

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MEDTRONIC, INC., :

4 Petitioner : No. 12-1128

5 v. :

6 BOSTON SCIENTIFIC :

7 CORPORATION, ET AL. :

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9 Washington, D.C.

10 Tuesday, November 5, 2013

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 1:00 p.m.

15 APPEARANCES:

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17 Petitioner.

18 CURTIS E. GANNON, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.; for
20 United States, as amicus curiae, supporting
21 Petitioner.

22 ARTHUR I. NEUSTADT, ESQ., Alexandria, Virginia; on
23 behalf of Respondents.

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

2 (1:00 p.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this afternoon in Case 12-1128, Medtronic v. Boston
5 Scientific Corporation.

6 Mr. Waxman.

7 ORAL ARGUMENT OF SETH P. WAXMAN

8 ON BEHALF OF THE PETITIONER

9 MR. WAXMAN: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 Patent law places the burden of proving
12 infringement on the patentee. And until this case, it
13 was settled that the burden does not shift if the issue
14 arises in a declaratory action seeking a judgment of
15 non-infringement. The Federal circuit imposed a
16 different rule in suits brought under MedImmune where
17 the party seeking a declaration of non-infringement is a
18 licensee. That was error.

19 Allocation of the burden of proof inheres in
20 the governing substantive law, while the Declaratory
21 Judgment Act is procedural only and does not change
22 substantive rights. The burden of proof in MedImmune
23 actions, like all other declaratory actions, remains
24 where it would have rested in the equivalent coercive
25 suit brought by that patentee.

1 JUSTICE ALITO: Now, this concerns just the
2 risk of nonpersuasion. It doesn't concern the burden of
3 production; is that right?

4 MR. WAXMAN: That's correct. That's --
5 that's the issue in this case. Although as we point
6 out, that the word "burden of proof" -- I think the word
7 "burden of proof" used in the opinion below could be
8 thought to be addressed to both points, but the parties
9 agree that the relevant consideration here is the burden
10 of proof and that trial judges do retain discretion to
11 make rules about ordering -- the ordering of proof in
12 patent cases.

13 JUSTICE ALITO: Well, if that's all that's
14 involved, then the case doesn't seem to amount to quite
15 as much as one might have thought otherwise, does it?
16 If -- suppose the -- the patentee has the burden of
17 production, so they would have to explain why there was
18 infringement; they would have to introduce proof of
19 infringement.

20 And the only difference is who wins when
21 the -- the factfinder thinks that it is exactly in
22 equipoise.

23 MR. WAXMAN: Right. Well, that, of course,
24 was not what happened in -- not what the Respondent
25 maintained should happen in this case. But taking your

1 question as it is, this Court has pointed out repeatedly
2 that the burden of -- where the burden of persuasion
3 rests is very often outcome -- outcome determinative.
4 And that is certainly true in patent cases. What the
5 jury is told about who has the burden of persuasion is
6 surpassingly important in many cases, including many
7 patent cases.

8 And that's the issue in this case. I mean,
9 the substantive -- the -- the reason why the Federal
10 circuit erred is clearly doctrinal, which is this Court
11 has said, over and over again, that burdens of proof,
12 like standards of proof, are substantive. They inhere
13 in the substantive right, and the Court has also said,
14 repeatedly, that the declaratory judgment action is
15 procedural only and doesn't change substantive rights.

16 But I think if you go to a -- to the policy
17 question, Justice Alito, reversing the burden in a
18 declaratory action would impair the purpose and utility
19 of the Declaratory Judgment Act, which was enacted to
20 provide a mechanism for determining how the equivalent
21 coercive action would be resolved without the -- without
22 requiring the declaratory judgment plaintiff to subject
23 itself to retrospective liability.

24 And, indeed, shifting the burden would
25 threaten the issue preclusive effect of the declaratory

1 judgment, frustrated --

2 CHIEF JUSTICE ROBERTS: It seems to me we
3 could -- all that may be true, but we need to cut down
4 to the basic issue, which is MedImmune changes all that.
5 The idea is you're moving along with the license,
6 everybody's happy. All of a sudden, you jump into
7 court. Why shouldn't you have the burden as the party
8 who seeks to disturb the status quo?

9 MR. WAXMAN: Well, the -- the reason,
10 Mr. Chief Justice, is the reason that the burden of
11 proof is substantive, and a declaratory judgment action
12 under the Act is not -- is aimed not to change any
13 substantive rights. And that's why all of the decided
14 cases in this area, except for the one below, left the
15 burden exactly where substantive patent law left it.

16 JUSTICE KENNEDY: Does it help your answer
17 or -- or does it limit the theory of your case too much
18 to say that, in this case, there is a controversy
19 satisfying the declaratory judgment rules because the
20 patentholder gave notice of potential -- or of
21 infringement? Am I right about that?

22 MR. WAXMAN: You're right about that, and
23 that would be true, Justice Kennedy, on all MedImmune
24 cases.

25 JUSTICE KENNEDY: Now, could we -- or should

1 we make the case turn on that, or can we say, with
2 declaratory judgment, there has to be a dispute, we --
3 we know that a dispute is likely, a controversy, so the
4 formality of a notice is not important.

5 MR. WAXMAN: Well, I don't know that it's a
6 formality of a notice. I mean, the issue that this
7 Court addressed in MedImmune -- the question that you're
8 raising, I think, is one that goes to Article III
9 jurisdiction. You can't use the declaratory judgment
10 procedure to get the Court to answer a hypothetical
11 question.

12 JUSTICE KENNEDY: Well, it goes to me to --
13 a basic question of fairness. When I picked up this
14 case, I thought, how is the patentholder supposed to
15 know what all these new inventions are? What does it
16 know about it? But then I answered my own question by
17 saying, well, it gave notice of infringement.

18 But -- that's why I've asked if the notice
19 is essential to your position?

20 MR. WAXMAN: I think the notice is the --
21 well, it's essential to the Article III MedImmune
22 question, whether or not there actually is a case or
23 controversy.

24 So, in this case, it's perfectly obvious
25 because the -- the license requires Medtronic to

1 affirmatively go to Mirowski within 30 days of
2 introducing any product and not only tell -- providing
3 notice of the product, but providing the manual -- the
4 diagrams and the manuals that are given to physicians so
5 that Mirowski can determine, within 60 days, whether or
6 not to assert infringement.

7 In MedImmune, you didn't have that
8 procedure, but the Court still held in the context of
9 that case that, because Genentech had made clear that it
10 thought that the Cabilly patent covered the accused
11 devices, there was sufficient -- sufficiently concrete
12 controversy that MedImmune did not have to stop paying
13 royalties and breach the license.

14 And -- and so, therefore -- I think I may be
15 talking around your question, but I am trying to get to
16 the point that the -- the requirement of some notice,
17 the -- the patentee -- there's no declaratory judgment
18 jurisdiction if the patentee doesn't know about the
19 product, has -- has never done anything to suggest that
20 the product -- that his or her patent reads on the
21 product.

22 But that is an Article III question that
23 would be -- you wouldn't get to the burden of proof if
24 you couldn't satisfy MedImmune.

25 JUSTICE GINSBURG: Mr. Waxman, what do you

1 make of the -- the patent listing non-infringement as an
2 affirmative defense in an infringement suit?

3 MR. WAXMAN: We agree with the articulation
4 of the point by the Solicitor General in the United
5 States brief, which is that the cases have recognized
6 that non-infringement can either be a general defense --
7 that is, when -- when non-infringement is simply a
8 general denial of a cause of -- of a claim of
9 infringement, it is not an affirmative defense.

10 But there are particular types of
11 non-infringement claims. And the ones that I'm familiar
12 with are prosecution history estoppel and the
13 experimental use exception that are affirmative
14 defenses.

15 In other words, those are situations in
16 which the alleged infringer says, hey, I'm not saying
17 that your patent doesn't read -- all the claims of your
18 patent don't read on my invention; I'm claiming
19 non-infringement because I was making experimental use,
20 and that has affirmatively been determined by Congress
21 not to infringe.

22 Or, yes, your -- the elements of your claim
23 read upon my invention, but during the prosecution of
24 the patent in the Patent Office, you disclaimed some
25 claim scope, and under prosecution history estoppel,

Official

1 this Court elucidated in Festow, there is no
2 infringement.

3 This is a case involving a general denial of
4 infringement, and therefore, it is not an affirmative
5 defense.

6 JUSTICE GINSBURG: What you -- what you just
7 responded, that would go as well for an alleged
8 infringer who is not a licensee, right?

9 MR. WAXMAN: Yes. I mean -- absolutely. I
10 mean, the point here --

11 JUSTICE GINSBURG: This here -- this case is
12 about the difference between the licensee and the
13 non-licensee.

14 MR. WAXMAN: Right. So a defense of
15 non-infringement -- a general defense of
16 non-infringement is not an affirmative defense. And in
17 the -- the potential or correlative coercive action
18 which would have been a suit for patent infringement by
19 Mirowski, had we ceased making the royalty payments,
20 they would have borne the burden of proving
21 infringement, unless we raised an affirmative defense,
22 like prosecution history estoppel or experimental use, in which case we
23 would have the burden.

24 The point of the Declaratory Judgment Act is
25 that the burden is left exactly where it would have

1 been, had there been no -- had this identical issue
2 arisen in the absence of the declaratory judgment
3 procedure.

4 And in this respect, it is identical to the
5 jury trial right, which this Court held in Beacon
6 Theatres v. Westover, is also an element of the
7 substantive claim and also cannot be deprived by the
8 peculiarity of a declaratory judgment being a claim for
9 an equitable remedy.

10 JUSTICE KAGAN: Mr. Waxman, as I understand
11 it, the agreement in this case identified certain
12 patents and contemplated that there would be disputes
13 about whether particular products of Medtronic violated
14 or infringed or practiced, whatever, those patents.

15 But there might be some other kinds of
16 agreements which, instead, identify certain products --

17 MR. WAXMAN: Mm-hmm.

18 JUSTICE KAGAN: -- and essentially treat
19 those as infringing products in the absence of a
20 license. In that sort of agreement, would you make the
21 same kind of claim, that if Medtronic had that agreement
22 that identified certain products, but Medtronic woke up
23 one day and said, you know what, we don't think that
24 those products infringe, we essentially want to
25 relitigate our agreement, can Medtronic come to court

1 and do that via a declaratory judgment action?

2 And if so, who would bear the burden of
3 proof?

4 MR. WAXMAN: So if I understand your
5 question, first, to -- to go to the license in this
6 case. This case not only involves products that
7 didn't -- that aren't specifically articulated in a
8 license agreement; neither the patents nor the products
9 at issue in this case had even been conceived, much less
10 in existence, at the time the license agreement was in
11 effect.

12 But in -- if I understand your question, in
13 a situation in which I make Widget A and you claim that
14 you have the patent that reads on that widget, and I --
15 you agree to license me to do it, if the license -- if
16 payment of the license depends upon a determination that
17 it otherwise would be infringing, I can file a
18 declaratory judgment action and seek a declaration that
19 it's not infringing.

20 That is, if the cover -- if the license
21 covers only products that otherwise would infringe, I
22 can bring a DEC action, claiming non-infringement, and
23 you would bear the burden, assuming that you had
24 threatened, in some way, to enforce your patent against
25 me.

1 In -- in the -- the situation that -- sort
2 of bogeyman situation that Mirowski and the -- the
3 intellectual property owner's brief articulate, which --
4 imagine, which is you license -- I have a -- I have a
5 product, you have a patent, you license it to me, and I
6 turn around the next day and sue for -- a declaration of
7 non-infringement, there are any number of ways that you,
8 as the patentee, could protect yourself from that
9 extraordinary eventuality.

10 You could provide, for example, that -- I --
11 you would require me to issue a -- you know, to -- to --
12 to pay a paid-up royalty for all use. Or you could
13 simply say, we don't care whether the patent infringes
14 or not; you agree to pay me three dollars per unit sold.
15 Or you could put a provision in that would say, if you
16 sue for patent infringement, the royalty rate goes to
17 3X.

18 Or, for that matter, if you sue, that
19 will -- that can -- I can deem that a breach of the
20 license agreement and -- and recover the -- the remedies
21 that patent law allows, an injunction and treble damages
22 and attorneys' fees in the context of a -- a willful
23 action.

24 I want to underscore, although the Federal
25 circuit made a broad rule, exactly what we have here.

1 In this case, Mirowski -- this license is from 1991.
2 Mirowski -- it's not in the record, but there's no
3 dispute that Mirowski has received hundreds of millions
4 of dollars of royalties from Medtronic for its patents.

5 It gets, as a benefit of this license --
6 notice, as I said, within 30 days of every new product
7 and the manual, and it can require Medtronic to start
8 accruing royalties and an interest rate of 2 -- of 2
9 points over prime, as soon as it sends us a notice.

10 And moreover, in the -- in the litigation
11 tolling agreement, we agree that, even though we are not
12 a party in the referenced St. Jude action, we would be
13 bound by any determination in that adjudication,
14 whereas, otherwise, we wouldn't.

15 So this license agreement was enormously
16 beneficial and couldn't be farther from the scenario of
17 I have a widget, I agree to license it, and the next
18 day, I turn around and sue you. But, in that event,
19 there would be lots and lots of remedies.

20 I do want to underscore one other thing,
21 that the Federal circuit said that it was applying this
22 special rule only in MedImmune-type cases. But the
23 rationale of the court is that what causes the burden to
24 shift is the absence of a counterclaim for infringement.

25 That would have, for example, caused the

1 burden to shift in the Myriad case that this Court
2 decided last term, where there was one researcher at NYU
3 who had standing to bring a declaratory judgment action.

4 There was no basis for Myriad to claim
5 infringement because he had made clear that he
6 wouldn't -- he wouldn't engage in the research and
7 clinical work that he was going to, so long as he was in
8 risk of patent infringement remedies. And that -- the
9 source of the rule -- the source of the law where the
10 burden of proof lies, is in substantive patent law. And
11 this Court has said, for 125 years, that it rests with
12 the infringer.

13 What neither the Federal circuit nor my
14 friend on the other side of this case has ever
15 identified is what is the source of the rule that shifts
16 the burden in a declaratory judgment action? It can't
17 be the Declaratory Judgment Act because that Act is
18 procedural only.

19 If I can reserve the balance of my time?

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Mr. Gannon.

22 ORAL ARGUMENT OF CURTIS E. GANNON,
23 FOR UNITED STATES, AS AMICUS CURIAE,
24 SUPPORTING THE PETITIONER

25 MR. GANNON: Mr. Chief Justice, and may it

1 please the Court:

2 The government agrees that using the same
3 burden of proof that would apply in the hypothetical
4 coercive action that underlies the Declaratory Judgment
5 Act is the best thing to do in this mirror image
6 declaratory judgment action. That best serves the
7 purposes of the Declaratory Judgment Act and allows for
8 final resolution of the types of controversies that this
9 Court contemplated in MedImmune.

10 If I could turn to Justice Kagan's points
11 about an incident in which the parties had actually
12 agreed to -- whether certain products were covered by a
13 particular license.

14 That would be different from the situation
15 we have here because the products in question here
16 weren't actually in existence at the time of the
17 underlying license agreement. The whole point of that
18 aspect of the license agreement was to, as you said,
19 channel future disputes into this particular dispute
20 resolution mechanism.

21 JUSTICE SOTOMAYOR: Are -- are you
22 suggesting that the burden-shifting rule should be
23 different in the hypothetical Justice Kagan --

24 MR. GANNON: I was not about to suggest
25 that, Justice Sotomayor. I was going to say that I

1 think that's the -- that -- that that would probably be
2 the least logical way to deal with the quandary that
3 might arise from thinking that somebody is then trying
4 to breach the license.

5 And we don't think there's any license
6 breach here because there wasn't any prior agreement on
7 the fact that these future products were going to be
8 covered by the -- by these patents, that they'd be
9 practicing these patents.

10 But, even if there were some concern about
11 the licensee turning around and challenging the
12 agreement that it had previously made, it seems like the
13 problem there is either that they should be estopped by
14 what they already said in the agreement or Lear needs to
15 be extended to keep them from being estopped in that
16 way. But shifting the burden of proof seems like an odd
17 way to get at solving whatever the quandary there might
18 be.

19 And I think that, at some point, this --
20 this also interweaves with a point that the Chief
21 Justice made, about whether Medtronic here is seeking to
22 change the status quo. And we don't think that
23 Medtronic is seeking to change the status quo here, for
24 a couple different reasons.

25 One of them is, as I was just saying, that

1 the agreement here didn't actually reach -- the license
2 agreement here didn't -- it didn't include a meeting of
3 the minds about whether these particular future products
4 would be covered by these patents, including one of the
5 patents was reissued after the time of the license.

6 And also, this license agreement expressly
7 preserved the parties' ability, including Medtronic's
8 ability, to challenge both the validity and the
9 enforceability of the patent. That's at page 13 of the
10 Joint Appendix. And so there's no way in which I think
11 it can be legitimately said that Medtronic is trying to
12 either get out of its contractual obligations or to
13 change the status quo.

14 The status quo, right now, is that the
15 royalties are collecting in a certified account, and so,
16 in a sense, both parties are trying to change the status
17 quo, in trying to get the stream of royalties that
18 either is applicable to these products or isn't, on the
19 basis of the resolution of a question that the parties
20 had not decided, but said would be decided in a
21 declaratory judgment action like this.

22 And we think that the best way to think of a
23 declaratory judgment action like this is that it is the
24 mirror image of the underlying coercive hypothetical
25 action that could have been brought against Medtronic.

1 CHIEF JUSTICE ROBERTS: Well -- well, but I
2 guess the argument is that it's the mirror image of an
3 action that could not have been brought because
4 Medtronic is paying royalties.

5 MR. GANNON: Well, the same thing is true in
6 MedImmune, and I think that the Court noted that the --
7 in MedImmune, that the Declaratory Judgment Act was
8 intended to help get the party out of the dilemma it
9 would be in, in deciding whether it should continue to
10 be effectively coerced into paying royalties that it
11 thinks it doesn't need to pay or exposing itself to the
12 risks associated with -- with breaching the license
13 and -- and being subject to treble damages, attorneys'
14 fees, and the other remedies that would be available
15 under the Patent Act.

16 And, yet, even though there had been no
17 infringement in that case and no breach of the contract
18 in that case, which is also true here, because, so far,
19 everybody has been behaving the way the license expected
20 them to behave, the Court recognized that the parties
21 had a concrete dispute about the applicability of the
22 patents to those particular products, that the scope of
23 the contract was not going to require payment of
24 royalties where the patent did not apply, and said that
25 the -- the issues that were going to be resolved in the

1 declaratory judgment action there were going to involve
2 questions of patent validity, patent enforceability, and
3 scope of coverage, patent infringement, which is exactly
4 what we have here.

5 Medtronic has raised in their complaint --
6 the well-pleaded complaint that you would look to here,
7 is one that arises under the Patent Act and includes
8 claims involving all three of those issues, just as was
9 the case in MedImmune.

10 JUSTICE GINSBURG: I take it you disagree
11 with the -- we have one friend of the Court brief that
12 says this is not a case arising under the patent law; it
13 arises under contract law. It's a contract case with a
14 patent issue.

15 MR. GANNON: Yes, Justice Ginsburg, we do
16 disagree with that. We think that this case involves a
17 claim that arises under the patent laws, for the reasons
18 that I was just saying.

19 I think that the way to -- the way to
20 conceptualize this is to look to what the well-pleaded
21 complaint would be in the hypothetical coercive action
22 that would be being brought against Medtronic if we
23 didn't have the problem presented by the fact that they
24 haven't actually breached the contract or infringed at
25 this point.

1 And we have every reason to think that that
2 hypothetical coercive action is one that arises under
3 the patent laws because it's one involving infringement.
4 That's the dispute that the parties acknowledge that
5 they have.

6 In the litigation tolling agreement at page
7 20 of the Joint Appendix, it talks about the fact that
8 the parties have a dispute under Section 271 of the
9 Patent Act. In the red brief here, Mirowski has -- has
10 told us on page 48 that, if Medtronic were to cease
11 paying royalties, that the recourse would be that they
12 would bring an infringement suit. And the complaint
13 here in paragraph 5 alleges that the claim here arises
14 under the Patent Act.

15 And because it does arise under the Patent
16 Act and because it's clear here that all of the
17 defensive issues would also be Federal, as I mentioned
18 before, I think there is no dispute here that this --
19 this would arise under the patent laws, which would
20 provide for district court jurisdiction under Section
21 1338 and exclusive appellate jurisdiction in the Federal
22 circuit under Section 1295(a), even before the
23 amendments in the America Invents Act in 2011.

24 I think that there is one other point that
25 would be worth making in response to some of the amicus

1 briefs about the -- the potential problems here
2 associated with whether the parties have an incentive to
3 enter into these type of licensing arrangements.

4 As Mr. Waxman already explained, the
5 patentholder here got lots of benefits out of -- out of
6 entering into an agreement like this, notwithstanding
7 the fact that they would leave themselves open to
8 precisely the suits that the agreement contemplated,
9 which was a suit involving both infringement and
10 validity questions; and that, under the circumstances,
11 there's -- they had plenty of incentive to enter into a
12 license agreement, notwithstanding the fact that they
13 would continue to bear the same burden of proof that
14 they would bear in every other procedural context in
15 which patent infringement claims have arisen up until
16 now.

17 And so I think that, in that sense,
18 that's -- that's not a sea change from their
19 perspective. And -- and, yet, even if they were to
20 think it so, as Mr. Waxman explained, a licensor in that
21 context would have several mechanisms that they could
22 use in order to rejigger the balance between the parties
23 if they wanted to.

24 And -- and I think that we agree with --
25 with everything on the list that Mr. Waxman mentioned,

1 including having fully paid-up licenses or allowing a
2 suit for infringement or invalidity to constitute a
3 termination of the license that would allow the
4 patentholder to bring an infringement action.

5 If there are no further questions, we would
6 urge the Court to reverse.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 Mr. Neustadt.

9 ORAL ARGUMENT OF ARTHUR I. NEUSTADT
10 ON BEHALF OF THE RESPONDENTS

11 MR. NEUSTADT: Thank you, Your Honor.
12 Mr. Chief Justice, and may it please the Court:

13 The Federal circuit got it right in this
14 case. The Federal circuit took the well-settled law on
15 burden of proof, and it applied it to two stipulated
16 facts and reached a conclusion that it had to reach. It
17 was controlled by it.

18 The two stipulated facts were, number one,
19 when Mirowski's counsel, me, wrote letters to Medtronic,
20 that was not a notice of infringement. There could be
21 no infringement in this case. Infringement is defined
22 as "using a patented invention without authority."
23 Medtronic had authority. It was licensed.

24 The second stipulated fact -- and this is at
25 page 51 of the Joint Appendix -- is that Medtronic is a

1 licensee. It cannot be an infringer. So everything
2 that you say about infringement involves a completely
3 different situation.

4 There was no shifting of the burden of
5 proof. The well-settled law that I referred to is the
6 normal default rule. The normal default rule is perhaps
7 one of the most fundamental tenets of our jurisprudence.
8 It says that, if a party files a complaint and seeks
9 relief, it has the responsibility to prove that it is
10 entitled to that relief.

11 And the normal default rule has the word
12 "default" in there because it refers to the fact that
13 the statute doesn't decide the burden of proof. And
14 there's no dispute in this case that the statute does
15 not decide the burden of proof.

16 So --

17 JUSTICE SCALIA: But -- but you could say
18 that about any declaratory judgment action. You can say
19 the person bringing the declaratory judgment action is
20 seeking the relief. And if -- if we follow what you
21 said, that then the burden shifts in every declaratory
22 judgment action. And it clearly doesn't.

23 I mean, we -- we've said, time and again,
24 that the burden of proof normally does not shift.
25 What's different here?

1 MR. NEUSTADT: I'll tell you what's
2 different here. The difference is that there is no
3 infringement. Medtronic is a licensee. As a result,
4 there can be no coercive counterclaim. As the Chief
5 Justice noted, they're paying royalties. There is no
6 infringement.

7 JUSTICE GINSBURG: How about a permissive
8 counterclaim?

9 MR. NEUSTADT: Pardon me?

10 JUSTICE GINSBURG: How about a permissive
11 counterclaim?

12 MR. NEUSTADT: A permissive counterclaim, by
13 definition, would have nothing to do with the issue that
14 is involved.

15 JUSTICE GINSBURG: But could -- could the
16 patentholder bring in the declaratory action a
17 counterclaim for infringement?

18 MR. NEUSTADT: No, they cannot because
19 Medtronic is a licensee. They cannot be an infringer.
20 And the difference --

21 JUSTICE KAGAN: Well, they can be an
22 infringer, Mr. Neustadt, if --

23 MR. NEUSTADT: Pardon me?

24 JUSTICE KAGAN: They can be an infringer if
25 they say, we're ignoring our agreement, we're not paying

1 royalties, but we're going to go on and continue making
2 the product.

3 Then MVF would say they would be infringing.
4 And that's the world that MedImmune imagines is
5 happening. It says --

6 MR. NEUSTADT: No. I'm sorry, I interrupted
7 you. Go ahead.

8 JUSTICE KAGAN: No, I'm finished.

9 MR. NEUSTADT: No, I'm sorry. I didn't mean
10 to interrupt you.

11 Okay. That's not what happened in
12 MedImmune. First, if you change -- if you change the
13 facts and Medtronic starts infringing because it stops
14 paying royalties, of course, you get different results.
15 Here's what happened in MedImmune, in our situation --

16 JUSTICE SOTOMAYOR: I'm not sure how you're
17 receiving royalties. It's in an escrow account.

18 MR. NEUSTADT: Medtronic is holding the
19 money.

20 JUSTICE SOTOMAYOR: Yes, but it's in an
21 escrow account. You can't touch it, right?

22 MR. NEUSTADT: Well, we do not have access
23 to the money that they're holding, correct.

24 JUSTICE SOTOMAYOR: Right. So how are you
25 getting paid? Why isn't there a technical infringement?

1 MR. NEUSTADT: Well, there can't be --

2 JUSTICE SOTOMAYOR: Because you're not
3 receiving the money.

4 MR. NEUSTADT: Because we agreed to that in
5 the agreement. That's part of our agreement.

6 JUSTICE SOTOMAYOR: Yes, but you're still
7 not receiving the money.

8 MR. NEUSTADT: But we don't -- we agreed to
9 not receiving the money. Everyone is operating in
10 accordance with the license. We can't say, you're
11 withholding money and not paying it to us.

12 JUSTICE SOTOMAYOR: And you agreed they
13 could sue you.

14 MR. NEUSTADT: Pardon me?

15 JUSTICE SOTOMAYOR: You agreed they could
16 sue you under a Declaratory Judgment Act to find out
17 whether or not they're infringing, correct?

18 MR. NEUSTADT: That's right.

19 JUSTICE SOTOMAYOR: All right. So why
20 shouldn't you be bound by that --

21 MR. NEUSTADT: I'm sorry?

22 JUSTICE SOTOMAYOR: Why shouldn't you be
23 bound by that agreement?

24 MR. NEUSTADT: Oh, we are bound by the
25 agreement that --

1 JUSTICE SOTOMAYOR: To prove that they're
2 infringing.

3 MR. NEUSTADT: No, they're not infringing.
4 It's claim coverage. Medtronic cannot infringe because
5 they're a licensee. The dispute is over claim coverage.
6 It's not infringement. That's why we cannot have a
7 counterclaim for infringement.

8 Justice Scalia's question, the big
9 difference is that we cannot counterclaim for
10 infringement. Under the normal default rule, where the
11 party seeking relief has the burden of proof, you have
12 to look at the case, and you have to ask yourself --

13 JUSTICE KENNEDY: I don't -- I don't
14 understand. Suppose the licensee says, this isn't
15 covered by the agreement at all, we're not going to pay
16 you anything. And it starts to manufacture its
17 products. That's -- that's the whole point. That's
18 outside the agreement, they are not going to pay you
19 anything.

20 MR. NEUSTADT: Well, they just --

21 JUSTICE KENNEDY: Or am I missing something?

22 MR. NEUSTADT: Yes, I believe you are. What
23 Medtronic wants in this license is they want an
24 insurance policy for their future products. The problem
25 is that they could -- if they don't have a license, they

1 can get enjoined. So they build this insurance policy
2 so that they're protected, and then they even have a
3 provision whereby they can go and file a DJ action.

4 Now, as I was saying, there are two types of
5 DJ actions in this circumstance. One is where the
6 accused infringer says, I am not infringing, and I want
7 a DJ to that effect. In that response, where you are
8 talking about infringement and not claim coverage, the
9 patentee has to counterclaim. It's compulsory.

10 The patentee then has the burden of proof in
11 that case because he has claimed infringement.

12 JUSTICE SCALIA: It seems to me it is often
13 the case, in declaratory judgment actions, that the
14 defendant in the action cannot counterclaim. I mean, it
15 typically occurs when somebody doesn't want to be in
16 breach of contract and -- and brings a suit to
17 see -- you know, claiming if I do this I won't be in
18 breach.

19 The other side can't counterclaim because
20 the person hasn't been in breach. The whole purpose of
21 the declaratory judgment statute is to enable you to sue
22 before the other side has a cause of action against you.
23 That's the whole purpose of it.

24 So -- so why should the fact that the other
25 side doesn't have a counterclaim change anything?

1 That's usually the situation.

2 MR. NEUSTADT: Because, under the normal
3 default rule, if only one party is seeking relief, that
4 party has the burden of proof. You get into a more
5 complicated situation --

6 JUSTICE SCALIA: But we are not dealing with
7 the normal default rule. We are dealing with a
8 declaratory judgment statute, and we've said, time and
9 time again, that it doesn't alter the burden of proof.
10 And your response is, well, it does when the other side
11 can't counterclaim. And my response to that is,
12 usually, the other side can't counterclaim.

13 MR. NEUSTADT: The -- if you take the normal
14 default rule as set forth in Schaffer, which is the case
15 we cite, and it's this Court's precedent involving an
16 individual education program, and this Court
17 specifically states if the parents bring the suit, they
18 have the burden of proof because they're seeking relief.

19 And if the school district brings a suit,
20 they have the burden of proof because they're the ones
21 who are seeking relief. Wherever you have a case where
22 only one party is seeking relief, the normal default
23 rule is applicable, and the party that seeks relief has
24 to prove it.

25 JUSTICE GINSBURG: But that was not -- Weast

1 was not -- was not a patent infringement case. It
2 wasn't a declaratory -- it wasn't a declaratory
3 judgment, was it?

4 MR. NEUSTADT: It wasn't, but that doesn't
5 make any difference, because there's no exception for
6 declaratory judgment cases in the normal default rule.
7 It's based --

8 JUSTICE BREYER: Well, why shouldn't there
9 be?

10 MR. NEUSTADT: I'm sorry?

11 JUSTICE BREYER: I mean, why shouldn't there
12 be? I take what you're saying is that their claim is,
13 look -- you called it claim scope or something. What
14 did you call it?

15 MR. NEUSTADT: Claim coverage.

16 JUSTICE BREYER: Claim coverage. They say,
17 we have a product, and it doesn't violate the -- the
18 patent for the reason that the claims in the patent
19 don't cover it.

20 MR. NEUSTADT: Correct.

21 JUSTICE BREYER: Now, you want to call that
22 a claim coverage. I would call it no infringement.
23 Call it what you wish. But the fact is there are -- and
24 moreover, you couldn't bring a counterclaim because he's
25 already agreed that, if he loses his suit, he'll pay you

1 the money. So there's nothing to claim for.

2 MR. NEUSTADT: That's correct.

3 JUSTICE BREYER: Yes, I know. Now, all
4 that's true.

5 MR. NEUSTADT: Yes.

6 JUSTICE BREYER: But, nonetheless, the fact
7 is in many claims -- in many instances, though perhaps
8 not yours, this kind of claim, i.e., that person's
9 patent does not cover my product --

10 MR. NEUSTADT: Yes.

11 JUSTICE BREYER: -- is actually a way of
12 saying whether your product infringes the patent, one
13 way of saying that. So their point is, call it what you
14 wish, but where you have a claim which amounts to a
15 claim that my product does not infringe his patent, the
16 rule that should apply is the person who owns the patent
17 should have to prove that the claims do cover the
18 product.

19 And there are a lot of good reasons, et
20 cetera, that they put in their brief why that should be
21 so. It's easiest for the patentee to know in what
22 respect it violates the claim. Normally, a patent,
23 being a monopoly, should not have too many advantages
24 beyond the scope of the monopoly.

25 And we don't like false patents because

1 that -- you'd have different results in the same kind of
2 patent with different people depending upon whether, in
3 some other instance, your client brought a suit or
4 whether this was -- I mean, you've read the arguments.

5 So looking at those functional arguments, is
6 there any answer that you have to their point, other
7 than cases in different subject matters, where burdens
8 of proof did shift?

9 MR. NEUSTADT: Well, the answer to your
10 question is that the normal default rule is a
11 fundamental tenet, that you can't go into court and say,
12 it's the responsibility of the defendant to disprove the
13 allegations of my complaint.

14 In cases where you have the counterclaim, of
15 course, the patentee is going to have the burden of
16 proof. In cases where there can be no counterclaim, you
17 have only one party seeking relief, and that party has
18 the burden of proof.

19 And it follows from the normal default rule,
20 which is the rule of the Court -- rule of this Court.
21 It's the established rule of the land. It's a
22 fundamental tenet that a party cannot come into court --

23 JUSTICE SCALIA: Then the Declaratory
24 Judgment Act doesn't change it; that's your position?

25 What do you do about the res judicata

1 problem? Let's assume that we put the burden of proof
2 where you want it. Okay? So this declaratory judgment
3 action is defeated. All right?

4 Nonetheless, they say, still and all, we are
5 going to go ahead and not pay any royalties. And, then,
6 you bring -- you bring an infringement action, right?

7 MR. NEUSTADT: Right.

8 JUSTICE SCALIA: Is -- is the prior decision
9 res judicata, or are you going to have to relitigate the
10 whole thing, but, this time, with the burden of proof on
11 you?

12 MR. NEUSTADT: No, you're not going to have
13 to relitigate the whole thing.

14 JUSTICE SCALIA: Why not? You never -- you
15 never established that you're entitled to any -- any
16 infringement damages.

17 MR. NEUSTADT: I agree, but you're not going
18 to have to relitigate the whole thing. This issue is
19 going to be decided on preponderance of the evidence.
20 And we don't have the burden. They have the burden on
21 that. Once that's decided --

22 JUSTICE SCALIA: No, you -- you would
23 normally have the burden as -- as the person claiming
24 infringement.

25 MR. NEUSTADT: Oh, of course.

1 JUSTICE SCALIA: Of course.

2 MR. NEUSTADT: Of course.

3 JUSTICE SCALIA: Right? So you'll have to
4 relitigate the whole thing because you -- you never
5 established that there was infringement. In the
6 declaratory judgment action, all you've established is
7 that they didn't prove non-infringement.

8 MR. NEUSTADT: Yeah. That's all true, and
9 I'm not arguing with it.

10 JUSTICE SCALIA: So we have to relitigate
11 the whole thing.

12 MR. NEUSTADT: No. First of all --

13 JUSTICE SCALIA: What's the alternative?

14 MR. NEUSTADT: Okay. I will give you two
15 answers. The first answer is you are never going to get
16 this situation because the last thing in the world
17 Medtronic wants to do is give up its license. So it's
18 not going to -- it's not going to stop paying royalties.
19 The same thing in --

20 JUSTICE SCALIA: It's my hypothetical, okay?

21 (Laughter.)

22 MR. NEUSTADT: Okay. Now, to follow your --
23 to follow -- to follow your hypothetical, the court who,
24 say, tries the issue with respect to whether or not
25 there's claim coverage -- and let's say we prevail

1 on that. When there's a subsequent infringement action,
2 you're correct, we cannot say that they're estopped by
3 res judicata or issue preclusion.

4 But we can say, Your Honor, you've seen this
5 entire case. Now, where it was preponderance of the
6 evidence before, it's now preponderance of the evidence
7 on the other side. It may be the difference between
8 49.9 and 50.5. And we're going to bring a motion for
9 summary judgment and --

10 JUSTICE SCALIA: So your answer is, Justice
11 Scalia, you're right, but it doesn't matter very much.
12 That's your answer, right?

13 MR. NEUSTADT: And I've got one further
14 answer to that.

15 JUSTICE SCALIA: Okay.

16 MR. NEUSTADT: And that is, there is no
17 exception to -- to 100 percent lack of finality with
18 respect to the normal default rule. The normal default
19 rule is more important than saying that, if there is a
20 little bit of chance of a lack of finality, we're going
21 to throw out the entire normal default rule in -- in
22 favor of this rule and put the burden of proof on the
23 party who is not even seeking any relief.

24 And there was no shifting in this case.
25 Shifting involves starting with a position, shifting to

1 another position. As soon as they filed the suit and
2 you're the only party seeking relief, they would have
3 the burden of proof.

4 Now, if they are infringing, we can
5 counterclaim. Then we're going to have the burden of
6 proof because that's an issue where you have two parties
7 seeking relief, and that's a little more complicated.

8 JUSTICE GINSBURG: Why -- why isn't that
9 true here? Because you are seeking release of the
10 escrowed funds.

11 MR. NEUSTADT: We're not seeking it in the
12 suit. The way the agreement was between the parties was
13 if Medtronic disagrees with our assessment, then they
14 can go ahead and file a DJ action, and if they can
15 prevail in that DJ action, they won't have to pay. We
16 seek nothing in the suit. We have no counterclaim.
17 We're asking for nothing.

18 As to Justice Kennedy's question before, as
19 notice of infringement, there was no notice of
20 infringement. What we told them was there was claim
21 coverage. And there's a big difference between claim
22 coverage and infringement.

23 If we tell them that we're asserting
24 infringement, we're going to have the burden of proof.
25 We can't assert infringement because they're the

1 licensee.

2 JUSTICE KENNEDY: Well, there would have
3 been infringement if you had refused to pay the royalty,
4 and --

5 MR. NEUSTADT: If they had --

6 JUSTICE KENNEDY: And if they had refused to
7 pay the royalty and you were covered, then -- then there
8 would have been infringement.

9 MR. NEUSTADT: But then you're changing all
10 the facts around. That's not -- that's not what we're
11 dealing with in this case.

12 JUSTICE KENNEDY: All right. I understand.

13 MR. NEUSTADT: And in MedImmune --

14 JUSTICE KAGAN: Well, Mr. Neustadt, I think
15 I just disagree with that. You keep on saying it's a
16 question of claim coverage, but the question of claim
17 coverage, all that is, is part of an infringement
18 analysis.

19 And that's the analysis, as Justice Kennedy
20 said, that's the analysis that would have been
21 appropriate if Medtronic had stopped paying royalties
22 and MVF had sued Medtronic as a result for patent
23 infringement.

24 And that's the world that we're supposed to
25 imagine after MedImmune, is if, contra the -- the actual

1 agreement, the licensee stopped paying royalties, and we
2 think about an infringement suit.

3 MR. NEUSTADT: No. That is -- permit me to
4 disagree with you. MedImmune was not involved with
5 that. Here was the problem in MedImmune: The MedImmune
6 did not want to continue to pay the royalties, but it
7 needed the license. 80 percent of its product line was
8 dependent upon that license.

9 So as a matter of sheer rigidity, they could
10 not not pay the royalty. They will lose their whole
11 business. They wanted to get into Federal court. At
12 that time, the Federal circuit had a Gen-Probe ruling
13 which says, everyone's paying royalties, there's no
14 dispute. In MedImmune, this Court reversed. You said,
15 there's enough of a controversy for MedImmune to have
16 this -- to -- to go in with the DJ action.

17 In that suit, it'd be exactly like this
18 suit. The patentee could not counterclaim because there
19 is no infringement. MedImmune is still paying its
20 royalties.

21 So in the MedImmune case -- but they never
22 got to it because -- because that MedImmune case was
23 settled -- you have the exact same situation we have
24 here, which is that there is no counterclaim, and
25 therefore, MedImmune, who is seeking relief, has the

1 burden to show it's entitled to relief.

2 JUSTICE BREYER: Well, how -- what do you do
3 with the government's argument here, which I take it as
4 being on page 17, they make an argument which, as I
5 understood it -- which is a big qualification -- the --
6 the -- some of these things are awfully complicated.
7 You might have a -- a claim or, really, it's a set of
8 claims that cover 48 pages with all kinds of symbols
9 and -- and 42 different sort of division possibilities.

10 And -- and then the -- the so-called
11 infringer, or the person who falls outside the coverage,
12 is looking at his product, and it's one of the most
13 complex things you've ever seen. And he has to think to
14 himself, well, how -- how am I supposed -- how does the
15 claim cover this? And -- and it's -- there are many,
16 many, many possibilities.

17 I take it that's what they mean when they
18 say it makes sense to put the burden of demonstrating
19 how the claim limitations map onto the accused product
20 because infringement may be found only when the product
21 falls within the scope -- scope of the asserted claim or
22 claims in every respect.

23 Your client, who's the patentee, knows how.
24 Otherwise, he wouldn't be bringing this infringement
25 suit or the inside-the-coverage suit or responding to

1 someone who says it's outside the coverage.

2 But -- but the person who is the alleged
3 infringer might not know it, and therefore, it makes
4 sense to put everything in the same place; notice of
5 infringement, burden of production, burden of proof.
6 And that way, it will be easier to focus on what's at
7 stake.

8 That's what I take it their argument is. If
9 I've not got it right, you're certainly --

10 MR. NEUSTADT: I think it's pretty close.

11 JUSTICE BREYER: All right.

12 MR. NEUSTADT: It's absolutely not true.

13 First of all -- well, the first answer --
14 and I'll get to the second answer -- is if you have that
15 and say, well, it's more convenient for us to do it,
16 you're creating a patent law exception to the normal
17 default.

18 And that's something you keep telling the
19 Federal circuit not to do. Like in eBay, don't create a
20 separate patent rule for injunctions.

21 JUSTICE KAGAN: It's -- it's not a patent
22 law exception. It's the recognition that a procedural
23 device that simply changes the nominal status of the
24 parties doesn't change the substantive rules and that
25 the burden of proof counts as a substantive issue.

1 MR. NEUSTADT: But you only have that
2 substantive rule where the patentee counterclaims. When
3 the patentee counterclaims, you have two parties seeking
4 relief. Naturally, the patentee has the burden of
5 proof. If there is no counterclaim, there can be no
6 infringement. You're just talking about claim coverage.

7 But it's the second part of your question,
8 Justice Breyer, what happens is the -- the patentee,
9 when they give notice of claim coverage, they can tell
10 them. There's no mysteries --

11 JUSTICE BREYER: But do they have to tell
12 them?

13 MR. NEUSTADT: Well, they always do.
14 There's no mystery. If --

15 JUSTICE BREYER: They always do?

16 MR. NEUSTADT: Well, sure. I mean, if you
17 go into the suit, the first question is interrogatory,
18 why do you think this -- why do you think this is
19 covered? So there's no mystery as to that. And it's
20 much easier to prove non-infringement than to prove
21 infringement because these are governed by the all
22 elements rule.

23 The all elements rule means that if the
24 patentee wants to prove infringement of a claim that has
25 ten elements, he's got to prove ten elements or in -- or

1 in your example, many more.

2 For the person who is -- is the licensee,
3 you want to prove non-infringement, he has to only pick
4 one of those elements and say, I don't have it.

5 JUSTICE BREYER: I see, that's a
6 good point. So what you're saying is that page 19 or
7 whatever I quoted is a made-up thing, which doesn't
8 ever -- never really exists in your experience.

9 MR. NEUSTADT: Oh, that's right.

10 JUSTICE BREYER: Because the first question
11 would be, well, you tell me how -- how this infringes.

12 MR. NEUSTADT: Yeah. And that argument
13 wasn't even presented to the Federal circuit before its
14 decision. And the Federal circuit would have openly
15 rejected it and say, you've got to be kidding.

16 JUSTICE BREYER: So you're saying, I don't
17 really care about what is an action where there is an
18 infringement action or there even could be one in the
19 circumstances before us, that's not my case because
20 they're going to pay me forever, if they lose this
21 declaratory judgment, so there's no shift.

22 And where there's no shift, you ought to
23 follow the rules for where there's no shift, which is
24 that the burden lies on the person bringing the suit.

25 MR. NEUSTADT: That's exactly right.

1 JUSTICE BREYER: That's your argument?

2 MR. NEUSTADT: Yes. The analysis that the
3 Federal circuit did is they've got a burden of proof
4 issue.

5 JUSTICE BREYER: I -- I see.

6 MR. NEUSTADT: Let me find the controlling
7 law. The controlling law is the normal default rule.
8 I've got only one party here seeking relief, and that's
9 the -- the licensee, so why shouldn't he prove this?

10 JUSTICE BREYER: And your argument is that
11 the horrors don't exist because the one on page 19
12 never has come up, and as far as the no -- no res
13 judicata, I don't care because I'll come to the same
14 result with a different means.

15 MR. NEUSTADT: Yeah. And then --

16

17 JUSTICE BREYER: And any other -- is there
18 any other -- is there any other practical point that
19 they brought up that you want respond to?

20 MR. NEUSTADT: Oh, sure. Hundreds of
21 claims, that's ridiculous -- you know, the courts say,
22 hey -- you know, I have other cases on my docket, get
23 down to five claims.

24 Anticipate any argument? The person suing,
25 the DJ licensee, doesn't have to anticipate any

1 argument. He said, you told me it was these claims.
2 And we even had an agreement with him we couldn't go
3 over 30. And all I got to do is say, in claim 1, we don't
4 have element number 6. In Claim 2, we don't have
5 element number 4. It's a very simple manner. There is
6 no problem whatsoever there.

7 So what the Federal Circuit did is, I've got
8 a burden of proof issue. Let me find the controlling
9 law. I'll look to the Supreme Court. The Supreme Court says
10 there is a normal default rule, and it's the party
11 seeking relief.

12 CHIEF JUSTICE ROBERTS: Yes, but you are
13 overlooking the -- the elephant in the room, which is
14 the relief they are seeking is protection against the
15 relief that you would be seeking, but for the
16 declaratory judgment action.

17 MR. NEUSTADT: We -- we can never seek it
18 because they are not infringing. And we do not have to
19 file a counterclaim for claim coverage because there is
20 no requirement that we do so. There is no coercive
21 complaint. If they are suing -- if there was a
22 non-infringement situation, we'd would have to file the
23 coercive complaint.

24 JUSTICE SCALIA: The Declaratory Judgment
25 Act is addressed to potential coercion, not actual

1 coercion. That's the whole point. You should be able
2 to bring the suit before coercion is applied.

3 Now, it is true that you're not applying
4 coercion right now, but what they're worried about is,
5 if they stop paying the royalties, you will apply
6 coercion, and the Declaratory Judgment Act is a way of
7 getting this on the table before a court without their
8 having to go into default and incurring all the
9 penalties, but it is not intended to shift the burden of
10 proof.

11 MR. NEUSTADT: Well, it doesn't shift the
12 burden of proof.

13 JUSTICE SCALIA: It does shift the burden of
14 proof because if what they are worried about is your
15 claiming infringement and -- and exacting a penalty from
16 them for their not paying the royalties that the
17 agreement provides, okay, that's what they are worried
18 about.

19 The Declaratory Judgment Act enables them to
20 sue beforehand, before they incur liability. That's its
21 whole purpose, and its purpose is not to shift the
22 burden of proof.

23 MR. NEUSTADT: The -- in answer to your --
24 your hypothetical, I agree with you on all of that. But
25 as in the MedImmune case, MedImmune ends up with the

1 burden of proof. MedImmune says, I've got to get a
2 resolution to this question. I want you to overrule
3 Gen-Pro, I want to show why the -- why my product is not
4 covered.

5 Well, all of that's fine, there is nothing
6 the matter with that, there is no coercion. It's just
7 that, when MedImmune does this, it's going to have the
8 burden to show it.

9 JUSTICE BREYER: But you would agree with
10 this, you would agree that, if that agreement of yours
11 read a little differently, if MedImmune -- if they had
12 said -- you know, we are not going to pay royalties
13 until your client brings an infringement suit, which you
14 intend to do, at that point, if you'd made that promise,
15 you would have the burden of proof because you'd bring
16 an infringement suit.

17 MR. NEUSTADT: Well, of course.

18 JUSTICE BREYER: And if they said either an
19 infringement suit or a declaratory judgment action,
20 then, again, you would have the burden of proof, even in
21 the declaratory judgment action because then they would
22 be totally parallel.

23 I mean, then you'd have, if you brought the
24 infringement suit, it's yours. And then, in the
25 declaratory judgment action, it should be true, too, in

1 your view.

2 MR. NEUSTADT: Well, the way it is, if you
3 have one party seeking relief, the licensee --

4 JUSTICE BREYER: But I mean --

5 MR. NEUSTADT: -- the licensee's got the
6 burden.

7 JUSTICE BREYER: The answer is yes or no.
8 The answer is yes or no. That is, am I right in -- in
9 understanding your argument that if that agreement had
10 said you can bring either kind of suit, either we --
11 yes, we the patentee, will bring a suit, in which case,
12 you will defend it; or if you bring it first, you can
13 bring a declaratory judgment action, okay, for the same
14 thing.

15 If it had said that and the agreement had
16 held up the royalties until one or the other was
17 decided, then your client, the patentee, would have the
18 burden of proof in either because it's exactly the same
19 thing.

20 You could have brought -- are you following
21 me?

22 MR. NEUSTADT: No, I'm afraid not.

23 JUSTICE BREYER: Okay. Skip it.

24 (Laughter.)

25 MR. NEUSTADT: So, really, what the Federal

1 circuit did -- said there was no shifting here. First,
2 you've got to look to who's got the burden of proof.
3 You get that from Schaffer, the normal default rule,
4 only one party seeking relief.

5 And then they said, and besides, the
6 patentee could not have brought suit because you can't
7 accuse him of infringement. So you have a simple case of
8 only one party seeking relief; that party has the
9 burden.

10 And you would have that anyway even -- even
11 without this agreement, because only one party can bring
12 suit. It's just like in Schaffer. This party brings
13 suit, they have the burden. Other party brings suit,
14 they have the burden.

15 CHIEF JUSTICE ROBERTS: So you are really
16 looking at it, though, from the point of view of a contract
17 action, rather than a patent action.

18 MR. NEUSTADT: Well, it can't be a patent
19 action because the whole purpose of the license is not
20 to have an infringer. And it is a contract action and
21 that gets into the jurisdictional question.

22 And, to answer Justice Ginsburg's question,
23 yes, there isn't the usual jurisdiction that you would
24 have in a patent infringement action. And this comes
25 from the unanimous opinion of this Court earlier this

1 year in Gunn vs. Minton, in which I think Your Honor --
2 Your Honor was the author, which says that that's just a
3 contract action.

4 Just having a patent question doesn't get
5 you into Federal court.

6 JUSTICE KAGAN: But Mr. Neustadt, I was under
7 the impression that, according to this contract, if
8 Medtronic stops paying royalties, you can bring not
9 only a contract suit, but, in fact, a patent suit.

10 MR. NEUSTADT: Well --

11 JUSTICE KAGAN: An infringement suit.

12 MR. NEUSTADT: -- that has nothing to do
13 with the contract because then they've breached the
14 contract.

15 JUSTICE KAGAN: But you can bring an
16 infringement suit according to the very agreement that
17 you signed.

18 MR. NEUSTADT: It's not in accordance with
19 the agreement. We can't bring an infringement suit.
20 They are not infringing.

21 JUSTICE KAGAN: They are infringing if they
22 break the contract, and they stop paying royalties.

23 MR. NEUSTADT: Oh, sure.

24 JUSTICE KAGAN: And then you can bring an
25 infringement suit.

1 MR. NEUSTADT: Well, of course. But that's
2 not the situation we face here. That -- that's always
3 been true. I mean, if they want to, if the burden of
4 proof is so burdensome to them, just go ahead and
5 breach. And then we will sue them, and we will have the
6 burden of proof.

7 JUSTICE SCALIA: You can always say that in
8 declaratory judgment actions, that is not the situation
9 we face. The Declaratory Judgment Act posits a
10 hypothetical situation. It always does.

11 MR. NEUSTADT: You cannot say that we're going to --

12 JUSTICE SCALIA: I am worried that you are
13 going to sue me later. You are not suing me now.
14 That's not the situation I face. But I worry that you
15 will sue me later.

16 MR. NEUSTADT: But you have -- but how can I
17 sue later if you're continuing to pay royalties? That
18 was -- that was the MedImmune situation. MedImmune
19 said, I've got to pay you royalties --

20 JUSTICE SCALIA: They don't want to -- they
21 don't want to continue to pay royalties. That's the
22 point. That's why they bring the Declaratory Judgment
23 Act, so that the court can tell them, you don't have to
24 pay royalties because this stuff is not covered.

25 MR. NEUSTADT: Well, that's absolutely

1 right. But in that case -- and the court didn't rule
2 upon it because it got remanded -- they would have the
3 burden of proof because they are the only party seeking
4 relief. You can't say not only --

5 JUSTICE GINSBURG: You cite -- you cite the
6 default rule, and you rely on that totally. But there
7 are other rules on burden of proof, for example, the
8 party who has better access to the information, so it's
9 not as though there is this firm rule with no
10 exceptions.

11 I take it, from your answers to
12 Justice Scalia, that you are saying in every declaratory
13 judgment action where only one party is seeking relief,
14 that party has the burden of proof. So you're not
15 limiting this to patent cases; is that right?

16 MR. NEUSTADT: Oh, that's correct. That's
17 the normal default rule. And there should be no
18 exception to that.

19 I see my light is red.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Mr. Waxman, you have three minutes
22 remaining.

23 REBUTTAL ARGUMENT OF SETH P. WAXMAN

24 ON BEHALF OF THE PETITIONER

25 MR. WAXMAN: I'd be happy to respond to any

1 questions that the Court has.

2 Otherwise, I think we'll submit on the briefs.

3 CHIEF JUSTICE ROBERTS: Okay. Thank you
4 counsel. Counsel.

5 The case is submitted.

6 (Whereupon, at 1:54 p.m., the case in the
7 above-entitled matter was submitted.)

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<p>A</p> <p>ability 18:7,8</p> <p>able 46:1</p> <p>aboveentitled 1:12 53:7</p> <p>absence 11:2,19 14:24</p> <p>absolutely 10:9 41:12 51:25</p> <p>access 26:22 52:8</p> <p>account 18:15 26:17,21</p> <p>accruing 14:8</p> <p>accuse 49:7</p> <p>accused 8:10 29:6 40:19</p> <p>acknowledge 21:4</p> <p>act 3:21 5:19 6:12 10:24 15:17,17 16:5,7 19:7,15 20:7 21:9,14,16 21:23 27:16 33:24 45:25 46:6,19 51:9,23</p> <p>action 3:14 5:14,18 5:21 6:11 10:17 12:1,18,22 13:23 14:12 15:3,16 16:4,6 18:21,23 18:25 19:3 20:1 20:21 21:2 23:4 24:18,19,22 25:16 29:3,14,22 34:3,6 35:6 36:1 37:14 37:15 39:16 43:17 43:18 45:16 47:19 47:21,25 48:13 49:17,17,19,20,24 50:3 52:13</p> <p>actions 3:23,23 29:5,13 51:8</p> <p>actual 38:25 45:25</p> <p>addressed 4:8 7:7 45:25</p> <p>adjudication 14:13</p> <p>advantages 32:23</p>	<p>affirmative 9:2,9 9:13 10:4,16,21</p> <p>affirmatively 8:1 9:20</p> <p>afraid 48:22</p> <p>afternoon 3:4</p> <p>agree 4:9 9:3 12:15 13:14 14:11,17 22:24 34:17 46:24 47:9,10</p> <p>agreed 16:12 27:4 27:8,12,15 31:25</p> <p>agreement 11:11 11:20,21,25 12:8 12:10 13:20 14:11 14:15 16:17,18 17:6,12,14 18:1,2 18:6 21:6 22:6,8 22:12 25:25 27:5 27:5,23,25 28:15 28:18 37:12 39:1 45:2 46:17 47:10 48:9,15 49:11 50:16,19</p> <p>agreements 11:16</p> <p>agrees 16:2</p> <p>ahead 26:7 34:5 37:14 51:4</p> <p>aimed 6:12</p> <p>al 1:7</p> <p>alexandria 1:22</p> <p>alito 4:1,13 5:17</p> <p>allegations 33:13</p> <p>alleged 9:16 10:7 41:2</p> <p>alleges 21:13</p> <p>allocation 3:19</p> <p>allow 23:3</p> <p>allowing 23:1</p> <p>allows 13:21 16:7</p> <p>alter 30:9</p> <p>alternative 35:13</p> <p>amendments 21:23</p> <p>america 21:23</p> <p>amicus 1:20 2:7 15:23 21:25</p>	<p>amount 4:14</p> <p>amounts 32:14</p> <p>analysis 38:18,19 38:20 44:2</p> <p>answer 6:16 7:10 33:6,9 35:15 36:10,12,14 41:13 41:14 46:23 48:7 48:8 49:22</p> <p>answered 7:16</p> <p>answers 35:15 52:11</p> <p>anticipate 44:24,25</p> <p>anyway 49:10</p> <p>appearances 1:15</p> <p>appellate 21:21</p> <p>appendix 18:10 21:7 23:25</p> <p>applicability 19:21</p> <p>applicable 18:18 30:23</p> <p>applied 23:15 46:2</p> <p>apply 16:3 19:24 32:16 46:5</p> <p>applying 14:21 46:3</p> <p>appropriate 38:21</p> <p>area 6:14</p> <p>arent 12:7</p> <p>arguing 35:9</p> <p>argument 1:13 2:2 2:5,9,12 3:3,7 15:22 19:2 23:9 40:3,4 41:8 43:12 44:1,10,24 45:1 48:9 52:23</p> <p>arguments 33:4,5</p> <p>arisen 11:2 22:15</p> <p>arises 3:14 20:7,13 20:17 21:2,13</p> <p>arising 20:12</p> <p>arrangements 22:3</p> <p>arthur 1:22 2:10 23:9</p> <p>article 7:8,21 8:22</p> <p>articulate 13:3</p>	<p>articulated 12:7</p> <p>articulation 9:3</p> <p>asked 7:18</p> <p>asking 37:17</p> <p>aspect 16:18</p> <p>assert 8:6 37:25</p> <p>asserted 40:21</p> <p>asserting 37:23</p> <p>assessment 37:13</p> <p>assistant 1:18</p> <p>associated 19:12 22:2</p> <p>assume 34:1</p> <p>assuming 12:23</p> <p>attorneys 13:22 19:13</p> <p>author 50:2</p> <p>authority 23:22,23</p> <p>available 19:14</p> <p>awfully 40:6</p> <p>B</p> <p>balance 15:19 22:22</p> <p>based 31:7</p> <p>basic 6:4 7:13</p> <p>basis 15:4 18:19</p> <p>beacon 11:5</p> <p>bear 12:2,23 22:13 22:14</p> <p>behalf 1:16,23 2:4 2:11,14 3:8 23:10 52:24</p> <p>behave 19:20</p> <p>behaving 19:19</p> <p>believe 28:22</p> <p>beneficial 14:16</p> <p>benefit 14:5</p> <p>benefits 22:5</p> <p>best 16:5,6 18:22</p> <p>better 52:8</p> <p>beyond 32:24</p> <p>big 28:8 37:21 40:5</p> <p>bit 36:20</p> <p>bogeyman 13:2</p> <p>borne 10:20</p>	<p>boston 1:6 3:4</p> <p>bound 14:13 27:20 27:23,24</p> <p>breach 8:13 13:19 17:4,6 19:17 29:16,18,20 51:5</p> <p>breached 20:24 50:13</p> <p>breaching 19:12</p> <p>break 50:22</p> <p>breyer 31:8,11,16 31:21 32:3,6,11 40:2 41:11 42:8 42:11,15 43:5,10 43:16 44:1,5,10 44:17 47:9,18 48:4,7,23</p> <p>brief 9:5 13:3 20:11 21:9 32:20</p> <p>briefs 22:1 53:2</p> <p>bring 12:22 15:3 21:12 23:4 25:16 30:17 31:24 34:6 34:6 36:8 46:2 47:15 48:10,11,12 48:13 49:11 50:8 50:15,19,24 51:22</p> <p>bringing 24:19 40:24 43:24</p> <p>brings 29:16 30:19 47:13 49:12,13</p> <p>broad 13:25</p> <p>brought 3:16,25 18:25 19:3 20:22 33:3 44:19 47:23 48:20 49:6</p> <p>build 29:1</p> <p>burden 3:11,13,19 3:22 4:2,6,7,9,16 5:2,2,5,17,24 6:7 6:10,15 8:23 10:20,23,25 12:2 12:23 14:23 15:1 15:10,16 16:3 17:16 22:13 23:15 24:4,13,15,21,24</p>
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