

1           IN THE SUPREME COURT OF THE UNITED STATES

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3   SPRINT COMMUNICATIONS                                 :

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

5                                 Petitioners                                 :

6                                 v.                                 :   No. 07-552

7   APCC SERVICES, INC., ET AL.                                 :

8   - - - - - x

9   Washington, D.C.

10    Monday, April 21, 2008

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

15   APPEARANCES:

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

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

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

2 (10:03 a.m.)

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

7 ORAL ARGUMENT OF CARTER G. PHILLIPS

8 ON BEHALF OF THE PETITIONERS

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

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

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

1     come from --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE SCALIA: What if all of the

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

23 JUSTICE STEVENS: Subpoenas out there and  
24 depositions.

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

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

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

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

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

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

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

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

25                  JUSTICE STEVENS:   But they have to -- they

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

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

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

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

1 assignment?

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

5 MR. PHILLIPS: But in no circumstance --

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

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

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

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

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

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

12              MR. PHILLIPS: But, Justice --

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

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

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

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

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

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

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

3                   JUSTICE GINSBURG:   But --

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

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

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

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



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

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

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

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

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

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

3                   JUSTICE BREYER:  How is that different?

4                   MR. PHILLIPS:  When --

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

11                  MR. PHILLIPS:  Right.

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

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

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

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

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

1 community. I don't know.

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

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

7 MR. PHILLIPS: Certainly.

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

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

13 JUSTICE BREYER: No.

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

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

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

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

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

13                  MR. PHILLIPS: I'm sorry?

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

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

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

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

1 his answer.

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

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

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

15 JUSTICE SOUTER: And Article III.

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

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

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

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

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

17           JUSTICE GINSBURG: But you said --

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

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

25           MR. PHILLIPS: Right.

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

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

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

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

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

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

1 themselves to the personal jurisdiction of the court.

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

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

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

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



1 the plaintiff in front of the court.

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

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

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

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

1     you say?

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

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

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

17                  MR. PHILLIPS: It goes directly --

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

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

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

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

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

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

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

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

11                  JUSTICE GINSBURG: No.

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

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

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

20                  If I could reserve the balance of my time.

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

23                  Mr. Englert.

24                  ORAL ARGUMENT OF ROY T. ENGLERT, JR.

25                  ON BEHALF OF THE RESPONDENTS

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

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

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

16                  MR. ENGLERT: Justice Scalia, a single  
17   decision, a small body of decisions that don't address  
18   the issue of standing, can be looked at in that way.

19   But a unanimous body of case law, two decisions from  
20   this Court, arguably a third decision from this Court,  
21   many decisions from lower courts --               JUSTICE

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

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

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

3 (Laughter.)

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

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

18 MR. ENGLERT: Absolutely.

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

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

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

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

13 MR. ENGLERT: The earliest case --

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

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

19 JUSTICE SCALIA: 1920?

20 MR. ENGLERT: Yes.

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

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

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

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

12 JUSTICE SCALIA: Sure, but --

13 MR. ENGLERT: This wrinkle of arguing --

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

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

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

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



1 JUSTICE SCALIA: Late 19th century?

2 MR. ENGLERT: Yes.

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

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

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

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

19 JUSTICE ALITO: Why isn't that irrelevant?

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

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

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

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

18 MR. ENGLERT: My client --

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

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

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

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

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

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

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

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

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

24 MR. ENGLERT: The assignee --

25 CHIEF JUSTICE ROBERTS: He had no

1 independent injury.

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

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

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

15 MR. ENGLERT: We did.

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

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

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

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

25 CHIEF JUSTICE ROBERTS: No. But you know,

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

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

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

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

24 (Laughter.)

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

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

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

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

1 MR. ENGLERT: Oh, Justice Scalia --

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

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

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

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

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

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

6 MR. ENGLERT: One.

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 to my clients completely --

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

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

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

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

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

25 MR. ENGLERT: He says he has some

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

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

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

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

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

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

1 for collection.

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

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

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

17 MR. ENGLERT: Well --

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

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

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

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

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

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

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

17 MR. ENGLERT: There are.

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

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

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

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

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



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

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

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

18           MR. ENGLERT: It's one lawsuit.

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

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

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

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

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

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

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

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

21 MR. ENGLERT: I'm sorry?

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

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

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

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

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

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

6 MR. ENGLERT: Yes.

7 JUSTICE BREYER: Other than standing.

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

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

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

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

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

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

1 nature.

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

5 MR. ENGLERT: Prospectively.

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

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

15 CHIEF JUSTICE ROBERTS: So why --

16 MR. ENGLERT: So my clients --

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

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

1 CHIEF JUSTICE ROBERTS: Well, but --

2 MR. ENGLERT: What Article III --

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

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

24 JUSTICE GINSBURG: The significance --

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

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

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

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

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

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

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

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

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

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

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



1 MR. ENGLERT: No more than my clients.

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

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

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

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

25 They have those protections. In fact, if

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

11 Thank you.

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

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

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

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

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

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

6 JUSTICE KENNEDY: And are problems --

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

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

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

19 JUSTICE GINSBURG: But wouldn't you --

20 MR. PHILLIPS: -- or associational standing.

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

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

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

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

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

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

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

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

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

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

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

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

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