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IN THE SUPREME COURT OF THE UNITED STATES

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CUOZZO SPEED TECHNOLOGIES, LLC, :
Petitioner, : No. 15-446

v. :

MICHELLE K. LEE, UNDER SECRETARY :
OF COMMERCE FOR INTELLECTUAL :
PROPERTY AND DIRECTOR, PATENT AND :
TRADEMARK OFFICE, :
Respondent. :

- - - - - x

Washington, D.C.
Monday, April 25, 2016

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:02 a.m.

APPEARANCES:

GARRARD R. BEENEY, ESQ., New York, N.Y.; on behalf of
Petitioner.

CURTIS E. GANNON, ESQ., Assistant to the Solicitor
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behalf of Respondent.

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	GARRARD R. BEENEY, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	CURTIS E. GANNON, ESQ.	
7	On behalf of the Respondent	26
8	REBUTTAL ARGUMENT OF	
9	GARRARD R. BEENEY, ESQ.	
10	On behalf of the Petitioner	56
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

(11:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 15-446, *Cuozzo Speed Technologies v. Lee*.

Mr. Beeney.

ORAL ARGUMENT OF GARRARD R. BEENEY

ON BEHALF OF THE PETITIONER

MR. BEENEY: Mr. Chief Justice, and may it please the Court:

I'd like to begin this morning with why the use of the broadest-reasonable-interpretation expedient in no way comports with the congressional purpose of *inter partes* review, and then address why the Board's *ultra vires* determination in instituting *inter partes* review is subject to judicial review.

Consistent with history, Congress left to the judiciary to determine construction standards, and therefore, in the American Invents Act, there is no explicit statutory language directing the Patent and Trademark Office to use any particular standard of claim construction.

But this Court should reverse, as a matter of statutory construction, for four reasons. First, in summary, all agree that the broadest-reasonable-interpretation expedient demands a

1 broad ability to amend claims, and that's so because the
2 broadest reasonable interpretation brings into play a
3 broader array of prior art that may be distinguishable
4 if the claims were given their actual interpretation.

5 In establishing inter partes review,
6 Congress sought to substitute and provide a district
7 court-like litigation for the determination of
8 patentability, and therefore, did not provide the wide
9 liberty to amend claims, as Justice --

10 JUSTICE SOTOMAYOR: I might be moved by your
11 argument if Congress had not given any right for the
12 Board to amend, because that would be consistent with
13 practices in the district court, where district court
14 can't amend under any circumstance. But basically,
15 Congress here said you can amend once. I'm not sure
16 that that supports your proposition.

17 MR. BEENNEY: I think -- Justice Sotomayor, I
18 think there is a distinction between allowing a party to
19 make a motion to amend and the absolute right to amend
20 even once. And Congress did not provide any right to
21 amend in inter partes review. It provided only an
22 extremely limited ability to seek to amend. And, in
23 fact, in practice, that opportunity to seek to amend is
24 almost always denied. And it is denied consistent with
25 congressional intent of establishing inter partes review

1 to be court -- a court-like adjudication. So simply as
2 a matter of numbers, the Board has denied 95 percent of
3 the motions to amend. In 42 months of inter partes
4 review, the Board has allowed five motions to amend and
5 allowed four -- less than 30 claims to be amended, while
6 canceling 10,000 claims.

7 CHIEF JUSTICE ROBERTS: What's the second of
8 your four?

9 MR. BEENEY: The second reason why,
10 Your Honor, the -- the result below should be reversed
11 is because the -- Congress, in establishing inter partes
12 review, intended inter partes review to adjudicate
13 property rights. And in doing so, it makes no sense to
14 attribute to those property rights a hypothetical
15 interpretation of their meets and bounds rather than
16 doing what district courts do, which is to give claims
17 their actual plain and ordinary meaning.

18 The third reason, Your Honors, why this
19 Court should reverse and -- and have the Patent and
20 Trademark Office use the ordinary claim construction
21 matter is because there are a number of anomalies that
22 injure the patent system and injure patentees that stem
23 directly from the use of inter partes review. Those
24 include a claim meaning different things in the courts
25 and before the Board. Those include different results

1 in the courts and the Board as to whether a patentee's
2 property rights are taken away. And those include
3 claims meaning one thing for patentability in the Board
4 but a wholly different thing for infringement in the
5 district courts. That's simply untenable, and there's
6 no reason to suspect that that was anywhere within
7 Congress's intent in enacting inter partes review.

8 Finally, this Court should reverse because
9 the government really has not in any way offered a
10 support of using the broadest reasonable interpretation
11 that is in any way tethered to inter partes review. It
12 simply says historically, we've done this before, and so
13 we should be permitted to do it again.

14 Strikingly missing from the government's
15 position, however, is really any objection to taking the
16 district court's substitute that Congress enacted, and
17 using the claim construction that the district courts
18 do, the ordinary meaning of the claim terms.

19 There is nothing really in the government's
20 brief that suggests that it would be inappropriate to
21 use that claim construction, and that's the claim
22 construction that should be used.

23 JUSTICE ALITO: Is the standard -- is the
24 standard of proof for invalidity the same in an
25 infringement action in district court as it is in inter

1 partes review?

2 MR. BEENEY: It is not, Justice Alito. And
3 I think the reason -- there was a sensible reason behind
4 it in that Congress tweaked the court-like adjudicatory
5 system and recognized that it was establishing a board
6 of experts, and therefore, there was no reason to have
7 the presumption in favor of patentability that we find
8 in the district courts.

9 But that in no way suggests that the
10 Congress, in enacting inter partes review, was
11 suggesting that there be a different claim-construction
12 standard that are used in the district courts when inter
13 partes review was to be a substitute for district court
14 litigation.

15 If I may Your Honors, I'd like to delve into
16 the question that Justice Sotomayor asked about the
17 amendment process.

18 I think it's important to recognize, as the
19 Patent and Trademark Office repeatedly has before its
20 merits brief in this case, the profound distinction
21 between the -- permitting a party to make a motion to
22 amend in an adjudicatory context and the absolute right
23 to amend in the examinational contest -- context. And,
24 in fact, the PTO, as it participated in the Microsoft v.
25 Proxyconn case, submitted a letter to the Federal

1 Circuit making exactly this point on April 27, 2015.
2 What the PTO said to the court was that, in fact, there
3 is this very profound distinction between the right to
4 make a motion to amend in an adjudicatory context and
5 the ability to amend patents in the examinational
6 context where there is an iterative, back-and-forth,
7 generally cooperative process between the examiner and
8 the patentee.

9 That is diametrically different to the
10 system that Congress established in inter partes review,
11 as the Patent and Trademark Office represented to the
12 district court.

13 And going back to the statistics that I was
14 citing in response to Justice Sotomayor's original
15 question, 95 percent of the motions to amend in inter
16 partes review are denied. Less than 30 claims have been
17 amended, while 10,000 have been canceled. And there is
18 simply not the kind of ability that is necessary in
19 order to avoid the prejudice to the patentee of giving
20 her claims a construction broader than what they
21 actually are that's afforded in inter partes review.

22 JUSTICE ALITO: Do the Board's institution
23 decisions always set out what it understands the
24 broadest reasonable interpretation to be? And -- and if
25 they do, is it -- must the Board stick with that

1 throughout the proceeding? And in that -- if that is
2 true, why does the patentholder need more than one
3 opportunity to amend?

4 MR. BEENEY: The -- IPR proceeds in two
5 separate stages, as -- as your question implicates,
6 Justice Alito. First, there is the institution
7 decision. In there, the Board typically does set forth
8 a preliminary-claim-interpretation standard. But for
9 the government to take the position that that's the end
10 of the ballgame is wholly inconsistent with its position
11 on the second question presented about appeal.
12 Obviously, the claim-construction interpretation is
13 subject to appeal, and so it can't be fixed in the
14 institution determination.

15 The final claim-construction standard that
16 the Board applies to make the ultimate decision as to
17 whether the patent is going to survive is in the final
18 decision that the Board renders. At that point in time,
19 it's too late for the patentee to make any kind of
20 determination as to whether it would like to amend and
21 cancel the claims that are under review.

22 I also think it's important to distinguish
23 the examinational context, in which, historically, BRI
24 has been cabin to. Historically, in fact, what's used
25 in the court-like litigation structure that Congress

1 established in inter partes review is the
2 ordinary-meaning standard.

3 But -- but in addition to the fact that one
4 --

5 JUSTICE GINSBURG: How does this work? I
6 mean, suppose you're right and it should be ordinary
7 meaning. That doesn't determine who's going to win or
8 lose this case, does it?

9 MR. BEENEY: What would happen, Your Honor,
10 if the Court agrees with us that the Board should be
11 using the ordinary-meaning test, is that the case should
12 be remanded to the Board to give Cuozzo's claims their
13 appropriate construction. That's never happened in this
14 proceeding. That would be the result of Your Honors
15 agreeing with us.

16 And we believe that once we go back to the
17 Board and the Board applies the appropriate construction
18 to our claims, our claims will survive review or -- or,
19 at -- at a minimum, we will be permitted to amend,
20 because the basis of the decision by the Board to deny
21 Cuozzo the opportunity to amend was that the claim
22 construction read out of the construction of the claims
23 an embodiment that's set forth in the specification.

24 Under the ordinary-meaning standard that the
25 Board should be applying in this adjudicatory context

1 that Congress set up to litigate over substantive
2 property rights, the Board would be applying the
3 ordinary-construction standard which we believe would
4 include the embodiment that's in this specification,
5 and, therefore, we would receive relief.

6 JUSTICE KENNEDY: Well, if -- if the -- if
7 the patent is invalid under its broadest, reasonable
8 interpretation, doesn't -- doesn't that mean the PTO
9 should never have issued the patent in the first place,
10 and doesn't that give very significant meaning and
11 structure to this process?

12 MR. BEENEY: Not necessarily, Justice
13 Kennedy. And -- and the reason is this: The purpose of
14 the broadest reasonable interpretation expedient, as the
15 government agrees it is, it is not a claim-construction
16 standard as the Federal circuit said in *Skvorecz*.

17 What it does is try to test for ambiguity in
18 the claim language, not patentability. Patentability is
19 the standard that Congress set in *inter partes* review.
20 But what the broadest reasonable interpretation does is
21 try to test for ambiguity in the patent language so it
22 can be amended. So the fact that a patented invention
23 or an application may not pass the broadest reasonable
24 expedient does not mean that the inventor has not
25 claimed a patentable invention. It simply means that

1 the language is ambiguous, and the language needs to be
2 refined. And that is a wholly different exercise.

3 JUSTICE KENNEDY: Well, I -- I guess I
4 was -- was thinking of the mind-set that -- that the
5 process, the structure, that the PTO uses in the first
6 place. It looks at a claim. If -- if I were the
7 examiner to determine whether or not I should grant the
8 patent, I'd say, I'm going to give this the broadest
9 interpretation to make sure I'm right. It seems to
10 me -- or am I wrong, that that's not what they do?

11 MR. BEENEY: They do, but not to determine
12 whether the claims are patentable. They do to determine
13 whether there's ambiguity in the language.

14 And, Your Honor, you can go back to a whole
15 line of district court cases from -- all the way from
16 Carr in, I think, 1924 in -- in the D.C. circuit to the
17 2016 decision in PCC Broadband, and all the cases in
18 between, Skvorecz and -- and In re Hyatt and all the
19 other ones. The purpose of the
20 broadest-reasonable-interpretation expedient -- and it's
21 called an "expedient" for a reason -- is to determine
22 whether claim language has ambiguity in it.

23 If it does, then the patent owner can amend
24 and -- and does so as of right in examinational context,
25 not in the IPR context, the patent owner can amend to

1 clarify that her claims really don't mean what they may
2 broadly be construed to mean.

3 JUSTICE BREYER: But the question that
4 Justice Kennedy asked, and I think it's an important
5 one, to me, anyway, was, if you -- forget this
6 proceeding. If, in fact, in the broadest possible, or
7 whatever, reasonable interpretation and you were in
8 front of the Patent Office, and that's what they would
9 look at, and if it was too broad because that broad, you
10 know, it has flaws in it of whatever kind, the patent
11 doesn't issue. Is that right or not right?

12 MR. BEENEY: It's not a question --

13 JUSTICE BREYER: It's either right or wrong.
14 You can tell me I'm right, or you can tell me I'm wrong.

15 MR. BEENEY: There isn't an iterative
16 process with the right to amend --

17 JUSTICE BREYER: I know that.

18 MR. BEENEY: So --

19 JUSTICE BREYER: I know that. I'm saying:
20 If at the end of the day, on the broadest reasonable
21 interpretation, it is not patentable, there is no patent
22 issued.

23 MR. BEENEY: That's correct.

24 JUSTICE BREYER: Okay. Now --

25 MR. BEENEY: That is correct.

1 JUSTICE BREYER: -- if that's so, you could
2 look at this new law as -- as -- as you were looking at
3 it, as trying to build a little court proceeding. If I
4 thought it was just doing that, I would say you were
5 right.

6 But there is another way to look at it. And
7 the other way to look at it -- and that's what I would
8 like your comment about -- is that there are these
9 things, for better words, let's call them patent trolls,
10 and that the -- the Patent Office has been issuing
11 billions of patents that shouldn't have been issued -- I
12 overstate -- but only some. And what happens is some
13 person in business gets this piece of paper and -- and
14 looks at it and says, oh, my God, I can't go ahead with
15 my invention.

16 And so what we're trying to do with this
17 process is to tell the office, you've been doing too
18 much too fast. Go back and let people who are hurt by
19 this come in and get rid of those patents that shouldn't
20 have been issued. Now, we will give you, again, once
21 the same chance we gave you before, and that is you can
22 amend it once if you convince the judge you should have
23 done it before. But if, on the broadest possible
24 interpretation, you know, reasonable interpretation, it
25 shouldn't have been issued, we're canceling it. And --

1 and that is for the benefit of those people who were
2 suffering from too many patents that shouldn't have been
3 issued in the first place. I don't know.

4 If it's that second purpose, then I would
5 think, well, maybe this is right, what they're doing.
6 And if it's ambiguous between those two purposes, I
7 would begin to think, well, maybe they should have the
8 power themselves under Chevron, Meade, or whatever, to
9 decide which to do.

10 Now, that's -- that's the argument, I think,
11 that's in my mind registering the other way. So what do
12 you say?

13 MR. BEENEY: Justice Breyer, if I agreed --
14 and respectfully, I'd like to explain why I disagree.

15 JUSTICE BREYER: Uh-huh.

16 MR. BEENEY: But -- but even if I did agree,
17 I -- I would say that Congress, in fact, established
18 exactly what Your Honor described. But it established a
19 system in which we are adjudicating property rights.
20 And it makes no more sense to adjudicate those property
21 rights in a court-like setting by pretending that those
22 rights are not what, in fact, was granted, what the
23 patentee claims, or what the patentee could assert in
24 district court infringement litigation than it does
25 to -- when you're in -- trying to determine whether

1 someone's property encroaches on another, which -- which
2 I would submit is really an apt analogy for the
3 obviousness-anticipation tests. We look at what the
4 boundaries -- the metes and bounds of that property
5 actually is.

6 So Congress, assuming that it did what Your
7 Honor suggested, established a system to do that, but it
8 established a system to adjudicate in a court-like
9 setting the actual patent rights that a patentee
10 obtains, not ones that someone suggests might be
11 broader. That is to determine ambiguity in claim
12 language, not to adjudicate rights.

13 JUSTICE SOTOMAYOR: I'm sorry. If language
14 is ambiguous, it can't have that plain meaning, can it?

15 MR. BEENEY: I'm sorry?

16 JUSTICE SOTOMAYOR: How would you have a
17 plain meaning that a district court would apply if
18 language is ambiguous? How could it say that you have a
19 valid property right in something that's ambiguous?

20 MR. BEENEY: The test of the ordinary
21 meaning, as enunciated by Philips and its progeny, will
22 first look at the claim language. If there's ambiguity
23 in the claim language, then what is the meaning of that
24 patent will be determined in light of the specification,
25 the prosecution history, and other intrinsic evidence.

1 In the rare case where there still may be
2 ambiguity, then the Court may consider extrinsic
3 evidence, dictionaries, other writings by the patentee,
4 what somebody of ordinary skill in the art might
5 determine a particular claim limitation to mean.

6 So there are a number of tools in the
7 ordinary-meaning-construction standard that should be
8 used here to --

9 JUSTICE SOTOMAYOR: Aren't those tools used
10 in determining the broadest -- the broadest reasonable
11 reading, meaning how can the PTO decide what a broad
12 reasonable reading is unless it looks at all of those
13 factors and decides that the specifications and all the
14 other things don't cure, continue to provide ambiguity
15 in the patent?

16 MR. BEENEY: It -- it does not. The
17 broadest reasonable interpretation is considerably
18 different than the ordinary meaning of construction
19 standard, and the fact that the Patent and Trademark
20 Office has admitted as much. In the manual for patent
21 examination procedures, the Patent and Trademark Office
22 tells its patent examiners, we, quote, "do not interpret
23 claims in the same manners as the courts."

24 Just recently, a very important tool that
25 courts look at in the ordinary-meaning context, the

1 prosecution history, in the Federal Register the Patent
2 and Trademark Office said that the only time it looks at
3 prosecution history is when it is actually raised by the
4 parties, relied on by the parties, and explained by the
5 parties.

6 There are very different sub tools, if you
7 will, within broadest reasonable interpretation and
8 ordinary meaning, and that's because they intend to
9 accomplish different purposes. One adjudicates
10 patentability, which is what Congress intended in IPR.
11 The other identifies ambiguity in claim language.

12 In fact --

13 CHIEF JUSTICE ROBERTS: Why --

14 MR. BEENEY: -- if one looks at -- if one
15 looks at the manual in Section 2111, the PTO tells its
16 examiners that one of the reasons we use the broadest
17 reasonable interpretation is because, unlike the courts,
18 we don't have before us a fully-developed prosecution
19 history. Well, when you're in inter partes review, you
20 do have a fully-developed prosecution history, and
21 that's what we should be looking at.

22 CHIEF JUSTICE ROBERTS: How does the
23 relationship between the district court infringement
24 action and the proceeding before the Board actually work
25 out in practice? If you're suing someone, here's my

1 patent, you're infringing it, and the infringer goes to
2 the -- the Board and says I want you to determine the
3 validity of the patent, and the district court is doing
4 the same thing, or at least determining the scope of the
5 patent and whether or not it infringes?

6 MR. BEENEY: What typically happens, Mr.
7 Chief Justice, is in those situations where a patent is
8 not subjected to inter partes review, and I file an
9 infringement case, is that the defendant may then seek
10 to file a petition before the Board --

11 CHIEF JUSTICE ROBERTS: Right.

12 MR. BEENEY: -- seeking review of the patent
13 and CICA stay in the district court.

14 And in fact, in this rather substantial
15 transfer of the adjudicatory function from the judiciary
16 to the administrative agency, we find that about 85
17 percent of patents that are being adjudicated by the
18 Board are subject to district court litigation. And in
19 those 85 percent of the time, district courts are
20 entering stays 70 percent of the time. So in fact, what
21 is happening is the judiciary is deferring to the Board
22 in making decisions about the patentability of the
23 claims that are at issue.

24 CHIEF JUSTICE ROBERTS: I would think that's
25 a little burdensome to the district court. They sort of

1 have to get deeply into the patent case and then take
2 whatever the Board says is the proper -- whether it's
3 valid or not.

4 MR. BEENEY: Well, that, in fact, what
5 happens is that should a claim survive inter partes
6 review, then there are various estoppel provisions that
7 Congress enacted in the America Invents Act that prevent
8 the relitigation of the identical prior art that may
9 have been adjudicated by the Board in IPR.

10 So the district courts don't need to revisit
11 what happened in inter partes review, which is yet
12 another example of why Congress intended inter partes
13 review to be a substitute for district court litigation.

14 JUSTICE KENNEDY: Well, in the district
15 court -- please correct me if I'm wrong -- does the
16 district court have the obligation to -- to interpret
17 the statute in a way that preserves the patent's
18 validity?

19 MR. BEENEY: Only -- as I was going through
20 that litany of steps with Justice Sotomayor, only when
21 the claims are ambiguous. We go to the intrinsic
22 evidence. If that's ambiguous, we go to the extrinsic
23 evidence. And then if, really --

24 JUSTICE KENNEDY: But I would not think that
25 the -- the -- that in the IPR, that rule would prevail.

1 MR. BEENEY: In -- in inter partes review
2 there is no presumption of validity. Congress
3 recognized --

4 JUSTICE KENNEDY: That -- that shows a
5 difference in these proceedings.

6 MR. BEENEY: There no doubt is a difference
7 in the proceeding. But the fact that Congress
8 recognized the expertise of this newly created Board
9 that it was establishing, and thereby removed the
10 presumption because of the expertise, in no way suggests
11 that, in adjudicating patentability, the Board in IPR
12 should be dispensing with all the guidance that this
13 Court has -- has provided, and all the guidance that
14 other courts have provided, in giving patent rights in
15 adjudicating whether they are patentable, their ordinary
16 meaning.

17 JUSTICE KAGAN: Are -- please.

18 MR. BEENEY: No. I was just going to say,
19 Justice Kagan, it just doesn't simply flow.

20 JUSTICE KAGAN: Is -- is your argument, Mr.
21 Beeney, that Congress couldn't have thought anything
22 else except that the ordinary-meaning standard would
23 control? Because if I look at the statute, I mean, it
24 just doesn't say one way or the other. So we're a
25 little bit reading tea leaves, aren't we?

1 MR. BEENEY: I think not, Justice Kagan.
2 And I think your -- your first sentence is perhaps
3 really only at the margin in exaggeration of our
4 position, and -- and it is because of this: Take one
5 factor that -- that Congress enacted in IPR, a 12-month
6 period from which the time the Board must reach its
7 final decision absent good cause. Contrast that with
8 the examination proceedings. The examinational context
9 and the reexaminational context take two to three years.
10 Why do they take two or three years? They take two to
11 three years because this is iterative, back and forth,
12 looking for prior art, discussing with the patentee what
13 did she invent, asking her to amend her claims if
14 they're deemed to be ambiguous or too broad. That
15 doesn't happen in -- in inter partes review. It can't
16 happen because of the time frame that Congress
17 legislated.

18 There are other reasons why --

19 JUSTICE KAGAN: I mean, I guess if I'm
20 trying to put myself in Congress's position, I'm -- I'm
21 looking at the PTO, and it does pretty much everything
22 by this broadest-construction standard. And if I had
23 the clear intent that you're suggesting, given the
24 backdrop of how the PTO generally operates, wouldn't I
25 say so?

1 MR. BEENEY: I think not, Justice Kagan, for
2 the historical reason that Congress has never addressed
3 claim-construction issues. It's always been a matter
4 left to the judiciary, number one.

5 And number two, the process that Congress
6 enacted in IPR is a brand new adjudicatory proceeding
7 unlike the PTO has ever confronted in the past. I mean,
8 arguing that one in inter partes review should use the
9 broadest reasonable interpretation is -- is really the
10 quintessential example of trying to pound a square peg
11 into a round hole simply because that peg used to fit a
12 very different hole.

13 Congress established a very different
14 proceeding in inter partes review. It is court-like; it
15 is done under very similar circumstances to the way a
16 case proceeds in a district court; it adjudicates actual
17 property rights and takes those property rights away.
18 And for all those reasons, if I may say, the statute
19 basically reeks that the ordinary-meaning-construction
20 standard used by the district courts should be used.

21 JUSTICE GINSBURG: Kind of a hybrid. It has
22 -- in certain respects it resembles administrative
23 proceedings and other district court proceedings. So
24 there -- there is a right to amend, or an opportunity,
25 an opportunity to amend before the agency; there isn't

1 in court. There are discovery differences; there are
2 other differences. So it's a -- it's a little of one
3 and a little of the other, this inter partes review.

4 MR. BEENEY: I think, Justice Ginsburg,
5 there are differences, but none of them go to the
6 fundamental fact of the claim-construction standard.
7 The system that Congress established is consistent only
8 with ordinary meaning.

9 And if you look again at this ability to
10 amend, in fact, in -- in examinational proceedings,
11 patent applications are almost always amended. In
12 reexamination they're amended 66 percent of the time.
13 In inter partes review, they're amended less than one
14 half of one percent of the time, and that is why the
15 claim-construction standard should be the ordinary
16 meaning.

17 If I may, Your Honors, I'd like to just very
18 briefly turn to the issue of appellate review of the
19 Board's institution decision when the Board exceeds a
20 statutory authority.

21 Just a -- very briefly, our position is that
22 under the heavy presumption of judicial review of
23 administrative actions, there's nothing in the statutory
24 scheme that meets the heavy burden to overcome that
25 presumption.

1 The statutory scheme here can be read,
2 either as the government would like to read it, to bar
3 review forever; but then that provision has to be
4 limited to its terms, that what is barred is the
5 director's decision to institute under that section, as
6 the statute says, not all the other criteria used in
7 determining whether to institute review.

8 But a better reading, as established by the
9 Federal circuit in *Versata*, and the government's
10 original position in *Versata* is that the statute only
11 prevents interim interlocutory review of the institution
12 decision at the time. Under *Mach Mining*, under *Boeing*,
13 this Court ought to find that the statute can be read to
14 permit review, and it should.

15 And if there are no further questions, I'd
16 like to reserve my remaining --

17 JUSTICE GINSBURG: Then I have just one
18 question about that.

19 Then this statute is doing no work, because
20 there would be a bar on interlocutory review under the
21 final judgment rule, in any event. You don't need a
22 statute to preclude interlocutory review when the
23 reviewing court can review only final judgments.

24 MR. BEENNEY: Correct, Justice Ginsburg.
25 But -- but what the statute does do that the

1 Administrative Procedures Act does not do is, number
2 one, bars appeal forever of decisions not to institute.
3 Because those decisions will never become part of the
4 final decision which you can appeal under a separate
5 statutory scheme under the American Invents Act. The
6 statute does that work. And the statute also does the
7 work of barring interlocutory petitions for mandamus.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 MR. BEENEY: Thank you.

10 CHIEF JUSTICE ROBERTS: Mr. Gannon.

11 ORAL ARGUMENT OF CURTIS E. GANNON

12 ON BEHALF OF THE RESPONDENT

13 MR. GANNON: Mr. Chief Justice, and may it
14 please the Court:

15 The PTO has reasonably decided to use its
16 longstanding broadest-reasonable-construction approach
17 in inter partes review proceedings because, as
18 Justice Ginsburg just noted, that they are a hybrid
19 between -- they're -- they're not exactly like anything
20 that has gone before. But the PTO reasonably concluded
21 that they are materially more like all of the other
22 proceedings that the PTO, and before that, the Patent
23 Office, has had in which it has repeatedly used
24 precisely this approach. And it has expressly used it
25 when it is possible for claim amendments to be made

1 because it promotes the improvement of patent quality
2 that Congress was interested in promoting in the America
3 Invents Act by eliminating overly broad questions.

4 JUSTICE SOTOMAYOR: Mr. --

5 CHIEF JUSTICE ROBERTS: I'm not --

6 JUSTICE SOTOMAYOR: I'm sorry.

7 CHIEF JUSTICE ROBERTS: Please, please.

8 JUSTICE SOTOMAYOR: Mr. Gannon, I'm -- I'm a
9 little bit confused. You bring a patent. You go into
10 the reexamination back and forth, with the Patent Office
11 giving it the broadest reasonable interpretation. And
12 you make amendments until you get to the point where the
13 Patent Office thinks that whatever you have is clear
14 enough to get a patent, correct?

15 MR. GANNON: Clear enough and also satisfies
16 the -- the requirements of patentability.

17 JUSTICE SOTOMAYOR: All right. So how
18 different at the end of that process is the ordinary
19 meaning from a continuing broad meaning? You've already
20 had all these chances to amend, to make things as
21 precise and as narrow as the Patent Office thinks it
22 needs to be.

23 MR. GANNON: Well, I do think that it is the
24 case that in most circumstances, these two different
25 forms of construction are going to end up in the same

1 place. That's true in most of the case law. The Dell
2 amicus brief supporting us explains this, in particular,
3 that it's --

4 JUSTICE SOTOMAYOR: All right. So when
5 doesn't it end up in the same place?

6 MR. GANNON: It doesn't end up in the same
7 place basically when you get to the very end and the
8 Court has to apply the presumption of validity that
9 Justice Kennedy was discussing before that requires the
10 Court to adopt a saving construction of a patent. It
11 gets to the end of the process. In both procedures, in
12 the broadest reasonable interpretation and in the
13 Philips standard, they're going to start with the
14 language of the claim in light of the specification as
15 it would be understood by a person of ordinary skill in
16 the arts. It's true in the initial examination context
17 that the PTO does not use prosecution history, but it
18 has expressly noted that it will use prosecution history
19 in a proceeding like this, the IPR --

20 JUSTICE SOTOMAYOR: That's what I -- that's
21 what I --

22 MR. GANNON: -- because it's already in
23 existence. And -- and my friend noted that it will only
24 consider prosecution history that's briefed by the
25 parties in the IPR. But the same thing is, of course,

1 true in a district court proceeding. The district
2 court's going to consider prosecution history that's
3 introduced to it before the parties.

4 And so at the end of the analysis if a -- if
5 a court or the PTO are left with two different
6 potentially reasonable readings of a -- of a patent
7 claim, a court has to adopt the saving construction that
8 ends the PT -- the one in -- in -- if the concern is one
9 about obviousness or anticipation in light of prior art,
10 that's probably going to be the narrower construction.

11 The Board -- the Board and the PTO, by
12 contrast, and before that, the Patent Office, have
13 recognized that if you have a claim that could
14 reasonably be read -- this isn't just a hypothetical
15 reading, but this is one, when you take all of this into
16 account, that could reasonably be read as reading on a
17 prior patent or as being obvious in light of a prior
18 patent, then that's a circumstance in which the Board is
19 going to say, you need to make this clear. Otherwise,
20 we're going to hold that it's not patentable.

21 And that's exactly what's happening in the
22 motions to amend that are happening before the Board in
23 IPR proceedings right now. My friend is correct --

24 CHIEF JUSTICE ROBERTS: Go ahead.

25 MR. GANNON: -- in saying that the vast

1 majority of motions to amend in IPRs have thus far been
2 denied. Only about 13 percent of -- of patentholders in
3 IPRs have actually filed motions to amend. And there
4 have now been six motions to amend that are granted.
5 There was one new one last week. It's a small number.

6 But the vast majority of these amendments
7 are denied on grounds of unpatentability. And this is a
8 reason that actually isn't that different from what
9 would happen in the initial exam or in the -- or in the
10 reexam.

11 And so my friend quotes Section 305, which
12 is the standard allowing for a patentholder to propose
13 amendments in a course of an ex partes reexamination.
14 But note that it's the ability to propose amendments.
15 That's not an amendment as of right. Just because you
16 propose an amendment in a -- in a reexamination doesn't
17 mean that the PTO, at the end of that, is going to say
18 that's right. This is patentable as -- as you have
19 proposed the amendment. It still has to find that, as
20 amended, it does not read on the prior art.

21 And --

22 CHIEF JUSTICE ROBERTS: But the one --

23 MR. GANNON: -- what's happening here is the
24 PTO is denying motions because even with the amendment,
25 they would read on prior art and be unpatentable.

1 CHIEF JUSTICE ROBERTS: I think as Justice
2 Ginsburg described it, we're dealing with a hybrid
3 entity with characteristics of the PTO and the district
4 court. But it seems to me perfectly clear that Congress
5 meant for this entity to substitute for the judicial
6 action.

7 So why -- why should we be so wedded to the
8 way they do business in the PTO with respect to the
9 broadest possible construction when the -- the point is
10 not to replicate PTO procedures. It's supposed to take
11 the place of district court procedures.

12 MR. GANNON: It's supposed to take the place
13 to some extent, but not to the ultimate extent. It's
14 not supposed to perfectly replicate the results of
15 district court litigation. And we know that because
16 Congress has imposed structural differences on the IPR
17 proceeding that will guarantee that there could be
18 different results at the end of the day.

19 Most importantly, there's the different
20 burden of proof. If you -- even though you're arguing
21 about invalidity, the -- the -- in -- in the district
22 court proceeding you're going to have to prove
23 invalidity by clear and convincing evidence under this
24 Court's --

25 CHIEF JUSTICE ROBERTS: Yeah, but I think we

1 ought -- we shouldn't, except as far as the number of
2 broadest different procedures as we -- we can, it's a
3 very extraordinary animal in legal culture to have two
4 different proceedings addressing the same question that
5 lead to different results.

6 MR. GANNON: That's true, Mr. Chief Justice.
7 But they -- they can lead to different results here for
8 multiple reasons, even setting aside the question of
9 whether the broadest reasonable interpretation applies
10 here.

11 CHIEF JUSTICE ROBERTS: Well, you're just
12 saying that, okay, there's a problem here, and so we
13 should accept another problem that's presented where we
14 don't have to do it.

15 MR. GANNON: Well, we -- we do think that
16 the reason why this ultimately ends up being more like a
17 Board proceeding or a PTO proceeding is because there's
18 the ability to make claim amendments. You're not, at
19 the end of the process, just stuck with having to adopt
20 a saving construction of the patents. The -- the patent
21 owner can come in and say, look, I can fix that problem.
22 I can keep this from being obvious.

23 CHIEF JUSTICE ROBERTS: Well, are you saying
24 in the IPR proceeding?

25 MR. GANNON: In the IPR that's --

1 CHIEF JUSTICE ROBERTS: Well, that's
2 happened six times ever.

3 MR. GANNON: It's -- it -- the -- out of --
4 yes, it's a small number so far. Many more motions --
5 actually, three times as many motions, 16 motions have
6 been denied as moot. They were contingent amendments,
7 where the -- the patent owner said, well, if you're
8 going to adopt -- if you're going to disagree with my
9 claim construction, I would propose amending the patent
10 this way. And the Board said, we deny your motion as
11 moot because we agree with your construction that the
12 patent is actually patentable without the amendments.

13 And this is not an instance where the patent
14 owner is shooting in the dark, where he has only one
15 chance to amend. As was already mentioned, the -- the
16 PTO, the Board, is generally going to give a preliminary
17 claim construction when it issues its -- its decision to
18 institute the proceedings. Here, at Pages 171 to 177a
19 of the Petition Appendix, there are seven pages of the
20 Board explaining, in its decision to institute this
21 proceeding, what it thinks the phrase "integrally
22 attached" means for purposes of this patent.

23 CHIEF JUSTICE ROBERTS: But there's already
24 been -- there's already been a case where you've had
25 contrary results with respect to the same patent, right?

1 In the same -- in other words, parallel litigation; one
2 says A and the other says not A.

3 MR. GANNON: Yes, that can happen.

4 CHIEF JUSTICE ROBERTS: Well, what do you do
5 in that case?

6 MR. GANNON: Well, in that case, if the
7 patent has been invalidated by the PTO, then the
8 district court litigation is -- is going to abate. If
9 the -- if the --

10 CHIEF JUSTICE ROBERTS: So you put the
11 district court to all the trouble? I mean, we're
12 talking about district courts that don't do patent cases
13 on a regular basis. You put the district court to all
14 the trouble of trying to construe the patent, and then
15 the -- the defendant comes in and says, well, guess
16 what? I won before the IP review, and so sorry, but all
17 that was wasted energy.

18 MR. GANNON: Well, the -- I think this is
19 the reason why the -- most district court proceedings
20 have been stayed while pending a parallel IPR proceeding
21 before the Board. And there are time limits on the
22 ability -- Congress expressly addressed this in
23 Section 315, where it talked about -- about the
24 inability of somebody who's already brought a district
25 court suit alleging invalidity of a patent to bring an

1 IPR proceeding or somebody who's in privity with such a
2 person. And -- and there are a time limit that if
3 some -- if you've been sued for infringement by the
4 patent owner in district court, then you have to start
5 one of these IPR proceedings within 12 months.

6 And so usually, the district court hasn't
7 gotten that far along, and there isn't that much wasted
8 effort. And instead, what we do is we go back to the
9 PTO, and the PTO gets exactly the chance that Congress
10 expected it to have, to say, is this one of those
11 patents that we really oughtn't to have issued in the
12 first place?

13 JUSTICE BREYER: All right. Is that --

14 JUSTICE KENNEDY: Is there a difference
15 in the -- in the -- the Board proceeding, the IPR,
16 and -- and the district court litigation, in this
17 respect: With district court litigation, we're very
18 concerned because of Article III, and we have to have a
19 specific controversy, specific injury, and so forth, but
20 that an IPR proceeding can be more speculative, in that
21 the Board and the parties can say this could be
22 interpreted in the future in a particular way. Is
23 that -- is there a difference to the tone or -- or the
24 thrust of -- of the inquiries in the -- in the two
25 instances?

1 MR. GANNON: Well, I think that, ultimately,
2 the question in the IPR is -- is narrow, because it's
3 only devoted to a couple types of unpatentability. And
4 it's going to be about whether the PTO ever should have
5 issued this patent because it was, in fact, anticipated
6 by a prior patent, or it was obvious in light of prior
7 art, and --

8 JUSTICE KENNEDY: Well, you say it's a --
9 it's narrow, but we have the broadest possible
10 construction. I'll -- I'll work with that. I think
11 you're probably right.

12 (Laughter.)

13 MR. GANNON: But what I mean by "narrower"
14 is that in -- in a district court proceeding, there are
15 other grounds that could be used to challenge the
16 patents and -- and it -- it could proceed along
17 different lines. This -- this is a narrower trap in
18 which the only grounds that can be considered are going
19 to be invalidity on the basis of 102 or 103. And it is
20 true that you do not have to be somebody who would have
21 Article III standing in order to initiate an IPR.
22 That's another thing that we think shows that this
23 wasn't intended to be just a perfect substitute for
24 district court litigation.

25 To be sure, most of these IPRs are going to

1 be instituted by parties who do have a competitive
2 interest, who were concerned about whether they're going
3 to be sued for infringement on the basis of this patent,
4 or -- or -- and, therefore, they want to make sure that
5 this patent that they think ought not to have been
6 issued is invalidated. And this is --

7 JUSTICE BREYER: What's the evidence? That
8 is to say, I picked that up from your brief, that this
9 statute is, in part -- call it a partial-Groundhog-Day
10 statute. You'll do it again until you get it right, and
11 partly, it's designed here to go back to the -- I -- to
12 the Patent Office, probably because a large number of
13 businessmen told Congress that they were getting threats
14 of suits in respect to patents that obviously should
15 never have been issued.

16 Now, if that was the problem, then it
17 doesn't make -- it does make sense to say at least the
18 PTO has the authority under a partial-Groundhog-Day
19 statute to do that part of it over. And that's not
20 surprising; there are only six that actually got
21 amended, because they narrowed it before and because the
22 PTO held these are invalid, anyway. Okay? That
23 isn't -- so that doesn't move me.

24 But look at the view I just expressed of the
25 statute. There is another view that this is just a

1 little district court proceeding designed to save people
2 that time and money that they'd have to spend on a big
3 district court proceeding. All right?

4 Now, what's the evidence that the first view
5 that I had, which would not say this is just a little
6 district court proceeding, is correct?

7 MR. GANNON: Well, I think we have two
8 different types of evidence. We do have the legislative
9 history that we quote in our brief that said -- the
10 committee report said that a purpose of this was to
11 improve patent quality and -- and help justify the
12 presumption in favor of validity that a company's issued
13 patents in district courts.

14 But then in terms of the notion that it's
15 not just intended to be another little district court
16 proceeding that happens to be faster and cheaper is --
17 is all of the structural differences that Congress
18 imported here to ensure that it wasn't going to be
19 exactly the same. And so, as I mentioned, it was going
20 to be limited to certain particular grounds of -- of
21 unpatentability under 102 and 103. The evidence that
22 could be considered there is limited. The only prior
23 art that can be considered is prior art that comes in
24 patents and prior publications. That's a narrower
25 universe than could be used in a district court

1 proceeding. And, of course, the burden of proof is
2 going to be different.

3 And so we think that in -- in speaking to
4 all of those things expressly and -- and then also in
5 ensuring that there still would be an opportunity to
6 amend claims, that, ultimately, is the reason why this
7 is not sufficiently like district court litigation for
8 the PTO to part -- to depart from its longstanding
9 practice of using the BRI approach in every type of
10 proceeding, including post-grant proceedings. This
11 isn't the first Groundhog Day-type statute that -- that
12 the PTO has had.

13 CHIEF JUSTICE ROBERTS: Is there -- what --
14 is the district court free to disagree with the PTO
15 reading of the patent? Could it say, fine, this is a
16 pertinent fact, a mixed question of law, in fact, in
17 litigation pending before me. And I appreciate the fact
18 that you think this agency thinks this, but my
19 responsibility is to decide this case according to the
20 facts and law, and I disagree with the PTO's reading.

21 MR. GANNON: Yes. As long as the patent
22 still exists. If the end of the IPR proceeding is the
23 cancelation of the relevant claim, then there isn't
24 going to be something to be litigated about in district
25 court.

1 CHIEF JUSTICE ROBERTS: Well --

2 MR. GANNON: But otherwise, the claim
3 construction that is adopted in -- in -- along the way
4 in getting to upholding the patent claim isn't going to
5 bind the district court any more than the district court
6 claim construction would bind a different district court
7 or the PTO.

8 CHIEF JUSTICE ROBERTS: Well, can it say
9 that I understand what PTO thinks the scope of the
10 patent is, but my responsibility is to interpret it
11 pursuant to a different standard, and under my different
12 standard I have a different result?

13 MR. GANNON: Yes. That -- that could be the
14 difference, and that is exactly what the courts have
15 repeatedly recognized, going back, as my friend noted,
16 to the 1924 decision from the D.C. circuit in the Carr
17 case, which recognized that the PTO and the courts are
18 using different standards precisely because you can
19 still clarify the scope of the claim when you're before
20 the PTO.

21 CHIEF JUSTICE ROBERTS: So if the district
22 court interprets the patent, is -- is that binding on
23 the PTO?

24 MR. GANNON: No.

25 CHIEF JUSTICE ROBERTS: And if the PTO

1 interprets the patent, that's not binding on the
2 district court.

3 MR. GANNON: That's right. And the same
4 thing is -- it's --

5 CHIEF JUSTICE ROBERTS: Well --

6 MR. GANNON: The same thing --

7 CHIEF JUSTICE ROBERTS: I'm sorry. It just
8 seems to me that that's a bizarre way to conduct
9 legal -- decide a legal question. I mean, who -- how
10 does it work? Whoever gets to the judgment first, or --

11 MR. GANNON: Well, with respect to the
12 question of whether the patent still exists, if the PTO
13 cancels the claims at the end of the proceeding, then
14 there won't be something to be litigating about in
15 district court.

16 If the PTO holds that the burden of proving
17 that this claim is unpatentable has not been satisfied,
18 then somebody else can take another shot at that before
19 the district court.

20 This particular party who proceeded before
21 the IPR --

22 CHIEF JUSTICE ROBERTS: Right.

23 MR. GANNON: -- won't be able to, because
24 they'll be estopped by Section 315 from pursuing the
25 same arguments in both forums.

1 CHIEF JUSTICE ROBERTS: Even though they're
2 different standards of proof?

3 MR. GANNON: Even though they're different
4 standards of proof.

5 CHIEF JUSTICE ROBERTS: Is that how estoppel
6 normally works?

7 MR. GANNON: Here, Congress has expressly
8 prescribed that you cannot use, in the district
9 proceeding, an argument that you could have advanced --

10 CHIEF JUSTICE ROBERTS: So the answer to my
11 question is, no, that's not the way estoppel normally
12 works.

13 MR. GANNON: That's right. But I would also
14 say that in this context, the Court has recognized in
15 *Blonder Tongue* that estoppel -- that -- that people can
16 repeatedly relitigate the question of patent validity in
17 district courts around the country.

18 CHIEF JUSTICE ROBERTS: Is there another
19 example where you have a complaint filed that puts an
20 issue before the district court during which the -- the
21 parties can take that issue away from the district court
22 and come up with an answer that then binds -- well, I
23 guess you're saying it doesn't bind the district court.

24 MR. GANNON: I -- I'm saying that if the PTO
25 has the ability in the meantime to cancel the claim, to

1 find that, yes, it is correct, this is one of those
2 patents we never ought to have issued in the first
3 instance, and that's true because when we've applied our
4 broadest-reasonable-construction approach --

5 CHIEF JUSTICE ROBERTS: Right.

6 MR. GANNON: -- and the patent owner has --
7 has proffered amendments, they can't come up with
8 something that is actually patentable --

9 CHIEF JUSTICE ROBERTS: Right. And that's
10 because of their -- their view, and then it goes back to
11 the district court, and the district court said, well,
12 thank you very much for your opinion, but my job is to
13 give a different analysis. I'm not bound by this
14 broadest-possible reading. And when I read the patent,
15 I think it comes out the other way, and that's how I'm
16 going to decide this case.

17 MR. GANNON: It is true that a district
18 court, as long as the patent still exists and the
19 district court has jurisdiction over the parties and the
20 parties aren't precluded from -- from raising those
21 claims, it could end up at a different result at the end
22 of the day, precisely because of a higher burden of
23 proof and the fact that it -- it has to adopt the saving
24 construction --

25 CHIEF JUSTICE ROBERTS: And this is under --

1 MR. GANNON: -- that the PTO would not need
2 to adopt.

3 CHIEF JUSTICE ROBERTS: And this is under a
4 statute designed to make the patent system more
5 reasonable and more expeditious in reaching judgments?

6 MR. GANNON: Yes. And -- and this is
7 something where Congress has expressly delegated to the
8 agency the authority to make regulations governing inter
9 partes review and say at 316(b) --

10 JUSTICE BREYER: How -- how does this
11 happen? I -- I thought we send it back, and the PTO
12 says we shouldn't have issued it.

13 MR. GANNON: And if --

14 JUSTICE BREYER: They say that we cancel it.

15 MR. GANNON: If --

16 JUSTICE BREYER: So there is nothing in the
17 district court; isn't that right?

18 MR. GANNON: Yes. I mean, at that point,
19 the -- the patent owner can appeal to the Federal
20 circuit. The Federal circuit --

21 JUSTICE BREYER: Can appeal what? Can
22 appeal the cancelation?

23 MR. GANNON: Can appeal the decision that --
24 the final written decision of the Board is one that will
25 say --

1 JUSTICE BREYER: And if they never issue a
2 patent, I apply for a patent because I have this thing
3 that instead of putting red cellophane on the
4 speedometer, I put purple cellophane on the speedometer.
5 It signals the presence of a hot dog stand. All right?

6 (Laughter.)

7 JUSTICE BREYER: I -- I then try to patent
8 it. And they look at this patent and, no, absolutely
9 not.

10 Can I appeal to the Court?

11 (Laughter.)

12 MR. GANNON: Well, if -- if -- I'm sorry.

13 JUSTICE BREYER: I'm sorry. They don't
14 issue a patent.

15 MR. GANNON: But the point --

16 JUSTICE BREYER: I have an application.

17 MR. GANNON: The point --

18 JUSTICE BREYER: They don't issue a patent.

19 Can I appeal their decision to the Court?

20 MR. GANNON: You would be able to -- yes.

21 And -- and so here, ultimately --

22 CHIEF JUSTICE ROBERTS: I'm sorry. Just to
23 interrupt. You're talking about something else. You
24 mean appeal to the Federal circuit, right?

25 MR. GANNON: That -- that -- he was talking

1 about a patent application, yes. And also, here,
2 there's going to be an appeal to the Federal circuit of
3 the -- of the substantive merits of the Board's decision
4 that this patent claim is unpatentable. It doesn't
5 satisfy the standard. And so --

6 CHIEF JUSTICE ROBERTS: But I -- what I was
7 asking --

8 MR. GANNON: -- ultimately, that's --

9 CHIEF JUSTICE ROBERTS: I'm sorry. What I
10 was asking, I think, is a different question. The
11 reason it's not -- it's not as if it's an appeal to the
12 district court because the district -- that -- that's an
13 issue before the district court: What is the scope of
14 this patent; what does it cover? And the Patent Office
15 is telling you, well, it covers this, and the district
16 court says, thank you, I apply a different standard. I
17 think it covers this. And when that's the case, it's a
18 valid patent.

19 MR. GANNON: That's correct. That could
20 happen. But if the claim has already been canceled, the
21 point is that if the -- if the --

22 JUSTICE SOTOMAYOR: Mr. Gannon, could you
23 give an example? I'm -- so far I'm halfway with you.
24 If the PTO has canceled the patent, the lawsuit in the
25 district court ends.

1 MR. GANNON: Yes.

2 JUSTICE SOTOMAYOR: There's nothing else for
3 it to do.

4 MR. GANNON: And --

5 JUSTICE SOTOMAYOR: But let's assume --

6 MR. GANNON: But although the patent owner
7 in the meantime could have appealed to the Federal
8 circuit --

9 JUSTICE SOTOMAYOR: Federal circuit and --

10 MR. GANNON: -- and determined --

11 JUSTICE SOTOMAYOR: -- assuming it loses in
12 the Federal circuit, the district court case has ended,
13 correct?

14 MR. GANNON: Well, if the patent is gone,
15 then -- then they're not going to be litigating about it
16 in district court.

17 JUSTICE SOTOMAYOR: All right. So what does
18 survive? Let's assume the Patent Office decides that
19 the patent's still alive. The loser goes up to the
20 Federal circuit, and the Federal circuit says this is
21 still a patent. They've given it a meaning of -- the
22 broadest possible meaning and said it's still valid.
23 Now what happens in the district court? What's still
24 alive? Give a concrete example.

25 MR. GANNON: Well --

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 <hr/> 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 cancels 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	Philips 16:21 28:13	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	phrase 33:21 50:25 52:16	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	picked 37:8	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	piece 14:13	preclusive 54:17	proceedings 21:5 22:8
14:10 16:9,24 17:15,19,20,21	patentees 5:22	place 11:9 12:6 15:3 28:1,5,7	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	31:11,12 35:12 48:11,14	preliminary 33:16	32:4 33:18 34:19 35:5
20:1 21:14 24:11 26:22	54:10	plain 5:17 16:14 16:17	preliminary-cl... 9:8	39:10 53:13 proceeds 9:4
27:1,9,10,13 27:14,21 28:10	patentholders 30:2	play 4:2	prescribed 42:8	23:16 process 7:17 8:7
29:6,12,17,18 32:20 33:7,9	patents 8:5 14:11,19 15:2	please 3:9 20:15 21:17 26:14	presence 45:5	11:11 12:5 13:16 14:17
33:12,13,22,25 34:7,12,14,25	19:17 32:20 35:11 36:16	27:7,7	presented 9:11 32:13	23:5 27:18 28:11 32:19
35:4 36:5,6 37:3,5,12	37:14 38:13,24 43:2 55:1	point 8:1 9:18 27:12 31:9	preserves 20:17	57:5 product 49:4
38:11 39:15,21 40:4,10,22	PCC 12:17	44:18 45:15,17 46:21	presumption 7:7 21:2,10 24:22	proffered 43:7
41:1,12 42:16 43:6,14,18	peg 23:10,11	pointed 56:12	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	pending 34:20 39:17	Portola 51:19,19 51:20	pretending 15:21 56:18	progeny 16:21
46:1,4,14,14 46:18,24 47:6	people 14:18 15:1 38:1	9:10 22:4,20 24:21 25:10	pretty 22:21	promotes 27:1
	42:15	50:2 57:2	prevail 20:25	promoting 27:2
	percent 5:2 8:15 19:17,19,20	possibility 52:15	prevent 20:7 49:20	proof 6:24 31:20
	24:12,14 30:2	possible 13:6 14:23 26:25	prevents 25:11	
	perfect 36:23	31:9 36:9	previously 51:4 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	today 56:6	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	troubled 34:11,14	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 typically 9:7 19:6	usually 35:6	wholly 6:4 9:10 12:2
tab 53:4		<hr/> U <hr/>	<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				
tell 13:14,14 14:17 50:10				

wouldn't 22:24 54:12,15,16 56:15,17 writings 17:3 written 44:24 wrong 12:10 13:13,14 20:15 52:11 55:8,17	<hr/> 3 <hr/>			
X	<hr/> 4 <hr/>			
x 1:2,11	<hr/> 5 <hr/>			
Y	<hr/> 6 <hr/>			
Yeah 31:25 years 22:9,10,11 York 1:19	<hr/> 7 <hr/>			
Z	<hr/> 8 <hr/>			
0	<hr/> 9 <hr/>			
1	<hr/> 10 <hr/>			
10,000 5:6 8:17 102 36:19 38:21 103 36:19 38:21 11:02 1:17 3:2 12 35:5 12-month 22:5 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	<hr/> 11 <hr/>			
2	<hr/> 12 <hr/>			
2015 8:1 2016 1:13 12:17 2111 18:15 25 1:13 26 2:7 27 8:1	<hr/> 13 <hr/>			