

1 JUSTICE SOTOMAYOR: What's going to happen
2 with -- in the district court?

3 MR. GANNON: It -- it --

4 JUSTICE SOTOMAYOR: Or what can happen in
5 the district court?

6 MR. GANNON: It -- in the context of the
7 district court proceeding, I agree with the Chief
8 Justice that the district court may still find some
9 reason to think that if it's not applying the
10 broadest-reasonable-construction approach, that -- that
11 it -- it's going to end up in a different place, and
12 it's not going to --

13 JUSTICE SOTOMAYOR: How is it going to end
14 up in a different place?

15 MR. GANNON: Well, I'm not sure. In --

16 JUSTICE SOTOMAYOR: Give me a concrete.

17 MR. GANNON: I -- I'm not sure. I -- we
18 think that at the -- at the margin, this can well make a
19 difference. But -- but --

20 JUSTICE SOTOMAYOR: Well, it can only make a
21 differences for the district court finding the patent
22 invalid, no?

23 MR. GANNON: No. I don't expect that it
24 would, because the problem here has to do -- it -- it's
25 the overly broad readings that are going to result in

1 having the patent be declared invalid with respect to
2 prior art. The -- what exactly the claim construction
3 is could be relevant to other questions about whether it
4 reads on the -- the particular product that's at issue
5 in the infringement action or whatever. And so there's
6 a reason why the claim construction issue could still be
7 a live one and why the district court would need to
8 decide what it thinks the appropriate claim construction
9 is, and it may -- it won't --

10 JUSTICE SOTOMAYOR: Before you --

11 MR. GANNON: -- be bound to -- to adopt --

12 JUSTICE SOTOMAYOR: -- time runs out --

13 MR. GANNON: -- exactly what the PTO did.

14 JUSTICE SOTOMAYOR: -- I do want to go back
15 to the appealability issue.

16 MR. GANNON: Uh-huh.

17 JUSTICE SOTOMAYOR: Assuming I start from
18 the EEOC, the Mach Mining -- Mach Mining v. EOC, which
19 we don't easily think that Congress is intending to
20 prevent courts from enforcing its directives to Federal
21 agencies, okay?

22 Number two, this is a very specific statute
23 with steps about what -- when and when not the PTO can
24 institute one of these reviews. There's all sorts of
25 provisions that say you can only do it under these

1 circumstances and only after making these findings.
2 Your position now is that that decision is never
3 reviewable.

4 Justice Ginsburg asked a very intelligent
5 question, which is, if we -- what's the purpose of it
6 outside the APA? And your opposing colleague says
7 there's two purposes: It precludes mandamus, and it
8 precludes reviews of the denial to grant such a hearing.

9 Why isn't that -- all of that enough to say
10 there should be some review? Why would Congress tell
11 the PTO don't do it except in these limited
12 circumstances, but nobody's going to ever watch you to
13 make sure that's what you're doing?

14 MR. GANNON: Well, I -- I'd say a couple
15 things. First of all, calling something nonappealable
16 would be a particularly odd way of saying that the only
17 way to get review of this in the Federal circuit is
18 through an appeal rather than mandamus.

19 And secondly, with respect to the question
20 of whether this is just barring review of the decision
21 not to institute a proceeding, we think that the
22 contrast with the statute that applies to ex parte
23 reexams is -- is very telling here. And this is because
24 in several provisions of the Patent Act, Congress has
25 used the same phrase. They have called certain

1 decisions by the PTO "final and nonappealable." That's
2 what they did here, but they -- they made that
3 applicable to a much broader category of decisions than
4 it had previously done.

5 But in the context of ex parte reexams, in
6 Section 303(c), which is reprinted on Page 1a of the
7 government's brief, they've made final and nonappealable
8 only the following: The determination by the director
9 that no substantial new question of patentability has
10 been raised.

11 And so that's a provision in which Congress
12 did exactly what my friend says it was trying to do
13 here. It said that the only thing that is final and
14 nonappealable is the decision that no new question has
15 been raised, and therefore, this proceeding will not be
16 instituted.

17 Here, the --

18 JUSTICE SOTOMAYOR: So what do we do with
19 the Federal circuit's reading in Portola -- Portola --
20 Portola where it basically had similar language and said
21 it's appealable only at the end?

22 MR. GANNON: I -- we -- we think -- I'm --
23 I'm not sure which case Your Honor is discussing, but we
24 think that here, the -- the reading -- the language
25 that -- of the scope of what Congress has made final and

1 nonappealable is the entire decision whether to
2 institute an inter partes review under this section.

3 JUSTICE GINSBURG: Mr. Gannon, would you
4 look at the reply brief at page 19, and they give a
5 series of rulings that the Board might make that, under
6 your view, would be immune from any judicial review.

7 So the Board goes ahead and institutes an
8 IPR, even though the requester for that IPR has already
9 filed a parallel civil action, something that the
10 statute says should not happen. That would not be
11 reviewable, that wrong decision, under your view of it.
12 Is that --

13 MR. GANNON: We -- we think that they would
14 not be subject to an appeal. The court of appeals here
15 left open the possibility of mandamus, and we understand
16 why it did that. Because the phrase here is
17 "nonappealable," that doesn't necessarily rule out
18 mandamus.

19 We don't think that it would make sense to
20 have mandamus only at the end of the proceeding. We
21 think that if mandamus were to happen, it should be the
22 way it would normally happen, at the time when the error
23 -- the alleged error occurs, but it would be only
24 reserved for extraordinary circumstances.

25 The -- the party would go immediately to the

1 Federal circuit and say, we have a clear and
2 indisputable entitlement to relief here because the
3 agency is violating the statutes. That's something
4 where there'd be expedited briefing, where the P tab
5 would not have invested all the resources into getting
6 to a decision on the merits before a court pulled it
7 back and said, you never should have gotten there.

8 So we do think that there may be
9 circumstances that satisfy mandamus where there could be
10 review of the Board's departure from statutory criteria,
11 but what Congress has spoken to here and made
12 nonappealable is the decision whether to institute
13 proceedings under the section. That's not just a
14 determination of whether there's a reasonable likelihood
15 under Subsection A, it's everything. And that section
16 includes references to 311, to 313. It has at a
17 reference to a decision under this chapter.

18 And so all of that, we think, is included in
19 the scope of the appeal bar, and that distinguishes it
20 from a case like Mach Mining where the presumption
21 against reviewability had not been overcome -- or the
22 presumption of favor of reviewability had not been
23 overcome. Here, Congress here clearly spoke to that.

24 JUSTICE GINSBURG: May I ask you a question
25 that relates to the other -- other issue?

1 The district court holds that a patent is
2 valid. Could the -- the PTO, on its own initiative,
3 then engage not in the inter partes review, but
4 reexamination? The district court says valid patent,
5 and PTO says, we want to, on our own, have a
6 reexamination.

7 MR. GANNON: Yes. The reexamination can be
8 instituted by the director at -- at her own discretion
9 or -- or by other persons. And in that proceeding, the
10 patentholder would be able to make any necessary
11 proposed amendments that it wanted to make under 305,
12 but the -- the PTO wouldn't necessarily approve those
13 amendments. It's not going to be an unfettered right to
14 amend.

15 JUSTICE GINSBURG: So -- and so it wouldn't
16 -- so the district court decision wouldn't be
17 preclusive, and the -- the PTO has the last word, then?

18 MR. GANNON: With respect to the ex parte
19 proceeding, yes.

20 CHIEF JUSTICE ROBERTS: Isn't that an appeal
21 from the district court judgment to an administrative
22 agency?

23 MR. GANNON: It -- it's not an appeal from
24 the district court judgment. It's a separate proceeding
25 before the agency that has ongoing authority to

1 reexamine the validity of patents that has been
2 issued -- that it has issued. That's the statutory
3 framework since 1980.

4 CHIEF JUSTICE ROBERTS: So -- so the
5 district court reaches a judgment saying, you win based
6 on my reading of the patent, and then you can go to the
7 PTO and say, no, the reading of the patent of the
8 district court was wrong, so you lose?

9 MR. GANNON: Well, my understanding of
10 Justice Ginsburg's hypothetical was that the -- the
11 director of the PTO could institute the reexamination
12 proceeding in -- in light of issues that were revealed
13 for the time in the district court proceeding.

14 CHIEF JUSTICE ROBERTS: And then can the
15 losing party in the district court go back to the
16 district court, or if it's on appeal, to the court of
17 appeals, and say the district court was wrong? The PTO
18 said that, and I should win.

19 MR. GANNON: They -- they could say that.
20 If they already have a final judgment, then that's not
21 going to be an issue. And depending on if the patent
22 has not actually been invalidated, then -- then they're
23 going to still be using the district court claim
24 construction in the judicial litigation.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Beeney, you have a minute left.

2 REBUTTAL ARGUMENT OF GARRARD R. BEENEY

3 ON BEHALF OF THE PETITIONER

4 MR. BEENEY: Thank you, Mr. Chief Justice.

5 Let me just begin by saying that as with the
6 government's brief, we heard nothing today that suggests
7 that the use of the ordinary-claim construction would
8 not accomplish Congress's purpose. But what we would
9 avoid is all of the bizarre harms that are caused by the
10 use of the broadest-reasonable-interpretation expedient.
11 We have different results, demonstrable different
12 results, as the Chief Justice pointed out. Many of the
13 cases are cited in our brief where a patent is upheld in
14 the district court and then invalidated by the Board.

15 That wouldn't happen if we used the same
16 claim construction as Congress intended by having a
17 court-like system. We wouldn't be depriving patent
18 owners of their property rights based on pretending the
19 patent means something that it doesn't mean. Patent
20 rights should be taken away only if the patent that's
21 claimed, that was granted, and that was issued is
22 unpatentable.

23 And that, Justice Kennedy, is why we
24 shouldn't have speculation in IPR. They're property
25 rights, and they should be treated as to what those

1 properties rights encompass.

2 Putting together the government's position,
3 the government says BRI is, quote, "an examinational
4 expedient" used, quote, "before the patent issues" in,
5 quote, "an iterative process," quote, "to provide
6 clarity and precision in claims." That is not IPR.
7 The government -- the Congress in enacting IPR got rid
8 of that examinational. They got rid of it.

9 Thank you very much.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 The case is submitted.

12 (Whereupon, at 12:02 p.m., the case in the
13 above-entitled matter was submitted.)

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A				
a.m 1:17 3:2	administrative	12:25 13:16	appealed 47:7	arts 28:16
abate 34:8	19:16 23:22	14:22 22:13	appeals 52:14	aside 32:8
ability 4:1,22	24:23 26:1	23:24,25 24:10	55:17	asked 7:16 13:4
8:5,18 24:9	54:21	27:20 29:22	APPEARAN...	50:4
30:14 32:18	admitted 17:20	30:1,3,4 33:15	1:18	asking 22:13
34:22 42:25	adopt 28:10	39:6 54:14	appellate 24:18	46:7,10
able 41:23 45:20	29:7 32:19	amended 5:5	Appendix 33:19	assert 15:23
54:10	33:8 43:23	8:17 11:22	applicable 51:3	Assistant 1:21
above-entitled	44:2 49:11	24:11,12,13	application	assume 47:5,18
1:15 57:13	adopted 40:3	30:20 37:21	11:23 45:16	assuming 16:6
absent 22:7	advanced 42:9	amending 33:9	46:1	47:11 49:17
absolute 4:19	afforded 8:21	amendment	applications	attached 33:22
7:22	agencies 49:21	7:17 30:15,16	24:11	attribute 5:14
absolutely 45:8	agency 19:16	30:19,24	applied 43:3	authority 24:20
accept 32:13	23:25 39:18	amendments	applies 9:16	37:18 44:8
accomplish 18:9	44:8 53:3	26:25 27:12	10:17 32:9	54:25
56:8	54:22,25	30:6,13,14	50:22	avoid 8:19 56:9
account 29:16	agree 3:24 15:16	32:18 33:6,12	apply 16:17 28:8	
Act 3:18 20:7	33:11 48:7	43:7 54:11,13	45:2 46:16	B
26:1,5 27:3	agreed 15:13	America 20:7	applying 10:25	back 8:13 10:16
50:24	agreeing 10:15	27:2	11:2 48:9	12:14 14:18
action 6:25	agrees 10:10	American 3:18	appreciate	22:11 27:10
18:24 31:6	11:15	26:5	39:17	35:8 37:11
49:5 52:9	ahead 14:14	amicus 28:2	approach 26:16	40:15 43:10
actions 24:23	29:24 52:7	analogy 16:2	26:24 39:9	44:11 49:14
actual 4:4 5:17	Alito 6:23 7:2	analysis 29:4	43:4 48:10	53:7 55:15
16:9 23:16	8:22 9:6	43:13	appropriate	back-and-forth
addition 10:3	alive 47:19,24	animal 32:3	10:13,17 49:8	8:6
address 3:13	alleged 52:23	anomalies 5:21	approve 54:12	backdrop 22:24
addressed 23:2	alleging 34:25	answer 42:10,22	April 1:13 8:1	ballgame 9:10
34:22	allowed 5:4,5	anticipated 36:5	apt 16:2	bar 25:2,20
addressing 32:4	allowing 4:18	anticipation	arguing 23:8	53:19
adjudicate 5:12	30:12	29:9	31:20	barred 25:4
15:20 16:8,12	ambiguity 11:17	anyway 13:5	argument 1:16	barring 26:7
adjudicated	11:21 12:13,22	37:22	2:2,5,8 3:3,6	50:20
19:17 20:9	16:11,22 17:2	APA 50:6	4:11 15:10	bars 26:2
adjudicates 18:9	17:14 18:11	appeal 9:11,13	21:20 26:11	based 55:5
23:16	ambiguous 12:1	26:2,4 44:19	42:9 56:2	56:18
adjudicating	15:6 16:14,18	44:21,22,23	arguments	basically 4:14
15:19 21:11,15	16:19 20:21,22	45:10,19,24	41:25	23:19 28:7
adjudication 5:1	22:14	46:2,11 50:18	array 4:3	51:20
adjudicatory	amend 4:1,9,12	52:14 53:19	art 4:3 17:4 20:8	basis 10:20
7:4,22 8:4	4:14,15,19,19	54:20,23 55:16	22:12 29:9	34:13 36:19
10:25 19:15	4:21,22,23 5:3	appealability	30:20,25 36:7	37:3
23:6	5:4 7:22,23 8:4	49:15	38:23,23 49:2	Beeney 1:19 2:3
	8:5,15 9:3,20	appealable	Article 35:18	2:9 3:5,6,8
	10:19,21 12:23	51:21	36:21	4:17 5:9 7:2

9:4 10:9 11:12 12:11 13:12,15 13:18,23,25 15:13,16 16:15 16:20 17:16 18:14 19:6,12 20:4,19 21:1,6 21:18,21 22:1 23:1 24:4 25:24 26:9 56:1,2,4 behalf 1:19,23 2:4,7,10 3:7 26:12 56:3 believe 10:16 11:3 benefit 15:1 better 14:9 25:8 big 38:2 billions 14:11 bind 40:5,6 42:23 binding 40:22 41:1 binds 42:22 bit 21:25 27:9 bizarre 41:8 56:9 Blonder 42:15 board 4:12 5:2,4 5:25 6:1,3 7:5 8:25 9:7,16,18 10:10,12,17,17 10:20,25 11:2 18:24 19:2,10 19:18,21 20:2 20:9 21:8,11 22:6 24:19 29:11,11,18,22 32:17 33:10,16 33:20 34:21 35:15,21 44:24 52:5,7 56:14 Board's 3:13 8:22 24:19 46:3 53:10 Boeing 25:12	bound 43:13 49:11 boundaries 16:4 bounds 5:15 16:4 brand 23:6 Breyer 13:3,13 13:17,19,24 14:1 15:13,15 35:13 37:7 44:10,14,16,21 45:1,7,13,16 45:18 BRI 9:23 39:9 57:3 brief 6:20 7:20 28:2 37:8 38:9 51:7 52:4 56:6 56:13 briefed 28:24 briefing 53:4 briefly 24:18,21 bring 27:9 34:25 brings 4:2 broad 4:1 13:9,9 17:11 22:14 27:3,19 48:25 Broadband 12:17 broader 4:3 8:20 16:11 51:3 broadest 4:2 6:10 8:24 11:7 11:14,20,23 12:8 13:6,20 14:23 17:10,10 17:17 18:7,16 23:9 27:11 28:12 31:9 32:2,9 36:9 47:22 broadest-cons... 22:22 broadest-poss... 43:14 broadest-reas...	26:16 43:4 48:10 broadest-reas... 3:11,25 12:20 56:10 broadly 13:2 brought 34:24 build 14:3 burden 24:24 31:20 39:1 41:16 43:22 burdensome 19:25 business 14:13 31:8 businessmen 37:13 <hr/> C C 2:1 3:1 cabin 9:24 call 14:9 37:9 called 12:21 50:25 calling 50:15 cancel 9:21 42:25 44:14 cancelation 39:23 44:22 canceled 8:17 46:20,24 canceling 5:6 14:25 cancel 41:13 Carr 12:16 40:16 case 3:4 7:20,25 10:8,11 17:1 19:9 20:1 23:16 27:24 28:1 33:24 34:5,6 39:19 40:17 43:16 46:17 47:12 51:23 53:20 57:11,12 cases 12:15,17	34:12 56:13 category 51:3 cause 22:7 caused 56:9 cellophane 45:3 45:4 certain 23:22 38:20 50:25 challenge 36:15 chance 14:21 33:15 35:9 chances 27:20 chapter 53:17 characteristics 31:3 cheaper 38:16 Chevron 15:8 Chief 3:3,8 5:7 18:13,22 19:7 19:11,24 26:8 26:10,13 27:5 27:7 29:24 30:22 31:1,25 32:6,11,23 33:1,23 34:4 34:10 39:13 40:1,8,21,25 41:5,7,22 42:1 42:5,10,18 43:5,9,25 44:3 45:22 46:6,9 48:7 54:20 55:4,14,25 56:4,12 57:10 CICA 19:13 circuit 8:1 11:16 12:16 25:9 40:16 44:20,20 45:24 46:2 47:8,9,12,20 47:20 50:17 53:1 circuit's 51:19 circumstance 4:14 29:18 circumstances 23:15 27:24	50:1,12 52:24 53:9 cited 56:13 citing 8:14 civil 52:9 claim 3:20 5:20 5:24 6:17,18 6:21,21 10:21 11:18 12:6,22 16:11,22,23 17:5 18:11 20:5 26:25 28:14 29:7,13 32:18 33:9,17 39:23 40:2,4,6 40:19 41:17 42:25 46:4,20 49:2,6,8 55:23 56:16 claim-constru... 7:11 9:12,15 11:15 23:3 24:6,15 claimed 11:25 56:21 claims 4:1,4,9 5:5,6,16 6:3 8:16,20 9:21 10:12,18,18,22 12:12 13:1 15:23 17:23 19:23 20:21 22:13 39:6 41:13 43:21 57:6 clarify 13:1 40:19 clarity 57:6 clear 22:23 27:13,15 29:19 31:4,23 53:1 clearly 53:23 colleague 50:6 come 14:19 32:21 42:22 43:7 comes 34:15
--	--	---	---	---

<p>38:23 43:15 comment 14:8 COMMERCE 1:7 committee 38:10 company's 38:12 competitive 37:1 complaint 42:19 comports 3:12 concern 29:8 concerned 35:18 37:2 concluded 26:20 concrete 47:24 48:16 conduct 41:8 confronted 23:7 confused 27:9 Congress 3:16 4:6,11,15,20 5:11 6:16 7:4 7:10 8:10 9:25 11:1,19 15:17 16:6 18:10 20:7,12 21:2,7 21:21 22:5,16 23:2,5,13 24:7 27:2 31:4,16 34:22 35:9 37:13 38:17 42:7 44:7 49:19 50:10,24 51:11,25 53:11 53:23 56:16 57:7 Congress's 6:7 22:20 56:8 congressional 3:12 4:25 consider 17:2 28:24 29:2 considerably 17:17 considered 36:18 38:22,23 consistent 3:16</p>	<p>4:12,24 24:7 construction 3:17,21,23 5:20 6:17,21 6:22 8:20 10:13,17,22,22 17:18 27:25 28:10 29:7,10 31:9 32:20 33:9,11,17 36:10 40:3,6 43:24 49:2,6,8 55:24 56:7,16 construe 34:14 construed 13:2 contest 7:23 context 7:22,23 8:4,6 9:23 10:25 12:24,25 17:25 22:8,9 28:16 42:14 48:6 51:5 contingent 33:6 continue 17:14 continuing 27:19 contrary 33:25 contrast 22:7 29:12 50:22 control 21:23 controversy 35:19 convince 14:22 convincing 31:23 cooperative 8:7 correct 13:23,25 20:15 25:24 27:14 29:23 38:6 43:1 46:19 47:13 counsel 26:8 55:25 57:10 country 42:17 couple 36:3 50:14 course 28:25</p>	<p>30:13 39:1 court 1:1,16 3:9 3:22 4:13,13 5:1,19 6:8,25 7:13 8:2,12 10:10 12:15 14:3 15:24 16:17 17:2 18:23 19:3,13 19:18,25 20:13 20:15,16 21:13 23:16,23 24:1 25:13,23 26:14 28:8,10 29:1,5 29:7 31:4,11 31:15,22 34:8 34:11,13,19,25 35:4,6,16,17 36:14,24 38:1 38:3,6,15,25 39:7,14,25 40:5,5,6,22 41:2,15,19 42:14,20,21,23 43:11,11,18,19 44:17 45:10,19 46:12,13,16,25 47:12,16,23 48:2,5,7,8,21 49:7 52:14 53:6 54:1,4,16 54:21,24 55:5 55:8,13,15,16 55:16,17,23 56:14 court's 6:16 29:2 31:24 court-like 4:7 5:1 7:4 9:25 15:21 16:8 23:14 56:17 courts 5:16,24 6:1,5,17 7:8,12 17:23,25 18:17 19:19 20:10 21:14 23:20 34:12 38:13</p>	<p>40:14,17 42:17 49:20 cover 46:14 covers 46:15,17 created 21:8 criteria 25:6 53:10 culture 32:3 Cuozzo 1:3 3:4 10:21 Cuozzo's 10:12 cure 17:14 CURTIS 1:21 2:6 26:11</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 D.C 1:12,22 12:16 40:16 dark 33:14 day 13:20 31:18 43:22 Day-type 39:11 dealing 31:2 decide 15:9 17:11 39:19 41:9 43:16 49:8 decided 26:15 decides 17:13 47:18 decision 9:7,16 9:18 10:20 12:17 22:7 24:19 25:5,12 26:4 33:17,20 40:16 44:23,24 45:19 46:3 50:2,20 51:14 52:1,11 53:6 53:12,17 54:16 decisions 8:23 19:22 26:2,3 51:1,3 declared 49:1 deemed 22:14 deeply 20:1</p>	<p>defendant 19:9 34:15 deferring 19:21 delegated 44:7 Dell 28:1 delve 7:15 demands 3:25 demonstrable 56:11 denial 50:8 denied 4:24,24 5:2 8:16 30:2,7 33:6 deny 10:20 33:10 denying 30:24 depart 39:8 Department 1:22 departure 53:10 depending 55:21 depriving 56:17 described 15:18 31:2 designed 37:11 38:1 44:4 determination 3:14 4:7 9:14 9:20 51:8 53:14 determine 3:17 10:7 12:7,11 12:12,21 15:25 16:11 17:5 19:2 determined 16:24 47:10 determining 17:10 19:4 25:7 devoted 36:3 diametrically 8:9 dictionaries 17:3 difference 21:5</p>
--	---	--	--	---

<p>21:6 35:14,23 40:14 48:19 differences 24:1 24:2,5 31:16 38:17 48:21 different 5:24 5:25 6:4 7:11 8:9 12:2 17:18 18:6,9 23:12 23:13 27:18,24 29:5 30:8 31:18,19 32:2 32:4,5,7 36:17 38:8 39:2 40:6 40:11,11,12,18 42:2,3 43:13 43:21 46:10,16 48:11,14 56:11 56:11 directing 3:19 directives 49:20 directly 5:23 director 1:8 51:8 54:8 55:11 director's 25:5 disagree 15:14 33:8 39:14,20 discovery 24:1 discretion 54:8 discussing 22:12 28:9 51:23 dispensing 21:12 distinction 4:18 7:20 8:3 distinguish 9:22 distinguishable 4:3 distinguishes 53:19 district 4:6,13 4:13 5:16 6:5 6:16,17,25 7:8 7:12,13 8:12 12:15 15:24 16:17 18:23</p>	<p>19:3,13,18,19 19:25 20:10,13 20:14,16 23:16 23:20,23 29:1 29:1 31:3,11 31:15,21 34:8 34:11,12,13,19 34:24 35:4,6 35:16,17 36:14 36:24 38:1,3,6 38:13,15,25 39:7,14,24 40:5,5,6,21 41:2,15,19 42:8,17,20,21 42:23 43:11,11 43:17,19 44:17 46:12,12,13,15 46:25 47:12,16 47:23 48:2,5,7 48:8,21 49:7 54:1,4,16,21 54:24 55:5,8 55:13,15,16,17 55:23 56:14 dog 45:5 doing 5:13,16 14:4,17 15:5 19:3 25:19 50:13 doubt 21:6</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 1:21 2:1,6 3:1 3:1 26:11 easily 49:19 EEOC 49:18 effort 35:8 either 13:13 25:2 eliminating 27:3 embodiment 10:23 11:4 enacted 6:16 20:7 22:5 23:6 enacting 6:7 7:10 57:7</p>	<p>encompass 57:1 encroaches 16:1 ended 47:12 ends 29:8 32:16 46:25 energy 34:17 enforcing 49:20 engage 54:3 ensure 38:18 ensuring 39:5 entering 19:20 entire 52:1 entitlement 53:2 entity 31:3,5 enunciated 16:21 EOC 49:18 error 52:22,23 ESQ 1:19,21 2:3 2:6,9 established 8:10 10:1 15:17,18 16:7,8 23:13 24:7 25:8 establishing 4:5 4:25 5:11 7:5 21:9 estopped 41:24 estoppel 20:6 42:5,11,15 event 25:21 evidence 16:25 17:3 20:22,23 31:23 37:7 38:4,8,21 ex 30:13 50:22 51:5 54:18 exactly 8:1 15:18 26:19 29:21 35:9 38:19 40:14 49:2,13 51:12 exaggeration 22:3 exam 30:9 examination 17:21 22:8</p>	<p>28:16 examinational 7:23 8:5 9:23 12:24 22:8 24:10 57:3,8 examiner 8:7 12:7 examiners 17:22 18:16 example 20:12 23:10 42:19 46:23 47:24 exceeds 24:19 exercise 12:2 existence 28:23 exists 39:22 41:12 43:18 expect 48:23 expected 35:10 expedient 3:11 3:25 11:14,24 12:20,21 56:10 57:4 expedited 53:4 expeditious 44:5 expertise 21:8 21:10 experts 7:6 explain 15:14 explained 18:4 explaining 33:20 explains 28:2 explicit 3:19 expressed 37:24 expressly 26:24 28:18 34:22 39:4 42:7 44:7 extent 31:13,13 extraordinary 32:3 52:24 extremely 4:22 extrinsic 17:2 20:22</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>fact 4:23 7:24</p>	<p>8:2 9:24 10:3 11:22 13:6 15:17,22 17:19 18:12 19:14,20 20:4 21:7 24:6 24:10 36:5 39:16,16,17 43:23 factor 22:5 factors 17:13 facts 39:20 far 30:1 32:1 33:4 35:7 46:23 fast 14:18 faster 38:16 favor 7:7 38:12 53:22 Federal 7:25 11:16 18:1 25:9 44:19,20 45:24 46:2 47:7,9,12,20 47:20 49:20 50:17 51:19 53:1 file 19:8,10 filed 30:3 42:19 52:9 final 9:15,17 22:7 25:21,23 26:4 44:24 51:1,7,13,25 55:20 Finally 6:8 find 7:7 19:16 25:13 30:19 43:1 48:8 finding 48:21 findings 50:1 fine 39:15 first 3:23 9:6 11:9 12:5 15:3 16:22 22:2 35:12 38:4 39:11 41:10 43:2 50:15</p>
--	--	---	--	---

<p>fit 23:11 five 5:4 fix 32:21 fixed 9:13 flaws 13:10 flow 21:19 following 51:8 forever 25:3 26:2 forget 13:5 forms 27:25 forth 9:7 10:23 22:11 27:10 35:19 forums 41:25 four 3:23 5:5,8 frame 22:16 framework 55:3 free 39:14 friend 28:23 29:23 30:11 40:15 51:12 front 13:8 fully-developed 18:18,20 function 19:15 fundamental 24:6 further 25:15 future 35:22</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 3:1 Gannon 1:21 2:6 26:10,11 26:13 27:8,15 27:23 28:6,22 29:25 30:23 31:12 32:6,15 32:25 33:3 34:3,6,18 36:1 36:13 38:7 39:21 40:2,13 40:24 41:3,6 41:11,23 42:3 42:7,13,24 43:6,17 44:1,6</p>	<p>44:13,15,18,23 45:12,15,17,20 45:25 46:8,19 46:22 47:1,4,6 47:10,14,25 48:3,6,15,17 48:23 49:11,13 49:16 50:14 51:22 52:3,13 54:7,18,23 55:9,19 GARRARD 1:19 2:3,9 3:6 56:2 General 1:22 generally 8:7 22:24 33:16 getting 37:13 40:4 53:5 Ginsburg 10:5 23:21 24:4 25:17,24 26:18 31:2 50:4 52:3 53:24 54:15 Ginsburg's 55:10 give 5:16 10:12 11:10 12:8 14:20 33:16 43:13 46:23 47:24 48:16 52:4 given 4:4,11 22:23 47:21 giving 8:19 21:14 27:11 go 10:16 12:14 14:14,18 20:21 20:22 24:5 27:9 29:24 35:8 37:11 49:14 52:25 55:6,15 God 14:14 goes 19:1 43:10 47:19 52:7 going 8:13 9:17</p>	<p>10:7 12:8 20:19 21:18 27:25 28:13 29:2,10,19,20 30:17 31:22 33:8,8,16 34:8 36:4,18,25 37:2 38:18,19 39:2,24 40:4 40:15 43:16 46:2 47:15 48:1,11,12,13 48:25 50:12 54:13 55:21,23 good 22:7 gotten 35:7 53:7 governing 44:8 government 6:9 9:9 11:15 25:2 57:3,7 government's 6:14,19 25:9 51:7 56:6 57:2 grant 12:7 50:8 granted 15:22 30:4 56:21 Groundhog 39:11 grounds 30:7 36:15,18 38:20 guarantee 31:17 guess 12:3 22:19 34:15 42:23 guidance 21:12 21:13</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>half 24:14 halfway 46:23 happen 10:9 22:15,16 30:9 34:3 44:11 46:20 48:1,4 52:10,21,22 56:15 happened 10:13 20:11 33:2</p>	<p>happening 19:21 29:21,22 30:23 happens 14:12 19:6 20:5 38:16 47:23 harms 56:9 hear 3:3 heard 56:6 hearing 50:8 heavy 24:22,24 held 37:22 help 38:11 higher 43:22 historical 23:2 historically 6:12 9:23,24 history 3:16 16:25 18:1,3 18:19,20 28:17 28:18,24 29:2 38:9 hold 29:20 holds 41:16 54:1 hole 23:11,12 Honor 5:10 10:9 12:14 15:18 16:7 51:23 Honors 5:18 7:15 10:14 24:17 hot 45:5 hurt 14:18 Hyatt 12:18 hybrid 23:21 26:18 31:2 hypothetical 5:14 29:14 55:10</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>identical 20:8 identifies 18:11 III 35:18 36:21 immediately 52:25 immune 52:6</p>	<p>implicates 9:5 important 7:18 9:22 13:4 17:24 importantly 31:19 imported 38:18 imposed 31:16 improve 38:11 improvement 27:1 inability 34:24 inappropriate 6:20 include 5:24,25 6:2 11:4 included 53:18 includes 53:16 including 39:10 inconsistent 9:10 indisputable 53:2 infringement 6:4,25 15:24 18:23 19:9 35:3 37:3 49:5 infringer 19:1 infringes 19:5 infringing 19:1 initial 28:16 30:9 initiate 36:21 initiative 54:2 injure 5:22,22 injury 35:19 inquiries 35:24 instance 33:13 43:3 instances 35:25 institute 25:5,7 26:2 33:18,20 49:24 50:21 52:2 53:12 55:11 instituted 37:1 51:16 54:8</p>
---	---	---	---	--

<p>institutes 52:7 instituting 3:14 institution 8:22 9:6,14 24:19 25:11 integrally 33:21 INTELLECT... 1:7 intelligent 50:4 intend 18:8 intended 5:12 18:10 20:12 36:23 38:15 56:16 intending 49:19 intent 4:25 6:7 22:23 inter 3:13,14 4:5 4:21,25 5:3,11 5:12,23 6:7,11 6:25 7:10,12 8:10,15,21 10:1 11:19 18:19 19:8 20:5,11,12 21:1 22:15 23:8,14 24:3 24:13 26:17 44:8 52:2 54:3 interest 37:2 interested 27:2 interim 25:11 interlocutory 25:11,20,22 26:7 interpret 17:22 20:16 40:10 interpretation 4:2,4 5:15 6:10 8:24 9:12 11:8 11:14,20 12:9 13:7,21 14:24 14:24 17:17 18:7,17 23:9 27:11 28:12 32:9 interpreted</p>	<p> 35:22 interprets 40:22 41:1 interrupt 45:23 intrinsic 16:25 20:21 introduced 29:3 invalid 11:7 37:22 48:22 49:1 invalidated 34:7 37:6 55:22 56:14 invalidity 6:24 31:21,23 34:25 36:19 invent 22:13 invention 11:22 11:25 14:15 inventor 11:24 Invents 3:18 20:7 26:5 27:3 invested 53:5 IP 34:16 IPR 9:4 12:25 18:10 20:9,25 21:11 22:5 23:6 28:19,25 29:23 31:16 32:24,25 34:20 35:1,5,15,20 36:2,21 39:22 41:21 52:8,8 56:24 57:6,7 IPRs 30:1,3 36:25 issue 13:11 19:23 24:18 42:20,21 45:1 45:14,18 46:13 49:4,6,15 53:25 55:21 issued 11:9 13:22 14:11,20 14:25 15:3 35:11 36:5 37:6,15 38:12</p>	<p> 43:2 44:12 55:2,2 56:21 issues 23:3 33:17 55:12 57:4 issuing 14:10 iterative 8:6 13:15 22:11 57:5</p> <hr/> <p style="text-align: center;">J</p> <p>job 43:12 judge 14:22 judgment 25:21 41:10 54:21,24 55:5,20 judgments 25:23 44:5 judicial 3:15 24:22 31:5 52:6 55:24 judiciary 3:17 19:15,21 23:4 jurisdiction 43:19 Justice 1:22 3:3 3:8 4:9,10,17 5:7 6:23 7:2,16 8:14,22 9:6 10:5 11:6,12 12:3 13:3,4,13 13:17,19,24 14:1 15:13,15 16:13,16 17:9 18:13,22 19:7 19:11,24 20:14 20:20,24 21:4 21:17,19,20 22:1,19 23:1 23:21 24:4 25:17,24 26:8 26:10,13,18 27:4,5,6,7,8,17 28:4,9,20 29:24 30:22 31:1,1,25 32:6 32:11,23 33:1</p>	<p> 33:23 34:4,10 35:13,14 36:8 37:7 39:13 40:1,8,21,25 41:5,7,22 42:1 42:5,10,18 43:5,9,25 44:3 44:10,14,16,21 45:1,7,13,16 45:18,22 46:6 46:9,22 47:2,5 47:9,11,17 48:1,4,8,13,16 48:20 49:10,12 49:14,17 50:4 51:18 52:3 53:24 54:15,20 55:4,10,14,25 56:4,12,23 57:10 justify 38:11</p> <hr/> <p style="text-align: center;">K</p> <p>K 1:6 Kagan 21:17,19 21:20 22:1,19 23:1 keep 32:22 Kennedy 11:6 11:13 12:3 13:4 20:14,24 21:4 28:9 35:14 36:8 56:23 kind 8:18 9:19 13:10 23:21 know 13:10,17 13:19 14:24 15:3 31:15</p> <hr/> <p style="text-align: center;">L</p> <p>language 3:19 11:18,21 12:1 12:1,13,22 16:12,13,18,22 16:23 18:11 28:14 51:20,24</p>	<p>large 37:12 late 9:19 Laughter 36:12 45:6,11 law 14:2 28:1 39:16,20 lawsuit 46:24 lead 32:5,7 leaves 21:25 Lee 1:6 3:4 left 3:16 23:4 29:5 52:15 56:1 legal 32:3 41:9,9 legislated 22:17 legislative 38:8 let's 14:9 47:5 47:18 letter 7:25 liberty 4:9 light 16:24 28:14 29:9,17 36:6 55:12 likelihood 53:14 limit 35:2 limitation 17:5 limited 4:22 25:4 38:20,22 50:11 limits 34:21 line 12:15 lines 36:17 litany 20:20 litigate 11:1 litigated 39:24 litigating 41:14 47:15 litigation 4:7 7:14 9:25 15:24 19:18 20:13 31:15 34:1,8 35:16 35:17 36:24 39:7,17 55:24 little 14:3 19:25 21:25 24:2,3 27:9 38:1,5,15</p>
---	--	---	---	---

<p>live 49:7 LLC 1:3 long 39:21 43:18 longstanding 26:16 39:8 look 13:9 14:2,6 14:7 16:3,22 17:25 21:23 24:9 32:21 37:24 45:8 52:4 looking 14:2 18:21 22:12,21 looks 12:6 14:14 17:12 18:2,14 18:15 lose 10:8 55:8 loser 47:19 loses 47:11 losing 55:15</p> <hr/> <p style="text-align: center;">M</p> <p>Mach 25:12 49:18,18 53:20 majority 30:1,6 making 8:1 19:22 50:1 mandamus 26:7 50:7,18 52:15 52:18,20,21 53:9 manners 17:23 manual 17:20 18:15 margin 22:3 48:18 materially 26:21 matter 1:15 3:22 5:2,21 23:3 57:13 Meade 15:8 mean 10:6 11:8 11:24 13:1,2 17:5 21:23 22:19 23:7 30:17 34:11 36:13 41:9</p>	<p>44:18 45:24 56:19 meaning 5:17,24 6:3,18 10:7 11:10 16:14,17 16:21,23 17:11 17:18 18:8 21:16 24:8,16 27:19,19 47:21 47:22 means 11:25 33:22 56:19 meant 31:5 meets 5:15 24:24 mentioned 33:15 38:19 merits 7:20 46:3 53:6 metes 16:4 MICHELLE 1:6 Microsoft 7:24 mind 15:11 mind-set 12:4 minimum 10:19 Mining 25:12 49:18,18 53:20 minute 56:1 missing 6:14 mixed 39:16 Monday 1:13 money 38:2 months 5:3 35:5 moot 33:6,11 morning 3:10 motion 4:19 7:21 8:4 33:10 motions 5:3,4 8:15 29:22 30:1,3,4,24 33:4,5,5 move 37:23 moved 4:10 multiple 32:8</p> <hr/> <p style="text-align: center;">N</p> <p>N 2:1,1 3:1</p>	<p>N.Y 1:19 narrow 27:21 36:2,9 narrowed 37:21 narrower 29:10 36:13,17 38:24 necessarily 11:12 52:17 54:12 necessary 8:18 54:10 need 9:2 20:10 25:21 29:19 44:1 49:7 needs 12:1 27:22 never 10:13 11:9 23:2 26:3 37:15 43:2 45:1 50:2 53:7 new 1:19 14:2 23:6 30:5 51:9 51:14 newly 21:8 nobody's 50:12 nonappealable 50:15 51:1,7 51:14 52:1,17 53:12 normally 42:6 42:11 52:22 note 30:14 noted 26:18 28:18,23 40:15 notion 38:14 number 5:21 17:6 23:4,5 26:1 30:5 32:1 33:4 37:12 49:22 numbers 5:2</p> <hr/> <p style="text-align: center;">O</p> <p>O 2:1 3:1 objection 6:15 obligation 20:16 obtains 16:10 obvious 29:17</p>	<p>32:22 36:6 obviously 9:12 37:14 obviousness 29:9 obviousness-a... 16:3 occurs 52:23 odd 50:16 offered 6:9 office 1:9 3:20 5:20 7:19 8:11 13:8 14:10,17 17:20,21 18:2 26:23 27:10,13 27:21 29:12 37:12 46:14 47:18 oh 14:14 okay 13:24 32:12 37:22 49:21 once 4:15,20 10:16 14:20,22 ones 12:19 16:10 ongoing 54:25 open 52:15 operates 22:24 opinion 43:12 opportunity 4:23 9:3 10:21 23:24,25 39:5 opposing 50:6 oral 1:15 2:2,5 3:6 26:11 order 8:19 36:21 ordinary 5:17 5:20 6:18 10:6 16:20 17:4,18 18:8 21:15 24:8,15 27:18 28:15 ordinary-claim 56:7 ordinary-cons... 11:3 ordinary-mea...</p>	<p>10:2,11,24 17:25 21:22 ordinary-mea... 17:7 23:19 original 8:14 25:10 ought 25:13 32:1 37:5 43:2 oughtn't 35:11 outside 50:6 overcome 24:24 53:21,23 overly 27:3 48:25 overstate 14:12 owner 12:23,25 32:21 33:7,14 35:4 43:6 44:19 47:6 owners 56:18</p> <hr/> <p style="text-align: center;">P</p> <p>P 3:1 53:4 p.m 57:12 page 2:2 51:6 52:4 pages 33:18,19 paper 14:13 parallel 34:1,20 52:9 part 26:3 37:9 37:19 39:8 parte 50:22 51:5 54:18 partes 3:13,14 4:5,21,25 5:3 5:11,12,23 6:7 6:11 7:1,10,13 8:10,16,21 10:1 11:19 18:19 19:8 20:5,11,12 21:1 22:15 23:8,14 24:3 24:13 26:17 30:13 44:9 52:2 54:3</p>
---	--	---	--	---

partial-Groun... 37:9,18	47:14,18,21 48:21 49:1	perfectly 31:4 31:14	47:22	32:13,21 37:16 48:24
participated 7:24	50:24 54:1,4 55:6,7,21	period 22:6	post-grant 39:10	procedures 17:21 26:1
particular 3:20 17:5 28:2	56:13,17,19,19 56:20 57:4	permit 25:14	potentially 29:6	28:11 31:10,11 32:2
35:22 38:20 41:20 49:4	patent's 20:17 47:19	permitted 6:13 10:19	pound 23:10	proceed 36:16
particularly 50:16	patentability 4:8 6:3 7:7 11:18	permitting 7:21	power 15:8	proceeded 41:20
parties 18:4,4,5 28:25 29:3	11:18 18:10 19:22 21:11	person 14:13 28:15 35:2	practice 4:23 18:25 39:9	proceeding 9:1 10:14 13:6
35:21 37:1 42:21 43:19,20	27:16 51:9	persons 54:9	practices 4:13	14:3 18:24 21:7 23:6,14
partly 37:11	patentable 11:25 12:12	pertinent 39:16	precise 27:21	28:19 29:1 31:17,22 32:17
party 4:18 7:21 41:20 52:25	13:21 21:15 29:20 30:18	petition 19:10 33:19	precisely 26:24 40:18 43:22	32:17,24 33:21 34:20 35:1,15
55:15	33:12 43:8	Petitioner 1:4,20 2:4,10 3:7 56:3	precision 57:6	35:20 36:14 38:1,3,6,16
pass 11:23	patented 11:22	phrase 33:21 50:25 52:16	preclude 25:22	39:1,10,22 41:13 42:9
patent 1:8 3:19 5:19,22 7:19	patentee 8:8,19 9:19 15:23,23	picked 37:8	precluded 43:20	48:7 50:21 51:15 52:20
8:11 9:17 11:7 11:9,21 12:8	16:9 17:3 22:12	piece 14:13	precludes 50:7,8	54:9,19,24 55:12,13
12:23,25 13:8 13:10,21 14:9	patentee's 6:1	place 11:9 12:6 15:3 28:1,5,7	preclusive 54:17	proceedings 21:5 22:8
14:10 16:9,24 17:15,19,20,21	patentees 5:22	31:11,12 35:12 48:11,14	prejudice 8:19	23:23,23 24:10 26:17,22 29:23
17:22 18:1 19:1,3,5,7,12	patentholder 9:2 30:12	plain 5:17 16:14 16:17	preliminary 33:16	32:4 33:18 34:19 35:5
20:1 21:14 24:11 26:22	patentholders 30:2	play 4:2	preliminary-cl... 9:8	34:19 35:5 39:10 53:13
27:1,9,10,13 27:14,21 28:10	patents 8:5 14:11,19 15:2	please 3:9 20:15 21:17 26:14	prescribed 42:8	proceeds 9:4 23:16
29:6,12,17,18 32:20 33:7,9	19:17 32:20 35:11 36:16	27:7,7	presence 45:5	process 7:17 8:7 11:11 12:5
33:12,13,22,25 34:7,12,14,25	37:14 38:13,24 43:2 55:1	point 8:1 9:18 27:12 31:9	presented 9:11 32:13	13:16 14:17 23:5 27:18
35:4 36:5,6 37:3,5,12	PCC 12:17	44:18 45:15,17 46:21	preserves 20:17	28:11 32:19 57:5
38:11 39:15,21 40:4,10,22	peg 23:10,11	pointed 56:12	presumption 7:7 21:2,10 24:22	product 49:4 proffered 43:7
41:1,12 42:16 43:6,14,18	pending 34:20 39:17	Portola 51:19,19 51:20	24:25 28:8 38:12 53:20,22	profound 7:20 8:3
44:4,19 45:2,2 45:7,8,14,18	people 14:18 15:1 38:1	9:10 22:4,20 24:21 25:10	pretending 15:21 56:18	progeny 16:21 promotes 27:1
46:1,4,14,14 46:18,24 47:6	42:15	50:2 57:2	pretty 22:21	promoting 27:2 proof 6:24 31:20
	percent 5:2 8:15 19:17,19,20	possibility 52:15	prevail 20:25	
	24:12,14 30:2	possible 13:6 14:23 26:25	prevent 20:7 49:20	
	perfect 36:23	31:9 36:9	49:20 prevents 25:11	
			previously 51:4	
			prior 4:3 20:8 22:12 29:9,17	
			29:17 30:20,25 36:6,6 38:22	
			38:23,24 49:2	
			privity 35:1	
			probably 29:10 36:11 37:12	
			problem 32:12	

<p>39:1 42:2,4 43:23 proper 20:2 properties 57:1 property 1:8 5:13,14 6:2 11:2 15:19,20 16:1,4,19 23:17,17 56:18 56:24 propose 30:12 30:14,16 33:9 proposed 30:19 54:11 proposition 4:16 prosecution 16:25 18:1,3 18:18,20 28:17 28:18,24 29:2 prove 31:22 provide 4:6,8,20 17:14 57:5 provided 4:21 21:13,14 proving 41:16 provision 25:3 51:11 provisions 20:6 49:25 50:24 Proxyconn 7:25 PT 29:8 PTO 7:24 8:2 11:8 12:5 17:11 18:15 22:21,24 23:7 26:15,20,22 28:17 29:5,11 30:17,24 31:3 31:8,10 32:17 33:16 34:7 35:9,9 36:4 37:18,22 39:8 39:12,14 40:7 40:9,17,20,23 40:25 41:12,16 42:24 44:1,11 46:24 49:13,23</p>	<p>50:11 51:1 54:2,5,12,17 55:7,11,17 PTO's 39:20 publications 38:24 pulled 53:6 purple 45:4 purpose 3:12 11:13 12:19 15:4 38:10 50:5 56:8 purposes 15:6 18:9 33:22 50:7 pursuant 40:11 pursuing 41:24 put 22:20 34:10 34:13 45:4 puts 42:19 putting 45:3 57:2</p> <hr/> <p style="text-align: center;">Q</p> <p>quality 27:1 38:11 question 7:16 8:15 9:5,11 13:3,12 25:18 32:4,8 36:2 39:16 41:9,12 42:11,16 46:10 50:5,19 51:9 51:14 53:24 questions 25:15 27:3 49:3 quintessential 23:10 quote 17:22 38:9 57:3,4,5,5 quotes 30:11</p> <hr/> <p style="text-align: center;">R</p> <p>R 1:19 2:3,9 3:1 3:6 56:2 raised 18:3 51:10,15</p>	<p>raising 43:20 rare 17:1 reach 22:6 reaches 55:5 reaching 44:5 read 10:22 25:1 25:2,13 29:14 29:16 30:20,25 43:14 reading 17:11 17:12 21:25 25:8 29:15,16 39:15,20 43:14 51:19,24 55:6 55:7 readings 29:6 48:25 reads 49:4 really 6:9,15,19 13:1 16:2 20:23 22:3 23:9 35:11 reason 5:9,18 6:6 7:3,3,6 11:13 12:21 23:2 30:8 32:16 34:19 39:6 46:11 48:9 49:6 reasonable 4:2 6:10 8:24 11:7 11:14,20,23 13:7,20 14:24 17:10,12,17 18:7,17 23:9 27:11 28:12 29:6 32:9 44:5 53:14 reasonably 26:15,20 29:14 29:16 reasons 3:23 18:16 22:18 23:18 32:8 REBUTTAL 2:8 56:2 receive 11:5</p>	<p>recognize 7:18 recognized 7:5 21:3,8 29:13 40:15,17 42:14 red 45:3 reeks 23:19 reexam 30:10 reexamination 24:12 27:10 30:13,16 54:4 54:6,7 55:11 reexamination... 22:9 reexamine 55:1 reexams 50:23 51:5 reference 53:17 references 53:16 refined 12:2 Register 18:1 registering 15:11 regular 34:13 regulations 44:8 relates 53:25 relationship 18:23 relevant 39:23 49:3 relied 18:4 relief 11:5 53:2 relitigate 42:16 relitigation 20:8 remaining 25:16 remanded 10:12 removed 21:9 renders 9:18 repeatedly 7:19 26:23 40:15 42:16 replicate 31:10 31:14 reply 52:4 report 38:10 represented 8:11 reprinted 51:6</p>	<p>requester 52:8 requirements 27:16 requires 28:9 resembles 23:22 reserve 25:16 reserved 52:24 resources 53:5 respect 31:8 33:25 35:17 37:14 41:11 49:1 50:19 54:18 respectfully 15:14 respects 23:22 Respondent 1:10,23 2:7 26:12 response 8:14 responsibility 39:19 40:10 result 5:10 10:14 40:12 43:21 48:25 results 5:25 31:14,18 32:5 32:7 33:25 56:11,12 revealed 55:12 reverse 3:22 5:19 6:8 reversed 5:10 review 3:13,15 3:15 4:5,21,25 5:4,12,12,23 6:7,11 7:1,10 7:13 8:10,16 8:21 9:21 10:1 10:18 11:19 18:19 19:8,12 20:6,11,13 21:1 22:15 23:8,14 24:3 24:13,18,22 25:3,7,11,14 25:20,22,23</p>
---	---	---	---	--

<p>26:17 34:16 44:9 50:10,17 50:20 52:2,6 53:10 54:3 reviewability 53:21,22 reviewable 50:3 52:11 reviewing 25:23 reviews 49:24 50:8 revisit 20:10 rid 14:19 57:7,8 right 4:11,19,20 7:22 8:3 10:6 12:9,24 13:11 13:11,13,14,16 14:5 15:5 16:19 19:11 23:24 27:17 28:4 29:23 30:15,18 33:25 35:13 36:11 37:10 38:3 41:3,22 42:13 43:5,9 44:17 45:5,24 47:17 54:13 rights 5:13,14 6:2 11:2 15:19 15:21,22 16:9 16:12 21:14 23:17,17 56:18 56:20,25 57:1 ROBERTS 3:3 5:7 18:13,22 19:11,24 26:8 26:10 27:5,7 29:24 30:22 31:1,25 32:11 32:23 33:1,23 34:4,10 39:13 40:1,8,21,25 41:5,7,22 42:1 42:5,10,18 43:5,9,25 44:3 45:22 46:6,9</p>	<p>54:20 55:4,14 55:25 57:10 round 23:11 rule 20:25 25:21 52:17 rulings 52:5 runs 49:12</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:1 3:1 satisfied 41:17 satisfies 27:15 satisfy 46:5 53:9 save 38:1 saving 28:10 29:7 32:20 43:23 saying 13:19 29:25 32:12,23 42:23,24 50:16 55:5 56:5 says 6:12 14:14 19:2 20:2 25:6 34:2,2,15 44:12 46:16 47:20 50:6 51:12 52:10 54:4,5 57:3 scheme 24:24 25:1 26:5 scope 19:4 40:9 40:19 46:13 51:25 53:19 second 5:7,9 9:11 15:4 secondly 50:19 SECRETARY 1:6 section 18:15 25:5 30:11 34:23 41:24 51:6 52:2 53:13,15 seek 4:22,23 19:9 seeking 19:12 send 44:11</p>	<p>sense 5:13 15:20 37:17 52:19 sensible 7:3 sentence 22:2 separate 9:5 26:4 54:24 series 52:5 set 8:23 9:7 10:23 11:1,19 setting 15:21 16:9 32:8 seven 33:19 shooting 33:14 shot 41:18 shows 21:4 36:22 signals 45:5 significant 11:10 similar 23:15 51:20 simply 5:1 6:5 6:12 8:18 11:25 21:19 23:11 situations 19:7 six 30:4 33:2 37:20 skill 17:4 28:15 Skvorecz 11:16 12:18 small 30:5 33:4 Solicitor 1:21 somebody 17:4 34:24 35:1 36:20 41:18 someone's 16:1 sorry 16:13,15 27:6 34:16 41:7 45:12,13 45:22 46:9 sort 19:25 sorts 49:24 Sotomayor 4:10 4:17 7:16 16:13,16 17:9 20:20 27:4,6,8</p>	<p>27:17 28:4,20 46:22 47:2,5,9 47:11,17 48:1 48:4,13,16,20 49:10,12,14,17 51:18 Sotomayor's 8:14 sought 4:6 speaking 39:3 specific 35:19,19 49:22 specification 10:23 11:4 16:24 28:14 specifications 17:13 speculation 56:24 speculative 35:20 Speed 1:3 3:4 speedometer 45:4,4 spend 38:2 spoke 53:23 spoken 53:11 square 23:10 stages 9:5 stand 45:5 standard 3:20 6:23,24 7:12 9:8,15 10:2,24 11:3,16,19 17:7,19 21:22 22:22 23:20 24:6,15 28:13 30:12 40:11,12 46:5,16 standards 3:17 40:18 42:2,4 standing 36:21 start 28:13 35:4 49:17 States 1:1,16 statistics 8:13 statute 20:17</p>	<p>21:23 23:18 25:6,10,13,19 25:22,25 26:6 26:6 37:9,10 37:19,25 39:11 44:4 49:22 50:22 52:10 statutes 53:3 statutory 3:19 3:23 24:20,23 25:1 26:5 53:10 55:2 stay 19:13 stayed 34:20 stays 19:20 stem 5:22 steps 20:20 49:23 stick 8:25 Strikingly 6:14 structural 31:16 38:17 structure 9:25 11:11 12:5 stuck 32:19 sub 18:6 subject 3:15 9:13 19:18 52:14 subjected 19:8 submit 16:2 submitted 7:25 57:11,13 Subsection 53:15 substantial 19:14 51:9 substantive 11:1 46:3 substitute 4:6 6:16 7:13 20:13 31:5 36:23 sued 35:3 37:3 suffering 15:2 sufficiently 39:7 suggested 16:7</p>
--	--	--	---	---

suggesting 7:11 22:23	telling 46:15 50:23	thrust 35:24	Uh-huh 15:15 49:16	vast 29:25 30:6
suggests 6:20 7:9 16:10 21:10 56:6	tells 17:22 18:15	time 9:18 18:2 19:19,20 22:6 22:16 24:12,14 25:12 34:21 35:2 38:2 49:12 52:22 55:13	ultimate 9:16 31:13	Versata 25:9,10
suing 18:25	terms 6:18 25:4 38:14	tone 35:23	ultimately 32:16 36:1 39:6 45:21 46:8	view 37:24,25 38:4 43:10 52:6,11
suit 34:25	test 10:11 11:17 11:21 16:20	Tongue 42:15	ultra 3:14	violating 53:3
suits 37:14	tests 16:3	tool 17:24	understand 40:9 52:15	vires 3:14
summary 3:24	tethered 6:11	tools 17:6,9 18:6	understanding 55:9	<hr/> W <hr/>
support 6:10	thank 26:8,9 43:12 46:16 55:25 56:4 57:9,10	Trademark 1:9 3:20 5:20 7:19 8:11 17:19,21 18:2	understands 8:23	want 19:2 37:4 49:14 54:5
supporting 28:2	they'd 38:2	transfer 19:15	understood 28:15	wanted 54:11
supports 4:16	thing 6:3,4 19:4 28:25 36:22 41:4,6 45:2 51:13	trap 36:17	unfettered 54:13	Washington 1:12,22
suppose 10:6	things 5:24 14:9 17:14 27:20 39:4 50:15	treated 56:25	United 1:1,16	wasn't 36:23 38:18
supposed 31:10 31:12,14	think 4:17,18 7:3,18 9:22 12:16 13:4 15:5,7,10 19:24 20:24 22:1,2 23:1 24:4 27:23 31:1,25 32:15 34:18 36:1,10 36:22 37:5 38:7 39:3,18 43:15 46:10,17 48:9,18 49:19 50:21 51:22,24 52:13,19,21 53:8,18	trolls 14:9	universe 38:25	wasted 34:17 35:7
Supreme 1:1,16	thinking 12:4	true 9:2 28:1,16 29:1 32:6 36:20 43:3,17	unpatentability 30:7 36:3 38:21	watch 50:12
sure 4:15 12:9 36:25 37:4 48:15,17 50:13 51:23	thinks 27:13,21 33:21 39:18 40:9 49:8	try 11:17,21 45:7	unpatentable 30:25 41:17 46:4 56:22	way 3:12 6:9,11 7:9 12:15 14:6 14:7 15:11 20:17 21:10,24 23:15 31:8 33:10 35:22 40:3 41:8 42:11 43:15 50:16,17 52:22
surprising 37:20	third 5:18	trying 14:3,16 15:25 22:20 23:10 34:14 51:12	untenable 6:5	We'll 3:3
survive 9:17 10:18 20:5 47:18	thought 14:4 21:21 44:11	turn 24:18	upheld 56:13	we're 14:16,25 21:24 29:20 31:2 34:11 35:17
suspect 6:6	threats 37:13	tweaked 7:4	upholding 40:4	we've 6:12 43:3
system 5:22 7:5 8:10 15:19 16:7,8 24:7 44:4 56:17	three 22:9,10,11 33:5	two 9:4 15:6 22:9,10,10 23:5 27:24 29:5 32:3 35:24 38:7 49:22 50:7	use 3:11,20 5:20 5:23 6:21 18:16 23:8 26:15 28:17,18 42:8 56:7,10	wedded 31:7
<hr/> T <hr/>		type 39:9	uses 12:5	week 30:5
T 2:1,1		types 36:3 38:8	usually 35:6	wholly 6:4 9:10 12:2
tab 53:4		typically 9:7 19:6	<hr/> V <hr/>	wide 4:8
take 9:9 20:1 22:4,9,10,10 29:15 31:10,12 41:18 42:21			v 1:5 3:4 7:24 49:18	win 10:7 55:5,18
taken 6:2 56:20			valid 16:19 20:3 46:18 47:22 54:2,4	won 34:16
takes 23:17			validity 19:3 20:18 21:2 28:8 38:12 42:16 55:1	word 54:17
talked 34:23			various 20:6	words 14:9 34:1
talking 34:12 45:23,25				work 10:5 18:24 25:19 26:6,7 36:10 41:10
tea 21:25				works 42:6,12
Technologies 1:3 3:4		<hr/> U <hr/>		
tell 13:14,14 14:17 50:10				

wouldn't 22:24 54:12,15,16 56:15,17	3			
writings 17:3	3 2:4			
written 44:24	30 5:5 8:16			
wrong 12:10	303(c) 51:6			
13:13,14 20:15	305 30:11 54:11			
52:11 55:8,17	311 53:16			
X	313 53:16			
x 1:2,11	315 34:23 41:24			
Y	316(b) 44:9			
Yeah 31:25	4			
years 22:9,10,11	42 5:3			
York 1:19	5			
Z	56 2:10			
0	6			
1	66 24:12			
10,000 5:6 8:17	7			
102 36:19 38:21	70 19:20			
103 36:19 38:21	8			
11:02 1:17 3:2	85 19:16,19			
12 35:5	9			
12-month 22:5	95 5:2 8:15			
12:02 57:12				
13 30:2				
15-446 1:4 3:4				
16 33:5				
171 33:18				
177a 33:18				
19 52:4				
1924 12:16				
40:16				
1980 55:3				
1a 51:6				
2				
2015 8:1				
2016 1:13 12:17				
2111 18:15				
25 1:13				
26 2:7				
27 8:1				