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IN THE SUPREME COURT OF THE UNITED STATES

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NAUTILUS, INC., :

Petitioner : No. 13-369

v. :

BIOSIG INSTRUMENTS, INC. :

- - - - - x

Washington, D.C.

Monday, April 28, 2014

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 a.m.

APPEARANCES:

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CURTIS E. GANNON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Respondent.

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

2 (10:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 13-369, Nautilus v. Biosig
5 Instruments.

6 Mr. Vandenberg.

7 ORAL ARGUMENT OF JOHN D. VANDENBERG

8 ON BEHALF OF THE PETITIONER

9 MR. VANDENBERG: Mr. Chief Justice, and may
10 it please the Court.

11 The Patent Act requires particular and
12 distinct claims, but the claim in this case is not
13 particular and distinct. It is ambiguous because it has
14 two reasonable readings with very different claim
15 scopes, even after all of the interpretive tools are
16 applied.

17 Such ambiguous claims defeat the public
18 notice function which is at the heart of Section 112,
19 and they increase litigation. They cause more claim
20 construction disputes, and they cause more reversals of
21 district court claim construction rulings.

22 Taken all together, ambiguous claims and the
23 Federal circuit's test allowing ambiguous claims defeats
24 the very purpose of Section 112 and the patent system,
25 namely, to encourage and promote innovation by others

1 after the first patent issues.

2 JUSTICE GINSBURG: Why is this claim
3 ambiguous? It's evident that these electrodes have to
4 be close enough so that the user's hand contacts both
5 electrodes, but separate enough to keep -- keep
6 electrodes distinct. Why isn't that sufficiently
7 definite?

8 MR. VANDENBERG: Your Honor, if -- if that
9 were the only reasonable construction, then that may
10 suffice. However, here, the other reasonable
11 construction is that the spaced relationship is a
12 special spacing that causes the electrodes to achieve
13 the desired result. And that was the construction that
14 the majority found at the Federal circuit, namely, that
15 spaced relationship is not what it sounds like, namely,
16 any spacing, but rather is a special spacing that is
17 derived by trial-and-error testing to get the spacing
18 just right so that the electrodes detect --

19 JUSTICE SOTOMAYOR: I don't think the
20 majority or the -- or the concurrence or the other side
21 disagreed with that. The only question was whether it
22 was part of the specifications or not. I thought that
23 was the only difference between them. They both agreed
24 ultimately that the electrodes had to cancel out -- was
25 it the EMGs?

1 MR. VANDENBERG: Correct.

2 JUSTICE SOTOMAYOR: So they both agreed that
3 that was part of the scope. The only issue was, was it
4 part of the specifications or part of the claims. But
5 both of them make up the scope of the patent.

6 MR. VANDENBERG: Your Honor, we would submit
7 that the disagreements between the judges and, in fact,
8 between Biosig itself went to the scope of the claim,
9 namely, does the scope of the claim cover all ways of
10 achieving the desired result no matter how the
11 electrodes are spaced. That's one possible reading.

12 The other possible reading is that the
13 claims cover only a special spacing of the electrodes to
14 achieve the desired result. And why that matters is if
15 you think of the inventor in 1994 who invents a new
16 material for electrodes, and this new material achieves
17 the desired result of detecting equal muscle signals on
18 the left and right side, regardless of the spacing of
19 the electrode. So it doesn't matter where you put the
20 electrodes, as long as you can touch them, this new
21 material achieved the -- the desired goal.

22 That inventor would not know in 1994 if they
23 infringed or not, because if the claims had the
24 interpretation that the majority eventually gave them,
25 namely, that the spaced relationship has this functional

1 limitation and it must be the result of this
2 trial-and-error balancing, there'd be no infringement.
3 But if spaced relationship meant any spacing, then there
4 would be infringement. So that is the exact type of
5 zone of uncertainty that United Carbon warned against
6 and which deters the innovation.

7 CHIEF JUSTICE ROBERTS: But it can't mean
8 any spacing, because anyone skilled in the art would
9 know the hand has to cover it. So you're basically
10 talking about a fairly narrow range between one side of
11 the hand and the other and not too close together that
12 they don't -- don't work. And that seems to me that
13 someone skilled in the art can just try a couple of
14 things and see where -- where the trial and error.
15 Trial and error makes -- could mean a very difficult
16 thing, like Edison discovering what works in a light
17 bulb. But here you've got a very limited range and
18 someone skilled in the art will just, well, let's try
19 it, you know, close to the middle, let's try it to so
20 far apart. But it's not any spaced relationship.

21 MR. VANDENBERG: And that's correct, Your
22 Honor, and I do -- when I refer to any spacing, it's
23 really a shorthand for any spacing that is narrow enough
24 so that the hand can actually touch both electrodes but
25 not touching. So I agree that under each interpretation

1 it makes sense that the electrodes have to be touchable
2 by a single hand, and they can't be touching each other
3 or there'd simply be a single electrode.

4 JUSTICE SOTOMAYOR: What would be the
5 purpose of the invention if it were only covering
6 spacing without the function of canceling the EMG? I
7 can't understand, if I read this patent, what it would
8 do unless you add its function.

9 MR. VANDENBERG: Well, Your Honor, the
10 purpose of the patent is it would cover possibly, again,
11 all techniques for achieving the desired function. So
12 again, going back to the invention of the new material,
13 if the inventor comes up with a specific way of
14 achieving the result, and here they came up with trial
15 and error spacing, they didn't describe that in the
16 patent. That didn't -- that wasn't described by the
17 inventor until 15 years later. But nevertheless, let's
18 say they had this specific way of achieving it. They
19 very well could have drafted the claim intentionally the
20 way they did to have a broader coverage so that they
21 cover all possible ways of achieving that desired
22 result. Patent attorneys are trained to try to draft
23 the claims, you know, some claims as broadly as
24 possible. So that reading by the concurrence was a very
25 plausible reading of this claim. Reading the claim, it

1 has any spaced relationship as long as, as the Chief
2 Justice indicated, I can touch them and they're not
3 touching each other. But that's it. There's no other
4 restriction on what "spaced relationship" means. That's
5 a very reasonable interpretation and that was the
6 interpretation that Biosig asserted at the Markman claim
7 construction in this case.

8 JUSTICE SCALIA: But you -- you acknowledge
9 that it -- it would be a valid patent if all you said is
10 you have to space these things and you figure out what
11 the spacing is going to be. You -- you can -- you can
12 get a patent for -- tell somebody trial and error.
13 Let's take Edison's light bulb. I mean, could he say,
14 you know, get some material that -- that will -- will
15 illumine when -- when electricity is passed through it
16 and you figure out by trial and error what this material
17 might be. Might be tungsten, who knows, you know.
18 Maybe it's chewing gum. Would that be a valid patent?

19 MR. VANDENBERG: It would not, Your Honor.
20 That --

21 JUSTICE SCALIA: So I don't -- I don't
22 really understand this trial and error spacing stuff.
23 What -- what is the limit on trial and error? Can you
24 get patented anything when you say, you know, this is
25 the basic principle, you figure out what -- you know,

1 what makes it work.

2 MR. VANDENBERG: Well, Your Honor,
3 there's -- there's two levels of indefiniteness here.
4 First, it's unclear which construction was intended. So
5 basically, there are two reasonable --

6 JUSTICE SCALIA: No. I understand that.

7 MR. VANDENBERG: But the second --

8 JUSTICE SCALIA: I'm asking why the second
9 construction is -- is a plausible patentable invention.

10 MR. VANDENBERG: Your Honor, it's not
11 patentable. In fact, it would be indefinite. However,
12 the person of skill in the art reading the claim is not
13 expected to do a full-blown invalidity analysis.
14 They're simply trying to figure out, where can I
15 innovate. I see this patent. It issues in '94. The --
16 the alternative --

17 JUSTICE SCALIA: All the person skilled in
18 the art will know is that he has to figure out what the
19 spacing is, right?

20 MR. VANDENBERG: No, Your Honor.

21 JUSTICE SCALIA: But -- but still the -- the
22 inventor doesn't tell you what the spacing has to be.

23 MR. VANDENBERG: Well, that is the second
24 problem. We agree. The second problem with these
25 claims is they're purely functional. They simply have a

1 clause that says whereby good things happen, namely,
2 that equal muscle signals are detected. The claims
3 don't tell you how. They leave that up in the air.
4 Maybe it has something to do with the spacing
5 electrodes, but maybe not.

6 And the further problem is that the
7 specification here did not describe any technique for
8 achieving the desired result. If one reads the
9 specification, you read it and it says various things
10 and it says, whereby the muscle signals are detected as
11 being equal on both hands, on both electrodes. Well, in
12 reality, the -- the electrical signals on my left and
13 right palms are unequal. Somehow, however, the
14 electrodes detect them as if they're being equal. The
15 patent doesn't say how. It doesn't say why. It doesn't
16 say what causes it. So this is the purely functional
17 type of claim that United Carbon and General Electric --

18 CHIEF JUSTICE ROBERTS: Do you -- do you
19 have any disagreement with a standard that's articulated
20 by the Solicitor General? He says that, you know, a
21 patent satisfies the requirement if, in light of the
22 specification and the prosecution history, a person
23 skilled in the art would reasonably understand the scope
24 of the claim.

25 MR. VANDENBERG: Your Honor, we may or may

1 not, depending on how the Solicitor General would apply
2 that standard to a claim that has two reasonable
3 interpretations after the person of skill in the art
4 reads the claim in light of the specification and
5 applies all the interpretive tools.

6 JUSTICE GINSBURG: The Court has to come up
7 with a formula. You were saying the Federal Circuit's
8 formula is no good. The Solicitor General has, as the
9 Chief Justice just said, has suggested an appropriate
10 formula. And you say, well, it depends on the
11 application. As a formula, do you agree?

12 MR. VANDENBERG: Your Honor, we -- we think
13 it's -- it would certainly be an improvement over the
14 Federal Circuit's amenable to construction and insolubly
15 ambiguous test. The Solicitor General refers to
16 reasonably understand. The parties have agreed on the
17 phrasing of "reasonable certainty." We think
18 "reasonable certainty" comes out of this Court's cases,
19 and therefore, we prefer that. To the extent,
20 obviously, "reasonably understand" means the same as
21 "reasonable certainty," then -- then we accept that.

22 CHIEF JUSTICE ROBERTS: Well, that's what
23 I'm having trouble dealing with. I suspect your friends
24 on the other side will say yes, right, that they accept
25 that, too. And you say, but it can't be insolubly

1 ambiguous or not amenable to construction. And they
2 say, well, that's not really what the Federal Circuit
3 said.

4 So until we get to the application, I don't
5 see much disagreement among any of you about the
6 standard or what's wrong with the Federal Circuit's
7 articulation. And the questions kind of suggest we move
8 very quickly into the particular invention and the
9 application. And I'm just -- I'm curious what you want
10 us to do if it seems like in every case, we have to get
11 right into the application rather than the legal
12 standards.

13 MR. VANDENBERG: Well, I think the -- the
14 key dispute here is what happens if, after all the
15 interpretive tools are applied, there's a genuine
16 ambiguity, meaning there really are two reasonable
17 interpretations of the claim. Genuine ambiguity, person
18 of skill in the art applying all the interpretive tools,
19 trying to understand the claim. What happens then?

20 Our position is that if such a claim, which
21 essentially points in two different directions, is
22 indefinite, the problem with the Federal Circuit's test
23 is the Federal Circuit would not find that indefinite.
24 Instead, the Federal Circuit would pick one because it's
25 amenable to construction. They would pick one. They

1 would then ask is the construction they picked itself
2 sufficiently clear for a person of skill in the art.

3 JUSTICE ALITO: What if a -- what if a
4 person who's a skilled artisan says that the claim could
5 mean A and it could mean B, they're both reasonable
6 constructions, but this person is reasonably certain it
7 means A, but not B? What would happen then?

8 MR. VANDENBERG: Well, I think the -- the
9 proper analysis would be to look at the alternative
10 construction and ask: Was that a reasonable
11 interpretation? Was the second interpretation a
12 reasonable interpretation of the claim? And courts
13 every day make judgments like that, whether
14 interpretations, for instance, of statutes. A second
15 interpretation of a statute is reasonable.

16 JUSTICE SCALIA: Well, the only -- the only
17 analog that comes to my mind immediately is our review
18 of agency action. Is -- is that the standard that you
19 want us to use? If -- if, you know, it's within the
20 scope of the ambiguity, oh, we don't think that's the
21 right answer. But it's close enough for government
22 work. Is that -- is that what you want us to apply to
23 patents?

24 MR. VANDENBERG: No, Your Honor, because the
25 starting point here is the text of the statute. The

1 text of the statute could hardly be more emphatic.
2 Section 112 requires that the invention be described in
3 full, clear, concise, and exact terms and then be
4 claimed particularly and distinctly. Given that text of
5 the statute, given the statutory purpose of protecting
6 the next innovator from uncertainty, we think that that
7 statutory language needs to be enforced, you know,
8 forcefully.

9 JUSTICE SCALIA: Can it be reasonable but
10 wrong.

11 MR. VANDENBERG: No, Your Honor. If a claim
12 --

13 JUSTICE SCALIA: I see. Whatever
14 interpretation is wrong is ipso facto unreasonable?

15 MR. VANDENBERG: If -- if I understand
16 correctly, a claim has only one proper construction. If
17 a claim is subject --

18 JUSTICE SCALIA: Okay. So whatever is wrong
19 is -- is, by your definition -- you know, we -- we
20 construe statutes all the time, and we certainly don't
21 think that the result we come to is the only reasonable
22 result. We think it's the best result, but not the only
23 reasonable one. But you're saying in this field there's
24 a right result and everything else is unreasonable.

25 MR. VANDENBERG: What -- what we're -- we

1 would analogize it most closely to -- to the Chevron
2 ambiguity analysis.

3 JUSTICE SCALIA: Yes, that's what I proposed
4 first. But I thought -- I thought you didn't like that.

5 MR. VANDENBERG: Well, if I misunderstood
6 the question I apologize. But my understanding is in
7 order to determine whether or not there is ambiguity in
8 the statute, that the Court first looks to the statutory
9 language and then applies interpretive tools. The same
10 is true here. And then the Court -- if the Court finds
11 there are more than one reasonable readings, then the
12 Court will designate the -- the statute as ambiguous and
13 then move on for the remainder of the Chevron analysis.

14 Under this statute, however, if the Court
15 determines the claim is ambiguous, the proper result is
16 invalidity.

17 JUSTICE GINSBURG: Well, what is -- what is
18 the ambiguity? Is it -- I thought from your brief that
19 it was the term "space relationship." Is that the --
20 what -- what is the ambiguity?

21 MR. VANDENBERG: Yes, Your Honor. It is the
22 term "space relationship" in the context of the claim.
23 And again, the ambiguity is that this claim either
24 covers all possible spacing of the electrodes within the
25 boundaries that we've discussed or it only covers

1 special spacings of the electrodes that are a result of
2 trial and error in order to achieve the desired result.
3 Those are hugely different claim scopes and that -- that
4 uncertainty between those two is what would chill
5 innovation.

6 JUSTICE SOTOMAYOR: Did you -- did you
7 proffer any evidence below showing that a person with
8 ordinary skill in the art did not understand what this
9 claim meant? Your brief seems to rely only on the
10 dispute between the majority and the concurrence. But
11 was there -- did you proffer any evidence below?

12 MR. VANDENBERG: Your Honor, we did not
13 proffer our own experts. The -- the evidence below
14 included that Biosig's own expert asserted that each of
15 the competing constructions was reasonable, in essence.
16 More specifically, he said that -- this was Dr.
17 Gannoulas said at Joint Appendix 274 -- that "The person
18 of skill in the art could readily discern the trial
19 court's construction of spaced relationship." The trial
20 court's construction was any spacing.

21 Then the expert went on and said, "The
22 person of skill in the art could easily discern the
23 claim scope because the EMG signals have to be
24 substantially removed." That was the competing
25 functional construction of spaced relationship. So

1 their own expert supported both of these competing
2 constructions and the reason they were comfortable doing
3 that is because --

4 JUSTICE SOTOMAYOR: Now, I have a really big
5 problem, which is we as Justices disagree on the meaning
6 of things all the time, and one side will say, this is
7 perfectly clear from the text of the statute, from
8 its -- from its history, from its context. And we do
9 all the statutory tools, and there will be one or more
10 of us who will come out and say, no, we think it's a
11 different interpretation. Would we have any valid
12 patents in the world if that's the standard that we --
13 that we adopt? That if any judge on a panel thinks that
14 there's another interpretation, that that's sufficient
15 to invalidate a patent as indefinite?

16 MR. VANDENBERG: Your Honor, we are not
17 taking the position that because the judges below
18 disagreed on the construction, that that is dispositive
19 or proves ambiguity in the claim. We -- we did say the
20 fact that Biosig itself took both competing
21 constructions as the need arose --

22 JUSTICE SOTOMAYOR: But the majority -- but
23 the majority here said that it was clear from the
24 prosecution history, the specifications, and the
25 description that this was definite. I don't know on

1 what basis I would have to overturn their review of that
2 issue.

3 MR. VANDENBERG: Well, that -- that Biosig
4 has taken both claim constructions. We've not seen them
5 assert that either claim construction was unreasonable.
6 The majority did not find the concurrence's construction
7 unreasonable. Nor did it find the trial court's
8 construction unreasonable. Their experts took both
9 positions. So we have a claim that on its face -- I
10 mean, the starting point is looking at the patent, of
11 course, not what judges or experts or parties said
12 later. The patent on its face is grammatically
13 ambiguous. There is a whereby clause dangling in the
14 middle of the claim that says whereby something good
15 happens.

16 JUSTICE SCALIA: Yes. We understand all
17 that. I -- I'm still having trouble understanding what
18 your standard is. You -- you agree that your standard
19 is not, there is a right answer and everything that is
20 not the right answer is unreasonable. That's not your
21 position.

22 MR. VANDENBERG: That's right, Your Honor.

23 JUSTICE SCALIA: Right?

24 MR. VANDENBERG: Right.

25 JUSTICE SCALIA: Okay. Then you invoke

1 Chevron. Do you mean that anything that would pass
2 Chevron's step one is okay?

3 MR. VANDENBERG: Your Honor --

4 JUSTICE SCALIA: That is, if it would pass
5 Chevron's step one it's ambiguous.

6 MR. VANDENBERG: Well, if -- let me be clear
7 about "pass." If it's ambiguous under Chevron step one,
8 then that is a close parallel to being ambiguous
9 under -- under Section 112, paragraph 2. But again, our
10 starting point, of course, is not Chevron. It's the
11 statutory text, which -- and the standard we submit is
12 to assert -- I'm sorry, to enforce the statutory text by
13 its plain terms.

14 JUSTICE KENNEDY: Would this -- would this
15 help? Do you agree that the standard at the PTO, and
16 let's say that it's whether or not -- the claim is
17 definite if a person skilled in the art would be
18 reasonably certain of its scope. Is the standard used
19 by the PTO the same standard that the CA Fed ought to
20 use?

21 MR. VANDENBERG: Yes, it is, Your Honor.

22 JUSTICE KENNEDY: All right. How does --
23 that's a sensible answer, I think. Now, how does the
24 presumption of validity bear on -- on the application of
25 the -- of that same standard in the court of appeals?

1 MR. VANDENBERG: The presumption of validity
2 certain applies to this defense. It requires the
3 challenger to raise the defense, to preserve the
4 defense, plead it as affirmative defense, to make the
5 initial argument as to why the claim is --

6 JUSTICE KENNEDY: Doesn't that imply some
7 deference on findings of fact?

8 MR. VANDENBERG: Your Honor, it would be
9 rare for there to be, in an indefiniteness case, to be
10 any underlying finding of fact. The -- the issue of
11 indefiniteness is really subsidiary.

12 JUSTICE KENNEDY: Does it imply -- what sort
13 of deference does it accord to the PTO?

14 MR. VANDENBERG: If indeed --

15 JUSTICE KENNEDY: That is, the presumption
16 of validity, does that accord some deference to the PTO?
17 And how would that apply or not apply here?

18 MR. VANDENBERG: It would apply -- it does
19 not apply in this case. There are no fact findings out
20 of the Patent Office regarding indefiniteness. But if
21 there was -- the same indefiniteness issue came up and
22 the Patent Office found, for instance, that a term of
23 art, let's say nanotechnology, biotechnology term of art
24 had a particular meaning, then that fact-finding may be
25 entitled to deference by the trial court.

1 However, indefiniteness itself is a legal
2 determination. The Federal Circuit said that. They
3 review this. They know --

4 JUSTICE KENNEDY: So there's no deference to
5 the PTO as to that legal interpretation.

6 MR. VANDENBERG: No, Your Honor, no more
7 than there'd be deference to the Patent Office claim
8 construction or any other legal decision.

9 JUSTICE KAGAN: The -- the quotation that
10 the Chief Justice read to you from the Solicitor
11 General's brief referred to the use of prosecution
12 history. Do you agree with the Solicitor General about
13 that use, about the permissibility of that use?

14 MR. VANDENBERG: Yes, Your Honor, so long as
15 the prosecution history that's being used to clarify
16 existed at the date the patent issued. The person of
17 skill in the art again is supposed to be motivated to
18 innovate around the patent the day it issues. Here
19 there is a re-examination prosecution history.
20 Sometimes there is later prosecution history in a
21 related patent. That type of prosecution history
22 shouldn't be used to sort of ex post facto cure an
23 initial indefiniteness.

24 But putting aside that rare instance, yes,
25 the prosecution history and the specification are part

1 of the interpretive tools that are available and would
2 be used.

3 I think it's important to remember here that
4 there is no legitimate need or excuse for ambiguity in
5 patent claims. Once the applicant has satisfied
6 paragraph one and its strict requirements for describing
7 the invention, it is easy to claim the invention
8 particularly and distinctly. The only reason that there
9 are so many ambiguous claims out there today is that
10 patent attorneys are trained to deliberately include
11 ambiguous claims. Ambiguous claims make the patent
12 monopoly more valuable. Every patent attorney knows
13 that.

14 JUSTICE GINSBURG: The government tells us
15 there are some 22,000 patent grants since 1976 that use
16 the term "spaced relationship." I suppose many of those
17 would fail your test?

18 MR. VANDENBERG: Not likely, Your Honor. It
19 would be highly unlikely in more than 99 percent of
20 those cases that there'd be any uncertainty of what
21 "spaced relationship" meant. The problem here is not
22 those words. It's the grammatical ambiguity in the
23 claim. It's the fact that the specification did not
24 describe, even arguably, the invention. That wasn't
25 described, the trial and error spacing, until 15 years

1 later, and that the patent specification has no concrete
2 examples of embodiments inside the claim or outside the
3 claim.

4 So we ask that the Court reaffirm its
5 precedents in United Carbon, General Electric and Eibel
6 Process. Eibel Process upheld the claim that had vague
7 sounding language. The language was "high elevation,"
8 "substantial elevation," but it was upheld because that
9 patent specification concretely described the invention,
10 its theory of operation, concrete examples that came
11 inside the claim scope, concrete examples that fell
12 outside. And that's why that patent satisfied the
13 particular and distinct claiming requirement and this
14 one does not.

15 I'll reserve the balance of my time.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 Mr. Harris.

18 ORAL ARGUMENT OF MARK D. HARRIS

19 ON BEHALF OF THE RESPONDENT

20 MR. HARRIS: Mr. Chief Justice, and may it
21 please the Court:

22 The decision of the Federal Circuit should
23 be affirmed for two reasons: First, that court
24 correctly held that the test for definiteness is whether
25 a claim puts a skilled artisan on reasonable notice of

1 the boundaries of the invention, and secondly, whatever
2 --

3 JUSTICE SCALIA: If that's -- if that's what
4 it held we wouldn't have taken this case. I thought we
5 took it because it had some really extravagant language.

6 MR. HARRIS: The court, the court below used
7 the word --

8 JUSTICE SCALIA: I mean, it's one thing to
9 run away from that language, as your brief does. It's
10 another thing to deny that it exists.

11 MR. HARRIS: Justice Scalia, we are not
12 denying that those words exist, "insolubly ambiguous,"
13 but what I think this court below, the Federal Circuit,
14 in this case explained, and it's explained consistently,
15 is that that -- those two words are not the test all by
16 themselves. In this very case --

17 JUSTICE KENNEDY: You would agree, I take
18 it, that if, was it, "insolubly ambiguous" were the
19 standard that the court used, that we should reverse?

20 MR. HARRIS: If there were no other context
21 and only those words alone would be used, it seems that
22 some district courts might misinterpret those words, as
23 the Solicitor General has mentioned, but --

24 CHIEF JUSTICE ROBERTS: So it was fair, as I
25 suggested earlier, nobody agrees with that formulation;

1 right?

2 MR. HARRIS: Yes, I guess so, Your Honor.
3 But I want to -- just want to clarify what that point
4 is. What the Federal Circuit said below, the full
5 statement of its test that it was applying in this case,
6 was: If reasonable efforts at claim construction result
7 in a definition that does not provide sufficient
8 particularity and clarity to inform skilled artisans of
9 the bounds of the claim, the claim is insolubly
10 ambiguous and invalid for indefiniteness. There is no
11 suggestion that the court --

12 JUSTICE SOTOMAYOR: There is a subtle -- no,
13 there is, if you read that language carefully. It seems
14 to be saying that what has to be reasonably definite is
15 the court's construction, and it takes the emphasis away
16 from whether a skilled -- someone skilled in the art
17 would be definite. There is a big difference between
18 can I read this and give it a construction and whether
19 or not a construction is definite enough so someone
20 skilled in the art could understand it.

21 MR. HARRIS: We would completely agree that
22 the test needs to include what the skilled artisan would
23 have understood at the time.

24 JUSTICE SOTOMAYOR: That's my problem with
25 the Federal Circuit's articulation and as you read its

1 decisions. Its focus is not always on that question.
2 Its focus seems to be on the reasonableness of its
3 construction, as opposed to the reasonableness of a
4 skilled artisan's or whether skilled, someone skilled in
5 the art could reasonably construe the scope of this
6 patent.

7 MR. HARRIS: But I think it's quite clear
8 from the way the Federal Circuit actually applied the
9 standard in this case that the Federal Circuit was
10 looking to what the evidence was as to what skilled
11 artisans would do with this claim language. If anything
12 it's Nautilus that's arguing that it doesn't seem to
13 matter what a skilled artisan thought at the time.

14 JUSTICE SOTOMAYOR: So what do you see as
15 the difference? He says that the concurrence's
16 definition is different from the majority's. The
17 government -- explain -- I read your brief. I know what
18 you think the difference is, but --

19 MR. HARRIS: Well, between the majority and
20 the concurrence below, first, we don't think --

21 JUSTICE SOTOMAYOR: He says there is a
22 difference in scope, so address that.

23 MR. HARRIS: Yes.

24 JUSTICE SOTOMAYOR: Why don't you see that
25 as being a difference of importance?

1 MR. HARRIS: It would be a difference if
2 there were a difference in scope, but there isn't one.
3 I think it's very important to look at what the majority
4 and the concurrence actually did. The majority was
5 addressing definiteness. The majority did that in two
6 steps. The majority said we are going to apply the
7 principles of claim construction. The first thing it
8 did was it looked to the claim language, the written
9 specification, the diagrams, all the traditional tools
10 of patent interpretation. It said there is definiteness
11 here because there are bounds to the spaced
12 relationship. It isn't just anything, it has to be
13 greater than zero, it has to be less than the width of a
14 hand. It's implicit in the -- actually explicit in the
15 statements of the patent.

16 Then it said that the functional limitation,
17 which is the whereby clause in the patent, sheds
18 additional light. That's where the concurrence got off
19 the train and the concurrence said: I don't think we
20 need to reach that issue. Nautilus has turned that
21 approach on its head. Nautilus says that the fact that
22 the concurrence didn't think it was necessary to reach
23 the functional limitation, in fact said that it's not
24 before us for procedural reasons, Nautilus reads that as
25 if the concurrence was somehow disavowing or disclaiming

1 the majority's approach. It never said that. It was a
2 procedural argument that it had. Then, in fact, there
3 is no disagreement between the majority and the
4 concurrence.

5 JUSTICE SCALIA: Would this patent be valid
6 if the concurrence's approach prevailed? It wouldn't
7 work, would it? It would not work. The mere fact that
8 you spaced it somewhere where the hands can touch it
9 would not necessarily produce the result, would it?

10 MR. HARRIS: If the patent said nothing
11 other than there is a space between --

12 JUSTICE SCALIA: That's all the claim said.

13 MR. HARRIS: Well, no, no, Justice Scalia.
14 The whereby clause explicitly said -- it described the
15 structure. This case is quite different from General
16 Electric, where there was no structure being given. It
17 said that there is going -- there are going to be EMG
18 signals that are going to be detected by the electrodes.

19 JUSTICE SCALIA: Right.

20 MR. HARRIS: Then those signals, which will
21 be detected as equal, are going to be fed into a
22 differential amplifier and thereby subtracted or
23 canceled out.

24 JUSTICE SCALIA: Whereby. Whereby. I would
25 read that as saying so long as you put the spacing at

1 some point where the hands can touch it and they are not
2 touching, that will produce the result that the signals
3 will be equalized. That's how I read the claim.

4 MR. HARRIS: Well, in fact, if the
5 electrodes are configured in such a way that they
6 detected the signals as equal --

7 JUSTICE SCALIA: No, no.

8 MR. HARRIS: -- it would produce that.

9 JUSTICE SCALIA: No. Yes, I understand
10 that, but that's not what it says. It doesn't say space
11 the electrodes in such a manner that the signals coming
12 from each side will be equal and you'll have to do this
13 by trial and error. That's not what it says. It just
14 says, you know, keep the electrodes apart. They have to
15 be apart so that the hands don't touch, and on the other
16 hand they can't be outside the scope of what the hands
17 grip. That's all it says. Whereby, if you do that, the
18 signals will be equalized. That's -- that's how I would
19 read it. It wouldn't work that way, would it?

20 MR. HARRIS: It wouldn't work if it gave no
21 specifics. But this is where the fact that it all
22 depends on what the skilled artisan would do is
23 critical. Because there was uncontested evidence that a
24 skilled artisan in 1992 was able to read this patent and
25 understand how to put together this invention in such a

1 way that it worked. In fact, Dr. Galiana's research
2 assistant did it, in 2 hours was able to build this
3 invention based on the diagrams.

4 JUSTICE BREYER: I'm a little confused here.
5 Imagine there are two kinds of electrodes, a blue one
6 and a green one, and you have to have a blue one and
7 green one on left hand and a blue one and green one on
8 right hand. And now, you cannot let them touch. The
9 blue can't touch the green. I got that. And suppose on
10 your left hand you put the blue one here and the green
11 one there. And in the right hand, you put the blue in
12 here and the green in here. See, they're not touching,
13 but they're different distances from each other in the
14 two hands. Does it work or not?

15 MR. HARRIS: If the distances on the two
16 sides --

17 JUSTICE BREYER: Look, look. This is like
18 that one hand.

19 MR. HARRIS: Yes.

20 JUSTICE BREYER: And this one's like the
21 other hand. Okay? So does it work or not?

22 MR. HARRIS: I don't -- I don't know
23 whether --

24 JUSTICE SCALIA: Let the record show that
25 the Justice is holding his fingers in the air.

1 (Laughter.)

2 JUSTICE BREYER: All right. Look, on the
3 green one is two inches -- the space between the green
4 one and the right one is like a half inch for the left
5 hand, and it's like one inch for the right hand. Okay?
6 Does it work?

7 MR. HARRIS: If I could answer that
8 question, Justice Breyer, in a -- in a more roundabout
9 way. What the --

10 JUSTICE BREYER: It was asked in a pretty
11 roundabout way.

12 (Laughter.)

13 MR. HARRIS: What the uncontested evidence
14 showed was that a skilled artisan at the time knew how
15 to space electrodes.

16 JUSTICE BREYER: Then did he know that they
17 had to be -- like if you put it two inches across here,
18 so there are two inches between them, and over here it's
19 like a half inch between them, did he know it did work
20 or did he know it didn't work?

21 MR. HARRIS: He would know by --

22 JUSTICE BREYER: He knew if it worked, but I
23 want to know if it does work.

24 MR. HARRIS: It probably would not work in
25 that situation.

1 JUSTICE BREYER: Okay. Now, as soon as you
2 say that, that's his point. His point is that when I
3 read it -- I guess that's the point that's being made.
4 When I read it, it just seems to me that the green one
5 can't touch the blue one, and the whole thing has to fit
6 within your hand, so each of them catches a finger. And
7 he's saying that isn't good enough. That doesn't work.
8 They have to be the same distance. And what that
9 distance is, this document doesn't tell us. And it
10 doesn't even tell us they have to be the same distance.
11 So therefore, since it doesn't tell us that, it's
12 ambiguous. Is that the correct argument? All right.
13 We think it's the correct argument. So now, what's your
14 answer?

15 MR. HARRIS: This Court has never found a
16 problem with the need for some amount of experimentation
17 in order to get the parameters exactly right.

18 JUSTICE BREYER: It doesn't even say that.
19 It doesn't even say that. It doesn't say go experiment
20 whether somebody with great big fingers on one hand and
21 tiny little fingers on the other hand --

22 MR. HARRIS: In -- in Eibel Process, this
23 Court faced -- as Mr. Vandenberg mentioned -- faced a
24 case in which a method of manufacturing paper, all it
25 said was that the angle of the supply of the pulp had to

1 be high. Didn't say anything more than that.

2 CHIEF JUSTICE ROBERTS: Is it part of an
3 answer to Justice Breyer's question that the diagram
4 shows them equally spaced or is that not relevant?

5 MR. HARRIS: I don't think the equal spacing
6 is the only issue, Mr. Chief Justice. The issue is how
7 do you find what that spacing is. And the answer, the
8 uncontested answer, is that skilled artisans were able
9 to do that very quickly. It's not trial and error as if
10 it's throwing darts and just seeing what might work.
11 It's just like tuning a radio. Just happen to move
12 things around in order you get that --

13 JUSTICE KAGAN: Why doesn't that --

14 JUSTICE SCALIA: You know, I can understand
15 that if the claim said that. If the claim said, you
16 know, fiddle with it until it works. But it doesn't say
17 that. It just says, you know, spacing, and I would
18 think so long as there's space, they don't touch, and
19 they're no more than the widths of the hands, it'll
20 work. It doesn't say that. I don't think the "whereby"
21 is -- is an invitation to experiment.

22 But the other case you were talking about,
23 tell us more about it. It just said a high angle.

24 MR. HARRIS: It's at a high angle. Minerals
25 Separation maybe is even a stronger case. In Minerals

1 Separation, it was a method for extracting ore from --
2 metal -- metallic ore from --

3 JUSTICE SOTOMAYOR: Why are you -- why are
4 you running from -- the working here is that it cancels
5 out a signal, correct?

6 MR. HARRIS: Yes.

7 JUSTICE SOTOMAYOR: And so what the majority
8 said is that that function is part of the understanding
9 of the spacing. Isn't that what the majority said?

10 MR. HARRIS: It said that an additional
11 constraint on the spacing is the fact that it has --
12 that it will work in a certain way.

13 JUSTICE SOTOMAYOR: So I don't know whether
14 it has to be equal spacing or one could be one inch and
15 the other half an inch apart. The bottom line is that
16 to work, it has to cancel out, that that's part of the
17 scope.

18 MR. HARRIS: Yes. Yes.

19 JUSTICE SOTOMAYOR: Now, the concurrence
20 said, no, you don't have -- you can't -- I'm not looking
21 at the specification.

22 MR. HARRIS: Yes.

23 JUSTICE SOTOMAYOR: I think it's definite
24 without it.

25 MR. HARRIS: Yes.

1 JUSTICE SOTOMAYOR: All right. I don't see
2 how it could be. That's what I think Justice Scalia is
3 saying and Justice Breyer is saying, that if we don't
4 understand what the purpose is, how can that spacing be
5 definite enough to make this thing work.

6 So tell us why you think that the
7 concurrence's interpretation is wrong. What's he
8 missing?

9 MR. HARRIS: The word -- when -- when it
10 says "whereby," the whereby means the elements that came
11 before are going to produce that result.

12 JUSTICE SOTOMAYOR: Mm-hmm.

13 MR. HARRIS: There's never been a problem
14 with the fact that a -- some amount of
15 experimentation -- I hate to even call it that because
16 it's really just tuning dials on a radio -- may be
17 needed in order to get the exact number, the exact
18 setting.

19 JUSTICE SOTOMAYOR: Result that the
20 specification --

21 MR. HARRIS: But what the whereby clause
22 says, it -- it conveys a structure. It says they have
23 to be detected, the signals, in such a way that they're
24 equal. That normally wouldn't be the case. In all the
25 devices that existed up to that time, they wouldn't be

1 equal. Signals would come in from the right and the
2 left hand that during exercise would be unequal, because
3 when a person is running or moving, the right hand and
4 left hand have different amounts of contact with the
5 electrodes.

6 The whole novelty of this was the fact that
7 you didn't have to cancel EMG signals, what we call
8 downstream, meaning by just filtering them out. They
9 could be detected in such a way that they would be equal
10 and then be cancelled.

11 JUSTICE KAGAN: Why didn't the patent
12 provide more specificity as to the exact spacing?

13 MR. HARRIS: Because like Eibel Process and
14 like Mineral Separation, it wasn't possible. It
15 depended on too many variables. It depended -- the
16 actual spacing in every single instance would depend on
17 four variables. This was made clear in the expert
18 declarations. The size of the electrode, the shape of
19 the electrode, the spacing between the electrodes, and
20 the materials, those four things. Just like in Eibel
21 Process, what the Court said was, you may not know in
22 advance what it is. But a skilled artisan will know.

23 JUSTICE GINSBURG: What about the apparatus
24 on which the electrodes are mounted? Isn't that another
25 variable way you can't say half an inch, because it

1 depends, as you said, on size, shape, and materials of
2 the electrodes. But doesn't it also depend on the
3 apparatus?

4 MR. HARRIS: Yes. Yes, it does. It does.
5 The critical point is that there's no question that a
6 skilled artisan knew how to do this. They've introduced
7 no evidence that a skilled artisan didn't know this. In
8 fact, their entire argument is based on attorneys coming
9 up with arguments later.

10 CHIEF JUSTICE ROBERTS: What -- what about
11 the case that he postulated, an abstract one, where you
12 have two perfectly reasonable constructions. What --
13 what happens then?

14 MR. HARRIS: If there are two constructions,
15 each of which has survived the Markman claim
16 construction process, and each one of them does the
17 things that Markman says the correct construction needs
18 to do, which is that it fully comports with the
19 instrument as a whole and it preserves the patent's
20 internal coherence, then yes, we would agree in that
21 case it's indefinite. But what they've put forward --

22 JUSTICE KAGAN: Doesn't Markman exist for a
23 different purpose? I thought that Markman existed in
24 order to explain things to a lay juror or a lay judge.
25 Why should the Markman test be used in this context,

1 where we're trying to figure out a different question
2 entirely?

3 MR. HARRIS: Well, I -- I'm not sure I agree
4 with the premise, Your Honor. The Markman explained
5 that the nature of the test may need to be -- or the
6 nature of the process may need to be necessarily
7 sophisticated. It's a hard thing to construe -- to
8 construe claims, and we -- it depends critically on the
9 abilities of the skilled artisan to do that.

10 Just to return to that -- to that -- to the
11 point again, because I think it's such an important
12 point. All they're relying on here are attorney
13 arguments. In fact, this morning, just now,
14 Mr. Vandenberg mentioned that the ambiguity isn't even
15 in the words "space relationship." This is the first
16 time I ever heard that. It's actually somehow in the
17 whereby clause. That argument was never made at any
18 time below or up until now.

19 And the reason that's critical -- I'm not
20 arguing waiver -- but the reason that's critical is the
21 rule that Nautilus is suggesting here will encourage
22 attorneys years after infringement has occurred to just
23 come up with some way to argue that there is something
24 that's unclear in the patent.

25 CHIEF JUSTICE ROBERTS: Could I -- could I

1 just go back to my -- you know, the two reasonable. Is
2 there a range? The Chevron -- the Chevron analogy again
3 comes to mind. Let's say one is more reasonable than
4 the other, but they're both reasonable. What type of
5 range do you have before you say that the patent is
6 invalid?

7 MR. HARRIS: I think I agree with the
8 comments that were -- the questions that were asked
9 before, that it's very common in matters of statutory
10 interpretation to have different answers, some of which
11 are reasonable but are incorrect. We hold -- we believe
12 that the test requires that the -- if there's -- there
13 has to be more than one correct construction before it's
14 going to be indefinite. If it only depends on the fact
15 that there are reasonable interpretations that are made
16 in good faith that lawyers are arguing or that jurists
17 have come to, that's not going to be enough. Any more
18 than it is --

19 JUSTICE SCALIA: There's never more than one
20 correct construction. Even -- even when there is there
21 isn't. I mean, we always have to come up with an
22 answer. And the patent office has to come up with an
23 answer. It means this or it doesn't mean this. Have
24 you ever heard of a court that says, well, you know, it
25 could mean either one of these?

1 MR. HARRIS: No. In fact, I think --
2 Justice --

3 JUSTICE SCALIA: It's a tie.
4 (Laughter.)

5 MR. HARRIS: I -- I think that's the point.
6 The point is that one of the constructions is going to
7 be better. All they have suggested here is that both
8 constructions, somebody in good faith made.

9 JUSTICE SCALIA: So then you win all the
10 time.

11 MR. HARRIS: No.

12 JUSTICE SCALIA: There is no such thing as
13 ambiguity, because there is always a right answer.

14 MR. HARRIS: As this Court has said in the
15 rule of lenity context, there can be situations where a
16 statute isn't clear.

17 JUSTICE ALITO: It sounds like you really
18 are advocating the "insolubly ambiguous" standard,
19 that's what you're saying. Unless you have to throw up
20 your hands at the end and you say, we can't figure out
21 which one this means, there is no correct
22 interpretation, unless that's the case, then the patent
23 is valid.

24 MR. HARRIS: The premise of Markman is that
25 in most, if not all, cases or many, many, many cases

1 where there is going to be real substantial disagreement
2 between two parties, good faith disagreement where each
3 side is supported by its reading of the materials,
4 nevertheless, the court can come to an answer and should
5 come to an answer.

6 I just want to mention quickly, this Court
7 has had several cases where words appeared to be
8 ambiguous on its face and yet the Court didn't have the
9 trouble of applying them and interpreting them in the
10 patent context.

11 Markman was a case about the word
12 "inventory." "Inventory" on its surface could mean
13 either accounts receivable or the actual stuff. In the
14 Yeomans case, the word was "manufacture." Does
15 "manufacture" mean the result or does it mean the
16 process?

17 JUSTICE ALITO: Well, was the Federal
18 Circuit wrong when it said the test should be insolubly
19 ambiguous? Was that wrong or not?

20 MR. HARRIS: If "insolubly" means applying
21 the standard tools of claim construction, then it's
22 correct to say that that is what's required. But that
23 term, I think by some district courts, I'll acknowledge,
24 may be misinterpreted to mean as long as we can come up
25 with anything, and it makes it sound as if it's not

1 necessary to actually tie it back to the language of the
2 patent.

3 If the court is doing it the correct way
4 that Markman prescribes, looking at all the patent
5 materials and the prosecution history, if it can come to
6 an answer, then we would agree that answer -- that the
7 patent is definite.

8 JUSTICE SOTOMAYOR: Do you agree with your
9 adversary that the prosecution history is that at the
10 time the patent was issued and not on re-examination or
11 anything else subsequent?

12 MR. HARRIS: I think in this case it comes
13 out the same.

14 JUSTICE SOTOMAYOR: No, no. I didn't ask
15 that question.

16 MR. HARRIS: No, I think that the
17 prosecution history later also can count.

18 JUSTICE SOTOMAYOR: Explain that. Because
19 he says, and it seems logical, that you're going to
20 stifle inventiveness if people can't, once the patent is
21 issued, know how to get around it.

22 MR. HARRIS: Well, let me clarify what I
23 mean by that. If evidence is introduced at a later
24 stage during -- in, say, in re-examination, some of that
25 evidence may be, it may be -- a court may be able to

1 consider that at a later time as being relevant.

2 If I can finish the question.

3 CHIEF JUSTICE ROBERTS: You mean the answer?

4 MR. HARRIS: Yes, the answer.

5 If the court -- in other words, if evidence,
6 as here, was introduced at re-examination about what
7 skilled artisans knew at the time, the mere fact that it
8 was introduced at a later stage is not a problem.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 MR. HARRIS: Thank you.

11 CHIEF JUSTICE ROBERTS: Mr. Gannon.

12 ORAL ARGUMENT OF CURTIS E. GANNON

13 ON BEHALF OF THE UNITED STATES,

14 AS AMICUS CURIAE, SUPPORTING RESPONDENTS

15 MR. GANNON: Mr. Chief Justice and may it
16 please the Court:

17 I'll start with a question that the
18 Chief Justice asked. You already recited the standard
19 that we support here, which is that a patent claims is
20 sufficiently definite under paragraph 2, a person of
21 ordinary skill in the art would reasonably understand
22 the scope of the claim. And I understand Petitioner's
23 submission to be a dispute about what happens if there
24 are two potentially reasonable constructions at the end
25 of the Markman claim process.

1 And we think that if there are two
2 constructions that are of nearly equal persuasiveness,
3 then that would be ambiguous. But if one construction
4 is appreciably better, then that is good enough without
5 having to take the second step of saying that the second
6 best construction that's not as good and appreciably not
7 as good IS -- is also unreasonable. We think that
8 that's not the way this Court or judges --

9 JUSTICE BREYER: What worries me about that,
10 which is certainly attractive, what you just say, is
11 that lawyers will come up with all kinds of experts, you
12 know. And quite often, if this situation ever arises,
13 and I don't know if it really ever does, it could
14 reflect a difference of opinion among scientists. I
15 mean, you could have those who followed the phlogiston
16 logistic theory of fire. You could have those who
17 follow the oxygen theory of fire. All we have to do is
18 update that, and you could find different experts who
19 would have different opinions while all agreeing that it
20 is absolutely clear.

21 I doubt that the Patent Office will very
22 often find that problem arising. And if it does, why
23 not just say, forget about it? As long as you can say
24 reasonable experts can clearly -- you know, what you
25 just said -- that's the end of it. And we'll tell you

1 what to do later, when we really find the problem or you
2 tell us what to do. I mean, I'm having a problem about
3 it, and I'm explaining what my problem was.

4 MR. GANNON: Well, I think that the question
5 is what does it mean when the Court has demanded
6 reasonable clarity or reasonable certainty, and that's
7 the standard that we read in this Court's cases on
8 definiteness.

9 JUSTICE BREYER: Can't we just stop there?
10 I mean, do we really have to go into this theoretical
11 dispute between the two scientists, who have opposite
12 theories of --

13 MR. GANNON: Well, I don't think it's a
14 dispute between two scientists with opposite theories.
15 The question of what a person of ordinary skill in the
16 art would think, I think that a person of ordinary skill
17 in the art is a hypothetical legal construct, like the
18 reasonable person from tort law.

19 JUSTICE SCALIA: When do we ever decide a
20 case in which we would not say that our result is
21 appreciably better than the result we reject?

22 MR. GANNON: Well, I think that there are
23 times when the Court would recognize that it's an
24 authentically closer question.

25 JUSTICE SCALIA: Well, it's still close, but

1 not appreciably better. If it's not appreciably better,
2 we would have to say it's a draw.

3 MR. GANNON: I don't think that the Court
4 has a unified field theory of --

5 JUSTICE SCALIA: Well, I think the test
6 you're giving us is not much of a test, it really isn't.
7 It seems to me it says so long as there is a right
8 answer, everything else is wrong.

9 MR. GANNON: No, I think it says that as
10 long as the right answer is appreciably better than the
11 second best answer, that you do not have to take the
12 second step of having to declare --

13 JUSTICE SCALIA: How big is appreciable?

14 MR. GANNON: I don't --

15 JUSTICE SCALIA: You don't know.

16 MR. GANNON: I think it's difficult to put a
17 mathematical precise -- a mathematically precise number
18 on it.

19 JUSTICE ALITO: That's the whole problem
20 with what you're -- with what you're saying. I have no
21 idea what "appreciable" means. Let's say we have a --

22 MR. GANNON: Something more like 60/40 than
23 52/48. And I think in general the Court recognizes the
24 difficulty of that type of mathematical precision in
25 applying tests like what it means to be clear and

1 convincing.

2 JUSTICE ALITO: Usually when we ask whether
3 something is reasonable, we have in mind this reasonable
4 person and the set of circumstances in which the
5 reasonable person is going to act. So in torts, the
6 reasonable person is going to engage in an activity that
7 has some benefits but also has some risks; what would
8 that person do in that situation.

9 Now, here you're saying what would the
10 reasonable skilled artisan do in what situation? What
11 is this person doing, setting out to build the device?
12 What --

13 MR. GANNON: They are trying to understand
14 the scope of the claim. And so, and I -- I do think
15 it's important here to recognize that there are two
16 different questions that are getting conflated in some
17 of the discussion. I think that with respect to
18 definiteness under paragraph 2, as the court of appeals
19 majority recognized, that this is -- in this case the
20 question is whether the claim clearly states that it
21 requires the electrodes to be arranged in such a fashion
22 that they will have the effect of detecting
23 substantially equal EMG signals at the electrodes. It's
24 not with downstream circuitry, which is what Petitioner
25 suggested in the opening brief. In Petitioner's reply

1 brief they've suggested they could use some sort of
2 protective sleeve on the electrodes, but that wouldn't
3 be consistent with the parts of the limitations that say
4 that there needs to be physical and electrical contact
5 with the electrodes.

6 And the majority recognize that there are
7 multiple variables that come into play here, the
8 spacing, the materials, the separation, as my, my
9 co-counsel was just explaining, and -- but the
10 disagreement between the majority and the concurring
11 opinion here is just in whether the functional
12 limitation inheres in the phrase "spaced relationship"
13 taken in isolation or whether it can be read from the
14 rest of the claim as a whole.

15 CHIEF JUSTICE ROBERTS: When you say
16 something like "appreciably better," that's a term that
17 may acquire meaning over time. Just like
18 reasonableness, we get a good sense of what it means.
19 Is it your sense that the Federal Circuit has been
20 applying its test in this case? I mean, not in this
21 case but in a series of cases that is -- it is close to
22 appreciably better or is it something quite different?

23 MR. GANNON: Well, we do acknowledge that
24 the phrases that the Federal Circuit has used about
25 "insolubly ambiguous" and "amenable to construction" are

1 subject to be -- to be overread and --

2 CHIEF JUSTICE ROBERTS: Yeah, nobody
3 likes --

4 JUSTICE SCALIA: -- subject to being read,
5 not overread.

6 MR. GANNON: Well, I think that they -- that
7 they could cause mischief if applied in isolation. And
8 we haven't taken a position on every case that the court
9 of appeals has applied these standards in, and I don't
10 think that the court of appeals was intending a marked
11 departure from this Court's overarching --

12 JUSTICE KENNEDY: Are there cases where
13 there are two reasonable constructions, but both would
14 be patentable?

15 MR. GANNON: Well, I think --

16 JUSTICE KENNEDY: Would that satisfy the
17 specificity requirement of the statute?

18 MR. GANNON: I think that we are arguing now
19 about when the second best construction ceases to be a
20 reasonable one, I think. And I think that if the Court
21 wants to think of just whether there is a good enough
22 construction such that there is reasonable clarity as
23 required under United Carbon and in the Minerals
24 Separation case where the Court said that the certainty
25 that's required is not greater than is reasonable.

1 JUSTICE KAGAN: What do you think of this
2 Chevron analogy, Mr. Gannon? Because sometimes we do
3 say something close to it's a tie. We say there are a
4 couple of reasonable constructions or a number of
5 reasonable constructions. We could pick one, we think
6 it might be better, but it's all close enough that we
7 don't think we ought to pick one. So similarly, it's
8 all close enough that the definiteness requirement has
9 not been met. Is that a good analogy?

10 MR. GANNON: I -- I think that that would
11 probably -- we think that the sorts of constructions
12 that would be reasonable under Chevron that the agency
13 could take as a second best construction probably aren't
14 sufficient to be the definite construction here. And so
15 I -- I don't think it's a close analogy because we don't
16 think that anyone is seeking that type of deference to
17 another decisionmaker as --

18 JUSTICE KAGAN: No. I'm not sure I quite
19 got that. It's just that anything that would flunk
20 Chevron step one and would go on to Chevron step two,
21 you would say that that kind of ambiguity, the kind of
22 ambiguity --

23 MR. GANNON: No. I --

24 JUSTICE KAGAN: -- that would get you to
25 Chevron step two --

1 MR. GANNON: I don't think so.

2 JUSTICE KAGAN: -- is also the kind of
3 ambiguity that would fail to satisfy the definiteness --

4 MR. GANNON: No. And I'm sorry if I wasn't
5 clear about this before. I was trying to say that in a
6 60/40 situation that I said would be adequate here, such
7 that the second construction did not prevent there from
8 being sufficient clarity, I think that we would think
9 that an agency would be entitled to choose the 40
10 percent option. But we don't think that that would be
11 -- that that would prevent the 60 percent option from
12 being good enough in the context required here.

13 JUSTICE SOTOMAYOR: The Federal Circuit
14 seems to say that if there's two reasonable
15 constructions and one would make the patent valid, I
16 think this goes to Justice Kennedy's question, that
17 they're obligated to pick the one that makes the patent
18 valid.

19 MR. GANNON: The case, I think -- I believe
20 the case that's being talked about there is cited in the
21 Exxon opinion.

22 JUSTICE SOTOMAYOR: Uh-huh.

23 MR. GANNON: And that talks about when there
24 are two equally-plausible constructions. I think that
25 that probably is the -- the knife edge of insolubly

1 ambiguous. And there, the Federal Circuit suggested
2 that -- that, as Justice Scalia was -- was saying
3 before, that -- that because there would be a decision
4 rule, that you would pick the construction that would
5 save the patent, that that would be okay.

6 JUSTICE SOTOMAYOR: Is that right?

7 MR. GANNON: I don't think that that allows
8 for sufficient clarity. We believe that if there are
9 two constructions --

10 JUSTICE SOTOMAYOR: So they're wrong in that
11 as well.

12 MR. GANNON: In that particular statement
13 of -- of the rule, yes. We do think, however, that
14 there is a distinction between the -- that the
15 presumption of patent validity does play a role here.
16 It doesn't change the standard, but it -- it does -- it
17 does play a role in indicating that, as the PTO has
18 recognized, that courts will do more to save a patent
19 than the PTO does when it's examining one. And I
20 would -- I would say that we also disagree with the
21 notion --

22 JUSTICE KENNEDY: How can that be if it's
23 the same test?

24 MR. GANNON: Well, it's -- the overarching
25 question is, is the same of whether a person skilled in

1 the art would reasonably understand the scope of the
2 claim, but --

3 JUSTICE KENNEDY: And that's the same test
4 at both levels.

5 MR. GANNON: It's -- it's not the same test
6 that the PTO applies in examination proceedings because
7 it uses a slightly different threshold of ambiguity.

8 CHIEF JUSTICE ROBERTS: Are you finished
9 with your answer?

10 MR. GANNON: I could give an explanation of
11 why.

12 CHIEF JUSTICE ROBERTS: Could you do it in a
13 sentence?

14 MR. GANNON: I could say that it involves
15 the different circumstances there that include the
16 different record, the different burden of proof, the
17 lack of adversarial presentation there, and mostly
18 critically, the fact that it's easier to amend the
19 claims before the patent has been issued.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
21 Four minutes, Mr. Vandenberg.

22 REBUTTAL ARGUMENT BY JOHN D. VANDENBERG

23 ON BEHALF OF THE PETITIONER

24 MR. VANDENBERG: Thank you. I think the --
25 the essential points here are, first, the emphatic

1 language that Congress chose, and then thinking about
2 ambiguous claims. There is no legitimate need for
3 ambiguous claims. There is a strong economic incentive
4 for patent attorneys to draft ambiguous claims, not to
5 put all their eggs in that basket. They want some clear
6 claims in case some copyist comes along, but they want
7 ambiguous claims so they can -- their client can treat
8 it as a nose of wax later, as happened here. That is
9 well established in the patent bar, that there is this
10 strong economic incentive. But patent attorneys have
11 ample tools to avoid ambiguous claims if this Court
12 tells them that it will no longer be permitted. That --
13 that is the key here, is that there's a strong economic
14 incentive. The patent attorney and the inventor are in
15 the best position to avoid the ambiguity that Congress
16 prohibits and therefore, the problem is, the Federal
17 Circuit has blessed ambiguity with its test. And in
18 order to stop all of the problems that the amici have
19 pointed out that are caused by ambiguous claims, we
20 submit this Court needs to be clear and go back to
21 United Carbon and General Electric and to the statutory
22 text and be clear that ambiguity is simply not
23 permitted.

24 In terms of how the Federal Circuit ruled
25 here, and we point to the majority's opinion at petition

1 appendix 15(a), the court, the majority, definitely
2 applied the insolubly ambiguous test. They said,
3 "Because the term was amenable to construction,
4 indefiniteness here would require a showing that a
5 person of ordinary skill would find spaced relationship
6 to be insolubly ambiguous." And therefore, if the Court
7 rejects that test, we submit, at the very least, the
8 Court cannot affirm the judgment below on that basis.

9 But more importantly --

10 JUSTICE GINSBURG: But the Federal Circuit
11 said something -- I'm looking at the petition appendix
12 at 20(a) -- that sounded very close to what the
13 government standard is. It said, "Sufficiently" --
14 "that the claim provides parameters sufficient for a
15 skilled artisan to understand the bounds of spaced
16 relationship." That sounds very close to what the
17 government says and it isn't -- they don't say anything
18 about insoluble in -- in that statement.

19 MR. VANDENBERG: It is true that here in
20 some of their cases, the court will -- the Federal
21 Circuit will use language like that saying that one
22 could have understood. However, it's clear they were
23 not applying the type of test that United Carbon and
24 General Electric required. They did not even consider
25 whether the person of skill in the art may have read the

1 claim the different way.

2 And in terms of the two different claim
3 scopes, we would simply invite the Court's attention
4 back to our reply brief at page 20, which explained the
5 different claim scopes. We think the government
6 misunderstood the point, and therefore, in the reply, we
7 amplified it some more.

8 But as -- as I said, the Court at the very
9 least should not affirm. But we think it's important
10 here for the Court to create another concrete guide
11 post. In KSR and Bilski, this Court provided a huge
12 service to the patent bar in applying the correct law to
13 an actual patent claim, creating concrete guide posts
14 for Section 101 and 103. Well, the patent bar and the
15 trial courts need another concrete guide post if
16 applying the correct law of Section 112, paragraph 2 to
17 this particular claim.

18 If there are no further questions, thank
19 you.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 The case is submitted.

22 (Whereupon at 11:07 a.m., the case in the
23 above-entitled matter was submitted.)

24

25

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