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IN THE SUPREME COURT OF THE UNITED STATES

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DAVID J. KAPPOS, UNDER SECRETARY :
OF COMMERCE FOR INTELLECTUAL :
PROPERTY AND DIRECTOR, PATENT :
AND TRADEMARK OFFICE, : No. 10-1219

Petitioner :

v. :

GILBERT P. HYATT :

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Washington, D.C.

Monday, January 9, 2012

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:05 a.m.

APPEARANCES:

GINGER D. ANDERS, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of Petitioner.

AARON M. PANNER, ESQ., Washington, D.C.; on behalf of
Respondent.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear
argument next in Case 10-1219, Kappos v. Hyatt.
Ms. Anders.

ORAL ARGUMENT OF GINGER D. ANDERS
ON BEHALF OF THE PETITIONER

MS. ANDERS: Thank you, Mr. Chief Justice,
and may it please the Court:

Section 145 of the Patent Act permits a
person who has sought a patent from the PTO and believes
that the agency has wrongly denied his application to
seek judicial review of that decision in district court.
The Federal Circuit in this case held that the plaintiff
in a section 145 action may obtain a more favorable
standard of review, de novo review, by flouting the
PTO's rules during the examination process.

Under the court's approach a plaintiff may
present to the court material new evidence that he
refused or failed without cause to present to the PTO.
And as his reward, he is given de novo review of the
PTO's expert determinations on all of the relevant
issues.

For three reasons that unprecedented regime
should not be allowed to stand. First, principles of

1 administrative deference and exhaustion require that the
2 PTO be given the opportunity to apply its expert
3 judgment to all of the reasonably available evidence.
4 For that reason, section 145 should be interpreted as a
5 safety valve proceeding that permits applicants to
6 introduce evidence to the court that they reasonably
7 could not have presented to the PTO.

8 JUSTICE SCALIA: Can you only get a 145
9 proceeding when you have new evidence?

10 MS. ANDERS: No.

11 JUSTICE SCALIA: Suppose I have no new
12 evidence and -- and I want to challenge. Can I bring a
13 145?

14 MS. ANDERS: Yes, section 145 --

15 JUSTICE SCALIA: Right.

16 MS. ANDERS: -- permits any applicant
17 dissatisfied with the decision of the PTO --

18 JUSTICE SCALIA: And on what basis does the
19 court decide the case? De novo?

20 MS. ANDERS: No, the Federal Circuit has
21 held that in those cases substantial evidence review
22 applies, and where the Federal Circuit gets that is this
23 Court's case in Morgan v. Daniels. That was an action
24 under section 145's predecessor. There was no new
25 evidence in that case and the Court held that this was a

1 proceeding in the nature of a suit to set aside a
2 judgment, the judgment of the expert agency which had
3 made a determination, and that therefore, because this
4 was administrative review, a deferential standard of
5 review should apply.

6 JUSTICE SCALIA: Yes.

7 MS. ANDERS: So it's quite clear that
8 when --

9 JUSTICE SCALIA: How close a predecessor is
10 the predecessor?

11 MS. ANDERS: All of the material language is
12 the same. There is -- there is no material difference
13 for purposes of this case.

14 JUSTICE GINSBURG: But the Morgan case
15 involved ---it wasn't a contest between the PTO and the
16 would-be patent holder; it was an interference
17 proceeding, wasn't it?

18 MS. ANDERS: That is correct, Justice
19 Ginsburg, it was an interference proceeding, and that's
20 because at the time section 145's predecessor applied
21 equally to interferences and to ex parte patent denials.
22 But the Court's reasonings, its discussion of -- of the
23 predecessor statute, did not distinguish based on the
24 facts that this was an interference. And also this
25 Court --

1 JUSTICE SOTOMAYOR: I thought that -- it's
2 interesting that the language of Morgan and one of its
3 companion cases, not companion in the sense of being
4 heard at the same time, but on the same issue -- the
5 Radio City case -- both of them don't talk in the
6 language of today. They don't talk about deference,
7 they don't talk about substantial evidence. They talk
8 about whether the PTO has expertise, and presumptions
9 that their fact findings based on their expertise have
10 to be overcome with some convincing evidence.

11 So they are talking in different language,
12 but the concept they are talking about is one where the
13 Court does accept findings of the PTO on the matters
14 that involve their expertise, and give them weight --
15 substantial weight, essentially. And only overturn it
16 if the Court is, in the words of Morgan and Radio City,
17 "thoroughly convinced" that they were wrong.

18 So what's wrong with that standard?
19 Everybody likes the deference language of today, but
20 they were very clear in what they were saying: If the
21 PTO made a finding, you decide whether that finding was
22 based on its expertise, and if it was, you don't change
23 it, court, unless you are thoroughly convinced they were
24 wrong. Is there anything wrong with that? With that
25 articulation of what the standard should be in all

1 situations, whether there is new evidence or no new
2 evidence?

3 MS. ANDERS: Well, I think here we are
4 suggesting that in -- in 145 actions when there is new
5 evidence the Morgan "thorough conviction" standard
6 should apply. That reflects the fact that the court
7 needs to look at the new evidence, but because the PTO
8 has made an expert determination, as the Court said in
9 Morgan, that determination should not be overturned
10 unless there is a high degree of certainty.

11 And I would note that that is essentially
12 what this Court did just last term in Microsoft v. i4i.
13 There the Court said that when a third party is
14 challenging the validity of a granted patent, that the
15 third party should have to show invalidity based on a
16 heightened burden of proof, clear and convincing
17 evidence. And that reflects the same wisdom that --
18 that underlies --

19 JUSTICE SOTOMAYOR: Let me tell you what my
20 problem is with this case. It is the issue that Verizon
21 raised, and the lack of connection between the district
22 court's holding and the circuits court holding. The
23 district court excluded the affidavit for the proposed
24 arguments on the basis of them being new arguments that
25 board rules precluded them from raising at the stage

1 they did.

2 The circuit court described the affidavit as
3 new evidence. And the Verizon amicus brief says:
4 Court, be careful, because it's not really clear what's
5 new evidence in this affidavit and what's new argument.
6 And that question troubles me, for the following reason:
7 Verizon posits that the issue of whether a description
8 is specific enough is a legal question to which the PTO
9 is not entitled to deference. Why, other than Federal
10 Circuit and Patent Board precedent, is that right? And
11 can you explain why this affidavit that was rejected is
12 in fact new evidence and not merely new argument?

13 MS. ANDERS: Certainly, Justice Sotomayor.

14 I think that the district court did
15 characterize this as new evidence, and the reason it did
16 that is because Mr. Hyatt made a concerted strategic
17 decision here to present his affidavit as new evidence.
18 In form this is -- this is factual evidence. This is a
19 declaration containing proffer testimony that Mr. Hyatt
20 would offer if there were a trial. So it is in form
21 factual evidence, and in order to take advantage of the
22 possibility of introducing new evidence in the section
23 145 action, Mr. Hyatt argued that this is new factual
24 evidence that should --

25 JUSTICE SOTOMAYOR: Could you tell me what

1 -- other than it's in the form of an affidavit, tell me
2 what in the content was new evidence? I want to get
3 away from the labels and I want to get to the substance,
4 because I've looked at all of these submissions and it
5 sounds like what I read in the briefs every day.

6 MS. ANDERS: Certainly. I think whether or
7 not the -- the ultimate question of whether the written
8 description is sufficient is a question of law. It
9 would be one that rests on several subsidiary fact
10 findings, including what the ordinary skill in the art
11 is, what a person of ordinary skill in the art would
12 understand when he reads the specification, and where in
13 the specification there is support, there is description
14 support, for the claims that shows that Mr. Hyatt
15 possessed the invention that he claimed.

16 And so I think when you look at what
17 happened at the PTO, the examiner said: Despite my
18 expertise, I can't tell where in the specification your
19 claims are supported. This is at 258 -- it's a 250-page
20 specification reprinted in the joint appendix. It has
21 over 100 pages of diagrams of source code and 117
22 claims. And so the PTO asked for this information; Mr.
23 Hyatt refused to present it or he didn't present it, and
24 then on rehearing the board said that he had not had any
25 cause not to present his new -- this new argument. And

1 so at that point Mr. Hyatt went into the 145 proceeding
2 and he was -- he characterized this as factual evidence
3 in order to get around, presumably, or it would be
4 reasonable to try to get around, the board's ruling that
5 he couldn't present new evidence.

6 Now you certainly could characterize this as
7 legal argument. We believe that we would win on that
8 ground as well, even if this were new argument, because
9 certainly the PTO is entitled to enforce its rules here,
10 and both the district court and the panel found that the
11 PTO did not abuse its discretion in -- in holding that
12 Mr. Hyatt had forfeited his right to raise this
13 argument. But that's not -- that's not an additional
14 question presented that we - that we added here because
15 it's a very case-specific question.

16 But at any rate the -- the entire case has
17 now been litigated on the basis of this being factual
18 evidence --

19 JUSTICE SCALIA: Your case is stronger if it
20 isn't new facts, right? That's what you would say.

21 MS. ANDERS: I'm sorry?

22 JUSTICE SCALIA: Your case is stronger if in
23 fact it is only new argument, and not new fact.

24 MS. ANDERS: Certainly. I think it should
25 be very clear that we would win on that ground. The en

1 banc court here characterized this as new factual
2 evidence and applied a rule that will -- will govern, if
3 it's left to stand, in all 145 actions, would will
4 permit applicants to withhold evidence from the PTO.

5 JUSTICE GINSBURG: Ms. Anders, one of the
6 problems with, I think, your position, is it sounds very
7 strange to have two proceedings, one where you go
8 directly to the Federal Circuit under 101 -- 141; and
9 then this other one where you go to the district court,
10 where if that's not as that, as Judge Newman said, a
11 whole new -- whole new game, then -- and why would
12 Congress create two judicial review routes, one in
13 district court, reviewable in the Federal Circuit, the
14 other directly in the Federal Circuit, if there's no
15 difference, that is, if in both of them it is not de
16 novo review, it is review of what the agency did under
17 the ordinary standard for reviewing agency action?

18 What's different about the -- the 145
19 proceeding?

20 MS. ANDERS: Well, in the 145 proceeding the
21 applicant has the ability to introduce new evidence that
22 couldn't be presented to the PTO. And I think --

23 JUSTICE KAGAN: What kind of evidence is
24 that, Ms. Anders?

25 MS. ANDERS: Well, I think there's two

1 primary categories, both of which can be very important
2 in the examination proceedings. The first is oral
3 testimony. The PTO doesn't hear oral testimony, but it
4 is routine in the examination procedures for --

5 JUSTICE KAGAN: So in the 145, an applicant
6 can take all of his written affidavits and say: I want
7 to present oral testimony, on these exact matters, but
8 live?

9 MS. ANDERS: He could certainly bring that
10 to the district court, yes. Now the district court
11 always, under general evidentiary rules, can say: I
12 believe this evidence is cumulative so I'm not going to
13 hear it. But to the extent that the district court
14 believes it would be helpful to hear oral testimony, for
15 instance, if the PTO's determinations involve
16 credibility decisions, then certainly the district court
17 could hear that testimony, and that's often how this
18 proceeding has been used.

19 JUSTICE KAGAN: But to the extent the
20 substance of that testimony was something that he could
21 have brought to the PTO, that testimony, in your view,
22 would be out of bounds.

23 MS. ANDERS: There would have to be a
24 reasonable justification for not having presented --

25 JUSTICE BREYER: There has to be a

1 reasonable, some kind of justification. Can you work
2 with the word "equitable"? I mean, this was an
3 equitable action, and could you say that the -- to the
4 district court, well, of course, you -- assume you win
5 on the second question. But on the first question, this
6 is not an on/off thing. That's your real objection to
7 the de novo standard.

8 You say, but these are equitable actions,
9 and generally an individual should not be allowed to run
10 around the PTO. So you better have some kind of reason,
11 but leave it up to the district courts to work with that
12 word "equitable" and to -- it seems to me there will be
13 a lot of shading cases here where you can't quite tell
14 if it is new or isn't new and some parts are and some
15 aren't. So just leave it up to the district court and
16 say: Take into account the fact that people should not
17 be allowed to run around the PTO and work equity.
18 That's kicking of the ball back.

19 Now if you like that, let me know. If you
20 don't like it, tell me what we -- why -- what should
21 we -- you want an absolute rule, tell me why.

22 MS. ANDERS: The standard we are proposing
23 is that the district court has discretion to determine
24 whether there was reasonable cause not to present the
25 evidence to the PTO.

1 JUSTICE BREYER: And if it says there isn't,
2 then it can't hear it? I mean, imagine you're sitting
3 there as a district judge, you think: Oh, my God, they
4 should have presented it, but this is the key matter
5 forever. Do I really pay no attention to it at all?

6 MS. ANDERS: Well, I think it's no different
7 from exhaustion or forfeiture rules in any other
8 context.

9 JUSTICE BREYER: Now, except you have a
10 history here.

11 MS. ANDERS: The board applicant has the --

12 JUSTICE BREYER: You have the history of the
13 pre-APA section 145 where they apparently did take the
14 evidence in.

15 MS. ANDERS: Well, certainly in the early
16 cases they took new evidence in. But by 1952, which is
17 when Congress re-enacted this provision, you have the
18 lower courts applying the Morgan standard and saying:
19 Based on Morgan's reasoning, because we know that the
20 PTO is the primary fact finder, because we know their
21 decision is so important, we will apply limitations on
22 new evidence because we don't think that that
23 evidence --

24 JUSTICE KAGAN: But then you really do go
25 back to Justice Ginsburg's question because your

1 understanding of what they wouldn't have a reasonable
2 opportunity to present, I mean, it's very, very narrow.
3 It's a bunch of cumulative testimony that nobody would
4 want to present and no judge would want to hear. And
5 other than that, you are basically saying in all
6 circumstances, well, they could have done that in the
7 PTO. So then you have Justice Ginsburg's problem.
8 Which is, these are two channels that are exactly the
9 same.

10 JUSTICE GINSBURG: And you were beginning to
11 answer that by saying, well, you can't have oral
12 testimony before the PTO. But what else? I asked you
13 what would be -- what's different about 141 and 145 in
14 your view. And you said one thing is oral testimony.
15 What else?

16 MS. ANDERS: Well, the other primary
17 category of evidence that could come in would be
18 evidence that has a temporal component. If there is a
19 lot of evidence that can be relevant to patentability
20 that develops only slowly or that might arise very late
21 in the process. So for instance, obviousness is a very
22 common ground of rejection. But one thing that can be
23 relevant to obviousness is if the invention, once
24 disclosed, has commercial success. So this type of
25 sales evidence can develop very late in --

1 JUSTICE KAGAN: But I thought that your
2 brief suggested that even with respect to that kind of
3 evidence, a person can go back to the PTO. Is that
4 right?

5 MS. ANDERS: For the most part, the record
6 closes once the -- once the applicant files his brief on
7 appeal to the board. And then it can be months or years
8 before the board issues its decision.

9 Now there are, there are a couple of avenues
10 through which an applicant could still introduce new
11 evidence even when the board is considering the appeal.
12 But both of those, as the process goes, the request for
13 continuing examination and the continuation application,
14 both of those have increasing down sides that require
15 the applicant to abandon his appeal or give up some of
16 his patent -- the patent term that he would presumably
17 get, so --

18 CHIEF JUSTICE ROBERTS: What if the new
19 evidence is in reaction to the PTO's ruling. The PTO
20 says: Look, we are not -- we are not going to issue a
21 patent because you didn't show us that the valve in the
22 back of the thing or whatever, was -- was novel, and we
23 think that's important. And the applicant goes to,
24 under 14.5, to the district court and said: Well I
25 didn't submit that evidence because I didn't have any

1 idea that that was going to be a significant issue, and
2 I am, you know, sorry, but I have a good basis for not
3 thinking of that and here it is. Is that the type of
4 new evidence that could be admitted?

5 MS. ANDERS: Well, in the first instance,
6 the PTO's procedures actually provide, they actually
7 provide for this situation, and that's when the board or
8 the examiner enters a new ground of rejection. Then at
9 that point the applicant has the right to reopen
10 prosecution to introduce new --

11 CHIEF JUSTICE ROBERTS: So this is an
12 exception? I thought you were telling us earlier you
13 generally can't get --

14 MS. ANDERS: Right. Yes. I'm sorry. This
15 is an exception that would apply when there is a new
16 ground for the decision. That is something that Mr.
17 Hyatt could have tried to take advantage of. He didn't.
18 He simply sought rehearing. But in any event, both the
19 district court -- the district court carefully
20 considered the board's grounds of rejection and decided
21 that this wasn't -- that these weren't new grounds for
22 rejection, and the panel affirmed that.

23 But to get back to the difference between
24 141 and 145, I think Congress separated these two
25 proceedings out in 1927. Before that you had gotten an

1 appeal first on the record and then, and then the bill
2 in equity under 145. So Congress separated this in
3 1927, and it appears from the legislative history that
4 it's concerned with streamlining the proceeding and
5 having more efficiency in patent appeals. So it would
6 be reasonable to conclude that there would be some
7 number of applicants who, probably the majority of
8 applicants, who wouldn't have new evidence, who could go
9 to 141 and simply get a final decision from a court
10 after one court proceeding in the court of appeals.
11 But --

12 JUSTICE KENNEDY: What evidence -- oh,
13 please, continue.

14 MS. ANDERS: Simply that there are -- for
15 some number of other applicants, it was important to
16 provide a safety valve because the PTO couldn't consider
17 oral testimony and because certainly at the time oral
18 testimony was a major concern in interference
19 proceedings, where you would often have two inventors
20 saying: I invented it first. No, I invented it first.
21 And you would have this credibility fight. So it was
22 very important at the time to provide a safety valve
23 proceeding for those applicants.

24 JUSTICE GINSBURG: But you said that you
25 could go into court on 145 even if you had no new

1 evidence.

2 MS. ANDERS: Yes, and Morgan, in fact, was a
3 case like that. It appears some applicants may have
4 done that.

5 JUSTICE GINSBURG: Well, did you -- In that
6 case, would there be any difference between 141 and 145
7 other than you go to a different court?

8 MS. ANDERS: No, I don't think there would
9 be for an applicant who had no new evidence at that
10 time. But I think the -- the other alternative, to
11 treat 145 as an entirely de novo proceeding that allows
12 any new evidence that the applicant failed without cause
13 to present to the PTO, thereby obtaining de nova review,
14 it's -- there is no evident policy justification for
15 Congress to provide --

16 JUSTICE KENNEDY: Well, that was Judge
17 Newman's view, but the en banc court took the middle
18 position. Often in trial court evidence problems, the
19 judge says: Well, it goes to its weight; not the
20 admissibility. And it seems to me that's what Judge --
21 the en banc majority was saying, that the fact that it
22 was not presented before or that it points in a
23 different direction from what the PTO found goes to its
24 weight, not its admissibility. In other words, they
25 would give consideration to the fact that it wasn't

1 introduced and asked, and maybe discount it as a result,
2 unless there is a reason. So it depends on the facts of
3 the case.

4 Number one, am I reading or am I summarizing
5 the en banc majority correctly? And number two, why
6 isn't that a sensible way to interpret the statute so,
7 as Justice Ginsburg is suggesting, you give some meaning
8 to 145? It -- it performs a function that 141 does not.

9 MS. ANDERS: Well, I think you are correct,
10 Justice Kennedy, that -- that the en banc court believed
11 that administrative deference principles didn't weigh
12 against its conclusions because the district court could
13 give more weight to the new evidence.

14 But that is not an adequate response, we
15 don't think, because this is still de novo review. So
16 once the applicant introduces new evidence, the manner
17 in which the district court evaluates the PTO's
18 conclusions has entirely changed. This is no longer a
19 deferential standard looking at the evidence. This is
20 actually de novo review, with no deference given to any
21 of the PTO's fact findings, even on the evidence before
22 it. And we don't think that is a sensible way to read
23 the statute because there is no basis in the text of the
24 statute for a bifurcated standard that would provide for
25 deferential "thorough conviction" review when there is

1 no new evidence, but then de novo --

2 JUSTICE KENNEDY: Well, then you are saying
3 that we should choose either between your position or
4 Judge Newman's position.

5 MS. ANDERS: Well, Judge Newman's position I
6 think is inconsistent with Morgan, because Morgan was a
7 section -- Revised Statute 4915 action. It was a 145
8 action with no new evidence. And the Court there said
9 that the "thorough conviction" standard should apply
10 because this is administrative review. So to hold that
11 145 requires de novo review even when there is no new
12 evidence would be to overrule Morgan.

13 JUSTICE SOTOMAYOR: But I'm not sure --

14 JUSTICE KAGAN: But Morgan only talked about
15 the standard of review, isn't that right? Morgan has
16 very little to say about what types of evidence ought to
17 be admitted in this proceeding. And one thing we could
18 do is to separate out these two things and say, you
19 know, we think that there is a basis for one, for let's
20 say giving the government a fairly deferential standard
21 of review -- call it clear and convincing, call it
22 thorough conviction -- but go the other way, rule
23 against you on the evidentiary point, which Morgan says
24 nothing about?

25 MS. ANDERS: Well, I think Morgan did not

1 directly address the -- the admissibility of new
2 evidence, but by saying that the PTO is the primary
3 decisionmaker, and that the Court should not lightly set
4 aside what the PTO does, it invoked administrative
5 deference principles, which in turn show why all of the
6 reasonably available evidence needs to be presented to
7 the agency.

8 And -- I do think that it -- it wouldn't
9 make sense to have a de novo standard of review for
10 patent denials any time new evidence comes in, largely
11 based on this Court's decision in Microsoft. There, the
12 Court rejected the argument that a third party who had
13 no opportunity to present evidence to the PTO should not
14 be held to as high a standard of review. So it would be
15 particularly perverse here to say that de novo review
16 should apply whenever a patent applicant puts in any new
17 evidence that --

18 JUSTICE SOTOMAYOR: But I don't know that
19 that -- I think you're confusing the nature of the
20 review, which is de novo, new, with the burdens that
21 attach to the proof. Those are two different concepts.
22 And so that's what Microsoft said. Don't confuse
23 burdens with standards of review. That it's de novo
24 review is one thing, but even in de novo review we often
25 give more weight or presumptive weight to some facts as

1 opposed to others. And that's what I think Morgan was
2 talking about. Morgan was very clear: Whether it was
3 new evidence or not, you give -- you accept as valid
4 whatever the PTO does, and you require to be thoroughly
5 convinced by new evidence or not that they were wrong.

6 I don't know why that standard can't apply
7 in any situation. I think that's what Judge Newman
8 intended, although he didn't say that.

9 So why are we confusing the standard of
10 review with the burden?

11 MS. ANDERS: Well, I think that the
12 presumption of validity and the need to give deference
13 to the PTO's determinations are essentially two ways
14 of -- of saying the same thing. As Microsoft noted, the
15 presumption of -- of validity comes from the assumption
16 that the agency is presumed to do its job. That's what
17 Judge Ridge said. And that in turn is what the Court
18 said in RCA, where it announced the presumption of
19 validity, and there, it relied on Morgan --

20 JUSTICE SOTOMAYOR: I have two problems with
21 your argument. The first is, and I know that it may be
22 unique to me because many of my colleagues say that you
23 don't rely on legislative history. But I'm not relying
24 just on legislative history. I'm relying that the
25 legislative history is replete with the commissioner of

1 patents himself saying that section 145 required de novo
2 review. And witness after witness tried to argue for
3 Congress to change it, and it didn't, arguing that it
4 required de novo review.

5 Second, our cases repeatedly describe it as
6 de novo review. So you got to get past that.

7 And then you got to get past that between
8 1927 and 1945 you have Barrett on your side. But there
9 are plenty of courts, including the Second Circuit, and
10 a very respected jurist, Learned Hand, saying that if
11 you exclude new evidence it should only be if it's on
12 principles of estoppel, that someone intentionally
13 withheld evidence from the PTO.

14 So how do you deal with a record that
15 doesn't basic -- that doesn't support your basic
16 argument?

17 MS. ANDERS: I think the record does support
18 our argument, Justice Sotomayor, because what you see in
19 the early twentieth century after Morgan had construed
20 this as administrative review -- you referred to the
21 1927 hearing. There, I think many of the people used
22 the phrase "de novo" in a very loose way that probably
23 was a result of its dating before the APA. They
24 referred to it mostly as the -- as a contrast between
25 the original action and the appeal. And that's the same

1 thing you see in the early cases. For instance,
2 Globe-Union referred to this as a de novo proceeding,
3 even as it said that the thorough conviction standard
4 should apply and -- and new evidence should be limited
5 because this was administrative. So I don't think you
6 can place very much weight on the use of the term "de
7 novo."

8 I do think it is notable that every time
9 there was an objection in the cases before 1952, the
10 courts applied limitations on new evidence. Dowling,
11 the case you referred to, that was dicta; the Court
12 discussed the standard but didn't actually apply it
13 there. And so I think the most natural inference is
14 that in 1952, Congress looked to Morgan and it looked to
15 these cases, and it viewed this as an administrative
16 review proceeding.

17 If I could reserve the balance of my time.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Panner.

20 ORAL ARGUMENT OF AARON M. PANNER

21 ON BEHALF OF THE RESPONDENT

22 MR. PANNER: Mr. Chief Justice, and may it
23 please the Court:

24 The language of section 145, the structure
25 of the judicial review provisions in the Patent Act, the

1 long history of the provision, and this Court's
2 constructions of its predecessors all make clear that
3 the government's argument that a plaintiff is barred
4 from introducing new evidence in an action under section
5 145, except in the unusual if not extraordinary
6 circumstance where the applicant had no opportunity to
7 introduce the substance of that evidence, is incorrect.

8 Section 145 does not follow the modern norm
9 of on-the-record review. Such review is afforded under
10 sections 141 to 144. And no principle of administrative
11 law supports the government's "no opportunity" standard
12 in situations where Congress has authorized the trial de
13 novo to obtain relief from adverse agency action.

14 CHIEF JUSTICE ROBERTS: The problem I have
15 with your submission: you say there are basically two
16 routes to get review of the denial by the Patent Office.
17 The first is under 141, you appeal to the Federal
18 Circuit, right, and in that situation, you're limited to
19 the record before the agency --

20 MR. PANNER: Yes, Your Honor.

21 CHIEF JUSTICE ROBERTS: -- on which you
22 lost. And there is deference to the agency, which ruled
23 against you.

24 Under 145, you can add new evidence, you
25 could address questions that the PTO raised, saying you

1 don't -- you haven't dealt with this valve in the back
2 and you could say, well, here's new evidence dealing
3 with that. There is no deference to the agency. And to
4 some extent you can pick which judge you want to hear,
5 to the extent you can -- can do that.

6 Why would anybody proceed under section 141
7 instead of 145?

8 MR. PANNER: Well, Your Honor, to be clear
9 about what is permitted under section 145, it is correct
10 that new evidence can be permitted to go to issues that
11 have been properly ruled on by the PTO in the course of
12 ruling on the ex parte application.

13 The reason that appeals to the Federal
14 Circuit are quite common is because often, the issue
15 that is the basis for the rejection is a legal issue.
16 And as to those issues, there's de novo review in the
17 Federal Circuit. The Federal Circuit will be ruling on
18 those legal issues in time in any event. It is really
19 in the circumstance where there is a factual question as
20 to which new evidence is relevant, where the applicant
21 will avail himself of what --

22 CHIEF JUSTICE ROBERTS: So that in -- in
23 every case where it's anything other than a purely legal
24 issue, you would go under 145?

25 MR. PANNER: Well, Your Honor, if you had

1 evidence that you wanted to present, and the remedies at
2 the PTO were inadequate for one reason or another. But
3 in thinking about the practical implications of the
4 procedural option that section 145 affords, it's
5 important to recognize that this procedure has been in
6 place for generations, and it has been understood by the
7 Patent Bar as reflected in decisions of --

8 CHIEF JUSTICE ROBERTS: Yes, I know. That's
9 why I am -- I'm really confused, because I take it that
10 people don't often use 145, right? They almost always
11 appeal to the Federal Circuit.

12 MR. PANNER: Well, I think that the number
13 of cases involving rejections that are taken up into
14 court are somewhat limited, in part because applicants
15 often have an adequate remedy before the PTO. But where
16 there is a circumstance, where there has been a final --
17 a board action, a case like this one, where the --
18 the -- I -- the ground for rejection, not meaning the
19 technical grounds, because the grounds of written
20 description had been identified in the examiner's
21 decision -- but where the reasoning that justified the
22 rejection was quite new in the decision of the Board,
23 and where there were -- there was factual evidence that
24 the applicant wanted to submit to a general district
25 court, to permit the district court to understand where

1 in the specification the support for these --

2 CHIEF JUSTICE ROBERTS: Well, Ms. --

3 Ms. Anders told us that there's a procedure before the
4 PTO that lets you deal with these -- these sort of
5 something came up that you didn't think about, and you
6 can address that.

7 MR. PANNER: Your Honor, what -- what
8 Ms. Anders was referring to, I believe, is the
9 possibility to reopen where there are new grounds for a
10 rejection. There were no new grounds here because it
11 was still a written description rejection. The
12 applicant did argue in appeal, in filing for rehearing,
13 that the explanation that the board had provided was one
14 that he had not been able to discern from the
15 examination -- of the examiner's rejection.

16 And if you just look at the record in this
17 case, when the examiner said that there was support
18 lacking for the features that were -- where the board
19 eventually did affirm, there is no explanation as to
20 what element was missing. Why the feature was not
21 supported in the specification. The board provided that
22 reasoned explanation, and the applicant tried to respond
23 and the board refused to accept it.

24 JUSTICE BREYER: Do you think -- in terms of
25 here is a question on the standard of review. I am

1 somewhat -- I would like your response to the approach.
2 That where there's ambiguity, I mean you are going to
3 win if there is no ambiguity. But if there is
4 ambiguity, I think that 1946 makes a difference. That
5 is preceding that time, every agency went its own way,
6 and you had dozens of specialized methods of review.
7 And the whole purpose of 50 years of administrative law
8 has been to try to create uniformity across agencies in
9 a vast Federal government.

10 And now what is obviously worrying me in the
11 first case and this case, too, is we are chipping away
12 at that. And that will be very hard for lawyers and for
13 ordinary people to understand if we suddenly go back and
14 create specialized rules in favor of each agency that
15 always wants a specialized rule, of course, they think
16 what they do is terribly important, which it is, I'm
17 sure.

18 But that's why I am saying if ambiguity on
19 the standard of review, you go with uniformity.

20 MR. PANNER: Right. Well, there is really
21 two points, Your Honor. With respect to standard of
22 review, which is separate from the question of
23 admissibility of the evidence, on standard of review the
24 APA says that where there is a trial de novo this
25 standard is whether the finding is unwarranted by the

1 facts under 2(f).

2 JUSTICE BREYER: That begs the question in a
3 sense because they are interlinked. I mean the same
4 reasons would support that it's not a trial de novo even
5 if you introduce some new evidence.

6 MR. PANNER: Well, I think that --

7 JUSTICE BREYER: It is an old trial with
8 some new evidence, and there will be a thousand
9 different variations on that theme.

10 MR. PANNER: I think that goes to Justice
11 Sotomayor's point really, which is there is a trial de
12 novo and clearly at a minimum what the courts are
13 talking about when they refer to this, not five times,
14 not ten times but dozens of times this Court several
15 times, lower courts pervasively when they are talking
16 about a de novo proceeding they are talking about the
17 fact that the applicant can introduce new evidence to
18 attempt to overcome the adverse action that was entered
19 by the --

20 JUSTICE BREYER: All right, so the new
21 part -- I get that.

22 MR. PANNER: Okay. And then the question
23 becomes what is the appropriate standard of review when
24 there is new evidence going to this question. And the
25 answer here goes I think to Section 2(f) says that there

1 is -- the question is whether it's warranted by the
2 facts. There is then the question of what weight may be
3 afforded to a particular agency -- agency determination.
4 At a minimum, the fact that there has been a rejection
5 shifts the burden. When an applicant goes to the PTO,
6 there is an assumption of an entitlement to patent,
7 unless the PTO can show that the applicant is not
8 entitled to that patent.

9 So the burden is on the PTO. Once there has
10 been a proper rejection by the agency and the board has
11 ruled, then of the applicant bears the burden. So at a
12 minimum there has been a shifting. And the applicant
13 would then bear the burden and as a practical matter, as
14 the Federal circuit indicated, the district judge will
15 weigh the evidence before it, including the new evidence
16 and the findings by the agency in making its
17 determination as to whether the applicant has carried
18 his burden to show that he's entitled to the patent.

19 JUSTICE KENNEDY: If the judge does that,
20 how does he articulate the weight that he gives to it,
21 the PTO finds? Does he say I give deference to this, I
22 give substantial deference? This was all discussed in
23 page 9 of your brief, you summarized what the majority
24 opinion of the en banc court did.

25 MR. PANNER: Yes, Your Honor.

1 JUSTICE KENNEDY: And in that connection, on
2 this same line, do you agree with that summary?

3 MR. PANNER: I do, Your Honor. That is to
4 say that what the Federal circuit recognized is that in
5 determining the weight to give to new evidence and in
6 determining what weight to give to the determined --
7 prior determination of the agency, it's appropriate for
8 the district court to look at the circumstances of the
9 new evidence and 1 of the things, this is inequitable --
10 was an equitable action. And of course the judge is
11 sitting without a jury.

12 In Microsoft there was obviously concern by
13 this Court that there not be shifting standards of proof
14 that would be confusing to a jury and could lead to
15 collateral litigation about that. Where a district
16 judge is making a determination about a factual issue,
17 the district judge can as a practical matter quite
18 reasonably determine what was before the board, what did
19 the board decide, what was the basis for that, how
20 strongly supported is it, versus how -- how -- to what
21 extent is this new evidence, something that really
22 requires me to look at this anew.

23 JUSTICE KENNEDY: Well, in line with
24 Justice Breyer's question, can you give us an example of
25 some other agency review proceeding that is somewhat

1 like this, or is this just unique?

2 MR. PANNER: I don't think it's entirely
3 unique at all, Your Honor. That is to say, for example,
4 in proceedings where there is orders to pay money by the
5 FCC, the findings of the agency are given prima facie
6 weight in an action -- in an enforcement action. And so
7 new evidence is permitted and the district judge would
8 make a determination based on the record and the new
9 evidence. But the party or the agency seeking to
10 enforce the prior order would be able to rely on those
11 factual findings to -- as prima facie evidence, where if
12 there was no contrary evidence that would actually
13 establish those facts. There are other administrative
14 review schemes that do afford trial de novo in which
15 there may be more or less deference to whatever the
16 agency did depending on what the record may reflect
17 about the considered judgment of the agency.

18 JUSTICE GINSBURG: Are there limits on the
19 new evidence that can be produced? Are there any limits
20 in your view?

21 MR. PANNER: Well, Your Honor, I think that
22 the principle of estoppel that was recognized in Barrett
23 is not one that we are challenging. That is to say in a
24 circumstance in which an applicant, and of course that
25 was an interference proceeding and it's perhaps easier

1 to foresee this happening in an interference context,
2 but in that case the Plaintiff had actually suppressed,
3 had directed witnesses not to answer questions that went
4 into a particular factual area. And then when -- after
5 appeal and when the district court action was brought,
6 attempted to introduce the very evidence that he had --
7 that the applicant had deliberately suppressed. And the
8 district court said, look, that is -- gives rise to an
9 estoppel, which seems to me a generally applicable
10 principle.

11 JUSTICE BREYER: Well, if you are willing to
12 accept that, then what about broadening that to prevent
13 people from running around the PTO, and simply saying
14 that unless the -- unless the person, the potential
15 patentee, unless he wants to -- unless he has shown or
16 you can show that he is innocent, that is to say it
17 wasn't deliberate, it wasn't negligent, it wasn't a part
18 of a trial of a strategy, unless he shows that he was
19 totally without sin in some form of words in not
20 introducing the evidence the first, time he can't
21 introduce it now?

22 MR. PANNER: I think the difficulty with
23 that, Your Honor, is not only is it inconsistent with
24 the practice of the courts which have always recognized
25 that but it also ignores the fact that there needs to be

1 decisions that an applicant makes about what evidence to
2 present to the PTO. And there may be good cause for not
3 presenting evidence in the PTO that becomes quite
4 relevant once --

5 JUSTICE BREYER: Well, say that. Say unless
6 he can show that there was good cause for his not having
7 introduced it before the PTO, the court now won't
8 consider it?

9 MR. PANNER: Well, Your Honor we would
10 certainly meet that good cause standard in this case but
11 the thing that I think is difficult about that standard
12 is that it could potentially lead to all sorts of
13 collateral litigation. In a typical case, for example,
14 an applicant will seek to introduce new expert testimony
15 that either was not or was -- is additional to whatever
16 was at issue or was offered in the PTO. Often expert
17 testimony will not be offered at all in an ex parte
18 application.

19 JUSTICE SOTOMAYOR: So give us a standard
20 and how what -- the good cause that you are somehow
21 willing to accept different from the government's
22 reasonable cause standard? And equity seems to have
23 required an intentional or bad faith withholding, is
24 that what you want to limit yourself to? What do you do
25 with sort of the -- the in between. The intentional and

1 the grossly negligent.

2 MR. PANNER: Justice Sotomayor, to be clear,
3 the proper standard is one -- does not permit exclusion
4 of evidence because there was good cause to present it
5 and it was not.

6 The standard for -- which we think is
7 supported in the cases is one that would permit the
8 introduction of evidence as the Federal Circuit said
9 consistent with the rules of evidence in civil
10 procedure. That's why principles of estoppel which are
11 reflected in ordinary equity practice, not just
12 administrative review context, would be -- would be
13 applicable and could lead to the -- .

14 JUSTICE SOTOMAYOR: And what do you see the
15 limits of that estoppel principal -- equity principal?
16 I think that's what Justice Breyer was really -- was
17 referring to. What would be the contours of your equity
18 limits?

19 MR. PANNER: And I that think in looking at
20 the cases that were decided before 1952, which everyone
21 seems to -- to agree is -- is the magic date, the
22 furthest that any court went was the decision in
23 Barrett. And it's interesting that the panel decision
24 in this case also relied on the idea in Barrett.

25 JUSTICE SOTOMAYOR: That's a little bit

1 unfair, to characterize the cases as limited to that.
2 Some talked about negligence.

3 MR. PANNER: Not --

4 JUSTICE SOTOMAYOR: And some courts said it
5 should be intentional. There was a debate back and
6 forth.

7 MR. PANNER: In the court of -- in the court
8 of appeals, Your Honor, the only exclusion of
9 evidence --

10 JUSTICE SOTOMAYOR: Yes, I agree.

11 MR. PANNER: -- was from Barrett and that
12 was a case that involved again, directing a witness not
13 to answer, the suppression of inquiry into a particular
14 factual area where the applicant then -- changing his
15 story and claiming a different date for reduction of
16 practice and a different basis for reduction to practice
17 than had been argued before the PTO -- attempted to
18 introduce the evidence that he had suppressed.

19 So that's a very different circumstance.
20 And the courts -- the decisions are actually at pains to
21 say that Barrett should not be over-read. The Third
22 Circuit in the Carborundum case said that; the Nichols
23 case, which we've we cited in our brief said that; and
24 of course, as you pointed out, Judge Hand observed that
25 in the -- in the Dowling case. Globe-Union said that,

1 so even the cases that the government itself relied on
2 were accepted evidence, despite the arguments that were
3 made by the defendants in those cases that this was
4 evidence that should have been excluded because it could
5 have been presented. And -- and did consider it.

6 And that brings us, I think -- there has
7 been a -- a lot of discussion about Morgan and the
8 standard of review and what Morgan has to say about
9 that. And the critical point that this Court recognized
10 in Microsoft was that Morgan is one of the early cases
11 and then -- and Radio Corporation is another that depend
12 on an idea of the presumption of validity, which of
13 course was then adopted by Congress in section 282 as a
14 statutory presumption, that was given that common law
15 meaning that required clear and convincing evidence.
16 But the clear and convincing evidence is to overcome the
17 grant of a property right to the defendant in those
18 cases.

19 What is critical in Morgan is the fact that
20 the Patent Office had granted a patent to the defendant
21 and it was a challenge to the validity of that patent
22 that the plaintiff's case relied on. And it's -- and
23 that's absolutely clear because the court cites to
24 Johnson v. Towsley which is a case involving a land
25 grant. And what the Court says is, our presumption is

1 when the executive has the power to give property
2 rights, we don't get a to review it.

3 Now in this case we see a limited exception,
4 because there is a statute that actually tells us we
5 have to do it, but that exception is going to be
6 limited. But if you look at what Morgan relies on,
7 Morgan is not relying on agency expertise; it's relying
8 on agency authority, which is a different matter. And
9 so -- and the authority the agency had to grant a
10 property right. In the -- in the conception of a -- of
11 the court of 1893, and the administrative law that
12 existed in 1893, the fact that there was no property
13 right being challenged in an action where there was an
14 effort to overcome a rejection means that this idea
15 about the presumption of the validity of the rights that
16 had been granted by an executive department doesn't come
17 into play. There had been no rights granted by the
18 executive department, and there is a new proceeding in
19 which, to quote Professor Merrill's article, "the Court
20 had the whole case." And that is really reflected in
21 the language that Congress chose.

22 Now, of course, that -- the differences
23 between what Congress provided under section 145 and the
24 modern administrative review do lead to some -- to some
25 questions. There is the question, you know, what should

1 the standard be if there is no new evidence? Which --
2 you know, which the --

3 JUSTICE GINSBURG: And I think you are not
4 taking the position that judge Newman did. I think --
5 didn't you say that if no new evidence is introduced in
6 a 145 proceeding then the court engages in APA-style
7 review?

8 MR. PANNER: Your Honor, Judge Newman said
9 that if there -- that all -- all findings should be de
10 novo in a Section 145 action, but the -- the majority of
11 the en banc court said if there is no new evidence --
12 relying on what the Federal Circuit had held for many
13 years, that if there is no new evidence than the
14 standard would be the substantial evidence standard that
15 would apply on appeal.

16 JUSTICE GINSBURG: And that -- and that --

17 JUSTICE KENNEDY: And you agree with that?

18 MR. PANNER: We haven't taken a position on
19 it, but --

20 JUSTICE KENNEDY: I noticed that.

21 MR. PANNER: -- let me suggest why it might
22 be right, Your Honor. Which is that Section 141 and
23 Section 144 do -- this Court in -- you know, held in
24 Zurko that once you are in a situation where there is no
25 new evidence -- and as an aside, Zurko emphasized that

1 Morgan was a case that was on no new evidence -- where
2 you have in a case that's on no new evidence, there the
3 APA standard of -- of review, substantial evidence,
4 arbitrary and capricious, review applied. And it
5 might -- this might be the sort of narrow circumstance
6 where to apply a de novo standard, even though that may
7 be otherwise suggested by the language of Section 145,
8 would create an anomaly, as -- as this Court recognized
9 in Zurko.

10 JUSTICE SOTOMAYOR: It seems to me you were
11 introducing such a gamesmanship. Anybody who wanted to
12 get out of substantial deference under the APA just has
13 to present an expert. That's -- that's what makes
14 little sense to me, trying to -- now we are
15 hair-splitting in a very minute way.

16 MR. PANNER: Right. I -- I don't think --

17 JUSTICE SOTOMAYOR: Articulate a standard
18 that would -- no one is suggesting total de novo review
19 with no deference to any kind of presumption applied to
20 the PTO decision. Another way to look at it --

21 MR. PANNER: I'm not sure --

22 JUSTICE SOTOMAYOR: -- is the way that I
23 suggested, which is it doesn't matter if there is no new
24 evidence or not; what is the level of respect that you
25 are going to give to the PTO factual findings?

1 MR. PANNER: And, Your Honor, I think the
2 standard of proof is one of -- is the preponderance of
3 the evidence. And the question of what weight, as the
4 Federal Circuit said, what weight to afford to that
5 prior finding of the PTO, would depend on what the
6 record showed. That is the -- as the facts of the case
7 may appear in section 145. It requires the district
8 court to look at the findings and look at the new
9 evidence, and to then make a determination.

10 JUSTICE SOTOMAYOR: Be -- as the language of
11 Morgan, be convinced that the PTO was wrong?

12 MR. PANNER: As section -- as I say, the
13 language of Morgan deals with the circumstance in which
14 there is a challenge to the validity of an issued
15 patent. The action that was at issue, the action as to
16 which the validity was being challenged, was not the
17 denial of the patent to the applicant; it was the fact
18 that the PTO had issued a patent to the defendant in
19 that case. And so there was a collateral attack,
20 effectively a collateral challenge to the validity of
21 that issued patent. And that is why Radio Corporation
22 of America cites Morgan, and that's how you know, it's
23 relevant to the -- this Court's, you know, decision in
24 Microsoft, that the statutory presumption of validity
25 carries this heightened standard of proof.

1 JUSTICE BREYER: Suppose you were a lawyer,
2 back to the Chief Justice's question, as you are; and
3 you have the client there; and you are thinking, you
4 know, if he prints all his evidence before the PTO, and
5 they say no, we have had it. I mean, there we are. But
6 if we hold back something, well then we are going to get
7 not -- we are going to get de novo review and a district
8 court. Boy! But if we are too obvious about holding
9 back something, we run into the estoppel rule.

10 My goodness. You're -- you're in a mess, it
11 seems to me, trying to advise a client what to do in
12 that situation. Better not say hold something back; on
13 the other hand, if he does he is pretty -- how do you
14 deal? You see?

15 MR. PANNER: I think the -- I understand the
16 concern, but the practicalities of patent prosecution
17 practice are that no applicant would hold back evidence
18 in an effort to -- to -- to produce that sort of
19 tactical advantage, because once --

20 CHIEF JUSTICE ROBERTS: Because -- I'm
21 sorry, go ahead.

22 MR. PANNER: I think because it's -- it's
23 frankly more straightforward and easier to try to meet
24 those objections in the Office. That's what usually
25 happens, is that there's a dialogue with the examiner to

1 try to meet the grounds for rejection.

2 One of the things that I think is important
3 with respect to the context of this case is, there were
4 a vast number of rejections. There was not just a
5 rejection on written-description enablement grounds, but
6 there were rejections for double patentings; there were
7 rejections for anticipation; there were rejections for
8 obviousness. And every single one -- every single
9 one -- of those grounds for rejection was overcome in
10 the appeal before the Board. And many of the
11 written-description rejections were overcome in the
12 appeal before the Board. And -- and at -- with respect
13 to every one -- if one goes back and reads the
14 examiner's decision, the examiner did provide an
15 explanation as to what was lacking with respect to
16 certain elements of the claimed invention, and with
17 respect to every single one of those, the Board
18 reversed.

19 So where the applicant was provided a fair
20 opportunity to try to meet the concerns, the applicant
21 did so, and the Board ruled in his favor. And he again
22 attempted -- there is no question of sandbagging here.
23 The -- the applicant brought these arguments to the
24 Board in the rehearing petition -- in the request for
25 rehearing -- and said, "here's my answer to your more

1 focused explanation," and they -- they refused to hear
2 it.

3 So as a practical matter, I think that --
4 and you don't have to take my word for it, again,
5 because this procedure has been in place for so long,
6 and problems have not arisen. And even if there were
7 uncertainty as to what the precise standard for
8 admissibility was, the applicants would have every
9 reason to test that, and to -- to try to do something
10 along that line if that were a realistic option and
11 favorable.

12 The fact of the matter is that that has not
13 happened, because the applicants have every reason in
14 the world to pursue the application with vigor before
15 the Office. And the Federal Circuit, which of course is
16 more familiar with the patent application process than
17 any other court, had no concerns that the rule that they
18 were adopting would lead to abuses.

19 CHIEF JUSTICE ROBERTS: I guess as a
20 practical matter, these things all end up before the
21 Federal Circuit anyway, right?

22 MR. PANNER: That's right, Your Honor.

23 CHIEF JUSTICE ROBERTS: And I suppose if you
24 had the same case and one is coming up under the 141,
25 and the other one under 145, I suppose it is

1 theoretically possible they could reach different
2 results because of different standards of review?

3 MR. PANNER: Well, Your Honor, you can't do
4 both.

5 CHIEF JUSTICE ROBERTS: No, no. I know.
6 I'm not saying -- the point is that although they all
7 come before the Federal Circuit, they may come to them
8 at a very different posture that would cause the Federal
9 Circuit to rule differently if you had the same case
10 under one and under the other.

11 MR. PANNER: Well, Your Honor, it wouldn't
12 be on the same record. If it were on the same record,
13 then presumably the -- the issue that would be presented
14 would be quite similar. The only time I can see that --
15 so in other words, if there were a different record,
16 it's true that the Federal Circuit's review of the
17 district decision would be -- it would be the difference
18 that this Court recognized in Zurko. It would be the
19 court -- court standard of review, which is -- gives
20 perhaps slightly less weight to the decision of the
21 district court than the court agency review. But that
22 doesn't seem like an advantage. In the -- in a
23 circumstance at least where an applicant has prevailed,
24 the applicant would be more likely to see the victory
25 taken away by the Federal Circuit.

1 Unless the Court has questions?

2 Thank you, Your Honor.

3 CHIEF JUSTICE ROBERTS: Thank you,

4 Mr. Panner.

5 Ms. Anders, you have 3 minutes remaining.

6 REBUTTAL ARGUMENT OF GINGER D. ANDERS

7 ON BEHALF OF THE PETITIONER

8 MS. ANDERS: Thank you.

9 This is an action for judicial review of
10 agency determination. This is an action that requires
11 the patent applicant to -- to seek a property right from
12 the agency, to have it denied, and to challenge that in
13 court. And as a result, this Court said in Zurko that
14 this is review of an agency determination, and
15 therefore, Morgan's deferential standard should be
16 carried forward into the APA.

17 And in construing Morgan, the Court in Zurko
18 did not consider that it was -- whether a property right
19 had been awarded or not; it was simply that the agency
20 had made a determination in its expertise. And I think
21 that goes to why it would not be sufficient for the
22 Court simply to weigh the evidence differently. In
23 every other agency -- judicial review proceeding of
24 actions, the rule is that the agency is the primary
25 decisionmaker. The agency has to consider the evidence

1 first and make a determination. That aids judicial
2 review. It allows the agency to apply its expertise.
3 And we generally don't think of the Court as being the
4 one who should make the first determination on issues of
5 fact.

6 JUSTICE SCALIA: Seems you have a strange
7 statute here. I don't know any statute that -- that
8 reads this way. "As the facts" -- "as the facts" --
9 where is it? "As the facts may" -- "as the facts in the
10 case may appear." That's --

11 MS. ANDERS: Well, that language was in the
12 statute in Morgan when the Court construed this as
13 judicial review. And I think that -- there would have
14 to be a compelling reason in order to interpret the
15 statute to permit an agent -- the applicant -- to
16 introduce evidence that he failed without cause --
17 without justification to provide to the agency.

18 And I don't think that Mr. Hyatt has shown
19 any such justification.

20 JUSTICE KAGAN: Well, but I guess the
21 compelling reason is the statutory language, and
22 especially with respect to the admissibility of evidence
23 question. I mean, it -- the standard that you suggest
24 just can't be derived from the statutory language, isn't
25 that right?

1 MS. ANDERS: Well, I think certainly there
2 is an exhaustion requirement within the statute. The
3 Board has to have considered the application, and
4 therefore, it would make no sense to have the Board
5 consider the application if it didn't have to consider
6 all of the evidence that was provided.

7 So I think in that sense, you know, the
8 standard that the Federal Circuit put in place and that
9 Mr. Hyatt is proposing really is providing --

10 JUSTICE SOTOMAYOR: But why doesn't the
11 Court just say what you said. If it's -- not the Court,
12 Congress -- if you admit that Congress intended a
13 section 145 action to permit new evidence, if it wanted
14 to limit that evidence to something that could not have
15 been found with due diligence or whatever your
16 limitations are, why did it speak more broadly? I mean,
17 the statutory language suggests as "the facts in this
18 case," not in the case before the PTO. As law -- "as
19 equity might permit."

20 This is very broad language.

21 MS. ANDERS: Well, the language could be
22 taken to suggest that some new evidence is admissible,
23 but I think then we look to the fact that this -- just
24 like Section 141 is a judicial review proceeding and
25 there has to be compelling reason before we deviate from

1 the normal deferential standards that apply when a --
2 when a court is reviewing an agency's determination.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 The case is submitted.

5 (Whereupon, at 12:03 p.m., the case in the
6 above-entitled matter was submitted.)

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