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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SHADY GROVE ORTHOPEDIC :

4 ASSOCIATES, P.A., :

5 Petitioner :

6 v. : No. 08-1008

7 ALLSTATE INSURANCE :

8 COMPANY. :

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10 Washington, D.C.

11 Monday, November 2, 2009

12

13 The above-entitled matter came on for oral  
14 argument before the Supreme Court of the United States  
15 at 10:58 a.m.

16 APPEARANCES:

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

19 CHRISTOPHER LANDAU, ESQ., Washington, D.C.; on behalf  
20 of the Respondent.

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P R O C E E D I N G S

(10:58 a.m.)

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

Mr. Nelson.

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

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

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

Whether the case is viewed as presenting a question under the Rules Enabling Act as construed in *Hanna v. Plumer*, or instead more generally as an Erie question, the answer is the same. The State rule does not govern. That result is underscored by the Class Action Fairness Act, which extended Federal diversity

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1 jurisdiction to cases of this type precisely so that  
2 Federal procedural standards would apply.

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

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

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

19 JUSTICE GINSBURG: They didn't want to have  
20 class actions.

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

23 JUSTICE GINSBURG: And how is it different  
24 from Cohen v. Beneficial, the security for costs?  
25 Procedural in one sense, but with a definite substantive

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1 purpose in mind; that is, to restrict derivative  
2 actions.

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

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

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

23 JUSTICE GINSBURG: You could say just as  
24 well here that the question isn't addressed by the  
25 Federal rules. If New York wants to say this kind of

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1 claim can be brought only as an individual action, not  
2 as a class action, why -- why shouldn't the Federal  
3 court say that's perfectly fine; this class of cases  
4 can't be brought as a class action; we respect the  
5 State's position on that.

6 Why should we as a Federal court in a  
7 diversity case create a claim that the State never  
8 created?

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

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

25 The difference as to -- as to the State is

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1 that the State has no power to displace Federal law, and  
2 Rule 23, promulgated under the Rules Enabling Act, is  
3 Federal law.

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

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

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

19 Gasperini, I think, is different, with due  
20 respect to someone who probably knows more about it than  
21 I do. But as I read Gasperini at least, I see the Court  
22 there saying that what is going to be applied in the  
23 Federal court is what it saw as a substantive standard  
24 limiting damages. That is to say, damages are excessive  
25 if they are in excess of -- manifestly exceed what is --

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1 JUSTICE GINSBURG: But there wasn't a cap on  
2 damages in Gasperini. It wasn't a cap.

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

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

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

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

21 But excessiveness of damages is, to go back  
22 to a point that was made in the previous argument, like  
23 fairness. Fairness in relation to what? Excessiveness  
24 of damages has to be judged according to what the State  
25 law is on what damages one is entitled to recover.

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1 CHIEF JUSTICE ROBERTS: Under -- under your  
2 theory, are all of the statutes set forth by the  
3 Respondents in their appendices invalid in Federal  
4 court?

5 MR. NELSON: No, Your Honor, certainly not.  
6 Especially given that their appendix, half of it  
7 consists of Federal statutes, which of course are valid  
8 because Congress -- Congress can --

9 CHIEF JUSTICE ROBERTS: Well, it's not half.

10 MR. NELSON: A significant number. And I  
11 think it's a -- it's a goodly number.

12 Now, as to the State statutes, I think the  
13 State statutes are very different. Some of them may or  
14 may not be valid, but they operate very differently from  
15 the State statute at issue here.

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

21 JUSTICE GINSBURG: So suppose in this case  
22 the New York legislature, instead of having a statute  
23 that covered penalties generally, minimum recoveries  
24 generally, wrote into each statute, each penalty  
25 statute, each minimal recovery statute, that this suit

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1 may not be brought as a class action; instead of having  
2 an encompassing statute that covered all of them, it  
3 wrote into each individual statute that limitation.

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

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

17 MR. NELSON: Well, I -- again, I think  
18 that's what the best answer to that question would be,  
19 because the right in a class action is still an  
20 individual right; it's simply the -- the question is  
21 simply whether multiple claims of multiple parties can  
22 be aggregated in a single action. That doesn't expand  
23 the right that the -- that the state legislature has  
24 created for the individual.

25 JUSTICE GINSBURG: Are you saying that even

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1 if it -- then you are telling me it doesn't make any  
2 difference whether they do it across the board, as they  
3 did here, or in each penalty statute it says no class  
4 action?

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

9 If that case were presented, I'm simply  
10 saying that -- that I still don't think that that  
11 necessarily establishes a substantive right within the  
12 meaning of the Rules Enabling Act.

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

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

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

25 MR. NELSON: Yes, my answer would be the

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1 same, but this -- the result here doesn't turn on that  
2 answer being correct.

3 JUSTICE SOTOMAYOR: I'm sorry.  
4 Justice Ginsburg's hypothetical was you are entitled to  
5 \$100 as a statutory penalty, but only if it's an  
6 individual claim. If you -- if this is brought as a  
7 class action, you don't get the statutory penalty. I  
8 thought that was the substance of her question.

9 Now, are you saying that also is merely  
10 procedural and -- and preempted by Rule 23?

11 MR. NELSON: I think -- I think it's  
12 procedural in the sense that it establishes -- if it  
13 establishes a right, the right it establishes is  
14 procedural and procedural rights don't override the --

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

18 MR. NELSON: When -- when -- when what  
19 determines whether you get it is the form of the action  
20 that you have brought in a Federal court and whether it  
21 has been brought aggregated with other --

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

25 MR. NELSON: No.

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1 JUSTICE SOTOMAYOR: -- as it -- as with  
2 respect to class actions?

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

6 JUSTICE SOTOMAYOR: You mean the State could  
7 do.

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

16 CHIEF JUSTICE ROBERTS: Well, it has to  
17 apply to individual actions as well?

18 MR. NELSON: I think -- I think if -- if the  
19 application of the -- of the statute depends on  
20 whether -- whether the action is brought as a Rule 23  
21 action in Federal court or not, to me that's -- that is  
22 placing consequences on a procedural issue, and is not a  
23 matter of substance.

24 But again, I want to emphasize that this  
25 statute is very different from that. This statute is a

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1 statute that is not even limited to rights of action  
2 under New York State law. This is an action --

3 JUSTICE SCALIA: Have they applied it -- and  
4 if I recall your brief correctly, you say that the New  
5 York courts have applied it to causes of action arising  
6 under other State laws. Is that right?

7 MR. NELSON: I actually haven't found one  
8 that applies it to actions arising under other State  
9 laws. I found actions that apply to actions arising  
10 under Federal law. And the principal one --

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

13 MR. NELSON: That is correct. They are  
14 rules -- there are decisions of the appellant division.  
15 But as you know, this Court very shortly after deciding  
16 Erie emphasized holdings of intermediate State court of  
17 appeals are very persuasive data as to what State law  
18 is.

19 JUSTICE GINSBURG: It depends upon the  
20 persuasiveness of the reasoning of the court.

21 MR. NELSON: Yes. And in this case, the  
22 statute on its face uses the term "right of an action  
23 brought under a statute." There is no suggestion in  
24 901(b) that it's limited to New York State statutes.  
25 The term "statute" in the -- in the Civil Practice Law

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1 and Rules is not confined to New York State statutes.

2 Section 901 as a whole clearly is applicable  
3 to -- to rights of action brought under any source of  
4 law. And the New York State courts in the -- the most  
5 applicable case, the Rudgayzer case, justified its  
6 application of the statute to a Federal right of action  
7 on the ground that this was merely an act -- a -- a rule  
8 that governed local forms of -- of proceeding.

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

18 MR. NELSON: Well, a statute certainly  
19 phrased that way could do both. The question is when  
20 the statute is not phrased that way, when it's phrased  
21 simply as a general procedural instruction as part of  
22 the general procedural --

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

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

4 JUSTICE GINSBURG: Because the statute may  
5 put forth both a substantive policy and a procedural  
6 policy. And I'll give you a concrete examples.

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

17 That is certainly the way statutes of  
18 limitations have been interpreted by a number of States  
19 as having both a procedural aspect and a substantive  
20 aspect.

21 MR. NELSON: Well, I -- I certainly agree  
22 that statutes of limitations are generally applied by  
23 State courts to foreign causes of action. And that's  
24 because, I think, for choice of law purposes, they are  
25 considered and were traditionally considered to be

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1 procedural matters. It's only with the advent of Erie  
2 that they were characterized as substantive matters for  
3 purposes of -- of the application of -- of Erie  
4 doctrine.

5 JUSTICE GINSBURG: Well, that is not  
6 altogether true, because there was always recognition  
7 that a so-called built-in statute of limitations was  
8 substantive.

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

18 And as this Court said in the -- in the Byrd  
19 case, that when looking at -- at State law, and there  
20 the question was whether an issue was an issue for the  
21 jury. But in determining whether it would be considered  
22 to be substantive or procedural, the question is whether  
23 it is so bound up with the definition of the rights and  
24 obligations under State law that it will be deemed to be  
25 part of the substance of the law or whether it simply

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1 relates to a mode of enforcing the right. And -- and --

2 JUSTICE GINSBURG: I thought Byrd turned on  
3 the characteristics of a Federal court and that is the  
4 judge/jury relationship.

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

12 JUSTICE GINSBURG: It wouldn't matter what  
13 the answer to that was, with the Seventh Amendment  
14 looming over that case.

15 MR. NELSON: Well, you know, the Court  
16 didn't decide it as a Seventh Amendment issue, and --  
17 and because that particular question, I think, was --  
18 was a question that arose out of a State law  
19 administrative scheme, I think it's controversial  
20 whether it -- whether the Seventh Amendment would apply,  
21 and the Court, I think, advisedly decided that as an  
22 Erie case rather than as a Seventh Amendment case.

23 I want to also --

24 JUSTICE STEVENS: Can I ask you one brief  
25 hypothetical?

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1 MR. NELSON: Sure.

2 JUSTICE STEVENS: Supposing this statute,  
3 instead of being as broad as it is, said any statute  
4 imposing penalties against insurance companies may not  
5 be brought as a class action, any claims brought under  
6 that statute?

7 MR. NELSON: Justice Stevens, I think the  
8 outcome there would more clearly be the same, because  
9 again, it would not be -- it would not be part of the --  
10 of the New York State law definition of the right to  
11 insurance --

12 JUSTICE STEVENS: I think you said that if  
13 it puts a ceiling on it, that would be substantive  
14 rather than procedural.

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

17 JUSTICE STEVENS: Right.

18 MR. NELSON -- its own State laws, that I  
19 think becomes a substantive matter. The statute that I  
20 think you've -- you've hypothesized here is one that is  
21 based on the characteristics of the defendant regardless  
22 of the source of law under which it's being sued.

23 JUSTICE STEVENS: Well, you can make it a  
24 claim brought under the insurance code, instead of  
25 against insurance companies.

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1           MR. NELSON: Yes. Well, that then, I think,  
2 becomes very similar to the -- the hypothetical statutes  
3 that Justices Ginsburg and Sotomayor were positing, and  
4 I acknowledge that that is -- that that is a much harder  
5 question.

6           But, again, I think, ultimately, if the-- if  
7 the issue addressed by the statute is shall claims of  
8 individuals be aggregated and adjudicated as part of one  
9 unit, that is a substantive -- or a procedural matter  
10 and is governed in the Federal courts by a Federal  
11 procedural standard.

12           CHIEF JUSTICE ROBERTS: What if the basis  
13 for the restriction is the additional administrative  
14 costs of the class action? In other words, it doesn't  
15 say you can't bring it, but it says any recovery shall  
16 be reduced by 10 percent because class actions cost more  
17 than individual actions?

18           MR. NELSON: Well, there -- that I think  
19 would be a statute that is serving a manifestly  
20 procedural interest, and if the Federal courts have not  
21 chosen in their rules to impose an administrative charge  
22 on class actions, a State law that purported to do so  
23 would -- would not -- not have any application to  
24 Federal procedure.

25           That -- that statute I think would be not

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1 only foreclosed in its operation by the Rules Enabling  
2 Act and *Hanna v. Plumer*, but would just be, on its face,  
3 something that, even leaving asides the Federal rules,  
4 would fall on the procedural side of the line in just  
5 classic Erie terms because the policies that it reflects  
6 are manifestly procedural.

7           And I think, actually, the same is true  
8 here. A statute --

9           JUSTICE GINSBURG: How is it different from  
10 security for costs? I mean, that's what I started with.  
11 That's that -- there's nothing in the Federal rules that  
12 say security for costs.

13           MR. NELSON: Well, the -- the -- as I  
14 understand the Court's reasoning in *Cohen*, the security  
15 was -- was not just for the cost of the action, but for  
16 the plaintiffs' liability to the corporation that was  
17 created under state law in the case of an unsuccessful  
18 derivative action.

19           And that liability was what the Court looked  
20 at in *Cohen* as -- as making -- making the fundamental  
21 issue substantive, and the bond was sort of the -- you  
22 know, the tail on the dog, in the sense that the Court  
23 characterized it as substantive, having first  
24 characterized the damages remedy as substantive because  
25 without the bond, according to the majority, the remedy

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1 would be meaningless.

2 I -- you know, the proposition was certainly  
3 debatable -- even Justice --

4 JUSTICE GINSBURG: Without the bond, the  
5 remedy would be -- I don't -- this is the plaintiffs  
6 that had to put up security for costs.

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

17 That was -- that was, as I understand it,  
18 the Court's reasoning.

19 If the -- if the Court has no further  
20 questions, I would like to reserve the remainder of my  
21 time.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Mr. Landau.

24 ORAL ARGUMENT OF CHRISTOPHER LANDAU

25 ON BEHALF OF THE RESPONDENT

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1 MR. LANDAU: Mr. Chief Justice, and may it  
2 please the Court:

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

10 JUSTICE SOTOMAYOR: But isn't Rule 23 a  
11 judgment by Congress that class actions that meet the  
12 criteria of Rule 23 are fair and efficient, correct?  
13 That's Congress's judgment?

14 MR. LANDAU: No, Your Honor.

15 JUSTICE SOTOMAYOR: Under your theory, any  
16 State could pass a law that says no cause of action  
17 under State law can be brought as a class action ever.  
18 That would be your theory because it's substantive, if  
19 it's an Erie choice.

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

24 It's delegated authority under the Rules  
25 Enabling Act to set forth these rules, so there is

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1 always a limitation on what a rule of procedure can do.  
2 That's why there is an advisory committee that sets it.  
3 It's not a statute, and there are -- there are  
4 restrictions on -- on the rules that don't apply to  
5 Congress.

6 But going to the substance of your question,  
7 Your Honor, Rule 23 governs the criteria for when --  
8 when you can have a class, but it doesn't address the  
9 underlying question, which is can you have a class in  
10 the first place?

11 Is there -- the legislature that creates the  
12 cause of action can say, this is categorically  
13 ineligible for class certification.

14 JUSTICE SOTOMAYOR: You haven't quite  
15 answered my question.

16 MR. LANDAU: I'm sorry?

17 JUSTICE SOTOMAYOR: Your State can come in  
18 and say, no State cause of action will ever be subject  
19 to class treatment, and you would say there is no  
20 conflict between that and Rule 23?

21 MR. LANDAU: Well, Your Honor, if the State  
22 is talking about its own State law causes of action, the  
23 State is the master. The State creates these causes of  
24 action in the first place. If a State, like New York  
25 did here, says, certain causes of action --

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

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

9 If the State --

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

15 That's what the State has said as its policy  
16 choice, correct?

17 MR. LANDAU: Well, Your Honor, no, because  
18 the policy choice here is a substantive policy choice to  
19 limit penalties from being distorted in a class action  
20 case.

21 JUSTICE SOTOMAYOR: It's a policy choice.

22 MR. LANDAU: Well, if the -- if the State,  
23 Your Honor, makes a policy choice, it is a substantive  
24 policy choice, as I believe -- your hypothetical, at  
25 some points, was talking about what sounded like a

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1 substantive policy choice.

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

7 JUSTICE SOTOMAYOR: So you have answered my  
8 question. Under your view, a State could say, no class  
9 actions.

10 MR. LANDAU: It's a --

11 JUSTICE SOTOMAYOR: And -- and a Federal  
12 court, sitting in diversity, could never aggregate those  
13 claims, those State law claims?

14 MR. LANDAU: For state law claims, yes. If  
15 it makes a substantive decision that we want -- a State  
16 could abolish that cause of action altogether, Your  
17 Honor. And I think the concern that Your Honor's  
18 expressing is somehow that Federal courts could be  
19 flooded with State law causes of action. Well, that  
20 won't happen because they would still have to meet  
21 Federal jurisdictional norms to get into Federal court.

22 So you won't get small State law claims.  
23 You would still have to meet the requirements for  
24 Federal jurisdiction.

25 CHIEF JUSTICE ROBERTS: Counsel, do I -- do

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

10 MR. LANDAU: Well, the Erie -- you could,  
11 Your Honor. The answer -- the short answer is yes  
12 because the Erie cases have looked to the purpose.

13 I think Justice --

14 CHIEF JUSTICE ROBERTS: How do you -- how do  
15 you tell?

16 MR. LANDAU: Well, Your Honor, it's not  
17 always easy.

18 Erie cases, for that reason, are not  
19 always -- result in easy line-drawing. Certainly, in  
20 making the Erie choice, this Court has looked to the  
21 State's purpose.

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

23 CHIEF JUSTICE ROBERTS: I suppose it's  
24 pertinent, then, whether they do it, as I think you  
25 were -- was discussed earlier, on an across-the-board

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1 basis or on an individual basis?

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

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

9 There is two responses. First, they really  
10 haven't proven that. The only case they have that  
11 actually has applied it to anything other than a New  
12 York cause of action is the Rudgayzer case under the  
13 Telephone Consumer Protection Act, which is a very  
14 unique Federal statute that specifically incorporates  
15 State law.

16 It looks to State law. And the Rudgayzer  
17 court didn't come in and say, this is broadly applicable  
18 to a Federal cause of action. It relied on that very  
19 language.

20 JUSTICE SOTOMAYOR: Counsel, how can you say  
21 that? The case itself says: We read the language of  
22 the statute; Congress didn't say this was to be a class  
23 action; we are not permitting it. I understand the  
24 difference, and it could have argued or analyzed the  
25 case the way you said, but the appellate division there

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1 did exactly what your adversary said it did.

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

10 But even more broadly, Your Honor, I think  
11 the key point is what they are trying to get at somehow  
12 by -- by saying this applies broadly is to say that New  
13 York would treat this as procedural. And they are --  
14 they are asking this Court essentially to speculate on  
15 that. But there is no need to speculate because the New  
16 York Court of Appeals two years ago addressed this  
17 statute in quite some detail in the Sperry case, and the  
18 New York Court of Appeals actually went through why the  
19 statute was adopted, why 901(b) was adopted. And the  
20 New York Court of Appeals specifically said it was a  
21 response. The word -- it said, you know, when -- when  
22 New York modernized its class action statute regime in  
23 1975, there was concern expressed among a lot of people  
24 that applying penalties on a class-wide basis, statutory  
25 penalties and minimum measures of recovery unrelated to

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1 any actual damages, would be distorted and there would  
2 be overdeterrence and overkill in the class action  
3 context.

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

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

20 JUSTICE BREYER: All right, if that's  
21 exactly what we did, why isn't that second-guessing the  
22 judgment of the rule that they are saying it  
23 is efficient -- an inefficient procedure. It is  
24 inefficient in terms of the object of -- of the Federal  
25 rules and what the class wanted. We want efficient

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1 methods of achieving justice.

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

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

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

15 JUSTICE BREYER: No, it does. It's the  
16 judicial process that does it.

17 MR. LANDAU: Your Honor, I think --

18 JUSTICE BREYER: It's the judicial process  
19 and its expense --

20 MR. LANDAU: I think --

21 JUSTICE BREYER: -- that forces the  
22 settlements that create unjust results.

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

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

6 MR. LANDAU: No, because --

7 JUSTICE BREYER: How is this different?

8 MR. LANDAU: -- because then you would have  
9 a clear Hanna problem, Your Honor. I think -- let's go  
10 back to the threshold question. They try to get around  
11 what is a form distortion, a clear Erie problem by  
12 saying you don't even get to Erie because you have a  
13 threshold Hanna issue, which is Rule 23 answers this  
14 question.

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

21 In fact, I think the Chief Justice earlier  
22 asked how this case differs from the statutes in  
23 appendices A and B. And I think I really didn't really  
24 hear a clear answer. The statutes in Appendix A are all  
25 statutes where States and the Federal Government have

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1 put caps on the recovery in class actions. That shows  
2 that you can have a substantive cap on what is a  
3 procedural device.

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

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

18 JUSTICE STEVENS: And that would -- that  
19 would apply not only to statutory causes of action but  
20 causes of action based on New York common law.

21 MR. LANDAU: Right. Under -- under New York  
22 law. If they were making decisions, they having created  
23 these causes of action under their own State's law, if  
24 they think it would be overdeterrent to have these kinds  
25 of actions brought on a class-wide basis and they were

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1 enacting this for purposes of limiting the remedies that  
2 were available for these causes of action that they  
3 created, I -- there would be a strong argument that --  
4 that should apply under Erie.

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

15 MR. LANDAU: Right.

16 CHIEF JUSTICE ROBERTS: But it's not  
17 appropriate to say, we don't like the class action  
18 procedure as a general matter.

19 MR. LANDAU: Right.

20 CHIEF JUSTICE ROBERTS: And in Justice  
21 Stevens' hypothetical it applied across the board, which  
22 would cause me, anyway, to think it was the latter.

23 MR. LANDAU: I would agree with Your Honor.  
24 If you have an unadorned prohibition on class actions in  
25 the State's -- from a State, I think the most natural

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1 understanding of that is that was their determination of  
2 how the procedures in their courts are going to work.

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

9 MR. LANDAU: No, Your Honor -- again, I  
10 think they can blend. I think in Gasperini this Court  
11 pointed out that the -- the heightened standard of  
12 judicial review of damages awards had a manifestly -- it  
13 was a procedural command with a manifestly substantive  
14 purpose. I think this case is not really dissimilar.  
15 Instead -- the cases in Appendix A say that in a  
16 class -- excuse me, the statutes say in a class action  
17 you may not recover more than X. The only difference  
18 here is it says, if you are seeking to recover more than  
19 X, you may not have a class action.

20 And with respect to the statutes in Appendix  
21 B, those say there may not be a class action for  
22 particular causes of action.

23 JUSTICE GINSBURG: New York doesn't have --  
24 as the -- the question that Justice Sotomayor asked and  
25 that Justice Stevens asked -- doesn't have any

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1 anti-class action as a procedural policy. It has picked  
2 out a particular kind of action. One for a penalty, one  
3 where there was -- what is it -- a minimal recovery, and  
4 said that category, we have -- we're not anti-class  
5 action in general, but these penalties that we created,  
6 we don't want those scored as class actions.

7 MR. LANDAU: Precisely, Your Honor. And I  
8 think that underscores is why this is substantive, the  
9 fact that this reflects a substantive policy decision  
10 that is not about the efficiency or operation of the  
11 class action process itself, the judicial process. This  
12 is a substantive decision to calibrate the remedy that  
13 New York has afforded under its own law, and a decision  
14 that when you have penalties that New York has decided  
15 in the -- and the Sperry case is very explicit on  
16 this -- that New York made a decision that the -- the  
17 appropriate level of enforcement for those was the level  
18 in an individual action, and that when you got -- when  
19 you tried to make it into a class, that that would be  
20 overenforcement of those.

21 JUSTICE GINSBURG: One -- one question that  
22 was raised by the other side is, well, if you're saying  
23 this kind of restriction, restriction on class action  
24 applies in a diversity case, why not a state that says  
25 we love class actions, and we want class actions to

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1 be -- not to be hemmed in by all of the Rule 23  
2 requirements?

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

6 State law cannot change or water down those  
7 criteria or direct that you get to the goal line of a  
8 certified class by some mechanism other than the Rule 23  
9 criteria.

10 Our position, Your Honor, our point is that  
11 you don't get to the Rule 23 criteria if the state law  
12 or the substantive law that creates the cause of action  
13 sends you off the highway before you get into the land  
14 of the criteria.

15 If it just says, this is categorically  
16 unavailable as a class -- as many states have, in fact,  
17 done in the statutes in Appendix B, they have come up  
18 with novel causes of action, sometimes, abusive e-mail  
19 cause of action.

20 And they said, well, we do not want a class  
21 action to be brought for this kind of claim. That is a  
22 decision that reflects a substantive choice by the  
23 legislature that it would be overdeterrence and  
24 overenforcement to have this brought on a class-wide  
25 basis.

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1 CHIEF JUSTICE ROBERTS: Well, it -- it only  
2 reflects a substantive choice -- if it is a substantive  
3 choice. If they say, we are not going to allow class  
4 actions because we think, procedurally, they are a bad  
5 idea because we think lawyers get too much recovery when  
6 they recover, in other words, your -- your position  
7 depends upon a characterization of the ban, and the  
8 restriction on class actions is either substantive or  
9 procedural.

10 MR. LANDAU: Well, Your Honor, I think what  
11 you can -- you can assume that, if they are not changing  
12 their criteria and not changing the rules governing all  
13 class actions, but singling out particular causes of  
14 action or particular penalties, that it's done for a  
15 substantive reason.

16 Here, in New York, we actually know that's  
17 true because the Sperry court says that. And one, I  
18 think, important point in 901(b) is the initial clause,  
19 the unless clause, that we have been focusing a lot on  
20 the last clause that says it may not be brought as a --  
21 as a class action, if it's seeking a statutory penalty.

22 But it says, "unless a statute creating or  
23 imposing a penalty or minimum measure of recovery  
24 specifically authorizes the recovery thereof in a class  
25 action."

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1           That's showing, that even though this is  
2 located in the CPLR, that it's really part and parcel of  
3 their statutory regime. It's saying, this is our  
4 statutory default rule.

5           To be sure, a New York statute can override  
6 that, but the idea that this is somehow simply  
7 procedural because it's in the CPLR is really belied by  
8 that language that -- that really shows that -- and,  
9 frankly, I think it also belies the fact that this  
10 applies to causes of action outside of New York because  
11 the unless clause really can only be understood as  
12 setting a default baseline for the New York legislature  
13 in enacting a statute, that they may want to  
14 specifically authorize class actions for penalties.

15           So, again, I think --

16           JUSTICE STEVENS: Let me just be sure I am  
17 not lost on one point. Does this just apply to  
18 statutory causes of action created by New York law? Or  
19 does it apply to a statutory cause of action created by  
20 New Mexico law?

21           MR. LANDAU: New York, Your Honor. There's  
22 nothing --

23           JUSTICE STEVENS: The language doesn't limit  
24 it that way, does it?

25           MR. LANDAU: You are right, Your Honor, but,

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1 again, you read language against certain background  
2 assumptions and norms that states --

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

6 MR. LANDAU: You know, and the truth is,  
7 Your Honor, I think it still wouldn't matter at the end  
8 of the day. I think, in Gasperini, the law -- the  
9 provision of the CPLR in Gasperini provided for  
10 heightened review.

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

14 JUSTICE STEVENS: But it seems to me that  
15 your position basically is that New York can decide what  
16 kinds of cases shall be brought as class actions,  
17 period.

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

21 JUSTICE STEVENS: Well, not substantive  
22 reason, but for some good reason.

23 MR. LANDAU: Okay. Right. Well -- well,  
24 that New York -- yes, that New York can make a decision  
25 that it doesn't want certain New York causes of action

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1 to be brought as class actions and the Federal courts --

2 CHIEF JUSTICE ROBERTS: But the question is  
3 New Mexico causes of action. Can they decide that they  
4 don't want actions from outside of the state to be  
5 brought as class actions?

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

9 CHIEF JUSTICE ROBERTS: What it would do, it  
10 seems to me, is make it clear that that was not a  
11 substantive decision, but, instead, a procedural  
12 decision.

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

15 JUSTICE GINSBURG: But it could be -- it  
16 could be -- as I -- the example of the statute of  
17 limitations. We create a claim. It has a certain life.  
18 It's dead after that time. That's New York law.

19 A sister state may say, we create the same  
20 claim, but we think it has a longer life. New York  
21 would say, that's fine. Bring that claim in your own  
22 state. Don't clutter up our courts with out-of-state  
23 claims when we would not hear the identical claim under  
24 our own law.

25 There are policies that do operate as

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1 procedural limitations and have a substantive thrust.

2 MR. LANDAU: Absolutely, Your Honor.

3 JUSTICE GINSBURG: New York might well say,  
4 look, we don't hear in New York penalty cases, and so we  
5 are not going to entertain the sister state claim for  
6 any -- when we wouldn't entertain our own, we are not  
7 frustrating the sister state, they could bring the class  
8 action there, but not in -- not in our courts.

9 MR. LANDAU: And I think the point -- I  
10 agree 100 percent. I think the point that you are --  
11 that point underscores, Your Honor, is that, ultimately,  
12 the Erie issue is a Federal issue.

13 You can look to New York to try to  
14 understand the design and operation of the state rule at  
15 issue, but, ultimately, you are being asked, as a  
16 Federal court, to set the appropriate relationship  
17 between the state court system and the Federal court  
18 system.

19 And, again, the lesson of Erie is you don't  
20 want to create incentives that will bring people like a  
21 magnet to Federal court and distort these ex ante  
22 foreign choices of litigants for state law claims.

23 JUSTICE GINSBURG: Well, they -- they bring  
24 up the Class Action Fairness Act, which allows a  
25 plaintiff -- I should say allow a defendant to remove a

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1 class action from a state court to a Federal court, but  
2 they also allow a plaintiff to initiate an action in the  
3 Federal court.

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

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

15 And if you were to construe Rule 23  
16 otherwise, as overriding this kind of statute -- all the  
17 statutes in Appendix B, that would be a truly remarkably  
18 substantive interpretation that this Court has always  
19 stressed, that it must, in construing the rules, be  
20 careful not to tread into that territory and has  
21 construed the rules with an eye towards the limitations  
22 of the Rules Enabling Act.

23 The other side -- Shady Grove would walk you  
24 right into an extremely problematic situation from the  
25 point of view of the Rules Enabling Act, as well as

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1 creating these -- these incentives that really go  
2 against the heart of the Erie doctrine that would turn a  
3 \$500 case into a \$5 million case.

4           And one interesting point, I think, is that  
5 all these statutes that are listed in our Appendix B  
6 that limit class certification for particular causes of  
7 action, under their theory that Rule 23 requires that  
8 everything be amenable to class certification, those  
9 would all be out the window.

10           I don't think counsel really wanted to admit  
11 that this morning, but the logic of their theory is that  
12 Rule 23 governs this case and Rule 23 requires that  
13 every cause of action that comes before it be eligible  
14 for class certification.

15           That would knock out each and every one of  
16 the statute ins Appendix B. They don't live up to -- in  
17 their reply brief, at footnote 10, on page 15, they try  
18 to distinguish those statutes by saying, oh, well, the  
19 limitations on class actions in those statutes is in the  
20 substantive cause of action.

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

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1           And, again, what we would ask the Court is  
2 just to -- is to recognize that Rule 23 occupies the  
3 ground it occupies, but it doesn't go -- it occupies the  
4 ground of the criteria, which go to the efficiency and  
5 fairness of the process.

6           But where a state has made an antecedent  
7 decision that -- that a particular cause of action or  
8 particular remedy is categorically unavailable -- or  
9 ineligible for class certification, that's a decision  
10 that Federal courts should respect under the Erie  
11 doctrine.

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

14           Mr. Nelson, you have four minutes remaining.

15           REBUTTAL ARGUMENT OF SCOTT L. NELSON

16           ON BEHALF OF THE PETITIONER

17           MR. NELSON: Thank you.

18           I would like to begin with the point that my  
19 friend made about the "unless" clause in 901(b) and that  
20 that somehow indicated that it applied only to New York  
21 State statutes. In fact, the New York courts have  
22 applied that "unless" clause to Federal statutes,  
23 holding in one case that the Truth in Lending Act  
24 satisfied the "unless" clause because it authorized a  
25 class action, and in another that the Telephone Consumer

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1 Protection Act did not because it didn't authorize a  
2 class action.

3 So it actually is, I think, quite clear from  
4 the language of the statute and from the Court's  
5 application --

6 JUSTICE GINSBURG: There -- when you are  
7 dealing with a Federal statute, there -- there is a  
8 factor that doesn't come up when you are dealing with  
9 sister States, and that is the Supremacy Clause.

10 If Congress has made a judgment -- let's say  
11 1983 -- I don't think the State that says, for our  
12 comparable claims we don't allow class action could --  
13 could apply that to --

14 MR. NELSON: I think that's right. If  
15 Congress had provided that a class action was authorized  
16 in any court under a statute, New York couldn't prevent  
17 it.

18 But my point here is that the "unless"  
19 clause is simply consistent with the rest of the  
20 statute, which makes clear that it applies to statutes  
21 from any source.

22 And that means that far from being in the  
23 heartland of Erie, this is far outside the heartland of  
24 Erie. It's a case where the State court for procedural  
25 -- or the State's legislature, for procedural reasons, a

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1 balancing of the fairness and efficiency the -- of class  
2 actions and those things that must -- that are requisite  
3 to the just, speedy, and efficient --

4 JUSTICE GINSBURG: I can't see how that's so  
5 when they limit just a particular remedy or penalty. If  
6 they were saying, well, across the board we don't want  
7 class actions, I could follow your argument much better.  
8 But when New York singles out penalties, it seems to be  
9 talking then about the efficiency and fairness of  
10 proceedings, but that it doesn't want penalty claims to  
11 be magnified.

12 MR. NELSON: Well, but that's an aspect of  
13 -- of the fairness and efficiency of proceedings.  
14 Remember, of course, these are not claims for which the  
15 plaintiffs can't recover in State court. They are  
16 simply claims that they have to proceed individually in  
17 State court to pursue.

18 And the further point I would make is that  
19 the judgment that the -- that the New York legislature  
20 makes, that statutory penalties under any set of  
21 statutes are not appropriate for class treatment, is  
22 really contrary to the decision that the rules drafters  
23 of Rule 23 have made, which actually specifies the  
24 circumstances under which classes can be certified  
25 exactly by reference to the type of relief sought.

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1           So it's a case where the rule and the State  
2 statute really do cover the same ground, to use the  
3 approach this Court took in the Burlington case, where  
4 it said that a State statute would not be given an  
5 effect when the Federal rule occupies the territory.

6 And that's --

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

9           MR. NELSON: And -- and Rule 59 doesn't  
10 occupy the territory of the standard to be applied, and  
11 Rule 41(b) as construed in Semtech just does not address  
12 preclusive effect.

13           And finally, again, on the issue of ex ante  
14 forum choice, Congress, in the Class Action Fairness  
15 Act, provided jurisdiction so that Federal procedural  
16 rules would apply. If, as my friend argues, whether or  
17 not a case can proceed as a class action is a matter of  
18 substantive right, that principle can't be cabined to  
19 cases where the substantive -- or where the State  
20 standard precludes class actions.

21           If a class action, yes or no, is a matter of  
22 substantive right, that applies equally to State  
23 standards that -- that would promote class actions, and  
24 therefore, even though as -- as my friend says, it would  
25 be a Hanna issue, there would be an abridgement of a

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1 substantive right. So --

2 CHIEF JUSTICE ROBERTS: You can finish your  
3 thought, if you like.

4 MR. NELSON: Well, the thought is that  
5 that's an indication that amenability to class actions  
6 should be treated both for plaintiffs and for defendants  
7 as a matter of procedural right governed by the Federal  
8 rules.

9 CHIEF JUSTICE ROBERTS: Thank you, Counsel.  
10 The case is submitted.

11 (Whereupon, at 11:55 a.m., the case in the  
12 above-entitled matter was submitted.)

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