1 IN THE SUPREME COURT OF THE UNITED STATES
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3 TEVA PHARMACEUTICALS :
4 USA, INC., ET AL., :
5 Petitioners :
6 v. : No. 13-854.
7 SANDOZ, INC., ET AL. :
8 - - - - - - - - - - - - - - - - - - x
9 Washington, D.C.
10 Wednesday, October 15, 2014
11
12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:04 a.m.
15 APPEARANCES:
16 WILLIAM M. JAY, ESQ., Washington, D.C.; on behalf of
17 Petitioners.
18 GINGER D. ANDERS, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.; on
20 behalf of United States, as amicus curiae.
21 CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of
22 Respondents.
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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 will hear
4 argument first this morning in Case 13-854, Teva
5 Pharmaceuticals v. Sandoz.
6 Mr. Jay.
7 ORAL ARGUMENT OF MR. WILLIAM M. JAY
8 ON BEHALF OF THE PETITIONERS
9 MR. JAY: Mr. Chief Justice, and may it
10 please the Court:
11 In our judicial system, the trial judges
12 find the facts. Courts of Appeals review those
13 fact-findings deferentially under Rule 52. The Federal
14 courts apply that familiar standard, even whenever the
15 ultimate question is one of law, but it rests on
16 subsidiary fact-finding.
17 Now, the Federal Circuit says that claim
18 construction is different, that there are no facts in
19 claim construction, but more than a hundred years of
20 practice from this Court makes clear that that's not
21 right. Facts can enter claim construction and they do
22 so when the trial judge does what this Court has
23 instructed her to do, to find what a person of skill in
24 the art already knows as relevant to interpreting the
25 patent.

1 JUSTICE GINSBURG: Can you bring it down to
2 this case and tell -- tell us what are the facts to
3 which the Federal Circuit should have applied clearly
4 erroneous rule?
5 MR. JAY: Certainly, Justice Ginsburg.
6 There are three in our view. The first is that the
7 Federal -- the Federal Circuit failed to defer to the
8 trial court's finding about the presumed meaning of the
9 term "average molecular weight" in the -- in the
10 relevant context.
11 The second is that the trial -- Federal
12 Circuit failed to defer to what the district court
13 expressly found resolving an expert dispute was the
14 import of Figure 1 and where the peak of the curve in
15 Figure 1 appears.
16 And the third is how a person of ordinary
17 skill in the art would have read a piece of the
18 prosecution history.
19 So if I may, I'll begin with why the -- the
20 reference to average molecular weight in the patent and
21 the -- and the specific reference to size exclusion
22 chromatography, the particular technology being used to
23 find that, fits the rule that we're asking this Court to
24 adopt.
25 Before you --

1 JUSTICE KENNEDY: I -- I want you to answer
2 that, but would -- would you say that it's whether a
3 skilled artisan would make this inference? Is that part
4 of the finding?
5 MR. JAY: Part of the finding is the
6 knowledge of a skilled artisan. That's right.
7 Sometimes -- sometimes the finding is just about pure
8 science, how an invention works, what -- what this Court
9 called it in the Winans v. New York and Erie case is
10 terms of art or the state of the art. And the way the
11 state of the art can enter the analysis is when you're
12 using science to construe the patent.
13 So, for example, at this temperature the
14 invention would work; at that temperature the invention
15 would not work. Therefore, you know, the temperature
16 must be Celsius and not Fahrenheit, for example.
17 When you do that, when you're using science
18 and not words or structure as the -- as an
19 interpretative guide, that rests on fact-finding just as
20 much as -- as knowing the meaning of terms of art to
21 people with skill in the art does.
22 Now, the terms of art has a lengthy pedigree
23 in this Court's cases, not just in patent cases,
24 although it's certainly strong in patent cases as well.
25 But in the interpretation of other written instruments,

1 the -- the meaning of terms of art in a community to
2 which -- an interpretative community to which the trial
3 judge does not belong is exactly the kind of thing that
4 trial judges need the input from experts to determine.
5 JUSTICE ALITO: Well, that's not true of
6 terms of art in statutes, is it?
7 MR. JAY: Terms of art in statutes, Justice
8 Alito, are not -- are nonetheless written to be read by
9 the general public. And what -- when they have a --
10 when they have a legal meaning, the determination of
11 that legal meaning is still a question of law.
12 JUSTICE ALITO: Well, some of them are very
13 technical, and I doubt that the -- the general public
14 has any understanding of some very technical terms that
15 appear in statutes. So would they not be read in light
16 of what someone who is knowledgeable in that field would
17 understand the -- the term to mean?
18 MR. JAY: I think it's very rare for
19 Congress to adopt statutes that have terms -- that have
20 terms that are meant to be read by a specialized
21 audience --
22 JUSTICE ALITO: Well, I'll give you an
23 example. The Dodd-Frank Act refers to Tier 1 Capital.
24 Do you think that the average person on the street has
25 any idea what Tier 1 capital is?

1 MR. JAY: I -- I expect that it has an
2 established meaning, but -- although I certainly don't
3 know for sure.
4 JUSTICE ALITO: Among the general public or
5 among people who are knowledgeable in that particular
6 area?
7 MR. JAY: I think when you're interpreting a
8 statute that it's generally clear at least what the
9 right frame of reference is. Now, in the -- in the
10 patent case, what the frame of reference is is itself a
11 question of fact, as this Court said in Graham v. John
12 Deere. Ascertaining the level of skill in the art, who
13 is the skilled artisan, who is this patent written for,
14 that is itself a factual question, and then figuring out
15 what that -- what that person knows is also a factual
16 question. You know, that's terms of art or the state of
17 the art.
18 JUSTICE SOTOMAYOR: Mr. Jay, could you tell
19 me what you see as the difference between your position
20 and the government's?
21 MR. JAY: I think that the government agrees
22 with us that the answer to the question presented is
23 that Rule 52(a) applies and that clear error review
24 should apply to findings of fact. I think --
25 JUSTICE SOTOMAYOR: To some, because they

1 differentiate others.

2 MR. JAY: I think that -- I think that our

3 test is largely the same as well, but we disagree on how

4 the test comes out on these facts. We submit that the

5 three fact-findings that I mentioned to Justice Ginsburg

6 at the beginning of the argument are -- they are factual

7 findings. The government agrees that some but not all,

8 and they -- we agree on the ultimate disposition that

9 the Federal Circuit's judgment can't stand.

10 JUSTICE SOTOMAYOR: If you and the

11 government can't agree, why should we defer to a

12 district court? Why don't we defer, as has been done

13 now forever, to the Federal Circuit and let them review

14 these things de novo?

15 MR. JAY: Respectfully, Justice Sotomayor,

16 what's been done forever is deferring to district courts

17 on matters of subsidiary findings. And I think it's

18 significant that in the first patent case that came to

19 this Court from the Federal Circuit, the new Federal

20 Circuit, Dennison, what this Court did was direct the

21 Federal Circuit to apply deference to subsidiary

22 fact-finding in the context of obviousness. And this

23 Court has --

24 JUSTICE SOTOMAYOR: What we did -- in

25 Martin, we -- we talked about claim construction being

1 the odd hybrid.

2 MR. JAY: It is an odd hybrid -- well, it is

3 a hybrid. I don't know that it's odd, Justice

4 Sotomayor. I think that it actually fits of a piece

5 with other mixed questions of law and fact. And the

6 universal practice for mixed questions of law and fact

7 is that when they rest on subsidiary fact-finding, you

8 review the fact-finding part deferentially, even when

9 the leap from the fact-finding to the ultimate legal

10 conclusion is a short one.

11 JUSTICE KENNEDY: In the Markman context,

12 the trial judge says to the jury: Now, the construction

13 of the claim is for the court, and the court's

14 construction of the claim is X, Y, Z. Could that

15 determination by the district judge, which is for the

16 trial judge, involve some subsidiary questions of fact

17 as to which he must be given deference?

18 MR. JAY: Sir, I may have missed the --

19 JUSTICE KENNEDY: It's a jury case like

20 Markman and Markman says the construction of the claim

21 is for the court, and the court tells the jury: This

22 claim is to be construed as follows, A, B, C, D. Does

23 that determination, that interpretation by the district

24 court -- would that error contain factual determinations

25 as to which deference must be given to the trial judge?

1 MR. JAY: A claim construction can contain
2 factual determinations. It might not. In many cases it
3 will not, because the ultimate question is a question of
4 law and when it rests just on looking at the words in
5 the patent and applying the canons of claim
6 construction, it remains a pure question of law.
7 When -- when facts enter the analysis, those facts
8 decided by the trial judge in the context of findings
9 are reviewed deferentially.
10 JUSTICE SCALIA: Well, is -- is it the same
11 question whether a particular fact has to be submitted
12 to the jury? And whether a particular fact-finding by
13 the judge is entitled to deference or are they -- are
14 they the same question?
15 MR. JAY: They are not the same question,
16 Justice Scalia.
17 JUSTICE SCALIA: I didn't think they were.
18 MR. JAY: This Court resolved the judge/jury
19 question for claim construction in Markman, but -- and
20 there were no subsidiary fact-findings of the type that
21 we've been talking about in Markman, because
22 Mr. Markman's expert was an expert in document
23 construction. That -- that's not the kind of rule that
24 we're advocating here. We're advocating for deference
25 to classic fact-finding.

1 CHIEF JUSTICE ROBERTS: You -- you've
2 referred several times to subsidiary facts. You know,
3 the difference between questions of law and fact has not
4 always been an easy one for the Court to draw. What do
5 you mean by a subsidiary fact?
6 MR. JAY: I simply mean, Justice --
7 Mr. Chief Justice, that the ultimate question this Court
8 said in Markman is a question of law, but it often rests
9 on factual findings, knowledge of the -- excuse me -- of
10 the state of the art and of how the art works. And
11 that's -- that's just as true in other mixed question
12 cases.
13 CHIEF JUSTICE ROBERTS: Well, what's your
14 definition of subsidiary fact?
15 MR. JAY: A subsidiary fact is a fact that
16 is not the ultimate question the court is looking at,
17 but one that is an ingredient in that -- in that
18 judgment. So in the context of claim construction, what
19 often happens is the beginning of the analysis is: What
20 is the meaning of this specialized term to people in the
21 art? That may not be controlling because the
22 interpretation of the patent may show, as a legal
23 matter, that that can't be the right meaning because the
24 text of the patent itself, under -- applying the canons
25 of claim construction, for example, or simply applying

1 the patentee's own definition, rule out the ordinary
2 meaning to skilled artisans, making that finding
3 irrelevant. Then it wouldn't be a subsidiary finding of
4 the ultimate claim construction at all.
5 JUSTICE GINSBURG: Then maybe the evidence
6 shouldn't have come in.
7 MR. JAY: I'm sorry, Justice Ginsburg.
8 JUSTICE GINSBURG: The evidence should not
9 have come in.
10 MR. JAY: Well, Justice Ginsburg, the court
11 may not anticipate at the time what the -- what the
12 ultimate outcome is going to be. At the time, the court
13 must make a judgment about which experts to allow. But
14 I think that's an important point, that the judge
15 retains gatekeeping authority, and ultimately the judge
16 will decide how many terms she will allow the parties to
17 dispute and which -- what evidence to take and in what
18 form to take it. So --
19 JUSTICE GINSBURG: If these are -- these are
20 truly fact questions, then what happened to the Seventh
21 Amendment?
22 MR. JAY: I think, Justice Ginsburg, that --
23 first of all, this is not a jury case. But, of course,
24 I'll answer the question for patent cases more broadly,
25 in which some are jury cases. These are subsidiary

1 fact-findings that go to a threshold question for the
2 court and in that respect they're no different than the
3 fact-findings that go into other pretrial judgments that
4 are not for the jury.
5 Rule 52 has been applied to judicial
6 fact-finding in any number of jury cases, pretrial and
7 post-trial matters that don't -- that don't go to the
8 jury. And this Court decided in Markman that the
9 ultimate question of claim construction is one of law
10 and thus not for the jury.
11 JUSTICE GINSBURG: And the government's
12 brief said -- and I think you agree with this, but
13 you'll tell me -- that inferences to be drawn from
14 fact-findings get de novo review. And my understanding
15 is that in a typical civil case, a jury finds the facts
16 and can draw inferences from the facts, but here --
17 well, first do you agree with the government that
18 inferences from -- from the facts get de novo review?
19 MR. JAY: No. I don't think I can agree
20 with that, Justice Ginsburg, because that's not what
21 Rule 52 says. And we may be conflating jury cases -- in
22 our colloquy here, we may be conflating jury cases and
23 judicial fact-findings because -- you know, the scope of
24 Rule 52 is set out in the rule itself and in the -- the
25 Advisory Committee Notes in 1937 and this Court's

1 decision in Anderson all talk -- and Pullman Swint as
2 well -- all talk about the inferences to be drawn as
3 being part of the trial judge's role, because the trial
4 judge has heard the entire factual record. The trial
5 judge is in the best position to draw the inferences
6 from the record as -- as well as to resolve direct
7 head-to-head conflicts in the evidence.
8 JUSTICE ALITO: Isn't your --
9 JUSTICE KAGAN: Mr. Jay --
10 JUSTICE ALITO: Go ahead.
11 JUSTICE KAGAN: -- I -- I just want to make
12 sure I understand your answer to what the gap is between
13 a certain kind of fact and then the ultimate question of
14 law. So when an expert gets on the stand and gives
15 testimony about what a person in the field, a skilled
16 artisan in the field, would understand to be the meaning
17 of a particular patent term, and you are saying that
18 that's a -- that's factual and that the decision whether
19 to credit that or not is a factual determination. But
20 how is that different from the ultimate legal question
21 that the Court has to answer, which is kind of the same
22 thing, it's how a person -- a skilled artisan in the
23 field, what -- what that person would understand a
24 patent to mean.
25 MR. JAY: Well, the difference is that the

1 instances, and they will be frequent, where it's not
2 kind of the same thing. Let me -- let me spell that
3 out. The first part of your question is, is what the
4 expert says factual, the meaning to skilled artisans.
5 And it absolutely is, just as it is in this Court's
6 contract and tariff cases where the Court specifically
7 says that the meaning of a term to people in a
8 particular field, to which the judge doesn't belong,
9 that's a fact question, and -- so as to whether there is
10 a specialized meaning.
11 But where there is no specialized meaning or
12 any specialized meaning is irrelevant because the patent
13 itself, through the process of document construction,
14 tells you what the answer is -- so, for example, here's
15 the ordinary meaning of this term, but that won't work
16 in the context of this patent because it would run up
17 against the canon of claim differentiation. That won't
18 in this patent because it would make the invention not
19 work. That wouldn't work in this patent because then
20 the preferred embodiment in the -- in the specification
21 wouldn't -- wouldn't be encompassed.
22 JUSTICE KAGAN: So what you're saying is
23 that in certain cases the factual finding truly is the
24 legal determination, but that in other cases, other
25 matters can come in to drive a wedge between the two.

1 MR. JAY: Correct. And I think that this is
2 a case where the out -- the facts come very close to
3 pointing to the correct outcome because --
4 JUSTICE KENNEDY: Two -- two cases, and this
5 is part of Justice Kagan's question, I think. Case one:
6 District judge says a reasonable police officer would
7 think this is probable cause. Case two: A person
8 skilled in the art would think that this was an average
9 molecular weight. Do the courts give the same deference
10 or lack of deference in each case.
11 MR. JAY: I think, as I understand your
12 question, Justice Kennedy, in each question the person
13 on the stand is actually opining about the ultimate
14 question. But if -- if I may, in each case -- for
15 example, if the -- if the question is did the police
16 officer see the gun, that -- that may rest on a
17 credibility finding about whether the police officer is
18 telling the truth or lying. The resolution of that
19 question may be absolutely dispositive of whether there
20 was probable cause or not, on and off. One way there's
21 probable cause; the other there isn't. But it's still
22 an underlying factual finding as the Court said in --
23 JUSTICE SCALIA: But to say -- to say -- I
24 don't -- I don't agree with your response to Justice
25 Kagan. To say that the -- that the fact-finding will be

1 dispositive of the legal question is not to say that it
2 is the same as the legal question, which is what I think
3 you responded. I don't think it's the same as the legal
4 question. The legal question is are you liable for
5 violating this patent. And indeed, it -- it may be
6 that -- that given a particular meaning that is
7 established by a factual finding, the outcome is -- is
8 virtually dictated, but it is not the same. It is not
9 the same question.
10 MR. JAY: I do agree that it's not the same.
11 It's not even -- it's not even the same as the ultimate
12 question of claim construction. But the -- the step
13 from the factual finding to the claim construction may
14 rest on something as simple as this: There is nothing
15 else in this patent to get me, the judge, off of the
16 ordinary meaning of this term to people with skill in
17 the art.
18 JUSTICE KAGAN: But how would you define the
19 standard? I mean, it's absolutely true what Justice
20 Scalia says, that at a certain level of generality there
21 is a gap. But I thought that in order to determine
22 liability, what the court has to inquire into is how a
23 person with ordinary skill in the relevant art at the
24 time of the invention would understand the claim. And
25 that seems like exactly the question that the expert is

1 testifying to.

2 MR. JAY: The expert is not testifying to

3 how the person of ordinary skill would understand the

4 patent writ at large. And the patent -- that is the

5 ultimate question for the Court. What the expert is --

6 can testify to and what Dr. Grant testified to in this

7 case is how particular terms in the patent have a

8 recognized meaning with -- within the art. The art is

9 not going to take a position on how the doctrine of

10 claim differentiation applies, for example, but the

11 skilled artisan can testify about what the established

12 meaning of the particular term is.

13 JUSTICE BREYER: So let me try this and if

14 you don't agree with it, just say no and I'll stop.

15 Okay?

16 MR. JAY: Okay.

17 JUSTICE BREYER: I thought the classical

18 distinction is pretty much what I think Justice Scalia

19 was driving at, that there are a certain number of

20 factual questions where the question is of the kind,

21 does this label belong on this thing, this thing being

22 not in dispute. It might be a South African yellow

23 canary up there. The statute might use the word "South

24 African yellow canary." But we are not certain whether

25 that is a South African yellow canary.

1 If we call in a bird expert who looks at it
2 and says it is, that is a question of fact. If we call
3 in a lawyer to say how are these words being used in the
4 statute and does that fit within it, then it is a
5 question of law.
6 MR. JAY: I think that that's basically
7 right, Justice Breyer. Though in this case, we have an
8 expert who came in to testify about why these terms have
9 a particular meaning.
10 JUSTICE BREYER: Yes. But we also have the
11 Federal Circuit in the two cases where you disagree with
12 the government accepting the fact that, in fact, the
13 experts or the lawyer who talked to the patent guy did
14 use the wrong words. They accept that. And then what
15 they say is, well, in their view it is that that didn't
16 really concern the Federal Circuit, but for the weight
17 that the judge gave when trying to interpret the terms
18 in the patent.
19 MR. JAY: Well --
20 JUSTICE BREYER: And that at least is a
21 legal question. Have I got that right basically, what
22 the argument is?
23 MR. JAY: That's more or less what they've
24 said.
25 JUSTICE BREYER: And what do you say in

1 response?
2 MR. JAY: I -- I say two important things in
3 response. One is that in predicting what the Federal
4 Circuit would do under the correct standard, I don't
5 think you can disaggregate the pieces of its incorrect
6 analysis because it rested on the -- on the view that
7 everything went in favor of Respondents and nothing went
8 in favor of Petitioners here.
9 But the second thing -- this is also very
10 important -- on the -- you alluded, Justice Breyer, to
11 the prosecution history piece, but that skips over the
12 very important piece, what the specification, the use of
13 size exclusion chromatography as the technique in the
14 specification teaches. And as the district court found,
15 page 43a-44a of the petition appendix, the presumed
16 meaning of that term "average molecular weight" when you
17 -- when you're using this technology is peak average
18 molecular weight. And the -- there are other
19 technologies such as osmometry and light scattering that
20 give rise to a different presumed meaning of what
21 average molecular weight is, because they produce
22 different measurements. But the only kind of peak
23 average that you can read from the chromatogram is peak
24 average molecular weight.
25 And the Federal Circuit went right by the

1 finding that the presumed meaning would be peak average
2 molecular weight and gave -- essentially treated the
3 three possibilities, peak, number and weight average, as
4 though they were equal. But that's not what the
5 district court found in the context of this technology.
6 JUSTICE ALITO: In a recent law review
7 article written by two authors, one of whom is a -- is
8 the deputy solicitor in the Patent and Trademark Office,
9 the office -- the authors said that they surveyed a very
10 large number of cases to try to find any in which the
11 difference between de novo review and clear error review
12 of factual questions by the Federal Circuit made a
13 difference in the outcome and they couldn't find any
14 case in which this fascinating legal debate had a
15 practical significance.
16 Now, you want to introduce a level of
17 complication to this. The Federal Circuit says de novo
18 for everything, and you want the court -- you want the
19 Federal Circuit now to struggle to determine which are
20 factual questions as to which there's clear error
21 review, which ones get de novo review, whether it's the
22 ultimate question. Is it worthwhile as a practical
23 matter?
24 MR. JAY: It is, Justice Alito. I'd like --
25 like to respond to your question and then, if I may, to

1 reserve my time for rebuttal unless you have follow-up.
2 First of all, does it matter? It does
3 matter. It matters in cases like this, and I don't know
4 whether the study that Your Honor referred to would pick
5 up this case because that's -- that's precisely the
6 problem. If you read the Federal Circuit's opinion in
7 this case, you -- it makes no reference to the
8 fact-findings as fact-findings and you would not
9 understand, for example, the finding that I was just
10 alluding to about presumed meaning because it's not
11 referred to anywhere.
12 There are a host of cases like that. There
13 have been for years. And more systematically, as
14 Professor Menell points out in his amicus brief, I think
15 pages 17 to 18, the de novo standard produces the
16 problem that encourages the Federal Circuit to blow
17 right by the skilled artisan's perspective. It doesn't
18 talk about it; it doesn't talk about the evidence that
19 supports it. So that's one point.
20 Another point is about whether the Federal
21 Circuit could handle this. This is the -- this is the
22 standard, disaggregating subsidiary factual questions
23 from ultimate legal questions, that courts of appeals
24 apply all the time and that the regional courts of
25 appeals did in fact apply before the Federal Circuit

1 came along. The best example of that is the Harries
2 case we've cited in our brief written by Judge Hand.
3 So to apply that standard practice we think
4 would not be unduly disruptive to the Federal Circuit,
5 and it would not insulate every single claim
6 construction from review. It simply would make the --
7 have facts treated as facts.
8 If I may, I'd like to reserve the balance of
9 my time.
10 CHIEF JUSTICE ROBERTS: Thank you, Mr. Jay.
11 Ms. Anders.
12 ORAL ARGUMENT OF GINGER D. ANDERS
13 ON BEHALF OF THE UNITED STATES,
14 AS AMICUS CURIAE
15 MS. ANDERS: Mr. Chief Justice, and may it
16 please the Court:
17 Just to start with the distinction between
18 factual findings and legal inferences here, we think
19 that factual findings are those that are based, at least
20 in part, on evidence that is outside the patent and its
21 prosecution history and that concern matters that are
22 distinct from the patent itself. So those could be
23 factual findings about what kind of data a particular
24 scientific technique produces or how the inventions,
25 prior inventions in the field worked. Those are factual

1 findings.

2 We then think that when the district court

3 takes those findings and now it can understand the --

4 the concepts that are described in the patent because

5 it's made those findings, when the district court takes

6 those findings and then looks at the patent and asks how

7 would a person of skill in the art interpret the words

8 in this patent in light of all the pieces of the patent

9 document and the canons of claim construction, those

10 inferences that it draws are legal ones.

11 So I think to take -- to take the size

12 exclusion chromatography as an example of this because

13 it's probably easier to discuss it concretely, I think

14 what happened there was that the district court made a

15 factual finding that when SEC is used the type of data

16 that -- that just is spit out is -- produces peak

17 molecular weight, and if you wanted to produce any other

18 measure of molecular weight you would need to do more

19 calculations. That's the factual finding that the

20 district court made.

21 It then took a look at the patent document

22 and said, in light of that, what inference can I draw

23 from the specifications referenced to SEC, and the legal

24 inference that it drew was that probably the patent

25 meant to refer to peak molecular weight when it used the

1 term "molecular weight." And I think the court of
2 appeals understood the factual finding in the same way
3 that the district court did. I think it accepted that
4 when you use SEC, the data that comes out is MP and you
5 would need further calculations to produce other types
6 of data. But what the --
7 JUSTICE GINSBURG: Why do you reject what
8 Mr. Jay tells us were also fact-findings?
9 MS. ANDERS: I'm sorry, Justice Ginsburg?
10 JUSTICE GINSBURG: I think you have just
11 told us that the peak, and that that's a fact-finding. But
12 you don't accept the other two things that Mr. Jay
13 characterized as fact-findings. Can you tell us why
14 not?
15 MS. ANDERS: Well, to take SEC first, I
16 think what -- I think we agree --
17 JUSTICE SCALIA: To take what first?
18 MS. ANDERS: SEC, which is the use of size
19 exclusion chromatography in the specification.
20 I think we agree that it's a fact-finding to
21 say that -- that if you use SEC, then peak molecular
22 weight is produced and that you'd need further
23 calculations to do other things. The district court
24 then made a legal inference where it said because --
25 because the specification uses SEC, we know that -- that

1 the patent, in the context of the patents-in-suit -- and
2 this is a quote from the district court's opinion: "In
3 the context of the patents-in-suit, the meaning of
4 'average molecular weight' must be peak molecular
5 weight."
6 That's a legal inference because it's --
7 it's taking one part of the document and using it to
8 interpret another part of the document. The Court in
9 Markman said that that is classic textual analysis, when
10 you look at the patent and you say, this part of the
11 specification tells me something about the claims.
12 So we think with respect to SEC what the
13 Federal Circuit did was it disagreed with the legal
14 inference that the -- that the district court made.
15 JUSTICE KAGAN: But suppose an expert just
16 says, in my field skilled artisans think that molecular
17 weight means the following. Is that a -- and then the
18 district court accepts that finding. Is that a factual
19 determination in your view? Because I think Mr. Jay
20 would say it is.
21 MS. ANDERS: I think -- well, first of all,
22 that's not what the district -- what the expert
23 testified to here and what the district court found, so
24 I think we disagree about what the district court
25 actually said in its opinion.

1 But if that were what the expert testified
2 to, then I think that would be a statement of fact, that
3 in -- in the world we understand generally that SEC
4 means MP. I think that would be a finding of fact.
5 But I would make two points about that. The
6 first is that there is then a significant legal analysis
7 that the district court has to do to figure out how to
8 construe the patent, and I think that's particularly
9 clear in the context of indefiniteness, which is what
10 this case is about, that even if the district court has
11 some evidence that generally artisans might understand a
12 term in a particular way, the court then has to look at
13 the claims themselves, the terms that -- that surround
14 the term we're trying to construe, the specification,
15 the embodiments in the specification, the prosecution
16 history. It has to look at all of that and decide,
17 given all of that, would a person of skill in the art be
18 reasonably certain about how to construe this patent.
19 So that is a legal inquiry that the court
20 would have to do after receiving the fact-finding.
21 CHIEF JUSTICE ROBERTS: Under your view, two
22 different district courts construing the same patent
23 could come out to opposite results based on a subsidiary
24 factual finding, and neither of those would be clearly
25 erroneous, and yet on a public patent that is going to

1 bind a lot of other people, people won't know what to
2 do. You have two different interpretations of the
3 patent. What happens then?
4 MS. ANDERS: Well, I think that concern is
5 overstated for -- for two -- two reasons. I think the
6 first is that it's -- it's pretty unlikely that that
7 scenario is going to occur, and the second is that, even
8 in the rare circumstances in which it did, there are
9 reasons to think that that's not actually a -- a problem
10 from a policy standpoint.
11 So -- so just to elaborate on that, I think
12 because -- because this inquiry needs to remain
13 primarily legal, because even after the court makes
14 fact-findings, it needs to engage in a contextual
15 analysis of the patent as a whole in light of the canons
16 of claim construction, we think that the legal questions
17 are generally going to predominate in the --
18 CHIEF JUSTICE ROBERTS: Well, that's just
19 kind of avoiding the question. I mean, you can easily
20 envision this case coming up differently in the district
21 court depending upon what district courts find as the,
22 you know, accepted understanding to artisans.
23 And again, each of those opposite results,
24 neither one may be clearly erroneous.
25 MS. ANDERS: Well, I think another point is

1 that district courts I think have a way, have ample
2 tools to try to avoid that scenario from occurring.
3 They can, when there are seriatim cases, there can be
4 pre-trial coordination in the same district so that --
5 so that the situation doesn't arise. Of course,
6 preclusion will -- will prevent a patentee from having
7 an issue of claim construction decided against it and
8 then coming back and trying to relitigate the issue.
9 JUSTICE BREYER: What do we do when there's
10 a bus accident on a technical thing and different people
11 who were injured sue in different places at different
12 times? Same problem, isn't it?
13 MS. ANDERS: I'm --
14 JUSTICE BREYER: Same problem. I mean, you
15 can think of a thousand cases like that where -- where
16 you have a big bus accident, technical problem with the
17 motor, different place -- people from different places
18 who are victims and they sue in different places at
19 different times. Juries or tried to the bench, they
20 could reach different factual conclusions.
21 MS. ANDERS: I think that is exactly
22 right and I think --
23 JUSTICE BREYER: All right. So what do we
24 do --
25 CHIEF JUSTICE ROBERTS: No. It's because

1 you have a patent which is a public document that is
2 binding the world in terms of what other inventors can
3 do and another inventor looking at it can say, well,
4 what can I do?
5 JUSTICE BREYER: Right.
6 CHIEF JUSTICE ROBERTS: He doesn't know.
7 That is very different than just a particular negligence
8 case that comes up.
9 JUSTICE BREYER: Yeah, I was actually
10 curious what we did, because I can think of examples in
11 antitrust, I can think of examples in corporate law, I
12 can think of examples versus every area of the law,
13 where often it does happen, as the Chief Justice says,
14 it could -- the different factual things have enormous
15 public implications.
16 What I was interested in and asked because I
17 wanted to know, what are the legal devices for dealing
18 with that?
19 MS. ANDERS: Well, I would make two points.
20 I think that, first, because of the way preclusion
21 works, it only runs against the patentee. All right.
22 So if the patentee loses on an issue of claim
23 construction or indefiniteness, he cannot then
24 relitigate that issue, but other -- other accused
25 infringers can relitigate it and try to build a better

1 record.

2 We actually think that that -- that keeps

3 this from being a policy problem, the possibility that

4 you could have a subsequent decision that reaches a

5 different conclusion.

6 JUSTICE SCALIA: I guess a deed is a private

7 document that's -- has public effect, right? It

8 prevents certain people from trespassing on the property

9 that is conveyed, and I suppose that could be construed

10 in the various courts that reach different results. So

11 the mere fact that -- that this binds the public is --

12 is not conclusive.

13 MS. ANDERS: I think that's right. And of

14 course in the patent system now, there's a -- there's

15 toleration of a certain amount of disuniformity and I

16 think that's because we generally think that there are

17 other values that -- that supersede that uniformity.

18 So, for instance, you could have, in the case of

19 infringement, you can have two different accusers in

20 different suits; one makes a better record than the

21 other, and the patent could be held to infringe one

22 product but not infringe another materially similar

23 product.

24 JUSTICE ALITO: And you say that factual

25 findings that are subject to clear error review must be,

1 quote, "in some sense distinct from the meaning or
2 validity of the patent." I don't understand what that
3 means when the issue is the meaning or validity of the
4 patent. If the evidence is -- is relevant, then it
5 is -- there is a connection. So what does that mean, in
6 some sense distinct?
7 MS. ANDERS: Well, it means that the
8 district court is making a finding based on -- based on
9 science, based on expertise, somebody's -- somebody's
10 expertise in the field and making a finding about a
11 matter that isn't just what does this term mean in the
12 patent. It's making a more broad finding.
13 So for instance, what does this type of
14 scientific process, what type of data does it produce?
15 You can say that's related to the patent because of
16 course the patent uses SEC and one question is what kind
17 of data does it produce. But it is also a finding of
18 fact to say, as a general matter, the way science works
19 is that SEC produces MP without further calculation.
20 JUSTICE ALITO: Well, that sounds like every
21 factual finding. It sounds like you're saying that
22 anything that is a factual issue is subject to clear
23 error review. But I thought you were saying something
24 less than that.
25 MS. ANDERS: Well, I think that’s a factual

1 finding, but then what the district court has to do is
2 take that information which allows it to assume the --
3 the perspective of a skilled artisan and then decide
4 what it tells it about the patent itself. And that's a
5 question of looking at -- at the document itself. So
6 the fact that the patent uses SEC, does that raise an
7 inference about what the term "molecular weight" in the
8 patent means or not. That's a question of textual
9 analysis.
10 CHIEF JUSTICE ROBERTS: Thank you,
11 Ms. Anders.
12 Mr. Phillips.
13 ORAL ARGUMENT OF CARTER G. PHILLIPS
14 ON BEHALF OF RESPONDENTS
15 MR. PHILLIPS: Thank you, Mr. Chief Justice,
16 and may it please the Court:
17 It seems to me that the two questions that
18 were asked in the opening portions to my colleagues and
19 friends -- one came from Justice Alito, one came from
20 you, Mr. Chief Justice -- are matters that this Court
21 already has effectively decided in the Markman case and
22 are the reason why de novo review is appropriate under
23 these circumstances.
24 In effect, Justice Alito asked the question
25 is all of this worth the candle, because the debate

1 between the government and the Petitioner in this case
2 and the difficulty of trying to decide which facts do
3 you defer to and which ones don't you defer to and when
4 is it a credibility determination, when is it not. This
5 Court said unanimously more than 15 years ago in Markman
6 that all of those kinds of issues get subsumed within
7 the fundamental question of how best to interpret the
8 patent, and that that's the ultimate question and that's
9 a legal question, and therefore, all of the disputes,
10 factual in nature or however you want to describe them,
11 get subsumed within that. It seems to me the final --
12 the ultimate conclusion from that then is whatever
13 determination is made is ultimately subject to de novo
14 review.
15 JUSTICE BREYER: I think that Markman just
16 dealt with judge/jury, not which court gets the fact up
17 -- decides the facts basically, which is where I do
18 start. So if you want to -- but if I take that as a
19 given, then I'd say why should you treat fact matters
20 here any different than any other case. The main reason
21 for letting the district judge, I've always thought,
22 decide facts as an initial matter in a technical case is
23 because there are all kinds of facts, you know. We
24 happen to have some particularly odd definitional ones
25 here, but there are all kinds of facts. In technical

1 cases, there are all kinds of facts. And the
2 traditional reason is you've seen the witnesses -- but
3 there is one thing he's done that the -- that the court
4 of appeals has not done, and in a technical case, it
5 seems to me that makes an enormous difference. He sat
6 there the whole time and listened to these experts talk.
7 MR. PHILLIPS: Actually, that's not true.
8 JUSTICE BREYER: And that, I think, is a
9 very powerful reason for saying in a technical case,
10 don't overturn the judge's factual findings whether they
11 are -- particularly scientific matters, but no
12 particularly here -- unless those three judges who will
13 not even read the whole record normally and certainly
14 won't hear those witnesses, don't let them do it unless
15 they are convinced that it is clearly erroneous.
16 Now, that's the argument, and I would like
17 to say that's different from a statute.
18 MR. PHILLIPS: Right. But it's not --
19 JUSTICE BREYER: Whether or not it is
20 different from the -- it's different from -- it's the
21 same as any technical case. Now, why is this different?
22 MR. PHILLIPS: I think, Judge, that's the
23 question the Chief Justice asked, which isn't it
24 possible and isn't it likely when we gave you the
25 example of seven district courts interpreting three --

1 JUSTICE BREYER: But I mean, that same
2 thing, as we know, could happen in dozens of -- of
3 technical cases.
4 MR. PHILLIPS: Right. But --
5 JUSTICE BREYER: And you go on importance, I
6 could make up some important hypotheticals. You want
7 trivial ones, I'll make up some of those. You want to put
8 a definition on a thing, fine. You know, we can all
9 both -- and you're probably better than I am at it. And
10 you say is that the only answer that patents are somehow
11 different?
12 MR. PHILLIPS: Yes. Patent claim
13 construction is different. I think that's exactly what
14 this Court said in Markman --
15 JUSTICE GINSBURG: Can we go -- can we go
16 back to the question? If it's technical, it's all right
17 for the judge to find the fact. I thought in our
18 Seventh Amendment cases we have rejected the notion that
19 if an issue is difficult, technical, the judge can
20 decide it even though it's a fact.
21 MR. PHILLIPS: Right. No. There are lots
22 of -- there are lots of technical issues that juries are
23 allowed to decide. What the -- what the Court
24 recognized in Markman was that the nature of the inquiry
25 under claim construction -- and it's important to just

1 step back for a second and put it in context.
2 Claim construction is based, first, on the
3 plain language of the claims. Regardless of whether
4 they are written for scientists or not, you're supposed
5 to start with the plain and ordinary meaning of the
6 claim language itself. And then as construed through
7 the specifications, which are, again, designed to
8 provide a reasonably clear exegesis of what the patent
9 and the invention is, what the claims mean. And then
10 you have the prosecution history, which can, in some
11 instances, be complicated.
12 But in this particular instance where the
13 very specific word in this patent was inquired about by
14 two patent examiners, experts in the subject matter, and
15 asked what does average molecular weight -- excuse me --
16 mean in this context, they got the answer peak asked in
17 the exact same context they got the answer weight. And
18 what is -- I mean, the notion in that circumstance that
19 this is not indefinite under the -- in this situation
20 seems to me completely indefensible.
21 JUSTICE KAGAN: Mr. Phillips --
22 MR. PHILLIPS: And that --
23 JUSTICE KAGAN: I'm sorry.
24 MR. PHILLIPS: No, go ahead.
25 JUSTICE KAGAN: Is your argument that there

1 are no subordinate factual determinations in these kinds
2 of cases or as you opened by saying, as your argument,
3 sure, there are factual determinations; we can come up
4 with a zillion of them, but it's not worth the candle to
5 figure out which is which.
6 MR. PHILLIPS: It's not -- it's not worth
7 the candle because all you're going to do is create a
8 cottage industry of trial lawyers fighting with the
9 judge about which bucket some particular evidence fits
10 into and whether you can -- whether it's --
11 JUSTICE BREYER: But normally, normally is
12 not difficult to distinguish the one from the other.
13 Sometimes it is. But in the cases where it isn't, which
14 I think are vast, did that dial read 7? I have 4
15 witnesses who said it did, and I have 3 witnesses who
16 said it read 5. And now let's complicate that, but it
17 all has to do with what happened in a laboratory at a
18 particular time. Are we going to have the 3 people from
19 the Federal Circuit going in and second-guessing the
20 judge without giving him any weight on that kind of
21 factual question, which I suspect, I have no reason to
22 believe it won't, will turn up comparatively just as
23 often?
24 MR. PHILLIPS: Justice Breyer, I think
25 that -- I mean, I don't want to go to war with your -- I

1 don't want to go to war with your hypothetical.
2 JUSTICE BREYER: I want the answer. I want
3 the answer.
4 MR. PHILLIPS: The problem with the
5 hypothetical is that it assumes that there -- that there
6 will be instances in which the question of pure science
7 is a matter about which there is disagreement. And
8 that --
9 JUSTICE BREYER: What happened in --
10 MR. PHILLIPS: And it's very, very uncommon
11 and that's why it's not worth -- this Court -- this
12 Court said it specifically in Markman. It said, "Our
13 experience in interpreting documents teaches us that
14 they will rarely, if ever, be resolved."
15 And the evidence we have from the patent
16 office is never resolved on the basis of differences of
17 opinion by an expert under -- under these circumstances.
18 So as I was saying before, what are you doing? You're
19 creating a cottage industry --
20 JUSTICE KAGAN: But Mr. Phillips, if that's
21 your argument, I mean, then you'd just have to deal with
22 Rule 52(a) because Rule 52(a) sets out the very blanket
23 rule. It doesn't say except where it's not worth the
24 candle. It just says what it says, that these are
25 matters for the trial court.

1 MR. PHILLIPS: But if -- but if, as this
2 Court said in Markman, treating interpretative issues as
3 purely legal and the reason for doing that is to avoid
4 the problem the Chief Justice identified, which is that
5 otherwise, you're going to end up with a single document
6 that is binding on the rest of the world having
7 inconsistent meanings and, therefore, it is different.
8 It is different from every other issue in patent law,
9 and I think it's different from every other issue of
10 litigation. It is a --
11 JUSTICE GINSBURG: Explain why it's
12 different from obviousness because the other side said,
13 well, why shouldn't the fact law division for claim
14 construction be the same as it is for obviousness.
15 MR. PHILLIPS: Right. And the reason is, is
16 that obviousness carries with it a whole slew of
17 additional factual questions that ultimately will
18 predominate whereas -- and also begins with the
19 proposition this is what the claim means. All right.
20 So you start with that as a given, which is a pure
21 question of law.
22 The obviousness issue at that point can turn
23 on the success of the -- of the product, can turn on how
24 the market responded to it. Those are lots and lots of
25 pure factual issues that this Court had already

1 recognized in John Deere -- Graham v. John Deere, and
2 said, you know, there's no reason to have pure question
3 of law even if at the end of the day there is a question
4 of law.
5 What I took Markman to mean -- I'm going to
6 go back to that same language -- treating interpretative
7 issues as purely legal is that there are -- is that
8 it's -- it is, it's literally not worth the candle, that
9 the right way to analyze it. The only way effectively
10 to provide notice to the world is to have one court
11 that's expert make the final judgment. That's the other
12 part of the analysis, it seems to me at least, worth a
13 little bit of comment, which is which is the better body
14 for making this decision?
15 You say, Justice Breyer, you like the
16 district court because the district court, 1, may have
17 the opportunity to -- to listen to the witnesses,
18 although in this case, claim construction was done
19 strictly on the papers. There were no witnesses who
20 testified.
21 But number 2, if you go back to what the
22 ultimate inquiry is, which is what does the term mean in
23 the context of the patent, which is what Markman says,
24 so it's got to be against the claim language, the
25 specification and the prosecution history, what -- what

1 are we -- what is the undertaking there, under those
2 circumstances, treating it -- giving that kind of a
3 decision-making process, which is something Federal
4 Circuit does every day.
5 JUSTICE BREYER: I mean, it isn't that I
6 like it better. It is that Rule 52(a) says that
7 fact-finding of the district court should be overturned
8 only for clear error. And once I start down this road,
9 well, that's true on some facts and not other facts,
10 and -- and I get into this. See, I'm not an expert. I
11 don't see where the stopping place is. I don't see how
12 to manage the system and I am moved by the fact that the
13 lawyers here are pretty much -- who know patent law are
14 pretty much in favor of district courts as far as amici
15 are concerned. They're pretty much in favor of district
16 courts making the fact-finding. So -- so I don't see
17 where to go to start drawing the lines you want to draw.
18 MR. PHILLIPS: I'm -- I'm not sure I -- I
19 agree with your assessment about how comfortable the
20 world is with the district courts making fact-finding in
21 the patent context. My experience is --
22 JUSTICE BREYER: I don't know. Rule 52(a)
23 and that's the -- what do I do about that?
24 MR. PHILLIPS: And it seems to me Markman
25 answered 52(a). Markman says it's a pure question of

1 law and it should all be treated as a pure question of
2 law in order to guarantee uniformity and to provide
3 adequate notice to the world.
4 JUSTICE ALITO: So if a patent is --
5 JUSTICE SOTOMAYOR: Can I clarify a point
6 that you made in response a little earlier? You said
7 that this was not a hearing. It is a hearing, but is it
8 always on papers?
9 MR. PHILLIPS: Doesn't have to be. But in
10 this context, this was all done on the basis of the
11 submitted declarations and -- and depositions.
12 JUSTICE SOTOMAYOR: So there was no live
13 hearing.
14 MR. PHILLIPS: There was no live hearing on
15 this, no.
16 JUSTICE KENNEDY: Well, Markman hearings
17 certainly have expert testimony, don't they?
18 MR. PHILLIPS: They can. They don't have
19 to. You don't have to have Markman --
20 JUSTICE KENNEDY: When they do have expert
21 testimony, you want it to say that that's -- it doesn't
22 involve any findings of fact to which the court of
23 appeals must defer.
24 MR. PHILLIPS: Yes. I mean, I think that's
25 the right answer. And the reason for it is, is that,

1 again, you've got to put it in context. And if you use
2 the government's theory, it's particularly striking
3 which is if it's a dispute about a scientific principle
4 apart from the patent, they're virtually -- that doesn't
5 happen. I mean, you can read the first 25 pages of
6 Grant's declaration. There is no disagreement between
7 anything he said and anything that our experts said on
8 any of those general principles of law.
9 It is only when you get to the
10 interpretation in the context of the patent, which is
11 language he uses repeatedly, and then tries to -- tries
12 to take his interpretation, his reading of the patent,
13 elevate it to a finding of fact and giving deference to
14 the decision-making of the district court.
15 JUSTICE SCALIA: So what do you want the
16 district court to do? Do you want the district court,
17 nonetheless, even though what it finds is not going to
18 be given any deference, do you want them to listen to
19 witnesses?
20 MR. PHILLIPS: Of course.
21 JUSTICE SCALIA: Or to take at least written
22 testimony where there's what you say is a rare
23 scientific question comes up?
24 MR. PHILLIPS: No --
25 JUSTICE SCALIA: Even if it's going to be

1 decided by the court of appeals, why should the -- why
2 should the district court have any witnesses at all?
3 JUSTICE KENNEDY: And why should it say that
4 if you want also just to follow the same question
5 just -- not to separate conclusions of law -- findings
6 of fact and conclusions of law, that's all out.
7 MR. PHILLIPS: Well, in reality --
8 JUSTICE KENNEDY: No findings of fact at
9 all.
10 MR. PHILLIPS: Well, I mean, actually, the
11 claim construction analysis is just a claim construction
12 analysis when she goes through it. She doesn't -- the
13 district judge didn't accord findings of fact,
14 conclusions of law analysis to it in the first place.
15 She just analyzed each of the claims including the
16 average molecular weight.
17 JUSTICE SCALIA: So this district judge
18 should not have even taken this testimony; is that it?
19 MR. PHILLIPS: Well, no, I think it's
20 perfectly sensible to take the testimony.
21 JUSTICE SCALIA: Why? Why?
22 MR. PHILLIPS: Because it helps inform
23 even the district judge's understanding of what the
24 patent is about in order to be able to apply the claim
25 language, the specification, and the prosecution

1 history.

2 Remember, at the end, all you're talking

3 about is if you can't figure it out from everything else

4 that's in front of you, which you should be able to,

5 will there be a situation where there is some testimony

6 about a scientific principle, apart from the patent,

7 that could get you there, and the situation is virtually

8 unheard of. The patent office says no.

9 JUSTICE ALITO: Mr. Phillips, can I try this

10 out and see if you agree with me.

11 If a patent is like public law, if it's like

12 a statute or like a rule, then factual findings

13 regarding the meaning of that patent are not entitled to

14 clear error review.

15 MR. PHILLIPS: Right.

16 JUSTICE ALITO: Any more than factual

17 findings regarding the meaning of a statute are -- or

18 the Constitution are entitled to plain error review.

19 What was the original understanding of the Second

20 Amendment? That's a factual question, but it's not

21 subject to plain error review. What did Congress intend

22 if you think Congress intended things? That's a factual

23 question, but it's not subject to plain error review.

24 Now, on the other hand, if a patent is

25 private law, if it's like a deed or if it's like a

1 contract, then Rule 52(a) comes into play.
2 Do you agree with that?
3 MR. PHILLIPS: Yes, I agree with that. As
4 I've said all along --
5 JUSTICE ALITO: So it all turns on which --
6 how we --
7 MR. PHILLIPS: Which one you think it's
8 closer to.
9 JUSTICE ALITO: Okay.
10 MR. PHILLIPS: But actually, I think Markman
11 answered that, because I think Markman recognized that
12 this is a public document that is going to be binding on
13 third parties, and that therefore ought to be construed
14 as a matter of law in order to ensure the stare decisis
15 component of it. And they rejected it. Remember, the
16 Court -- this Court specifically rejected the
17 alternative argument put forward, I think by the
18 government's lawyer, suggesting that you can use
19 collateral estoppel and other methods of dealing with
20 fact-findings or fact determinations. This Court said
21 no, that's not adequate. You need stare decisis in
22 order to guarantee the kind of uniformity that only the
23 Federal Circuit can apply --
24 JUSTICE BREYER: How many patents do they
25 issue a year about, do you have any rough idea?

1 MR. PHILLIPS: I'm sorry. How many patents?
2 JUSTICE BREYER: How many patents are issued
3 every year? Roughly. Do you have any idea?
4 MR. PHILLIPS: I don't. The SG's lawyer
5 would almost certainly be in a better position to answer
6 that. But obviously it's a significant number of them.
7 JUSTICE KAGAN: Mr. Phillips, there might be
8 very different kinds of factual determinations that are
9 relevant to patentability than are relevant to
10 interpretation of a statute, so let me just give you
11 one. I mean, suppose that the validity of a patent
12 depended on when a particular invention was made. You
13 know, was it done in 1980 or was it done in 2000.
14 MR. PHILLIPS: Right, the priority date.
15 JUSTICE KAGAN: And that was absolutely
16 critical to your determination of whether a patent was
17 valid. But that seems like so within the province of
18 the trial court and --
19 MR. PHILLIPS: You mean -- or the jury.
20 JUSTICE KAGAN: How do I deal with that?
21 MR. PHILLIPS: Yes, but that's -- that's the
22 priority date and the priority date's always been
23 recognized as a question of fact. I mean, the court --
24 JUSTICE KAGAN: So a question of fact which
25 the trial court ought to get deference on, no?

1 MR. PHILLIPS: Yes, absolutely. But that's
2 not -- that's not a claim construction issue.
3 That's just a question of what is the
4 priority date for purposes of -- you have to go outside
5 the patent to get that. Because you've got to be -- you
6 have to find out at what point other things were
7 available, you know, how does it react to other filings
8 that would have been made?
9 JUSTICE KAGAN: I see, but are you saying
10 that there aren't similar things that could arise within
11 the context of claim construction, just different
12 people's view of what the facts on the ground are? You
13 know, is molecular weight usually measured in
14 kilodaltons or something else.
15 MR. PHILLIPS: Yes, but that's the whole
16 point. There isn't any disagreement about that. Most
17 of the -- of those kinds of issues that are completely
18 distinct from the patent itself where you're not just
19 trying to figure out the language of the patent, there
20 are very few differences of opinion about it. Everybody
21 acknowledged, even the Federal Circuit acknowledged that
22 suggesting that average weight was -- implied average
23 molecular weight, weight average molecular weight was
24 implied by the reference to kilodaltons, right, was a
25 misstatement of law. It was a misstatement of science.

1 But I think quite rightly, then drew the
2 precise legal conclusion that I would hope this Court
3 would affirm, which is that when a patent holder
4 identifies flatly inconsistent positions in the
5 prosecution history in order to get two separate patents
6 issued, one using a measure for one and one using a
7 measure for the other, where -- where, just to be clear
8 about this, this patent is all about molecular weight.
9 The whole purpose of this was to get --
10 JUSTICE SOTOMAYOR: Mr. Phillips, why do you
11 think that the court below just didn't make that
12 holding? To be frank with you, when I read the
13 background of this case, your intuitive or your reaction
14 was my own.
15 MR. PHILLIPS: Right.
16 JUSTICE SOTOMAYOR: But they didn't. They
17 didn't actually say that clearly enough. And I'm going
18 to ask on the rebuttal what Mr. Jay would say if they said
19 that. Is that an issue of law? If you have
20 inconsistent positions in patent prosecution, you're
21 bound.
22 MR. PHILLIPS: Yes. I mean, I think
23 that's -- I mean, whether you can -- whether it's an
24 estoppel, I don't know, but whether it's the best way to
25 interpret the patent, regardless of what else there is

1 in the record and the evidence, I think that's one place
2 where the Solicitor General and we are in complete
3 agreement, that the one thing you cannot do is take
4 fundamentally inconsistent positions in the prosecution
5 history, create a record that says, average weight means
6 -- average molecular weight means weight and average
7 molecular weight means peak, when the whole purpose of
8 this exercise is to get the weight into a certain range
9 of kilodaltons in order to protect it against toxicity.
10 I mean, that's the whole patent. You would
11 have thought in the ordinary course, if I were writing a
12 patent, and I thought everything turned on average
13 molecular weight, I might actually bother to define the
14 term.
15 JUSTICE BREYER: All right. That may be
16 true, but what you -- and I know I'm not going to get an
17 answer from you, because I know what it would
18 be.
19 MR. PHILLIPS: Well, you always get an
20 answer from me.
21 JUSTICE BREYER: My question is, where are
22 we going if we start carving out one aspect of the
23 patent litigation, namely the construction, and say that
24 fact matters underlying that, root facts, even when they
25 are one witness versus another, are for the court on

1 review to decide, but in all other matters, they're
2 really clear error. I don't know where I'm going with
3 that, because I'm not an expert in this area. But you
4 see that I'm nervous about it?
5 MR. PHILLIPS: I do. And I guess what I
6 would suggest, Justice Breyer, and hopefully this is an
7 answer to your question, is that the Federal Circuit has
8 followed this path for well more than 20 years.
9 JUSTICE BREYER: Oh, you've seen the figures
10 in here. The figures are they followed the path and
11 they reverse non-stop and it's, like, 30 percent or 40
12 percent of all the cases get reversed.
13 MR. PHILLIPS: But those numbers have
14 continued to come down, and the reason they've continued
15 to come down is that there was an enormous fight between
16 both the district courts and the Federal Circuit about
17 the methodology of claim construction. But the en banc
18 decision of the Federal Circuit in Phillips made it very
19 clear, you look at the claims, the specification, the
20 prosecution history, the learned treatises and
21 dictionaries, and as a last recourse, if need be, you
22 can turn to experts to help you understand it.
23 And nobody -- and I'm not discouraging,
24 Justice Scalia, the use of experts. I mean, there is
25 reason to testify. Anybody who wants to understand

1 certain kinds of patents are going to want to have
2 experts come in. I can guarantee you parties are not
3 going to present these cases to the judge without coming
4 in with a tutorial that provides a very good explanation
5 of how that patent operates.
6 All of that's legitimate. And I would give
7 a district court, if I were the Federal Circuit, the
8 deference that the district judge is otherwise entitled
9 to based on the strength of the argument to kind of --
10 the kind of lesser deference courts pay to courts -- to
11 administrative agencies in certain circumstances.
12 JUSTICE GINSBURG: You're talking about
13 Skidmore.
14 MR. PHILLIPS: Skidmore, thank you. I was
15 looking for the word, but it wasn't coming to me.
16 You know, the notion that you're entitled
17 to whatever deference the -- the power of your logic
18 gets you to. But if you use that test here where, as I
19 said, Justice Sotomayor --
20 JUSTICE SCALIA: If you're right, we'll say
21 the same thing. I mean, you could call that deference
22 if you like, but --
23 MR. PHILLIPS: Well, it's a measure of --
24 but at least it gives the district court an incentive to
25 do harder work in order to be in a position to lay claim

1 to more deference.

2 But what we do know here is that the -- the

3 fundamental -- the prosecution history creates to my

4 mind an insolubly ambiguous patent and there's no way

5 out of that box. And then what the district -- what the

6 court of appeals said is, is there anything in the SEC

7 calibration data or the shifting of this and that that

8 somehow makes this suddenly become definite enough, and

9 the answer to that is no, none of that does anything

10 except suggest to a person of skill in the art that peak

11 could potentially have been a legitimate way to

12 interpret that.

13 But none of that gets you out of the box.

14 And indeed, every time their expert testified to this he

15 kept saying, well, it's because the prosecution history

16 refers to peak. But that's only because he discounted

17 the other half of the prosecution history that referred

18 explicitly and completely to the weight.

19 And it's in that context that I would hope

20 that this Court, if it decides to go past de novo, if it

21 thinks this exercise is worth the candle, will go beyond

22 just simply saying there's a new standard to be applied

23 and analyze each of the facts of the -- that have been

24 put before the Court by the Petitioner, and make a

25 determination because it's -- one, it would be very

1 helpful to know what the indefiniteness standard means
2 in light of last year's decision in Nautilus and that
3 can be elucidated here. But two, it seems to me that,
4 whatever else you want to say about this, this is a
5 hopelessly indefinite set of claims. It is not entitled
6 to protection. It should be regarded -- it should be
7 regarded as invalid, and my client should be able to go
8 forward with the generics that would bring this medicine
9 to -- at less expense to the population.
10 If there are no further questions, Your
11 Honors.
12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 Mr. Jay, 3 minutes.
14 REBUTTAL ARGUMENT OF WILLIAM M. JAY
15 ON BEHALF OF PETITIONERS
16 MR. JAY: Thank you, Mr. Chief Justice. I
17 would like to make, I think, five points.
18 One is in response to Mr. Phillips's
19 suggestion that there aren't going to be many cases with
20 contested facts. This is a case with contested facts.
21 This is a case in which -- let's talk about figure one
22 in particular because we didn't touch on that as much in
23 the top half of the argument.
24 The meaning of figure one is crucial to the
25 Federal Circuit because it said its understanding of

1 figure one was that it made it hard to credit our
2 interpretation of the patent. But there was directly
3 opposed scientific evidence in the district court, would
4 the peak shift or would it not shift. Dr. Ryu said,
5 page 375a of the joint appendix, no, it wouldn't. The
6 district court found as a fact that, yes, it would.
7 JUSTICE GINSBURG: Why does the government
8 disagree with you about that?
9 MR. JAY: The government agrees with us
10 100 percent about figure one and I think the government
11 says, and we agree with this as well, the error on
12 figure one is itself a sufficient basis to remand. And
13 what might happen on remand I think you can't
14 necessarily predict because you can't disaggregate the
15 -- all of these de novo conclusions from each other.
16 JUSTICE GINSBURG: Which From the facts that you
17 say are facts and the government says do not qualify as
18 to their test.
19 MR. JAY: The government says that the SEC
20 point about presumed meaning, and I think -- the
21 government doesn't pay sufficient attention to the
22 presumed meaning fact-finding. But we disagree on that,
23 and on -- relating to the prosecution history.
24 Now, Mr. Phillips alluded to the prosecution
25 history, and, Justice Sotomayor, this gets to your

1 question that you asked me to address. Can the
2 prosecution history by itself answer this case, and the
3 answer is no, it can't. The Federal Circuit couldn't
4 say that it did because when you have a patent that is
5 sufficiently definite in light of the specification,
6 that's the end of the matter.
7 As the Federal Circuit said in Phillips, the
8 prosecution history ranks below the specification as an
9 interpretative aid, and if the patent is sufficiently
10 definite in light of the specification, and we say that
11 it is, and Dr. Grant said that it was -- Dr. Grant
12 referred to a number of things besides what Mr. Phillips
13 just told you about why peak was the more likely
14 meaning. So, for example, number average and weight
15 average are usually seen together, peak by itself.
16 JUSTICE SOTOMAYOR: I'm sorry, you didn't
17 answer my question. If the Federal Circuit just simply
18 said, mistake or not, you said it, you said it was
19 molecular weight, not peak, you're stuck.
20 MR. JAY: It can't say that, Justice
21 Sotomayor, because its own doctrine says -- what you're
22 positing is some kind of disclaimer, and a disclaimer --
23 JUSTICE SOTOMAYOR: No, I'm positing an
24 estoppel of some sort.
25 MR. JAY: Well, whichever way you see it,

1 that rises -- that requires a clear and convincing
2 standard, a clear and unambiguous standard that they did
3 not apply here, they could not apply here. And in
4 particular what we have now is the '808 patent. These
5 two statements were made 4 years and 6 years after the
6 '808 patent issued. If it was definite when it issued,
7 it's still definite today.
8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 The case is submitted.
10 MR. JAY: Thank you.
11 (Whereupon, at 11:02 a.m., the case in the
12 above-entitled matter was submitted.)
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