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IN THE SUPREME COURT OF THE UNITED STATES

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COMCAST CORPORATION, ET AL., :

Petitioner s : No. 11-864

v. :

CAROLINE BEHREND, ET AL. :

- - - - - x

Washington, D.C.

Monday, November 5, 2012

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:04 a.m.

APPEARANCES:

MIGUEL ESTRADA, ESQ., Washington, D.C.; on behalf of
Petitioners.

BARRY BARNETT, ESQ., Dallas, Texas; on behalf of
Respondents.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 11-864, Comcast Corporation v. Behrend.

Mr. Estrada.

ORAL ARGUMENT OF MIGUEL ESTRADA
ON BEHALF OF THE RESPONDENTS

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

The Third Circuit held in this case that the assessment of the adequacy of expert evidence offered in support of class certification is a merits question that has no place in the class certification inquiry.

According to the Third Circuit and to the plaintiffs in this Court, what is sufficient is for the proponents of class certification to point to some abstract methodology, such as econometrics or regression analysis, that conceivably might be applied to the problem at hand in a way in which, in the fullness of time, will evolve into admissible evidence by the time of the class trial.

JUSTICE GINSBURG: Mr. Estrada, you are limiting your argument to the determination of damages, as I understand it.

1 MR. ESTRADA: I think you limited my
2 argument to determination of damages, Justice Ginsburg.

3 (Laughter.)

4 JUSTICE GINSBURG: Because the -- because
5 the Third Circuit agreed that, as far as any antitrust
6 impact --

7 MR. ESTRADA: Yes.

8 JUSTICE GINSBURG: -- that could be
9 established on a class basis.

10 MR. ESTRADA: We -- we, obviously -- as is
11 obvious from our cert petition, we do not agree with
12 that. For purposes of inquiring into the damages
13 question in this Court, I think we have to assume that
14 that is so. I think it doesn't change the
15 outcome with --

16 JUSTICE GINSBURG: But why -- why not?
17 Because, generally -- and at least it's my impression --
18 that in class certifications, if the liability question
19 can be adjudicated on a class basis, then the damages
20 question may be adjudicated individually.

21 Take a -- take a Title VII case. A
22 liability -- a pattern of practice of discrimination,
23 therefore, liability, but damages can be assessed on an
24 individual basis. So why isn't bifurcation possible
25 here?

1 MR. ESTRADA: Well, let me make two points
2 in response to that question, Justice Ginsburg: One
3 about what the legal standards are, and -- you know, the
4 second one, which is as important, about what the record
5 in this case is.

6 With respect to the first point, what the
7 rule asks us to look at is not questions of damages
8 versus liability, but whether the common questions
9 predominate over those that are individual to the class
10 members.

11 I don't disagree, and it is not my position
12 today that there may be cases in which individual
13 damages questions are consistent with class
14 certification. But as the lower courts have recognized,
15 it is not the case that all damages questions may -- may
16 remain individual consistently with class certification.

17 Indeed, the 1966 advisory notes expressly
18 say that questions of damages with respect to class
19 members may or may not predominate in cases like this;
20 i.e., antitrust class actions. Let --

21 JUSTICE KAGAN: But, Mr. Estrada, doesn't
22 Justice Ginsburg's question actually point out that
23 the -- the law that both district court and the
24 circuit court used in this case was actually quite
25 favorable to you?

1 Unlike some courts, both the district court
2 and the circuit court said that the plaintiffs needed to
3 show that there was a class-wide measurement of damages.
4 And then in addition, both courts said, really, it
5 was -- the burden was on the plaintiffs to demonstrate
6 that that class-wide measure of damages existed.

7 Now, I understand that you have problems
8 with the way in which the plaintiffs met that burden.
9 You say that they didn't meet that burden. But it seems
10 to me that the legal standard that was used was exactly
11 the legal standard that you wanted, that the plaintiffs
12 had to come in and show, by a preponderance, that they
13 had a class-wide way to measure damages in this case.

14 MR. ESTRADA: I don't think that's right,
15 Justice Kagan. I think we can have a healthy debate
16 about whether the district court did what you just
17 finished saying. I think there can be no debate that
18 the court of appeals did so because, repeatedly,
19 throughout its opinion, said that the questions as to
20 the adequacy of whether they had complied with the
21 Hydrogen Peroxide Standard was a merits question that
22 was for later adjudication in this case.

23 JUSTICE KAGAN: Well, here's what the
24 district court said. "The experts' opinions raise
25 substantial issues of fact and credibility that we are

1 required to resolve to decide the pending motion." That
2 is the motion for class certification.

3 "Having rigorously analyzed the experts'
4 reports, we conclude that the class has met its burden
5 to demonstrate that the element of antitrust impact is
6 capable of proof at trial through evidence that is
7 common to the class and that there is a common
8 methodology available to measure and quantify damages on
9 a class-wide basis."

10 So that seems to me exactly what you say
11 they should have done. Now, you disagree with their
12 ultimate determination, but not with the statement of
13 the law.

14 MR. ESTRADA: Well, I think that it is true
15 that our position in the district court was that
16 Hydrogen Peroxide controlled and that the district court
17 correctly stated the holding of the Third Circuit ruling
18 in that case.

19 Beyond that, I don't think that we do agree,
20 because, in the Third Circuit, once the case got there,
21 we got a rule of law saying that, although this court
22 prescribed the rule amendment, 23(f), precisely to
23 enable courts of appeals to review whether the district
24 court got it right for important policy questions, that
25 the job of the court of appeals under 23(f) can be fully

1 discharged by saying that providence will provide; we'll
2 think about it in the morning. And that is not
3 consistent with the proposition that the correct law was
4 applied in the lower courts.

5 Furthermore, although the district court did
6 enounce the correct standard in reflecting the holding
7 of Hydrogen Peroxide, it is far from apparent -- and
8 this is part of our point to the Third Circuit -- excuse
9 me -- to the Third Circuit -- which was not actually
10 heard on the merits, that what he did was different from
11 simply saying that econometrics and regression analysis
12 are well-established methodologies for dealing with
13 problems of this kind.

14 And I will ask you to -- to look at the top
15 of page 145 of the Pet. App., where you can look at
16 discussions -- no, I'm sorry, it's 131, in footnote
17 24 -- where the district court made clear that his
18 understanding of the capable class-wide proof involved
19 the inquiry whether the plaintiffs actually had evidence
20 that reflected the methodologies that had been used in
21 this case -- in these kinds of cases.

22 He says, "It is undisputed that multiple
23 regression analysis is an acceptable and widely
24 recognized statistical tool for cases of this kind."

25 So at a very general level, I don't have a

1 disagreement with you that, in many cases where there is
2 error, the district court started out with the right
3 foot. I don't agree with you that the correct standard
4 either was applied by the district court or was even
5 attempted by the court of appeals.

6 Now, if we were to go to the merits of the
7 question -- and to answer -- you know, the second part
8 of the question that I started out with
9 Justice Ginsburg -- keep in mind that, even on the
10 assumption that the district court accepted that there
11 was common class proof of antitrust impact, that is not
12 the same as accepting -- and I don't think the district
13 court accepted -- that there was common class-wide proof
14 that the impact for every individual was the same.

15 And that is a key point about what the
16 theory of impact here was.

17 JUSTICE GINSBURG: It doesn't have to be the
18 same for every member of the class. As the dissenting
19 judge pointed out, you can have subclasses.

20 MR. ESTRADA: Well -- and I'm happy to also
21 deal with that question. There are cases, indeed, in
22 which -- you know, the variances of the classes can be
23 dealt with, with subclasses. No one on the plaintiffs'
24 side has actually asserted here that the record would
25 allow this. And Mr. Jordan pointed out there is

1 considerable basis for skepticism in thinking that that
2 could ever be accomplished because we are talking about
3 649 franchise areas with different competitive
4 conditions.

5 But if you go back to -- to the theory of
6 impact -- and the theory of impact was that RCN, this
7 putative overbuilder, was -- you know, the little engine
8 that could, that it was going to radiate out to the
9 entire DMA area and completely overbuild the area. So
10 the theory of impact was, if you drop a stone in the
11 water, you are going to have ripples all the way out, so
12 you have ripples as to every member of the class. It
13 doesn't mean that every ripple is the same.

14 So -- so that the key question for the
15 damages issue in front of you now is whether what
16 McClave came up with was an adequate methodology for
17 measuring the size of the ripple --

18 JUSTICE KENNEDY: I did -- are there cases
19 in the -- in the ordinary course of class actions -- I
20 know they are all different -- where the district court
21 can find that common questions do predominate, without
22 addressing the question whether damages can be proven on
23 a class-wide basis? Or are they always interlinked?

24 MR. ESTRADA: No, I think the text of
25 (b)(20) -- of (b)(3) expressly requires that questions,

1 whether they be damages or liability that are common to
2 the class, predominate over those that are individual as
3 to class members. And I -- I fully accept -- and I am
4 not arguing -- that the mere fact that there may be
5 individual damages questions precludes class
6 certification.

7 I am actually arguing for the flip side of
8 that issue, which is that just because it -- it may not
9 be preclusive in certain cases doesn't mean that it is
10 preclusive in no case.

11 I would refer the Court to the Fifth
12 Circuit's opinion by Judge Garwood in the Bell v. AT&T
13 case, which was, like this, an antitrust case, where the
14 Fifth Circuit acknowledged that, in many of these cases,
15 it's almost hornbook law that there may be individual
16 issues that would not preclude class cert, but that
17 there are certain cases in which -- you know, the theory
18 of injury and -- and the proof that would be needed to
19 make it out is so sui generis and individualized --

20 JUSTICE BREYER: Well, I completely agree
21 with hornbook law. Three pipe manufacturers get
22 together and, in January, fix their prices, all right?

23 MR. ESTRADA: Right.

24 JUSTICE BREYER: Fourteen wholesalers want
25 to show that, and each has different damages because

1 they bought different amounts of pipe.

2 MR. ESTRADA: Right.

3 JUSTICE BREYER: Hornbook law: Certify the
4 class and leave the damages issues for later.

5 MR. ESTRADA: Right.

6 JUSTICE BREYER: This case, this case,
7 hornbook law: Section 2 forbids monopolization. It is
8 absolutely clear Comcast has that power. That's why
9 they're -- that's why they're regulated. And, indeed,
10 they engage in things that show that they did not
11 achieve that through skill, foresight, and industry.

12 What things? And now, we have a list of
13 four. And the district court says exactly what? If we
14 prove monopolization, which is relevant to all these
15 people in the class, then what we do is we later look
16 into how much that monopolization raised the prices
17 above competitive levels. And I offer a model to look
18 at the competitive levels and look at what happened over
19 here, and there we are, it will help. Okay?

20 Now, hornbook law, whether that's so or not
21 so is a matter for later, but see first if there is
22 liability. Okay. That's their argument. What's the
23 answer?

24 MR. ESTRADA: Well, I mean, the answer is --
25 I will take your first example, and, in fact, I was

1 going to give -- you know, the example of a case that I
2 had that was similar where -- you know, three plastic
3 cup manufacturers met in -- you know, some airport and
4 fixed -- you know, the prices.

5 Now, this is like saying you fixing -- you
6 know, the price of widgets. There is a preexisting
7 but-for world, and the question as to who bought what
8 when is not really a question of adjudication, but of
9 computation. And those are the types of cases where the
10 courts say that the individual damages questions really
11 do not preclude a -- a certification.

12 Now, your second example may or may not be
13 suitable for class treatment.

14 JUSTICE BREYER: Well, here, since what they
15 are saying is they have two theories, Section 1, the
16 agreements to keep other people out of this area are
17 unlawful in themselves. Question 2 is whether they
18 contribute to monopolization. Okay?

19 MR. ESTRADA: No, but -- but the question --

20 JUSTICE BREYER: Now, that's the legal issue
21 of liability. Now, if they're right, why isn't the
22 measure of damages just what you said? We look to the
23 people who are subject to the monopoly power, and we
24 work out how much above the competitive level they had
25 to pay.

1 MR. ESTRADA: But the legal --

2 JUSTICE BREYER: Some paid some; some paid
3 another. We have some experts in to try to make that
4 computation. Sounds the same to me.

5 MR. ESTRADA: No, but it isn't because one
6 key point that is missing from the hypothetical,
7 Justice Breyer, is exactly what the theory of liability
8 that is present in this case is, as the case comes to
9 the Court. They had four theories of possible --

10 JUSTICE BREYER: I saw the four theories,
11 and it seems to me that we are now on the theory of
12 the -- one of the pieces of exclusionary conduct was
13 agreement through various mergers, et cetera, that
14 potential competitors would not come in and compete.

15 Now, I don't know why the judge struck out
16 the other one, the number 2. But number 3 and Number 4,
17 I can see it. But on monopolization theory, that's not
18 relevant to damages. Throughout, we assume that the
19 regulator is doing a terrible job; otherwise, the prices
20 wouldn't be so high in the first place.

21 But what's the difference in this case? I
22 just didn't hear it, and I put that to show you how it
23 seemed to me there is very similar. The difference --

24 MR. ESTRADA: No. I mean, I think -- you
25 know, the key point that you are missing in your

1 hypothetical --

2 JUSTICE BREYER: Is?

3 MR. ESTRADA: -- basically starts with the
4 actual point of antitrust law, whether these people
5 are -- actually are potential competitors. It's not
6 actually relevant to the class certifications that we
7 face today.

8 But I don't accept, for present purposes or
9 for later, that these people that already have different
10 clusters of cable service that were simply aggregated in
11 these transactions actually were actual potential
12 competitors. They were not --

13 JUSTICE BREYER: That's -- I mean, that's
14 liability.

15 MR. ESTRADA: Well, you are right --

16 JUSTICE BREYER: You have the right to prove
17 that they weren't, fine.

18 MR. ESTRADA: I just said that. But the
19 point is that, as the case comes to the -- to the Court,
20 the question is whether the class that was certified by
21 the district court and validated in its own way by the
22 court of appeals is one that is consistent and fits
23 reliably with the legal theory that the plaintiffs are
24 allowed to pursue --

25 JUSTICE BREYER: And this does, too --

1 MR. ESTRADA: -- in this case.

2 JUSTICE BREYER: -- because if they prove
3 their case, the question on damages is to what extent
4 did the absence of competition from the overbuilders --
5 and it should have been DBS too, from reading this, but
6 nonetheless, let me express no view on that.

7 (Laughter.)

8 JUSTICE BREYER: But on -- on -- to what
9 extent did the failure of competition from those people
10 raise price above the competitive level?

11 MR. ESTRADA: I mean, I hate --

12 JUSTICE BREYER: And if --

13 MR. ESTRADA: Justice Breyer --

14 JUSTICE BREYER: -- how is it different from
15 the pipes --

16 MR. ESTRADA: -- I mean, I really hate to be
17 so prosaic.

18 JUSTICE BREYER: No, you shouldn't.

19 MR. ESTRADA: And you mentioned something --
20 something so contrary to the facts, but the fact is that
21 the fundamental question here is that there is one
22 theory they are permitted to pursue. It is that this
23 overbuilder, RCN, would have radiator -- radiated out
24 through the DMA area.

25 Now, you may think that they should have

1 been allowed to pursue some other different theory.
2 It's not the case that you have in front of you. And
3 the fact is that -- that -- that as the case comes to
4 the Court, the theory that remains is based on the
5 proposition that RCN was going to be the overbuilder
6 that -- that was going to impact prices. Well, two --

7 JUSTICE KAGAN: Well, Mr. --

8 MR. ESTRADA: If I could just finish?

9 Two things follow from that. You know, the
10 first one which is directly pertinent to the issue here
11 is that the McClave model purported to compute damages
12 that were not limited to overbuilding and that, in fact,
13 expressly measured overbuilding only as to 5 out of the
14 16 counties. The damage model just does not fit the
15 legal theory that stays in the case.

16 The second aspect of it is that, as a
17 question of the factual fit with the record in the case,
18 the transactions that added the largest number of
19 subscribers here occurred in 2000 and very early 2001.
20 The record in this case includes public announcements by
21 RCN, repeated by the FCC in its competition review, that
22 they were not going to franchise any new franchises. So
23 there is a basic question of lack of fit between the ipse
24 dixit of the expert and -- you know, the record in this case.

25 JUSTICE KAGAN: Mr. Estrada, as -- as the

1 case comes to the Court, I guess I wonder why any of
2 this is relevant. You mentioned earlier -- you
3 mentioned earlier that we reformulated the question
4 presented in this case. And we reformulated in a way
5 which said that what we wanted to talk about was whether
6 a district court at a class certification stage has to
7 conduct a Daubert inquiry, in other words, has to decide
8 on the admissibility of expert testimony relating to
9 class-wide damages.

10 And -- you know, it would not be crazy to
11 surmise that we reformulated the question because we
12 wanted to present -- we wanted to decide a legal
13 question, rather than a question about who was right as
14 to this particular expert's report and how strong it
15 was. And it turns out that, as to that legal question,
16 your clients waived their -- their argument that this
17 was inadmissible evidence.

18 So -- so what do we do in that circumstance?

19 MR. ESTRADA: Well, I don't agree with you
20 that we waived. And -- you know, we covered this in, I
21 think, three or pages in the reply brief, with all of
22 the citations as to how we challenged the --

23 JUSTICE GINSBURG: But you challenged the
24 probity, Mr. Estrada. You said Comcast said it had no
25 objection to McClave's qualification as an expert. So

1 what you were talking about was the probity of this
2 report, not the admissibility.

3 MR. ESTRADA: No, that is not right, Justice
4 Ginsburg. Daubert and its progeny really encompasses
5 three distinct prongs. One of them is, of course, the
6 qualifications of the expert. The second one is the --
7 the -- the reliability of the methodology. And the
8 third is fit.

9 And all we said at the -- at the class
10 hearing is that we had no objection to the proposition
11 that these people have Ph.D.'s, which indeed they do.
12 But the issue still was, both in the district court and
13 in the court of appeals, one that we urged that the
14 methodology was not relevant and did not --

15 JUSTICE KAGAN: The district court,
16 Mr. Estrada, clearly understood you to be making an
17 argument about weight and not about admissibility. And
18 indeed, the district court in open court -- and -- and
19 it's in the transcript -- suggests that it's doing
20 something different from holding a Daubert hearing,
21 explains how it's different from holding a Daubert
22 hearing, and both lawyers agree to that statement.

23 MR. ESTRADA: Well, but I think we -- we
24 agree that he needed to conduct more than a Daubert
25 hearing because we agree with the holding of the Seventh

1 Circuit in American Honda, that the question at the
2 class cert hearing is not solely one of whether the
3 evidence would be admissible, but also one of -- of
4 whether the district judge himself is persuaded that
5 this is class-wide proof that has not been impeached in
6 his own mind.

7 And so -- you know, the mere fact that we
8 all understood that what should have been ruled on at
9 the class cert hearing encompassed more than pure
10 Daubert admissibility, is actually part of our complaint
11 here.

12 I mean, I think, if you read what the
13 district court did, he basically looked at his job as
14 looking at whether the model was capable, as in
15 literally capable, of -- of -- of establishing -- you
16 know, the facts that the plaintiffs say it establishes,
17 without really weighing in his own mind whether it had
18 been shown to be fit and -- you know, reliable.

19 JUSTICE KAGAN: Mr. Estrada, it seems like a
20 remarkable proposition, honestly, especially with a
21 client like yours that is well-lawyered. It seems like
22 a remarkable proposition that somebody -- a party can
23 say, we have objections about the weight of this
24 evidence.

25 We don't think -- we don't think it's a

1 strong expert report, and that -- and that we -- and
2 that the Court should then infer that there is an
3 objection to admissibility of evidence, as opposed,
4 again, to the weight and strength of evidence.

5 I mean, surely, a district court confronted
6 with an argument about the weight and strength of
7 evidence does not have to say, oh, I better go hold a
8 Daubert hearing to rule on admissibility even though
9 nobody's asked me --

10 MR. ESTRADA: But, Justice Kagan --

11 JUSTICE KAGAN: -- to rule on admissibility.

12 MR. ESTRADA: But, Justice Kagan, I mean, I
13 think we could go through chapter and verse to
14 everything that we put in the reply brief. But I think,
15 in fairness, I have to point out to you that we never
16 said that our objection was to the weight and not to the
17 admissibility.

18 We agree that these people have properly
19 scholarly credentials. And after that, as we say in the
20 reply brief with citations to the record, we said, this
21 model is so unreliable that it is just not usable,
22 period, full stop. We went to the Third Circuit and
23 said, this is not evidence of any kind, much less --

24 JUSTICE KAGAN: Did you -- did you ever file
25 a motion to strike the expert report?

1 MR. ESTRADA: No, we did not, and we
2 actually don't think that that's needed because it would
3 actually be sort of silly to engage in a motion to
4 strike the evidence that we are asking the district
5 judge to consider, in order to decide whether it
6 actually is reliable.

7 JUSTICE SOTOMAYOR: Mr. Estrada, could you
8 pronounce for me or give me the legal rule as you want
9 us to articulate it? Let me get you out of Daubert,
10 okay? Because I think you really can't deny that you
11 never raised the word "Daubert" below until the very
12 end. Your fight before the district court was on the
13 probity of the model, not on a Daubert issue, correct?

14 MR. ESTRADA: I don't think that's fair
15 because I think --

16 JUSTICE SOTOMAYOR: Did you use the word
17 "Daubert" before the district court?

18 MR. ESTRADA: We cited Daubert cases in the
19 court of appeals. We did say to the district court that
20 the model was not usable.

21 JUSTICE SOTOMAYOR: Okay. So you didn't use
22 "Daubert" below --

23 MR. ESTRADA: I think that's fair.

24 JUSTICE SOTOMAYOR: -- so let's get out of
25 the Daubert language, okay?

1 Tell me how and what rule we announce, so
2 that district courts find an expert's evidence
3 probative, the other side argues it's not, and when does
4 the district court let the jury decide between the two?

5 MR. ESTRADA: There --

6 JUSTICE SOTOMAYOR: Where is the line that
7 the district court draws between class certification and
8 merits adjudication, so that, at some point, it goes to
9 the jury?

10 MR. ESTRADA: There are two things that the
11 district court has to do, and both involve an assessment
12 of the validity or, as you would put it, probity of the
13 expert evidence -- you know, the first one keeps in mind
14 that the focus of the class certification hearing is to
15 decide whether the -- this case should be tried as a
16 class.

17 And therefore, the first question that the
18 district court has to ask is, even if I think that this
19 is not ready now, do they have a methodology that
20 sufficiently fits the facts and is reliably based on a
21 scientific method, so that these people will be capable
22 of proving class-wide this issue at trial. That's not
23 enough.

24 JUSTICE SCALIA: We must have thought that,
25 I suppose, or else, we wouldn't have reformulated the

1 question this way, right?

2 MR. ESTRADA: Well --

3 JUSTICE SCALIA: That's the way you put the
4 question initially, and we reformulated it to be a
5 Daubert question.

6 MR. ESTRADA: I was -- I was going to point
7 out, by reference to one of your opinions,
8 Justice Scalia, that there is a question sort of based
9 on the Williams case, 504 U.S., as to -- you know, the
10 extent to which these issues are open to the Respondent
11 to challenge as well.

12 Because by the time we framed the cert
13 petition -- even though we framed it in terms of
14 Daubert, it was abundantly clear, as we pointed out in
15 the reply brief, that we were challenging the fit and
16 the reliability of the methodology. And there was nary
17 a word in the -- in the brief in opposition that
18 actually took issue with that.

19 On the faith of that, you reformulated the
20 question. Your ruling in Williams would say that that
21 issue is now over and that we move to the consideration
22 of the merits.

23 And I would like to reserve the remainder of
24 my time for rebuttal.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Mr. Barnett.

3 ORAL ARGUMENT OF BARRY BARNETT
4 ON BEHALF OF THE RESPONDENTS

5 MR. BARNETT: Mr. Chief Justice, and may it
6 please the Court:

7 Justice Ginsburg and Justice Kagan, you are
8 exactly right. The petition for certiorari was framed
9 not, as counsel just misspoke, in terms of Daubert, but
10 it was framed in terms of whether you have to go into --
11 whether the district court and the court of appeals have
12 to deal with merits issues, and that question was what
13 was reformulated.

14 And to get a sense of how profoundly
15 uninterested Comcast was in Daubert and in arguing
16 weight and probativeness, as opposed to admissibility,
17 which is the question before this Court, they never,
18 ever cited Daubert. They didn't cite it in the district
19 court. They didn't cite it in the court of appeals.

20 JUSTICE KENNEDY: One of my -- one of my
21 questions in the case is this: There was a question to
22 Mr. Estrada with reference to a jury trial. But
23 there's -- there's -- the judge doesn't really have a
24 gate -- what do you call it -- a gatekeeper function
25 here. There is no -- there's no jury.

1 And if the judge admits the evidence and if
2 it turns out that that doesn't meet the standard of
3 reliability, then he can exclude it. I don't -- I don't
4 see why the judge has to say, all right, now, first, I'm
5 going to do Daubert, and next, I'm going to do whether
6 this is reliable.

7 This is just a magic words approach, it
8 seems to me.

9 MR. BARNETT: I don't think it is a magic
10 word approach at all, Your Honor, because it has
11 tremendous significance to people who are actually
12 litigating the case. It's -- I submit that it is
13 disrespectful to a district judge not to object on
14 Daubert grounds and then complain that what he did was
15 completely unusable in the court.

16 They cited Daubert and Rule 702, 50 -- I
17 quit counting at 50, but it was only after the -- the
18 question was reframed not to deal with merits questions,
19 but to deal with Daubert specifically.

20 JUSTICE KENNEDY: Well, I -- I take it there
21 is no argument over whether or not the expert is
22 qualified.

23 MR. BARNETT: Indeed, Your Honor.

24 JUSTICE KENNEDY: The question is just
25 whether his -- his theory makes any sense.

1 MR. BARNETT: That's true.

2 JUSTICE KENNEDY: And the -- and the
3 Petitioner says it doesn't.

4 MR. BARNETT: But, Justice Kennedy, it's
5 also the case that the judge saying, do you have any
6 objections to this witness as an expert, that's about as
7 big an invitation you can get that, if you have got a
8 Daubert objection, you better make it now -- you need to
9 make it now.

10 JUSTICE KENNEDY: Well, Mr. Barnett, I -- I
11 can think of -- my initial reaction -- it has been an
12 awful long time since I have been in the courtroom --
13 is -- is that that's whether or not this man is -- is
14 qualified to give an opinion.

15 MR. BARNETT: That was --

16 JUSTICE KENNEDY: Step one. The next
17 thing is does this opinion make any sense?

18 MR. BARNETT: The second step is using
19 the -- the Court's opinions in Daubert, as well as in
20 Carmichael, as well as in Joiner, which the Court has
21 held applies to all kinds of expert testimony in Federal
22 court. The district judge has an obligation to serve as
23 a gatekeeper, whether there is a jury in the box or not.

24 On a preliminary injunction, the court, if
25 there is a proper Daubert objection, must make the

1 objection at that time.

2 JUSTICE SOTOMAYOR: Excuse me. Do you
3 think -- that -- that's why I am trying to get away from
4 the magic words. Why do you disagree with the simple
5 proposition that a district court, by whatever magic
6 words it uses, has to come to the conclusion that the
7 expert's testimony is persuasive? And isn't that, at
8 bottom line, a judgment that it's reliable and
9 probative?

10 MR. BARNETT: I completely agree, Justice
11 Sotomayor. And we -- we embrace whatever Daubert
12 standard anybody wants to apply retroactively. But the
13 main point is Judge Padova --

14 JUSTICE SOTOMAYOR: So you are not
15 disagreeing with your adversary on a legal standard.
16 Every judge on a -- this is the simple way I formulate
17 the rule -- every judge before he certifies -- he or she
18 certifies a class, has to decide whether the methods
19 being used are probative and relevant, sufficient to
20 prove common -- common questions of damages.

21 MR. BARNETT: Justice Sotomayor, I agree
22 with that proposition if there is a proper objection
23 made, such that the district court is put on notice that
24 he or she needs to do the work.

25 Judge Padova had a 4-day hearing, heard a

1 day and a half of Dr. McClave, and then had a separate
2 hearing to ask specific questions about, what about,
3 well, there is one of the four mechanisms that the
4 anticompetitive conduct translated into sky high prices
5 throughout the Philadelphia DMA.

6 JUSTICE ALITO: In this case, why doesn't
7 the question of probative value subsume the Daubert
8 question?

9 MR. BARNETT: I don't think it does, Your
10 Honor. And, again, it's not magic words. Trial
11 lawyers -- and I have been on this case for almost 10
12 years now -- once you say Daubert or once you say 702 or
13 once you say, I object, it's not reliable, at the time,
14 contemporaneously, the district judge has an opportunity
15 to fix whatever the problem is. And the other side has
16 a chance to fix whatever the problem is, too.

17 JUSTICE ALITO: But if the problem is -- let
18 me ask my question in a different way. If the problem
19 is that the model that is being -- that was used by the
20 expert does not fit the theory of liability that remains
21 in the case, would that -- what is the difference in
22 determining probative value there and determining
23 whether it comes in under Daubert? I don't understand
24 it.

25 MR. BARNETT: Well, it -- it certainly is

1 not an admissibility question. So, I mean, that's what
2 the question is before the Court. That is definitely
3 not an admissibility question. It's a question of
4 probativeness. And you can analyze it however you want
5 to under a clearly erroneous test, which is what applies
6 both under a Daubert standard, as well as a class
7 certification, where the judge is --

8 JUSTICE SCALIA: You're -- you are saying
9 it's inadmissible if it's inadequately probative, right?

10 MR. BARNETT: It --

11 JUSTICE SCALIA: So the two questions boil
12 down to the same, don't they? If it's inadequately
13 probative, it's inadmissible, isn't that right.

14 MR. BARNETT: If -- if you are talking about
15 at the hearing for the class certification --

16 JUSTICE SCALIA: Well, whenever.

17 MR. BARNETT: -- as opposed to a trial.

18 JUSTICE SCALIA: I'm talking about what --
19 what is the criterion for Daubert?

20 MR. BARNETT: Daubert --

21 JUSTICE SCALIA: Is it adequately probative?
22 If not, it's inadmissible, so.

23 MR. BARNETT: If it is unreliable, then it
24 is not admissible.

25 JUSTICE SCALIA: Well, you want to say --

1 MR. BARNETT: It is not adequately or
2 inadequately --

3 JUSTICE SCALIA: You say unreliable. I say
4 inadequately probative. It's -- it is unreliable
5 because it is inadequately probative.

6 MR. BARNETT: It's -- okay, Your Honor.

7 JUSTICE SCALIA: There --

8 MR. BARNETT: I am not going to quibble with
9 you about that. But this case -- Comcast, at the heart
10 of this appeal, it's Comcast --

11 JUSTICE KAGAN: Mr. Barnett, it's always
12 true, isn't it, that evidence that is inadequately
13 probative is inadmissible?

14 MR. BARNETT: Is it always the case?

15 JUSTICE KAGAN: It's always been true,
16 right, if evidence is not probative?

17 MR. BARNETT: If there is an objection -- if
18 there is an objection, there is a lot of authority --

19 JUSTICE KAGAN: Well, that's the thing. I
20 mean, but have we ever said that -- that without an
21 objection, somebody can say, look, we -- we argued about
22 this evidence, and that should be just good enough, even
23 though we didn't -- we didn't make an objection to
24 exclude it?

25 MR. BARNETT: I -- I am unaware of any time

1 this Court has said it's okay not to object.

2 CHIEF JUSTICE ROBERTS: We are -- we are
3 having an elaborate discussion, and you did in -- in the
4 briefs, about whether or not this was a claim that was
5 waived below. No court has addressed that yet. We're a
6 court of review, not first view.

7 So it seems to me that one option for the
8 Court, since we did reformulate the question, is to
9 answer the question and then send it back for the court
10 to determine whether or not the parties adequately
11 preserved that option or not -- that objection or not.

12 MR. BARNETT: Your Honor, I agree that
13 that's one of the options that Your Honor has. But of
14 course, it goes back with all the scuffs and scars and
15 mess-ups that preceded it up until today.

16 CHIEF JUSTICE ROBERTS: Well, fine. I mean,
17 and the district court, presumably, can decide based on
18 the proceedings and all that below, all the scars and
19 mess-ups, whether or not it was adequately preserved or
20 not.

21 MR. BARNETT: I agree, Mr. Chief Justice.
22 I -- I do --

23 JUSTICE BREYER: The strongest argument I
24 think for that point of view would be simply this: The
25 Smith Company makes widgets. The plaintiff says they

1 monopolize the widget business. That business has
2 monopolized because they achieved the power to raise
3 price above the competitive level through exclusionary
4 practices. For example, United Fruit used to pour
5 garbage on the ships of its competitors.

6 Now, we have here a class of people who have
7 been injured by their monopoly power -- and here they
8 are, and you give a list. The judge says to the other
9 side, how do you know that's the right list? Well, we
10 know; here's how we know. We have an expert here who
11 has used a model to pick out the right people who were
12 injured by the monopoly power -- its exercise. And the
13 other side says, no, that model is no good.

14 Well, if it genuinely is no good and really
15 worthless, then I guess you haven't shown these are the
16 right people for the class. And I think that's what
17 they're saying. And so the response to that is, to
18 answer this question, do we have to go look at the
19 model? I mean, on its face, it seems okay. I don't
20 know. I haven't looked at the record. And --

21 MR. BARNETT: I would love to talk about the
22 model.

23 JUSTICE BREYER: Could you talk about that a
24 little bit, please?

25 MR. BARNETT: Yes, I --

1 JUSTICE BREYER: Did I get my analysis
2 right?

3 MR. BARNETT: I would love to talk about
4 this model. This --

5 JUSTICE BREYER: No, no. That isn't what I
6 want to really know.

7 (Laughter.)

8 JUSTICE BREYER: I want to know -- if you
9 think of the examples I just -- do you, as the
10 plaintiff, when you draw up your list of class members,
11 have to have on that list people who really were hurt by
12 the -- or plausibly were hurt by the exercise of market
13 power? And you have to have some way of picking them
14 out, and you have chosen this model as a way. So I
15 guess they could object on the ground that model is
16 worthless.

17 Is this analysis right? And you would have
18 to show, no, it isn't worthless.

19 MR. BARNETT: Yes, Your Honor. We do have
20 to show that this is a fantastic model, which it is. It
21 is --

22 JUSTICE BREYER: You don't have to show that
23 much. I think you only have to show it's a plausible
24 model.

25 MR. BARNETT: All right. I -- I agree. I

1 am not going to put the -- I am happy with whatever test
2 you all want to apply is what I'm saying.

3 (Laughter.)

4 MR. BARNETT: This is a good model. And two
5 of the basic misconceptions that this case comes into
6 this Court with is, first, that there -- that
7 Dr. McClave was talking about a causal connection
8 between the anticompetitive conduct and the damages.

9 He was estimating, whatever the -- whatever
10 the anticompetitive conduct is, whatever the judge or
11 jury finds is the anticompetitive conduct that accounts
12 for the sky-high prices throughout the Philadelphia
13 area -- whatever it is, this is an accurate reflection
14 of the damages on a class-wide basis aggregated across
15 the class. The -- Comcast --

16 JUSTICE SCALIA: He didn't say what --
17 there -- there were four possibilities that he took into
18 account, right, as to what the anticompetitive conduct
19 was?

20 MR. BARNETT: And, Your Honor --

21 JUSTICE SCALIA: And as it turns out, only
22 one of those was found to -- to be in the game.

23 MR. BARNETT: I do want to make sure I -- I
24 make the connection. Dr. Williams was the one who
25 talked about this -- not Dr. McClave. Dr. Williams was

1 the one who said this is the anticompetitive conduct,
2 and this is what caused there to be less competition.
3 It was Dr. McClave's job to figure out, well, what's the
4 harm to the class as a result of that chain of events?

5 You are right, Your Honor, that --
6 Justice Scalia, that Judge -- Judge Padova excluded
7 three of the four mechanisms that Dr. Williams talked
8 about as having a causal connection. And it turns out
9 Dr. Williams --

10 JUSTICE SCALIA: That was the basis for the
11 claims.

12 MR. BARNETT: It was not, Your Honor.

13 JUSTICE SCALIA: It was not the basis? His
14 was based only on the one that the court accepted?
15 Where -- where in the record is -- is that?

16 MR. BARNETT: His -- his model was agnostic
17 about what the anticompetitive conduct was.

18 JUSTICE SCALIA: You can't be agnostic about
19 what the anticompetitive conduct is, if you are going to
20 do -- if you're going to do an analysis of what are the
21 consequences of the -- of the anticompetitive conduct,
22 you have to know the anticompetitive conduct you are
23 talking about.

24 MR. BARNETT: Again, I want to make sure I
25 am being precise about this, Justice Scalia. There is

1 no question that the conduct that caused the harm is the
2 clustering behavior that Comcast engaged in over a
3 decade's time.

4 What is not clear -- was not clear, but is
5 now, because Judge Padova has told us, which of the
6 mechanisms that Dr. Williams formulated as possible
7 causes of the -- the possible engines that resulted in
8 the prices going way up.

9 JUSTICE BREYER: And I guess, in a
10 monopolization case, it is not the case that you have to
11 trace the damages to the exclusionary conduct.

12 MR. BARNETT: Exactly.

13 JUSTICE BREYER: In a classical class
14 of -- Section 2 case, the damages are caused by the
15 monopolization, which lacks skill, foresight, and
16 industry justification. So the fact that he omitted
17 three, but kept one has nothing to do with damages in
18 a classical Section 2 case, is that right?

19 MR. BARNETT: Exactly right, Justice Breyer.
20 And maybe, if you think of it as the possibility of -- I
21 think of in terms of engines. There is an engine that
22 is causing something. Maybe it's --

23 JUSTICE BREYER: But here is the difficulty
24 that I am having, a little technical, but -- but it --
25 this is a regulated industry.

1 MR. BARNETT: Yes, Your Honor.

2 JUSTICE BREYER: And because it's a
3 regulated industry, the regulator, in your view, is
4 doing one of the worst jobs in history. They are
5 willing to come in and overbuild and everything, so he
6 must be letting prices -- all right. Suppose the judge
7 or lawyer were to find, that's okay, it doesn't matter,
8 all we're interested in is what Justice Scalia says.

9 Then, if that were true, from looking at the
10 footnote on this, I guess you'd take this model, and you
11 would simply subtract or add to the base, which is
12 supposed to be the competitively priced districts.

13 MR. BARNETT: Yes, Your Honor.

14 JUSTICE BREYER: The districts that also
15 have satellite.

16 MR. BARNETT: Indeed.

17 JUSTICE BREYER: And that shouldn't be tough
18 to do, but I don't know if it's tough to do, and I don't
19 see how we're ever going to find out.

20 MR. BARNETT: The record says it can be
21 done. In fact --

22 JUSTICE BREYER: I don't know. How would
23 you answer such a question?

24 MR. BARNETT: I would -- would cite you
25 to -- let's see if I can find it.

1 It's in -- actually in the court of appeals
2 record AO 01533 through 34, it is stated there that you
3 can take off of the DBS -- if you don't like the DBS
4 penetration screen, then you can turn it off, and
5 damages are still, as we have established since -- when
6 Comcast -- when they finally did file a Daubert motion,
7 would be something like \$550 million on a class-wide
8 basis.

9 So that is in the record, as well as there
10 is ample evidence, Exhibit 82, which shows 23 different
11 iterations of the damages models, including damages
12 models that Dr. Chipty on the Comcast side put together,
13 slicing and dicing all of this data to show that, no
14 matter how you slice it and dice it, almost, if you did
15 it in any kind of a fair way that the Federal Judicial
16 Center recognizes as a reliable type of methodology, you
17 are going to have significant damages across the class
18 for each class member throughout the time period.

19 The other thing I would like --

20 JUSTICE KAGAN: Mr. Barnett -- I'm sorry.

21 Go ahead.

22 MR. BARNETT: No, Your Honor. I was about
23 to change that subject.

24 JUSTICE KAGAN: Okay. Then I will.

25 (Laughter.)

1 JUSTICE KAGAN: I am still in search of a
2 legal question that anybody disagrees about here.

3 (Laughter.)

4 JUSTICE KAGAN: You know, I read before the
5 district court statement of the standard, now all points
6 of the circuit court statement of the standard, where
7 the circuit court says, "The inquiry for a district
8 court at the class certification stage is whether the
9 plaintiffs have demonstrated" -- burden is on you -- "by
10 a preponderance of the evidence that they will be able
11 to measure damages on a class-wide basis using common
12 proof."

13 The parties both agree with that statement
14 of the standard. It seems to me that the parties also
15 both agree -- and this goes back to Justice Sotomayor's
16 question -- that if the Daubert question had not been
17 waived, that if -- if Comcast had objected to the
18 admissibility of this expert report, that, indeed, the
19 court would -- should have held a hearing on the
20 admissibility of the expert report.

21 So this is a case where it seems to me that,
22 except for the question of how good the expert report
23 is, none of the parties have any adversarial difference
24 as to the appropriate legal standard. And -- you know,
25 usually, we decide cases based on disagreements about

1 law. And here, I can't find one.

2 Is there any? Do you disagree with
3 Mr. Estrada on any statement of the legal standard?

4 MR. BARNETT: I -- I do not, Your Honor, and
5 I think Justice -- Judge Padova got it exactly right.
6 You read the -- the standard that he applied. In fact,
7 if anything, it's a tougher standard than should be the
8 test. But we're -- we embrace that test and we are
9 happy about it, and we don't disagree with Mr. Estrada.

10 And this is what I was about to change
11 subject to a little bit, the two misconceptions that
12 fundamentally affect Comcast's view of the world --

13 JUSTICE ALITO: Well, before you do that,
14 let me ask a question related to what Justice Kagan just
15 asked. If we were to answer the question presented as
16 reformulated, I take it your answer would be that a
17 district court under those circumstances may not certify
18 a class action; is that right?

19 MR. BARNETT: If there is a proper
20 objection, properly and timely presented, it's preserved
21 up through the appellate courts and all the things that
22 you need to do in order to be fair to the judge, as well
23 as make sure you get it -- give it as good a chance to
24 be right as possible, the answer would be yes. But
25 that's a lot of caveats before you get --

1 JUSTICE ALITO: Well, then the only
2 remaining question is whether the issue was in the case
3 as a factual -- as a matter of the record here; isn't
4 that right?

5 MR. BARNETT: Well, if the issue of
6 admissibility is in the case, I don't think it is. If
7 evidence comes in -- again, this is -- this was not a
8 bunch of expert reports that were just piled up on
9 the -- in chambers, and Judge Padova went through them.
10 He actually, at their request, had a four-day hearing,
11 and then a fifth day, where he posed a series -- I think
12 it was a four-page letter where the judge says, I'm
13 concerned about this, I'm concerned about that, y'all
14 come back and tell me why it's okay.

15 And what --

16 JUSTICE ALITO: Well, could this report be
17 probative if it did not satisfy Daubert?

18 MR. BARNETT: The answer, Your Honor -- and
19 my source is Section 274 of Trial and Corpus Juris
20 Secundum, well-recognized in this Court, no doubt. It
21 says that, if it's in the record, if it comes in
22 unobjected to, it has whatever probative value the
23 court -- the trier-of-fact chooses to place on it.

24 JUSTICE KENNEDY: That the court as the
25 trier-of-fact chooses to -- that the -- not reserved to

1 cases where there's a jury? Is that --

2 MR. BARNETT: No, Your Honor.

3 JUSTICE KENNEDY: It seems to me that, as I
4 indicated before, that the whole question of weight and
5 admissibility is somewhat less important when the trial
6 judge is not the gatekeeper. The trial judge, at the
7 end of the day, can hear the testimony and say, you
8 know, I admitted this testimony, but it doesn't make any
9 sense, it doesn't work.

10 MR. BARNETT: What's happening, Your Honor,
11 is you have got to satisfy -- Rule 23(b)(3) says the
12 judge has to make findings. That's one of the few
13 parts of Rule 23 that talks about findings.

14 JUSTICE KENNEDY: Well, he does what I said,
15 but then he has 100 pages of findings.

16 MR. BARNETT: Yes, Your Honor. But he's --
17 he's acting as a gatekeeper, and what he's doing -- or
18 she's doing is projecting, what's this trial going to
19 look like, based on the evidence in front of me?

20 JUSTICE KENNEDY: No, I think that's where
21 we disagree. The judge has to make a determination
22 that, in his view, the -- the class can be certified.

23 MR. BARNETT: Absolutely. He does. And
24 if --

25 JUSTICE KENNEDY: And that includes some

1 factual inquiries as -- as to the damages alleged and
2 the cause of the injury and whether or not there is a
3 common -- whether or not there's a commonality.

4 MR. BARNETT: The -- Justice Kennedy, the
5 district judge asks, prove to me -- to the plaintiff,
6 that you can prove it at trial, prove to me now that, at
7 trial, you will be able to submit a damages model that
8 passes muster, under Daubert or whatever test there is,
9 depending on what the objections are.

10 So the judge is acting in a gatekeeper role,
11 right then, kind of projecting into the future about
12 what am I going to do when the jury's in the box --

13 JUSTICE KENNEDY: Well, that's not -- I'll
14 think about it, but that's not my understanding. I
15 thought the judge has to make a determination that, in
16 the next case we are going to hear this morning, that
17 the representation is material or it affects the market.
18 The judge has to make that conclusion, make that
19 finding.

20 MR. BARNETT: And the finding that the judge
21 makes, based on preponderance of the evidence,
22 plaintiffs have shown to me that, more likely than not,
23 at trial, plaintiffs will be able to show, on a
24 class-wide basis, some evidence, enough to get a verdict
25 that could be upheld, enough that satisfies to some

1 evidence or whatever the test is at trial, that shows
2 damages on a class-wide basis.

3 So the judge isn't saying, this is it, you
4 can't fix it, you can't change it, you can't modify it,
5 you can't enhance it between now and trial. He says
6 that you can do it. You have shown to me -- to my
7 satisfaction, that, more likely than not, that the
8 evidence that you will present to the jury at trial is
9 going to be admissible, and it's going to be
10 sufficiently persuasive if the jury chooses to accept
11 it.

12 And this is where -- I really want to get to
13 this about the merits. This -- I think there is a great
14 deal of confusion about what Judge Aldisert meant in the
15 Third Circuit when he talked about the merits.

16 Comcast, each time construes, when he uses
17 the word "merits," talk about incantation of magic
18 words, that that means whether it's good or bad, that
19 that is what Judge Aldisert was talking about. That is
20 not what he was talking about at all. He was talking
21 about trial on the merits. He was saying that, right
22 now, we don't have to decide whether this model is
23 perfect. It's enough.

24 The test -- this issue isn't before us
25 because it's been waived, Daubert and all that, but if

1 you want to know what our observation would be, if this
2 were presented in a proper case, then observation is it
3 doesn't have to be perfect, and it can be enhanced
4 between now -- which is supposed to happen at an early,
5 practicable time -- and trial, so that the jury can see
6 it.

7 JUSTICE SOTOMAYOR: Counsel, tell me -- you
8 articulate for me what you think -- what the district
9 court found when it accepted your expert's theory as
10 adequate.

11 MR. BARNETT: What Judge --

12 JUSTICE SOTOMAYOR: What do you think that
13 means, legally?

14 MR. BARNETT: What Judge Padova found was
15 that the McClave damages model is persuasive to him --
16 sufficiently persuasive to him, that it could be used at
17 trial to prove damages on a class-wide basis.

18 JUSTICE SOTOMAYOR: And so what does
19 "sufficiently persuasive" mean?

20 MR. BARNETT: That more likely than not --

21 JUSTICE SOTOMAYOR: It sounds nice, but more
22 likely than not --

23 MR. BARNETT: More likely than not that it
24 will be admissible at trial, and it will meet the
25 standard that's required to get to a verdict. Not that

1 it's I'm convinced that you're right. And that's what
2 Judge Aldisert was talking about.

3 He said, it's not time for us to say Comcast
4 wins or plaintiffs win, based on all this evidence. The
5 only thing that's really before the court is whether,
6 more likely than not, the plaintiffs have presented a
7 model -- we're talking about a model in this case. It
8 could be a different issue in a different case. In the
9 the Amgen case that's coming up, it could be a different
10 issue.

11 JUSTICE GINSBURG: Mr. Barnett, this is on a
12 different issue, but you had originally suggested that
13 you had -- that the motion -- that the settlement that's
14 looming was a reason that this Court ought not to decide
15 this case. But do you now agree that, given the
16 district court's denial of your motion to enforce the
17 settlement, that the proposed settlement has no bearing
18 on this Court's consideration of the case?

19 MR. BARNETT: At this time, Your Honor, I
20 think -- I think it has no bearing on what this Court
21 does or does not do in this case. It is something that
22 we would have the right to appeal at an appropriate
23 time, but we're not doing that now.

24 CHIEF JUSTICE ROBERTS: Counsel, it -- it
25 seems to me that your answer to Justice Sotomayor, which

1 is whether it's more likely than not that this will be
2 something that can be used at trial, one way to capture
3 that is whether or not this evidence is usable, right?

4 MR. BARNETT: I would not say that. And
5 partly --

6 CHIEF JUSTICE ROBERTS: More likely than not
7 whether it can be used at trial, that sounds like, is it
8 usable?

9 MR. BARNETT: Well, the reason I'm
10 hesitating is because --

11 CHIEF JUSTICE ROBERTS: Well, I know the
12 reason you're hesitating.

13 (Laughter.)

14 MR. BARNETT: Well -- and also, it's because
15 it's something you don't know. When that word was used,
16 "unusable," in court, they were talking about common
17 impact. That's what that was about. That was what that
18 discussion was about. It wasn't about this model.

19 JUSTICE KENNEDY: Well, of course, there
20 matters for the trier of fact to determine at the merits
21 stage, but under -- under Daubert and under Rule 702,
22 the judge has to say that the evidence is relevant to
23 the task at hand, and it has a reliable foundation. I
24 can see a judge saying, well, now, this theory that
25 you're using, this theory works, I think it's accepted

1 in academia. Then he hears all the testimony, and he
2 says, It just doesn't work here.

3 MR. BARNETT: And Judge Padova could have
4 done that, but he didn't do that. I think he was
5 persuaded by the evidence that Dr. McClave put on, and
6 he rejected -- because we know from his 81-page opinion
7 that he rejected an awful lot of what Comcast's experts
8 said.

9 So he -- he could have made that
10 determination. And this is why it's an -- if we're
11 talking -- if we're not dealing just with an
12 admissibility issue that's been forfeited away, we're
13 dealing with abuse of discretion and clearly erroneous.
14 And this is --

15 JUSTICE KENNEDY: I'm -- I'm not sure what I
16 just described is not Daubert.

17 MR. BARNETT: Your Honor, if you're in a
18 trial court and somebody says Daubert or somebody says
19 Rule 702 or somebody says I object to this expert's
20 testimony, that has profound significance. And, again,
21 I think it's -- it's almost disrespectful to the
22 district court to say, it's okay, although this -- this
23 question wasn't on the test that you had when you were
24 trying to decide the case, we're going to add the
25 question to the test, and by the way, you flunked it.

1 That's not fair.

2 JUSTICE SOTOMAYOR: Counsel, the bottom line
3 is can a district court ever say that it's persuaded by
4 unreliable or not probative evidence. That's really the
5 bottom line question.

6 MR. BARNETT: I --

7 JUSTICE SOTOMAYOR: Does it commit legal
8 error when it finds something that's unreliable and
9 unpersuasive -- or unprobative?

10 MR. BARNETT: Well, Your Honor, I agree.
11 And of course, that's not the issue in the case because
12 Judge Padova was convinced it was reliable. And there's
13 plenty of proof that there was.

14 JUSTICE SOTOMAYOR: I -- I think that's a
15 fair reading of what he said --

16 MR. BARNETT: Right.

17 JUSTICE SOTOMAYOR: -- but if we're
18 answering a legal question.

19 MR. BARNETT: We're talking about the -- the
20 edges and all the -- where everything is done properly
21 below. If it doesn't pass muster under Daubert --
22 whatever the test is, let's not reformulate it here -- I
23 suppose, yes, then it's not admissible.

24 JUSTICE SOTOMAYOR: The problem everyone's
25 having is -- I think -- that why do you need Daubert to

1 point out that something is not probative or unreliable?
2 Why -- whether it's an expert or a lay witness
3 testifying, wouldn't you apply that same standard to
4 anybody's testimony?

5 MR. BARNETT: Justice Sotomayor, let me --
6 let me just give you an example. There were a bunch of
7 issues that the dissenting judge raised, including the
8 overbuilding screen, a particular kind of market screen,
9 mathematical averages. If -- in the DBS penetration
10 screen, if he had raised any of those, if there had been
11 a whisper of a hint of a suggestion, of a thought, of
12 those things in the district court, we'd have been
13 all over that. And we would have proved that it was
14 false, that those -- that those statements are untrue.

15 And we know that's accurate because, as I
16 just read to you from the -- the court of appeals
17 record, the DBS screen can, in fact, be taken off,
18 eliminated from the sample, and you still have
19 \$550 million worth of damages on a class-wide basis.

20 JUSTICE SCALIA: Mr. --

21 MR. BARNETT: And the reason we got to that
22 is because they finally did when -- on the eve of trial,
23 file an actual Daubert motion, and that was our
24 response. And they cited footnote 323 of their brief.

25 JUSTICE SCALIA: Mr. Barnett, suppose --

1 suppose we held that where -- where there's a bench
2 trial, it doesn't make any difference what -- what --
3 whether the judge excludes the evidence under Daubert --
4 I never know how to say it. Is it Daubert or Daubert?

5 (Laughter.)

6 MR. BARNETT: It depends on the time of day,
7 Your Honor.

8 (Laughter.)

9 JUSTICE SCALIA: Yes, I think you're right.
10 It doesn't make a dime's worth of difference whether the
11 judge excludes it under -- under Daubert or proceeds to
12 find it simply unreliable -- unreliable. Suppose --
13 suppose we held that. What -- what difference would it
14 make in the world?

15 MR. BARNETT: I would --

16 JUSTICE SCALIA: So the trial judge could
17 say, yes, I have a Daubert motion, but -- but I'm going
18 to defer that. I'm just going to -- going to proceed to
19 see whether this evidence is reliable.

20 MR. BARNETT: Justice Scalia, I would say
21 what you're doing is what I suggest the Court ought to
22 do. Everybody knows that district judges have broad
23 discretion in a lot of different things that they do.
24 You just made it this much bigger as a result of saying,
25 we're not even going to bother with the Daubert thing,

1 we're going to trust that the district judge is not
2 going to be persuaded by phony evidence, and we're going
3 to trust-- if he gets it nearly close, right, that he
4 got it right.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Mr. Estrada, you have five minutes
7 remaining.

8 REBUTTAL ARGUMENT OF MIGUEL ESTRADA

9 ON BEHALF OF THE PETITIONERS

10 MR. ESTRADA: Thank you, Mr. Chief Justice.

11 Let me -- let me start with the proposition
12 which I continue to find startling, that a damages model
13 can stand up to examination on the theory that it is not
14 linked to any theory of anticompetitive conduct. Now,
15 the theory seems to be that what the McClave model is
16 intended to do is to isolate competitive markets
17 elsewhere that are competitive in some sense, come to
18 the conclusion that the Philadelphia DMA is somehow less
19 competitive, and charge whatever the expert says is the
20 difference to Comcast.

21 But that has a fundamental failure, as a
22 matter of substantive antitrust law, because we know
23 from cases from this Court and the court of appeals
24 going back to Story Parchment, that the one requirement
25 is that causation link of the damages -- you know, it

1 has to be certainly linked to illegal conduct.

2 JUSTICE BREYER: Is that right? Is that
3 what Learned Hand said? Is -- is that what Alcoa holds?
4 Is that United Fruit holds when they bomb their
5 competitor's ship and achieve monopolization? That the
6 only people who can get damages are the people who run
7 the ship and were bombed --

8 MR. ESTRADA: No, I think --

9 JUSTICE BREYER: -- who bought those
10 bananas? I didn't know that. But besides, if you're
11 right, which I tend to doubt, but I'll look it up, if
12 you're right --

13 MR. ESTRADA: Story Parchment.

14 JUSTICE BREYER: Yes, all right. Fine.
15 I'll look that up. If you're right and as they pointed
16 out, it's still one of the easiest things in the world
17 to simply change the base for this model. Instead of
18 the base being those businesses or homeowners who
19 received their service at competitive prices, we say --
20 we modify it by including those who received services
21 where DBS was involved, and that'll be a higher price,
22 and we subtract that price from the price they paid
23 where there was overbuilding threatened.

24 Now, that'll be a new number. They say it
25 was a new number. And I think anybody running a model

1 could do that, but I promise you, I don't know. And to
2 know whether you're right on that, or they're right, I
3 will have to get into the model-building business, where
4 I am not an expert.

5 MR. ESTRADA: Well, no. I think all you
6 have to do is whether the proponent -- is to ask whether
7 the proponent of class certification has discharged his
8 duty under this Court's cases, to come forward with
9 evidence that is persuasive under the point whether the
10 case as a whole can be tried as a class. You don't have
11 to become an econometrician. You have to know enough to
12 assess whether the record that has been proffered is
13 probative on the question before the Court.

14 Here, it isn't. And one of the reasons it
15 isn't is because they came to the hearing in class
16 certification in the fall of 2009 after full merits
17 discovery. The papers -- we said to them, we have full
18 merits discovery, this model does not work. We had
19 variants of not usable. Every word -- I can read it
20 all, Justice Kagan, if it's worth taking the time. You
21 know, the flaws preclude its use, it's not to be
22 accepted, it's not usable, it does not result in a valid
23 methodology that can be used.

24 And so, having said all of that, we said,
25 this model is bunk. You have full class merits

1 discovery. You have plenty of opportunity to come up
2 with a better model. Nothing.

3 We go to the court of appeals. It is
4 affirmed. Then it goes back to the -- to the district
5 court for further trial proceedings. The district
6 court, having read the court of appeals' opinion,
7 invites them to submit the evolutionary model that the
8 court of appeals had in mind. Nothing. We are still
9 sticking with our story, McClave's the guy.

10 And so they have had every conceivable
11 opportunity to develop a model. Why haven't they done
12 that, Justice Breyer? Oh, maybe because there is a
13 problem in the record. You can take all of the maps in
14 the record, which are part of the field supplemental
15 appendix, and you can see the different areas of
16 penetration for DBS -- you know, has different rates of
17 penetration all over the class area.

18 Same thing for RCN and FiOS. And you can
19 look at what -- what the market penetration is in each
20 franchise area. Consider that each of them is a
21 different licensing authority, that the overbuilding
22 would have to go to franchise by franchise and radiate
23 out in the fullness of time. And I don't know if there
24 is an econometrician that can combine all of that into a
25 single class or subclasses.

1 They haven't identified one. And the key
2 point for the resolution of the case in front of you,
3 Justice Kagan, is that the question that comes here is
4 whether a class that is more expansive than the one that
5 you -- that you certified in Wal-Mart can possibly be
6 certified where there is no evidence that is tied to the
7 record in the case that is reliably probative that a
8 class would exist.

9 Thank you, Mr. Chief Justice.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 The case is submitted.

12 (Whereupon, at 11:05 a.m., the case in the
13 above-entitled matter was submitted.)

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