SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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ROYAL CANIN U.S.A., INC., ET AL.,   )

        Petitioners,   )

          v.   ) No. 23-677

ANASTASIA WULLSCHLEGER, ET AL.,   )

        Respondents.   )

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Pages: 1 through 73

Place: Washington, D.C.

Date: October 7, 2024

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 6     ANASTASIA WULLSCHLEGER, ET AL.,     )
 7                 Respondents.            )
 8     - - - - - - - - - - - - - - - - - - -
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10                  Washington, D.C.
11               Monday, October 7, 2024
12
13          The above-entitled matter came on for
14     oral argument before the Supreme Court of the
15     United States at 11:23 a.m.
16
17     APPEARANCES:
18     KATHERINE B. WELLINGTON, ESQUIRE, Boston,
19          Massachusetts; on behalf of the Petitioners.
20     ASHLEY C. KELLER, ESQUIRE, Chicago, Illinois; on
21          behalf of the Respondents.
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1   C O N T E N T S

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

2   (11:23 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear

4   argument next in Case 23-677, Royal Canin versus

5   Wullschleger.

6   Ms. Wellington.

7   ORAL ARGUMENT OF KATHERINE B. WELLINGTON

8   ON BEHALF OF THE PETITIONERS

9   MS. WELLINGTON: Mr. Chief Justice,

10   and may it please the Court:

11   The Eighth Circuit's decision below is

12   an extreme outlier. It conflicts with the text

13   and structure of Section 1367 and with more than

14   a century of precedent. Chief Justice Marshall

15   held in Mollan against Torrance in 1824 that in

16   a diversity case, a federal court's jurisdiction

17   once vested cannot be divested by subsequent

18   events.

19   The Court extended that reasoning to

20   removal actions in Kirby against American Soda

21   in 1904. And in 1938, this Court held in St.

22   Paul Mercury that if the plaintiff after removal

23   amends his pleadings, this does not deprive the

24   district court of jurisdiction because the

25   defendant's statutory right to removal should

1   not be subject to the plaintiff's caprice. The

2   second Justice Marshall confirmed that

3   conclusion in Carnegie-Mellon against Cohill in

4   1988, and Justice Scalia concurred in Rockwell

5   in 2007.

6   Respondents ask this Court to upset

7   that settled interpretation, claiming that it

8   conflicts with the text of Section 1367. But

9   Congress codified this Court's longstanding

10   precedent in the text of Section 1367 itself,

11   making clear that if the federal court has

12   original jurisdiction, it shall continue to have

13   supplemental jurisdiction unless Congress

14   expressly provided otherwise.

15   Respondents cannot cite a single

16   decision of this Court, a single decision of a

17   court of appeals outside of the Eighth Circuit,

18   or a single treatise that supports their

19   position. Respondents realize how weak their

20   case is and instead ask the Court to decide

21   something else, whether Grable should be

22   overruled and, if not, whether Grable's

23   requirements were met.

24   This Court did not grant certiorari on

25   either question. Grable is settled law, and the

1   Eighth Circuit correctly applied it here. The

2   Court should affirm its longstanding precedent

3   and reverse the decision below.

4   I welcome the Court's questions.

5   JUSTICE THOMAS: You mentioned Section

6   1367. Could you spend a few minutes on your

7   argument as to how it disposes of -- supports

8   your argument?

9   MS. WELLINGTON: Certainly, Your

10   Honor. So the text of Section 1367 states that

11   there is supplemental jurisdiction unless

12   Congress has expressly provided otherwise. And

13   the text of Section 1367 does not say that when

14   a plaintiff amends the complaint to delete the

15   federal question, there is no longer

16   supplemental jurisdiction.

17   And that's exactly the interpretive

18   approach that this Court adopted in Exxon Mobil

19   against Allapattah, where the Court was trying

20   to figure out what does Section 1367 say about

21   Rule 23 and plaintiffs in class actions. And

22   the Court looked at Section 1367, said it

23   doesn't say anything about Rule 23, and that

24   means that there is supplemental jurisdiction.

25   There are also some important

1   structural inferences here. So -- so Section

2   1367(c)(3) makes clear that where the district

3   court has dismissed all claims over which it has

4   original jurisdiction, it can continue to

5   exercise supplemental jurisdictional. And that

6   really disposes of the argument that there has

7   to be an ongoing federal question in the case in

8   order for supplemental jurisdictional to be

9   warranted. Congress didn't intend that here.

10   JUSTICE KAGAN: So do you think,

11   Ms. Wellington, that -- let's say this wasn't a

12   removal case. Let's say this was an original

13   case and it was brought in federal court, and

14   then the plaintiff took out the federal claim,

15   leaving only state claims. Is there

16   supplemental jurisdiction there?

17   MS. WELLINGTON: So this Court has

18   treated these two situations differently, and

19   Justice Scalia explained why in Rockwell. So

20   there was a concern in Rockwell that when a

21   plaintiff goes into federal court, pleads a

22   federal question, and then immediately or

23   subsequently drops it, that they're trying to

24   plead their way into federal court.

25   JUSTICE KAGAN: So forgetting what the

1   reason for that is, you do agree with that rule

2   that once I file a suit in federal court as an

3   original matter, then take out the federal

4   claims, leaving only state law claims, there's

5   nothing at that point for the federal court to

6   do? It's not a doctrine of discretion anymore.

7   The federal court has to dismiss. Is that

8   correct?

9   MS. WELLINGTON: That is how we have

10   asked this Court to read Rockwell. The U.S.

11   Chamber of Commerce brief, you know --

12   JUSTICE KAGAN: I just --

13   MS. WELLINGTON: Yes.

14   JUSTICE KAGAN: -- want to make sure.

15   MS. WELLINGTON: That is our view.

16   JUSTICE KAGAN: So, if that's the

17   case, I don't think that your arguments from

18   1367 can be right because your arguments from

19   1367 would suggest the opposite result in the

20   case that I gave. In other words, it's very

21   hard to read 1367 as imposing some kind of

22   distinction between original cases and removed

23   cases.

24   MS. WELLINGTON: So I agree, Your

25   Honor, that there is no distinction in the text

1   of 1367 itself. This Court could revisit its

2   decision in Rockwell or limit it to the FCA

3   context. We haven't asked the Court to do that

4   because we think that we win on the text here.

5   We think, if you just --

6   JUSTICE KAGAN: I guess what it

7   suggests to me, though, is, if you were willing

8   to say, look, the Rockwell understanding of

9   original cases is settled, we're not contesting

10   that, then I think your arguments from 1367 go

11   away because 1367 just doesn't create the kind

12   of distinction that you're asking us to create.

13   So either you lose as to removed cases

14   too, or these arguments from the text are just

15   not going to get us to your result.

16   MS. WELLINGTON: So we disagree, Your

17   Honor, with your interpretation of the text of

18   Section 1367. We think Congress has made clear

19   that there is supplemental jurisdiction unless

20   Congress has expressly provided otherwise.

21   It hasn't done that. And I think it's

22   very important to consider how Congress came to

23   write Section 1367. It was in response to

24   Finley, where this Court took an extremely

25   narrow view of pendent-claim and pendent-party

1   jurisdiction and pendent-party jurisdiction in

2   particular, and Congress said no, that's not

3   what we want. We want a broader view of

4   pendent-claim and pendent-party jurisdiction.

5   And that's why they wrote this very

6   broad statute here. And it would be very

7   strange to conclude that Congress intended to

8   abrogate Cohill. It was decided just two years

9   before it enacted --

10   JUSTICE SOTOMAYOR: That's the point

11   --

12   JUSTICE BARRETT: But Cohill --

13   JUSTICE SOTOMAYOR: -- isn't it?

14   JUSTICE BARRETT: Sorry. Go ahead.

15   JUSTICE SOTOMAYOR: That's the point,

16   isn't it? I -- I can't get over the fact that

17   what Congress did in 1367 was address the

18   questions that had been in the Court. The first

19   one was the diversity issue under St. Paul, and

20   it agreed with the Court.

21   It disagreed with the Court on pendent

22   and supplemental jurisdiction, and it wrote a

23   statute to address that. And yet it knew from

24   Cahill that we had said that if a plaintiff

25   dismisses an action, that potentially we go back

1   to the original amendment, and it didn't do what

2   it did for diversity. It wrote it to say only

3   when the district court dismisses the federal

4   claims do you retain supplemental jurisdiction.

5   That, to me, is the statute. They had

6   all our case law. They addressed one -- one

7   thing they agreed with. They disagreed with

8   another, and they disagreed with the third by

9   not adopting what it did with diversity.

10   MS. WELLINGTON: So two responses,

11   Your Honor. First, Section (3) -- (c)(2) does

12   express -- expressly address this Cohill

13   situation. It says the district courts may

14   decline to exercise supplemental jurisdiction

15   when the state law claim substantially

16   predominates.

17   JUSTICE SOTOMAYOR: No, when the

18   district court has dismissed all claims. It

19   doesn't say when the plaintiff has dismissed all

20   claims.

21   MS. WELLINGTON: So I agree, that's

22   (c)(3).

23   JUSTICE SOTOMAYOR: And when the

24   district court dismisses all federal claims, the

25   party still has a right to appeal, correct?

1   MS. WELLINGTON: That's correct.

2   JUSTICE SOTOMAYOR: When the district

3   court doesn't do that in a diverse action, then

4   that -- because the claim has disappeared,

5   there's no appeal for the defendant -- for the

6   -- for -- for anybody, correct?

7   MS. WELLINGTON: I -- I sort of -- I

8   think, Your Honor, it depends on the case. I

9   think there could still be an appeal in a

10   diversity case where the district court

11   dismisses a claim and the plaintiff says you

12   shouldn't have dismissed that claim.

13   JUSTICE SOTOMAYOR: No, but that's

14   because they're there because of the -- the

15   diversity provision of the statute.

16   JUSTICE JACKSON: Can I just

17   understand your argument about whether or not an

18   amendment can affect federal question

19   jurisdiction? So setting aside diversity for a

20   second, we're in federal question land. The

21   case is filed in federal court. And the

22   plaintiff goes through the first couple weeks

23   and then says: You know what? I'm dropping my

24   federal claims because it originally brought a

25   complaint that had federal and state claims.

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 1                  Does that affect jurisdiction in your
 2      view or not?
 3                  MS. WELLINGTON:  And this is a case
 4      originally brought --
 5                  JUSTICE JACKSON:  Originally brought
 6      --
 7                  MS. WELLINGTON:  -- in federal court?
 8                  JUSTICE JACKSON:  -- originally
 9      brought in federal court.  And the plaintiff
10      amends and takes out the federal claims.
11                  Can the court proceed, can it decide
12      through supplemental jurisdiction or whatnot to
13      continue on with the case?
14                  MS. WELLINGTON:  So this Court
15      suggested in Rockwell that the answer to that
16      would be no, you would not continue in that
17      case.  And just --
18                  JUSTICE JACKSON:  Okay.  So next
19      question.  You -- the case is brought in state
20      court and it has federal and state claims, and
21      before the defendant has the ability to remove,
22      the plaintiff says:  Oops, I didn't mean to
23      bring the federal claims, I'm dropping them.  So
24      no removal action yet or motion yet.
25                  Can it be still removed?  Is there any
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1   basis for federal jurisdiction in that

2   situation?

3   MS. WELLINGTON: No, Your Honor.

4   JUSTICE JACKSON: All right. So it

5   seems to me then your argument comes down to the

6   impact of removal because somehow, even though

7   in a situation in which the plaintiff amends, if

8   it was brought originally in federal court or

9   amends if it's brought originally in state

10   court, those have an impact, you say, on federal

11   question jurisdiction.

12   Somehow, if the defendant removes

13   before the plaintiff can drop the federal

14   claims, you say no impact on federal question

15   jurisdiction. Is that right?

16   MS. WELLINGTON: That's correct.

17   JUSTICE JACKSON: Why?

18   MS. WELLINGTON: So this Court

19   explained in St. Paul Mercury that once you've

20   removed to federal court, there is a removal

21   statute and the defendants have a right to

22   remove.

23   JUSTICE JACKSON: But the removal

24   statute doesn't say, as I think Justice

25   Sotomayor was trying to get at, anything about

1   what happens to jurisdiction. I thought the

2   removal statute was really just giving the

3   defendant the ability to bring this action into

4   federal court.

5   It doesn't say anything about whether

6   or not the federal court can be divested of

7   jurisdiction once it's there. And I don't

8   understand why the federal court can be divested

9   of jurisdiction if it starts in federal court

10   because the plaintiff brought it -- brought it

11   there but can't be divested of jurisdiction if

12   it comes to federal court because the defendant

13   brought it there.

14   MS. WELLINGTON: And -- and just to be

15   clear, the rule that we're asking for and the

16   rule that this Court has applied for a hundred

17   years is that it's a matter of discretion once

18   you get to federal court on removal. It's up to

19   the district court judge.

20   JUSTICE JACKSON: On removal. But I

21   guess why -- why does it make a difference as to

22   how this case landed in federal court as to

23   whether or not the federal judge can be divested

24   of his jurisdiction? That's what your argument

25   seems to turn on, and I don't know why that's

1   the case.

2   MS. WELLINGTON: And this Court

3   addressed that in St. Paul Mercury and said that

4   the defendant's right to remove should not be

5   subject to the plaintiff's caprice. Congress

6   gave defendants rights in the situation when the

7   case gets to federal court on removal. That's

8   different than when a case is originally --

9   JUSTICE JACKSON: It changes the scope

10   of jurisdiction. The -- the removal right

11   carries with it the ability to affect the

12   jurisdiction of the Court, is what you're

13   saying?

14   MS. WELLINGTON: That's what this

15   Court has long held in cases like St. Paul

16   Mercury. In Cohill, the Court recognized that,

17   in Rockwell. It also recognized it in cases

18   like Carlsbad, where this Court was talking

19   about Cohill remands and determined that they

20   were not mandatory, that they were a matter of

21   discretion for the district court.

22   And I agree, Your Honor, that in most

23   cases, the outcome's going to be the same. When

24   you get to federal court on a removal, in a

25   removal case, you drop your federal claim.

1   Immediately, most of the time you're going to go

2   right back to state court. It's going to be the

3   same outcome.

4   Where it matters are cases like this

5   one, where the case has been going on for almost

6   two years when they amend their claims. We've

7   cited other cases where it's been pending in

8   federal court for a long time and right before

9   an adverse decision, so that's on page 16 of our

10   yellow brief, right before an adverse decision,

11   the plaintiff amends their complaint to try to

12   get back to state court.

13   And in that situation, district courts

14   have said: Well, I'm going to balance this

15   attempt at gamesmanship with other

16   considerations like --

17   JUSTICE BARRETT: Counsel, can I

18   interrupt you there? I mean, St. Paul Mercury

19   is a little bit different because it's

20   diversity. And there has always been a problem,

21   you know, when I used to teach diversity

22   jurisdiction, in the amount in controversy and

23   figuring out how to value it. And you're not

24   capped to the damages that you claim. And so

25   there wasn't a real change there.

1   And, you know, Cohill, okay, it's --

2   it's helpful, but it's really about a different

3   point. It's about dismissal versus remand. I

4   think the best thing for you are all these court

5   of appeals cases.

6   I mean, I -- I have a lot of trouble

7   with the textual argument for the reasons

8   Justice Kagan is saying, but, I mean, it does

9   give me some pause to say, well, all these

10   courts of appeals have thought this was okay and

11   there is that footnote in Rockwell, but it's not

12   quite the old soil principle because the old

13   soil principle requires you to be able to hang

14   your hat on something in the statute and say

15   this is what brought along the old soil with it.

16   So you cite Taggart and the old soil

17   principle, but what are you attaching it to as

18   to opposed to just some sort of, like,

19   free-floating, everyone thought we could do

20   this?

21   MS. WELLINGTON: So we totally agree,

22   Your Honor, it has to be important that for

23   decades and decades and decades every court of

24   appeals has gone the same way. We disagree,

25   Your Honor, that Cohill didn't address this

1   question. It does say that when a federal law

2   claim is eliminated at an early stage of the

3   litigation, the district court has a powerful

4   reason to choose.

5   JUSTICE BARRETT: To choose its dicta,

6   its dicta. Just go with my old soil question.

7   MS. WELLINGTON: So -- so I think it

8   is important here that Congress whole swath took

9   parts of Gibbs and Cohill and the lower court

10   cases prior to the enactment of the statute. So

11   Section (a) as well as Sections (c)(2) and (3)

12   are word for word from Gibbs.

13   The top part of Section (c), the

14   district court may decline to exercise

15   supplemental jurisdiction, that's drawn directly

16   from Cohill. And (c)(1), where it talks about

17   the claim raises a novel or complex issue of

18   state law, that comes from 1980s court of

19   appeals decisions that took that into account

20   when determining whether to exercise

21   supplemental jurisdiction. So this --

22   CHIEF JUSTICE ROBERTS: Your -- your

23   briefing, obviously, suggests at least at the

24   outset you don't think Grable has much to do

25   with this case. And your friend on the other

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 1    side obviously disagrees.
 2          But I wonder why it -- it doesn't.  I
 3    mean, your reading, I think, assumes the
 4    correctness of your position under 1367 that
 5    this complaint is one over which the district
 6    court would have original jurisdiction.
 7          And your friend, I think, has
 8    concluded that depends upon whether Grable is
 9    correct.  And so why -- why isn't it -- why
10    doesn't it depend upon Grable?
11          MS. WELLINGTON:  So this Court can
12    decide jurisdictional issues in any order.
13    That's what it held in Sinochem.  We agree that
14    there has to be an adjudication of the Grable
15    question in order to get to the ultimate, you
16    know, remedy in this case.  But that's not what
17    we're asking this Court to decide.
18          So we don't think the Court has to
19    decide the issue.  If the Court wants to decide
20    the issue, we think there plainly was
21    jurisdiction based on the original complaint.
22    The original complaint repeatedly claims that
23    there are violations of the Food, Drug and
24    Cosmetic Act and then in paragraphs 136 and 137
25    of the complaint asks for an injunction
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1   requiring ongoing compliance with federal law.

2   CHIEF JUSTICE ROBERTS: Well, the

3   original complaint but not the removed

4   complaint. In other words, not the complaint

5   with all the federal things stripped out of it.

6   In that situation, if that's the one

7   you look at, then Grable is critical to your

8   success, I think.

9   MS. WELLINGTON: Just to be clear, so

10   the -- the complaint at the time of removal had

11   a federal claim, you know, that's our position.

12   I think Your Honor is talking about supplemental

13   jurisdiction.

14   CHIEF JUSTICE ROBERTS: I'm sorry,

15   yes, of course.

16   MS. WELLINGTON: And -- and this Court

17   has long held that you don't have to have a

18   federal question at all stages of the case in

19   order to exercise supplemental jurisdiction.

20   That's exactly what the Court held in Rosado,

21   where the original federal claim became moot,

22   and this Court said that the three judge

23   district court could continue to go on and

24   decide the ancillary claims even though it

25   didn't have original jurisdiction because you

 1   don't have to have jurisdiction over the

 2   original federal claim through all proceedings.

 3   JUSTICE KAVANAUGH: In -- in 2007, in

 4   Rockwell, in Footnote 6, the statement there

 5   resolves this case in your favor, Footnote 6.

 6   Now the other side's going to say a

 7   lot of things about Footnote 6, I think, that

 8   it's dicta, that it's mistaken, that it's wrong,

 9   that it should be ditched.

10   You want to just take on Footnote 6?

11   Because you win with Footnote 6, but --

12   MS. WELLINGTON: So we --

13   JUSTICE KAVANAUGH: -- you know, do we

14   stick with that?

15   MS. WELLINGTON: We think Footnote 6

16   is not dicta. We think it's actually quite

17   essential to answering the question that Justice

18   Jackson was asking: Why do we treat these two

19   circumstances differently?

20   And you have to remember, prior to

21   Rockwell, this Court had not addressed cases

22   that were originally filed in federal court. So

23   this Court was trying to explain we have a

24   hundred years where we do something different in

25   the removal context. Why are we going to do

     1   something different here? And Justice Scalia

     2   was explaining the different policy concerns.

     3   So we don't think that's dicta. We

     4   actually think it is essential to the reasoning

     5   in that case. And even if you think it isn't a

     6   holding, it certainly is recognizing that this

     7   Court has resolved the question in the removal

     8   context going all the way back to --

     9   JUSTICE ALITO: Ms. Wellington --

    10   JUSTICE KAVANAUGH: And why is it

    11   correct --

    12   JUSTICE ALITO: Go ahead.

    13   JUSTICE KAVANAUGH: And why is it

    14   correct -- why -- okay, assuming -- why is it

    15   correct? In other words, it does seem, as

    16   Justice Kagan's questions indicate, that the

    17   Rockwell above the line and the Rockwell

    18   footnote, you would think, would come out the

    19   same way under the text of the statute.

    20   So I guess, assuming the

    21   above-the-line part is correct, why does the

    22   text of the statute support footnote 6?

    23   MS. WELLINGTON: So I think the text

    24   of the statute supports the removal jurisdiction

    25   in this case, not what happened in Rockwell. So

1   I -- I actually --

2   JUSTICE KAVANAUGH: All right. So the

3   -- I think your answer is the part of Rockwell

4   that's not in the footnote is -- it's shaky.

5   MS. WELLINGTON: That's correct. And

6   that's what the Chamber of Commerce --

7   JUSTICE KAVANAUGH: The part in the

8   footnote, you think that's solid.

9   MS. WELLINGTON: I think that's solid

10   because the text of Section 1367 says there is

11   supplemental jurisdiction unless Congress has

12   expressly provided otherwise. Section (c)(3)

13   makes clear that you don't have to have a

14   federal question throughout the proceedings in

15   order for there to continue to be supplemental

16   jurisdiction; (c)(2) expressly addresses

17   situations like this one, where the federal law

18   claims have fallen out. In that situation, the

19   state-law claims would substantially

20   predominate.

21   JUSTICE KAVANAUGH: I think they're

22   going to probably say something also like it was

23   stray comments that weren't carefully

24   considered. And I -- do you want to respond to

25   the -- I'm just previewing what they're likely

1   to say.

2   MS. WELLINGTON: One thing I would --

3   I do want to emphasize here is this Court was

4   thinking about this question in Cohill. If you

5   go to the oral argument in Cohill -- right

6   around minute 5, Justice Scalia is asking the

7   same questions that we're talking about today.

8   So the Court wasn't somehow unaware of this

9   question.

10   JUSTICE KAVANAUGH: Right. He seemed

11   to be articulating the position in the oral

12   argument, as I read it, that Judge Stras

13   ultimately came to in the Eighth Circuit, but

14   obviously by the time of Rockwell, Justice

15   Scalia had not stuck with that.

16   MS. WELLINGTON: I -- I think that's

17   right, and I think it is important that this

18   Court was aware of the question, continued to

19   apply its precedents, long-standing precedent in

20   Cohill. And I don't think you can write Cohill,

21   which is all about this is a doctrine of

22   discretion. I don't think you can write Cohill

23   if you think that the court didn't have

24   jurisdiction.

25   JUSTICE SOTOMAYOR: So can we go back

1   to --

2   JUSTICE ALITO: Suppose a --

3   JUSTICE SOTOMAYOR: Go ahead.

4   JUSTICE ALITO: Suppose a diversity

5   case -- I have a diversity case, I file it in

6   state court, it's removed to federal court, and

7   once I'm in federal court, I join a non-diverse

8   party. Can the federal -- can the federal court

9   hold on to that case?

10   MS. WELLINGTON: So, no, Your Honor,

11   and that is addressed specifically in 1367(b).

12   So there are circumstances, you know, for

13   example, where there's a third-party defendant

14   or a dispensable plaintiff under Rule 20 that,

15   you know, the court may be able to because it's

16   not addressed in Section --

17   JUSTICE ALITO: Yeah, well, why should

18   there be a different rule regarding parties and

19   claims?

20   MS. WELLINGTON: So Congress thought

21   very hard about this. This Court has long held

22   -- had two different lines of precedent, one for

23   pendent-claim jurisdiction and one for

24   pendent-party jurisdiction. It has taken a very

25   broad view to pendent-claim jurisdiction and

1   very narrow view to pendent-party jurisdiction.

2   And Congress said that's not what we

3   want. We don't want Finley. We do want some

4   limits. I think (b) tells you that (a) is so

5   broadly written that if you don't have (b), that

6   there would be concerns about diversity

7   jurisdiction questions, Your Honor. But

8   Congress thought very carefully about this. And

9   it -- it made clear that there would continue to

10   be supplemental jurisdiction, even when the

11   federal claims dropped out of the case.

12   JUSTICE ALITO: If we thought that the

13   Eighth Circuit's decision is right as a matter

14   of first principle, what relevance, if any,

15   would this line of court of appeals decisions

16   have in our decision-making?

17   MS. WELLINGTON: I think it's very

18   important here because Congress is codifying

19   precedent. It's codifying these court of

20   appeals decisions in particular in (c)(1). It's

21   very much aware of them. And the court of

22   appeals decisions are reflecting this Court's

23   decision in St. Paul Mercury and Cohill and --

24   and now Rockwell. This is incredibly well

25   established.

1   So I don't think the Court should

2   ignore that that's what the court of appeals

3   have been doing and that they're doing it for a

4   reason, because this is a doctrine of

5   discretion. It's a matter for the district

6   court to say what are the fairness concerns?

7   What are the comity concerns? What are the

8   judicial efficiency concerns?

9   Maybe the district court can dispose

10   of the state law questions really easily and the

11   case has been going on for two years in the

12   district court. Doesn't make sense to send that

13   case back to state court.

14   JUSTICE ALITO: Well, this goes back

15   to a question that Justice Barrett asked.

16   Usually when we apply this old soil rule, we're

17   talking about a term of art in the statute about

18   which there was a body of preexisting precedent.

19   What term of art can you point to here

20   that supports your argument?

21   MS. WELLINGTON: Sure. So if you look

22   at (c), the district courts may decline to

23   exercise supplemental jurisdiction, that

24   language comes directly from Cohill. It's not

25   in Gibbs. That's the language the Court uses

     1   twice. And so when you're thinking about what

     2   did Congress intend to codify when it comes to

     3   whether the district court can exercise

     4   discretion, I think you have to take into

     5   account what this Court held in Cohill.

     6   I also think, Your Honor, if you think

     7   that the text doesn't say anything, this Court

     8   has held that statutory silence implies

     9   ratification by Congress. I think you can apply

    10   that doctrine as well to reach the answer here.

    11   JUSTICE KAGAN: I think if you think

    12   that the text doesn't say anything, you're left

    13   with trying to figure out what rule to use in

    14   this instance that best coheres with the whole

    15   panoply of rules that we use in other contexts.

    16   And I think that on that account, you

    17   have a tough road to hoe. You have -- you have

    18   St. Paul, and that's the amount in controversy.

    19   But for the reasons that Justice Barrett said,

    20   the amount in controversy requirement has

    21   generally been thought of as sui generis because

    22   of the difficulty of figuring out when, how

    23   you're supposed to measure that.

    24   But, otherwise, you know, I think that

    25   the rule basically is we look to the operative

1   complaint. We look to the original complaint

2   when the original complaint is operative, but

3   once the complaint has been amended, we look to

4   the amended complaint because that's the

5   operative complaint. And that's why you can

6   create diversity jurisdiction or destroy

7   diversity jurisdiction by adding and removing

8   parties.

9   And it's also why you can, you know,

10   add -- it is also what -- what explains

11   Rockwell. And it also explains how you can add

12   and remove federal claims to create or -- or get

13   rid of federal question jurisdiction.

14   So you're asking for a very kind of

15   unique rule, where it's like, no, we don't look

16   to the operative complaint; we look to this old

17   complaint that has nothing to do with the case

18   anymore.

19   MS. WELLINGTON: May I respond, Your

20   Honor?

21   CHIEF JUSTICE ROBERTS: Certainly.

22   MS. WELLINGTON: So I think it's very

23   important here that this is a long-standing rule

24   that really reflects the idea that Congress

25   wanted district courts to make the decision.

1　They wanted district courts to decide is there

2　gamesmanship going on here? Is there judicial

3　efficiency concerns? Are there comity concerns?

4　　　　　　And this rule that this Court is

5　talking about would need to apply to all sorts

6　of different circumstances, such as when the

7　claims become moot, when the parties settle the

8　claim, when the plaintiff amends the complaint.

9　And when Congress drafted Section 1367(c), what

10　it wanted was to give district courts

11　discretion, and that's a reflection of decades

12　and decades of precedent, Your Honor.

13　　　　　　CHIEF JUSTICE ROBERTS: Thank you.

14　Thank you, counsel.

15　　　　　　Just a brief question. You complain

16　about the forum manipulation problems this would

17　create. I don't see how that's a problem here.

18　They wanted -- they start in state court; they

19　want to go back to state court. They're not

20　trying to manipulate anything.

21　　　　　　MS. WELLINGTON: So we think that it

22　is forum manipulation, particularly in this

23　case, where they waited almost two years to

24　amend the complaint after they lose in the

25　Eighth Circuit. We think that's a form of forum

 1   manipulation.

 2   We think there are much more extreme

 3   forms of forum manipulation, for example, where

 4   a plaintiff -- you know, the district court

 5   says: I'm about to rule against you. That's

 6   what happened in three cases on page 16 of the

 7   yellow brief. And the plaintiff says: Great,

 8   send me back to state court. And that's a very

 9   serious form of forum manipulation.

10   But we agree, Your Honor, in many

11   cases, the mine-run of cases, you get to federal

12   court, you immediately amend the complaint, the

13   federal judge is going to send that back to

14   state court. We're really talking about the

15   more unique circumstances like this one where

16   it's been going on for a long time and Congress

17   wanted district courts to consider different

18   considerations.

19   CHIEF JUSTICE ROBERTS: Thank you.

20   Justice Thomas?

21   JUSTICE THOMAS: Justice Sotomayor

22   asked you about what happens when the -- a judge

23   dismisses some of the -- the federal claims.

24   And you responded to that. And she was

25   referring to (c)(3), which only refers to the

1   district court dismissing those claims. It says

2   -- but (c)(3) says nothing about the instance in

3   which the party amends the complaint and

4   eliminates the federal claims.

5   Would you address that?

6   MS. WELLINGTON: Certainly. That's a

7   really important point. So that is addressed in

8   (c)(2). So in (c)(2), where there is no longer

9   a federal claim, the state claim will

10   substantially predominate. It could also fall

11   under (c)(4) in exceptional circumstance.

12   I would point out, Your Honor, that

13   (c) is simply listing when district courts may

14   decline to exercise supplemental jurisdiction.

15   This Court in Exxon Mobil against Allapattah

16   said really the key question is it in the

17   statute? And -- and, certainly, amendments to

18   the complaint is not in the statute. We think

19   that's sufficient.

20   But if you want to look at the text of

21   (c)(2), I think that also answers the question.

22   JUSTICE THOMAS: But -- but do you

23   agree that when the district court dismisses the

24   claim it remains in the case?

25   MS. WELLINGTON: I agree, Your Honor.

1   But that is also true of an amended complaint.

2   You can appeal whether a complaint was properly

3   amended. We cited the Lucente case in the

4   Second Circuit that reinstates the original

5   complaint on appeal. So, if that's the test, we

6   think that's met.

7   JUSTICE THOMAS: Do we normally think

8   of a complaint that's amended by the party to

9   eliminate a federal claim as still having that

10   claim?

11   MS. WELLINGTON: I -- I think that's

12   true of all these circumstances. Where the

13   claim becomes moot, where the parties settle,

14   where the plaintiff voluntarily amends, where

15   the district court dismisses, those claims, for

16   the purposes of the party, aren't going to

17   continue to be litigated.

18   We think the important question here

19   is: When do you evaluate whether there is an

20   original federal question in the case? Under

21   this Court's longstanding precedent going all

22   the way back to St. Paul Mercury, you look at

23   the time of removal, Your Honor.

24   JUSTICE THOMAS: So when does an

25   amended complaint supersede the earlier

1   complaint?

2   MS. WELLINGTON: Your Honor, we don't

3   think that's the right question. The question

4   isn't whether it supersedes the original

5   complaint. The question is: At the time of

6   removal, is there an original federal question

7   in the case? We think that's what the phrase

8   "in the action" is doing.

9   If you look directly at Gibbs, which

10   is where that language came from, Gibbs is

11   saying what you need is the original claim and

12   the supplemental claim to be in the same case.

13   That's true regardless of whether the complaint

14   is amended. That claim was filed in the same

15   case.

16   CHIEF JUSTICE ROBERTS: Justice Alito?

17   JUSTICE ALITO: When many courts of

18   appeals have considered a question and they've

19   all decided it the same way, that certainly

20   requires very respectful consideration. They

21   are very likely correct.

22   But would you also recognize that

23   there can be circumstances in which there can be

24   sort of a snowball effect in busy courts of

25   appeals, particularly on certain -- a certain

1   category of issues so that if a court of appeals

2   decides a question one way, then the next one

3   just latches onto that, and pretty soon, courts

4   of appeals confronting an issue are very likely

5   to say: Wow, if all these other circuits have

6   gone this way, I'm not going to create a

7   conflict in the circuits on this. I'm just

8   going to go along with it.

9   Do you think that's a -- a dynamic

10   that can occur in courts of appeals? And, if

11   so, should we take it into account?

12   MS. WELLINGTON: I think that's

13   possible, Your Honor, but I think this is a

14   pretty unique case.

15   We searched high and low, and the only

16   two cases we found that went the other way was

17   one district court case from 1915 and one

18   district court case from 1940. That is

19   overwhelming precedent in the courts of appeals.

20   And if you look at cases like Boelens,

21   which is a case that Justice Scalia cited in

22   Rockwell from the Fifth Circuit, it very

23   carefully explains the reasoning of why we treat

24   these two circumstances differently.

25   I think you also have to look at this

1   Court's precedents, cases like International

2   College of Surgeons, Rosado, Carlsbad, Osborn

3   against Haley. All of those cases are

4   suggesting that this is a doctrine of

5   discretion. So this Court has been giving the

6   lower federal courts the same signal for many,

7   many decades of this is how we're going to treat

8   this situation, and we think that's what

9   Congress codified in the text of Section 1367

10   itself.

11   JUSTICE ALITO: Well, do you think

12   that -- that courts of appeals read our

13   decisions differently than we may?

14   I mean, you know, I'm -- I was on a

15   court of appeals for 15 years. If I saw a

16   strong dictum in a Supreme Court decision, I

17   would very likely just salute and move on. But,

18   here --

19   (Laughter.)

20   JUSTICE ALITO: -- we have --

21   JUSTICE SOTOMAYOR: Not now.

22   (Laughter.)

23   JUSTICE ALITO: -- more of an

24   obligation -- it depends, Justice Sotomayor --

25   (Laughter.)

1   JUSTICE ALITO: -- both when we're

2   considering -- you know, when we're considering

3   what we've written, we know how these things are

4   written. You know, we know how these footnotes

5   are written.

6   Can -- do we have liberty to read them

7   a little bit differently?

8   MS. WELLINGTON: Of course, the Court

9   has the liberty to read its footnotes how it

10   would like. But I -- but I do think it is

11   important to keep in mind here that the question

12   is what did Congress intend.

13   Congress enacted this statute in

14   reaction to the Court's very narrow view of

15   supplemental jurisdiction. In Finley, it

16   adopted very broad language. And I think it

17   would be very weird to think that Congress

18   intended to abrogate Cohill silently without

19   saying anything about it.

20   And I think it would also be strange

21   to treat the situation where the plaintiff

22   amends the complaint differently than a

23   situation where it becomes moot, where it drops

24   out of the case for some other reason, such as

25   settlement.

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 1              I think then you'd have to get into
 2    the Eighth Circuit's decision between
 3    involuntary and voluntary amendments.
 4              JUSTICE ALITO:  Thank you.  Thank you.
 5              CHIEF JUSTICE ROBERTS:  Justice
 6    Sotomayor?
 7              JUSTICE SOTOMAYOR:  I go back to
 8    Congress knew when to adopt or not adopt a
 9    particular circuit court reading, and it didn't
10    do anything with 1367, but it did do with
11    diversity to codify that.  So I don't know how
12    much the old soil counts.
13              But let's go back to first principles.
14    What's the justification for this?  Plaintiff
15    manipulation, correct?
16              MS. WELLINGTON:  It's much broader
17    than that, Your Honor.
18              So judicial efficiency is a very
19    important reason why Congress enacted the Gibbs
20    principles into Section 1367.
21              So a case may be pending for two or
22    three years.  The district court might be really
23    familiar with it.  It might be a really
24    straightforward question of state law.  In that
25    situation --
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1   JUSTICE SOTOMAYOR: So how doesn't

2   Rule 15 take care of that? It gives plaintiffs

3   a narrow window to amend and, otherwise, it

4   needs to seek permission.

5   So why didn't the district court

6   simply deny permission here?

7   MS. WELLINGTON: This case was pending

8   almost two years before the amendment was made,

9   but it was still an amendment as of right in

10   this case. So you can have an amendment --

11   JUSTICE SOTOMAYOR: It wasn't within

12   the window permitted by the rule.

13   MS. WELLINGTON: It was, Your Honor,

14   because the case went up on appeal and came

15   down. So there are situations like that.

16   JUSTICE SOTOMAYOR: I see.

17   MS. WELLINGTON: But there's also --

18   you know, leave to amend should be freely given

19   under Rule 15. That's not really the kind of

20   standard that takes into account these judicial

21   efficiencies, comity --

22   JUSTICE SOTOMAYOR: Oh, it certainly

23   does. I mean, that's the entire purpose of the

24   freedom -- of the power and discretion to amend.

25   So I just think, as a matter of first

1   principles, it's -- it's really -- you have an

2   amici, the Center for Litigation and Courts, who

3   supports your argument but says don't rely on

4   that. And I think they make that point for a

5   reason. It's not your strongest point.

6   And then I don't understand why we

7   should change all the other rules that respect

8   an amended complaint as the complaint setting

9   forth the claims in an action.

10   MS. WELLINGTON: Your Honor, we think,

11   if you were to rule for the other side, that

12   would be upsetting a hundred years of precedent,

13   every single court of appeals decisions. That

14   would be changing the rules.

15   All we ask this Court to do here is

16   apply settled law.

17   CHIEF JUSTICE ROBERTS: Justice Kagan?

18   Justice Gorsuch?

19   JUSTICE GORSUCH: We talked a lot

20   about 1367, but I'm not sure we paid much

21   attention yet to 1447. And I -- I can certainly

22   see the argument that the operative complaint

23   should be the one at the time of removal under

24   the old version of 1447, which suggests that a

25   case should be remanded if it was improvidently

41

1   removed.

2   That -- that does seem to focus the

3   Court's attention on the complaint at the time

4   of removal. And I think a lot of the court of

5   appeals kind of have been operating under that

6   kind of idea of the rule.

7   But it's been amended, and it now

8   reads that -- that a case should be remanded if

9   at any time it appears that the district court

10   lacks subject matter jurisdiction, which, you

11   know, just reading that, one might -- and I'm

12   sure we're going to hear this argument, so I

13   wanted to give you a chance to respond to it

14   before you sit down -- that that focuses the

15   Court's attention on -- on the then-operative

16   complaint.

17   Thoughts?

18   MS. WELLINGTON: Two responses, Your

19   Honor.

20   So I think it's important to keep in

21   mind that the 1911 version of the statute, the

22   predecessor of 1447 that was in effect during

23   St. Paul Mercury had basically the same text as

24   it did today.

25   JUSTICE GORSUCH: I grant -- I grant

    1   you that. And then it went to was

    2   improvidently removed --

    3   MS. WELLINGTON: Yes.

    4   JUSTICE GORSUCH: -- for a very long

    5   time. And now it's come back to looking more

    6   directly at the -- the then-operative complaint,

    7   doesn't it?

    8   MS. WELLINGTON: So I think it is

    9   important that this Court reached the ruling

   10   that it did in St. Paul Mercury under the old

   11   text. I think that suggests that it --

   12   JUSTICE GORSUCH: I grant you that --

   13   MS. WELLINGTON: Yes.

   14   JUSTICE GORSUCH: -- with respect to

   15   the amount in controversy. We've been around

   16   that -- that tree a few times.

   17   So putting aside that point, have you

   18   got anything else you want to say about it?

   19   MS. WELLINGTON: Certainly.

   20   So they didn't make that argument in

   21   the red brief because it doesn't answer the

   22   question. The question is whether the federal

   23   court has jurisdiction or not.

   24   We think that's answered at the time

   25   of removal. And this Court, in the Wisconsin

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 1       Department of Corrections case, said that
 2       Section 1447 was merely procedural.  It did not
 3       affect the district court's jurisdiction.  So I
 4       think you would have to revisit that case in
 5       order to read 1447 here the way you suggest.
 6                JUSTICE GORSUCH:  Thank you.
 7                CHIEF JUSTICE ROBERTS:  Justice
 8       Kavanaugh?
 9                JUSTICE KAVANAUGH:  I just want to
10       make sure on the state of the law, and maybe
11       following up on Justice Kagan's question,
12       because you would think when you pick this up,
13       if you were uninitiated, that there would be a
14       standard rule.  Look at the complaint at the
15       time of filing or removal, or look at the
16       complaint at the time of amendment.
17                But at least as I looked at
18       everything, it's just a mess, right?  There's
19       just boxes everywhere where, you know, in the
20       diversity context, destroying diversity almost
21       always compels dismissal or a remand, but
22       reducing the amount in controversy or changing
23       citizenship of a party almost never does.
24       Right?  Is that correct?
25                MS. WELLINGTON:  That's correct, Your
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1   Honor. There --

2   JUSTICE KAVANAUGH: Like Morgan's

3   Heirs and St. Paul Mercury, on the one hand, and

4   Owen Equipment, on the other, there's no logic

5   connecting those things, at least as I see it.

6   MS. WELLINGTON: I --

7   JUSTICE KAVANAUGH: Just rules out

8   there without connective logic. There might be

9   -- each box has its own little idiosyncratic

10   policy considerations, but there's no connective

11   rule, at least as I read it. Correct me if I'm

12   wrong.

13   MS. WELLINGTON: I think you're right.

14   JUSTICE KAVANAUGH: Or the other side

15   can correct me if I'm wrong too. Yeah.

16   MS. WELLINGTON: I think you're right,

17   Your Honor, that there are different rules that

18   apply in different circumstances, that they have

19   different policy concerns or long-standing

20   prudential concerns, and that this Court

21   shouldn't go around disrupting those rules.

22   There are lots of different rules that

23   apply with respect to adding diverse parties.

24   Sometimes you can do that. Sometimes you can't.

25   You can add a non-diverse successor in interest,

 1   for example. So there's lots of different

 2   circumstances. And we simply ask the Court to

 3   apply settled law. We don't think the Court has

 4   to come up with a unifying theory for all these

 5   different areas of the law. Congress acted with

 6   an important reason here with respect to

 7   supplemental jurisdiction. It wanted to protect

 8   the defendant's right to remove. And I think

 9   that's why you see this broad text here. And as

10   well as judicial efficiency. So --

11   JUSTICE KAVANAUGH: And by "settled

12   law," you mean footnote 6, you mean Cohill? Or

13   what are you referring to there?

14   MS. WELLINGTON: So you're right, Your

15   Honor. So St. Paul Mercury, Cohill, and

16   Rockwell. There are also cases like Carlsbad,

17   where this Court expressly asked, is a Cohill

18   remand -- that's the phrase the Court used -- is

19   a Cohill remand discretionary? I don't think

20   this Court could answer the question yes without

21   having, again, decided this question. There are

22   other cases like International College of

23   Surgeons and Rosado that, again, emphasize that

24   this is a discretionary question.

25   And I don't think this Court should

1   just depart from all of that precedent here. I

2   don't think there's a good reason to. And this

3   Court should -- this is a statutory question.

4   Stare decisis carries enhanced force in the

5   statutory context. And that's why we've asked

6   the Court to continue to apply settled law.

7   JUSTICE KAVANAUGH: Thank you.

8   CHIEF JUSTICE ROBERTS: Justice

9   Barrett?

10   Justice Jackson?

11   JUSTICE JACKSON: Just a couple of

12   quick points. So you keep talking about

13   protecting the defendant's prerogative of

14   removal. But I thought there was also sort of

15   basic principles about the plaintiff's

16   prerogative to bring a case in state or federal

17   court to be the master of their claims.

18   So what I don't understand is why the

19   plaintiff has to be stuck with the

20   jurisdictional consequences of claims they are

21   no longer bringing? They've given up their

22   ability to seek relief on the federal claims.

23   And so it just seems odd to me, especially when

24   our case law kind of generally links

25   jurisdiction with the claim, you have to have

 1   jurisdiction for every claim, those two concepts

 2   run together, and yet somehow they can drop

 3   claims and still be, in your view, subject to

 4   the jurisdictional consequences of that.

 5   That just seems discordant to me. So

 6   can you speak a little bit about that?

 7   MS. WELLINGTON: It's a really

 8   important question, Your Honor, because what

 9   Congress was trying to do is take into account

10   the right of plaintiffs to be the master of

11   their complaint, but also the right of

12   defendants to remove. And that's exactly what

13   investing discretion --

14   JUSTICE JACKSON: But Justice Gorsuch

15   points to statutes that talk about remand. So

16   even though the defendant has exercised its

17   right of removal, there are circumstances in

18   which that right is not given precedence. The

19   case goes back to state court. Right?

20   MS. WELLINGTON: That's exactly right.

21   It's up to the district court to decide. And we

22   think in the mine run of cases where you amend

23   the complaint right after you remove, there's

24   removal to federal court, that's going to go

25   back to state court.

1   What we're really talking about here

2   are more unusual cases where it has been going

3   on for on long time. There may be particular

4   concerns --

5   JUSTICE JACKSON: Can I just ask you

6   about the text, moving quickly because I'm

7   mindful of the time? I don't understand how the

8   question could possibly be whether or not there

9   is original jurisdiction at the time of removal.

10   Of course, there is. That's why the case gets

11   to be removed. I mean, there's no question

12   there that does any work because you only get to

13   remove it if there's original jurisdiction.

14   So isn't the question really what

15   happens when, after we've identified original

16   jurisdiction and it's removed, the claims over

17   which there were original jurisdiction drop out?

18   Can supplemental jurisdiction be exercised when

19   those original jurisdiction claims are no longer

20   there?

21   When we look at the text of 1367, I

22   don't understand your argument that supplemental

23   jurisdiction arises in that situation because

24   (a) says in any civil action of which district

25   courts have original jurisdiction, the district

 1   court shall have supplemental jurisdiction.

 2   But in my scenario, original

 3   jurisdiction is gone. So how can you have

 4   supplemental jurisdiction in a situation like

 5   this?

 6   MS. WELLINGTON: I think it's really

 7   important to go back to the first principles

 8   that this Court was applying in Cohill. It was

 9   looking at St. Paul Mercury, which holds that

10   you have original jurisdiction at a particular

11   time. And so once you get original

12   jurisdiction, you continue to have supplemental

13   jurisdiction. That's what the Court held in

14   Rosado. There, the original claim became moot

15   and --

16   JUSTICE JACKSON: So wouldn't we

17   expect it to say in which the district court had

18   original -- or ever had original jurisdiction?

19   It seems to be in the present tense saying that

20   you have to have original jurisdiction in order

21   to exercise supplemental.

22   MS. WELLINGTON: And I think that's

23   because you have decades and decades of

24   precedent saying that, in a removal context, you

25   look at whether there's jurisdiction at the time

1   of removal. At that time, the district court

2   has original jurisdiction, and then the question

3   is, will it continue to have supplemental

4   jurisdiction?

5   The text here is framed in a

6   forward-looking future tense. And we think

7   "shall have" does cover the situation where

8   there's ongoing supplemental jurisdiction.

9   JUSTICE JACKSON: Thank you.

10   CHIEF JUSTICE ROBERTS: Thank you,

11   counsel.

12   Mr. Keller.

13   ORAL ARGUMENT OF ASHLEY C. KELLER

14   ON BEHALF OF THE RESPONDENTS

15   MR. KELLER: Mr. Chief Justice, and

16   may it please the Court:

17   The life of the law has not been

18   logic. It has been experience. And experience

19   should have taught us by now that a suit arises

20   under the law that creates the cause of action.

21   That should be the definitive test for arising

22   under jurisdiction for at least three reasons.

23   It's the most faithful to the text, it avoids

24   serious constitutional problems, and it will

25   save decades of pointless litigation over

1   jurisdiction.

2   Now, if you're not yet ready to

3   re-embrace American Well Works, and it sounds

4   like you might not be, I suspect that stare

5   decisis does a fair bit of work, in which case

6   stare decisis applies an easy alternative path

7   to affirm. This case is Merrell Dow, but for

8   pets not people. And while I take a back seat

9   to nobody in my love of our four-legged friends,

10   I am confident Congress believed that misbranded

11   human product was a more substantial federal

12   issue than misbranded pet food.

13   If we turn to which complaint

14   controls, the Eighth Circuit again should be

15   affirmed. My friend and I crucially agree, the

16   text of 1367 is dispositive here. And

17   remarkably we also agree, if this case were

18   originally in federal court, it must be

19   dismissed. Why? Because by amending out all of

20   the federal issues, they're no longer in the

21   action. If that's what the text of 1367 means

22   for an original case, how can the exact same

23   words take on a different meaning with removal?

24   Despite my friend's professed

25   commitment to textualism, she has no choice but

1   to flee to public policy. We can't have these

2   mischievous plaintiffs lawyers shopping around

3   for their judges, we're told. Now, that concern

4   is not happening in the real world. And my

5   friend's solution wouldn't solve the problem

6   even if it were.

7   But none of that matters. This Court

8   has said many times that text trumps policy.

9   You merely need to say so once again in order to

10   affirm.

11   I welcome your questions.

12   JUSTICE THOMAS: Mr. Keller, would you

13   spend a bit more time on the application of 1367

14   and how it supports your argument?

15   MR. KELLER: Of course, Your Honor.

16   So I think the plain text controls. We agree

17   about that. The present tense verbs, I think,

18   are intended to indicate that there is

19   jurisdiction presently.

20   We focused on the word "have" with the

21   colloquy with Justice -- Justice Jackson. I

22   would also focus on the word "are." There has

23   to be a relationship between the other claims,

24   the state-law claims that are related to claims

25   in the action, the federal -- federal claims

 1   that are within the Court's original

 2   jurisdiction.

 3   If we amend out those federal claims,

 4   they're no longer in the action. There's no

 5   relationship. And so there's no supplemental

 6   jurisdiction. That's 1367(a). That's the

 7   requirement to establish supplemental

 8   jurisdiction. You don't get to the exceptions

 9   in (b) or(c) unless you establish jurisdiction

10   under (a).

11   JUSTICE KAGAN: I think not logic but

12   experience, you lose, Mr. Keller, because the

13   experience cuts the other way. I mean, just the

14   -- this has all -- until the Eighth Circuit came

15   along, the position of the Petitioners has

16   always been understood, assumed. Every --

17   everybody thought that that was the rule. And

18   it was a rule which really has had a no adverse

19   consequences because everybody remands these

20   cases anyway. In 99 percent of the cases, these

21   -- these -- you know, there's a remand.

22   So, like, what harm is this rule

23   doing? And this rule has existed in every

24   single circuit court for lo these many years.

25   MR. KELLER: Yeah, so I respectfully

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1    disagree.  The master principle that I think
2    governs in every context, except the amount in
3    controversy, is that the amended complaint
4    controls.  If you amend a complaint in state
5    court to add a federal claim --
6              JUSTICE KAGAN:  So I basically agree
7    with you.  I mean, I basically agree with you on
8    that and not with Justice Kavanaugh.  Justice
9    Kavanaugh says it's all arbitrary.  I don't
10   think it's arbitrary.  I think some of the cases
11   that he was talking about is when facts in the
12   world change, but when we're not talking about
13   facts in the world, when we're talking about
14   allegations, I think that the structure is the
15   way you describe it, that we look to the
16   operative complaint, the amended complaint,
17   except in the amount in controversy area, where
18   there is sort of special considerations.
19             But -- so I -- I kind of agree with
20   you that if we were creating a system where all
21   the rules cohered, yours is the better rule.
22   But -- but I think on the other side of the
23   table is, look, we have this anomalous rule, but
24   this anomalous rule has been accepted by
25   everybody for many, many years.  And it does no
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1    harm anyway, since most of these cases are

2    remanded back to state court where they belong.

3              MR. KELLER:  Yeah, a couple of

4    responses to that, Justice Kagan.

5              First of all, I don't think that we,

6    meaning this Court, has ever embraced that rule.

7    It's true that the lower courts deserve

8    respectful consideration, but a lot of these

9    cases predate binding statutory text, so I'm not

10   sure that that's dispositive.

11             Also I would respectfully submit that

12   you're the supervisory Court that's most

13   important in our Article III system.  And when

14   you're hearing a question for the first time,

15   you ought to adjudicate it correctly,

16   notwithstanding the respectful consideration

17   that you would give to the lower courts.

18             And if you've determined, as it sounds

19   like you have, that from first principles, I'm

20   right, the fact that lower courts that obviously

21   can't bind this one got it wrong, I don't think

22   is a reason to just say let's go along to get

23   along.

24             And I also think there --

25             JUSTICE GORSUCH:  Counsel, you're --
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1   MR. KELLER: -- are far -- oh, I beg

2   your pardon.

3   JUSTICE GORSUCH: -- you're suggesting

4   that it's kind of the first time the Court's

5   considered the question. I understand that.

6   But you do have Cohill and the Rockwell footnote

7   to deal with. And I haven't heard a word about

8   those yet.

9   MR. KELLER: Well, here it comes,

10   Justice Gorsuch.

11   (Laughter.)

12   JUSTICE GORSUCH: I can't wait.

13   (Laughter.)

14   MR. KELLER: As -- as Justice

15   Kavanaugh previewed, I don't think that footnote

16   6 in Rockwell is anywhere near the ratio

17   decidendi of the opinion. Justice Scalia was as

18   capable as anyone of making a stray remark.

19   He didn't even consider the statutory

20   text of 1367, which both my friend and I agree

21   is dispositive.

22   And the easiest way to tell that it's

23   dicta is if you cover up footnote 6, would it

24   make any difference for the adjudication of the

25   rights and responsibilities of the parties?

 1   Obviously not.

 2   Rockwell would have come out the exact

 3   same way and the exact same outcome and judgment

 4   would have occurred. So --

 5   JUSTICE KAVANAUGH: We have a lot of

 6   things in opinions that you can make that same

 7   comment about that we follow, just for the --

 8   just to put that out there. Sorry to interrupt.

 9   MR. KELLER: I -- and I -- and I agree

10   with you, Justice Kavanaugh. The fact that it's

11   dicta doesn't mean that you toss it out the

12   window. I think what it means is you take it --

13   JUSTICE KAVANAUGH: No, that we don't

14   even treat it as dicta, but keep going.

15   MR. KELLER: Well, it's up to you to

16   decide whether or not you would treat it as

17   dicta here. I think it's pretty ill-considered

18   and it doesn't be get into the fact that it

19   creates the inconsistency that we've been

20   talking about, where the exact same text means

21   one thing for an original case and something

22   else for a removed case.

23   I don't think that's the sort of thing

24   that Justice Scalia would have countenanced,

25   given his commitment to textualism.

1   JUSTICE BARRETT: Counsel, your friend

2   on the other side -- are you finished?

3   JUSTICE GORSUCH: Yeah. Thank you.

4   JUSTICE BARRETT: Your friend on the

5   other side says that this would wreak havoc with

6   the Class Action Fairness Act and remove cases.

7   Do you want to address that?

8   MR. KELLER: I'm not sure that I

9   understand that point, Your Honor. I don't see

10   why it would wreak any havoc. CAFA makes it a

11   lot easier to remove cases into federal court.

12   So in the mine-run case, they're going to have

13   no difficulty.

14   The difficulty that they face here is

15   you have no diversity of any kind. CAFA

16   obviously eliminates completely diversity and

17   goes to minimal diversity as the standard, but

18   that's a relatively unusual circumstance.

19   Oftentimes we plaintiffs are trying to seek a

20   nationwide class or something broader.

21   So I don't think it's going to wreak

22   havoc because the incentives are going to be

23   there when there is widespread harm for

24   plaintiffs to pursue classes that include

25   citizens from many different states.

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1                CHIEF JUSTICE ROBERTS:  Counsel, we

2      have had cases where we came out the other way

3      than the -- every court of appeals had come out,

4      right?

5                MR. KELLER:  Yes, you have, Mr. Chief

6      Justice.

7                CHIEF JUSTICE ROBERTS:  Like what?

8                MR. KELLER:  I think there are --

9      that's a great question.

10                (Laughter.)

11                MR. KELLER:  And none spring to mind,

12      but I am positive that I can find some.

13                JUSTICE KAVANAUGH:  Central Bank?

14                CHIEF JUSTICE ROBERTS:  Well, I mean,

15      it's pretty bold to take the position without

16      knowing one.

17                MR. KELLER:  Fair.  Mea culpa.

18                CHIEF JUSTICE ROBERTS:  Was that --

19      was that the case in Chadha?

20                MR. KELLER:  INS versus Chadha?

21                CHIEF JUSTICE ROBERTS:  Yes.

22                MR. KELLER:  I -- I don't know.  I

23      apologize.

24                CHIEF JUSTICE ROBERTS:  Somebody will

25      check.  I --
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1   JUSTICE KAGAN: Gosh, I'm not sure

2   which way that cuts.

3   (Laughter.)

4   CHIEF JUSTICE ROBERTS: I'm not sure

5   that's true. I just have it in the back of my

6   mind, but -- okay.

7   JUSTICE KAVANAUGH: I'll just go back

8   to the state of the law. I certainly didn't use

9   the word "arbitrary." It's just that each

10   bucket has developed based on its own

11   idiosyncratic considerations.

12   And you can't necessarily get a

13   through-line of look at the time of filing or

14   the time of amendment, at least as I look at

15   them. And it's beyond just amount in

16   controversy. It's change in citizenship as

17   well.

18   And I just want to -- do you agree

19   with that, on the change in citizenship?

20   MR. KELLER: I agree, obviously, that

21   the change in citizenship rule has a long

22   pedigree. It goes back to 1824. I don't agree

23   that that's about which complaint controls.

24   That's about real-world facts.

25   JUSTICE KAVANAUGH: Right.

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1              MR. KELLER:  So if you want to amend a
2    complaint to say:  I made a mistake, I said that
3    I was from Florida and the defendant was from
4    Illinois, but I realized that the defendant
5    actually moved to Florida two years ago, so
6    we're both from Florida, the amended complaint
7    would control there.
8              JUSTICE KAVANAUGH:  Right.  And then
9    on footnote 6, let me just -- I know you're
10   going to disagree that it controls.  If -- if it
11   does control, I mean, if it is binding, it goes
12   against you in this case, correct?
13             MR. KELLER:  Of course.  And then I
14   win under Grable or Merrell Dow.
15             JUSTICE KAVANAUGH:  Right.
16             JUSTICE KAGAN:  And, you know, I just
17   wonder, so you look at footnote 6.  To me
18   footnote 6 is like somebody said:  Hey, but how
19   about Cohill?  And then they said:  Oh, yeah,
20   Cohill, so we have to put in footnote 6.  And --
21   and so the fact that footnote 6 is there
22   suggests a certain kind of reading of Cohill.
23             And, you know, what Cohill was about
24   that it -- was this question of do you have to
25   dismiss a case or can you remand the case back
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1   to the state court? But Cohill's logic does cut

2   against you, I think, fairly heavily here

3   because as I read Cohill what it does is say

4   something like this: You know, the supplemental

5   jurisdiction business, ever since Gibbs, we've

6   understood it as a completely discretionary area

7   of jurisdiction. You can keep the case. You

8   can dismiss the case. If you can keep the case,

9   and you can dismiss the case, surely you should

10   be able to remand the case as well.

11   And that's the essential logic of

12   Cohill. It's like everything is discretionary

13   in this area, why shouldn't this be too?

14   But that logic really does cut against

15   you because it suggests that everything is

16   discretionary in this area, including keeping

17   the case.

18   MR. KELLER: Yeah, a couple of

19   responses to that, Justice Kagan.

20   Whatever amount of discretion I think

21   existed in the Cohill era, I don't think can

22   continue through binding statutory text. So

23   we're no longer operating in a common law realm.

24   We're operating in a realm where Congress chose

25   to act.

1   We can debate whether Congress chose

2   to codify whatever the common law rules were,

3   hook, line, and sinker. I would suggest from

4   Allapattah that it codified binding statutory

5   text, and we should follow the text.

6   So I don't think we can just go with

7   free-wheeling old principles now that Congress

8   --

9   JUSTICE KAGAN: Well, how about if I

10   think the text doesn't really help either of

11   you? The -- you know, you're saying text;

12   you're saying text. And, in fact, neither of

13   you really has a very strong argument about text

14   and we have to decide this case on other

15   grounds.

16   MR. KELLER: So the other grounds, I

17   think, would be the master principle that we

18   talked about, that the operative complaint

19   almost always controls. The only context that

20   I'm aware of where it doesn't control is the

21   amount in controversy.

22   That, by the way, was also codified

23   through binding text. That's 1446. I agree

24   that it goes back longer to cases like St. Paul

25   Mercury. As an aside, I actually think that's a

1   completely defensible interpretation of the old

2   statutory text precisely because Congress

3   understands it doesn't want to blur the line

4   between jurisdictional facts and the merits.

5   We don't want to create the Judge

6   Posner problem where a plaintiff comes into

7   Court and loses or wins an amount that's less

8   than the amount in controversy and now we have

9   to --

10   JUSTICE KAGAN: Thank you.

11   MR. KELLER: -- remand for lack of

12   jurisdiction.

13   JUSTICE ALITO: Do I understand your

14   -- what you just said to mean that you would win

15   this case even if 1367 had never been enacted?

16   MR. KELLER: I think that I would win

17   this case if 1367 hadn't been enacted, and we

18   were still in a more common law regime and this

19   issue were squarely presented to the Court for

20   the first time.

21   Cohill had this issue obliquely

22   presented. Yes, there was an amended complaint,

23   but the party presentation rule should matter.

24   No one made that fact relevant for the Court's

25   consideration.

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1              You could have considered it sua

2    sponte because it went to jurisdiction, but no

3    one did.  And this Court has pointed out before

4    that drive-by jurisdictional rulings don't have

5    any precedential effect.

6              The reason you had to say that is

7    sometimes, even though you would like to avoid

8    it, you issue drive-by jurisdictional rulings.

9              JUSTICE GORSUCH:  Why -- why -- why --

10   why would we say Cohill addressed this?  As I

11   understand it, in -- the question there was

12   whether to remand or dismiss and this -- this

13   issue wasn't presented to the Court at all.

14             MR. KELLER:  I completely agree with

15   it.  It was not presented to the Court.  The

16   facts of Cohill, though, I have to say in the --

17   in the spirit of candor was that there was an

18   amended complaint.  And it dropped the federal

19   claim.  And then there was the question of

20   whether there is discretion to remand versus

21   just discretion to dismiss for lack of

22   continuing jurisdiction.

23             JUSTICE GORSUCH:  And do you have any

24   way to rationalize St. Paul Mercury other than

25   it's been codified now?
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1   MR. KELLER: No, I do think that I can

2   rationalize St. Paul Mercury. As I was saying

3   just a moment ago, I do think that the amount in

4   controversy, even before Congress said in 1446

5   we have to look to the initial pleading, going

6   back to cases like St. Paul Mercury, it is

7   reasonable to read -- read the words "amount in

8   controversy" to mean theoretically possible to

9   be recovered. It doesn't matter what happens

10   after you file your lawsuit.

11   And so if the plaintiff pleads in an

12   initial complaint, consistent with Rule 11 or

13   whatever the equivalent was in 1938, I'm above

14   the jurisdictional amount in controversy, that's

15   showing that it's theoretically possible to

16   recover that amount in good faith, and that's

17   good enough for the statutory jurisdictional

18   requirement that Congress added on to Article

19   III.

20   JUSTICE BARRETT: Mr. Keller, in

21   thinking about -- you know, Justice Kavanaugh

22   was talking about the different boxes and some

23   of the inconsistencies. One way I've been

24   thinking about this is I think it's been true

25   for a very long time, back to Strawbridge versus

1   Curtiss and the complete diversity requirement,

2   you know, talking about Mottley and the

3   well-pleaded complaint rule, that the Court for

4   a very long time exercised a pretty free hand in

5   interpreting 1331 and 1332.

6   That language is identical to Article

7   III, but yet the Court interpreted it to mean

8   something different. And I think that in the

9   Gibbs regime, pre-1367, the Court was exercising

10   a pretty free hand in -- in articulating the

11   contours of pendent jurisdiction and ancillary

12   jurisdiction before Congress controlled it.

13   Can you think -- I mean, I think a lot

14   of this case seems to kind of come down to is

15   that just the way we've been treating

16   jurisdictional statutes and do we keep it up

17   with 1367, or in 1367 because in Finley the

18   Court kind of said nope, look, Congress, there

19   need to be clear jurisdictional rules, expressly

20   invited Congress to address it, which Congress

21   did? Would you say, do you think it's fair to

22   say, or can you think of a counter example that

23   in 1367 when it comes to supplemental

24   jurisdiction, the Court has tightened its belt,

25   and is it being as freewheeling or can you think

1   of other examples where the Court, this Court,

2   has done kind of what the court of appeals

3   seemed to have continued to do in 1367, which is

4   maybe make a little more jurisdictional policy

5   than was set out in the text?

6   MR. KELLER: Yeah, an important

7   question, Justice Barrett. I think I would

8   describe the history a little differently. I

9   wouldn't describe it as freewheeling. I would

10   say it all points in one direction. The Court

11   construed jurisdictional statutes more narrowly

12   than Article III. So that's certainly true with

13   Strawbridge versus Curtiss. We know that

14   there's not a complete diversity requirement

15   because of CAFA.

16   It's the same thing with 1331.

17   Justice Thomas noted this in Grable. From the

18   very beginning of the Jurisdiction and Removal

19   Act of 1875, this Court almost immediately

20   construed the words "arising under" to be not

21   coextensive with Article III.

22   JUSTICE BARRETT: Gibbs is a counter

23   example to Article III.

24   MR. KELLER: Gibbs is a counter

25   example, and the Court in Finley, I think,

1   gently criticized Gibbs for operating without a

2   statute. It did invite Congress to act.

3   Congress has now acted, and so having taken up

4   this Court's invitation to supply positive law,

5   codifying this entire area, I think you should

6   stick to your normal statutory interpretation

7   principles. And if you want to put a thumb on

8   the scale, it should be against jurisdiction

9   consistent with tradition.

10   JUSTICE JACKSON: Setting aside 1367,

11   going back to Justice Alito's question, I'm

12   wondering whether the sort of core principles

13   basis for your position is basically the

14   plaintiff is the master of the complaint. They

15   get to plead the claims.

16   For federal question jurisdiction, the

17   claims matter. That is, jurisdiction is based

18   on the claims that the plaintiff pleads. If the

19   claims are amended, the federal court can be

20   divested of jurisdiction, and removal really has

21   no bearing on the scope of jurisdiction or at

22   least that's never been established, that --

23   that how it comes to federal court matters with

24   respect to an amended complaint.

25   Is that roughly where you're coming

1   from with the principles that would underlie

2   this, even setting aside the statute?

3   MR. KELLER: Yes, that syllogism is

4   perfect.

5   If there are no further questions, or

6   -- I'm happy to go to seriatim.

7   CHIEF JUSTICE ROBERTS: Justice

8   Thomas?

9   Justice Alito?

10   Justice Kavanaugh?

11   Thank you, counsel.

12   MR. KELLER: Thank you, Your Honor.

13   CHIEF JUSTICE ROBERTS: Rebuttal?

14   REBUTTAL ARGUMENT OF KATHERINE B. WELLINGTON

15   ON BEHALF OF THE PETITIONERS

16   MS. WELLINGTON: Thank you, Your

17   Honor.

18   As Justice Kagan says, under

19   experience, Respondents lose. To rule for

20   Respondents on the question presented, this

21   Court would need to overrule or distinguish away

22   St. Paul Mercury, Cohill, Rockwell, Gibbs,

23   Carlsbad, Rosado, Powerex, Osborn against Haley,

24   International College of Surgeons, and Wisconsin

25   Department of Corrections. That's 10 decisions

         1   of this Court, on top of dozens and dozens of

         2   court of appeals decisions that have

         3   consistently and unanimously supported

         4   Petitioners' position.

         5   Indeed, even Respondents agreed that

         6   the district court could exercise supplemental

         7   jurisdiction. They said it in their amended

         8   complaint. It's only until the Eighth Circuit

         9   invited briefing on this that they switched

        10   positions.

        11   And I think it's quite telling here

        12   that the Eighth Circuit reached the decision it

        13   did by apparently missing all of the footnotes

        14   that it should have read, including in Rockwell

        15   but also in the Second Circuit and the Eleventh

        16   Circuit decisions that it cited. So I think

        17   that's the reason we're here today.

        18   As Justice Barrett asked, ruling for

        19   Respondents would also call into question the

        20   rule that applies in CAFA cases. The court of

        21   appeals have said -- you know, if you get into

        22   federal court on a removal in a CAFA case, the

        23   plaintiff immediately amends to try to get rid

        24   of all the class action allegations, the courts

        25   of appeals have said that's a question of

1   discretion for the district court.

2   Maybe the district court will send a

3   lot of those cases back to state court, but

4   maybe, when the case has been going on for two

5   years and the class is about to get certified,

6   that's a situation in which the district court

7   may say, okay, I'm going to keep this case here

8   in federal court.

9   It would also call into question the

10   Court's longstanding rules that amendments to

11   the amount in controversy do not affect

12   jurisdiction.

13   And what do Respondents want instead?

14   So, instead of an approach that gives district

15   courts discretion in every case to determine

16   what makes sense as a matter of judicial

17   economy, convenience, fairness, and comity, they

18   want an inflexible rule that gives district

19   courts no choice, and it would subject the

20   defendant's right to removal to the plaintiff's

21   caprice.

22   As the Chief's questions suggest,

23   where this Court decides to overrule every

24   single court of appeals, it should have a really

25   good reason. And there isn't a really good

1   reason here to upset a longstanding

2   jurisdictional rule that has worked just fine

3   for a century. The Eighth Circuit simply got it

4   wrong, and this Court should vacate the decision

5   below.

6   Thank you.

7   CHIEF JUSTICE ROBERTS: Thank you.

8   The case is submitted.

9   (Whereupon, at 12:29 p.m., the case

10   was submitted.)

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10 [1] **70**:25
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3 [3] **2**:4 **10**:11 **18**:11

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