IN THE SUPREME COURT OF THE UNITED STATES

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SPRINT COMMUNICATIONS :

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

Petitioners :

v. : No. 07-552

APCC SERVICES, INC., ET AL. :

- x

Washington, D.C.

Monday, April 21, 2008

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

APPEARANCES:

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

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

C O N T E N T S

P R O C E E D I N G S

(10:03 a.m.)

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

Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE PETITIONERS

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

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

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

come from --

JUSTICE SCALIA: Say it again? What is the common ground?

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

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

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

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

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

JUSTICE SCALIA: Well then, this is not really a very significant case, is it? Because I presume that these enterprises that agglomerate claims and bring suit as a collection agency, they could simply get their compensation, instead of by way of, of a flat fee, by, you know, claiming entitlement to 2 percent of the rewards. So it's no big deal, I mean, really.

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

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

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

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

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

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

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

JUSTICE SCALIA: Go ahead, I'm sorry.

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

JUSTICE SCALIA: What if all of the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE STEVENS: Subpoenas out there and depositions.

MR. PHILLIPS: But, Justice Stevens, if you

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

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

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

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

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

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

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

JUSTICE STEVENS: But they have to -- they

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

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

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

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

assignment?

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

MR. PHILLIPS: But in no circumstance --

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

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

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

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

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

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

MR. PHILLIPS: But, Justice --

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

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

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

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

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

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

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

JUSTICE GINSBURG: But --

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

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

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

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

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

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

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

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

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

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

JUSTICE BREYER: How is that different?

MR. PHILLIPS: When --

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

MR. PHILLIPS: Right.

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

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

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

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

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

community. I don't know.

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

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

MR. PHILLIPS: Certainly.

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

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

JUSTICE BREYER: No.

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

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

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

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

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

MR. PHILLIPS: I'm sorry?

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

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

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

MR. PHILLIPS: Well, and that may well be

his answer.

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

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

MR. PHILLIPS: Right, there is Article III.

JUSTICE SOUTER: And Article III.

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

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

MR. PHILLIPS: Well, that may or may not

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

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

JUSTICE GINSBURG: But you said --

MR. PHILLIPS: I am sorry, Your Honor.

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

MR. PHILLIPS: Right.

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

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

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

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

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

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

themselves to the personal jurisdiction of the court.

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

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

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

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

the plaintiff in front of the court.

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

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

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

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

you say?

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

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

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

MR. PHILLIPS: It goes directly --

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

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

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

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

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

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

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

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

JUSTICE GINSBURG: No.

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

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

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

If I could reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Phillips.

Mr. Englert.

ORAL ARGUMENT OF ROY T. ENGLERT, JR.

ON BEHALF OF THE RESPONDENTS

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

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

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

MR. ENGLERT: Justice Scalia, a single decision, a small body of decisions that don't address the issue of standing, can be looked at in that way. But a unanimous body of case law, two decisions from this Court, arguably a third decision from this Court, many decisions from lower courts -- JUSTICE SCALIA: I don't consider two decisions an enormous body.

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

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

(Laughter.)

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

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

MR. ENGLERT: Absolutely.

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

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

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

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

MR. ENGLERT: The earliest case --

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

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

JUSTICE SCALIA: 1920?

MR. ENGLERT: Yes.

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

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

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

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

JUSTICE SCALIA: Sure, but --

MR. ENGLERT: This wrinkle of arguing --

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

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

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

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

JUSTICE SCALIA: Late 19th century?
MR. ENGLERT: Yes.
CHIEF JUSTICE ROBERTS: We're not under any body of law. I didn't see any cases cited after we had more carefully explicated our understanding of Article III. What's the latest case from this Court that you've got?
MR. ENGLERT: Well, as you know, I argue that the Vermont Agency case strongly supports us. But if you want a case specifically about assigning collection, then the latest case I have is Titus in 1939.
JUSTICE ALITO: Well, aren't Titus and Spiller different in that there the assignee is suing on a judgment that was obtained in a forum where Article III didn't apply?
MR. ENGLERT: No, absolutely not, Justice Alito.
JUSTICE ALITO: Why isn't that irrelevant?
MR. ENGLERT: Because for the exact reason Mr. Phillips gave you. The ASARCO case and Coleman v. Miller, Justice Frankfurter's concurring opinion, and a number of other cases stand for the proposition that a party who invokes the jurisdiction of this Court or of any other Federal court must satisfy Article III. So

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

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

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

MR. ENGLERT: My client --

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

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

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

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

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

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

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

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

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

MR. ENGLERT: The assignee --

CHIEF JUSTICE ROBERTS: He had no

independent injury.

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

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

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

MR. ENGLERT: We did.

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

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

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

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

CHIEF JUSTICE ROBERTS: No. But you know,

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

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

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

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

(Laughter.)

MR. ENGLERT: The -- the assignment in this

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

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

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

MR. ENGLERT: Oh, Justice Scalia --

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

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

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

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

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

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

MR. ENGLERT: One.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

to my clients completely --

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

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

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

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

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

MR. ENGLERT: He says he has some

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

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

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

counterclaim rights because the PSPs aren't individual parties.

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

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

for collection.

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

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

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

MR. ENGLERT: Well --

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

Now that might be right. And if it is right

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

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

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

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

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

MR. ENGLERT: There are.

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

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

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

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

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

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

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

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

MR. ENGLERT: It's one lawsuit.

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

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

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

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

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

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

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

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

MR. ENGLERT: I'm sorry?

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

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

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

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

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

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

MR. ENGLERT: Yes.

JUSTICE BREYER: Other than standing.

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

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

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

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

CHIEF JUSTICE ROBERTS: Speaking -- speaking --

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

nature.

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

MR. ENGLERT: Prospectively.

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

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

CHIEF JUSTICE ROBERTS: So why --

MR. ENGLERT: So my clients --

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

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

CHIEF JUSTICE ROBERTS: Well, but --
MR. ENGLERT: What Article III --
CHIEF JUSTICE ROBERTS: Well, Article III does trump tradition. I mean, if it doesn't meet Article III, no amount of tradition can save it. And you several times refer, when asked one of these questions, to the tradition and the old cases, but I haven't heard an answer yet to the concrete injury that is suffered by the aggregators.
MR. ENGLERT: The -- on the assumption on which this case comes to the Court, the aggregators' injury is the assigned injury of the assignors. We are taking the principle of Vermont Agency and saying that applies just as much to assignees for collection as it does to any other assignees. Contrary to Mr. Phillips' position and Judge Sentelle's position, that there are assignments and then there are assignments, the law has looked many times at the question whether there are assignments and then there are assignments. The argument that assignees for collection should be treated differently has been made many times. It has never prevailed in Federal court, unless and until it prevails in this case.
JUSTICE GINSBURG: The significance --
JUSTICE SCALIA: Mr. Englert, could you --

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

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

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

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

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

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

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

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

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

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

MR. ENGLERT: No more than my clients.

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

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

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

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

They have those protections. In fact, if

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

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Englert.

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

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

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

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

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

JUSTICE KENNEDY: And are problems --

MR. PHILLIPS: -- to litigate the issue.

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

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

JUSTICE GINSBURG: But wouldn't you --

MR. PHILLIPS: -- or associational standing.

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

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

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

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

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

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

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

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

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

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

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

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