

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   COMCAST CORPORATION, ET AL.,                   :

4                           Petitioner s                   :   No. 11-864

5                   v.   :

6   CAROLINE BEHREND, ET AL.                   :

7   - - - - - x

8   Washington, D.C.

9   Monday, November 5, 2012

10

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

14   APPEARANCES:

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

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

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

2 (10:05 a.m.)

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

6 Mr. Estrada.

7 ORAL ARGUMENT OF MIGUEL ESTRADA

8 ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

3                   (Laughter.)

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

7                   MR. ESTRADA: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 MR. ESTRADA: Right.

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

1     they bought different amounts of pipe.

2                     MR. ESTRADA:   Right.

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

5                     MR. ESTRADA:   Right.

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

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

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

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

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

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

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

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

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

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

1 MR. ESTRADA: But the legal --

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

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

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

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

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

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

1     hypothetical --

2                     JUSTICE BREYER:   Is?

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

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

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

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

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

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

25                    JUSTICE BREYER:  And this does, too --

1 MR. ESTRADA: -- in this case.

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

7 (Laughter.)

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

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

12 JUSTICE BREYER: And if --

13 MR. ESTRADA: Justice Breyer --

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

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

18 JUSTICE BREYER: No, you shouldn't.

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

25 Now, you may think that they should have



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

7                   JUSTICE KAGAN: Well, Mr. --

8                   MR. ESTRADA: If I could just finish?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 MR. ESTRADA: But, Justice Kagan --

11 JUSTICE KAGAN: -- to rule on admissibility.

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

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

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

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

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

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

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

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

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

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

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

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

5                   MR. ESTRADA:   There --

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

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

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

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

1 question this way, right?

2 MR. ESTRADA: Well --

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

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

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

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

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

25 Thank you.



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

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

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

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

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

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

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

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

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

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

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

23                  MR. BARNETT: Indeed, Your Honor.

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

1 MR. BARNETT: That's true.

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

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

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

15 MR. BARNETT: That was --

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

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

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

1 objection at that time.

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

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

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

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

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

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

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

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

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

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

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

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

10 MR. BARNETT: It --

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

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

16 JUSTICE SCALIA: Well, whenever.

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

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

20 MR. BARNETT: Daubert --

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

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

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

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

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

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

7                   JUSTICE SCALIA: There --

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

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

14                  MR. BARNETT: Is it always the case?

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

25 MR. BARNETT: Yes, I --

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

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

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

7 (Laughter.)

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

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

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

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

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

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

3 (Laughter.)

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

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

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

20 MR. BARNETT: And, Your Honor --

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

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

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

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

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

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

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

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

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

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

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

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

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

12 MR. BARNETT: Exactly.

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

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

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

1 MR. BARNETT: Yes, Your Honor.

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

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

13 MR. BARNETT: Yes, Your Honor.

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

16 MR. BARNETT: Indeed.

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

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

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

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

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

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

19           The other thing I would like --

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

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

24           JUSTICE KAGAN: Okay. Then I will.

25           (Laughter.)

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

3 (Laughter.)

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

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

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



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

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

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

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

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

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

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

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

15 And what --

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

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

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

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

2 MR. BARNETT: No, Your Honor.

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

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

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

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

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

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

25 JUSTICE KENNEDY: And that includes some

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

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

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

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

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

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

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

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

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

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

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

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

11                    MR. BARNETT: What Judge --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 (Laughter.)

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

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



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

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

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

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

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

1                   That's not fair.

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

6                   MR. BARNETT: I --

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

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

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

16                  MR. BARNETT: Right.

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

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

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

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

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

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

20 JUSTICE SCALIA: Mr. --

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

25 JUSTICE SCALIA: Mr. Barnett, suppose --

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

5                     (Laughter.)

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

8                     (Laughter.)

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

15                    MR. BARNETT: I would --

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

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

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

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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

8 REBUTTAL ARGUMENT OF MIGUEL ESTRADA

9 ON BEHALF OF THE PETITIONERS

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

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

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

1 has to be certainly linked to illegal conduct.

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

8 MR. ESTRADA: No, I think --

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

13 MR. ESTRADA: Story Parchment.

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

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

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

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

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

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

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

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

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

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



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

9                   Thank you, Mr. Chief Justice.

10                  CHIEF JUSTICE ROBERTS: Thank you, counsel.

11                  The case is submitted.

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

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