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IN THE SUPREME COURT OF THE UNITED STATES

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 NAUTILUS, INC., :  
     Petitioner : No. 13-369  
 v. :  
 BIOSIG INSTRUMENTS, INC. :  
 - - - - - x

Washington, D.C.  
 Monday, April 28, 2014

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

APPEARANCES:  
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     Petitioner.  
 MARK D. HARRIS, ESQ., New York, N.Y.; on behalf of  
     Respondent.  
 CURTIS E. GANNON, ESQ., Assistant to the Solicitor  
     General, Department of Justice, Washington, D.C.; for  
     United States, as amicus curiae, supporting  
     Respondent.

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

2 (10:07 a.m.)

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

6 Mr. Vandenberg.

7 ORAL ARGUMENT OF JOHN D. VANDENBERG

8 ON BEHALF OF THE PETITIONER

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

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

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

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

1 after the first patent issues.

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

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

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

1 MR. VANDENBERG: Correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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



1 what makes it work.

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

6 JUSTICE SCALIA: No. I understand that.

7 MR. VANDENBERG: But the second --

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

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

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

20 MR. VANDENBERG: No, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

23 JUSTICE SCALIA: Right?

24 MR. VANDENBERG: Right.

25 JUSTICE SCALIA: Okay. Then you invoke

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

3 MR. VANDENBERG: Your Honor --

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

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

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

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

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

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

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

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

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

14          MR. VANDENBERG:           If indeed --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 I'll reserve the balance of my time.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 Mr. Harris.

18 ORAL ARGUMENT OF MARK D. HARRIS

19 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

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



1 right?

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

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

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

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

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

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

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

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

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

23 MR. HARRIS: Yes.

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

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

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

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

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

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

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

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

19 JUSTICE SCALIA: Right.

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

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

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

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

7 JUSTICE SCALIA: No, no.

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

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

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

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

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

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

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

19 MR. HARRIS: Yes.

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

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

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

1 (Laughter.)

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

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

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

12 (Laughter.)

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

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

21 MR. HARRIS: He would know by --

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

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

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

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

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

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



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

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

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

13 JUSTICE KAGAN: Why doesn't that --

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

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

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

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

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

6 MR. HARRIS: Yes.

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

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

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

18 MR. HARRIS: Yes. Yes.

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

22 MR. HARRIS: Yes.

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

25 MR. HARRIS: Yes.

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

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

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

12 JUSTICE SOTOMAYOR: Mm-hmm.

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

19 JUSTICE SOTOMAYOR: Result that the  
20 specification --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Could I -- could I

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

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

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

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

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

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

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

11 MR. HARRIS: No.

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

1 consider that at a later time as being relevant.

2 If I can finish the question.

3 CHIEF JUSTICE ROBERTS: You mean the answer?

4 MR. HARRIS: Yes, the answer.

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

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 MR. HARRIS: Thank you.

11 CHIEF JUSTICE ROBERTS: Mr. Gannon.

12 ORAL ARGUMENT OF CURTIS E. GANNON

13 ON BEHALF OF THE UNITED STATES,

14 AS AMICUS CURIAE, SUPPORTING RESPONDENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 JUSTICE SCALIA: How big is appreciable?

14 MR. GANNON: I don't --

15 JUSTICE SCALIA: You don't know.

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

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

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

1 convincing.

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

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

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

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

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

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

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



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

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

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

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

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

15 MR. GANNON: Well, I think --

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

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

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

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

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

23 MR. GANNON: No. I --

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

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

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

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

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

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

22 JUSTICE SOTOMAYOR: Uh-huh.

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

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

6           JUSTICE SOTOMAYOR:           Is that right?

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

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

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

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

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

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

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

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

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

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

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

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

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

22 REBUTTAL ARGUMENT BY JOHN D. VANDENBERG

23 ON BEHALF OF THE PETITIONER

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

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

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

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

9 But more importantly --

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

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

1 claim the different way.

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

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

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

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 The case is submitted.

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

24

25



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