SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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ELSA HALL, AS PERSONAL)
REPRESENTATIVE OF THE ESTATE OF)
ETHLYN LOUISE HALL AND AS)
SUCCESSOR TRUSTEE OF THE ETHLYN) No. 16-1150
LOUISE HALL FAMILY TRUST,)
Petitioner,)
v.)
SAMUEL HALL, ET AL.,)
Respondents.)

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Pages: 1 through 67

Place: Washington, D.C.

Date: January 16, 2018

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3 ELSA HALL, AS PERSONAL)

4 REPRESENTATIVE OF THE ESTATE OF)

5 ETHLYN LOUISE HALL AND AS) No. 16-1150

6 SUCCESSOR TRUSTEE OF THE ETHLYN)

7 LOUISE HALL FAMILY TRUST,)

8 Petitioner,)

9 v.)

10 SAMUEL HALL, ET AL.,)

11 Respondents.)

12 - - - - - - - - - - - - - - - - - -

13 Washington, D.C.

14 Tuesday, January 16, 2018

15

16 The above-entitled matter came on for oral

17 argument before the Supreme Court of the United States

18 at 10:04 a.m.

19

20 APPEARANCES:

21 ANDREW C. SIMPSON, Christiansted, V.I.; on behalf of

22 the Petitioner.

23 NEAL K. KATYAL, Washington, D.C.; on behalf of the

24 Respondents.

25

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

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear

4 argument first this morning in Case 16-1150,

5 Hall versus Hall.

6 Mr. Simpson.

7 ORAL ARGUMENT OF ANDREW C. SIMPSON

8 ON BEHALF OF THE PETITIONER

9 MR. SIMPSON: Mr. Chief Justice, may

10 it please the Court:

11 Ever since the Judiciary Act of 1789,

12 there has been a right of appeal from a final

13 judgment. We ask that this Court support the

14 right of appeal in this case because -- for

15 three reasons.

16 First, it comes from a final judgment

17 entered in the case. It provides a bright-line

18 rule that brooks no exception. When a final

19 judgment is entered, you have a right of

20 appeal.

21 Second, Rule 42 does not merge cases.

22 There's a careful architecture in the federal

23 rules from Rules 13 through Rule 24 designed to

24 bring cases that should be tried as one case

25 together.

1 Rule 42, on the other hand, is for the
2 exceptional case that doesn't fall within the
3 categories that fall under Rules 13 through 24.
4 And -- and there's no reason for merger in
5 those cases.
6 JUSTICE SOTOMAYOR: Please explain to
7 me what the purpose of 42 -- dividing it up
8 into two sections is.
9 MR. SIMPSON: Certain -- certainly.
10 JUSTICE SOTOMAYOR: Because you don't
11 need the (b) section under your reading. Why
12 use the word "consolidate," which your
13 adversary points out generally has a
14 connotation of merging two things into one?
15 Why use it at all?
16 MR. SIMPSON: I --
17 JUSTICE SOTOMAYOR: What's the
18 necessity of it?
19 MR. SIMPSON: I -- I think Rule
20 42(a)(1), which talks about joining for hearing
21 or trial, is designed for the case that the
22 judge wants to keep on separate tracks but has
23 a reason to have, say, an omnibus hearing;
24 whereas 42(a)(2) is for true consolidation,
25 whether it's for trial, for a hearing, or for

1 pretrial.

2 JUSTICE SOTOMAYOR: I don't understand

3 the necessity, meaning if we had only (a)(1),

4 the court could do exactly what you're saying

5 as well. It didn't need (a)(2) to accomplish

6 what (a)(1) already says it can. It suggests

7 to me that there's a separate purpose for

8 (a)(2).

9 MR. SIMPSON: I -- I agree that there

10 is a separate purpose. I think, as -- in the

11 -- as Footnote 4 in the Ringwald case explains,

12 the old consolidation statute actually is

13 embodied in (a)(2) and (a)(3). It's (a)(1)

14 that is new. So there was consolidation

15 before, and (a)(2) and (a)(3) continued the

16 consolidation.

17 What (a)(1) does is allow for, like --

18 as I say, an omnibus hearing that -- where the

19 cases remain on separate tracks. And if I can

20 give an example of how that would work, suppose

21 there is a mass tort, a industrial explosion.

22 You have a class of plaintiffs, separate

23 actions, that are death cases. You have some

24 who are terminally ill from this case, from

25 this explosion. You have some that have

1 property damage only.

2 The court might decide I'm going to

3 consolidate under (a)(2) the death cases and

4 the people who are terminal and the -- and the

5 -- and the property damage. So we have three

6 separate groups, three separate tack -- tracks.

7 It makes sense to keep those cases

8 together and consolidate them under (a)(2), but

9 there might be, for example, the initial

10 hearing, where the judge says: Despite that

11 I've got these three groups of consolidated

12 cases, separately consolidated, I also have

13 overriding administrative business to do, and

14 I'm going to do that under (a)(1). I'm going

15 to have an omnibus pretrial hearing under

16 (a)(1), I'm going to bring everyone together.

17 I'm not consolidating these three groups, but

18 we're going to talk about how we're going to

19 administer this case. And --

20 JUSTICE SOTOMAYOR: How is this

21 different from a case in which a plaintiff

22 brings multiple claims, not all of them

23 directly related? And in that situation, if

24 there's a partial entry of judgment on one of

25 the claims, you can't appeal. How is this

1 different?
2 MR. SIMPSON: Are you talking about
3 where the plaintiff has filed separate lawsuits
4 or just one lawsuit --
5 JUSTICE SOTOMAYOR: One lawsuit with
6 multiple claims.
7 MR. SIMPSON: Because this -- this is
8 a -- my client's case is one lawsuit with
9 multiple claims that proceed to determination,
10 just as --
11 JUSTICE GINSBURG: Your -- your client
12 has not brought a lawsuit with multiple claims.
13 Your client has brought a claim. And it's not
14 like a -- one plaintiff has one, two, three
15 claims. This is a separate claim brought not
16 by the plaintiff, so it's not the plaintiff
17 picking one claim and -- and leaving out
18 another plaintiff's claim.
19 This is a lawsuit A against B and then
20 a separate lawsuit on an entirely different
21 subject matter, B against C. So --
22 MR. SIMPSON: That's --
23 JUSTICE GINSBURG: -- it doesn't bring
24 up at all the question that Justice Sotomayor
25 just posed.

1 MR. SIMPSON: That -- that's entirely
2 correct. And under Rule 14, if C was liable to
3 B for something arising out of the A versus B
4 lawsuit, that could be brought as one lawsuit
5 and --
6 JUSTICE KAGAN: Mr. Simpson, I guess I
7 don't understand your answer to Justice
8 Sotomayor or Justice Ginsburg because, although
9 this suit does present this different kind of
10 issue, I took it that your argument would apply
11 just as well to a suit in which somebody has
12 five claims, splits them up into five different
13 lawsuits. And you're saying that should be
14 treated the same way that one claim with -- one
15 suit with those five claims is.
16 MR. SIMPSON: I -- I don't think that
17 those -- well, I think if it gets to the point
18 where a final judgment is entered because the
19 case has not been managed from an early point
20 of the case, where in that situation what the
21 courts do is, under Rule 12(b)(6), they -- they
22 say that this -- this -- you have five
23 different lawsuits going on. Once one is
24 decided, you're facing res judicata in the
25 other four.

1 And what they do is they order the
2 plaintiff to file all of the claims in one
3 case, and then they dismiss the other four. So
4 that's how that's handled under the
5 architecture of the rules. That shouldn't even
6 come up under Rule 42.
7 JUSTICE KAGAN: I -- I guess the --
8 the bigger point that I'm making is that it
9 seems to me that your argument applies whenever
10 there is consolidation of cases, regardless of
11 exactly how those cases look and what's in
12 them. Am I -- am I right about that, the
13 breadth of your argument?
14 MR. SIMPSON: Yes, Your Honor. I --
15 that is absolutely correct. And I point out in
16 the briefs that when you have that kind of a
17 case, what the court of appeals can do is stay
18 them. But I actually believe, more
19 importantly, the district court should be
20 managing those early on and you should never
21 get to that point.
22 JUSTICE KAGAN: Do you think --
23 CHIEF JUSTICE ROBERTS: I take it --
24 it's -- it's correct, isn't it, that if you
25 prevail and -- so that you can appeal, you must

1 appeal?

2 MR. SIMPSON: Absolutely. And that's

3 why I say that if -- if that case that Justice

4 Kagan has described gets to that point, then,

5 yes, they must appeal, and then I think the

6 court of appeals has the ability to look at

7 them and say, well, this case should have been

8 brought as one case and I'm going to -- the

9 court can say I will stay that.

10 CHIEF JUSTICE ROBERTS: Yeah, but, I

11 mean, I -- yes, but I think most people would

12 think that the district court has a greater

13 familiarity with the litigation, particularly

14 since the court of appeals may know nothing

15 about it until you get a notification, and

16 understands how related the two cases are or

17 how not related they are. And maybe the

18 ability to consolidate ought to continue to --

19 I mean, to keep the cases together, to the

20 extent appropriate, ought to remain with the

21 district court, rather than suddenly throwing

22 the issue before a court of appeals that is new

23 to the whole litigation.

24 MR. SIMPSON: It -- that -- that's

25 certainly the argument that has been made by

1 the amici, but I think if you look at the
2 architecture of the rules, again, Rule 23(f)
3 also deals with an appeal coming up,
4 an interlocutory appeal under the class action
5 statutes, and there the discretion is given
6 completely to the appellate court. And --
7 JUSTICE GINSBURG: But what about the
8 district court in a case like this one? Could
9 the district court say I think that E, your
10 client, loses on her claim, but I'm not going
11 to enter -- I'm going to instruct the clerk not
12 to enter judgment until we resolve the -- what
13 started out as a counterclaim and then became a
14 separate claim?
15 MR. SIMPSON: I think the court can do
16 that. I don't think that would be appropriate.
17 I don't think that's what the rules anticipate.
18 If -- and, you know, under Rule 72, if
19 a judgment is entered on the docket, after 150
20 days it's deemed final. So I think there's a
21 -- there's an indication in the rules that we
22 want these cases to move along.
23 JUSTICE KENNEDY: But as -- as these
24 questions indicate, there's a whole wide range
25 of -- of -- of possibilities here. And -- and

1 you're saying that the district judge, which,
2 as the Chief Justice pointed out, is really
3 better situated to decide whether the appeal
4 should be held, has -- has very little
5 authority to do that.
6 And, furthermore, it seems to me this
7 is a trap for the unwary.
8 MR. SIMPSON: Well, to address the
9 first question, I -- I think the district court
10 has great latitude to do this, but it's under
11 the rubric of Rule 13, compulsory
12 counterclaims, Rule 14, third-party practice,
13 Rule 19, joinder of indispensable parties.
14 That's where these -- the Footnote 7
15 cases in Gelboim, the cases that should have
16 been filed as one, that's where that's supposed
17 to happen. That's not where it comes up in
18 Rule 42.
19 In terms of a trap for the unwary, the
20 double final judgment rule that my friend
21 proposes actually creates the trap for the
22 unwary because you can have situations where a
23 final judgment is not entered after your case
24 is dismissed and a final judgment is entered.
25 You can have a situation where you

1 don't know how the court is going to deem it
2 consolidated because, if I understand their
3 argument, if it's consolidated for trial, they
4 agree that it can be appealed immediately, but
5 if -- a final judgment is entered, but if it's
6 consolidated for this nebulous all purposes, it
7 cannot.
8 JUSTICE KENNEDY: Suppose these
9 parties who certainly don't agree on very much
10 did agree that this case could be treated as
11 one for purposes of appeal.
12 What would the stipulation say? What
13 words would they use to do that?
14 MR. SIMPSON: For the parties to
15 stipulate that it would be --
16 JUSTICE KENNEDY: The parties -- the
17 parties agree that there should be only one
18 appeal.
19 MR. SIMPSON: I -- I --
20 JUSTICE KENNEDY: Is it -- is it
21 possible under your view? And I'm not sure
22 what the stipulation would even say.
23 MR. SIMPSON: I think the -- I think
24 the stipulation in that circumstance would be
25 the parties in 1154 who have the final judgment

1 would stipulate in the court of appeals to a
2 stay and say we agree that this should remain
3 in abeyance until the rest of the case is
4 decided.
5 But that allows the party to protect
6 their right of appeal.
7 CHIEF JUSTICE ROBERTS: Well, the
8 court of appeals might well have something to
9 say about that. The courts of appeals don't
10 like to have matters just resting on their
11 docket, depending upon matters of years before
12 the district court might get to the other
13 matter.
14 MR. SIMPSON: Certainly. But I think
15 in -- if the parties are coming to the court
16 and explaining why they think it should be
17 stayed, I -- I don't -- the court of appeals
18 might disagree, and, obviously, that's its
19 prerogative.
20 JUSTICE GORSUCH: Well, counsel, for
21 the -- for the courts of appeals that prefer
22 the practice of deferring everything until
23 there's a final judgment on a final matter in
24 the district court, could they just have a
25 rule, a local rule or practice of deferring

1 cases along the lines that we've just
2 discussed?
3 MR. SIMPSON: I -- I think -- I think
4 if -- they could have a rule for cases that
5 should have been filed as one, the Gelboim note
6 7 cases.
7 JUSTICE GORSUCH: No, I'm talking
8 about for cases just like this. If -- if we're
9 in a circuit that prefers as a matter of
10 practice to wait until everything is done, is
11 there anything inhibiting them from adopting a
12 rule staying cases where there's another
13 related matter still lurking in the district
14 court? I can't see any.
15 And it's not -- this is not an
16 unfriendly question.
17 MR. SIMPSON: Understood. I -- I -- I
18 think the whole purpose, you know, Rule 1 of
19 the Federal Rules of Civil Procedure, and I
20 think there's an equivalent under the Federal
21 Rules of Appellate Procedure, is that cases are
22 supposed to be administered for the speedy
23 administration of justice, speedy and
24 efficient.
25 And I think a blanket rule like that

1 would run counter to that. I think if the
2 court exercised its discretion to look at each
3 case and say, well, we think this should be
4 stayed, I think that would pass muster.
5 JUSTICE KAGAN: Mr. --
6 JUSTICE ALITO: Suppose you were
7 arguing this point before the civil rules
8 committee, and so the question would be: What
9 is the best procedure? What would your
10 argument be? Why is the procedure you outline
11 a better one than the alternative?
12 MR. SIMPSON: The why -- the reason
13 it's a better one is because it provides this
14 bright-line rule. You cannot be trapped. When
15 you have a final judgment, you know you have to
16 appeal.
17 There's -- as I indicated, there's a
18 problem in the double final judgment rule with
19 not having a second final judgment actually
20 entered. There's the problem of not knowing
21 why the case was -- what -- that the court of
22 appeals might disagree with you as to why the
23 court of --
24 JUSTICE ALITO: Well, why would there
25 -- why would the alternative not provide a

1 bright-line rule? So the alternative might be
2 that if a case -- if cases are consolidated,
3 they are considered to be one case for purposes
4 of the final judgment rule.
5 MR. SIMPSON: I -- I think -- I think
6 that's counter to a whole -- a lot of history
7 of this Court and counter to the rest of the,
8 as we describe in the briefs, the various
9 problems with merging cases.
10 JUSTICE KENNEDY: Could you design a
11 rule, if you were following Justice Alito's
12 question, you're addressing the rules
13 committee, you want to improve the rules, could
14 you design a rule so that the parties or the
15 judge does have an option?
16 MR. SIMPSON: Absolutely. It would be
17 Rule 42(a)(4). And it would be -- provide that
18 in cases that should have been brought as one
19 under -- or could have been brought as one
20 under Rules 13 through 24, the district court
21 will have the power to merge them. But if they
22 don't fall within that category, that is the
23 Gelboim Footnote 7 category --
24 JUSTICE ALITO: But why is that better
25 than Rule 54(b)? This is what I'm getting at.

1 So you -- I asked you why would your rule be a
2 better rule, and part of your answer was
3 there's a lot of history and authority on the
4 other side. But I'm asking you to disregard
5 all that.
6 Let's say it's just a policy question.
7 Why is your rule better than a rule that says
8 that when cases are consolidated they are
9 considered to be one case for purposes of the
10 final judgment rule, and the district court, of
11 course, can proceed under Rule 54(b) if it
12 wishes?
13 MR. SIMPSON: It creates a lot of
14 murky rules. For example, if a plaintiff has
15 -- a private party plaintiff is suing and the
16 government is suing, and those two cases are
17 consolidated, when -- when does the time for no
18 -- for filing a notice of appeal run, 30 days
19 or 60 days? If they're not merged, each party
20 knows. If they're merged, there's a real
21 question as to when that happens.
22 JUSTICE GINSBURG: In this case -- in
23 this case, it was the clerk that entered the
24 final judgment, am I right? The clerk was the
25 one who issued the judgment under 58.

1 MR. SIMPSON: Yes.
2 JUSTICE GINSBURG: And doesn't that
3 rule provide that the court could otherwise
4 order if the court didn't want that judgment to
5 be entered?
6 MR. SIMPSON: Yes. And -- and not
7 only that, you know, I think there is evidence
8 from -- not only from that, but from the fact
9 that when the motion for attorneys' fees was
10 not filed within 14 days of final judgment, the
11 district judge denied the motion for fees for
12 failure to file it in a timely fashion. If
13 that was not a final judgment, they would not
14 have denied the motion.
15 JUSTICE KAGAN: Could you explain a
16 little bit more how you're reading Rule 58?
17 MR. SIMPSON: Sure.
18 JUSTICE KAGAN: And that was what
19 Justice Ginsburg asked you; is that right, when
20 you said yes, it authorizes the court to do
21 that. What -- how does it do that?
22 MR. SIMPSON: It -- it's non-specific.
23 It is -- essentially, it says if -- the -- with
24 -- after entry of a verdict, or -- and two
25 other occasions, the clerk shall enter the

1 judgment, unless the district judge directs
2 otherwise.
3 There's no guidance given to that.
4 JUSTICE GORSUCH: Well, but, counsel,
5 that's what it says I think in (b)(1) with
6 respect to general verdicts. But then (b)(2)
7 with respect to special verdicts doesn't
8 contain any parallel language like that and, in
9 fact, suggests that the judgment has to be
10 entered promptly.
11 What do we do about that?
12 MR. SIMPSON: I -- I -- I think -- I
13 think it does have to be entered promptly. And
14 that -- I think that's what happened in this
15 case. It was entered promptly. Not under 52
16 -- not under that section.
17 JUSTICE GORSUCH: But as I understood
18 your answer to Justice Kagan and -- and Justice
19 Ginsburg, it was one of the reasons we don't
20 need to worry about your proposed rule is that
21 the district court has discretion to delay the
22 entry of judgment and that that is textually
23 found in (b)(1), which, indeed, it is with
24 respect to general verdicts, but there's no
25 parallel language that you can rely on with

1 respect to (b)(2).

2 And does that diminish your argument

3 by suggesting there the district court doesn't

4 have jurisdiction -- discretion to delay the

5 entry of judgment?

6 MR. SIMPSON: I -- I don't -- I don't

7 think it diminishes the argument at all. I

8 think -- we are advocating for the entry of

9 judgment. So whether it's under (b)(1) or

10 (b)(2), I'm not sure that there's a distinction

11 from our point of view.

12 JUSTICE KAGAN: May I ask you a

13 different kind of question, Mr. Simpson? It

14 just really goes back to the language here.

15 I mean, would you agree that your

16 understanding of what it means to consolidate

17 cases is different from the ordinary meaning of

18 that term?

19 MR. SIMPSON: I think -- I'm not sure

20 what the ordinary meaning of that term is,

21 quite frankly, Your Honor.

22 JUSTICE KAGAN: Well, suppose I said

23 to you that a company was going to consolidate

24 two offices. Are they going to have two

25 offices or one office?

1 MR. SIMPSON: Typically, I think
2 people would think they would have one office.
3 So, if you're talking about the -- the typical
4 layman's understanding, yes, I think that means
5 one. But --
6 JUSTICE KAGAN: So -- and it's not
7 just laymen, right? I mean, if you look at
8 Black's Law Dictionary, it says a consolidation
9 in civil procedure, it defines as "the
10 court-ordered unification of two or more
11 actions into a single action."
12 So that's the Black's Law Dictionary
13 definition. Same thing. Two becomes one.
14 MR. SIMPSON: And I -- I -- I don't
15 think that's what the rules do. And I don't
16 think that's --
17 JUSTICE GINSBURG: What was -- there
18 was a statute, was there not, before the rules,
19 there was a statute?
20 MR. SIMPSON: Correct.
21 JUSTICE GINSBURG: And the statute
22 used the word "consolidate," didn't it? I
23 don't have it in front of me. So I -- but what
24 the -- the statute that dealt with this issue
25 before Rule 58.

1 MR. SIMPSON: Yes, Your Honor.
2 JUSTICE GINSBURG: Didn't that statute
3 --
4 MR. SIMPSON: Again, I'm looking for
5 the language, but --
6 JUSTICE KAGAN: I mean, it did. And
7 -- and then, in Johnson, Johnson tells us that
8 "consolidate" for the purpose of that
9 predecessor statute did not mean a complete
10 merger.
11 MR. SIMPSON: Correct.
12 JUSTICE KAGAN: So Johnson is very
13 much on your side. But -- but Johnson was
14 interpreting a statute which, although it
15 similarly used the word "consolidate," was
16 different in other respects.
17 And I'm wondering whether now that
18 we're on a kind of blank slate, we have a new
19 rule, it's different from the statute in a
20 number of ways, why we have to keep on giving
21 this quite unusual understanding of the word
22 "consolidate," why we have to keep on the same
23 track; why we can't just say, you know what,
24 "consolidate" means consolidate. It means two
25 becomes one.

1 MR. SIMPSON: That -- I -- of course,
2 you're -- you are operating on a blank slate
3 and you could do that, but I think when you
4 look at how the courts have interpreted
5 "consolidate," there are many different
6 understandings of the term.
7 And -- and so -- and I think that's
8 what the -- the rules have embodied over the
9 years. So you have --
10 JUSTICE KAGAN: Well, there is -- lots
11 of courts say, look, we're going to consolidate
12 for some purposes but not all purposes. And
13 when a court does that, of course, it means
14 something else. It means just segments of
15 these two lawsuits are going to come together.
16 But when a court says we're going to
17 consolidate for all purposes, I mean, just the
18 usual understanding of that is, okay, now we
19 have one lawsuit in front of us. And that
20 would have consequences as to what we think the
21 final judgment is, when it comes, and when your
22 appellate rights would kick in.
23 MR. SIMPSON: Yes, Your Honor. But,
24 again, even there the courts are all over the
25 world on that.

1 Some courts say all purposes has to --
2 JUSTICE KAGAN: I know. But where --
3 we kind of get to figure out what's right and
4 what's wrong as to all these courts that are
5 all confused. That's why we're here.
6 MR. SIMPSON: But I would submit then
7 that if -- if that would be the definition,
8 then the cases must truly become one.
9 CHIEF JUSTICE ROBERTS: But there
10 could be --
11 JUSTICE BREYER: In which case I have
12 just one question, which is forget the
13 consolidation for a moment, just to clarify in
14 my mind; think of Rule 54(b), imagine it's a
15 case with a lot of parties and a lot of issues,
16 and Rule 54(b), I think, says that "the court
17 can direct entry of a final judgment as to one
18 or more, but fewer than all, the claims or
19 parties," right?
20 MR. SIMPSON: Yes.
21 JUSTICE BREYER: Okay. Now suppose a
22 judge does that as to one of the claims. At
23 that moment, the clerk writes a separate piece
24 of paper and it says final judgment as to that
25 claim, right?

1 MR. SIMPSON: I don't -- I don't know
2 how that --
3 JUSTICE BREYER: Well, that's
4 important because -- because what I'm going to
5 ask you is -- is -- there is a single piece of
6 paper here, is there not?
7 MR. SIMPSON: Yes.
8 JUSTICE BREYER: And it says final
9 judgment, right?
10 MR. SIMPSON: In this case only, yes.
11 JUSTICE BREYER: So I thought perhaps
12 there is a rule somewhere which says when there
13 is a final judgment on a separate piece of
14 paper, you can take an appeal. But there is no
15 such rule that I can find.
16 Rather, what it says is the appeals
17 courts have jurisdiction over every decision,
18 final decision. It doesn't say "final
19 judgment." And so, if it says "final decision"
20 and there is no place where it says you can
21 always appeal from a final judgment, then
22 whether this counts as a decision for purposes
23 of appeal, is it a final decision, is up for
24 grabs.
25 And the policy arguments and the old

1 statute and the old case are all relevant.
2 Now, have I got the question right?
3 MR. SIMPSON: I think so, yes.
4 JUSTICE BREYER: I do?
5 MR. SIMPSON: Yes, I think so.
6 JUSTICE BREYER: Okay. So then we are
7 going to decide -- if we decided against you
8 and said, no, final decision does not always
9 mean final judgment, and, indeed, this is a
10 case for the policy reasons they list, for
11 example, where it doesn't count, okay, and the
12 judge has to -- all right. What havoc would we
13 work?
14 MR. SIMPSON: A lot of havoc.
15 JUSTICE BREYER: Now, I know you think
16 that, but I want to know what.
17 MR. SIMPSON: Well, for -- for
18 starters, there's -- there's always been the
19 core, going -- going not even back just to the
20 Judiciary Act but back to Blackstone, of the
21 final judgment that -- where the court
22 disassociates itself from the case being an
23 appealable judgment. And that's what we have
24 here.
25 JUSTICE BREYER: And so all the time,

1 under Rule 54(b) when he issues a final
2 judgment, it's always appealable? True or
3 false?
4 MR. SIMPSON: If -- if the judge
5 certifies the question under --
6 JUSTICE BREYER: No, he doesn't
7 certify it. What he does is follow 54(b). He
8 enters in a normal case, not consolidated, a
9 piece of paper which says this is a final
10 judgment in respect to claim number 1 of the --
11 there are 42 claims in the case. That piece of
12 paper is entered.
13 Is there always an appeal, yes or no?
14 MR. SIMPSON: Yes, unless the court of
15 appeals decides that the judge has not
16 applied 54(b) --
17 JUSTICE BREYER: So you will -- I will
18 be able to find authority where -- that
19 supports this; is that right? And where is
20 that authority in your brief? Because I want
21 to -- the authority is for the proposition,
22 forgetting consolidation, that once a piece of
23 paper under 54(b) is entered, says final
24 judgment in respect to some but not all of the
25 case, there is always an appeal.

1 Where is that authority?
2 MR. SIMPSON: I think that's what Rule
3 54(b) says.
4 JUSTICE BREYER: Where is the
5 authority that says that's what Rule 54(b)
6 means?
7 MR. SIMPSON: I -- I -- I'm not sure
8 that the question has come up in that --
9 JUSTICE BREYER: Oh, it must have come
10 up. Surely, somebody has tried to take an
11 appeal sometime from a judgment under 54(b)
12 where there are 92 parties in a case. Like a
13 BP, they have 4,000 parties, okay, and -- and
14 one of them gets a partial judgment and it's
15 entered under 54(b), wants an appeal. That's
16 never come up? Okay, you don't have the
17 authority. I'll look for it.
18 JUSTICE GINSBURG: In 54(b), it's not
19 simply that the -- the judge enters a judgment.
20 He has to make a finding. He has to find that
21 there is no just reason for delay. Only if the
22 court expressly determines that there is no
23 just reason for a delay. And the whole purpose
24 of 54(b) is to enable an appeal even though the
25 case has covered the --

1 JUSTICE BREYER: Thank you. That's
2 what I wanted to know, actually.
3 MR. SIMPSON: Okay. I -- I apologize.
4 I did not understand the question. But --
5 because exactly when the order is issued it
6 becomes appealable, I don't know anyone who
7 would challenge that unless they were claiming
8 that the judge had not met the standard.
9 I would -- if there are no further
10 questions, I'd like to reserve the balance of
11 my time.
12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.
14 Mr. Katyal.
15 ORAL ARGUMENT OF NEAL K. KATYAL
16 ON BEHALF OF THE RESPONDENTS
17 MR. KATYAL: Thank you, Mr. Chief
18 Justice, and may it please the Court:
19 The district here entered -- the court
20 entered an order here consolidating for all
21 purposes the cases brought by brother and
22 sister against each other. Instead of
23 challenging that, Petitioner wants to appeal
24 part of its claims now. That maneuver runs
25 headlong into determinations by both Congress

1 and this Court that litigants can only appeal
2 generally from final decisions.
3 If adopted, my friend's rule --
4 JUSTICE SOTOMAYOR: Could you tell me
5 how you square this with the fact that the
6 district court denied the motion for attorneys'
7 fees because it wasn't filed with -- within 15
8 days of the final judgment?
9 MR. KATYAL: Absolutely. So, first of
10 all, Justice Sotomayor, this is a late-breaking
11 claim in the reply brief, both -- it's not --
12 JUSTICE SOTOMAYOR: But it does
13 suggest to me that the district court --
14 MR. KATYAL: I will --
15 JUSTICE SOTOMAYOR: -- is treating
16 them --
17 MR. KATYAL: I don't think so. I'll
18 get to that in a moment. But I do think it is
19 waived. I mean, that is both -- below we
20 argued this was an all-purpose consolidation.
21 We pointed out in our brief in opposition at
22 page 2 the only time they take issue with it is
23 in their merits reply brief. And as this Court
24 said in Argentina versus NML, that is far too
25 late.

1 But now, to answer the substantive
2 question --
3 CHIEF JUSTICE ROBERTS: But just to
4 interrupt --
5 MR. KATYAL: Yes.
6 CHIEF JUSTICE ROBERTS: -- that means
7 -- that means that maybe they can't raise a
8 separate claim for the fees. It's a -- it's an
9 argument; it's not a separate claim.
10 MR. KATYAL: No, but the -- as I
11 understand his argument, it's that we -- this
12 case is not an all-purpose consolidation case.
13 And I think to make that argument -- and using
14 the attorneys' fees as his rationale for that.
15 And I think to make that argument only
16 in the reply brief at the merits stage is too
17 late, Mr. Chief Justice.
18 CHIEF JUSTICE ROBERTS: Okay. Now you
19 can get back to Justice Sotomayor.
20 MR. KATYAL: Now, with -- with respect
21 to the attorney fees questions, I think my
22 friend has misstated the way the rules work.
23 So, first of all, the judgment here, the piece
24 of paper, to use Justice Breyer's term, was
25 entered on February 4th of 2015.

1 That resolved all claims. It was at
2 that moment a final judgment and started three
3 different clocks ticking. One is the 14-day
4 attorneys' fees clock. One is the -- the Rule
5 59 motion for a new trial, which is a 28-day
6 clock. And one is the 30-day notice of appeal
7 clock.
8 Now, the attorneys' fees motion was
9 filed actually 20 days later, after the 14-day
10 clock had expired. Had the motion been filed
11 within the 14 days, it wouldn't have been out
12 of time. But the different -- what happened
13 here is that the motion came in late. And all
14 the district court is saying, which is the same
15 thing that courts all over the country say, is:
16 You don't get to start a new attorneys' fees
17 clock by filing after the 14-day period a
18 motion for a Rule 59 new trial.
19 Moore's Federal Practice says this is
20 essentially a trap engendered by the 2009
21 rules.
22 JUSTICE SOTOMAYOR: But if it's not a
23 final judgment at all, which is your point,
24 it's not a final judgment until both -- all
25 issues in both cases are resolved, how does the

1 14-day clock start --

2 MR. KATYAL: So, Justice Sotomayor --

3 JUSTICE SOTOMAYOR: -- without a final

4 judgment?

5 MR. KATYAL: Justice Sotomayor, our

6 position is it is a final judgment when the

7 piece of paper was entered on February 4th.

8 And what changed it, and this is what Rule 59,

9 the advisory committee notes say, is when you

10 file a Rule 59 motion, it suspends what was

11 otherwise a final judgment.

12 So we agree, my friend could have

13 brought his appeal February 5th, absolutely.

14 There's no problem with that. But what he's

15 trying to do now is have his cake and eat it,

16 too, may -- file a motion for a new trial and

17 then take a piece of the case up, and it runs

18 headlong into all the --

19 JUSTICE GINSBURG: But the piece --

20 the piece has a final judgment attached to it.

21 There were two final judgments, right? There

22 was a final judgment in her case and there was

23 a final judgment in her brother's case.

24 She's not -- she wants to appeal her

25 case. There's nothing else to be done in her

1 case. So she should wait, how many, two, three
2 more years until she can appeal?
3 Do you claim that the judge would have
4 in any way altered the judgment that you won
5 during the pendency of the -- of the son's suit
6 against the -- the daughter?
7 MR. KATYAL: Yes, we do, Justice
8 Ginsburg. There is a few different points to
9 make here.
10 Number 1 is in all-purpose
11 consolidation cases it's very common to have
12 two pieces of paper, two judgments, as there
13 are here. The Gonzalez case in the Northern
14 District of Illinois in 2014, the Tucker case
15 in the Eastern District. Lots of cases say
16 that you have to -- and you actually are
17 mandated to have two pieces of paper, even when
18 you have all-purposes consolidation.
19 But to go back to Justice Breyer's
20 question, there is no case, zero case that says
21 that when you file two pieces of paper, that
22 that somehow changes things.
23 Rather, the Court has always looked to
24 the underlying substance. Is this two becoming
25 one or is it two separate claims?

1 JUSTICE GINSBURG: But it's for the
2 judge --
3 CHIEF JUSTICE ROBERTS: Well, if it's
4 just -- if it's -- if they're consolidated for
5 all purposes, why did the district court enter
6 separate judgments? Why didn't he wait and
7 say, well, there's only going to be one
8 judgment because these are all consolidated for
9 all purposes, so I should wait until we're
10 ready to have one judgment?
11 MR. KATYAL: Because, again, I think
12 lots of times courts do it for belts and
13 suspenders reasons, but I don't think that that
14 somehow takes back their all-purpose
15 consolidation. All-purpose consolidation --
16 JUSTICE GORSUCH: Why not? Why
17 doesn't it?
18 MR. KATYAL: So --
19 JUSTICE GORSUCH: Now, that's where I
20 get stuck.
21 If we have a district court that
22 issues separate judgments, I think pretty much
23 any cautious litigator would take that
24 seriously and file a notice of appeal because
25 it's a signal from the district court that it

1 is complete. It is finished. There is a final
2 decision in this matter.
3 MR. KATYAL: So, Justice Gorsuch,
4 first, let's start with what the district court
5 did. It's found at the petition appendix, page
6 815. This is the consolidation order. And it
7 says: "First, the motion to consolidate is
8 granted. Second" --
9 JUSTICE GORSUCH: I've read it and
10 it's ambiguous. It doesn't say they are
11 merged. It doesn't use that word.
12 MR. KATYAL: Well --
13 JUSTICE GORSUCH: It doesn't say for
14 all purposes.
15 And then we have, as the Chief Justice
16 points out, a later order from the same
17 district court, which I assume we would take as
18 seriously as a consolidation order, it being a
19 final judgment and all. So help me out with
20 that.
21 MR. KATYAL: Yes. If I could, first
22 I'd like to -- just to use the language of the
23 plain text of this order -- of what the order
24 is.
25 So Number 2 is the following cases,

1 plural, shall be consolidated, Number 1154 and
2 then 1395.
3 And then the third piece is: "All
4 submissions in the consolidated case shall be
5 filed in Case Number 354." So two really does,
6 plural, cases, become one, kind of like
7 marriage.
8 JUSTICE GINSBURG: If the case --
9 JUSTICE BREYER: That's why I'm
10 interested in Rule -- in Rule 54. I'm
11 interested in a case where we're not interested
12 in consolidation.
13 So rule -- under that rule, no
14 consolidation because the finding of what
15 Justice Ginsburg said, a district judge can
16 enter a final judgment as to some but not to
17 all the parties or claims.
18 Now, once you as a lawyer see that
19 piece of paper that says final judgment, you
20 think: I better appeal.
21 MR. KATYAL: Well, I don't --
22 JUSTICE BREYER: Period. Now, if
23 there is nothing to the contrary, there is a
24 strong argument for doing the same thing here
25 because lawyers then know, once they see a

1 piece of paper saying a final judgment, bong,
2 appeal.
3 Now, sometimes they also have to know
4 that if someone has moved for a new trial and
5 it's granted, then, of course, there's no
6 longer a final judgment. But that wouldn't be
7 true in Rule 59 or 50, what was it, 50,
8 wherever it was, 54, in respect to a new trial
9 for some of the other parties.
10 MR. KATYAL: So --
11 JUSTICE BREYER: That wouldn't affect
12 the judgment on -- that says final judgment as
13 to Smith when Jones gets a new trial on other
14 issues.
15 And so why wouldn't the lawyer think
16 exactly the same here?
17 MR. KATYAL: So --
18 JUSTICE BREYER: It's the same
19 process. It's the same thing. It is totally
20 consolidated, perhaps no more and no less than
21 an ordinary case with thousands of parties and
22 thousands of issues.
23 MR. KATYAL: So -- so, Justice Breyer,
24 I'll answer your question and then, if I could,
25 I'd like to return to Justice Gorsuch's

1 question.

2 JUSTICE BREYER: Yeah.

3 MR. KATYAL: So the answer to your

4 question is the part of Rule 54 which nobody

5 has read yet. And if you -- turn our red brief

6 to the appendix, page 3A reproduces 54. And

7 I'll just read a part of it to you: "When an

8 action presents more than one claim for relief

9 -- whether there's a claim, counterclaim,

10 crossclaim, or third-party claim -- or when

11 multiple parties are involved, the court may

12 direct entry of a final judgment as to one or

13 more, but fewer than all."

14 JUSTICE BREYER: Right.

15 MR. KATYAL: Now, here is the

16 important language, a sentence down:

17 "Otherwise, any order or other decision,

18 however designated, that adjudicates fewer than

19 all the claims or rights and liabilities of

20 fewer than all the parties does not end the

21 action."

22 So the Rule 54, Justice Breyer,

23 answers the question by saying, look, if you

24 have a consolidated case, and then not all the

25 claims or counterclaims of all of the rights

1 and parties are adjudicated, then you're on
2 notice that your case is not yet final.
3 And that's what we're asking you to
4 do, which is the rule, as our red brief at page
5 14 points out, in every single circuit, with
6 the partial exception of the Sixth Circuit,
7 which has introduced contrary things. And he
8 wants to switch up the rule massively.
9 Now, Justice Gorsuch, you asked what
10 about this order, doesn't it suggest maybe that
11 it wasn't all-purpose consolidation? As -- as
12 I said, the Third Circuit as the case comes to
13 the court, this is found at petition appendix,
14 page 4, says this was all-purpose
15 consolidation. At the oral argument, they even
16 asked this and said, hey, it doesn't use the
17 word all purpose, but the court relying on the
18 Third Circuit precedent, which is Bergstrom,
19 said if a decision -- and this is the law in
20 many, many circuits -- if a decision doesn't
21 say all-purpose consolidation or not, but
22 everything is merged together, it is treated as
23 all-purpose consolidation.
24 And that follows from --
25 CHIEF JUSTICE ROBERTS: Mr. Katyal, I

1 -- one thing that concerns me. This is, for
2 all the back and forth, a relatively simple
3 case. We're talking about two cases, same
4 lawyers, same parties, but consolidation can
5 come up in a situation and often does when
6 there are 100 separate cases, a mass tort
7 situation.
8 And there, one waiting for the final
9 judgment can be a very long wait and it could
10 be very prejudicial. I mean, let's say it's in
11 some sort of mass tort and some of the people
12 have, you know, emotional distress damages,
13 others physical injury, and early on the judge
14 says, look, I don't think you can recover
15 emotional distress. So all the cases that just
16 have emotional distress, judgment is entered
17 against them.
18 Now let's go on to the other thing
19 which is going to take five years. Doesn't
20 your position make that extremely complicated?
21 MR. KATYAL: No, Mr. Chief Justice. I
22 think that this is -- this is really a bad
23 solution of my friend in search of a problem.
24 There is no problem. That is, in those
25 complicated cases, there are three different

1 independent safety valves.

2 And as this Court in Mohawk said, they

3 go a long way toward resolving this in, for

4 example, the multiple claim case.

5 So there is Rule 54. The district

6 court can -- can send a case up to the court of

7 appeals. There's 1292(b), an interlocutory

8 appeal. And there is the writ of mandamus.

9 And together I think those do a good job --

10 JUSTICE GINSBURG: But why wouldn't

11 the district court think: What's the point in

12 my entering a 54(b) rule? I have a case in

13 which a final judgment is entered. Why isn't

14 that piece of paper that says final judgment

15 under Rule 58 the equivalent of 54(b)? I mean,

16 the judges say you want me to order a 54(b)

17 judgment, but there's already a final judgment

18 in this case. The clerk entered it. And I

19 didn't tell him otherwise.

20 MR. KATYAL: So just let me say,

21 Justice Ginsburg, I'm not aware of any case in

22 the entire federal system that says because I

23 entered a piece of paper with the -- that uses

24 the words final judgment, that that alone is

25 enough.

1 And to the contrary, and this goes
2 back to Justice Breyer's question, Mackey and
3 Cold Metal Process are both cases in which
4 there was the designation of a final judgment.
5 But that wasn't enough because, if you resolve
6 only some of the claims or you resolve claims
7 only against some of the defendants, that's not
8 enough. You've got to ask for the 54 or have
9 it sua sponte.
10 JUSTICE GINSBURG: Can you explain to
11 me, you did say in your brief that there is --
12 that a common issue is central to the
13 resolution of these two cases.
14 One case is the estate against the son
15 for using his -- rent from his mother's
16 property improperly. That's the charge of the
17 estate.
18 Then there's the charge of the son
19 against the daughter for alienation of
20 affections. What is the -- what is the common
21 issue central to the resolution of both of
22 those cases?
23 MR. KATYAL: The Third Circuit
24 found -- and this is Petition Appendix pages 8
25 and 9 -- that there was overlap, that there was

1 going to be credibility determinations, that
2 there was going to be --
3 JUSTICE GINSBURG: You said the
4 central issue. I see in one case the central
5 issue is, did the son misuse the rent from his
6 mother's property? Other case, did the
7 daughter alienate the mother's affection
8 against the son?
9 MR. KATYAL: And --
10 JUSTICE GINSBURG: So what's --
11 MR. KATYAL: And the central issues in
12 both turn on the state of mind and the
13 credibility of both the brother and the sister.
14 And that is what the petition appendix -- what
15 the Third Circuit found.
16 JUSTICE KAGAN: Mr. --
17 MR. KATYAL: That's why they were
18 central. Look, I can imagine they could
19 disagree with that, but that's appealing the
20 consolidation order, not now going back and
21 saying: I want to break apart a chunk of the
22 case.
23 JUSTICE GINSBURG: Can I ask you, this
24 relates to the question that the Chief asked,
25 and I think it's key: She's lost the case, and

1 she's lost it and has a final judgment. The
2 judge orders a new trial of the other case.
3 How much time has elapsed from the time she
4 lost her case with a paper saying final
5 judgment and when the son's case against the
6 daughter is finally resolved?
7 MR. KATYAL: Right. So the -- there
8 is a large gap of time, as there often is in --
9 JUSTICE GINSBURG: How much time?
10 MR. KATYAL: Well, I think at about
11 approximately two years. And that's true
12 sometimes in multiple defendant cases --
13 JUSTICE GINSBURG: And she should --
14 she should sit there --
15 MR. KATYAL: No.
16 JUSTICE GINSBURG: -- for the two
17 years?
18 MR. KATYAL: No. She should do
19 exactly what the Third Circuit said: Ask for a
20 54(b) judgment or perhaps a 1292. And the
21 difference is, as the Chief Justice and Justice
22 Kennedy were saying to my friend, the district
23 court is empowered under 54 and 1292 and they
24 are the ones with expertise and familiarity --
25 JUSTICE GINSBURG: How would a lawyer

1 that has a final judgment, which -- you -- you
2 get a piece of paper that says final judgment,
3 you know that now you can appeal. How would a
4 lawyer know that, oh, this piece of paper that
5 says final judgment, forget it, that it's
6 meaningless, meaningless; you have to get a
7 54(b) judgment?
8 MR. KATYAL: Because, as I was saying,
9 Justice Ginsburg, any lawyer who read Rule
10 54(b), the language I was reading to Justice
11 Breyer, it says however you designate it -- and
12 I'm not even sure it uses the words "final
13 judgment" on that form, but however you
14 designate it, the designation alone is not
15 enough. That is the rule in circuit after
16 circuit.
17 And, you know, if you adopt my
18 friend's rule --
19 JUSTICE BREYER: Okay. Okay. So --
20 MR. KATYAL: -- you have a trap for
21 the unwary on the other side.
22 JUSTICE BREYER: All right. Now I
23 think I may be getting this. You say, look,
24 here's what you want us to say. Once you see
25 your cases consolidated for all relevant

1 purposes -- I mean, there could be exceptions,
2 but forget that for a second -- for all
3 relevant purposes, you have what the rules call
4 a case with multiple claims involving multiple
5 parties, both.
6 And, therefore, what you do, lawyer,
7 is if you want a quick appeal, you tell the
8 judge to make an express finding that there is
9 no just reason for delay. Judge, you must make
10 that finding or you cannot enter a final
11 judgment. Whatever you call it, it isn't a
12 final judgment. That's because of the
13 "otherwise" language.
14 So you want the consolidation -- it
15 would be nice if it explicitly, but you want us
16 to say it implicitly references 54(b) and
17 that's how we should handle it; is that right
18 or wrong?
19 MR. KATYAL: That is right. And that
20 is exactly what every circuit does -- this is
21 our red brief at page 14 -- with the partial
22 exception of the Sixth. We're asking --
23 JUSTICE ALITO: Well, in Johnson --
24 JUSTICE KAGAN: Mr. Katyal --
25 MR. KATYAL: -- that you keep the same

1 rule in place.
2 JUSTICE ALITO: Mr. Katyal, in
3 Johnson, the Court -- before Rule 42 was
4 adopted, the Court said consolidation is
5 permitted as a matter of convenience and
6 economy and administration but does not merge
7 the suits into a single cause or change the
8 rights of the parties.
9 Now, if -- and -- and there's the old
10 rule that the plaintiff is the master of the
11 complaint that the plaintiff files. So, if the
12 intent of Rule 42 was to change that, wouldn't
13 the -- wouldn't the -- the rule drafters have
14 done so clearly? But just to use the term
15 "consolidation" doesn't -- is certainly not a
16 clear signal that Johnson's understanding of
17 consolidation is no longer the one that's
18 embodied in the rule.
19 MR. KATYAL: So, Justice Alito, we
20 quite agree that plaintiffs are in general the
21 masters of their complaint, but they're not
22 masters of the timing of their appeal. That is
23 the whole purpose of the final judgment rule,
24 to empower district courts really to make the
25 determination.

1 Johnson was a partial consolidation
2 case. It was not a full purpose consolidation
3 case. And here's what the advisory committee
4 notes in 1937 said about this. They said:
5 Section 734, which was the statute being
6 interpreted in Johnson, but is -- insofar as
7 the statute differs from the rule, it is
8 modified.
9 And so you do have the advisory
10 committee saying so. And as Justice Kagan
11 points out, that is the definition --
12 JUSTICE GINSBURG: The advisory
13 committee did not say -- it said insofar as; it
14 didn't say that your position is the correct
15 one.
16 Suppose -- could you not, instead of
17 just -- there was -- the court granted a new
18 trial in your client's case against the
19 daughter. You could have asked the district
20 court at that point to stay the entry of
21 judgment on the estate's claim, couldn't you?
22 MR. KATYAL: Well, I -- I think we
23 might be able to, but as Justice Gorsuch was
24 pointing out, that delay of the entry of the
25 judgment when you have a special verdict

1 form --

2 JUSTICE GINSBURG: But you had --

3 MR. KATYAL: -- has to occur within

4 150 days.

5 JUSTICE GINSBURG: You had a certain

6 advantage by not doing that, by not asking to

7 stay the entry of the judgment on the estate's

8 claim, because then you and your law firm have

9 no claim outstanding against you that has to be

10 shown on financial statements.

11 MR. KATYAL: So --

12 JUSTICE GINSBURG: So by having the

13 separate judgment final, you don't have to

14 report it --

15 MR. KATYAL: So --

16 JUSTICE GINSBURG: -- but if you're

17 right that it really isn't a final judgment,

18 then as the -- Sam and his law firm, had they

19 listed this as a claim still outstanding

20 against them --

21 MR. KATYAL: So, Justice Ginsburg, we

22 agree with you that sometimes, if you adopt our

23 rule, it's going to benefit one side or the

24 other. I think the point we're making here is

25 the same point that this Court made in Mohawk,

1 which is in general in the mine run of cases --
2 JUSTICE GINSBURG: But I asked -- I
3 asked you that question. Do you know, then,
4 did they treat it as a claim still outstanding
5 against them?
6 MR. KATYAL: Well, I think that -- I
7 think that, as the Third Circuit said, yes,
8 there's so much overlap between these two that
9 there can be --
10 JUSTICE GINSBURG: No, I'm asking you
11 how that law firm treated what was a claim
12 against them and now is no longer because they
13 prevailed after the trial. And a judgment has
14 been entered.
15 MR. KATYAL: Well, they can certainly
16 appeal from that judgment against -- that --
17 which dismissed the claim against the law firm.
18 The question is only can they appeal of right
19 --
20 JUSTICE GINSBURG: No, I'm not talking
21 about the claim against -- I just want to know
22 is that -- on your theory, then the claims
23 should be still outstanding.
24 MR. KATYAL: We agree every claim that
25 they lost on one of those two pieces of

1 paper --
2 JUSTICE GINSBURG: No, no, on the --
3 MR. KATYAL: -- can be appealed.
4 JUSTICE GINSBURG: -- the claim that
5 they won.
6 MR. KATYAL: The --
7 JUSTICE GINSBURG: The claim that they
8 -- they won -- the estate lost, right? The
9 estate lost that case. And I'm asking you, do
10 they have to still report it as a potential
11 liability unless and until the whole case is
12 wrapped up?
13 MR. KATYAL: So if I understand your
14 question -- I mean, if they lost everything,
15 they lost -- and they -- they didn't win any
16 claims against us. So the law firm has won.
17 And the -- and the son has won in the trial.
18 And those are what those two pieces of
19 paper are. And my point to you is anything
20 that -- that my friend on the other side lost,
21 they can appeal. The only question is the
22 timing. And if they are worried about the
23 hardship, they can use Rule 54 or 1292.
24 JUSTICE GORSUCH: Mr. Katyal, on 54,
25 where I get tripped up is the word "action."

1 54 speaks of sending upstairs a claim within an
2 -- within an action. And the federal rules
3 consistently understand the word "action" to be
4 the complaint, the lawsuit. In fact, even this
5 rule that we're now interpreting speaks of
6 actions. Rule 2, Rule 3.
7 So it seems to me that your dependence
8 on 54 runs into a bit of a plain language
9 issue.
10 MR. KATYAL: I don't think so. I
11 think that this Court has always said that Rule
12 54 should be interpreted practically, not
13 technically. It does have a kind of unique
14 meaning that goes all the way back to Mackey
15 and Cold Metal. And the question is --
16 JUSTICE GORSUCH: Do you have any --
17 do you have any answer on the text of action,
18 though?
19 MR. KATYAL: Well, I think that the
20 text of action is -- refers -- means a single
21 judicial unit, and the -- and the rules empower
22 a court to -- a district court to decide what
23 is a single judicial unit.
24 So this is why every circuit,
25 basically, with the exception of the Sixth,

1 says it is -- an action for purposes of Rule 54
2 is a all-purpose consolidated set of cases
3 which is merged. Two becomes one. That is an
4 action.
5 Now, there are times when the rules
6 use different words -- use the same words to
7 have different meanings in it. So attorneys'
8 fees, for example, are considered costs under
9 Rule 68 but not 41.
10 JUSTICE GORSUCH: Do you know anywhere
11 else in -- in the rules where "action" is used
12 differently?
13 MR. KATYAL: Well, I think actually --
14 you know, I don't -- I'm not sure that you --
15 you should get into that for purposes here and
16 -- and write an opinion that says action for
17 all purposes in other rules, but --
18 JUSTICE GORSUCH: No, I'm -- I'm just
19 asking whether you're familiar with any other
20 place in the rules.
21 MR. KATYAL: Well, I -- I don't know
22 that it comes up really in -- in any other
23 rules. Our red brief explains the kind of idea
24 that this is going to have some domino effect
25 on other rules, we don't think is true.

1 To the extent it'll matter, it might
2 matter in, you know, a couple of rules. But,
3 if anything, as Professor Steadman's article
4 shows, you know, that might promote more
5 efficiency. But we think you shouldn't get
6 into it.
7 There's a long tradition of the Court
8 adopting different meanings of words in the
9 Federal Rules of Civil Procedure, costs, you
10 know, costs and, you know, other -- other words
11 like that.
12 So I don't think you should get -- I
13 don't think you should do more. Now, if -- our
14 central point to you, and this is made by the
15 district judges' amicus brief, is that the
16 whole point of the federal rules is to empower
17 them as dispatchers to send up those cases, as
18 the Chief Justice said, pose unique hardships.
19 Now, Justice Ginsburg, you had asked,
20 well, the 1937 rules don't really fully
21 repudiate Johnson, but I do think -- and this
22 goes back to --
23 JUSTICE GINSBURG: No, we don't
24 repudiate --
25 MR. KATYAL: -- Justice Sotomayor --

1 JUSTICE GINSBURG: -- it at all.
2 MR. KATYAL: Well, but --
3 JUSTICE GINSBURG: There's not one
4 word said about Johnson.
5 MR. KATYAL: Well, there's not one
6 word said about Johnson, but there is something
7 important in the rules, and this goes back to
8 the very first question today, which is Justice
9 Sotomayor's question, there are two different
10 parts to Rule 42. There is (a)(2) and there's
11 (a)(1). (a)(1) is to join for hearing any --
12 or trial -- any or all matters at issue in the
13 actions. But (2) is broader. It's to
14 consolidate the actions.
15 And that's got to mean something more
16 than just holding a joint proceeding, like my
17 friend on the other side said with his
18 hypothetical, that really does refer to and
19 empower the district court to make an
20 all-purpose consolidation, to make two, one,
21 like marriage.
22 JUSTICE KAGAN: And was that in the
23 prior statute, Mr. Katyal, that 42(a)(1), which
24 really does lead you to think about the term
25 consolidation differently.

1 MR. KATYAL: Right. Right. So I
2 don't believe the prior statute did break apart
3 these two. And so I do think that, to go back
4 to the plain text of (a)(2), I do think it does
5 say something different.
6 JUSTICE KAGAN: Could you also add
7 42(a)(3)? Because 42(a)(1) is about, you know,
8 joint hearings and trials.
9 MR. KATYAL: Exactly.
10 JUSTICE KAGAN: 42(a)(3) says, look,
11 you can also issue any other kind of order you
12 want to minimize delay. And then, separate
13 from that, you have this consolidation
14 provision.
15 MR. KATYAL: Exactly, Justice Kagan.
16 And so, look, I could imagine that you could
17 twist the rule and mean it to -- to be
18 something else and try and get it out of
19 Johnson, but, boy, before you did so and go
20 against the plain text, I think you'd have to
21 have a incredibly good reason to depart from
22 the long-standing idea that federal district
23 courts are best empowered, as the amicus brief
24 by federal judges says, to make these
25 determinations, to send up those cases.

1 CHIEF JUSTICE ROBERTS: You -- you've
2 mentioned that a couple times. What -- what
3 are we to make of the amicus brief by -- filed
4 by seven retired federal judges? Do we imply
5 that the other 280 don't agree with it or -- or
6 --
7 (Laughter.)
8 CHIEF JUSTICE ROBERTS: I -- I don't
9 quite know what to -- what to do with that.
10 MR. KATYAL: Right. I mean, I think,
11 you know, you have -- you have a similar group
12 before you in Gelboim, and I do think that, you
13 know, look, we -- if we had more time, we -- I
14 suppose we would have gotten more judges, but
15 we did want to bring to you the perspective, I
16 think the judges want to bring to you the
17 perspective of, you know, having sit through
18 these long, complicated trials --
19 CHIEF JUSTICE ROBERTS: Well, it's the
20 perspective of seven individuals. I don't know
21 that that represents the perspective of
22 district judges generally.
23 MR. KATYAL: Right. It's -- it's just
24 one data point, but I do think it's a data
25 point that squares very much with what this

1 Court has said time and again in Cold Metal, in
2 Mackey, in, you know, Richardson, that district
3 courts in complex cases, to use what you were
4 saying earlier, Mr. Chief Justice, are
5 particularly suited to trying to decide whether
6 or not cases are going to be interrelated.
7 And to allow piecemeal appeals, by --
8 you know, without the permission of the
9 district court is really to do something very
10 dangerous to the -- to the circuits.
11 JUSTICE KAGAN: Well, Mr. Katyal, what
12 do you think we should do if, on the one hand,
13 we think your rule makes a lot of sense for
14 cases that are consolidated completely for all
15 purposes, but, on the other hand, we're
16 concerned that this case should not have been?
17 What should we do with that?
18 MR. KATYAL: Well, I don't think, you
19 know, that it's way too late to say this case
20 shouldn't have been consolidated. I mean,
21 that's just, I think, waived in multiple
22 different ways, but --
23 JUSTICE KAGAN: It just does seem to
24 me that many of the questions that have been
25 put to you really do deal with the question of

1 whether consolidation was proper here.
2 MR. KATYAL: Right. Exactly. And as
3 our brief at page 43 explains, look, you can
4 appeal a consolidation order. You can even do
5 it on an interlocutory basis. There are cases
6 that permit that. That would have been the
7 proper cause of action.
8 But to fight, and this is my opening
9 lines to you today, to fight about that, you
10 know, through the guise of trying to say, well,
11 I get to file a right of appeal, he's
12 complaining about consolidation. Let him
13 complain about consolidation, you know, he
14 should have complained about it and other
15 litigants can in other cases, but don't try and
16 twist Rule 54 and Rule 42 to try and
17 accommodate that.
18 That's a very separate thing.
19 JUSTICE GINSBURG: Well, would you --
20 you're making it two cases, in fact, your
21 client did, because originally that claim was
22 brought as a counterclaim, part of one action
23 and a counterclaim. You deliberately dropped
24 the counterclaim and commenced an independent
25 action.

1 MR. KATYAL: So, Justice Ginsburg,
2 that's exactly what's going on in Cold Metal.
3 There are two very different -- there are two
4 different causes of action.
5 JUSTICE GINSBURG: You made it -- your
6 client has made it from a case with a claim and
7 a counterclaim into two cases.
8 MR. KATYAL: Right. And that's an
9 argument he could have used to try and oppose
10 consolidation. But at this point, as this case
11 comes to the Court, I don't think that would be
12 appropriate.
13 Now, to the extent we're worried about
14 abuse about consolidation or something like
15 that, I think Justice Alito's idea of the
16 national federal rules committee is one to
17 think about this, but I don't think it would be
18 a good idea to use local rules and have
19 geographic variations circuit to circuit and
20 people having to wonder whether or not they
21 have to file notices of appeal and, you know,
22 whether there would be a right --
23 JUSTICE GORSUCH: Wouldn't it be
24 clearer if it were in the rules rather than in
25 the case law which is currently so split?

1 MR. KATYAL: Well, I don't think it's
2 actually split. I mean, if you go back --
3 JUSTICE GORSUCH: Well, the reason
4 that we took this case is because there is a
5 split.
6 MR. KATYAL: Well, only with a partial
7 exception of the Sixth Circuit. Our brief goes
8 through all of these cases. When you deal with
9 all-purpose consolidation -- his split is about
10 partial consolidation in general. There's only
11 three cases we have been able to find in the
12 Sixth Circuit, two of which are unreported,
13 that disagree with what every other circuit
14 that we have been able to find that's ruled on
15 this has found.
16 So I think all we're saying to you is
17 leave the rules where they are. To the extent
18 you're concerned about any, you know, problems
19 with the rules, any problems with
20 consolidation, I think the national rules
21 committee is the place to be.
22 If there are no further questions.
23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.
25 Mr. Simpson, four minutes.

1 REBUTTAL ARGUMENT OF ANDREW C. SIMPSON
2 ON BEHALF OF THE PETITIONER
3 MR. SIMPSON: The -- the
4 characterization of this consolidation changed
5 in the -- from the opposition to the writ for
6 certiorari to the red brief.
7 At the red brief, at the certiorari
8 stage, it was characterized as we did as a
9 consolidation for trial.
10 And that's what it was. I think it's
11 important to understand that all the circuits
12 disagree about even what is consolidation for
13 all purposes.
14 The Bogosian case from the Third
15 Circuit says a case consolidated for pretrial
16 and trial purposes is for all purposes.
17 That's what happened in our case. It
18 was consolidated for pretrial and trial. And
19 so, under the Third Circuit definition, it is
20 all purposes.
21 Other circuits have a completely
22 different definition and they talk about, in
23 the unitary consolidation type of case, there's
24 one docket, there's one judgment entered, not
25 two. They call that all-purpose consolidation.

1 So that's one of the problems we have
2 here. The Rule 54, Justice Gorsuch, as you
3 noted, refers to a single action. There's
4 nothing in the amendments to the -- or the
5 adoption of the federal rules to suggest that
6 the rules committee was planning on overruling
7 a Supreme Court precedent from the year before
8 that said cases don't merge. Merge doesn't
9 appear in the federal rules.
10 To correct one statement in reference
11 to a question asked by Justice Ginsburg, Your
12 Honor, the son's case is still not final. So
13 it is not two years. We are now three years --
14 February will make three years since the entry
15 of the final judgment in my client's case, and
16 the other case still is not final.
17 The new trial has already been held.
18 No judgment has been entered on it. Once a
19 judgment is entered on it --
20 JUSTICE SOTOMAYOR: How long -- do you
21 have any idea why it's being held? This is
22 more curiosity.
23 MR. SIMPSON: No, I -- I -- I have a
24 theory. The -- the -- the -- the counsel
25 representing Elsa in her individual capacity

1 made an oral motion for new trial and -- and
2 judgment on the pleadings or, excuse me,
3 judgment as a matter of law. At the time of
4 the conclusion of Samuel's case, when that was
5 denied, they rested and put on no evidence.
6 The judge took the motion under
7 advisement. The verdict then came in. And
8 he's never ruled on that. And -- and at the
9 same time, they also filed a written one before
10 --
11 JUSTICE SOTOMAYOR: What's the
12 verdict?
13 MR. SIMPSON: The -- the verdict --
14 JUSTICE SOTOMAYOR: Against your
15 client?
16 MR. SIMPSON: The verdict was against
17 Elsa in her individual capacity. And one --
18 just one quick clarification on this case.
19 There are two different Elsas in this
20 case. They are not the same parties. Elsa in
21 her individual capacity is legally distinct
22 from Elsa as the trustee of the trust. And
23 that's the Alexander v. Todman case. And the
24 Third Circuit makes that very clear. So this
25 is not A versus B and B versus A where B could

1 have asserted this -- this as a counterclaim
2 against Elsa in her individual capacity.
3 If there are no other questions.
4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel. The case is submitted.
6 (Whereupon, at 11:03 a.m., the case
7 was submitted.)
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