

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SPRINT COMMUNICATIONS :

4 COMPANY, L.P., ET AL., :

5 Petitioners :

6 v. : No. 07-552

7 APCC SERVICES, INC., ET AL. :

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9 Washington, D.C.

10 Monday, April 21, 2008

11

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

15 APPEARANCES:

16 CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf
17 of the Petitioners.

18 ROY T. ENGLERT, JR., ESQ., Washington, D.C.; on behalf
19 of the Respondents.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in Case 07-552, Sprint Communications Company v. APCC Services, Inc. Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE PETITIONERS

MR. PHILLIPS: Thank you, Mr. Chief Justice, and may it please the Court:

Chief Judge Sentelle observed in his dissent below that there are assignments and then there are assignments, and that's essentially going to be the theme of my presentation this morning. It is I think common ground between the parties in this litigation that if you have an assignment which represents the grant of the entirety of both the right and the remedy, that is the complete assignment of the chosen action, then under those circumstances there's no question that the assignee has standing under Article III.

By parity of reasoning, if all that the assignee receives is a power of attorney, a mere collection agency role, under those circumstances I think it's common ground between the parties that Article III is not satisfied. Two of the data points

1 come from --

2 JUSTICE SCALIA: Say it again? What -- what
3 is the common ground?

4 MR. PHILLIPS: I think the second part of
5 the common ground is that if all that the assignee
6 receives is the power of attorney, that is to serve as
7 the lawyer for the assignor, under those circumstances
8 the assignee doesn't -- cannot -- has no concrete stake
9 any more than I or my clients do in these particular
10 cases, any more than I do in my client's interest in
11 these particular cases, and there I don't think anybody
12 disputes that Article III is not satisfied.

13 Now, the Court in Vermont Agency sort of
14 identified two additional data points. First of all, it
15 made clear that a 10 percent bounty by itself unattached
16 to anything else is not sufficient, largely I think for
17 the same reasons why the lawyer's claim is insufficient,
18 because that's not tied to the particular right at stake
19 and therefore is inadequate to allow Article III to be
20 satisfied.

21 The second half of it is, though, if
22 that bounty is coupled with an assignment of the rights
23 and even if that's a partial assignment of the rights,
24 then there is Article III jurisdiction under those
25 circumstances.

1 CHIEF JUSTICE ROBERTS: So that if these
2 contracts provided that the aggregators will turn over
3 all of the proceeds of the litigation except for one
4 penny, then you'd be satisfied?

5 MR. PHILLIPS: Well, I'm not sure I'd be
6 satisfied. I think there's -- I think there's a
7 different -- I think the answer is that might satisfy
8 Article III. The only reason I'm reluctant to say that
9 that's the line that ought to be drawn is because this
10 Court's taxpayer-standing cases seem to recognize that
11 there are situations where there is a sufficiently de
12 minimis amount at stake that under those circumstances
13 Article III won't be satisfied. But clearly the
14 cleanest line to draw is in circumstances where have you
15 no stake in the outcome that clearly is beyond what
16 Article III would ultimately do.

17 JUSTICE SCALIA: Well then, this is not
18 really a very significant case, is it? Because I
19 presume that these enterprises that -- that agglomerate
20 claims and bring suit as a collection agency, they could
21 simply get their compensation, instead of by way of -- of
22 a flat fee, by -- you know, claiming entitlement to two
23 percent of the rewards. So it's no big deal, I mean,
24 really.

25 MR. PHILLIPS: But it is a big deal, not

1 necessarily because of the importance of the article. I
2 think the Article III part of it is still a big deal. I
3 think requiring as a separation of powers matter that
4 there has to be a concrete stake in the party bringing
5 the litigation, that's an important principle and the
6 Court shouldn't abandon it, and that's posed directly in
7 this case.

8 But more fundamentally in terms of the
9 importance of the underlying process, remember here
10 we're talking about an assignee who takes on 1400
11 different assignor claims involving 400,000 pay phones.
12 And when -- and that's the problem, is that when you
13 break this down and you allow just simple assignments to
14 satisfy Article III and prudential standing concerns,
15 then what you end up with is this mass tort litigation.

16 JUSTICE GINSBURG: But it would be just the
17 same, Mr. Phillips, would it not, if the arrangement was
18 that the aggregator gets a piece of the action? Let's
19 take out the de minimis one cent. A significant stake,
20 like the qui tam plaintiff has. So you would have the
21 same problems that you're complaining about with regard
22 to discovery from the individual PSPs, the same problem
23 with respect to counterclaim.

24 That's -- so it seems to me that, as Justice
25 Scalia suggested, this isn't about a whole lot if just

1 by the device of giving the aggregator part of the, a
2 piece of the action, the suit would be okay because the
3 prudential objections that you are making here would
4 apply just as well.

5 MR. PHILLIPS: Well, and I would -- I would
6 still assert those same prudential objections in the
7 hypothetical you pose. What I'm saying is that when you
8 -- when you have an assignment and there is a bounty
9 built into it, however you want to define the bounty,
10 whether it's a penny or 10 percent or 2 percent or
11 whatever, that may satisfy Article III. I understand
12 that. That does not answer the question of whether
13 here's prudential standing under those circumstances.
14 In that --

15 JUSTICE SCALIA: Go ahead, I'm sorry.

16 MR. PHILLIPS: In that context, Justice
17 Ginsburg, you do have the problems. You don't get the
18 discovery. You don't get to use the efficiency of the
19 counterclaim process, and there are serious questions
20 about whether or not there are res judicata and
21 collateral estoppel effects, and I would argue in that
22 context that there's a very significant claim that those
23 proceedings ought not to be entertained by a Federal
24 court as a prudential matter, not as a matter of Article
25 III.

1 JUSTICE SCALIA: What if all of the
2 claimants assign their claims to something called an
3 agglomeration trust and the -- the person who's bringing
4 suit here brings it as a trustee? He has no interest in
5 it personally and he is compensated the same way, the
6 same way this agglomerator is compensated. He has no
7 personal interest. He could sue, couldn't he?

8 MR. PHILLIPS: I mean, there is a long
9 tradition of allowing trustees to bring litigation on
10 behalf of the trust because that's the only way that a
11 trust can in fact enforce its rights.

12 JUSTICE SCALIA: So once again, it's no big
13 deal. I mean --

14 MR. PHILLIPS: Well, it is a big deal,
15 because trust relationships carry all kinds of
16 additional legal consequences. I mean, what is
17 particularly offensive about this arrangement, Your
18 Honors, is that the assignor gets all of the benefits of
19 being able to bring mass tort litigation with none of the
20 responsibilities.

21 JUSTICE SOUTER: He would do the same thing
22 in Justice Scalia's example if it were an irrevocable
23 trust. The trust could do exactly what the aggregator is
24 doing here.

25 MR. PHILLIPS: That's true, but there are

1 additional trust responsibilities that would attach to
2 that process. There's an entire legal regime to deal
3 with that.

4 JUSTICE SOUTER: Well, there are trust
5 responsibilities that might protect those who assigned
6 their interest to the trust, but I don't offhand see what
7 difference it would make -- what difference those
8 responsibilities would make vis-a-vis you and your
9 client.

10 MR. PHILLIPS: Well, again, Justice Souter,
11 I think the answer probably is going to depend on how
12 the Court interprets the prudential standing doctrine.
13 Again, I don't have any quarrel as an Article III
14 matter, because I think it's one of those long-held
15 traditions that trustees are allowed to bring litigation
16 on behalf of the trust and that's understood. But --

17 JUSTICE SOUTER: But the real issue is not
18 whether the trustee can sue. The real issue is whether
19 the trust can sue.

20 MR. PHILLIPS: Right. I mean, that's where
21 the claims are, sure.

22 JUSTICE SOUTER: It seems to me in his
23 example if the trust can sue, why can't the aggregator
24 sue? And your answer was, well, trustees have certain
25 responsibilities. But I don't see that those

1 responsibilities inure to the benefit of your client or
2 to an opposing party in litigation that a trust brings.
3 So I don't see how that would differentiate it.

4 MR. PHILLIPS: Well, there are two
5 differentiations. One is that there is this entire
6 legal regime that regulates trusts and that has allowed
7 the court to -- the courts for 200 years, probably longer
8 than that, to be comfortable to allow litigation to
9 proceed in a particular way.

10 But second of all and the second answer to
11 your first question is the prudential concerns remain
12 just -- potentially just as serious. I think the
13 question is do you want to create litigation devices that
14 allow the courts to avoid -- to allow lower courts or,
15 more to the point, allow plaintiffs to avoid the
16 requirements either of Federal Rule of Civil Procedure 23
17 or the associational standing doctrine. Those are
18 doctrines that are designed to limit mass tort
19 litigations in particularized circumstances --

20 JUSTICE STEVENS: You mentioned -- you
21 mentioned discovery as a -- I don't see why you can't get
22 discovery against this whole bunch of people.

23 MR. PHILLIPS: Because they're not a party
24 to the litigation. I mean, you can get discovery --

25 JUSTICE STEVENS: Subpoenas out there and

1 depositions.

2 MR. PHILLIPS: But, Justice Stevens, if you
3 sue me, you hail me into court, you put me to the
4 burdens of being a defendant in litigation, the least I
5 can -- I ought to get out of that is that I can turn to
6 you and ask you to admit certain facts, I can turn to you
7 and ask you to answer certain interrogatories, and I
8 don't have to go chasing you down, because you've already
9 submitted yourself to the -- to the personal jurisdiction
10 of that court.

11 JUSTICE STEVENS: Of course, in this
12 particular situation you can do the same thing. You can
13 file requests for admissions and serve interrogatories.
14 I don't understand why you can't do that.

15 MR. PHILLIPS: Well, I can serve them on the
16 -- on the aggregator, but I cannot serve them on the
17 party who in fact has the relevant information that I
18 need. I have to use third-party subpoena power.

19 JUSTICE STEVENS: I would assume the
20 aggregators have the relevant information.

21 MR. PHILLIPS: I'm sorry, Justice Stevens?

22 JUSTICE STEVENS: I would assume the
23 aggregator would have the relevant information.

24 MR. PHILLIPS: In some instances it might or
25 it might not. The problem is the aggregator has got to

1 get the information.

2 JUSTICE STEVENS: But they have to -- they
3 have the burden of proof in the case and I assume they
4 have to investigate the facts and be prepared for
5 trial.

6 MR. PHILLIPS: And that would help on the
7 affirmative case that they have to put together, but it
8 doesn't help with respect to the counterclaims. The
9 Qwest amicus brief does a very nice job of explaining
10 that there are a lot of situations where the -- where
11 the payphone operators are overpaid and it's very
12 difficult -- first of all, and the aggregator has no
13 idea or any incentive to find out any of that -- any of
14 that information. And when Qwest made the requests of
15 the aggregator saying, provide me with the information,
16 the brief quotes in a variety of places comments such
17 as, you know, "whatever the -- our aggregator says is
18 fine with us," or "I don't care about those claims," or
19 answers like that, which, if I sue you -- or excuse me,
20 if you sue me and I ask for those, you cannot give me
21 back those answers.

22 JUSTICE KENNEDY: But you can make that same
23 answer if it's just a standard assignee for collection
24 of -- of a debt for single person.

25 MR. PHILLIPS: Right, but if it's a simple

1 assignee for a debt and nothing more than that, just a
2 power of attorney -- or are you talking about a full
3 assignment?

4 JUSTICE KENNEDY: No, no. It's a full
5 assignment, where everybody agrees that there's
6 standing.

7 MR. PHILLIPS: Right, but then those
8 circumstances --

9 JUSTICE KENNEDY: You can make the same
10 argument: Oh, he might not have all the information.

11 MR. PHILLIPS: Right, but at least there he
12 is also responsible for both -- he has the entirety of
13 the right. He has the right and the remedy. So that
14 whatever counterclaims you have operate directly against
15 that particular individual.

16 But even in that context, Justice Kennedy,
17 it seems to me there's a fundamental difference, as a
18 matter of prudence, between dealing with -- with a single
19 assignee back and forth and the disputes that arise
20 there and the difficulty of discovery that would exist
21 there, and the situation we have here where you have
22 1400 payphone operators --

23 JUSTICE BREYER: You have a discovery
24 problem. I don't see that it's a standing problem. And
25 two things it reminds me of are, one very common, a

1 financer takes an interest in receivables and he's going
2 to have to collect them as receivables and there may be
3 50,000. That could have the same kind of practical
4 problems. Or we had cases in the First Circuit you may
5 or may not be aware of where somebody went around and
6 had assignments for 50,000 cabbages that were delivered
7 a day late in 50,000 box cars and each one was worth
8 about \$10. Nobody figured a way out of that. They had
9 to pass a special statute.

10 There was -- and so it seems to me you're
11 better off than the cabbage people because have you two
12 possible remedies: One on discovery; you could ask the
13 judge, Judge, see what the Communications Commission
14 thinks. It's called primary jurisdiction of the kind.

15 MR. PHILLIPS: But, Justice --

16 JUSTICE BREYER: Or you could go to the FCC
17 and you say, FCC, you got us into this.

18 Now, you -- you have some rules here that
19 make some sense in terms of collection. You have both
20 those agency avenues open to you, not open to the cabbage
21 people, and this doesn't seem a standing problem. Now,
22 what's your response to that?

23 MR. PHILLIPS: Well, there are two elements
24 of the standing problem: The first one is we're all --
25 let's be clear -- we're talking about a hypothetical

1 that's different from this case because we're talking
2 about a hypothetical where in fact the assignee has a
3 concrete interest in the outcome of this dispute. Here
4 the assignee has no interest in the outcome of this
5 dispute. So the Article III problem arises there.

6 The question is if you have a minor amount
7 at interest, even if it's, you know, concrete but
8 nevertheless approaches de minimis, should you
9 nevertheless entertain that case. And I think the
10 answer to your question, Justice Breyer, is that instead
11 of making this into a Federal court case, where you have
12 1400 claims like this, what the Court should say is that
13 the better course to follow is in fact for the
14 plaintiffs to take their claims, if they want to, in an
15 aggregate form to the FCC because that's the right
16 institution to deal with it because it doesn't have the
17 limitations of Article III and it doesn't have the
18 limitations of prudential standing to interfere with its
19 ability to provide complete relief.

20 And, indeed, if you read the Respondents'
21 brief, they identify, as the prototype litigation, in
22 which this entire system worked effectively, a claim
23 that was in fact litigated in front of the Federal
24 Communications Commission, not a case that was litigated
25 in front of the Federal courts. So, to my mind, the

1 right answer to this case is to take these cases all to
2 the FCC, not as a matter of what we do as primary
3 jurisdiction, but simply as what the plaintiffs do
4 because they don't have the vehicle to bring this to the
5 Federal courts.

6 JUSTICE GINSBURG: But --

7 JUSTICE SCALIA: What do you do about --
8 about aggregated plaintiffs who are not in the field of
9 Federal regulation? They're just sort of out of luck?
10 Can they petition for the creation of a -- of an FCC that
11 they can take their claims to? I mean, this is a fluke
12 that there happens to be this Federal agency they could
13 have gone to. Certainly our principles of standing
14 should not depend upon that fluke, should it?

15 MR. PHILLIPS: Well, I think when the Court
16 is considering the questions of prudence, you know, it
17 can certainly take it into account, and maybe that would
18 argue in the alternative in another case if there
19 weren't such an available vehicle that the Court might
20 be more inclined to entertain it under those
21 circumstances.

22 JUSTICE GINSBURG: Would there be review?
23 The FCC, you pointed out, doesn't have Article III
24 barriers. So the FCC decides one way or another. One
25 party ends up losing. Is there review in a Federal

1 court?

2 MR. PHILLIPS: I mean, Justice Ginsburg,
3 that is Spiller. That's what the Court said in Spiller,
4 and I think it's a logical outgrowth of what the Court
5 held in ASARCO, which is that, even though a claim
6 doesn't start with Article III jurisdiction because it's
7 not an Article III entity, that when a final
8 determination comes out of that entity that is in fact
9 enforceable as a right that that right is enforceable
10 consistent with Article III notions. And that's true.
11 That is what the Court essentially, without dealing with
12 Article III at all, said in Spiller, and that's clearly
13 what the Court held in ASARCO.

14 JUSTICE GINSBURG: What is the advantage?
15 You have proposed the FCC route. That obviously wasn't
16 taken here. What is the advantage of going to Federal
17 court on claims like this?

18 MR. PHILLIPS: From my perspective or from
19 the plaintiffs' perspective.

20 JUSTICE GINSBURG: Why would the plaintiff
21 make such a choice if the agency --

22 MR. PHILLIPS: Because -- because the -- the
23 plaintiffs here, the payphone operators, get a free pass
24 in this proceeding. They get all of the benefits of
25 being able to go to Federal court and bring litigation

1 with none of the burdens of having to deal with discovery
2 or cross-claims or counterclaims or even necessarily
3 being bound by doctrines of res judicata and collateral
4 estoppel. So you get all the benefits and none of the
5 disadvantages. That's why it's an advantage to them to
6 go to Federal court.

7 JUSTICE BREYER: How is that different?

8 MR. PHILLIPS: When --

9 JUSTICE BREYER: Just on that very point --
10 I need clarification on this. How is that different
11 than the case of the financier who takes accounts
12 receivable, which is very common? You finance the
13 accounts. You take a secured interest in accounts
14 receivable.

15 MR. PHILLIPS: Right.

16 JUSTICE BREYER: And there you might
17 foreclose on the -- on the secured interests. Then you
18 as the financier have to collect from everybody. How is
19 your case different from that?

20 MR. PHILLIPS: Well, I don't know --

21 JUSTICE BREYER: In the respect you were
22 just talking about.

23 MR. PHILLIPS: Right. Well, I mean, the -- I
24 mean, the real question is I don't know why that case is
25 necessarily in Federal court either. I mean, a lot of

1 that --

2 JUSTICE BREYER: I know, but I mean, there
3 may be many reasons for that. I'm just saying it's a
4 normal, practical problem, I believe, in the banking
5 community. I don't know.

6 MR. PHILLIPS: Right, but most of that's
7 litigated in State courts, in which case there's no
8 serious problem ninety-nine percent of the time anyway --

9 JUSTICE BREYER: Go back to my question, I'd
10 like to get an answer to it.

11 MR. PHILLIPS: Certainly.

12 JUSTICE BREYER: In respect to the problem
13 you were just mentioning, the discovery problem of
14 counterclaims or those problems, is this case any
15 different than the financing case I just mentioned?

16 MR. PHILLIPS: No, I don't think so.

17 JUSTICE BREYER: No.

18 MR. PHILLIPS: I think -- I think those exact
19 problems would arise in that context as well. On the
20 other hand, that's a situation that seems to me is
21 largely driven by the exigencies and by accident in
22 Federal court. This is a situation that is driven into
23 Federal court by the plaintiffs' choice and by the
24 ability and by the preference to be in a position to get
25 the benefits of litigation in Federal court without any

1 of the detriments that might otherwise arise in that
2 context.

3 JUSTICE SOUTER: Could you explain that?

4 That really goes back to your answer to Justice
5 Ginsburg's question and I'm not getting it. She said,
6 you know, why -- why would you go to the Federal court if
7 you can you go to the FCC, and you said, well, you get
8 the benefits of being in Federal court. What -- maybe I
9 should be asking other -- other counsel this question,
10 but as you understand it what is the benefit of being in
11 the Federal court rather than the FCC that makes this so
12 attractive?

13 MR. PHILLIPS: I mean, I guess I would
14 encourage you to ask counsel on the other side, because
15 personally I would think that they would have a full and
16 fair remedy --

17 JUSTICE SOUTER: So you don't know of any
18 benefits?

19 MR. PHILLIPS: I'm sorry?

20 JUSTICE SOUTER: You don't know of any
21 benefits?

22 MR. PHILLIPS: I don't know of -- well, other
23 than the ones I've already articulated, where I think
24 they get some advantages of being in a Federal court and
25 have --

1 JUSTICE SOUTER: Well, you eliminate step
2 one. I mean, you go to the FCC, you win there, then
3 you've got to face an appeal before the Federal courts.
4 Why not go right to the Federal courts immediately? You
5 eliminate one level of litigation. No?

6 MR. PHILLIPS: Well, and that's -- that may
7 well be his answer.

8 JUSTICE KENNEDY: Well, I'd like you to go
9 back to the question that Justice Stevens, Justice
10 Breyer, and I asked you. You said, oh, there's a
11 problem, there's no counterclaim, we can't get the
12 information. And that -- and we say, well, that happens
13 in every accounts-receivable assignment; there's no
14 problem there. And then you say, well, that should be in
15 State court. That's not right.

16 I thought it was agreed, that if there --
17 stipulated by you at the outset, that if there's a
18 standard assignment for collection you can be in the
19 Federal court; there is standing.

20 MR. PHILLIPS: Right, there is Article III
21 standing.

22 JUSTICE KENNEDY: And Article III.

23 MR. PHILLIPS: Right. And let's not lose
24 sight of that core question --

25 JUSTICE KENNEDY: If you're saying -- if

1 you're saying that it's the aggregation that makes it
2 difficult to reach everybody, well, that's a question of
3 discovery, and it's still the aggregator's
4 responsibility. If the aggregator can't answer
5 necessary questions for discovery of the suit, the
6 suit's dismissed.

7 MR. PHILLIPS: Well, that may or may not
8 happen. But, Justice Kennedy, let's be clear, okay. The
9 core question here is whether or not an aggregator who
10 has no claim, who has no stake at all, not a penny's
11 worth, can pursue this litigation. On that it seems to
12 me the answer got -- should be no. There's no benefit to
13 it. The concrete stake is a core requirement of Article
14 III and the Court ought to enforce it as a separation-of-
15 powers question.

16 The issue that we've been discussing here is
17 what do you do when you get past that, and when you have
18 a kind of a bounty that's been attached to it, and how
19 do you resolve that? And in that situation, which is not
20 this case, I still think that there would be grounds for
21 prudential standing to serve as a basis to eliminate
22 this kind of litigation. On the other hand, it may well
23 --

24 JUSTICE GINSBURG: But you said --

25 MR. PHILLIPS: I am sorry, Your Honor.

1 JUSTICE GINSBURG: You said the aggregator
2 -- if I understood your brief right -- that the
3 aggregator could sue on behalf of these 1400 plaintiffs
4 naming every one of them as a named plaintiff in the
5 complaint and still the aggregator would run the show
6 because they each authorized the aggregator to conduct
7 the litigation.

8 MR. PHILLIPS: Right.

9 JUSTICE GINSBURG: Now, it seems to me that
10 it's not very prudential to require that there be 1400
11 named plaintiffs instead of one.

12 MR. PHILLIPS: Well, I mean, the price you
13 pay -- bless you -- is that when you bring Federal court
14 litigation -- is that you have to have -- you have to
15 expose yourself to exactly the burdens that come with
16 it.

17 JUSTICE SOUTER: You also pay a price. I
18 thought that's what you were going to get at. Talking
19 about prudential standing, 1400 filing fees is pretty
20 prudential.

21 MR. PHILLIPS: Right. Federal courts
22 clearly have an interest in that.

23 JUSTICE GINSBURG: But I thought your
24 position was they could all join in one complaint just
25 as long as they're all named separately.

1 MR. PHILLIPS: They can join in a single
2 complaint. Now, you know, the court can consider whether
3 or not it thinks joinder is appropriate under those
4 circumstances, but -- but they could unquestionably do
5 that. But then, again, they are then at that point a
6 plaintiff in the litigation having brought this action
7 and, therefore, subject to all of the burdens of being a
8 plaintiff in the litigation, including submitting
9 themselves to the personal jurisdiction of the court.

10 I mean, let's be clear about this. There
11 are 1400 names out there of people all over the country
12 that under the -- under the plaintiffs aggregators'
13 theory we have to go chase down in order to obtain
14 discovery, to obtain any of our counterclaims or anything
15 like that. Whereas if they come into this Court and they
16 submit themselves to the jurisdiction, at least the
17 process works as the Federal Rules of Civil Procedure --

18 JUSTICE KENNEDY: Well, I don't like to be
19 the broken record. I'm just not getting -- I don't see
20 why that isn't the responsibility of the plaintiff. The
21 district court said, now, you've brought these claims.
22 The defendants need this information. You go get that.
23 That's your responsibility.

24 MR. PHILLIPS: Well, I don't doubt that the
25 trial court can do that, but the question is: Why do we

1 have to go to the burden of having to chase all of that
2 in the first instance?

3 I mean, the Respondent's brief at page 10
4 criticizes us for not having brought 1400 third-party
5 complaints, not having sought additional discovery. All
6 of those are burdens that simply arise in this context
7 that otherwise do not exist in an ordinary case where
8 you simply ask the party who has the actual claim to be
9 the plaintiff in front of the court.

10 And that's -- and, again, just to be clear,
11 we are still here dealing with the hypothetical. We're
12 not dealing with the core question of what do you do
13 with a plaintiff who has not one penny at stake in
14 litigation that, as the lawyers want to describe, is all
15 hard cash.

16 JUSTICE SOUTER: I'm sorry. The only way,
17 it seems to me, that you can eliminate what you regard
18 as a problem is by having 1400 separate actions, so that
19 in any given case if you want discovery, your plaintiff,
20 the person who has got to provide that discovery, is
21 standing right there.

22 And I don't see how you can get the benefits
23 that you are claiming entitled to without having 1400
24 separate actions. If you don't have 1400 separate
25 actions, whether you have an aggregation like this,

1 whether you have a joint action, whether you have a
2 class action, this problem of chasing down, as you
3 describe it, is going to be there.

4 So it seems to me the prudential question
5 for this Court is: Do we really want to require 1400
6 separate actions so that you can have your perfect
7 paradigm of private litigation? And to say, yes, we
8 want 1400 actions, it seems to me is a stretch. What do
9 you say?

10 MR. PHILLIPS: I think the answer to that is
11 that when you -- when you deal with mass tort
12 litigation, the Rules of Civil Procedure ought to apply
13 in that context as it applies in every other place. And
14 when the courts deviate from the standard paradigm for --
15 for litigation, they do it expressly, either through the
16 rules or through doctrines that already exist.

17 And so we have Rule 23, which sets out very
18 clear protections for both the courts -- or not only for
19 the courts, but for the plaintiffs and for the absent
20 defendants -- absent, absent plaintiffs and for the
21 defendants, and it is a clear mechanism for conducting
22 1400 claims all at once in a particular situation.

23 JUSTICE SOUTER: What does that have to do
24 with -- that -- I guess that goes to prudential standing.

25 MR. PHILLIPS: It goes directly --

1 JUSTICE SOUTER: It has nothing to do with
2 Article III standing.

3 MR. PHILLIPS: No, to be sure. Again, I
4 don't think that -- I mean, the Article III debate here
5 seems to me to turn solely on the question of there is
6 no stake in the outcome of this case. That's a bedrock
7 requirement of Article III and ought to be a basis for
8 simply reversing. But, you know, to the extent that the
9 Court then goes beyond that and worries about what's the
10 next case going to look like and where -- what are the
11 prudential limitations, which I don't think the Court has
12 to resolve any of this, what I would suggest is the Court
13 should be informed by Rule 23 and associational standing
14 and those doctrines --

15 JUSTICE SOUTER: Are you saying, in effect,
16 that if we get to the prudential-standing point, the
17 answer is that in the absence of a rule comparable to
18 Rule 23 we should not recognize prudential standing, but
19 that if we adopted a rule that sort of regulated how
20 this would work, prudential standing would be
21 appropriate? Is that basically it?

22 MR. PHILLIPS: I think that's the right
23 answer, is that the Court shouldn't just make it up as
24 it goes along. And if there is a need for this -- look,
25 and the truth is we've been here 200 years. We haven't

1 had to have aggregator standing all of this time. It
2 strikes me that there's no compelling need for a change
3 and that for that reason the Court ought to go back to
4 the paradigm example, plaintiffs sue defendants and you
5 have normal discovery and counterclaims.

6 JUSTICE GINSBURG: Is there any -- is there
7 any significance to this being the -- this assignment
8 transfers legal title. True, there's an obligation to
9 pay -- to pay the separate PSPs. But does anything turn
10 on legal title? For example, suppose the -- I gather the
11 check would be payable to the aggregator if the
12 aggregator prevails. Could a creditor of the aggregator
13 come in and say, stop, you owe me lots of money and I
14 want to reach those proceeds?

15 MR. PHILLIPS: I mean, that -- I mean the
16 proceeds -- I assume -- do those claims arise out of the
17 relationship between the payphone operators and the
18 aggregator?

19 JUSTICE GINSBURG: No.

20 MR. PHILLIPS: It's completely unrelated to
21 that? It's just a garnishment on it?

22 JUSTICE GINSBURG: These are just the
23 creditors. Or even the aggregator goes bankrupt.

24 MR. PHILLIPS: I assume those moneys could
25 be taken out of the aggregator and then the PSP would

1 have a claim over against the aggregator for breach of
2 contract.

3 If I could reserve the balance of my time.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 Mr. Phillips.

6 Mr. Englert.

7 ORAL ARGUMENT OF ROY T. ENGLERT, JR.

8 ON BEHALF OF THE RESPONDENTS

9 MR. ENGLERT: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 One of the last things Mr. Phillips said was
12 there's no need to change the law in this case and I
13 strongly agree with that. Assignees for collection have
14 been litigating in Federal courts since at least the
15 19th century and there is not one decision cited in any
16 of the briefs in this case in which an assignee's
17 lawsuit was dismissed solely because of what the
18 assignee intended to do with the proceeds.

19 JUSTICE SCALIA: And also not one in which
20 the issue of standing was raised and decided. And our
21 jurisprudence says that where we do not address the
22 issue of standing the case has no precedential value on
23 the subject.

24 MR. ENGLERT: Justice Scalia, a single
25 decision, a small body of decisions that don't address

1 the issue of standing, can be looked at in that way.
2 But a unanimous body of case law, two decisions from
3 this Court, arguably a third decision from this Court,
4 many decisions from lower courts --

5 JUSTICE SCALIA: I don't consider two
6 decisions an enormous body.

7 MR. ENGLERT: But there is an enormous body
8 in the lower courts under Rule 17.

9 JUSTICE SCALIA: Well, we don't count the
10 lower courts.

11 (Laughter.)

12 JUSTICE SOUTER: Mr. Englert, with respect
13 to what weight we should give to those decisions, I just
14 want to put a simple hypo and -- and I'll ask a question
15 on it. Assume that in this case the assignment -- well,
16 assume another case, rather, in which the assignment is
17 identical to this one, except that the terms of the
18 second agreement, i.e., if I the aggregator collect
19 anything I give it to you. Assume that is part
20 of the first agreement, so that there is an assignment
21 and as part of the assigning document there is a stated
22 obligation on the part of the assignee to pay all
23 proceeds to the assignor.

24 I am assuming that your position would be
25 the same; is that correct?

1 MR. ENGLERT: Yes, absolutely.

2 JUSTICE SOUTER: Now, my question is, you're
3 taking that position, I think, just as you did in
4 response to Justice Scalia, on the grounds that there is
5 a huge body of law that assignment for collection
6 conveys adequate standing. But are any of the
7 assignment for collection cases in that body of law
8 clearly cases like the one in my hypothetical in which
9 the assignment itself by its terms requires the total
10 payment of any benefit back to the assignor?

11 MR. ENGLERT: Justice Souter, the cases
12 don't always discuss the way in which the assignment
13 arose. But typically, in those cases they simply say,
14 there are these two promises, and they say the fact that
15 there is a second promise makes no difference. That's
16 my position. The fact that there's a second promise,
17 whether in the same document or in a different document,
18 makes no difference.

19 JUSTICE SCALIA: What's the earliest of
20 those cases in our Court?

21 MR. ENGLERT: The earliest case --

22 JUSTICE SCALIA: The earliest case in our
23 Court that upholds this kind of -- or without specifically
24 addressing the standing issue, gives judgment?

25 MR. ENGLERT: The earliest case that gives

1 judgment is Spiller in 1920.

2 JUSTICE SCALIA: 1920?

3 MR. ENGLERT: Yes.

4 JUSTICE SCALIA: In -- in Vermont Agency --
5 in the Vermont Agency case, which dealt with qui tam,
6 that many people, including the Justice Department,
7 thought did not confer Article III standing, we held to
8 the contrary that it did confer Article III standing,
9 mainly because it had been around forever. It was -- it
10 was the understood part of the judicial power when the
11 Constitution was adopted.

12 Do you have any case prior to 1920 in which
13 English courts or even early American courts thought
14 that this -- that this would -- would be sufficient to
15 bring a lawsuit?

16 MR. ENGLERT: Well, assignee standing, not
17 assignee for collection standing but assignee standing,
18 is referred to in Blackstone's Commentaries
19 contemporaneously with the Constitution.

20 JUSTICE SCALIA: Sure, but --

21 MR. ENGLERT: This wrinkle of arguing that --

22 JUSTICE SCALIA: It's more than a wrinkle.
23 The assignee keeps the money.

24 MR. ENGLERT: But the wrinkle of arguing
25 that that makes a difference as far as I know first

1 arose in the 19th century. And every single case and
2 every single Federal court that has considered the
3 question under any body of law has rejected the
4 argument.

5 JUSTICE SCALIA: What's the earliest Federal
6 court case you have?

7 MR. ENGLERT: Late 18th -- late 19th
8 century.

9 JUSTICE SCALIA: Late 19th century?

10 MR. ENGLERT: Yes.

11 CHIEF JUSTICE ROBERTS: We're not under any
12 body of law. I didn't see any cases cited after we had
13 more carefully explicated our understanding of Article
14 III. What's the latest case from this Court that you've
15 got?

16 MR. ENGLERT: Well, as you know, I argue
17 that the Vermont Agency case strongly supports us. But
18 if you want a case specifically --

19 CHIEF JUSTICE ROBERTS: Well, in that case
20 you've obviously got the bounty -- yes.

21 MR. ENGLERT: -- about assigning collection,
22 then the latest case I have is Titus in 1939.

23 JUSTICE ALITO: Well, aren't Titus and
24 Spiller different in that -- that there the assignee is
25 suing on a judgment that was obtained in a forum where

1 Article III didn't apply?

2 MR. ENGLERT: No, absolutely not, Justice
3 Alito.

4 JUSTICE ALITO: Why isn't that irrelevant?

5 MR. ENGLERT: Because for the exact reason
6 Mr. Phillips gave you. The ASARCO case and Coleman v.
7 Miller, Justice Frankfurter's concurring opinion, and a
8 number of other cases stand for the proposition that a
9 party who invokes the jurisdiction of this Court or of
10 any other Federal court must satisfy Article III. So
11 when Spiller, the secretary of the Cattleman's
12 Association, went to the Federal district court seeking
13 enforcement of the reparations award he had gotten
14 before the ICC, he had to satisfy Article III.

15 When Titus came to this Court arguing that
16 the lower courts had not properly given full faith and
17 credit, he had to satisfy Article III. Each of those
18 parties invoking the jurisdiction of the Federal court
19 was someone who had to turn over 100 percent of the
20 proceeds to the assignors. And in each case this Court
21 rejected the argument that he was not a proper
22 plaintiff.

23 CHIEF JUSTICE ROBERTS: Counsel, you say in
24 your brief that there is no reason for concern about the
25 absence of concrete adverseness. But I would have

1 thought there was a great deal of reason for concern in
2 that your client doesn't care if he wins or loses.

3 MR. ENGLERT: My client --

4 CHIEF JUSTICE ROBERTS: It's all the same to
5 him. If he wins, he doesn't get to keep the money; if
6 he loses, he loses.

7 MR. ENGLERT: Well, that's -- that's false
8 in every possible respect, Your Honor. He does keep --
9 get to keep some of the money. Now, we haven't proved
10 that in the lower court. It's an allegation at this
11 point, but it happens to be true. But aside from
12 that --

13 CHIEF JUSTICE ROBERTS: I thought the
14 question came to us on the assumption that he doesn't
15 retain any of the money.

16 MR. ENGLERT: On the assumption, but not the
17 fact.

18 Second, my client's whole reason for
19 existence is to collect payphone compensation. This is
20 what my client does day in and day out. Usually not --

21 CHIEF JUSTICE ROBERTS: But I thought our
22 cases made clear that that kind of -- I forget what
23 we call it -- it's a separate interest from the injury
24 that you're alleging in the lawsuit. You don't allege
25 in the lawsuit that the basis for Article III injury is

1 that you're in this line of work and if the work dries
2 up you're in big trouble. That wouldn't be enough to
3 support Article III standing.

4 MR. ENGLERT: No. What's enough to support
5 Article III standing is the interest of the assignors,
6 as the Court held in Vermont Agency.

7 CHIEF JUSTICE ROBERTS: Well, but then why
8 is the assignee bringing the lawsuit?

9 MR. ENGLERT: The assignee --

10 CHIEF JUSTICE ROBERTS: He had no
11 independent injury.

12 MR. ENGLERT: The assignee is bringing the
13 lawsuit for the most pragmatic of all possible reasons.
14 Mr. Phillips wanted to talk a lot about discovery, and
15 Justice Kennedy and I believe Justice Souter asked why
16 is this lawsuit in Federal court instead of before the
17 FCC. There are good answers to those questions.

18 The discovery in Federal court -- the
19 discovery available in Federal court, is more
20 appropriate to -- is more necessary in a large case, a
21 \$200 million case like this one, than in a relatively
22 small case --

23 CHIEF JUSTICE ROBERTS: I'm sorry, we got
24 off the track here.

25 MR. ENGLERT: We did.

1 CHIEF JUSTICE ROBERTS: I'm trying to find
2 out what the assignee's injury is.

3 MR. ENGLERT: The -- the assignee's
4 injury --

5 CHIEF JUSTICE ROBERTS: And how it's
6 redressed by the receipt of the money.

7 MR. ENGLERT: It is, as this Court said in
8 Vermont Agency, the assignor's injury and it is
9 redressed by --

10 CHIEF JUSTICE ROBERTS: No. But you know,
11 Vermont Agency, obviously, the -- the assignee recovers
12 something himself, that he gets to keep the bounty.
13 Here that's not the case.

14 MR. ENGLERT: Here that's not the case, but
15 the reasoning of Vermont Agency specifically rejected
16 the proposition that the bounty was helpful to the
17 assignee's standing. And there is not a word in Vermont
18 Agency that says when you combine the bounty with the
19 assignor's interest that's enough. It just says the
20 assignor's interest is enough, full stop, because of the
21 ancient doctrine.

22 JUSTICE GINSBURG: I thought it said -- I
23 thought it said, Mr. Englert, that -- that the United
24 States has -- is treated as having assigned part of its
25 claim for damages to the qui tam relator, and that gave

1 the qui tam plaintiff a stake in the action, a stake in
2 the proceeds. I thought that Vermont Agency -- and
3 Justice Scalia will correct me if I'm wrong -- was
4 envisioning the kind of assignment that Judge Sentelle
5 was talking about when he said there are assignments and
6 then there are assignments.

7 JUSTICE SCALIA: I was under the same
8 misimpression, I have to say. I wrote it.

9 (Laughter.)

10 MR. ENGLERT: The -- the assignment in this
11 case conveys all right, title and interest. It conveys
12 it for purposes of collection to be sure, but it conveys
13 all right, title and interest.

14 Now, the proposition that the "for purposes
15 of collection" purpose of an assignment negates the
16 ability of the plaintiffs to sue is one that has been
17 litigated many times in Federal courts, and that
18 argument has been rejected in every case in which it's
19 come up until now, including two from this Court. So
20 between the fact that the reasoning of Vermont Agency,
21 whatever the facts were, relied on the interest of the
22 assignor, relied on the ancient doctrine that the
23 assignee for Article III purposes stands in the
24 assignor's shoes, and the fact that this argument has
25 been rejected in every case in which it's come up, I

1 think the case for Article III standing is quite strong
2 here.

3 JUSTICE SCALIA: Well, I must say we seem to
4 have come full circle from *Flast v. Cohen*, which -- which
5 said that the doctrine of standing had nothing whatever
6 to do with Article III. That it all -- the only thing
7 it's there for is to assure that concrete adverseness on
8 which our adversary system depends. We've come full
9 circle from that to now your argument that concrete
10 adverseness doesn't matter at all.

11 MR. ENGLERT: Oh, Mr. Chief -- Justice Scalia
12 --

13 JUSTICE SCALIA: Is there a combination of
14 the two that's possible, that maybe one of the elements
15 of Article III standing is -- is that both parties have a
16 stake in winning and losing?

17 MR. ENGLERT: There is tremendous concrete
18 adverseness in this case. And both parties have a great
19 stake in winning and losing. The -- the aggregator
20 doesn't get to keep the money, although actually it
21 does, but this case can be decided on the assumption,
22 subject to remand that it doesn't get to keep the money.
23 But it exists for the purpose of bringing -- of
24 obtaining redress from carriers -- obtaining payphone
25 compensation from carriers, usually outside the

1 litigation process. But this is -- this is what my
2 client does -- what my clients do.

3 CHIEF JUSTICE ROBERTS: Well, the Sierra Club
4 protect -- you know, undertakes activities to protect the
5 environment, but that doesn't give it standing in every
6 environmental case to sue. It needs to show members
7 with a concrete interest and so on. The fact that
8 your client is in the business of suing on behalf of
9 payphone operators --

10 MR. ENGLERT: My client is not in the
11 business of suing on the business of payphone operators.
12 My client is in the business of collecting, usually
13 outside the litigation process. And this is merely an
14 extension of the day-to-day operations.

15 JUSTICE KENNEDY: Can you tell me is this
16 1,400 causes of action or is it one?

17 MR. ENGLERT: One.

18 JUSTICE KENNEDY: How does that come about?
19 Suppose a lot of people owe the bank -- a lot of farmers
20 owe the bank money, can there be assignment and then
21 there's one cause of action?

22 MR. ENGLERT: Sure. And let me give you
23 one very important pragmatic reason why --

24 JUSTICE KENNEDY: And how does the law
25 express the metaphysical process in which 1,400 causes

1 of action become one cause of action?

2 MR. ENGLERT: Well, they are all assigned to
3 one entity that brings the cause of action just as a
4 trustee brings causes of action --

5 JUSTICE KENNEDY: Well, there is not a
6 representative cause of action. I mean, what is the
7 magic point at which it becomes one cause of action?

8 MR. ENGLERT: The point at which they are
9 all assigned to one entity that then brings the cause of
10 action, and importantly, has authority to settle the
11 cause of action without any further permission from the
12 clients. The -- a very, very important protection here
13 for Mr. Phillips --

14 JUSTICE KENNEDY: I'm still missing -- I'm
15 still missing something here. Can you give me an example
16 of where this has happened in other cases that this Court
17 has heard or that are commonly heard?

18 MR. ENGLERT: Every Rule 23 class action --
19 every Rule 23 class action, every associational standing
20 case, every trustee action.

21 JUSTICE KENNEDY: I interrupted you and I
22 talked over you. Every Rule 23 cause of action and what
23 else?

24 MR. ENGLERT: Every associational standing
25 case, every action brought by a trustee.

1 JUSTICE KENNEDY: Well, associational
2 standing, Sierra Club v. Morton, they are interested in
3 an ongoing injury in which there is a common -- in which
4 there is a common injury. These are -- these are
5 liquidated amounts.

6 MR. ENGLERT: But that's not uncommon, Your
7 Honor. Justice Souter's opinion for the Court in United
8 Food and Commercial Workers v. Brown quoted a Seventh
9 Circuit case that said representative damages litigation
10 is common from class actions under Rule 23 to suits by
11 trustees representing hundreds of creditors in
12 bankruptcy, to parent patriot actions by State
13 governments to litigation by and against executors at
14 decedent's estates. This is something that happens
15 every day in Federal court.

16 JUSTICE KENNEDY: Those are usually ongoing
17 injuries as to which there's a common interest in
18 stopping the injury. Here you're aggregating liquidated
19 amounts.

20 MR. ENGLERT: It's actually not entirely
21 liquidated amounts. There are ongoing disputes about
22 ongoing payphone compensation. But I don't think it
23 would make any difference even if that weren't true.

24 JUSTICE KENNEDY: I might understand it if
25 was some sort of injunction actions -- that in the future

1 please pay what you're supposed to pay.

2 MR. ENGLERT: No. But, Justice Kennedy,
3 consider the typical Rule 23 damages action, which is
4 about past amounts due in the ordinary case. You have
5 one cause of action on behalf of the class instead of
6 many causes of action on behalf of many people. It
7 happens all the time.

8 JUSTICE KENNEDY: But that's allowed because
9 the requisites for class actions have been -- have been
10 met and that's authorized by the rule. That's not true
11 here.

12 MR. ENGLERT: Because we have something much
13 better here. What we have here, Justice Kennedy, is
14 assignments of the cause of actions by every plaintiff
15 to my clients completely --

16 JUSTICE KENNEDY: There are a lot of better
17 procedures that are in the rules but it is not in the
18 rule.

19 MR. ENGLERT: Actually it is. Rule 17
20 was put in the rules. And if you read the works of
21 Judge Charles Clark, you will see that Rule 17 was put in
22 the rules to authorize just this kind of action to be
23 brought in the name of assignees, including assignees for
24 collection. And one year after he joined the Federal --

25 JUSTICE STEVENS: May I ask a fact question?

1 I'm just a little puzzled here. I probably should have
2 asked Mr. Phillips. But what issues of fact are there
3 going to be in this case? It seems to me everything
4 ought to be on computer somewhere, and it's just a
5 matter of pushing the right button and you know how much
6 money you owe. Am I missing something?

7 MR. ENGLERT: You're not missing something,
8 Justice Stevens. That's what this case is about, is
9 computer records, massive computer records in the
10 possession of the carriers and some tools the aggregators
11 have to analyze computer records.

12 JUSTICE SCALIA: Except for counterclaims.
13 He says I have some counterclaims.

14 MR. ENGLERT: He says he has some
15 counterclaims, but in nine years of litigation his
16 clients have never used Rule 19; they have never used
17 Rule 22; they have never made any effort -- he says we
18 have asserted they have to go out and bring 1,400
19 separate lawsuits. What we said on page 10 of our brief
20 was they have never tried in nine years of litigation
21 to use --

22 JUSTICE GINSBURG: Well, what did they do?
23 I mean, you mention necessary parties but these other --
24 on your own theory the PSPs are not necessary parties,
25 and this -- this is a defendant seeking to join

1 additional plaintiffs, and that's rather odd. And you
2 also talk about interpleader. I don't know who is the
3 stakeholder in this picture.

4 MR. ENGLERT: Well, Your Honor, my point is
5 that there are many procedural devices available to deal
6 with many situations like this, Rule 19 and Rule 22 and
7 separate lawsuits. If there were serious counterclaims
8 in this case, first of all as a factual matter, AT&T and
9 Sprint would know it from their own records and second,
10 they would have done something in nine years to try to
11 bring a claim against a PSP, and they have done nothing
12 in nine years. So this is a very, very odd case in
13 which to be worrying about whether they have lost some
14 rights because the PSPs -- lost some counterclaim rights
15 because the PSPs aren't individual parties.

16 It's also a very odd case in which to be
17 worrying about discovery rights because the PSPs aren't
18 individual parties because that issue was resolved in
19 their favor in 2000 by the special master's discovery
20 order saying, just as Justice Stevens postulated, the
21 aggregator is ordered to go out and get the information
22 from the PSPs.

23 Now they complained that some of the PSPs,
24 some of these mom and pop operations, said we don't have
25 any information. That's because for the most part the

1 PSP don't have any information. The information resides
2 with the carriers and with the aggregators. So as a
3 purely practical, pragmatic matter this is not the case
4 in which to be worrying that some discovery rights have
5 been lost; this is not the case in which to be worrying
6 in which some counterclaim rights have been lost; this
7 is not the case in which to be worrying that my clients
8 aren't bound. Every single -- I'm sorry, that the PSPs
9 aren't bound, the assignors aren't bound, because every
10 single one of them has signed an agreement, or two
11 agreements, really, saying it will be bound. What
12 this comes down to is a series of abstractions put up
13 against the tradition of allowing lawsuits by assignees
14 for collection.

15 JUSTICE BREYER: Well, I guess it could be
16 that -- that you're asking them to go back into records
17 that are somewhat old. What you're asking to find out is
18 -- is every call made out of a payphone that was a
19 long-distance call, and we don't even know who actually
20 turned out to be the carrier. It's like asking them,
21 tell us exactly on the payphone at that corner over there
22 who was called at 9:15 a.m. to some number in 1987, and
23 maybe they should have records of that but they don't.
24 They have estimates --

25 MR. ENGLERT: No, they do. There is no --

1 JUSTICE BREYER: They say maybe the time
2 necessary to go through those records, to figure out
3 whether you should give 12 cents to the person who ran
4 that payphone, is really not worth it.

5 MR. ENGLERT: Well --

6 JUSTICE BREYER: And therefore, if they are
7 right in some claim like that, is there a way to get
8 this worked out at the FCC? I mean, it -- it -- I don't
9 think it was the purpose of this statute to have 12 cent
10 claims, even aggravated, brought back years later under
11 some set of procedural rules that will be so expensive to
12 get the discovery that it just won't be worth it.

13 Now that might be right. And if it is right
14 or whether it's right, can the FCC work this out?

15 MR. ENGLERT: Your Honor, several points if
16 I may. 47 U.S.C. section 276 says that payphone
17 service providers are to be compensated for each and
18 every payphone call. So it was Congress's purpose to
19 make every 24-cent call compensable, and the FCC set up a
20 very elaborate system to make them keep records. And
21 they kept those records --

22 JUSTICE BREYER: I'm aware of that system.
23 I'm aware of that.

24 MR. ENGLERT: Now, as -- and there is about
25 \$200 million at stake in this case so this is not about

1 each 24-cent payphone -- payphone call individually.
2 This is a properly advocated case.

3 JUSTICE BREYER: Right. But my question is
4 to get to that figure there may be billions of calls,
5 for all I know.

6 MR. ENGLERT: There are.

7 JUSTICE BREYER: And it could be quite
8 expensive to track down each of those calls
9 individually. I don't know if it is or not; but if it
10 is, is there a way to get this problem worked out at the
11 FCC or do we have the cabbage case grown large?

12 MR. ENGLERT: Your Honor, my client has
13 brought scores of these actions -- my clients have
14 brought scores of these actions, some before the FCC,
15 the largest ones -- and this is the largest one of
16 all -- in Federal court to get the advantage of the
17 discovery processes of Federal court. Most of these
18 cases settle. These cases as Justice Stevens pointed
19 out are about analyzing computer records, and you can
20 fight to the death or you can say let's figure out who
21 owes whom what and let's settle; and most of the cases
22 settle. There is no reason why there should be any more
23 or less incentive to settle when the case is before the
24 FCC than when it's before a Federal court.

25 JUSTICE BREYER: In settlement they may work

1 out. But if it is -- for example costs a dollar to
2 fight a claim that's worth 12 cents, individually,
3 before you get to billions, they don't want to be in
4 that situation where they are really paying money for
5 nothing; because in their opinion they already paid.

6 I mean we understand this kind of problem.
7 So I go back to my question. They have one view of it;
8 you have another of what's going on here. And their
9 view is very unfavorable to your clients and your
10 clients' view is very unfavorable to their clients. So
11 I would like to know is there a way to get this worked
12 out at the FCC? Maybe that will turn out not to be
13 relevant in this case but I'd still like to know your
14 opinion.

15 MR. ENGLERT: Well, this case was brought in
16 Federal court under a statute that permits the
17 plaintiffs to choose whether to go to Federal Supreme
18 Court or the FCC. The reason it's nine years old is not
19 because we didn't sue immediately; it's because we've
20 been litigating for nine years about our right to
21 litigate.

22 Does the FCC have a useful role to play in
23 this process at this point? Never say never, but I
24 don't see one. The case was brought in Federal court
25 under a doctrine that has always allowed assignees for

1 collection to sue in Federal court, and there is no
2 reason I can think of why it shouldn't proceed in
3 Federal court.

4 JUSTICE SCALIA: Mr. Englert, is -- is this
5 one -- one lawsuit or 1,400 lawsuits, I mean, however
6 many clients you have?

7 MR. ENGLERT: It's one lawsuit.

8 JUSTICE SCALIA: How can it be -- how is it
9 one lawsuit when there are -- I mean, just a lot of
10 different individual claims? You think you could have
11 brought this as a class action?

12 MR. ENGLERT: We, after Judge Sentelle
13 dismissed this case, we moved in the alternative to
14 amend our complaint to add either 1,400 individual
15 plaintiffs or a class action. The plaintiffs opposed
16 that, and then she reversed herself on reconsideration --

17 JUSTICE SCALIA: They opposed it on what
18 seems to be a reasonable ground, that each of these
19 claims is quite different. There are different calls,
20 different -- different amounts owing. Each -- each case
21 is not going to be judged on the same -- on the same
22 facts.

23 MR. ENGLERT: That's really not true,
24 Justice Scalia. Just it's a pure practical matter,
25 leaving aside theory, this is about analyzing computer

1 databases. This is about analyzing call records.
2 Because of the system the FCC set up, none of the
3 information resides with the PSPs; it resides with the
4 aggregators and with the carriers.

5 JUSTICE KENNEDY: Do you agree that this
6 could not have been brought as a class action?

7 MR. ENGLERT: No, I don't concede that --

8 JUSTICE KENNEDY: Why didn't you bring it as
9 a class action?

10 MR. ENGLERT: I'm sorry?

11 JUSTICE KENNEDY: Then why didn't you bring
12 it as a class action? We can all go home.

13 MR. ENGLERT: Because it's so much better to
14 bring it on behalf of individuals who have expressly
15 consented to be bound, than on behalf of people who may
16 not even know about it and who may not have consented to
17 be bound and may not want to be bound as in the typical
18 class action.

19 There are all kinds of problems with class
20 actions. Class actions are typically brought by
21 enterprising law firms who may not ever have met their
22 clients. This is a different litigation altogether.
23 This is litigation by a trade association that exists to
24 -- to collect payphone compensation, doing the same thing
25 it always does, only doing it in court on behalf of 1,400

1 companies that each signed an agreement saying I want
2 you to go do this for me and I agree to be bound by the
3 result. So I can get entitlement interest.

4 JUSTICE BREYER: Can you -- this is giving me
5 a thought here. Just a total imaginary case, nothing to
6 do with your clients. Put yourself in the opposite
7 position. Suppose you were representing a defendant and
8 that defendant were asked by this imaginary plaintiff to
9 dig up records on the computer. To dig up each
10 individual record costs \$1. There were billions of such
11 records, and the value to you, to the other side, the
12 plaintiff, imaginary in this case, was 12 cents a call.
13 Okay? So you say look, those people are asking us to
14 dig up billions of records, it's going to cost us a
15 dollar each to do it, and all they are going to get out
16 of it is 12 cents a call. But of course we are the ones
17 who have to pay the dollar, and they get the 12 cents.
18 Now, is there a way for the legal system to solve that
19 problem?

20 MR. ENGLERT: Yes.

21 JUSTICE BREYER: Other than standing.

22 MR. ENGLERT: Push the parties to settle.
23 That's what rational economics --

24 JUSTICE BREYER: Well, the defendant says --
25 now your client, I am not going to settle; there are no

1 such claims. This is ridiculous but it's going to cost
2 me a dollar to prove it.

3 MR. ENGLERT: Yeah, the client says millions
4 for defense, but not one cent -- one cent for tribute
5 and every lawyer gets happy, because the client wants to
6 litigate to the death instead of just surrendering to
7 extortion, in that kind of case they have to decide
8 whether the economically rational thing is to set a bad
9 precedent or is to -- is to settle.

10 That happens all the day for defense counsel
11 and I'm quite often defense counsel --

12 CHIEF JUSTICE ROBERTS: Speaking -- speaking
13 --

14 MR. ENGLERT -- but this case is not of that
15 nature.

16 CHIEF JUSTICE ROBERTS: Speaking of one cent
17 for tribute, I mean, it's easy to get rid of this
18 problem, isn't it?

19 MR. ENGLERT: Prospectively --

20 CHIEF JUSTICE ROBERTS: Why don't your
21 agreements just say you get to keep \$10 out of every sum
22 that your recover? Then we wouldn't have this problem.

23 MR. ENGLERT: I agree, and we made that
24 point in our brief in opposition to cert. This case is
25 of no practical significance going forward for the body

1 of the law. There's nothing this Court is going to
2 decide in this case that's going to make a difference.
3 People will just draft their assignment and --

4 CHIEF JUSTICE ROBERTS: So why --

5 MR. ENGLERT: So my clients --

6 CHIEF JUSTICE ROBERTS: Why doesn't the tie
7 -- why doesn't the tie go to Article III? I mean if it
8 makes no difference either way, I'd like to preserve the
9 significance of Article III as a limit on court
10 jurisdiction.

11 MR. ENGLERT: Article III is a proper and
12 important limit on court jurisdiction when it -- when it
13 restricts court jurisdiction. When we have a traditional
14 cause of action, the abstractions that have come to be
15 thought of as Article III jurisprudence don't trump
16 tradition.

17 CHIEF JUSTICE ROBERTS: Well, but --

18 MR. ENGLERT: What Article III --

19 CHIEF JUSTICE ROBERTS: Well, Article III
20 does trump tradition. I mean, if it doesn't meet
21 Article III, no amount of tradition can save it. And
22 you several times refer, when asked one of these
23 questions, to the tradition and the old cases, but I
24 haven't heard an answer yet to the concrete injury that
25 is suffered by the aggregators.

1 MR. ENGLERT: The -- as -- on the assumption
2 on which this case comes to the Court, the aggregators'
3 injury is the assigned injury of the assignors. We are
4 -- we are taking the principle of Vermont Agency and
5 saying that applies just as much to assignees for
6 collection as it does to any other assignees. Contrary
7 to Mr. Phillips' position and Judge Sentelle's position,
8 that there are assignments and then there are assignments,
9 the law has -- has looked many times at the question
10 whether there are assignments and then there are
11 assignments. The argument that assignees for collection
12 should be treated differently has been made many times.
13 It has never prevailed in Federal court, unless and until
14 it prevails in this case.

15 JUSTICE GINSBURG: The significance --

16 JUSTICE SCALIA: Mr. Englert, could you --

17 JUSTICE GINSBURG: -- to the legal title,
18 would it make a difference if the assignee did not have
19 legal title, was just --

20 MR. ENGLERT: Oh, it would make a huge
21 difference, Justice Ginsburg.

22 JUSTICE GINSBURG: So -- but is that just a
23 formality? For example, the question I asked
24 Mr. Phillips. Could a creditor of the aggregator get at
25 this money when the check is paid by AT&T and Sprint and

1 therefore reduce the amount available to distribute to
2 the PSPCs?

3 MR. ENGLERT: Well, if we assume insolvency
4 and we assume a secured creditor, then, yes, I think the
5 PSPs are general unsecured creditors, and the secured
6 creditor is in line ahead of them. Different facts,
7 different results. But -- but, yes, it does make a
8 difference if the assignee enters insolvency, which is
9 not going to happen in this case, but if the assignee
10 enters insolvency and if there is a creditor that
11 arguably under insolvency principles has a higher claim
12 than the PSPs, yes, it does make a difference to the
13 assignee.

14 JUSTICE GINSBURG: How about for tax
15 purposes? Must the aggregator report the proceeds as
16 income?

17 MR. ENGLERT: Your Honor, I'm sorry. I just
18 don't know the answer to that question. I'm guessing
19 they either don't report them as income or they report
20 them as income, but then have a deduction in the exact
21 same amount. But I don't -- I really don't know the
22 exact answer to that.

23 JUSTICE SCALIA: Mr. Englert, can you -- can
24 you explain to me again how it is that when you acquire
25 14 separate causes of action, 14 separate claims, against

1 the same defendant, just by your acquiring them they
2 sort of melt into one cause of action. How does that --
3 how does that happen?

4 MR. ENGLERT: That happens the same way it
5 happens under Rule 23. It happens the same way it
6 happens with the trustee who is representing people who
7 would otherwise have many different causes of action.
8 It's a -- it's a very common thing in Federal court.
9 That if a -- if a bankruptcy trustee or -- or if a class
10 representative brings a lawsuit on behalf of many people,
11 then there is one cause of action instead of the many
12 causes of action there would be if those many people sued
13 directly. It's not an issue.

14 CHIEF JUSTICE ROBERTS: In all of those
15 cases, the class action, the trustee, the -- the
16 named plaintiff, the named trustee has concrete injury
17 and redressability to themselves?

18 MR. ENGLERT: No more than my clients.

19 CHIEF JUSTICE ROBERTS: Very much more than
20 your clients. The trustee has legal obligations that he
21 has to discharge. If it's a suit that he should bring
22 on behalf of the beneficiaries and doesn't do it, he is
23 sued for breach of trust. In the class action case, the
24 representative has to have standing, has to show
25 concrete injury and redressability. Here we don't have

1 any of that.

2 MR. ENGLERT: I respectfully disagree, Your
3 Honor. My clients have legal obligations that they have
4 to discharge. They are embodied in the very agreements
5 reproduced in the back of the red brief, that require us
6 to pursue this action and require us to turn over --

7 JUSTICE KENNEDY: But why do we have Rule 23
8 that requires certification of a class action? If you
9 can say, well, I don't need Rule 23, I'm going to take
10 1400 claims and make them one any way.

11 MR. ENGLERT: For very good reasons. Rule
12 23 exists to protect absent plaintiffs, something we
13 don't have here, and to protect defendants so that they
14 will know there will be a res judicata effect of the
15 judgment, whether for them or against them, so that they
16 can't be sued by other class members.

17 They have those protections. In fact, if
18 you read the blue and yellow briefs in this case, they
19 keep referring in the abstract to the protections of
20 Rule 23, but they don't identify a single concrete
21 protection that they do not have under this system.
22 Rule 23 is inferior to an action by assignees for
23 collection in every imaginable way. It's not a superior
24 alternative. And to say that the existence of Rule 23
25 means we should throw out a traditional form of action

1 that's been recognized for well over a century would be
2 a very surprising result.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 Mr. Englert.

6 Three minutes, Mr. Phillips. You might
7 start by the point your friend just made. What is the
8 protection that Rule 23 provides that you don't have?

9 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

10 ON BEHALF OF THE PETITIONERS

11 MR. PHILLIPS: Thank you, Mr. Chief Justice.

12 The specific protection is that the courts
13 determine how the settlements will play out. They make
14 sure that all of the requirements of Rule 23 are
15 satisfied before the litigation goes forward. That
16 means that there is a demonstration of commonality, that
17 there -- the predominance issue is resolved, that this
18 is a matter that should be litigated in this forum
19 because it is a more efficient mechanism for litigating
20 it, not because the assignor -- assignee has decided that
21 this is more efficient way from the assignee's
22 perspective --

23 JUSTICE KENNEDY: And are problems --

24 MR. PHILLIPS: -- to litigate the issue.

25 JUSTICE KENNEDY: Are the requirements of

1 typicality and -- the same type of injury designed in
2 part to preserve the rights of the defendant?

3 MR. PHILLIPS: Yes, of course, because you
4 don't want to have all this litigation being heaped on
5 a -- on a particular defendant under these circumstances.
6 There is an efficiency to this process that the rules
7 anticipate. And I think you're absolutely right,
8 Justice Kennedy. There is simply no reason in the world
9 to say we're going to allow this to be as a substitute
10 for existing doctrines under either Rule 23 --

11 JUSTICE GINSBURG: But wouldn't you --

12 MR. PHILLIPS: -- or associational standing.

13 JUSTICE GINSBURG: Suppose -- suppose this
14 had been mounted as a class action. I take it you would
15 oppose certification.

16 MR. PHILLIPS: To be sure, and my guess is --

17 JUSTICE GINSBURG: And one of the reasons
18 would be that these are all different situations,
19 different amounts involved in each case? Some -- you
20 would have a counterclaim, not others. I assume you
21 would say they're not enough alike.

22 MR. PHILLIPS: Absolutely, Justice Ginsburg.
23 We would oppose this. I don't think that this is a proper
24 case for class certification. But it seems to me that
25 that doesn't mean okay, and, therefore, the answer to

1 this is: Come up with some other contrivance in order
2 to litigate this in a way that obviously maximizes the
3 convenience to one side without regard to the
4 protections that are designed both for the defendant and
5 for the court that's embodied in Rule 23.

6 JUSTICE STEVENS: Mr. Phillips, do you
7 attach any significance to the fact that every member of
8 the so-called class here has individually agreed to be
9 bound by the judgment?

10 MR. PHILLIPS: Well, it's interesting
11 because they -- in one -- in the assignment part of it
12 they say they are bound, but on the -- on the separate
13 set of the agreement it talks about the reasonable
14 discretion of the assignor -- assignee. So the
15 agreement is, to my mind, inherently contradictory as to
16 what are the obligations.

17 JUSTICE STEVENS: Which -- the assignees,
18 but the assignors have agreed to be bound, I thought, if
19 the assignee said so --

20 MR. PHILLIPS: Well, if it's reasonable --
21 it says reasonable discretion. And so the question is,
22 you know, is this -- was that an exercise of reasonable
23 discretion? And I don't know the answer to that in any
24 given case.

25 And I think part of the -- Justice Kennedy

1 and Justice Ginsburg -- Breyer, you asked the question
2 about above and beyond discovery, what are the other
3 problems that arise when you go down this -- and the more
4 -- the other one is that being bound by the judgment.

5 If you have a complete assignment of the
6 chosen action, the assignee, then, is completely bound.
7 There is nothing left. The assignor has no rights left.
8 There is nothing left for the assignor to do in that
9 situation; whereas, in these kinds of situations where
10 the assignee receives the -- the right to go forward but
11 the remedy is in another party's hands, the potential
12 being bound is completely lost.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 Mr. Phillips. The case is submitted.

15 (Whereupon, at 11:04 a.m., the hearing in
16 the above-entitled matter was submitted.)

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<p style="text-align: center;">A</p> <p>abandon 6:6</p> <p>ability 15:19 19:24 38:16</p> <p>able 8:19 17:25</p> <p>above-entitled 1:12 62:16</p> <p>absence 27:17 34:25</p> <p>absent 26:19,20 26:20 58:12</p> <p>absolutely 31:1 34:2 60:7,22</p> <p>abstract 58:19</p> <p>abstractions 46:12 54:14</p> <p>accident 19:21</p> <p>account 16:17</p> <p>accounts 18:11 18:13,13</p> <p>accounts-recei... 21:13</p> <p>acquire 56:24</p> <p>acquiring 57:1</p> <p>action 3:18 6:18 7:2 24:6 26:1,2 38:1 40:16,21 41:1,1,3,4,6,7 41:10,11,18,19 41:20,22,25 43:3,5,6,22 50:11,15 51:6 51:9,12,18 54:14 56:25 57:2,7,11,12 57:15,23 58:6 58:8,22,25 60:14 62:6</p> <p>actions 25:18,24 25:25 26:6,8 42:10,12,25 43:9,14 48:13 48:14 51:20,20</p> <p>activities 40:4</p> <p>actual 25:8</p> <p>add 50:14</p> <p>additional 4:14</p>	<p>8:16 9:1 25:5 45:1</p> <p>address 29:21 29:25</p> <p>addressing 31:24</p> <p>adequate 31:6</p> <p>admissions 11:13</p> <p>admit 11:6</p> <p>adopted 27:19 32:11</p> <p>advantage 17:14 17:16 18:5 48:16</p> <p>advantages 20:24</p> <p>adversary 39:8</p> <p>adverseness 34:25 39:7,10 39:18</p> <p>advocated 48:2</p> <p>affirmative 12:7</p> <p>agency 3:23 4:13 5:20 14:20 16:12 17:21 32:4,5 33:17 36:6 37:8,11,15,18 38:2,20 55:4</p> <p>agglomerate 5:19</p> <p>agglomeration 8:3</p> <p>agglomerator 8:6</p> <p>aggravated 47:10</p> <p>aggregate 15:15</p> <p>aggregated 16:8</p> <p>aggregating 42:18</p> <p>aggregation 22:1 25:25</p> <p>aggregator 6:18 7:1 8:23 9:23 11:16,23,25</p>	<p>12:12,15,17 22:4,9 23:1,3,5 23:6 28:1,11 28:12,12,18,23 28:25 29:1 30:18 39:19 45:21 55:24 56:15</p> <p>aggregators 5:2 11:20 24:12 44:10 46:2 51:4 54:25 55:2</p> <p>aggregator's 22:3</p> <p>agree 29:13 51:5 52:2 53:23</p> <p>agreed 21:16 61:8,18</p> <p>agreement 30:18,20 46:10 52:1 61:13,15</p> <p>agreements 46:11 53:21 58:4</p> <p>agrees 13:5</p> <p>ahead 7:15 56:6</p> <p>AL 1:4,7</p> <p>alike 60:21</p> <p>Alito 33:23 34:3 34:4</p> <p>allegation 35:10</p> <p>allege 35:24</p> <p>alleging 35:24</p> <p>allow 4:19 6:13 10:8,14,14,15 60:9</p> <p>allowed 9:15 10:6 43:8 49:25</p> <p>allowing 8:9 46:13</p> <p>alternative 16:18 50:13 58:24</p> <p>altogether 51:22</p> <p>amend 50:14</p>	<p>American 32:13</p> <p>amicus 12:9</p> <p>amount 5:12 15:6 54:21 56:1,21</p> <p>amounts 42:5,19 42:21 43:4 50:20 60:19</p> <p>analyze 44:11</p> <p>analyzing 48:19 50:25 51:1</p> <p>ancient 37:21 38:22</p> <p>answer 5:7 7:12 9:11,24 10:10 11:7 12:23 15:10 16:1 19:10 20:4 21:7 22:4,12 26:10 27:17,23 54:24 56:18,22 60:25 61:23</p> <p>answers 12:19 12:21 36:17</p> <p>anticipate 60:7</p> <p>anybody 4:11</p> <p>anyway 19:8</p> <p>APCC 1:7 3:5</p> <p>appeal 21:3</p> <p>APPEARAN... 1:15</p> <p>applies 26:13 55:5</p> <p>apply 7:4 26:12 34:1</p> <p>approaches 15:8</p> <p>appropriate 24:3 27:21 36:20</p> <p>April 1:10</p> <p>arguably 30:3 56:11</p> <p>argue 7:21 16:18 33:16</p> <p>arguing 32:21 32:24 34:15</p> <p>argument 1:13</p>	<p>2:2,7 3:3,7 13:10 29:7 33:4 34:21 38:18,24 39:9 55:11 59:9</p> <p>arises 15:5</p> <p>arose 31:13 33:1</p> <p>arrangement 6:17 8:17</p> <p>article 3:20,25 4:12,19,24 5:8 5:13,16 6:1,2 6:14 7:11,24 9:13 15:5,17 16:23 17:6,7 17:10,12 21:20 21:22 22:13 27:2,4,7 32:7,8 33:13 34:1,10 34:14,17 35:25 36:3,5 38:23 39:1,6,15 54:7 54:9,11,15,18 54:19,21</p> <p>articulated 20:23</p> <p>ASARCO 17:5 17:13 34:6</p> <p>aside 35:11 50:25</p> <p>assignees 43:23</p> <p>asked 21:10 36:15 44:2 52:8 54:22 55:23 62:1</p> <p>asking 20:9 46:16,17,20 52:13</p> <p>assert 7:6</p> <p>asserted 44:18</p> <p>assign 8:2</p> <p>assigned 9:5 37:24 41:2,9 55:3</p> <p>assignee 3:20,22 4:5,8 6:10 12:23 13:1,19</p>
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