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5 v. :

7 SEALTITE BUILDING :

9 FASTENERS, ET AL. :

10 - - - - - x

11 Washington, D.C.

12 Tuesday, December 2, 2014

13

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 10:03 a.m.

17 APPEARANCES:

18 WILLIAM M. JAY, ESQ., Washington, D.C.; on behalf of
19 Petitioner.

20 JOHN F. BASH, ESQ., Assistant to the Solicitor General,
21 Department of Justice, Washington, D.C.; for United
22 States, as amicus curiae, supporting Petitioner.

23 NEAL K. KATYAL, ESQ., Washington, D.C.; on behalf of
24 Respondents.

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

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 13-352, B&B Hardware v.
5 Hargis Industries.

6 Mr. Jay.

7 ORAL ARGUMENT OF WILLIAM JAY

8 ON BEHALF OF THE PETITIONER

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

11 The Lanham Act contains only one concept of
12 likelihood of confusion. That is why the two tribunals
13 in this case decided the same issue, and that is why
14 issue of preclusion is appropriate. Whether a court is
15 considering registration or infringement or both at the
16 same time, the statutory test is the same, whether the
17 resemblance of the marks as used on particular goods
18 would give rise to a likelihood of confusion or mistake
19 or deceit.

20 JUSTICE GINSBURG: Mr. Jay, there are
21 exceptions to preclusion even though you would see the
22 identical issue, and one of them is when the stakes are
23 higher in the second proceeding than in the first and,
24 indeed, the restatement of judgments gives some
25 examples of that. And it seems to me this is such a

1 case, because it's one thing to say that we won't
2 register your mark and another to say you can't use the
3 mark.

4 MR. JAY: There is an exception for when --
5 when the stakes are different, Justice Ginsburg, but I
6 think that the difference has to be a difference of an
7 order of magnitude greater than we're dealing with here.
8 So I think the best example in the restatement is the
9 example of a small claims court. Small claims courts
10 are set up in such a way that their designers understand
11 their judgments won't be preclusive and that's what gets
12 people to litigate there.

13 Here the stakes are different, but I don't
14 think it can be said that the stakes before the
15 Trademark Trial and Appeal Board are so low.

16 JUSTICE GINSBURG: I don't think that your
17 example of small claims court is the closest. There's
18 one on section 83, which is determinations by an
19 administrative tribunal, and the example it gives is of
20 a scheme that contemplates an agency proceeding to be as
21 expeditious as possible. And one way of assuring
22 expeditiousness is to confine the stakes to the matter
23 immediately in controversy.

24 MR. JAY: The matter immediately in
25 controversy, though, in -- in this case, the matter is

1 the same and the -- the way that --

2 JUSTICE GINSBURG: The matter in controversy
3 is registration, and in the second proceeding, it's
4 infringement.

5 MR. JAY: That's correct. That's why
6 there's no claim preclusion, for example. So in that
7 sense, they are different, but the inquiry that the two
8 tribunals are asking is the same.

9 And to say that the -- the stakes are
10 different, certainly, they're different, but I don't
11 think that they are sufficiently different that you can
12 infer from that that Congress wanted the trademark
13 board's judgments not to be preclusive.

14 And I would encourage the Court to think
15 about the ways in which the trademark board decides
16 issues that will be, I think everyone would agree,
17 exactly the same in subsequent litigation such as
18 priority. Priority is the key to determining who gets
19 to register a mark, who's the senior mark, and who's --
20 and who's the junior mark. The trademark board
21 frequently decides that factual question, who came
22 first, who started using it in commerce first. And
23 there's no reason to think that Congress would want that
24 factual matter relitigated in a subsequent infringement
25 action without regard to the proceeding that's come

1 before.

2 JUSTICE SCALIA: I suppose --

3 JUSTICE SOTOMAYOR: Well, just --

4 JUSTICE SCALIA: I suppose in one sense
5 the -- the trademark determination is broader rather
6 than narrower than the infringement determination,
7 right? The infringement determination just applies to
8 one alleged infringer whereas the trademark registration
9 would register the trademark as against the world. So
10 I'm not sure that it's terribly narrower.

11 MR. JAY: Well, in the -- in an opposition
12 or cancellation proceeding, Justice Scalia, there --
13 there is a concrete dispute between the holders of two
14 marks. But you're right that a registration is a right
15 nationwide as against the world that gives you
16 priority as of a certain date.

17 JUSTICE GINSBURG: But -- but the person who
18 uses the mark could continue to use it. And the reason
19 the restatement gives before the expeditious first
20 proceeding is that you don't want to make that
21 proceeding pull out all the stops because it's going to
22 be determinative of the infringement suit.

23 MR. JAY: But I think you could say the
24 same, Justice Ginsburg, if the Trademark Trial and
25 Appeal Board's decision were appealed to a U.S. District

1 Court or to the Federal Circuit. The stakes would be
2 the same. The stakes would still be registration.

3 But I don't understand the other side to be
4 saying that that tribunal's judgment would not be
5 preclusive because -- because of a difference in the
6 stakes. They're saying that the issues are different to
7 be sure. They're saying that the legal issue of
8 confuse -- of likelihood of confusion in infringement
9 proceedings is different than the legal issue in
10 registration proceedings.

11 But I think once you get past that argument,
12 and I think the statute and the history and the
13 structure all dispatch that, then I think that the -- I
14 don't think that the notion that the stakes are
15 different can save Respondents from preclusion here.

16 JUSTICE ALITO: Would you agree that if we
17 accept your argument, the number of cases in which the
18 elements of issue preclusion will be met by the TTAB
19 proceeding will be relatively rare? And if that is the
20 case, is it worthwhile to create a rule that applies
21 only in that very limited set of circumstances?

22 MR. JAY: I think, Justice Alito, that the
23 number of circumstances in which the -- our rule would
24 apply depends on the number of circumstances in which
25 people seek to register the same goods that they are

1 actually using. Now, it's certainly true that sometimes
2 people file registrations for goods that they don't
3 intend to use and that their actual use in real life
4 will be different.

5 But I do think that for the 40-some odd
6 percent of registrations that are -- deal with marks
7 already in use, that generally, when an applicant comes
8 to the patent office and says, I'd like to register a
9 trademark for use on these goods, that it's the goods
10 that that person is already using. So that under our
11 rule when the marks are the same, the goods are the
12 same, and they're sold in the same channels of commerce,
13 that's when it's appropriate for preclusion to apply.

14 And I don't think that that's such a
15 vanishingly small set of circumstances that you would
16 say the game isn't worth the candle.

17 JUSTICE SOTOMAYOR: I have a bit of a
18 problem, okay? We have held that in -- in Kappos last
19 year or two terms ago -- I've now lost track of time --
20 that an applicant who loses before the board can
21 introduce new evidence at the trial. So we have made
22 the assumption that -- that an applicant doesn't have to
23 produce everything. So what happens in the situation
24 when there is new evidence? What kind of deference do
25 we owe then? Is it -- that's why I think Justice Alito

1 said this might be a unique case because I -- then --
 2 your adversary may tell me and tell me differently --
 3 the two proceedings had almost identical evidence.

4 MR. JAY: That is certainly our position,
 5 that the proceedings were the same. The only difference
 6 Respondent has identified is this point about the
 7 two-word phrase, "building fasteners," which I'd be
 8 happy to come back to.

9 But I want to make sure I understand Your
 10 Honor's question. You're asking what the preclusive
 11 effect of a district court's judgment would be if new
 12 evidence is --

13 JUSTICE SOTOMAYOR: No. Just assume that
 14 there's new evidence that they want to present at the
 15 infringement trial.

16 MR. JAY: Oh, I see.

17 JUSTICE SOTOMAYOR: So what's the charge
 18 the court gives? What deference does the court ask to
 19 be given to the board in that situation?

20 MR. JAY: I think --

21 JUSTICE SOTOMAYOR: It didn't have evidence
 22 that existed before.

23 MR. JAY: Well, I think that there are --
 24 there are two different questions. One is whether the
 25 marks are the same, the goods are the same, and they're

1 being sold in the same channels of commerce, and
2 that's -- that is what would line up the infringement
3 proceeding with the registration proceeding.

4 And saying I have new evidence that I would
5 like to introduce that I didn't introduce before, you
6 have the option to go up to the district court on review
7 of the trademark board proceeding. You always have that
8 option, and that's what -- that is the significance of
9 *Kappos v. Hyatt*.

10 If you don't take that option, I think you
11 should not expect in the infringement litigation to say,
12 well, preclusion doesn't apply merely because I think I
13 have some new evidence.

14 And that's a bedrock principle of the law on
15 judgments, that new evidence is not enough to get you
16 right to preclusion, but --

17 JUSTICE SOTOMAYOR: So you're talking about
18 the effects of full preclusion.

19 MR. JAY: Well --

20 JUSTICE SOTOMAYOR: If you could have, you
21 should have.

22 MR. JAY: If you could have, you should
23 have. Now, there certainly will be -- there certainly
24 are matters that the trademark board will not
25 adjudicate, and there certainly are ways in which

1 infringement litigation can differ and that the simplest
2 way is if the goods are different. So if you seek to
3 register a broad array of goods and the trademark board
4 finds a likelihood of confusion based on that broad
5 array of goods in your registration, but the
6 infringement action turns only on one -- you know, one
7 good within that set, jeans instead of all clothing, for
8 example, then I think preclusion wouldn't apply. And
9 that's the way the Federal Circuit applies it going in
10 the opposite direction, that if infringement -- if
11 infringement -- that no confusion judgment turns only on
12 a tiny subset of the goods listed in the registration.
13 Well, then, of course the issue is different because --

14 JUSTICE BREYER: Suppose the -- and maybe
15 this is what is worrying some people. The marks, you
16 have a mark, I have a mark, and I have -- it's like
17 Louis Vuitton or something. I mean, it covers just
18 thousands of things. And there is one manufacturer who
19 makes one of those things, and he really thinks, I don't
20 have to worry about this, you know. If -- if I win or
21 lose, it's not that big a deal. I don't think they're
22 going to come into my area really.

23 MR. JAY: Louis Vuitton thinks this or
24 the --

25 JUSTICE BREYER: No, the -- the competitor

1 in one small thing like a lipstick or something, he
2 doesn't think there is going to be Louis Vuitton
3 lipstick, though there may be. And sure enough, it is
4 there, and sure enough, he does do it, so he just
5 doesn't want to go to the time and trouble of having
6 every possible bit of evidence and so forth. And then
7 lo and behold, later on it turns out this is a very big
8 deal to him. And what he's worried about is that that
9 means I have to look at every trademark application, I
10 have to give my all the first time, and if I don't, I'm
11 stuck. That's true, isn't it?

12 MR. JAY: Well, it is true that whichever
13 forum he goes to first, whether it's the trademark board
14 or a court considering infringement, yes, he's supposed
15 to give his all the first time because the judgment can
16 be preclusive in future litigation.

17 But -- and I think that the reasons to pay
18 attention to registration in the circumstances that you
19 gave are significant ones, because if he just lets Louis
20 Vuitton sit there in the market with a registration for
21 5 years, and Louis Vuitton's mark becomes incontestable
22 then he has to face the consequences of that.

23 So I think that people who are already in
24 the -- in the market and see a junior mark holder coming
25 in and seeking registration, they have reasons to oppose

1 that registration. But if they don't want to go to the
2 board, they don't have to go to the board. No one ever
3 has to go to the board who doesn't want to, because you
4 always have the option of pursuing the cancellation
5 relief or getting a mark cancelled or getting your mark
6 registered. You can do that in district court coupled
7 with an infringement action.

8 So if you are the senior mark holder, sue
9 for infringement and you'll have a jury trial, right.
10 If you win, then you can get the opposing mark
11 cancelled, provided that it hasn't become uncontestable.

12 That, I think, is a large part of our answer
13 to the other side's argument about the jury trial right,
14 that there's always the option to sue. There's also
15 always the option to get Article III review of a
16 judgment of the Trademark Trial and Appeal Board. The
17 board is just deciding a question of public right. It's
18 not trenching on the -- the role of Article III judges.
19 But once its renders such a judgment, as a matter of
20 preclusion law, as a matter of statutory text, its
21 judgment is preclusive because it's deciding the same
22 issue and under this Court's decision in *Astoria v.*
23 *Solimino*.

24 JUSTICE KAGAN: Do you happen to know what
25 proportion of people in the situation that Justice

1 Breyer indicated do go to the board? And is the board
2 the -- the primary avenue or is it not?

3 MR. JAY: That's a difficult question,
4 Justice Kagan. I know that there are more board
5 proceedings filed each year, opposition and cancellation
6 proceedings filed, than there are infringement actions,
7 you know, trademark actions, filed in the district
8 courts. I know, however, that a lot of those don't go
9 to final judgment, precisely because I think often the
10 mere filing of an action in the -- in the board can
11 alert the -- perhaps the junior mark holder that you're
12 junior to someone else, you're going to have a problem
13 if you don't either, A, reach an accommodation; B, limit
14 yourself geographically; C, choose a different mark.
15 And I think that the board's proceedings may well be
16 more conducive to that than litigation. But in the --
17 there are, I think, fewer than 200 board cases that go
18 to final judgment each year in contested proceedings.
19 I'm not sure how many trademark cases actually go to
20 final judgment.

21 JUSTICE KENNEDY: When you say "to final
22 judgment," you mean final judgment before the board or
23 file judgment after review in the courts?

24 MR. JAY: I mean final judgment before the
25 board, Justice Kennedy. The number of litigants that

1 actually go on and seek review, as you would expect, is
2 smaller. But there's certainly always the option to
3 seek review, either before the Federal circuit under the
4 APA standard of review or in district court. And if you
5 go to district court, you can, if you choose, introduce
6 new evidence.

7 JUSTICE SOTOMAYOR: You have alternatively
8 argued in your brief for some form of deference if we're
9 not going to call it preclusive. It seemed to me that
10 that was addressing an issue you didn't seek cert on,
11 which was whether the court below erred in not
12 permitting the mark holder to -- to tell the jury that
13 the board had found a similarity and confusion. But I
14 don't know that you've actually made that argument,
15 number one. And number two, on what would you base a
16 holding of deference? In what field of law do we say,
17 give deference and how -- what -- what's the standard
18 that we would use?

19 MR. JAY: The -- first, Justice Sotomayor,
20 let me be clear. Our primary position is, of course,
21 preclusion. And the only reason that we would get into
22 deference is if preclusion doesn't apply because, even
23 though it's the same issue, for some reason the
24 Trademark Board can't render a preclusive judgment, and
25 we think that that issue is what's not properly been

1 preserved because the other side waived it at the cert
2 stage.

3 But if you got into that, we think that what
4 you would look -- and this is why we put question 2 in
5 our cert petition and the Court granted both questions,
6 what you would look to, I think -- or, for example, the
7 arbitration cases like Alexander v. Gardner-Denver, in
8 which this Court decided that an arbitration in a
9 Title VII action would not be -- arbitration would not
10 be preclusive of a Title VII action. But the fact that
11 the same parties had litigated the same discrimination
12 issue before an arbitrator with, perhaps, the same
13 evidence was entitled to evidentiary weight and perhaps
14 if every -- if the proceedings were full and fair and
15 the issues really were the same, perhaps, great weight,
16 I think, is the final footnote in Gardner-Denver and
17 then in McDonald v. City of West Branch.

18 JUSTICE GINSBURG: Were those in days before
19 you could get a jury trial in a Title VII case?

20 MR. JAY: The Court, I believe, had not held
21 that at that point, Justice Ginsburg. So I think
22 that's -- I think that's correct. But I don't think
23 that the jury question has any effect on this because,
24 you know, for example, there's -- there's a jury right
25 in a 1983 case, there's a jury right in an ADEA case.

1 JUSTICE GINSBURG: What disturbed the Eighth
2 Circuit on that point was that the jury would be
3 powerfully confused; it has enough to deal with what the
4 charge in the infringement case is.

5 MR. JAY: It -- it certainly would require
6 an explanation of what went on, but I think that that
7 would have been better than instructing the jury, as was
8 done here, that the two proceedings involved completely
9 different issues and that the jury should not give it
10 any weight at all.

11 If I may at this point, I'd like to reserve
12 the balance of my time.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 Mr. Bash.

15 ORAL ARGUMENT OF JOHN F. BASH
16 FOR UNITED STATES, AS AMICUS CURIAE
17 SUPPORTING PETITIONER

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

20 Respondent has not identified any material
21 difference between the issue decided by the board and
22 the issue -- and what was at issue in the infringement
23 case. For that reason --

24 JUSTICE KAGAN: Mr. Bash, that's a very much
25 stronger statement than your briefs make. So your

1 briefs go likely and probably and this and that. And --
2 so are all of your likely's and probably's no longer
3 true?

4 MR. BASH: Well, the likely's or probably's
5 were an opening for Respondent to identify a material
6 difference between the suit and the board proceeding.
7 The reason we did that is because we were framing the
8 standard in a slightly different way than it was
9 proposed below. And we think if the normal course of
10 proceedings had happened, Petitioner would have asked
11 for summary judgment and then Respondent should have
12 come forward and identified some difference in the goods
13 or marks or channels of trade, and then the district
14 court and potentially the jury could have considered
15 whether that difference was material.

16 The issues weren't teed up like that in
17 the courts below, so we wanted to give Respondent a fair
18 opportunity to identify a difference between what
19 happened in the board and what happened before
20 the court, and Respondent has not identified any
21 difference that we would consider material under our
22 standard.

23 JUSTICE SOTOMAYOR: All right. That's an
24 even -- that's another fudge word, "material." They
25 have represented one, which was the use of the mark with

1 the word "fastener" or whatever it was that the -- that
2 the Solicitor General's Office referred to earlier, that
3 Mr. Jay referred to earlier. So get to the stuff you
4 think is immaterial.

5 MR. BASH: So the only difference that
6 Respondent has identified is what we would characterize
7 as a different mark, "Sealtite Building Fasteners"
8 versus "Sealtite." Now, I think Petitioner has
9 demonstrated that "Sealtite Building Fasteners" wasn't
10 even really at issue in the trial, but even putting
11 aside that factual distinction, the ordinary rule is
12 just adding a generic term like "building fasteners"
13 can't make the difference in a preclusion analysis. So
14 I think the way it should have worked had everything
15 gone sort of the correct way is that Petitioner would
16 have said, hey, the board proceeding gets issue
17 preclusion in this infringement suit. I'm suing about
18 the word "Sealtite," which is, by the way, what the jury
19 was instructed, not "Sealtite Building Fasteners."
20 Respondent then could have come forward and said, well,
21 actually, the mark's a little different now. It's
22 "Sealtite Building Fasteners" or "Sealtite Screws" or
23 "Sealtite Nails."

24 And at the summary judgment stage, the
25 district court would have had to make a judgment about

1 whether that was a sufficiently different mark to
2 obviate issue preclusion. And the material standard is
3 not just drawn from thin air. It's the ordinary
4 standard in issue preclusion where the question arises
5 whether the second tribunal is considering a
6 fundamentally different issue than the first tribunal.
7 I think in *Montana v. United States*, when this Court
8 talked about the changed circumstances principle, it
9 averted to that principle.

10 And it really has to be that way. I mean,
11 just imagine the court-to-court scenario, infringement
12 court at time one and then infringement court at time
13 two. Surely, if Petitioner had obtained a judgment that
14 the mark "Sealtite" infringes in an infringement court,
15 Respondent couldn't then just add "Fasteners" and start
16 the suit all over again and then once Respondent --

17 JUSTICE GINSBURG: Well, how do you respond
18 to the question I asked Mr. Jay, that is, as the
19 Restatement of Judgments says, if one aspect of the
20 first proceeding is to assure expeditiousness, then
21 confining the stakes to that issue of registration makes
22 sense so that the parties will not be induced to dispute
23 the administrative proceeding in anticipation of its
24 effect on another proceeding.

25 MR. BASH: Justice Ginsburg, I think that's

1 a correct statement of the law, but it's inapplicable
2 here. I think it has two components. One is how
3 expedited are the proceedings here? How close is it to
4 small court? The other is what's at stake? So let me
5 just take both of those in turn.

6 This is not like small claims court or
7 arbitral court. This is a proceeding in which you have
8 the full discovery permitted by the civil rules, in fact
9 with respect to interrogatories, three times as many
10 interrogatories as in the civil rules, the full Federal
11 Rules of Evidence, including E-discovery. It's just
12 like a civil -- a civil proceeding. And, in fact, then
13 you can --

14 JUSTICE GINSBURG: There are some
15 differences. There's no live testimony, right.

16 MR. BASH: There is -- there's no live
17 testimony, but I don't think that has ever been
18 understood as the sort of difference between an
19 administrative tribunal and a judicial proceeding that
20 could effectively mean that there wasn't a full and fair
21 opportunity to litigate the question.

22 JUSTICE KAGAN: One of the amicus briefs
23 suggests that this is very, very much less expensive, so
24 that it's like 10 percent of the cost of an infringement
25 suit. Why is that?

1 MR. BASH: Because in an infringement suit,
2 the most discovery-intensive aspects, I think, are often
3 damages and injunctive relief. In other words, you
4 really have to look at the other side's books to know
5 how many of these products did you sell, what were your
6 profits, and so forth. So it's not surprising that in a
7 suit where damages or injunctive relief is at issue, it
8 could be, you know, four times the cost for discovery
9 purposes of this kind of suit.

10 JUSTICE SCALIA: I -- I find it hard to
11 believe that this board proceeding is -- is intended
12 to -- to be expeditious, because the losing party can go
13 up to the district court and start all over again de
14 novo.

15 MR. BASH: Thank you, Justice Scalia.

16 JUSTICE SCALIA: How is that expeditious? I
17 don't understand that.

18 MR. BASH: I was going to follow on to my
19 answer to Justice Ginsburg by making that point. I
20 mean, you have a full de novo trial in district court if
21 you want it, and that doesn't reflect the sort of
22 proceeding that Congress would have thought was summary
23 in nature. And I would just add one, I guess,
24 higher-level point about the nature of the proceedings,
25 which is that I think that can come into this case in

1 two ways. One, you could think that Congress would not
2 have intended these proceedings to get preclusive effect
3 because of their summary nature and I think that's how
4 Respondent is using it. But that -- that doesn't work,
5 because Congress did not set the procedures for the
6 board. Section 1123 gives the director authority to set
7 the procedures.

8 JUSTICE BREYER: That's -- that's what I
9 think you'll hear in a minute, because in the brief, the
10 red brief, on pages 30 to 31 and 8 and 9, there is
11 discussion about the evidentiary procedures before the
12 board. And the -- the Respondent says they are much
13 more limited. One, you cannot call live witnesses; two,
14 the board continuously says that they should not be like
15 a district court. They should be far more limited. So
16 I guess the argument is, well, in light of that
17 procedural difference, he can't call all his witnesses,
18 he can't test the consumer experts of the other side who
19 say that there is no confusion, and he can't present his
20 very credible expert who will come up and say, I
21 interviewed 4,000 consumers and they are totally mixed
22 up.

23 So -- so if you have that -- would you
24 address that?

25 MR. BASH: I will address that. The only

1 significant difference is no live testimony in front of
2 the adjudicator. There is written depositions where the
3 experts testify, they submit reports, and they can be
4 cross-examined. So the only significant difference is
5 no live testimony in front of the adjudicator. And as
6 you know, that is a principle embodied in the APA as
7 consistent with ordinary administrative action. The
8 adjudicator in an administrative tribunal does not need
9 to hear the witness. That's embodied in the APA
10 provision cited in the reply brief.

11 The -- the other different -- purported
12 differences that Respondent in one of the amicus briefs
13 have identified are not actual differences. They're
14 quoting snippets of TTAB decisions where the board was
15 perturbed that the parties engaged in excessive
16 discovery and they said something like, Look, given the
17 narrowest of what we're -- narrowness of what we're
18 deciding -- in one of the cases it was descriptiveness
19 -- you don't need to engage in full-blown discovery.
20 The rules and numerous TTAB decisions make very clear
21 that full-lead discovery is allowed.

22 The only other, I think, difference or
23 purported difference identified in one of the amicus
24 briefs was consumer surveys and the idea that they will
25 only accept a consumer survey where it has the word on a

1 blank card. That's true -- you know, just the word
2 "Sealtite" on a blank placard. That's true when what is
3 sought to be registered is a word mark, not a design
4 mark with a particular color. The idea being that you
5 can't skew the survey by adding colors and things when
6 actually what you're seeking registration for is just
7 the word.

8 But the same thing could happen in an
9 infringement court. If the defendant was sued based on
10 their registered word mark, I think a factfinder in an
11 infringement court would say a survey that has design
12 elements -- color, font, and so forth -- when you're
13 asserting the right to use this word in any context,
14 that sort of survey is not going to be as probative as a
15 survey that just uses the word, since you're seeking the
16 right to just use the word.

17 JUSTICE KAGAN: Mr. Bash, could you go back,
18 I think it was to Justice Alito's question before, and
19 just talk a little bit about, do you think that this is
20 an unusual case in that the issues are the same or a
21 usual case?

22 MR. BASH: I don't have statistics, so I'm
23 sort of speaking just from my experience reading
24 the case law. But I don't think it's terribly unusual.
25 I mean, I think a lot of times people seek to register a

1 mark for the goods they sell and so an infringement suit
2 is going to involve the same goods in the channels of
3 trade those goods are ordinarily sold in. So I don't
4 think it's a situation where issue preclusion is not
5 worth the candle, and in fact, I think it's
6 extraordinary administrable, in fact, more administrable
7 than the average just litigation context, because the
8 limitations in the first action, in other words, what
9 goods were at issue, what marks are at issue, what the
10 channels of trade are, are often just set forth right
11 there in the registration. So it's not like you have to
12 conduct a searching inquiry to figure out what was at
13 issue in the first administrative proceeding. You look
14 at the registration. If no common law rights are at
15 issue on the opposition side, you look at the opposer's
16 registration, and you say, okay, this was about cars
17 sold to retail consumers; that's what was at issue in
18 the board proceeding. If now we're talking about cars
19 sold to government or municipal entities, that is
20 potentially a materially different issue. And then you
21 have to make the sort of materiality judgment that
22 courts make every day.

23 But I guess I just want to close with I
24 think Respondents' primary textual argument that what is
25 being considered here are different issues is that the

1 registration provision uses the word -- the phrase, "so
2 resembles" and the infringement provision 1114 uses the
3 phrase "used in commerce." I mean, as you can just see
4 from the text of the provisions, they both are about the
5 marks being used in commerce and whether the marks used
6 in commerce would confuse people.

7 If I could just finish one sentence. The --
8 and in the infringement provision, the phrase "colorable
9 imitation" is defined, as the reply brief points out, as
10 "so resembles." So the textual provisions are precisely
11 parallel.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 Mr. Katyal.

14 ORAL ARGUMENT OF NEAL K. KATYAL
15 ON BEHALF OF THE RESPONDENTS

16 MR. KATYAL: Thank you, Mr. Chief Justice,
17 and may it please the Court:

18 Congress designed the Trademark Registry as
19 a relatively low-cost signaling mechanism to provide
20 notice, but Congress made clear that the main event, the
21 conclusive determination of the right to use a mark in
22 commerce, was reserved for Article III courts with
23 robust procedures and sweeping remedies.

24 JUSTICE SOTOMAYOR: But you do have that
25 alternative before -- after a board action.

1 MR. KATYAL: We certainly do with respect to
2 district court review. It's de novo, and that's one
3 reason, Justice Sotomayor, why we think when we're
4 analyzing whether Congress intended to adopt a
5 preclusion doctrine we think the answer to that is no.
6 That is --

7 JUSTICE SOTOMAYOR: Well, that's my problem,
8 which is, it seems to me, that you are rendering the
9 board proceeding almost irrelevant with respect to
10 litigation. And it may be when you're seeking de novo
11 review, but why should we say that you get a second bite
12 at the apple after you've wasted the board's time? Why
13 not just tell you go straight -- if you're going to wait
14 for an infringement action, go there.

15 MR. KATYAL: Well, I think that Congress did
16 intend that the district court -- the TTAB proceeding
17 was rendered largely irrelevant when there was district
18 court de novo review.

19 JUSTICE SOTOMAYOR: Except that in Kappos,
20 we explicitly said that some weight should be given to
21 the board's judgment. So it's not as if it's being
22 ignored altogether, right?

23 MR. KATYAL: Precisely. But when there's
24 new evidence, as there was in Kappos, then it is de novo
25 review. And this Court in Astoria said when that

1 occurs, that when you have a system like that, that's
2 Congress telegraphing that they didn't intend for
3 preclusive review to exist. That is to say, why would
4 Congress have said that the TTAB decisions over
5 registration, something that they have absolute 100
6 percent --

7 JUSTICE SOTOMAYOR: But that's not what
8 happened here. The court below said, no, you can't give
9 a jury -- you can't describe to this jury what the
10 trademark board did. You can't decide whether it was
11 the same evidence and how much weight to give. That's
12 not the path that was followed here.

13 MR. KATYAL: Well, I disagree, Your Honor.
14 In this case, the jury was told about the -- about the
15 TTAB determination at several points in the record.
16 Now, it's true that the district court ultimately said,
17 look, at the end of the day these are different
18 questions. This is what Joint Appendix page 247 says,
19 that the district court said, after review of all of
20 this, it was different evidence answering a different
21 question and fundamentally the different question that
22 is at issue in TTAB or district court de nova review is
23 this. It is -- you know, when -- they do say the same
24 concept, likelihood of confusion, but the subject is
25 very different. That is, in a registration decision the

1 question about what is likely to confuse is a
2 resemblance where -- a confusing resemblance. Whereas
3 the question under the statute with respect to
4 infringement is a confusing use.

5 Now, that distinction has
6 persisted for 150 years, since the year 1870, and I
7 think you could endorse the type of statutory gymnastics
8 that my friend from the government does to say, hey,
9 these are the same inquiry. But at the end of the day,
10 that is against everything this Court's precedents
11 teach, which is that when Congress uses different
12 statutory formulations in different provisions, they are
13 deemed to mean different things. And here, you know, my
14 friend from the government concluded by saying, well,
15 you know the statute defines confusing resemblance --
16 excuse me, defines -- defines colorable imitation as a
17 resemblance and so, therefore, the inquiries are somehow
18 the same. Absolutely not. Because what the trademark
19 infringement statute says, 1114, is not simply that you
20 need to have a colorable imitation, it's that you need
21 to have a colorable imitation that in its use causes a
22 likelihood of confusion. A colorable imitation alone is
23 not enough. You've got to have both the colorable
24 imitation or resemblance, plus the use of it. That's
25 what causes the infringement and that's the heart of the

1 infringement inquiry --

2 JUSTICE SCALIA: But, but, but, but. The
3 board has to decide whether the trademark as applied to
4 particular goods is confusing. Once you say it's as
5 applied to particular goods in a particular area of
6 commerce, isn't that the same as saying has used whether
7 it causes confusion?

8 MR. KATYAL: Not at all, Justice Scalia.
9 And you have all of the amici, all the trademark
10 practitioners before you on behalf of neither party or
11 on behalf of us telling you that is not what the statute
12 means or how it's applied. Why? Because, yes, it
13 mentions the word "use" once with respect to in
14 connection of the goods, but that's only to connect the
15 fact -- the mark to the fact that it is being applied to
16 certain goods. Every amici is telling you that the way
17 in which the TTAB interprets that statute is to say that
18 the ultimate focus is on the confusing resemblance.

19 This case is a perfect illustration of that.
20 The TTAB here said, look, we're going to look to whether
21 or not these are the same things. Basically, are these
22 bolts or not and not to how in practice it's actually
23 used. And that is why --

24 JUSTICE SCALIA: But even in use what causes
25 the confusion will be the resemblance. I don't care if

1 you just add on -- tack on "as used." The problem is
2 the resemblance between the two marks in every -- in
3 every situation it seems to me.

4 MR. KATYAL: Justice Scalia, here's our key
5 point. It's not simply the resemblance. It's how the
6 products are used in practice. It's how they're
7 marketed, how they're sold, to whom they're sold. In
8 this case, for example, Justice --

9 JUSTICE SOTOMAYOR: Was that presented to
10 the board in this case?

11 MR. KATYAL: Excuse me?

12 JUSTICE SOTOMAYOR: Was it presented to the
13 board?

14 MR. KATYAL: What's the "it"? I'm sorry.

15 JUSTICE SOTOMAYOR: That answer. How you
16 use the mark, the market. I thought the board did.

17 MR. KATYAL: We tried to put some of that
18 evidence in, Your Honor, but as -- as the amici are
19 saying and, indeed, as the decision in this case
20 reveals, ultimately, the way the TTAB decides -- it
21 doesn't really weigh actual use very much at the end of
22 the day. That is, you can have all the inputs of actual
23 use that you want into the TTAB process, but the
24 question the TTAB is answering guided --

25 JUSTICE SOTOMAYOR: You didn't answer my

1 question. Was all of that -- was the same evidence --

2 MR. KATYAL: Absolutely not. And so for --
3 let me just -- let me respond to what -- to the question
4 that you were asking my friend before, was the evidence
5 the same. Absolutely not.

6 So in the -- in the TTAB proceedings there
7 were a whopping four depositions introduced and zero
8 discovery, zero discovery. In the trial, 14 live
9 witnesses over a seven-day trial with 4,000 pages of
10 discovery, this mirrors, as the amici say, the way that
11 these proceedings generally unfold and here are some of
12 the differences. The jury was told -- the jury trial
13 had lots of evidence about customer sophistication.
14 And -- and, indeed, the district court on summarizing
15 that evidence said -- and this is at Joint Appendix --
16 this is Petition Appendix page 37 -- that that evidence
17 was overwhelming. That this was not kind of people
18 going to Ace Hardware, the customers like that. This is
19 a very sophisticated set of customers who knew exactly
20 the difference between the types of bolts. Now,
21 the TTAB --

22 JUSTICE SCALIA: And this evidence could not
23 have been introduced before the board.

24 MR. KATYAL: We -- we tried --

25 JUSTICE SCALIA: To be sure it was not

1 introduced, but could it have been introduced before the
2 board?

3 MR. KATYAL: It could only to introduced to
4 limit the mark and that's what the amici say. That is
5 -- and this is a technical part of trademark law, but
6 here's how it works. Basically, when the TTAB is
7 examining evidence of actual use, they can use it to
8 determine whether or not -- what the mark means. So you
9 can introduce evidence about what is a building
10 fastener, but you can't introduce that evidence to
11 somehow limit the meaning of the mark. So the mark here
12 is simply the word "Sealtite," that's what Joint
13 Appendix page 70 says.

14 You couldn't in TTAB point to all the amici
15 who are before you saying that the TTAB couldn't take
16 actual use evidence and say, well, it's only sold to
17 this type of consumer or that type of consumer. That
18 wouldn't be something that they could do.

19 JUSTICE BREYER: Could you do this -- I
20 don't know if you have time -- but with an example. The
21 reason I'm having a hard time, I'm thinking Louis
22 Vuitton, say, all right. Now Lilly Vuitton wants to
23 register a mark. Okay. So we go to the TTAB and it's
24 for lipstick. And Lilly says, look it, it says Lilly
25 Vuitton and Louis says, yeah. And now the question is

1 well, will it cause confusion when used in connection
2 with the lipstick?

3 MR. KATYAL: Right.

4 JUSTICE BREYER: So we look at it. All
5 right. Now we're in the infringement action. Exact
6 same situation. And here they are supposed to say, will
7 it cause confusion when you -- when -- will it cause
8 confusion in connection with the sale of any goods or
9 services which includes the lipstick? So I'm having a
10 terrible time seeing what the difference is.

11 MR. KATYAL: Well, Justice Breyer, the
12 difference is exactly what you just said there with --

13 JUSTICE BREYER: It may be what I said, but
14 I just didn't see it.

15 MR. KATYAL: The statute -- in the
16 infringement statute, 1114, mentions use repeatedly,
17 including advertising, sales, all different ways in
18 which use causes confusion. And the ultimate question
19 that's being asked is: Does that use, does such use
20 cause confusion?

21 JUSTICE BREYER: Yes. And it says the same
22 thing here. It says does it so resemble a mark as to
23 cause confusion when used in connection with the goods?

24 MR. KATYAL: Exactly, Justice Breyer. But
25 there it is the mark's resemblance that

1 causes confusion. And to be sure, you can look to the
2 fact that it's --

3 JUSTICE BREYER: It's the resemblance in
4 connection with the goods.

5 MR. KATYAL: With the fact that it's goods,
6 but not how the goods are used, the advertising, the
7 marketing, the sales. That's the difference.

8 JUSTICE BREYER: Not how they're used.
9 Okay. So what about saying this then. We'd say, if it
10 turns out that in your infringement case that was really
11 an issue, you know, that was really a big deal in
12 this -- a serious deal in this case, it's not because of
13 the use of the goods, it's because of the resemblance
14 through advertising cures it. Then you don't have --
15 not -- not precluded. You are only precluded in the
16 case the SG says, which is where everything is really
17 the same.

18 MR. KATYAL: We have two answers to that.
19 The first is as Justice Ginsburg was saying earlier when
20 the weight of the proceedings has differences at stake,
21 then preclusion shouldn't apply. But the second, just
22 to deal with that, is that if the mark itself claims
23 some sort of limited sale, limited -- limited category
24 of people to whom it's being sold to in the channels of
25 trade and the like, then that actual use evidence can

1 come in.

2 The red brief at page 47 gives you a bunch
3 of cases from the TTAB, as well as the Federal Circuit,
4 cases like Octocom, cases like Mayer Berkshire, in which
5 the -- in which the TTAB is told it's actually error to
6 introduce evidence of actual use. Now, why is it error?
7 Because if you have a general mark, like the mark
8 Sealtite, it's not being limited in any way to
9 particular channels of trade or particular ways in which
10 it's sold. If it is --

11 JUSTICE KENNEDY: Would the -- would the
12 same rule apply in a de novo review of the board's
13 actions in a Federal district court?

14 MR. KATYAL: We do think that it would
15 apply. And I don't take my friend on the other side to
16 be arguing the reverse. Yes, you could have live
17 testimony that -- that aspect falls out. But still, the
18 overall statutory inquiry is about whether the mark has
19 a confusing resemblance.

20 JUSTICE KENNEDY: And I was going to ask you
21 in your answer to Justice Scalia in which you've talked
22 about the narrowness of the issues, you would make the
23 same comments and -- and give us the same instruction
24 regarding what issues and what evidence is presented in
25 the district court on de novo review?

1 MR. KATYAL: That is why -- that our view is
2 that even if evidence is introduced at the district
3 court de novo stage, that still doesn't cure the
4 fundamental problem. Preclusion shouldn't apply both
5 because the question being asked is different as well as
6 the procedures by which they're adjudicated. For
7 example, no jury trial in the -- in the de novo review
8 proceeding means that the full panoply of kind of rights
9 that inhere when this Court -- when Article III courts
10 are asked to decide a longstanding common law tradition
11 such as the right of infringement.

12 CHIEF JUSTICE ROBERTS: Well, the -- the
13 issues are not always different. Justice Breyer's
14 lipstick example, I mean, that's sold in a retail
15 market. So the question is not -- there isn't going to
16 be a different use from what the TTAB is looking at and
17 what you want to be able to look at de novo. But I
18 gather in your case, you say these building fasteners,
19 people don't go buy them like they buy lipstick, it's
20 only more sophisticated general contractors.

21 So why isn't that enough of an answer to say
22 that as a general matter, the TTAB provisions are
23 preclusive, but if you are showing a different -- a
24 difference in use or a more specialized use or something
25 other than what the TTAB would have been looking at,

1 preclusion doesn't apply. Which I gather is -- is the
2 way preclusion normally works.

3 MR. KATYAL: I'd say two things. Number one
4 is I don't think that argument is available to the
5 Petitioner since they hadn't advanced that particular
6 argument. And if they did, I think it would run
7 headlong into the district court's conclusion at page
8 28A that the evidence here was so different, even giving
9 all sorts of deference --

10 CHIEF JUSTICE ROBERTS: Well, I'm more
11 concerned if the argument is available to you. I mean,
12 in other words, you're the one that is asking for the
13 absence of preclusion. And it seems to me that you
14 could prevail on the idea that when the -- when the uses
15 are actually different it's not precluded, but when
16 they -- they are not -- when they are the same, it is.
17 That's the basic preclusion rule.

18 MR. KATYAL: Well, I think that ultimately,
19 though, the basic preclusion rule is caveated in two
20 different ways. One is the inquiry actually has to be
21 the same, it has to be an identical inquiry; and the
22 second is that the procedures and the incentives at
23 stake, as Justice Ginsburg was saying, have to be the
24 same as well.

25 We think the answer to that -- to both of

1 those is no. That is, even when the registration
2 analysis is looking at evidence of actual use, it is
3 looking to it for a different purpose. It's ultimately
4 asking is the resemblance confusing, not is the actual
5 use confusing.

6 Now, imagine you could have some theoretical
7 world, some hypothetical in which the TTAB is deciding
8 the exact same actual use question as in the
9 infringement action. The INTA brief at page 20, filed
10 by the trademark practitioners on behalf of neither
11 party, says that theoretical world never happens in
12 reality.

13 JUSTICE SCALIA: Well, would you give me an
14 example of -- of a situation in which the use is
15 confusing but the resemblance is not?

16 MR. KATYAL: Sure. So the -- the confusing
17 use is -- so suppose that the Trademark Office allows
18 the regs straying of the word "Sike," S-I-K-E, to put on
19 shoes. It's a general standard logo. It doesn't have
20 any particular -- you know, it doesn't have any
21 particular marks or anything like that, no stylization.

22 JUSTICE SCALIA: To be put on shoes?

23 MR. KATYAL: Yeah, put on shoes, but it's
24 just S-I-K-E. That may be not create a likelihood of
25 confusion in its generic, broad, just character form,

1 but when it is applied at the infringement stage with
2 the swoosh of Nike and the like, then you could find a
3 confusing use. And by contrast --

4 JUSTICE SCALIA: Well, I'm asking for an
5 example where there is a confusing use, but not a
6 confusing resemblance.

7 MR. KATYAL: That is one, Your Honor, in
8 which the confusing resemblance -- because the confusing
9 resemblance for registration is decided in a kind of
10 paper way with usually standard character marks, in
11 other words, no stylization, no font, no logos --

12 JUSTICE SCALIA: Before the board, you are
13 talking about.

14 MR. KATYAL: Exactly, before the board.

15 JUSTICE SCALIA: Okay, never mind the board.
16 Doesn't the court that is deciding whether this is an
17 infringing use, doesn't that court have to decide
18 whether that use is confusing by reason of the
19 resemblance?

20 MR. KATYAL: Not simply -- that's our whole
21 point. And what I was saying to you earlier, it's not
22 simply the resemblance that causes infringement. It is
23 the use as well. So if the mark itself is being used in
24 a generic way, that doesn't -- that isn't itself a
25 confusing --

1 JUSTICE BREYER: Well, it says right here,
2 "so resembles a mark as to be likely to cause confusion
3 when used on or in connection with the goods of the
4 applicant."

5 MR. KATYAL: Right.

6 JUSTICE BREYER: So why doesn't Nike say,
7 look at the Sike mark, look at how it's used. As it's
8 used and we use ours with a swish, of course it causes
9 confusion. Wouldn't they be free to tell the board
10 that?

11 MR. KATYAL: Justice Breyer, the answer to
12 that is no. That is --

13 JUSTICE BREYER: They can't?

14 MR. KATYAL: That is, in the board
15 proceeding, they can look to evidence of stylization,
16 the packaging, the way in which it's actually used.
17 They can look to the good, the fact that it is a shoe,
18 but they can't go further than that.

19 JUSTICE BREYER: Ah.

20 MR. KATYAL: And that's the answer, that's
21 why all of those cases, Octocom, Mayer/Berkshire, the
22 New York Football Giants case, all -- as well as all the
23 amici, are saying that's not the way the board works in
24 practice, and it's guided by the language of the
25 statute --

1 JUSTICE BREYER: Your example --

2 MR. KATYAL: -- because the language of the
3 statute refers to use being confusing three times with
4 respect to infringement --

5 JUSTICE KAGAN: I guess -- I guess I'm just
6 not understanding what you are saying. I'm sure it's
7 me. But if you put this mark on the sneaker and then
8 you say, well, is it confusing as it appears on the
9 sneaker, isn't that exactly what the TTAB is asking?

10 MR. KATYAL: No --

11 JUSTICE KAGAN: Look, here is this mark.
12 Here is this good. Here is this mark on this good. Is
13 that confusing?

14 MR. KATYAL: Justice Kagan, the mark that is
15 being put on the good in the registration inquiry is the
16 mark that is being claimed. "Mark" is a specific term
17 of art. It's defined in Section 1127 of the statute to
18 mean the actual word in the application; here it would
19 be "Sealtite," in my example it would be "Sike." It's
20 not how the mark is used --

21 CHIEF JUSTICE ROBERTS: So just to make sure
22 I understand, you are saying the mark is just S-I-K-E
23 without the swoosh.

24 MR. KATYAL: Exactly, and indeed the PTO
25 encourages all registrations to have that kind of

1 generic mark in order to facilitate this kind of
2 low-cost registration notice system that I was talking
3 about at the outset.

4 JUSTICE ALITO: Isn't the swoosh itself a
5 mark?

6 MR. KATYAL: The swoosh itself may be a
7 mark --

8 JUSTICE ALITO: So you have introduced
9 another mark. I don't see how your example works.

10 MR. KATYAL: Well then, to use the actual
11 word in -- "Sike" in the way that Nike uses it, you
12 know, with the same kind of stylization, color, logo,
13 all that kind of stuff. That is, it's often the case
14 that registration confusing resemblance is a broader
15 category of circumstances than confusing use.

16 JUSTICE SOTOMAYOR: I -- I understand you --

17 JUSTICE KENNEDY: What is the answer? Would
18 that be confusing?

19 MR. KATYAL: It certainly could be a --

20 JUSTICE KENNEDY: I need to know the
21 answer --

22 MR. KATYAL: It certainly could be a
23 confusing use, yes, Justice Kennedy.

24 JUSTICE KENNEDY: And --

25 JUSTICE GINSBURG: Mr. Katyal --

1 JUSTICE KENNEDY: -- the -- the district
2 court would hear no additional evidence that the board
3 would not have heard other than the difference between
4 oral and written?

5 MR. KATYAL: No. The district court in an
6 infringement action would --

7 JUSTICE KENNEDY: No, no.

8 MR. KATYAL: -- on de novo review.

9 JUSTICE KENNEDY: On de novo review.

10 MR. KATYAL: Right. In the district court's
11 de novo review proceeding -- and this is what the amici
12 are saying -- it focuses on really the abstract
13 question, unless -- there is one exception to that. The
14 exception is if the mark that is being sought -- and
15 this is what I was saying to Justice Kagan -- does limit
16 itself in some way. So if Sike sought to register a
17 mark that actually had the colors and the particular
18 distinctive font of -- that Nike uses, then of course
19 that evidence about actual use could come in. But when
20 you're having, as a circumstance like this --

21 JUSTICE SOTOMAYOR: I -- I'm sorry. You
22 keep saying we tried to put it in. Did you put it in?

23 MR. KATYAL: We --

24 JUSTICE SOTOMAYOR: The board did recite
25 that they were used in a different market, and a lot of

1 things that suggest they had all the information that
2 you ultimately put in on trial -- at trial.

3 MR. KATYAL: Justice Sotomayor, there is no
4 question I think in my mind in this case that they
5 didn't have the same evidence. If you look to, for
6 example, the confused customer sophistication --

7 JUSTICE SOTOMAYOR: By the way, is there a
8 record? I should have looked for it earlier. Is the
9 trademark record before us in the joint appendix?

10 MR. KATYAL: I'm not sure if the trademark
11 record is. The trademark opinion ultimately is.

12 JUSTICE SOTOMAYOR: Yes. No, no, no. The
13 record that was submitted to the trademark court.

14 MR. KATYAL: I'm not sure if the full record
15 is before you. We can obviously try and get that to you
16 if you'd like.

17 But let me suggest to you that if you
18 looked, for example, at customer sophistication, the
19 district court says the evidence on this is overwhelming
20 that this is a sophisticated group of consumers as to
21 which -- after -- based on lots of live testimony, lots
22 of different witnesses, whereas the Trademark Board said
23 the reverse. They said, ah, it's hard to tell which way
24 this cuts; there is very limited evidence one way or the
25 other.

1 Same thing with the words "Sealtite Building
2 Fastener," which the district court at page 35a said
3 there was evidence at trial that Sealtite, Hargis,
4 always used the entire phrase as one thing, "Sealtite
5 Building Fasteners." Why is that important? Because if
6 you are using "Building Fasteners" in connection with
7 "Sealtite," you are not going to confuse people who are
8 buying screws for the aerospace industry or something
9 like that. It's limited to building fasteners.

10 JUSTICE KAGAN: Mr. Katyal, if we want to
11 check up on what you are saying about these limitations,
12 where would we look? Where does the board say we don't
13 look at use in the way that you're saying they don't
14 look at use?

15 MR. KATYAL: Let me read to you from the
16 Octocom decision. This is -- this is from -- this is at
17 page 47 of our brief: "It was not error for the board
18 to give no weight to evidence that Octocom modems are
19 bought by a particular class of purchases. It would
20 have been error to do otherwise. Because the party
21 seeks an unrestricted registration, such evidence of a
22 specific class of customers didn't relate to a material
23 fact" --

24 JUSTICE KAGAN: You know, I'm doing this
25 quickly and on the fly, but isn't that the key phrase,

1 "unrestricted application"?

2 MR. KATYAL: Exactly.

3 JUSTICE KAGAN: They sought an unrestricted
4 application.

5 MR. KATYAL: Exactly.

6 JUSTICE KAGAN: And here there is not an
7 unrestricted application.

8 MR. KATYAL: No, there is, Justice Kagan.
9 The application is at page 70. It is only for the word
10 "Sealtite." It is not to a specific class of
11 purchasers, such as the sophisticated group of consumers
12 that the district court found so crucial in finding no
13 infringement.

14 JUSTICE SOTOMAYOR: I didn't --

15 JUSTICE KAGAN: Is that your one case or do
16 you have others?

17 MR. KATYAL: Sure. Mayer/Berkshire says the
18 same thing. This is at 424 F.3d at 1232: "A claim of
19 infringement before the court and likelihood of
20 confusion before this board are different claims. In
21 board proceedings, likelihood of confusion is determined
22 independent of the context of actual usage. In an
23 infringement action, on the other hand, the context of
24 the use of the mark is relevant."

25 It could not be clearer, Justice Kagan.

1 That's the way this is done in practice.

2 JUSTICE GINSBURG: Mr. Katyal, Justice
3 Scalia suggested that these are not expeditious
4 proceedings before the whatever it is, TTAB. And
5 what -- what is the situation there? I know it's a lot
6 less expensive to go to the board than it is to go to a
7 court, but how rapidly are these processed?

8 MR. KATYAL: I think the amici are before
9 you, all of the amici saying that it is a much quicker
10 process that tracks Congress's intent, which was a
11 low-cost system that was going to provide notice. And
12 if you adopt my friend's argument on the other side, as
13 all the amici are saying to you, you do incentivize the
14 Hargises of the world to come forth and in the
15 registration -- they may not seek registration at all
16 because the cost of doing so, as was suggested in the
17 first part of the argument, is now going to be so high,
18 you are stuck for all time -- this is, Justice Breyer,
19 your earlier Louis Vuitton example -- you are stuck for
20 all time with -- because you happened to litigate
21 registration in the TTAB, now be -- now it is preclusive
22 in an infringement action down the road.

23 JUSTICE ALITO: I thought you said that the
24 preclusion analysis would be the same if there were de
25 novo review in the district court. So if that's the

1 case, then, how can you rely on the nature of the TTAB
2 proceeding alone?

3 MR. KATYAL: Well, if the nature --
4 because even in the district court, the process isn't
5 the same as an infringement in two different respects.
6 One is, of course, there is no right to a jury trial and
7 we do think that there are some constitutional doubts
8 that are engendered by my friend's reading on the other
9 side. And second, the question that is being asked in
10 de novo review is ultimately a different one. It's
11 about whether or not the use is confusing, not whether
12 the resemblance is.

13 JUSTICE ALITO: Well, I see all those
14 points, but do you claim that the district court
15 proceeding is -- is expeditious and for that reason
16 there would be no preclusion?

17 MR. KATYAL: No. We're not saying that
18 the -- at least the district court process does have the
19 robust Article III and jury protections available to it.
20 If the jury decides, first, a finding of infringement,
21 we do think, as our brief points out, that a separate
22 statute, 1051, would make that pre -- not preclusive,
23 but would simply bar -- bar the registration of that
24 mark.

25 And I think that's an important point

1 because Congress here did something, and this is what
2 our red brief at page 30 says, with respect to
3 registration decisions, they actually thought through
4 how is registration going to matter at the infringement
5 stage? And they said, look, it's going to give you
6 certain things. It's going to give you presumptions of
7 validity, presumptions of ownership and the like, but
8 nowhere did they do what, for example, they've done in
9 the patent statute in 35 U.S.C. 315 and 325 and
10 affirmatively buy into the preclusion doctrine and
11 say --

12 JUSTICE BREYER: Quick question. If you are
13 right about the difference between resembling causing
14 confusion and using in connection causing confusion,
15 then if you go to the review procedure and you go into
16 the full district court, that doesn't preclude either.

17 MR. KATYAL: Exactly.

18 JUSTICE BREYER: So there's no preclusion
19 whether you go to the district court or not in your
20 basic statutory view there.

21 MR. KATYAL: That is correct.

22 JUSTICE KENNEDY: But it seems to me that,
23 and I'll check what the experts in this area say in the
24 amicus briefs, but it seems to me that the fact that
25 this is a simpler proceeding and that a person concerned

1 about cost would want the simpler proceeding and would
2 want the preclusion.

3 MR. KATYAL: Well, Your Honor, sometimes
4 they may want that once they've already made the
5 decision to register, so our point is twofold. First,
6 people like Hargis may not seek registration in the
7 first place. And second, as the amici are saying, if
8 they do seek registration, then they have to do, Justice
9 Kennedy, exactly what you're saying, which is litigate
10 to the hilt and turn that district court de novo review
11 proceeding into an infringement trial. And that's
12 antithetical to what Congress wanted. Congress wanted a
13 low-cost system to incentivize people to come in because
14 it generates positive externalities.

15 JUSTICE SOTOMAYOR: I'm not sure that I buy
16 that, because to the extent that someone's not going to
17 settle and go away or get a sublicense, why should we be
18 now inviting, instead of a district court proceeding,
19 inviting an infringement action? I mean, that will --
20 that's going to be more lengthy no matter what because
21 then damages and a lot of other things are involved.

22 MR. KATYAL: Because, Justice Sotomayor, the
23 registration decision at the end only decides a very
24 limited thing. It doesn't decide the right to use the
25 good. That's something only infringement does. That's

1 why -- that's kind of -- it's kind of the main banana is
2 infringement. Congress has known that. That's the way
3 it's been for hundreds of years. There isn't going to
4 be any sidestepping of an infringement inquiry in an
5 appropriate case. It's going to happen.

6 The question then is: Do you want a
7 litigant like Hargis to be stuck with a limited record
8 with limited evidence on a limited question,
9 particularly when, as I was saying to Justice Scalia,
10 the registration question that's being determined either
11 in the district court or in the TTAB is generally a
12 broader one. It's about the paper mark. And there's
13 easier to find likelihood of confusion based on that
14 paper mark than you can in actuality.

15 And so someone like Hargis in which you've
16 had a jury trial finding, look, no infringement, indeed
17 they had to -- the evidence was so weak on likely to
18 confusion that they had to manufacture some of it, those
19 types of rulings will never be able to happen because of
20 an administrative process, a stripped down process that
21 didn't ask the right question at the end of the day,
22 which is, is the use of the product, looking at the
23 stylization, looking at the way it's done in practice,
24 looking at the customer sophistication and the like, is
25 that use actually causing confusion?

1 This case is a perfect illustration of why
2 you wouldn't want to have a preclusion rule in practice
3 because there's no infringement at bottom line here when
4 the product's actual use is being decided. The only way
5 you can find a likelihood of confusion is by looking to
6 something more abstract, the resemblance and the
7 similarity of the goods alone, only the goods, not the
8 way in which the goods are actually being manufactured
9 and being sold.

10 JUSTICE KAGAN: Well, Mr. Katyal, I'm just
11 looking here at the TTAB's analysis and it seems to me
12 it's loaded with stuff about use. It says, "B&B's
13 sophisticated fasteners are primarily used in sealing
14 applications while Hargis's products are the next step
15 up from a nail and are not made for sealing."

16 MR. KATYAL: Justice Kagan, there's no doubt
17 that they recite that as part of the facts, but at page
18 70, they say the determinative factor here is the
19 similarity of the goods and not the similarity of the
20 goods in the actual marketplace because as the district
21 court found, these goods actually don't compete in the
22 marketplace whatsoever.

23 Sure, some evidence is going to come in at
24 the front end. Our point, Justice Kagan, is at the back
25 end, the process that is the question the TTAB is

1 deciding ultimately is about confusing resemblance and
2 that is a lot easier --

3 JUSTICE KAGAN: Again, it says, "The
4 products of the parties move in different channels of
5 trade." It says, "It's the use of substantially
6 identical marks on closely-related products."

7 MR. KATYAL: Well, Justice Kagan, our point
8 is not -- our brief acknowledges that, that oftentimes
9 the TTAB, some evidence of actual use comes in, but it
10 comes in to answer a different question.

11 It's kind of like Montana v. Egelhoff, the
12 dual intoxication case. Some evidence about alcohol can
13 come in for -- to determine whether or not someone had
14 the first degree murder intent. Other evidence on
15 intoxication might come in in a different trial to
16 determine whether or not someone had the physical
17 ability to pull the trigger. The evidence comes in in
18 both cases, but it's asking a different question at the
19 end of the day. The resemblance inquiry is abstract
20 and -- and the infringement one is actuality.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Jay, you have three minutes.

23 REBUTTAL ARGUMENT OF WILLIAM M. JAY.

24 ON BEHALF OF THE PETITIONER

25 MR. JAY: Thank you, Mr. Chief Justice.

1 Everything Hargis wanted to put in at the
2 trademark board it could have put in. If it had won, it
3 would have had a valuable protection. And, Justice
4 Kennedy, this goes to why litigants would -- would seek
5 preclusion. It would have been protected against an
6 infringement action based on the same facts. And that
7 is why we think that the Federal Circuit has been for
8 years affirming the idea that once you've already won in
9 one tribunal in an infringement action, the trademark
10 board shouldn't reach a different decision. The
11 trademark board should not be registering marks that
12 infringe, it should not be withholding registration for
13 marks that don't.

14 Let me point -- let me be absolutely clear
15 about what the trademark board can consider. I must
16 respectfully disagree with my friend about -- about what
17 he said. If you want to consider the logo, the board
18 can consider the logo. Look at the Toro case about the
19 mark LawnPup which had a -- which was used with a little
20 dog. Look at the Federal Circuit's decision in Kenner
21 which dealt with the mark Play-Doh and which the Federal
22 Circuit went on and on about the fact that the two
23 products were used with trade dress that was exactly the
24 same. Even though --

25 JUSTICE BREYER: This -- remember the case

1 we had where you can trademark a color.

2 MR. JAY: Right.

3 JUSTICE BREYER: And it was a peculiar shade
4 of green and used on dry cleaning pads. Suppose I want
5 to do that and I own the trademark, a junior person
6 comes in and he has a different shade of green. Okay?
7 Seems different. Can I introduce evidence that the
8 people who use these particular kinds of dry cleaners
9 are colorblind? And so they won't recognize the
10 difference. It has nothing to do with the use. It has
11 only to do with the customers or the conditions in which
12 they are used. Can I introduce that at the board or
13 not?

14 MR. JAY: Let me -- I think no, but let me
15 contrast with --

16 JUSTICE BREYER: No.

17 MR. JAY: But the reason why -- what Hargis
18 could put in, what it needed to put in, this just goes
19 to the essential difference. And this is what Justice
20 Kagan brought out in her colloquy with my friend. That
21 there is a restriction in these registrations. One is
22 restricted to aerospace fasteners. One is restricted to
23 building fasteners. And the differences between those
24 marks, that's what the board took evidence on and
25 considered. It didn't just make up what the nature of

1 the fastener market was. It took evidence on it and
2 that's why at 61A and 64A of the Petition Appendix it
3 explains it understands that the fastener market is not
4 monolithic. It explains that there is not direct
5 competition, but it understands that there is likely
6 confusion because if you are looking for a fastener and
7 you think that, oh, I'll buy a Sealtite fastener, it
8 must be made by the aerospace people, that's what --
9 that's what they were getting at, and that's evidence
10 that the board could come in.

11 My friend said repeatedly that the evidence
12 was different between the proceedings. Respectfully,
13 that doesn't matter. Page 52 of our blue brief, Section
14 27 of the Restatement of Judgments: New evidence is not
15 what matters. The question is were they asking the same
16 question. And the Trademark Board could and did take
17 evidence about the question whether aerospace fasteners
18 are so different from construction fasteners that,
19 despite the phonetic identity of the marks, we should
20 let Hargis use its mark on these different goods. And
21 the board said: We've looked at the differences, but we
22 find that they are intrinsically related because they're
23 both fasteners even if different.

24 Maybe that was right and maybe that was
25 wrong. We, of course, think it was right. But if

1 Hargis thought it was wrong its remedy was to appeal,
2 not to relitigate.

3 JUSTICE KAGAN: Mr. Katyal suggested that --
4 he read from two cases which suggest some kind of
5 different standard.

6 MR. JAY: The difference, Justice Kagan, is
7 if both cases recite modems as to good, the board
8 doesn't look beyond that and say, oh, fancy modems and
9 cheap modems. But if you recite different goods in your
10 two registrations, it absolutely does look at the
11 differences between those goods and that is why there is
12 preclusion here.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 The case is submitted.

15 (Whereupon, at 11:04 a.m., the case in the
16 above-entitled matter was submitted.)

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