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

2 (10:15 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 17-1471,
5 Home Depot versus Jackson.

6 Mr. Barnette.

7 ORAL ARGUMENT OF WILLIAM P. BARNETTE

8 ON BEHALF OF THE PETITIONER

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

11 Home Depot is a defendant under any
12 reasonable construction of that term and, in
13 fact, that's our only role in this case. We're
14 just a defendant.

15 Home Depot is not a counterclaim
16 defendant. It didn't sue anyone in this case.
17 Home Depot is not a third-party defendant.
18 We're not being sued for indemnity or
19 contribution.

20 Home Depot is simply a defendant, the
21 original defendant, to a consumer fraud class
22 action filed in state court by Mr. Jackson. As
23 such, we're within the plain terms of
24 Section 1441(a), are entitled to remove this
25 class action under the Class Action Fairness

1 Act to federal court, and the Fourth Circuit
2 erred in holding otherwise.

3 Because Home Depot is simply a
4 defendant, this Court's holding in Shamrock Oil
5 does not govern. As the Court is aware,
6 Shamrock Oil is an original plaintiff case, not
7 an original defendant case. The lower courts
8 have erred in extending the holding of Shamrock
9 Oil to say that, basically, you have to be an
10 original defendant to be able to remove.

11 The plain text of Section 1441(a) --

12 JUSTICE SOTOMAYOR: I'm not quite
13 sure, putting this outside the class action
14 setting, generally, all defendants have to
15 agree to removal and with some other
16 limitations.

17 If you're now an additional defendant
18 to the action, why do you -- why don't you need
19 Jackson's approval to remove? And he's not
20 approving because he's opposing you.

21 MR. BARNETTE: I don't expect he
22 would, Your Honor. That's correct. Under
23 1441(a) and traditional diversity jurisdiction,
24 1332(a), you're correct that all defendants
25 have to remove as a part of the procedure under

1 1446.

2 Here, though, in Shamrock Oil, the
3 Court went through the history of removal and
4 diversity, understood that it was very
5 important to the framers that diversity
6 jurisdiction was in the original constitution,
7 Article III, Section 2. Removal was in the
8 original Judiciary Act of 1789, so it was
9 important to the framers that each side have
10 one shot at a -- at a federal forum.

11 JUSTICE SOTOMAYOR: But that's not
12 true.

13 MR. BARNETTE: Presume --

14 JUSTICE SOTOMAYOR: All defendants
15 don't have a shot at removal. Only if
16 everybody agrees, in an original action, all
17 defendants have to agree to removal, correct?

18 MR. BARNETTE: That is correct, Your
19 Honor.

20 JUSTICE SOTOMAYOR: So not every
21 defendant individually has a right to removal.

22 MR. BARNETTE: Your Honor, in Shamrock
23 Oil, the Court looked at that history, looked
24 at -- basically, Congress had said plaintiffs
25 can't remove. We know that. Originally, the

1 right to removal was given to defendants only.
2 For about 20 years after the Civil War, it was
3 given to both plaintiffs and defendants. And
4 then, in 1887, again, it was given back to only
5 defendants. So this Court in Shamrock Oil --

6 JUSTICE SOTOMAYOR: My point still
7 remains that the statute by its own form
8 doesn't guarantee the power to every defendant
9 to remove.

10 MR. BARNETTE: So, in Shamrock Oil,
11 the Court, Your Honor, held because of this
12 binary selection that Congress has made, you're
13 either a plaintiff or a defendant.

14 JUSTICE SOTOMAYOR: Well, how about in
15 a -- how about --

16 MR. BARNETTE: If you're the
17 plaintiff, then you're not the defendant.

18 JUSTICE SOTOMAYOR: If your theory is
19 this right of removal, how about an involuntary
20 plaintiff? Under Federal Rule 19(a)(2), some
21 people can be made involuntary plaintiffs. Do
22 they have a right to remove?

23 MR. BARNETTE: No, Your Honor. The
24 right to removal --

25 JUSTICE SOTOMAYOR: Would there be --

1 MR. BARNETTE: -- is given to the
2 defendant or the defendants --

3 JUSTICE SOTOMAYOR: They never had a
4 chance --

5 MR. BARNETTE: -- under 1441(a).

6 JUSTICE SOTOMAYOR: They never had a
7 chance to pick a forum. That's the main
8 support for your theory.

9 MR. BARNETTE: So the Shamrock --

10 JUSTICE SOTOMAYOR: Which is that
11 everybody should have one opportunity to choose
12 their forum, correct?

13 MR. BARNETTE: A defendant -- the
14 defendant or the defendants is entitled to
15 remove under 1441(a). In Shamrock Oil, this
16 Court held, because the original plaintiff is
17 not solely the defendant, they don't have that
18 right. Therefore, also, you wouldn't need
19 their right to consent to removal by other
20 defendants.

21 In the same scenario, the original
22 defendant that files an additional claim
23 bringing in a new party defendant, they're a
24 plaintiff at that point.

25 JUSTICE GORSUCH: So --

1 MR. BARNETTE: This Court in Merchant
2 Heat & Light said you step into the role of the
3 plaintiff.

4 JUSTICE GORSUCH: So, counsel, if I
5 understand your answer to Justice Sotomayor,
6 it's that counterclaim defendants count as
7 defendants for purposes of 1441, but plaintiffs
8 don't, even though they -- counterclaim
9 defendant -- plaintiffs don't, even though
10 they're the original defendant.

11 MR. BARNETTE: It -- it --

12 JUSTICE GORSUCH: Now how can it be
13 that the word "defendant" expands and contracts
14 like that? I -- I could understand an argument
15 that everybody who's a defendant in any claim
16 in the case might count as a defendant for
17 purposes of 1441, but what I can't abide or
18 understand at least, is how the word
19 "defendant" could -- could be so Procrustean as
20 to just happen to fit you.

21 MR. BARNETTE: Your Honor, just to
22 briefly adjust what you said in your question,
23 if I may, we're not saying counterclaim
24 defendants. We're saying the parties that are
25 solely defendants. A counterclaim defendant

1 that's an original plaintiff, we're -- we don't
2 say has the right to remove under Shamrock Oil.
3 We take the Court's holding there as a given.

4 But we're not within that holding.
5 We're saying if you're solely a defendant,
6 that's your only role. On the binary choice
7 Congress has established, you're either a
8 plaintiff or a defendant.

9 JUSTICE GORSUCH: But -- but -- but
10 that doesn't --

11 MR. BARNETTE: If you're not a
12 plaintiff of any sort, you have to be a
13 defendant.

14 JUSTICE GORSUCH: Counsel, that still
15 just -- I got it, but that doesn't answer the
16 question, though, all right? You're saying
17 that the plaintiff here is no longer -- doesn't
18 qualify as a defendant --

19 MR. BARNETTE: Correct.

20 JUSTICE GORSUCH: -- even though the
21 plaintiff in this claim was the original
22 defendant. How could that be? How come
23 they're not a defendant too for purposes of
24 1441?

25 MR. BARNETTE: Again, because, as this

1 Court said in Merchant Heats & -- Merchants
2 Heat & Light, excuse me, once you file that
3 additional claim, third-party claim, you then
4 -- that original defendant steps into the role
5 of plaintiff.

6 And just like any other plaintiff,
7 like the original plaintiff, like this
8 defendant-plaintiff, those parties just go
9 along with the removal. Plaintiffs don't
10 consent to the removal, as the justice pointed
11 out.

12 JUSTICE SOTOMAYOR: Does your theory
13 fall apart if we don't accept your
14 claim-by-claim analysis? You approach this
15 claim by claim. I'm not quite sure how we can
16 -- you can do that since the statute speaks
17 about a civil action and it talks about removal
18 of an action, not a removal of a claim.

19 But, assuming we don't accept your
20 theory that removal is claim by claim, where
21 does that leave you?

22 MR. BARNETTE: Your Honor, you're
23 correct 1441 and 1453 talk about -- I'm sorry,
24 1332 talk about removing the civil action --
25 and 1446 -- but the point here is this Court

1 held very clearly in Exxon -- Exxon versus
2 Allapattah, you have to look at the claims
3 within the civil action to determine
4 jurisdiction.

5 Rule 8 is a short and plain --

6 JUSTICE SOTOMAYOR: That's different
7 than --

8 MR. BARNETTE: -- statement of a claim
9 entitling you to relief. It's not the civil
10 action that entitles a party to relief. It's
11 the claim. You have to look at the claim to
12 determine the amount in controversy. So once
13 -- and once one -- one --

14 JUSTICE SOTOMAYOR: The removal -- the
15 removal statutes say you look at the cost --
16 you look at the action, not the claim.

17 MR. BARNETTE: Well, 1446(b) says that
18 once there's a claim that establishes
19 jurisdiction, that's when you have 30 days to
20 remove. That -- the claim is key here. The
21 civil action is just --

22 JUSTICE SOTOMAYOR: But it's so --

23 MR. BARNETTE: -- the overarching
24 matter or lawsuit.

25 JUSTICE SOTOMAYOR: You don't have a

1 right under your theory to -- well, you have a
2 right that you don't have normally. If you
3 have a claim as a counterclaim defendant to --
4 that's not based on original jurisdiction,
5 you're still claiming you have a right to
6 remove? You were never entitled to a federal
7 forum to start with.

8 MR. BARNETTE: Your Honor, this case
9 is a qualifying class action under CAFA that,
10 by definition, is within the original
11 jurisdiction of the district courts. We --

12 JUSTICE SOTOMAYOR: No. Now you're
13 looking at the overall claim. You're not
14 saying to us look at the claim that makes you a
15 defendant.

16 MR. BARNETTE: The claim we removed is
17 the class action. We weren't in the case
18 before the class action.

19 JUSTICE SOTOMAYOR: Well, that is
20 true, but --

21 MR. BARNETTE: So we're not a
22 counterclaim defendant, if I could point that
23 out.

24 JUSTICE SOTOMAYOR: But, under your
25 theory, if there's a counterclaim defendant and

1 it's not filing an original action, you could
2 still remove?

3 MR. BARNETTE: I'm sorry, could you
4 repeat that, Your Honor?

5 JUSTICE SOTOMAYOR: Is it -- if you're
6 looking at the claim, if you're a counterclaim
7 defendant, are you looking at the original
8 action or are you looking at your action or
9 your --

10 MR. BARNETTE: We're looking at the
11 claim that's being removed. But, just to be
12 clear, we are not a counterclaim defendant.
13 Rule 13 is specific on what counterclaims are.
14 That's a -- a claim a party has against an
15 opposing party.

16 We were not in that original case.
17 That's absolutely correct. But 1441 does not
18 say only the original defendant can remove. It
19 does not say only claims brought by the
20 original plaintiff can be removed. It doesn't
21 say only claims by the original plaintiff
22 against the original defendant can be removed.

23 JUSTICE KAGAN: But, Mr. Barnette, as
24 -- as Justice Sotomayor was saying, 1441(a),
25 which is the principal removal statute, says

1 that a civil action, not claims, but a civil
2 action can be removed where the district courts
3 have original jurisdiction.

4 And what I've always taken that to
5 mean is that to look for original jurisdiction,
6 you look to the plaintiff's complaint, the
7 original plaintiff. It gives you original
8 jurisdiction. So, there, the plaintiff's
9 complaint doesn't have any claims that belong
10 in federal court. So where do you get the
11 authority to remove under 1441(a)?

12 MR. BARNETTE: Again, Your Honor, this
13 class action qualifies under CAFA, which
14 establishes that it's within the original
15 jurisdiction of the district courts. I could
16 --

17 JUSTICE KAGAN: Well, your claim might
18 be under the original jurisdiction of the
19 district courts if it had -- or not your claim,
20 but the claim to which you are defendant, if
21 that had started the lawsuit.

22 But that didn't start the lawsuit.
23 The lawsuit, the civil action, was started by a
24 claim that's completely non-federal in nature.
25 And you look to the original claim to decide

1 whether the courts have original jurisdiction,
2 don't you?

3 MR. BARNETTE: Your Honor, this is a
4 somewhat unusual situation, although it's
5 becoming increasingly less unusual because
6 these class actions keep getting filed.

7 But, to your point, Mr. Jackson
8 essentially filed a new civil action in the
9 existing case.

10 Rule 3 says a civil action commences
11 with the filing of a complaint in court.

12 JUSTICE KAGAN: Well, it might be
13 unusual, and it might be that the rules weren't
14 contemplating this situation, although I don't
15 really think that that's true, because the
16 rules contemplate very liberal joinder and of
17 all parties.

18 But, regardless, the rule is the rule.
19 And the rule says, when you try to figure out
20 removal, you look to whether the court, the
21 federal court, would have original jurisdiction
22 of the case.

23 And to do that, I mean, I have to say
24 there's only one -- one place to look to decide
25 whether original jurisdiction exists, and

1 that's to the plaintiff's original complaint.

2 MR. BARNETTE: Respectfully, Your
3 Honor, I don't believe that's what the statute
4 says. That's not what 1441(a) says and that's
5 not what 1332(d)(2) says as far as CAFA
6 removals.

7 Again, a defendant or defendant can
8 remove a civil action that's within the
9 original jurisdiction of the district courts.
10 We are squarely within that language. We are a
11 defendant. All we are in this case is a
12 defendant. We're a class action defendant.
13 CAFA gives the original jurisdiction.

14 JUSTICE KAGAN: I mean, the question
15 is you would -- you would be right if this
16 claim started -- excuse me, if this action
17 started with the claim against you. But it
18 didn't start with the claim against you.

19 And you're suggesting that we
20 essentially ignore all this language about
21 original jurisdiction in order to, you know,
22 get to this second claim, but the second claim
23 isn't what counts under 1441. What counts
24 under 1441 is the first claim.

25 MR. BARNETTE: Your Honor, I would

1 agree with that analysis if 1441(a) said only
2 claims brought by the original plaintiff or
3 only the original defendant can remove, but it
4 doesn't say that.

5 JUSTICE KAGAN: Well, it said --

6 MR. BARNETTE: All it says is original
7 jurisdiction. This class action is within the
8 original jurisdiction.

9 JUSTICE KAGAN: I mean, to -- to --
10 I'm repeating myself, but to decide whether --

11 MR. BARNETTE: Sorry, I feel like I am
12 as well.

13 JUSTICE KAGAN: -- original
14 jurisdiction exists, you look to the original
15 claim. That's what original jurisdiction is.

16 MR. BARNETTE: Well, Your Honor,
17 again, we don't think that's -- we think that's
18 an atextual reading of the statute.

19 I would also point out that the other
20 side has said the sort of unanimous view of the
21 lower courts that you can only have the
22 original defendant removed and you can't look
23 beyond that.

24 Actually, the Fifth and Eleventh
25 Circuits have allowed additional party

1 defendants, new defendants added to cases to
2 remove. So the analysis you're talking about
3 has not been uniformly applied throughout the
4 federal courts.

5 We think it only makes sense. I mean,
6 again, you're -- we're not in the case prior.
7 The only -- the first time we're brought in the
8 case is with a summons, and under Rule 4, the
9 summons goes to the defendant. That's the
10 plain language. We got a summons and complaint
11 in this case. We had to to be brought into the
12 case. We're not in the case otherwise.

13 JUSTICE BREYER: Are you -- are you --

14 MR. BARNETTE: They can't -- sorry.

15 JUSTICE BREYER: Listen, I -- there is
16 -- what I'm about to say has some flaw, and I'm
17 trying to figure out what it is because they
18 don't really make this argument. And,
19 therefore -- but -- but I -- it stopped me and
20 I wanted to see what the answer was.

21 All right. A class action may be
22 removed, right?

23 MR. BARNETTE: Correct.

24 JUSTICE BREYER: Okay. So we go look
25 to see what is a class action, and then we have

1 a definition in 1332 for these purposes. It
2 says the term "class action" means any civil
3 action -- okay, this is a civil action -- filed
4 under Rule 23.

5 Well, a civil action filed under Rule
6 23, I mean, the plaintiff filed a civil action
7 under Rule 23.

8 MR. BARNETTE: Or a state court
9 equivalent, Your Honor.

10 JUSTICE BREYER: But that wasn't a
11 class action. And you didn't file a civil
12 action under Rule 23. What you were, were the
13 defendant, and you brought a counterclaim
14 against a third-party, or you're the
15 third-party, or whatever.

16 MR. BARNETTE: Yeah, we didn't bring a
17 counterclaim at all.

18 JUSTICE BREYER: No, no, no, no, it's
19 somebody, the -- I'm sorry, the other -- the
20 other -- the plaintiff did. No, it's not the
21 plaintiff. The plaintiff -- see, that's the
22 hard part. It's like an Abbott and Costello
23 movie, you know, I mean.

24 (Laughter.)

25 JUSTICE BREYER: But -- but, look, A

1 sued B, and A is the plaintiff and B is the
2 defendant, and then B sued you.

3 MR. BARNETTE: Correct.

4 JUSTICE BREYER: So you're C, okay,
5 over here. So being C over here, B, who is the
6 one who sued you, is he -- did he file a civil
7 action under Rule 23?

8 MR. BARNETTE: Yes, we don't --

9 JUSTICE BREYER: I don't think he did,
10 did he? Where does it say he did?

11 MR. BARNETTE: I think we clearly --

12 JUSTICE BREYER: What he did was he
13 filed a --

14 MR. BARNETTE: I think we clearly did
15 under CAFA.

16 JUSTICE BREYER: He says he brings --
17 that's what he says, but he's bringing within
18 the rules, he's bringing within the rules, what
19 is it called, a third-party claim?

20 MR. BARNETTE: Again, Your Honor,
21 there's a lot of shorthand that's involved in
22 this and, unfortunately, it's just generally
23 inaccurate. We're not a counterclaim
24 defendant. We're not a third-party defendant,
25 those specific terms. We're just a defendant.

1 JUSTICE BREYER: Forget what you're
2 not. What I want you to know -- I realize
3 that. But it's only if it's a class action, a
4 civil action filed under Rule 23.

5 Now --

6 MR. BARNETTE: Or a --

7 JUSTICE BREYER: -- did the person who
8 filed the class action whose name happens to be
9 B --

10 (Laughter.)

11 JUSTICE BREYER: -- did that person
12 file a civil action under Rule 23?

13 MR. BARNETTE: Yes, Your Honor.

14 JUSTICE BREYER: Yes? How do we know
15 that?

16 MR. BARNETTE: I would -- I would turn
17 the Court's attention to Dark Cherokee, where
18 you ran through the CAFA analysis on the slip
19 opinion at page 2 and said 1453 directs you to
20 1332(d), as you noted.

21 We look at (d)(1) for the definitions
22 of class actions.

23 JUSTICE BREYER: Yes.

24 MR. BARNETTE: That's a filing under
25 Federal Rule 23 or a state equivalent.

1 JUSTICE BREYER: It is? Where does it
2 say that?

3 MR. BARNETTE: In 1332(d)(1).

4 JUSTICE BREYER: No, no, no, I know.
5 Where does it say the rule that when a
6 defendant files a class action, namely B --

7 MR. BARNETTE: What they're --

8 JUSTICE BREYER: -- against C, that
9 that is an action filed, a civil action,
10 because civil actions are usually filed by
11 plaintiffs, where does it say that that action
12 filed by B is a civil action filed under Rule
13 23? That's a simple question.

14 MR. BARNETTE: A couple things.
15 1332(d) just refers to a filing by a
16 representative party. That's the language the
17 statute uses. Mr. Jackson certainly is a
18 representative party. He's a class
19 representative. He refers to himself as a
20 plaintiff in the filing.

21 JUSTICE BREYER: Why are you still not
22 giving direct answers?

23 MR. BARNETTE: In the civil action, he
24 was defined as B2.

25 JUSTICE BREYER: Because what he says

1 is -- it says a civil action --

2 JUSTICE ALITO: The argument is that
3 what Mr. Jackson filed against you was not a
4 civil action filed under Rule 23.

5 JUSTICE BREYER: That's right.
6 Exactly. Thank you.

7 JUSTICE ALITO: And if that is the
8 case, then I don't know what rules would govern
9 this claim that Jackson filed against you.

10 Is this some kind of class action that
11 is -- is this some sort of suit that is sort of
12 like a class action, but it's not under Rule
13 23, so none of the requirements of Rule 23
14 would apply?

15 I mean, the argument is -- it's a
16 clever argument, comes out of I don't know
17 where -- the argument is, no, it's not, he
18 didn't file a class action against you under
19 Rule 23, but, when the court adjudicates this
20 action, it should apply the rules that -- it
21 should apply the Rule 23 rules.

22 MR. BARNETTE: Your Honor, again, I
23 would just point the Court to Rule 3 of the
24 Federal Rules of Civil Procedure, which says a
25 civil action is commenced by filing a complaint

1 in a court.

2 JUSTICE BREYER: Exactly.

3 MR. BARNETTE: He filed a class action
4 complaint in court against Home Depot.

5 JUSTICE BREYER: No, no, that's the
6 problem.

7 MR. BARNETTE: That commences the
8 civil action request.

9 JUSTICE BREYER: That's the problem.

10 JUSTICE KAGAN: Mr. Barnette, under
11 your theory, every time one party joins another
12 party, we would have a new civil action.

13 MR. BARNETTE: No, the --

14 JUSTICE KAGAN: But we don't. We only
15 have one civil action, and the civil action
16 includes a multitude of claims, or can, between
17 and among a wide range of parties.

18 But it's only one civil action.

19 MR. BARNETTE: Your Honor, that's not
20 our position. A counterclaim against an
21 original plaintiff would not constitute a new
22 -- new civil action. But when you're bringing
23 in a new defendant by summons --

24 JUSTICE KAGAN: So you're -- you're --
25 you're -- you're -- you're excluding one kind

1 of claim, which is the claim against an
2 original plaintiff, but there -- there can be
3 many, many parties under the -- the federal
4 rules and there can be counterclaims and there
5 can be cross-claims and there can be impleaders
6 and there can be all kinds of arrows going in
7 every which direction.

8 And you're suggesting that every one
9 of those is a new civil action under Rule
10 1441(a), which is the one that I'm focusing on,
11 and I'm suggesting that that's wrong. There's
12 only one civil action, and it's the action
13 that's brought by the original plaintiff.

14 MR. BARNETTE: No, Your -- Your Honor,
15 respectfully, we disagree. I'm not arguing all
16 these other things. I'm saying focus on this
17 case. Substance governs, not labels of the
18 parties' situation. That's this Court's
19 holding in City of Indianapolis.

20 You look at the substance of this.
21 Home Depot was not in the case. This document
22 is just a class action complaint against us.
23 And Rule 3 clearly says filing a complaint in
24 court establishes a civil action.

25 JUSTICE KAGAN: Mr. Barnette --

1 MR. BARNETTE: That's all that
2 happened here.

3 JUSTICE KAGAN: -- you're suggesting
4 that we should look at this case as though the
5 original claim never occurred and we should
6 pretend that the claim started with the
7 original defendant.

8 But the case did not start with the
9 original defendant. The civil action started
10 with the original plaintiff, who brought a
11 claim against a defendant who then brought a
12 claim against you.

13 And this is all -- I mean, it -- of
14 course, the claim against you is governed by
15 Rule 23, but all of these claims are one civil
16 action. And the question is, what gives you
17 the ability to remove that civil action if
18 there's no original jurisdiction over it?

19 MR. BARNETTE: The plain language of
20 1441 and CAFA give us original jurisdiction
21 over this claim.

22 JUSTICE KAGAN: Over the claim, but --

23 MR. BARNETTE: And we -- we would --

24 JUSTICE KAGAN: -- but 1441 does not
25 speak in terms of claims.

1 MR. BARNETTE: Right. 1446 does.
2 1441(c) does refer to claims. 1446(b) says the
3 procedure starts when you have a claim that
4 establishes federal jurisdiction.

5 This Court in Exxon said, once you
6 have one claim within a civil action, the
7 entire civil action is removed.

8 We're saying you remove --

9 JUSTICE KAGAN: Yeah, but the reason
10 why claims are -- are there is that's to deal
11 with a plaintiff that's bringing three claims
12 and one of them raises a federal question and
13 two of them don't. And then all that 1446 is
14 saying is that, when you're in that position,
15 the one claim that raises a federal question is
16 going to be able to get you into federal court.

17 So there's your claim-by-claim
18 analysis. But the action is what is removed,
19 and the action is removed by determining
20 whether there's original jurisdiction, which is
21 determined by looking to the original
22 complaint.

23 MR. BARNETTE: Respectfully, Your
24 Honor, that's not what 1441(a) says. So we're
25 -- we're traveling under the plain language of

1 that statute, the plain language of CAFA, and
2 we would say you would -- you would remove --
3 certainly would remove the entire civil action.
4 If there is supplemental jurisdiction over that
5 original \$10,000 debt collection action by Citi
6 against Mr. Jackson, of course, those claims
7 are no longer in the case at all. No claims by
8 or against Citi are longer in the case.

9 But you would either keep that under
10 supplemental jurisdiction or sever it off and
11 send it back to state court. A \$10,000 claim
12 belongs in state court probably. But we -- we
13 can remove the class action. It's within the
14 original jurisdiction of the district courts.
15 That's what CAFA clearly says.

16 We're not expanding federal
17 jurisdiction. This case could have been filed
18 as a stand-alone against us in federal court or
19 it could have been filed as a stand-alone
20 against us in state court and we would have
21 removed it.

22 The fact that Mr. Jackson chose to
23 file a new class action proceeding in an
24 existing case, that -- that does not serve to
25 defeat removal. I mean, that's what -- that's

1 the approach the plaintiffs are trying to take,
2 but that's not how the law operates.

3 A couple other things, Your Honor, I
4 would just mention. The -- the cases following
5 Shamrock Oil that have held -- the lower court
6 cases that have held that only original
7 defendants can remove, those are all based on
8 the presumption against removal that this Court
9 already held in Dart Cherokee does not apply to
10 CAFA. And, frankly, that -- that presumption
11 really does not appear to be well founded in
12 any -- any event.

13 When you look at the significance the
14 framers put on diversity jurisdiction, put on
15 removal jurisdiction, when you look at this
16 Court's cases like Exxon again, where we say --
17 where the Court said we're not going to apply
18 jurisdictional statutes too broadly but nor are
19 we going to read them too narrowly. Or you
20 look at a case like Reyes Mata that says
21 federal courts have a virtually unflagging
22 obligation to exercise jurisdiction where it's
23 found. And then when you have the Supremacy
24 Clause in the Constitution.

25 Basically, these are cases of

1 concurrent jurisdiction. They're going to go
2 forward in one venue or the other, state or
3 federal, but there's no reason for federal
4 courts to put a thumb on the scale and send
5 them to state court, to resolve doubts in favor
6 of remand. That just shouldn't apply in a
7 traditional diversity setting. But the Court's
8 already held under CAFA it does not apply.

9 JUSTICE SOTOMAYOR: Can I ask a
10 question about -- because it is important to me
11 -- about how lower courts have interpreted
12 things for decades now since Shamrock.

13 Basically, your argument has been
14 rejected by virtually every district court.
15 Not surprising it hasn't gone to the circuit
16 courts because you generally can't appeal a
17 remand.

18 MR. BARNETTE: Pre-CAFA, that's
19 correct, Your Honor.

20 JUSTICE SOTOMAYOR: That's correct.
21 So, to me, doesn't that have some force?
22 Couldn't and shouldn't I presume that, given
23 the state of the law, which was unanimity on
24 this question, why shouldn't I presume
25 Congress, in -- in creating this class action

1 statute, removal, and in addressing these
2 questions over the years, wouldn't have
3 understood that this was the state of the law?
4 That your position was not accepted?

5 MR. BARNETTE: Well, again, Your
6 Honor, that's actually not an accurate state of
7 the law. As we point out in our brief, the
8 Fifth and Eleventh Circuits have allowed
9 additional parties, third-parties, to remove in
10 these circumstances, not class action cases but
11 traditional cases, traditional diversity cases.
12 Those cases are from the '80s and '90s.

13 So, on this point about if you rule in
14 our favor, there's going to be this flood of
15 cases in the federal courts, I would say look
16 at the Fifth and Eleventh Circuit. Have there
17 been a flood of cases in those circuits? No,
18 there haven't. And that's the law.

19 As you point out, there was not a lot
20 of circuit law on this pre-CAFA. This issue, I
21 think tellingly, only arose post-CAFA as a way
22 to get around CAFA. There were no counterclaim
23 class actions being filed before CAFA because
24 there were much easier ways for plaintiffs to
25 stay out of federal court. It only is when

1 CAFA came into play that this device became
2 more widely used. And it's a growing trend.

3 I'm sorry, Your Honor.

4 JUSTICE BREYER: I hate to do this,
5 but let me do the -- I don't hate that much.
6 If you have something else important to say,
7 I'll figure it out.

8 MR. BARNETTE: No, go ahead, Your
9 Honor.

10 JUSTICE BREYER: I mean, I --

11 MR. BARNETTE: Not as important as
12 what you're going to say, I'm sure.

13 JUSTICE BREYER: Not --

14 (Laughter.)

15 JUSTICE BREYER: No, that is not
16 likely so. Look -- look what I'm doing, which
17 I -- which you -- which you haven't.

18 MR. BARNETTE: I'm sorry?

19 JUSTICE BREYER: I don't think I --
20 I've shown you what I'm doing. I'm going back
21 to where it says in 1453(b), what is it we can
22 remove? We can remove --

23 MR. BARNETTE: A qualified class
24 action --

25 JUSTICE BREYER: No, wait. Less than

1 that. A -- I'll figure it out later.

2 MR. BARNETTE: All right.

3 JUSTICE BREYER: I don't want to
4 interrupt your rebuttal time.

5 MR. BARNETTE: All right. I'd like to
6 reserve the remainder of my time for rebuttal,
7 Your Honor.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Mr. Bland.

11 ORAL ARGUMENT OF F. PAUL BLAND

12 ON BEHALF OF THE RESPONDENT

13 MR. BLAND: Mr. Chief Justice, and if
14 it please the Court:

15 Since -- the original jurisdiction
16 idea has really been set forth here and Justice
17 Sotomayor correctly pointed out that the case
18 law under 1444(a) is virtually unanimous in our
19 behalf and what my friend says is that actually
20 there's a division among the case law, that the
21 Fifth Circuit, the Eleventh Circuit disagree.

22 The Fifth and Eleventh Circuit cases,
23 Your Honors, are talking about a different
24 statute. It's not 1441(a). It's 1441(c).

25 1441(c) draws the exact distinction

1 that Justice Kagan draws; in other words,
2 1441(c) talks about claims. 1441(a) talks
3 about a civil action, the single unitary civil
4 action that starts when a plaintiff files a
5 complaint.

6 CHIEF JUSTICE ROBERTS: Well, but it
7 -- it -- 1446(b), which is setting forth the
8 procedures for removal, it refers to the notice
9 of removal of a civil action or proceeding.

10 MR. BLAND: Yes, Your Honor.

11 CHIEF JUSTICE ROBERTS: Well -- so it
12 doesn't have to just be a civil action, does
13 it?

14 MR. BLAND: Well --

15 CHIEF JUSTICE ROBERTS: However you
16 want to conceptualize it, it seems to me that
17 you might conceptualize as including what would
18 otherwise be a freestanding proceeding, such as
19 the one that -- where B sued C, but then it
20 also talks about a proceeding.

21 And even if you don't think that's a
22 civil action properly conceived, it's certainly
23 a proceeding of some kind, isn't it?

24 MR. BLAND: Well, I -- I don't think
25 it's a -- a proceeding is not an action over

1 which you'd have original jurisdiction under
2 1441(a), and as I understand the relationship
3 between 1441(a) and 1446, Your Honor, 1441(a)
4 is -- is the part of the removal statutes that
5 says here are the types of -- here -- here are
6 cases over which there's removal jurisdiction.

7 And then 1446 are the procedures that
8 go through -- you have to have -- everyone has
9 to agree and you have to do it within so many
10 days and this sort of thing.

11 CHIEF JUSTICE ROBERTS: Well, do you
12 think those procedures apply to 1441(a)?

13 MR. BLAND: They -- they do apply to
14 1441(a) except where they've been amended by
15 CAFA, but 1441(a) is where the grant of
16 original jurisdiction -- or where the grant of
17 jurisdiction comes from. And this Court has
18 repeatedly said that if there is not original
19 jurisdiction over the claims in the -- excuse
20 me, over the plaintiff's complaint, if there's
21 not original jurisdiction over the plaintiff's
22 complaint, that you don't -- you don't meet the
23 standard -- you don't meet -- you don't qualify
24 for removal.

25 So that was -- that goes back to the

1 Planters' Bank case, the Union-Planters' Bank
2 case in 1894. It was a central case that sets
3 this out. Then it was applied the next year in
4 a diversity case, the Mexican National --
5 National Railroad case. My friend has said
6 that -- that the original jurisdiction rule
7 doesn't apply in diversity cases. That's
8 wrong. It was applied in a diversity case
9 right after it was first enunciated by this
10 Court.

11 And the original jurisdiction rule of
12 1441(a) is where all -- all of the district
13 courts, starting in the 1950s, that were
14 looking at Shamrock Oil and then said, yes, the
15 same rule that applies in Shamrock Oil also
16 applies to third-party defendants,
17 counterclaimants, cross-claimants, what -- what
18 have you, that it doesn't turn upon the nature
19 of whatever state or federal rule, procedural
20 rule, is bringing someone in; that the
21 substantive question of is there jurisdiction
22 goes back to the original jurisdiction test.

23 And that's why the 1441(a) distinction
24 between 1441(a) and 1441(c), which relies upon
25 a claim, is so important. There are other

1 statutes that create federal jurisdiction over
2 claims. For example, the bankruptcy code. My
3 friend would have a terrific argument and we
4 would be in terrible shape if we were arguing a
5 bankruptcy case.

6 But because we are arguing under four
7 -- because the jurisdictional test here is
8 1441(a), which has always turned on can you
9 find jurisdiction in the plaintiff's complaint,
10 it's really a different animal.

11 JUSTICE ALITO: But what you're
12 arguing is not based on the language, not based
13 on the term "original jurisdiction" in 1441.
14 It's based on the well-pleaded complaint rule.
15 Am I right on that?

16 MR. BLAND: Actually, Your Honor, I
17 don't think you are right. And can I try and
18 explain? I think this is sort of complicated
19 because I think the Court has sometimes used
20 these words to mean the same things and they
21 really don't.

22 So the -- the original jurisdiction
23 rule for 1441(a), as I -- what it says is that
24 you look to see whether there is jurisdiction
25 from the plaintiff's complaint.

1 JUSTICE ALITO: Yeah. That's the --

2 MR. BLAND: But -- but -- but -- I'm
3 sorry. I didn't mean --

4 JUSTICE ALITO: No, go ahead.

5 MR. BLAND: Okay. So the well-pleaded
6 complaint rule, by contrast, comes from 1331,
7 which is the substantive juris -- the federal
8 question jurisdiction statute, and it's a way
9 of finding out is there original jurisdiction.

10 So you only look at the complaint.
11 But the well-completed complaint rule doesn't
12 --

13 JUSTICE ALITO: Yeah, but you're
14 saying -- you're -- you're -- there would be
15 original jurisdiction if this claim were in the
16 case at the beginning. You would agree with
17 that. So you're saying it's original
18 jurisdiction at the beginning, right? That's
19 what --

20 MR. BLAND: Yeah, that's right.

21 JUSTICE ALITO: So you're reading that
22 into the text, and you make --

23 JUSTICE KAGAN: Well, original is at
24 the beginning, isn't it?

25 JUSTICE ALITO: No. Well, original --

1 JUSTICE KAGAN: It's jurisdiction at
2 the beginning from the original complaint.

3 MR. BLAND: I -- I totally agree with
4 you.

5 (Laughter.)

6 JUSTICE ALITO: You agree with Justice
7 --

8 MR. BLAND: Yes. We agree,
9 absolutely.

10 JUSTICE ALITO: -- with Justice
11 Kagan's answer to my question?

12 (Laughter.)

13 MR. BLAND: There -- there -- I don't
14 -- I -- I feel like I'm making a TV commercial,
15 but there's only one original. You know,
16 there's the original complaint. There's the
17 original civil action. And then -- then there
18 are claims within it. So --

19 JUSTICE ALITO: Well, this is -- this
20 is -- this case is very, very complicated. And
21 let's go -- let's go back step by step. Put
22 aside this question of original jurisdiction.

23 If we look at the text, we have a
24 reference to the defendant or the defendants.
25 So Home Depot would qualify there, would it

1 not?

2 MR. BLAND: No, because, in -- in the
3 context of 1441(a), defendant is, in that
4 setting, is a defendant in a civil action where
5 there is original jurisdiction.

6 JUSTICE ALITO: Okay. You're reading
7 things into it. But, in the ordinary sense of
8 the term, are they -- are they not defendants?

9 MR. BLAND: They're -- they're --

10 JUSTICE ALITO: They are some kind of
11 defendants.

12 MR. BLAND: There -- there are lots of
13 colloquial ways in which they would be termed a
14 defendant. But within the meaning of 1441(a),
15 every court that's looked at --

16 JUSTICE ALITO: Yeah. Okay. And
17 where does this come from? All right? So we
18 start out with a term that's big enough to
19 encompass them. Now we have the limitation.
20 Where does this limitation come from? It comes
21 from Shamrock Oil, does it not? That's the --
22 the origin of it.

23 MR. BLAND: Shamrock Oil was the first
24 case to look at a counterclaim defendant from
25 this Court, yes.

1 JUSTICE ALITO: Right. And so
2 Shamrock Oil basically says, look, you -- you
3 started out as the plaintiff, and you chose the
4 state forum. And now that you have been sued
5 with a counterclaim, you can't -- you know, you
6 -- you chose the state court and you're stuck
7 in state court, so you can't remove it to
8 federal court.

9 I -- I don't see that Shamrock Oil
10 goes any further than that.

11 MR. BLAND: Well, first, I want to --
12 Shamrock Oil is -- is ultimately looking at --
13 at the text. There is language in Shamrock Oil
14 where they said this is not about waiver. What
15 this is about is what did Congress provide to
16 you.

17 And so that that key -- there's key
18 language in Shamrock that says it's not about
19 waiver, but it's about what did Congress
20 provide to you. And so then the question is
21 Shamrock -- Shamrock -- in Shamrock, you didn't
22 have an original jurisdiction issue because
23 Shamrock chose to sue in state court, but they
24 could have sued in federal court. This case is
25 different.

1 JUSTICE ALITO: Right. They chose
2 state court.

3 MR. BLAND: Citibank could never have
4 brought this case in federal court. So there
5 was never original jurisdiction here where
6 there was original jurisdiction in Shamrock.
7 So Shamrock didn't talk about our argument.

8 JUSTICE ALITO: Yeah, but Citibank is
9 gone. And, you know, Citibank brought a little
10 case on the credit card debt in state court.
11 And then suddenly this thing gets
12 transmogrified into a class action that you
13 say, well, this one has to stay in state court
14 despite CAFA. If it had been brought
15 originally in this forum, it would be removable
16 under CAFA. That's what Congress wanted.

17 And somebody came up with this idea of
18 using this sort of proceeding as a way of
19 getting around CAFA. And there's a law review
20 article that actually says, after CAFA, well,
21 look, we found a way to get around CAFA so that
22 we can keep these things in state court.

23 Is that not correct?

24 MR. BLAND: There -- there -- there
25 are a number of premises, Your Honor, with

1 which I strongly disagree.

2 So, first of all, CAFA doesn't change
3 what 1441(a) says. Four -- CAFA in the -- in
4 the -- in the Senate report, which this Court
5 treated as being -- having precedential value
6 in the Dart Cherokee case.

7 The -- the -- the -- the -- the Senate
8 report said that CAFA was intended, the -- the
9 Section 1453, which Justice Breyer was quoting
10 from earlier, was intended to make some
11 alterations to but is -- but is essentially
12 adopting 1440(a).

13 The idea of having counterclaims
14 defendants has been around forever. The idea
15 that there has been some jump in class action
16 counterclaims simply is not empirically true.

17 There was a law review article by an
18 advocate. It's not really a law review article
19 and a peer-reviewed article. I think it's more
20 like a blog. But, anyhow, a guy writes an
21 article saying --

22 JUSTICE ALITO: Since when are law
23 review --

24 MR. BLAND: -- we're worried this is
25 going to be a lot of our problem.

1 JUSTICE ALITO: Since when are law
2 review articles peer reviewed?

3 MR. BLAND: You know, that's a good
4 point.

5 JUSTICE ALITO: Who are they reviewed
6 by?

7 (Laughter.)

8 MR. BLAND: You're totally right. I
9 -- I'm so sorry. I -- I should never have said
10 that, you're right.

11 JUSTICE ALITO: They should be --
12 maybe they should be peer reviewed.

13 MR. BLAND: Law review articles are
14 student reviewed, they're not peer reviewed. I
15 -- I -- I withdraw. That was --

16 JUSTICE BREYER: I'm fine on law
17 review articles.

18 (Laughter.)

19 JUSTICE BREYER: But I have a
20 question. I think they have very good policy
21 arguments on the other side. I understand it.
22 I don't think Shamrock really covers it.

23 So I might, at least for purposes of
24 argument, assume they are a defendant under
25 1441 and, if they were alone, they could just

1 remove the case. And when they remove it and
2 get into district court, if they get it into
3 district court, Rule 23 applies. I have no
4 problem with that, for a hypothetical, for this
5 question.

6 Where I got stuck, which you will get
7 me out of --

8 (Laughter.)

9 JUSTICE BREYER: -- is that I think
10 they can't get into federal court without 1453
11 because not all defendants agree with them, or
12 there are a variety of reasons they need 1453.
13 Is that right?

14 MR. BLAND: So I -- I -- I agree that
15 they cannot get in --

16 JUSTICE BREYER: No, I'm just saying,
17 is that right?

18 MR. BLAND: It is.

19 JUSTICE BREYER: Okay. Now, if they
20 need 1453, I go to 1453 and I look who can --
21 who can take advantage of 1453, and it talks
22 about a class action. Now they could surely do
23 it if we didn't -- if we just stop there. But
24 then it says class action shall have the
25 meanings given to that term under 1332(d)(1).

1 This is just language. It's just
2 language, no policy, no nothing. So I turn to
3 1332(d)(1), right, and what do I discover when
4 I get there in the first words?

5 What it says is class action, the very
6 word I just left, the very word that referred
7 me here, means any civil action filed under
8 Rule 23.

9 So I look. Was this a civil action
10 filed under Rule 23? Now I'm over with Justice
11 Kagan. A civil action is an action brought by
12 a plaintiff. And that's just what it happens
13 to be.

14 It doesn't have to do with claims.
15 And, therefore, since this isn't a civil action
16 filed -- only filed, not what governs it if
17 they're in federal court -- filed under Rule
18 23, it can't -- they can't take advantage of
19 1453 because they don't fit within the
20 definition.

21 Now am I right?

22 MR. BLAND: You're right about that,
23 yes.

24 JUSTICE BREYER: If I'm right about
25 that, why didn't you make that argument?

1 MR. BLAND: Because 1453 is
2 essentially -- 1453 amends and changes
3 essentially some of the provisions of 1446 that
4 the Chief Justice was talking about.
5 Essentially, they track each other.

6 1446 sets out the rules for removal,
7 and then there were several rules around CAFA
8 where -- where the -- where Congress was
9 concerned that there were abuses, that cases
10 were being -- were being kept in state court
11 that should be in federal court, so just for
12 class actions, 1453 changes some of the
13 procedural rules.

14 So you no longer require unanimity in
15 all the defendants. You can have a defendant
16 who's not -- a defendant in a home state can go
17 forth.

18 But 1453 is not by itself a grant of
19 federal jurisdiction the way 1440(a) is.

20 JUSTICE BREYER: Nobody says it is.
21 All I'm saying is, do they need 1453 to be able
22 to remove?

23 MR. BLAND: For -- for CAFA, yes, they
24 do.

25 JUSTICE BREYER: Okay.

1 MR. BLAND: And they -- and they --

2 JUSTICE BREYER: And I look to who
3 does it cover, and it covers a class action as
4 defined in a different statute. I don't care
5 if they said class action defined in the
6 antitrust law.

7 Then I'd go look and see how they
8 define it in the antitrust law or defined in, I
9 don't care what, I mean, defined in the
10 criminal code. But I want to -- they referred
11 me to that, so I went and looked at that.

12 And when I looked at that, I saw class
13 action is defined as I just said. Okay. So my
14 question is, same question, great argument for
15 you. Why didn't you make it? And so there's
16 something wrong with my thinking, and that's
17 what I'm trying to find out.

18 MR. BLAND: Well, I think -- I think
19 that we were focusing on -- on 1440(a) as the
20 grant of removal jurisdiction, 1446 as the
21 procedures, and 1453 not as a new grant of
22 removal jurisdiction but just more procedures.

23 And so, to the extent that there's
24 just no original jurisdiction over civil action
25 under 1440(a), we think that's the end of it.

1 So that's where we have focused the vast
2 majority of our advocacy.

3 I think that the point you make about
4 1453 is -- is extremely clever and wish we had
5 -- had -- had articulated it more better.

6 (Laughter.)

7 MR. BLAND: But I think that --

8 JUSTICE BREYER: I wasn't trying to
9 help you.

10 MR. BLAND: But I do think that
11 1440(a) is -- is where -- where this case
12 starts and ends. The original jurisdiction
13 cases going back to the 1890s really govern.

14 I want to point out for a second now,
15 since there's been a lot of discussion about
16 this difference between a civil action and a
17 claim, and also this word "defendant" if it's
18 defendant now is not just the original
19 defendant, but a defendant's cross-claim or
20 counterclaim or whatever different rule you
21 want to use, 13, 14, 19, or -- or something
22 like that, that it's going to have a gigantic
23 effect not on class actions but on all sorts of
24 individual cases.

25 And here's why: So picture just a

1 regular state law negligence case where a
2 defendant's resident of the same state as the
3 plaintiff, and the defendant would really like
4 to be in federal court. They'd like their
5 first bite at the apple, right? And they have
6 an out-of-state insurer.

7 Right now, if that defendant brings a
8 claim against the out-of-state insurer, no --
9 no diversity jurisdiction, even if it's over
10 the jurisdictional amount, because you don't
11 have complete diversity; you have the defendant
12 and the plaintiff's same.

13 Under their rule, now what you do is
14 you look at the claim by claim, instead of by
15 the original civil action, going back to the
16 word "original." So, if you now start looking
17 at things claim by claim, there is diversity
18 between the two defendants.

19 So every single time you have a
20 personal injury case in which there's a
21 defendant who wants to be out of federal court
22 and they have an out-of-state insurer, so
23 basically any company who's not in Connecticut
24 will be able to now name their insurance
25 company through some sort of third-party claim,

1 and now why isn't there diversity jurisdiction?

2 The simple answer is there is.

3 Another thing that their idea is of --
4 of broadening the idea of -- definition of --
5 of what is a defendant from the -- you know,
6 from the rule that has been affirmed by
7 literally dozens and dozens of district courts
8 and circuit courts around the country for
9 years, and you'd go from 1440(a)'s limit on
10 civil action to instead have a -- a rule that's
11 going to turn upon claims, is you can start
12 having a lot of business-to-business disputes
13 that right now would be in state court that
14 could get into federal court.

15 So, for example, there are a lot of
16 cases in which corporations would rather have
17 their cases, with all respect to the federal
18 courts, in Delaware state courts, where there's
19 a lot of sophistication, a lot of rules that
20 have been built up. There are a lot of Silicon
21 Valley companies who are more interested in
22 being in -- in San Jose -- in the state courts
23 of California, where there's a lot of
24 sophistication around their particular issues
25 that's built up.

1 So what happens if you're a defendant
2 in one of these cases and you suddenly decide,
3 you know, I really wish I hadn't made this deal
4 because the law that's built up is bad for me,
5 you find another company, bring a cross-claim
6 against them. Now their -- under their theory,
7 whether or not there's diversity is based upon
8 a claim-by-claim basis. You look at them and
9 say, oh, we're going to bring a cross-claim
10 against them. They're a defendant because,
11 even though under all the law that's existed up
12 to now, we're now going to change this and the
13 defendant's not just going to be the defendant
14 to the original claim; they're going to be a
15 cross-claim, counterclaim, whatever. In those
16 cases, a company is going to be able to change
17 its mind and bring those cases in --

18 JUSTICE SOTOMAYOR: I have -- I
19 have --

20 JUSTICE ALITO: Well, perhaps it's not
21 possible to decide this case in a way that
22 doesn't go as -- doesn't effectively decide all
23 these other different situations that you've --
24 you've posited, but if we look just at what
25 happened here -- and this -- and this involves

1 not -- I mean, this implicates not just the
2 original removal statute but CAFA, is there any
3 good reason why a claim like this, if you
4 accept CAFA, why this should be -- should not
5 be removable to -- to federal court?

6 MR. BLAND: Yes, Your Honor, because
7 CAFA is a balancing act. CAFA is -- if CAFA
8 was a preemption statute, it would not be a
9 field preemption, it would be an express
10 preemption. Congress saw certain problems that
11 they were unhappy about and they solved those
12 problems.

13 JUSTICE ALITO: When you think CAFA
14 said, well, if -- if a claim like this is filed
15 originally in federal -- in state court, it can
16 be removed, but if it comes into the state
17 court in this strange sort of back-door way,
18 then it has to stay in state court. You really
19 think that that's a possible decision Congress
20 would make?

21 MR. BLAND: So, first of all, I -- I
22 do think it's possible because, as Justice
23 Sotomayor said earlier, I think that you assume
24 that Congress knows the backdrop against which
25 it's -- it's legislating. They have a bunch of

1 lawyers when they're writing these laws.

2 Congress had repeatedly changed the --
3 the jurisdiction statute. So, in 2011, there
4 was the amendment to overturn this Court's
5 decision in the Holmes versus Vornado case,
6 where the Congress said any party can remove a
7 case, not a defendant, in the -- the America
8 Invents Act. The American Invents Act is --

9 JUSTICE ALITO: Well, I mean, that's
10 -- I mean, that's based on the --

11 MR. BLAND: Congress could have done
12 it.

13 JUSTICE ALITO: -- the idea that they
14 -- they -- they were aware of these district
15 court cases. They're -- they're almost all
16 district court cases.

17 MR. BLAND: That's -- that's correct.

18 JUSTICE ALITO: And they said, well,
19 okay, we -- we want to accept that.

20 MR. BLAND: Right.

21 JUSTICE ALITO: I mean, that's --

22 MR. BLAND: I mean, it's quite
23 possible that Congress never thought of this
24 because it just wasn't really a very big
25 problem and it wasn't one of the issues that

1 came up in the hearings. I -- I sort of
2 tracked the hearings at the time. I don't
3 remember anyone talking about it.

4 I mean, this Court has said on a
5 number of occasions that even if you think that
6 there is something that if Congress had thought
7 about they would have done something, you can't
8 engraft a solution into what Congress said
9 to -- to address the problem.

10 I mean, I think it's possible --

11 JUSTICE KAVANAUGH: Is Home Depot --
12 I'm sorry. Is Home Depot a defendant under
13 1453?

14 MR. BLAND: No, Your Honor, because --

15 JUSTICE KAVANAUGH: And what -- what
16 is it then?

17 MR. BLAND: It's a -- it's a -- it's a
18 counterclaim or third- -- third-party claim
19 defendant. And that's just different than a
20 defendant for -- for --

21 JUSTICE KAVANAUGH: So, when it says
22 any defendant, that doesn't include --

23 MR. BLAND: Right, because --

24 JUSTICE KAVANAUGH: -- that kind of
25 defendant?

1 MR. BLAND: Right, because the word
2 "defendant" in the removal statutes has this --
3 has this fixed meaning from 1440(a). And
4 putting the word "any" in front of it doesn't
5 change.

6 So if you had -- if Congress had a
7 statute that said -- or a statute about
8 rabbits, and then they amended it and said "any
9 rabbit," that doesn't mean that a weasel or a
10 gerbil becomes a rabbit. You know, it's still
11 -- the word "any" in front of a noun leaves the
12 noun as what it is. So --

13 CHIEF JUSTICE ROBERTS: Well, but that
14 still means that a brown rabbit is a rabbit.
15 In other words, when you were describing what
16 they were, you said a counterclaim defendant or
17 a third-party defendant, it's a type of
18 defendant. And if you have a statute that says
19 "any defendant," it would seem that it includes
20 those as well.

21 MR. BLAND: It's a type of defendant
22 in a colloquial way, Your Honor, but I don't --
23 I disagree with the concept that it's a type of
24 defendant for purposes of the removal statutes.
25 I think for --

1 CHIEF JUSTICE ROBERTS: Where do
2 people speak colloquially of third-party
3 defendants?

4 (Laughter.)

5 MR. BLAND: Yeah.

6 CHIEF JUSTICE ROBERTS: Which was not
7 necessarily meant that way. I mean, it's --
8 it's -- it's only used as a fairly technical
9 term.

10 MR. BLAND: Right. And -- and -- and
11 -- and in the removal statutes, the word
12 "defendant" has -- has this meaning where it's
13 -- it's not by itself, but it is cabined by
14 civil action on one side and original
15 jurisdiction on the other side, which this
16 Court has -- has repeatedly interpreted to say
17 that -- that third-party counterclaimants and
18 so forth in all other settings are not
19 included.

20 So the only question is does CAFA
21 change anything by sticking the word "any" in
22 front of it? And -- but the thing is we know
23 what Congress was trying to do in that
24 sentence. What Congress was trying to do was
25 there was a concern that plaintiffs' lawyers

1 were supposedly going out and suing several
2 defendants and they would pick one who was sort
3 of their buddy who was not going to agree to
4 removal, and so then that one said, well, no,
5 you wouldn't be able to get unanimous agreement
6 from all the defendants to remove. And so
7 that's what that provision was aimed at, was
8 the unanimous consent, that everyone was
9 supposed to agree.

10 And the Senate report says that clear
11 as day. And if you read the whole sentence in
12 context, what the word "any" there means is
13 each and every. It means each and every. And
14 they're saying each and every defendant
15 separately has the right to remove this case to
16 federal court.

17 JUSTICE BREYER: But it -- that does
18 say -- I mean, you know, you heard his policy
19 argument. It's a little hard to see why if you
20 understand it, and he does use -- the rules use
21 the word "defendant" to refer to his client in
22 this situation. The statutes use it. It has
23 some other qualifications in front of it.

24 So policy, language is possible, why
25 isn't he right? And I grant you that I've only

1 been able to say that once I got into this. I
2 had to get through the argument, but I don't
3 know the answer to that. All right.

4 So why isn't he on the policy end, on
5 the --

6 MR. BLAND: On the policy?

7 JUSTICE BREYER: On the policy and on
8 the brown rabbit analogy.

9 MR. BLAND: Okay. CAFA was a
10 compromise. You know, there -- the Chamber of
11 Commerce brief colorfully calls it a grinding
12 eight-year battle. There were a series of
13 changes that were made over it. There were
14 times in which it was going to cover more than
15 it ended up covering. It shrunk somewhat.
16 There were a lot of people who wanted more
17 cases to stay in court.

18 The -- the Senate report actually,
19 they have one of those things, you know, where
20 they say like there's like this sort of list,
21 like five myths where they say things that
22 people -- or bad things people say about CAFA
23 but aren't true. One of them was, well, some
24 people say it's going to federalize all class
25 actions. Actually, we expect that more than

1 50 percent of class actions will remain in
2 state court after CAFA.

3 It was never intended to federalize
4 all class actions. Judge Easterbrook of the
5 Seventh Circuit in the First -- excuse me, the
6 -- the First Bank case, said, look, if Congress
7 had wanted to say we want to federalize all
8 large multi-state class actions, they could
9 have said that.

10 They could have written the equivalent
11 of a field preemption. But instead of treating
12 this as something where they were trying to
13 federalize all class actions, they didn't throw
14 a hand grenade. They were shooting rifle shots
15 at particular abuses that they saw.

16 And you can see it when you look at
17 how 1453 tracks 1446. There are certain things
18 that Congress was upset about and they were
19 trying to fix those things. They weren't
20 trying to -- they weren't trying to federalize
21 everything else.

22 There were a lot of reasons why you
23 don't want every single class action in federal
24 court. I mean, this case, for example, is a
25 case involving 286 people, 90 percent of whom

1 live in North Carolina, who have claims
2 entirely under North Carolina law against a
3 North Carolina defendant and Home Depot.

4 So, I mean, this is not the kind of
5 case -- this case, even if -- there's a way in
6 which this entire argument in some ways, Your
7 Honors, is a -- is -- is -- is a -- while
8 incredibly complicated for me at least, is a --
9 is an abstraction in the sense that this case
10 is going to end up in state court under the --
11 under the -- the home state removal -- the
12 local -- the local removal section anyhow of
13 CAFA. CAFA has an exception that we -- that we
14 put forward in our brief.

15 This is a local controversy if you
16 ever heard of one. But CAFA was not attempting
17 to -- to -- to nationalize everything. If they
18 had, they would have gone in a different way.

19 There are a lot of decisions Congress
20 has made here. When they've wanted to say
21 "claims," they have said, in the bankruptcy
22 code in 1441, claims. When they wanted to say
23 "civil action," they meant something else. If
24 they had wanted to federalize everything, they
25 would have federalized everything. They didn't

1 want to here.

2 If they had wanted to say third-party
3 counterclaimants, they would have done exactly
4 what they did in the American Invents Act
5 where, when they didn't like one of this
6 Court's decisions, that admittedly was under
7 the well-pleaded complaint rule, but in
8 Footnote 2 this Court cited the exact same
9 language that we were talking about under the
10 original jurisdiction statute.

11 And so it's clear that it's a removal
12 rule. It's not -- it's not -- it's not a
13 subject matter jurisdiction rule. It's a
14 removal rule. And the same -- the same rule
15 has been applied in a bunch of diversity cases.

16 Congress made that decision in that
17 statute and they didn't make that decision
18 here. This is an issue where, if Congress is
19 unhappy about this, they sure know how to fix
20 it. They've done -- they have done the exact
21 same thing in the American Invents Act. The
22 bankruptcy code is written differently. They
23 knew how to say party instead of defendant.
24 They know how to say claim instead of civil
25 action.

1 The -- the -- the -- the -- the -- the -- the
2 statutes here, you know, it may well be that if
3 Congress had thought about this in CAFA, they
4 just said, well, we don't really like that,
5 they would have done something differently.
6 But you can't rewrite the statute for them on
7 the grounds that they didn't --

8 JUSTICE ALITO: Well, they could have
9 been -- they surely -- they could have been
10 more specific in a way that favors Home Depot.
11 They also could have been more specific in a
12 way that favors you, right?

13 It's -- it's pretty hard to argue that
14 when they said any defendants, they said we're
15 going to say any defendants because we don't
16 want to include the kind of defendant that Home
17 Depot is.

18 MR. BLAND: Well, it's in a sentence
19 where, if you look at the sentence as a whole,
20 if you look at the sentence as a whole it says
21 "a class action may be removed in accordance
22 with Section 1446 without regard to whether any
23 defendant is a citizen of the state in which
24 the action was brought, except that such action
25 may be removed by any defendant without the

1 consent of all defendants."

2 When they used the word "any" there,
3 they mean each and every. What they are trying
4 to do is solve the problem I was just talking
5 about a second ago about where you have
6 unanimous -- where you -- the unanimous
7 requirement that everyone has to agree to
8 remove.

9 It's -- it's absolutely crystal clear
10 what they meant and they -- and they said in
11 the Senate report what they meant. And so to
12 take that word and say that now it's going to
13 change the nature of a defendant so that the
14 Section 1440(a) is now going to mean something
15 different for class actions than it means
16 everywhere else, that's really a problem.

17 CHIEF JUSTICE ROBERTS: Why is --
18 okay, each and every. Why doesn't it mean each
19 and every defendant in the civil action, in the
20 proceeding?

21 MR. BLAND: Because what -- what their
22 -- what the point of what they are saying is
23 they are saying each and every defendant has a
24 separate right to decide that they want to
25 remove the case to federal court, that you

1 don't have to have unanimity.

2 And the Congress said the point of
3 what we're aiming at here in the Senate report
4 was to avoid unanimity.

5 CHIEF JUSTICE ROBERTS: Well, it still
6 works with respect to Home Depot.

7 MR. BLAND: I -- I -- with respect,
8 Your Honor, it -- it's -- it is a -- a -- a --
9 a procedural change, it -- that -- that -- that
10 -- that tracks part of 1446 and says this
11 doesn't apply here. But it is not changing who
12 has the right, the power, to remove under
13 1440(a) where the word "defendant" has a
14 different meaning.

15 The word "defendant" there talks about
16 original jurisdiction. And Home Depot
17 certainly does not have original jurisdiction
18 here under this -- under the -- under the whole
19 line of cases both from this Court and then the
20 ton of district court cases that came
21 afterwards applying it to third-party
22 counterclaim defendants.

23 JUSTICE KAGAN: Is what you are
24 saying, Mr. Bland, that 1446 changes a number
25 of the procedures by which you can remove? It

1 does not, it never before --

2 MR. BLAND: 1453 is the CAFA one.

3 JUSTICE KAGAN: 1453.

4 MR. BLAND: 1453 changes 1446.

5 JUSTICE KAGAN: Right.

6 MR. BLAND: Sorry, but otherwise
7 you're --

8 JUSTICE KAGAN: Exactly right.

9 MR. BLAND: Sorry.

10 JUSTICE KAGAN: I'm confusing things
11 in an effort to make them more clear.

12 (Laughter.)

13 MR. BLAND: That's my life.

14 JUSTICE KAGAN: So 1453 changes a
15 number of the procedures in 1446, so that there
16 are different procedures in CAFA suits as to
17 removal.

18 1453 does not -- does not purport to
19 and simply does not affect the grant of removal
20 jurisdiction. The grant of removal
21 jurisdiction can only be found in one place,
22 and that's in 1441(a).

23 MR. BLAND: Yes, exactly, Your Honor.
24 And so if there are no further questions, that
25 is -- that's exactly right, and if Congress

1 wanted to change it, they could have.

2 Thank you so much, Your Honors.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Five minutes, Mr. Barnette.

6 REBUTTAL ARGUMENT OF

7 WILLIAM P. BARNETTE

8 ON BEHALF OF THE PETITIONER

9 MR. BARNETTE: Thank you, Mr. Chief
10 Justice.

11 A couple quick points, Your Honors.
12 The compromises that were done in CAFA were on
13 things like is the amount in controversy going
14 to be 1 million dollars or 10 million dollars
15 and they set it on 5 million dollars. There
16 are no compromises on these qualifying 5
17 million dollar plus minimal diversity class
18 actions. Those are all capable of being
19 removed under CAFA.

20 On Justice Kagan's original
21 jurisdiction question, just to be clear,
22 original jurisdiction does not mean the case as
23 originally filed. 1446(b) and 1332(d)(7) in
24 CAFA both recognize a case can start out not
25 within the original jurisdiction, not

1 removable, can become removable subsequently
2 and within the original jurisdiction, and
3 that's exactly what happened here. We had a
4 qualifying class action filed under CAFA that
5 allows for removal.

6 On Justice Kavanaugh's question, of
7 course we're a defendant. I mean, they want 5
8 million dollar plus -- 5 million dollars plus
9 from us. I -- I don't know what else you would
10 call us. We're a defendant.

11 In conclusion, Your Honors, Home Depot
12 is simply and solely a defendant. Shamrock
13 Oil's holdings should not be extended to
14 parties like Home Depot that are solely
15 defendants.

16 Home Depot is within the plain
17 language of 1441(a), is entitled to remove this
18 case under CAFA. The Fourth Circuit's judgment
19 should be reversed. Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel. The case is submitted.

22 (Whereupon, at 11:10 a.m., the case
23 was submitted.)

24

25

Official - Subject to Final Review

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