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

2 (11:09 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 16-969, SAS Institute
5 versus Matal.

6 Mr. Castanias.

7 ORAL ARGUMENT OF GREGORY A. CASTANIAS

8 ON BEHALF OF THE PETITIONER

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

11 For three reasons, the Patent Trial
12 and Appeal Board is not authorized to issue
13 final written decisions on fewer than all of
14 the patent claims challenged by inter partes
15 review petitioners.

16 The first is the plain language of the
17 statute. It requires the Board to issue a
18 final written decision with respect to the
19 patentability of "any patent claim challenged
20 by the petitioner." That's also supported by
21 the context of the Act.

22 Second, that plain and inclusive
23 command is not --

24 JUSTICE GINSBURG: And doesn't -- may
25 I just ask you about what you just quoted,

1 doesn't the provision begin "if an inter partes
2 review is instituted"? If there is -- it's
3 instituted, then --

4 MR. CASTANIAS: Yes, that's exactly
5 right, Justice Ginsburg. The -- the statute
6 starts with a conditional. The conditional was
7 met in this case because an inter partes review
8 was -- was, in fact, instituted in this case.

9 The second -- the second reason --

10 JUSTICE SOTOMAYOR: It was only
11 instituted with respect to certain claims. So
12 I have two questions.

13 MR. CASTANIAS: Please.

14 JUSTICE SOTOMAYOR: I'm not at all
15 clear what it is you're challenging here. Are
16 you challenging the Board's right to initiate
17 partial adjudications or are you challenging
18 the fact that they are not addressing all of
19 the claims in their final decision? What is it
20 that you're actually asking us to review?

21 MR. CASTANIAS: Well, we are
22 challenging the latter. Our question presented
23 is focused on the language --

24 JUSTICE SOTOMAYOR: So what is it
25 exactly that you want the Board to do with

1 respect to the claims that it didn't grant
2 adjudication of?

3 MR. CASTANIAS: We -- we believe that
4 Section 318(a) requires the Board --

5 JUSTICE SOTOMAYOR: So you want them
6 to say we didn't grant review on these claims
7 because? Or do you want them to say the patent
8 is valid with respect to these claims that we
9 didn't grant review?

10 MR. CASTANIAS: Well, I think it's
11 actually --

12 JUSTICE SOTOMAYOR: Because the only
13 -- the only power they're given is to decide
14 the patentability of claims. So what exactly
15 is it that you're asking them to do?

16 MR. CASTANIAS: Well, Justice
17 Sotomayor, what we are asking the Board to do
18 is to say, in its final written decision, that
19 we are not finding, for example, claim 4 of the
20 ComplementSoft patent -- as they did in this
21 case, we are not finding that unpatentable.
22 That way, we can then appeal that decision --

23 JUSTICE SOTOMAYOR: Ahh, you want to
24 get around Cuozzo.

25 MR. CASTANIAS: No, I don't.

1 JUSTICE SOTOMAYOR: That -- that's
2 exactly what you want to do.

3 MR. CASTANIAS: That -- that's what
4 the government --

5 JUSTICE SOTOMAYOR: You want to --

6 MR. CASTANIAS: That's what the
7 government says we want to do. That's not what
8 we want to do.

9 JUSTICE SOTOMAYOR: Well, I don't see
10 what else you're trying to do, because what
11 will you do? You will come up on appeal and
12 say the Board was wrong in not instituting
13 review of those other claims? That's what
14 Cuozzo was about, us saying you can't do that.

15 I didn't agree with Cuozzo, so --

16 MR. CASTANIAS: Well, I certainly
17 under --

18 JUSTICE SOTOMAYOR: -- you know, I
19 mean --

20 MR. CASTANIAS: -- I certainly
21 understand that.

22 (Laughter.)

23 JUSTICE SOTOMAYOR: But -- but -- but
24 it is what we said. And -- and so, assuming I
25 stick with precedent on this issue, what other

1 purpose would there be for the Board basically
2 to say we made a decision not to institute
3 review?

4 MR. CASTANIAS: Well, first of all,
5 Justice Sotomayor, if you look at what the
6 Board actually did in saying that they were not
7 going to institute review, the Board
8 effectively did make a patentability
9 determination in what it calls its initial
10 determination. So we have a decision by the
11 Patent -- the Patent Trial and Appeal Board
12 that has, in fact, ruled on the question but
13 because of the way they have ruled on it, we
14 can't appeal it and it can't be estopping. And
15 --

16 JUSTICE SOTOMAYOR: All right. You do
17 want to get around Cuozzo.

18 MR. CASTANIAS: Well, it's --

19 JUSTICE SOTOMAYOR: Because there is
20 absolutely no way that that's anything other
21 than that. What's the -- if you're not
22 challenging their decision not to institute
23 review, why would that make any difference?

24 MR. CASTANIAS: Well, Justice Breyer's
25 opinion for the Court in Cuozzo was very clear

1 in saying that the -- that the determination in
2 that case was a challenge under the Section
3 314(a) institution only.

4 We're not challenging the Section
5 314(a) institution; what we're saying is that
6 whatever institution means, whatever
7 institution means when the Board says we're
8 only instituting as to these particular claims,
9 it doesn't take into account the fact -- and
10 this was not addressed in Cuozzo -- that 318(a)
11 by its terms, by its text, requires a final
12 written decision.

13 JUSTICE SOTOMAYOR: So would the
14 review on appeal be on the basis of a motion --
15 like a motion to dismiss? On the face of
16 whatever you presented the Board with, at the
17 beginning, did the Board have a reasonable
18 basis to conclude that no reasonable basis
19 existed to challenge the validity of that
20 claim?

21 MR. CASTANIAS: No, the review would
22 not be over the reasonable basis or not. The
23 review would be on the question of
24 patentability.

25 JUSTICE SOTOMAYOR: So how could we --

1 how could the appellate court make that
2 determination if there's no record with respect
3 to that issue?

4 MR. CASTANIAS: Well, Justice
5 Sotomayor, there actually --

6 JUSTICE SOTOMAYOR: If --

7 MR. CASTANIAS: -- is a record. I'm
8 sorry, I didn't mean to --

9 JUSTICE SOTOMAYOR: No, no, I --

10 MR. CASTANIAS: -- cut you off.

11 JUSTICE SOTOMAYOR: If the Board
12 didn't institute review of those claims, there
13 would be an incomplete record with respect to
14 those other claims.

15 MR. CASTANIAS: Let's keep in mind
16 that there are -- inter partes review is a --
17 is a much more streamlined process than trial
18 court litigation. And the complaint is much
19 more than notice pleading.

20 In this case, the -- the petition that
21 was filed here was a complete document. It
22 laid out all of the grounds and all of the
23 challenges to all 16 of the ComplementSoft
24 patent claims. It also included a declaration
25 from an expert witness.

1 If you look at the first few pages of
2 the Joint Appendix in this case, which has
3 the --

4 JUSTICE SOTOMAYOR: Well, that's fine.
5 But if the Board didn't institute review of
6 those other claims, the other side has not had
7 an opportunity to present its evidence in
8 contravention of your expert.

9 You're asking the appellate court to
10 decide patentability on the basis of an
11 incomplete, undeveloped record.

12 MR. CASTANIAS: Well, we'll either ask
13 the appellate court to decide patentability or
14 at least decide that we made a case of
15 patentability that ought to be decided.

16 JUSTICE SOTOMAYOR: All right.

17 MR. CASTANIAS: And it --

18 JUSTICE SOTOMAYOR: So why don't you
19 get to the first issue at all?

20 MR. CASTANIAS: Right.

21 JUSTICE SOTOMAYOR: What you really
22 want to say is the Board shouldn't institute
23 partial reviews; it should, if it finds -- I
24 think what you're saying is, once it determines
25 you have enough evidence to challenge one

1 claim, it should hold a hearing on everything.
2 Because without that, you can't really decide
3 patentability in a due process way, in a fair
4 way.

5 So why have you limited your challenge
6 in the way you have? What's the purpose of
7 doing that? And what advantage does that give
8 you?

9 It seems to me that it's an unfair
10 advantage to the other side. It's an unfair
11 advantage to the system. So why don't you just
12 argue what you really want to argue, which is,
13 I should have an opportunity to litigate all of
14 my claims?

15 MR. CASTANIAS: Well, that's exactly
16 -- that is exactly our argument. We should
17 have the opportunity to litigate them in --

18 JUSTICE GINSBURG: But the statute
19 precludes you from contesting the Institution
20 decision.

21 MR. CASTANIAS: Well, the -- the
22 statute precludes me from contesting the
23 Institution decision, but, Justice Ginsburg, I
24 think if we could move to the -- to the
25 regulation that the Patent Office issued in

1 this case, that there -- that the government is
2 relying on.

3 What you see in the -- in the Federal
4 Register, at 77 Federal Register 48702, the
5 government considered the objection that
6 reviews ought to take place with regard to all
7 challenged patent claims.

8 And what you won't see in the Federal
9 Register, where the Patent Office took up this
10 regulation, is any reference to Section 318(a).
11 It was -- that section was never considered.

12 What we have under Section 318(a) is
13 Congress saying to us and to -- and to the
14 public that when an -- when an inter partes
15 review is instituted -- and -- and keep in mind
16 that that's a binary choice --

17 JUSTICE GINSBURG: And it's -- if it's
18 instituted and -- here, it was instituted, but
19 only on two of -- what -- what?

20 MR. CASTANIAS: Nine out of the 16
21 claims.

22 JUSTICE GINSBURG: Nine -- okay. Nine
23 out of 16. So that's -- so 318 relates to when
24 an inter partes review is instituted.

25 MR. CASTANIAS: It's an if/then --

1 it's an if/then. It's a binary, that if it's
2 instituted, then we're entitled to a decision
3 on all challenged patent claims. And that's --

4 JUSTICE GINSBURG: If it's -- if it's
5 instituted on any one, then the decision has to
6 be on all 16?

7 MR. CASTANIAS: The decision has to be
8 on all 16, that's right. That's what Section
9 318 says.

10 JUSTICE GINSBURG: Even though the
11 only one that they're examining is one?

12 MR. CASTANIAS: Well, that is -- that
13 is a determination by the Board at the outset
14 that we apparently have not met a burden of
15 proof. What we end up with under the -- under
16 the scheme that -- that the Patent Office is
17 following right now is a system whereby we were
18 sued -- we were sued in a complaint by
19 ComplementSoft, in a complaint that alleged
20 infringement of -- and I quote the complaint,
21 "at least claims 1, 2, 3, 4, 8, and 10."

22 We asked for review of all 16 claims
23 because of that "at least" language. The
24 Patent Office then only reviewed a certain
25 number of the claims, and then, in their

1 infringement contentions in this case,
2 ComplementSoft asserted every single claim in
3 the patent against us but claim 4.

4 And so, now, what we're left with is a
5 situation whereby we are in the Patent Office,
6 fighting for years in the inter partes review
7 over the patentability of nine of the 16
8 claims, and then we're going to have to go back
9 --

10 JUSTICE SOTOMAYOR: I'm sorry. How
11 did you do that for years? It's a year and a
12 half, isn't it, at most?

13 MR. CASTANIAS: Well, the -- the
14 petition was filed in 2012, and then we've gone
15 up to the Federal Circuit, and now, we're
16 before this Court. But, yes, it's a year and a
17 half at most, three months -- well --

18 JUSTICE SOTOMAYOR: It's usually a
19 year. How long did it take here?

20 MR. CASTANIAS: It took -- they took
21 the maximum amount of time in this case. So --

22 JUSTICE SOTOMAYOR: A year and a half
23 or a year?

24 MR. CASTANIAS: The year, they did not
25 extend the time.

1 JUSTICE SOTOMAYOR: All right.

2 MR. CASTANIAS: So --

3 JUSTICE KAGAN: Mr. Castanias, can I
4 ask how your statutory argument works, given
5 your position on canceled claims?

6 MR. CASTANIAS: Uh-huh.

7 JUSTICE KAGAN: If I understand your
8 position on canceled claims, it's that the
9 Board need not render a decision as to those
10 claims. Is that right?

11 MR. CASTANIAS: That's right.

12 JUSTICE KAGAN: So I guess what's the
13 difference between a canceled claim and a
14 non-instituted claim? In other words, both
15 were originally in the petition. Both are no
16 longer in dispute.

17 So, with respect to the one, you say
18 it's perfectly consistent with the statutory
19 language that the Board did not render a
20 decision. Then why not with respect to the
21 other as well?

22 MR. CASTANIAS: Well, Justice Kagan,
23 there's a world of difference between the two.

24 A canceled claim no longer exists. We
25 can't be sued in the district court on a

1 canceled claim. If the denial of institution
2 means that we have to go relitigate that claim
3 under the same Section 102 and 103 grounds,
4 that we would otherwise be able to challenge
5 them in front of the -- the Patent Trial and
6 Appeal Board --

7 JUSTICE KAGAN: So I understand
8 there's a practical difference, but I was
9 looking for -- because you say that your view
10 is commanded by the statute and particularly, I
11 think, by this phrase "challenged by the
12 Petitioner."

13 But if you were right about the
14 statutory language, that would apply to
15 canceled claims as well? It was challenged by
16 the Petitioner in the original petition.

17 MR. CASTANIAS: Yes, and -- but it's
18 no longer challenged by the Petitioner at the
19 time of the final decision.

20 JUSTICE KAGAN: And this one is also
21 no longer in dispute.

22 MR. CASTANIAS: And it is -- it is an
23 ex-claim. It is no longer a claim. There's
24 nothing -- there's nothing to adjudicate. And
25 that's the -- that's the answer by the --

1 JUSTICE KAGAN: And I think what the
2 Board would say is that the same thing is true
3 here, there's nothing to adjudicate because
4 they have said that it doesn't pass the
5 threshold, so they're not in the business of
6 adjudicating it.

7 MR. CASTANIAS: But it's -- but it's
8 because they've said that, and that's not what
9 the statute says. Now, it's -- our position is
10 --

11 JUSTICE KAGAN: Well, what language in
12 the statute distinguishes between the canceled
13 claim and the non-instituted claim?

14 MR. CASTANIAS: It is challenged by
15 the Petitioner -- and, actually, the word
16 "claim" would work as well because it's no
17 longer a patent claim. It doesn't exist.

18 But there is -- the -- the chapter --
19 the inter partes chapter of the American
20 Invents Act, Justice Kagan, tells a really --
21 it's a very simple, straightforward, and I
22 would dare say elegant story. It starts by
23 defining the scope of inter partes review in
24 section 311. Section 311 is entitled Inter
25 Partes Review.

1 Section 311(b) is entitled Scope. And
2 in that scope provision, it refers to what the
3 petitioner in an inter partes review may
4 request. You then move on to section 312,
5 which defines the requirements of a petition.
6 What does it require the petition to identify?
7 Among other things, each claim challenged.

8 So now, we're still at the beginning
9 of the process, and then 314 --

10 JUSTICE SOTOMAYOR: Why bother -- why
11 bother requiring you to set forth all your
12 grounds for every claim you choose to
13 challenge? Because nothing in this forces you
14 to challenge the claims in inter partes review.

15 MR. CASTANIAS: No, we might select a
16 subset --

17 JUSTICE SOTOMAYOR: So you could
18 choose -- you could have chosen to challenge
19 four and still gone back to district court and
20 challenged all 16 in district court.

21 MR. CASTANIAS: And we -- and we might
22 have to do that --

23 JUSTICE SOTOMAYOR: So this was never
24 -- so this was never intended to capture all
25 litigation over validity?

1 MR. CASTANIAS: Oh, no, of course not.
2 And -- and we would never say that.

3 JUSTICE SOTOMAYOR: So -- so why
4 bother requiring you to set forth all your
5 grounds, particularly if you only really have
6 to do it with respect to one? You could take
7 your strongest case, set forth all the grounds
8 there, and on the other, say, we also want to
9 challenge all the other 15 because, under your
10 theory, you don't have to do anything more than
11 that.

12 You just have to identify one claim
13 that's weak. The Board says, we'll institute
14 review, and then you're entitled to challenge
15 all the other claims that you didn't set forth
16 with particularity.

17 MR. CASTANIAS: And -- and the --

18 JUSTICE SOTOMAYOR: Because the Board
19 has to give you a hearing on those claims
20 anyway.

21 MR. CASTANIAS: And the statute -- but
22 -- but, Justice Sotomayor, keep in mind that
23 the statute invests the Board with the
24 discretion at the outset whether or not, that
25 binary choice, whether or not to institute.

1 And that's the -- and that's an
2 important word in the statute, "whether." It
3 doesn't say whether and if so as to which
4 claims. It is a binary choice, whether. And
5 that's consistent --

6 JUSTICE KENNEDY: Could the Board
7 contact the parties and say, we will not grant
8 review as to all of the challenges claimed, but
9 if you reduce it to just claims 3 and 4, we
10 will hear it? Could the Board do that?

11 MR. CASTANIAS: I -- I think the Board
12 could do that and then leave the Petitioner
13 with the election at that point to say, you
14 know what, we think we'd rather go challenge
15 all the claims in district court and have --
16 have to pay for one proceeding, rather than
17 two.

18 And that's really what this -- this is
19 about, Justice Sotomayor, to go back to your
20 question about what do you really want. We
21 want to have our Section 102 and 103 objections
22 to the ComplementSoft patent heard in a single
23 forum.

24 Is the Patent Trial and Appeal Board
25 more favorable for that --

1 JUSTICE SOTOMAYOR: But you don't --
2 you want that, but it doesn't mean the other
3 side wants that. It doesn't mean that the
4 Board needs that.

5 MR. CASTANIAS: Well, the statute --
6 we believe the statute says that that's what
7 we're entitled to if --

8 JUSTICE SOTOMAYOR: You think it's an
9 inherent right.

10 MR. CASTANIAS: -- if there is a grant
11 --

12 JUSTICE SOTOMAYOR: Could you show me
13 where -- anywhere in this statute the Board is
14 prohibited directly from initiating --
15 initiation -- initiating partial review?

16 MR. CASTANIAS: Well, I --

17 JUSTICE SOTOMAYOR: Of some claims --
18 of some claims or not? And --

19 MR. CASTANIAS: To the extent that
20 we're talking about the sort of partial
21 institution that they're doing right now, where
22 those are not decided in the final decision, I
23 would start with Section 318(a). It -- it --

24 JUSTICE SOTOMAYOR: Assume there's not
25 -- I find that 314 --

1 MR. CASTANIAS: Okay.

2 JUSTICE SOTOMAYOR: -- permits -- it
3 has no direct prohibition of partial
4 institution, that the Board is entitled to do
5 that, then why would we have to read the
6 language "patent claims challenged by the
7 Petitioner" any different than the Board is
8 reading it?

9 The Board is reading it to -- to mean
10 any patent claim challenged by the Petitioner
11 at the review stage.

12 MR. CASTANIAS: Justice Sotomayor, as
13 I was -- when I was engaging in colloquy with
14 Justice Ginsburg earlier and Justice Kagan, I
15 was talking about how the -- the statute tells
16 a really elegant story and -- and the way that
17 the inter partes review is supposed to work.
18 Once -- once a petition is filed, it is that
19 petition that is before the Board.

20 And Section 314, the one that you're
21 -- you're focused on, gives the director the
22 discretion to institute. It's whether to
23 institute. But it is whether to institute that
24 petition. It's not whether to institute with
25 regard to any particular claim.

1 JUSTICE KAGAN: Well, one of the
2 stories that the statute as written seems to
3 tell is of great discretion to the Board with
4 respect to the institution decision.

5 MR. CASTANIAS: Uh-huh.

6 JUSTICE KAGAN: It says you never have
7 to institute; it's your choice whether to
8 institute; you can't get review of the
9 institution decision, which is our Cuozzo case;
10 you get to write your own rules about the
11 institution decision, which is the -- the
12 rule-making delegation.

13 So it's a little bit odd to say, well,
14 here's the one thing you don't have discretion
15 over when it comes to institution: you can't
16 say these claims but not those claims.

17 In a -- in a context in which Congress
18 said the institution decision is really for the
19 Board, it's a discretionary decision that lies
20 in its bailiwick, why should we carve out that
21 one thing?

22 MR. CASTANIAS: Well, excuse me,
23 Justice Kagan, I think I would answer your
24 question by saying that the fact that that
25 discretion is imposed to grant or deny, whether

1 to grant, suggests very strongly as a textual
2 matter that there is not a further secret grant
3 of selective review at that point.

4 But, moreover, why -- why should it be
5 our choice? Why -- why should we be the -- the
6 entity that picks? Well, obviously, the
7 statutory language, we think, supports us. The
8 ordinary principle that the petitioner or the
9 plaintiff in litigation is the master of its
10 complaint, we -- because so many of these cases
11 follow litigation, we know best what claims
12 we're likely to be facing in litigation.

13 And, finally, it serves exactly the
14 two purposes that the majority opinion of the
15 Court in *Cuozzo* identified for the inter partes
16 review system, which is it screens out bad
17 patents while bolstering valid ones.

18 And it's -- it's one of the reasons
19 why you don't have a lot of amicus briefs on
20 either side in this case, is that we're
21 actually in the position of saying, yes, we
22 would like -- we would like to be -- have
23 appellate review and be bound by an adverse
24 decision with regard to claims that the Patent
25 Office did not think met the standard for

1 institution.

2 But that's not -- that's not
3 unreasonable, particularly in this case,
4 because as we pointed out in our reply brief on
5 the merits, the Patent Office in this case, the
6 Board, decided to institute review with respect
7 to claim 4 but not claim 2.

8 Now, claim 4 actually is identical to
9 claim 2, except it contains an additional
10 limitation. Had we been given the opportunity
11 to say to the -- to either to the Board in the
12 process of the litigation leading up to a final
13 decision or to the Federal Circuit on appellate
14 review, we could have said: Look, claim 4, if
15 it falls, claim 2 is going to fall with it.
16 There is no -- there's no earthly reason why we
17 should confirm this claim or reject that claim
18 but allow the other claim to go into --

19 JUSTICE BREYER: The Patent Office --
20 the Patent Office disagrees. So -- so I can't
21 make -- I -- I think the language does,
22 actually, help you. I have no doubt that the
23 language you point to helps you, but where I
24 run into trouble is I can't imagine how a
25 statute is supposed to work where you,

1 objecting, say: I object to 10 claims, all
2 right? Now we look at this and say: You're
3 going to get that grant; if just one of those
4 10 claims is reasonable likelihood, you'll
5 prevail. Okay?

6 MR. CASTANIAS: I'm not sure I -- I'm
7 not sure I follow that.

8 JUSTICE BREYER: So you will -- you
9 will have inter partes review under the first
10 thing, 13, 14, as long as just one, all you
11 have to have is one, and you will get inter
12 partes review.

13 MR. CASTANIAS: I -- it's not "will
14 get"; I "may get."

15 JUSTICE BREYER: You may get. Okay.
16 They say -- now, it's up to the Patent Office.
17 And the Patent Office says, yeah, one, okay.

18 Now, what you're saying is because
19 there was one and nine they're never going to
20 review, they think there's nothing to it.
21 Okay? And it says that their decision not to
22 review will not be appealed, all right?

23 Okay. So they find one, and all of a
24 sudden, they discover they're in court and have
25 to appeal everything on nine claims they

1 thought made no sense. But if they find all 10
2 are no good, then they're out of court, no way
3 to get them in there, dah, dah, dah. Okay?

4 Now, that's the part I have trouble
5 grasping, why someone would write a statute
6 like that.

7 MR. CASTANIAS: Well, Justice Breyer,
8 I think I'd start by urging you to read the
9 statute free of the regulation. Just read the
10 statutory language --

11 JUSTICE BREYER: I have done that. I
12 actually have it written down. My law clerk
13 has it here. But I -- I grant you I have a
14 hard time keeping it all in mind.

15 MR. CASTANIAS: And -- and it's hard
16 to find in -- in the entire statutory scheme,
17 the language of scope, what the "challenged in
18 the petition," even the amendment --

19 JUSTICE BREYER: No, I started by
20 saying --

21 MR. CASTANIAS: -- language didn't
22 specify anything about --

23 JUSTICE BREYER: I started by saying
24 --

25 MR. CASTANIAS: Excuse me.

1 JUSTICE BREYER: -- that I think
2 language does favor you but not definitely. I
3 mean, there is a lot of opening and ambiguity
4 here. And that's why I turned to what I was
5 having trouble with, is trying to imagine what
6 the purpose would be of writing a statute the
7 way you want, though I find it very practical
8 to think of the statute as your opponents want
9 it.

10 Now, that -- that exposing my method
11 of thinking, I'm not wedded to that, but I do
12 want to know what your answer is.

13 MR. CASTANIAS: Well, my -- my answer
14 is that I think that it makes -- it's very
15 practical to read the statute as we're reading
16 it. And I don't think it's ambiguous at all.
17 I think it's -- I think the ambiguity is only
18 injected by the addition of the regulation that
19 the Patent Office has -- has introduced into
20 this, because you won't find a hint of partial
21 institution anywhere in the statute, and you
22 have some strong textual indicators against it.

23 That's why we say that even if we were
24 in Chevron world and even if Section 318 were
25 the subject of a regulation, which it's not, it

1 would still not be within the zone of
2 reasonableness with regard to the -- the scope
3 of the ambiguity.

4 But why would you write it this way?
5 For exactly the two reasons that you -- you
6 wrote for the Court in Cuozzo. IPR screens out
7 bad patents while bolstering valid ones.

8 Look at what the Board did in this
9 case. In their institution decision, which ran
10 22 pages, it's not -- it wasn't just a
11 determination like the statute anticipates. It
12 was a full, written, reasoned decision, made in
13 very short order after three months. The Board
14 moved all of the work that they could have done
15 at the end to this institution phase and said:
16 Yeah, we're not going to institute with regard
17 to claim 2 and claims 10 through 16.

18 But we've still got reasoned decisions
19 on that. But those claims haven't been
20 bolstered, to use the words of -- of Cuozzo.
21 And the -- the decision by the Board to reject
22 our arguments ought to then, if we lose either
23 before the Board in the final decision written
24 or on appeal, it should estop us from
25 relitigating those issues in the federal

1 courts.

2 That was exactly the point of the
3 inter partes review statute, is to make
4 district court litigation simpler by allowing
5 the expert agency to do these types of
6 adjudications. I say that with trepidation
7 because of the first argument -- but they are
8 adjudications of a type that agencies may make,
9 and it streamlines the patent litigation that
10 follows.

11 If there are no further questions,
12 I'll reserve the remainder of my time.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Bond.

16 ORAL ARGUMENT OF JONATHAN C. BOND

17 ON BEHALF OF THE RESPONDENTS

18 MR. BOND: Mr. Chief Justice, and may
19 it please the Court:

20 In establishing inter partes review,
21 Congress gave the PTO an enhanced tool to
22 identify and revisit patent claims that it has
23 determined may not be patentable for certain
24 reasons, and it entrusted the agency with
25 determining when to use that tool and how those

1 proceedings should work in practice.

2 Petitioner's challenge to the scope of
3 the final written decision here, its argument
4 that it should have included more claims in the
5 final written decision, fails because the PTO
6 or the -- the Board here, as under delegated
7 authority, validly determined not to institute
8 on those claims. They were never part of the
9 instituted proceeding, and there's nothing in
10 the statute that requires the Board to
11 institute or to include in its final decision
12 claims that were never part of the proceeding
13 in the first place.

14 Now, the crux of this dispute is, as I
15 think the prior colloquy illustrated, over the
16 partial institution decision. The Board's
17 partial institution decision here to institute
18 review, except as to claims 2 and 11 through
19 16, is not reviewable under Section 314(d) and
20 this Court's decision in *Cuozzo*. And, in any
21 event, it reflects a permissible exercise of
22 the broad discretion conferred on the Board by
23 the statute.

24 JUSTICE GORSUCH: Well, what is the --

25 CHIEF JUSTICE ROBERTS: But what do

1 you do with the problem your friend raised with
2 respect to claim 4 and claim 2? It does seem
3 to put them in a difficult position.

4 MR. BOND: So it's actually not clear
5 that claim 4 is narrower than claim 2. As we
6 explained in the briefing in the court of
7 appeals, it's possible that claim 4 is actually
8 broader in some respects. That's a close
9 dispute that the Board, in its discretion,
10 determined claim 4 presents a -- a close
11 question. Claim 2 does not, as presented to
12 us, present a close question.

13 CHIEF JUSTICE ROBERTS: Well, that
14 doesn't seem to me -- I mean, I know we don't
15 have review of the decision which claims to
16 review, it doesn't seem to me like very
17 helpful, in terms of what the whole process was
18 supposed to accomplish.

19 MR. BOND: So we think Congress vested
20 the Board with discretion of deciding in what
21 circumstances claims are closely-enough related
22 that granting a review on one may -- implies
23 that it makes sense to grant a claim on a
24 related claim -- or grant review on a related
25 claim because they're so closely related.

1 Here, the Board determined that the
2 request for review on claim 2 failed because
3 the petition failed at the threshold. It
4 didn't identify specific references in the
5 prior art that rendered claim 2 obvious over
6 the prior art.

7 With respect to claim 4, the petition
8 had made a closer showing. Now, that's a
9 function of the petition.

10 JUSTICE KENNEDY: Well, why couldn't
11 the Board just -- just say we -- we decline to
12 grant it unless you reduce the -- unless you
13 eliminate this claim?

14 MR. BOND: So, we think the Board
15 could do that, and we think that the Board has
16 that authority to say we're denying review
17 across the board, but we -- and on Petitioner's
18 view, I think that he conceded that that --

19 JUSTICE KENNEDY: But then we can rule
20 against you, and there's no real problem.

21 MR. BOND: We -- we could deny review
22 across the board, but if you tailor your
23 petition, we could grant review in that
24 circumstance.

25 But that, we think, illustrates the

1 artificiality of the Petitioner's position that
2 the Board could get to the same result, just
3 through a more cumbersome, multistage process
4 of saying, we're not going to grant it this
5 way, but if you revise and resubmit, we will
6 then entertain your challenge.

7 Here, we understand that Congress
8 designed --

9 JUSTICE KENNEDY: Well, it doesn't
10 because the challengers might say, in that --
11 in that event, we'll just go to the district
12 court. We don't want -- we don't want it.

13 MR. BOND: Sure, and they could do
14 that in this instance. A challenger here who's
15 dissatisfied with the Board's decision about
16 the scope of review can say, you know what,
17 it's not worth our time, we can settle with the
18 -- the Patent Owner our -- our IPR dispute, we
19 can agree not to pursue it and can proceed in
20 litigation.

21 And if, as in this case, the alleged
22 infringer was sued in a -- in a district court
23 infringement case and then brings an I -- IPR
24 proceeding, there's no stay of the district
25 court proceeding, at least mandated by the

1 statute, so they can proceed in the district
2 court to litigate as they had -- already had
3 been doing.

4 CHIEF JUSTICE ROBERTS: I -- I thought
5 roughly half of the proceedings were stayed?

6 MR. BOND: As matter of the district
7 court's discretion, I think a little over
8 50 percent of contested stay motions are
9 granted, but, of course, if it's the alleged
10 infringer who went to the IPR or went to the
11 PTO to ask for an IPR and then says, look, I'm
12 done with IPR, they wouldn't grant review on
13 the claims that I would like, they can go back
14 to the district court and say, I no longer need
15 a stay if one was granted in the first place,
16 let's proceed to litigate this here in this
17 infringement suit.

18 And so we think that the statute is
19 perfectly consistent with inter partes review
20 being conducted on a partial institution basis,
21 and at a minimum, as I think was discussed
22 earlier, no provision of the statute clearly
23 prohibits what the -- what the PTO is doing
24 here.

25 JUSTICE ALITO: Well, what about

1 318(a)? If we look at that by itself, where is
2 there any ambiguity? If an inter partes review
3 is instituted and not dismissed under this
4 chapter, the Patent Trial and Appeal Board
5 shall issue a final decision with respect to
6 the patentability of any patent claim
7 challenged by the Petitioner.

8 What is ambiguous about that?

9 MR. BOND: So a couple of things.
10 First, we'd say, as Petitioner invited the
11 Court to do, read through the statute
12 sequentially. We set it forth starting at page
13 11A of our brief in the appendix. Read through
14 and see what --

15 JUSTICE ALITO: Well, that really
16 wasn't my question. If we look at that
17 language by itself, where is there ambiguity?

18 MR. BOND: Sure. If -- if you look at
19 the four words, "challenged by the Petitioner,"
20 in isolation, they don't answer any of the
21 questions about the scope of what we mean by
22 challenged by the Petitioner.

23 So, if you look at those four words in
24 isolation, they don't tell you standing alone
25 challenged in an IPR proceeding or this IPR

1 proceeding as distinct from in an infringement
2 suit where you also challenged them. It also
3 doesn't tell you challenged on a ground
4 permitted within IPR.

5 JUSTICE ALITO: You think that's --
6 you think that is a serious interpretation of
7 this challenge -- they challenged it in a
8 discussion in their office. They challenged it
9 in a discussion in a bar. It means challenged
10 it in this proceeding. What else could it
11 mean?

12 MR. BOND: Well, you know that because
13 of context. It also means challenged on a
14 ground within IPR, challenged timely and
15 challenged by a petitioner who's not estopped
16 from doing so.

17 And the reason that question isn't
18 hard is because of the context of the statute,
19 including the opening clause that takes as its
20 starting premise --

21 JUSTICE ALITO: You think it's not
22 hard?

23 MR. BOND: We think --

24 JUSTICE ALITO: You think that's not a
25 hard question at least?

1 MR. BOND: No, we think what's not
2 difficult is the question you posed -- or the
3 question that I suggested of we know that they
4 mean challenged in an IPR proceeding and in
5 this IPR proceeding. That question we don't
6 think is difficult because of the context,
7 because of the opening clause referring to "if
8 an IPR proceeding is instituted," we're
9 referring to that IPR proceeding.

10 And it is --

11 JUSTICE BREYER: Is this how you would
12 read it -- and don't just agree with me because
13 it sounds as if I agree with you, I just want
14 to know what you -- don't get me off on a
15 mistake if it is -- if an inter partes review
16 is instituted, any patent claim that is the
17 subject of that inter partes review challenged
18 by -- in other words, it is understood that the
19 word "patent claim" refers to a claim that
20 inter partes review has been granted in respect
21 to.

22 MR. BOND: We --

23 JUSTICE BREYER: Is that right or
24 wrong?

25 MR. BOND: We think that's essentially

1 right. I -- I would say that another way of
2 framing it is challenged by the Petitioner
3 implicitly within the instituted proceeding,
4 referred to in the opening clause. So I think
5 we're -- we're saying --

6 CHIEF JUSTICE ROBERTS: That's more of
7 a stretch from the -- it's a fairly complicated
8 and refined stretch of any claim challenged by
9 the Petitioner.

10 MR. BOND: So we think it's actually
11 consistent with ordinary usage to say, at the
12 merits phase of a discretionary review
13 proceeding, that when you say challenged by the
14 Petitioner, you mean within the merits phase
15 that the opening clause presupposes has taken
16 place.

17 When this Court grants certiorari --

18 JUSTICE BREYER: I put it -- I put it
19 my way because the word "any" is like Exhibit
20 Number 1 for a word, the scope of which is very
21 often ambiguous in a statute.

22 If you can eat any fish, you can eat
23 any fish. Think about that one.

24 MR. BOND: So --

25 (Laughter.)

1 JUSTICE BREYER: All right. Now --
2 now my -- my point is we have loads of statutes
3 where the word "any" has a scope and the scope
4 is determined by the context of the statute.
5 And so what I'm thinking in the back of my mind
6 is this is one of those, but as I say, don't
7 let me get off on a wrong foot.

8 MR. BOND: So we do agree that any
9 encompasses anything within the scope that the
10 context of 318(a) and its broader context of
11 the scheme encompasses. So it's any claim
12 within the instituted proceeding.

13 But just focusing on that word "any,"
14 I think it's helpful to look past the language
15 the Petitioner quotes to the -- the end of
16 318(a). It says "any patent claim challenged
17 by the Petitioner and any new claim added under
18 section 316(d)."

19 What "any" is doing here is not saying
20 this is an all-encompassing review provision
21 that requires this final written decision to
22 encompass anything in the universe. It's doing
23 something much more limited.

24 The tail end of this sentence in
25 section 318(a) is simply clarifying that, when

1 you get to the final decision, there are two
2 kinds of things the Board needs to address. It
3 needs to address those claims that were
4 actually challenged within the instituted IPR,
5 if there are any left, and it needs to address
6 any substitute claims added by amendment or
7 proposed to be added by amendment under 316(d),
8 if there are any.

9 JUSTICE ALITO: If Congress wanted to
10 say what you think this means, why in the world
11 would they phrase it the way it is phrased in
12 318(a)? Why wouldn't they say with respect to
13 the patentability of any claim found by the
14 director to have at least some likelihood of
15 success? Or any claim on which review was
16 granted? Why in the world would they say any
17 patent claim challenged by the Petitioner?

18 MR. BOND: Well, two points, Your
19 Honor. There are several things that can cause
20 a claim not to be in the case by the end. The
21 fact that the PTO or the PTAB on delegated
22 authority didn't institute is one, but also
23 canceled claims and also settled claims.
24 Parties can settle not just the entire dispute
25 but also their dispute over individual claims.

1 Any of those things would mean that
2 the claim is no longer challenged by the
3 Petitioner at the time of the final decision.

4 JUSTICE BREYER: It doesn't actually
5 have to mean that. I just thought there's
6 another tack here, that if you're voting in
7 Congress on this, you actually don't know what
8 you think of in respect to the answer to this
9 question we are now litigating.

10 And since you don't know, the best
11 answer, from the point of view of the agency,
12 you use a word like "any" and "any claim," as I
13 say, filled with ambiguity, so that the agency
14 can decide which way it wants to go. Is there
15 any indication of that?

16 MR. BOND: So we -- we do think that
17 Congress, indeed, left these matters to the
18 agency in 316(a). It's just like the question
19 that was presented in *Cuozzo*. No statutory
20 provision in *Cuozzo* specifically addressed the
21 claim construction standard.

22 CHIEF JUSTICE ROBERTS: Well, but
23 that's -- so you're saying, if I understand
24 your answer to Justice Breyer, that Congress
25 deliberately adopted an ambiguous term in the

1 statute so that the agency would determine what
2 it meant.

3 It's one thing to say, you know, the
4 agency should determine which patent claims
5 challenge it will decide in --

6 MR. BOND: You --

7 CHIEF JUSTICE ROBERTS: Or which ones
8 that aren't decided will be considered? It's
9 another thing to decide let's pick a word
10 that's so vague that nobody will be able to
11 figure it out, and we'll leave it to the
12 Commission.

13 MR. BOND: No, and let -- let me be
14 clear. Our point is not that Congress enacted
15 on purpose a deliberately ambiguous statute.
16 Our point is that the statute Congress enacted
17 is consistent with partial institution. But to
18 the extent there's a question about that,
19 Congress left those questions to the agency.

20 JUSTICE SOTOMAYOR: Well, there is one
21 very telling sign that the "any patent claim
22 challenged by the Petitioner" has a different
23 meaning, and that's in 314 itself, which says
24 "claims challenged in the petition."

25 If Congress intended claims challenged

1 in the petition to be a part of 318, it could
2 have used exactly the same words.

3 MR. BOND: That's exactly right. And
4 that, I think, is the second answer to Justice
5 Alito's question, the reason to think that
6 Congress intended this result is that Congress
7 used this very phrase that would encompass
8 Petitioner's position in a different phrase of
9 the statute.

10 JUSTICE ALITO: But you think
11 "challenged by the Petitioner" is narrower than
12 -- I'm sorry, any change -- "any patent claim
13 challenged by the Petitioner" is narrower than
14 the words that are used in 314?

15 MR. BOND: So we think it is narrower
16 in the circumstance for the same reason the
17 Petitioner does, that it includes the
18 possibility that claims will drop out along the
19 way.

20 And, again, "challenged by the
21 Petitioner" standing alone is capaciously broad
22 and could encompass any number of things. It's
23 context that tells you that it's narrower.

24 JUSTICE GORSUCH: But doesn't that
25 exactly work the other way around? Of course,

1 by the end, you're only going to resolve the
2 challenges that remain pending. When you're
3 doing the Institution decision of inter partes
4 review, you're going to look at the petition.
5 Couldn't it be just that simple?

6 And doesn't 314 kind of cut against
7 the government in some ways too by suggesting
8 that all the PTO needs to do is decide whether
9 there is one claim that isn't frivolous, that's
10 -- that's the sum total of its job under the
11 plain terms.

12 MR. BOND: So --

13 JUSTICE GORSUCH: And that -- and that
14 beyond that, it need not go further.

15 MR. BOND: So two points. First, we
16 agree that 314 is focused on the Institution
17 phase and, therefore, the focus is on the
18 petition --

19 JUSTICE GORSUCH: Right.

20 MR. BOND: -- whereas in 318 --

21 JUSTICE GORSUCH: It's what -- what's
22 left.

23 MR. BOND: Right, it's what's left of
24 the proceeding.

25 JUSTICE GORSUCH: So that's why

1 there's a difference in language there, you
2 agree.

3 MR. BOND: Right, exactly. And we
4 think that that underscores that what's left
5 can include the fact --

6 JUSTICE GORSUCH: But how then do we
7 deal with the fact that in 314, we have all the
8 -- all the PTO has to do is decide whether
9 there is one non-frivolous claim. It's a
10 thumbs-up or a thumbs-down decision --

11 MR. BOND: Because --

12 JUSTICE GORSUCH: -- that's
13 anticipated there, not a -- not a
14 claim-by-claim examination.

15 MR. BOND: Well, two points, Your
16 Honor. First, what Congress included there is
17 simply a floor. It's phrased as a prohibition
18 that the PTO and, on delegated authority the
19 Board, may not institute, unless it finds that
20 at least one of the claims has a reasonable
21 likelihood of being found invalid.

22 It doesn't say that the Board must
23 therefore institute or must do an up-or-down
24 determination.

25 JUSTICE GORSUCH: No.

1 MR. BOND: We think that that leaves
2 room for the Board to say we can't institute if
3 we don't find at least one, but you know what?
4 We're going to conserve our resources, as
5 316(b) tells us in the adopting regulations and
6 focus then on the claims --

7 JUSTICE GORSUCH: Well, help me --
8 help me out with 316 then if that's where you
9 are going to go to. Where do you -- where do
10 you see the authority for the regulations that
11 the director is proscribed here?

12 MR. BOND: Sure. They're in two
13 provisions, principally 316(a)(4), which was
14 the same provision at issue in Cuozzo.

15 JUSTICE GORSUCH: Now, (a)(4), that --
16 my problem with that, where I get stuck is that
17 (a)(4) concerns establishing a governing inter
18 partes review. And we're not at that stage
19 yet. We're at the decision whether to
20 institute inter partes review.

21 MR. BOND: Sure.

22 JUSTICE GORSUCH: I would have thought
23 you'd have to look to (a)(2) rather than
24 (a)(4).

25 MR. BOND: Right, so (a)(2) is the

1 second provision, but we do think that (a)(4)
2 encompasses this because it's establishing and
3 governing inter partes review. And the Board's
4 determination whether to institute on a
5 particular claim is part of that universe of
6 things that was granted to the Board.

7 But certainly also (a)(2) because that
8 establishes or gives the Board authority to
9 establish rules that govern the showing of
10 sufficiency that needs to be made. This is on
11 17(a) of the -- defense.

12 JUSTICE GORSUCH: I'd agree with you
13 that you've given great discussion on the
14 standards for showing sufficient grounds to
15 institute a review. I'm not sure, I guess you
16 can help me on how that also includes the
17 authority whether to grant review of this or
18 that claim, the weeding out process.

19 MR. BOND: Sure.

20 JUSTICE GORSUCH: I can see how it
21 might affect the reasonable likelihood inquiry
22 and how the director is going to go about doing
23 that, but I -- I guess it's a little less clear
24 to me how it also grants him authority or her
25 authority to decide which claims to proceed

1 with.

2 MR. BOND: Sure. Because -- well,
3 what it says is the standards for showing of
4 sufficient grounds. And those standards for
5 showing sufficient grounds, that's in (a)(2).

6 JUSTICE GORSUCH: Yeah.

7 MR. BOND: And what the Board's
8 regulation is doing is preserving the Board's
9 ability to assess sufficiency on a
10 claim-by-claim basis. We think that's
11 encompassed within (a)(2).

12 JUSTICE GORSUCH: Well, but -- but
13 314(a) seems to proscribe that -- that
14 question, at least with respect to one claim.
15 It speaks to that very issue.

16 MR. BOND: Well, it sets a floor, just
17 like the outer time limits that Congress
18 required in 316(a)(11), set an outer time
19 limit, but don't preclude the Board from
20 setting a lower time limit on the completion of
21 the final written decision.

22 The same we think is true of 316 -- or
23 314(a). It said you may not institute unless
24 at least one of these claims, you conclude, is
25 worthwhile because it clears that reasonable

1 likelihood threshold.

2 But especially in the context of the
3 scheme that gives the Board complete discretion
4 to deny review entirely, we think it's
5 improbable that Congress would have tied the
6 Board's hands in this one respect.

7 Moreover, not just to say you don't
8 have --

9 JUSTICE GORSUCH: Is there some
10 inconsistency with 304 where you're allowed --
11 the director gets to decide which question
12 specifically the director wants to take up?
13 There seems to be an express grant to the
14 director there to do exactly what you want to
15 do here. And is its absence here suggestive?

16 MR. BOND: We don't think so, Your
17 Honor. I think the scheme of ex parte
18 reexamination is fundamentally different in
19 that its parties are suggesting to the Board or
20 the Board on its own initiative saying we're
21 going to look at a particular substantial new
22 question of patentability that has been raised,
23 and we'll look at which particular claims we
24 think are implicated by that.

25 JUSTICE GORSUCH: It's not just claims

1 in 304, it is questions. And so the director
2 can pick and choose which questions. And it is
3 granted that express authority.

4 And normally we -- we think that when
5 it's granted in one place but not clearly
6 granted in the other that that -- that that
7 intends a difference.

8 MR. BOND: So, at a minimum, that
9 difference doesn't clearly preclude the Board
10 here under 314(d) and its regulatory authority
11 from saying we're going to treat this as a
12 floor, that we are told by Congress we can't do
13 it unless we clear this floor, but we're going
14 to hold patents or IPR petitions to a higher
15 standard and evaluate them claim by claim
16 because that's consistent with the purpose as
17 Congress told us in 316(b) to consider in
18 adopting our regulations.

19 And those purposes boil down to, as
20 the Court underscored in *Cuozzo*, making sure
21 we're actually improving patent quality and
22 doing so efficiently.

23 Now, the Board's partial institution
24 approach is perfectly consistent with both of
25 those aims. It focuses its energies on those

1 patent claims it determines actually have a
2 reasonable likelihood of being invalidated
3 without wasting time on other claims.

4 The Petitioner's all-or-nothing
5 approach puts the Board to an untenable choice;
6 either it wastes time on claims it's already
7 determined don't have a reasonable likelihood
8 of being invalidated at least based on the
9 arguments presented in the petition, or it
10 doesn't use this new tool at all and all of the
11 work of creating inter partes review was for
12 nothing.

13 And so, in either event, we're not
14 getting the benefit or achieving either of the
15 goals that Congress had in mind.

16 And there --

17 JUSTICE ALITO: Is there anything in
18 the statute that would prevent the Board, if it
19 is required to render a final decision on all
20 claims initially challenged by the Petitioner
21 from instituting a streamlined procedure for
22 dealing with the claims that were found at the
23 outset to have no likelihood of success?

24 Why does it need to go through a full
25 proceeding with respect to those claims? Can

1 -- can it not just say in a summary form we
2 found that these have no likelihood of success?

3 And then that could be appealed to the
4 Federal Circuit and the Federal Circuit could
5 decide whether that -- that determination was
6 permissible.

7 MR. BOND: So a couple of points, Your
8 Honor. First, at the institution phase, the
9 Board is not deciding the merits, it is
10 deciding not to decide the merits. It is
11 saying you haven't for some reason made a
12 sufficient showing to make us convinced that it
13 is worth our time to investigate the merits of
14 your claim.

15 They can also deny, however, for
16 additional reasons, irrespective of the merits.
17 They might say, just as all agree they can deny
18 the petition entirely apart from the merits,
19 they might say this patent claim is going to be
20 very time-consuming and is not going to advance
21 the goals of the statute, so we're going to
22 deny review on that ground.

23 So there is not necessarily a ruling
24 on the merits at all, and it's fundamentally
25 different than a district court, say, folding

1 in a 12(b)(6) or summary judgment ruling
2 because it's based on the agency's discretion,
3 not just the merits.

4 JUSTICE KAGAN: Or couldn't the agency
5 at that point say, you know, the ground on
6 which you charge this patent is invalid is not
7 a ground we can review at this time?

8 MR. BOND: Right. Exactly right.
9 They could as well say that you have challenged
10 this on 112 under indefiniteness or under
11 Section 101, and it's a law of nature
12 challenge, and that's not properly presented to
13 us. They could say on those grounds or you are
14 estopped and we're not going to consider
15 those -- those --

16 JUSTICE KAGAN: And then it would
17 seem, I mean, that would be a strange kind of
18 thing to say, well, you can't challenge on that
19 ground, but we're going to issue a decision as
20 to patentability.

21 MR. BOND: Exactly right. So you're
22 forced with either the PTO -- the PTAB either
23 deciding we're not going to review this ground
24 and then that gets baked into the final
25 decision and treated as a merits ruling, which

1 can then be appealed to the Federal Circuit and
2 creates circumvention of Cuzco, or you're
3 forcing the Board to decide the merits,
4 notwithstanding the fact that it didn't
5 institute review, didn't get submissions from
6 the parties at the merits stage, and didn't
7 apply the different standards that apply at the
8 merits stage of IPR proceedings.

9 CHIEF JUSTICE ROBERTS: It -- it
10 didn't institute review, but it issued a quite
11 lengthy decision addressing the issues, right?

12 MR. BOND: It issued a lengthy
13 decision, about half as long as the final
14 decision, but they're different in kind. And
15 I'd like to emphasize a few ways that they
16 differ.

17 So, importantly, when the Board denies
18 review, it often is denying review for some
19 threshold reason based on a failing in the
20 petition presented to it, not deciding
21 patentability at the end.

22 So a good example here is at Petition
23 Appendix page 115a to 116a where the Board
24 denies institution of claims 11 through 16.
25 Those claims are what are known as

1 means-plus-function claims, where under Section
2 1112(f) -- or 112(f) their meaning is
3 determined by a particular structure set forth
4 in the specification, not in the claim itself.

5 Accordingly, the Board's regulations
6 -- and this is 42.104 -- require a petition for
7 inter partes review to identify what structure
8 do you think determines the construction of
9 this claim so that we, the Board, can determine
10 if it's unpatentable?

11 The Board said at 115, the petition
12 didn't identify what structure it was that the
13 petitioner thought informed the construction or
14 the interpretation of these claims.

15 So a fortiori, we can't determine
16 patentability based on your submission.

17 CHIEF JUSTICE ROBERTS: How often --
18 how often does it issue decisions -- written
19 decisions at this stage in determining whether
20 to institute inter partes review?

21 MR. BOND: So I -- I don't have
22 statistics on how frequently it issues
23 decisions of this kind. We think it is the
24 Board's ordinary practice, and we think for two
25 reasons that is actually a good practice that

1 the Board, in its discretion, has -- has
2 adopted.

3 It's helpful for the Board itself
4 because, if the Board institutes review, it
5 then -- the judges of the panel or whatever
6 panel is assigned to it, then have a very short
7 window set by statute to determine the merits
8 of this proceeding after the administrative
9 trial is complete.

10 And, second, it's beneficial for the
11 parties to this case and other cases to know
12 what it is the Board is looking for in this
13 relatively new statutory scheme when it
14 institutes review and exercises its discretion.

15 That discussion at page 115A of the
16 petition appendix is illustrative. It shows
17 other parties in the future. If you actually
18 don't follow our rule and include the kind of
19 structure that we say you must, because 112F
20 requires us to look at that in construing the
21 claim, we are unlikely to grant review on your
22 petition.

23 That's instructive to the bar and the
24 patent bar and to the patent community --

25 JUSTICE SOTOMAYOR: I thought --

1 MR. BOND: -- to know how --

2 JUSTICE SOTOMAYOR: -- that that was
3 the very reason given by the Board in
4 encouraging these kinds of opinions to be
5 written.

6 MR. BOND: That's precisely right,
7 that it's useful to the patent -- it's useful
8 to the patent bar and useful to the community
9 to know --

10 JUSTICE SOTOMAYOR: So the patent
11 Board basically told the public, we're issuing
12 these decisions for educational purposes?

13 MR. BOND: That's right, it -- to
14 educate the -- the -- the public and the patent
15 bar and also itself and its panels on what the
16 nature of this suit is or what -- what this
17 dispute is and what it looks for in the future.

18 But, in any event, even if the patent
19 -- even if the Board could adopt a more
20 efficient method of partial institution, we
21 think that's beside the point of the question
22 presented to you today.

23 Whether the Board could achieve more
24 efficient partial institution with a thumbs up
25 or thumbs down is not a reason for the Board to

1 jettison that system entirely and adopt this
2 much more inefficient approach where it lacks
3 discretion over the one thing that is common to
4 patent law. The default rule in patent law is
5 that claims are evaluated independently. In
6 litigation, each claim is independently
7 presumed valid under Section 282.

8 It would be highly incongruous for
9 Congress to say, when the expert agency is
10 reviewing patents it has issued, it lacks
11 discretion to constrain the scope of its review
12 and lacks discretion to do what is ordinarily
13 the rule in patent law. And indeed, the rule
14 in discretionary review generally, we're not
15 aware of any context in which a tribunal vested
16 with discretionary review authority is put to
17 this choice of reviewing all --

18 JUSTICE GORSUCH: What do you say
19 about our -- our last argument, where a lot of
20 our attention focused on Congress's putative
21 intention to -- to want to move things to an
22 expert agency and -- and speed things along,
23 make it more efficient?

24 Could -- could that be a reason here
25 why Congress might have wanted the Patent

1 Office to review any -- and -- and issue a
2 final decision on any and all claims brought to
3 it?

4 MR. BOND: So, two points. We don't
5 think that it would be more efficient in a
6 sense of making things go faster. If the Board
7 --

8 JUSTICE GORSUCH: No, I -- no, surely,
9 not necessarily efficient from the -- the PTO's
10 perspective, but efficient from the economy's
11 perspective.

12 MR. BOND: So -- so then two points on
13 the -- on the economy benefit point. It is not
14 going to benefit the economy first if the PTO
15 is put to a choice between not instituting
16 review at all, that is no benefit to the
17 economy, or spinning its wheels on claims in a
18 patent on --

19 JUSTICE GORSUCH: But it could do what
20 Justice Kennedy said. That -- that would --
21 everybody agrees would remain an available
22 choice.

23 MR. BOND: It could indeed do that,
24 and that, we think, highlights that this is
25 consistent with Congress's goals. If it could

1 achieve -- achieve the same result in two more
2 cumbersome steps -- two more cumbersome steps,
3 it makes sense that Congress did not intend to
4 preclude it from doing so through this natural
5 --

6 JUSTICE GORSUCH: Well, it would
7 require consent by the -- by the litigant in
8 that case, where as here, this litigant took
9 the view that I really want an adjudication on
10 everything that -- would it be crazy to suppose
11 that Congress might have wanted that as a way
12 to achieve maximum efficiency through this
13 administrative process?

14 MR. BOND: So --

15 JUSTICE GORSUCH: From the -- from the
16 economy's perspective?

17 MR. BOND: We don't think the consent
18 issue is fundamentally different, because if a
19 petitioner, again, comes in and says, I want
20 IPR on claims 1 through 10, and the Board says,
21 we will give you IPR on one through five, the
22 petitioner can, in effect, walk away if they
23 can just simply agree with the patent owner to
24 say, look, we drop our IPR challenge, I'll go
25 back to the infringement suit where you sued me

1 and presumably want to litigate, and we will
2 litigate that there. That's permitted under
3 Section 317.

4 Now, to be sure, the Board at that
5 point can proceed to adjudicate in its own --
6 within its own proceeding the underlying
7 claims, but that has nothing to do with the
8 rights or a consent of the parties inter se.

9 And I think to the -- the underlying
10 question here is isn't this meant as a
11 substitute for litigation? We think the
12 statute itself makes clear that that's not the
13 design of inter partes review.

14 The limited scope -- so it's limited
15 to 102 and 103, it's limited to particular
16 prior art, and it's limited only to particular
17 claims that this petitioner brings to the PTO.
18 It can't be viewed as a substitute for
19 litigation such that someone could reasonably
20 look at the scheme and say Congress wanted all
21 of these claims decided either in one forum or
22 the other. It's baked into the scheme that
23 there will be this potential for some claims to
24 be reviewed by the PTO and others in court.

25 And partial institution actually

1 enhances the efficiency and harmonious working
2 of these two things because the -- the Board
3 can say, look, you've got a solid challenge on
4 claim number 1, we will review that. The rest
5 of them, we don't think have met our standard,
6 or we exercise our discretion not to review
7 them. We're releasing those to the district
8 court, so the district court litigation can
9 proceed, and we will deal with this one, and
10 the district court can decide what to do.

11 Petitioner's position, by contrast,
12 creates, I think, an incentive at least for
13 parties to seek to tie up district court
14 litigation by seeking an IPR.

15 And the example we gave in, I think,
16 page 39 and 40 of our brief is where an -- an
17 entity sued for infringement, and then, on a
18 strong patent claim, can take that claim to
19 IPR, add on some weak and vulnerable claims and
20 ask the PTO to grant review.

21 If the Board's only choice is to grant
22 all or nothing and it grants all, then the
23 district court is very likely we think -- at --
24 at least there's a possibility, that it will
25 stay the district court litigation, and the

1 alleged infringer has effectively slowed down
2 the district court litigation over claims that
3 had nothing to do with that suit.

4 That possibility, we think, is
5 inherent in petitioner's approach that puts the
6 agency though that kind of choice, whereas --

7 JUSTICE GINSBURG: Are you relying at
8 all on the notion that this entire inter partes
9 scheme is to give the agency a chance to take a
10 second look to correct its error, therefore, it
11 should not be the petitioner who controls what
12 the agency will consider?

13 MR. BOND: Yes, Your Honor. And I
14 think that's an important feature of inter
15 partes review, that this notion of master of
16 the complaint just doesn't translate here, one,
17 because Section 311(b) doesn't say you may get
18 review of anything you want, but you may get
19 review only of these kinds of things, but more
20 fundamentally because the point of this scheme
21 is to give the agency an opportunity to
22 reconsider decisions in the form of patent
23 claims it has previously issued.

24 It doesn't make any sense to give the
25 Board complete --

1 JUSTICE GORSUCH: It can --

2 MR. BOND: -- discretion --

3 JUSTICE GORSUCH: -- it can still do
4 that through ex parte proceedings reviewability
5 on its own any time, right?

6 MR. BOND: Well, ex parte --

7 JUSTICE GORSUCH: Those -- those still
8 exist? They --

9 MR. BOND: They do still exist. They
10 have a different standard, and Congress thought
11 that wasn't sufficient and adopted this
12 additional mechanism.

13 JUSTICE GORSUCH: Right.

14 MR. BOND: And so Congress, in giving
15 the agency authority and discretion to deny
16 review entirely and so much discretion over the
17 way these proceedings work, we think it's
18 simply improbable that Congress would have
19 given the agency all the discretion, except
20 over the scope of which claims it will
21 institute and particularly given that the
22 background rule of patent law is that it will
23 -- it will examine claims one by one.

24 If there are no further questions.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Castanias, four minutes.

4 REBUTTAL ARGUMENT BY GREGORY A. CASTANIAS
5 ON BEHALF OF THE PETITIONER

6 MR. CASTANIAS: Thank you, Mr. Chief
7 Justice.

8 I have three specific responses to
9 points made by my friend and then four broader
10 points that I hope I will be able to get in, in
11 my limited time.

12 Justice Kagan, your colloquy with my
13 friend here was about 101 and 112. That's
14 answered by the scope provision of Section
15 311(b). That limits inter partes reviews to
16 102 and 103 challenges in the first instance.

17 Mr. Chief Justice, you had a colloquy
18 with my friend about the lengthy decision that
19 was entered at the institution phase here. And
20 my friend responded to you that this was a
21 failure to follow the rules of the tribunal.

22 This was a merits decision that was
23 made. It said that we had failed to show the
24 corresponding structure, which is a requirement
25 of the law under Section 112-6. And if we had

1 had a challenge to that that we wanted to
2 appeal, we should have been able to have that
3 finalized, it -- via estopping, and also
4 appealable for us.

5 Justice Sotomayor, you asked the
6 question about what the education purposes of
7 the institution decision. Our point is that
8 education can come from an appealable and
9 estopping decision.

10 Now, the broader points, Justice
11 Breyer, you, in your colloquy with my friend,
12 rewrote the statute for him to get to the place
13 he wanted to go. You said the statute should
14 be read as "any patent claim that is the
15 subject of inter partes review and" -- that's
16 not what the statute says.

17 JUSTICE BREYER: No, I just mentioned
18 that the word "any" is ambiguous.

19 MR. CASTANIAS: Well, it is only
20 ambiguous absent context. And as we showed,
21 the Rosenwasser case, when you have "shall" and
22 "any" in the same way that that minimum wage
23 statute was -- was worded, the "any" here
24 doesn't mean you may have any vegetable on the
25 menu. It doesn't -- that obviously doesn't

1 mean you can -- you -- you must have
2 everything --

3 JUSTICE BREYER: Just ambiguous in
4 between whether they are referring to a claim
5 in which it has been granted or whether they
6 are referring to any claim in the petition.

7 MR. CASTANIAS: Well --

8 JUSTICE BREYER: Ambiguous as to
9 between those two things, it seemed ambiguous.

10 MR. CASTANIAS: And that is where,
11 Justice Breyer, this Court's decision in
12 Utility Air, that made clear that a statutory
13 provision that may seem ambiguous in isolation
14 is often clarified by the remainder of the
15 statutory scheme because only one of the
16 permissible --

17 JUSTICE SOTOMAYOR: Let me ask you --

18 MR. CASTANIAS: -- meanings produces
19 the substantive effect.

20 JUSTICE SOTOMAYOR: You talked about
21 canceled claims. How about settled claims?
22 Say, in the middle of the proceedings, you
23 settle a claim.

24 Under your theory, the Board would
25 still have to address that?

1 MR. CASTANIAS: I -- I think that if
2 we are saying we are no longer challenging
3 that, we -- it's no longer a claim challenged
4 by the petitioner. The settlement presumably
5 --

6 JUSTICE SOTOMAYOR: It's in the
7 petition.

8 MR. CASTANIAS: The settlement
9 would --

10 JUSTICE SOTOMAYOR: What gives you a
11 right to drop it then?

12 MR. CASTANIAS: Because the language
13 of 318(a) is "by the petitioner." And that's
14 what the context tells us about that.

15 JUSTICE KAGAN: Mr. Castanias, while
16 we're on the statute, I understand that this is
17 your argument for why there has to be a final
18 decision with respect to every claim
19 challenged, but, you know, however you -- but
20 you're still saying that -- that you're not
21 challenging the -- the partial institution. Is
22 that right?

23 MR. CASTANIAS: But we're -- we're not
24 challenging --

25 JUSTICE KAGAN: And I guess here's my

1 question: What language says that partial
2 institution is not permissible?

3 MR. CASTANIAS: The fact that the
4 Board has already given the discretion whether
5 to institute. The discretion whether to
6 institute does not hide inside it a secret
7 second level of discretion to decide to
8 institute anything other than the petition.

9 JUSTICE KAGAN: I think I'm not
10 understanding. Could you just point me to the
11 -- the language that you're saying. That's the
12 --

13 MR. CASTANIAS: It's in Section --

14 JUSTICE KAGAN: -- thing that you can't
15 --

16 MR. CASTANIAS: It's in Section --
17 it's in Section 314(b), Timing. And it says,
18 "The director shall determine whether to
19 institute an inter partes review."

20 And we say that's a binary choice, and
21 we say that's consistent with the if/then
22 language of Section 318.

23 To -- to Justice Gorsuch's colloquy
24 with my friend, there is no interpretation
25 here. No evaluation at all, even in the

1 institution regulation of Section 318(a). So I
2 don't know what we're possibly deferring to
3 here with regard to the language of Section
4 318(a).

5 The Section 314(a) did -- didn't
6 address it. The Section 314(a) regulation
7 didn't address it in the Federal Register. And
8 as you pointed out, Justice Gorsuch, the --
9 (a)(2) talks about grounds to institute. It's
10 not a weeding-out function and it's not a final
11 written decision regulation.

12 On reviewability, our yellow brief I
13 think tells the tale. This is not the same
14 section. And it is -- it certainly would be,
15 in the words of Justice Alito, shenanigans, if
16 the Board is allowed to fail to follow the
17 regulation here.

18 CHIEF JUSTICE ROBERTS: I thought you
19 were being overly ambitious when you said you'd
20 get to four points in rebuttal, but thank you,
21 counsel.

22 (Laughter.)

23 MR. CASTANIAS: My last point was
24 efficiency, Your Honor.

25 (Laughter.)

1 MR. CASTANIAS: Thank you.

2 CHIEF JUSTICE ROBERTS: The case is
3 submitted.

4 (Whereupon, at 12:09 p.m., the case
5 was submitted.)

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<p style="text-align: center;">2</p> <p>2 ^[11] 13:21 25:7,9,15 29:17 31:18 32:2,5,11 33:2,5 2012 ^[1] 14:14 2017 ^[1] 1:13 22 ^[1] 29:10 27 ^[1] 1:13 282 ^[1] 59:7</p>	<p>a(2) ^[6] 47:23,25 48:7 49:5,11 71:9 a(4) ^[4] 47:15,17,24 48:1 a.m ^[2] 1:17 3:2 ability ^[1] 49:9 able ^[4] 16:4 43:10 66:10 67:2 above-entitled ^[1] 1:15 absence ^[1] 50:15 absent ^[1] 67:20 absolutely ^[1] 7:20 accomplish ^[1] 32:18 Accordingly ^[1] 56:5 account ^[1] 8:9 achieve ^[4] 58:23 61:1,1,1,12 achieving ^[1] 52:14 across ^[2] 33:17,22 Act ^[2] 3:21 17:20 actually ^[20] 4:20 5:11 7:6 9:5 17:15 24:21 25:8,22 27:12 32:4,7 39:10 41:4 42:4,7 51:21 52:1 56:25 57:17 62:25 add ^[1] 63:19 added ^[3] 40:17 41:6,7 addition ^[1] 28:18 additional ^[3] 25:9 53:16 65:12 address ^[6] 41:2,3,5 68:25 71:6,7 addressed ^[2] 8:10 42:20 addressing ^[2] 4:18 55:11 adjudicate ^[3] 16:24 17:3 62:5 adjudicating ^[1] 17:6 adjudication ^[2] 5:2 61:9 adjudications ^[3] 4:17 30:6,8 administrative ^[2] 57:8 61:13 adopt ^[2] 58:19 59:1 adopted ^[3] 42:25 57:2 65:11 adopting ^[2] 47:5 51:18 advance ^[1] 53:20 advantage ^[3] 11:7,10,11 adverse ^[1] 24:23 affect ^[1] 48:21 agencies ^[1] 30:8 agency ^[17] 30:5,24 42:11,13,18 43:1,4,19 54:4 59:9,22 64:6,9,12,21 65:15,19 agency's ^[1] 54:2 agree ^[10] 6:15 34:19 38:12,13 40:8 45:16 46:2 48:12 53:17 61:23</p>		
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