

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - x

KEITH SMITH, ET AL., :

Petitioners : No. 09-1205

v. :

BAYER CORPORATION :

- - - - - x

Washington, D.C.

Tuesday, January 18, 2011

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

APPEARANCES:

RICHARD A. MONAHAN, ESQ., Charleston, West Virginia; on behalf of Petitioners.

PHILIP S. BECK, ESQ., Chicago, Illinois; on behalf of Respondent.

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	RICHARD A. MONAHAN, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	PHILIP S. BECK, ESQ.	
7	On behalf of the Respondent	25
8	REBUTTAL ARGUMENT OF	
9	RICHARD A. MONAHAN, ESQ.	
10	On behalf of the Petitioners	47
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next this morning in case 09-1205, Smith versus Bayer Corporation.
Mr. Monahan.

ORAL ARGUMENT OF RICHARD A. MONAHAN
ON BEHALF OF PETITIONERS

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

Petitioners Keith Smith and Shirley Sperlazza were not named plaintiffs in the prior Federal proceeding litigated by George McCollins. They never received notice of that prior proceeding; they never received an opportunity to appear and be heard; they never received an opportunity to opt out; and they never received an opportunity to appeal the decision denied by certification.

No precedent of this Court would justify treating -- treating people as parties under preclusion principles under these circumstances. Recently in Taylor v. Sturgell this Court addressed the rule against nonparty preclusion and discussed the recognized exceptions.

The Court in that case discussed a properly

1 conducted class action as being one of the exceptions.
2 The Court in discussing these preclusion rules noted
3 that they are limited by due process concerns, and the
4 Court noted that the properly conducted class action is
5 an exception due to the due process protections
6 incorporated into Rule 23.

7 Obviously, this Court has discussed the due
8 process protections with class actions in prior cases,
9 particularly those dealing with 23(b)(3) classes in
10 cases such as Eisen and Shutts. The Court has noted
11 that whenever a class is certified notice must be
12 provided; the right to -- notice must be provided; they
13 must have the right to appear and be heard in person or
14 by counsel; they must have the right to opt out as well
15 as protection of adequate representation.

16 JUSTICE ALITO: Well, suppose a class action
17 based on diversity is filed in one of the Federal
18 districts in West Virginia and the district court denies
19 class certification. The same plaintiff, the same
20 plaintiff's attorney, takes the old complaint, writes in
21 the name of the new named party, files exactly the same
22 complaint in another Federal -- in the other Federal
23 district in West Virginia. Would your argument be the
24 same? That can go forward, get another shot at class
25 certification?

1 MR. MONAHAN: Your Honor, under the -- yes,
2 under those circumstances, as outlined by -- by Your
3 Honor.

4 JUSTICE GINSBURG: All you have to do is get
5 a new named plaintiff?

6 MR. MONAHAN: Yes, as long as it's not the
7 same party. If it's a different party --

8 JUSTICE GINSBURG: And it can be the same
9 attorney?

10 MR. MONAHAN: Yes, it could be the same
11 attorney. This Court noted that in Taylor v. Sturgell,
12 in South -- South Central Bell v. Alabama, and also as
13 discussed in the Richards case.

14 JUSTICE GINSBURG: Would the -- would the
15 decision that's saying -- saying Rule 23 standards have
16 not been met, the individual issues predominate over the
17 common issue -- doesn't that deserve some measure of
18 respect when the same thing is tried again?

19 MR. MONAHAN: Yes, Your Honor, but that
20 would be under stare decisis principles, we believe, and
21 that's the situation, since it is a different party,
22 since it's not the same party itself. And certainly the
23 district courts in West Virginia would look to other
24 district courts' opinions and would likely render them
25 persuasive, or consider them persuasive, under those

1 circumstances.

2 JUSTICE ALITO: But they have no obligation
3 to follow another district court opinion, do they?

4 MR. MONAHAN: Technically, no, Your Honor.
5 If the Fourth Circuit, for instance, had spoken on the
6 matter, though, and it was something that was decided by
7 the Fourth Circuit, or of course by this Court, then
8 clearly they would.

9 JUSTICE GINSBURG: And this one was
10 determined by the multidistrict panel, right?

11 MR. MONAHAN: Yes. Yes, a district judge in
12 Minnesota. Yes, Your Honor.

13 Interestingly, in Taylor, this Court noted
14 that adopting a broad theory of virtual representation
15 based upon an identity of interests, adequate
16 representation, and a close relationship would -- would,
17 in essence, be equivalent to adopting a de facto class
18 action or recognizing a common law class action without
19 any of the procedural due process protections provided
20 by Rule 23.

21 Obviously, in dealing with these cases, the
22 main reason a certification is -- the main reason the
23 due process protections are provided upon certification
24 is to go ahead and justify binding the class members to
25 any judgment issued by the court at that point. Until

1 you have that, unless you have the certification and the
2 due process protections for a Rule 23(b)(3) class, until
3 you have those, the absent class members remain
4 strangers to the proceeding.

5 JUSTICE GINSBURG: But the absent class
6 members retain their individual right. They are not
7 being precluded as to their individual claim. It's only
8 they can't be a class representative.

9 MR. MONAHAN: That's -- that's true, Your
10 Honor. We submit, however, that any procedural rights
11 which have been recognized and adopted, those procedural
12 rights, just as the substantive claim, itself, have to
13 be adjudicated consistent with due process. And West
14 Virginia itself has adopted Rule 23 of the West Virginia
15 Rules of Civil Procedure, and that State has the right
16 to apply and interpret that rule as it sees fit to
17 manage its own docket and administrate its own docket as
18 it sees fit.

19 JUSTICE GINSBURG: Am I right to read the
20 supplemental brief as saying that now, the West Virginia
21 Supreme Court agrees with the multidistrict panel on
22 what the content of West Virginia law is?

23 MR. MONAHAN: That's not correct, Your
24 Honor. All of the issues raised in our petition for
25 cert remain just as they were. At worst, if *White v.*

1 Wyatt withstands petition for rehearing, at worst we
2 lose our CCPA claim. That certainly is a valuable claim
3 to us. I will not dispute that. But we also have a
4 common law fraud claim. We also have breach of warranty
5 claims, and those are still in existence.

6 And the critical fact of this case in that
7 regard is, the question of whether or not a class may be
8 certified under West Virginia Rules of Civil Procedure
9 has never been litigated, has never been decided by any
10 court.

11 JUSTICE KAGAN: Well, Mr. Monahan, do you
12 mean by that that you would have a blanket rule that a
13 decision on Federal Rule of Civil Procedure 23 can never
14 be preclusive as to a State Rule of Civil Procedure 23?

15 MR. MONAHAN: Your Honor, I believe it would
16 depend upon whether or not that State has said that not
17 only are we going to look at these Federal decisions as
18 being persuasive, but we're going to consider ourselves
19 bound by the decisions of the Fourth District or the
20 United States District Court for the Southern District
21 of West Virginia.

22 JUSTICE KAGAN: Well, suppose the State
23 says: We will not consider ourselves bound; we do have
24 our own law with respect to Rule 23, but sometimes we'll
25 go along with the Federal rule and sometimes we won't.

1 Is it then up to the courts to actually try to determine
2 whether the -- the West Virginia court in this case
3 would have gone along, would have interpreted its own
4 rule of civil procedure the same way that the Federal
5 Court interpreted the Federal rule?

6 MR. MONAHAN: Well, for instance, what Your
7 Honor suggested is essentially what the West Virginia
8 Supreme Court of Appeals does. I mean, they will --
9 they will consider them to be persuasive. They will
10 consider them -- but in their In re Rezulin case, the
11 court noted -- the court actually criticized the circuit
12 judge for relying exclusively on Federal decisions
13 denying class certification in medical device or
14 prescription drug cases. And the court noted that, you
15 know, although we will look at those rules and they may
16 be persuasive, they are not binding or controlling on
17 us, and that is because we do not want our legal
18 analysis to be nothing more than a mere Pavlovian
19 response to Federal decisional rules.

20 JUSTICE ALITO: What is -- what is the
21 difference between the Federal law and the West Virginia
22 law on the class certification issue? Not the
23 application to this particular complaint, but as to the
24 -- the standard. What do you see as the difference
25 between the Federal standard and the West Virginia

1 standard?

2 MR. MONAHAN: The main difference, Justice
3 Alito, is that our court has -- and they cite this in
4 In re Rezulin, for instance. They cite Neuberger on
5 Class Actions as one of the authorities to support this
6 principle, but they note that in -- in our court that
7 normally challenges based upon reliance, causation, and
8 damages will not bar certification on a predominance
9 basis, because those go to the right of the individual
10 to recover, but not to the overall liability issues of
11 the defendant, which it believes can be addressed as
12 common issues in many cases and save the court an
13 extreme amount of time addressing those common issues.

14 Now, the court indicates that if individual
15 trials need to be conducted later on, on any of those
16 issues, if there are truly individual issues that need
17 to be resolved concerning those claims, individual
18 trials can be accomplished.

19 JUSTICE SOTOMAYOR: On the ground that the
20 court here, the Federal court, decided that they weren't
21 predominant issues based mostly on the fact that, like
22 the Virginia court has now, it's decided that there is
23 no economic loss, what were the differences?

24 What were the differences here? How would
25 the difference in standard play out here?

1 MR. MONAHAN: Well, for instance -- and this
2 is an interesting aspect of this case -- the court's not
3 only trying to bind us on the procedural ruling, but is
4 also trying to bind us in a substantive ruling as to
5 what the elements of the claims in West Virginia are and
6 as to what's needed to prove those claims.

7 For instance, the Eighth Circuit has -- has
8 held that in looking at the district court's opinion,
9 that it has held that an actual physical injury is
10 required, but economic loss alone is not enough.
11 Clearly, 1.9 that's not consistent with West Virginia
12 law. An economic loss alone can be sufficient. In West
13 --

14 JUSTICE SOTOMAYOR: The -- I'm sorry. I
15 don't mean to cut you off, but you're really arguing
16 that due process requires the same treatment,
17 essentially, of notice and an opportunity to be heard
18 that we are giving to a substantive decision that blocks
19 a future member from pursuing his or her claim, correct?

20 MR. MONAHAN: Yes, very similar, Your Honor.
21 I mean, in this circumstance -- I mean, these rights are
22 provided. These procedural rights, once they are
23 created, are being provided, and they can't be taken
24 away without due process. West Virginia has recognized
25 the right to -- to proceed in our court under our rule,

1 and not -- you don't have to guarantee --

2 JUSTICE SOTOMAYOR: You're almost treating
3 it as a property right, and -- and you're basically
4 saying we're equating it with, essentially, a property
5 right.

6 MR. MONAHAN: Well, I think -- I think what
7 I'm trying to say, Your Honor, is that these type of
8 procedural rights -- whenever you have a substantive
9 claim, which is a property right, and you seek to
10 litigate them, you shall have available to you all the
11 Rules of Civil Procedure which have been adopted and
12 recognized, and those procedural elements of the claim
13 should be treated or adjudicated just the same as a
14 substantive claim, consistent with due process.

15 JUSTICE SOTOMAYOR: If we disagree with you,
16 because there is a difference of some sort between
17 procedure and substantive rights, then what would
18 command the due process violation in a situation in
19 which the Federal litigation has applied essentially the
20 same standard that the State has and there has been
21 adequate representation on the procedural question,
22 where no substantive right of a plaintiff has been
23 extinguished?

24 That's a lot of conditions, but those are
25 the three conditions of this case. So what in due

1 process requires that outcome, your outcome?

2 MR. MONAHAN: I believe that the basic --
3 because we are not the same party, we believe the basic
4 elements are just the notice and the right to be heard,
5 which our party has never had. May I --

6 JUSTICE SOTOMAYOR: You're extinguishing a
7 substantive right? Return to my question of what makes
8 a procedural right substantive.

9 MR. MONAHAN: Well, this particular
10 procedural right is very closely connected -- I mean,
11 one of the main purposes of a class action is to level
12 the economic playing field and to enable people with
13 small individual claims to aggregate them in order to
14 seek justice. Without those --

15 JUSTICE SOTOMAYOR: Actually not true. The
16 plaintiff here received the same thing. The issue is
17 how much money the lawyers are going to receive, really,
18 because plaintiff gets their attorney's fees, gets a
19 statutory violation amount, which is going to be the
20 same whether it's in a class action or an individual
21 action, so it's really not the plaintiff who stands to
22 win.

23 MR. MONAHAN: No, Your Honor, what --
24 what -- the assumptions you just made I don't believe
25 are correct in this -- in this particular case, because,

1 one, obviously if we lose the CCPA claim in light of the
2 White case, there would be no statutory attorney fees.
3 And even if we had the CCPA claim, it's -- the court has
4 discretion, it may award them. There's no requirement
5 that it do so, no requirement whatsoever.

6 And how can anybody bring -- any lawyer
7 trying to bring one of these small damage claims, if the
8 damages are only \$100, \$200 per plaintiff, for instance,
9 how could any lawyer justify facing a defendant such as
10 Bayer in a complex product liability action? Just the
11 cost alone of having experts, of doing discovery, all
12 those matters would greatly exceed the value of the
13 claim itself. So the class action is the only way in
14 which to aggregate the claims and level the economic
15 playing field for everybody.

16 The other thing, I would note for the common
17 law fraud claim West Virginia does have a bad faith
18 exception for attorney fees, but that depends on the
19 degree of fraud that the Court finds, and that -- that
20 in and of itself is discretionary.

21 CHIEF JUSTICE ROBERTS: What if -- how far
22 does your procedural right extend? Let's say in the
23 second action the court says, look, we've been through
24 all this before; we have had a million pages of
25 discovery from the prior action, no protective order at

1 all. So while if you were the first person here, you're
2 entitled to, you know, ten interrogatories, because we
3 have been through this before, I'm going to say you can
4 look at all the discovery that's there, but you only get
5 five interrogatories.

6 Now, do you say no, no, no, I'm entitled to
7 the same procedural rights I would have if I were here
8 first? Is that right?

9 MR. MONAHAN: Your Honor, I think the court
10 does have some flexibility, depending upon the
11 procedural role at issue. And in essence, the court is
12 applying almost essentially the stare decisis type of
13 principles there. We have resolved this exact discovery
14 issue before, the exact --

15 CHIEF JUSTICE ROBERTS: So now it's not only
16 that you're entitled to your day in court substantively;
17 you're -- you're entitled to your day in court
18 procedurally as to some procedural aspects but not
19 others?

20 MR. MONAHAN: Well, I certainly think the
21 Court needs to examine the procedural aspect and its
22 importance, and the part that it plays. I mean, for
23 instance, one of the problems we have in this situation
24 is that normally res judicata and collateral estoppel do
25 not normally apply to mere procedural rulings. They're

1 not normally used for that purpose.

2 Most cases where they are used for that
3 purpose are cases where a dismissal has occurred based
4 upon a procedural ruling or a procedural failing. And
5 whenever they apply collateral estoppel and res
6 judicata, it's almost -- every case I have seen deals
7 with the exact same party in another proceeding. And
8 there they preclude them. But here it's a totally
9 different party. And the issue under West Virginia law
10 has never been litigated by any court.

11 JUSTICE BREYER: If a totally different
12 party, if a person, say an intervenor, joins a
13 litigation late, and there have been a lot of procedural
14 rulings, I guess that that intervenor takes the case as
15 he finds? He can go to the judge and say: Judge, I
16 want you to reconsider your procedural ruling in light
17 of the fact I'm here.

18 How does the situation I have just sketched
19 differ from this one? I mean, you have a client who's
20 coming to the litigation late. He's separate from the
21 litigation, I know, but he could send a representative
22 to the judge and say: Judge, I want you to reconsider
23 in light of the fact I'm joining. Now, I know I'm not
24 joining; in fact, I'm bringing a different case. But
25 I'm thinking of the -- of the Chief Justice's hypo here

1 and I'm -- and I'm trying to apply it. And is your
2 client analogous to that person who joins litigation
3 late?

4 MR. MONAHAN: No, Your Honor, because -- I
5 mean, for instance, this Court has noted -- and they
6 note it, I believe in the -- you noted it in the
7 Richards case. The Chase National Bank v. Norwalk and
8 Martin v. Wilks has noted that a stranger to litigation
9 has no duty to seek to intervene in the case; however,
10 they can; they can seek to intervene if they have
11 notice, if they so choose.

12 If you take that affirmative step to
13 intervene, knowing what has happened in that case, you
14 obviously have notice of the case because you're
15 choosing to intervene. And if you seek to intervene
16 having that notice, then you take it as you find it.

17 Now, you can certainly ask the court to
18 reconsider because you want to raise new arguments, but
19 there would be no obligation to do so.

20 JUSTICE GINSBURG: Here you have a different
21 forum; pick up a different plaintiff, and you go to a
22 different forum. How -- and I guess your answer is that
23 you could go on and on and on until -- until maybe you
24 find a judge who will certify this class.

25 MR. MONAHAN: Your Honor, I don't -- I don't

1 believe so. I don't believe that's the case because
2 there are limitations to that. One would be, I think,
3 if you filed at another Federal court, for instance,
4 Rule 23 would be the same legal standard. Federal Rule
5 23 is the same legal standard in all Federal courts.

6 JUSTICE GINSBURG: But we have a new
7 plaintiff, so that plaintiff wouldn't have had notice
8 and an opportunity to be -- to be heard.

9 MR. MONAHAN: For preclusion purposes,
10 that's correct. But I think the Federal court certainly
11 would look at those cases for stare decisis purposes and
12 looking as to whether or not the class should be
13 certified under the same legal standard.

14 Now, here we do have a different forum. We
15 have the State of West Virginia is a separate sovereign,
16 has its own rights to do this. But, once -- once -- if
17 a class would be denied in West Virginia at one time, I
18 believe that the chances of having another one succeed
19 are very low, because courts will look to those stare
20 decisis principles.

21 JUSTICE GINSBURG: Yes, but there are 50
22 States.

23 MR. MONAHAN: I'm sorry, Your Honor?

24 JUSTICE GINSBURG: There are 50 States. And
25 if the plaintiff was asking for a nationwide class

1 action --

2 MR. MONAHAN: Yes, Your Honor, and the issue
3 with that, though, is this Court has -- in Taylor v.
4 Sturgell, for instance, which Your Honor authored, the
5 government argued in that case that, you know, we should
6 adopt this virtual representation theory because of
7 repetitive litigation. We had this FOIA request. Any
8 person out there could file asking the government for
9 these documents and the government may have to go on
10 thousands of times, millions of times conceivably to do
11 this.

12 And this Court note -- noted that the threat
13 of repetitive litigation is not sufficient to justify
14 adopting a new exception to the rule against nonparty
15 preclusion.

16 JUSTICE ALITO: What kind of notice do you
17 think due process would require? If the court in which
18 the case was first filed thought, I'm not going waste, I
19 don't want to waste my time on this class certification
20 issue if it's just going to be relitigated over and over
21 and over again, so I want to provide sufficient notice
22 so that the members of a class will be bound by my -- by
23 my class certification issue, what -- what would have to
24 be done? Would they all have to be given individual
25 notice and asked to opt out?

1 MR. MONAHAN: Your Honor, I -- I believe so.
2 I believe -- I mean, consistent with Shutts, this
3 Court's ruling in Shutts and Eisen, I think they would,
4 because once they had the notice and that they would
5 decide not to opt out, then they would be bound by any
6 ruling that the -- that the court issues there. But
7 if -- if they don't have that opportunity, especially
8 whenever -- and this case also involves the
9 Anti-Injunction Act, of course, the principles of
10 Federalism and comity, and any question under the
11 Anti-Injunction Act, any doubt should go against issuing
12 injunctions?

13 And the -- the exceptions to that Act are
14 narrowly construed in light of principles of Federalism,
15 and because we do have a separate State here and we're
16 trying to apply or seek State relief and seek the State
17 rules and follow the State rules, I do believe you would
18 need the same notice that we have in Shutts, the notice,
19 the opportunity to appear and the opportunity to opt
20 out.

21 Now, certainly other issues -- if we're
22 talking about policy concerns, another thing I would
23 note is that in CAFA recently -- whenever Congress
24 adopted CAFA, certainly if they believe that basing
25 one -- using one class denial in Federal court as a

1 basis to preclude all other similar classes seeking --
2 seeking certification, if they thought that was
3 consistent with due process, certainly they could have
4 considered adopting that as part of CAFA. But they
5 chose to deal with it in a very different way, a very
6 different manner, and that was to go ahead and change
7 the jurisdictional status and diversity cases, make
8 minimal diversity and allow removal with certain --
9 certain exceptions for certain discretionary ones, stay
10 at home and local controversy exceptions, but they
11 didn't -- I mean, that's how they chose to deal with it.

12 Now, certainly we would admit that since
13 CAFA has been enacted, the chance -- certainly there's
14 not nearly as many of these cases which will occur where
15 this will be an issue, because many large classes now
16 will get removed.

17 JUSTICE KAGAN: When -- when Congress
18 enacted CAFA, did Congress think about this precise
19 issue, the issue that Justice Ginsburg is raising about
20 a lawyer going from State to State with a different
21 named plaintiff? Was that -- was that part of what
22 Congress was reacting to?

23 MR. MONAHAN: Yes, Justice Kagan, it's my
24 understanding that that was something they were
25 concerned about. They were concerned about, again, some

1 States being too permissive in granting class
2 certifications, and they were worried about some of
3 those same factors.

4 But, you know, one of the primary concerns
5 on all -- in CAFA itself, though, was protecting the
6 absent class members' rights, and this Court's noted
7 those same rights in *Amchem* and *Ortiz*, many of its
8 cases, your cases, you've noted that that's a principle
9 concern. And this Court has heightened the standard in
10 those class -- class settlement certifications for the
11 court to make sure that each and every element and
12 requirement is met, to ensure that -- that the
13 settlement itself is fair to all class members,
14 including the absent class members, and that, you
15 know -- and that the attorney fees are fair.

16 JUSTICE ALITO: Wouldn't it be a violation
17 -- wouldn't it be a violation of due process if Congress
18 enacted a statute or if there were a rule adopted that
19 said that the first ruling on class certification by a
20 Federal court binds all members of the class in any
21 other Federal litigation? Would that be a -- they would
22 retain their individual claims, but there could not be
23 another -- another class action -- another class action
24 filed. Would that be a due process violation?

25 MR. MONAHAN: In all other Federal cases, I

1 believe that that might survive a due process challenge;
2 because you're limiting it to the same legal standard in
3 those cases. I -- certainly I think because it would be
4 applying those -- to absent class members who were not
5 truly parties, I believe some of those due process
6 concerns could be raised.

7 But you certainly would not have the
8 elements of the Federalism, you would not have the
9 different legal standard that we have with State courts
10 applying their own rules.

11 JUSTICE ALITO: Well, is there a due process
12 right to have class action?

13 MR. MONAHAN: Your Honor, this Court has
14 noted a procedural right to seek class certification.
15 There is no right to have one. We have to meet the
16 requirements.

17 JUSTICE ALITO: What if Congress just
18 decided to get rid of class actions altogether? Would
19 that be unconstitutional?

20 MR. MONAHAN: Your Honor, I -- certainly
21 would hope that they would provide notice and an
22 opportunity for people to come and make their arguments
23 and to argue both sides of the question. But, no, I
24 don't believe so.

25 JUSTICE BREYER: Did it ever happen, did you

1 ever come across an instance before where in a Federal
2 court a judge in a district court said, no, you can't
3 have a certification, no; and then a different plaintiff
4 went to a different Federal court in a different part of
5 the country and asked for a similar certification? Have
6 you ever found anything like that in precedent, that
7 it's in two Federal courts rather than the State?

8 MR. MONAHAN: Yes, Your Honor. I believe
9 that maybe Thorogood, the recent Thorogood case out of
10 the Seventh Circuit, might involve something similar to
11 that.

12 JUSTICE BREYER: And did they say -- did
13 they say in -- in that case that the second judge is
14 bound as a matter of stare decisis, or is he bound as a
15 matter of collateral estoppel?

16 MR. MONAHAN: Based on a collateral estoppel
17 preclusion principles, Your Honor. Which --

18 JUSTICE BREYER: So it's the same issue as
19 here?

20 MR. MONAHAN: Well, it's even somewhat worse
21 in my opinion, because not only do they have a different
22 party, but they went from a nationwide class to a
23 statewide class, and that itself is -- you know,
24 that's -- even Bridgestone; that would be all right
25 under.

1 JUSTICE SCALIA: Of course you -- you would
2 say that the subsequent plaintiff is not bound if he was
3 not given notice and an opportunity to opt out, even if
4 he came back to the same court, right?

5 It would be a stupid thing to do.

6 MR. MONAHAN: Yes, Your Honor.

7 JUSTICE SCALIA: And he's probably going to
8 lose. But you would say he's not bound, right?

9 MR. MONAHAN: Yes, yes, because He's not the
10 same party -- but the legal standard would be the same
11 and it would not be a wise move.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 Mr. Beck.

14 ORAL ARGUMENT OF PHILIP S. BECK

15 ON BEHALF OF RESPONDENT

16 MR. BECK: Mr. Chief Justice, and may it
17 please the Court:

18 The core issue here is whether absent class
19 members can be bound by a denial of class certification
20 where there was adequate representation on that issue,
21 but not notice and opportunity to be heard.

22 JUSTICE KAGAN: When you said on that issue,
23 Mr. Beck, on what issue, because I think that there is
24 an argument in this case that the West Virginia approach
25 to class certification is different from the Eighth

1 Circuit's approach, that Rezulin would not have been the
2 way that the Eighth Circuit would have approached the
3 class certification question.

4 MR. BECK: The issue that was decided and
5 preclusive was the issue of predominance, Your Honor,
6 and what happened there is that Judge Davis, the judge
7 who was supervising the multidistrict litigation, he
8 made a determination under West Virginia law as to
9 what's required to make out an economic loss claim, and
10 he concluded that what is required is individual proof
11 of injury as well as individual proof of causation, and
12 then he went on to describe what kind of evidence would
13 be necessary to do that.

14 So he made a legal determination, and then
15 he went -- and then after looking at what kind of
16 evidence would be required -- excuse me -- made a, I
17 think a mixed law and fact determination that given
18 that, individual issues would predominate over common
19 issues. His -- his interpretation of West Virginia law
20 was later vindicated by the West Virginia Supreme Court
21 in White, where they held that -- that there is a
22 requirement of individual proof of injury, which had
23 been contested by Petitioners, and it's clear that it's
24 going to require the same exact kind of inquiry.

25 So what we have is that there's no

1 suggestion in Rezulin or anywhere else that the
2 predominance requirement under the West Virginia version
3 of Rule 23, which is essentially identical to the
4 Federal version, has any other content that's different
5 from the Federal version.

6 In Rezulin there's a suggestion that when --
7 that the West Virginia courts would treat differences in
8 -- in damages or reliance as less significant than some
9 Federal courts, but nothing at all that suggests in any
10 way that if the underlying cause of action requires
11 individual proof of injury and causation, that somehow
12 that common questions are going to predominate over
13 individual questions. There's no suggestion of that.

14 JUSTICE GINSBURG: They couldn't know, they
15 -- when they went to the West Virginia Supreme Court,
16 that was before this *White v. Wyatt*. They were arguing
17 a question of substantive law: What do we have to show
18 in order to get damages, when we say we weren't hurt by
19 the drug, we're saying -- we're not saying we didn't get
20 any benefit from it. We're just saying we paid more
21 money for it than we should because it wasn't of the
22 quality that it was represented to be.

23 When the Federal judge said, having to make
24 a determination of West Virginia law, no, it's not the
25 law; you have to show causation, some harm to you. But

1 then when they -- when these plaintiffs went to the West
2 Virginia court, that was still an open question of West
3 Virginia law, and the West Virginia courts might have
4 decided it differently than the Federal court, right?

5 MR. BECK: Yes. Well, yes -- when the
6 Federal district judge made the determination, it was in
7 Mr. McCollins's case, and he's called upon to resolve
8 questions of State law just like courts are every day in
9 diversity actions; and he resolved the question of State
10 law, what's required by the West Virginia Consumer
11 Credit and Protection Act.

12 JUSTICE GINSBURG: But sometimes Federal
13 judges, they try their best, they're not the last word
14 on what the State law is.

15 MR. BECK: And some -- and Your Honor, if --
16 if for example, Judge Davis had found as he did in
17 McCollins, and then he had issued the same injunction,
18 and then the White case had come down the other way,
19 that -- that says that there is no requirement of
20 injury, then conceivably the Petitioners could have gone
21 back to Judge Davis and asked for relief from his
22 injunction, and then we would have an interesting
23 question.

24 JUSTICE GINSBURG: Not these Petitioners.
25 They weren't parties to the case before.

1 MR. BECK: No, but they were -- they were
2 parties to the injunction proceeding. They were the
3 defendants in the injunction proceeding. So they're
4 subject to an injunction, and then -- then the law
5 changes, or the law is declared differently by the West
6 Virginia Supreme Court.

7 Nothing would have precluded them from
8 coming back in front of Judge Davis and said
9 respectfully, sir, you -- you were wrong in your
10 prediction, and we would like to be relieved from the
11 injunction, and then we would have a very interesting
12 question about whether being correct or incorrect is --
13 is something that can eliminate the law of preclusion;
14 because normally if -- if a party is precluded, they're
15 not allowed to say I shouldn't be precluded because I
16 think the judge made a mistake on the law. But we don't
17 have that here because, in fact, Judge Davis was
18 vindicated on -- when it comes to West Virginia law.

19 JUSTICE KAGAN: Mr. Beck, I'm -- I'm not
20 sure that White answers the question that I asked,
21 because White decided a matter of substantive liability,
22 and the question I asked was whether the approach to
23 class certification was different in the Eighth Circuit
24 and in West Virginia.

25 MR. BECK: Yes.

1 JUSTICE KAGAN: If you look at Rezulin, if
2 you compare to it some Eighth Circuit cases, there seems
3 to be a difference in at least tone, shall we say, about
4 the extent to which a finding is required that common
5 issues predominate.

6 MR. BECK: I think that, actually, Judge
7 Davis took into account the difference in tone, and he
8 looked very carefully at Rezulin, and he said that what
9 Rezulin was focusing on was individual questions of
10 damages, which defendants often argue is enough so that
11 individual questions predominate, individual questions
12 of reliance, which we also often argue mean that
13 individual questions predominate.

14 But he said this is different, because this
15 is, in order to prove liability, they've got to
16 establish individual injury, which means, on a
17 person-by-person basis, either that they were harmed by
18 the drug or that the drug didn't work to lower their
19 cholesterol as -- as it was supposed to, and they have
20 to show that whatever the violation of the Consumer
21 Fraud Act was is causally linked there.

22 And he said that's a different animal from
23 questions of reliance and damages, and -- and I've heard
24 or read no conceivable explanation about how, under any
25 standard of predominance, you could have common

1 questions predominating when every single member of the
2 class is going to have to examine the medical records to
3 see whether their cholesterol came down, whether they
4 suffered any side effects, and -- and if their
5 cholesterol didn't come down and they did suffer side
6 effects, how that could be linked to a violation of the
7 Consumer Fraud Act.

8 So what Judge -- Judge Davis didn't depart
9 from Rezulin at all. Judge Davis said this goes to core
10 questions of liability, and as I interpret the West
11 Virginia statute, in order to establish liability,
12 they're going to have to show that on an
13 individual-by-individual basis, and the relevance of
14 White is that he's correct.

15 Of course, White goes even further and says
16 because of that there's no cause of action under the
17 West Virginia Consumer Credit and Protection Act.

18 JUSTICE GINSBURG: How do you answer that
19 they have claims that do not involve the consumer?
20 Whatever it is that -- they have fraud claims and some
21 other kind of claims.

22 MR. BECK: A warranty claim, Your Honor.
23 There was also a warranty claim in the McCollins case,
24 the original Federal case. Their warranty claim is no
25 different, and the requirements of a warranty claim are

1 no different.

2 Fraud obviously requires individual proof of
3 injury and causation. The fraud is -- I mean, the
4 Consumer Fraud Act is -- is an effort to make it easier
5 for plaintiffs to make out a cause of action. If you
6 can't make out a cause of action under the Consumer
7 Fraud Act, it certainly can't be made out under fraud.

8 And in terms of preclusion law, what the
9 Eighth Circuit observed was that when there's the -- the
10 same core set of facts that make out a cause of action,
11 adding another label to it doesn't change the preclusion
12 analysis.

13 JUSTICE GINSBURG: Mr. Beck, if you're right
14 about issue preclusion, then if Bayer had gone into the
15 West Virginia court and said, West Virginia court, Judge
16 Davis has decided this case in Minnesota Federal
17 District Court; issue preclusion, that's one thing. But
18 what was used here was quite a heavy gun, and that is
19 the -- an empty suit injunction, which seems to say:
20 We're not going to trust the West Virginia court to
21 apply issue preclusion. We're going to stop that court
22 from proceeding altogether.

23 And the anti-suit injunction is -- it's a
24 very strong weapon, and even though it's the -- the
25 clients who are being precluded, it's really saying to

1 another court: We're not even going to let you get to
2 this question, we're going to stop you.

3 So maybe you could be right about preclusion
4 but wrong about use of the anti-suit injunction.

5 MR. BECK: Well, Your Honor, the -- any time
6 that someone invokes the relitigation exception to the
7 Anti-Injunction Act, by definition, an alternative would
8 be to go into the second court and -- and just simply
9 plead preclusion. That would always be available. And
10 if that were sufficient, then there would be no
11 relitigation exception to the Anti-Injunction Act.

12 Here's a reason why it's very important in a
13 case like this. Under their theory, they -- they could
14 not only file a class action in one county in West
15 Virginia, and then if we couldn't get an injunction but
16 we pled preclusion, and if -- and if we prevailed, they
17 could file one in another county. And in West Virginia,
18 county judges don't look to judges from other counties
19 of stare decisis.

20 And so they could go, under their approach,
21 to another county, and that judge might agree with us.
22 And then they go to another county, and eventually
23 they're pretty confident that they would find one judge
24 in one county in West Virginia who would reject our
25 preclusion analysis and allow the case to go forward.

1 And in West Virginia, we have no right to have an appeal
2 heard. There is no intermediate appellate court, and
3 there's no appeal of right to the West Virginia Supreme
4 Court.

5 JUSTICE KENNEDY: Well, of course you're
6 arguing the principle. What would have happened if the
7 class had gone -- those who wanted to be in the class
8 had gone first to the West Virginia court and the West
9 Virginia court had denied class certification? Would
10 that preclude a later Federal court from granting class
11 certification?

12 MR. BECK: If the -- if the West Virginia
13 court had denied class certification on an issue that is
14 present in Rule 23, then it would be preclusive under
15 Rule 23. It would be under the Full Faith and Credit
16 statute, where Federal courts have to give full faith
17 and credit to State judgments to the same extent that a
18 State would.

19 If, however, Your Honor, the court said in
20 West Virginia, Well, they meet all of the requirements
21 of our Rule 23, but under West Virginia law we have
22 discretion to deny a class even if they meet all the
23 requirements of Rule 23, then that would be an
24 interesting question, because under Federal procedure,
25 under this Court's opinions, if someone meets all the

1 requirements of Rule 23, then class certification is
2 appropriate.

3 JUSTICE KAGAN: Mr. Beck, the relitigation
4 exception of the Anti-Injunction Act speaks in terms of
5 judgments. Why is the denial of class certification a
6 judgment?

7 MR. BECK: I'm not sure that it would be
8 in -- in the mine-run case, but we don't have it. We --
9 one of the reasons that this case is unusual is that we
10 actually have a real-life final judgment that
11 incorporates the denial of class certification.

12 JUSTICE KAGAN: But the judgment, if I
13 understood it correctly, there was just a
14 contemporaneous summary judgment motion, and the court
15 granted summary judgment as well. But the denial of
16 class certification isn't responsible for the judge's
17 dismissal of the suit.

18 MR. BECK: Well, but it is -- it is merged
19 into the judgment. It's explicitly a part of the
20 judgment. It's in the judgment itself. I think it's
21 our Joint Appendix -- 83, is it?

22 JUSTICE KAGAN: So that sounds like a very
23 contingent answer to my question. If that were not the
24 case, if it -- if there was the denial of a class
25 certification, but then the action proceeds as a

1 non-class litigation, you think that there would be no
2 judgment, and so the Anti-Injunction Act would not
3 apply?

4 MR. BECK: No, Your Honor. I think that
5 would be tougher question. It's posed in some of the
6 other cases percolating up, the Thorogood case, for
7 example, or some of them out of the Seventh Circuit.

8 I think that under normal preclusion
9 analysis, decisions that have not reached the point
10 where there's a formal final judgment can still be given
11 preclusive effect if they're sufficiently final, that a
12 court says it's exceedingly unlikely that we could
13 reconsider. There's another --

14 JUSTICE GINSBURG: That's true about --
15 that's true about preclusion, but -- and so that you
16 might go into the West Virginia court and say this
17 second plaintiff should be precluded, but as Justice
18 Kagan pointed out, you're dealing with the
19 anti-injunction statute that talks about judgment.

20 MR. BECK: And I was about to say, Your
21 Honor, that -- that under the Anti-Injunction Act it
22 might actually be a different analysis, and because the
23 issue isn't present here, we haven't briefed it, but I
24 could see under the -- looking at the statutory language
25 of the re-litigation exception that talks about

1 judgments and also looking to the Federalism concerns
2 that -- that inform the -- the Anti-Injunction Act, one
3 could argue, in an appropriate case, that whatever the
4 law is as to preclusion generally, when it comes to the
5 Anti-Injunction Act, we're going to require more in the
6 form of a -- of a formal judgment that -- that
7 incorporates the particular ruling. As I said, that's
8 not our case, but --

9 JUSTICE KAGAN: Oh, but why isn't it really,
10 because here what happened was that there was a denial
11 of class certification and there was a granting of a
12 summary judgment motion at one and the same time? But
13 the thing that was responsible for getting the case out
14 of court was the granting of the summary judgment
15 motion, not the denial of class certification. That was
16 extraneous to the judgment that the case was dismissed.

17 MR. BECK: I think it's actually -- while --
18 while it was collateral to the summary judgment motion
19 on Mr. McCollins' individual claim, it's actually
20 essential to the judgment in -- in terms including it,
21 in terms of who's bound by -- by -- by the judgment. If
22 class certification had been -- we -- we need to know
23 once the judge has ruled on class certification, whether
24 he's granted it or denied it in order to know who's
25 affected by the judgment on the merits and otherwise.

1 And if he had granted the motion to certify
2 the class, then there would be one set of effects coming
3 out of a final judgment. If he denies the motion to
4 certify the class, there's a different set of effects
5 that come out of the judgment.

6 So, it is essential to the judgment, in our
7 mind, and incidentally the -- essential to the judgment
8 point under preclusion law is not one that -- that the
9 Petitioners have ever raised below. It's not one that
10 is in their questions presented or their cert petition
11 or their brief. So this isn't an issue that -- that
12 they've preserved or argued, but we do believe, quite
13 clearly, that the class certification denial was an
14 integral part of the final judgment, and -- and
15 obviously it's in there on its terms.

16 JUSTICE SOTOMAYOR: Counsel, under the
17 Anti-Injunction Act, would it permit a blanket
18 injunction that says, against all future State court
19 class proceedings across the United States? Could a
20 court just order a re-litigation bar?

21 MR. BECK: I don't believe so, Your Honor.
22 I think that -- I think that in this Court's Chick Kam
23 Choo decision, there was an emphasis that under the
24 Anti-Injunction Act you have to have, you know, the same
25 issue litigated, and there was a concern about whether

1 there was a significant difference in standards.

2 JUSTICE SOTOMAYOR: That's my question to
3 you.

4 MR. BECK: Yes.

5 JUSTICE SOTOMAYOR: So articulate what we're
6 comparing when we're saying that the re-litigation bar
7 can apply to a procedural ruling.

8 MR. BECK: Yes.

9 JUSTICE SOTOMAYOR: We started a little bit
10 on the question. Is there any requirement that that
11 issue have been fully and fairly adjudicated in the
12 prior proceedings?

13 MR. BECK: Oh, I think -- I think that for
14 the -- for -- for preclusion to apply, even before one
15 gets to the Anti-Injunction Act, there's a requirement
16 that the issue be fully and fairly litigated. I think
17 that -- I think the focus would be, as Judge Davis's
18 was, is there a difference in -- in the class
19 certification procedures that would -- that would result
20 in a -- in a different outcome, given the particular
21 issue that's been decided. So that -- so that there --
22 you know, I could conceive of issues that would be
23 dispositive in a Federal court on class certification
24 that would have nothing to do with -- with certification
25 in State court.

1 JUSTICE SOTOMAYOR: Let's say -- you talked
2 about different standards. Your adversary said that in
3 this State reliance doesn't need to be proven. Let's
4 assume that fact. And the district court's ruling here
5 was based on a reliance requirement and said no
6 predominance because each individual plaintiff will have
7 to prove reliance. Does that become the same -- a
8 different standard or no?

9 MR. BECK: Judge Davis's opinion was not
10 based in any way on reliance.

11 JUSTICE SOTOMAYOR: I -- I -- I'm posing it
12 as a hypothetical.

13 MR. BECK: Oh, I'm sorry. I'm sorry.

14 JUSTICE SOTOMAYOR: As a hypothetical.

15 MR. BECK: If a State court had said that
16 this thing, that -- that reliance or whatever, that is
17 talked about so much in Federal courts, we don't care
18 about that, that's not part of our standard, then --
19 then that would be -- and that was the basis of the
20 Federal court's decision, then I think you would be
21 applying different standards, and under Chick Kam Choo,
22 there wouldn't be preclusion.

23 JUSTICE SOTOMAYOR: You see, the problem is
24 that I don't know how you get and when you get to the
25 question of whether reliance needs to be proven or not,

1 if you're going to bar the State court from reaching
2 that -- that substantive question, not that substantive
3 issue, but that substantive question, which is not very
4 different from here, which is what does economic loss
5 require in terms of proof?

6 MR. BECK: Well, we're -- we're moving now
7 from what is in Rule 23 in Federal and State
8 jurisprudence to what is the underlying cause of action
9 when we -- when -- you know, whether reliance is a part
10 of the plan. We keep saying "reliance" and --

11 JUSTICE SOTOMAYOR: Well, I'm shifting them
12 only to try to get --

13 MR. BECK: Okay.

14 JUSTICE SOTOMAYOR: -- a sense of what
15 different standards mean --

16 MR. BECK: Okay. And -- and --

17 JUSTICE SOTOMAYOR: -- to you, and how we
18 articulate that rule in a way that doesn't preclude --
19 doesn't permit the barring --

20 MR. BECK: I think --

21 JUSTICE SOTOMAYOR: -- of claims when there
22 is a different standard.

23 MR. BECK: I think -- I think, Justice
24 Sotomayor, that you have to distinguish between Rule 23
25 and the underlying State law that's the subject of the

1 lawsuit. And anytime a -- a Federal court is looking at
2 whether a class action can be certified for a violation
3 of State law, it has to make a determination of
4 whether -- of what State law is in terms of how you
5 prove a violation, what the elements are. And that's
6 what -- that's just -- you have to do that every single
7 day.

8 And you make that kind of determination, and
9 then you move to the next step of whether that should be
10 preclusive, which is when Rule 23 comes into play. And
11 I think that's the point where you say, are the State
12 standards under Rule 23 different from the Federal
13 standards.

14 JUSTICE SCALIA: I'm -- I'm the -- I'm the
15 party trying to bring the later class action, and you
16 tell me I can't do it because somebody else sought a
17 class action and -- and it -- and it was denied. And I
18 say, well, I don't care, I -- you know, that's somebody
19 else. That was not me. I was not -- and not only was I
20 not a party to that case, I think that person had a
21 lousy lawyer, and had I chosen the lawyer, we wouldn't
22 have lost that point. What's your response to that?

23 You cannot even say, as you can where the
24 class has been certified, well, at least there was a
25 determination by some judge that the absent parties were

1 adequately represented. There hasn't been even that
2 determination.

3 MR. BECK: Well, Your Honor, there was that
4 determination in this case at the injunction stage.
5 They did claim -- they -- they said, well, was this --
6 was this lawyer from West Virginia who made exactly the
7 same arguments that they made, was he -- did he
8 adequately represent our interests.

9 JUSTICE SCALIA: You do that ex post, you
10 litigate this later?

11 MR. BECK: Well, adequacy of course is part
12 of rule 23 analysis, but it's also independently a part
13 of preclusion law analysis where in order to be
14 precluded, for a nonparty to be precluded, then you have
15 to do the analysis that's called for in Taylor v.
16 Sturgell, where you have to say in order to preclude a
17 nonparty, does it meet the two-part test of Taylor v.
18 Sturgell.

19 The first part: were their interests
20 aligned? Here their interests were perfectly aligned.
21 And then the second part is an either/or: did the party
22 in the first action understand herself -- in this case
23 himself -- to be acting in a representative capacity or
24 did the court take care to protect the interests of the
25 nonparty?

1 CHIEF JUSTICE ROBERTS: But that's a very
2 subjective decision whether the lawyer is -- right here.

3 MR. BECK: I'm sorry.

4 CHIEF JUSTICE ROBERTS: -- whether the --
5 the lawyer is adequate or not. People have different
6 kind of views about what kind of lawyer they want, and I
7 can see someone who doesn't even know that this action
8 is going on saying, I don't care if you think the lawyer
9 is adequate, I don't think he is; besides I wanted --
10 you know, my brother-in-law to be the lawyer.

11 MR. BECK: Well -- and in every preclusion
12 case there's a -- there's a question about adequacy, and
13 it focuses not on whether someone likes the lawyer or
14 they've got a brother-in-law who is a lawyer. It
15 focuses on whether the parties' interests are aligned,
16 and McCollins' interests were identical to Mr. Smith's
17 and Ms. Sperlazza's; and it -- and it points to whether
18 Mr. McCollins understood that he was acting in a
19 representative capacity and to whether Judge Davis took
20 care to protect the interests of nonparties.

21 So it doesn't say that everybody gets to
22 pick their own lawyer. If that were the rule, there
23 would be no law of preclusion because nobody would ever
24 pick the same lawyers. My -- one other point I want to
25 make --

1 JUSTICE SCALIA: But if it -- I'm sorry.

2 CHIEF JUSTICE ROBERTS: You know, to say --
3 it's odd to say you're precluded. The whole point is
4 the basic principle that you're entitled to your day in
5 court, and you're saying well, you're not entitled to
6 your day in court if somebody else had a day in court
7 and they had a good lawyer.

8 MR. BECK: And -- and that is exactly the
9 case that is posed by nonparty preclusion; and -- and as
10 this Court's opinion in Taylor v. Sturgell said, there
11 are circumstances where a nonparty can be precluded
12 based on litigation from someone else, and I -- I
13 referenced the test, and the first point I wanted to
14 make --

15 JUSTICE SCALIA: How can you -- how can you
16 possibly find that in the first action the lawyer
17 understood that he was acting in a representative
18 capacity?

19 MR. BECK: Well if --

20 JUSTICE SCALIA: He tried to act in a rep --
21 -but -- but his representation was denied.

22 MR. BECK: It's the party rather than the
23 lawyer, and -- and it's when -- when he commenced that
24 litigation and when he litigated the issue that we're
25 talking about of class certification, there's no doubt

1 in the world that he is -- that he understood himself to
2 be acting on behalf of a class.

3 That -- that's why he was litigating class
4 certification, and -- and, Your Honor, what we -- we
5 have here also, because we're -- we're kind of verging
6 into the due process analysis, you have to start with
7 the question of what is the interest that's at stake
8 here. The injunction doesn't forbid any -- any
9 plaintiff from pursuing their individual claim or
10 arguing anything they want about underlying West
11 Virginia law. It only precludes them from going forward
12 in a class action, and that is --

13 JUSTICE GINSBURG: But that's -- that's
14 often theoretical because on these small claims, it's
15 class action or nothing. Nobody's going to pay a lawyer
16 to go to court with a \$100 case.

17 MR. BECK: These I don't think fall in that
18 category, Your Honor. There's -- it's \$200 statutory
19 penalty per violation, which means per prescription
20 refill. There's -- there's attorney's fees on top of
21 that; there's punitive damages on top of that. The
22 McCollins case in Federal court was that kind of case,
23 and he pled that he satisfied the jurisdictional amount
24 of \$75,000. But even if it's a small claim, the -- that
25 doesn't mean that the opportunity to litigate it in a

1 class action and join other parties is a property
2 interest that implicates due process protections. That
3 is --

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Thank you.

6 Mr. Monahan, you have 4 minutes remaining.

7 REBUTTAL ARGUMENT OF RICHARD A. MONAHAN

8 ON BEHALF OF PETITIONERS

9 MR. MONAHAN: In this case, the MDL court
10 did not seek to bind any parties. The decision was deny
11 class certification; the decision was not to bind any
12 absent class members.

13 Moreover, in cases talking about adequate
14 representation, such as *Hansberry v. Lee* and the
15 *Richards* case, one of the things this Court noted was
16 that normally you have a judgment that indicates who it
17 purports to bind. There's nothing in the district
18 court's initial judgment indicating that the absent
19 class members are bound by the denial of class
20 certification, nothing whatsoever.

21 In *Devlin v. Scardelletti* which they say
22 supports their opinion, clearly it supports our
23 position, because that was a case dealing with a
24 certified class settlement, where there were objections.
25 And because the objections were made and overruled, this

1 Court noted that those people could appeal directly
2 without having to intervene in that case.

3 JUSTICE GINSBURG: Well, you have to -- I
4 think you would concede that the Seventh Circuit, now
5 two decisions, one in Bridgestone and then the other in
6 Thorogood, the Seventh Circuit thinks it can do this.

7 MR. MONAHAN: Yes, Your Honor, and the
8 Seventh Circuit for instance in Bridgestone, which --
9 which the Eighth Circuit relied on in this case,
10 indicated that adequate representation was one of the
11 factors, our right to appeal was one of the factors, and
12 then our individual claims still existing, consisted
13 sufficient due process. But one, we have no notice, so
14 how can we appeal anything if we don't know it exists?
15 And this Court has noted that in many cases, in Mullane
16 and Richards and throughout, that if you have no notice
17 of a matter, how can you ever have an opportunity to be
18 heard because you don't know about it?

19 Now, as to adequate representation, that was
20 something I wanted to turn to.

21 JUSTICE KENNEDY: But just on notice, does
22 the record show when the client first came to the
23 attorney?

24 MR. MONAHAN: Your Honor, our case was filed
25 in September 2001. The McCollins case was filed in

1 August 2001, and nobody knew about the other one at all.
2 I mean, these cases were filed almost the same time,
3 less -- less than a month apart in different counties,
4 different attorneys, different named plaintiffs.

5 I did want to note in *Devlin v.*
6 *Scardelletti*, Justice Scalia noted his dissent that not
7 even Petitioners were advancing the novel and surely
8 erroneous argument that absent class members were
9 considered parties before class certification.

10 JUSTICE BREYER: Do we know that in the
11 record, that the attorneys didn't even know about each
12 other's cases? Is that borne out? I mean, is that an
13 issue?

14 MR. MONAHAN: Your Honor, we've argued that
15 throughout. We knew nothing about it. And see, the MDL
16 proceeding, we had like one or two cases that were
17 filed, individual actions where the plaintiffs did not
18 want to seek class action status, and those got removed
19 to Federal court and transferred. The MDL court
20 provides notice of the orders affecting all cases in
21 general and then provides you with orders in your own
22 case. You do not get orders about other individual
23 cases.

24 So we never knew about *McCollins* and then
25 proceeded to class certification. I would note that the

1 White case here in no -- no way vindicates the district
2 court. The White case did say that reliance did not
3 have to be proven if you have fraudulent concealment or
4 suppression. Rather, the standard is all you have to do
5 is you have to show would an objectively reasonable
6 person have bought the product had they known all the
7 information that was concealed and suppressed; and
8 clearly that can be dealt with on a common basis.

9 But a confusing aspect here, it seems like
10 many people try to argue that for class actions that you
11 have to have all common issues or else you can't have
12 one; and that's unfortunate because I'm not aware of any
13 class action where you don't have --

14 JUSTICE GINSBURG: Can I just go back to
15 what you said before? I thought the West Virginia
16 Supreme Court said you can't have actions for drugs
17 under the consumer whatever.

18 MR. MONAHAN: Yes, they added -- they added
19 a syllabus point 6, the last paragraph of the opinion, a
20 paragraph that says that from now on that -- that
21 prescription drug purchasers cannot have such a claim;
22 and that was unknown to anybody, it was not raised in
23 part of the certified question and had not been
24 litigated or argued. So that's part of the petition for
25 rehearing is my understanding.

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

3 The case is submitted.

4 (Whereupon at 12:05 p.m., the case in the
5 above-entitled matter was submitted.)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

binding 6:24 9:16	25:24 28:7,18	29:23 34:9,11	circumstance	46:2,3,12,15
binds 22:20	28:25 31:23,24	34:13 35:1,5,11	11:21	47:1,11,12,19
bit 39:9	32:16 33:13,25	35:16,25 37:11	circumstances	47:19,24 49:8,9
blanket 8:12	35:8,9,24 36:6	37:15,22,23	3:21 5:2 6:1	49:18,25 50:10
38:17	37:3,8,13,16	38:13 39:19,23	45:11	50:13
blocks 11:18	42:20 43:4,22	39:24 45:25	cite 10:3,4	classes 4:9 21:1
borne 49:12	44:12 45:9	46:4 47:11,20	civil 7:15 8:8,13	21:15
bought 50:6	46:16,22,22	49:9,25	8:14 9:4 12:11	clear 26:23
bound 8:19,23	47:9,15,23 48:2	certifications	claim 7:7,12 8:2	clearly 6:8 11:11
19:22 20:5	48:9,24,25	22:2,10	8:2,4 11:19	38:13 47:22
24:14,14 25:2,8	49:22 50:1,2	certified 4:11 8:8	12:9,12,14 14:1	50:8
25:19 37:21	51:3,4	18:13 42:2,24	14:3,13,17 26:9	client 16:19 17:2
47:19	cases 4:8,10 6:21	47:24 50:23	31:22,23,24,25	48:22
breach 8:4	9:14 10:12 16:2	certify 17:24	37:19 43:5 46:9	clients 32:25
BREYER 16:11	16:3 18:11 21:7	38:1,4	46:24 50:21	close 6:16
23:25 24:12,18	21:14 22:8,8,25	challenge 23:1	claims 8:5 10:17	closely 13:10
49:10	23:3 30:2 36:6	challenges 10:7	11:5,6 13:13	collateral 15:24
Bridgestone	47:13 48:15	chance 21:13	14:7,14 22:22	16:5 24:15,16
24:24 48:5,8	49:2,12,16,20	chances 18:18	31:19,20,21	37:18
brief 7:20 38:11	49:23	change 21:6	41:21 46:14	come 23:22 24:1
briefed 36:23	category 46:18	32:11	48:12	28:18 31:5 38:5
bring 14:6,7	causally 30:21	changes 29:5	class 4:1,4,8,11	comes 29:18
42:15	causation 10:7	Charleston 1:15	4:16,19,24 6:17	37:4 42:10
bringing 16:24	26:11 27:11,25	Chase 17:7	6:18,24 7:2,3,5	coming 16:20
broad 6:14	32:3	Chicago 1:17	7:8 8:7 9:13,22	29:8 38:2
brother-in-law	cause 27:10	Chick 38:22	10:5 13:11,20	comity 20:10
44:10,14	31:16 32:5,6,10	40:21	14:13 17:24	command 12:18
<hr/>	41:8	Chief 3:3,9 14:21	18:12,17,25	commenced
C	CCPA 8:2 14:1,3	15:15 16:25	19:19,22,23	45:23
C 2:1 3:1	Central 5:12	25:12,16 44:1,4	20:25 22:1,6,10	common 5:17
CAFA 20:23,24	cert 7:25 38:10	45:2 47:4 51:1	22:10,13,14,19	6:18 8:4 10:12
21:4,13,18 22:5	certain 21:8,9,9	cholesterol	22:20,23,23	10:13 14:16
called 28:7 43:15	certainly 5:22	30:19 31:3,5	23:4,12,14,18	26:18 27:12
capacity 43:23	8:2 15:20 17:17	Choo 38:23	24:22,23 25:18	30:4,25 50:8,11
44:19 45:18	18:10 20:21,24	40:21	25:19,25 26:3	compare 30:2
care 40:17 42:18	21:3,12,13 23:3	choose 17:11	29:23 31:2	comparing 39:6
43:24 44:8,20	23:7,20 32:7	choosing 17:15	33:14 34:7,7,9	complaint 4:20
carefully 30:8	certification 3:18	chose 21:5,11	34:10,13,22	4:22 9:23
case 3:4,25 5:13	4:19,25 6:22,23	chosen 42:21	35:1,5,11,16	complex 14:10
8:6 9:2,10 11:2	7:1 9:13,22	circuit 6:5,7 9:11	35:24 37:11,15	concealed 50:7
12:25 13:25	10:8 19:19,23	11:7 24:10 26:2	37:22,23 38:2,4	concealment
14:2 16:6,14,24	21:2 22:19	29:23 30:2 32:9	38:13,19 39:18	50:3
17:7,9,13,14	23:14 24:3,5	36:7 48:4,6,8,9	39:23 42:2,15	concede 48:4
18:1 19:5,18	25:19,25 26:3	Circuit's 26:1	42:17,24 45:25	conceivable
20:8 24:9,13				

<p>30:24 conceivably 19:10 28:20 conceive 39:22 concern 22:9 38:25 concerned 21:25 21:25 concerning 10:17 concerns 4:3 20:22 22:4 23:6 37:1 concluded 26:10 conditions 12:24 12:25 conducted 4:1,4 10:15 confident 33:23 confusing 50:9 Congress 20:23 21:17,18,22 22:17 23:17 connected 13:10 consider 5:25 8:18,23 9:9,10 considered 21:4 49:9 consisted 48:12 consistent 7:13 11:11 12:14 20:2 21:3 construed 20:14 consumer 28:10 30:20 31:7,17 31:19 32:4,6 50:17 contemporane ... 35:14 content 7:22 27:4 contested 26:23 contingent 35:23 controlling 9:16 controversy 21:10</p>	<p>core 25:18 31:9 32:10 Corporation 1:6 3:5 correct 7:23 11:19 13:25 18:10 29:12 31:14 correctly 35:13 cost 14:11 counsel 4:14 25:12 38:16 47:4 51:1,2 counties 33:18 49:3 country 24:5 county 33:14,17 33:18,21,22,24 course 6:7 20:9 25:1 31:15 34:5 43:11 court 1:1,12 3:10 3:19,22,25 4:2 4:4,7,10,18 5:11 6:3,7,13 6:25 7:21 8:10 8:20 9:2,5,8,11 9:11,14 10:3,6 10:12,14,20,20 10:22 11:25 14:3,19,23 15:9 15:11,16,17,21 16:10 17:5,17 18:3,10 19:3,12 19:17 20:6,25 22:9,11,20 23:13 24:2,2,4 25:4,17 26:20 27:15 28:2,4 29:6 32:15,15 32:17,20,21 33:1,8 34:2,4,8 34:9,10,13,19 35:14 36:12,16</p>	<p>37:14 38:18,20 39:23,25 40:15 41:1 42:1 43:24 45:5,6,6 46:16 46:22 47:9,15 48:1,15 49:19 49:19 50:2,16 courts 5:23,24 9:1 18:5,19 23:9 24:7 27:7 27:9 28:3,8 34:16 40:17 court's 11:2,8 20:3 22:6 34:25 38:22 40:4,20 45:10 47:18 created 11:23 credit 28:11 31:17 34:15,17 critical 8:6 criticized 9:11 cut 11:15</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 damage 14:7 damages 10:8 14:8 27:8,18 30:10,23 46:21 Davis 26:6 28:16 28:21 29:8,17 30:7 31:8,9 32:16 44:19 Davis's 39:17 40:9 day 15:16,17 28:8 42:7 45:4 45:6,6 de 6:17 deal 21:5,11 dealing 4:9 6:21 36:18 47:23 deals 16:6 dealt 50:8 decide 20:5</p>	<p>decided 6:6 8:9 10:20,22 23:18 26:4 28:4 29:21 32:16 39:21 decision 3:17 5:15 8:13 11:18 38:23 40:20 44:2 47:10,11 decisional 9:19 decisions 8:17 8:19 9:12 36:9 48:5 decisis 5:20 15:12 18:11,20 24:14 33:19 declared 29:5 defendant 10:11 14:9 defendants 29:3 30:10 definition 33:7 degree 14:19 denial 20:25 25:19 35:5,11 35:15,24 37:10 37:15 38:13 47:19 denied 3:17 18:17 34:9,13 37:24 42:17 45:21 denies 4:18 38:3 deny 34:22 47:10 denying 9:13 depart 31:8 depend 8:16 depending 15:10 depends 14:18 describe 26:12 deserve 5:17 determination 26:8,14,17 27:24 28:6 42:3 42:8,25 43:2,4</p>	<p>determine 9:1 determined 6:10 device 9:13 Devlin 47:21 49:5 differ 16:19 difference 9:21 9:24 10:2,25 12:16 30:3,7 39:1,18 differences 10:23,24 27:7 different 5:7,21 16:9,11,24 17:20,21,22 18:14 21:5,6,20 23:9 24:3,4,4 24:21 25:25 27:4 29:23 30:14,22 31:25 32:1 36:22 38:4 39:20 40:2,8,21 41:4,15,22 42:12 44:5 49:3 49:4,4 differently 28:4 29:5 directly 48:1 disagree 12:15 discovery 14:11 14:25 15:4,13 discretion 14:4 34:22 discretionary 14:20 21:9 discussed 3:23 3:25 4:7 5:13 discussing 4:2 dismissal 16:3 35:17 dismissed 37:16 dispositive 39:23 dispute 8:3 dissent 49:6</p>
---	--	--	--	---

district 4:18,23 5:23,24 6:3,11 8:19,20,20 11:8 24:2 28:6 32:17 40:4 47:17 50:1	12:12 13:4 23:8 42:5	exceedingly 36:12	far 14:21	focusing 30:9
districts 4:18	eliminate 29:13	exception 4:5 14:18 19:14 33:6,11 35:4 36:25	Federal 3:12 4:17,22,22 8:13 8:17,25 9:4,5 9:12,19,21,25 10:20 12:19 18:3,4,5,10 20:25 22:20,21 22:25 24:1,4,7 27:4,5,9,23 28:4,6,12 31:24 32:16 34:10,16 34:24 39:23 40:17,20 41:7 42:1,12 46:22 49:19	FOIA 19:7
diversity 4:17 21:7,8 28:9	emphasis 38:23	exceptions 3:24 4:1 20:13 21:9 21:10	fees 13:18 14:2 14:18 22:15 46:20	follow 6:3 20:17
docket 7:17,17	empty 32:19	exclusively 9:12	field 13:12 14:15	forbid 46:8
documents 19:9	enable 13:12	excuse 26:16	file 19:8 33:14,17	form 37:6
doing 14:11	enacted 21:13,18 22:18	existence 8:5	filed 4:17 18:3 19:18 22:24 48:24,25 49:2 49:17	formal 36:10 37:6
doubt 20:11 45:25	entitled 15:2,6 15:16,17 45:4,5	existing 48:12	files 4:21	forum 17:21,22 18:14
drug 9:14 27:19 30:18,18 50:21	ensure 22:12	exists 48:14	final 35:10 36:10 36:11 38:3,14	found 24:6 28:16
drugs 50:16	essence 6:17 15:11	experts 14:11	find 17:16,24 33:23 45:16	Fourth 6:5,7 8:19
due 4:3,5,5,7 6:19,23 7:2,13 11:16,24 12:14 12:18,25 19:17 21:3 22:17,24 23:1,5,11 46:6 47:2 48:13	ESQ 1:15,17 2:3 2:6,9	explanation 30:24	finding 30:4	fraud 8:4 14:17 14:19 30:21 31:7,20 32:2,3 32:4,7,7
duty 17:9	essential 37:20 38:6,7	explicitly 35:19	file 19:8 33:14,17	fraudulent 50:3
D.C 1:8	essentially 9:7 11:17 12:4,19 15:12 27:3	extend 14:22	filed 4:17 18:3 19:18 22:24 48:24,25 49:2 49:17	front 29:8
<hr/>	establish 30:16 31:11	extent 30:4 34:17	files 4:21	full 34:15,16
E	estoppel 15:24 16:5 24:15,16	extinguished 12:23	final 35:10 36:10 36:11 38:3,14	fully 39:11,16
E 2:1 3:1,1	ET 1:3	extinguishing 13:6	find 17:16,24 33:23 45:16	further 31:15
easier 32:4	eventually 33:22	extraneous 37:16	finding 30:4	future 11:19 38:18
economic 10:23 11:10,12 13:12 14:14 26:9 41:4	everybody 14:15 44:21	extreme 10:13	finds 14:19 16:15	<hr/>
effect 36:11	evidence 26:12 26:16	fact 8:6 10:21 16:17,23,24 26:17 29:17 40:4	first 15:1,8 19:18 22:19 34:8 43:19,22 45:13 45:16 48:22	G
effects 31:4,6 38:2,4	ex 43:9	facto 6:17	fit 7:16,18	G 3:1
effort 32:4	exact 15:13,14 16:7 26:24	factors 22:3 48:11,11	five 15:5	general 49:21
Eighth 11:7 25:25 26:2 29:23 30:2 32:9 48:9	exactly 4:21 43:6 45:8	facts 32:10	flexibility 15:10	generally 37:4
Eisen 4:10 20:3	examine 15:21 31:2	failing 16:4	focus 39:17	George 3:13
either 30:17	example 28:16 36:7	fair 22:13,15	focuses 44:13,15	getting 37:13
either/or 43:21	exceed 14:12	fairly 39:11,16		Ginsburg 5:4,8 5:14 6:9 7:5,19 17:20 18:6,21 18:24 21:19 27:14 28:12,24 31:18 32:13 36:14 46:13 48:3 50:14
element 22:11		faith 14:17 34:15 34:16		give 34:16
elements 11:5		fall 46:17		given 19:24 25:3 26:17 36:10 39:20

<p>10:9 16:15 17:21,23 19:9 20:11 21:6 33:8 33:20,22,25 36:16 46:16 50:14 goes 31:9,15 going 8:17,18 13:17,19 15:3 19:18,20 21:20 25:7 26:24 27:12 31:2,12 32:20,21 33:1,2 37:5 41:1 44:8 46:11,15 good 45:7 government 19:5 19:8,9 granted 35:15 37:24 38:1 granting 22:1 34:10 37:11,14 greatly 14:12 ground 10:19 guarantee 12:1 guess 16:14 17:22 gun 32:18</p> <hr/> <p style="text-align: center;">H</p> <p>Hansberry 47:14 happen 23:25 happened 17:13 26:6 34:6 37:10 harm 27:25 harmed 30:17 hear 3:3 heard 3:15 4:13 11:17 13:4 18:8 25:21 30:23 34:2 48:18 heavy 32:18 heightened 22:9 held 11:8,9 26:21 home 21:10</p>	<p>Honor 5:1,3,19 6:4,12 7:10,24 8:15 9:7 11:20 12:7 13:23 15:9 17:4,25 18:23 19:2,4 20:1 23:13,20 24:8 24:17 25:6 26:5 28:15 31:22 33:5 34:19 36:4 36:21 38:21 43:3 46:4,18 48:7,24 49:14 hope 23:21 hurt 27:18 hypo 16:25 hypothetical 40:12,14</p> <hr/> <p style="text-align: center;">I</p> <p>identical 27:3 44:16 identity 6:15 Illinois 1:17 implicates 47:2 importance 15:22 important 33:12 incidentally 38:7 including 22:14 37:20 incorporated 4:6 incorporates 35:11 37:7 incorrect 29:12 independently 43:12 indicated 48:10 indicates 10:14 47:16 indicating 47:18 individual 5:16 7:6,7 10:9,14 10:16,17 13:13 13:20 19:24</p>	<p>22:22 26:10,11 26:18,22 27:11 27:13 30:9,11 30:11,13,16 32:2 37:19 40:6 46:9 48:12 49:17,22 individual-by-i... 31:13 inform 37:2 information 50:7 initial 47:18 injunction 28:17 28:22 29:2,3,4 29:11 32:19,23 33:4,15 38:18 43:4 46:8 injunctions 20:12 injury 11:9 26:11 26:22 27:11 28:20 30:16 32:3 inquiry 26:24 instance 6:5 9:6 10:4 11:1,7 14:8 15:23 17:5 18:3 19:4 24:1 48:8 integral 38:14 interest 46:7 47:2 interesting 11:2 28:22 29:11 34:24 Interestingly 6:13 interests 6:15 43:8,19,20,24 44:15,16,20 intermediate 34:2 interpret 7:16 31:10 interpretation</p>	<p>26:19 interpreted 9:3,5 interrogatories 15:2,5 intervene 17:9 17:10,13,15,15 48:2 intervenor 16:12 16:14 invokes 33:6 involve 24:10 31:19 involves 20:8 issue 5:17 9:22 13:16 15:11,14 16:9 19:2,20,23 21:15,19,19 24:18 25:18,20 25:22,23 26:4,5 32:14,17,21 34:13 36:23 38:11,25 39:11 39:16,21 41:3 45:24 49:13 issued 6:25 28:17 issues 5:16 7:24 10:10,12,13,16 10:16,21 20:6 20:21 26:18,19 30:5 39:22 50:11 issuing 20:11</p> <hr/> <p style="text-align: center;">J</p> <p>January 1:9 join 47:1 joining 16:23,24 joins 16:12 17:2 Joint 35:21 judge 6:11 9:12 16:15,15,22,22 17:24 24:2,13 26:6,6 27:23 28:6,16,21 29:8</p>	<p>29:16,17 30:6 31:8,8,9 32:15 33:21,23 37:23 39:17 40:9 42:25 44:19 judges 28:13 33:18,18 judge's 35:16 judgment 6:25 35:6,10,12,14 35:15,19,20,20 36:2,10,19 37:6 37:12,14,16,18 37:20,21,25 38:3,5,6,7,14 47:16,18 judgments 34:17 35:5 37:1 judicata 15:24 16:6 jurisdictional 21:7 46:23 jurisprudence 41:8 justice 3:3,9 4:16 5:4,8,14 6:2,9 7:5,19 8:11,22 9:20 10:2,19 11:14 12:2,15 13:6,14,15 14:21 15:15 16:11 17:20 18:6,21,24 19:16 21:17,19 21:23 22:16 23:11,17,25 24:12,18 25:1,7 25:12,16,22 27:14 28:12,24 29:19 30:1 31:18 32:13 34:5 35:3,12,22 36:14,17 37:9 38:16 39:2,5,9</p>
--	---	--	--	--

40:1,11,14,23 41:11,14,17,21 41:23 42:14 43:9 44:1,4 45:1,2,15,20 46:13 47:4 48:3 48:21 49:6,10 50:14 51:1 Justice's 16:25 justify 3:19 6:24 14:9 19:13	17:3 law 6:18 7:22 8:4 8:24 9:21,22 11:12 14:17 16:9 26:8,17,19 27:17,24,25 28:3,8,10,14 29:4,5,13,16 29:18 32:8 34:21 37:4 38:8 41:25 42:3,4 43:13 44:23 46:11 lawsuit 42:1 lawyer 14:6,9 21:20 42:21,21 43:6 44:2,5,6,8 44:10,13,14,22 45:7,16,23 46:15 lawyers 13:17 44:24 Lee 47:14 legal 9:17 18:4,5 18:13 23:2,9 25:10 26:14 Let's 14:22 40:1 40:3 level 13:11 14:14 liability 10:10 14:10 29:21 30:15 31:10,11 light 14:1 16:16 16:23 20:14 likes 44:13 limitations 18:2 limited 4:3 limiting 23:2 linked 30:21 31:6 litigate 12:10 43:10 46:25 litigated 3:13 8:9 16:10 38:25 39:16 45:24	50:24 litigating 46:3 litigation 12:19 16:13,20,21 17:2,8 19:7,13 22:21 26:7 36:1 39:6 45:12,24 little 39:9 local 21:10 long 5:6 look 5:23 8:17 9:15 14:23 15:4 18:11,19 30:1 33:18 looked 30:8 looking 11:8 18:12 26:15 36:24 37:1 42:1 lose 8:2 14:1 25:8 loss 10:23 11:10 11:12 26:9 41:4 lost 42:22 lot 12:24 16:13 lousy 42:21 low 18:19 lower 30:18 19 11:11	MDL 47:9 49:15 49:19 mean 8:12 9:8 11:15,21,21 13:10 15:22 16:19 17:5 20:2 21:11 30:12 32:3 41:15 46:25 49:2,12 means 30:16 46:19 measure 5:17 medical 9:13 31:2 meet 23:15 34:20 34:22 43:17 meets 34:25 member 11:19 31:1 members 6:24 7:3,6 19:22 22:6,13,14,20 23:4 25:19 47:12,19 49:8 mere 9:18 15:25 merged 35:18 merits 37:25 met 5:16 22:12 million 14:24 millions 19:10 mind 38:7 mine-run 35:8 minimal 21:8 Minnesota 6:12 32:16 minutes 47:6 mistake 29:16 mixed 26:17 Monahan 1:15 2:3,9 3:6,7,9 5:1,6,10,19 6:4 6:11 7:9,23 8:11,15 9:6 10:2 11:1,20	12:6 13:2,9,23 15:9,20 17:4,25 18:9,23 19:2 20:1 21:23 22:25 23:13,20 24:8,16,20 25:6 25:9 47:6,7,9 48:7,24 49:14 50:18 money 13:17 27:21 month 49:3 morning 3:4 motion 35:14 37:12,15,18 38:1,3 move 25:11 42:9 moving 41:6 Mullane 48:15 multidistrict 6:10 7:21 26:7
K				N
Kagan 8:11,22 21:17,23 25:22 29:19 30:1 35:3 35:12,22 36:18 37:9 Kam 38:22 40:21 keep 41:10 Keith 1:3 3:11 KENNEDY 34:5 48:21 kind 19:16 26:12 26:15,24 31:21 42:8 44:6,6 46:5,22 knew 49:1,15,24 know 9:15 15:2 16:21,23 19:5 22:4,15 24:23 27:14 37:22,24 38:24 39:22 40:24 41:9 42:18 44:7,10 45:2 48:14,18 49:10,11 knowing 17:13 known 50:6				N 2:1,1 3:1 name 4:21 named 3:12 4:21 5:5 21:21 49:4 narrowly 20:14 National 17:7 nationwide 18:25 24:22 nearly 21:14 necessary 26:13 need 10:15,16 20:18 37:22 40:3 needed 11:6 needs 15:21 40:25 Neuberger 10:4 never 3:13,14,16 3:16 8:9,9,13 13:5 16:10 49:24 new 4:21 5:5
L				
label 32:11 language 36:24 large 21:15 late 16:13,20		main 6:22,22 10:2 13:11 manage 7:17 manner 21:6 Martin 17:8 matter 1:11 6:6 24:14,15 29:21 48:17 51:5 matters 14:12 McCollins 3:13 28:17 31:23 37:19 44:16,18 46:22 48:25 49:24 McCollins's 28:7		

<p>17:18 18:6 19:14 Nobody's 46:15 nonparties 44:20 nonparty 3:23 19:14 43:14,17 43:25 45:9,11 non-class 36:1 normal 36:8 normally 10:7 15:24,25 16:1 29:14 47:16 Norwalk 17:7 note 10:6 14:16 17:6 19:12 20:23 49:5,25 noted 4:2,4,10 5:11 6:13 9:11 9:14 17:5,6,8 19:12 22:6,8 23:14 47:15 48:1,15 49:6 notice 3:14 4:11 4:12 11:17 13:4 17:11,14,16 18:7 19:16,21 19:25 20:4,18 20:18 23:21 25:3,21 48:13 48:16,21 49:20 novel 49:7</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 objections 47:24 47:25 objectively 50:5 obligation 6:2 17:19 observed 32:9 obviously 4:7 6:21 14:1 17:14 32:2 38:15 occur 21:14 occurred 16:3</p>	<p>odd 45:3 Oh 37:9 39:13 40:13 Okay 41:13,16 old 4:20 once 11:22 18:16 18:16 20:4 37:23 ones 21:9 open 28:2 opinion 6:3 11:8 24:21 40:9 45:10 47:22 50:19 opinions 5:24 34:25 opportunity 3:15 3:16,17 11:17 18:8 20:7,19,19 23:22 25:3,21 46:25 48:17 opt 3:16 4:14 19:25 20:5,19 25:3 oral 1:11 2:2,5 3:7 25:14 order 13:13 14:25 27:18 30:15 31:11 37:24 38:20 43:13,16 orders 49:20,21 49:22 original 31:24 Ortiz 22:7 other's 49:12 ourself 8:18 outcome 13:1,1 39:20 outlined 5:2 overall 10:10 overruled 47:25</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1</p>	<p>PAGE 2:2 pages 14:24 paid 27:20 panel 6:10 7:21 paragraph 50:19 50:20 part 15:22 21:4 21:21 24:4 35:19 38:14 40:18 41:9 43:11,12,19,21 50:23,24 particular 9:23 13:9,25 37:7 39:20 particularly 4:9 parties 3:20 23:5 28:25 29:2 42:25 44:15 47:1,10 49:9 party 4:21 5:7,7 5:21,22 13:3,5 16:7,9,12 24:22 25:10 29:14 42:15,20 43:21 45:22 Pavlovian 9:18 pay 46:15 penalty 46:19 people 3:20 13:12 23:22 44:5 48:1 50:10 percolating 36:6 perfectly 43:20 permissive 22:1 permit 38:17 41:19 person 4:13 15:1 16:12 17:2 19:8 42:20 50:6 person-by-per... 30:17 persuasive 5:25 5:25 8:18 9:9</p>	<p>9:16 petition 7:24 8:1 38:10 50:24 Petitioners 1:4 1:16 2:4,10 3:8 3:11 26:23 28:20,24 38:9 47:8 49:7 PHILIP 1:17 2:6 25:14 physical 11:9 pick 17:21 44:22 44:24 plaintiff 4:19 5:5 12:22 13:16,18 13:21 14:8 17:21 18:7,7,25 21:21 24:3 25:2 36:17 40:6 46:9 plaintiffs 3:12 28:1 32:5 49:4 49:17 plaintiff's 4:20 plan 41:10 play 10:25 42:10 playing 13:12 14:15 plays 15:22 plead 33:9 please 3:10 25:17 pled 33:16 46:23 point 6:25 36:9 38:8 42:11,22 44:24 45:3,13 50:19 pointed 36:18 points 44:17 policy 20:22 posed 36:5 45:9 posing 40:11 position 47:23 possibly 45:16 post 43:9</p>	<p>precedent 3:19 24:6 precise 21:18 preclude 16:8 21:1 34:10 41:18 43:16 precluded 7:7 29:7,14,15 32:25 36:17 43:14,14 45:3 45:11 precludes 46:11 preclusion 3:20 3:23 4:2 18:9 19:15 24:17 29:13 32:8,11 32:14,17,21 33:3,9,16,25 36:8,15 37:4 38:8 39:14 40:22 43:13 44:11,23 45:9 preclusive 8:14 26:5 34:14 36:11 42:10 prediction 29:10 predominance 10:8 26:5 27:2 30:25 40:6 predominant 10:21 predominate 5:16 26:18 27:12 30:5,11 30:13 predominating 31:1 prescription 9:14 46:19 50:21 present 34:14 36:23 presented 38:10 preserved 38:12 pretty 33:23</p>
--	--	--	---	--

prevailed 33:16	48:13	26:3 27:17 28:2	49:11	request 19:7
primary 22:4	product 14:10	28:9,23 29:12	records 31:2	require 19:17
principle 10:6	50:6	29:20,22 33:2	recover 10:10	26:24 37:5 41:5
22:8 34:6 45:4	proof 26:10,11	34:24 35:23	referenced 45:13	required 11:10
principles 3:21	26:22 27:11	36:5 39:2,10	refill 46:20	26:9,10,16
5:20 15:13	32:2 41:5	40:25 41:2,3	regard 8:7	28:10 30:4
18:20 20:9,14	properly 3:25 4:4	44:12 46:7	rehearing 8:1	requirement
24:17	property 12:3,4	50:23	50:25	14:4,5 22:12
prior 3:12,14 4:8	12:9 47:1	questions 27:12	reject 33:24	26:22 27:2
14:25 39:12	protect 43:24	27:13 28:8 30:9	relationship 6:16	28:19 39:10,15
probably 25:7	44:20	30:11,11,13,23	relevance 31:13	40:5
problem 40:23	protecting 22:5	31:1,10 38:10	reliance 10:7	requirements
problems 15:23	protection 4:15	quite 32:18 38:12	27:8 30:12,23	23:16 31:25
procedural 6:19	28:11 31:17	<hr/>	40:3,5,7,10,16	34:20,23 35:1
7:10,11 11:3,22	protections 4:5,8	R	40:25 41:9,10	requires 11:16
12:8,12,21 13:8	6:19,23 7:2	R 3:1	50:2	13:1 27:10 32:2
13:10 14:22	47:2	raise 17:18	relied 48:9	res 15:24 16:5
15:7,11,18,21	protective 14:25	raised 7:24 23:6	relief 20:16	resolve 28:7
15:25 16:4,4,13	prove 11:6 30:15	38:9 50:22	28:21	resolved 10:17
16:16 23:14	40:7 42:5	raising 21:19	relieved 29:10	15:13 28:9
39:7	proven 40:3,25	reached 36:9	relitigated 19:20	respect 5:18 8:24
procedurally	50:3	reaching 41:1	relitigation 33:6	respectfully 29:9
15:18	provide 19:21	reacting 21:22	33:11 35:3	Respondent 1:18
procedure 7:15	23:21	read 7:19 30:24	relying 9:12	2:7 25:15
8:8,13,14 9:4	provided 4:12,12	really 11:15	remain 7:3,25	response 9:19
12:11,17 34:24	6:19,23 11:22	13:17,21 32:25	remaining 47:6	42:22
procedures	11:23	37:9	removal 21:8	responsible
39:19	provides 49:20	real-life 35:10	removed 21:16	35:16 37:13
proceed 11:25	49:21	reason 6:22,22	49:18	result 39:19
proceeded 49:25	punitive 46:21	33:12	render 5:24	retain 7:6 22:22
proceeding 3:13	purchasers	reasonable 50:5	rep 45:20	Return 13:7
3:14 7:4 16:7	50:21	reasons 35:9	repetitive 19:7	Rezulin 9:10
29:2,3 32:22	purports 47:17	REBUTTAL 2:8	19:13	10:4 26:1 27:1
49:16	purpose 16:1,3	47:7	represent 43:8	27:6 30:1,8,9
proceedings	purposes 13:11	receive 13:17	representation	31:9
38:19 39:12	18:9,11	received 3:14,15	4:15 6:14,16	re-litigation
proceeds 35:25	pursuing 11:19	3:16,17 13:16	12:21 19:6	36:25 38:20
process 4:3,5,8	46:9	recognized 3:23	25:20 45:21	RICHARD 1:15
6:19,23 7:2,13	p.m. 51:4	7:11 11:24	47:14 48:10,19	2:3,9 3:7 47:7
11:16,24 12:14	<hr/>	12:12	representative	Richards 5:13
12:18 13:1	Q	recognizing 6:18	7:8 16:21 43:23	17:7 47:15
19:17 21:3	quality 27:22	reconsider 16:16	44:19 45:17	48:16
22:17,24 23:1,5	question 8:7	16:22 17:18	represented	rid 23:18
23:11 46:6 47:2	12:21 13:7	36:13	27:22 43:1	right 4:12,13,14
	20:10 23:23	record 48:22		

6:10 7:6,15,19 10:9 11:25 12:3 12:5,9,22 13:4 13:7,8,10 14:22 15:8 23:12,14 23:15 24:24 25:4,8 28:4 32:13 33:3 34:1 34:3 44:2 48:11 rights 7:10,12 11:21,22 12:8 12:17 15:7 18:16 22:6,7 ROBERTS 3:3 14:21 15:15 25:12 44:1,4 45:2 47:4 51:1 role 15:11 rule 3:22 4:6 5:15 6:20 7:2,14,16 8:12,13,14,24 8:25 9:4,5 11:25 18:4,4 19:14 22:18 27:3 34:14,15 34:21,23 35:1 41:7,18,24 42:10,12 43:12 44:22 ruled 37:23 rules 4:2 7:15 8:8 9:15,19 12:11 20:17,17 23:10 ruling 11:3,4 16:4,16 20:3,6 22:19 37:7 39:7 40:4 rulings 15:25 16:14	saying 5:15,15 7:20 12:4 27:19 27:19,20 32:25 39:6 41:10 44:8 45:5 says 8:23 14:23 28:19 31:15 36:12 38:18 50:20 Scalia 25:1,7 42:14 43:9 45:1 45:15,20 49:6 Scardelletti 47:21 49:6 second 14:23 24:13 33:8 36:17 43:21 see 9:24 31:3 36:24 40:23 44:7 49:15 seek 12:9 13:14 17:9,10,15 20:16,16 23:14 47:10 49:18 seeking 21:1,2 seen 16:6 sees 7:16,18 send 16:21 sense 41:14 separate 16:20 18:15 20:15 September 48:25 set 32:10 38:2,4 settlement 22:10 22:13 47:24 Seventh 24:10 36:7 48:4,6,8 shifting 41:11 Shirley 3:11 shot 4:24 show 27:17,25 30:20 31:12 48:22 50:5 Shutts 4:10 20:2	20:3,18 side 31:4,5 sides 23:23 significant 27:8 39:1 similar 11:20 21:1 24:5,10 simply 33:8 single 31:1 42:6 sir 29:9 situation 5:21 12:18 15:23 16:18 sketched 16:18 small 13:13 14:7 46:14,24 Smith 1:3 3:4,11 Smith's 44:16 somebody 42:16 42:18 45:6 somewhat 24:20 sorry 11:14 18:23 40:13,13 44:3 45:1 sort 12:16 Sotomayor 10:19 11:14 12:2,15 13:6,15 38:16 39:2,5,9 40:1 40:11,14,23 41:11,14,17,21 41:24 sought 42:16 sounds 35:22 South 5:12,12 Southern 8:20 sovereign 18:15 speaks 35:4 Sperlazza 3:12 Sperlazza's 44:17 spoken 6:5 stage 43:4 stake 46:7	standard 9:24,25 10:1,25 12:20 18:4,5,13 22:9 23:2,9 25:10 30:25 40:8,18 41:22 50:4 standards 5:15 39:1 40:2,21 41:15 42:12,13 stands 13:21 stare 5:20 15:12 18:11,19 24:14 33:19 start 46:6 started 39:9 State 7:15 8:14 8:16,22 12:20 18:15 20:15,16 20:16,17 21:20 21:20 23:9 24:7 28:8,9,14 34:17 34:18 38:18 39:25 40:3,15 41:1,7,25 42:3 42:4,11 States 1:1,12 8:20 18:22,24 22:1 38:19 statewide 24:23 status 21:7 49:18 statute 22:18 31:11 34:16 36:19 statutory 13:19 14:2 36:24 46:18 stay 21:9 step 17:12 42:9 stop 32:21 33:2 stranger 17:8 strangers 7:4 strong 32:24 stupid 25:5 Sturgell 3:22	5:11 19:4 43:16 43:18 45:10 subject 29:4 41:25 subjective 44:2 submit 7:10 submitted 51:3,5 subsequent 25:2 substantive 7:12 11:4,18 12:8,14 12:17,22 13:7,8 27:17 29:21 41:2,2,3 substantively 15:16 succeed 18:18 suffer 31:5 suffered 31:4 sufficient 11:12 19:13,21 33:10 48:13 sufficiently 36:11 suggested 9:7 suggestion 27:1 27:6,13 suggests 27:9 suit 32:19 35:17 summary 35:14 35:15 37:12,14 37:18 supervising 26:7 supplemental 7:20 support 10:5 supports 47:22 47:22 suppose 4:16 8:22 supposed 30:19 suppressed 50:7 suppression 50:4 Supreme 1:1,12 7:21 9:8 26:20
<hr/> S <hr/>				
S 1:17 2:1,6 3:1 25:14 satisfied 46:23 save 10:12				

<p>27:15 29:6 34:3 50:16 sure 22:11 29:20 35:7 surely 49:7 survive 23:1 syllabus 50:19</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 2:1,1 take 17:12,16 43:24 taken 11:23 takes 4:20 16:14 talked 40:1,17 talking 20:22 45:25 47:13 talks 36:19,25 Taylor 3:22 5:11 6:13 19:3 43:15 43:17 45:10 Technically 6:4 tell 42:16 ten 15:2 terms 32:8 35:4 37:20,21 38:15 41:5 42:4 test 43:17 45:13 Thank 25:12 47:4,5 51:1 theoretical 46:14 theory 6:14 19:6 33:13 thing 5:18 13:16 14:16 20:22 25:5 32:17 37:13 40:16 things 47:15 think 12:6,6 15:9 15:20 18:2,10 19:17 20:3 21:18 23:3 25:23 26:17 29:16 30:6 35:20 36:1,4,8</p>	<p>37:17 38:22,22 39:13,13,16,17 40:20 41:20,23 41:23 42:11,20 44:8,9 46:17 48:4 thinking 16:25 thinks 48:6 Thorogood 24:9 24:9 36:6 48:6 thought 19:18 21:2 50:15 thousands 19:10 threat 19:12 three 12:25 time 10:13 18:17 19:19 33:5 37:12 49:2 times 19:10,10 tone 30:3,7 top 46:20,21 totally 16:8,11 tougher 36:5 transferred 49:19 treat 27:7 treated 12:13 treating 3:20,20 12:2 treatment 11:16 trials 10:15,18 tried 5:18 45:20 true 7:9 13:15 36:14,15 truly 10:16 23:5 trust 32:20 try 9:1 28:13 41:12 50:10 trying 11:3,4 12:7 14:7 17:1 20:16 42:15 Tuesday 1:9 turn 48:20 two 24:7 48:5</p>	<p>49:16 two-part 43:17 type 12:7 15:12</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>unconstitutional 23:19 underlying 27:10 41:8,25 46:10 understand 43:22 understanding 21:24 50:25 understood 35:13 44:18 45:17 46:1 unfortunate 50:12 United 1:1,12 8:20 38:19 unknown 50:22 unusual 35:9 use 33:4 ut 6:2</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:5 3:22 5:11 5:12 7:25 17:7 17:8 19:3 27:16 43:15,17 45:10 47:14,21 49:5 valuable 8:2 value 14:12 verging 46:5 version 27:2,4,5 versus 3:4 views 44:6 vindicated 26:20 29:18 vindicates 50:1 violation 12:18 13:19 22:16,17 22:24 30:20 31:6 42:2,5 46:19</p>	<p>Virginia 1:15 4:18,23 5:23 7:14,14,20,22 8:8,21 9:2,7,21 9:25 10:22 11:5 11:11,24 14:17 16:9 18:15,17 25:24 26:8,19 26:20 27:2,7,15 27:24 28:2,3,3 28:10 29:6,18 29:24 31:11,17 32:15,15,20 33:14,17,24 34:1,3,8,8,12 34:20,21 36:16 43:6 46:10 50:15 we'll 8:24 we're 8:18 12:4 20:15,21 27:19 27:19,20 32:20 32:21 33:1,2 37:5 39:5,6 41:6,6 45:24 46:5,5 we've 14:23 49:14 whatsoever 14:5 47:20 White 7:25 14:2 26:21 27:16 28:18 29:20,21 31:14,15 50:1,2 Wilks 17:8 win 13:22 wise 25:11 withstands 8:1 word 28:13 work 30:18 world 46:1 worried 22:2 worse 24:20 worst 7:25 8:1 wouldn't 18:7 22:16,17 40:22</p>
--	--	--	---

<p>42:21 writes 4:20 wrong 29:9 33:4 Wyatt 8:1 27:16</p> <hr/> <p>X</p> <hr/> <p>x 1:2,7</p> <hr/> <p>\$</p> <hr/> <p>\$100 14:8 46:16 \$200 14:8 46:18 \$75,000 46:24</p> <hr/> <p>0</p> <hr/> <p>09-1205 1:4 3:4</p> <hr/> <p>1</p> <hr/> <p>11:04 1:13 3:2 12:05 51:4 18 1:9</p> <hr/> <p>2</p> <hr/> <p>2001 48:25 49:1 2011 1:9 23 4:6 5:15 6:20 7:14 8:13,14,24 18:4,5 27:3 34:14,15,21,23 35:1 41:7,24 42:10,12 43:12 23(b)(3) 4:9 7:2 25 2:7</p> <hr/> <p>3</p> <hr/> <p>3 2:4</p> <hr/> <p>4</p> <hr/> <p>4 47:6 47 2:10</p> <hr/> <p>5</p> <hr/> <p>50 18:21,24</p> <hr/> <p>6</p> <hr/> <p>6 50:19</p> <hr/> <p>8</p>	83 35:21			
---	-----------------	--	--	--