OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: SHADY GROVE ORTHOPEDIC ASSOCIATES, P.A., Petitioner, v. ALLSTATE INSURANCE COMPANY.

CASE NO: No. 08-1008

PLACE: Washington, D.C.

DATE: Monday, November 2, 2009

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IN THE SUPREME COURT OF THE UNITED STATES

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SHADY GROVE ORTHOPEDIC :

ASSOCIATES, P.A., :

Petitioner :

v. : No. 08-1008

ALLSTATE INSURANCE :

COMPANY. :

- x

Washington, D.C.

Monday, November 2, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:58 a.m.

APPEARANCES:

SCOTT L. NELSON, ESQ., Washington, D.C.; on behalf of the Petitioner.

CHRISTOPHER LANDAU, ESQ., Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:58 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 08-1008, Shady Grove Orthopedic Associates v. Allstate Insurance.

Mr. Nelson.

ORAL ARGUMENT OF SCOTT L. NELSON

ON BEHALF OF THE PETITIONER

MR. NELSON: Mr. Chief Justice, and may it please the Court:

Since the inception of the Rules Enabling Act, this Court has repeatedly held that within their scope of operation, rules promulgated under that Act govern the practice and procedure of Federal courts in diversity and Federal question cases alike.

This case concerns whether a New York State law prohibiting New York State courts from certifying a class applies in a Federal diversity action and displaces the otherwise applicable Federal class certification standards set forth in Federal Rule of Civil Procedure 23.

Whether the case is viewed as presenting a question under the Rules Enabling Act as construed in Hanna v. Plumer, or instead more generally as an Erie question, the answer is the same. The State rule does

not govern. That result is underscored by the Class Action Fairness Act, which extended Federal diversity jurisdiction to cases of this type precisely so that Federal procedural standards would apply. In the --

JUSTICE GINSBURG: But this is a procedural standard that has a manifestly substantive purpose, which is to restrict recoveries of penalties. In that sense, it's like a cap on damages. And if you're right, then the purpose that New York had would be completely undermined, because what lawyer would bring a $500 case in State court when she could bring a $5 million case in Federal court?

MR. NELSON: Well, to begin with, I –- I don't think that it's a substantive rule because it reflects a policy. The policy here, as described by the New York Court of Appeals in the Sperry case, is that the -- the legislature believed that class actions were not necessary in this category of cases.

I think that is ultimately a procedural policy. It's not a limitation on --

JUSTICE GINSBURG: They didn't want to have class actions.

MR. NELSON: They certainly did not want to have class actions, Justice Ginsburg.

JUSTICE GINSBURG: And how is it different

from Cohen v. Beneficial, the security for costs? Procedural in one sense, but with a definite substantive purpose in mind; that is, to restrict derivative actions.

MR. NELSON: Well, the Cohen case I think is different in this respect, although when Cohen was decided shareholder derivative actions together with class actions were under Rule 23.

Those things have now been divorced, and shareholder derivative actions differ from class actions in the Rule 23 sense in a fundamental way. In Rule 23, the class is composed solely of individuals who each have a substantive right to pursue that recovery under the relevant law. In a derivative action, the plaintiff is actually asserting a substantive right to -- to really assert a claim on behalf of someone else, the corporation.

And what the Court said in Cohen and elaborated more in the Kamen case in 1991 is that that question is really a matter of the law of shareholder-corporate relations, the circumstances in which a shareholder may bring a derivative suit, and isn't really answered by the Federal rules. And in Cohen in particular, what the Court focused on --

JUSTICE GINSBURG: You could say just as

well here that the question isn't addressed by the Federal rules. If New York wants to say this kind of claim can be brought only as an individual action, not as a class action, why shouldn't the Federal court say that's perfectly fine; this class of cases can't be brought as a class action; we respect the State's position on that. Why should we as a Federal court in a diversity case create a claim that the –- that the State never created?

MR. NELSON: Well, the reason is that Rule 23 actually does address the issue, and it's the same issue that the -- that the State rule tries to address, which is whether the matters may be certified as a class.

Not only does Rule 23(b) provide explicitly that the court may certify an action if the Rule 23(b)(1), (2), or (3) criteria are met, but this Court also emphasized in the Califano v. Yamasaki case that under Rule 1, the Federal rules apply to all actions in the Federal courts. And what that means, as the Court put it in Yamasaki, is that a class action is available, potentially, if the 23 standards are satisfied, in any action within the Federal courts, unless Congress has exercised its power to override a Federal rule, which, as the author of Federal law, Congress is always

empowered to do.

The difference as to -- as to the State is that the State has no power to displace Federal law, and Rule 23, promulgated under the Rules Enabling Act, is Federal law.

JUSTICE GINSBURG: This Court in its recent decisions has been sensitive to not overriding State limitations, and so has read the Federal rule to avoid the conflict.

Gasperini is one such case with regard to Rule 59, interpreted so that you do not collide with the State policy, and the same thing with Semtek with Rule 41(b). The Federal rule is interpreted so as not to conflict with the State policy.

MR. NELSON: Well, I would -- I would actually first go back to what the Court said in Walker, and I don't think it's -- Walker v. Armco, and I don't think it's disavowed that that the Federal rule is given its plain meaning, and when a collision is unavoidable, the Court -- the Court recognizes conflict.

Gasperini, I think, is -- is different, with due respect to someone who probably knows more about it than I do. But as I read Gasperini at least, I see the Court there saying that what is going to be applied in the Federal court is what it saw as a substantive

standard limiting damages. That is to say, damages are excessive if they are in excess of -- manifestly exceed what is –-

JUSTICE GINSBURG: But there wasn't a cap on damages in Gasperini. It wasn't a cap. It was --

MR. NELSON: It wasn't -- excuse me. I'm sorry. Go ahead.

JUSTICE GINSBURG: It was that we want the courts to exercise a role in checking these damages so they won't be excessive.

MR. NELSON: Well, the -- the Court in Gasperini said what it saw was a substantive principle of New York law, was that damages could not exceed reasonable compensation for the -- for the plaintiff's injuries. Now, that -- that is not a cap in the sense of $1 million, $5 million, $50,000. But it's a cap in the sense of providing the substantive standard by which the court determines excessiveness.

And as for Rule 59, the reason the Court saw no conflict there is Rule 59 simply provides the procedural mechanism within which a defendant makes a motion to seek a new trial on the grounds of excessiveness of damages.

But it -- but excessiveness of damages is, to go back to a point that was made in the previous

argument, like fairness. Fairness in relation to what? Excessiveness of damages has to be judged according to what the State law is on what damages one is entitled to recover.

CHIEF JUSTICE ROBERTS: Under -- under your theory, are all of the statutes set forth by the Respondents in their appendices invalid in Federal court?

MR. NELSON: No, Your Honor, certainly not. Especially given that their appendix -- half of it consists of Federal statutes, which of course are valid because Congress -- Congress can --

CHIEF JUSTICE ROBERTS: Well, not half.

MR. NELSON: Well, a significant number. I -- I think it's -- it's a goodly number.

Now, as to the State statutes, I think the State statutes are very different. Some of them may or may not be valid, but they operate very differently from the State statute at issue here.

They focus on particular rights of action. Some of them set forth limits on recovery that really are set forth as damages caps, and all of them are tied specifically to the substantive cause of action created by State law.

JUSTICE GINSBURG: So suppose in this case

the New York legislature, instead of having a statute that covered penalties generally, minimum recoveries generally, wrote into each statute, each penalty statute, each minimal recovery statute, that this suit must -- may not be brought as a class action -- instead of having an encompassing statute that covered all of them, wrote into each individual statute that limitation.

MR. NELSON: I would agree that that presents a very different question. I'm not -- I'm still not certain that I -- that I think that the State court can do that, because I don't think that a limitation on whether an action can be brought as a class establishes substantive rights within the meaning of the Rules Enabling Act.

JUSTICE GINSBURG: So you -- are you telling me that even if New York had provided for a specific penalty for a specific matter, the Federal court could disregard that and make it a class action, even if the State that created the right said, this is a right for an individual only?

MR. NELSON: Well, I -- again, I think that's what the best answer to that question would be, because the -- the right in a class action is still an individual right; it's simply the -- the question is

simply whether multiple claims of multiple parties can be aggregated in a single action. That doesn't expand the right that the -- that the State legislature has created for the individual.

JUSTICE GINSBURG: Are you saying that even if it -- then you are telling me it doesn't make any difference whether they do it across the board, as they did here, or in each penalty statute it says no class action.

MR. NELSON: Again, what I'm saying is it certainly may make a difference in the sense that the Court doesn't have to go nearly that far to resolve this case.

If that case were presented, I'm simply saying that -- that I still don't think that that necessarily establishes a substantive right within the meaning of the Rules Enabling Act.

JUSTICE GINSBURG: Well, does it or not? I mean, it presented you -- here's a case that says: You can sue for this penalty but only in an individual action.

MR. NELSON: Yes. As I've said, I think the best answer to that question is: That does not establish a substantive right. It establishes a procedural right with respect to --

JUSTICE GINSBURG: So you are saying that even if New York didn't use this shorthand, even if they incorporated it into each penalty statute, your answer would be the same --

MR. NELSON: Yes, my answer would be the same, but this -- the result here doesn't turn on that answer being correct.

JUSTICE SOTOMAYOR: I'm sorry. Justice Ginsburg's hypothetical was you are entitled to $100 as a statutory penalty but only if it's an individual claim. If you -- if this is brought as a class action, you don't get the statutory penalty. I thought that was the substance of her question.

Now, are you saying that also is merely procedural and -- and pre-empted by Rule 23?

MR. NELSON: I think -- I think it's procedural in the sense that it establishes -- if it establishes a right, the right it establishes is procedural and procedural rights don't override the --

JUSTICE SOTOMAYOR: Counsel, you get $100 or you don't get $100. How can you be any less substantive than getting the $100 or not getting the $100?

MR. NELSON: Whether you -- when – when what determines whether you get it is the form of the action that you have brought in a Federal court and

whether it has been brought aggregated with other --

JUSTICE SOTOMAYOR: Then under your view, there is absolutely nothing, no law that the State could pass that would not conflict with Rule 23 --

MR. NELSON: No.

JUSTICE SOTOMAYOR: -- as it -- as with respect to class actions?

MR. NELSON: I mean, one thing that the Court could do is that it could establish a cap that applied with respect to --

JUSTICE SOTOMAYOR: You mean the State could do.

MR. NELSON: I'm sorry, yes. I misspoke. The State could certainly establish a cap that applied whether an action was brought as a class action or an individual action. In other words, for any related series of transactions, the overall damages to which this defendant can be subjected, whether in a multiplicity of individual actions or in a class action is X. That, I think, would clearly be substantive.

CHIEF JUSTICE ROBERTS: Well, it has to apply to individual actions as well?

MR. NELSON: I think -- I think if -- if the application of the -- of the statute depends on whether -- whether the action is brought as a Rule 23

action in Federal court or not, to me that's -- that is placing consequences on a procedural issue, and is not a matter of substance.

But, again, I want to emphasize that this statute is very different from that. This statute is a statute that is not even limited to rights of action under New York State law. This is an action that --

JUSTICE SCALIA: Have they applied it? If I recall your brief correctly, you say that the New York courts have applied it to causes of action arising under other State laws. Is that right?

MR. NELSON: I -- I actually haven't found one that applies it to actions arising under other State laws. I have -- I found actions that apply it to actions arising under Federal law. And the principal one --

JUSTICE GINSBURG: There is no New York Court of Appeals decision to that effect?

MR. NELSON: That is correct. They are rules -- there are decisions of the appellant division. But, as you know this Court very shortly after deciding Erie emphasized, holdings of intermediate State court of appeals are very persuasive data as to what State law is.

JUSTICE GINSBURG: It depends upon the

persuasiveness of the reasoning of the court.

MR. NELSON: Yes. And in this case, the statute on its face uses the term "right of an action brought under a statute." There is no suggestion in 901(b) that it's limited to New York State statutes. The term "statute" in the -- in the Civil Practice Law and Rules is not confined to New York State statutes.

Section 901 as a whole clearly is applicable to -- to rights of action brought under any source of law. And the New York State courts in the -- the most applicable case, the Rudgayzer case, justified its application of the statute to a Federal right of action on the ground that this was merely an -- a -- a rule that governed local forms of -- of proceeding.

JUSTICE SCALIA: Can’t a statute be both? Can a statute both establish a substantive limitation and also establish a rule of procedure for New York courts? Why can't a statute say, New York courts will not entertain any action, including those arising under foreign law, that are class actions seeking penalties? And also, no New York State cause of action which seeks a penalty can be sued on in a -- in a collaborative action? Couldn't you do both in the same?

MR. NELSON: Well, a statute certainly phrased that way could do both. The question is when

the statute is not phrased that way, when it's phrased simply as a general procedural instruction as part of the general procedural --

JUSTICE SCALIA: Well, you are begging the question. It's a general instruction. But can't -- can't the instruction be interpreted to be both?

MR. NELSON: Well, the -- the question I think is -- is what basis would there be for construing it to be both? It -- it -- it's unitary in language --

JUSTICE GINSBURG: Because the statute may put forth both a substantive policy and a procedural policy. I'll give you a concrete example.

New York establishes a claim and says in the statute: But this sort of claim has to be brought within 1 year. Then New York gets a similar claim under another State's law, and it says, even though we applied our -- even though our statute applies to our own law in a substantive way -- that is, it says you have no action after a certain amount of time –- we don't want our courts to be cluttered with claims from out of State when we wouldn't entertain similar claims in our own State.

That is certainly the way statutes of limitations have been interpreted by a number of States as having both a procedural aspect and a substantive

aspect.

MR. NELSON: Well, I -- I certainly agree that statutes of limitations are generally applied by State courts to foreign causes of action. And that's because, I think, for choice of law purposes, they are considered and were traditionally considered to be procedural matters. It's only with the advent of Erie that they were characterized as substantive matters for purposes of -- of the application of -- of the doctrine.

JUSTICE GINSBURG: Well, that is not altogether true, because there was always recognition that a so-called built-in statute of limitations was substantive.

MR. NELSON: If -- if the right of action itself is delimited, as opposed to a statute of limitation which, you know, cuts off your ability to sue but supposedly doesn't cut off the underlying right, yes, I think that's right. But, again, that goes to -- to the fact that, you know, it does make a difference whether a legislature chooses to establish a rule as a general procedural matter or whether it makes it integral to the -- to the definition of the right.

And as this Court said in the -- in the Byrd case, that when looking at -- at State law -- and there

the question was whether an issue was an issue for the jury. But in determining whether it would be considered to be substantive or procedural, the question is whether it is so bound up with the definition of the rights and obligations under State law that it will be deemed to be part of the substance of the law or whether it simply relates to a mode of enforcing the right. And -- and --

JUSTICE GINSBURG: I thought Byrd turned on the characteristics of a Federal court and that is the judge/jury relationship.

MR. NELSON: Well, Byrd -- Byrd turns in part on that, but it also turns on -- on the Court's view that -- that that issue, whether a case -- an issue is decided by -- by jury or judge, is -- is one that is not substantive under the Erie doctrine. So -- so there are two aspects, I think, to what the Court is doing in Byrd. But one of them --

JUSTICE GINSBURG: Well, it wouldn't matter what the answer to that was, with the Seventh Amendment looming over that case.

MR. NELSON: Well, you know, the Court didn't decide it as a Seventh Amendment issue, and -- and because that particular question, I think, was -- was a question that arose out of a State law administrative scheme, I think it's controversial

whether it -- whether the Seventh Amendment would apply, and the Court, I think, advisedly decided that as an Erie case rather than as a Seventh Amendment case.

I want to also --

JUSTICE STEVENS: Can I ask you one brief hypothetical?

MR. NELSON: Sure.

JUSTICE STEVENS: Supposing this statute, instead of being as broad as it is, said any statute imposing penalties against insurance companies may not be brought as a class action, any claims brought under that statute?

MR. NELSON: Justice Stevens, I think the outcome there would more clearly be the same, because, again, it would not be -- it would not be part of the -- of the New York State law definition of the right to insurance --

JUSTICE STEVENS: I thought you said that if it puts a ceiling on it, that would be -- that would be substantive rather than procedural.

MR. NELSON: Well, if -- if -- if the Court put a ceiling on rights of action under its own law --

JUSTICE STEVENS: Right.

MR. NELSON: -- its own State laws, that I think becomes a substantive matter. The statute that I

think you've -- you've hypothesized here is one that is based on the characteristics of the defendant regardless of the source of law under which it's being sued.

JUSTICE STEVENS: Well, you can make it a claim brought under the insurance code, instead of against insurance companies.

MR. NELSON: Yes. Well, that then, I think, becomes very similar to the -- the hypothetical statutes that Justices Ginsburg and Sotomayor were positing, and I acknowledge that that is -- that that is a much harder question.

But, again, I think, ultimately, if the –- if the issue addressed by the statute is, shall claims of individuals be aggregated and adjudicated as part of one unit, that is a substantive matter -- or a procedural matter and is governed in the Federal courts by a Federal procedural standard.

CHIEF JUSTICE ROBERTS: What if the basis for the restriction is the additional administrative costs of a class action? In other words, it doesn't say you can't bring it, but it says any recovery shall be reduced by 10 percent because class actions cost more than individual actions?

MR. NELSON: Well, there -- that I think would be a statute that is serving a manifestly

procedural interest, and if the Federal courts have not chosen in their rules to impose an administrative charge on class actions, a State law that purported to do so would -- would not -- not have any application to Federal procedure.

That -- that statute I think would be not only foreclosed in its operation by the Rules Enabling Act and Hanna v. Plumer, but would just be, on its face, something that, even leaving aside the Federal rules, would fall on the procedural side of the line in just classic Erie terms because the policies that it reflects are manifestly procedural.

And I think, actually, the same is true here. A statute --

JUSTICE GINSBURG: How is it different from security for costs? I mean, that's what I started with. That's -- there's nothing in the Federal rules that say security for costs.

MR. NELSON: Well, the -- the -- as I understand the Court's reasoning in Cohen, the security was -- was not just for the cost of the action, but for the plaintiff's liability to the corporation that was created under State law in the case of an unsuccessful derivative action.

And that liability was what the Court looked

at in Cohen as -- as making -- making the fundamental issue substantive, and the bond was sort of the -- you know, the tail on the dog, in the sense that the Court characterized it as substantive, having first characterized the damages remedy as substantive because without the bond, according to the majority, the remedy would be meaningless.

I -- you know, the proposition was certainly debatable -- even Justice --

JUSTICE GINSBURG: Without the bond, the remedy would be -- I don't -- this is a plaintiff that had to put up security for costs.

MR. NELSON: Right, and -- but -- but the remedy I'm referring to is the defendant's right to recover damages from the plaintiff under State law if a derivative action was unsuccessful. And it was securing that remedy that the -- that the Court saw the bond to be critical to, which was not only why it -- it treated it as substantive, but also granted an interlocutory appeal because, if -- if the bond wasn't there, the right to recover from this plaintiff would be -- would be meaningless.

That was -- that was, as I understand it, the Court's reasoning.

If the -- if the Court has no further

questions, I would like to reserve the remainder of my time, please.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Landau.

ORAL ARGUMENT OF CHRISTOPHER LANDAU

ON BEHALF OF THE RESPONDENT

MR. LANDAU: Mr. Chief Justice, and may it please the Court:

As some of Justice Ginsburg's initial questions point out, this case falls within the heartland of Erie because allowing plaintiffs to recover State law penalties in Federal court that they can't recover in State court on a State law cause of action would powerfully distort ex ante forum choices, which is precisely what the Erie doctrine seeks to avoid.

JUSTICE SOTOMAYOR: But isn't Rule 23 a judgment by Congress that class actions that meet the criteria of Rule 23 are fair and efficient, correct? That's Congress's judgment?

MR. LANDAU: No, Your Honor.

JUSTICE SOTOMAYOR: Under your theory, any State could pass a law that says no cause of action under State law can be brought as a class action ever. That would be your theory because it's substantive, if it's an Erie choice.

MR. LANDAU: Two points, Your Honor. First, of course, Rule 23 is not enacted by Congress. That's one of the important points here, that it comes out of this Court.

It's delegated authority under the Rules Enabling Act to set forth these rules, so there is always a limitation on what a rule of procedure can do. That's why there is an advisory committee that sets it. It's not a statute, and there are -- there are restrictions on -- on the rules that don't apply to Congress.

But going to the substance of your question, Your Honor, Rule 23 governs the criteria for when -- when you can have a class, but it doesn't address the underlying question, which is: Can you have a class in the first place?

Is there -- the legislature that creates the cause of action can say, this is categorically ineligible for class certification.

JUSTICE SOTOMAYOR: You haven't quite answered my question.

MR. LANDAU: I'm sorry.

JUSTICE SOTOMAYOR: Your State can come in and say, no State cause of action will ever be subject to class treatment. And you would say there is no

conflict between that and Rule 23?

MR. LANDAU: Well, Your Honor, if the State is talking about its own State law causes of action, the State is the master. The State creates these causes of action in the first place. If a State, like New York did here, says certain causes of action --

JUSTICE SOTOMAYOR: No. No State cause of action can be brought as a class. You're saying there is no conflict with Rule 23's judgment about efficiency of Federal court litigation?

MR. LANDAU: Well, Your Honor, it could be, if a State said that no State cause of action could be brought as a class action, that that -- you have to look at what the State was doing in making that rule.

If the State --

JUSTICE SOTOMAYOR: Just what it's doing here. There are some things -- we make a policy choice, the State, that, contrary to Rule 23, that there are some causes of action that are not fairly and efficiently brought as a class.

That's what the State has said as a policy choice, correct?

MR. LANDAU: Well, Your Honor, no, because the policy choice here is a substantive policy choice to limit penalties from being distorted in a class action

case.

JUSTICE SOTOMAYOR: It's a policy choice.

MR. LANDAU: Well, if the -- if the State, Your Honor, makes a policy choice, it is a substantive policy choice, as I believe -- your hypothetical, at some points, was talking about what sounded like a substantive policy choice.

If it makes a procedural policy choice, as, in a sense, Mississippi has done and Virginia, by simply not having class actions at all -- they don't have that -- well, then that doesn't raise an issue under the Rules of Decision Act because it's not --

JUSTICE SOTOMAYOR: So you have answered my question. Under your view, a State could say, no class actions.

MR. LANDAU: A State --

JUSTICE SOTOMAYOR: And -- and a Federal court, sitting in diversity, could never aggregate those claims, those State law claims?

MR. LANDAU: For State law claims, yes. If it makes a substantive decision that we want -- a State could abolish that cause of action altogether, Your Honor. And I think the concern that Your Honor is expressing is somehow that Federal courts could be flooded with State law causes of action. Well, that

won't happen because they would still have to meet Federal jurisdictional norms to get into Federal court.

So you won't get small State law claims. You would still have to meet the requirements for Federal jurisdiction.

CHIEF JUSTICE ROBERTS: Counsel, do I –- do I understand your response to turn on -- let's say the State, for example, limits class actions because it doesn't want vast exposure under the penalty provisions that you could get in a class action. It only wants to pay when they can be brought on an individual basis. But they may also limit class actions by saying, as Justice Sotomayor suggested, that they are not fair and efficient. Do you get one result in the former case and a different result in the latter?

MR. LANDAU: Well, the Erie -- you could, Your Honor. The answer -- the short answer is "yes", because the Erie cases have looked to the purpose.

I think Justice --

CHIEF JUSTICE ROBERTS: How do you -- how do you tell?

MR. LANDAU: Well, Your Honor, it's not always easy.

Erie cases, for that reason, are not always -- result in easy line-drawing. Certainly, in

making the Erie choice, this Court has looked to the State's purpose.

Here, in this case, it happens to be --

CHIEF JUSTICE ROBERTS: I suppose it's pertinent, then, whether they do it, as I think you were -- was discussed earlier, on an across-the-board basis or on an individual basis?

MR. LANDAU: I think that's something that one could look at, as part of determining how -- what is the design and operation in State court.

And on that point, I'll say the other side does try to make it seem like it is absolutely dispositive that this is being applied more broadly than New York State law causes of action.

There is two responses. First, they really haven't proven that. The only case they have that actually has applied it to anything other than a New York cause of action is the Rudgayzer case under the Telephone Consumer Protection Act, which is a very unique Federal statute that specifically incorporates State law. It looks to State law. And the Rudgayzer court didn't come in and say, this is broadly applicable to a Federal cause of action. It relied on that very language.

JUSTICE SOTOMAYOR: Counsel, how can you say

that? The case itself says: We read the language of the statute; Congress didn't say this was to be a class action; we are not permitting it. I understand the difference, and it could have argued or analyzed the case the way you said, but the appellate division there did exactly what your adversary said it did.

MR. LANDAU: We are -- we disagree –- I mean, what the court did in Rudgayzer -- they did not say, this applies broadly to all New York -- to all Federal causes of action. It looked at the TCPA and said the TCPA is a special statute that refers to the law of the State. It's an unusual statute. So again, I think the Rudgayzer case, if you look at the analysis, it supports us.

But even more broadly, Your Honor, I think the key point is what they are trying to get at somehow by -- by saying that this applies broadly is to say that New York would treat this as procedural. And they are -- they are asking this Court essentially to speculate on that. But there is no need to speculate because the New York Court of Appeals 2 years ago addressed this statute in quite some detail in the Sperry case, and the New York Court of Appeals actually went through why the statute was adopted, why 901(b) was adopted. And the New York Court of Appeals specifically said it was a

response. The word -- it said, you know, when -- when New York modernized its class action statute regime in 1975, there was concern expressed among a lot of people that applying penalties on a class-wide basis, statutory penalties and minimum measures of recovery unrelated to any actual damages, would be distorted and there would be overdeterrence and overkill in the class action context.

JUSTICE BREYER: Suppose the reason -- suppose the reason that they did that -- suppose they are very honest about their reasons, and they say, we think class actions are very often a very good thing, because a lot of people who are hurt can get some recovery and it acts as a deterrent. But there is some bad things about them. And one of the bad things is, somebody files a lawsuit, and before you know it, the litigation expenses are so high that the company feels it has to settle. Now, in our view that latter factor predominates. And that means that these procedures, class actions, will sometimes -- too often -- lead to the unjust, inefficient settlement of disputes. And that's why we are doing it.

MR. LANDAU: I think that's exactly what they did here, Your Honor.

JUSTICE BREYER: All right, if that's

exactly what we did, why isn't that second-guessing the judgment of the rule that they are saying it is efficient -- an inefficient procedure. It is inefficient in terms of the object of -- of the Federal rules and what the class wanted. We want efficient methods of achieving justice.

MR. LANDAU: I'm sorry, to the extent -- the hypothetical I thought you were saying, they were recognizing that it would be overdeterrence --

JUSTICE BREYER: Overdeterrence because they feel that the class action procedure is one that leads to forcing companies to settle, and to that extent the class action procedure does not lead to the efficient determination of disputes but to the inefficient and unjust determination. That's their honest reason.

MR. LANDAU: Right, Your Honor. I think what -- what I hear them saying in your hypothetical is not really the operation of judicial process. It doesn't go to the criteria.

JUSTICE BREYER: No, it does. It says it’s the judicial process that does it.

MR. LANDAU: Well, I think --

JUSTICE BREYER: It's the judicial process and its expanse --

MR. LANDAU: I think --

JUSTICE BREYER: -- that forces the settlements that create unjust results.

MR. LANDAU: Right, but I think there they are looking at the unjust results. As I hear your hypothetical, you're saying –-

JUSTICE BREYER: That may be, and suppose they said, you know, a 30-day period for appeal creates unjust results in our opinion, and therefore we think it is more efficient to have a 90-day appeal period. That wouldn't last for 2 seconds, wouldn't it?

MR. LANDAU: No, because then you would --

JUSTICE BREYER: So how is this different?

MR. LANDAU: Because then you would have a clear Hanna problem, Your Honor. I think -- let's go back to the threshold question. They try to get around what is a clear forum distortion, a clear Erie problem by saying you don't even get to Erie because you have a threshold Hanna issue, which is Rule 23 answers this question.

I didn't hear any real analysis from the other side of what is it in Rule 23 that actually says that you must be able to certify a class in every single cause of action that comes before you, even if the very legislature that created the cause of action says you may not have a class?

In fact, I think the Chief Justice earlier asked how this case differs from the statutes in appendices A and B. And I think I really didn't really hear a very clear answer. The statutes in Appendix A are all statutes where States and the Federal Government have put caps on the recovery in class actions. That shows that you can have a substantive cap on what is a procedural device.

JUSTICE STEVENS: Yes, well, let me be -- I just say I want -- I want to be sure I understood your answer to Justice Sotomayor. Is it your position that, if we follow your view in this case, it would also be true that -- if New York had passed a statute saying no cause of action based on New York law may be maintained as a class action?

MR. LANDAU: Yes, Your Honor. If New York did that -- I guess my answer is -- you really would have to look behind that. If it simply said -- if Mississippi and Virginia codified their current nonexistence of -- nonauthorization of class actions under State law and affirmatively said that there may not be a class action --

JUSTICE STEVENS: And that would -- that would apply not only to statutory causes of action but causes of action based on New York common law.

MR. LANDAU: Right. Under -- under New York law. If they were making decisions, they having created these causes of action under their own State's law, if they think it would be overdeterrent to have these kinds of actions brought on a class-wide basis and they were really enacting this for purposes of limiting the remedies that were available for these causes of action that they created, I -- there would be a strong argument that that should apply under --

CHIEF JUSTICE ROBERTS: But I guess --

MR. LANDAU: -- under Erie.

CHIEF JUSTICE ROBERTS: But -- but wouldn't Justice Stevens's hypothetical suggest that they were less concerned about the impact of -- of the class action procedure than they were about its procedural efficiency? In other words, I understand your position if you're saying, look, we've only got $20 million in this fund to pay plaintiffs and we think it's better to go on an individual basis, because if it's a class action, you know, it would be over in one shot or whatever --

MR. LANDAU: Right.

CHIEF JUSTICE ROBERTS: -- but it's not appropriate to say, we don't like the class action procedure as a general matter.

MR. LANDAU: Right.

CHIEF JUSTICE ROBERTS: And in Justice Stevens's hypothetical, it applied across the board, which would cause me, anyway, to think it was the latter.

MR. LANDAU: I would agree with Your Honor. If you have an unadorned prohibition on class actions in the State -- from a State, I think the most natural understanding of that is that was their determination of how the procedures in their courts are going to work.

JUSTICE SCALIA: It has to be one or the other, though. You -- you -- is it your position that if this is substantive, as you contend, it cannot be procedural? So New York State could not apply this -- this rule to out-of-State causes of action, and if it did, you -- you ought to have lost this case.

MR. LANDAU: No, Your Honor -- again, I think they can blend. I think in Gasperini this Court pointed out that the -- the heightened standard of judicial review of damages awards had a manifestly -- it was a procedural command with a manifestly substantive purpose. I think this case is not really dissimilar. Instead -- the cases in Appendix A say that in a class -- excuse me, the statutes say in a class action you may not recover more than X. The only difference

here is it says, if you are seeking to recover more than X, you may not have a class action.

And with respect to the statutes in Appendix B, those say there may not be a class action for particular causes of action. I don't --

JUSTICE GINSBURG: New York doesn't have -- as the -- the question that Justice Sotomayor asked and that Justice Stevens asked -- doesn't have any anti-class action as a procedural policy. It has picked out a particular kind of action, one for a penalty, one where there's -- what is it -- minimum recovery, and said that category, we have -- we're not anti-class action in general, but these penalties that we created, we don't want those brought as class actions.

MR. LANDAU: Precisely, Your Honor. And I think that underscores is why this is substantive or the fact that this reflects a substantive policy decision. It is not about the efficiency or operation of the class action process itself, the judicial process. This is a substantive decision to calibrate the remedy that New York has afforded under its own law, and a decision that when you have penalties that New York has decided -- and the Sperry case is very explicit on this -- that New York made a decision that the -- the appropriate level of enforcement for those was the level in an

individual action, and that when you got -- when you tried to make it into a class, that that would be overenforcement of those. And --

JUSTICE GINSBURG: One -- one question that was raised by the other side is, well, if you're saying this kind of restriction -- restriction on class action -- applies in a diversity case, why not a State that says we love class actions and we want class actions to be -- not to be hemmed in by all of the Rule 23 requirements?

MR. LANDAU: Then, Your Honor, you would have a Hanna issue because Rule 23 does set forth the criteria for a Federal court to certify a class.

State law cannot change or water down those criteria or direct that you get to the goal line of a certified class by some mechanism other than the Rule 23 criteria.

Our position, Your Honor, our point is that you don't get to the Rule 23 criteria if the State law or the substantive law that creates the cause of action sends you off the highway before you get into the land of the criteria.

If it just says, this is categorically unavailable as a class, as many States have, in fact, done in the statutes in Appendix B -- they have come up

with novel causes of action sometimes, abusive e-mail cause of action.

And they said, well, we do not want a class action to be brought for this kind of claim. That is a decision that reflects a substantive choice by the legislature that it would be overdeterrence and overenforcement to have this brought on a class-wide basis.

CHIEF JUSTICE ROBERTS: Well, it -- it only reflects a substantive choice -- if it is a substantive choice. If they say, we are not going to allow class actions because we think, procedurally, they are a bad idea because we think lawyers get too much recovery when they recover -- in other words, it -- your -- your position depends upon a characterization of the ban, and the restriction on class actions is either substantive or procedural.

MR. LANDAU: Well, Your Honor, I think what you can -- you can assume that, if they are not changing their criteria and not changing the rules governing all class actions, but singling out particular causes of action or particular penalties, that it's done for a substantive reason.

Here, in New York, we actually know that's true because the Sperry court says that. And one, I

think, important point in 901(b) is the initial clause, the “unless” clause, that we have been focusing a lot on the last clause that says it may not be brought as a -- as a class action, if it's seeking a statutory penalty.

But it says, "unless a statute creating or imposing a penalty or minimum measure of recovery specifically authorizes the recovery thereof in a class action."

That's showing, that even though this is located in the CPLR, that it's really part and parcel of their statutory regime. It's saying, this is our statutory default rule.

To be sure, a New York statute can override that, but the idea that this is somehow simply procedural because it's in the CPLR is really belied by that language that -- that really shows that -- and, frankly, I think it also belies the fact that this applies to causes of action outside of New York because the “unless” clause really can only be understood as setting a default baseline for the New York legislature in enacting a statute, that they may want to specifically authorize class actions for penalties.

So, again, I think --

JUSTICE STEVENS: Let me just be sure I am not lost on one point. Does this just apply to

statutory cause of action created by New York law? Or does it apply to a statutory cause of action created by New Mexico law?

MR. LANDAU: New York law, Your Honor. There's nothing --

JUSTICE STEVENS: The language doesn't limit it that way, does it?

MR. LANDAU: You are right, Your Honor, but, again, you read language against certain background assumptions and norms that States when they're --

JUSTICE STEVENS: Well, let me ask you this question: Supposing it did apply to statutory cause of actions created by New Mexico law?

MR. LANDAU: You know, and the truth is, Your Honor, I think it still wouldn't matter at the end of the day. I think, in Gasperini, the law -- the provision of the CPLR in Gasperini provided for heightened review.

There was no indication that that applied only to New York causes of action. Again, it may be one clue, but it's not dispositive.

JUSTICE STEVENS: But it seems to me that your position basically is that New York can decide what kinds of cases shall be brought as class actions, period.

MR. LANDAU: Well, Your Honor, if New York decides, for substantive reasons -- and we are talking about New York causes of action --

JUSTICE STEVENS: Well, whatever the reason --

MR. LANDAU: Okay.

JUSTICE STEVENS: -- for some good reason.

MR. LANDAU: Right. Well -- well, New York -- yes, that New York can make a decision that it doesn't want certain New York causes of action to be brought as class actions, and the Federal courts --

CHIEF JUSTICE ROBERTS: But the question is New Mexico causes of action. Can they decide that they don't want actions from outside of the State to be brought as class actions?

MR. LANDAU: Well, Your Honor, I think that would raise some interesting questions about New York's power to --

CHIEF JUSTICE ROBERTS: What it would do, it seems to me, is make it clear that was not a substantive decision, but, instead, a procedural decision.

MR. LANDAU: Correct, Your Honor. That's right. And, again -- and, again --

JUSTICE GINSBURG: But it could be -- it could be, as I -- the example of the statute of limitations. We create a claim. It has a certain life. It's dead after that time. That's New York law.

A sister State may say, we create the same claim, but we think it has a longer life. New York would say, that's fine. Bring that claim in your own State. Don't clutter up our courts with out-of-State claims when we would not hear the identical claim under our own law.

There are policies that do operate as procedural limitations and have a substantive thrust.

MR. LANDAU: Absolutely.

JUSTICE GINSBURG: New York might well say, look, we don't hear in New York penalty cases, and so we are not going to entertain the sister State claim for any -- when we wouldn't entertain our own. We are not frustrating the sister State. They could bring the class action there, but not in -- not in our courts.

MR. LANDAU: And I think the point -- I agree 100 percent. I think the point that you are -- that point underscores, Your Honor, is that, ultimately, the Erie issue is a Federal issue.

You can look to New York to try to understand the design and operation of the State rule at

issue, but, ultimately, you are being asked, as a Federal court, to set the appropriate relationship between the State court system and the Federal court system.

And, again, the lesson of Erie is you don't want to create incentives that will bring people like a magnet to Federal court and distort these ex ante foreign choices of litigants for State law claims.

JUSTICE GINSBURG: Well, they -- they bring up the Class Action Fairness Act, which allows a plaintiff -- they allow a defendant to remove a class action from a State court to a Federal court, but they also allow a plaintiff to initiate an action in the Federal court.

MR. LANDAU: That's correct, Your Honor, but the Class Action Fairness Act, on its face -- and the legislative history actually makes this point explicit -- it had no intention to change the operation of the Erie doctrine in class actions.

And so there is nothing in the Class Action Fairness Act that changes the scope of Rule 23. Again, Rule 23 just doesn't address this antecedent issue. It assumes, but does not require, that you have a cause of action that is amenable to class certification in the first place.

And if you were to construe Rule 23 otherwise, as overriding this kind of statute -- all the statutes in Appendix B, that would be a truly remarkably substantive interpretation that this Court has always stressed, that it must, in construing the rules, be careful not to tread into that territory and has construed the rules with an eye towards the limitations of the Rules Enabling Act.

The other side -- Shady Grove would walk you right into an extremely problematic situation from the point of view of the Rules Enabling Act, as well as creating these -- these incentives that really go against the heart of the Erie doctrine that would turn a $500 case into a $5 million case.

And one interesting point, I think, is that all these statutes that are listed in our Appendix B that limit class certification for particular causes of action -- under their theory that Rule 23 requires that everything be amenable to class certification, those would all be out the window.

I don't think counsel really wanted to admit that this morning, but the logic of their theory that -- is that Rule 23 governs this case and Rule 23 requires that every cause of action that comes before it be eligible for class certification.

That would knock out each and every one of the statutes in Appendix B. They don't live up to -- in their reply brief, at footnote 10, on page 15, they try to distinguish those statutes by saying, ah, well, the limitation on class actions in those statutes is in the substantive cause of action.

It's not in -- it's not somewhere else in the code, but that doesn't -- that doesn't save their argument under Rule 23. They really can't square that with their -- their core position that Rule 23 itself answers the question presented in this case.

And, again, what we would ask the Court is just to -- is to recognize that Rule 23 occupies the ground it occupies, but it doesn't go -- it occupies the ground of the criteria, which go to the efficiency and fairness of the process.

But where a State has made an antecedent decision that -- that a particular cause of action or a particular remedy is categorically unavailable -- or ineligible for class certification, that's a decision that Federal courts should respect under the Erie doctrine.

If there are no further questions, I see my time is about to expire.

CHIEF JUSTICE ROBERTS: Thank you, Mr.

Landau.

MR. LANDAU: Thank you, Chief Justice.

CHIEF JUSTICE ROBERTS: Mr. Nelson, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF SCOTT L. NELSON

ON BEHALF OF THE PETITIONER

MR. NELSON: Thank you.

I would like to begin with the point that my friend made about the "unless" clause in 901(b) and that that somehow indicated that it applied only to New York State statutes. In fact, the New York courts have applied that "unless" clause to Federal statutes, holding in one case that the Truth in Lending Act satisfied the "unless" clause because it authorized a class action, and in another that the Telephone Consumer Protection Act did not because it didn't authorize a class action.

So it actually is, I think, quite clear from the language of the statute and from the Court's application --

JUSTICE GINSBURG: There -- when you are dealing with a Federal statute, there’s a -- there’s a factor that doesn't come up when you are dealing with sister States, and that is the Supremacy Clause.

If Congress has made a judgment -- let's say

1983 -- I don't think the State that says, for our comparable claims, we don't allow class action could -- could apply that --

MR. NELSON: I think that's right. If Congress had provided that a class action was authorized in any court under a statute, New York couldn't prevent it.

But my point here is that the "unless" clause is simply consistent with the rest of the statute, which makes clear that it applies to statutes from any source.

And that means that far from being in the heartland of Erie, this is far outside the heartland of Erie. It's a case where the State court for procedural -- or the State's legislature, for procedural reasons, a balancing of the fairness and efficiency, the –- of class actions and those things that must -- that are requisite to the just, speedy, and efficient --

JUSTICE GINSBURG: I can't see how that's so when they limit just a particular remedy or penalty. If they were saying, well, across the board we don't want class actions, I could follow your argument much better. But when New York singles out penalties, it seems to be talking not about the efficiency and fairness of proceedings, but that it doesn't want penalty claims to

be magnified.

MR. NELSON: Well, but that's an aspect of -- of the fairness and efficiency of proceedings. Remember, of course, these are not claims for which the plaintiffs can't recover in State court. They are simply claims that they have to proceed individually in State court to pursue.

And the further point I would make is that the judgment that the -- that the New York legislature makes, that statutory penalties under any set of statutes are not appropriate for class treatment, is really contrary to the decision that the rules drafters of Rule 23 have made, which actually specifies the circumstances under which classes can be certified exactly by reference to the type of relief sought.

So it's a case where the rule and the State statute really do cover the same ground, to use the approach this Court took in the Burlington case, where it said that a State statute would not be given effect when the Federal rule occupies the territory. And that's --

JUSTICE GINSBURG: But it didn't say that about Rule 59, and it didn't say that about Rule 41(b).

MR. NELSON: And -- and Rule 59 doesn't occupy the territory of the standard to be applied, and

Rule 41(b) as construed in Semtek just does not address preclusive effect.

And finally, again, on the issue of ex ante forum choice, Congress, in the Class Action Fairness Act, provided jurisdiction so that Federal procedural rules would apply. If, as my friend argues, whether or not a case can proceed as a class action is a matter of substantive right, that principle can't be cabined to cases where the substantive -- or where the State standard precludes class actions.

If a class action, yes or no, is a matter of substantive right, that applies equally to State standards that -- that would promote class actions, and therefore, even though as -- as my friend says, it would be a Hanna issue, there would be an abridgement of a substantive right. So -- I see that my time is --

CHIEF JUSTICE ROBERTS: You can finish your thought, if you like.

MR. NELSON: Well, the thought is that that's an indication that amenability to class actions should be treated both for plaintiffs and for defendants as a matter of procedural right governed by the Federal rules. Thank you.

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

(Whereupon, at 11:55 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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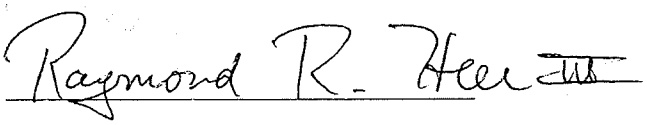

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