

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	MARK S. WERBNER, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	GINGER D. ANDERS, ESQ.	
7	For United States, as amicus curiae,	
8	supporting Petitioner	15
9	ORAL ARGUMENT OF	
10	SETH P. WAXMAN, ESQ.	
11	On behalf of the Respondent	26
12	REBUTTAL ARGUMENT OF	
13	MARK S. WERBNER, ESQ.	
14	On behalf of the Petitioner	43
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:13 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 13-896, Commil USA v. Cisco
5 Systems.

6 Mr. Werbner.

7 ORAL ARGUMENT OF MARK S. WERBNER

8 ON BEHALF OF PETITIONER

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

11 This case concerns whether an infringer, who
12 bypasses myriad means of adjudicating patent validity
13 and who then actively induces infringement, can escape
14 responsibility simply by claiming that they believe the
15 patent was invalid.

16 JUSTICE KENNEDY: Well, not claiming, but by
17 proving.

18 MR. WERBNER: Well, they would have to prove
19 that, Your Honor. But we submit that the presumption of
20 validity, especially because of that, it would be wrong
21 to allow the infringer to escape liability in those
22 instances. If there's a mistake, it should be borne by
23 the infringer who made the mistake.

24 CHIEF JUSTICE ROBERTS: You mentioned the
25 presumption of validity. What percentage of patents

1 that are challenged are found to be valid?

2 MR. WERBNER: Well, Your Honor, from the
3 briefing, it appears a high number; 40 percent was an
4 estimate. I don't know how --

5 CHIEF JUSTICE ROBERTS: Well, 40 -- 40
6 percent of the patents are -- are found to be valid?
7 Invalid.

8 MR. WERBNER: Invalid.

9 CHIEF JUSTICE ROBERTS: Invalid. So only
10 60 percent are upheld. That's not much of a presumption
11 of validity.

12 MR. WERBNER: Mr. Chief Justice, I would
13 submit that it would be for Congress to change the
14 presumption of validity, if -- if it's out of line. The
15 presumption has been part of patent law for several
16 hundred years, even before the codification in 1952.
17 And it's more than just a procedural mechanism, it's a
18 message that patents are presumed valued. They should
19 be respected not just by judges and juries, but by the
20 public who are told that until proven otherwise, patents
21 are presumed valid. And someone who wishes to gamble on
22 their belief that it's invalid should bear the
23 consequences if they're wrong.

24 JUSTICE GINSBURG: This question would come
25 up only if the patent had been held valid, right? And

1 the defense is although the patent is valid, we had a
2 good faith belief that it was invalid.

3 MR. WERBNER: That's right, Justice
4 Ginsburg. It would basically give the accused infringer
5 a second bite at the apple because they would have to
6 have the patent found valid. And then, if that went
7 against them, then they would want a second chance to
8 say even though they were mistaken, they believed that
9 it was invalid.

10 And we think that giving them that second
11 bite at the apple will eviscerate the effectiveness of
12 Section 271(b), which is vital to protect the interest
13 of patent owners. And the --

14 JUSTICE SOTOMAYOR: The court below believed
15 that there was no good faith basis to distinguish a good
16 faith belief in lack of infringement from a good faith
17 belief in -- in validity. How do you address that
18 difference?

19 MR. WERBNER: Justice Sotomayor --

20 JUSTICE SOTOMAYOR: Or is there one and why?

21 MR. WERBNER: There is a substantial
22 difference, Your Honor, because we can see that -- that
23 validity and infringement are different. I'd like to
24 start with the statutory basis that makes that clear.
25 271(b) says that whoever shall actively induce

1 infringement shall be liable as an infringer. It speaks
2 not at all to validity. Validity is in a completely
3 separate section of the Patent Act, section --

4 JUSTICE SCALIA: No, but it's a -- it's a --
5 it's a type of aiding and abetting liability and both
6 at -- in tort law and in criminal law. At the common
7 law, it was clear that you're not liable as an aider and
8 abetter unless you have a wrongful intent. If indeed
9 your -- and you acknowledge that -- that part of this
10 depends upon -- upon wrongful intent, don't you? You --
11 you say that it can't hinge upon the belief that the
12 patent is invalid, but do you not acknowledge that you
13 have to -- you -- you have to believe that you are
14 inducing infringement of -- of the invalid patent?

15 MR. WERBNER: Well, indeed, Justice --

16 JUSTICE SCALIA: Where do you get that
17 requirement from?

18 MR. WERBNER: Well, indeed, Justice Scalia,
19 those are two separate. The -- and I acknowledge that,
20 as the Court said in the Global-Tech matter, that some
21 intent is required and that was found from the words
22 "actively induce" in Section 271(b).

23 JUSTICE SCALIA: Well, why just some intent?
24 What -- what good does it do to say, well, you know,
25 you're really not a bad actor, but you're, you know --

1 you're half a bad actor, that's enough. It -- it seems
2 to me that -- that if you don't know that you're
3 infringing or that you're encouraging somebody to
4 infringe is -- is no -- no worse than you're not knowing
5 that the patent is valid.

6 MR. WERBNER: Well, under the court's Aro 2
7 case that the Court described in Global-Tech's as a
8 fixture of patent law, the Court specifically there
9 recognized that once an accused infringer received
10 actual notice of the patent and is put on notice of the
11 infringing conduct, that that -- that creates no defense
12 to that person.

13 And I think the policy reason for that is
14 that having actual knowledge of the patent goes a very
15 long way in -- in -- in putting the person who then goes
16 forward with knowledge of the patent different than in
17 Global-Tech, and they infringe and they were on notice,
18 they should be the ones, if I might say, who should have
19 stopped when they had that notice, Your Honor, and gone
20 to the myriad means of adjudicating patent validity.

21 Now under the America Invents Act, for
22 example, there are streamlined procedures available. So
23 the wrongdoing arises when someone who has actual
24 knowledge of the patent and is on notice from the patent
25 owner of infringement, if they don't go to the

1 streamline procedures -- and they can do a declaratory
2 judgment, they can do the IPR, the inter-parties review
3 at the Patent Office -- then they are gambling on their
4 belief. And as between the patent owner and the accused
5 who was on notice, it's wrong if the infringer with --
6 with that chooses not to pursue those methods.

7 JUSTICE SCALIA: Well, you have a cause of
8 action against the person who infringes, right? And it
9 doesn't matter whether he thinks the patent is invalid
10 or not. You -- you got that person, don't you? So this
11 is sort of a supplemental cause of action against --
12 against somebody who induces, who aids and abets.

13 MR. WERBNER: Yes, Your Honor, that's --
14 that's true. And the 271(a), the direct infringer, has
15 strictly liability. But I submit that when we look at
16 271(b) and (c), there shouldn't be this yawning gap
17 between the aider and abetter and the -- the direct
18 infringer. There should be more required --

19 JUSTICE SCALIA: But there is a common
20 law -- I mean, there -- there was a common law, both
21 civil and criminal. The aider and abetter was really
22 a -- way beyond what it took to -- to convict the person
23 who committed the tort or -- or committed the crime.

24 MR. WERBNER: Justice Scalia, it's true.
25 But if we look at the restatement dealing with aiding

1 and abetting, we see that it depends. There are several
2 provisions that -- that deal with aider and abetter, and
3 the one that has the word "induce" in it requires a much
4 lower scienter and intent, does the one who is
5 assisting. And -- and that makes sense.

6 If I could point out one other statutory
7 aspect, and I'm referring to what was -- what is
8 Footnote 6 on page 22 of the government's brief, there's
9 an example there of three statutes that are very
10 powerful in telling us what was meant by Congress in
11 271(b), Footnote 6 on page 22.

12 The first, when we try to discern the
13 textual meaning of 271(b), we need go no further than
14 271(e)(5), that very same section. And there, at the
15 very end of that section, it talks about "the courts of
16 the United States shall have subject matter jurisdiction
17 for declaratory judgment that such patent" -- this is
18 the brand name patent -- "is invalid or not infringed."
19 And I'll give two more examples where we see where
20 Congress knows the difference between invalidity and
21 infringement. Where Congress is addressing both, it
22 says both. And that was the first of three examples.

23 JUSTICE KAGAN: Mr. Werbner, suppose I have
24 a product and I'm trying to figure out whether, if I
25 sell this product, I'll have liability. And there are

1 two ways to construe a statute -- construe a patent; one
2 is narrow and one is broad. And if the patent is
3 construed narrowly, I won't be infringing it. But if
4 the patent is construed broadly, it's not valid. Right?
5 So I have two possible defenses, depending on whether
6 the patent is construed narrowly or the patent is
7 construed broadly.

8 Now, Global-Tech says that I have a good
9 faith defense as to non-infringement, but you're
10 suggesting I don't have that good faith defense as to
11 invalidity. And I guess I don't understand quite why
12 that would make sense in the context that I'm talking
13 about, which I think is a pretty typical context. But
14 it would seem that the two defenses are so intertwined
15 and so two sides of the same coin that they should be
16 treated in the same way.

17 MR. WERBNER: Justice Kagan, I -- I
18 understand the question. And -- and one of judges in
19 the court below said in dissent they're not two sides of
20 the same coin, they're actually two separate coins. And
21 I -- I see the -- the -- where the issue arises in claim
22 construction, but every party to a patent litigation is
23 uncertain about claim construction, plaintiff and
24 defendant. And until a Markman hearing is had, no party
25 knows for sure how the claim will be construed. That's

1 just inherent in patent litigation.

2 If the person makes a judgment, as they have
3 to, about what the claim constructions are and they
4 think the patent doesn't infringe, then they are in a
5 different situation if they have a question about
6 validity. And they have options. Contrary to what my
7 opponent says, there are options at that point. If the
8 person is not certain about claim construction as to
9 whether there will be validity or not, they can do an
10 IPR before the Patent Office, a new procedure that was
11 part of the America Invents Act which can be resolved in
12 18 months, and -- and often stay the litigation. They
13 could go for declaratory judgment.

14 So my -- my answer would -- would be that,
15 regardless of what leads them to their confusion, if
16 they assumed the risk by -- by proceeding, then -- then
17 if it turns out they're wrong, they -- they should bear
18 the risk as between --

19 JUSTICE SCALIA: Well, you -- you could say
20 the same thing about -- about whether they were
21 infringing or not. They could bring a declaratory
22 judgment action as to whether they're infringing or not.
23 And therefore, they don't have to gamble that they're --
24 that they're not infringing. They can get a declaratory
25 judgment. So, you know, put the burden on them.

1 Why do you do it for the one and not for the
2 other? That's -- that's what I don't understand.

3 MR. WERBNER: Well, Your Honor, I would say
4 that with respect to beliefs and invalidity, it's deeply
5 ingrained in American law that there is a difference.
6 And -- for example, in the Cheek v. United States case,
7 that distinction was made very clear, that's in the
8 context of a criminal statute where the accused for tax
9 evasion, raising all sorts of mistakes of law and the
10 like, this Court held in that Cheek decision that one
11 accused of violating the prohibition will not be heard
12 to say they thought the prohibition was invalid or
13 unconstitutional.

14 JUSTICE KAGAN: But that really does get
15 back to the Chief Justice's opening question, because
16 you're quite right in your reply brief when you say that
17 this is a tradition in American law, that we assume that
18 statutes are constitutional, that we assume that
19 contracts are valid, that's right, but it's because they
20 really are. You know, almost all statutes are
21 constitutional. And here we're in a different universe
22 entirely, aren't we? Where, you know, you could flip a
23 coin as to whether a patent is valid or invalid and be
24 pretty close, right? It's about 50/50.

25 MR. WERBNER: Well, the Congress has said

1 that there should be a presumption of validity and
2 that's been the law and in the Court's opinion in i4i
3 quoting Justice Cardozo about the force of the
4 presumption and Judge Rich who explained the basis
5 when -- when the government acts to presume that it did
6 so properly. So maybe there is some step, but that's --
7 what I mean to say a -- a gap between the current
8 presumption and certain practices.

9 CHIEF JUSTICE ROBERTS: Is that a -- is that
10 an historical development? Did more of them used to be
11 valid, however many decades ago and, it's sort of
12 changed recently?

13 MR. WERNER: I think more recently,
14 there -- there is more of an issue. I'm not certain,
15 Mr. Chief Justice, how -- how the statistics were
16 further back. But I do know that Congress has responded
17 very recently and the PTO is responding to the various
18 issues, and that should be the mechanism, congressional
19 action and -- and PTO action, and not prejudice patent
20 owners, who have not done anything wrong, who have
21 gained their patent. And, of course, in this case, it
22 is a valid patent and Cisco not only was found to be
23 infringing a valid patent, they went to the PTO to
24 re-exam this patent and it was found --

25 JUSTICE KENNEDY: But you -- you seem to be

1 arguing that notice is all that's needed. But the whole
2 point of Global-Tech was inquiry was encouraged. And it
3 seems to me that there's not a parallel or a symmetry
4 between what you're arguing and what Global-Tech said.
5 Global-Tech said, we want you to inquire. You say, once
6 you get a notice -- and I'm sure these letters just come
7 all the time, they're form letters -- that that's it.

8 MR. WERBNER: Justice Kennedy, I don't think
9 that it would be sufficient to be a form letter. I know
10 that the Respondent has raised questions about that, but
11 I -- I don't submit that it -- it can just be a form
12 letter or inadequate. But -- but I want to make my
13 point clear as a matter of Global-Tech and infringement,
14 because that's really different from the validity.
15 There, I think, it would be helpful if the Court could
16 clarify Global-Tech. It was dealing with a situation
17 where there wasn't knowledge of the patent. So I think
18 some of the statements there might -- might, in the
19 context of not knowing of the patent and willful
20 blindness, be different.

21 I think Aro II, where there was knowledge of
22 the patent, and this Court held very clearly that there
23 would be no defense available once this person received
24 the notice in the patent, I think that should guide the
25 Court in the cases where there is knowledge of the

1 patent.

2 If I may reserve the rest of my time.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 MR. WERNER: Thank you.

5 CHIEF JUSTICE ROBERTS: Ms. Anders.

6 ORAL ARGUMENT OF GINGER D. ANDERS

7 FOR UNITED STATES, AS AMICUS CURIAE

8 SUPPORTING PETITIONER

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

11 Neither a good faith belief in
12 non-infringement, nor a good faith belief in invalidity
13 should preclude liability for inducing enforcement.

14 JUSTICE SOTOMAYOR: Are you asking us to
15 overturn Global-Tech and --

16 MS. ANDERS: No.

17 JUSTICE SOTOMAYOR: -- Aro?

18 MS. ANDERS: No. We don't think that the
19 Court should overturn Global-Tech. We think that
20 Global-Tech clearly resolved the issue.

21 JUSTICE SOTOMAYOR: So if we read all the
22 texts to mean that you have to have knowledge of the
23 patent and knowledge that your activity infringes it,
24 then your argument doesn't hold up.

25 MS. ANDERS: If that's how the Court

1 understands Global-Tech, then we would say, like
2 Petitioner, that -- that even if you think that -- that
3 knowledge of the infringing nature of the acts is
4 necessary, knowledge of invalidity is not also
5 necessary.

6 JUSTICE SOTOMAYOR: So break up your
7 argument if you would for me addressing both
8 presumptions. Because I think those are different
9 arguments.

10 MS. ANDERS: Well, so we think that if you
11 look at Global-Tech, it doesn't clearly resolve the
12 issue about whether knowledge of infringement --
13 knowledge of the infringing nature of the acts is
14 necessary. There's language in the opinion that states
15 that knowledge of the patent would be sufficient to
16 satisfy knowledge of the infringement. The court also
17 did not have to resolve the question about whether a
18 good faith belief in non-infringement would be necessary
19 because that was not presented in Global-Tech. The
20 defendant there had no arguments that even if he knew
21 about the patent --

22 JUSTICE SOTOMAYOR: Well, there was an
23 argument there that he didn't know that someone
24 replacing a top infringed.

25 MS. ANDERS: I -- if Your Honor --

1 JUSTICE SOTOMAYOR: The fabric --

2 MS. ANDERS: -- is talking about Aro II in
3 that case, what the Court said was that you need
4 knowledge that the -- that the use is infringing and the
5 Court held that that knowledge was conclusively
6 satisfied by the defendant's knowledge of the patent and
7 knowledge of the link between the patent and the
8 conduct. I think there was no plausible argument there
9 that the defendant had a good faith belief or -- I'm
10 sorry, that the defendant lacked a good faith belief
11 that his conduct was not infringing. The question of
12 whether direct infringement was occurring was hotly
13 contested. It was litigated all the way up to the
14 Supreme Court and back, and it closely divided the
15 Justices 5/4. So I think anyone would say that in that
16 case, the defendant had a good faith belief in -- in
17 non-infringement.

18 Now, if I could just address why it makes
19 sense, I think, to read Global-Tech and Aro this way and
20 to not require knowledge of the --

21 JUSTICE KAGAN: Before you do that, Ms.
22 Anders, I mean, it just does seem whatever the factual
23 circumstances of that case were, we could not have been
24 more clear about the breadth of the holding. I mean, we
25 just said, we now hold that induced infringement under

1 271(b) requires knowledge that the induced acts
2 constitute patent infringement. And your brief
3 essentially puts a "not" in that sentence.

4 MS. ANDERS: With respect, Justice Kagan, I
5 don't think that's so. I think the -- the sentence that
6 immediately preceded the sentence that Your Honor just
7 read said that it would be strange to hold that
8 knowledge of the patent is needed under 271(c), but not
9 271(b). Accordingly, we now hold that knowledge that
10 the induced acts constitute a patent infringement is
11 necessary. So I think that the Court may have equated
12 the two things.

13 But -- but just to go back to why I think it
14 would make sense to read --

15 JUSTICE SCALIA: Excuse me, I don't
16 understand what you just said. He equated what two
17 things?

18 MS. ANDERS: It may have acknowledged the
19 patent --

20 JUSTICE SCALIA: Knowledge of the patent and
21 knowledge that the patent is -- is being infringed?

22 MS. ANDERS: Yes. Yes. This is what the
23 Court did in Aro II. I think the Court --

24 JUSTICE SCALIA: Are we that dumb, that --
25 that -- that we would say those two things in successive

1 sentences?

2 MS. ANDERS: Well, no. I think it comes
3 from Aro II, Your Honor. What the Court said in Aro II
4 was the knowledge of infringement is necessary and the
5 Court said the defendant has no defense that he lacked
6 knowledge of infringement when he possessed knowledge of
7 the patent and knowledge of the accusation of
8 infringement. So I think that's where this language
9 comes from.

10 But again, just to address both why this
11 makes sense and why I think it makes sense to say that a
12 good faith belief in invalidity is not a defense even --
13 even though 40 percent of patents may be invalid.

14 JUSTICE GINSBURG: I hope you'll spend --
15 concentrate on that because that's the crux of this
16 case. I mean, that's what the Federal circuit majority
17 said, that there's no principal difference between the
18 two. And if you could make sure that you -- if you
19 think there is a principal difference, tell us what it
20 is.

21 MS. ANDERS: Yes, Justice Ginsburg, I'll
22 address that. But first I'd like to say that I think a
23 key point here is that if the inducer is right that the
24 patent is invalid, or that it's not infringed, he will
25 not be liable because the Court will find that the

1 patent was invalid or not infringed. And so in that
2 case, you don't have to worry about liability. So the
3 question is really what should happen when the defendant
4 is wrong? Right. Who should bear the risk of the
5 defendants being wrong that the patent is invalid or --
6 or not infringed? And we think the inducer should bear
7 the burden. This is -- this is someone who knows about
8 the patent, who has considered it, who has decided not
9 to challenge, not to use the statutory mechanisms that
10 Congress has provided to challenge the patent.

11 JUSTICE SCALIA: The patentee has a cause of
12 action against the person who -- who violates the
13 patent, right? You're just talking about supplemental
14 liability for somebody who induced that -- that
15 violation. And generally, for that kind of liability,
16 we have required mens rea. We have required knowledge
17 that you're doing something wrong.

18 MS. ANDERS: Well, two points with respect
19 to that. The first point is that certainly in the
20 criminal law, you may need wrongful intent you're an
21 aider and abetter, but you do not need knowledge that
22 the principal offense is illegal. So, for instance, if
23 you're aiding and abetting a felon to possess a gun, you
24 need to know that you're selling them a gun and that
25 they're a felon. You don't need to know that it's

1 illegal for the -- for a felon to possess a gun. So we
2 think that's analogous here.

3 The second point I would make is that 271(b)
4 is not some simply supplemental liability, it is an
5 important means of enforcing --

6 JUSTICE SCALIA: Have we held that, what you
7 just said? Has this Court held that? Do we have a case
8 in this Court that says that?

9 MS. ANDERS: I think that's a --

10 JUSTICE SCALIA: You -- you can be liable
11 for aiding and abetting a felony when you don't know
12 that it's a felony?

13 MS. ANDERS: You don't have to know that the
14 underlying conduct is illegal, yes, that's right. I
15 think that's a principle of the common law. I -- I
16 think you see that in the criminal law treatises for
17 certainly.

18 But -- but 271(b), I think, is -- Congress
19 intended that to be available to enforce patent rights
20 when it would be impracticable for patentholders to --
21 to file suit directly against a direct infringer. So
22 situations like the Grokster scenario where you have
23 millions of direct infringers, you need to go after the
24 person who is inducing that conduct

25 But to go back to Justice Ginsburg's point

1 about why would it make sense to treat the two issues
2 differently, I think there are three reasons that --
3 that you would do so. The first is that even though,
4 as -- as Justice Kagan said, claim construction can be a
5 common subsidiary issue in both non-infringement
6 questions and invalidity issues, I don't think it's
7 anomalous to still treat the two issues as separate.

8 For instance, in *Chief v. United States*, the
9 Court -- it -- it's clear that in -- in the statutory
10 context, you might have a question about statutory
11 construction that would be relevant to whether you're
12 violating the statute, and that same question might be
13 relevant to the validity of the statute, but the Court
14 still said that your belief that you -- that -- that the
15 statute was invalid did not negate your stand with
16 respect to whether you're violating the law.

17 And as to --

18 CHIEF JUSTICE ROBERTS: You said on a -- a
19 couple of times about the idea of -- of difficulty of
20 going after all the little people. But why is that? It
21 would seem to me that once you have a few successful
22 suits against the users rather than inducers, both the
23 users and the inducer will get the message and not --
24 not continue on with the infringement.

25 MS. ANDERS: Well, I'm not sure that that's

1 -- that's always going to be the case as a practical
2 matter. I think there may be situations in -- in which,
3 you know, the -- the users may have -- the direct users
4 may have immunities. For instance, the Patent Act
5 provides, in the context of surgical materials, that
6 doctors can't be directly liable for infringement, so
7 the only -- the only course there is to go after the
8 inducer.

9 So I think that Congress anticipated in the
10 Patent Act that inducement would be an independent means
11 of imposing liability.

12 But to go back to the -- the two reasons
13 that it may make sense as a policy matter to treat
14 invalidity and non-infringement differently, I think one
15 of them is that invalidity questions can be even harder
16 and more complex to determine. I think it's important
17 to keep in mind here that -- that what we're saying is
18 that the defendant would have a -- he would be able to
19 immunize himself from liability based on his good faith
20 belief with respect to anticipation, whether there's
21 prior art that -- that may make it obvious to a person
22 skilled in the art --

23 JUSTICE SCALIA: Of course, that -- that's
24 not your position, is it? I mean, the United States
25 would treat the both the same, right?

1 MS. ANDERS: That is our --

2 JUSTICE SCALIA: The United States says you
3 don't have to know either one. You -- you -- it doesn't
4 matter.

5 MS. ANDERS: That is our frontline position,
6 but we -- we --

7 JUSTICE SCALIA: Yes.

8 MS. SANDERS: -- of course acknowledge that
9 the Court may understand Global-Tech differently than we
10 do, and in that case we think that there are -- there
11 are reasons --

12 JUSTICE SCALIA: The differences are not
13 enough to persuade you, but you think they should be
14 enough to persuade us. Is that it?

15 MS. ANDERS: No. I think as a -- I think
16 our -- our primary point is that it's not usually the
17 case in the law that we require defendants to have
18 knowledge that they will ultimately be held liable, that
19 they have no good faith arguments about, you know,
20 complex legal questions, technical factual questions,
21 claim construction questions. That is not usually the
22 way it works in the law.

23 But even when a defendant may need knowledge
24 that his conduct is illegal, it is not the case that --
25 that a belief that -- that the underlying legal duty is

1 invalid, would -- would negate that scienter.

2 CHIEF JUSTICE ROBERTS: What you just said
3 does sound like an argument that Global-Tech was -- was
4 wrong.

5 MS. ANDERS: Again, I don't think it is,
6 Your Honor, because, again, even if you understand
7 Global-Tech to require knowledge of infringement, we
8 think there are reasons to treat infringement
9 differently.

10 And I go back to the statute here. If you
11 assume that 271(b) requires knowledge with respect to
12 the fact that the acts constitute infringement,
13 infringement is defined in 271(a). Infringement is
14 defined as practicing the elements of the patent without
15 authorization. The validity of the patent is not an
16 element of the plaintiff's cause of action, so it is
17 possible to establish infringement without establishing
18 the validity of the patent.

19 JUSTICE SCALIA: You have infringed a
20 nonpatent, right? I mean, it -- I guess you could say
21 that, but --

22 MS. ANDERS: No.

23 JUSTICE SCALIA: -- and we have many cases
24 that say you can't infringe an invalid patent.

25 MS. ANDERS: I think --

1 JUSTICE SCALIA: We say that often.

2 MS. ANDERS: I think Congress made clear
3 that infringe -- that invalidity is something that
4 prevents liability from infringement. It does not
5 prevent infringement from occurring. Once the PTO has
6 granted a patent, that patent exists and it can be
7 infringed. 271(a) says --

8 JUSTICE SOTOMAYOR: There are two different
9 burdens, aren't there, for infringement and for
10 invalidity? Infringement, the patent owner bears the
11 burden of proving that the other is fringing; and for
12 invalidity, the -- the other side bears the burden. So
13 they are treated differently --

14 MS. ANDERS: That's correct. I --

15 JUSTICE SOTOMAYOR: -- in the law.

16 CHIEF JUSTICE ROBERTS: Briefly.

17 MS. ANDERS: I think 271(a) makes clear that
18 because of the presumption of validity, infringement and
19 invalidity are separate issues. The patentee does not
20 have to prove validity in order to establish
21 infringement.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.
23 Mr. Waxman.

24 ORAL ARGUMENT OF SETH P. WAXMAN

25 ON BEHALF OF THE RESPONDENT

1 MR. WAXMAN: Mr. Chief Justice, and may it
2 please the Court:

3 As this Court explained in Grokster and in
4 Global-Tech, the linchpin of scienter for inducement
5 liability is knowledge that the induced acts, quote,
6 "violate the rights of the patentee." Because
7 practicing an invalid patent violates no such right of a
8 patentee, an accused inducer who reasonably believes in
9 good faith that a patent is void lacks the scienter
10 required for liability under Section 271(b).

11 JUSTICE SOTOMAYOR: So what does that do to
12 the presumption?

13 MR. WAXMAN: The --

14 JUSTICE SOTOMAYOR: If the presumption is
15 that a patent is invalid until you prove, you have the
16 burden -- that a patent is valid, you have the burden to
17 prove it's invalid, your position basically says, no, I
18 don't have to prove it, I just have to show I had a good
19 faith basis.

20 MR. WAXMAN: Well, no, no, no. I mean, in
21 order to invalidate a patent in court, the party urging
22 that the patent is invalid bears the burden of proving
23 invalidity by clear and convincing evidence. That's
24 actually not the burden if you challenge it before the
25 PTO.

1 But it is a high burden, and it's
2 appropriately high because once a patent is declared
3 invalid, it is unenforceable against anybody for all
4 time and under principles of -- under the Blonder-Tongue
5 principles, a patentee who loses once is gone. And
6 there -- this case, of course, and the issue in this
7 case only arises, as all specific intent cases arise,
8 only where there is otherwise established a cause of
9 action.

10 So, in other words, the good faith belief
11 either that the patent wasn't being infringed by the
12 direct infringers or was a void patent will arise only
13 when a court or the PTO has concluded that the patent is
14 indeed valid. And when -- and the only issue in this
15 case is will it -- that it is the -- the plaintiff's
16 duty, the plaintiff's burden to prove scienter. And
17 as -- as Aro suggests, and Global-Tech affirms, if the
18 plaintiff comes forward and says, I sent him a letter
19 identifying the patent and expressing my belief that the
20 patent is infringed, if the -- if the defendant doesn't
21 have anything else to say, that can be viewed as
22 permitting the jury to conclude that, in fact, the
23 defendant had scienter.

24 The only issue in this case is what the
25 defendant can say in response to the scienter element,

1 an element that does apply, as Justice Scalia was
2 pointing out, at common law for aiding and abetting
3 liability. And the -- the jury will certainly be told
4 after the --

5 JUSTICE SOTOMAYOR: But you're not aiding
6 and abetting. You're --

7 MR. WAXMAN: I'm sorry?

8 JUSTICE SOTOMAYOR: -- induce -- you're not
9 aiding and abetting. You're inducing.

10 MR. WAXMAN: So --

11 JUSTICE SOTOMAYOR: You're -- you're --
12 actually it's like I want -- you're -- you're appointing
13 a surrogate and you're saying, you do it for me, but you
14 do it.

15 MR. WAXMAN: Well, I -- I want to get to my
16 last point about what the jury will be instructed, but
17 let me first, with all due respect, take on that
18 assertion.

19 When Congress enacted Section 271(b) and
20 Section 271(c) in 1952, both the House report and the
21 Senate report said two things about those provisions:
22 Number one, that they were enacted to reflect common law
23 principles of aiding and abetting liability, and that
24 they were thus, quote, "an expression of law and
25 morals."

1 And this Court in Global-Tech precisely
2 recognized that these provisions are, in fact, the
3 modern day statutory version of civil aiding and
4 abetting. The Federal Circuit has always recognized it.
5 And aiding and abetting at common law absolutely require
6 knowledge of wrongdoing.

7 And just to get to your original question,
8 in a case in which the jury has found that the patent is
9 valid and the plaintiff goes on to say, you know, and
10 there was appropriate scienter because -- and it's quite
11 unlike this case because there was no letter -- a letter
12 was sent saying, I have this, the '395 patent, and
13 here's why you infringe it, you've heard the defendant
14 explain why he or she or it nonetheless had a reasonable
15 good faith belief that the patent was void.

16 In -- in evaluating the reasonableness and
17 good faith of that expressed belief, you need to take
18 into account that under the patent laws, patents --
19 issued patents are presumed valid and that in order
20 to -- in order to establish the invalidity of a patent
21 in court, as I have otherwise instructed you, the
22 defendant has to prove invalidity by clear and
23 convincing evidence, and that's what you should take
24 into account when you are evaluating the defendant's
25 profession of a good faith belief. And --

1 CHIEF JUSTICE ROBERTS: If you -- go ahead.

2 MR. WAXMAN: No -- I'm sorry. I was just
3 going to -- just going to Justice Kagan's point, the --
4 about, you know, the two sides of the coin or two
5 different coins, whatever metaphor you want to use, what
6 the -- what happens in the paradigmatic case -- and it
7 actually happened in this case when the lawsuit was
8 filed is the defendant looks at the claim that it has a
9 method that is violating this patent and it may seek
10 legal counsel. And what it found in this case and what
11 it would testify to if it were allowed is we looked at
12 these -- at this patent. This patent seems to, by all
13 intents and purposes, claim Bluetooth technology, and if
14 the patent is construed narrowly as we think it should
15 be, our customers are not practicing the steps.

16 CHIEF JUSTICE ROBERTS: Well, that seems to
17 me to go to the application in your case. But to step
18 back, if you regard the patent as law, it seems to me
19 that your position is really just ignorance of the law
20 as an excuse.

21 MR. WAXMAN: No, no, no. We are not -- not
22 at all, Mr. Chief Justice. We are not arguing at all
23 for a freestanding defense of a mistake of law. We're
24 not arguing here -- or there was a reference to Cheek.
25 We're not claiming that there is a reasonable good faith

1 defense in a belief that the patent laws are
2 unconstitutional or that they don't imply -- apply
3 secondary liability or even, we don't -- it wouldn't be
4 a reasonable good faith belief.

5 CHIEF JUSTICE ROBERTS: No. But if the
6 patent -- you don't have to say the patent laws are
7 unconstitutional, but if you regard the patent more as
8 law rather than -- than contract, and it does apply
9 against the whole confer legal rights against the whole
10 world --

11 MR. WAXMAN: Yes.

12 CHIEF JUSTICE ROBERTS: -- and you say,
13 well, even if we turn out to have been wrong about what
14 that law means, what that patent means, we still have a
15 valid defense.

16 MR. WAXMAN: Well, what the law means and
17 what a patent means are two very different things. And
18 I think that really is the crux of what I should have
19 started saying. There's no dispute that practicing all
20 of the steps of a patented invention is unlawful and a
21 defense of a belief that it wasn't wouldn't be a
22 defense. But invalidity defenses are not disputes about
23 the -- the parameters or the scope of the -- of Section
24 102 or 103 or 112. Invalidity defenses are utterly
25 factual. Several of them the Supreme Court -- the

1 Federal circuit has said are purely factual, and the
2 other ones that aren't are questions of law that
3 depend -- that are resolved completely by resolution of
4 facts. And the government, in its brief at Page 30,
5 acknowledges and extolls this. So a contention that
6 there is a reasonable good faith that a patent is void
7 is not arguing about the legality of good faith. It
8 argues about the force of the issued document.

9 JUSTICE KAGAN: I guess I'm not sure what
10 you're saying. I mean, even take a typical contract
11 case. Typical contract cases, somebody sues you for
12 breach of contract and you say, oh, I thought that the
13 contract was invalid. It's true. I would have breached
14 it if it were valid, but I thought the contract was
15 invalid. That usually does not allow -- that's not a
16 good defense. I mean, if it turns out that the contract
17 was invalid, you win. But if the contract was valid,
18 you lose even though you thought the contract was
19 invalid. And so, too, here it would seem to me.

20 MR. WAXMAN: And that is exactly the rule
21 that -- I mean, contract breach is a -- it's not a tort,
22 but it's the analogy to a direct tort. It's analogous
23 to the direct infringer. On the contrary, at common
24 law, tortious interference required an act that was not
25 only intentional but, quote, "improper." And that's

1 reflected in Section 766 of the first restatement of
2 torts under tortious interference.

3 And there are -- many, many courts have
4 understood and construed that word "improper" to require
5 a belief that the contract -- that you were tortiously
6 interfering with a contract that is, in fact, valid, and
7 many courts have allowed the third party, the
8 aider -- essentially, the aider and abetter a defense
9 that they believe that, you know, this was a contract
10 for the supply of alcohol during prohibition. And
11 juries have found a lack of scienter and a lack of
12 third-party liability at common law for the absence of
13 that belief.

14 I mean, at common law -- and this Court
15 in -- in the Court's Central Bank of Denver v. First
16 Interstate Bank of Denver, which was a private
17 securities action, has a long treatment of the history
18 of civil aiding and abetting liability and underscores
19 what the treatises reflect, which is that third-party
20 liability for a non-culpable wrongful act was
21 exceptionally rare.

22 JUSTICE GINSBURG: But as Ms. Anders made
23 the point that in -- in the patent context, it's the
24 aider and abetter or the inducer is the mastermind and
25 then the aider and abetter is selling the allegedly

1 infringing device to a lot of customers. And as between
2 those two, it's much more effective to go after the
3 person who is supplying the alleged -- the infringing
4 device.

5 MR. WAXMAN: Well, Justice Ginsburg, in some
6 contexts it is; in some contexts it isn't. When, you
7 know, Walmart or McDonald's get a letter from Commil
8 saying that you are infringing our patent because you're
9 using the -- you know, Cisco provided wide area network,
10 a couple things happen. We're talking about the
11 practicalities of things.

12 In the first place, companies like Cisco
13 all -- it is a commonplace to have an indemnification
14 for customers saying if you're sued for patent
15 infringement, we will take over the defense and we are
16 liable. And even if they don't have that, it obviously
17 is going to do a company like Cisco or, heaven forbid, a
18 smaller, you know, innovative company to say, well, you
19 know, they can't really reach us. They're just suing
20 our customers. And in practice, what sometimes happens,
21 even in the absence of an indemnification agreement, is
22 the manufacturer, whether it's Cisco or Apple or
23 whoever, will intervene in the action or file an
24 individual dec action to take on the very question. And
25 so in the real world of litigation, this issue is

1 resolved.

2 Now, on the Chief Justice's question about
3 how valid are patents, I mean, the -- the answer is the
4 statistics have changed over time.

5 At -- at page 49 of our brief, we cite a
6 1998 study that showed that patents were invalidated 46
7 percent of the time. In 2002, a study was done of
8 Federal circuit decisions between 2003 and 2009 and
9 found that patents -- challenged patents were
10 invalidated 60 percent of the time. And I do think that
11 in light of this Court's explication of the bounds of
12 certain validity principles in Alice Corp. as to
13 business method patents, Nautilus as to indefiniteness,
14 Mayo as to patentable subject matter, KSR as to
15 obviousness, there's no question that that number is
16 going to go up.

17 JUSTICE KAGAN: Well, but that might be a
18 very good reason for Congress to take a new look at this
19 presumption of validity. But your problem is that this
20 presumption of validity exists and that this question of
21 validity functions in a patent suit only as an
22 affirmative defense.

23 MR. WAXMAN: So I don't -- I -- maybe I'm
24 seeing this wrong, but I don't actually see the
25 presumption of validity as a problem. The presumption

1 of the validity raises the bar of proving to a jury that
2 you had a reasonable good faith belief that this patent
3 would be invalidated; that you have to -- it wouldn't be
4 reasonable to assume, oh, I think I can prove by 51
5 percent that it's invalid, or I think it's 51 percent
6 likely.

7 The -- the reasonableness in good faith of
8 your profession has to be evaluated against the high bar
9 that you will face in court. And the -- the flip side
10 of the coin is so one of these letters comes in and --
11 and Cisco -- I mean, we've seen the government's
12 statistics are 60 to -- 60 to 100,000 of these letters a
13 year. Cisco gets way more than one letter every day. I
14 mean, they're sued twice a year. Every time they get a
15 letter, according to the government and according to
16 Commil, what they are supposed to do is shut down the
17 production line, tell all of the customers who've bought
18 their technology, oh, no, no, no, the patent is presumed
19 valid, you should stop; otherwise, you'll be infringing
20 while they do what they did, which is to file an action
21 in the PTO to seek a declaration of invalidity.

22 CHIEF JUSTICE ROBERTS: That's only a
23 problem if you turn out to be wrong.

24 MR. WAXMAN: Exactly.

25 CHIEF JUSTICE ROBERTS: Right? I mean, so

1 why shouldn't you bear that risk? Why do you require
2 the patent holder to lose the value of his patent until
3 you get around to deciding the validity or the -- the
4 infringement suit is solved?

5 MR. WAXMAN: So I think a couple of answers.
6 First of all, it is not the -- I mean, you could
7 establish an a priori rule that says, since all we're
8 talking about here is retrospective damages looking back
9 from the adjudication of invalidity, and then that
10 the -- that the direct infringers are practicing all of
11 the steps.

12 And the question just is, whose -- who bears
13 the burden of that -- of those retrospective damages.
14 Where the common law put it under aiding and abetting
15 liability, and where 271(b) and 271(c) put it, as this
16 Court has explained in Grokster and in Global-Tech, is
17 to leave it for the jury. The jury is told, this entity
18 is accused of inducing infringement or contributory
19 infringement, and you therefore need to find, in the
20 first instance, that some entity was, in fact -- could
21 be, quote, immersed as a direct infringer, to quote this
22 Court's opinion in Aro. If you do that, aiding and
23 abetting liability will follow if the plaintiff
24 establishes three separate tests, one of which is
25 scienter.

1 And the jury will -- and you need to
2 evaluate whether, in fact, the plaintiff has established
3 scienter. If the plaintiff establishes scienter, then
4 the alleged -- the alleged inducer is an adjudicated
5 inducer and is, in fact, responsible for all of those
6 damages.

7 JUSTICE SOTOMAYOR: I -- I still don't
8 understand. I mean, you posit that you know that your
9 steps, if the patent is valid, infringe.

10 MR. WAXMAN: I'm sorry, I didn't hear you.

11 JUSTICE SOTOMAYOR: You know, an -- for
12 inducement, you have to prove that the person knows that
13 they're infringing. The next question is, are they
14 liable for it, and that issue has to do with validity; a
15 second question.

16 So I don't know why the patent owner has to
17 suffer the loss of royalties to your gamble that the
18 patent is void, because presumably they've proven that
19 you knew your steps infringed.

20 MR. WAXMAN: So I --

21 JUSTICE SOTOMAYOR: So you knew that, at
22 least on the terms of the patent as it exists, you
23 violated.

24 MR. WAXMAN: I have a doctrinal -- my answer
25 has a doctrinal portion and a practical, real-world

1 portion. The doctrinal portion is simply the statement
2 that was made by somebody on the bench, and -- and I'll
3 just quote Justice Black in his dissenting opinion in
4 Exhibit Supply, which began with a statement that was
5 agreed -- was -- was started as common ground, where
6 he -- he said, there can be no infringement of a void
7 patent. And if you -- and -- and there are --

8 JUSTICE GINSBURG: May I -- may I stop you
9 at that point and ask how does that compare with what
10 Charles Rich said, which is -- and I think this is in
11 the government's brief and I'm sure that you know it --
12 assertion that invalid claims can't be infringed is a
13 nonsense statement.

14 What do you suppose he meant by that?

15 MR. WAXMAN: Okay. First of all, Charles
16 Rich, Judge Rich, Chief Judge Rich, held for the court
17 in Richdel, which was, which was decided in 1983 at the
18 very outset of the Federal Circuit's creation, this was
19 the holding of Richdel, that if a claim is invalid,
20 there is nothing to be infringed.

21 JUSTICE GINSBURG: Well, that --

22 MR. WAXMAN: What he meant -- what he meant
23 when he made the statement that you've quoted was
24 accurate in the very peculiar context of that case.
25 Because in that case, there was, in fact, a claim of

1 invalidity under best mode, and there was a claim that
2 the steps of the method or the combination were not
3 being practiced.

4 JUSTICE GINSBURG: Well, then what's --
5 what's --

6 MR. WAXMAN: But because of -- may I just --

7 JUSTICE GINSBURG: You're making this
8 case-specific. But he also said, courts constantly hold
9 claims infringed, but invalid.

10 MR. WAXMAN: So what that means is, if I an
11 just finish my point on the case that he was deciding,
12 and what it made -- why it made sense for -- because of
13 a reason of the quirk of the case, the best mode defense
14 of invalidity was not presented to the jury. And he was
15 simply saying that it was wrong to say that by having
16 found the -- the question of whether all the steps were
17 practiced or in that case, not, he necessarily -- the
18 jury necessarily made a finding on invalidity.

19 What -- what the more general statement,
20 Justice Ginsburg, reflects is the fact that infringement
21 can be referred to -- I mean, it -- there are, as was
22 pointed out, separate defenses. One is the first -- in
23 271(a) or 282(a) -- (a)(1), is you're not practicing all
24 of the steps of the claimed invention, and that is
25 vernacularly referred to as noninfringement.

1 The claim that a patent is valid depends on
2 a -- or invalid depends on a showing that it doesn't
3 satisfy Sections 102, 103, or 112 of the Patent Act, and
4 is a -- is a showing that, if made, will invalidate the
5 patent against everybody, not just the defendant in the
6 case.

7 JUSTICE GINSBURG: I thought -- and maybe
8 correct me if I'm wrong -- that what this meant was
9 thinking of how it comes up in litigation. So you're in
10 the district court, and you have -- let's say you're the
11 alleged infringer or contributory infringer or inducer,
12 so you say, number one, the patent is invalid; and,
13 number two, if it's valid, it was not infringed.

14 So in the court of first instance, both of
15 those issues are discrete in the sense that I am arguing
16 it's not valid, so no patent is out of it; but if I'm
17 wrong about that, it wasn't infringed. So though --
18 those are discrete inquiries.

19 MR. WAXMAN: There's -- there's -- we're not
20 disputing that they're discrete inquiries. The validity
21 of the -- a -- a finding of infringement, the ability
22 to, as this Court put it in Aro 1, immerse a defendant
23 as an infringer presupposes that there is, in fact --
24 someone is practicing all the steps of a valid patent.
25 That is -- that's indisputable.

1 It's simply -- it is a nonsense statement to
2 say that you can be immersed as an infringer of a void
3 patent. The patent provides rights. The rights to
4 exclude; the right to withhold authorization within the
5 meaning of 271(a), defining infringement. If you have
6 no ability, no legal right to withhold authorization,
7 you don't have a legal right that's being violated if
8 somebody practices the claimed steps.

9 Now, I do want to make a couple of points --
10 well, first, I should go back to the -- let me try to
11 remember my practical side of Justice -- the answer to
12 Justice Sotomayor's question. I wish I could remember
13 it, because it was really good. Maybe I'll -- maybe
14 I'll --

15 JUSTICE SOTOMAYOR: Your answer -- your
16 answer was really good or my question?

17 MR. WAXMAN: No, no, your question was good,
18 but my answer was also good, and it will probably come
19 to me on the walk back to my office.

20 JUSTICE SCALIA: I have forgotten the
21 question. What was -- what was the question?

22 MR. WAXMAN: So I think the question was --
23 well, what was the question?

24 JUSTICE KAGAN: Mr. Waxman, as a -- as a
25 company that's in this position, the company has other

1 alternatives. It can go to court and seek a declaratory
2 judgment, it can go to the PTAB, it can go to the PTO,
3 it can do all of these things essentially to figure out
4 whether the patent is valid. And those things also have
5 the side benefit of getting invalid patents struck so
6 that nobody else will have to deal with them either.

7 So why isn't that the right way to
8 understand this system, is that, no, rather than come --
9 rather than allow a company to come in and do what we
10 don't allow in any other context, as far as I can see,
11 which is to plead a good faith belief in the invalidity
12 of the patent, that, no, we -- we say to them, yes, we
13 understand you have a question, Congress has set up many
14 mechanisms for you to get an answer to that question,
15 use one of those mechanisms.

16 MR. WAXMAN: Okay. So, I mean, look, I'm --
17 our argument isn't principally a policy argument, but
18 I'll give you the policy answer to your question. The
19 legal answer is that 271(b) and (c) liability is a
20 validly and recognized as a statutory instantiation of
21 civil aiding and abetting liability. And third-party
22 liability at common law was a rarity and a particular
23 rarity in the absence of culpability.

24 But as to your question, so Cisco is a big
25 company and it has a lot of resources. It's true that

1 it gets hundreds or thousands of these letters every
2 year. And if the notion that it should run into court
3 and institute an action every time somebody with a
4 business method patent that seems now pretty clearly
5 invalid under this Court's decision in Alice has to
6 begin patent litigation and stop -- stop the production
7 line and tell all of its customers not to do it, I
8 think, would be an odd practical remedy.

9 The question here is: What about a company
10 that's perhaps a less -- that's Cisco 20 years ago. You
11 know, an innovative company that is making products that
12 people can use. It gets a letter and it looks at this
13 letter and says, gee, you know, if the patent is
14 construed the way we think it should be construed, we
15 don't think our customers are violating it, and if it's
16 construed broadly, it's probably void because of X, Y,
17 or Z.

18 If we go to court -- first of all, we will
19 have to shut down our only means of -- you know, we have
20 to shut down our production line, we have to tell our
21 customer to stop using it and we get to go to court and
22 litigate what probably will be a \$1 million to
23 \$10 million case, which if we don't shut our production
24 line, we will be retrospectively liable for all the
25 damages that occurred. And the paradigm of what happens

1 here is -- again, this is getting back to a point that I
2 do remember that you made, which is the two sides of the
3 coin -- what the lower court held -- what the trial
4 court held was that under Global-Tech, it had to allow
5 Cisco in -- on the issue of scienter to explain why it
6 had a good faith belief that the patent was not
7 infringed. But it was not allowed to explain why, if
8 the -- all the steps -- if the claim -- if the patent
9 were construed so as to encompass what Cisco does, it
10 would be invalid for lack of enablement or written
11 description. And -- which is exactly what happened.

12 And so the defense that Cisco was allowed to
13 make at trial was the sound of one hand clapping
14 whereas what Cisco did, once it received notice of this
15 suit, was to -- to do an analysis and say, this appears
16 to claim only Bluetooth, we don't do Bluetooth, so our
17 customers are not practicing the steps. But if this
18 were construed broadly enough to include the protocols
19 that we are involved in, it would be anticipated and in
20 any event, there's no enablement or a written
21 description of how to do it.

22 JUSTICE SOTOMAYOR: That goes to -- that
23 goes to rolling the dice.

24 MR. WAXMAN: Well, yes.

25 JUSTICE SOTOMAYOR: Meaning if you --

1 MR. WAXMAN: But --

2 JUSTICE SOTOMAYOR: Infringement is one
3 thing. If you have a good faith belief, you've done the
4 inquiry, the one that Justice Kennedy talked about, that
5 was the premise of Global-Tech, which is there's a valid
6 patent out there, you have to give a reason why your
7 steps don't infringe their steps.

8 MR. WAXMAN: You have to give --

9 JUSTICE SOTOMAYOR: If you can do that,
10 that's fine. If you can't, if -- once you've done,
11 you've lost on that, then you've rolled the dice. Why
12 should the patent owner now be deprived of the value?

13 MR. WAXMAN: Justice Sotomayor, you are
14 rolling the dice no matter what. Because if you can't
15 convince -- you need to be able to convince a jury that
16 notwithstanding the -- whatever proof the plaintiff has
17 that you were on notice of the patent and a claim of
18 infringement, that your scienter, which after all is
19 measured by what you believe, not why what the other
20 side tells you to believe, you are -- if the jury can
21 only evaluate half of the thought process of the
22 defendant, the defendant says, if it's narrowly
23 construed, the -- the steps aren't practiced; if it's
24 broadly construed, it's invalid. But when you get to
25 the jury, the only thing you're allowed to tell the jury

1 is, well, I believed that if it was narrowly construed,
2 we wouldn't be practicing this. That's not a real --
3 that's not giving the jury the benefit of what you
4 believed.

5 And again, all this case is about, it's not
6 about immunizing anything. It's about what the jury
7 will hear if the defendant has anything to say about its
8 scienter in response to a prima facia showing by the
9 plaintiff that the defendant knew of the patent and that
10 it -- the patent was being infringed.

11 JUSTICE KAGAN: Is there -- this is -- we
12 have no question, right, that validity or invalidity is
13 an affirmative defense?

14 MR. WAXMAN: Correct.

15 JUSTICE KAGAN: Is that correct? I mean, is
16 there any other area of law where the defendant gets to
17 say, I thought an affirmative defense would be
18 available? It turned out I was wrong, but I thought an
19 affirmative defense would be available.

20 MR. WAXMAN: Oh, I think, if you -- may I --

21 CHIEF JUSTICE ROBERTS: Sure.

22 MR. WAXMAN: Quickly. Any of the common
23 law, any of the -- if you go back to the common law and
24 look at instances where aiding and abetting liability,
25 which as this Court pointed out is referenced in 876(b)

1 of the first restatement, that defense was available.
2 Because someone who didn't have that belief was not
3 culpable and, quote, "morally wrong."

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Mr. Werbner, you have four minutes left.

7 REBUTTAL ARGUMENT OF MARK S. WERBNER

8 ON BEHALF OF PETITIONER

9 MR. WERBNER: Thank you, Mr. Chief Justice.

10 Justice Kagan, to your question just now, I
11 know of no other area of the law where a defendant, if
12 it turns out they're right, they win, and if it turns
13 out they're wrong, they win. That's the position that
14 Cisco is seeking.

15 And the parade of horrors of having to
16 shut down the factory --

17 JUSTICE SOTOMAYOR: You're argument goes too
18 far, because that's the same for infringement. If you
19 don't think you're infringing and you have a good faith
20 basis, you're right.

21 MR. WERBNER: Well, there -- there is the --
22 in my mind, the fact is, is that Cisco in their amici
23 pressed Congress to create through the PTO the IPR
24 procedures. It's not a million dollar lawsuit, and it's
25 not one that goes on forever. They have many lawyers

1 that can evaluate the risk and go to the PTO. That's
2 where they should go if they're seeking validity.
3 Infringement you can't go to the PTO, but the IPR allows
4 that.

5 JUSTICE SCALIA: Of course your response to
6 the -- the assertion that your -- your argument goes too
7 far is well, we don't -- we don't agree that -- that it
8 applies to whether you've infringed, right? I mean,
9 your argument is even -- even the question of
10 infringement, despite what we said in Global-Tech, that
11 is not a defense either, right? So at least you're
12 consistent.

13 MR. WERBNER: Well, Justice Scalia, I do
14 want to point out that Cisco cannot point to a single
15 statutory provision that suggests that Congress thought
16 that the validity of the patent was an element of
17 271(b).

18 So, no matter how the Court comes out on the
19 non-infringement scienter and the Global-Tech,
20 regardless, our position doesn't depend on it and -- and
21 there's no statutory support for validity being a
22 component of a 271(b). And the reference was to
23 Blonder-Tongue? That -- that case that this Court
24 decided back in, I think, the early '70s said that a
25 jury finding or a judge that a patent is invalid doesn't

1 wipe it out. It's not -- it doesn't become void or
2 canceled. It's a matter of collateral estoppel that has
3 to be pled under Rule 8(c). And if a defendant later
4 does not, then that patent was infringing an invalid
5 patent because it's an affirmative defense.

6 So I think the Blonder-Tongue case really
7 completely undermines the position that -- that
8 infringement presupposes validity. It's quite separate,
9 it's quite distinct and for the reasons we stated, we
10 would ask that the case be reversed and remanded to the
11 Federal circuit unless there are questions.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 The case is submitted.

15 (Whereupon, at 11:14 a.m., the case in the
16 above-entitled matter was submitted.)

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A	actively 3:13 5:25 6:22	34:7 46:7,12 47:25	32:8	13:16 17:14
\$1 45:22	activity 15:23	allows 50:3	appointing 29:12	18:13 21:25
\$10 45:23	actor 6:25 7:1	alternatives 44:1	appropriate 30:10	23:12 25:10
a.m 1:13 3:2 51:15	acts 13:5 16:3,13 18:1,10 25:12 27:5	America 7:21 11:11	appropriately 28:2	31:18 38:8
abets 8:12	actual 7:10,14 7:23	American 12:5 12:17	area 35:9 48:16 49:11	43:10,19 46:1 48:23 50:24
abetter 6:8 8:17 8:21 9:2 20:21 34:8,24,25	address 5:17 17:18 19:10,22	amici 49:22	argues 33:8	bad 6:25 7:1
abetting 6:5 9:1 20:23 21:11 29:2,6,9,23 30:4,5 34:18 38:14,23 44:21 48:24	addressing 9:21 16:7	amicus 1:19 2:7 15:7	arguing 14:1,4 31:22,24 33:7 42:15	Bank 34:15,16
ability 42:21 43:6	adjudicated 39:4	analogous 21:2 33:22	argument 1:12 2:2,5,9,12 3:3 3:7 15:6,24 16:7,23 17:8 25:3 26:24 44:17,17 49:7 49:17 50:6,9	bar 37:1,8
able 23:18 47:15	adjudicating 3:12 7:20	analogy 33:22	arguments 16:9 16:20 24:19	based 23:19
above-entitled 1:11 51:16	adjudication 38:9	analysis 46:15	arises 7:23 10:21 28:7	basically 5:4 27:17
absence 34:12 35:21 44:23	affirmative 36:22 48:13,17 48:19 51:5	Anders 1:17 2:6 15:5,6,9,16,18 15:25 16:10,25 17:2,22 18:4 18:18,22 19:2 19:21 20:18 21:9,13 22:25 24:1,5,15 25:5 25:22,25 26:2 26:14,17 34:22	Aro 7:6 14:21 15:17 17:2,19 18:23 19:3,3 28:17 38:22 42:22	basis 5:15,24 13:4 27:19 49:20
absolutely 30:5	affirms 28:17	24:1,5,15 25:5 25:22,25 26:2 26:14,17 34:22	art 23:21,22	bear 4:22 11:17 20:4,6 38:1
account 30:18 30:24	ago 13:11 45:10	anomalous 22:7	asking 15:14	bears 26:10,12 27:22 38:12
accurate 40:24	agree 50:7	answer 11:14 36:3 39:24 43:11,15,16,18 44:14,18,19	aspect 9:7	began 40:4
accusation 19:7	agreed 40:5	answers 38:5	assertion 29:18 40:12 50:6	behalf 1:15,21 2:4,11,14 3:8 26:25 49:8
accused 5:4 7:9 8:4 12:8,11 27:8 38:18	agreement 35:21	anticipated 23:9 46:19	Assistant 1:17	belief 4:22 5:2 5:16,17 6:11 8:4 15:11,12 16:18 17:9,10 17:16 19:12 22:14 23:20 24:25 28:10,19 30:15,17,25 32:1,4,21 34:5 34:13 37:2 44:11 46:6 47:3 49:2
acknowledge 6:9,12,19 24:8	ahead 31:1	anticipation 23:20	assuming 11:16	beliefs 12:4
acknowledged 18:18	aider 6:7 8:17 8:21 9:2 20:21 34:8,8,24,25	anybody 28:3	authorization 25:15 43:4,6	believe 3:14 6:13 34:9 47:19,20
acknowledges 33:5	aiding 6:5 8:25 20:23 21:11 29:2,5,9,23 30:3,5 34:18 38:14,22 44:21 48:24	APPEARAN... 1:14	available 7:22 14:23 21:19 48:18,19 49:1	believed 5:8,14 48:1,4
act 6:3 7:21 11:11 23:4,10 33:24 34:20 42:3	aids 8:12	appears 4:3 46:15	back 12:15	believes 27:8
action 8:8,11 11:22 13:19,19 20:12 25:16 28:9 34:17 35:23,24 37:20 45:3	alcohol 34:10	apple 5:5,11 35:22		bench 40:2
	Alice 36:12 45:5	application 31:17		benefit 44:5 48:3
	alleged 35:3 39:4,4 42:11	applies 50:8		best 41:1,13
	allegedly 34:25	apply 29:1 32:2		beyond 8:22
	allow 3:21 33:15 44:9,10 46:4			
	allowed 31:11			

big 44:24	28:6,7,15,24	Circuit's 40:18	come 4:24 14:6	23:9 26:2
bite 5:5,11	30:8,11 31:6,7	circumstances	43:18 44:8,9	29:19 36:18
Black 40:3	31:10,17 33:11	17:23	comes 19:2,9	44:13 49:23
blindness 14:20	40:24,25 41:11	Cisco 1:6 3:4	28:18 37:10	50:15
Blonder-Tong...	41:13,17 42:6	13:22 35:9,12	42:9 50:18	congressional
28:4 50:23	45:23 48:5	35:17,22 37:11	Commil 1:3 3:4	13:18
51:6	50:23 51:6,10	37:13 44:24	35:7 37:16	consequences
Bluetooth 31:13	51:14,15	45:10 46:5,9	committed 8:23	4:23
46:16,16	case-specific	46:12,14 49:14	8:23	considered 20:8
borne 3:22	41:8	49:22 50:14	common 6:6	consistent 50:12
bought 37:17	cases 14:25	cite 36:5	8:19,20 21:15	constantly 41:8
bounds 36:11	25:23 28:7	civil 8:21 30:3	22:5 29:2,22	constitute 18:2
brand 9:18	33:11	34:18 44:21	30:5 33:23	18:10 25:12
breach 33:12,21	cause 8:7,11	claim 10:21,23	34:12,14 38:14	constitutional
breached 33:13	20:11 25:16	10:25 11:3,8	40:5 44:22	12:18,21
breadth 17:24	28:8	22:4 24:21	48:22,23	construction
break 16:6	Central 34:15	31:8,13 40:19	commonplace	10:22,23 11:8
brief 9:8 12:16	certain 11:8	40:25 41:1	35:13	22:4,11 24:21
18:2 33:4 36:5	13:8,14 36:12	42:1 46:8,16	companies	constructions
40:11	certainly 20:19	47:17	35:12	11:3
briefing 4:3	21:17 29:3	claimed 41:24	company 35:17	construe 10:1,1
Briefly 26:16	challenge 20:9	43:8	35:18 43:25,25	construed 10:3
bring 11:21	20:10 27:24	claiming 3:14,16	44:9,25 45:9	10:4,6,7,25
broad 10:2	challenged 4:1	31:25	45:11	31:14 34:4
broadly 10:4,7	36:9	claims 40:12	compare 40:9	45:14,14,16
45:16 46:18	chance 5:7	41:9	completely 6:2	46:9,18 47:23
47:24	change 4:13	clapping 46:13	33:3 51:7	47:24 48:1
burden 11:25	changed 13:12	clarify 14:16	complex 23:16	contention 33:5
20:7 26:11,12	36:4	clear 5:24 6:7	24:20	contested 17:13
27:16,16,22,24	Charles 40:10	12:7 14:13	component	context 10:12,13
28:1,16 38:13	40:15	17:24 22:9	50:22	12:8 14:19
burdens 26:9	Cheek 12:6,10	26:2,17 27:23	concentrate	22:10 23:5
business 36:13	31:24	30:22	19:15	34:23 40:24
45:4	Chief 3:3,9,24	clearly 14:22	concerns 3:11	44:10
bypasses 3:12	4:5,9,12 12:15	15:20 16:11	conclude 28:22	contexts 35:6,6
	13:9,15 15:3,5	45:4	concluded 28:13	continue 22:24
	15:9 22:8,18	close 12:24	conclusively	contract 32:8
C	25:2 26:16,22	closely 17:14	17:5	33:10,11,12,13
c 2:1 3:1 8:16	27:1 31:1,16	codification	conduct 7:11	33:14,16,17,18
44:19	31:22 32:5,12	4:16	17:8,11 21:14	33:21 34:5,6,9
canceled 51:2	36:2 37:22,25	coin 10:15,20	21:24 24:24	contracts 12:19
Cardozo 13:3	40:16 48:21	12:23 31:4	confer 32:9	contrary 11:6
case 3:4,11 7:7	49:5,9 51:13	37:10 46:3	confusion 11:15	33:23
12:6 13:21	chooses 8:6	coins 10:20 31:5	Congress 4:13	contributory
17:3,16,23	circuit 19:16	collateral 51:2	9:10,20,21	38:18 42:11
19:16 20:2	30:4 33:1 36:8	combination	12:25 13:16	convict 8:22
21:7 23:1	51:11	41:2	20:10 21:18	convince 47:15
24:10,17,24				

47:15 convincing 27:23 30:23 Corp 36:12 correct 26:14 42:8 48:14,15 counsel 15:3 26:22 31:10 49:5 51:13 couple 22:19 35:10 38:5 43:9 course 13:21 23:7,23 24:8 28:6 50:5 court 1:1,12 3:10 5:14 6:20 7:7,8 10:19 12:10 14:15,22 14:25 15:10,19 15:25 16:16 17:3,5,14 18:11,23,23 19:3,5,25 21:7 21:8 22:9,13 24:9 27:2,3,21 28:13 30:1,21 32:25 34:14 37:9 38:16 40:16 42:10,14 42:22 44:1 45:2,18,21 46:3,4 48:25 50:18,23 court's 7:6 13:2 34:15 36:11 38:22 45:5 courts 9:15 34:3 34:7 41:8 create 49:23 creates 7:11 creation 40:18 crime 8:23 criminal 6:6 8:21 12:8 20:20 21:16 crux 19:15	32:18 culpability 44:23 culpable 49:3 curiae 1:19 2:7 15:7 current 13:7 customer 45:21 customers 31:15 35:1,14,20 37:17 45:7,15 46:17 D D 1:17 2:6 3:1 15:6 D.C 1:8,18,21 Dallas 1:15 damages 38:8 38:13 39:6 45:25 day 30:3 37:13 deal 9:2 44:6 dealing 8:25 14:16 dec 35:24 decades 13:11 decided 20:8 40:17 50:24 deciding 38:3 41:11 decision 12:10 45:5 decisions 36:8 declaration 37:21 declaratory 8:1 9:17 11:13,21 11:24 44:1 declared 28:2 deeply 12:4 defendant 10:24 16:20 17:9,10 17:16 19:5 20:3 23:18 24:23 28:20,23 28:25 30:13,22	31:8 42:5,22 47:22,22 48:7 48:9,16 49:11 51:3 defendant's 17:6 30:24 defendants 20:5 24:17 defense 5:1 7:11 10:9,10 14:23 19:5,12 31:23 32:1,15,21,22 33:16 34:8 35:15 36:22 41:13 46:12 48:13,17,19 49:1 50:11 51:5 defenses 10:5,14 32:22,24 41:22 defined 25:13,14 defining 43:5 Denver 34:15,16 Department 1:18 depend 33:3 50:20 depending 10:5 depends 6:10 9:1 42:1,2 deprived 47:12 described 7:7 description 46:11,21 despite 50:10 determine 23:16 development 13:10 device 35:1,4 dice 46:23 47:11 47:14 difference 5:18 5:22 9:20 12:5 19:17,19 differences 24:12 different 5:23	7:16 11:5 12:21 14:14,20 16:8 26:8 31:5 32:17 differently 22:2 23:14 24:9 25:9 26:13 difficulty 22:19 direct 8:14,17 17:12 21:21,23 23:3 28:12 33:22,23 38:10 38:21 directly 21:21 23:6 discern 9:12 discrete 42:15 42:18,20 dispute 32:19 disputes 32:22 disputing 42:20 dissent 10:19 dissenting 40:3 distinct 51:9 distinction 12:7 distinguish 5:15 district 42:10 divided 17:14 doctors 23:6 doctrinal 39:24 39:25 40:1 document 33:8 doing 20:17 dollar 49:24 due 29:17 dumb 18:24 duty 24:25 28:16 E E 2:1 3:1,1 early 50:24 effective 35:2 effectiveness 5:11 either 24:3 28:11 44:6	50:11 element 25:16 28:25 29:1 50:16 elements 25:14 enablement 46:10,20 enacted 29:19 29:22 encompass 46:9 encouraged 14:2 encouraging 7:3 enforce 21:19 enforcement 15:13 enforcing 21:5 entirely 12:22 entity 38:17,20 equated 18:11 18:16 escape 3:13,21 especially 3:20 ESQ 1:15,17,21 2:3,6,10,13 essentially 18:3 34:8 44:3 establish 25:17 26:20 30:20 38:7 established 28:8 39:2 establishes 38:24 39:3 establishing 25:17 estimate 4:4 estoppel 51:2 evaluate 39:2 47:21 50:1 evaluated 37:8 evaluating 30:16 30:24 evasion 12:9 event 46:20 everybody 42:5 evidence 27:23 30:23
---	--	--	---	---

eviscerate 5:11	24:19 27:9,19	41:16	7:7	half 7:1 47:21
exactly 33:20	28:10 30:15,17	four 49:6	go 7:25 9:13	hand 46:13
37:24 46:11	30:25 31:25	freestanding	11:13 18:13	happen 20:3
example 7:22	32:4 33:6,7	31:23	21:23,25 23:7	35:10
9:9 12:6	37:2,7 44:11	fringing 11:22	23:12 25:10	happened 31:7
examples 9:19	46:6 47:3	26:11	31:1,17 35:2	46:11
9:22	49:19	frontline 24:5	36:16 43:10	happens 31:6
exceptionally	far 44:10 49:18	functions 36:21	44:1,2,2 45:18	35:20 45:25
34:21	50:7	further 9:13	45:21 48:23	harder 23:15
exclude 43:4	Federal 19:16	13:16	50:1,2,3	hear 3:3 39:10
excuse 18:15	30:4 33:1 36:8		goes 7:14,15	48:7
31:20	40:18 51:11	G	30:9 46:22,23	heard 12:11
Exhibit 40:4	felon 20:23,25	G 3:1	49:17,25 50:6	30:13
exists 26:6 36:20	21:1	gained 13:21	going 22:20 23:1	hearing 10:24
39:22	felony 21:11,12	gamble 4:21	31:3,3 35:17	heaven 35:17
explain 30:14	figure 9:24 44:3	11:23 39:17	36:16	held 4:25 12:10
46:5,7	file 21:21 35:23	gambling 8:3	good 5:2,15,15	14:22 17:5
explained 13:4	37:20	gap 8:16 13:7	5:16 6:24 10:8	21:6,7 24:18
27:3 38:16	filed 31:8	gee 45:13	10:10 15:11,12	40:16 46:3,4
explication	find 19:25 38:19	general 1:18	16:18 17:9,10	helpful 14:15
36:11	finding 41:18	41:19	17:16 19:12	high 4:3 28:1,2
expressed 30:17	42:21 50:25	generally 20:15	23:19 24:19	37:8
expressing	fine 47:10	getting 44:5	27:9,18 28:10	hinge 6:11
28:19	finish 41:11	46:1	30:15,17,25	historical 13:10
expression	first 3:4 9:12,22	GINGER 1:17	31:25 32:4	history 34:17
29:24	19:22 20:19	2:6 15:6	33:6,7,16	hold 15:24 17:25
extolls 33:5	22:3 29:17	Ginsburg 4:24	36:18 37:2,7	18:7,9 41:8
	34:1,15 35:12	5:4 19:14,21	43:13,16,17,18	holder 38:2
F	38:6,20 40:15	34:22 35:5	44:11 46:6	holding 17:24
fabric 17:1	41:22 42:14	40:8,21 41:4,7	47:3 49:19	40:19
face 37:9	43:10 45:18	41:20 42:7	government	Honor 3:19 4:2
facia 48:8	49:1	Ginsburg's	13:5 33:4	5:22 7:19 8:13
fact 25:12 28:22	fixture 7:8	21:25	37:15	12:3 16:25
30:2 34:6	flip 12:22 37:9	give 5:4 9:19	government's	18:6 19:3 25:6
38:20 39:2,5	follow 38:23	44:18 47:6,8	9:8 37:11	hope 19:14
40:25 41:20	Footnote 9:8,11	giving 5:10 48:3	40:11	horribles 49:15
42:23 49:22	forbid 35:17	Global-Tech	granted 26:6	hotly 17:12
factory 49:16	force 13:3 33:8	6:20 7:17 10:8	Grokster 21:22	House 29:20
facts 33:4	forever 49:25	14:2,4,5,13,16	27:3 38:16	hundred 4:16
factual 17:22	forgotten 43:20	15:15,19,20	ground 40:5	hundreds 45:1
24:20 32:25	form 14:7,9,11	16:1,11,19	guess 10:11	
33:1	forward 7:16	17:19 24:9	25:20 33:9	I
faith 5:2,15,16	28:18	25:3,7 27:4	guide 14:24	i4i 13:2
5:16 10:9,10	found 4:1,6 5:6	28:17 30:1	gun 20:23,24	idea 22:19
15:11,12 16:18	6:21 13:22,24	38:16 46:4	21:1	identifying
17:9,10,16	30:8 31:10	47:5 50:10,19		28:19
19:12 23:19	34:11 36:9	Global-Tech's	H	ignorance 31:19

II 14:21 17:2 18:23 19:3,3 illegal 20:22 21:1,14 24:24 immediately 18:6 immerse 42:22 immersed 38:21 43:2 immunities 23:4 immunize 23:19 immunizing 48:6 imply 32:2 important 21:5 23:16 imposing 23:11 impracticable 21:20 improper 33:25 34:4 inadequate 14:12 include 46:18 indefiniteness 36:13 indemnification 35:13,21 independent 23:10 indisputable 42:25 individual 35:24 induce 5:25 6:22 9:3 29:8 induced 17:25 18:1,10 20:14 27:5 inducement 23:10 27:4 39:12 inducer 19:23 20:6 22:23 23:8 27:8 34:24 39:4,5 42:11 inducers 22:22	induces 3:13 8:12 inducing 6:14 15:13 21:24 29:9 38:18 infringe 7:4,17 11:4 25:24 26:3 30:13 39:9 47:7 infringed 9:18 16:24 18:21 19:24 20:1,6 25:19 26:7 28:11,20 39:19 40:12,20 41:9 42:13,17 46:7 48:10 50:8 infringement 3:13 5:16,23 6:1,14 7:25 9:21 14:13 16:12,16 17:12 17:25 18:2,10 19:4,6,8 22:24 23:6 25:7,8,12 25:13,13,17 26:4,5,9,10,18 26:21 35:15 38:4,18,19 40:6 41:20 42:21 43:5 47:2,18 49:18 50:3,10 51:8 infringer 3:11 3:21,23 5:4 6:1 7:9 8:5,14,18 21:21 33:23 38:21 42:11,11 42:23 43:2 infringers 21:23 28:12 38:10 infringes 8:8 15:23 infringing 7:3 7:11 10:3 11:21,24 13:23 16:3,13 17:4	17:11 35:1,3,8 37:19 39:13 49:19 51:4 ingrained 12:5 inherent 11:1 innovative 35:18 45:11 inquire 14:5 inquiries 42:18 42:20 inquiry 14:2 47:4 instance 20:22 22:8 23:4 38:20 42:14 instances 3:22 48:24 instantiation 44:20 institute 45:3 instructed 29:16 30:21 intended 21:19 intent 6:8,10,21 6:23 9:4 20:20 28:7 intentional 33:25 intentions 31:13 inter-parties 8:2 interest 5:12 interference 33:24 34:2 interfering 34:6 Interstate 34:16 intertwined 10:14 intervene 35:23 invalid 3:15 4:7 4:8,9,22 5:2,9 6:12,14 8:9 9:18 12:12,23 19:13,24 20:1 20:5 22:15 25:1,24 27:7 27:15,17,22 28:3 33:13,15	33:17,19 37:5 40:12,19 41:9 42:2,12 44:5 45:5 46:10 47:24 50:25 51:4 invalidate 27:21 42:4 invalidated 36:6 36:10 37:3 invalidity 9:20 10:11 12:4 15:12 16:4 19:12 22:6 23:14,15 26:3 26:10,12,19 27:23 30:20,22 32:22,24 37:21 38:9 41:1,14 41:18 44:11 48:12 invention 32:20 41:24 Invents 7:21 11:11 involved 46:19 IPR 8:2 11:10 49:23 50:3 issue 10:21 13:14 15:20 16:12 22:5 28:6,14,24 35:25 39:14 46:5 issued 30:19 33:8 issues 13:18 22:1,6,7 26:19 42:15 J judge 13:4 40:16 40:16 50:25 judges 4:19 10:18 judgment 8:2 9:17 11:2,13	11:22,25 44:2 juries 4:19 34:11 jurisdiction 9:16 jury 28:22 29:3 29:16 30:8 37:1 38:17,17 39:1 41:14,18 47:15,20,25,25 48:3,6 50:25 Justice 1:18 3:3 3:9,16,24 4:5,9 4:12,24 5:3,14 5:19,20 6:4,15 6:16,18,23 8:7 8:19,24 9:23 10:17 11:19 12:14 13:3,9 13:15,25 14:8 15:3,5,9,14,17 15:21 16:6,22 17:1,21 18:4 18:15,20,24 19:14,21 20:11 21:6,10,25 22:4,18 23:23 24:2,7,12 25:2 25:19,23 26:1 26:8,15,16,22 27:1,11,14 29:1,5,8,11 31:1,3,16,22 32:5,12 33:9 34:22 35:5 36:17 37:22,25 39:7,11,21 40:3,8,21 41:4 41:7,20 42:7 43:11,12,15,20 43:24 46:22,25 47:2,4,9,13 48:11,15,21 49:5,9,10,17 50:5,13 51:13 Justice's 12:15 36:2 Justices 17:15
---	--	--	--	--

K Kagan 9:23 10:17 12:14 17:21 18:4 22:4 33:9 36:17 43:24 48:11,15 49:10 Kagan's 31:3 keep 23:17 Kennedy 3:16 13:25 14:8 47:4 key 19:23 kind 20:15 knew 16:20 39:19,21 48:9 know 4:4 6:24 6:25 7:2 11:25 12:20,22 13:16 14:9 16:23 20:24,25 21:11 21:13 23:3 24:3,19 30:9 31:4 34:9 35:7 35:9,18,19 39:8,11,16 40:11 45:11,13 45:19 49:11 knowing 7:4 14:19 knowledge 7:14 7:16,24 14:17 14:21,25 15:22 15:23 16:3,4 16:12,13,15,16 17:4,5,6,7,20 18:1,8,9,20,21 19:4,6,6,7 20:16,21 24:18 24:23 25:7,11 27:5 30:6 knows 9:20 10:25 20:7 39:12 KSR 36:14	lack 5:16 34:11 34:11 46:10 lacked 17:10 19:5 lacks 27:9 language 16:14 19:8 law 4:15 6:6,6,7 7:8 8:20,20 12:5,9,17 13:2 20:20 21:15,16 22:16 24:17,22 26:15 29:2,22 29:24 30:5 31:18,19,23 32:8,14,16 33:2,24 34:12 34:14 38:14 44:22 48:16,23 48:23 49:11 laws 30:18 32:1 32:6 lawsuit 31:7 49:24 lawyers 49:25 leads 11:15 leave 38:17 left 49:6 legal 24:20,25 31:10 32:9 43:6,7 44:19 legality 33:7 let's 42:10 letter 14:9,12 28:18 30:11,11 35:7 37:13,15 45:12,13 letters 14:6,7 37:10,12 45:1 liability 3:21 6:5 8:15 9:25 15:13 20:2,14 20:15 21:4 23:11,19 26:4 27:5,10 29:3 29:23 32:3 34:12,18,20	38:15,23 44:19 44:21,22 48:24 liable 6:1,7 19:25 21:10 23:6 24:18 35:16 39:14 45:24 light 36:11 linchpin 27:4 line 4:14 37:17 45:7,20,24 link 17:7 litigate 45:22 litigated 17:13 litigation 10:22 11:1,12 35:25 42:9 45:6 little 22:20 LLC 1:3 long 7:15 34:17 look 8:15,25 16:11 36:18 44:16 48:24 looked 31:11 looking 38:8 looks 31:8 45:12 lose 33:18 38:2 loses 28:5 loss 39:17 lost 47:11 lot 35:1 44:25 lower 9:4 46:3	8:9 9:16 14:13 23:2,13 24:4 36:14 47:14 50:18 51:2,16 Mayo 36:14 McDonald's 35:7 mean 8:20 13:7 15:22 17:22,24 19:16 23:24 25:20 27:20 33:10,16,21 34:14 36:3 37:11,14,25 38:6 39:8 41:21 44:16 48:15 50:8 meaning 9:13 43:5 46:25 means 3:12 7:20 21:5 23:10 32:14,14,16,17 41:10 45:19 meant 9:10 40:14,22,22 42:8 measured 47:19 mechanism 4:17 13:18 mechanisms 20:9 44:14,15 mens 20:16 mentioned 3:24 message 4:18 22:23 metaphor 31:5 method 31:9 36:13 41:2 45:4 methods 8:6 million 45:22,23 49:24 millions 21:23 mind 23:17 49:22 minutes 49:6 mistake 3:22,23	31:23 mistaken 5:8 mistakes 12:9 mode 41:1,13 modern 30:3 months 11:12 morally 49:3 morals 29:25 morning 3:4 myriad 3:12 7:20
L		M majority 19:16 making 41:7 45:11 manufacturer 35:22 March 1:9 MARK 1:15 2:3 2:13 3:7 49:7 Markman 10:24 mastermind 34:24 materials 23:5 matter 1:11 6:20		N N 2:1,1 3:1 name 9:18 narrow 10:2 narrowly 10:3,6 31:14 47:22 48:1 nature 16:3,13 Nautilus 36:13 necessarily 41:17,18 necessary 16:4,5 16:14,18 18:11 19:4 need 9:13 17:3 20:20,21,24,25 21:23 24:23 30:17 38:19 39:1 47:15 needed 14:1 18:8 negate 22:15 25:1 Neither 15:11 network 35:9 new 11:10 36:18 non-culpable 34:20 non-infringe... 10:9 15:12 16:18 17:17 22:5 23:14 50:19 noninfringem... 41:25

nonpatent 25:20	outset 40:18	27:22 28:2,11	24:14	45:8
nonsense 40:13	overturn 15:15	28:12,13,19,20	Petitioner 1:4,16	practicalities
43:1	15:19	30:8,12,15,18	1:20 2:4,8,14	35:11
notice 7:10,10	owner 7:25 8:4	30:20 31:9,12	3:8 15:8 16:2	practice 35:20
7:17,19,24 8:5	26:10 39:16	31:12,14,18	49:8	practiced 41:3
14:1,6,24	47:12	32:1,6,6,7,14	place 35:12	41:17 47:23
46:14 47:17	owners 5:13	32:17 33:6	plaintiff 10:23	practices 13:8
notion 45:2	13:20	34:23 35:8,14	28:18 30:9	43:8
notwithstandi...	P	36:21 37:2,18	38:23 39:2,3	practicing 25:14
47:16	P 1:21 2:10 3:1	38:2,2 39:9,16	47:16 48:9	27:7 31:15
number 4:3	26:24	39:18,22 40:7	plaintiff's 25:16	32:19 38:10
29:22 36:15	page 2:2 9:8,11	42:1,3,5,12,16	28:15,16	41:23 42:24
42:12,13	33:4 36:5	42:24 43:3,3	plausible 17:8	46:17 48:2
O	parade 49:15	44:4,12 45:4,6	plead 44:11	preceded 18:6
O 2:1 3:1	paradigm 45:25	45:13 46:6,8	please 3:10	precisely 30:1
obvious 23:21	paradigmatic	47:6,12,17	15:10 27:2	preclude 15:13
obviously 35:16	31:6	48:9,10 50:16	pled 51:3	prejudice 13:19
obviousness	parallel 14:3	50:25 51:4,5	point 9:6 11:7	premise 47:5
36:15	parameters	patentable	14:2,13 19:23	presented 16:19
occurred 45:25	32:23	36:14	20:19 21:3,25	41:14
occurring 17:12	part 4:15 6:9	patented 32:20	24:16 29:16	pressed 49:23
26:5	11:11	patentee 20:11	31:3 34:23	presumably
odd 45:8	particular 44:22	26:19 27:6,8	40:9 41:11	39:18
offense 20:22	party 10:22,24	28:5	46:1 50:14,14	presume 13:5
office 8:3 11:10	27:21 34:7	patentholders	pointed 41:22	presumed 4:18
43:19	patent 3:12,15	21:20	48:25	4:21 30:19
oh 33:12 37:4,18	4:15,25 5:1,6	patents 3:25 4:6	pointing 29:2	37:18
48:20	5:13 6:3,12,14	4:18,20 19:13	points 20:18	presumption
Okay 40:15	7:5,8,10,14,16	30:18,19 36:3	43:9	3:19,25 4:10
44:16	7:20,24,24 8:3	36:6,9,9,13	policy 7:13	4:14,15 13:1,4
once 7:9 14:5,23	8:4,9 9:17,18	44:5	23:13 44:17,18	13:8 26:18
22:21 26:5	10:1,2,4,6,6,22	peculiar 40:24	portion 39:25	27:12,14 36:19
28:2,5 46:14	11:1,4,10	people 22:20	40:1,1	36:20,25,25
47:10	12:23 13:19,21	45:12	posit 39:8	presumptions
ones 7:18 33:2	13:22,23,24	percent 4:3,6,10	position 23:24	16:8
opening 12:15	14:17,19,22,24	19:13 36:7,10	24:5 27:17	presupposes
opinion 13:2	15:1,23 16:15	37:5,5	31:19 43:25	42:23 51:8
16:14 38:22	16:21 17:6,7	percentage 3:25	49:13 50:20	pretty 10:13
40:3	18:2,8,10,19	permitting	51:7	12:24 45:4
opponent 11:7	18:20,21 19:7	28:22	possess 20:23	prevent 26:5
options 11:6,7	19:24 20:1,5,8	person 7:12,15	21:1	prevents 26:4
oral 1:11 2:2,5,9	20:10,13 21:19	8:8,10,22 11:2	possessed 19:6	prima 48:8
3:7 15:6 26:24	23:4,10 25:14	11:8 14:23	possible 10:5	primary 24:16
order 26:20	25:15,18,24	20:12 21:24	25:17	principal 19:17
27:21 30:19,20	26:6,6,10 27:7	23:21 35:3	powerful 9:10	19:19 20:22
original 30:7	27:9,15,16,21	39:12	practical 23:1	principally
		persuade 24:13	39:25 43:11	44:17

principle 21:15	29:21 30:2	raised 14:10	reflects 41:20	rest 15:2
principles 28:4	PTAB 44:2	raises 37:1	regard 31:18	restatement
28:5 29:23	PTO 13:17,19	raising 12:9	32:7	8:25 34:1 49:1
36:12	13:23 26:5	rare 34:21	regardless 11:15	retrospective
prior 23:21	27:25 28:13	rarity 44:22,23	50:20	38:8,13
priori 38:7	37:21 44:2	re-exam 13:24	relevant 22:11	retrospectively
private 34:16	49:23 50:1,3	rea 20:16	22:13	45:24
probably 43:18	public 4:20	reach 35:19	remanded 51:10	reversed 51:10
45:16,22	purely 33:1	read 15:21	remedy 45:8	review 8:2
problem 36:19	purposes 31:13	17:19 18:7,14	remember 43:11	Rich 13:4 40:10
36:25 37:23	pursue 8:6	real 35:25 48:2	43:12 46:2	40:16,16,16
procedural 4:17	put 7:10 11:25	real-world	replacing 16:24	Richdel 40:17
procedure 11:10	38:14,15 42:22	39:25	reply 12:16	40:19
procedures 7:22	puts 18:3	really 6:25 8:21	report 29:20,21	right 4:25 5:3
8:1 49:24	putting 7:15	12:14,20 14:14	require 17:20	8:8 10:4 12:16
proceeding		20:3 31:19	24:17 25:7	12:19,24 19:23
11:16	Q	32:18 35:19	30:5 34:4 38:1	20:4,13 21:14
process 47:21	question 4:24	43:13,16 51:6	required 6:21	23:25 25:20
product 9:24,25	10:18 11:5	reason 7:13	8:18 20:16,16	27:7 37:25
production	12:15 16:17	36:18 41:13	27:10 33:24	43:4,6,7 44:7
37:17 45:6,20	17:11 20:3	47:6	requirement	48:12 49:12,20
45:23	22:10,12 30:7	reasonable	6:17	50:8,11
products 45:11	35:24 36:2,15	30:14 31:25	requires 9:3	rights 21:19
profession 30:25	36:20 38:12	32:4 33:6 37:2	18:1 25:11	27:6 32:9 43:3
37:8	39:13,15 41:16	37:4	reserve 15:2	43:3
prohibition	43:12,16,17,21	reasonableness	resolution 33:3	risk 11:16,18
12:11,12 34:10	43:21,22,23	30:16 37:7	resolve 16:11,17	20:4 38:1 50:1
proof 47:16	44:13,14,18,24	reasonably 27:8	resolved 11:11	ROBERTS 3:3
properly 13:6	45:9 48:12	reasons 22:2	15:20 33:3	3:24 4:5,9 13:9
protect 5:12	49:10 50:9	23:12 24:11	36:1	15:3,5 22:18
protocols 46:18	questions 14:10	25:8 51:9	resources 44:25	25:2 26:16,22
prove 3:18	22:6 23:15	REBUTTAL	respect 12:4	31:1,16 32:5
26:20 27:15,17	24:20,20,21	2:12 49:7	18:4 20:18	32:12 37:22,25
27:18 28:16	33:2 51:11	received 7:9	22:16 23:20	48:21 49:5
30:22 37:4	Quickly 48:22	14:23 46:14	25:11 29:17	51:13
39:12	quirk 41:13	recognized 7:9	respected 4:19	rolled 47:11
proven 4:20	quite 10:11	30:2,4 44:20	responded 13:16	rolling 46:23
39:18	12:16 30:10	reference 31:24	Respondent	47:14
provided 20:10	51:8,9	50:22	1:22 2:11	royalties 39:17
35:9	quote 27:5 29:24	referenced	14:10 26:25	rule 33:20 38:7
provides 23:5	33:25 38:21,21	48:25	responding	51:3
43:3	40:3 49:3	referred 41:21	13:17	run 45:2
proving 3:17	quoted 40:23	41:25	response 28:25	
26:11 27:22	quoting 13:3	referring 9:7	48:8 50:5	S
37:1		reflect 29:22	responsibility	S 1:15 2:1,3,13
provision 50:15	R	34:19	3:14	3:1,7 49:7
provisions 9:2	R 3:1	reflected 34:1	responsible 39:5	SANDERS 24:8

satisfied 17:6	50:2	33:11 40:2	9:6 20:9 22:9	21:4
satisfy 16:16	seen 37:11	43:8 45:3	22:10 30:3	supply 34:10
42:3	sell 9:25	sorry 17:10 29:7	44:20 50:15,21	40:4
saying 23:17	selling 20:24	31:2 39:10	stay 11:12	supplying 35:3
29:13 30:12	34:25	sort 8:11 13:11	step 13:6 31:17	support 50:21
32:19 33:10	Senate 29:21	sorts 12:9	steps 31:15	supporting 1:19
35:8,14 41:15	sense 9:5 10:12	Sotomayor 5:14	32:20 38:11	2:8 15:8
says 5:25 9:22	17:19 18:14	5:19,20 15:14	39:9,19 41:2	suppose 9:23
10:8 11:7 21:8	19:11,11 22:1	15:17,21 16:6	41:16,24 42:24	40:14
24:2 26:7	23:13 41:12	16:22 17:1	43:8 46:8,17	supposed 37:16
27:17 28:18	42:15	26:8,15 27:11	47:7,7,23	Supreme 1:1,12
38:7 45:13	sent 28:18 30:12	27:14 29:5,8	stop 37:19 40:8	17:14 32:25
47:22	sentence 18:3,5	29:11 39:7,11	45:6,6,21	sure 10:25 14:6
Scalia 6:4,16,18	18:6	39:21 43:15	stopped 7:19	19:18 22:25
6:23 8:7,19,24	sentences 19:1	46:22,25 47:2	strange 18:7	33:9 40:11
11:19 18:15,20	separate 6:3,19	47:9,13 49:17	streamline 8:1	48:21
18:24 20:11	10:20 22:7	Sotomayor's	streamlined	surgical 23:5
21:6,10 23:23	26:19 38:24	43:12	7:22	surrogate 29:13
24:2,7,12	41:22 51:8	sound 25:3	strictly 8:15	symmetry 14:3
25:19,23 26:1	set 44:13	46:13	struck 44:5	system 44:8
29:1 43:20	SETH 1:21 2:10	speaks 6:1	study 36:6,7	Systems 1:6 3:5
50:5,13	26:24	specific 28:7	subject 9:16	
scenario 21:22	show 27:18	specifically 7:8	36:14	T
scienter 9:4 25:1	showed 36:6	spend 19:14	submit 3:19	T 2:1,1
27:4,9 28:16	showing 42:2,4	stand 22:15	4:13 8:15	take 29:17 30:17
28:23,25 30:10	48:8	start 5:24	14:11	30:23 33:10
34:11 38:25	shut 37:16 45:19	started 32:19	submitted 51:14	35:15,24 36:18
39:3,3 46:5	45:20,23 49:16	40:5	51:16	talked 47:4
47:18 48:8	side 26:12 37:9	stated 51:9	subsidiary 22:5	talking 10:12
50:19	43:11 44:5	statement 40:1,4	substantial 5:21	17:2 20:13
scope 32:23	47:20	40:13,23 41:19	successful 22:21	35:10 38:8
second 5:5,7,10	sides 10:15,19	43:1	successive 18:25	talks 9:15
21:3 39:15	31:4 46:2	statements	sued 35:14	tax 12:8
secondary 32:3	simply 3:14 21:4	14:18	37:14	technical 24:20
section 5:12 6:3	40:1 41:15	states 1:1,12,19	sues 33:11	technology
6:3,22 9:14,15	43:1	2:7 9:16 12:6	suffer 39:17	31:13 37:18
27:10 29:19,20	single 50:14	15:7 16:14	sufficient 14:9	tell 19:19 37:17
32:23 34:1	situation 11:5	22:8 23:24	16:15	45:7,20 47:25
Sections 42:3	14:16	24:2	suggesting 10:10	telling 9:10
securities 34:17	situations 21:22	statistics 13:15	suggests 28:17	tells 47:20
see 5:22 9:1,19	23:2	36:4 37:12	50:15	terms 39:22
10:21 21:16	skilled 23:22	statute 10:1 12:8	suing 35:19	testify 31:11
36:24 44:10	smaller 35:18	22:12,13,15	suit 21:21 36:21	tests 38:24
seeing 36:24	Solicitor 1:17	25:10	38:4 46:15	Tex 1:15
seek 31:9 37:21	solved 38:4	statutes 9:9	suits 22:22	texts 15:22
44:1	somebody 7:3	12:18,20	supplemental	textual 9:13
seeking 49:14	8:12 20:14	statutory 5:24	8:11 20:13	Thank 15:3,4

26:22 49:4,5,9 51:12,13 thing 11:20 47:3 47:25 things 18:12,17 18:25 29:21 32:17 35:10,11 44:3,4 think 5:10 7:13 10:13 11:4 13:13 14:8,15 14:17,21,24 15:18,19 16:2 16:8,10 17:8 17:15,19 18:5 18:5,11,13,23 19:2,8,11,19 19:22 20:6 21:2,9,15,16 21:18 22:2,6 23:2,9,14,16 24:10,13,15,15 25:5,8,25 26:2 26:17 31:14 32:18 36:10 37:4,5 38:5 40:10 43:22 45:8,14,15 48:20 49:19 50:24 51:6 thinking 42:9 thinks 8:9 third 34:7 third-party 34:12,19 44:21 thought 12:12 33:12,14,18 42:7 47:21 48:17,18 50:15 thousands 45:1 three 9:9,22 22:2 38:24 time 14:7 15:2 28:4 36:4,7,10 37:14 45:3 times 22:19 told 4:20 29:3	38:17 top 16:24 tort 6:6 8:23 33:21,22 tortious 33:24 34:2 tortiously 34:5 torts 34:2 tradition 12:17 treat 22:1,7 23:13,25 25:8 treated 10:16 26:13 treatises 21:16 34:19 treatment 34:17 trial 46:3,13 true 8:14,24 33:13 44:25 try 9:12 43:10 trying 9:24 Tuesday 1:9 turn 32:13 37:23 turned 48:18 turns 11:17 33:16 49:12,12 twice 37:14 two 6:19 9:19 10:1,5,14,15 10:19,20 18:12 18:16,25 19:18 20:18 22:1,7 23:12 26:8 29:21 31:4,4 32:17 35:2 42:13 46:2 type 6:5 typical 10:13 33:10,11	undermines 51:7 underscores 34:18 understand 10:11,18 12:2 18:16 24:9 25:6 39:8 44:8 44:13 understands 16:1 understood 34:4 unenforceable 28:3 United 1:1,12,19 2:7 9:16 12:6 15:7 22:8 23:24 24:2 universe 12:21 unlawful 32:20 upheld 4:10 urging 27:21 USA 1:3 3:4 use 17:4 20:9 31:5 44:15 45:12 users 22:22,23 23:3,3 usually 24:16,21 33:15 utterly 32:24	5:17,23 6:2,2 7:20 11:6,9 13:1 14:14 22:13 25:15,18 26:18,20 36:12 36:19,20,21,25 37:1 38:3 39:14 42:20 48:12 50:2,16 50:21 51:8 validly 44:20 value 38:2 47:12 valued 4:18 various 13:17 vernacularly 41:25 version 30:3 viewed 28:21 violate 27:6 violated 39:23 43:7 violates 20:12 27:7 violating 12:11 22:12,16 31:9 45:15 violation 20:15 vital 5:12 void 27:9 28:12 30:15 33:6 39:18 40:6 43:2 45:16 51:1	27:1,13,20 29:7,10,15 31:2,21 32:11 32:16 33:20 35:5 36:23 37:24 38:5 39:10,20,24 40:15,22 41:6 41:10 42:19 43:17,22,24 44:16 46:24 47:1,8,13 48:14,20,22 way 7:15 8:22 10:16 17:13,19 24:22 37:13 44:7 45:14 ways 10:1 We'll 3:3 we're 12:21 23:17 31:23,25 35:10 38:7 42:19 we've 37:11 went 5:6 13:23 Werbner 1:15 2:3,13 3:6,7,9 3:18 4:2,8,12 5:3,19,21 6:15 6:18 7:6 8:13 8:24 9:23 10:17 12:3,25 13:13 14:8 15:4 49:6,7,9 49:21 50:13 who've 37:17 wide 35:9 willful 14:19 win 33:17 49:12 49:13 wipe 51:1 wish 43:12 wishes 4:21 withhold 43:4,6 word 9:3 34:4 words 6:21 28:10
--	---	---	--	--

works 24:22	1952 4:16 29:20	37:12,12		
world 32:10	1983 40:17			
35:25	1998 36:6	<u>7</u>		
worry 20:2		70s 50:24		
worse 7:4	<u>2</u>	766 34:1		
wouldn't 32:3	2 7:6	<u>8</u>		
32:21 37:3	20 45:10	8(c) 51:3		
48:2	2002 36:7	876(b) 48:25		
written 46:10,20	2003 36:8			
wrong 3:20 4:23	2009 36:8			
8:5 11:17	2015 1:9			
13:20 20:4,5	22 9:8,11			
20:17 25:4	26 2:11			
32:13 36:24	271(a) 8:14			
37:23 41:15	25:13 26:7,17			
42:8,17 48:18	41:23 43:5			
49:3,13	271(b) 5:12,25			
wrongdoing	6:22 8:16 9:11			
7:23 30:6	9:13 18:1,9			
wrongful 6:8,10	21:3,18 25:11			
20:20 34:20	27:10 29:19			
	38:15 44:19			
<u>X</u>	50:17,22			
x 1:2,7 45:16	271(c) 18:8			
	29:20 38:15			
<u>Y</u>	271(e)(5) 9:14			
Y 45:16	282(a) 41:23			
yawning 8:16				
year 37:13,14	<u>3</u>			
45:2	3 2:4			
years 4:16 45:10	30 33:4			
	31 1:9			
<u>Z</u>	395 30:12			
Z 45:17				
	<u>4</u>			
<u>0</u>	40 4:3,5,5 19:13			
	43 2:14			
<u>1</u>	46 36:6			
1 41:23 42:22	49 36:5			
10:13 1:13 3:2				
100,000 37:12	<u>5</u>			
102 32:24 42:3	5/4 17:15			
103 32:24 42:3	50/50 12:24			
11:14 51:15	51 37:4,5			
112 32:24 42:3				
13-896 1:4 3:4	<u>6</u>			
15 2:8	6 9:8,11			
18 11:12	60 4:10 36:10			