

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
PAGES: 1-50

ALDERSON REPORTING COMPANY
1155 CONNECTICUT AVE., NW
WASHINGTON, D.C. 20036
(202) 289-2260

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SHADY GROVE ORTHOPEDIC :

4 ASSOCIATES, P.A., :

5 Petitioner :

6 v. : No. 08-1008

7 ALLSTATE INSURANCE :

8 COMPANY. :

9 - - - - - x

10 Washington, D.C.

11 Monday, November 2, 2009

12

13 The above-entitled matter came on for oral

14 argument before the Supreme Court of the United States

15 at 10:58 a.m.

16 APPEARANCES:

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

18 the Petitioner.

19 CHRISTOPHER LANDAU, ESQ., Washington, D.C.; on behalf

20 of the Respondent.

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1 P R O C E E D I N G S

2 (10:58 a.m.)

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

6 Mr. Nelson.

7 ORAL ARGUMENT OF SCOTT L. NELSON

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

25 JUSTICE GINSBURG: And how is it different

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

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

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

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

25 JUSTICE GINSBURG: You could say just as

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

10 MR. NELSON: Well, the reason is that Rule
11 23 actually does address the issue, and it's the same
12 issue that the -- that the State rule tries to address,
13 which is whether the matters may be certified as a
14 class.

15 Not only does Rule 23(b) provide explicitly
16 that the court may certify an action if the Rule 23(b)
17 (1), (2), or (3) criteria are met, but this Court also
18 emphasized in the Califano v. Yamasaki case that under
19 Rule 1, the Federal rules apply to all actions in the
20 Federal courts. And what that means, as the Court put
21 it in Yamasaki, is that a class action is available,
22 potentially, if the 23 standards are satisfied, in any
23 action within the Federal courts, unless Congress has
24 exercised its power to override a Federal rule, which,
25 as the author of Federal law, Congress is always

1 empowered to do.

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

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

10 Gasperini is one such case with regard to
11 Rule 59, interpreted so that you do not collide with the
12 State policy, and the same thing with Semtek with Rule
13 41(b). The Federal rule is interpreted so as not to
14 conflict with the State policy.

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

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

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

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

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

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

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

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

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

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

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

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

13 CHIEF JUSTICE ROBERTS: Well, not half.

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

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

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

25 JUSTICE GINSBURG: So suppose in this case

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

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

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

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

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

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

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

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

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

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

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

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

8 JUSTICE SOTOMAYOR: I'm sorry.
9 Justice Ginsburg's hypothetical was you are entitled to
10 \$100 as a statutory penalty but only if it's an
11 individual claim. If you -- if this is brought as a
12 class action, you don't get the statutory penalty. I
13 thought that was the substance of her question.

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

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

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

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

1 whether it has been brought aggregated with other --

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

5 MR. NELSON: No.

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

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

11 JUSTICE SOTOMAYOR: You mean the State could
12 do.

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

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

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

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

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

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

12 MR. NELSON: I -- I actually haven't found
13 one that applies it to actions arising under other State
14 laws. I have -- I found actions that apply it to
15 actions arising under Federal law. And the principal one
16 --

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

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

25 JUSTICE GINSBURG: It depends upon the

1 persuasiveness of the reasoning of the court.

2 MR. NELSON: Yes. And in this case, the
3 statute on its face uses the term "right of an action
4 brought under a statute." There is no suggestion in
5 901(b) that it's limited to New York State statutes.
6 The term "statute" in the -- in the Civil Practice Law
7 and Rules is not confined to New York State statutes.

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

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

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

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

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

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

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

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

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

1 aspect.

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

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

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

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

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

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

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

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

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

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

4 I want to also --

5 JUSTICE STEVENS: Can I ask you one brief
6 hypothetical?

7 MR. NELSON: Sure.

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

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

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

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

23 JUSTICE STEVENS: Right.

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

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

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

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

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

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

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

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

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

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

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

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

25 And that liability was what the Court looked

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

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

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

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

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

25 If the -- if the Court has no further

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

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 Mr. Landau.

5 ORAL ARGUMENT OF CHRISTOPHER LANDAU
6 ON BEHALF OF THE RESPONDENT

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

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

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

20 MR. LANDAU: No, Your Honor.

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

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

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

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

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

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

22 MR. LANDAU: I'm sorry.

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

1 conflict between that and Rule 23?

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

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

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

15 If the State --

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

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

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

1 case.

2 JUSTICE SOTOMAYOR: It's a policy choice.

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

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

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

16 MR. LANDAU: A State --

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

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

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

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

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

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

19 I think Justice --

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

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

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

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

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

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

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

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

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

25 JUSTICE SOTOMAYOR: Counsel, how can you say

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

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

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

1 response. The word -- it said, you know, when -- when
2 New York modernized its class action statute regime in
3 1975, there was concern expressed among a lot of people
4 that applying penalties on a class-wide basis, statutory
5 penalties and minimum measures of recovery unrelated to
6 any actual damages, would be distorted and there would
7 be overdeterrence and overkill in the class action
8 context.

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

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

25 JUSTICE BREYER: All right, if that's

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

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

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

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

20 JUSTICE BREYER: No, it does. It says
21 it's the judicial process that does it.

22 MR. LANDAU: Well, I think --

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

25 MR. LANDAU: I think --

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

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

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

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

12 JUSTICE BREYER: So how is this different?

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

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

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

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

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

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

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

10 CHIEF JUSTICE ROBERTS: But I guess --

11 MR. LANDAU: -- under Erie.

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

22 MR. LANDAU: Right.

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

1 MR. LANDAU: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 So, again, I think --

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

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

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

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

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

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

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

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

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

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

4 JUSTICE STEVENS: Well, whatever the
5 reason --

6 MR. LANDAU: Okay.

7 JUSTICE STEVENS: -- for some good reason.

8 MR. LANDAU: Right. Well -- well,
9 New York -- yes, that New York can make a decision
10 that it doesn't want certain New York causes of action
11 to be brought as class actions, and the Federal courts
12 --

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

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

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

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

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

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

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

13 MR. LANDAU: Absolutely.

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

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

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

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

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

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

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

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

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

9 The other side -- Shady Grove would walk you
10 right into an extremely problematic situation from the
11 point of view of the Rules Enabling Act, as well as
12 creating these -- these incentives that really go
13 against the heart of the Erie doctrine that would turn a
14 \$500 case into a \$5 million case.

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

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

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Thank you, Mr.

1 Landau.

2 MR. LANDAU: Thank you, Chief Justice.

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

5 REBUTTAL ARGUMENT OF SCOTT L. NELSON

6 ON BEHALF OF THE PETITIONER

7 MR. NELSON: Thank you.

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

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

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

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

1 1983 -- I don't think the State that says, for our
2 comparable claims, we don't allow class action could --
3 could apply that --

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

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

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

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

1 be magnified.

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

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

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

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

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

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

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

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

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

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

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

1 (Whereupon, at 11:55 a.m., the case in the
2 above-entitled matter was submitted.)
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ability 17:17	33:22,24,25	adopted 29:24	49:3	approach 48:18
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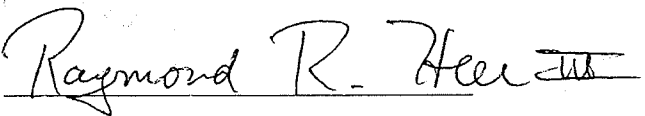
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of; SHADY GROVE ORTHOPEDIC ASSOCIATES, P.A., Petitioner, v. ALLSTATE INSURANCE COMPANY.; and that these attached pages constitute the original transcript of the proceedings for the records of the Court.

Raymond R. Heer 

REPORTER