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IN THE SUPREME COURT OF THE UNITED STATES

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THE STANDARD FIRE INSURANCE :

COMPANY, :

Petitioner : No. 11-1450

v. :

GREG KNOWLES :

- - - - - x

Washington, D.C.

Monday, January 7, 2013

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

APPEARANCES:

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

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

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P R O C E E D I N G S

(11:06 a.m.)

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

Mr. Boutrous.

ORAL ARGUMENT OF THEODORE J. BOUTROUS, JR.,
ON BEHALF OF THE PETITIONER

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

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

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

CHIEF JUSTICE ROBERTS: Would your position

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. BOUTROUS: But what Congress was

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 MR. BOUTROUS: Exactly.

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

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

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

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

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

21 MR. BOUTROUS: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 Mr. Knowles --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 CHIEF JUSTICE ROBERTS: I'm sorry.

24 JUSTICE SOTOMAYOR: I'm sorry.

25 CHIEF JUSTICE ROBERTS: Let's go by

1 seniority. Justice Alito.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 out of Federal court.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 ORAL ARGUMENT OF DAVID C. FREDERICK
22 ON BEHALF OF THE RESPONDENT

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

25 Our position is that the stipulation is

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

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

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

13 MR. FREDERICK: No.

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

17 MR. FREDERICK: What --

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

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

25 What the complaint here does in the prayer

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

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

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

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

19 MR. FREDERICK: That's correct.

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

1 favorable judges. Couldn't it find that?

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

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

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

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

1 purposes.

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

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

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

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

25 JUSTICE BREYER: That's the same question.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 JUSTICE ALITO: In practical terms.

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

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

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

1 continuum the real amount falls?

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

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

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

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

1 that.

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

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

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

22 That just is not responsive to his question.

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

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

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

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

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

22 We don't want --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 But that's something which -- you know

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 MR. FREDERICK: GCOP.

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

25 MR. FREDERICK: Well, certainly,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 investigated that does not serve the court.

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

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

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

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

25 JUSTICE SOTOMAYOR: Well, the only strategic

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

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

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

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

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

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

1 and Texarkana, Arkansas is a jurisdiction in Arkansas.

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

9 MR. FREDERICK: Well --

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

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

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

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

1 submit.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Boutrous, you have four minutes.

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

5 ON BEHALF OF THE PETITIONER

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

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

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

1 stipulation and not valid for the class.

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

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

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

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

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

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

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

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

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

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

25 JUSTICE KAGAN: Mr. Boutrous, the idea of

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

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

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

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

18 MR. BOUTROUS: No, Your Honor.

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

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

1 CHIEF JUSTICE ROBERTS: (Nods.)

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

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 The case is submitted.

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

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