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IN THE SUPREME COURT OF THE UNITED STATES

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COMMIL USA, LLC, :

Petitioner : No. 13-896

v. :

CISCO SYSTEMS, INC. :

- - - - - x

Washington, D.C.

Tuesday, March 31, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:13 a.m.

APPEARANCES:

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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 valid. 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 strict 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 American 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. WERBNER: 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. WERBNER: 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. It 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 when 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 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 anything. 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, 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, 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 can  
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 of--

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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