

1 MR. GANNON: Yes.

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

4 MR. GANNON: And --

5 JUSTICE SOTOMAYOR: But let's assume --

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

9 JUSTICE SOTOMAYOR: Federal circuit and --

10 MR. GANNON: -- and determined --

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

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

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

25 MR. GANNON: Well --

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

3 MR. GANNON: It -- it --

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

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

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

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

16 JUSTICE SOTOMAYOR: Give me a concrete.

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

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

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

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

10 JUSTICE SOTOMAYOR: Before you --

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

12 JUSTICE SOTOMAYOR: -- time runs out --

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

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

16 MR. GANNON: Uh-huh.

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

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

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

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

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

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

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

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

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

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

17 Here, the --

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

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

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

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

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

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

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

25 The -- the party would go immediately to the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Beeney, you have a minute left.

2 REBUTTAL ARGUMENT OF GARRARD R. BEENEY

3 ON BEHALF OF THE PETITIONER

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

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

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

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

1 properties rights encompass.

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

9 Thank you very much.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 The case is submitted.

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

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