

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 EXXON MOBIL CORPORATION, :

4 Petitioner :

5 v. : No. 04-70

6 ALLAPATTAH SERVICES, INC., :

7 ET AL.; :

8 and :

9 MARIA DEL ROSARIO ORTEGA, :

10 Petitioner :

11 v. : No. 04-79

12 STAR-KIST FOODS, INC. :

13 - - - - -X

14 Washington, D.C.

15 Tuesday, March 1, 2005

16 The above-entitled matter came on for oral
17 argument before the Supreme Court of the United States at
18 10:27 a.m.

19 APPEARANCES:

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

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

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

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

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

2 (10:27 a.m.)

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

6 Mr. Phillips.

7 ORAL ARGUMENT OF CARTER G. PHILLIPS

8 ON BEHALF OF THE PETITIONER IN 04-70

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

11 This Court 32 years ago in Zahn v. International
12 Paper affirmed that a class action could not proceed under
13 28 U.S.C., section 1332, the diversity statute, if it was
14 clear that some of the unnamed members of that class do
15 not satisfy the amount-in-controversy requirement.

16 The question in this case is whether Congress in
17 1990 overturned this Court's ruling in Zahn and its
18 interpretation of section 1332 not by amending section
19 1332 but, instead, by enacting a supplemental jurisdiction
20 statute, section 1367. The answer to that question, Your
21 Honors, is no.

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

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

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

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

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

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

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

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

15 Here we start by looking at what was Congress'
16 clear intent, manifested primarily in the last language of
17 1367(a), where it says supplemental jurisdiction shall
18 include claims that involve the joinder or intervention of
19 additional parties. Here --

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

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

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

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

1 jurisdictional problem.

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

4 JUSTICE GINSBURG: I thought the Court said
5 that --

6 MR. PHILLIPS: -- and continues --

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

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

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

24 MR. PHILLIPS: I'm sorry.

25 JUSTICE GINSBURG: The Caterpillar didn't start

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

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

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

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

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

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

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

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

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

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

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

24 JUSTICE STEVENS: Right.

25 MR. PHILLIPS: -- and dismiss the entirety of

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

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

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

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

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

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

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

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

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

22 MR. PHILLIPS: I -- I would --

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

1 non-objectionable.

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

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

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

14 But, Justice O'Connor, to answer your first
15 question, I would have -- I would have thought the
16 conclusion was exactly the opposite, that what -- what --
17 the statute says you don't have jurisdiction over civil
18 actions over which you didn't have jurisdiction prior to
19 1990, but you do have jurisdiction over claims that then
20 can be appended to those for which you have jurisdiction
21 in 1990.

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

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

4 JUSTICE O'CONNOR: Unless 1367 effectively
5 overturned Zahn.

6 MR. PHILLIPS: And --

7 JUSTICE O'CONNOR: It was enacted later.

8 MR. PHILLIPS: It clearly was enacted later, but
9 my point here is that I think the language -- when the
10 Congress both in (a) and (b) harkens back to in any civil
11 action of which the district courts have original
12 jurisdiction, it's clearly not trying to amend 1331 or
13 1332.

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

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

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

1 jurisdiction. Diversity, there isn't.

2 MR. PHILLIPS: No.

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

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

7 JUSTICE BREYER: All right.

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

12 JUSTICE BREYER: Yes.

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

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

17 JUSTICE BREYER: Yes.

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

1 jurisdiction over claims brought separately.

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

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

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

8 MR. PHILLIPS: Absolutely falls within (a).

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

11 MR. PHILLIPS: Exactly.

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

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

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

18 MR. PHILLIPS: Which is?

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

23 MR. PHILLIPS: Right. I picked one.

24 JUSTICE BREYER: All right.

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

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

6 (Laughter.)

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

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

16 MR. PHILLIPS: Pendent party jurisdiction.

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

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

1 jurisdiction over the third party claim that I identified
2 for Justice Breyer, and that that would fall within
3 1367(a) under my interpretation of it, but that 1367(b)
4 would not allow the plaintiff then to bring a subsequent
5 action against the third party defendant.

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

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

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

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

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

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

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

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

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

24 If I could --

25 JUSTICE GINSBURG: I thought that's what Kroger

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

4 MR. PHILLIPS: Right.

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

8 MR. PHILLIPS: Right, but the -- the question is
9 what was the statutory authority for that part of -- for
10 the first part of ancillary jurisdiction, which is the
11 bringing in of the third party defendant. And that's what
12 1367(a) does in the diversity context.

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

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

18 ORAL ARGUMENT OF ROBERT A. LONG, JR.

19 ON BEHALF OF THE RESPONDENT IN 04-79

20 MR. LONG: Yes, Justice Stevens.

21 Justice Stevens, and may it please the Court:

22 I have three basic points.

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

1 language of section 1367 does not alter the complete
2 diversity requirement or the requirement that each
3 plaintiff in a diversity action must have more than
4 \$75,000 in controversy.

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

10 And third, the best interpretation of section
11 1367 and the one that causes the least harm is that it
12 overturns the result in Finley and otherwise, with a few
13 exceptions, codifies the pre-Finley understanding of
14 supplemental jurisdiction.

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

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

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

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

3 MR. LONG: Yes.

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

8 MR. LONG: Exactly.

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

12 MR. LONG: No, I don't think so. I think what
13 the plain language -- and -- and here we are, I think --
14 we can rely on plain language. What 1367(a) says is that
15 in each case you must look to some other statute that
16 confers original jurisdiction. It can be 1331. It can be
17 1332. And of course, although those statutes use the same
18 term, original jurisdiction, there are -- there's
19 decisional law that comes along --

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

24 MR. LONG: Well --

25 JUSTICE KENNEDY: -- is -- is correct.

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

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

21 But --

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

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

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

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

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

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

14 MR. LONG: I didn't bring --

15 JUSTICE GINSBURG: Class Action Fairness Act.

16 MR. LONG: Class Action Fairness Act.

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

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

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

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

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

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

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

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

7 MR. LONG: Yes, but that --

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

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

13 JUSTICE BREYER: Yes.

14 MR. LONG: -- and it's in -- and this is the
15 answer to the point that, well, there can never be any
16 supplemental jurisdiction on our view in a -- in a
17 diversity case. Yes, there can because in a variety of
18 situations -- and -- and you've named where there's a rule
19 14 third party claim and that's by a defendant --

20 JUSTICE BREYER: I understand that. What about
21 19 and 24?

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

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

4 JUSTICE BREYER: Yes.

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

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

11 MR. LONG: Yes. It would otherwise --

12 JUSTICE BREYER: He can do it, though.

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

15 JUSTICE BREYER: And what about under rule 19?

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

18 JUSTICE BREYER: You could not?

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

21 JUSTICE BREYER: And rule 20 you could not?

22 MR. LONG: Could not. It was --

23 JUSTICE BREYER: And rule 24 you could.

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

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

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

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

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

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

23 MR. LONG: Okay.

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

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

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

6 JUSTICE BREYER: Okay.

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

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

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

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

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

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

21 JUSTICE SCALIA: Oh, is indispensable.

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

1 the defense side.

2 MR. LONG: Right. Right.

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

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

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

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

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

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

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

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

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

11 JUSTICE BREYER: You could have before this
12 statute.

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

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

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

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

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

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

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

23 MR. LONG: Yes.

24 JUSTICE GINSBURG: The defendant --

25 MR. LONG: Yes.

1 JUSTICE GINSBURG: -- can have a --

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

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

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

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

23 MR. LONG: Yes.

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

1 MR. LONG: Yes.

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

4 MR. LONG: Yes.

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

6 MR. LONG: Yes.

7 JUSTICE BREYER: -- that could be a 19, 20, or
8 24.

9 MR. LONG: Exactly. Exactly.

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

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

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

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

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

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

22 MR. LONG: Yes.

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

25 MR. LONG: Yes.

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

5 MR. LONG: That's correct.

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

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

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

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

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

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

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

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

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

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

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

1 come in some other way -- I mean, things that frankly are
2 not likely to happen in a lot of cases -- but then say,
3 oh, but the -- the doors are -- are wide open under rule
4 20, bring in as many plaintiffs as you want right at the
5 outset or later on if you'd prefer, don't worry about
6 diversity, don't worry about the amount in controversy.
7 Those two things just -- just don't go together.

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

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

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

3 Thank you.

4 JUSTICE STEVENS: Thank you, Mr. Long.

5 Mr. Stearns, we'll hear from you.

6 ORAL ARGUMENT OF EUGENE E. STEARNS

7 ON BEHALF OF THE RESPONDENTS IN 04-70

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 And so I take it their point is by coincidence

1 or not, that's what this statute says.

2 MR. STEARNS: I'd --

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

5 MR. STEARNS: Well --

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

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

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

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

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

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

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

3 (Laughter.)

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

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

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

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

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

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

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

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

25 And incidentally, it is anathema to law

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

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

18 MR. STEARNS: Well --

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

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

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

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

8 What happened --

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

11 MR. STEARNS: But --

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

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

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

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

24 JUSTICE STEVENS: I thought the --

25 MR. STEARNS: It goes to the full committee.

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

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

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

7 MR. STEARNS: What the House committee --

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

10 MR. STEARNS: The House report --

11 JUSTICE STEVENS: Am I correct or --

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

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

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

20 JUSTICE STEVENS: Right.

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

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

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

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

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

12 JUSTICE GINSBURG: He was the chair of the --

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

17 JUSTICE STEVENS: Are you sure he said that?

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

20 JUSTICE STEVENS: Where did he say that?

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

23 JUSTICE STEVENS: In a footnote to what?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 MR. STEARNS: Your Honor, respectfully, this
5 Court has been looking the other way on Strawbridge for
6 200 years, and what Congress did was ratify some of your
7 previous abrogations of Strawbridge and they made another
8 minor adjustment. And you know what it -- what did they
9 did is, again, consistent with 200 years of friendliness
10 to defendants in Federal court. The whole notion of
11 diversity jurisdiction --

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

14 MR. STEARNS: The whole --

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

18 MR. STEARNS: Indeed.

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

21 MR. STEARNS: Precisely.

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

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

4 MR. STEARNS: Your Honor, respectfully --

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

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

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

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

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

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

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

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

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

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

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

21 (Laughter.)

22 MR. STEARNS: I'm sorry?

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

25 MR. STEARNS: I paraphrased, Your Honor.

1 (Laughter.)

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

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

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

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

25 But what are we doing here? These -- these

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

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

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

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

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

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

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

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

19 JUSTICE STEVENS: Your answer is no, I gather.

20 MR. STEARNS: The answer is no.

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

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

7 Thank you.

8 JUSTICE STEVENS: Thank you, Mr. Stearns.

9 Mr. Ayer, we'll hear from you.

10 ORAL ARGUMENT OF DONALD B. AYER

11 ON BEHALF OF THE PETITIONER IN 04-79

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

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

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

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

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

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

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

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

3 MR. AYER: Yes.

4 JUSTICE SOUTER: -- not jurisdictional.

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

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

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

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

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

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

22 MR. AYER: Correct, Your Honor.

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

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

7 MR. AYER: Well --

8 JUSTICE BREYER: Now, you respond to that what?

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

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

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

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

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

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

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

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

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

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

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

22 Well, we -- we have cited cases, I think on page
23 33 of our brief, where it's perfectly clear that no court,
24 I think, in its right mind is going to turn around 2 weeks
25 later and say, oh, you got me. You know, we're going to

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

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

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

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

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

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

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

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

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

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

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

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

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

14 MR. AYER: That is correct, Your Honor.

15 JUSTICE SOUTER: Okay.

16 MR. AYER: That is correct.

17 And -- and I would just like to go on and say
18 one other thing, and that is, this Court has written how
19 many hundreds I don't know, but hundreds of cases
20 articulating nuances -- and -- and I've learned how
21 remarkable they are, the nuances -- of law under 1332 and
22 under what amounts to a case within -- it's incredible how
23 complex the law that this Court has spelled out is under
24 1332.

25 Our view of the statute is that that body of law

1 has been preserved and it's been preserved in two places.
2 It has been preserved in the first clause of 1367(a),
3 which is really all that's at issue right here, and it's
4 also been -- been preserved in the last clause of 1367(b)
5 which says that -- that as to the list of enumerated
6 exceptions -- in essence, (b) says if you've got a case
7 within the original jurisdiction, then it says, with
8 regard to plaintiffs' claims against parties joined under
9 14, 19, 20, and 24 and with regard to claims brought by
10 persons to be joined under 19 or 24, then you don't have
11 supplemental jurisdiction if to do so would be
12 inconsistent with the requirements of jurisdiction under
13 1332.

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

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

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

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

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

21 MR. AYER: Right.

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

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

4 MR. AYER: Right.

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

8 MR. AYER: Right.

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

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

13 MR. AYER: Well --

14 JUSTICE BREYER: -- by giving it their reading.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 We would submit that there is no basis to infer
16 from any of those things, and particularly not the first
17 one that dealt with (a), that they meant by dropping on a
18 claim to somehow say, oh, my goodness, you've got to have
19 jurisdiction over all of the claims before you.

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

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

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

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

13 But I would go beyond that and say that if you
14 just look at this language, no -- no intent to affect the
15 jurisdictional requirements of 1332 in diversity-only
16 class actions, number one, most importantly, we don't
17 think there's been a change in the requirements under
18 1332. As I've said before, this statute engrafted this
19 Court's entire body of 1332 jurisprudence in the first
20 line of -- of clause (a) and in the last line of clause
21 (b), and so it's all there. No one has changed 1332.
22 This is supplemental jurisdiction additional to it.

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

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

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

15 Thank you very much.

16 JUSTICE STEVENS: Thank you, Mr. Ayer.

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

20 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

21 ON BEHALF OF THE PETITIONER IN 04-70

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

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

1 sort of feels like a Finley type case in the -- in -- in
2 how it applies in the diversity context. But the
3 fundamental point here is that there is a very different
4 approach and there has always been a very different
5 approach to Federal question jurisdiction and to diversity
6 jurisdiction. Federal question jurisdiction has always
7 been claims-driven. Diversity jurisdiction has always
8 been party-driven. And the Congress that enacted 1367 in
9 1990 had to have understood that. It's been the law for
10 as long as -- as we've had -- for the 200 years that
11 Strawbridge has been around, that distinction has -- has
12 existed.

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

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

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

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

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

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

25 JUSTICE GINSBURG: This didn't make a whole lot

1 of sense.

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

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

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

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

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

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

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

20 Thank you, Your Honor.

21 JUSTICE STEVENS: Thank you, Mr. Phillips.

22 This -- these cases are submitted.

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

25