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IN THE SUPREME COURT OF THE UNITED STATES

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COMCAST CORPORATION, ET AL., :

Petitioner s : No. 11-864

v. :

CAROLINE BEHREND, ET AL. :

- - - - - x

Washington, D.C.

Monday, November 5, 2012

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

APPEARANCES:

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

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

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P R O C E E D I N G S

(10:05 a.m.)

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

Mr. Estrada.

ORAL ARGUMENT OF MIGUEL ESTRADA
ON BEHALF OF THE RESPONDENTS

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

The Third Circuit held in this case that the assessment of the adequacy of expert evidence offered in support of class certification is a merits question that has no place in the class certification inquiry. According to the Third Circuit and to the plaintiffs in this Court, what is sufficient is for the proponents of class certification to point to some abstract methodology, such as econometrics or regression analysis, that conceivably might be applied to the problem at hand in a way in which in the fullness of time will evolve into admissible evidence by the time of the class trial.

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

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

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

6 MR. ESTRADA: Yes.

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

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

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

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

25 MR. ESTRADA: Well, let me make two points

1 in response to that question, Justice Ginsburg: One
2 about what the legal standards are, and, you know, the
3 second one, which is as important, about what the record
4 in this case is.

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

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

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

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

1 that there was a class-wide measurement of damages. And
2 then in addition, both courts said really, it was -- the
3 burden was on the plaintiffs to demonstrate that that
4 class-wide measure of damages existed.

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

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

21 JUSTICE KAGAN: Well, here's what the
22 district court said. "The experts' opinions raise
23 substantial issues of fact and credibility that we are
24 required to resolve to decide the pending motion." That
25 is the motion for class certification. "Having

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

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

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

16 Beyond that, I don't think that we do agree,
17 because in the Third Circuit, once the case got there,
18 we got a rule of law saying that although this court
19 prescribed the rule amendment, 23(f), precisely to
20 enable courts of appeals to review whether the district
21 court got it right for important policy questions, that
22 the job of the court of appeals under 23(f) can be fully
23 discharged by saying that providence will provide; we'll
24 think about it in the morning. And that is not
25 consistent with the proposition that the correct law was

1 applied in the lower courts.

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

11 And I will ask you to look at the top of
12 page 145 of the Pet. App., where you can look at
13 discussions -- I'm sorry, it's 131 in footnote 24, where
14 the district court made clear that his understanding of
15 the capable class-wide proof involved the inquiry
16 whether the plaintiffs actually had evidence that
17 reflected the methodologies that had been used in this
18 case -- in these kinds of cases.

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

22 So at a very general level, I don't have a
23 disagreement with you that in many cases where there is
24 error, the district court started out with the right
25 foot. I don't agree with you that the correct standard

1 either was applied by the district court or was even
2 attempted by the court of appeals.

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

12 And that is a key point about what the
13 theory of impact here was.

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

17 MR. ESTRADA: Well, and I'm happy to also
18 deal with that question. There are cases, indeed, in
19 which, you know, the variances of the classes can be
20 dealt with, with subclasses. No one on the plaintiffs'
21 side has actually asserted here that the record would
22 allow this. And Mr. Jordan pointed out, there is
23 considerable basis for skepticism in thinking that that
24 could ever be accomplished because we are talking about
25 649 franchise areas with different competitive

1 conditions.

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

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

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

21 MR. ESTRADA: No, I think the text of
22 (b)(20) -- of (b)(3) expressly requires that questions,
23 whether they be damages or liability, that are common to
24 the class predominate over those that are individual as
25 to class members. And I fully accept, and I am not

1 arguing, that the mere fact that there may be individual
2 damages questions precludes class certification.

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

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

16 JUSTICE BREYER: I completely agree with
17 hornbook law. Three pipe manufacturers get together and
18 in January fix their prices, all right? Fourteen
19 wholesalers want to show that and each has different
20 damages because they bought different amounts of pipe.
21 Hornbook law: Certify the class and leave the damages
22 issues for later.

23 MR. ESTRADA: Right.

24 JUSTICE BREYER: This case, this case,
25 hornbook law: Section 2 forbids monopolization. It is

1 absolutely clear Comcast has that power. That's why
2 they're -- that's why they're regulated and, indeed,
3 they engage in things that show that they did not
4 achieve that through skill, foresight and industry.

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

13 Now, hornbook law, whether that's so or not
14 so is a matter for later, but see first if there is
15 liability. Okay, that's their argument. What's the
16 answer?

17 MR. ESTRADA: Well, I mean, the answer is --
18 I will take your first example and, in fact, I was going
19 to give, you know, the example of a case that I had that
20 was similar where, you know, three plastic cup
21 manufacturers met in, you know, some airport and fixed
22 the prices. Now, this is like saying you fixing, you
23 know, the price of widgets. There is a preexisting
24 but-for world and the question as to who bought what
25 when is not really a question of adjudication but of

1 computation. And those are the types of cases where the
2 courts say that the individual damages questions really
3 do not preclude a -- a certification.

4 Now, your second example may or may not be
5 suitable for class treatment.

6 JUSTICE BREYER: Well, here, since what they
7 are saying is they have two theories: Section 1, the
8 agreements to keep other people out of this area are
9 unlawful in themselves. Question 2 is whether they
10 contribute to monopolization. Okay?

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

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

18 MR. ESTRADA: But the legal --

19 JUSTICE BREYER: Some paid some, some paid
20 another. We have some experts in to try to make that
21 computation. Sounds the same to me.

22 MR. ESTRADA: No, but it isn't, because one
23 key point that is missing from the hypothetical,
24 Justice Breyer, is exactly what the theory of liability
25 that is present in this case is as the case comes to the

1 court. They had four theories of possible --

2 JUSTICE BREYER: I saw the four theories and
3 it seems to me that we are now on the theory of one of
4 the pieces of exclusionary conduct was agreement through
5 various mergers, et cetera, that potential competitors
6 would not come in and compete.

7 Now, I don't know why the judge struck out
8 the other one, the number 2, but number 3 and Number 4,
9 I can see it. But on monopolization theory, that's not
10 relevant to damages. Throughout we assume that the
11 regulator is doing a terrible job, otherwise the prices
12 wouldn't be so high in the first place.

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

16 MR. ESTRADA: No. I mean, I think, you
17 know, the key point that you are missing in your
18 hypothetical --

19 JUSTICE BREYER: Is?

20 MR. ESTRADA: -- basically starts with the
21 actual point of antitrust law, whether these people
22 actually are potential competitors. It's not actually
23 relevant to the class certifications that we face today.
24 But I don't accept, for present purposes or for later,
25 that these people that already have different clusters

1 of cable service that were simply aggregated in these
2 transactions actually were actual potential competitors.
3 They were not --

4 JUSTICE BREYER: I mean, that's liability.

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

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

8 MR. ESTRADA: I just said that. But the
9 point is that as the case comes to the -- to the Court
10 the question is whether the class that was certified by
11 the district court and validated in its own way by the
12 court of appeals is one that is consistent and fits
13 reliably with the legal theory that the plaintiffs are
14 allowed to pursue --

15 JUSTICE BREYER: And this does, too --

16 MR. ESTRADA: -- in this case.

17 JUSTICE BREYER: -- because if they prove
18 their case, the question on damages is to what extent
19 did the absence of competition from the overbuilders --
20 and it should have been DBS too from reading this, but
21 nonetheless let me express no view on that -- but on --
22 on -- to what extent did the failure of competition from
23 those people raise price above the competitive level?

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

25 JUSTICE BREYER: And --

1 MR. ESTRADA: Justice Breyer --

2 JUSTICE BREYER: -- the pipes --

3 MR. ESTRADA: -- I mean, I really hate to be
4 so prosaic and you mentioned something -- something so
5 contrary to the facts, but the fact is that the
6 fundamental question here is that there is one theory
7 they are permitted to pursue. It is that this
8 overbuilder, RCN, would have radiator -- radiated out
9 through the DMA area.

10 Now, you may think that they should have
11 been allowed to pursue some other different theory.
12 It's not the case that you have in front of you. And
13 the fact is that -- that as the case comes to the Court,
14 the theory that remains is based on the proposition that
15 RCN was going to be the overbuilder that -- that was
16 going to impact prices. Two --

17 JUSTICE KAGAN: Well, Mr. --

18 MR. ESTRADA: If I could just finish. Two
19 things follow from that. You know, the first one which
20 is directly pertinent to the issue here is that the
21 McClave model purported to compute damages that were not
22 limited to overbuilding, and that in fact expressly
23 measured overbuilding only as to 5 out of the 16
24 counties. The damage model just does not fit the legal
25 theory that stays in the case.

1 The second aspect of it is that as a
2 question of the factual fit with the record in the case,
3 the transactions that added the largest number of
4 subscribers here occurred in 2000 and very early 2001.
5 The record in this case includes public announcements by
6 RCN, repeated by the FCC in its competition review, that
7 they were not going to franchise any new franchises. So
8 there is a basic question of lack of fit between the
9 ipse dixit of the expert and, you know, the record in
10 this case.

11 JUSTICE KAGAN: Mr. Estrada, as -- as the
12 case comes to the Court, I guess I wonder why any of
13 this is relevant. You mentioned earlier, you mentioned
14 earlier that we reformulated the question presented in
15 this case. And we reformulated in a way which said that
16 what we wanted to talk about was whether a district
17 court at a class certification stage has to conduct a
18 Daubert inquiry, in other words has to decide on the
19 admissibility of expert testimony relating to class-wide
20 damages.

21 And, you know, it would not be crazy to
22 surmise that we reformulated the question because we
23 wanted to present, we wanted to decide a legal question,
24 rather than a question about who was right as to this
25 particular expert's report and how strong it was. And

1 it turns out that as to that legal question, your
2 clients waived their -- their argument that this was
3 inadmissible evidence. So -- so what do we do in that
4 circumstance?

5 MR. ESTRADA: Well, I don't agree with you
6 that we waived. And, you know, we covered this in, I
7 think, 3 or 4 pages in the reply brief with all of the
8 citations as to how we challenged the --

9 JUSTICE GINSBURG: But you challenged the
10 probity, Mr. Estrada. You said Comcast said it had no
11 objection to McClave's qualification as an expert. So
12 what you were talking about was the probity of this
13 report, not the admissibility.

14 MR. ESTRADA: No, that is not right, Justice
15 Ginsburg. Daubert and its progeny really encompasses
16 three distinct prongs. One of them is, of course, the
17 qualifications of the expert. The second one is the --
18 the reliability of the methodology; and the third is
19 fit. And all we said at the -- at the class hearing is
20 that we had no objection to the proposition that these
21 people have Ph.D.'s, which indeed they do. But the
22 issue still was both in the district court and in the
23 court of appeals one that we urged that the methodology
24 was not relevant and did not --

25 JUSTICE KAGAN: The district court,

1 Mr. Estrada, clearly understood you to be making an
2 argument about weight and not about admissibility. And
3 indeed the district court in open court -- and -- and
4 it's in the transcript -- suggests that it's doing
5 something different from holding a Daubert hearing,
6 explains how it's different from holding a Daubert
7 hearing, and both lawyers agree to that statement.

8 MR. ESTRADA: Well, but I think we -- we
9 agree that he needed to conduct more than a Daubert
10 hearing because we agree with the holding of the Seventh
11 Circuit in American Honda that the question at the class
12 cert hearing is not solely one of whether the evidence
13 would be admissible, but also one of -- of whether the
14 district judge himself is persuaded that this is
15 class-wide proof that has not been impeached in his own
16 mind. And so, you know, the mere fact that we all
17 understood that what should have been ruled on at the
18 class cert hearing encompassed more than pure Daubert
19 admissibility is actually part of our complaint here.

20 I mean, I think if you read what the
21 district court did, he basically looked at his job as
22 looking at whether the model was capable, as in
23 literally capable, of -- of -- of establishing, you
24 know, the facts that the plaintiffs say it establishes
25 without really weighing in his own mind whether it had

1 been shown to be fit and, you know, reliable.

2 JUSTICE KAGAN: Mr. Estrada, it seems like a
3 remarkable proposition, honestly, especially with a
4 client like yours that is well lawyered. It seems like
5 a remarkable proposition that somebody -- a party can
6 say, we have objections about the weight of this
7 evidence. We don't think -- we don't think it's a
8 strong expert report, and that -- and that we -- and
9 that the Court should then infer that there is an
10 objection to admissibility of evidence as opposed,
11 again, to the weight and strength of evidence. I mean,
12 surely a district court confronted with an argument
13 about the weight and strength of evidence does not have
14 to say: Oh, I better go hold a Daubert hearing to rule
15 on admissibility even though nobody's asked me --

16 MR. ESTRADA: But, Justice Kagan --

17 JUSTICE KAGAN: -- to rule on admissibility.

18 MR. ESTRADA: But, Justice Kagan, I mean, I
19 think we could go through chapter and verse to
20 everything that we put in the reply brief. But I think
21 in fairness I have to point out to you that we never
22 said that our objection was to the weight and not to the
23 admissibility. We agree that these people have properly
24 scholarly credentials, and after that, as we say in the
25 reply brief with citations to the record, we said: This

1 model is so unreliable that it is just not usable
2 period, full stop. We went to the Third Circuit and
3 said: This is not evidence of any kind, much less --

4 JUSTICE KAGAN: Did you ever file a motion
5 to strike the expert report?

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

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

19 MR. ESTRADA: I don't think that's fair,
20 because I think --

21 JUSTICE SOTOMAYOR: Did you use the word
22 "Daubert" before the district court?

23 MR. ESTRADA: We cited Daubert cases in the
24 court of appeals. We did say to the district court that
25 the model was not usable.

1 JUSTICE SOTOMAYOR: Okay. So you didn't use
2 "Daubert" below --

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

4 JUSTICE SOTOMAYOR: -- so let's get out of
5 the Daubert language, okay? Tell me how and what rule
6 we announce so that district courts find an expert's
7 evidence probative, the other side argues it's not, and
8 when does the district court let the jury decide between
9 the two? Where is the line that the district court
10 draws between class certification and merits
11 adjudication so that at some point it goes to the jury?

12 MR. ESTRADA: There are two things that the
13 district court has to do and both involve an assessment
14 of the validity or, as you would put it, probity of the
15 expert evidence. You know, the first one keeps in mind
16 that the focus of the class certification hearing is to
17 decide whether the -- this case should be tried as a
18 class, and therefore the first question that the
19 district court has to ask is, even if I think that this
20 is not ready now, do they have a methodology that
21 sufficiently fits the facts and is reliably based on a
22 scientific method so that these people will be capable
23 of proving class-wide this issue at trial. That's not
24 enough.

25 JUSTICE SCALIA: We must have thought that,

1 I suppose, or else we wouldn't have reformulated the
2 question this way, right?

3 MR. ESTRADA: Well --

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

7 MR. ESTRADA: I was -- I was going to point
8 out by reference to one of your opinions,
9 Justice Scalia, that there is a question sort of based
10 on the Williams case, 504 U.S., as to, you know, the
11 extent to which these issues are open to the Respondent
12 to challenge as well. Because by the time we framed the
13 cert petition, even though we framed it in terms of
14 Daubert, it was abundantly clear, as we pointed out in
15 the reply brief, that we were challenging the fit and
16 the reliability of the methodology, and there was nary a
17 word in the -- in the brief in opposition that actually
18 took issue with that. On the face of that, you
19 reformulated the question. Your ruling in Williams
20 would say that that issue is now over and that we move
21 to the consideration of the merits, and I would like to
22 reserve the remainder of my time for rebuttal.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Barnett.

1 ORAL ARGUMENT OF BARRY BARNETT
2 ON BEHALF OF THE RESPONDENTS

3 MR. BARNETT: Mr. Chief Justice and may it
4 please the Court:

5 Justice Ginsburg and Justice Kagan, you are
6 exactly right, the petition for certiorari was framed
7 not, as counsel just misspoke, in terms of Daubert, but
8 it was framed in terms of whether you have to go into --
9 whether the district court and the court of appeals have
10 to deal with merits issues, and that question was what
11 was reformulated. And to get a sense of how profoundly
12 uninterested Comcast was in Daubert and in arguing
13 weight and probativeness as opposed to admissibility,
14 which is the question before this Court, they never,
15 ever cited Daubert. They didn't cite it in the district
16 court, they didn't cite it in the court of appeals.

17 JUSTICE KENNEDY: One of my -- one of my
18 questions in the case is this. There was a question to
19 Mr. Estrada with reference to a jury trial, but the
20 judge doesn't really have a gate -- what do you call it,
21 a gatekeeper function here. There is no -- there's no
22 jury. And if the judge admits the evidence and if it
23 turns out that that doesn't meet the standard of
24 reliability, then he can exclude it.

25 I don't -- I don't see why the judge has to

1 say: All right, now first I'm going to do Daubert, and
2 next I'm going to do whether this is reliable. This is
3 just a magic words approach, it seems to me.

4 MR. BARNETT: I don't think it is a magic
5 word approach at all, Your Honor, because it has
6 tremendous significance to people who are actually
7 litigating the case. It's -- I submit that it is
8 disrespectful to a district judge not to object on
9 Daubert grounds and then complain that what he did was
10 completely unusable in the court. They cited Daubert
11 and Rule 702, 50 -- I quit counting at 50, but it was
12 only after the question was reframed not to deal with
13 merits questions, but to deal with Daubert specifically.

14 JUSTICE KENNEDY: Well, I -- I take it there
15 is no argument over whether or not the expert is
16 qualified.

17 MR. BARNETT: Indeed, Your Honor.

18 JUSTICE KENNEDY: The question is just
19 whether his -- his theory makes any sense.

20 MR. BARNETT: That's true.

21 JUSTICE KENNEDY: And the Petitioner says it
22 doesn't.

23 MR. BARNETT: But, Justice Kennedy it's also
24 the case that the judge saying, "Do you have any
25 objections to this witness as an expert?"

1 That's about as big an invitation you can
2 get that if you have got a Daubert objection, you better
3 make it now, you need to make it now.

4 JUSTICE KENNEDY: Well, I -- I can think
5 of -- my initial reaction -- it has been an awful long
6 time since I have been in the courtroom -- is that
7 that's whether or not this man is -- is qualified to
8 give an opinion.

9 MR. BARNETT: That was --

10 JUSTICE KENNEDY: That's one. The next
11 thing is does this opinion make any sense.

12 MR. BARNETT: The second step is using
13 the -- the Court's opinions in Daubert, as well as in
14 Carmichael, as well as in Joiner, which the Court has
15 held applies to all kinds of expert testimony in Federal
16 court. The district judge has an obligation to serve as
17 a gatekeeper whether there is a jury in the box or not.
18 On a preliminary injunction, the court, if there is a
19 proper Daubert objection, must make the objection at
20 that time.

21 JUSTICE SOTOMAYOR: Excuse me, do you
22 think -- that -- that's why I am trying to get away from
23 magic words. Why do you disagree with the simple
24 proposition that a district court, by whatever magic
25 words it uses, has to come to the conclusion that the

1 expert's testimony is persuasive? And isn't that at
2 bottom line a judgment that it's reliable and probative?

3 MR. BARNETT: I completely agree, Justice
4 Sotomayor, and we -- we embrace whatever Daubert
5 standard anybody wants to apply retroactively. But the
6 main point is Judge Padova --

7 JUSTICE SOTOMAYOR: So you are not
8 disagreeing with your adversary on a legal standard.
9 Every judge on a -- this is the simple way I formulate
10 the rule -- every judge before he certifies -- he or she
11 certifies a class, has to decide whether the methods
12 being used are probative and relevant, sufficient to
13 prove common -- common question of damages.

14 MR. BARNETT: Justice Sotomayor, I agree
15 with that proposition if such that there is a proper
16 objection made such that the district court is put on
17 notice that he or she needs to do the work. Judge
18 Padova had a 4-day hearing, heard a day and a half of
19 Dr. McClave, and then had a separate hearing to ask
20 specific questions about, what about, well there is one
21 of the four mechanisms that the anticompetitive conduct
22 translated into sky high prices throughout the
23 Philadelphia DMA.

24 JUSTICE ALITO: In this case why doesn't the
25 question of probative value subsume the Daubert

1 question?

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

10 JUSTICE ALITO: I think the problem is --
11 let me ask my question in a different way. If the
12 problem is that the model that is being -- that was used
13 by the expert does not fit the theory of liability that
14 remains in the case, would that -- what is the
15 difference in determining probative value there and
16 determining whether it comes in under Daubert? I don't
17 understand it.

18 MR. BARNETT: Well, it -- it certainly is
19 not an admissibility question. So, I mean that's what
20 the question is before the Court. That is definitely
21 not an admissibility question, it's a question of
22 probativeness, and you can analyze it however you want
23 to under a clearly erroneous test, which is what applies
24 both under a Daubert standard as well as a class
25 certification, where the judge is --

1 JUSTICE SCALIA: You're -- you are saying
2 it's inadmissible if it's inadequately probative, right?
3 So your objections boil down to the same, don't they?
4 If it's inadequately probative, it's inadmissible, isn't
5 that right?

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

8 JUSTICE SCALIA: Well, whenever.

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

10 JUSTICE SCALIA: I'm talking about what,
11 what is the criterion for Daubert?

12 MR. BARNETT: Daubert --

13 JUSTICE SCALIA: Is it adequately probative?
14 If not it's inadmissible.

15 MR. BARNETT: If it is unreliable then it is
16 not admissible.

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

18 MR. BARNETT: It is not adequately or
19 inadequately --

20 JUSTICE SCALIA: You say unreliable, I say
21 inadequately probative. It's -- it is unreliable
22 because it is inadequately probative.

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

24 JUSTICE SCALIA: There --

25 MR. BARNETT: I am not going to quibble with

1 you about that, but this case, Comcast, at the heart of
2 this appeal it's Comcast --

3 JUSTICE KAGAN: Mr. Barnett, it's always
4 true, isn't it, that evidence that is inadequately
5 probative is inadmissible?

6 MR. BARNETT: Is it always the case?

7 JUSTICE KAGAN: It's always been true,
8 right, if evidence is not --

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

11 JUSTICE KAGAN: If that's the case. I mean,
12 but have we ever said that -- that without an objection
13 somebody can say, look, we -- we argued about this
14 evidence and that should be just good enough, even
15 though we didn't -- we didn't make an objection to
16 exclude it?

17 MR. BARNETT: I -- I am unaware of any time
18 this Court has said it's okay not to object.

19 CHIEF JUSTICE ROBERTS: We are having an
20 elaborate discussion, and you did in -- in the briefs
21 about whether or not this was a claim that was waived
22 below. No court has addressed that yet. We're a court
23 of review, not first view. So it seems to me that one
24 option for the Court, since we did reformulate the
25 question, is to answer the question and then send it

1 back for the court to determine whether or not the
2 parties adequately preserved that option or not -- that
3 objection or not.

4 MR. BARNETT: Your Honor, I agree that
5 that's one of the options that Your Honor has, but of
6 course it goes back with all the scuffs and scars and
7 mess-ups that preceded it up until today.

8 CHIEF JUSTICE ROBERTS: Well, fine. I mean,
9 and the district court presumably can decide based on
10 the proceedings and all that below, all the scars and
11 mess-ups, whether or not it was adequately preserved or
12 not.

13 MR. BARNETT: I agree, Mr. Chief Justice.

14 JUSTICE BREYER: The strongest argument I
15 think for that point of view would be simply this, the
16 Sniff Company makes widgets. The plaintiff says they
17 monopolize the widget business. That business is
18 monopolized because they achieved the power to raise
19 price above the competitive level through exclusionary
20 practices. For example, United Fruit used to pour
21 garbage on the ships of its competitors.

22 Now we have here a class of people who have
23 been injured by their monopoly power -- and here they
24 are, and you give a list. The judge says or the other
25 side, how do you know that's the right list? Well, we

1 know; here's how we know. We have an expert here who
2 has used a model to pick out the right people who were
3 injured by the monopoly power, its exercise. And the
4 other side says no, that model is no good.

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

12 MR. BARNETT: I would love to talk about the
13 model.

14 JUSTICE BREYER: Could you talk about that a
15 little bit, please?

16 MR. BARNETT: Yes, I --

17 JUSTICE BREYER: Did I get my analysis
18 right?

19 MR. BARNETT: I would love to talk about
20 this model. This --

21 JUSTICE BREYER: No, no, that isn't what I
22 want to really know.

23 (Laughter.)

24 JUSTICE BREYER: I want to know -- if you
25 think of the examples I just -- as the plaintiff, when

1 you draw up your list of class members, you have to have
2 on that list people who really were hurt by the -- or
3 plausibly were hurt by the exercise of market power, and
4 you have to have some way of picking them out, and you
5 have chosen this model as a way. So, I guess they could
6 object on the ground that model is worthless.

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

9 MR. BARNETT: Yes, Your Honor, we do have to
10 show that this is a fantastic model, which it is.

11 JUSTICE BREYER: You don't have to show that
12 much. I think you only have to show it's a plausible
13 model.

14 MR. BARNETT: All right. I -- I agree. I
15 am not going to put the -- I am happy with whatever test
16 you all want to apply is what I'm saying.

17 This is a good model. And two of the basic
18 misconceptions that this case comes into this Court with
19 is first, that there -- that Dr. McClave was talking
20 about a causal connection between the anticompetitive
21 conduct and the damages. He was estimating, whatever
22 the -- whatever the anticompetitive conduct is, whatever
23 the judge or jury finds is the anticompetitive conduct
24 that accounts for the sky-high prices throughout the
25 Philadelphia area -- whatever it is, this is an accurate

1 reflection of the damages on a class-wide basis
2 aggregated across the class. The -- Comcast --

3 JUSTICE SCALIA: You didn't say what --
4 there -- there were four possibilities that he took into
5 account, right, as to what the anticompetitive conduct
6 was?

7 MR. BARNETT: And, Your Honor --

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

10 MR. BARNETT: I do want to make sure I -- I
11 make the correction. Dr. Williams was the one who
12 talked about this, not Dr. McClave. Dr. Williams was
13 the one who said this is the anticompetitive conduct and
14 this is what caused there to be less competition. It
15 was Dr. McClave's job to figure out, well, what's the
16 harm to the class as a result of that chain of events?
17 You are right, Your Honor, that -- Justice Scalia, that
18 Judge -- Judge Padova excluded three of the four
19 mechanisms that Dr. Williams talked about as having a
20 causal connection. And it turns out Dr. Williams --

21 JUSTICE SCALIA: That was the basis for the
22 claims.

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

24 JUSTICE SCALIA: It was not the basis? His
25 was based only on the one that the court accepted?

1 Where in the record is -- is that?

2 MR. BARNETT: His -- his model was agnostic
3 about what the anticompetitive conduct was.

4 JUSTICE SCALIA: You can't be agnostic about
5 what the anticompetitive conduct is, if you are going to
6 do -- if you're going to do an analysis of what are the
7 consequences of the -- of the anticompetitive conduct,
8 you have to know the anticompetitive conduct you are
9 talking about.

10 MR. BARNETT: Again, I want to make sure I
11 am being precise about this, Justice Scalia. There is
12 no question that the conduct that caused the harm is the
13 clustering behavior that Comcast engaged in over a
14 decade's time. What is not clear, was not clear but is
15 now, because Judge Padova has told us which of the
16 mechanisms that Dr. Williams formulated as possible
17 causes of the -- the possible engines that resulted in
18 the prices going way up.

19 JUSTICE BREYER: I guess in a monopolization
20 case it is not the case that you have to trace the
21 damages to the exclusionary conduct.

22 MR. BARNETT: Exactly.

23 JUSTICE BREYER: In the classical class of
24 -- section 2 case, the damages are caused by the
25 monopolization, which lacks skill, foresight and

1 industry justification. So the fact that he omitted
2 three but kept one has nothing to do with damages in the
3 classical section 2 case, is that right?

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

8 JUSTICE BREYER: But here is the difficulty
9 that I am having. A little technical, but -- but it --
10 this is a regulated industry.

11 MR. BARNETT: Yes, Your Honor.

12 JUSTICE BREYER: And because it's a
13 regulated industry, the regulator in your view is doing
14 one of the worst jobs in history. They are willing to
15 come in and overbuild and everything, so he must be
16 letting prices -- all right. Suppose the judge or
17 lawyer were to find: That's okay, doesn't matter, all
18 we're interested in is what Justice Scalia says. Then
19 if that were true, from looking at the footnote on this,
20 I guess you'd take this model and you would simply
21 subtract or add to the base, which is supposed to be the
22 competitively priced districts.

23 MR. BARNETT: Yes, Your Honor.

24 JUSTICE BREYER: The districts that also
25 have satellite.

1 MR. BARNETT: Indeed.

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

5 MR. BARNETT: The record says it can be
6 done. In fact --

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

9 MR. BARNETT: I would -- would cite you
10 to -- let's see if I can find it. It's in -- actually
11 in the Court of Appeals record AO 01533 through 34. It
12 is stated there that you can take off of the DBS -- if
13 you don't like the DBS penetration screen, then you can
14 turn it off and damages are still, as we have
15 established since -- when Comcast complied -- when they
16 finally did file a Daubert motion, would be something
17 like \$550 million on a class-wide basis.

18 So that is in the record as well as there is
19 ample evidence; Exhibit 82, which shows 23 different
20 iterations of the damages models including damages
21 models that Dr. Chipty on the Comcast side put together
22 slicing and dicing all of this data to show that no
23 matter how you slice it and dice it almost, if you did
24 it in any kind of a fair way that the Federal Judicial
25 Center recognizes as a reliable type of methodology you

1 are going to have significant damages across the class
2 for each class member throughout the time period.

3 The other thing I would like --

4 JUSTICE KAGAN: Mr. Barnett -- I'm sorry.
5 Go ahead.

6 MR. BARNETT: No, Your Honor, I was about to
7 change that subject.

8 JUSTICE KAGAN: Okay. Then I will.

9 I am still in search of a legal question
10 that anybody disagrees about here.

11 You know, I read before the district court
12 statement of the standard, now all points of the circuit
13 court statement of the standard, where the circuit court
14 says, "The inquiry for a district court at the class
15 certification stage is whether the plaintiffs have
16 demonstrated" -- burden is on you -- "by a preponderance
17 of the evidence that they will be able to measure
18 damages on a class-wide basis using common proof." The
19 parties both agree with that statement of the standard.
20 It seems to me that the parties also both agree, and
21 this goes back to Justice Sotomayor's question, that if
22 the Daubert question had not been waived, that if -- if
23 Comcast had objected to the admissibility of this expert
24 report, that indeed, the court would -- should have held
25 a hearing on the admissibility of the expert report.

1 So this is a case where it seems to me that
2 except for the question of how good the expert report
3 is, none of the parties have any adversarial difference
4 as to the appropriate legal standard. And, you know,
5 usually we decide cases based on disagreements about
6 law, and here I can't find one.

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

9 MR. BARNETT: I -- I do not, Your Honor, and
10 I think Justice -- Judge Padova got it exactly right.
11 You read the standard that he applied. In fact, if
12 anything, it's a tougher standard than should be the
13 test, but we embrace that test and we are happy about
14 it, and we don't disagree with Mr. Estrada.

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

18 JUSTICE ALITO: Before you do that, let me
19 ask a question related to what Justice Kagan just asked.
20 If we were to answer the question presented as
21 reformulated, I take it your answer would be that a
22 district court under those circumstances may not certify
23 a class action; is that right?

24 MR. BARNETT: If there is a proper
25 objection, properly and timely presented, it's preserved

1 up through the appellate courts and all the things that
2 you need to do in order to be fair to the judge as well
3 as make sure you get it -- give it as good a chance to
4 be right as possible, the answer would be yes. But
5 that's a lot of caveats before you get --

6 JUSTICE ALITO: Well, then the only
7 remaining question is whether the issue was in the case
8 as a factual -- as a matter of the record here; isn't
9 that right?

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

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

22 MR. BARNETT: The answer, Your Honor, and my
23 source is Section 274 of Trial and Corpus Juris
24 Secundum, well recognized in this Court, no doubt. It
25 says that if it's in the record, if it comes in

1 unobjected to, it has whatever probative value the
2 court -- the trier-of-fact chooses to place on it.

3 JUSTICE KENNEDY: That the court as the
4 trier-of-fact chooses to. That the -- not reserved to
5 cases where there's a jury? Is that --

6 MR. BARNETT: No, Your Honor.

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

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

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

20 MR. BARNETT: Yes, Your Honor. But he's
21 acting as a gatekeeper, and what he's doing or she's
22 doing is projecting: What's this trial going to look
23 like based on the evidence in front of me.

24 JUSTICE KENNEDY: No, I think that's where
25 we disagree. The judge has to make a determination that

1 in his view the class can be certified.

2 MR. BARNETT: Absolutely. He does.

3 JUSTICE KENNEDY: And that includes some
4 factual inquiries as to the damages alleged and the
5 cause of the injury and whether or not there is a common
6 -- whether or not there's a commonality.

7 MR. BARNETT: Justice Kennedy, the district
8 judge asks: Prove to me -- to the plaintiff, that you
9 can prove it at trial. Prove to me now that at trial
10 you will be able to submit a damages model that passes
11 muster, under Daubert or whatever test there is,
12 depending on what the objections are. So the judge is
13 acting in a gatekeeper role right then, kind of
14 projecting into the future about what am I going to do
15 when the jury's in the box --

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

23 MR. BARNETT: And the finding that the judge
24 makes based on preponderance of the evidence, plaintiffs
25 have shown to me that more likely than not, at trial,

1 plaintiffs will be able to show on a class-wide basis,
2 some evidence, enough to get a verdict that could be
3 upheld, enough that satisfies to some evidence or
4 whatever the test is at trial, that shows damages on a
5 class-wide basis. So the judge isn't saying: This is
6 it, you can't fix it, you can't change it, you can't
7 modify it, you can't enhance it between now and trial.
8 He says that you can do it. You have shown to me, to my
9 satisfaction, that more likely than not that the
10 evidence that you will present to the jury at trial is
11 going to be admissible and it's going to be sufficiently
12 persuasive if the jury chooses to accept it.

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

17 Comcast, each time construes, when he uses
18 the word "merits," talk about incantation of magic
19 words, that that means whether it's good or bad, that
20 that is what Judge Aldisert was talking about. That is
21 not what he was talking about at all. He was talking
22 about trial on the merits. He was saying that right now
23 we don't have to decide whether this model is perfect.
24 It's enough. The test -- this issue isn't before us
25 because it's been waived, Daubert and all that, but if

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

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

11 MR. BARNETT: What Judge --

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

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

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

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

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

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

1 it's I'm convinced that you're right. And that's what
2 Judge Aldisert was talking about. He said: It's not
3 time for us to say Comcast wins or plaintiffs win based
4 on all this evidence; the only thing that's really
5 before the court is whether more likely than not the
6 plaintiffs have presented a model -- we're talking about
7 a model in this case; it could be a different issue in a
8 different case. In than the Amgen case that's coming up
9 it could be a different issue.

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

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

23 CHIEF JUSTICE ROBERTS: Counsel, it -- it
24 seems to me that your answer to Justice Sotomayor, which
25 is whether it's more likely than not that this will be

1 something that can be used at trial, one way to capture
2 that is whether or not this evidence is usable, right?

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

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

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

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

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

17 JUSTICE KENNEDY: Well, of course there
18 matters for the trier of fact to determine at the merits
19 stage, but under Daubert and under Rule 702 the judge
20 has to say that the evidence is relevant to the task at
21 hand, and it has a reliable foundation. I can see a
22 judge saying, "Well, now, this theory that you're using,
23 this theory works. I think it's accepted in academia."
24 Then he hears all the testimony and he says, "It just
25 doesn't work here."

1 MR. BARNETT: And Judge Padova could have
2 done that, but he didn't do that. I think he was
3 persuaded by the evidence that Dr. McClave put on and he
4 rejected, because we know from his 81-page opinion that
5 he rejected an awful lot of what Comcast's experts said.
6 So he -- he could have made that determination. And
7 this is why it's an -- if we're talking -- if we're not
8 dealing just with an admissibility issue that's been
9 forfeited away, we're dealing with abuse of discretion
10 and clearly erroneous. And this is --

11 JUSTICE KENNEDY: I'm -- I'm not sure what I
12 just described is not Daubert.

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

22 JUSTICE SOTOMAYOR: Counsel, the bottom line
23 is, can a district court ever say that it's persuaded by
24 unreliable or not probative evidence. That's really the
25 bottom line question.

1 MR. BARNETT: I --

2 JUSTICE SOTOMAYOR: Does it commit legal
3 error when it finds something that's unreliable and
4 unpersuasive or unprobative?

5 MR. BARNETT: Well, Your Honor, I agree, and
6 of course that's not the issue in the case, because
7 Judge Padova was convinced it was reliable. And there's
8 plenty of proof that there was.

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

11 MR. BARNETT: Right.

12 JUSTICE SOTOMAYOR: -- but if we're
13 answering a legal question.

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

19 JUSTICE SOTOMAYOR: The problem everyone's
20 having is -- I think -- that why do you need Daubert to
21 point out that something is not probative or unreliable?
22 Whether it's an expert or a lay witness testifying,
23 wouldn't you apply that same standard to anybody's
24 testimony?

25 MR. BARNETT: Justice Sotomayor, let me just

1 give you an example. There were a bunch of issues that
2 the dissenting judge raised, including the overbuilding
3 screen, a particular kind of market screen, mathematical
4 averages. If in the DBS penetration screen, if he had
5 raised any of those, if there had been a whisper of a
6 hint of a suggestion, of a thought of the those things
7 in the district court, we'd have been all over that, and
8 we would have proved that it was false, that those --
9 that those statements are untrue.

10 And we know that's accurate because, as I
11 just read to you from the -- the court of appeals
12 record, the DBS screen can in fact be taken off,
13 eliminated from the sample, and you still have
14 \$550 million worth of damages on a class-wide basis.

15 JUSTICE SCALIA: Mr. --

16 MR. BARNETT: And the reason we got to that
17 is because they finally did, on the eve of trial, file
18 an actual Daubert motion, and that was our response, and
19 they cited footnote 323 of their brief.

20 JUSTICE SCALIA: Mr. Barnett, suppose --
21 suppose we held that where -- where there's a bench
22 trial, it doesn't make any difference what -- what --
23 whether the judge excludes the evidence under Daubert.
24 I never know how to say it. Is it Daubert or Daubert?

25 MR. BARNETT: It depends on the time of day,

1 Your Honor.

2 JUSTICE SCALIA: Yes, I think you're right.
3 It doesn't make a dime's worth of difference whether the
4 judge excludes it under -- under Daubert or proceeds to
5 find it simply unreliable -- unreliable. Suppose --
6 suppose we held that. What difference would it make in
7 the world?

8 MR. BARNETT: I would --

9 JUSTICE SCALIA: So the trial judge could
10 say, "Yes, I have a Daubert motion, but -- but I'm going
11 to defer that. I'm just going to -- going to proceed to
12 see whether this evidence is reliable."

13 MR. BARNETT: Justice Scalia, I would say
14 what you're doing is what I suggest the Court ought to
15 do. Everybody knows that district judges have broad
16 discretion in a lot of different things that they do.
17 You just made it this much bigger as a result of saying,
18 "We're not even going to bother with the Daubert thing,
19 we're going to trust that the district judge is not
20 going to be persuaded by phony evidence, and we're going
21 to trust, if he gets it nearly close, right, that he got
22 it right."

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Estrada, you have five minutes
25 remaining.

1 REBUTTAL ARGUMENT OF MIGUEL ESTRADA

2 ON BEHALF OF THE PETITIONERS

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

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

14 But that has a fundamental failure as a
15 matter of substantive antitrust law, because we know
16 from cases from this Court and the court of appeals
17 going back to story parchment, that the one requirement
18 is that causation link of the damages, you know, it has
19 to be certainly linked to illegal conduct.

20 JUSTICE BREYER: Is that right? Is that
21 what learned hand said? Is -- is that what Alcoa holds,
22 is that United Fruit holds when they bomb their
23 competitor's ship and achieve monopolization that the
24 only people who can get damages are the people who run
25 the ship and were bombed --

1 MR. ESTRADA: No, I think --

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

6 MR. ESTRADA: Story parchment.

7 JUSTICE BREYER: Yes, all right. Fine.
8 I'll look that up. If you're right and as they pointed
9 out, it's still one of the easiest things in the world
10 to simply change the base for this model. Instead of
11 the base being those businesses or homeowners who
12 received their service at competitive prices, we say --
13 we modify it by including those who received services
14 where DBS was involved, and that'll be a higher price
15 and we subtract that price from the price they paid
16 where there was overbuilding threatened. Now, that'll
17 be a new number. They say it was a new number. And I
18 think anybody running a model could do that, but I
19 promise you I don't know. And to know whether you're
20 right on that or they're right, I will have to get into
21 the model-building business where I am not an expert.

22 MR. ESTRADA: Well, no. I think all you
23 have to do is whether the proponent -- is to ask whether
24 the proponent of class certification has discharged his
25 duty under this Court's cases to come forward with

1 evidence that is persuasive under the point whether the
2 case as a whole can be tried as a class. You don't have
3 to become an econometrician; you have to know enough to
4 assess whether the record that has been proffered is
5 probative on the question before the Court.

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

16 And so having said all of that, we said,
17 "This model is bunk. You have full class merits
18 discovery. You have plenty of opportunity to come up
19 with a better model." Nothing.

20 We go to the Court of Appeals. It is
21 affirmed. Then it goes back to the -- to the district
22 court for further trial proceedings. The district
23 court, having read the court of appeals' opinion,
24 invites them to submit the evolutionary model that the
25 court of appeals had in mind. Nothing. We are still

1 sticking with our story: McClave's the guy.

2 And so they have had every conceivable
3 opportunity to develop a model. Why haven't they done
4 that, Justice Breyer? Oh. Maybe because there is a
5 problem in the record.

6 You can take all of the maps in the record,
7 which are part of the field supplemental appendix, and
8 you can see the different areas of penetration for DBS,
9 you know, has different rates of penetration all over
10 the class area.

11 Same thing for RCN and FiOS. And you can
12 look at what -- what the market penetration is in each
13 franchise area.

14 Consider that each of them is a different
15 licensing authority, that the overbuilding would have to
16 go to franchise by franchise and radiate out in the
17 fullness of time. And I don't know if there is any kind
18 of attrition that can combine all of that into a single
19 class or subclasses. They haven't identified one.

20 And the key point for the resolution of the
21 case in front of you, Justice Kagan, is that the
22 question that comes here is whether a class that is more
23 expansive than the one that you -- that you certified in
24 Walmart can possibly be certified where there is no
25 evidence that is tied to the record in the case that is

1 reliably probative that a class would exist.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel,
3 the case is submitted.

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

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