OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ROBIN FREE, ET AL., Petitioners v. ABBOTT LABORATORIES, INC., ET AL.

CASE NO: 99-391 c.2

PLACE: Washington, D.C.

DATE: Monday, March 27, 2000

PAGES: 1-52

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IN THE SUPREME COURT OF THE UNITED STATES

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ROBIN FREE, ET AL., :

Petitioners :

v. : No. 99-391

ABBOTT LABORATORIES, INC., :

ET AL. :

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Washington, D.C.

Monday, March 27, 2000

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

DANIEL A. SMALL, ESQ., Washington, D.C.; on behalf of the Petitioners.

FRANK CICERO, JR., ESQ., Chicago, Illinois; on behalf of the Respondents.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 99-391, Robin Free v. Abbott Laboratories. Mr. Small.

ORAL ARGUMENT OF DANIEL A. SMALL

ON BEHALF OF THE PETITIONERS

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

Section 1367 plainly requires original jurisdiction as a predicate to the exercise of supplemental jurisdiction. In this case, supplemental jurisdiction may not be exercised over the claims of the absent class members because the claims of the named plaintiffs are not within the original jurisdiction of the district court.

The critical issue in this case, therefore, involves an issue of original jurisdiction and involves an interpretation, the proper interpretation of the matter-in-controversy requirement of the diversity statute. Specifically, the issue is whether the determination under that requirement that a particular plaintiff satisfies that requirement looks only to the value of that plaintiff's claims, or does it also look to the value of his coplaintiff's claims. The answer is, the matter-in-

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controversy rule is an all-or-nothing rule. Either all plaintiffs in the case satisfy it, or none do.

QUESTION: Mr. Small, you didn't raise the question whether any plaintiff in this class qualifies. That is, I take it that the Frees in their own right, if they were suing for their own individual injury, would not get anywhere near $50,000, because they're like all the others in that respect.

MR. SMALL: It is true, Your Honor, that none of the plaintiffs have damages that would satisfy the then-applicable $50,000 matter-in-controversy requirement. The only reason the Fifth Circuit found that the named plaintiff satisfied that requirement was a Louisiana fee statute that awarded fees in a class action solely to the class representative.

QUESTION: But then their ability to collect those fees depends on their bringing other people with them, that is, the solo plaintiffs who don't qualify for Federal court jurisdiction.

MR. SMALL: That is precisely correct. The applicability of that Louisiana fee statute applies only in a class action. If there's no jurisdiction to bring a class action, that statute would not apply and the named plaintiffs, the Frees, would not have the jurisdictional amount.

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QUESTION: As I understand, you did bring that up below, but you didn't tender it to this Court.

MR. SMALL: Well, Your Honor, we didn't specifically raise it because we didn't frame the question presented in that way. We were addressing it as an issue of whether the Zahn ruling of this Court should be overturned.

QUESTION: Yes, but if it goes to the amount in controversy, or diversity jurisdiction, it is jurisdictional and, even if you didn't bring it up, you know that we would have an obligation to do so on our own.

MR. SMALL: I believe that's correct, Your Honor. We attempted in the Fifth Circuit, in the second appeal before that court, to raise certain issues of jurisdiction, subject matter jurisdiction which the Fifth Circuit refused to hear on the ground of the law of the case doctrine, and there are other issues, of course, which we do not agree with that the Fifth Circuit decided, but we are not squarely presenting those to this Court.

QUESTION: Well, I don't want to detain you, because you want to argue Zahn and the effect of 1367, but I do see that as a major problem in this lawsuit, that these plaintiffs could qualify only because they bring other plaintiffs with them, and not in their individual right.

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MR. SMALL: I think, Your Honor, that goes to the appropriate result in this case if the Court were to reverse, because it would require that everyone's claims go back to State court, because the absent class members as well as the named plaintiffs would not have the amount --

QUESTION: But it's a matter of Louisiana law, is it not, at least so the Fifth Circuit held, that the named plaintiffs get all of the attorney's fees?

MR. SMALL: That was decided as a matter of Louisiana law. There was a specific --

QUESTION: But not as individuals. In other words, if they were just bringing this claim for the baby formula in their own right, they do not get attorney's fees for that, do they?

MR. SMALL: They would not get attorney's fees under the specific Louisiana statute.

QUESTION: So Louisiana permits them, as class representatives, to get these fees.

MR. SMALL: That's correct.

QUESTION: But to get them, they must pull other people along with them, and that was the only point that I was attempting to make.

MR. SMALL: That's correct.

QUESTION: Why don't you address yourself to the

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question presented.

MR. SMALL: Our view of the matter-in-controversy requirement is a permissible interpretation under section 1332, the diversity statute, and it's also the better reading of that statute for several reasons.

First, let me summarize quickly what the reasons are that our interpretation of 1332, which fits within the language, is the better interpretation. First, it avoids having section 1367 operate in a way that Congress clearly did not intend. It could not be clearer that Congress did not intend, when it enacted 1367, to sweep aside a fundamental, longstanding rule of limiting diversity jurisdiction.

QUESTION: Well, when you say it could not be clearer, I take it you're talking about the legislative history and not the statute itself.

MR. SMALL: We're talking about more than just the legislative history, Your Honor. We're talking first about the context in which the statute became law.

QUESTION: But don't we usually first look to find out what Congress intended, at the words that Congress wrote?

MR. SMALL: Yes, and looking at --

QUESTION: What is your view of that language?

MR. SMALL: My view of that language, Your

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Honor, is that section 1367's plain language has relevance to only one issue in this case. The plain language tells this Court that before supplemental jurisdiction can be exercised in this case, original jurisdiction has to exist, and so it refers the court from 1367 to the original jurisdiction statute, which in this case is 1332. That is the end of the role of 1367 in this case.

Now we're into 1332, and there, we don't have plain language. We're saying that the term, matter-in-controversy, in section 1332, is subject to different interpretations. Our interpretation is certainly permissible, it fits within the language, and our interpretation is the preferred one for several reasons, the first of which I indicated was that Congress did not intend to overrule Zahn.

And Congress' intent can be effectuated in 1367 only if 1332 is interpreted in the way we suggest, and that task is called a classic judicial task that this Court recognized just last week in FDA v. Brown & Williamson, to take multiple laws that have been passed over time and make them work in combination.

We are asking the Court in this case to read section 1332 permissibly, within its language, in a way that allows 1367 to function coherently and in a way that Congress intended when it enacted --

QUESTION: Will you go back for a minute to 1367, and the Fifth Circuit ruled against you on this point, didn't it?

MR. SMALL: Yes, Your Honor.

QUESTION: And what is your response to the Fifth Circuit's construction of 1367?

MR. SMALL: The Fifth Circuit overlooked, in our opinion, the original jurisdiction predicate in 1367. It assumed that it has original jurisdiction over the named plaintiffs' claims when in fact they did not, because the matter-in-controversy rule says you cannot have original jurisdiction over one plaintiff's claims without considering the value of all his coplaintiffs', or her coplaintiffs' claims, and if you look at all the --

QUESTION: Unless they all qualify, nobody does.

MR. SMALL: That's exactly right, Your Honor.

QUESTION: Which is the rule that's applied for diversity.

MR. SMALL: That's precisely correct.

QUESTION: And you're just urging that the same rule be applied for amount.

MR. SMALL: That's correct, and obviously there's the parallel between the other provision of --

QUESTION: Just a minute, Mr. Small. It isn't

correct, is it, for class members? In diversity, I thought that for diversity purposes the named plaintiffs must qualify, but the ones who tag along do not.

MR. SMALL: In the class action context, as this Court's decision in Ben Hur has subsequently been construed by lower courts, it is true that you look at the named plaintiffs to see whether they are diverse from each of the defendants.

First of all, the rule still applies to all the named plaintiffs. If there's more than one, each of the named plaintiffs have to be diverse from each of the named defendants. Moreover, I think it's fair to say that Ben Hur has been the anomalous decision of this Court with respect to the diversity statute. In every other way that this Court has construed the diversity statute, both for class actions and nonclass actions, they have interpreted the statute narrowly. It's not a reason to now start interpreting other aspects of 1332 for --

QUESTION: I was just trying to clarify that the Strawbridge rule of complete diversity doesn't apply in class actions to the extent that only the citizenship of named representatives count.

MR. SMALL: I agree with you in part, Your Honor. The part that I disagree with is, Ben Hur, which is the only Supreme Court decision that's ever relied on

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for that proposition, was essentially an in rem case, meaning that there were trust assets before the Court that had to be disposed of and could only be disposed of --

QUESTION: Are you suggesting that today, in all the class actions that are brought in Federal court, that rule isn't observed, that only the named representatives count for diversity purposes?

MR. SMALL: I'm not disputing that, Your Honor. I'm saying that that's a lower court interpretation that has expanded Ben Hur. That's all I'm saying, Your Honor.

QUESTION: Now, you suggest that this statute changed the lower court's general reading of Ben Hur?

MR. SMALL: No, Your Honor, I don't believe that our interpretation would affect Ben Hur. In fact, the House Judiciary Committee report cites the Ben Hur right alongside Zahn in saying that those were jurisdictional requirements that were not intended to be affected by 1367. I think the basic purpose of 1367, which is also made very clear, is to codify existing supplemental jurisdiction as it existed before Finley.

The concern of Congress in enacting 1367 was the Finley case, which had called into question whether the statutory authority was there to exercise supplemental jurisdiction in all types of cases.

QUESTION: Let me see if I understand your

argument under 1367. In clause (b) it begins, in any civil action of which the district courts have original jurisdiction. Founded solely on section 1332 of this title, you say read no further. That clause has not been satisfied in this case. Whatever follows is just irrelevant. Is that -- or, I don't wish to misstate your argument. Is that your argument?

MR. SMALL: Not quite, Justice Kennedy. What we're saying is, we never get to 1367(b) in this case. This case is all about 1367(a) and section 1332.

1367(a) is the part of the statute that confers supplemental jurisdiction, okay, and before the statute can confer any supplemental jurisdiction, there must be original jurisdiction. There is none in this case, therefore none is conferred under (a). We never get to (b).

QUESTION: But let me just be sure I understand. Are you making the argument, basically, that Justice Ginsburg suggested, or are you making the same argument -- let's assume for the moment that the plaintiffs', the original plaintiffs', class representatives' claim didn't depend on attorney's fees, but that one individual had a $60,000 or $70,000 claim. Then would you say there was no original jurisdiction in that situation?

MR. SMALL: That's correct, Your Honor, and the

reason is there would be coplaintiffs in the case, here absent class members, who do not have the jurisdictional amount. The matter-in-controversy requirement says, it's not enough just to look at one plaintiff's claim to see whether that satisfies the amount-in-controversy requirement. You have to look at everyone's, and if anyone's in the case, any plaintiff who doesn't satisfy the amount-in-controversy, no plaintiff --

QUESTION: That just rules out supplemental jurisdiction altogether.

MR. SMALL: Well, Your Honor, it never existed before 1367 as to claims by plaintiffs joined under Rule 20 or Rule 23, so it's not a change in the law. It codifies the way the law was before.

QUESTION: Well, but certainly one can read it as making a change in the law, as overruling Zahn.

MR. SMALL: Well, that is, of course, what the question is here --

QUESTION: Yes.

MR. SMALL: -- Your Honor, and our point is that that's not an appropriate reading because, number 1, we know Congress didn't want to do that.

QUESTION: How do you know? If what Congress wrote overrules Zahn, why do you get to anything else?

MR. SMALL: Well, we know that what Congress

wrote in 1367 does not overrule Zahn because all that 1367 says is, you can have supplemental jurisdiction if there's first original jurisdiction. There's no original jurisdiction in this case.

QUESTION: But it -- the statute begins by saying, except as provided in subsections (b) and (c), so it seems to me that to make your argument you have to go to (b) and then say that the first clause takes you out of it.

MR. SMALL: If our position were that 1367(a) granted supplemental jurisdiction over the absent class members, we would have to get to (b) to say, but it took it away. That's not our position. Our position is it was never granted in the first place.

QUESTION: That's what I don't understand. Now, maybe I'm back to where I think the Chief Justice was. Where do you think this statute (a) -- where does it operate? I mean --

MR. SMALL: Well --

QUESTION: -- you're saying -- you're saying -- all right, we have a person called Smith. Smith's the lead plaintiff. He qualifies as original jurisdiction as to him, okay. We assume that.

MR. SMALL: Yes.

QUESTION: And now we're going to look to other

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members of the class, B, C, and D, and you're saying unless there's original jurisdiction also as to B, also as to C, also as to D, that the whole statute doesn't operate. Isn't that what you're saying?

MR. SMALL: That is true.

QUESTION: All right. Now, if that's true, then why isn't that also true -- take the person that they're aiming at in this statute, somebody who comes along and has some kind of supplemental claim later on, or a defendant or somebody who's not in the suit.

There's somebody you can add, and there's somebody that this was needed to get into court, and why wouldn't exactly your same argument then apply to that person? You'd say, well, there was never original jurisdiction over that person, which of course there wasn't. That's why they wrote this statute.

So if we accept that argument of yours as to class people, why wouldn't we have to accept it as to everybody and then this 1367(a) would do nothing whatsoever?

MR. SMALL: It has to do, Your Honor, with the scope of the matter-in-controversy rule. There are parties over which supplemental jurisdiction can be exercised in a diversity case. For example, defendants' claims can be the subject of supplemental jurisdiction.

For instance, if a defendant impleads a third party, that claim can be within the supplemental jurisdiction in a diversity case. All the statute is doing is for --

QUESTION: Why? Just tell me why? On your theory, that person that they just brought in wouldn't have had an original -- you wouldn't have had original jurisdiction over that claim.

MR. SMALL: But that's not the way the matter-in-controversy requirement has been interpreted in decisions --

QUESTION: Oh, no, no. You want to just limit your word, original jurisdiction, to where what happens to be the disqualifying feature has to do with the amount in controversy, and I'm asking you, fine, that's nice, I agree that would let you limit the case and win, but why do it that -- why that limitation?

MR. SMALL: I believe there are reasons that have been expressed by the Court in deciding whether the addition of certain claims into a diversity case are treated as a matter of original jurisdiction or as a matter of supplemental jurisdiction.

In the Kroger case, for instance, Your Honor, the question of whether the impleaded third party defendant was in the case as a matter of supplemental jurisdiction was easily disposed of because it was viewed

as being different from a plaintiff being brought in, because the defendant is hailed into court against its will and shouldn't be put to the bother of having to go into a separate State court action to bring a counterclaim, or a third party claim, or whatever.

So there is a justification the court has offered for saying what the scope of the matter-in-controversy requirement is. There are reasons it doesn't apply to claims by defendants and it used to be, before 1367, that certain plaintiffs' claims could come in, for instance under Rule 24, if they were intervening as a matter of necessity to protect their rights in the litigation.

QUESTION: Since you're -- you're way ahead of me because you're an expert on this and I'm not, so what -- give me an example of somebody who, on your interpretation, 1367 would enable you to bring into the case, but without 1367 it wouldn't.

MR. SMALL: 1367 did not expand supplemental jurisdiction at all. There are no parties that could enter under 1367 that could not before.

QUESTION: Okay. On that theory, Congress did nothing.

QUESTION: Why did Congress pass it?

MR. SMALL: Congress passed 1367 because of the

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Finley decision. Congress was concerned that the Finley decision raised great doubt about whether there was statutory authority for supplemental jurisdiction. The Finley decision said that unless the original jurisdiction statute, in that case the Federal Tort Claims Act, showed that there was supplemental jurisdiction, it could not be exercised and that in that context, when parties were being added to the case, the original jurisdiction statute would be narrowly construed.

So Congress was very concerned that the foundation for pendant party jurisdiction was undercut by Finley, and possibly even pendant claim jurisdiction, so that was the reason.

Now, remember that 1367 was passed as part of a large bill that dealt with all sorts of noncontroversial matters that Congress believed could be readily dealt with late in the session, and no one thought this was controversial. This was just a way to codify existing law so that Finley was no longer a problem.

QUESTION: Why -- but Finley was a Supreme Court decision, right?

MR. SMALL: Yes, Your Honor.

QUESTION: And what did Finley do that 1367 changed?

MR. SMALL: Finley said there may -- there

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cannot be an exercise of supplemental jurisdiction in a pendant party case unless there's statutory authority for that exercise, and Congress wanted to provide the missing statutory authority that the Finley court pointed out. 1367 is that missing authority.

QUESTION: So --

QUESTION: So then at least it provided for pendant party jurisdiction, which this Court said didn't exist before absent explicit statutory authorization.

MR. SMALL: That was the particular problem in Finley but, of course, there was concern that Finley could be read broader and, in fact, had been by some of the lower courts to justify denials of supplemental jurisdiction in other areas.

QUESTION: Did 1367 give jurisdiction to a Finley-type plaintiff where the Finley court had not given jurisdiction?

MR. SMALL: Yes, Your Honor.

QUESTION: So then 1367 does confer jurisdiction on some plaintiffs at least, at least the Finley plaintiffs.

MR. SMALL: It --

QUESTION: Finley-type plaintiffs.

MR. SMALL: The answer is yes. It restored supplemental jurisdiction to the way it was before Finley

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was enacted.

QUESTION: I don't know if it restored.

QUESTION: Finley --

QUESTION: This Court had said that there was no such jurisdiction.

MR. SMALL: It's true at the -- it did change the law from the way it existed after the Finley case was decided.

QUESTION: All right. Then if it does so as to the Finley plaintiffs, why not to the plaintiffs in this case?

MR. SMALL: Well, Finley --

QUESTION: As you read the statute as I'm suggesting you have to read it in order to get to your position.

MR. SMALL: There is, of course, a completely different history behind diversity jurisdiction compared to pendant party jurisdiction. Remember, in pendant party jurisdiction there has to be a claim in the court that's a Federal claim, and this Court and Congress has treated cases that include Federal claims very differently from cases that include only State law claims. If there's a Federal claim, then the plaintiff can be put to the problem of either having to split its case between Federal court for the Federal claim and State court for the State

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claim, or else has to put all its claims into State court, including the Federal claim.

In the diversity context, that's not the situation. All the claims can be in State court without having any Federal claims decided by a State court, so that is part of the rationale for treating diversity jurisdiction differently, but despite any particular rationale, there has certainly been a clear policy by Congress to steadily narrow diversity jurisdiction, supplemental --

QUESTION: The way you read the statute is that Congress told the Supreme Court, when you get another Finley case, would you think about it again? That's -- it seems to me that's all you're saying the statute does. It's a very odd statute.

MR. SMALL: We don't believe that that's what Congress was doing. I think Congress was trying to codify ancillary and pendant jurisdiction.

QUESTION: Well, you gave --

QUESTION: Well, you say it would require us to come out the other way in the next Finley case, not just think about it again. It would reverse the outcome in Finley.

MR. SMALL: It would do precisely that, Justice Scalia. It would provide the statutory authority that the

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Finely court noted was missing.

QUESTION: And Finley was a case involving supplemental jurisdiction, not involving Federal question jurisdiction in the first place, or, I'm sorry, Federal jurisdiction in the first place, involving supplemental jurisdiction.

MR. SMALL: That's correct.

QUESTION: And 1367 deals with what, supplemental jurisdiction, not original jurisdiction?

MR. SMALL: That's correct.

QUESTION: So it would be more likely for 1367 to be addressing itself to Finley than to Zahn.

MR. SMALL: That's correct. The -- Finley was the immediate impetus of Congress enacting 1367.

QUESTION: And if you were going to address Zahn, presumably you'd be more likely to do it in 1332, no?

MR. SMALL: It would certainly make sense to do it in 1332, I agree, Justice Scalia.

QUESTION: Now, you also had a point about an inconsistency that's created if you interpret 1367 in such a fashion as saying -- as overruling Zahn. Namely, as saying that the courts somehow have original jurisdiction so long as one of the parties meets the Federal requirement. What is the inconsistency that you're

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concerned about?

MR. SMALL: The inconsistency under the respondents' interpretation is that you can have a plaintiff come into a diversity case under Rule 20 in their supplemental jurisdiction over that plaintiff, but the very same plaintiff could not enter the case under Rule 19 when it was necessary, for instance, to avoid the potential for multiple liability or inconsistent obligations on the part of a defendant, and would also prohibit that very same plaintiff from coming in to the case as an intervenor under Rule 24 to protect his or her interests in the litigation.

It simply cannot make sense for that distinction between Rules 19 and 24 on the one hand and Rule 20 on the other, and that's precisely what Judge Easterbrook asked in the Stromberg case. He said, what sense can this make, and the answer is, none, and Congress -- that is a reason to interpret the matter-in-controversy requirement of section 1332 in a way that will cause 1367 to operate coherently.

QUESTION: Then why do you -- how do you explain the absence of Rule 23 in 1367(b), which enumerates several rules?

MR. SMALL: There was no need, Your Honor, to include Rule 23 in 1367(b) because there's no original

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jurisdiction over class members who lack the jurisdictional amount, therefore there's no supplemental jurisdiction conferred over their claims by 1367(a), and therefore no need to exclude that jurisdiction in 1367(b).

If I may reserve the rest of my time, Your Honor.

QUESTION: Very well, Mr. Small.

Mr. Cicero, we'll hear from you.

ORAL ARGUMENT OF FRANK CICERO, JR.

ON BEHALF OF THE RESPONDENTS

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

Under section 1367, combined with section 1332, there clearly were both original jurisdiction and supplemental jurisdiction over the named plaintiffs and class members in this case.

In responding to Justice Ginsburg's question, petitioners' counsel chose to refer to only one of two statutes respecting attorney's fees that the Fifth Circuit relied on in finding that the amount in controversy was met here.

At page 79a of the petition for certiorari, you will find the opinion of the Fifth Circuit in 1995 holding that there was original jurisdiction, that the lower court therefore incorrectly abstained from deciding the case,

and citing not only section 595, which Justice Ginsburg inquired about, but also citing Article 37:137 -- excuse me, 51:137 of the State antitrust law, and under that law the -- there is a classic fee-shifting statute such as appears in many State statutes, providing that the prevailing party can get not only the damages sustained but also the cost of suit and reasonable attorney's fees.

The two plaintiffs here --

QUESTION: May I stop you at that point?

MR. CICERO: Yes. Yes.

QUESTION: Is it reasonable to suppose that someone who has an individual claim of this nature, even treble, that is, for being overcharged for baby formula, would get attorney's fees so large that they could make the amount in controversy? That is, what are these individual claims worth? It would be for how much extra I had to pay for the formula that I wouldn't have to pay if they hadn't had a price-fixing arrangement, right?

MR. CICERO: That's what it was over a period of time, Your Honor, and for numerous purchases during a year, trebled, but we would have a different case if the plaintiffs' lawyers had stipulated that in no circumstances would their fees be in excess of the requisite amount, but they didn't do that.

In fact, I believe they have agreed that there's

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jurisdiction here, because the question presented says --

QUESTION: Well, there has to be -- the Court would have to decide --

MR. CICERO: That's correct.

QUESTION: -- if the case were brought originally in Federal court whether what you're claiming is a reasonable assertion of amount-in-controversy, and if I'm right that these claims are worth in the neighborhood of something like $100 apiece, even trebled would be a $300 claim, how could you expect a court to award on a claim of that size such an astronomical fee that would get you up to $50,000?

MR. CICERO: Well, as the Court observed -- as the Court has observed in several of the cases where you get involved in questions of class action such as Zahn, the cost of prosecuting a case like this, and a cost of prosecuting that case, where the damages were being claimed -- were themselves probably more than $100, but it doesn't really matter, $50,000, which was the jurisdictional amount at that time, is not an exorbitant, reasonable fee for attorneys to prosecute a case that was --

QUESTION: Do you have any examples in Louisiana of a small claim getting under the provision on which you rely, 51:137, a small claim attracting large legal fees

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under Louisiana law --

MR. CICERO: Well --

QUESTION: -- under that provision?

MR. CICERO: I don't off-hand, Your Honor. The Fifth Circuit, of course, and the district court both ruled that a reasonable amount of fees here, even for the -- under -- the Fifth Circuit understood that the ruling had been that there was original jurisdiction for the two Frees. They ruled that it could well be in excess of $50,000. I submit that that was a reasonable judgment.

QUESTION: Well, and we generally defer to the court of appeals on questions of State law. In other words, if the Fifth Circuit says, under Louisiana law we think this was a -- would be likely to happen, we don't generally second-guess the Fifth Circuit.

MR. CICERO: That's correct, Your Honor.

QUESTION: Mr. Cicero, have we ever held that for purposes of the amount-in-controversy statutes attorney's fees are included?

MR. CICERO: Your Honor, you held in the --

QUESTION: That's a major Federal question, it seems -- you think the amount-in-controversy doesn't just mean the claim, but it also includes attorney's fees?

MR. CICERO: It includes -- Your Honor held -- Your Honor, the Court held in the Missouri Interstate

Insurance, I think it was, the Jones case was the second name, in 1933 that attorney's fees under statutes like this were substantive matters and could be included for purposes of determining, and were included in that case --

QUESTION: You're right about that. Do you remember how much the fee was? That was an individual claim.

MR. CICERO: I don't remember off-hand, Justice Ginsburg. I know that at that time, of course, the requisite amount was also substantially lower than it is at the present time.

QUESTION: It's a 1933 decision, and the fee -- the Court -- it was a $250 attorney's fees, then upped to $550, and in response, in your response to the Chief Justice before, I do not see in Judge Higginbotham's opinion anything that says that under Louisiana law that second statute would justify a fee of this size.

MR. CICERO: Well, the --

QUESTION: And if there is something that I missed in the opinion, point it out to me.

MR. CICERO: Well, the Court -- the only thing that's different between the two statutes was the question that Your Honor asked first, and that is whether 595, which deals specifically with class actions, if this was not a class action, therefore you did not have the

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attribution to the named plaintiffs, whether the case did not fail for that reason.

The judgment about attorney's fees and what the amount reasonably would be was the same whether you're dealing with Article 51:137 or with Article 595. The only point of 595 is to say what is the law in most States anyway, which is that the named plaintiffs are the ones who are responsible for the arrangements with attorneys, for compensating the attorneys, for paying for the fees and so on, so that as far as the question of the amount of the fees is concerned, the question with respect to 595 is exactly the same as the one with respect to 597.

QUESTION: I'm just suggesting that there aren't awards of that size made when you're not representing a class where the recovery will -- aggregated, the recovery will be very large. That's why lawyers represent class -- classes and not individual plaintiffs when they have claims of this nature.

MR. CICERO: Well, that's correct, but as the Court knows, in several of these cases, including the Clark case, that the plaintiffs are in effect -- the petitioner is in effect asking this Court to overrule.

The court was -- the courts were left with jurisdiction over a party which in that case had the ad damnum of the requisite amount, but the Clark case, as

well as Snyder, Harris, and, I submit, the City of Chicago case, decided two terms ago, are all cases which the petitioner's argument is asking this Court to overrule in --

QUESTION: Snyder said you couldn't aggregate. I don't understand how -- I would think --

MR. CICERO: Well --

QUESTION: -- Snyder supports his position.

MR. CICERO: Well, Snyder -- it was correct in the holding that you couldn't aggregate, but with respect to the doctrine of the case, which was citing Clark, that you cannot -- that only plaintiffs who have the requisite amount can stay in Federal court, both Clark and Zahn, because Zahn had four plaintiffs, both of those were cited and relied on Clark in citing the rule that only plaintiffs who had the requisite amount could stay, but the court did not lose jurisdiction, because there had been plaintiffs without the requisite --

QUESTION: Yes, but they wouldn't have jurisdiction over the class action. They would have jurisdiction over the case brought by the qualifying plaintiffs.

MR. CICERO: That's correct.

QUESTION: And let me -- since you brought that up, what about this very case? Suppose the Zahn rule were

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upheld. Could the named plaintiffs in this case stay in Federal court when all they have is their claim for less than $20,000?

MR. CICERO: Yes, they could, if the court --

QUESTION: On the basis that --

MR. CICERO: If the court reasonably made the judgment that prosecuting that case would amount to, or would require more than $50,000 in reasonable attorney's --

QUESTION: If the court decided that on those individual claims there could be a fee of that size justified, and you have not been able to tell me, at least this morning, that there's any small claim in Louisiana in which a court ever awarded a fee of that size.

MR. CICERO: I'm not able to this morning, Your Honor, that's correct.

QUESTION: Would you address yourself now to the question presented?

MR. CICERO: Yes, Mr. Chief Justice.

In addition -- in addition to having original jurisdiction here, which I think that 1367(a) clearly confers supplemental jurisdiction, 1367(a) confers it, 13 -- which is a general grant. 1367(b) does not except Rule 23 cases from the general grant in (a).

A class action like this case is one that is so

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related as to form part of the same case or controversy. Indeed, to be in court under Rule 23 at all, as the Court knows, common questions of law and fact must predominate, so that it's a classic case for the exercise of supplemental jurisdiction, economies to be derived therefrom, instead of splitting the case and having the people with original jurisdiction be in Federal court, absent class members be in State court --

QUESTION: Well, they could all go to State court. There -- I mean, it isn't a problem of not being able to get it all in State court. You're not talking Federal question. You're talking diversity.

MR. CICERO: Well, they could all go to State court --

QUESTION: Sure.

MR. CICERO: -- but if -- if, Justice Scalia, the named plaintiffs met the requisite standards for diversity of citizenship, the defendants could remove. You could have exactly the situation you had here, so that --

QUESTION: Mr Cicero, I -- I'm just going back to your prior answer, because you're -- and under your prior answer, every one of these class members could stay in State court. You told me in response to the question that the named representatives could stay in Federal court

because they could get this fee.

MR. CICERO: Yes.

QUESTION: But the named representatives are just like every other member of the class as far as the stake that they have, the claim that they have, so all you would have to do is add a whole slew of other names. You could have a class action with 100, 200 named representatives, and then they could all stay in Federal court.

MR. CICERO: Well, that's correct. They could stay in Federal court as plaintiffs, or they could stay in Federal court as class plaintiffs, as here.

But if I misspoke earlier, Justice Ginsburg, in this case there is jurisdiction over the two Frees, and the two Frees stay in Federal court, and the judgment of the Fifth Circuit we believe is a valid judgment, which --

QUESTION: Well, that's only if you read the statute as allowing them to bring along the others to test whether they have the amount, or you take -- forget about 595. You just concentrate on the other statute and say what you haven't been able to document this morning, that on a small claim you could hope to get such a sizeable fee.

But let's leave that and go over to whether 1367 overruled Zahn, which is the question presented.

MR. CICERO: Once there is original jurisdiction, as is, I believe, set forth in the question presented, then there clearly is supplemental jurisdiction here because of subsection (a) of 1367, no exception under subsection (b) --

QUESTION: Right, but your opponent contests precisely whether there is original jurisdiction.

MR. CICERO: I understand that.

QUESTION: And he contests your assertion that by reason of Clark, when you file a suit in which some of the plaintiffs do not meet the jurisdictional amount requirement, there is jurisdiction over the suit. I think that's highly questionable.

Suppose you refuse to dismiss. Suppose you refuse to dismiss those plaintiffs who do not meet the jurisdictional amount requirement. Let's say -- let's assume they're all named plaintiffs, not even a class action. You refuse to dismiss those named plaintiffs who do not meet the jurisdictional amount requirement.

What would the judgment of the court be? Would it be judgment on the merits against those plaintiffs who do not meet the jurisdictional requirement, or what, dismissal only as to them? I think not. I think the court would have to dismiss the entire suit.

MR. CICERO: That's not what happened --

QUESTION: Unless and until you dismiss --

MR. CICERO: Excuse me.

QUESTION: -- the people who don't meet the jurisdictional requirement.

MR. CICERO: That's what -- no, because precisely what happened in Clark is what Your Honor is postulating here. That is, several people brought claims, and only one was found to have the requisite amount by the court of appeals. The rest were dismissed from the case. The court held they should have been dismissed from the case, but there was jurisdiction ab initio over the one who had the requisite jurisdictional amount.

The position plaintiffs are taking here is flatly contrary to Clark.

QUESTION: What do you think about the argument they made, which I take it was that this statute's just interested in changing the result in Finley? I under -- as I understood it, and Justice Scalia could -- he wrote it, so -- I understood that Finley was a Federal claim under the Federal Tort Claim Act.

A sues B, and everybody concedes that A could assert some State claims against B, but the question was, could they bring in C to assert the -- A wants to sue C on those State claims, which are related to the claim against B, and it's a case in which there would independently have

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been diversity jurisdiction, A versus C, and so all that this statute's trying to do is to change that result, and whereas the court was worried about whether Congress had permitted it, they said yes, Congress permits it. That's what this is about. Nothing else.

MR. CICERO: I think he's -- I think petitioner is clearly wrong on that, Your Honor. I think that the statute did more -- indeed, I believe that the statute overruled the Zahn case, and the text of the statute is clear with respect to that, and all the petitioners do, and they've done it consistently here, is, they have taken the proper judicial construction and the statutory construction and set it back.

QUESTION: Well, you're absolutely right, in my opinion, that literally the language would cover an over -- overturning Zahn too, but then it would also cover, literally, permissive joinder under Rule 20. I take it then you could bring in all the plaintiffs you want, join them too, and you don't like that result.

MR. CICERO: I'm sorry.

QUESTION: You don't agree with that. I mean, you're saying they didn't intend to do that, because that's the end of Strawberry, or that's the end of complete diversity.

What I do is, I happen to be from Massachusetts,

I sue somebody from Rhode Island, and now, by the way, I have 40,000 friends who have the same claim, all from Rhode Island, too, so I bring them all in under Rule 20. Now, that would be quite a change in Federal law.

MR. CICERO: I'm not saying that -- I -- they may well have done that because of Rule -- the subsection (b), to the extent --

QUESTION: No, it doesn't apply to my case, I know.

MR. CICERO: I understand that. To the extent that there are carved-out exceptions, they preserve the rule --

QUESTION: Right, so if you -- you're either saying -- so that you are now going to say that indeed, since you want a literal interpretation of this language, you're saying that not only did this statute overturn Zahn, it also turned -- overturned what I call is the pillar of this obscure area of the law, namely Strawberry, or -- is that the case? You know, that you have to have complete --

MR. CICERO: Strawberry is Strawbridge.

QUESTION: Yes. So it's going back, and it's abolishing the complete diversity rule, and they never said a -- that's pretty hard to take, isn't it? I mean, that's a pretty big change. Nobody ever noticed it.

MR. CICERO: Well, Your Honor, I don't know whether anybody ever noticed it or not, because the -- there were a lot of academics crawling over this area, as the Court knows, and they wrote a lot of things about it, including some in the legislative history, but the statute -- and of course it's well-accepted the statute clearly operates to say in this case, Zahn notwithstanding, the absent class members, there is jurisdiction despite the fact they may not make the requisite amount.

Does that make sense? Yes, it does. It makes Zahn parallel to the rule of Ben Hur, for example, so that there is a symmetry there.

QUESTION: Mr. Cicero, you said -- you said that everybody agrees on that. If I understand right, the Tenth Circuit doesn't agree.

MR. CICERO: Well, that's correct, Your Honor. I didn't say --

QUESTION: So everybody -- the Tenth Circuit in fact found 1367 ambiguous.

MR. CICERO: Well, they -- the Tenth Circuit said that they were going to look at the statutory construction, that's correct. They were going to look at the legislative history.

QUESTION: So we can't say -- now, there were

certainly a lot of academic commentators about the time of Zahn that said Zahn was wrongly decided, because it should have been like Ben Hur, that only the named representatives' amount-in-controversy mattered, not the class members, but that debate was in the 1970's --

MR. CICERO: Well --

QUESTION: -- and Zahn has existed since then.

MR. CICERO: Some of the commentators, Your Honor, were people like the ones we cite in our footnote, in the footnote at page 6 of our brief, who stated in an article afterward that they realized that they had to correct what the plain language of the statute said, and so that footnote -- that one sentence was put into the legislative history in a section dealing with subsection (b), by the way.

A sentence was put in that said, this is not intended to alter the jurisdictional requirements and divert class action diversity cases as set forth under section 1332, footnoting Zahn and Ben Hur.

What does that tell us? Well, that phrase, the jurisdictional requirements, is the phrase at the end of subsection (b), but conspicuously, although they were straining to try to have that apply to (a), they thought, it wasn't in a section dealing with (a). It wasn't ever in subsection (b). Subsection (b) conspicuously does not

accept Rule 23.

QUESTION: Well, if you take Mr. Small's interpretation you never get to (b), because (a) -- because you're not -- you can't have a Zahn-type claim under (a). His position was that if Congress wanted to make the change, it would have to make it in 1332. That was the place for it.

But there were studies that led up to 1367. There was -- wasn't there the Federal Court Study Committee?

MR. CICERO: Yes, Your Honor.

QUESTION: And everybody was concerned about Finley, and wasn't that the motive, motivating force --

MR. CICERO: Well --

QUESTION: -- for 1367?

MR. CICERO: Two things with respect to your question, Your Honor. First of all, if you accept Mr. Small's argument, petitioner's argument about 1367(a), you don't need (b) at all, because the exceptions of (b) are not necessary if 1367(a) already incorporated all of those doctrines. Indeed, in their brief, once again they take it backwards. They say, 1367(b) sets forth what the applicable rules are, and 1367(a) is a complementary section which complements (b). That's backwards, and you don't need (b) at all if they're right about (a).

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Secondly, there was --

QUESTION: Is that different from what, by the way -- his interpretation different from the Tenth Circuit's interpretation of 1367?

MR. CICERO: I'm not sure, Your Honor, exactly how they got there. That was not a class action. That was a case of a couple of plaintiffs who had different jurisdictional amounts, and the result they held was the same, and that is that the action could not be maintained with respect to those who were not -- who did not have the requisite amount, but they did not hold that persons -- the one who did have the requisite amount was out of the case, which is what he's asking for here.

He's asking for a double-headed result. He's asking for a result that not only says it can't be a class action, but that says that the judgment with respect to the two plaintiffs as to which there was jurisdiction doesn't stand either, and that wasn't the --

QUESTION: Mr. Cicero, practically, if you have two people who present themselves as champions of a class, will they want to stay in Federal court as individual claimants and not continue to be champions of the class?

I mean, it seems to me the very purpose of their bringing the class action, the lawyer representing them, is that they're going to have these thousands of people

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and not two plaintiffs.

MR. CICERO: Well, it may well be they don't want to. Indeed, they didn't want to. They moved to remand, and I would expect they wouldn't want to, but the fact is --

QUESTION: Well, they moved to remand because they wanted to be with the class, right.

MR. CICERO: Well, they -- and -- they wanted to be with the class, and what they're asking here now by the result they're asking is that the Court in effect give them a remand by saying that there wasn't jurisdiction.

But the defendants have rights here, too, and section 1332 makes clear that assuming the requisite amount is met, there is the entitlement to remove those people to Federal court and to have the case tried in --

QUESTION: May I ask a question, counsel? Let me just assume something for a moment. Assume that I think you've by far got the better reading of the plain language of the statute, and assume that it's also perfectly clear, and maybe it isn't perfectly clear, but it's really quite clear that Congress did not intend that, that they did not intend to expand -- make a rather dramatic expansion in Federal jurisdiction after this task force study said that diversity's a big problem for the Federal courts.

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Assuming those two things, you -- the better reading, but the legislative history is crystal clear to the contrary. What should we do?

MR. CICERO: Well, Your Honor, what you should do here, I think, is that you should affirm the Fifth Circuit, because I think the reading of the statute was correct, and this goes to your question as well as the second part of Justice Ginsburg's question, the legislative history is not one-sided here, because the judicial -- the Court Study Commission, which issued its report in April of 1990, the report of the commission itself had a simple statement concerning ancillary jurisdiction, or supplemental jurisdiction that it should be in anything arising out of the same case or controversy, but the subcommittee, as the Court knows, chaired by Judge Posner, had a statute very similar to what was finally enacted which did not refer to subsection, to Rule 23 in the draft of subsection (b), and which said the intention -- as the report said, the intention was to overrule Zahn.

Now, Judge Weis in particular took -- had a strong interest in not expanding diversity jurisdiction. But when he got before the Judiciary Committee of the House in September, and it was clear that there was not general satisfaction with the broad draft that was being

put forward at that time, he offered, in connection with his prepared remarks, and it's in the legislative history, he offered a text of a suggested statute which was in all material respects like the one that came out of the subcommittee of the Judicial Court Study Commission, and that, with some minor differences in wording, was what was finally adopted by the Congress.

There was plenty of understanding from April on that Zahn and Rule 23 were issues with respect to this statute, but despite the fact that the academics said, gee, the language of the statute is plain, and would overrule Zahn, we better get a sentence into the legislative report, Congress didn't do that. Congress did not include Rule 23 in the exceptions of -- to the general grant of subsection (a).

It would have been very easy for them to do it if there was an intention not to have this overrule Zahn, but I can understand why there could have been a lot of reasons why people in 1990, with the -- in -- during the Bush administration, with the Bush Justice Department and so on, might well not have wanted to explicitly confront the issue of Rule 23 in the exceptions to the broad grant, and therefore it wasn't done. It's perfectly --

QUESTION: Okay, but I take it there is no hint anywhere of an intent to overrule Strawbridge, and I take

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it that your position there has to be, no, there wasn't any intent to overrule it, but that's what the plain language does, and Congress can fix it up when it comes back next time if that's the case. Is that --

MR. CICERO: Well, that's correct, if -- that's correct, Your Honor.

QUESTION: I didn't -- I wasn't sure what your position was in your brief --

MR. CICERO: If they made it --

QUESTION: -- but that's the position you're taking here.

MR. CICERO: If that was an oversight or a mistake, they can correct it, and there is a --

QUESTION: Well, it almost certainly must be. I mean, the -- it's inconceivable that they meant to go that far. But I think you're taking the position here that you will be consistent, Strawbridge goes, and Congress undoubtedly will come back and mend that in January or whenever.

MR. CICERO: Well, Strawbridge doesn't go in its entirety, because the purpose of subsection, or the clear import of subsection (b) is to preserve Strawbridge in a great many examples.

QUESTION: Yes, but it's not -- it doesn't -- look, this is exactly the point that's worrying me, that I

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seem to have only two choices. The word is all claims, and if you take those words, all claims, we have two choices, apply it, or don't, and certainly the word, all, in the law is a word that often doesn't mean all. Exceptions are often written in.

So what you're telling me, don't write an exception, read all to mean all, but if I do that, imagine a bus accident in the center of Texas, 50 people killed, every one of them from Texas but one, all defendants from Texas. That one person is from Oklahoma, and because one of the 50 are from Oklahoma, we now have a Federal court suit in which all 50 sue the Texas defendants. Is that right?

That -- if I say all -- I either say all means all, or I don't, and once you're down the line of saying, read in some exceptions, this is a good candidate.

MR. CICERO: Justice Breyer --

QUESTION: Yes.

MR. CICERO: -- I'm not saying read in some exceptions. I'm saying that your interpretation is a correct one of how the statute leaves us, and that may be an interpretation that in a certain circumstance is problematical, but that doesn't mean that the entire statute is absurd, wrong, or only meant to apply, or only should apply to Finley, which is what the plaintiffs are

asking the Court to do.

The fact is that with respect to the issue here, absent class members, amount-in-controversy, the statute makes sense. It -- the statute is clear. The statute makes sense. If there is some other tinkering that needs to be done in another area because the exceptions that were put in were not broad enough to accomplish a result with respect to Strawbridge, Congress can do that, but the exception --

QUESTION: But Mr. Cicero, it's one thing to say that, sub silentio, Congress overruled Zahn because the words literally read do that, to a 1973 case. Strawbridge is how old?

MR. CICERO: 1806, I think.

QUESTION: And the thought that that mainstay of Federal diversity jurisdiction, that 1806 case, was overruled by 1367 I think is an awful lot to take on.

MR. CICERO: Well, Your Honor, I think that what's happened here, perhaps, with respect to that, is one of those gotchas that Judge Pollack talks about in one of the cases that's cited here and that comes up in certain places, and that is that with respect to the question of multiple plaintiffs under Rule 20, that the exceptions that were carved out may not have been broad enough to preserve in its entirety Strawbridge, but that

doesn't mean that the statute should lead one, should lead the Court to the other extreme; that is, to import into it, into subsection (a) a meaning that doesn't make any sense with respect to having --

QUESTION: Well --

MR. CICERO: -- subsection (b) at all. You don't need (b) if you have (a).

QUESTION: Well, you say, not in its entirety, but it seems to me when you're talking about initial joinder of plaintiffs, that's the heart of Strawbridge and of the complete diversity rule, and it just -- to think of what that would throw into Federal courts if you were to have -- if you were to say that 1367, with a few exceptions, has enacted minimal diversity, that's a very big step to take.

MR. CICERO: Well, I agree with Your Honor, but that's not what -- what we're asking the Court to do here, and what the Fifth Circuit and the Seventh Circuit have held, and Judge Posner in another case in the Seventh Circuit the same thing, is that Rule 23, which is not included in the carve-outs of subsection (b), Rule 23 allows this case to go forward with the absent class members.

It's not shocking. It's sensible. It's in accord with --

QUESTION: But if you go on what's not in (b), rule 20 isn't in (b), either.

MR. CICERO: That's correct with respect to multiple plaintiffs. Rule 20 is in with respect to multiple defendants, but not with respect to multiple plaintiffs. That was pointed out --

QUESTION: Thank you, Mr. Cicero.

MR. CICERO: Thank you very much.

QUESTION: Mr. Small, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF DANIEL A. SMALL

ON BEHALF OF THE PETITIONERS

MR. SMALL: Thank you, Mr. Chief Justice. I don't think there's any distinction under respondents' argument between what would happen to Zahn and what would happen to Strawbridge v. Curtiss. Both cases would have to go under their interpretation.

QUESTION: What's your response to the contention that (b) of 1367 is meaningless if your interpretation is adopted?

MR. SMALL: It's not correct, Your Honor.

QUESTION: Why not?

MR. SMALL: 1367(b) prohibits claims by plaintiffs against certain parties added to the action by defendants.

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That was precisely the situation in Kroger. Kroger analyzed that as a matter of supplemental jurisdiction. That claim, potential claim by the plaintiff against the impleaded third party defendant was an issue of supplemental jurisdiction that would not be affected by the original jurisdiction predicate of 1367(a). Therefore, it's necessary to exclude under (b) the exercise of supplemental jurisdiction in that situation, otherwise there would be an expansion of supplemental jurisdiction pre-Finley that Congress did not intend.

The -- and also pre-Finley plaintiffs could enter a case as intervenors as of right under Rule 24. Those claims were evaluated as a matter of supplemental jurisdiction, not as original jurisdiction. There would -- so there would be jurisdiction over those claims conferred by 1367(a). They need to be taken away in (b).

Now, the key issue in this case is not an interpretation of 1367. It's an interpretation of 1332, because there's no argument here that if we're right about the interpretation of 1332, 1367 does not overrule Zahn.

QUESTION: Was there original jurisdiction over C in Finley?

MR. SMALL: I'm sorry?

QUESTION: Was there original jurisdiction over

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the -- that person, the municipality in Finley? You know, the one that -- the one the plaintiff wanted to bring in.

MR. SMALL: In Finley there was not.

QUESTION: There was not. So therefore, Finley -- on this you wouldn't say -- wouldn't change the result in Finley.

MR. SMALL: It would, Your Honor, because the Federal Tort Claims Act works differently from the diversity statute. It has not been interpreted, as has the diversity statute, to have jurisdiction over the United States defeated if some party comes in under supplemental jurisdiction, but that is how the diversity statute works.

Now, there are three results that will occur from respondents' interpretation that they seriously don't dispute. You'll have incoherence in 1367, you will have 1367 operating contrary to clear legislative intent, and you'll have a broadening of supplemental jurisdiction in diversity cases. Those are reasons to narrowly construe the matter-in-controversy requirement, particularly when this court has gone out of its way --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Small.

MR. SMALL: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:03 a.m., the case in the

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above-entitled matter was submitted.)

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CASE NO: 99-391

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)