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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 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 receiving, 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 is the
3 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 common stake
9 than I or my clients do in these particular cases, any
10 more than I do in my client's interest in these
11 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, that 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 a different -- I think the
7 answer is that might satisfy Article III. The only
8 reason I'm reluctant to say that that's the line that
9 ought to be drawn is because this Court's taxpayer
10 standing cases seems to recognize that there are
11 situations where there is a sufficiently de minimis
12 amount of 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 agglomerate claims
20 and bring suit as a collection agency, they could simply
21 get their compensation, instead of by way of, of a flat
22 fee, by, you know, claiming entitlement to 2 percent of
23 the rewards. So it's no big deal, I mean, really.

24 MR. PHILLIPS: But it is a big deal, not
25 necessarily because of the importance of the article. I

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

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

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

23 That's -- so it seems to me that, as Justice
24 Scalia suggested, this isn't about a whole lot if just
25 by the device of giving the aggregator part of the, a

1 piece of the action, this suit would be okay because the
2 prudential objections that you are making here would
3 apply just as well.

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

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

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

25 JUSTICE SCALIA: What if all of the

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

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

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

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

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

24 MR. PHILLIPS: That's true, but there are
25 additional trust responsibilities that would attach to

1 that process. There's an entire legal regime to deal
2 with that.

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

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

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

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

20 JUSTICE SOUTER: It seems to me in his
21 example if the trust can sue, why can't the aggregator
22 sue? And your answer was, well, trustees have certain
23 responsibilities. But I don't see that those
24 responsibilities inure to the benefit of your client or
25 to an opposing party in litigation that a trust brings.

1 So I don't see how it would differentiate it.

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

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

18 JUSTICE STEVENS: You mentioned discovery.
19 I don't see why you can't get discovery against this
20 whole bunch of people.

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

23 JUSTICE STEVENS: Subpoenas out there and
24 depositions.

25 MR. PHILLIPS: But, Justice Stevens, if you

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

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

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

17 JUSTICE STEVENS: I would assume the
18 aggregators have the relevant information.

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

20 JUSTICE STEVENS: I would assume the
21 aggregator would have the relevant information.

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

25 JUSTICE STEVENS: But they have to -- they

1 have the burden of proof in the case and I assume they
2 have to investigate the facts and be prepared for
3 trial.

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

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

23 MR. PHILLIPS: Right, but if it's a simple
24 assignee for a debt and nothing more than that, just a
25 power of attorney -- or are you talking about a full

1 assignment?

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

5 MR. PHILLIPS: But in no circumstance --

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

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

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

20 JUSTICE BREYER: You have a discovery be
21 problem. I don't see that it's a standing problem. And
22 two things it reminds me of are, one very common, a
23 financier takes an interest in receivables and he's going
24 to have to collect them as receivables and there may be
25 50,000. That could have the same kind of practical

1 problems. Or we had cases in the First Circuit you may
2 or may not be aware of where somebody went around and
3 had assignments for 50,000 cabbages that were delivered
4 a day late in 50,000 box cars and each one was worth
5 about \$10. Nobody figured a way out of that. They had
6 to pass a special statute.

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

12 MR. PHILLIPS: But, Justice --

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

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

20 MR. PHILLIPS: Well, there are two elements
21 of the standing problem: The first one is we're all --
22 let's be clear -- we're talking about a hypothetical
23 that's different from this case because we're talking
24 about a hypothetical where in fact the assignee has a
25 concrete interest in the outcome of this dispute. Here

1 the assignee has no interest in the outcome of this
2 dispute. So the Article III problem arises there.

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

17 And, indeed, if you read the Respondents'
18 brief, they identify, as the prototype litigation, in
19 which this entire system worked effectively, a claim
20 that was in fact litigated in front of the Federal
21 Communications Commission, not a case that was litigated
22 in front of the Federal court. So, to my mind, the
23 right answer to this case is to take these cases all to
24 the FCC, not as a matter of what we do as primary
25 jurisdiction, but simply as what the plaintiffs do

1 because they don't have the vehicle to bring this to the
2 Federal courts.

3 JUSTICE GINSBURG: But --

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

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

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

23 MR. PHILLIPS: I mean, Justice Ginsburg,
24 that is Spiller. That's what the Court said in Spiller,
25 and I think it's a logical outgrowth of what the Court

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

10 JUSTICE GINSBURG: What is the advantage?
11 You have proposed the FCC route. That obviously wasn't
12 taken here. What is the advantage of going to Federal
13 court on claims like this?

14 MR. PHILLIPS: From my perspective or from
15 the plaintiffs' perspective.

16 JUSTICE GINSBURG: Why would the plaintiff
17 make such a choice if the agency --

18 MR. PHILLIPS: Because the -- the plaintiffs
19 here, the payphone operators, get a free pass in this
20 proceeding. They get all of the benefits of being able
21 to go to Federal court and bring litigation with none of
22 the burdens of having to deal with discovery or
23 cross-claims or counterclaims or even necessarily being
24 bound by doctrines of res judicata and collateral
25 estoppel. So you get all the benefits and none of the

1 disadvantages. That's why it's an advantage for them to
2 go to Federal court.

3 JUSTICE BREYER: How is that different?

4 MR. PHILLIPS: When --

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

11 MR. PHILLIPS: Right.

12 JUSTICE BREYER: And there you might
13 foreclose on the secured interests. Then you as the
14 financier have to collect from everybody. How is your
15 case different from that?

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

17 JUSTICE BREYER: In the respect you were
18 just talking about.

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

23 JUSTICE BREYER: I know, but I mean, there
24 may be many reasons for that. I'm just saying it's a
25 normal, practical problem, I believe, in the banking

1 community. I don't know.

2 MR. PHILLIPS: Right, but most of that's
3 litigated in State courts, in which case there's no
4 serious problem --

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

7 MR. PHILLIPS: Certainly.

8 JUSTICE BREYER: In respect to the problem
9 you were just mentioning, the discovery problem of
10 counterclaims or those problems, is this case any
11 different than the financing case I just mentioned?

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

13 JUSTICE BREYER: No.

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

23 JUSTICE SOUTER: Could you explain that?
24 That really goes back to your answer in Justice
25 Ginsburg's question and I'm not getting it. She said

1 why would you go to the Federal court if you can you go
2 to the FCC, and you said, well, you get the benefits of
3 being in Federal court. What -- I should be asking
4 other counsel this question, but as you understand it
5 what is the benefit of being in the Federal court rather
6 than the FCC that makes this so attractive?

7 MR. PHILLIPS: I guess I would encourage you
8 to ask counsel on the other side, because personally I
9 would think that they would have a full and fair remedy
10 --

11 JUSTICE SOUTER: So you don't know of any
12 benefits?

13 MR. PHILLIPS: I'm sorry?

14 JUSTICE SOUTER: You don't know of any
15 benefits?

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

20 JUSTICE SOUTER: Well, you eliminate step
21 one. I mean, you go to the FCC, you win there, then
22 you've got to face an appeal before the Federal courts.
23 Why not go right to the Federal courts immediately? You
24 eliminate one level of litigation.

25 MR. PHILLIPS: Well, and that may well be

1 his answer.

2 JUSTICE SOUTER: Well, I'd like you to go
3 back to the question that Justice Stevens, Justice
4 Breyer, and I asked you. You said, oh, there's a
5 problem, there's no counterclaim, we can't get the
6 information. And we say, well, that happens in every
7 accounts receivable assignment; there's no problem
8 there. And then you say, well, that should be in State
9 court. That's not right.

10 I thought it was agreed, stipulated by you
11 at the outset, that if there's a standard assignment for
12 collection you can be in the Federal court; there is
13 standing.

14 MR. PHILLIPS: Right, there is Article III.

15 JUSTICE SOUTER: And Article III.

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

18 JUSTICE SOUTER: If you're saying, if you're
19 saying that it's the aggregation that makes it difficult
20 to reach everybody, well, that's a question of
21 discovery, and it's still the aggregator's
22 responsibility. If the aggregator can't answer
23 necessary questions for discovery of the suit, the
24 suit's dismissed.

25 MR. PHILLIPS: Well, that may or may not

1 have happen. But let's be clear, okay. The core
2 question here is whether or not an aggregator who has no
3 claim, who has no stake at all, not a penny's worth, can
4 pursue this litigation. On that it seems to me the
5 answer got -- should be no. There's no benefit to it.
6 The concrete stake is a core requirement of Article III
7 and the Court ought to enforce it as a separation of
8 powers question.

9 The issue that we've been discussing here is
10 what do you do when you get past that, and when you have
11 a kind of a bounty that's been attached to it, and how
12 do you resolve that? In that situation, which is not
13 this case, I still think that there would be grounds for
14 prudential standing to serve as a basis to eliminate
15 this kind of litigation. On the other hand, it may well
16 --

17 JUSTICE GINSBURG: But you said --

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

19 JUSTICE GINSBURG: You said the aggregator
20 had -- that the aggregator could sue on behalf of these
21 1400 plaintiffs naming every one of them as a named
22 plaintiff in this complaint and still the aggregator
23 would run the show because they each authorized the
24 aggregator to conduct the litigation.

25 MR. PHILLIPS: Right.

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

4 MR. PHILLIPS: Well, I mean, the price you
5 pay -- bless you -- is that when you bring Federal court
6 litigation -- is that you have to have -- you have to
7 expose yourself to exactly the burdens that come with
8 it.

9 JUSTICE SOUTER: You also pay a price. I
10 thought that's what you were going to get at. Talking
11 about prudential standing, 1400 filing fees is pretty
12 prudential.

13 MR. PHILLIPS: Right. Federal courts
14 clearly have an interest in that.

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

18 MR. PHILLIPS: They can join in a single
19 complaint. You know, the court can consider whether or
20 not it thinks joinder is appropriate under those
21 circumstances, but they could unquestionably do that.
22 But then, again, they are then at that point a plaintiff
23 in the litigation having brought this action and,
24 therefore, subject to all of the burdens of being a
25 plaintiff in the litigation, including submitting

1 themselves to the personal jurisdiction of the court.

2 I mean, let's be clear about this. There
3 are 1400 names out of people all over the country that
4 under the -- under the plaintiffs aggregators' theory we
5 have to go chase down in order to obtain discovery, to
6 obtain any of our counterclaims or anything like that.
7 Whereas if they come into this Court and they submit
8 themselves to the jurisdiction, at least the process
9 works as the Federal Rules of Civil Procedure --

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

16 MR. PHILLIPS: Well, I don't doubt that the
17 trial court can do that, but the question is: Why do we
18 have to go to the burden of having to chase all of that
19 in the first instance?

20 I mean, the Respondent's brief at page 10
21 criticizes us for not having brought 1400 third-party
22 complaints, not having sought additional discovery. All
23 of those are burdens that simply arise in this context
24 that otherwise do not exist in an ordinary case where
25 you simply ask the party who has the actual claim to be

1 the plaintiff in front of the court.

2 And that's -- and, again, just to be clear,
3 we are still here dealing with the hypothetical. We're
4 not dealing with the core question of what do you do
5 with a plaintiff who has not one penny at stake in
6 litigation that, as the lawyers describe, is all hard
7 cash.

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

14 And I don't see how you can get the benefits
15 that you are claiming entitled to without having 1400
16 separate actions. If you don't have 1400 separate
17 actions, whether you have an aggregation like this,
18 whether you have a joint action, whether you have a
19 class action, this problem of chasing down, as you
20 describe it, is going to be there.

21 So it seems to me the prudential question
22 for this Court is: Do we really want to require 1400
23 separate actions so that you can have your perfect
24 paradigm of private litigation? And to say, yes, we
25 want 1400 actions, it seems to me is a stretch. What do

1 you say?

2 MR. PHILLIPS: I think the answer to that is
3 that when you -- when you deal with mass tort
4 litigation, the Rules of Civil Procedure ought to apply
5 in that context as it applies in every other place. And
6 when the courts deviate from the standard paradigm for
7 litigation, they do it expressly, either through the
8 rules or through doctrines that already exist.

9 And so we have Rule 23, which sets out very
10 clear protections for both the courts -- or not only for
11 the courts, but for the plaintiffs and for the absent
12 defendants -- absent, absent plaintiffs and for the
13 defendants, and is a clear mechanism for conducting 1400
14 claims all once in a particular situation.

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

17 MR. PHILLIPS: It goes directly --

18 JUSTICE SOUTER: It has nothing to do with
19 Article III standing.

20 MR. PHILLIPS: No, to be sure. Again, I
21 don't think that -- I mean, the Article III debate here
22 seems to me to turn solely on the question of there is
23 no stake in the outcome of this case. That's a bedrock
24 requirement of Article III and ought to be a basis for
25 simply reversing. But, you know, to the extent that the

1 Court then goes beyond that and worries about what's the
2 next case going to look like and what are the prudential
3 limitations, which I don't think the Court has to
4 resolve any of this, what I would suggest is the Court
5 should be informed by Rule 23 and associational standing
6 and those doctrines --

7 JUSTICE SOUTER: Are you saying, in effect,
8 that if we get to the prudential-standing point, the
9 answer is that in the absence of a rule comparable to
10 Rule 23 we should not recognize prudential standing, but
11 that if we adopted a rule that sort of regulated how
12 this would work, prudential standing would be
13 appropriate? Is that basically it?

14 MR. PHILLIPS: I think that's the right
15 answer, is that the Court shouldn't just make it up as
16 it goes along. And if there is a need for this -- look,
17 and the truth is we've been here 200 years. We haven't
18 had to have aggregator standing all of this time. It
19 strikes me that there's no compelling need for a change
20 and that for that reason the Court ought to go back to
21 the paradigm example, plaintiffs sue defendants and you
22 have normal discovery and counterclaims.

23 JUSTICE GINSBURG: Is there any significance
24 to this being the -- this assignment transfers legal
25 title. True, there's an obligation to pay, to pay the

1 separate PSPs. But does anything turn on legal title?
2 For example, suppose the -- I gather the check would be
3 payable to the aggregator if the aggregator prevails.
4 Could a creditor of the aggregator come in and say,
5 stop, you owe me lots of money and I want to reach those
6 proceeds?

7 MR. PHILLIPS: That -- I mean the proceeds
8 -- I assume -- do those claims arise out of the
9 relationship between the payphone operators and the
10 aggregator?

11 JUSTICE GINSBURG: No.

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

14 JUSTICE GINSBURG: These are just the
15 creditors. Or the aggregator goes bankrupt.

16 MR. PHILLIPS: I assume those moneys could
17 be taken out of the aggregator and then the PSP would
18 have a claim over against the aggregator for breach of
19 contract.

20 If I could reserve the balance of my time.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Mr. Phillips.

23 Mr. Englert.

24 ORAL ARGUMENT OF ROY T. ENGLERT, JR.

25 ON BEHALF OF THE RESPONDENTS

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

3 One of the last things Mr. Phillips said was
4 there's no need to change the law in this case and I
5 strongly agree with that. Assignees for collection have
6 been litigating in Federal courts since at least the
7 19th century and there is not one decision cited in any
8 of the briefs in this case in which an assignee's
9 lawsuit was dismissed solely because of what the
10 assignee intended to do with the proceeds.

11 JUSTICE SCALIA: But also not one in which
12 the issue of standing was raised and decided. And our
13 jurisprudence says that where we do not address the
14 issue of standing the case has no precedential value on
15 the subject.

16 MR. ENGLERT: Justice Scalia, a single
17 decision, a small body of decisions that don't address
18 the issue of standing, can be looked at in that way.
19 But a unanimous body of case law, two decisions from
20 this Court, arguably a third decision from this Court,
21 many decisions from lower courts -- JUSTICE

22 SCALIA: I don't consider two decisions an enormous
23 body.

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

1 JUSTICE SCALIA: Well, we don't count the
2 lower courts.

3 (Laughter.)

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

16 I am assuming that your position would be
17 the same; is that correct?

18 MR. ENGLERT: Absolutely.

19 JUSTICE SOUTER: Now, my question is, you're
20 taking that position, I think, just as you did in
21 response to Justice Scalia, on the grounds that there is
22 a huge body of law that assignment for collection
23 conveys adequate standing. But are any of the
24 assignment for collection cases in that body of law
25 clearly cases like the one in my hypothetical in which

1 the assignment itself by its terms requires the total
2 payment of any benefit back to the assignor?

3 MR. ENGLERT: Justice Souter, the cases
4 don't always discuss the way in which the assignment
5 arose. But typically, in those cases they simply say,
6 there are these two promises, and they say the fact that
7 there is a second promise makes no difference. That's
8 my position. The fact that there's a second promise,
9 whether in the same document or in a different document,
10 makes no difference.

11 JUSTICE SCALIA: What's the earliest of
12 those cases in our Court?

13 MR. ENGLERT: The earliest case --

14 JUSTICE SCALIA: The earliest case in our
15 Court that upholds this that, without specifically
16 addressing the standing issue, gives judgment?

17 MR. ENGLERT: The earliest case that gives
18 judgment is Spiller in 1920.

19 JUSTICE SCALIA: 1920?

20 MR. ENGLERT: Yes.

21 JUSTICE SCALIA: In Vermont Agency, in the
22 Vermont Agency case, which dealt with qui tam, that many
23 people, including the Justice Department, thought did
24 not confer Article III standing, we held to the contrary
25 that it did confer Article III standing, mainly because

1 it had been around forever. It was -- it was the
2 understood part of the judicial power when the
3 Constitution was adopted.

4 Do you have any case prior to 1920 in which
5 English courts or even early American courts thought
6 that this, that this would be sufficient to bring a
7 lawsuit?

8 MR. ENGLERT: Well, assignee standing, not
9 assignee for collection standing but assignee standing,
10 is referred to in Blackstone's Commentaries
11 contemporaneously with the Constitution.

12 JUSTICE SCALIA: Sure, but --

13 MR. ENGLERT: This wrinkle of arguing --

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

16 MR. ENGLERT: But the wrinkle of arguing
17 that that makes a difference as far as I know first
18 arose in the 19th century. And every single case and
19 every single Federal court that has considered the
20 question under any body of law has rejected the
21 argument.

22 JUSTICE SCALIA: What's the earliest Federal
23 court case you have?

24 MR. ENGLERT: Late 18th -- late 19th
25 century.

1 JUSTICE SCALIA: Late 19th century?

2 MR. ENGLERT: Yes.

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

8 MR. ENGLERT: Well, as you know, I argue
9 that the Vermont Agency case strongly supports us. But
10 if you want a case specifically about assigning
11 collection, then the latest case I have is Titus in
12 1939.

13 JUSTICE ALITO: Well, aren't Titus and
14 Spiller different in that there the assignee is suing on
15 a judgment that was obtained in a forum where Article
16 III didn't apply?

17 MR. ENGLERT: No, absolutely not, Justice
18 Alito.

19 JUSTICE ALITO: Why isn't that irrelevant?

20 MR. ENGLERT: Because for the exact reason
21 Mr. Phillips gave you. The ASARCO case and Coleman v.
22 Miller, Justice Frankfurter's concurring opinion, and a
23 number of other cases stand for the proposition that a
24 party who invokes the jurisdiction of this Court or of
25 any other Federal court must satisfy Article III. So

1 when Spiller, the secretary of the Cattleman's
2 Association, went to the Federal district court seeking
3 enforcement of the reparations award he had gotten
4 before the ICC, he had to satisfy Article III.

5 When Titus came to this Court arguing that
6 the lower courts had not properly given full faith and
7 credit, he had to satisfy Article III. Each of those
8 parties invoking the jurisdiction of the Federal court
9 was someone who had to turn over 100 percent of the
10 proceeds to the assignors. And in each case this Court
11 rejected the argument that he was not a proper
12 plaintiff.

13 CHIEF JUSTICE ROBERTS: Counsel, you say in
14 your brief that there is no reason for concern about the
15 absence of concrete adverseness. But I would have
16 thought there was a great deal of reason for concern and
17 that your client doesn't care if he wins or loses.

18 MR. ENGLERT: My client --

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

22 MR. ENGLERT: Well, that's -- that's false
23 in every possible respect, Your Honor. He does keep --
24 get to keep some of the money. Now, we haven't proved
25 that in the lower court. It's an allegation at this

1 point, but it happens to be true. But aside from
2 that --

3 CHIEF JUSTICE ROBERTS: I thought the
4 question came to us on the assumption that he doesn't
5 retain any of the money.

6 MR. ENGLERT: On the assumption, but not the
7 fact.

8 Second, my client's whole reason for
9 existence is to collect payphone compensation. This is
10 what my client does day in and day out.

11 CHIEF JUSTICE ROBERTS: But I thought our
12 cases made clear that that kind of -- -- I forget what
13 we call it -- it's a separate interest from the injury
14 that you're alleging in the lawsuit. You don't allege
15 in the lawsuit that the basis for Article III injury is
16 that you're in this line of work and if the work dries
17 up you're in big trouble. That wouldn't be enough to
18 support Article III standing.

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

22 CHIEF JUSTICE ROBERTS: Well, but then why
23 is the assignee bringing the lawsuit?

24 MR. ENGLERT: The assignee --

25 CHIEF JUSTICE ROBERTS: He had no

1 independent injury.

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

8 The discovery in Federal court, the
9 discovery available in Federal court, is more
10 appropriate to -- is more necessary in a large case, a
11 \$200 million case like this one, than in a relatively
12 small case --

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

15 MR. ENGLERT: We did.

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

18 MR. ENGLERT: The -- the assignee's
19 injury --

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

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

25 CHIEF JUSTICE ROBERTS: No. But you know,

1 Vermont Agency, obviously, the assignee recovers
2 something himself, that he gets to keep the bounty.
3 Here that's not the case.

4 MR. ENGLERT: Here that's not the case, but
5 the reasoning of Vermont Agency specifically rejected
6 the proposition that the bounty was helpful to the
7 assignee's standing. And there is not a word in Vermont
8 Agency that says when you combine the bounty with the
9 assignor's interest that's enough. It just says the
10 assignor's interest is enough, full stop, because of the
11 ancient doctrine.

12 JUSTICE GINSBURG: I thought it said -- I
13 thought it said, Mr. Englert, that, that the United
14 States has -- is treated as having assigned part of its
15 claim for damages to the qui tam relator, and that gave
16 the qui tam plaintiff a stake in the action, a stake in
17 the proceeds. I thought that Vermont Agency -- and
18 Justice Scalia will correct me if I'm wrong -- was
19 envisioning the kind of assignment that Judge Sentelle
20 was talking about when he said there are assignments and
21 then there are assignments.

22 JUSTICE SCALIA: I was under the same
23 misimpression, I have to say, and I wrote it.

24 (Laughter.)

25 MR. ENGLERT: The -- the assignment in this

1 case conveys all right, title and interest. It conveys
2 it for purposes of collection to be sure, but it conveys
3 all right, title and interest.

4 Now, the proposition that the "for purposes
5 of collection" purpose of an assignment negates the
6 ability of the plaintiffs to sue is one that has been
7 litigated many times in Federal courts, and that
8 argument has been rejected in every case in which it's
9 come up until now, including two from this Court. So
10 between the fact that the reasoning of Vermont Agency,
11 whatever the facts were, relied on the interest of the
12 assignor, relied on the ancient doctrine that the
13 assignee for Article III purposes stands in the
14 assignor's shoes, and the fact that this argument has
15 been rejected in every case in which it's come up, I
16 think the case for Article III standing is quite strong
17 here.

18 JUSTICE SCALIA: I must say we seem to have
19 come full circle from Flash v. Cohen, which said that
20 the doctrine of standing had nothing whatever to do with
21 Article III. That it all -- the only thing it's there
22 for is to assure that concrete adverseness on which our
23 adversary system depends. You've come full circle from
24 that to now your argument that concrete adverseness
25 doesn't matter at all.

1 MR. ENGLERT: Oh, Justice Scalia --

2 JUSTICE SCALIA: Is there a combination of
3 the two that's possible, that maybe one of the elements
4 of Article III standing is that both parties have a
5 stake in winning and losing?

6 MR. ENGLERT: There is tremendous concrete
7 adverseness in this case. And both parties have a great
8 stake in winning and losing. The -- the aggregator
9 doesn't get to keep the money, although actually it
10 does, but this case can be decided on the assumption,
11 subject to remand that it doesn't get to keep the money.
12 But it exists for the purpose of bringing -- of
13 obtaining redress from carriers obtaining payphone
14 compensation from carriers, usually outside the
15 litigation process. But this is -- but this is what my
16 client does -- what my clients do.

17 CHIEF JUSTICE ROBERTS: The Sierra Club
18 protect -- undertakes activities to protect the
19 environment, but that doesn't give it standing in every
20 environmental case to sue. It needs to show members
21 what the concrete interest and so on. The fact that
22 your client is in the business of suing on behalf of
23 payphone operators --

24 MR. ENGLERT: My client is not in the
25 business of suing on the business of payphone operators.

1 My client is in the business of collecting, usually
2 outside the litigation process. This is merely an
3 extension of the day-to-day operation.

4 JUSTICE KENNEDY: Can you tell me is this
5 1,400 causes of action or is it one?

6 MR. ENGLERT: One.

7 JUSTICE KENNEDY: How does that come about?
8 Suppose a lot of people owe the bank -- a lot of farmers
9 owe the bank money, can there be assignment in this one
10 cause of action?

11 MR. ENGLERT: Sure. And let me give you
12 one --

13 JUSTICE KENNEDY: And how does the law
14 express the metaphysical process in which 1,400 causes
15 of action become one cause of action?

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

19 JUSTICE KENNEDY: Well, there is not a
20 representative cause of action. What is the magic point
21 at which it becomes one cause of action?

22 MR. ENGLERT: The point at which they are
23 all assigned to one entity that then brings the cause of
24 action, and importantly, has authority to settle the
25 cause of action without any further permission from the

1 clients. The -- a very, very important protection here
2 for Mr. Phillips --

3 JUSTICE KENNEDY: I'm still missing
4 something here. Can you give me an example of where
5 this has happened in other cases that this Court has
6 heard that are commonly heard?

7 MR. ENGLERT: Every Rule 23 class action,
8 every associational standing case, every trustee action.

9 JUSTICE KENNEDY: I interrupted you and I
10 talked over you. Every Rule 23 cause of action and what
11 else?

12 MR. ENGLERT: Every associational standing
13 case, every action brought by a trustee.

14 JUSTICE KENNEDY: Well, associational
15 standing, Sierra Club v. Morton, they are interested in
16 an ongoing injury in which there is a common -- in which
17 there is a common injury. These are liquidated amounts.

18 MR. ENGLERT: But that's not uncommon, Your
19 Honor. Justice Souter's opinion for the Court in United
20 Food and Commercial Workers v. Brown reported a Seventh
21 Circuit case that said representative damages litigation
22 is common from class actions under Rule 23 to suits by
23 trustees representing hundreds of creditors in
24 bankruptcy, to parent patriot actions by State
25 governments to litigation by and against executors at

1 decedent's estates. This is something that happens
2 every day in Federal court.

3 JUSTICE KENNEDY: Those are usually ongoing
4 injuries as to which there's a common interest in
5 stopping the injury. Here you're aggregating liquidated
6 amounts.

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

11 JUSTICE KENNEDY: I might understand it if
12 was some sort of injunction actions -- in the future
13 please pay what you're supposed to pay.

14 MR. ENGLERT: No. But, Justice Kennedy,
15 consider the typical Rule 23 damages action, which is
16 about amounts due in the ordinary case. You have one
17 cause of action on behalf of the class instead of many
18 causes of action on behalf of many people. It happens
19 all the time.

20 JUSTICE KENNEDY: But that's allowed because
21 the requisites for class actions have been met and
22 that's authorized by the rule. That's not true here.

23 MR. ENGLERT: Because we have something much
24 better here. What we have here, Justice Kennedy, is
25 assignments of the cause of actions by every plaintiff

1 to my clients completely --

2 JUSTICE KENNEDY: There are a lot of better
3 procedures that are in the rules but it is not in the
4 rule.

5 MR. ENGLERT: Actually there is. Rule 17
6 was put in the rules. And if you read the works of
7 Judge Charles Park, you will see that Rule 17 was put in
8 the rules to authorize justice kind of action to be
9 brought in the name of assignees, including assignees for
10 collection. And one year after he joined the Federal --

11 JUSTICE STEVENS: May I ask a fact question?
12 I'm just a little puzzled here. I probably should have
13 asked Mr. Phillips. But what issues in fact are there
14 going to be in this case? It seems to me everything
15 ought to be on computer somewhere, and it's just a
16 matter of pushing the right button and you know how much
17 money you owe. Am I missing something?

18 MR. ENGLERT: You're not missing something,
19 Justice Stevens. That's what this case is about, is
20 computer records, massive computer records in possession
21 of the carriers and some tools the aggregators have to
22 analyze computer records.

23 JUSTICE SCALIA: Except for counterclaims.
24 He says I have some counterclaims.

25 MR. ENGLERT: He says he has some

1 counterclaims, but in nine years of litigation his
2 clients have never used Rule 19; they have never used
3 Rule 22; they have never made any effort -- he says we
4 have asserted they have to go out and bring 1,400
5 separate lawsuits. What we said on page 10 of our brief
6 was they have never tried in nine years of of litigation
7 to use --

8 JUSTICE GINSBURG: Well, what did they do?
9 I mean, you mention necessary parties but these other --
10 on your own theory the PSPs are not necessary parties,
11 and this -- this is a defendant seeking to join
12 additional plaintiffs, and that's rather odd. And you
13 also talk about interpleader. I don't know who is the
14 stakeholder in this picture.

15 MR. ENGLERT: Well, Your Honor, my point is
16 that there are many procedural devices available to deal
17 with many situations like this, Rule 19 and Rule 22 and
18 separate lawsuits. If there were serious counterclaims
19 in this case, first of all as a factual matter, AT&T and
20 Sprint would know it from their own records and second,
21 they would have done something in nine years to try to
22 bring a claim against PSP, and they have done nothing in
23 nine years. So this is a very, very odd case in which
24 to be worrying about whether they have lost some
25 counterclaim rights because the PSPs -- lost some

1 counterclaim rights because the PSPs aren't individual
2 parties.

3 It's also a very odd case in which to be
4 worrying about discovery rights because the PSPs aren't
5 individual parties because that issue was resolved in
6 their favor in 2000 by the special master's discovery
7 order saying, just as Justice Stevens postulated, the
8 aggregator to go out and get the information from the
9 PSPs.

10 Now they complained that some of the PSPs,
11 some of these mom and pop operations, said we don't have
12 any information. That's because for the most part the
13 PSP don't have any information. The information resides
14 with the carriers and with the aggregators. So as a
15 purely practical, pragmatic matter this is not the case
16 in which to be worrying that some discovery rights have
17 been lost; this is not the case in which to be worrying
18 in which some counterclaim rights have been lost; this
19 is not the case in which to be worrying that my clients
20 aren't bound. Every single -- I'm sorry, that the PSPs
21 aren't bound, the assignors aren't bound, because every
22 single one of them has signed an agreement, or two
23 agreements, really, saying they will be bound. What
24 this comes down to is a series of abstractions put up
25 against the tradition of allowing lawsuits by assignee

1 for collection.

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

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

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

17 MR. ENGLERT: Well --

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

25 Now that might be right. And if it is right

1 or whether it's right, can the FCC work this out?

2 MR. ENGLERT: Your Honor, several points if
3 I may. 47 U.S.C. in section 276 says that payphone
4 service providers are to be compensated for each and
5 every payphone call. So it was Congress's purpose to
6 make any 24 cent call compensable, and the FCC set up a
7 very elaborate system to make them keep records.

8 JUSTICE BREYER: I'm aware of that system.
9 I'm aware of that.

10 MR. ENGLERT: Well, as -- and there is about
11 \$200 million at stake in this case so this is not about
12 each 24-cent payphone call individually. This is a
13 properly advocated case.

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

17 MR. ENGLERT: There are.

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

23 MR. ENGLERT: Your Honor, my client has
24 brought scores of these actions -- my clients have
25 brought scores of these actions, some before the FCC,

1 the largest ones -- and this is the largest one of
2 all -- in Federal court to get the advantage of the
3 discovery processes in Federal court. Most of these
4 cases settle. These cases as Justice Stevens pointed
5 out are about analyzing computer records, and you can
6 fight to the death or you can say let's figure out who
7 owes whom what and let's settle; and most of the cases
8 settle. There is no reason why there should be any more
9 or less incentive to settle when the case is before the
10 FCC than when it's before a Federal court.

11 JUSTICE BREYER: In settlement they may work
12 out. But if it is -- for example costs a dollar to
13 fight a claim that's worth 12 cents, individually,
14 before you get to billions, they don't want to be in
15 that situation where they are really paying money for
16 nothing; because in their opinion they already paid.

17 I mean we understand this kind of problem.
18 So I go back to my question. They have one view of it;
19 you have another of what's going on here. And their
20 view is very unfavorable to your clients and your
21 clients' view is very unfavorable to their clients. So
22 I would like to know is there a way to get this worked
23 out at the FCC? Maybe that will turn out not to be
24 relevant in this case but I'd still like to know your
25 opinion.

1 MR. ENGLERT: Well, this case was brought in
2 Federal court under a statute that permits the
3 plaintiffs to choose whether to go to Federal Supreme
4 Court or the FCC. The reason it's nine years old is not
5 because we didn't sue immediately; it's because we've
6 been litigating for nine years about our right to
7 litigate.

8 Does the FCC have a useful role to play in
9 this process at this point? Never say never, but I
10 don't see one. The case was brought in Federal court
11 under a doctrine that has always allowed assignees for
12 collection to sue in Federal court, and there is no
13 reason I can think of why it shouldn't proceed in
14 Federal court.

15 JUSTICE SCALIA: Mr. Englert, is this one
16 lawsuit or 1,400 lawsuits, or however many clients you
17 have?

18 MR. ENGLERT: It's one lawsuit.

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

23 MR. ENGLERT: We, after Judge Sentelle
24 dismissed this case, we moved to the alternative to
25 amend our complaint to add either 1,400 individual

1 plaintiffs or a class action. The plaintiffs opposed
2 that, and then she reversed herself on --

3 JUSTICE SCALIA: They opposed it on what
4 seems to be a reasonable ground, that each of these
5 claims is quite different. There are different calls,
6 different -- different amounts owing. Each case is not
7 going to be judged on the same -- on the same facts.

8 MR. ENGLERT: That's really not true,
9 Justice Scalia. Just it's a pure practical matter,
10 leaving aside theory, this is about analyzing computer
11 databases. This is about analyzing call records.
12 Because of the system the FCC set up, none of the
13 information resides with the PSPs; it resides with the
14 aggregators and with the carriers.

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

17 MR. ENGLERT: No, I disagree, Justice
18 Kennedy.

19 JUSTICE KENNEDY: Why didn't you bring it as
20 a class action?

21 MR. ENGLERT: I'm sorry?

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

24 MR. ENGLERT: Because it's so much better to
25 bring it on behalf of individuals who have expressly

1 consented to be bound, than on behalf of people who may
2 not even know about it and who may not have consented to
3 be bound and may not want to be bound as in the typical
4 class action.

5 There are all sorts of problems with class
6 actions. Class actions are typically brought by
7 enterprising law firms who may not ever have met their
8 clients. This is a different litigation altogether.
9 This is litigation by a trade association that exists to
10 collect payphone compensation, doing the same thing it
11 always does, only doing it in court on behalf of 1,400
12 companies that each signed an agreement saying I want
13 you to go do this for me and I agree to be bound by the
14 result. So I can get entitlement interest.

15 JUSTICE BREYER: Do you -- this is giving me
16 a thought here. Just a total imaginary case, nothing to
17 do with your clients. Put yourself in the opposite
18 position. Suppose you were representing a defendant and
19 that defendant were asked by this imaginary plaintiff to
20 dig up records on the computer. To dig up each
21 individual record costs \$1, there were billions of such
22 records, and the value to you, to the other side, the
23 plaintiff, imaginary in this case, was 12 cents a call.
24 Okay? So you say look, those people are asking us to
25 dig up billions of records, it's going to cost us a

1 dollar each to do it, and all they are going to get out
2 of it is 12 cents a call. But of course we are the ones
3 who have to pay the dollar, and they get the 12 cents.
4 Now, is there a way for the legal system to solve that
5 problem?

6 MR. ENGLERT: Yes.

7 JUSTICE BREYER: Other than standing.

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

10 JUSTICE BREYER: Well, the defendant says --
11 now your client, I am not going to settle; there are no
12 such claims. This is ridiculous but it's going to cost
13 me a dollar to prove it.

14 MR. ENGLERT: Yeah, the client says millions
15 for defense, but not one cent -- one cent for tribute
16 and every lawyer gets happy, because the client wants to
17 litigate to the death instead of just surrendering to
18 extortion, in that kind of case they have to decide
19 whether the economically rational thing is to set a bad
20 precedent or is to settle.

21 That happens all the day for defense counsel
22 and I'm quite often defense counsel --

23 CHIEF JUSTICE ROBERTS: Speaking -- speaking
24 --

25 MR. ENGLERT -- but this case is not of that

1 nature.

2 CHIEF JUSTICE ROBERTS: Speaking of one cent
3 for tribute, it's easy to get rid of this problem, isn't
4 it?

5 MR. ENGLERT: Prospectively.

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

9 MR. ENGLERT: I agree, and we made that
10 point in our brief in opposition to cert. This case is
11 of no practical significance going forward for the body
12 of the law. There's nothing this Court is going to
13 decide in this case that's going to make a difference.
14 People will just draft their assignment and --

15 CHIEF JUSTICE ROBERTS: So why --

16 MR. ENGLERT: So my clients --

17 CHIEF JUSTICE ROBERTS: Why doesn't the tie
18 go to Article III? I mean if it makes no difference
19 either way I'd like to preserve significance of Article
20 III as a limit on court jurisdiction.

21 MR. ENGLERT: Article III is a proper and
22 important limit on court jurisdiction when it restricts
23 court jurisdiction. When we have a traditional cause of
24 action, the abstractions that have come to be thought of
25 as Article III jurisprudence don't trump tradition.

1 CHIEF JUSTICE ROBERTS: Well, but --

2 MR. ENGLERT: What Article III --

3 CHIEF JUSTICE ROBERTS: Well, Article III
4 does trump tradition. I mean, if it doesn't meet
5 Article III, no amount of tradition can save it. And
6 you several times refer, when asked one of these
7 questions, to the tradition and the old cases, but I
8 haven't heard an answer yet to the concrete injury that
9 is suffered by the aggregators.

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

24 JUSTICE GINSBURG: The significance --

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

1 JUSTICE GINSBURG: -- to the legal title,
2 would it make a difference if the assignee did not have
3 legal title, was just --

4 MR. ENGLERT: Oh, it would make a huge
5 difference, Justice Ginsburg.

6 JUSTICE GINSBURG: So -- but is that just a
7 formality? For example, the question I asked
8 Mr. Phillips. Could a creditor of the aggregator get at
9 this money when the check is paid by AT&T and Sprint and
10 therefore reduce the amount available to distribute to
11 the PSPCs?

12 MR. ENGLERT: Well, if we assume insolvency
13 and we assume a secured creditor, then, yes, I think the
14 PSPs are general unsecured creditors, and the secured
15 creditor is in line ahead of them. Different facts,
16 different results. But, yes, it does make a difference
17 if the assignee enters insolvency, which is not going to
18 happen in this case, but if the assignee enters
19 insolvency and if there is a creditor that arguably
20 under insolvency principles has a higher claim than the
21 PSPs, yes, it does make a difference to the assignee.

22 JUSTICE GINSBURG: How about for tax
23 purposes? Must the aggregator report the proceeds as
24 income?

25 MR. ENGLERT: Your Honor, I'm sorry. I just

1 don't know the answer to that question. I'm guessing
2 they either don't report them as income or they report
3 them as income, but then have a deduction in the exact
4 same amount. But I really don't know the exact answer
5 to that.

6 JUSTICE SCALIA: Mr. Englert, can you
7 explain to me again how it is that when you acquire 14
8 separate choses in action, 14 separate claims, against
9 the same defendant, just by your acquiring them they
10 sort of melt into one cause of action. How does that --
11 how does that happen?

12 MR. ENGLERT: That happens the same way it
13 happens under Rule 23. It happens the same way it
14 happens with the trustee who is representing people who
15 would otherwise have many different causes of action.
16 It's a very common thing in Federal court. If the -- if
17 a bankruptcy trustee or if a class representative brings
18 a lawsuit on behalf of many people, then there is one
19 cause of action instead of the many causes of action
20 there would be if those many people sued directly. It's
21 not an issue.

22 CHIEF JUSTICE ROBERTS: In all of those
23 cases, the class action, the trustee, you know, the
24 named plaintiff, the named trustee has concrete injury
25 and redressability to themselves?

1 MR. ENGLERT: No more than my clients.

2 CHIEF JUSTICE ROBERTS: Very much more than
3 your clients. The trustee has legal obligations that he
4 has to discharge. If it's a suit that he has to bring
5 on behalf of the beneficiaries and doesn't do it, he is
6 sued for breach of trust. In a class action case, the
7 representative has to have standing, has to show
8 concrete injury and redressability. Here we don't have
9 any of that.

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

15 JUSTICE KENNEDY: But why do we have Rule 23
16 that requires certification of a class action? If you
17 can say, well, I don't need Rule 23, I'm going to take
18 1400 claims and make them one any way.

19 MR. ENGLERT: For very good reasons. Rule
20 23 exists to protect absent plaintiffs, something we
21 don't have here, and to protect defendants so that they
22 will know there will be a res judicata effect of the
23 judgment, whether for them or against them, so that they
24 can't be sued by other class members.

25 They have those protections. In fact, if

1 you read the blue and yellow briefs in this case, they
2 keep referring in the abstract to the protections of
3 Rule 23, but they don't identify a single concrete
4 protection that they do not have under this system.
5 Rule 23 is inferior to an action by assignees for
6 collection in every imaginable way. It's not a superior
7 alternative. And to say that the existence of Rule 23
8 means we should throw out a traditional form of action
9 that's been recognized for well over a century would be
10 a very surprising result.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 Mr. Englert.

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

17 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS
18 ON BEHALF OF THE PETITIONERS

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

20 The specific protection is that the courts
21 determine how the settlements will play out. They make
22 sure that all of the requirements of Rule 23 are
23 satisfied before the litigation goes forward. That
24 means that there is a demonstration of commonality, that
25 there -- the predominance issue is resolved, that this

1 is a matter that should be litigated in this forum
2 because it is a more efficient mechanism for litigating
3 it, not because the assignor -- assignee decided that
4 this is more efficient way from the assignee's
5 perspective --

6 JUSTICE KENNEDY: And are problems --

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

8 JUSTICE KENNEDY: Are the requirements of
9 typicality and -- the same type of injury designed in
10 part to preserve the rights of the defendant?

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

19 JUSTICE GINSBURG: But wouldn't you --

20 MR. PHILLIPS: -- or associational standing.

21 JUSTICE GINSBURG: Suppose this had been
22 mounted as a class action. I take it you would oppose
23 certification.

24 MR. PHILLIPS: To be sure, and my answer is
25 --

1 JUSTICE GINSBURG: And one of the reasons
2 would be that these are all different situations,
3 different amounts involved in each case? Some -- you
4 would have a counterclaim, not others. I assume you
5 would say they're not a lot alike. Not at all alike.

6 MR. PHILLIPS: Absolutely, Justice Ginsburg.
7 We would oppose it. I don't think that this is a proper
8 case for class certification. But it seems to me that
9 that doesn't mean okay, and, therefore, the answer to
10 this is: Come up with some other contrivance in order
11 to litigate this in a way that obviously maximizes the
12 convenience to one side without regard to the
13 protections that are designed both for the defendant and
14 for the court that's embodied in Rule 23.

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

19 MR. PHILLIPS: Well, it's interesting
20 because they -- in one -- in the assignment part of it
21 they say they are bound, but on the -- on the separate
22 set of the agreement it talks about the reasonable
23 discretion of the assignor -- assignee. So the
24 agreement is, to my mind, inherently contradictory as to
25 what are the obligations.

1 JUSTICE STEVENS: Which -- the assignees,
2 but the assignors have agreed to be bound --

3 MR. PHILLIPS: Well, if it's reasonable --
4 it says reasonable discretion. And so the question is,
5 you know, is this -- was that an exercise of reasonable
6 discretion? And I don't know the answer to that in any
7 given case.

8 And I think part of the -- Justice Kennedy
9 and Justice Breyer, you asked the question about above
10 and beyond discovery, what are the other problems that
11 arise when you go down this -- and the more -- the other
12 one is that being bound by the judgment.

13 If you have a complete assignment of the
14 chosen action, the assignee, then, is completely bound.
15 There is nothing left. The assignor has no rights left.
16 There is nothing left for the assignor to do in that
17 situation; whereas, in these kinds of situations where
18 the assignee receives the right to go forward but the
19 remedy is in another party's hands, the potential for
20 being bound is completely lost.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Mr. Phillips. The case is submitted.

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

25

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