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IN THE SUPREME COURT OF THE UNITED STATES

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JERRY W. GUNN, ET AL., :

Petitioners : No. 11-1118

v. :

VERNON F. MINTON :

- - - - - x

Washington, D.C.

Wednesday, January 16, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

JANE WEBRE, ESQ., Austin, Texas; on behalf of
Petitioners.

THOMAS M. MICHEL, ESQ., Fort Worth, Texas; on behalf of
Respondent.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next this morning in Case Number 11-1118, Gunn v. Minton.

Ms. Webre?

ORAL ARGUMENT OF JANE WEBRE

ON BEHALF OF THE PETITIONERS

MS. WEBRE: Mr. Chief Justice, and may it please the Court:

In Grable, this Court explained that "arising under" jurisdiction demands, not only a contested Federal issue, but a substantial one embedded in a State claim in order to indicate whether there is a serious Federal interest in exercising Federal jurisdiction over the State claim.

This Court should reverse the judgment below because Minton -- Mr. Minton's claims do not present a substantial Federal issue, and exercising Federal jurisdiction over his claim and legal malpractice claims like his, State legal malpractice claims would --

JUSTICE GINSBURG: The question is whether the experimental use -- whether that was a viable theory. Why isn't that a substantial -- what do you mean by, "substantial"?

1 MS. WEBRE: Well, Your Honor, defining
2 substantiality is a difficult point. I -- I would
3 answer in two layers. First, Mr. Minton's claim did not
4 involve a legal question of does the -- how does the
5 experimental use doctrine work; how is it applied, what
6 are its parameters?

7 The question was did his fact-bound and
8 situation-specific affidavit present relevant evidence
9 of the application here in this particular case. And it
10 is not a substantial question because, first, from a --
11 a unique case perspective, it involved merely a
12 hypothetical determination.

13 There were no actual patent rights that
14 would be at issue. Those were already fully, finally,
15 irrevocably determined in the underlying patent
16 litigation in Federal court.

17 And, second, from a jurisprudence
18 standpoint, the -- the question of uniformity of patent
19 law, any decision by a State court, in Mr. Minton's
20 legal malpractice claim, would not be binding in any
21 way, on either the PTO in a patent application, or on
22 any subsequent Federal court deciding a real patent
23 case.

24 JUSTICE GINSBURG: Do you mean substantial
25 beyond the -- the -- this particular case?

1 MS. WEBRE: Yes, Your Honor. And I -- I
2 think that that's where the Federal circuit's
3 jurisdictional -- the Federal circuit's "arising under"
4 jurisdiction standard, which the Supreme Court of Texas
5 applied here, that's exactly where it goes awry, is that
6 the court improperly conflates the -- the question of
7 necessity of a Federal issue with the question of
8 whether that issue is substantial.

9 And, in the Grable case, this Court
10 emphasized that those are two separate issues. There
11 are four prongs to the Grable test. The Federal issue
12 embedded in the State claim must be necessary to the
13 State claim; actually disputed; substantial; and then
14 there is a federalism inquiry that exercised a Federal
15 jurisdiction over this State claim can't upend the
16 proper balance between State and Federal authority.

17 The Grable court announced that, and then
18 just a year later, in the Empire HealthChoice case, Your
19 Honor -- Justice Ginsburg, you wrote that opinion for
20 the Court, and that acted sort of as an underscoring of
21 "and here's how limited the Grable rule really is."

22 The Empire HealthChoice opinion
23 distinguishes between Grable, which presented a merely
24 pure question of law, and the claims at issue in Empire
25 HealthChoice which were fact-bound and

1 situation-specific. It distinguished the -- the
2 question of whether a State court is competent to apply
3 Federal law to the extent relevant to the claims and
4 found that, yes, it was.

5 And the -- the Court emphasized that,
6 certainly, the State courts are going to be deciding the
7 occasional Federal issue here and there, but let's not
8 make a Federal case out of each and every State tort
9 claim that might have an embedded Federal issue.

10 Now, in the earlier argument, there was some
11 discussion of the fact that jurisdiction means a lot of
12 different things in a lot of different contexts. But,
13 here, this Court has, on more than one occasion,
14 determined that jurisdiction -- "arising under"
15 jurisdiction means the same thing in 1331, the general
16 Federal question jurisdictional grant, and 1338(a),
17 the -- the exclusive provision that's applicable
18 specifically to patents.

19 Now, that has been amended slightly. It --
20 it, now, includes compulsory counterclaims where they
21 didn't used to be a part, but the jurisdictional grant
22 that Congress gave through the first sentence of 1338(a)
23 uses the same exact phrase, the "arising under," "any
24 civil action arising under Federal law."

25 And, Justice Scalia, you wrote the opinion

1 for the Court in the Holmes Group case and explained
2 that the linguistic consistency between those two means
3 that they mean the same thing.

4 There is nothing unique about this subject
5 matter -- the patent subject matter, that changes the
6 scope of the jurisdictional grant. To be sure, the --
7 the grant of original jurisdiction to the district
8 courts is exclusive, and that is different from the
9 general Federal question.

10 And to be --

11 JUSTICE ALITO: Well, why isn't that
12 significant? Doesn't that manifest Congress's view
13 that -- that -- that this is -- that this is a
14 complicated specialty area? And so there would be,
15 arguably, a special reason for having these cases, cases
16 that involve a patent issue, in Federal court, rather
17 than State court?

18 MS. WEBRE: Yes, Your Honor. But the --
19 Congress did that in a couple of different ways. First
20 of all, I think it begs the question -- it begs the --
21 the core question, to say that exclusive -- the fact
22 that jurisdiction is exclusive answers the
23 substantiality because, in order to get to exclusivity
24 of the jurisdiction, you have to get to jurisdiction
25 first.

1 You have to -- it has to be "arising under"
2 an act of Congress relating to patents before it can
3 then be exclusive. So -- so we still have the first
4 step. But, also, Congress did not cast the net broader
5 than the general "arising under" standard.

6 Even under the -- the statutory framework
7 after the America Invents Act amendment -- under the
8 statutory structure, there are still a number of patent
9 issues -- legal issues that are going to be decided in
10 the State courts that do not come within the exclusive
11 jurisdiction of the Federal courts. For example,
12 compulsory counterclaims, now, come within the exclusive
13 jurisdiction, but permissive counterclaims don't.

14 Permissive counterclaims can certainly
15 present just as substantive a question of patent law,
16 and, yet, those are excluded under the statutory scheme
17 of 1338(a). Patent issues raised as a defensive matter
18 are not sufficient to support "arising under"
19 jurisdiction under 1338(a).

20 So, certainly, Congress contemplated a
21 situation where some patent issues are just not going to
22 come within the exclusive jurisdiction of the Federal
23 courts.

24 And I think it's interesting to -- to back
25 up a little bit and look at the Federal circuit's

1 evolved perception of its own exclusive jurisdiction.
2 In the early years of the Federal circuit, in 1984, the
3 first Chief Justice -- the first chief judge of the
4 court, Chief Judge Markey, in the Atari case that is
5 cited at page 21 of the amicus brief filed by the
6 American Intellectual Property Lawyers Association, the
7 Federal circuit wrote, "Congress was not concerned that
8 an occasional patent law decision of a regional circuit
9 court or of a State court would defeat its goal of
10 increased uniformity in the national law of patents."

11 And that was the view of the Federal
12 circuit's own jurisdiction in 1984. But, in the time
13 evolved, the Federal circuit has changed its perception
14 of its own jurisdiction, and that's why we are here
15 today, is, in 2007, the Federal circuit went awry and --
16 and changed the standard that no longer follows what
17 this Court articulated in Grable.

18 They -- they have improperly conflated the
19 necessity and substantiality components of the -- of an
20 appropriate Grable analysis. And they totally disregard
21 a proper balance of the State and Federal interests.
22 The Federal circuit announced that there's an interest
23 in -- Federal interest in uniformity of patent law, and
24 then that was that. That was the end of the inquiry.
25 There is no balance if you don't look at the State

1 interest on the other side.

2 And, in legal malpractice cases, in general
3 and in Mr. Minton's claim in particular, there are
4 substantial State interests. There is the general
5 interest, the right of a State to develop its own State
6 claims, its own State law, and its own State courts.

7 But there is also a State interest in
8 governing the relationship between attorney and client
9 that happens through the legal malpractice process.
10 But, specifically, with regard to Mr. Minton's claim,
11 one of his primary theories in -- in this case -- in the
12 legal malpractice case, is that the attorney's error,
13 with regard to bringing up the Experimental Use
14 Doctrine, deprived him of the opportunity to make a
15 lucrative settlement with the NASD in the underlying
16 patent litigation.

17 Well, the question of exactly how you prove
18 whether and to what extent the NASD would have paid a
19 settlement and for how much in the underlying case is a
20 matter of tremendous dispute right now. That is an
21 evolving issue in the -- in the legal malpractice
22 jurisprudence of the State of Texas.

23 In fact, in the month of December 2012, the
24 Supreme Court of Texas heard argument in a case called
25 Elizondo v. Krist that addresses that precise issue.

1 How do you prove that NASDAQ would have paid him
2 \$100 million, if only these lawyers had raised this
3 issue earlier?

4 And, yet, if this -- if Mr. Minton's claims
5 are hailed into Federal court because of the fact-bound
6 and situation-specific application of the Experimental
7 Law Doctrine, the Federal courts would be Erie guessers
8 as to that important issue that the State courts really
9 need to resolve.

10 JUSTICE SCALIA: Ms. Webre, is there any
11 binding effect of a Federal determination here on State
12 law? And is there any binding effect of any State
13 determination here on Federal law?

14 MS. WEBRE: No, Your Honor.

15 JUSTICE SCALIA: If it was left to the
16 State, would what the States say about -- about patent
17 law be binding in any Federal cases? And, vice-versa,
18 if it went to the Federal jurisdiction, would anything
19 that the Federal court says about -- about State tort
20 law be binding on State courts?

21 MS. WEBRE: In neither direction would any
22 decision be binding. The -- the State -- any decision
23 in a State court on a legal malpractice matter regarding
24 issues of patent law would not be binding in any way on
25 the Federal courts or on the PTO in handling any of the

1 patent applications -- prosecution of patents.

2 JUSTICE SCALIA: Well, that -- that being
3 so, your -- your last argument about the Federal
4 government messing up -- you know, State tort law in an
5 area that -- that is currently very much in the fore in
6 the -- in the decisions of the Texas Supreme Court, that
7 doesn't really carry a lot of weight, except in this
8 single case.

9 I mean, they are not going to mess up Texas
10 law in that regard. They may get this case wrong,
11 but --

12 MS. WEBRE: You -- you are right that --
13 that it will not, substantially, adversely impact Texas
14 State law, but that's an illustration of a substantial
15 State interest.

16 And, in a way, it's akin to the issue in
17 Grable because the -- the embedded issue in Grable that
18 justified this Court reaching down and grabbing a State
19 law claim and bringing it up into Federal courts wasn't
20 just that the issue was disputed, the -- the
21 construction of that statute was unresolved. But that
22 it needed resolving. It needed resolving by a court
23 whose decision could be precedential, so then it's
24 resolved from then on.

25 And so the -- the question of how do you

1 prove a settlement is an issue that needs resolving by a
2 court who's going to advance the jurisprudence.

3 JUSTICE SCALIA: What about the Federal
4 issue? Doesn't that need resolving?

5 MS. WEBRE: There are no Federal issues that
6 need resolving here because it's solely a question of
7 the application of these specific facts in this
8 affidavit to the doctrine. There's -- there's no
9 overarching question of -- of patent law that needs
10 resolving.

11 JUSTICE KENNEDY: Let me -- me ask this
12 question: Suppose you have two cases, hypothetical,
13 case A, case B, both involve the Experimental Use
14 Doctrine in Federal patent law. In case A, it's a very
15 weak argument; it's most unlikely it's not going to
16 apply. Case B, very strong argument, Experimental Use
17 Doctrine applies.

18 Any difference in the removability in those
19 two cases?

20 MS. WEBRE: I don't believe so, Your Honor,
21 because the question isn't the -- the significance to
22 the particular claim. The question is the Federal
23 issue. Is there a --

24 JUSTICE KENNEDY: Well, if -- if you say --
25 since you're going to say it -- I mean, if it's a

1 "substantial" Federal issue, then it's substantial in
2 hypothetical B, but not in hypothetical A?

3 MS. WEBRE: Well, it's -- it's, perhaps,
4 more necessary. But -- and maybe what I need to do is
5 back up a little bit and discuss what I think are the
6 factors for a court to look at, when deciding whether or
7 not an embedded Federal issue is a substantial one.

8 And looking at this -- this Court's
9 articulation in the Grable case and the Empire
10 HealthChoice case, the -- the issues that the Court
11 looked at -- one was the nature of the Federal -- of the
12 Federal question itself -- the Federal issue, is it a
13 constitutional issue?

14 JUSTICE SOTOMAYOR: So does that mean that,
15 if the claim in the malpractice action is that the PTO
16 acted unconstitutionally -- assume that set of facts --
17 how does that change your analysis?

18 MS. WEBRE: That -- that would be a more
19 substantial Federal question than the one presented
20 here, but I submit that it would not be sufficient to
21 warrant "arising under" jurisdiction here because it
22 is -- it involves only a hypothetical actual set of
23 patent rights. No judgment that can happen in a State
24 legal malpractice case actually impacts any patent
25 rights.

1 Let's say Mr. Minton won a judgment from a
2 State legal malpractice court saying, it was the
3 negligence, that you would have won the experimental use
4 exception, your patent would have been declared valid.
5 And so he has a judgment from a State court saying,
6 the -- the loss of your patent was the result of the
7 negligence and not because it was actually invalid.

8 That doesn't give him a valid patent. He
9 cannot take that judgment and then sue somebody and say,
10 look, look, I've got a patent. And it's --

11 JUSTICE SOTOMAYOR: So go back to -- you
12 were going through a list of questions, and I posited
13 let's assume that the malpractice claim does involve a
14 constitutional question.

15 MS. WEBRE: Yes. So --

16 JUSTICE SOTOMAYOR: Then what other
17 factors --

18 MS. WEBRE: Well, the -- the -- in the
19 continuum constitutional issues would be more
20 substantial; statutory issues would be a little less
21 substantial. In fact, this Court grappled with that in
22 the Grable case and said, we're not going to draw a hard
23 and fast line on statutory issues.

24 But then, in the Empire HealthChoice
25 opinion, the Court noted that this is a -- the issue --

1 the Federal issue there was nonstatutory, and so,
2 therefore, let's not make a Federal case out of it. So,
3 in that continuum, that would be one factor to look at.

4 Another factor to look at would be, is the
5 Federal issue -- the legal issue undisputed or
6 uncertain? Not necessarily the application of these
7 particular facts to the legal issue because there really
8 isn't a Federal interest in how this affidavit is
9 construed or not.

10 But, in -- in the resolution of the legal
11 issues, as in Grable, is the question of law disputed or
12 uncertain? And the corollary to that is does it need
13 resolving? Because that was the situation in the Grable
14 case. But just because an issue is novel doesn't ipso
15 facto make it a -- a substantial issue.

16 This Court, in the Merrell Dow case,
17 discussed that, that --

18 JUSTICE SCALIA: Why -- why do all -- why do
19 all of these issues cut in your favor, in all cases
20 involving malpractice? I mean, you're urging, not just
21 that your client win here, but you want us to adopt a
22 general rule that malpractice suits involving patent
23 rights can never, ever come under "Federal arising"
24 under jurisdiction.

25 Isn't that -- isn't that what you want us to

1 say?

2 MS. WEBRE: Yes, Your Honor.

3 JUSTICE SCALIA: So the burden would be on
4 you to show that every one of these factors, in all of
5 those cases, is always going to cut in your favor.
6 That -- what, that they will never involve a
7 constitutional issue? That they will never, ever
8 determine future patent decisions?

9 MS. WEBRE: Well, Your Honor, I -- I urge
10 that because I think that's the only appropriate
11 application of the Grable test to legal malpractice
12 cases. And it's not that --

13 JUSTICE SCALIA: Well, I like -- I like
14 bright-line rules. In fact -- you know, I thought
15 Holmes had it right. It doesn't arise under, unless the
16 cause of action is a Federal cause of action. But once
17 we've gone down -- down the road of Grable, I don't --
18 you're -- you're proving a negative.

19 The burden is on you to prove a negative,
20 that there is no situation that can arise in -- in
21 malpractice cases involving patents where the Federal
22 issue would justify arising under jurisdiction. That's
23 a hard road to hoe.

24 MS. WEBRE: I think there are two reasons --
25 there are two reasons why that's the only appropriate

1 way to apply the Grable test to legal malpractice cases,
2 and both of them involve the lack of precedent from the
3 case.

4 One is it can never involve actual patent
5 rights. The consequence of a judge's --

6 JUSTICE SOTOMAYOR: How about fraud on -- a
7 claim of fraud on -- that the malpractice was fraud on
8 the PTO? Lawyer loses that. It's been litigated.
9 Isn't it res judicata, and won't it affect the patent --
10 or might it not affect the patent in a patent action?

11 MS. WEBRE: No, Your Honor, it would not.
12 It would not affect the patent office, either, as a
13 matter of res judicata or as a matter of issue
14 preclusion -- non-mutual issue preclusion or as a matter
15 of jurisprudential precedent, for a couple of reasons.

16 One is that, as a starting point, the -- the
17 question of attorney misconduct can affect the issuance
18 of a patent before the patent office, but that would
19 happen not in the context of a legal malpractice claim,
20 but in the context of the actual prosecution of the
21 patent before the PTO itself.

22 So the PTO would have made a -- its own
23 determination and granted or not granted limited
24 sanction, whatever action it is the PTO takes in --
25 before -- in a proceeding before itself, the PTO would

1 be deciding that.

2 So a legal malpractice case would only be
3 subsequent to that. So, in -- in the first instance,
4 the PTO gets to decide that.

5 From a res judicata standpoint, the PTO's
6 patent review manual -- the Manual of Examination of
7 Patents provides that res judicata effect is only given
8 to decisions by either the Board of Patent Review or
9 Interferences, the United States District Court for the
10 District of Columbia, and the Federal circuit. No State
11 courts make that list.

12 So, from a res judicata standpoint, only
13 going right up the chain is going to bind the PTO. And,
14 from an issue preclusion standpoint, the PTO would never
15 be a party -- could never be a party to a -- a legal
16 malpractice claim and, therefore, would not be bound by
17 any State court decision.

18 And what's kind of a funny --

19 JUSTICE SOTOMAYOR: I find that somewhat
20 hard to follow.

21 Let's assume, in adjudicating a medical -- a
22 malpractice claim, the State court finds that the
23 attorney suppressed information. It's a finding of
24 fact. He had this information in his or her file, and
25 they didn't disclose it. I'm not quite sure how the PTO

1 ignores that litigation.

2 MS. WEBRE: The PTO may not ignore it. The
3 PTO --

4 JUSTICE SOTOMAYOR: Or the district court
5 doesn't, if it gets to review that in a later action.

6 MS. WEBRE: Well, but --

7 JUSTICE SOTOMAYOR: I'm only raising this
8 question to address Justice Scalia's point. You're
9 asking for an absolute rule, and I posited a situation
10 where I think it's not so clear that a State court
11 finding might not have an effect.

12 So do we have to go to your absolute rule?

13 MS. WEBRE: No, Your Honor. You do not have
14 to go to my absolute rule. I think that the absolute
15 rule is the -- the most sensible and appropriate
16 application of the Grable test to State law legal
17 malpractice claims, and it has the added benefit of
18 certainty. It -- it doesn't roll us back to the Justice
19 Holmes' rule.

20 JUSTICE SCALIA: I guess you might argue
21 that, even if it fails the Grable test in a couple of
22 isolated cases, we should still adopt that rule because
23 the benefits of having a -- a clear rule that doesn't
24 have to be litigated in every -- every case outweigh the
25 fact that one or two might -- might not come out that

1 way if we applied Grable.

2 MS. WEBRE: Well --

3 JUSTICE SCALIA: Because we're making it up
4 anyway, right?

5 (Laughter.)

6 MS. WEBRE: Well, Your Honor, I -- I would
7 take it a step further than that because I think that
8 any actual impact of -- of what you're positing, Justice
9 Sotomayor, is so ephemeral. The idea that -- that the
10 PTO will look at a fact-finding in a legal malpractice
11 case, and, oh, goodness, I didn't realize there was this
12 suppression of evidence, I'm now going to dig further.

13 Well, that's such a speculative and
14 ephemeral possibility, it doesn't disrupt the fabric of
15 patent jurisprudence -- patent law, in any way, and it
16 doesn't tie the hands of the PTO in any way. It doesn't
17 bind the PTO in any future consideration of a
18 continuation patent or any other related
19 continuation-in-part patent.

20 JUSTICE KENNEDY: Let -- let me ask you
21 this: The Brighton Miller treatise is rather
22 complimentary of Grable, it says it brought
23 considerable certainty to the area. I was pleased to
24 hear that because I'm not sure that it's true.

25 (Laughter.)

1 JUSTICE KENNEDY: But can you just tell me, as an -- as an
2 empirical matter, does "arising under"
3 for removal jurisdiction cases consume a tremendous
4 amount of time in litigation in the Federal courts?
5 It's just --

6 MS. WEBRE: Well, it -- it does a couple of
7 things. First is it consumes a lot of time of the
8 courts and the litigants in removing and then getting
9 remanded again. And it -- as is discussed in the --

10 JUSTICE KENNEDY: What I -- yes. What I
11 mean is the argument over "arising under" over
12 jurisdiction.

13 MS. WEBRE: There are, on this issue of the
14 legal malpractice cases, in the wake of the Federal
15 circuit's opinions, the Air Measurement case and
16 Immunocept case in 2007, scores and scores and scores of
17 courts -- State and Federal courts have been grappling
18 with this precise jurisdictional issue.

19 I think this case is about the fifth or
20 sixth cert petition that came up to this Court on this
21 jurisdictional question. I think there are three or
22 four behind us in queue, and there -- there continues to
23 be uncertainty in the lower courts on this precise
24 issue.

25 And -- and it really presents for this Court

1 a question of is "arising under" jurisdiction truly a
2 lenient standard, as the Federal court has articulated?

3 Now, it's true that the -- the entire body
4 of State law legal malpractice cases arising out of
5 patent representation is not going to overwhelm the
6 Federal court. It's not going to -- to --

7 JUSTICE KENNEDY: So my question was even
8 broader. Let's say we resolve legal malpractice.
9 Then -- then we will have products liability with a
10 particular product, and then we will have some food and
11 agriculture cases. It goes on and on.

12 MS. WEBRE: Well, I think that is a -- that
13 is a -- that's a substantial issue. But, like
14 Justice Scalia said, that -- you know, the -- this Court
15 departed from Justice Holmes' construct some years ago.
16 But I think that there is the opportunity in this case
17 to provide a great deal of certainty, to provide
18 absolute certainty vis-à-vis legal malpractice cases
19 because of their unique hypothetical aspect. The
20 consequence of the judgment affects no rights.

21 But, second, in reaffirming --
22 rearticulating the Grable test, emphasizing the
23 importance and the separateness of the substantiality
24 inquiry, emphasizing the importance of the federalism
25 aspect, this Court has a great opportunity to resolve a

1 lot of uncertainty.

2 And, if there are no further questions, I
3 would like to reserve the -- the remainder of my time.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Michel?

6 Is that correct, "Michel"?

7 ORAL ARGUMENT OF THOMAS M. MICHEL

8 ON BEHALF OF THE RESPONDENT

9 MR. MICHEL: It is, Your Honor. Thank you.
10 Mr. Chief Justice, and may it please the
11 Court:

12 This case is about whether a State court has
13 subject matter jurisdiction over a State law patent
14 malpractice claim that rests entirely on an issue of
15 patent law that is only heard in Federal court, and when
16 that issue is dispositive, central to the case, has
17 issues of first impression in them, has no State
18 analogue in any other area of the law, and whether in
19 the deciding issues of questions of law and will not
20 disturb the balance between State and Federal judicial
21 responsibility.

22 JUSTICE GINSBURG: What about other areas of
23 exclusive Federal jurisdiction, where the claim, if you
24 are stating it initially, would have to go into Federal
25 court and not State court, say, an antitrust claim, a

1 copyright claim?

2 Is -- is what you're saying about patents,
3 does that go for every area, where initial jurisdiction
4 is exclusively in the Federal court?

5 MR. MICHEL: No, Your Honor. It does not.

6 JUSTICE GINSBURG: Then what's the
7 difference between, say, antitrust and patent?

8 MR. MICHEL: There -- there are many
9 differences, Your Honor. First, antitrust has -- has a
10 State analogue. The Texas Supreme Court in
11 Coca-Cola v. Harmer, 218 Southwest --

12 JUSTICE SOTOMAYOR: Then take immigration
13 law.

14 MR. MICHEL: Yes.

15 JUSTICE SOTOMAYOR: Don't get in the weeds.
16 Take immigration law.

17 MR. MICHEL: Yes. Now, once again, the
18 issues -- immigration law may be a -- a differing area
19 where there is exclusive Federal court jurisdiction in
20 that area, possibly. But, once again, the analysis and
21 the application in immigration law, from a malpractice
22 case, may give rise in that area.

23 However --

24 JUSTICE SCALIA: Excuse me. I guess I just
25 don't understand this. Is it the case that there is

1 "arising under" jurisdiction only when the Federal cause
2 of action presented is one over which Federal courts
3 have exclusive jurisdiction?

4 MR. MICHEL: That --

5 JUSTICE SCALIA: Is that -- is that the
6 rule?

7 MR. MICHEL: I believe, in part.

8 JUSTICE SCALIA: I mean, any -- any Federal
9 statute that can be sued upon, both in Federal courts
10 and in State courts, but as to which Federal courts are
11 the dispositive adjudicators, you say that that does not
12 come within this "arising under" rule?

13 MR. MICHEL: Does -- does not come within
14 this Court's doctrinal holdings in Grable and Empire
15 because we have a Federal balancing and State balancing
16 issue. And, as we've articulated, when Congress has
17 articulated --

18 JUSTICE SCALIA: Do you have a case for
19 that, that says, if a suit could be brought in State
20 court, even though it involves a dispositive Federal
21 question as to which this Court would be the -- you
22 know, the last interpreter, it cannot possibly come
23 within "arising under" jurisdiction?

24 Have you got a case for that.

25 MR. MICHEL: I'm sorry, Your Honor. I don't

1 know if I followed your question.

2 JUSTICE SCALIA: Do you have a case which
3 says that, when a Federal question is presented in a
4 case over which Federal courts have jurisdiction, but
5 also State courts have jurisdiction, although, needless
6 to say, the Federal courts would be dispositive on the
7 issue, such a case cannot come within the "arising
8 under" jurisdiction?

9 MR. MICHEL: No, I don't think anything that
10 expressly. But the A&T and the --

11 JUSTICE SCALIA: I would find it
12 extraordinary for -- for that to be the rule.

13 MR. MICHEL: Well, you can't isolate it.
14 That rule is more complicated because it is the
15 application of the Grable standard that's the analysis.

16 JUSTICE KENNEDY: But getting back --
17 Justice Ginsburg simply made the point, I had thought,
18 that you place a good deal of reliance on the fact that
19 there is exclusive jurisdiction. And her question to me
20 pointed out how far-reaching this case might be because
21 it -- it could involve patents, copyright, all other
22 areas of exclusive jurisdiction. If that is going to be
23 your special rule, it's not so confined as you suggest.

24 That's all that question meant to me.
25 Certainly -- certainly, you -- you could have cases

1 where there is concurrent jurisdiction, 1983, in which
2 we'd have the same problem.

3 MR. MICHEL: I think -- I think the factors
4 that go into determining the -- one of the grounds that
5 has been articulated by Grable and the balancing for
6 Merrell Dow is the number of cases that would come into
7 Federal court, and it is a doctrinal decision. It is a
8 doctrinal rule.

9 JUSTICE SOTOMAYOR: So patent law cases of
10 malpractice are smaller in number than copyright
11 cases --

12 MR. MICHEL: Patent law cases --

13 JUSTICE SOTOMAYOR -- immigration, other
14 exclusive jurisdictions, so that's okay to -- to remove,
15 but those others aren't?

16 MR. MICHEL: Those --

17 JUSTICE SOTOMAYOR: Does that make a whole
18 lot of sense?

19 MR. MICHEL: That is the articulation in
20 Grable, Your Honor.

21 JUSTICE SOTOMAYOR: Well, how about a
22 different one, the one that's being proposed by your
23 adversary --

24 MR. MICHEL: That --

25 JUSTICE SOTOMAYOR: -- which is define

1 "substantial" as to how it affects Federal law, which I
2 think was the bottom line -- or the development of
3 Federal law, the bottom line of Grable.

4 And she says -- you dispute this in your
5 brief -- that it doesn't affect the invalidated patent,
6 that there's no way that a judgment on the malpractice
7 is going to be used in a continuation patent dispute
8 because it's not one of the listed preclusive courts.

9 So how does a ruling affect patent law?

10 MR. MICHEL: Sure. Many -- many ways, Your
11 Honor.

12 First, the test is uniformity, under Grable,
13 the uniformity of patent law -- Federal law, not whether
14 the --

15 JUSTICE SOTOMAYOR: Why is -- who's going to
16 follow it?

17 MR. MICHEL: In many situations. For
18 example, she -- she conflates -- Petitioners conflate,
19 res judicata with issue preclusion. That goes back to
20 your earlier question, Justice Sotomayor, and that issue
21 preclusion will have an effect. And as, in fact --

22 JUSTICE GINSBURG: Issue preclusion applies
23 only to someone who was a party.

24 MR. MICHEL: Correct. That would only apply
25 to the inventor; it would not apply to the PTO. It can

1 only be used against, in this, case Mr. Minton. And, in
2 fact, patent counsel in this case, under the rules of
3 the Federal circuit, under patent law and the Patent
4 Manual, disclosed the State court's rulings in this case
5 to the Patent Office during its continuing patent. The
6 State district court judge made a scope and claim
7 decision.

8 So, Justice Sotomayor, back to your
9 question --

10 JUSTICE GINSBURG: But that, certainly, is
11 not binding. The -- whatever the State -- whatever the
12 State court says, as a matter of patent law, has no
13 binding effect on that question coming into Federal
14 court.

15 MR. MICHEL: It does.

16 JUSTICE GINSBURG: How?

17 MR. MICHEL: Under this Court's decision
18 *Marrese v. The Academy of Orthopedic Assertions* --
19 *Surgeons*, a State court's decision is entitled to issue
20 preclusion, even in Federal forum. And so that is
21 why -- also the patent -- the continuation patent
22 would -- could be declared invalid for failing to
23 disclose that information.

24 We are not saying it's binding on the PTO,
25 but it is an issue of issue preclusion as against Minton

1 that would be in front of the PTO and is in front of the
2 PTO, as we speak.

3 JUSTICE SCALIA: I mean, is that -- my
4 goodness, but you are going to have a purely
5 hypothetical State decision here. The State will have
6 held that -- you know, if -- if he had said this, the
7 result would have been something else. And you think
8 that that precludes the -- the issue when it arises in
9 real life?

10 And you say, since the State court made that
11 hypothetical determination, it precludes me from arguing
12 it in -- in real life.

13 MR. MICHEL: Yes. It is a factor --

14 JUSTICE SCALIA: Do you have any cases like
15 that? It seems, to me, a rather weird -- weird
16 situation. I mean, maybe it could, but it -- it's
17 strange.

18 MR. MICHEL: Well, it is a matter of issue
19 preclusion. This Court -- that is the danger of
20 allowing these patent law issues to proceed in State
21 court.

22 This Court -- the State district court in
23 this case entered in a brand-new issue of Federal -
24 Petitioners and Respondents totally disagree as to
25 whether this is a fact-specific case or whether this case

1 involves issues of law. And, in fact, we contend it
2 involves issues of first impression.

3 In this case, the State district court made
4 holdings about issues of whether the question of -- the
5 experimental use exception is a question of law or a
6 question of fact.

7 It made the requirement that experimental
8 use had to go to a required claim element, as opposed to
9 a claimed element. It made the determination -- and the
10 Court of Appeals made the legal determination that
11 knowledge of the buyer is conclusive, rather than as a
12 factor.

13 Those are all issues of not only disputed
14 substantial issues of Federal patent law that both
15 parties submitted briefings in the trial court and the
16 court of appeals, 70 pages long, disputing the legal --

17 JUSTICE SOTOMAYOR: Besides the parties --

18 MR. MICHEL: Yes.

19 JUSTICE SOTOMAYOR: -- how else does it
20 affect the development of patent law?

21 MR. MICHEL: The --

22 JUSTICE SOTOMAYOR: Who else is going to
23 follow --

24 MR. MICHEL: They're --

25 JUSTICE SOTOMAYOR: -- this malpractice

1 determination?

2 MR. MICHEL: It's going to have a really
3 profound effect on the patent law practitioners who are
4 uniquely situated and work in parcel -- and interlocking
5 with the Patent Law Office.

6 It is the patent lawyers who draft the
7 patents, it is the patent lawyers who present them to
8 the Patent Office, they are the ones who engage when
9 they need to be amended or refined or narrowed or
10 broadened.

11 JUSTICE SCALIA: They knew -- they knew
12 these were controverted issues. You say that they --
13 they are controverted issues. So they would have been
14 alerted to a problem anyway. And they certainly would
15 not accept a State court determination as authoritative
16 resolution of that problem.

17 MR. MICHEL: The patent --

18 JUSTICE SCALIA: The patent attorneys. I
19 mean, you --

20 MR. MICHEL: No, the Patent Office will have
21 to take that as guidance because their new taskmaster
22 will not be -- be following Federal patent law because,
23 in this case, the Court injected a brand-new requirement
24 that was never held by a patent lawyer, that you had to
25 have an expert witness testify to establish your

1 experimental use testing exception.

2 That's never been held anywhere in Federal
3 patent law. So, now, who's the patent lawyer going to
4 be looking to for guidance? The exclusive Federal
5 courts? The Patent Office? Guidance from the Federal
6 circuits?

7 No, they are going to have their backs
8 watched by the State courts, saying, uh-huh, you know
9 what? I'm going to impose a new legal obligation on
10 you, and you are going to be held for malpractice. And
11 that's not -- that's not --

12 JUSTICE GINSBURG: What would happen -- what
13 would happen if that came up in an ordinary litigation
14 in Federal court, and the Federal circuit, ultimately,
15 decided the question, that the State court was entirely
16 wrong about this; you don't need a witness.

17 Well, that's the end of it, right? Once the
18 Federal court decides the question, then whatever the --
19 the State judge thought was the Federal law is -- is
20 gone.

21 MR. MICHEL: No, that's exactly the problem.
22 The State courts aren't bound by the Federal circuit's
23 holding. There will be no Federal review of substantial
24 issues of Federal law -- zero -- unless this Court is
25 going to --

1 JUSTICE SCALIA: Excuse me. The State
2 courts are not bound by the Federal court's holding?
3 You mean State courts can resolve patent questions,
4 contrary to what the Supreme Court of the United States
5 says the law is?

6 MR. MICHEL: No, not contrary -- that was
7 the point I was going to make -- not contrary to the
8 holdings of the United States Supreme Court, contrary to
9 the Federal circuit's holding. And, in fact, the Fort
10 Worth Court of Appeals did not follow the Federal
11 circuit's holding in this area.

12 JUSTICE KAGAN: Well, are you saying,
13 Mr. Michel, that what -- what the State courts are going
14 to do is to say that, notwithstanding that the Federal
15 circuit has ruled on a matter and notwithstanding that
16 the lawyer has complied with the rule as articulated by
17 the Federal circuit, that, nonetheless, they will be
18 held to have committed malpractice because they didn't
19 comply with the State's rule?

20 Is -- is that what you think the State
21 judges are really going to do?

22 MR. MICHEL: I think the State judges are
23 going to try to, possibly, apply Federal circuit
24 holding. In this case, they did not. They injected a
25 new holding, which established a new liability for the

1 patent lawyers, which is not reviewable, unless this Court
2 were to grant certiorari review.

3 And so that then leaves the only review on
4 these materials -- these are going to be substantial
5 issues of --

6 JUSTICE SOTOMAYOR: So what you're arguing,
7 they're going to make a mistake, and, because we might
8 not accept certiorari, that's binding on everybody
9 else --

10 MR. MICHEL: It's --

11 JUSTICE SOTOMAYOR: -- in the State --

12 MR. MICHEL: No. It's binding on the State
13 court practitioners, in that State, who get sued for
14 legal malpractice. And it's that interrelationship
15 between the lawyers who are drafting patents -- they
16 are going to be getting --

17 JUSTICE KAGAN: What if a lawyer says to
18 the -- you know, I complied with all the Federal law --
19 all the rules from the Federal circuit, I complied with.

20 MR. MICHEL: Yes.

21 JUSTICE KAGAN: You are suggesting that the
22 State court is going to say, too bad, you committed
23 malpractice anyway because you didn't comply with our
24 hypothetical law about patents?

25 MR. MICHEL: They did that in this case. At

1 214 --

2 CHIEF JUSTICE ROBERTS: It's not -- it's
3 not -- I guess it's not their hypothetical law. They
4 would be saying, this is what we think the Federal law
5 requires, and while we're happy -- or not happy -- but
6 it's interesting that the Federal circuit thinks
7 something else, but that doesn't bind us.

8 MR. MICHEL: Correct. Correct. And it's
9 not just hypothetical. The hypothetical doesn't mean
10 insubstantial. The hypothetical doesn't mean --

11 JUSTICE SCALIA: Why is that worse than the
12 fact that, if it goes to Federal court, all of the
13 lawyers in the State, in all malpractice cases, are
14 going to be, supposedly, bound by the Federal court's
15 holding as to State issues of malpractice?

16 I mean, it seems to me it's Twiddle Dum or
17 Twiddle Dee, whichever court system you go to, you are
18 going to terrorize the lawyers of that State on the
19 basis of an opinion of a court that is not dispositive
20 on those issues.

21 So I don't -- I don't know why --

22 MR. MICHEL: I think we disagree. Here,
23 when you try -- for example, in the patent infringement
24 case, the sole trial is going to be the patent
25 infringement.

1 You are going to try the Federal lawsuit,
2 Your Honor -- Justice Scalia, you are trying that patent
3 infringement lawsuit in State court, in the -- in the
4 case within the case analysis. The Federal rules,
5 that's what is so troubling about --

6 JUSTICE SCALIA: And you -- you are trying
7 the malpractice lawsuit -- the State malpractice lawsuit,
8 in Federal court.

9 MR. MICHEL: Correct. But the application
10 and the rules governing it are going to be by Federal
11 law. The rules in this case -- in particular, the
12 substantial issue of the experimental use exception, the
13 only issue we've saved was the -- the experimental use
14 exception. We disagree that just because the State
15 court makes an opinion and a holding, it doesn't have
16 real-world effects. It really does. It's not an
17 advisory opinion.

18 And there needs to be a distinguishment
19 between the side issue the Petitioners are saying --
20 they are trying to get you focus on this one micro-issue
21 of whether it will affect an actual patent -- as to
22 whether it will affect patent law. And it will affect
23 patent law, and it will affect the application of patent
24 law. And so what you're going to have is you're going
25 to have two diverging systems.

1 You're going to have -- actually, you will
2 have one on the Federal side, and then you will have 50
3 jurisdictions espousing what they think the law is of
4 patent law and not being bound by the Federal circuit,
5 which is going to --

6 JUSTICE GINSBURG: Anytime -- anytime -- I
7 mean, a lot of patent questions -- as you already
8 pointed out, a lot of patent questions come up in State
9 court litigations, contract litigations, every time you
10 have a patent question, then must the case go to the
11 Federal court, in your view?

12 MR. MICHEL: No, that is not our position.

13 JUSTICE GINSBURG: So what is the dividing
14 line between patent questions that belong in State court
15 and patent questions that belong only in Federal court?

16 MR. MICHEL: For example, not every
17 malpractice case -- it will be the case within the case
18 doctrine in a patent case that will go to Federal court.

19 For example, failure to communicate a
20 settlement offer does not have a case within the case.
21 In a business transaction, it doesn't have the case
22 within the case analysis.

23 So those malpractices arising from them will
24 not go to Federal court. Breaches of fiduciary duty for
25 divestiture of fees don't have the causation element.

1 So we are --

2 JUSTICE SCALIA: So you are talking about a
3 case that has a patent issue, whether it's a contract
4 case, a tort case, a malpractice case -- if it has a
5 patent issue, you think it has to go to Federal court?

6 MR. MICHEL: We do not.

7 JUSTICE SCALIA: Well, then I repeat Justice
8 Ginsburg's question, how do you decide which of those do
9 and which of those don't?

10 MR. MICHEL: I think this is a case in
11 point. This case is on all fours with Grable. There is
12 no exception. The only distinguishing factor is this
13 hypothetical argument of the case within the case
14 analysis.

15 JUSTICE GINSBURG: Well, why don't you stay
16 within the lines that you give us? You have said not
17 every patent question that comes up in a State court gets
18 dismissed, just so you can start over in Federal court,
19 what patent questions -- now, let's not talk about breach
20 of fiduciary duty general questions -- what patent
21 questions are properly adjudicated in the State court
22 as part of a lawsuit that --

23 MR. MICHEL: Well, the -- the distinction
24 is, for example, in a licensing case, in a patent case,
25 where you -- those cases are brought in Federal - I

1 mean -- I'm sorry -- brought in State court -- our --
2 our request here is following Grable, that what will go
3 to Federal court are legal malpractice cases arising
4 from substantial issues of Federal patent law that have
5 that case within the case analysis.

6 And it's that narrow -- extremely narrow
7 window of cases. This is not, "Katie, bar the door."
8 We - we've set forth the empirical numbers. They are
9 going to be microscopic. But what they do have is
10 Grable's test. Every element that Grable articulated,
11 this case meets.

12 It does involve substantial issues of first
13 impression.

14 JUSTICE GINSBURG: But what was the
15 substantial Federal matter in Grable?

16 MR. MICHEL: The issue of the IRS, whether
17 personal service had to be given under an IRS --

18 JUSTICE GINSBURG: Yes. And that was going
19 to control, the actions of the Federal agency, of IRS.

20 MR. MICHEL: Correct.

21 JUSTICE GINSBURG: And you have no
22 counterpart for that here?

23 MR. MICHEL: We do have rules that will
24 govern the law on experimental use exception.

25 GINSBURG: You have -- you have --

JUSTICE

1 MR. MICHEL: And that would govern the
2 application in Federal court. That's why it should be
3 in Federal court, to govern how the agency -- and
4 whether a patent -- and this suit goes directly -- it
5 affects patents. This is going to patent validity.

6 JUSTICE GINSBURG: But the -- but the
7 Federal court -- you said before that whatever the
8 Federal circuit says, the State doesn't have to follow
9 it the next time there's a case in State court, but the
10 Federal court is certainly not going to follow what the
11 State judge says on experimental use.

12 MR. MICHEL: It does. I will tell you --
13 the reason why it does, it's in the doctrine of
14 collateral estoppel. It affects the inventor. It's
15 affecting the inventor in this case. This holding of
16 the State district court and the State court of appeals
17 are now before the Patent Office --

18 JUSTICE SOTOMAYOR: I'm sorry. How does
19 it -- the patent's invalid.

20 MR. MICHEL: I'm sorry?

21 JUSTICE SOTOMAYOR: The patent's invalid.
22 Nothing the Court does here is going to change that
23 invalidity. That -- that's what I don't understand.

24 MR. MICHEL: Correct.

25 JUSTICE SOTOMAYOR: He's not going to get

1 his patent back from this action.

2 MR. MICHEL: That's correct.

3 JUSTICE SOTOMAYOR: He's going to get money
4 for losing it, maybe.

5 MR. MICHEL: Correct.

6 JUSTICE SOTOMAYOR: So how does it affect
7 the patent?

8 MR. MICHEL: There is a pending continuation
9 patent. And --

10 JUSTICE SOTOMAYOR: We're back to that
11 issue. Okay.

12 MR. MICHEL: Yes, but that is a collateral
13 estoppel issue. Here, let me -- let me give up another
14 scenario because, in a different role, when the patent
15 is not declared invalid and, instead, there is a finding
16 of non-infringement, and that's what gives rise to the
17 legal malpractice case.

18 Then you go to State court, and, in that
19 situation, the determination of -- of infringement will
20 be raised as a basis for legal malpractice against the
21 lawyer in the malpractice action. Then the lawyers
22 raise, as within the case within the case exception, is
23 that, oh, the patent was invalid.

24 So, then, in that situation, a State
25 district court will be rendering an opinion on a live

1 patent, and then that will be binding on the inventor
2 and will affect real live actual patents, and it does
3 affect patents before the Patent Office.

4 Petitioner said we -- it's not an issue of
5 res judicata. They cite a rule. That's not our
6 argument. It's an issue of issue preclusion. It's also
7 the duty and the obligation of the lawyer to disclose
8 that judicial discussion -- discussion to the Patent
9 Office.

10 Otherwise his, continuation patent could be
11 declared invalid for inequitable conduct -- for not
12 disclosing material information.

13 JUSTICE GINSBURG: And your -- your
14 distinction between other areas of Federal jurisdiction
15 where the Federal law controls and patent is what?
16 What -- Justice Sotomayor brought up immigration law --

17 MR. MICHEL: Yes.

18 JUSTICE GINSBURG: -- copyright law. Why
19 don't they -- why doesn't what you said work the same
20 way in those fields?

21 MR. MICHEL: I think there are -- there are
22 distinctions in the area of patent law versus any other
23 area of the law namely because, as we get to the
24 State -- and this -- this goes to the analysis of the
25 State/Federal balance. That's why the exclusive Federal

1 court jurisdiction.

2 That's why exclusive nationwide jurisdiction
3 in patent law in the Federal circuit is different than
4 any other area of the law. It is that balancing test
5 that we are required to engage in.

6 That's why it's unique from antitrust,
7 trademark, civil rights, securities, employment. Those
8 have concurrent jurisdiction. They may not have an
9 agency involved.

10 For example, bankruptcy initially sounds
11 like it's exclusively Federal court issues, but, when
12 you look underneath the bankruptcy, there is core
13 proceedings, and there's non-core. Non-core are
14 concurrent. Those can be heard in State court.

15 Secondly, those underlying issues in
16 bankruptcy, typically, involve State property right
17 issues anyway. So they are really applying whether
18 somebody has a perfected security interest lien, whether
19 somebody has a justified debt, whether -- things of that
20 nature.

21 So rather than in any other area of law,
22 these other areas, even if they are exclusive in Federal
23 court jurisdiction, some of those underlying issues are
24 basically based on who the party is.

25 And they are still applying underlying

1 State issues.

2 JUSTICE GINSBURG: So your case turns on
3 the -- the Federal circuit having exclusive appellate
4 jurisdiction?

5 MR. MICHEL: That is one of the most
6 defining factors on the State/Federal balance of
7 judicial responsibility. Our understanding of that
8 analysis of the federalism and, also, the articulation
9 of -- just as we have showed up -- Petitioners said a
10 whole ton of cases were going to come in.

11 We supported statistics that the numbers
12 will be very small. But the distinguishing factor
13 because of the balancing test that we are required to --

14 JUSTICE GINSBURG: But, if there's a large
15 Federal interest, I mean, that's what you're saying that
16 there is in the Federal/State balance -- the Federal
17 balance -- it's preponderant on the Federal side.

18 If there is that large Federal interest, is
19 it surprising that the government hasn't come into this
20 case, if there's such a Federal interest to be
21 protected?

22 MR. MICHEL: No, I think the Federal
23 government -- I can't -- I can't speculate to -- for
24 that, Justice Ginsburg. There could be just many
25 reasons why they didn't come in on this case, just like

1 they don't come in on many other cases.

2 But the Federal interest here, in the
3 national uniformity, I think, has been well stated, both
4 by this Court and the Federal circuit.

5 JUSTICE GINSBURG: There's a difference
6 between you and your colleague on what "substantial"
7 means.

8 MR. MICHEL: Yes.

9 JUSTICE GINSBURG: And she says it doesn't
10 just mean necessary -- essential in this particular
11 litigation, but, as in the Grable case and the Kansas
12 City Title & Trust, has larger ramifications for many
13 other cases, not just this case and whether there's
14 going to be issue preclusion as to this particular
15 inventor.

16 Those -- I don't see an issue in this case
17 comparable to those.

18 MR. MICHEL: I think there are -- there are
19 a number of issues of -- of greater importance than just
20 this case. The question is the ongoing conflict in
21 Federal patent law on whether the experimental use
22 exception is a question of law or a question of fact.

23 The Federal circuit has gone both ways on
24 that, whether the issue of buyer knowledge is a
25 conclusive factor or whether it is just one of 13

1 factors.

2 JUSTICE GINSBURG: Whether they -- those
3 questions will come to the Federal circuit, and they'll
4 decide it, and then they'll be settled.

5 MR. MICHEL: Well, we would hope they would
6 be settled, but, then, we're going to have this whole
7 other body of law out there in State courts that aren't
8 bound by the Federal court to answer those questions.
9 And those will govern the practice of patent -- patent
10 lawyers.

11 JUSTICE GINSBURG: How likely is that, in
12 practice, that once the Federal circuit weighs in, that
13 the State judges will go their own way?

14 MR. MICHEL: I think it's a very real
15 possibility. We've had --

16 JUSTICE SCALIA: Well, my -- my experience
17 is that Federal judges, including this Federal judge,
18 are not interested in -- in getting into the weeds of
19 patent law, and, if -- if they could rely on a decision
20 of the Federal circuit, they would do that just as fast
21 as they can.

22 MR. MICHEL: You -- you would -- you would
23 think so. It doesn't appear to be the case because, in
24 this case, we had holdings that -- that experimental
25 testing had to be on a required claim element. There is

1 also an issue in this case of whether you had to have an
2 expert witness testify to prove up the experimental use
3 exception, nowhere held in Federal law.

4 The problem is these judges often will have
5 never handled a patent law in their career. This will
6 go to some judges who have been in family law, got
7 elected at the district court, and will never have
8 decided or looked at a patent law case.

9 We're requesting --

10 JUSTICE GINSBURG: Would that be the same
11 thing for antitrust, be the same for copyright?

12 MR. MICHEL: But the articulation isn't the
13 same. There are other -- in antitrust, there are State
14 analogs. The -- the judges are familiar with applying
15 it. In fact, the State of Texas, in Coca-Cola v.
16 Harmar, stated that there's a high interest in its own
17 State interest -- I mean, antitrust laws. The same with
18 trademark, trademark is concurrent jurisdiction.

19 The limited area that applies these factors,
20 going back to the balancing test, is extremely narrow.
21 Patent law is unique in that area of almost any other
22 area of law. We think the Texas Supreme Court got this
23 decision right, and we request that the Court follow
24 Grable and apply Grable to the case at hand. Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Ms. Webre, you have four minutes remaining.

2 REBUTTAL ARGUMENT OF JANE WEBRE

3 ON BEHALF OF THE PETITIONERS

4 JUSTICE SCALIA: Ms. Webre, can I ask you
5 about the question presented?

6 The way you presented it to us, it -- it was
7 as though we're -- we're reviewing whether the Federal
8 circuit was right to reject Grable in -- in whatever the
9 names of those opinions are. But. In fact, that's not
10 the situation at all.

11 The Texas Supreme Court here applied Grable,
12 and I think just the way you would want it applied. So
13 your -- your contention is simply they didn't apply it
14 correctly; isn't that right?

15 MS. WEBRE: I disagree, Your Honor. The
16 Texas Supreme Court didn't properly apply Grable. What
17 they applied was the Federal circuit's improper
18 departure from Grable, in two ways.

19 One is they conflated necessity with
20 substantiality, and that comes -- in the Federal
21 circuit's jurisprudence, that comes from a sound bite
22 from the earlier Christiansen case, where the -- the
23 line goes something like, "There is a substantial
24 Federal issue because it is necessary to the parties'
25 claim."

1 And so it conflates necessity with
2 substantiality, and the -- the Texas Supreme Court
3 followed the Federal circuit's construct. They said,
4 we're applying Grable, we're looking at substantiality,
5 but then they did exactly what the Federal circuit did.

6 And ditto with -- with the Federalism
7 balance. They pointed to the needs of the Federal
8 interest in the uniformity of patent law, and that was
9 the end of the inquiry.

10 And I think that that is a measure of the
11 deference that the Supreme Court of Texas -- as other
12 State courts would do, the deference they grant to the
13 Federal circuit in deciding the question of appropriate
14 scope of patent jurisprudence and the relative
15 importance of the -- the uniformity of patent law.

16 And so we arrive to you from the Supreme
17 Court of Texas, but truly presenting the -- the
18 appropriateness of the Federal circuit's redone
19 application of the Grable test.

20 JUSTICE SOTOMAYOR: Could you answer the one
21 point your adversary raised that -- that gives me
22 pause -- a lot of pause.

23 He says a ruling on patent law of how you
24 should or should not behave in a State malpractice claim
25 will affect all of the lawyers who practice in - in

1 your State because each of them will have to do or not
2 do whatever that malpractice ruling was because that's
3 what the State is going to -- State courts will follow
4 in the future.

5 So it will change those lawyers' behaviors
6 in Federal court.

7 MS. WEBRE: Your Honor, I think that that is
8 such a speculative road to go down. What is it the
9 lawyers are going to do different? A lawyer --

10 JUSTICE SOTOMAYOR: They are going to
11 present an expert all of the time when they don't need
12 to.

13 MS. WEBRE: They are -- they are going to do
14 some extra work and make an extra belt along with the
15 suspenders that they are required to do.

16 And where is the harm in that? And where is
17 the undermining of -- of the uniformity of patent law if
18 a lawyer in a-- in a real patent case in Federal
19 court --

20 JUSTICE SOTOMAYOR: But you can think of an
21 example where -- not perhaps on the facts of this case,
22 but where a State court's ruling could, in fact,
23 establish a -- a code of behavior that's not just belts
24 and suspenders, that's something else.

25 MS. WEBRE: Your Honor, I think that - that

1 spinning out a hypothetical on that would be truly
2 speculative. It's hard to imagine a situation where it
3 would be contrary or intentioned with what -- what the
4 Federal courts would hold, particularly since it's -- I
5 agree with Justice Scalia's construct, that the State
6 courts are going to try to apply appropriate Federal
7 law --

8 CHIEF JUSTICE ROBERTS: What about just
9 the -- just the flip side of this case? Let's suppose
10 they said, the one -- no, you don't need an expert. So
11 it's not belt and suspenders; it's neither belt nor
12 suspenders.

13 That's going to affect the conduct of the
14 lawyers in the State in the way that would be disruptive
15 of -- of the uniformity of Federal patent law.

16 MS. WEBRE: If an expert is required under
17 Federal jurisprudence, then an expert is required in a
18 real patent case. And if the State court makes the
19 mistake in -- in an occasional case here or there, then
20 a lawyer practicing in a real patent case -- in a real
21 case in Federal court, needs to make sure that they are
22 complying with the requirements.

23 And -- and if you're going to -

24 CHIEF JUSTICE ROBERTS: Well, right, the
25 requirements of the Federal law. The question is

1 there's going to be a different interpretation of what
2 that means in the State court and in the Federal
3 circuit.

4 MS. WEBRE: Well, Your Honor, if there is a
5 conflict, then what you're supposed to follow is the
6 jurisprudence of the courts who -- before whom you are
7 practicing. If -- if the Federal circuit or Federal
8 district court has something about patent law, then
9 that's what the lawyers should follow in prosecuting a
10 patent case.

11 And a lawyer who decides, I'm going to
12 disregard the Federal circuit standards on fact
13 question, expert required, whatever it is, and, instead,
14 follow the Fort Worth court of appeals on this issue, I
15 submit that -- that the lawyer does so at his peril, and
16 that doesn't undermine the appropriate uniformity of
17 patent law.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.
19 The case is submitted.

20 (Whereupon, at 12:03 p.m., the case in the
21 above-entitled matter was submitted.)

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