

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - x

JERRY W. GUNN, ET AL., :

Petitioners : No. 11-1118

v. :

VERNON F. MINTON :

- - - - - x

Washington, D.C.

Wednesday, January 16, 2013

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

APPEARANCES:

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

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

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	JANE WEBRE, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	THOMAS M. MICHEL, ESQ.	
7	On behalf of the Respondent	24
8	REBUTTAL ARGUMENT OF	
9	JANE WEBRE, ESQ.	
10	On behalf of the Petitioners	50
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(11:05 a.m.)

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

Ms. Webre?

ORAL ARGUMENT OF JANE WEBRE
ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 And, Justice Scalia, you wrote the opinion

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

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

10 And to be --

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

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

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

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

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

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

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

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

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

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

1 interest on the other side.

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

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

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

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

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

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

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

14 MS. WEBRE: No, Your Honor.

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

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

1 patent applications -- prosecution of patents.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 MS. WEBRE: Yes. So --

16 JUSTICE SOTOMAYOR: Then what other
17 factors --

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

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

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

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

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

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

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

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

1 say?

2 MS. WEBRE: Yes, Your Honor.

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

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

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

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

23 MS. WEBRE: I think there are two reasons --
24 there are two reasons why that's the only appropriate
25 way to apply the Grable test to legal malpractice cases,

1 and both of them involve the lack of precedent from the
2 case.

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

5 JUSTICE SOTOMAYOR: How about fraud on -- a
6 claim of fraud on -- that the malpractice was fraud on
7 the PTO? Lawyer loses that. It's been litigated.

8 Isn't it res judicata, and won't it affect the patent --
9 or might it not affect the patent in a patent action?

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

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

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

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

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

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

17 And what's kind of a funny --

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

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

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

3 JUSTICE SOTOMAYOR: Or the district court
4 does, if it gets to review that in a later action.

5 MS. WEBRE: Well, but --

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

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

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

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

1 MS. WEBRE: Well --

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

4 (Laughter.)

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

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

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

24 (Laughter.)

25 JUSTICE KENNEDY: But can you just tell me,

1 as an -- as an empirical matter, does "arising under"
2 for removal jurisdiction cases consume a tremendous
3 amount of time in litigation in the Federal courts?
4 It's just --

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

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

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

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

24 And -- and it really presents for this Court
25 a question of is "arising under" jurisdiction truly a

1 lenient standard, as the Federal court has articulated?

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

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

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

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

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

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Michel?

5 Is that correct, "Michel"?

6 ORAL ARGUMENT OF THOMAS M. MICHEL

7 ON BEHALF OF THE RESPONDENT

8 MR. MICHEL: It is, Your Honor. Thank you.

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

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

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

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

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

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

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

11 JUSTICE SOTOMAYOR: Then take immigration
12 law.

13 MR. MICHEL: Yes.

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

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

22 However --

23 JUSTICE SCALIA: Excuse me. I guess I just
24 don't understand this. Is it the case that there is
25 "arising under" jurisdiction only when the Federal cause

1 of action presented is one over which Federal courts
2 have exclusive jurisdiction?

3 MR. MICHEL: That --

4 JUSTICE SCALIA: If that -- is that the
5 rule?

6 MR. MICHEL: I believe, in part.

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

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

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

23 Have you got a case for that.

24 MR. MICHEL: I'm sorry, Your Honor. I don't
25 know if I followed your question.

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

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

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

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

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

23 That's all that question meant to me.
24 Certainly -- certainly, you -- you could have cases
25 where there is concurrent jurisdiction, 1983, in which

1 we'd have the same problem.

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

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

11 MR. MICHEL: Patent law cases --

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

15 MR. MICHEL: Those --

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

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

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

23 MR. MICHEL: That --

24 JUSTICE SOTOMAYOR: -- which is define
25 "substantial" as to how it affects Federal law, which I

1 think was the bottom line -- or the development of
2 Federal law, the bottom line of Grable.

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

8 So how does a ruling affect patent law?

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

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

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

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

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

23 MR. MICHEL: Correct. That would only apply
24 to the inventor; it would not apply to the PTO. It can
25 only be used against, in this, case Mr. Minton. And, in

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

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

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

14 MR. MICHEL: It does.

15 JUSTICE GINSBURG: How?

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

23 We are not saying it's binding on the PTO,
24 but it is an issue of issue preclusion as against Minton
25 that would be in front of the PTO and is in front of the

1 PTO, as we speak.

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

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

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

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

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

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

1 we contend it involves issue of first impression.

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

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

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

16 JUSTICE SOTOMAYOR: Besides the parties --

17 MR. MICHEL: Yes.

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

20 MR. MICHEL: The --

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

23 MR. MICHEL: They're --

24 JUSTICE SOTOMAYOR: -- this malpractice
25 determination?

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

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

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

16 MR. MICHEL: The patent --

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

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

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

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

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

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

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

25 JUSTICE SCALIA: Excuse me. The State

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

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

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

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

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

1 reviewable, unless this Court were to grant certiorari
2 review.

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

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

10 MR. MICHEL: It's --

11 JUSTICE SOTOMAYOR: -- in the State --

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

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

20 MR. MICHEL: Yes.

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

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

1 214 --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 So we are --

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

7 MR. MICHEL: We do not.

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

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

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

24 MR. MICHEL: Well, the -- the distinction
25 is, for example, in a licensing case, in a patent case,

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

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

13 It does involve substantial issues of first
14 impression.

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

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

19 JUSTICE GINSBURG: Yes. And that was in the
20 control, the actions of the Federal agency, of IRS.

21 MR. MICHEL: Correct.

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

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

1 JUSTICE GINSBURG: You have -- you have --

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

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

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

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

21 MR. MICHEL: I'm sorry?

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

25 MR. MICHEL: Correct.

1 JUSTICE SOTOMAYOR: He's not going to get
2 his patent back from this action.

3 MR. MICHEL: That's correct.

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

6 MR. MICHEL: Correct.

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

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

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

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

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

25 So, then, in that situation, a State

1 district court will be rendering an opinion on a live
2 patent, and then that will be binding on the inventor
3 and will affect real live actual patents, and it does
4 affect patents before the Patent Office.

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

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

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

18 MR. MICHEL: Yes.

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

22 MR. MICHEL: I think there are -- there are
23 distinctions in the area of patent law versus any other
24 area of the law namely because, as we get to the
25 State -- and this -- this goes to the analysis of the

1 State/Federal balance. That's why the exclusive Federal
2 court jurisdiction.

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

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

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

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

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

1 And they are still applying underlying
2 State issues.

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

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

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

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

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

23 MR. MICHEL: No, I think the Federal
24 government -- I can't -- I can't speculate to -- for
25 that, Justice Ginsburg. There could be just many

1 reasons why they didn't come in on this case, just like
2 they don't come in on many other cases.

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

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

9 MR. MICHEL: Yes.

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

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

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

24 The Federal circuit has gone both ways on
25 that, whether the issue of buyer knowledge is a

1 conclusive factor or whether it is just one of 13
2 factors.

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

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

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

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

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

23 MR. MICHEL: You -- you would -- you would
24 think so. It doesn't appear to be the case because, in
25 this case, we had holdings that -- that experimental

1 testing had to be on a required claim element. There is
2 also an issue in this case of whether you had to have an
3 expert witness testify to prove up the experimental use
4 exception, nowhere held in Federal law.

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

10 We're requesting --

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

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

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

1 Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Ms. Webre, you have four minutes remaining.

4 REBUTTAL ARGUMENT OF JANE WEBRE

5 ON BEHALF OF THE PETITIONERS

6 JUSTICE SCALIA: Ms. Webre, can I ask you

7 about the question presented?

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

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

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

21 One is they conflated necessity with
22 substantiality, and that comes -- in the Federal
23 circuit's jurisprudence, that comes from a sound bite
24 from the earlier Christiansen case, where the -- the
25 line goes something like, "There is a substantial

1 Federal issue because it is necessary to the parties'
2 claim."

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

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

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

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

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

25 He says a ruling on patent law of how you

1 should or should not behave in a State malpractice claim
2 will affect all of the lawyers who practice in -- in
3 your State because each of them will have to do or not
4 do whatever that malpractice ruling was because that's
5 what the State is going to -- State courts will follow
6 in the future.

7 So it will change those lawyers' behaviors
8 in Federal court.

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

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

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

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

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

1 and suspenders, that's something else.

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

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

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

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

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

1 CHIEF JUSTICE ROBERTS: Well, right, the
2 requirements of the Federal law. The question is
3 there's going to be a different interpretation of what
4 that means in the State court and in the Federal
5 circuit.

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

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

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
21 The case is submitted.

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

24
25

A				
above-entitled 1:11 54:23	agriculture 23:10	20:15 25:20 27:14 38:9,23	16:23 17:22 22:1,10,25	26:14 28:4 45:5 46:14
absolute 20:8,11 20:13,13 23:17	Air 22:14	42:3 51:21	23:3 25:25 26:11,22 27:6	49:21
Academy 30:17	akin 12:16	applications 12:1	39:23 41:4	bankruptcy 45:11,13,17
accept 33:14 36:8	AL 1:3	applied 4:5 5:5 20:25 50:13,14	arrive 51:18	bar 41:8
act 8:2,7	alerted 33:13	50:19	articulated 9:17 23:1 26:15,16	based 45:25
acted 5:20 14:16	amended 6:19 33:8	applies 13:17 29:21 49:20	28:4 35:15 41:11	basically 45:25
action 6:24 14:15 17:16,16	amendment 8:7	apply 6:2 13:16 17:25 29:23,24	articulation 14:9 28:18	basis 37:19 43:21
18:9,23 20:4 26:1 43:2,22	America 8:7	35:22 49:25 50:15,18 53:8	46:9 49:13	begs 7:20,20
actions 41:20	American 9:6	applying 45:18 46:1 49:15	asking 20:8	behalf 1:15,17 2:4,7,10 3:8
actual 4:13 14:22 18:3,19	amicus 9:5	51:6	aspect 23:18,24	24:7 50:5
21:7 38:21 44:3	amount 22:3	appropriate 9:20 17:10,24	Assertions 30:17	behave 52:1
added 20:16	analogs 49:15	20:14 51:15 53:8 54:18	Association 9:6	behavior 52:25
address 20:7	analogue 24:17 25:9	appropriateness 51:20	assume 14:16 15:13 19:20	behaviors 52:7
addresses 10:25	analysis 9:20 14:17 25:19	area 7:14 12:5 21:22 24:17	Atari 9:4	believe 13:20 26:6
adjudicated 40:22	27:14 38:4 39:22 40:15	35:10 44:23,24 45:5,22 49:20	attorney 10:8 18:16 19:22	belong 39:14,15
adjudicating 19:20	41:6 44:25 46:9	49:22,23	attorneys 33:17	belt 52:16 53:13 53:13
adjudicators 26:10	announced 5:17 9:22	areas 24:21 27:21 44:15	attorney's 10:12	belts 52:25
adopt 16:21 20:21	answer 4:3 48:9 51:22	45:23	Austin 1:15	benefit 20:16
advance 13:2	answers 7:22	arguably 7:15	authoritative 33:14	benefits 20:22
adversary 28:22 51:23	antitrust 24:24 25:6,8 45:7	argue 20:19	authority 5:16	beyond 4:25
adversely 12:13	49:12,14,18	arguing 31:10 36:6	awry 5:5 9:15	bind 19:12 21:16 37:7
advisory 38:17	anytime 39:6,6	argument 1:12 2:2,5,8 3:4,7	A&T 27:9	binding 4:20 11:11,12,17,20
affect 18:8,9,11 18:16 29:4,8	anyway 21:3 33:13 36:23	6:10 10:24 12:3 13:15,16	a.m 1:13 3:2	11:22,24 30:10 30:12,23 36:8
29:20 32:19 38:21,22,22,23	45:18	22:10 24:6 40:14 44:7		36:12 44:2
43:7 44:3,4 52:2 53:15	appeals 32:9,15 35:9 42:17	50:4	B	bit 8:25 14:5
affidavit 4:8 13:8 16:8	54:16	arises 31:7	B 13:13,16 14:2	bite 50:23
agency 41:20 42:4 45:10	appear 48:24	arising 3:12 5:3 6:14,23,24 8:1	back 8:24 14:5 15:11 20:17	Board 19:7
ago 23:14	APPEARAN... 1:14	8:5,18 14:21	27:15 29:18 30:7 43:2,11	body 23:2 48:8
agree 53:7	appellate 46:4		49:21	bottom 29:1,2
	applicable 6:17		backs 34:6	bound 19:15 34:21 35:1
	application 4:9 4:21 11:6 13:7		bad 36:22	37:14 39:4 48:9
	16:6 17:11		balance 5:16 9:21,25 24:19	brand-new 31:22 33:22
			45:1 46:7,17 46:18 51:9	breach 40:21
			balancing 26:14	Breaches 39:24
				brief 9:5 29:4

<p>briefings 32:14 Brighton 21:20 bright-line 17:14 bringing 10:13 12:19 broadened 33:9 broader 8:4 23:7 brought 21:21 26:18 41:1,2 44:17 burden 17:3,19 business 39:21 buyer 32:10 47:25</p> <hr/> <p style="text-align: center;">C</p> <p>C 2:1 3:1 called 10:24 career 49:6 carry 12:7 case 3:4 4:9,11 4:23,25 5:9,18 6:8 7:1 9:4 10:11,12,19,24 12:8,10 13:13 13:13,14,16 14:9,10,24 15:22 16:2,14 16:16 18:2 19:1 20:23 21:10 22:14,15 22:18 23:15 24:11,15 25:21 25:24 26:17,23 27:1,3,6,19 29:25 30:1,3 31:22,24,25 32:2 33:22 35:23 36:25 37:24 38:4,4 38:11 39:10,17 39:17,17,18,20 39:20,21,22 40:3,4,4,4,11 40:12,14,14,25</p>	<p>40:25 41:6,6 41:12 42:10,16 43:18,23,23 46:3,21 47:1 47:12,14,17,21 48:24,25 49:2 49:9,25 50:24 52:20,23 53:11 53:20,21,22,23 54:12,21,22 cases 7:15,15 10:2 11:17 13:12,19 16:19 17:5,12,21,25 20:21 22:2,13 23:3,10,17 27:24 28:5,8 28:10,11 31:13 37:13 41:1,4,8 46:11 47:2,14 cast 8:4 causation 39:25 cause 17:16,16 25:25 central 24:15 cert 22:19 certainly 6:6 8:14,20 27:24 27:24 30:9 33:13 42:11 certainty 20:17 21:22 23:16,17 certiorari 36:1,8 chain 19:12 change 14:17 42:23 52:7 changed 9:13,16 changes 7:5 chief 3:3,9 9:3,3 9:4 24:3,9 37:2 50:2 53:10 54:1,20 Christiansen 50:24 circuit 9:2,7,8 9:13,15,22 19:9 30:2</p>	<p>34:13 35:14,16 35:22 36:19 37:6 39:4 42:9 45:4 46:4 47:5 47:24 48:4,13 48:21 50:10 51:7,15 54:5,9 54:14 circuits 34:5 circuit's 5:2,3 8:25 9:12 22:14 34:21 35:8,10 50:19 50:23 51:5,20 cite 44:6 cited 9:5 City 47:13 civil 6:24 45:8 claim 3:14,16,20 4:3,20 5:12,13 5:15 6:9 10:3 10:10 12:19 13:22 14:15 15:13 18:6,18 19:15,21 24:13 24:22,24,25 30:5 32:7 49:1 51:2 52:1 claimed 32:8 claims 3:18,20 3:21 5:24 6:3 10:6 11:4 20:16 clear 20:9,22 client 10:8 16:21 Coca-Cola 25:10 49:16 code 52:25 collateral 42:15 43:13 colleague 47:7 Columbia 19:9 come 8:10,12,22 16:23 20:24 26:11,12,21 27:6 28:5 39:8 46:11,20 47:1</p>	<p>47:2 48:4 comes 40:18 50:22,23 coming 30:12 committed 35:17 36:22 communicate 39:19 comparable 47:18 competent 6:2 complicated 7:14 27:13 complied 35:15 36:18,19 complimentary 21:21 comply 35:18 36:23 complying 53:24 components 9:19 compulsory 6:20 8:12 concerned 9:7 conclusive 32:10 48:1 concurrent 27:25 45:9,15 49:19 conduct 44:12 53:15 confined 27:22 conflate 29:17 conflated 9:18 50:21 conflates 5:6 29:17 51:3 conflict 47:21 54:7 Congress 6:22 7:19 8:2,4,20 9:7 26:15 Congress's 7:12 consequence 18:4 23:19</p>	<p>considerable 21:22 consideration 21:16 consistency 7:2 constitutional 14:13 15:14,19 17:7 construct 23:14 51:5 53:7 construction 12:21 construed 16:9 consume 22:2 consumes 22:6 contemplated 8:20 contend 32:1 contention 50:15 contested 3:13 context 18:18,19 contexts 6:12 continuation 21:17 29:6 30:20 43:9 44:11 continuation-i... 21:18 continues 22:21 continuing 30:4 continuum 15:19 16:3 contract 39:9 40:4 contrary 35:3,5 35:6,7 53:5 control 41:20 controls 44:16 controverted 33:11,12 copyright 24:25 27:20 28:9 44:19 49:12 core 7:21 45:13 corollary 16:12 correct 24:5</p>
--	--	--	---	--

<p>29:23 37:8,8 38:9 41:21 42:25 43:3,6 correctly 50:16 counsel 24:3 30:1 50:2 54:20 counterclaims 6:20 8:12,13 8:14 counterpart 41:23 couple 7:19 18:14 20:20 22:5 court 1:1,12 3:10,11,17 4:16,19,22 5:4 5:6,9,17,20 6:2 6:5,13 7:1,16 7:17 9:4,9,9,17 10:24 11:5,19 11:23 12:6,18 12:19,22 13:2 14:6,10 15:2,5 15:21,25 16:16 19:8,16,21 20:3,9 22:19 22:24 23:1,5 23:13,24 24:10 24:11,14,24,24 25:3,9,18 26:19,20 28:6 30:5,11,13 31:9,18,20,21 31:21 32:2,9 32:14,15 33:14 33:22 34:13,14 34:17,23 35:3 35:7,9 36:1,13 36:22 37:12,17 37:19 38:3,8 38:15 39:9,11 39:14,15,18,24 40:6,18,20,23 41:2,4 42:3,4,8 42:10,11,17,17</p>	<p>42:23 43:19 44:1 45:2,12 45:15,24 47:5 48:9 49:8,23 49:24 50:13,18 51:4,13,19 52:8,21 53:20 53:23 54:4,10 54:16 courts 6:6 7:8 8:10,11,23 10:6 11:7,8,20 11:25 19:10 22:3,7,16,16 22:22 26:1,8,9 26:9 27:3,4,5 29:7 34:4,7,21 35:1,2,12 48:8 51:14 52:5 53:6,8 54:8 court's 14:8 26:13 30:3,16 30:18 35:1 37:14 52:24 currently 12:5 cut 16:19 17:5</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 danger 31:18 deal 23:16 27:17 debt 45:20 December 10:23 decide 19:3 40:9 48:5 decided 8:9 34:14 49:9 decides 34:17 54:13 deciding 4:22 6:6 14:6 18:25 24:18 51:15 decision 4:19 9:8 11:22,22 12:23 19:16 28:6 30:6,16 30:18 31:4</p>	<p>48:20 49:24 decisions 12:6 17:8 19:7 declared 15:4 30:21 43:16 44:12 Dee 37:17 defeat 9:9 defensive 8:17 deference 51:13 51:14 define 28:24 defining 4:1 46:7 demands 3:12 departed 23:14 departure 50:20 deprived 10:14 determination 4:12 11:11,13 18:22 31:10 32:8,9,25 33:14 43:20 determine 17:8 determined 4:15 6:14 determining 28:3 develop 10:5 development 29:1 32:19 difference 13:18 25:6 47:6 differences 25:8 different 6:12 6:12 7:8,19 25:17 28:21 43:15 45:4 52:11 54:3 difficult 4:2 dig 21:11 direction 11:21 directly 42:5 disagree 31:24 37:22 38:14 50:17 disclose 19:24</p>	<p>30:22 44:8 disclosed 30:3 disclosing 44:13 discuss 14:5 discussed 16:17 22:8 discussion 6:11 44:9,9 dismissed 40:19 dispositive 24:15 26:10,19 27:5 37:19 dispute 10:20 29:3,6 disputed 5:13 12:20 16:11 32:12 disputing 32:15 disregard 9:20 54:14 disrupt 21:13 disruptive 53:16 distinction 40:24 44:15 distinctions 44:23 distinguished 6:1 distinguishes 5:23 distinguishing 40:13 46:13 distinguishment 38:18 district 7:7 19:8 19:9 20:3 30:5 31:21 32:2 42:17 44:1 49:8 54:10 disturb 24:19 ditto 51:8 divergent 38:25 divestiture 39:25 dividing 39:13 doctrinal 26:13 28:6,7</p>	<p>doctrine 4:5 10:14 11:7 13:8,14,17 39:18 42:14 door 41:8 Dow 16:16 28:5 draft 33:5 drafting 36:15 draw 15:22 Dum 37:16 duty 39:24 40:21 44:8 D.C 1:8</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 earlier 6:10 11:3 29:19 50:24 early 9:2 effect 11:11,12 19:6 20:10 30:12 33:2 effects 38:16 either 4:21 18:11 19:7 elected 49:8 element 32:7,8 39:25 41:11 49:1 Elizondo 10:25 embedded 3:13 5:12 6:9 12:17 14:7 emphasized 5:10 6:5 emphasizing 23:21,23 Empire 5:18,22 5:24 14:9 15:24 26:13 empirical 22:1 41:9 employment 45:8 engage 33:7 45:6 entered 31:22</p>
--	--	--	---	--

<p>entire 23:2 entirely 24:13 34:14 entitled 30:18 ephemeral 21:8 21:13 Erie 11:7 error 10:12 espousing 39:3 ESQ 1:15,17 2:3 2:6,9 essential 47:11 establish 33:24 52:25 established 35:24 estoppel 42:15 43:14 ET 1:3 everybody 36:8 evidence 4:8 21:11 evolved 9:1,13 evolving 10:21 exact 6:23 exactly 5:5 10:17 34:20 51:7 Examination 19:5 example 8:11 29:17 37:23 39:16,19 40:25 45:11 52:23 exception 15:4 32:4 33:25 38:12,14 40:13 41:25 43:23 47:23 49:4 excluded 8:16 exclusive 6:17 7:8,21,22 8:3 8:10,12,22 9:1 24:22 25:18 26:2 27:18,21 28:13 34:3 45:1,3,23 46:4</p>	<p>exclusively 25:3 45:12 exclusivity 7:23 Excuse 25:23 34:25 exercised 5:14 exercising 3:15 3:19 experience 48:17 experimental 3:23 4:5 10:13 11:6 13:13,16 15:3 32:4,6 33:25 38:12,13 41:25 42:12 47:22 48:25 49:3 expert 33:24 49:3 52:13 53:12,18,19 54:15 explained 3:11 7:1 expressly 27:9 extent 6:3 10:18 extra 52:16,16 extraordinary 27:11 extremely 41:7 49:21</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>F 1:6 fabric 21:13 fact 6:11 7:21 10:23 15:21 17:14 19:23 20:24 27:17 29:20 30:1 31:25 32:5 35:8 37:12 47:23 49:16 50:11 52:24 54:14 facto 16:15 factor 16:3,4</p>	<p>31:12 32:11 40:13 46:13 48:1 factors 14:6 15:17 17:4 28:2 46:7 48:2 49:20 facts 13:7 14:16 16:7 52:23 fact-bound 4:7 5:25 11:5 fact-finding 21:9 fact-specific 31:24 failing 30:21 fails 20:20 failure 39:19 familiar 49:15 family 49:7 far-reaching 27:19 fast 15:23 48:21 favor 16:19 17:5 Federal 3:13,15 3:15,19,19 4:16,22 5:2,3,7 5:11,14,16 6:3 6:7,8,9,16,24 7:9,16 8:11,22 8:25 9:2,7,11 9:13,15,21,22 9:23 11:5,7,11 11:13,17,18,19 11:25 12:3,19 13:3,5,14,22 14:1,7,11,12 14:12,19 16:1 16:2,5,8,23 17:16,21 19:9 22:3,13,16 23:1,5 24:14 24:19,22,23 25:3,18,25 26:1,7,8,9,14 26:19 27:2,3,5 28:6,25 29:2</p>	<p>29:12 30:2,12 30:19 31:22 32:13 33:21 34:1,3,4,13,13 34:17,18,21,22 34:23 35:1,8,9 35:13,16,22 36:18,19 37:4 37:6,12,14 38:1,4,8,10 39:2,4,11,15 39:18,24 40:5 40:19 41:1,4,5 41:16,20 42:3 42:4,8,9,11 44:15,16 45:1 45:4,12,23 46:4,16,17,18 46:19,21,23 47:3,5,22,24 48:4,9,13,18 48:18,21 49:4 50:9,19,22 51:1,5,7,9,15 51:20 52:8,20 53:6,8,17,19 53:23 54:2,4,9 54:9,14 federalism 5:14 23:23 46:9 51:8 Federal/State 46:17 fees 39:25 fiduciary 39:24 40:21 fields 44:21 fifth 22:18 file 19:23 filed 9:5 finally 4:14 find 19:18 27:10 finding 19:22 20:10 43:16 finds 19:21 first 4:3,10 6:22 7:19,25 8:3 9:3</p>	<p>9:3 19:2 22:6 24:16 25:8 29:11 32:1 41:13 flip 53:11 focus 38:20 follow 19:19 29:15 32:22 35:9 42:9,11 49:24 52:5 54:7,11,16 followed 26:25 51:5 following 33:21 41:3 follows 9:16 food 23:9 fore 12:5 Fort 1:17 35:8 54:16 forth 41:9 forum 30:19 found 6:4 four 5:11 22:21 50:3 fours 40:12 framework 8:6 fraud 18:5,6,6 front 30:25,25 fully 4:14 funny 19:17 further 21:6,11 24:1 future 17:8 21:16 52:6</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 3:1 general 6:15 7:9 8:5 10:2,4 16:22 40:21 getting 22:7 27:15 36:16 48:19 Ginsburg 3:22 4:24 5:19 24:21 25:5</p>
---	---	---	--	--

<p>27:16 29:21 30:9,15 34:11 39:6,13 40:16 41:15,19,22 42:1,7 44:14 44:19 46:3,15 46:25 47:6,10 48:3,12 49:11 Ginsburg's 40:9 give 15:8 25:21 40:17 43:14 given 19:6 41:18 gives 43:17 51:23 go 15:11 20:11 20:13 24:23 25:2 28:3 32:7 37:17 39:10,18 39:24 40:5 41:3 43:19 48:14 49:7 52:10 goal 9:9 goes 5:5 23:10 29:18 37:12 42:5 44:25 50:25 going 6:6 8:9,21 12:9 13:2,15 13:25 15:12,22 17:5 19:12,12 21:11 23:4,5 27:21 29:6,14 31:3 32:21 33:1 34:2,6,8,9 34:24 35:6,12 35:20,22 36:4 36:7,16,22 37:14,18,24 38:1,10,24,24 39:1,5 41:10 42:6,11,23 43:1,4 46:11 47:15 48:7 49:21 52:5,11 52:12,15 53:8 53:15,25 54:3</p>	<p>54:13 good 27:17 goodness 21:10 31:3 govern 41:25 42:2,4 48:10 governing 10:8 38:10 government 12:4 46:20,24 grabbing 12:18 Grable 3:11 5:9 5:11,17,21,23 9:17,20 12:17 12:17 14:9 15:22 16:11,13 17:11,17,25 20:15,20,25 21:21 23:21 26:13 27:14 28:4,19 29:2 29:11 40:12 41:3,11,16 47:12 49:25,25 50:10,13,18,20 51:6,21 Grable's 41:11 grant 6:16,21 7:6,7 36:1 51:14 granted 18:22 18:22 grappled 15:21 grappling 22:16 great 23:16,24 greater 47:20 grounds 28:3 Group 7:1 guess 20:19 25:23 37:3 guessers 11:7 guidance 33:20 34:3,4 Gunn 1:3 3:5</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>hailed 11:5</p>	<p>hand 49:25 handled 49:6 handling 11:25 hands 21:15 happen 14:23 18:18 34:11,12 happens 10:9 happy 37:5,5 hard 15:22 17:22 19:19 53:4 harm 52:18 Harmar 49:17 Harmer 25:10 HealthChoice 5:18,22,25 14:10 15:24 hear 3:3 21:23 heard 10:24 24:14 45:15 held 31:5 33:23 34:1,9 35:17 49:4 high 49:17 hoe 17:22 hold 53:6 holding 34:22 35:1,8,10,24 37:15 38:15 42:16 holdings 26:13 32:3 35:7,23 48:25 Holmes 7:1 17:15 20:18 23:14 Honor 4:1 5:1 5:19 7:18 11:14 13:20 17:2,9 18:10 20:12 21:5 24:8 25:4,8 26:24 28:19 29:10 38:2 50:17 52:9 53:2 54:6 hope 48:6</p>	<p>hypothetical 4:12 13:12 14:2,2,22 23:18 31:4,10 36:24 37:3,9,9 37:10 40:14 53:3</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea 21:8 ignore 20:1 ignores 19:25 illustration 12:14 imagine 53:4 immigration 25:11,15,17,20 28:12 44:17 Immunocept 22:15 impact 12:13 21:7 impacts 14:24 importance 23:22,23 47:20 51:17 important 11:8 impose 34:8 impression 24:16 32:1 41:14 improper 50:19 improperly 5:6 9:18 includes 6:20 including 48:18 increased 9:10 indicate 3:14 inequitable 44:12 information 19:22,23 30:22 44:13 infringement 37:23,25 38:3 43:20 initial 25:2</p>	<p>initially 24:23 45:11 injected 33:22 35:24 inquiry 5:14 9:24 23:23 51:11 instance 19:2 insubstantial 37:10 Intellectual 9:6 intentioned 53:5 interest 3:15 9:22,23 10:1,5 10:7 12:15 16:8 45:19 46:16,19,21 47:3 49:17,18 51:10 interested 48:19 interesting 8:24 37:6 interests 9:21 10:4 Interferences 19:8 interlocking 33:3 interpretation 31:23 54:3 interpreter 26:21 interrelations... 36:14 invalid 15:7 30:21 42:20,22 43:16,24 44:12 invalidated 29:4 invalidity 42:24 inventor 29:24 42:15,16 44:2 47:16 Invents 8:7 involve 4:4 7:16 13:13 15:13 17:6 18:1,3 27:20 41:13</p>
---	---	---	---	---

<p>45:17 involved 4:11 45:10 involves 14:22 26:19 31:25 32:1 involving 16:20 16:22 17:21 ipso 16:14 irrevocably 4:15 IRS 41:17,18,20 isolate 27:12 isolated 20:21 issuance 18:16 issue 3:13,19 4:14 5:7,8,11 5:24 6:7,9 7:16 10:21,25 11:3 11:8 12:16,17 12:20 13:1,4 13:23 14:1,7 14:12,13 15:25 16:1,5,5,7,14 16:15 17:7,22 18:12,13 19:13 22:12,17,23 23:12 24:13,15 26:15 27:6 29:18,19,21 30:18,24,24 31:7,17,22 32:1 38:12,13 38:19 40:3,5 41:17 43:12,14 44:5,7,7 47:15 47:17,25 49:2 51:1 54:16 issues 5:10 8:9,9 8:17,21 11:24 13:5 14:10 15:19,20,23 16:11,19 24:16 24:18 25:17 31:19,25 32:3 32:12,13 33:11 33:12 34:23 36:5 37:15,20</p>	<p>41:5,13 45:12 45:16,18,24 46:2 47:20</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>JANE 1:15 2:3,9 3:7 50:4 January 1:9 JERRY 1:3 judge 9:3,4 30:5 34:18 48:18 judges 35:20,21 48:14,18 49:5 49:7,15 judge's 18:4 judgment 3:17 14:23 15:1,5,9 23:19 29:5 judicata 18:8,12 19:4,6,11 29:18 44:6 judicial 24:19 44:9 46:8 jurisdiction 3:12,16,20 5:4 5:15 6:11,14 6:15 7:7,22,24 7:24 8:11,13 8:19,22 9:1,12 9:14 11:18 14:21 16:24 22:2,11,25 24:12,22 25:2 25:18,25 26:2 26:22 27:3,4,7 27:18,21,25 44:15 45:2,3,9 45:24 46:5 49:19 jurisdictional 5:3 6:16,21 7:6 22:17,20 jurisdictions 28:13 39:3 jurisprudence 4:17 10:22 13:2 21:14</p>	<p>50:23 51:16 53:19 54:8 jurisprudential 18:14 Justice 3:3,9,22 4:24 5:19 6:25 7:11 9:3 11:10 11:15 12:2 13:3,11,24 14:14 15:11,16 16:18 17:3,13 18:5 19:18 20:3,6,7,17,19 21:2,7,19,25 22:9 23:6,13 23:14 24:3,9 24:21 25:5,11 25:14,23 26:4 26:7,17 27:1 27:10,15,16 28:8,12,16,20 28:24 29:14,19 29:21 30:7,9 30:15 31:2,13 32:16,18,21,24 33:10,17 34:11 34:25 35:11 36:6,11,17,21 37:2,11 38:2,6 39:6,13 40:2,8 40:8,16 41:15 41:19,22 42:1 42:7,19,22 43:1,4,7,11 44:14,17,19 46:3,15,25 47:6,10 48:3 48:12,17 49:11 50:2,6 51:22 52:12,22 53:7 53:10 54:1,20 justified 12:18 45:20 justify 17:22</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>KAGAN 35:11</p>	<p>36:17,21 Kansas 47:12 Katie 41:8 KENNEDY 13:11,24 21:19 21:25 22:9 23:6 27:15 kind 19:17 knew 33:10,10 know 12:4 17:14 23:13 26:21,25 31:5 34:7 36:18 37:21 knowledge 32:10 47:25 Krist 10:25</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>lack 18:1 large 46:15,19 larger 47:13 Laughter 21:4 21:24 law 4:19 5:24 6:3,24 8:15 9:8 9:10,23 10:6 11:7,12,13,17 11:20,24 12:4 12:10,14,19 13:9,14 16:11 20:15 21:14 23:3 24:12,14 24:17,18 25:12 25:15,17,20 28:8,11,25 29:2,8,12,12 30:2,11 31:19 31:25 32:4,13 32:19 33:2,21 34:2,18,23 35:4 36:18,24 37:3,4 38:11 38:22,23,24 39:3,4 41:5,25 44:16,17,19,23 44:24 45:4,5 45:22 47:22,23</p>	<p>48:8,20 49:4,6 49:7,9,22,23 51:10,17,25 52:19 53:9,17 54:2,10,19 laws 49:18 lawsuit 38:1,3,7 38:8 40:23 lawyer 18:7 33:23 34:2 35:15 36:17 43:22 44:8 52:11,20 53:22 54:13,17 lawyers 9:6 11:2 33:5,6 35:25 36:15 37:13,18 43:22 48:11 52:2,7,11 53:16 54:11 layers 4:3 leaves 36:3 left 11:15 legal 3:20,21 4:4 4:20 8:9 10:2,9 10:12,21 11:23 14:24 15:2 16:5,7,10 17:11,25 18:18 19:1,14 20:15 21:9 22:13 23:3,7,17 32:9 32:15 34:8 36:14 41:4 43:18,21 lenient 23:1 let's 6:7 15:1,13 16:2 19:20 23:7 40:20 53:11 liability 23:8 35:25 licensing 40:25 lien 45:19 life 31:8,11 limited 5:21 18:22 49:20</p>
---	--	---	---	---

line 15:23 29:1,2 39:14 50:25	17:25 18:6,18 19:1,15,21 20:16 21:9 22:13 23:3,7 23:17 24:13 25:20 28:9 29:5 32:24 34:9 35:17 36:14,23 37:13 37:15 38:7,8 39:17 40:4 41:4 43:18,21 43:22 52:1,4	5:23 Merrell 16:16 28:5 mess 12:9 messing 12:4 Michel 1:17 2:6 24:4,5,6,8 25:4 25:7,13,16 26:3,6,12,24 27:8,12 28:2 28:11,15,18,23 29:9,16,23 30:14,16 31:12 31:17 32:17,20 32:23 33:1,16 33:19 34:20 35:5,12,21 36:10,12,20,25 37:8,22 38:9 39:12,16 40:7 40:11,24 41:17 41:21,24 42:2 42:13,21,25 43:3,6,9,13 44:18,22 46:6 46:23 47:9,19 48:6,15,23 49:13	morning 3:4	45:14
lines 40:17	malpractices 39:23	microscopic 41:10	<hr/> N <hr/>	non-infringe... 43:17
linguistic 7:2	manifest 7:12	micro-issue 38:20	N 2:1,1 3:1	non-mutual 18:13
list 15:12 19:10	manual 19:5,5 30:3	Miller 21:20	names 50:11	noted 15:25
listed 29:7	Markey 9:4	million 11:2	narrow 41:7,7 49:21	notwithstandi... 35:13,14
litigants 22:7	Marrese 30:17	Minton 1:6 3:5 3:18 15:1 29:25 30:24	narrowed 33:8	novel 16:14
litigated 18:7 20:23	material 44:13	Minton's 3:18 4:3,19 10:3,10 11:4	NASD 10:15,18	number 3:4 8:8 28:5,9 47:20
litigation 4:16 10:16 19:25 22:3 34:12 47:12	materials 36:4	misconduct 18:16	NASDAQ 11:1	numbers 41:9 46:12
litigations 39:9 39:9	matter 1:11 7:5 7:5 8:17 10:20 11:23 18:12,12 18:13 22:1 24:12 30:11 31:17 35:14 41:16 54:23	mistake 36:7 53:21	national 9:10 47:4	nationwide 45:3
little 8:25 14:5 15:20	mean 3:25 4:24 7:3 12:9 13:25 14:14 16:20 22:10 26:7 31:2,15 33:18 35:2 37:9,10 37:16 39:7 41:2 46:16 47:11 49:18	money 43:4	nature 14:11 45:21	<hr/> O <hr/>
live 44:1,3	means 6:11,15 7:2 47:8 54:4	month 10:23	necessarily 16:6	O 2:1 3:1
long 32:15	meant 27:23		necessary 5:12 14:4 47:11 51:1	obligation 34:8 44:8
longer 9:16	measure 51:12		necessity 5:7 9:19 50:21 51:3	occasion 6:13
look 8:25 9:25 14:6 15:10,10 16:3,4 21:9 45:13	Measurement 22:14		need 11:9 13:4,6 14:4 16:12 33:8 34:15 52:13 53:12	occasional 6:7 9:8 53:21
looked 14:11 49:9	medical 19:20		needed 12:22,22	offer 39:20
looking 14:8 34:3 51:6	meets 41:12		needless 27:4	office 18:11,17 30:4 33:4,7,19 34:4 42:18 44:4,10
loses 18:7	merely 4:11		needs 13:1,9 38:18 51:9 53:23	oh 21:10 43:24
losing 43:5			negative 17:18 17:19	okay 28:13 43:12
loss 15:6			negligence 15:3 15:7	once 17:16 25:16,19 34:16 48:13
lot 6:11,12 12:7 22:6 23:25 28:17 39:7,8 51:24			neither 11:21 53:13	ones 33:7
lower 22:22			net 8:4	ongoing 47:21
lucrative 10:15			never 16:23 17:6 17:7 18:3 19:13,14 33:23 34:1 49:6,8	opinion 5:19,22 6:25 15:25 37:19 38:15,17 44:1
<hr/> M <hr/>			new 33:20 34:8 35:24,24	opinions 22:14 50:11
M 1:17 2:6 24:6			nonstatutory 16:1	opportunity 10:14 23:15,24
making 21:2			non-core 45:14	opposed 32:7
malpractice 3:20,21 4:20 10:2,9,12,21 11:23 14:15,24 15:2,13 16:20 16:22 17:11,21				oral 1:11 2:2,5 3:7 24:6
				order 3:14 7:23
				ordinary 34:12

<p>original 7:7 Orthopedic 30:17 outweigh 20:23 overarching 13:9 overwhelm 23:4</p>	<p>33:4,5,6,7,16 33:17,19,21,23 34:2,2,4 35:2 35:25 37:23,24 38:2,21,22,23 38:23 39:4,7,8 39:10,14,15,18 40:3,3,5,18,20 40:22,25 41:5 42:5,6,18 43:2 43:8,10,15,24 44:2,4,9,11,16 44:23 45:4 47:22 48:10,10 48:20 49:6,9 49:22 51:10,16 51:17,25 52:19 52:20 53:17,20 53:22 54:10,12 54:19</p>	<p>please 3:10 24:9 pleased 21:22 point 4:2 18:15 20:7 27:16 35:6 40:12 51:23 pointed 27:19 39:8 51:9 posited 15:12 20:8 positing 21:7 position 39:12 possibility 21:13 48:16 possibly 25:19 26:21 35:22 practice 38:7 48:10,13 52:2 practicing 53:22 54:9</p>	<p>presents 22:24 primary 10:11 problem 28:1 33:13,15 34:20 49:5 proceed 31:19 proceeding 18:24 proceedings 45:14 process 10:9 product 23:9 products 23:8 profound 33:2 prongs 5:11 proper 5:16 9:21 properly 40:22 50:18 property 9:6 45:17 proposed 28:21 prosecuting 54:11 prosecution 12:1 18:19 protected 46:22 prove 10:17 11:1 13:1 17:19 49:3</p>	<p style="text-align: center;">Q</p> <p>question 3:22 4:4,7,10,18 5:6 5:7,24 6:2,16 7:9,20,21 8:15 10:17 12:25 13:6,9,12,21 13:22 14:12,19 15:14 16:11 18:16 20:7 22:20,25 23:6 26:20,25 27:2 27:18,23 29:19 30:8,12 32:3,4 32:5 34:14,17 39:10 40:9,18 47:21,23,23 50:7 51:15 54:2,15 questions 15:12 24:1,18 35:2 39:7,8,14,15 40:20,21,22 48:4,9 queue 22:21 quite 19:24</p>
<p style="text-align: center;">P</p> <p>P 3:1 page 2:2 9:5 pages 32:15 paid 10:18 11:1 parameters 4:6 parcel 33:3 part 6:21 26:6 40:23 particular 4:9 4:25 10:3 13:22 16:7 23:9 38:11 47:11,15 particularly 53:6 parties 32:14,16 51:1 party 19:14,14 29:22 45:25 patent 4:13,15 4:18,21,22 7:5 7:16 8:8,15,17 8:21 9:8,23 10:16 11:16,24 12:1 13:9,14 14:23,24 15:4 15:6,8,10 16:22 17:8 18:3,8,9,9,11 18:17,17,20 19:5,7 21:14 21:14,17,18 23:4 24:12,14 25:6 28:8,11 29:4,6,8,12 30:1,2,2,4,4,11 30:20,20 31:19 32:13,19 33:2</p>	<p>patents 6:18 8:2 9:10 12:1 17:21 19:6 25:1 27:20 33:6 36:15,24 42:6 44:3,4 patent's 42:20 42:22 pause 51:24,24 pending 43:9 perception 9:1 9:13 perfected 45:19 peril 54:17 permissive 8:13 8:14 personal 41:18 perspective 4:11 petition 22:19 Petitioner 44:5 Petitioners 1:4 1:16 2:4,10 3:8 29:17 31:23 38:19 46:10 50:5 phrase 6:23 place 27:17</p>	<p>precise 10:25 22:17,22 precludes 31:7 31:10 preclusion 18:13,13 19:13 29:18,20,21 30:19,24 31:18 44:7 47:15 preclusive 29:7 preponderant 46:18 present 3:18 4:8 8:15 33:6 52:13 presented 5:23 14:19 26:1 27:2 50:7,8 presenting 51:19</p>	<p>prosecution 12:1 18:19 protected 46:22 prove 10:17 11:1 13:1 17:19 49:3 provide 23:16 23:16 provides 19:6 proving 17:18 provision 6:17 PTO 4:21 11:25 14:15 18:7,20 18:21,23,24 19:3,12,13,24 20:1,2 21:9,15 21:16 29:24 30:23,25 31:1 PTO's 19:4 pure 5:24 purely 31:3 p.m 54:22</p>	<p style="text-align: center;">R</p> <p>R 3:1 raise 43:23 raised 8:17 11:2 43:21 51:23 raising 20:6 ramifications 47:13 reaching 12:18 reaffirming 23:20 real 4:22 31:8 31:11 44:3 48:15 52:20 53:20,22,22 realize 21:10 really 5:21 11:8 12:7 16:7 22:24 33:1 35:20 38:16</p>

<p>45:18 real-world 38:16 rearticulating 23:21 reason 7:15 42:14 reasons 17:23 17:24 18:14 47:1 REBUTTAL 2:8 50:4 redone 51:20 refined 33:8 regard 10:10,13 12:10 regarding 11:23 regional 9:8 reject 50:10 related 21:17 relating 8:2 relationship 10:8 relative 51:16 relevant 4:8 6:3 reliance 27:17 rely 48:20 remainder 24:2 remaining 50:3 remanded 22:8 removability 13:18 removal 22:2 remove 28:13 removing 22:7 rendering 44:1 repeat 40:8 representation 23:4 request 41:3 49:24 requesting 49:10 required 32:7 45:6 46:14 49:1 52:17 53:18,19 54:15</p>	<p>requirement 32:6 33:22 requirements 53:24 54:2 requires 37:5 res 18:8,12 19:4 19:6,11 29:18 44:6 reserve 24:2 resolution 16:10 33:15 resolve 11:9 23:7,24 35:2 resolved 12:24 resolving 12:22 12:22 13:1,4,6 13:10 16:13 Respondent 1:18 2:7 24:7 Respondents 31:23 responsibility 24:20 46:8 rests 24:13 result 15:6 31:6 reverse 3:17 review 19:5,7 20:4 34:22 36:2,3 reviewable 36:1 reviewing 50:9 right 10:5,20 12:12 17:15 19:12 21:3 34:16 45:17 49:24 50:10,16 54:1 rights 4:13 14:23,25 16:23 18:4 23:19 45:8 rise 25:21 43:17 road 17:17,22 52:10 ROBERTS 3:3 24:3 37:2 50:2 53:10 54:1,20</p>	<p>role 43:15 roll 20:17 rule 5:21 16:22 20:8,11,13,14 20:18,21,22 26:5,11 27:11 27:13,22 28:7 35:15,18 44:6 ruled 35:14 rules 17:14 30:1 36:19 38:4,10 38:11 41:24 ruling 29:8 51:25 52:4,24 rulings 30:3</p> <hr/> <p style="text-align: center;">S</p> <p>S 2:1 3:1 sanction 18:23 saved 38:13 saying 15:2,5 25:1 30:23 34:7 35:11 37:4 38:19 46:16 says 11:19 26:18 27:2 29:3 30:11 35:4 36:17 42:9,12 47:10 51:25 Scalia 6:25 11:10,15 12:2 13:3 16:18 17:3,13 20:19 21:2 23:13 25:23 26:4,7 26:17 27:1,10 31:2,13 33:10 33:17 34:25 37:11 38:2,6 40:2,8 48:17 50:6 Scalia's 20:7 53:7 scenario 43:15 scheme 8:16 scope 7:6 30:5</p>	<p>51:16 scores 22:15,15 22:15 second 4:17 23:20 Secondly 45:16 securities 45:8 security 45:19 see 47:17 sense 28:17 sensible 20:14 sentence 6:22 separate 5:10 separateness 23:22 serious 3:15 service 41:18 set 14:16,22 41:9 settled 48:5,7 settlement 10:15 10:19 13:1 39:20 show 17:4 showed 46:10 side 10:1 38:19 39:2 46:18 53:11 significance 13:21 significant 7:12 simply 27:16 50:15 single 12:8 situated 33:3 situation 8:21 16:13 17:20 20:8 31:15 43:20,25 50:12 53:4 situations 29:16 situation-spec... 4:8 6:1 11:6 sixth 22:19 slightly 6:19 small 46:13 smaller 28:9</p>	<p>sole 37:24 solely 13:6 somebody 15:9 45:19,20 somewhat 19:18 sorry 26:24 41:2 42:19,21 sort 5:20 Sotomayor 14:14 15:11,16 18:5 19:18 20:3,6 21:8 25:11,14 28:8 28:12,16,20,24 29:14,19 30:7 32:16,18,21,24 36:6,11 42:19 42:22 43:1,4,7 43:11 44:17 51:22 52:12,22 sound 50:23 sounds 45:11 Southwest 25:10 speak 31:1 special 7:15 27:22 specialty 7:14 specific 13:7 specifically 6:18 10:10 speculate 46:24 speculative 21:12 52:10 53:4 spinning 53:3 standard 5:4 8:5 9:16 23:1 27:14 standards 54:14 standpoint 4:18 19:4,11,13 start 40:19 starting 18:15 State 3:14,16,21 4:19 5:12,13 5:15,16 6:2,6,8 7:17 8:10 9:9</p>
--	--	--	---	---

<p>9:21,25 10:4,5 10:5,6,6,7,22 11:8,11,12,16 11:19,20,22,23 12:4,14,15,18 14:23 15:2,5 19:9,16,21 20:9,15 22:16 23:3 24:11,12 24:16,19,24 25:9 26:9,14 26:18 27:4 30:3,5,10,11 30:18 31:4,4,9 31:19,21 32:2 33:14 34:7,14 34:18,21,25 35:2,12,19,21 36:11,12,13,22 37:13,15,18 38:3,7,14 39:8 39:14 40:18,22 41:2 42:9,10 42:12,17,17 43:19,25 44:25 45:15,17 46:2 48:8,14 49:14 49:16,18 51:14 52:1,3,5,5,24 53:7,16,20 54:4 stated 47:4 49:17 States 1:1,12 11:16 19:8 35:3,7 State's 35:18 State/Federal 45:1 46:7 stating 24:23 statistics 46:12 statute 12:21 26:8 statutory 8:6,8 8:16 15:20,23 stay 40:16 step 8:4 21:6</p>	<p>strange 31:16 strong 13:16 structure 8:8 subject 7:4,5 24:12 submit 14:20 54:17 submitted 32:14 54:21,23 subsequent 4:22 19:2 substantial 3:13 3:19,24,25 4:10,24 5:8,13 10:4 12:14 14:1,1,7,19 15:20,21 16:15 23:12 28:25 32:13 34:22 36:4 38:12 41:5,13,16 47:7 50:25 substantiality 4:2 7:23 9:19 23:22 50:22 51:4,6 substantially 12:13 substantive 8:15 sue 15:9 sued 26:8 36:13 sufficient 8:18 14:20 suggest 27:22 suggesting 36:21 suit 26:18 42:5 suits 16:22 support 8:18 supported 46:12 suppose 13:12 53:11 supposed 54:7 supposedly 37:14 suppressed 19:22</p>	<p>suppression 21:11 Supreme 1:1,12 5:4 10:24 12:6 25:9 35:3,7 49:23 50:13,18 51:4,13,18 sure 7:6 19:24 21:23 29:9 53:23 Surgeons 30:18 surprising 46:20 suspenders 52:17 53:1,13 53:14 system 37:17 systems 38:25</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 2:1,1 take 15:9 21:6 25:11,15 33:20 takes 18:23 talk 40:20 talking 40:2 taskmaster 33:20 tell 21:25 42:13 terrorize 37:18 test 5:11 17:11 17:25 20:15,20 23:21 29:11 41:11 45:5 46:14 49:21 51:21 testify 33:24 49:3 testing 33:25 49:1 Texas 1:15,17 5:4 10:22,24 12:6,9,13 25:9 49:16,23 50:13 50:18 51:4,13 51:19 Thank 24:3,8 50:1,2 54:20</p>	<p>theories 10:11 theory 3:24 thing 6:15 7:3 49:12 things 6:12 22:6 45:20 think 5:2 7:20 8:24 14:5 17:10,23 20:9 20:13 21:6 22:18,20 23:11 23:15 27:8 28:2,2 29:1 31:6 35:19,21 37:4,22 39:3 40:5,11 44:22 46:23 47:4,19 48:15,24 49:23 50:14 51:12 52:9,22 53:2 thinks 37:6 THOMAS 1:17 2:6 24:6 thought 17:14 27:16 34:18 three 22:20 tie 21:15 time 9:12 22:3,6 24:2 39:9 42:10 52:13 Title 47:13 today 9:15 ton 46:11 tort 6:8 11:19 12:4 40:4 totally 9:20 31:23 trademark 45:8 49:19,19 transaction 39:21 treatise 21:20 tremendous 10:20 22:2 trial 32:14 37:24 troubling 38:5 true 21:23 23:2</p>	<p>truly 22:25 51:19 53:3 Trust 47:13 try 35:22 37:23 38:1 53:8 trying 38:2,6,20 turns 46:3 Twiddle 37:16 37:17 two 4:3 5:10 7:2 13:12,19 17:23 17:24 20:24 38:25 50:20 typically 45:17</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>uh-huh 34:7 ultimately 34:13 uncertain 16:6 16:12 uncertainty 22:22 23:25 unconstitutio... 14:16 underlying 4:15 10:15,19 45:16 45:24 46:1 undermine 54:18 undermining 52:19 underneath 45:13 underscoring 5:20 understand 25:24 42:24 understanding 46:8 undisputed 16:5 uniformity 4:18 9:10,23 29:11 29:12 47:4 51:10,17 52:19 53:17 54:18 unique 4:11 7:4 23:18 45:7</p>
---	--	---	--	--

<p>49:22 uniquely 33:3 United 1:1,12 19:8 35:3,7 unresolved 12:21 upend 5:15 urge 17:9 urging 16:20 use 3:23 4:5 10:13 13:13,16 15:3 32:4,7 33:25 38:12,13 41:25 42:12 47:22 49:3 uses 6:23</p> <hr/> <p style="text-align: center;">V</p> <p>v 1:5 3:5 10:25 25:10 30:17 49:16 valid 15:4,8 validity 42:6 VERNON 1:6 versus 44:23 viable 3:23 vice-versa 11:17 view 7:12 9:11 39:11 vis-à-vis 23:17</p> <hr/> <p style="text-align: center;">W</p> <p>W 1:3 wake 22:13 want 16:21,25 50:14 warrant 14:21 Washington 1:8 wasn't 12:19 watched 34:7 way 4:21 11:24 12:16 17:25 20:25 21:14,15 29:5 44:21 48:14 50:8,14 53:16 ways 7:19 29:9 47:24 50:20</p>	<p>weak 13:15 Webre 1:15 2:3 2:9 3:6,7,9 4:1 5:1 7:18 11:10 11:14,21 12:12 13:5,20 14:3 14:18 15:15,18 17:2,9,23 18:10 20:1,5 20:12 21:1,5 22:5,12 23:11 50:3,4,6,17 52:9,15 53:2 53:18 54:6 Wednesday 1:9 weeds 25:14 48:19 weighs 48:13 weight 12:7 weird 31:14,14 went 9:15 11:18 we're 15:22 21:2 37:5 43:11 48:7 49:10 50:9,9 51:6,6 we've 17:17 26:15 48:16 whichever 37:17 win 16:21 window 41:8 witness 33:24 34:15 49:3 won 15:1,3 work 4:5 33:3 44:20 52:16 worse 37:11 Worth 1:17 35:9 54:16 wrong 12:10 34:15 wrote 5:19 6:25 9:7</p> <hr/> <p style="text-align: center;">X</p> <p>x 1:2,7</p> <hr/> <p style="text-align: center;">Y</p> <p>year 5:18</p>	<p>years 9:2 23:14</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>zero 34:23</p> <hr/> <p style="text-align: center;">\$</p> <hr/> <p>\$100 11:2</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>11-1118 1:4 3:4 11:05 1:13 3:2 12:03 54:22 13 48:1 1331 6:15 1338(a) 6:16,22 8:17,19 16 1:9 1983 27:25 1984 9:2,12</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2007 9:15 22:15 2012 10:23 2013 1:9 21 9:5 214 37:1 218 25:10 24 2:7</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 2:4</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>50 2:10 39:2</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>70 32:15</p>		
---	--	---	--	--