are getting rid  
19 of the St. Paul master of your complaint rule. But  
20 you're trying to find it in a provision which is really  
21 an anti-Zahn provision, not an anti-St. Paul provision.

22 MR. BOUTROUS: Your Honor, it really goes to  
23 a fundamental issue of what a class action is. If Mr.  
24 Knowles had come into court himself on behalf of  
25 himself, and Zahn -- in St. Paul, the money quote, if

1     you will, in St. Paul says "if he desires to go to State  
2     court, he can limit his recovery."

3                     Mr. Knowles --

4                     JUSTICE KAGAN: Let's get back to the Chief  
5     Justice's question because there are a thousand ways in  
6     which we let the named plaintiff prior to certification  
7     construct a case, and then we ask, as Justice Sotomayor  
8     said, later we ask, is the way he's constructed a case  
9     adequate or not, and we allow him to go forward or not  
10    based on that.

11                    But he gets to decide whether to seek  
12    damages. He gets -- at all, or whether he only can seek  
13    injunctive relief. He gets to decide which claims to  
14    bring, trespass or negligence. He gets to decide how  
15    many years' worth to ask for. He gets to decide which  
16    defendants to sue.

17                    All of these things are going to have an  
18    effect on -- on the amount that's -- that's being asked  
19    for. And yet in all of these ways, we allow or --  
20    maybe you're telling me no -- do we stop the named  
21    plaintiff from doing all -- all of those things, too?

22                    MR. BOUTROUS: We don't stop them from doing  
23    all of those things, Your Honor. And there are certain  
24    things -- we -- we agree that the complaint controls a  
25    great deal -- the factual allegations.

1 JUSTICE GINSBURG: What about specifically  
2 the question that the Chief asked about time? You did  
3 argue in the district court that these plaintiffs could  
4 have specified a 5-year time period, in which case it  
5 would be clear that the amount in controversy was  
6 satisfied. But instead, they took a 2-year period.

7 Can we take that also into account in  
8 determining the amount in controversy, that the  
9 complaint could have been enlarged to include 5 years  
10 instead of 2 years?

11 MR. BOUTROUS: Your Honor, I believe you  
12 could. And I believe that the Court's decision in Hertz  
13 said if there is a sign of manipulation that is meant to  
14 thwart jurisdiction or affect jurisdiction, the Court  
15 can look through that to look to competent proof of what  
16 the actual facts are.

17 And I think that what has happened here is  
18 the plaintiff's lawyers, in addition to these  
19 stipulations, they're slicing and dicing the classes up  
20 into pieces to -- to thwart jurisdiction and manipulate  
21 jurisdiction.

22 CHIEF JUSTICE ROBERTS: Your approach leads  
23 to particularly perverse results. You're at the  
24 position of arguing that -- you know, they are seeking  
25 less than \$5 million, but we're responsible for a lot



1 more damage than that. And of course, you don't concede  
2 it, but you do say, if in fact we're liable, the damages  
3 are going to be a lot greater. Could -- I assume that  
4 admission could be used against you under principles of  
5 judicial estoppel.

6 MR. BOUTROUS: It's an unusual position to  
7 be in, Your Honor, it's not quite what we're arguing.  
8 We're arguing that under the rules for judging the  
9 amount in controversy that this Court has enforced, the  
10 lower courts have enforced these for hundreds of years,  
11 and it's that you look at the complaint and say what's  
12 the maximum amount the plaintiff can get on their best  
13 day under the claims they've pled based on the facts and  
14 the proof and the evidence.

15 Here, the uncontradicted evidence, put aside  
16 the statute of limitations question or any other claim  
17 they could have brought, it exceeds \$5 million. The  
18 plaintiff never --

19 JUSTICE ALITO: Is there a difference  
20 between what you're --

21 JUSTICE SOTOMAYOR: But you -- you chimed  
22 into this discussion --

23 CHIEF JUSTICE ROBERTS: I'm sorry.

24 JUSTICE SOTOMAYOR: I'm sorry.

25 CHIEF JUSTICE ROBERTS: Let's go by

1 seniority. Justice Alito.

2 JUSTICE ALITO: Is there a difference  
3 between what you are advocating and the approach that's  
4 now taken in the General Removal Statute as it's been  
5 amended recently under 1446(c)(2)? So there as I read  
6 it, the amount demanded in the complaint is not  
7 necessarily controlling.

8 A case can be removed even if the amount  
9 demanded in the complaint is below the jurisdictional  
10 threshold and then the defendant can prove that the real  
11 amount involved exceeds the jurisdictional threshold.

12 MR. BOUTROUS: That's -- that's exactly  
13 right, Your Honor. There's greater leeway under CAFA  
14 because under 1332(a) and 1446, there are certain  
15 standards that need to be met to allow the defendant to  
16 put on proof. But that's how it's always been. The  
17 defendant can then put on evidence and say this is the  
18 actual amount in controversy.

19 And here, the only way the plaintiff got  
20 around it in the lower courts was to argue that the  
21 stipulation was binding, Justice Kagan, that was their  
22 argument below and that's what the district court found.  
23 It found that the stipulation was binding on the class.

24 JUSTICE KAGAN: It's binding if the class is  
25 certified and a case proceeds to judgment. It's not

1 binding on the absent class members prior to  
2 certification and prior to judgment.

3 MR. BOUTROUS: And that means that  
4 jurisdiction in the Federal courts exists because we  
5 judge jurisdiction at the time of removal. And at the  
6 time of removal, there was no binding limitation on the  
7 recovery that could be obtained, undisputed facts showed  
8 that that exceeds \$5 million when the claims of the  
9 individual class members are aggregated.

10 JUSTICE KAGAN: I think I don't understand  
11 that, Mr. Boutrous, because what you have, given that  
12 this is a State which says that these stipulations are  
13 binding if it proceeds, if there's certification, and if  
14 it proceeds to judgment, you have a cap of \$5 million.  
15 You cannot be charged more than \$5 million under this  
16 State's law, if this case ever gets to judgment.

17 MR. BOUTROUS: The problem, Your Honor,  
18 again and this isn't just me. This is what Congress  
19 said in its findings. In -- in the text as you noted,  
20 it eliminated the -- but the five pillars of  
21 restrictions and diversity jurisdiction because in State  
22 courts, the courts aren't applying Rule 23-like  
23 standards. They're not doing it in Miller County.

24 They're not even allowing class  
25 certification to occur or to be heard, and instead this

1 discovery is being taken. Here, the limitations period  
2 is limited to two -- or the class period is limited to  
3 two years. The discovery that was served with the  
4 complaint goes back to 13 years. So --

5 JUSTICE ALITO: Even if this case were  
6 handled on remand to the Arkansas Supreme Court exactly  
7 like a Federal class action, I don't understand how  
8 absent class members would ever be able to -- to  
9 determine whether by failing to opt out, they had  
10 compromised part of their claim. I don't see how, even  
11 if they're notified that there's a \$5 million cap -- and  
12 I don't know that Rule 23 requires that, but suppose  
13 they're notified of that.

14 They can't tell whether, by remaining a  
15 member of the class, their claim is going to be  
16 compromised at all. It would depend on lots of  
17 different things, including how many members are in the  
18 class after it's certified. And that's something they  
19 can't know.

20 MR. BOUTROUS: That's -- that's exactly  
21 right, Your Honor, and that's something page 3a of the  
22 addendum to our opening brief, the findings --

23 JUSTICE GINSBURG: Your concern is that  
24 the -- that the certification -- if the certification  
25 would occur in the Federal court, that's one thing. But

1   you're -- you're saying that the named plaintiff can't  
2   stand for the entire class when we know that -- that the  
3   certification question, if the stipulation is binding to  
4   prevent removal, it's going to be the State court that's  
5   going to look into the adequacy of representation and  
6   whether the stipulation binds all members of the class.

7                   That's your whole concern.  If the -- if the  
8   Federal court made that determination, I think you  
9   wouldn't be here.

10                   MR. BOUTROUS:  Well, that's what Congress  
11   was concerned about, too, Your Honor.  It was concerned  
12   that the State courts weren't applying standards of  
13   uniformity in these -- class actions that are affecting  
14   interstate commerce and that Rule 23's protections and  
15   standards should apply.

16                   JUSTICE KAGAN:  Well, Congress was concerned  
17   about suits of over \$5 million.  And -- and the question  
18   here is, is this a suit of over \$5 million.  Now, if it  
19   is a suit over \$5 million, a State court is bound by the  
20   due process clause and a State court is going to find,  
21   look, you're just giving these plaintiffs' claims away.  
22   We're not going to allow you to do that.  You're not an  
23   adequate representative.

24                   On the other hand, in a case like this where  
25   it's \$5,024,000 and it only gets there because you've

1 added on one and a half million dollars of legal fees,  
2 the Court might very well say you are an adequate  
3 representative, go for it. Now, usually we don't  
4 question State court judgments of that kind. Why should  
5 we do so here?

6 MR. BOUTROUS: We don't have a State court  
7 judgment yet, Your Honor, that -- and we judge the  
8 removal issues and the amount in controversy at the time  
9 of removal. And \$5 million is \$5 million, Congress drew  
10 the line there. And as Justice Alito was pointing out,  
11 the notices to the absent class members, Congress -- I  
12 was about to say 3a of the addendum to our blue brief,  
13 those are the findings that Congress put into the public  
14 law, number -- letter C: Confusing notices are  
15 published that prevent individuals from exercising their  
16 legitimate rights in -- and enforcing their legitimate  
17 claims.

18 And it would be ironic in the extreme  
19 if a -- where a statute was enacted to protect -- and  
20 this is in the findings -- "legitimate claims of absent  
21 class members" and to allow them -- the cases to be in  
22 Federal court, if this Court were to hold that a named  
23 plaintiff who doesn't represent those people can come  
24 into court and -- and say we're not going to seek the  
25 full amount of those claims in order to keep the case

1 out of Federal court.

2 That would be totally contrary to Congress's  
3 intent.

4 CHIEF JUSTICE ROBERTS: Well, you're  
5 assuming that it's a bad thing for the class members to  
6 have their claims limited. But it may well be a good  
7 thing for them to have their claims limited if that gets  
8 them into what would reasonably be regarded as a more  
9 sympathetic forum.

10 MR. BOUTROUS: I'm not making a judgment on  
11 that point, Your Honor. It may or may not be, and the  
12 Plaintiff makes this point. Maybe it's better to be in  
13 State court. But for removal purposes only, going back  
14 to just the pure analysis, the question is does the  
15 amount in controversy, when the claims of the individual  
16 class members are aggregated, exceed \$5 million? It's  
17 undisputed that that's true. The only basis for saying  
18 it doesn't exceed that amount is the stipulation, which  
19 everyone now agrees has no binding affect whatsoever.

20 The plaintiffs also argue, concede in their  
21 brief that --

22 JUSTICE KAGAN: Mr. Boutrous, I do  
23 think -- you have to be careful about two different uses  
24 of the word "binding." It has no binding effect right  
25 now on an absent class member; they can go out and bring

1 their own suit. If the -- the named plaintiff is found  
2 to be adequate and the suit goes forward and goes to  
3 judgment, then the stipulation does indeed have binding  
4 effect and -- and you have not been exposed to more than  
5 \$5 million.

6 MR. BOUTROUS: But the question, Your Honor,  
7 is, is it binding in this case on anybody or anything  
8 other than Mr. Knowles?

9 JUSTICE KAGAN: It's binding -- it is  
10 binding on everybody if there's a finding of adequate  
11 representation and if this goes forward as a class  
12 action; then it's binding and you haven't been exposed.

13 MR. BOUTROUS: But, Your Honor, again, under  
14 the jurisdictional approach -- and Your Honor cited  
15 St. Paul. St. Paul says that if -- once the amount in  
16 controversy has been established to exceed the amount,  
17 here \$5 million, it's on the burden of the parties  
18 seeking to oust jurisdiction to show, to a legal  
19 certainty, that the amount will not go over \$5 million.

20 Your questions and the plaintiff's brief  
21 concede it could well go over \$5 million if this class  
22 representative is found inadequate, if another person is  
23 appointed to be the class representative, and therefore,  
24 there is Federal jurisdiction. That's the rule that  
25 plaintiffs say should apply. They don't even -- he does



1 not even try to suggest that it's legally impossible  
2 that the amount might go over \$5 million, and that's the  
3 problem. It's going -- it's an amount that is over  
4 \$5 million and these cases, the -- the stipulation is  
5 meant to just keep the case in State court, contrary to  
6 Congress's intent and I will --

7 JUSTICE GINSBURG: What do you do -- in the  
8 language in 1332(d)(1)(D), the term "class members"  
9 means the persons, named or unnamed, who fall within the  
10 definition of the proposed class, the proposed class,  
11 and that's what we have here.

12 MR. BOUTROUS: That's -- that's what we're  
13 using, Your Honor, for our calculations, the proposed  
14 class, including the narrower time frame that we think  
15 is a manipulation, but nevertheless we've used that and  
16 the amount exceeds \$5 million.

17 And if I could reserve the rest of my time,  
18 Your Honor? Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
20 Mr. Frederick?

21 ORAL ARGUMENT OF DAVID C. FREDERICK

22 ON BEHALF OF THE RESPONDENT

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

25 Our position is that the stipulation is

1 binding throughout the "civil action filed by the  
2 putative class representative." I want to focus on the  
3 words "civil action" because there has been no civil  
4 action filed by any -- absent class members.

5 The only civil action that the district  
6 court is being considered for jurisdiction is the civil  
7 action that has been filed by the putative class  
8 representative. So, if the class is later not  
9 certified, the stipulation would only bind the putative  
10 class representative. If the class is certified --

11 JUSTICE KENNEDY: Are you -- are you saying  
12 that (6) doesn't apply at this point?

13 MR. FREDERICK: No.

14 JUSTICE KENNEDY: Because (6) talks about  
15 class action, and it says the duty of the district  
16 court --

17 MR. FREDERICK: What --

18 JUSTICE KENNEDY: -- is to aggregate the  
19 claims of the individual class members.

20 MR. FREDERICK: And what 1332(d)(1)(B) does,  
21 Justice Kennedy, is define class action in terms of the  
22 civil action that was filed, so long as it was filed  
23 pursuant to Federal Rule 23 or an equivalent State  
24 statute.

25 What the complaint here does in the prayer

1 for relief, and in paragraph 11 of the complaint, is to  
2 say that this civil action is not going to be worth more  
3 than \$5 million.

4 CHIEF JUSTICE ROBERTS: And you -- I assume  
5 you agree that if at the adequacy hearing, if there ever  
6 is one, and it's demonstrated that well, in fact, the  
7 amount in controversy is \$10 million, then you would be  
8 obviously not an adequate representative.

9 MR. FREDERICK: Well, that would be one  
10 outcome that a State court could come to. A second  
11 outcome could be that at that point, if an alternate  
12 class member comes in and files an intervened complaint  
13 and says, this case really is worth \$10 million, at that  
14 point section 1453(b) applies and they can remove to  
15 Federal court.

16 JUSTICE KAGAN: And they can remove no  
17 matter when that happens; is that right, as a result of  
18 CAFA, because CAFA took off the one year limit?

19 MR. FREDERICK: That's correct.

20 JUSTICE SCALIA: Or the State court could  
21 find, oh yes, it is -- the claim is worth a lot more  
22 than 5 million, but it's worth that amount to be in this  
23 generous court for these generous juries. And so you're  
24 really not harming these absent plaintiffs because they  
25 ought to want to be here. We've got juries and very

1 favorable judges. Couldn't it find that?

2 MR. FREDERICK: Well, what's very clear,  
3 Justice Scalia, is that Congress was not attempting to  
4 address the adequacy of class representation issue when  
5 it decided this statute and enacted it.

6 JUSTICE SCALIA: I understand it, but -- but  
7 I'm just addressing your point which you blithely say,  
8 if the -- if the representation is inadequate, if indeed  
9 it's worth a lot more, that will be handled. Not  
10 necessarily. The State court could find, and I suspect  
11 this State court would find, that it's worth the money  
12 to be in State court.

13 MR. FREDERICK: A putative class  
14 representative makes all kinds of strategic judgments  
15 about how best to maximize value for his clients and for  
16 the class. And that entails judgments about whether to  
17 assert various legal theories. Here, and  
18 Mr. Chief Justice, this goes to your very first  
19 question, this complaint renounced a claim for punitive  
20 damages.

21 But there are some cases out of the Tenth  
22 Circuit, the Frederick case, not associated with me, and  
23 in the Seventh Circuit, the Back Doctors case, they say  
24 essentially if there is a claim for punitive damages you  
25 have to make an estimate for amount in controversy

1 purposes.

2 As I understand their theory in -- as they  
3 express it on page 11 of the reply brief, it's very  
4 uncertain as to a case like ours where we have renounced  
5 a claim to punitive damages whether or not a Federal  
6 district court is, nonetheless, supposed to take that  
7 into account.

8 CHIEF JUSTICE ROBERTS: What if you had a  
9 case where a lawyer brings an action in Miller County  
10 and says, I represent -- I want to represent the class  
11 of people with these claims and these claims, whose  
12 names begin with A to K. It turns out that's  
13 \$4 million.

14 Then, in the next county, at the same time,  
15 he files a case saying, I'd like to represent these  
16 people whose names begin L to Z. In each of those  
17 cases, it's \$4 million. I take it you don't have any  
18 objection to that?

19 MR. FREDERICK: Well, my objection would be  
20 at the class certification stage, Mr. Chief Justice,  
21 where the requisite of typicality, numerosity, the  
22 contrivances that are being done are -- are going to  
23 whether or not those represent -- representatives are  
24 adequate. It does not speak to Federal jurisdiction --

25 JUSTICE BREYER: That's the same question.

1 CHIEF JUSTICE ROBERTS: But is a counsel who  
2 proceeds on that basis, is there any reason to question  
3 his adequacy, let's say he's fully representing,  
4 bringing all the claims and all the damages. He's just  
5 decided to break it up from A to K. Somebody from L is  
6 not going to say, well, he's inadequate when he's  
7 representing him just because he could have represented  
8 everybody in the other action.

9 MR. FREDERICK: I misunderstood, Mr. Chief  
10 Justice. I think that for Federal jurisdiction  
11 purposes, the Court has always had -- that kind of legal  
12 strategy is perfectly appropriate under the master of  
13 the complaint --

14 JUSTICE BREYER: If so, this is just a  
15 loophole because it swallows up all of Congress's  
16 statute, which is what their problem is, all you have to  
17 do, even if you were less obvious than the Chief  
18 Justice's example, what you do is you -- you file a  
19 complaint, you say it's for \$4,900,000; in fact, it's  
20 worth 10 million. But you inform people, unlike  
21 Justice Alito, you figure a way around his problem, you  
22 keep them informed, and you say, it's getting close,  
23 getting close.

24 And once you are up to \$4,800,000, the  
25 others get the word: Stay out of it. And once they

1 stay out of it, you go ahead with your action and then  
2 those that stayed out of it becomes the subject of a  
3 second action. And if it's for 50 million, then you  
4 have ten actions and then you have 20. So, in fact, all  
5 that is required is a few extra pieces of paper that  
6 will soon become standardized, and a lot of postage  
7 stamps.

8                   And we have 30 or 40 or \$50 million cases  
9 being tried in whatever counties Congress liked the  
10 least. I gather they're some in Arkansas. But that  
11 seems to be all behind Justice Scalia's and the Chief  
12 Justice's questions, and I would like to hear a pretty  
13 complete answer on that.

14                   MR. FREDERICK: Sure. Justice Breyer, if  
15 you look at the report that went along with the statute,  
16 what Congress was most concerned about was the situation  
17 where each individual class member would not be able to  
18 exceed \$75,000, but there might be a million of them.  
19 And so you might have a million class members, each of  
20 whom had a claim for \$50,000, and there was no way to  
21 get that to Federal court because of the Zahn  
22 non-aggregating rule.

23                   Congress was not concerned about having the  
24 master of the complaint altered in this class process;  
25 and, in fact, Congress rejected a proposal that would

1 lower the amount in controversy for class actions to \$2  
2 million because the congressional budget office said, if  
3 you keep it at that low, virtually every class action  
4 will be in Federal court and Congress has not  
5 appropriated additional funds for the Federal courts to  
6 deal with all of the class actions that would occupy  
7 this space.

8 CHIEF JUSTICE ROBERTS: Counsel, you  
9 realize, of course, you are on pretty thin ice. You are  
10 talking about a Senate Report and now you are talking  
11 about proposals that weren't enacted. Your -- your  
12 friend on the other side focuses on the statutory  
13 language which tells you how to find out how much is at  
14 stake.

15 MR. FREDERICK: And I'm telling you that his  
16 focus on the word "claims" is insufficient because there  
17 are no claims by absent members until there is a civil  
18 action that has been filed. And that is why if you look  
19 at the definition of a class action, it is a civil  
20 action that is filed pursuant to one of those rules.

21 JUSTICE ALITO: Under your argument, the  
22 amount that's demanded seems to be totally meaningless.  
23 Here, we are told that the real amount is only slightly  
24 above the \$5 million figure, but I don't think that  
25 makes any difference. So let's say that what was -- you



1 stipulate you are not going to get more than \$5 million,  
2 but really the value of the claim is \$50 million.

3 And you say that's perfectly okay. It will  
4 be dealt with later when the case is -- after the case  
5 has been remanded to the -- to the State courts. Isn't  
6 that right? So the \$5 million is just -- just means  
7 nothing.

8 MR. FREDERICK: No, the 5 million --

9 JUSTICE ALITO: In practical terms.

10 MR. FREDERICK: Well, Justice Alito, it  
11 means we have to determine, and the district court has  
12 to determine, whether or not the 5 million has been  
13 satisfied on the basis of the well pleaded complaint and  
14 an aggregation where, as a factual matter and as a  
15 stipulated matter in paragraph 11 of the complaint, the  
16 class representative here said, this case is not worth  
17 more than \$5 million.

18 And we know that that's true because even  
19 under their estimate of all of the class members in the  
20 State of Arkansas, the damages only equal about  
21 \$3 million. And so --

22 JUSTICE ALITO: Okay. But does that matter?  
23 We assume, I think, that the real amount is a little bit  
24 over \$5 million. Suppose the real amount is 6 million  
25 or 7 million, 8 million, does it matter where along that

1 continuum the real amount falls?

2 MR. FREDERICK: Not so long as there is a  
3 binding stipulation that says so long as this civil  
4 action is in place, it is not going to be worth  
5 \$5 million.

6 JUSTICE BREYER: But what you said then in  
7 response -- we're on the same subject, and I'm drawing  
8 the conclusion from what you say that yes, we've found a  
9 way around this. And what we're going to do is we will  
10 divide our \$25 million class action into six subsidiary  
11 actions and proceed exactly the same merry way. And we  
12 do that by means of stipulation.

13 Now, your words in the statute do favor  
14 that, in my opinion, at the moment. But the purpose  
15 seems to strongly cut the other way. And I do see a way  
16 to go the other way, in that you could say, given the  
17 purpose of this, the words do mean something different,  
18 and they do mean you should aggregate the real value of  
19 the real amounts that the class is likely to have.

20 Now, it's capable of that reading, and the  
21 virtue of that reading is that it would stop what looks  
22 like, from what you're saying, a mechanical method of  
23 avoiding the purpose of the statute. I say that  
24 explicitly because I really want to make it as much as  
25 possible that you will focus in on what's a response to

1     that.

2                   MR. FREDERICK:   Yes.   Well, Justice Breyer,  
3     Congress could have addressed any number of those kinds  
4     of issues with the specific terms that it used, but the  
5     well-pleaded complaint rule and the master of the  
6     complaint rule is a very subtle part of our diversity  
7     jurisdiction.   And that is so because we want these  
8     jurisdictional inquiries to be simple, not complicated.

9                   Under their approach, they would take all  
10    the conceivable legal theories that might be brought  
11    over a -- conceivable period of time, and ask the  
12    district court to make very nuanced judgments about --  
13    what --

14                  JUSTICE KENNEDY:   But what you're saying in  
15    your answer to Justice Breyer -- and I don't think  
16    you've really addressed his point -- that the statute  
17    number 6 says "shall aggregate the individual claim."  
18    What you're saying is that the simplest thing is to  
19    evade the statute.   Evasion is simple.   And therefore,  
20    we still use that approach because the simplest is the  
21    best.

22                  That just is not responsive to his question.

23                  MR. FREDERICK:   Well, Justice Kennedy, let  
24    me try it this way, which is that for the large case,  
25    the one that I gave in my hypothetical where there are a

1 million class members, and each of them has a claim of  
2 \$50,000, we know that prior to CAFA, that case was  
3 staying in State court because of this Court's Zahn  
4 rule.

5 But that might be a nationwide case. It  
6 might be worth hundreds of millions of dollars in  
7 damages. That was the kind of problem that Congress was  
8 trying to get at. But the case where there's a  
9 stipulation that actually might be meaningful, where the  
10 amount in controversy is debatable as to whether it's  
11 really \$5 million, that's the kind of case where  
12 jurisdictional simplicity ought to encourage --

13 JUSTICE GINSBURG: But your theory doesn't  
14 depend on it being just a little over \$5 million, the  
15 theory would hold whether it was \$8 million,  
16 \$9 million --

17 MR. FREDERICK: That's correct because --  
18 and Justice Ginsburg, I'm sorry to interrupt you, but  
19 that's precisely because we want the ability to make  
20 legal judgments and strategies to reside in the person  
21 who's bringing the complaint.

22 We don't want --

23 JUSTICE GINSBURG: Even though you admit in  
24 your brief -- you agreed that the stipulation -- I  
25 didn't think that this is what you said on page 53, the

1 stipulations can have no effect on absentees, until the  
2 Court finds at the certification stage that the  
3 stipulation was made in good faith and doesn't render  
4 the named plaintiff an inadequate representative.

5 But we have to judge removal at the time  
6 removal is made, and at that time, there is no  
7 determination of class. So at the removal stage, the  
8 stipulation is inoperative as to the non-named class  
9 members.

10 MR. FREDERICK: Not where there are  
11 allegations about what the aggregated damages are about.  
12 That's why -- to address this in the language of the  
13 civil action, those absent class members haven't filed  
14 any lawsuit. We don't really know what claims they  
15 might conceivably bring if they are were to be  
16 hypothesized.

17 What we do know is that there is a civil  
18 action, it has been filed by a putative class  
19 representative, that putative class representative in  
20 good faith, the district court found had acted in good  
21 faith in stipulating to a lower amount than  
22 \$5 million -- and the question is should that be given  
23 legal effect, where everybody knows it will be binding  
24 if the class is certified, and it will be binding on the  
25 class representative if the class is not certified.

1 JUSTICE ALITO: Suppose this were an  
2 individual action, and the amount is -- the amount is  
3 pled -- an individual diversity action -- and the amount  
4 that is pled is under \$75,000. The defendant still can  
5 remove the case and prove that the amount is really  
6 higher than that because the practice of the State in  
7 question is to allow a recovery that is over \$75,000.  
8 So why shouldn't the same approach apply here?

9 MR. FREDERICK: Well, you were referring to  
10 a statute, Justice Alito, that was recently enacted, in  
11 which it does say that the presumption shall be that the  
12 amount pleaded in the complaint is subject to disapproval.  
13 But that's reversing 200 -- well, 100-plus years of  
14 settled removal law, after the reforms of the 1870s  
15 created the removal jurisdiction the way it is more  
16 currently constructed.

17 And so in that interregnum between the 1870s  
18 and that statute passed just a couple of years ago, the  
19 rule was well-settled that the individual case pleading  
20 amount was fine. And under *St. Paul Mercury*, if there  
21 was a stipulation that had been filed contemporaneously  
22 with the complaint or prior to removal, that that would  
23 be given legal effect.

24 Here, the stipulation was filed with the  
25 complaint. There is no doubt that this was done in good

1 faith. The district court found that -- and I don't  
2 think that's really an even arguable proposition here,  
3 where they were asserting a 40 percent attorney's fee on  
4 this -- and so really the question is, where you have an  
5 aggregated estimate, should that be given legal effect.

6 JUSTICE ALITO: Wouldn't it be perverse if  
7 the rule were that in an individual action where a  
8 plaintiff is simply stipulating how much he or she is  
9 demanding -- individually -- which the person can do,  
10 it's possible to look behind that number.

11 But in a class action where the named  
12 Plaintiff is purporting to make a stipulation on behalf  
13 of absent class members as to whom the named plaintiff  
14 at that point has absolutely no authority, you can't  
15 look behind the number --

16 MR. FREDERICK: Well, as a policy matter, we  
17 might have a debate about the various virtues of that,  
18 but they were not enacted in the same piece of  
19 legislation.

20 So what we do know is that for CAFA,  
21 Congress had not adopted the rule that you're positing.  
22 Nonetheless, we do not attempt to argue that they have  
23 no basis for making arguments about amount of  
24 controversy when they remove, but it is subject to the  
25 rule that a binding stipulation shall be given binding

1 effect in the civil action that has been filed. And if  
2 that is later proved to be inadequate --

3 JUSTICE GINSBURG: How is it binding when  
4 you said in your brief it doesn't bind the unnamed class  
5 members?

6 MR. FREDERICK: Justice Ginsburg, this is  
7 important that you and I understand each other on this  
8 point because it is binding in the civil action filed  
9 for all purposes. So whoever is covered by that civil  
10 action will forever be bound by the \$5 million  
11 stipulation.

12 What we do not know is who will be members  
13 of that class until the certification hearing is done.  
14 Whoever ends up being covered by that civil action will  
15 forever be bound by that stipulation. That is what the  
16 district court knows.

17 JUSTICE KAGAN: Can I ask you this? Because  
18 I have been trying to figure out exactly what  
19 Mr. Boutrous is concerned about. And one thing he might  
20 be concerned about is that, notwithstanding that the  
21 class has really claims for \$20 million, the thing is  
22 going to be certified for \$5 million, and all these  
23 absent class members are -- are being deprived of  
24 something meaningful to them.

25 But that's something which -- you know



1 usually, we assume that State court judges will do their  
2 jobs, will pay attention to the Constitution, will apply  
3 adequacy of representation standards that come from the  
4 due process clause. So that seems like a strange thing  
5 to worry about in interpreting this Federal statute.

6 The other possibility is that he might be  
7 worried that this stipulation won't be really as binding  
8 as you say, that in a case in which there is an adequacy  
9 of representation determination made, the class goes  
10 forward, and then things work out and it really looks  
11 like all these absent class members are going to get --  
12 you know, badly treated.

13 He's going to tear this stipulation up or do  
14 something like that. And it's going to be way down the  
15 line. And why should we allow that to happen?

16 MR. FREDERICK: Well, for two reasons,  
17 because there are protections that are in the statute  
18 that protect both defendants and absent class members.  
19 And the protection for the absent class members is it  
20 that if that stipulation is insufficient to adequately  
21 represent their interests, the district court, the trial  
22 court and State court will not certify the class.

23 JUSTICE KAGAN: But this is -- he's done the  
24 certification, now it turns out that the certification  
25 was wrong, that in fact, these claims are worth a good

1 deal more. And he says, I can't in good faith allow all  
2 these people's claims to be adjudicated for this amount  
3 of money when I know they're worth five times as much.

4 MR. FREDERICK: And -- and as a matter of  
5 judicial estoppel, what is absolutely clear in every  
6 State that I am familiar with is that it follows this  
7 Court's basic formula in New Hampshire v. Maine, which  
8 looks at whether or not a change in position would  
9 prejudice the interests of the other party if the Court  
10 had relied on the original position of the litigant, and  
11 that will estop that person.

12 Now, it may -- it may well be that there are  
13 due process issues associated with class representative  
14 and the adequacy of a class representative is a  
15 continuing concern throughout a litigation precisely  
16 because of due process concerns.

17 CHIEF JUSTICE ROBERTS: Another thing he  
18 might be worried about is that if this action is  
19 allowed to proceed, although on its face it's worth  
20 \$4 million, they're going to have to make a  
21 determination whether to settle for a particular amount  
22 or not.

23 And if they make a determination that  
24 they've got to settle for whatever it is, 20 -- you  
25 know, \$20 per class member, that is going to set the

1 limit for other classes, including the class members who  
2 opt out of this action, the class members from Missouri.

3 And the point is that, for a variety of  
4 reasons, that this gives extraordinary leverage to the  
5 individual class representative of a sort that --  
6 precisely the sort that Congress was worried about.

7 MR. FREDERICK: Actually, I think  
8 Mr. Chief Justice, with all due respect, the economic  
9 incentives are completely reversed because if a class  
10 representative is bound by a stipulation that this case  
11 is not worth than \$5 million, the bidding starts at 5  
12 million, but it goes down, it doesn't go north because  
13 the defendant knows that no matter whether we go to  
14 trial or not, this case, this case -- this civil action  
15 is only going to be worth \$5 million.

16 CHIEF JUSTICE ROBERTS: It's going to be  
17 worth a lot more because, if you go to trial, you're  
18 going to have a judgment that they should have been  
19 giving the general contractor whatever --

20 MR. FREDERICK: GCOP.

21 CHIEF JUSTICE ROBERTS: -- pickup it is in  
22 every case. And so that is going to be extremely  
23 valuable. It's going to be worth a lot more -- but the  
24 downside, it's going to be a lot more than \$5 million.

25 MR. FREDERICK: Well, certainly,

1 Mr. Chief Justice, Congress could have drafted a statute  
2 that allowed for the removal of every State class action  
3 and dealt with that issue if it was deemed appropriate  
4 to have Federal courts decide all class actions, but  
5 that wasn't the statute that Congress enacted. And  
6 Congress also could have expressed concerns and  
7 difficulty with this idea of having the Master of the  
8 Complaint Rule applied in the class action context, but  
9 it didn't address that either.

10 And so when Congress is only addressing a  
11 very narrow problem of dealing with the non-aggregation  
12 principle so that class actions that were worth more  
13 than \$5 million would be allowed to be removed to  
14 Federal court, I don't think it would be appropriate for  
15 the Court to try to infer a larger set of --

16 CHIEF JUSTICE ROBERTS: It's very  
17 difficult -- one reason, it's very difficult to  
18 speculate about Congress, what they speculate about what  
19 they would have intended. Presumably, they may not have  
20 thought about the idea that there will be class actions  
21 worth a lot more than \$5 million, but the plaintiff's  
22 lawyer will only ask for less than \$5 million.

23 MR. FREDERICK: Well, these kinds of  
24 stipulations are well known and in fact, as we quote on,  
25 I think it's page 5 of our brief, Congress was aware of

1 factual stipulations. They concede in their reply brief  
2 that it's perfectly fine for their to be a joint  
3 stipulation between the putative class representative  
4 and the defendants.

5                   And, yet, I would think that that would  
6 raise even more problems and concerns by you because  
7 that would lead to the kind of collusion between a  
8 putative class representative and the defendant without  
9 knowing what the other interests of the absent class  
10 members are.

11                   And so here, where a good faith effort is  
12 made to quantify the aggregate claims and that good  
13 faith effort leads to the stipulation that the case will  
14 not be worth more than \$5 million, the interests of  
15 jurisdictional simplicity, the interest of fairness to  
16 the class members, the interest of understanding what  
17 the civil action is all about so that the defendant is  
18 on notice about what will be claimed in this civil  
19 action are all things that should be given respect.

20                   JUSTICE BREYER: What about -- what about,  
21 has anyone thought of this -- I hate to bring up sort of  
22 a new idea, but somebody may have thought of it.  
23 Imagine we're now in the Federal district court. And  
24 the Federal district court reads the statute because the  
25 case has just been removed. And he says -- you know,

1     this -- this case would be worth a lot more than 5  
2     million were it not for that stipulation.

3                     And let now me look at that stipulation.  
4     That stipulation is a part of some, let's call it,  
5     "monkey business," which you will resist that, but I  
6     mean by that to -- to encompass the kinds of things  
7     we've been talking about, that there are going to be  
8     five similar class actions, that they're going to take  
9     the people A through K, that they're going to --  
10    anything like that.

11                    And he says that's not under this statute  
12    the kind of stipulation that Congress meant to bar my  
13    consideration of the \$5 million. So if it's a  
14    manipulative stipulation, whatever that might be, it  
15    doesn't bar me as the district judge from aggregating up  
16    to -- beyond 5 million, but if it's not manipulative,  
17    fine. Has there -- has there been any thought on that  
18    kind of --

19                    MR. FREDERICK: Well, there are two tools  
20    that -- that we describe in our brief and that I think  
21    are reasonable ways that Federal courts address these  
22    matters. One is to look at whether or not it violates  
23    Rule 11 and there are -- there's a frivolous assertion  
24    of a stipulation, which Federal district judges deal  
25    with Rule 11 motions all the time.

1           The second is the concept of good faith,  
2   which is what St. Paul Mercury addressed when it said  
3   that a stipulation for less than the jurisdictional  
4   amount, if made in good faith, is something that will be  
5   treated as dispositive for jurisdictional purposes.

6           JUSTICE GINSBURG: Justice Breyer's  
7   hypothetical would not come up on your theory because  
8   the Federal court would never get the chance to make  
9   that determination. It would be made in the State  
10  court.

11           MR. FREDERICK: No. If I'm understanding  
12  Justice Breyer's hypothetical, it's at the amount of  
13  controversy stage and so there is litigation at that  
14  stage and the defendant presumably would bring to the  
15  judge's attention, I think this is being done in bad  
16  faith and I have these arguments for why this is  
17  deceitful -- deceitful, misleading, et cetera.

18           JUSTICE GINSBURG: So would that include the  
19  I'm suing for two years when I could have sued for five?

20           MR. FREDERICK: No, I don't think so because  
21  there are lots of tactical reasons why litigants might  
22  want to limit their claims or might have a good faith  
23  basis for saying, I've only investigated this time  
24  period, I do not have a good faith basis for asserting  
25  claims in a different time period that I have not

1 investigated that does not serve the court.

2 JUSTICE BREYER: Well, but there might be --  
3 there might be ways of working with this notion, a  
4 little risky from your point of view, but there might be  
5 ways of working with this good faith notion so that  
6 some -- there would be some power in the Federal  
7 district court to set aside certain stipulations which  
8 were used for manipulative purposes and what the definition  
9 of that manipulative is something that isn't clear to -- to  
10 me at the moment. But --

11 MR. FREDERICK: Well, the -- the -- the  
12 notion that I have distilled from St. Paul Mercury and  
13 the idea of good faith and looking at cases that have  
14 addressed bad faith, which is obviously the converse of  
15 good faith, is whether or not there is something  
16 misleading or deceitful in the way that this stipulation  
17 would be framed. And I think that that is as good a  
18 guidance as I can give you absent briefing.

19 JUSTICE SOTOMAYOR: But it would never  
20 involve a judgment that a claim is really worth  
21 \$50 million and just to defeat this statute, it's being  
22 limited to 5.

23 MR. FREDERICK: There -- there could be a  
24 strategic reason, Justice Sotomayor, why --

25 JUSTICE SOTOMAYOR: Well, the only strategic



1 reason according to your adversary is they want to stay  
2 in State court.

3 MR. FREDERICK: Well, but there are reasons  
4 because, in Arkansas, for instance, there is a direct  
5 appeal for the State supreme court. We could finish  
6 this case in many fewer years than it would take to wind  
7 its way up through the Eighth Circuit and up to this  
8 Court. That is one salutary reason.

9 The second is we're talking about State law  
10 claims that are breach of contract claims for a  
11 State-regulated industry. The State insurance board  
12 would be looking at how State insurance is done here.  
13 So there are very good reasons why a -- why a lawyer  
14 would want this case to be in State court and not want  
15 it to be removed to Federal court wholly apart from the  
16 ad hominem attacks that they make about Miller County,  
17 which were not brought to Congress's attention and in  
18 fact are false.

19 As we have put into amicus briefs, it is  
20 false. The arguments that they talk about abuse involve  
21 all cases that predated CAFA.

22 CHIEF JUSTICE ROBERTS: Why did you decide  
23 to file in Miller County?

24 MR. FREDERICK: Because these are Texarkana  
25 lawyers who filed on behalf of all Arkansas residents

1 and Texarkana, Arkansas is a jurisdiction in Arkansas.

2 JUSTICE SOTOMAYOR: Mr. Frederick, your  
3 answer just doesn't deal with the component that's been  
4 troubling, which is that it doesn't protect the absent  
5 class members. In situations like the one Justice Alito  
6 or the point Justice Alito made, which is they don't  
7 really know how much the entire quantity of the class  
8 might truly be, and who's protecting them --

9 MR. FREDERICK: Well --

10 JUSTICE SOTOMAYOR: -- if it would go your  
11 way?

12 MR. FREDERICK: Sure. In his hypothetical,  
13 that's true under Federal rules, too. If you're  
14 applying Federal Rule 23 and you have a large number of  
15 class members and the case gets settled for X dollars,  
16 the individual class member is held to the duty of  
17 deciding whether to opt out because that individual  
18 class member thinks I may have been able to get more  
19 than what is being offered in this class settlement or  
20 to attack the adequacy of the representation because the  
21 aggregate amount is not high enough.

22 It's a problem that applies in both Federal  
23 and in State court. It's not unique to State court at  
24 all.

25 If the Court has no further questions, we'll

1 submit.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Boutrous, you have four minutes.

4 REBUTTAL ARGUMENT OF THEODORE J. BOUTROUS, JR.,

5 ON BEHALF OF THE PETITIONER

6 MR. BOUTROUS: Thank you, Your Honor. Let  
7 me just start with the concerns that I have and I think  
8 they're best expressed and encapsulated in two of the  
9 friend-of-the-court briefs, the Manufactured Housing  
10 Institute brief and the 21st Century brief. They  
11 explain what has been happening in Miller County. It's  
12 not speedy justice. It takes five or six years to get a  
13 hearing on anything and then there's no hearing, even on  
14 class certification.

15 And that's why, Justice Kagan, it's cold,  
16 cold comfort to say maybe somebody day the Court will find  
17 this is an inadequate class member or class  
18 representative. It does not solve the problem that  
19 Congress sought to address.

20 With respect to Mr. Fredrick's suggestion  
21 that this stipulation is binding in this case forever  
22 and all-time on anybody who's in the case, his own brief  
23 on page 41 says, it might well be that another class  
24 representative might get appointed and the stipulation  
25 might be invalidated because it's -- it's an unfair

1 stipulation and not valid for the class.

2 That new class representative could come in  
3 and say, we are not going to be bound by this \$5 million  
4 number. That's not the amount in controversy.

5 JUSTICE SOTOMAYOR: So why can't the case be  
6 removed at that moment?

7 MR. BOUTROUS: Well, it theoretically could  
8 be, Your Honor, but that won't solve the problem of  
9 discovery. That goes back ten years in a case that's  
10 supposed to be about two years. It won't solve the  
11 problem of --

12 JUSTICE KAGAN: Mr. Boutrous -- you know, a  
13 lot of your brief talks about this problem of discovery.  
14 And it -- it may very well be that there is a  
15 significant one, I don't know, but when you look at  
16 CAFA, I mean, CAFA did a lot of things. And it did not  
17 address this problem that you have with discovery.  
18 There could be -- I can give you -- you know, ten  
19 different proposals that would enable you to bypass  
20 expensive discovery, but CAFA didn't do any of them.

21 And this is a kind of a jerry-rigged  
22 solution to get at a problem that Congress, in fact, did  
23 not address.

24 MR. BOUTROUS: That's incorrect, Your Honor.  
25 First, Congress knew what was going on in State courts

1 and wanted swift removal in a simple way for defendants  
2 to protect defendants and absent class members because  
3 it knew what was going on. There wasn't these  
4 protections. The Federal rules provide protection  
5 against discovery.

6 This Court in Twombly said one of the  
7 reasons is speedy motion to dismiss, and a strong  
8 standard is necessary as to avoid discovery that is  
9 burdensome, that coerces settlements that don't relate  
10 to the merits. So Congress knew it was bringing cases  
11 into the Federal system for precisely that reason.

12 And on this master of complaint point,  
13 Mr. Frederick is simply incorrect on this point.  
14 St. Paul wasn't a master of the complaint case, it said  
15 the plaintiff can limit the amount that he wants to  
16 seek. The master of the complaint doctrine has never,  
17 ever been applied by this Court where an unappointed  
18 named plaintiff, who's not been appointed to represent  
19 people, seeks to try to alter the claims and judgments  
20 of other people and the rights of them to recover.

21 It's usually been applied in the arising  
22 under contexts. Where the Court has said if a plaintiff  
23 wants to bring a State claim, they can. We are not  
24 going to force them to bring a Federal claim.

25 JUSTICE KAGAN: Mr. Boutrous, the idea of

1 master of the complaint is inherent in every class  
2 litigation because there could be no class actions,  
3 there could be no definition of anything, of the claims,  
4 of the amount of damages, of the number of defendants,  
5 of the amount of time unless the plaintiff, the named  
6 plaintiff, had some ability to define the claim.

7 And this is just one aspect of that larger  
8 power.

9 MR. BOUTROUS: Your Honor, on the amount in  
10 controversy, this Court has never held, in a class  
11 action or otherwise, that that's something that's  
12 subject to the well pleaded complaint rule or the master  
13 of the complaint doctrine. The court in the Hertz case  
14 and in the McNutt case, which it cites, said the Court  
15 should look past what the pleadings say.

16 JUSTICE KAGAN: Okay. Then you really are  
17 asking us to blow up the whole world.

18 MR. BOUTROUS: No, Your Honor.

19 JUSTICE KAGAN: Because you're saying: Next  
20 time we will be back and tell you that the named  
21 plaintiff can't define the clans. Next time we are  
22 going to be back and tell you that they can't name the  
23 defendants.

24 MR. BOUTROUS: No, Your Honor. May I  
25 answer, Your Honor?

1 CHIEF JUSTICE ROBERTS: (Nods.)

2 MR. BOUTROUS: We are asking the Court to  
3 apply the same rules on this score that the Court has  
4 always applied, that when the complaint claims one  
5 amount, the defendant can bring forth proof that it's a  
6 larger amount, that it exceeds the amount in controversy  
7 and the Court looks at the competent proof, that's the  
8 language the Court used in the Hertz case, to determine  
9 the actual amount in controversy, not some jerry-rigged  
10 amount the plaintiffs came up with.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 The case is submitted.

14 (Whereupon, at 12:06 p.m., the case in the  
15 above-entitled matter was submitted.)

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