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P R O C E E D I N G S

(1:00 p.m.)

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

Mr. Waxman.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE PETITIONER

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

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

Allocation of the burden of proof inheres in the governing substantive law while the Declaratory Judgment Act is procedural only and does not change substantive rights. The burden of proof in MedImmune actions, like all other declaratory actions, remains where it would have rested in the equivalent coercive 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. And the only difference is who wins when  
20 the -- the factfinder thinks that it was exactly in  
21 equipoise.

22 MR. WAXMAN: Right. Well, that, of course,  
23 was not what happened in -- not what the Respondent  
24 maintained should happen in this case. But taking your  
25 question as it is, this Court has pointed out repeatedly

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

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

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

25 CHIEF JUSTICE ROBERTS: It seems to me we

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

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

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

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

23 JUSTICE KENNEDY: Now, could we -- or should  
24 we make the case turn on that or can we say, with  
25 declaratory judgment, there has to be a dispute, we --

1 we know that a dispute is likely, a controversy, so the  
2 formality of a notice is not important.

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

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

18 MR. WAXMAN: I think the notice is the --  
19 well, it's essential to the Article III MedImmune  
20 question whether or not there actually is a case or  
21 controversy. So, in this case, it's perfectly obvious  
22 because the cont -- the license requires Medtronic to  
23 affirmatively go to Mirowski within 30 days of  
24 introducing any product and not only tell -- providing  
25 notice of the product, but providing the manual, the

1 diagrams and the manuals that are given to physicians so  
2 that Mirowski can determine within 60 days whether or  
3 not to assert infringement.

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

11 And -- and so, therefore -- I think I may be  
12 talking around your question, but I am trying to get to  
13 the point that the -- the requirement of some notice,  
14 the -- the patentee -- there's no declaratory judgment  
15 jurisdiction if the patentee doesn't know about the  
16 product, has -- has never done anything to suggest that  
17 the product -- that his or her patent reads on the  
18 product. But that is an Article III question that would  
19 be -- you wouldn't get to the burden of proof if you  
20 couldn't satisfy MedImmune.

21 JUSTICE GINSBURG: Mr. Waxman, what do you  
22 make of the patent listing non-infringement as an  
23 affirmative defense in an infringement suit?

24 MR. WAXMAN: We agree with the articulation  
25 of the point by the Solicitor General in the United



1 States brief, which is that the cases have recognized  
2 that non-infringement can either be a general defense --  
3 that is, when -- when non-infringement is simply a  
4 general denial of a cause of -- of a claim of  
5 infringement, it is not an affirmative defense.

6 But there are particular types of  
7 non-infringement claims. And the ones that I'm familiar  
8 with are prosecution history estoppel and the  
9 experimental use exception that are affirmative  
10 defenses. In other words, those are situations in which  
11 the alleged infringer says: Hey, I'm not saying that  
12 your patent doesn't read, all the claims of your patent  
13 don't read on my invention; I'm claiming  
14 non-infringement because I was making experimental use  
15 and that has affirmatively been determined by Congress  
16 not to infringe.

17 Or, yes, your -- the elements of your claim  
18 read upon my invention, but during the prosecution of  
19 the patent in the Patent Office, you disclaimed some  
20 claim scope, and under prosecution history estoppel,  
21 this Court elucidated in Festow there is no  
22 infringement.

23 This is a case involving a general denial of  
24 infringement and therefore it is not an affirmative  
25 defense.

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

4 MR. WAXMAN: Yes. I mean -- absolutely. I  
5 mean, the point here --

6 JUSTICE GINSBURG: This here -- this case is  
7 about the difference between the licensee and the  
8 non-licensee.

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

19 The point of the Declaratory Judgment Act is  
20 that the burden is left exactly where it would have been  
21 had there been no -- had the identical issue arisen in  
22 the absence of the declaratory judgment procedure. And  
23 in this respect, it is identical to the jury trial  
24 right, which this Court held in *Beacon Theatres v.*  
25 *Westover* is also an element of the substantive claim and

1 also cannot be deprived by the peculiarity of a  
2 declaratory judgment being a claim for an equitable  
3 remedy.

4 JUSTICE KAGAN: Mr. Waxman, as I understand  
5 it the agreement in this case identified certain patents  
6 and contemplated that there would be disputes about  
7 whether particular products of Medtronic violated or  
8 infringed or practiced, whatever, those patents. But  
9 there might be some other kinds of agreements which  
10 instead identify certain products --

11 MR. WAXMAN: Mm-hmm.

12 JUSTICE KAGAN: -- and essentially treat  
13 those as infringing products in the absence of a  
14 license. In that sort of agreement, would you make the  
15 same kind of claim, that if Medtronic had that agreement  
16 that identified certain products, but Medtronic woke up  
17 one day and said, you know what, we don't think that  
18 those products infringe, we essentially want to  
19 relitigate our agreement, can Medtronic come to court  
20 and do that via a declaratory judgment action, and if so  
21 who would bear the burden of proof?

22 MR. WAXMAN: So if I understand your  
23 question, first to -- to go to the license in this case.  
24 This case not only involves products that didn't -- that  
25 aren't specifically articulated in a license agreement;

1 neither the patents nor the products at issue in this  
2 case had even been conceived, much less in existence, at  
3 the time the license agreement was in effect.

4           But in -- if I understand your question, in  
5 a situation in which I make Widget A and you claim that  
6 you have the patent that reads on that widget, and I --  
7 you agree to license me to do it, if the license -- if  
8 payment of the license depends upon a determination that  
9 it otherwise would be infringing, I can file a  
10 declaratory judgment action and seek a declaration that  
11 it's not infringing. That is, if the cover -- if the  
12 license covers only products that otherwise would  
13 infringe, I can bring a DEC action claiming  
14 non-infringement and you would bear the burden, assuming  
15 that you had threatened in some way to enforce your  
16 patent against me.

17           In -- in the -- the situation that -- sort  
18 of bogeyman situation that Mirowski and the I --  
19 intellectual property owner's brief articulate, which --  
20 imagine, which is you license -- I have a -- I have a  
21 product, you have a patent, you license it to me, and I  
22 turn around the next day and sue for non -- a  
23 declaration of non-infringement, there are any number of  
24 ways that you, as the patentee, could protect yourself  
25 from that extraordinary eventuality.

1           You could provide, for example, that -- I --  
2 you would require me to issue a -- you know, to -- to --  
3 to pay a paid-up royalty for all use. Or you could  
4 simply say: We don't care whether the patent infringes  
5 or not; you agree to pay me three dollars per unit sold.  
6 Or you could put a provision in that would say: If you  
7 sue for patent infringement, the royalty rate goes to  
8 3X.

9           Or for that matter, if you sue, that will --  
10 that can -- I can deem that a breach of the license  
11 agreement and recover the remedies that patent law  
12 allows, an injunction and treble damages and attorneys'  
13 fees in the context of a -- a willful action.

14           I want to underscore, although the Federal  
15 Circuit made a broad rule, exactly what we have here.  
16 In this case, Mirowski -- this license is from 1991.  
17 Mirowski -- it's not in the record, but there's no  
18 dispute that Mirowski has received hundreds of millions  
19 of dollars of royalties from Medtronic for its patents.

20           It gets, as a benefit of this license,  
21 notice, as I said, within 30 days of every new product  
22 and the manual, and it can require Medtronic to start  
23 accruing royalties and an interest rate of 2 -- of 2  
24 points over prime as soon as it sends us a notice. And  
25 moreover, in the -- in the litigation tolling agreement,

1 we agree that, even though we are not a party in the  
2 reference St. Jude action, we would be bound by any  
3 determination in that adjudication whereas otherwise we  
4 wouldn't.

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

10 I do want to underscore one other thing,  
11 That the Federal Circuit said that it was applying this  
12 special rule only in MedImmune-type cases. But the  
13 rationale of the court is that what causes the burden to  
14 shift is the absence of a counterclaim for infringement.  
15 That would have, for example, caused the burden to shift  
16 in the Myriad case that this Court decided last term,  
17 where there was one researcher at NYU who had standing  
18 to bring a declaratory judgment action.

19 There was no basis for Myriad to claim  
20 infringement because he had made clear that he  
21 wouldn't -- he wouldn't engage in the research and  
22 clinical work that he was going to so long as he was in  
23 risk of patent infringement remedies. And that -- the  
24 source of the rule, the source of the law where the  
25 burden of proof lies, is in substantive patent law. And

1 this Court has said for 125 years that it rests with the  
2 infringer.

3 What neither the Federal Circuit nor my  
4 friend on the other side of this case has ever  
5 identified is what is the source of the rule that shifts  
6 the burden in a declaratory judgment action. It can't  
7 be the Declaratory Judgment Act because that act is  
8 procedural only.

9 If I can reserve the balance of my time.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 Mr. Gannon.

12 ORAL ARGUMENT OF CURTIS E. GANNON,  
13 FOR UNITED STATES, AS AMICUS CURIAE,  
14 SUPPORTING THE PETITIONER

15 MR. GANNON: Mr. Chief Justice, and may it  
16 please the Court:

17 The government agrees that using the same  
18 burden of proof that would apply in the hypothetical  
19 coercive action that underlies the Declaratory Judgment  
20 Act is the best thing to do in this mirror image  
21 declaratory judgment action. That best serves the  
22 purposes of the Declaratory Judgment Act and allows for  
23 final resolution of the types of controversies that this  
24 Court contemplated in MedImmune.

25 If I could turn to Justice Kagan's point

1 about an incident in which the parties had actually  
2 agreed to whether certain products were covered by a  
3 particular license.

4 That would be different from the situation  
5 we have here, because the products in question here  
6 weren't actually in existence at the time of the  
7 underlying license agreement. The whole point of that  
8 aspect of the license agreement was to, as you said,  
9 channel future disputes into this particular dispute  
10 resolution mechanism.

11 JUSTICE SOTOMAYOR: Are -- are you  
12 suggesting that the burden-shifting rule should be  
13 different in the hypothetical Justice Kagan --

14 MR. GANNON: I was not about to suggest  
15 that, Justice Sotomayor. I was going to say that I  
16 think that's the -- that -- that that would probably be  
17 the least logical way to deal with the quandary that  
18 might arise from thinking that somebody is then trying  
19 to breach the license. And we don't think there's any  
20 license breach here because there wasn't any prior  
21 agreement on the fact that these future products were  
22 going to be covered by the -- by these patents or they'd  
23 be practicing these patents.

24 But even if there were some concern about  
25 the licensee turning around and challenging the



1 agreement that it had previously made, it seems like the  
2 problem there is either that they should be estopped by  
3 what they already said in the agreement or Lear needs to  
4 be extended to keep them from being estopped in that  
5 way. But shifting the burden of proof seems like an odd  
6 way to get at solving whatever the quandary there might  
7 be.

8           And I think that at some point, this -- this  
9 also interweaves with a point that the Chief Justice  
10 made about whether Medtronic here is seeking to change  
11 the status quo. And we don't think that Medtronic is  
12 seeking to change the status quo here, for a couple  
13 different reasons.

14           One of them is, as I was just saying, that  
15 the agreement here didn't actually reach -- the license  
16 agreement here didn't -- it didn't include a meeting of  
17 the minds about whether these particular future products  
18 would be covered by these patents, including one of the  
19 patents was reissued after the time of the license.

20           And also, this license agreement expressly  
21 preserved the parties' ability, including Medtronic's  
22 ability, to challenge both the validity and the  
23 enforceability of the patent. That's at page 13 of the  
24 Joint Appendix. And So there's no way in which I think  
25 it can be legitimately said that Medtronic is trying to

1 either get out of its contractual obligations or to  
2 change the status quo.

3           The status quo right now is that the  
4 royalties are collecting in a certified account, and so,  
5 in a sense, both parties are trying to change the status  
6 quo in trying to get the stream of royalties that either  
7 is applicable to these products or isn't on the basis of  
8 the resolution of a question that the parties had not  
9 decided, but said would be decided in a declaratory  
10 judgment action like this.

11           And we think that the best way to think of a  
12 declaratory judgment action like this is that it is the  
13 mirror image of the underlying coercive hypothetical  
14 action that could have been brought against Medtronic.

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

19           MR. GANNON: Well, the same thing is true in  
20 MedImmune, and I think that the Court noted that the --  
21 in MedImmune that the Declaratory Judgment Act was  
22 intended to help get the party out of the dilemma it  
23 would be in, in deciding whether it should continue to  
24 be effectively coerced into paying royalties that it  
25 thinks it doesn't need to pay or exposing itself to the

1 risks associated with -- with breaching the license  
2 and -- and being subject to treble damages, attorneys'  
3 fees and the other remedies that would be available  
4 under the Patent Act.

5           And yet, even though there had been no  
6 infringement in that case and no breach of the contract  
7 in that case, which is also true here, because so far,  
8 everybody has been behaving the way the license expected  
9 them to behave, the Court recognized that the parties  
10 had a concrete dispute about the applicability of the  
11 patents to those particular products, that the scope of  
12 the contract was not going to require payment of  
13 royalties where the patent did not apply, and said that  
14 the -- the issues that were going to be resolved in the  
15 declaratory judgment action there were going to involve  
16 questions of patent validity, patent enforceability, and  
17 scope of coverage, patent infringement, which is exactly  
18 what we have here.

19           Medtronic has raised in their complaint --  
20 the well-pleaded complaint that you would look to here  
21 is one that arises under the Patent Act and includes  
22 claims involving all three of those issues, just as was  
23 the case in MedImmune.

24           JUSTICE GINSBURG: I take it you disagree  
25 with the -- we have one friend of the Court brief that

1 says this is not a case arising under the patent law, it  
2 arises under contract law. It's a contract case with a  
3 patent issue.

4 MR. GANNON: Yes, Justice Ginsburg, we do  
5 disagree with that. We think that this case involves a  
6 claim that arises under the patent laws, for the reasons  
7 that I was just saying. I think that the way to -- the  
8 way to conceptualize this is to look to what the  
9 well-pleaded complaint would be in the hypothetical  
10 coercive action that would be being brought against  
11 Medtronic if we didn't have the problem presented by the  
12 fact that they haven't actually breached the contract or  
13 infringed at this point.

14 And we have every reason to think that that  
15 hypothetical coercive action is one that arises under  
16 the patent laws because it's one involving infringement.  
17 That's the dispute that the parties acknowledge that  
18 they have. In the litigation tolling agreement at page  
19 20 of the Joint Appendix, it talks about the fact that  
20 the parties have a dispute under Section 271 of the  
21 Patent Act. In the red brief here, Mirowski has -- has  
22 told us on page 48 that if Medtronic were to cease  
23 paying royalties, that the recourse would be that they  
24 would bring an infringement suit. And the complaint  
25 here in paragraph 5 alleges that the claim here arises

1 under the Patent Act.

2           And because it does arise under the Patent  
3 Act and because it's clear here that all of the  
4 defensive issues would also be Federal, as I mentioned  
5 before, I think there is no dispute here that this --  
6 this would arise under the patent laws, which would  
7 provide for district court jurisdiction under Section  
8 1338 and exclusive appellate jurisdiction in the Federal  
9 circuit under Section 1295(a) even before the amendments  
10 in the America Invents Act in 2011.

11           I think that there is one other point that  
12 would be worth making in response to some of the amicus  
13 briefs about the -- the potential problems here  
14 associated with whether the parties have an incentive to  
15 enter into these type of licensing arrangements.

16           As Mr. Waxman already explained, the  
17 patentholder here got lots of benefits out of -- out of  
18 entering into an agreement like this, notwithstanding  
19 the fact that they would leave themselves open to  
20 precisely the suits that the agreement contemplated,  
21 which was a suit involving both infringement and  
22 validity questions; and that under the circumstances,  
23 there's -- they had plenty of incentive to enter into a  
24 license agreement, notwithstanding the fact that they  
25 would continue to bear the same burden of proof that

1 they would bear in every other procedural context in  
2 which patent infringement claims have arisen up until  
3 now.

4 And so I think that in that sense, that's --  
5 that's not a sea change from their perspective. And --  
6 and yet, even if they were to think it so, as Mr. Waxman  
7 explained, a licensor in that context would have several  
8 mechanisms that they could use in order to rejigger the  
9 balance between the parties if they wanted to, and --  
10 and I think that we agree with -- with everything on the  
11 list that Mr. Waxman mentioned, including having fully  
12 paid-up licenses or allowing a suit for infringement or  
13 invalidity to constitute a termination of the license  
14 that would allow the patentholder to bring an  
15 infringement action.

16 If there are no further questions, we would  
17 urge the Court to reverse.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Neustadt.

20 ORAL ARGUMENT OF ARTHUR I. NEUSTADT

21 ON BEHALF OF THE RESPONDENTS

22 MR. NEUSTADT: Thank you, Your Honor.

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

24 The Federal circuit got it right in this  
25 case. The Federal circuit took the well-settled law on

1 burden of proof and it applied it to two stipulated  
2 facts and reached a conclusion that it had to reach. It  
3 was controlled by it.

4           The two stipulated facts were: Number one,  
5 when Mirowski's counsel, me, wrote letters to Medtronic,  
6 that was not a notice of infringement. There could be  
7 no infringement in this case. Infringement is defined  
8 as "using a patented invention without authority."  
9 Medtronic had authority. It was licensed.

10           The second stipulated fact -- and this is at  
11 page 51 of the Joint Appendix -- is that Medtronic is a  
12 licensee. It cannot be an infringer. So everything  
13 that you say about infringement involves a completely  
14 different situation.

15           There was no shifting of the burden of  
16 proof. The well-settled law that I referred to is the  
17 normal default rule. The normal default rule is perhaps  
18 one of the most fundamental tenets of our jurisprudence.  
19 It says that if a party files a complaint and seeks  
20 relief, it has the responsibility to prove that it is  
21 entitled to that relief.

22           And the normal default rule has the word  
23 "default" in there because it refers to the fact that  
24 the statute doesn't decide the burden of proof. And  
25 there's no dispute in this case that the statute does

1 not decide the burden of proof. So --

2 JUSTICE SCALIA: But -- but you could say  
3 that about any declaratory judgment action. You can say  
4 the person bringing the declaratory judgment action is  
5 seeking the relief. And if -- if we follow what you  
6 said, that then the burden shifts in every declaratory  
7 judgment action. And it clearly doesn't. I mean, we --  
8 we've said time and again that the burden of proof  
9 normally does not shift. What's different here?

10 MR. NEUSTADT: I'll tell you what's  
11 different here. The difference is that there is no  
12 infringement. Medtronic is a licensee. As a result,  
13 there can be no coercive counterclaim. As the Chief  
14 Justice noted, they're paying royalties. There is no  
15 infringement.

16 JUSTICE GINSBURG: How about a permissive  
17 counterclaim?

18 MR. NEUSTADT: Pardon me?

19 JUSTICE GINSBURG: How about a permissive  
20 counterclaim?

21 MR. NEUSTADT: A permissive counterclaim by  
22 definition would have nothing to do with the issue that  
23 is involved.

24 JUSTICE GINSBURG: But could -- could the  
25 patentholder bring in the declaratory action a



1 counterclaim for infringement?

2 MR. NEUSTADT: No, they cannot because  
3 Medtronic is a licensee. They cannot be an infringer.  
4 And the difference --

5 JUSTICE KAGAN: Well, they can be an  
6 infringer, Mr. Neustadt, if --

7 MR. NEUSTADT: Pardon me?

8 JUSTICE KAGAN: They can be an infringer if  
9 they say we're ignoring our agreement; we're not paying  
10 royalties, but we're going to go on and continue making  
11 the product. Then MVF would say they would be  
12 infringing. And that's the world that MedImmune  
13 imagines is happening.

14 MR. NEUSTADT: No. I'm sorry, I interrupted  
15 you. Go ahead.

16 JUSTICE KAGAN: No, I'm finished.

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

19 Okay. That's not what happened in  
20 MedImmune. First, if you change -- if you change the  
21 facts and Medtronic starts infringing because it stops  
22 paying royalties, of course you get different results.  
23 Here's what happened in MedImmune in our situation --

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

1 MR. NEUSTADT: Medtronic is holding the  
2 money.

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

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

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

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

10 JUSTICE SOTOMAYOR: Because you're not  
11 receiving the money.

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

14 JUSTICE SOTOMAYOR: Yes, but you're still  
15 not receiving the money.

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

20 JUSTICE SOTOMAYOR: And you agreed they  
21 could sue you.

22 MR. NEUSTADT: Pardon me?

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

1 MR. NEUSTADT: That's right.

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

4 MR. NEUSTADT: I'm sorry?

5 JUSTICE SOTOMAYOR: Why shouldn't you be  
6 bound by that agreement.

7 MR. NEUSTADT: Oh, we are bound by the  
8 agreement that --

9 JUSTICE SOTOMAYOR: To prove that they're  
10 infringing.

11 MR. NEUSTADT: No, they're not infringing.  
12 It's claim coverage. Medtronic cannot infringe because  
13 they're a licensee. The dispute is over claim coverage.  
14 It's not infringement. That's why we cannot have a  
15 counterclaim for infringement.

16 Justice Scalia's question, the big  
17 difference is that we cannot counterclaim for  
18 infringement. Under the normal default rule where the  
19 party seeking relief has the burden of proof, you have  
20 to look at the case, and you have to ask yourself --

21 JUSTICE KENNEDY: I don't -- I don't  
22 understand. Suppose the licensee says: This isn't  
23 covered by the agreement at all; we're not going to pay  
24 you anything. And it starts to manufacture its  
25 products. That's -- that's the whole point. It's

1 outside the agreement; they are not going to pay you  
2 anything.

3 MR. NEUSTADT: Well, they just --

4 JUSTICE KENNEDY: Or am I missing something?

5 MR. NEUSTADT: Yes, I believe you are. What  
6 Medtronic wants in this license is they want an  
7 insurance policy for their future products. The problem  
8 is that they could -- if they don't have a license, they  
9 can get enjoined. So they build this insurance policy  
10 so that they're protected, and then they even have a  
11 provision whereby they can go and file a DJ action.

12 Now, as I was saying, there are two types of  
13 DJ actions in this circumstance. One is where the  
14 accused infringer says: I am not infringing and I want  
15 a DJ to that effect. In that response, where you are  
16 talking about infringement and not claim coverage, the  
17 patentee has to counterclaim. It's compulsory. The  
18 patentee then has the burden of proof in that case  
19 because he has claimed infringement.

20 JUSTICE SCALIA: It seems to me it is often  
21 the case in declaratory judgment actions that the  
22 defendant in the action cannot counterclaim. I mean, it  
23 typically occurs when somebody doesn't want to be in  
24 breach of contract and -- and brings a suit to see, you  
25 know, claiming if I do this I won't be in breach. The

1 other side can't counterclaim because the person hasn't  
2 been in breach. The whole purpose of the declaratory  
3 judgment statute is to enable you to sue before the  
4 other side has a cause of action against you. That's  
5 the whole purpose of it.

6 So -- so why should the fact that the other  
7 side doesn't have a counterclaim change anything?  
8 That's usually the situation.

9 MR. NEUSTADT: Because under the normal  
10 default rule, if only one party is seeking relief, that  
11 party has the burden of proof. You get into a more  
12 complicated situation --

13 JUSTICE SCALIA: But we are not dealing with  
14 the normal default rule. We are dealing with a  
15 declaratory judgment statute, and we've said time and  
16 time again that it doesn't alter the burden of proof.  
17 And your response is: Well, it does when the other side  
18 can't counterclaim. And my response to that is:  
19 Usually the other side can't counterclaim.

20 MR. NEUSTADT: The -- if you take the normal  
21 default rule as set forth in Schaffer, which is the case  
22 we cite, and it's this Court's precedent involving an  
23 individual education program. And this Court  
24 specifically states if the parents bring the suit, they  
25 have the burden of proof because they're seeking relief.

1 And if the school district brings a suit, they have the  
2 burden of proof because they're the ones who are seeking  
3 relief. Wherever you have a case where only one party  
4 is seeking relief, the normal default rule is applicable  
5 and the party that seeks relief has to prove it.

6 JUSTICE GINSBURG: But that was not -- Weast  
7 was not -- was not a patent infringement case. It  
8 wasn't a declaratory -- it wasn't a declaratory  
9 judgment, was it?

10 MR. NEUSTADT: It wasn't, but that doesn't  
11 make any difference, because there's no exception for  
12 declaratory judgment cases in the normal default rule.  
13 It's based --

14 JUSTICE BREYER: Well, why shouldn't there  
15 be?

16 MR. NEUSTADT: I'm sorry?

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

21 MR. NEUSTADT: Claim coverage.

22 JUSTICE BREYER: Claim coverage. They say:  
23 We have a product and it doesn't violate the patent for  
24 the reason that the claims in the patent don't cover it.

25 MR. NEUSTADT: Correct.

1 JUSTICE BREYER: Now, you want to call that  
2 a claim coverage. I would call it no infringement.  
3 Call it what you wish. But the fact is there are -- and  
4 moreover, you couldn't bring a counterclaim because he's  
5 already agreed that if he loses his suit, he'll pay you  
6 the money. So there's nothing to claim for.

7 MR. NEUSTADT: That's correct.

8 JUSTICE BREYER: Yes, I know. Now, all  
9 that's true.

10 MR. NEUSTADT: Yes.

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

15 MR. NEUSTADT: Yes.

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

24 And there are a lot of good reasons, et  
25 cetera, that they put in their brief why that should be

1 so. It's easiest for the patentee to know in what  
2 respect it violates the claim. Normally, a patent,  
3 being a monopoly, should not have too many advantages  
4 beyond the scope of the monopoly. And we don't like  
5 false patents because that -- you'd have different  
6 results in the same kind of patent with different people  
7 depending upon whether in some other instance your  
8 client brought a suit or whether this was -- I mean,  
9 you've read the arguments.

10 So looking at those functional arguments, is  
11 there any answer that you have to their point other than  
12 cases in different subject matters where burdens of  
13 proof did shift?

14 MR. NEUSTADT: Well, the answer to your  
15 question is that the normal default rule is a  
16 fundamental tenet, that you can't go into court and say  
17 it's the responsibility of the defendant to disprove the  
18 allegations of my complaint. In cases where you have  
19 the counterclaim, of course the patentee is going to  
20 have the burden of proof. In cases where there can be  
21 no counterclaim, you have only one party seeking relief  
22 and that party has the burden of proof.

23 And it follows from the normal default rule,  
24 which is the rule of the Court -- rule of this Court.  
25 It's the established rule of the land. It's a



1 fundamental tenet that a party cannot come into court --

2 JUSTICE SCALIA: Then the Declaratory  
3 Judgment Act doesn't change it; that's your position?  
4 What do you do about the res judicata problem? Let's  
5 assume that we put the burden of proof where you want  
6 it. Okay? So this declaratory judgment action is  
7 defeated. All right? Nonetheless, they say: Still and  
8 all, we are going to go ahead and not pay any royalties.  
9 And then you bring -- you bring an infringement action,  
10 right?

11 MR. NEUSTADT: Right.

12 JUSTICE SCALIA: Is -- is the prior decision  
13 res judicata or are you going to have to relitigate the  
14 whole thing, but this time with the burden of proof on  
15 you?

16 MR. NEUSTADT: No, you're not going to have  
17 to litigate the whole thing.

18 JUSTICE SCALIA: Why not? You never -- you  
19 never established that you're entitled to any -- any  
20 infringement damages.

21 MR. NEUSTADT: I agree. But you're not  
22 going to have to relitigate the whole thing. This issue  
23 is going to be decided on preponderance of the evidence.  
24 And we don't have the burden. They have the burden on  
25 that. Once that's decided --

1 JUSTICE SCALIA: No, you -- you would  
2 normally have the burden as -- as the person claiming  
3 infringement.

4 MR. NEUSTADT: Oh, of course.

5 JUSTICE SCALIA: Of course.

6 MR. NEUSTADT: Of course.

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

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

14 JUSTICE SCALIA: So we have to relitigate  
15 the whole thing.

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

17 JUSTICE SCALIA: What's the alternative?

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

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

25 MR. NEUSTADT: Okay. Now, to follow your --

1 to follow -- to follow your hypothetical, the court who,  
2 say, tries the issue with respect to whether or not  
3 there's claim coverage, and let's just say we prevail on  
4 that. When there's a subsequent infringement action,  
5 you're correct, we cannot say that they're estopped by  
6 res judicata or issue preclusion.

7 But we can say, Your Honor, you've seen this  
8 entire case. Now, where it was a preponderance of the  
9 evidence before, it's now preponderance of the evidence  
10 on the other side. It may be the difference between  
11 49.9 and 50.5. And we're going to bring a motion for  
12 summary judgment and --

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

16 MR. NEUSTADT: And I've got one further  
17 answer to that.

18 JUSTICE SCALIA: Okay.

19 MR. NEUSTADT: And that is, there is no  
20 exception to -- to 100 percent lack of finality with  
21 respect to the normal default rule. The normal default  
22 rule is more important than saying that if there is a  
23 little bit of chance of a lack of finality, we're going  
24 to throw out the entire normal default rule in -- in  
25 favor of this rule and put the burden of proof on the

1 party who is not even seeking any relief.

2 And there was no shifting in this case.

3 Shifting involves starting with a position, shifting to  
4 another position. As soon as they filed the suit and  
5 you're the only party seeking relief, they would have  
6 the burden of proof. Now, if they are infringing, we  
7 can counterclaim. Then we're going to have the burden  
8 of proof because that's an issue where you have two  
9 parties seeking relief and that's a little more  
10 complicated.

11 JUSTICE GINSBURG: Why -- why isn't that  
12 true here? Because you are seeking release of the  
13 escrowed funds.

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

21 As to Justice Kennedy's question before, as  
22 notice of infringement, there was no notice of  
23 infringement. What we told them was there was claim  
24 coverage. And there's a big difference between claim  
25 coverage and infringement. If we tell them that we're

1 asserting infringement, we're going to have the burden  
2 of proof. We can't assert infringement because they're  
3 the licensee.

4 JUSTICE KENNEDY: Well, there would have  
5 been infringement if you had refused to pay the royalty,  
6 and -- and if they had refused to pay the royalty and  
7 you were covered, then -- then there would have been  
8 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 a 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. So in the MedImmune case -- but they never  
21 got to it because -- because that MedImmune case was  
22 settled -- you have the exact same situation we have  
23 here, which is that there is no counterclaim, and  
24 therefore, MedImmune, who is seeking relief, has the  
25 burden to show it's entitled to relief.

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

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

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

22 Your client, who's the patentee, knows that;  
23 otherwise, he wouldn't be bringing this infringing suit  
24 or the inside-the-coverage suit, or responding to  
25 someone who says it's outside the coverage. But -- but

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

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

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

9 JUSTICE BREYER: All right.

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

11 First of all -- well, the first answer -- and I'll get  
12 to the second answer -- is if you have that and say,  
13 well, it's more convenient for us to do it, you're  
14 creating a patent law exception to the normal default.  
15 And that's something you keep telling the Federal  
16 circuit not to do. Like in eBay, don't create a  
17 separate patent rule for injunctions.

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

23 MR. NEUSTADT: But you only have that  
24 substantive rule where the patentee counterclaims. When  
25 the patentee counterclaims, you have two parties seeking



1 relief; naturally, the patentee has the burden of proof.  
2 If there is no counterclaim, there can be no  
3 infringement. You're just talking about claim coverage.

4 But it's the second part of your question,  
5 Justice Breyer, what happens is the patentee, when they  
6 give notice of claim coverage, they can tell them.

7 There's no mysteries --

8 JUSTICE BREYER: But do they have to tell  
9 them?

10 MR. NEUSTADT: Well, they always do.

11 There's no mystery. If --

12 JUSTICE BREYER: They always do?

13 MR. NEUSTADT: Well, sure. I mean, if you  
14 go into the suit, the first question is interrogatory,  
15 why do you think this -- why do you think this is  
16 covered? So there's no mystery as to that. And it's  
17 much easier to prove non-infringement than to prove  
18 infringement, because these are guided by the all  
19 elements rule. The all elements rule means that if the  
20 patentee wants to prove infringement of a claim that has  
21 ten elements, he's got to prove ten elements or in -- or  
22 in your example, many more.

23 For the person who is -- is the licensee,  
24 you want to prove non-infringement, he has to only pick  
25 one of those elements and say I don't cover.

1 JUSTICE BREYER: So that's a good point. So  
2 what you're saying is that page 19 or whatever I quoted  
3 is a made-up thing which doesn't ever never really exist  
4 in your experience.

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

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

8 MR. NEUSTADT: Yeah. And that argument  
9 wasn't even presented to the Federal circuit before its  
10 decision. And the Federal circuit would have openly  
11 rejected it and say you've got to be kidding me.

12 JUSTICE BREYER: So you're saying I don't  
13 really care about what is an action where there is an  
14 infringement action or there even could be one in the  
15 circumstances before us, that's not my case because  
16 they're going to pay me forever if they lose this  
17 declaratory judgment, so there's no shift. And where  
18 there's no shift, you ought to follow the rules for  
19 where there's no shift, which is that the burden lies on  
20 the person bringing the suit.

21 MR. NEUSTADT: That's exactly right.

22 JUSTICE BREYER: That's your argument.

23 MR. NEUSTADT: Yes. The analysis that the  
24 Federal circuit did is they've got a burden of proof  
25 issue.

1 JUSTICE BREYER: I -- I see.

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

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

11 MR. NEUSTADT: Yeah. And then you've got --  
12 and then you --

13 JUSTICE BREYER: And any other -- is there  
14 any other -- is there any other practical point that  
15 they brought up that you want respond to?

16 MR. NEUSTADT: Oh, sure. Hundreds of  
17 claims, that's ridiculous. You know, the courts say,  
18 hey, you know, I have other cases on my docket, get down  
19 to five claims.

20 Anticipate any argument? The person suing,  
21 the DJ licensee, doesn't have to anticipate any  
22 argument. He said, you told me it was these claims.  
23 And we even had an agreement with him we couldn't go  
24 over 30. And all I got to do is, in claim 1, we don't  
25 have element number 6.

1                   In Claim 2, we don't have Element Number 4.  
2     It's a very simple manner. There is no problem  
3     whatsoever there.

4                   So what the Federal Circuit did is: I've  
5     got a burden of proof issue. Let me find the  
6     controlling law. Look at the Supreme Court. The  
7     Supreme Court says there is a normal default rule, and  
8     it's the party seeking relief.

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

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

21                  JUSTICE SCALIA: The Declaratory Judgment  
22    Act is addressed to potential coercion, not actual  
23    coercion. That's the whole point. You should be able  
24    to bring the suit before coercion is applied. Now, it  
25    is true that you're not applying coercion right now, but

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

7 MR. NEUSTADT: Well, it doesn't shift the  
8 burden of proof.

9 JUSTICE SCALIA: It does shift the burden of  
10 proof because if what they are worried about is your  
11 claiming infringement and exacting a penalty from them  
12 for their not paying the royalties that the agreement  
13 provides, okay? That's what they are worried about.  
14 The Declaratory Judgment Act enables them to sue  
15 beforehand, before they incur liability. That's its  
16 whole purpose, and its purpose is not to shift the  
17 burden of proof.

18 MR. NEUSTADT: The -- in answer to your  
19 hypothetical, I agree with you on all of that. But as  
20 in the MedImmune case, MedImmune ends up with the burden  
21 of proof. MedImmune says: I've got to get a resolution  
22 to this question. I want you to overrule Gen Pro, I  
23 want to show why my product is not covered. Well, all  
24 of that's fine, there is nothing the matter with that,  
25 there is no coercion. It's just that when MedImmune

1 does this it's going to have the burden to show it.

2 JUSTICE BREYER: But you would agree with  
3 this. You would agree that if that agreement of yours  
4 read a little differently, MedImmune -- if they had  
5 said, we are not going to pay royalties until your  
6 client brings an infringement suit, which you intend to  
7 do, at that point, if you'd made that promise, you would  
8 have the burden of proof, because you'd bring an  
9 infringement suit.

10 MR. NEUSTADT: Well, of course.

11 JUSTICE BREYER: And if they said either an  
12 infringement suit or a declaratory judgment action, then  
13 again you would have the burden of proof, even in the  
14 declaratory judgment action because then they would be  
15 totally parallel. I mean, then you'd have, if you  
16 brought the infringement suit, it's yours. And then in  
17 the declaratory judgment action, it could be true too,  
18 in your view.

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

21 JUSTICE BREYER: I mean --

22 MR. NEUSTADT: -- the licensee's got he  
23 burden.

24 JUSTICE BREYER: The answer is yes or no.  
25 The answer is yes or no. That is, am I right in

1 understanding your argument that if that agreement had  
2 said you can bring either kind of suit, either we, yes,  
3 we the patentee, will bring a suit, in which case you  
4 will defend it; or if you bring it first, you can bring  
5 a declaratory judgment action. Okay? For the same  
6 thing. If it had said that and the agreement had held  
7 up the royalties until one or the other was decided,  
8 then your client the patentee would have the burden of  
9 proof in either because it's exactly the same thing.  
10 You could have brought -- are you following me?

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

12 JUSTICE BREYER: Okay. Skip it.

13 (Laughter.)

14 MR. NEUSTADT: So really what the Federal  
15 Circuit did said there was no shifting here. First you  
16 got to look to who's got the burden of proof. You get  
17 that from Schaffer, the normal default rule: Only one  
18 party seeking relief.

19 And then they said, and besides, the  
20 patentee could not have brought suit because he couldn't  
21 have brought infringement. So you have a simple case of  
22 only one party seeking relief; that party has the  
23 burden. And you would have that anyway even without  
24 this agreement, because only one party can bring suit.  
25 It's just like in Schaffer. This party brings suit,

1 they have the burden. Other party brings suit, they  
2 have the burden.

3 CHIEF JUSTICE ROBERTS: So you are really  
4 looking at it, though, from the view of a contract  
5 action rather than a patent action.

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

10 To answer Justice Ginsburg's question, yes,  
11 there isn't the usual jurisdiction that you would have  
12 in a patent infringement action. And this comes from  
13 the unanimous opinion of this Court earlier this year in  
14 Gunn vs. Minton, in which I think Your Honor, Your Honor  
15 was the author, which says that that's just a contract  
16 action. Just having a patent question doesn't get you  
17 into Federal court.

18 JUSTICE KAGAN: Mr. Neustadt, I was under  
19 the impression that, according to this contract, if  
20 Medtronics stops paying royalties you can bring not only  
21 a contract suit, but in fact a patent suit.

22 MR. NEUSTADT: Well --

23 JUSTICE KAGAN: An infringement suit.

24 MR. NEUSTADT: -- that has nothing to do  
25 with the contract, because then they've breached the



1 contract.

2 JUSTICE KAGAN: But you can bring an  
3 infringement suit according to the very agreement that  
4 you signed.

5 MR. NEUSTADT: It's not in accordance with  
6 the agreement. We can't bring an infringement suit.  
7 They are not infringing.

8 JUSTICE KAGAN: They are infringing if they  
9 break the contract and they stop paying royalties.

10 MR. NEUSTADT: Oh, sure.

11 JUSTICE KAGAN: And then you can bring an  
12 infringement suit.

13 MR. NEUSTADT: Well, of course. But that's  
14 not the situation we face here. That's always been  
15 true. I mean, if they want to, if the burden of proof  
16 is so burdensome to them, just go ahead and breach. And  
17 then we will sue them and we will have burden of proof.

18 JUSTICE SCALIA: You can always say that in  
19 declaratory judgment actions: That is not the situation  
20 we face. The Declaratory Judgment Act posits a  
21 hypothetical situation. It always does.

22 MR. NEUSTADT: You cannot say --

23 JUSTICE SCALIA: I am worried that you are  
24 going to sue me later. You are not suing me now.  
25 That's not the situation I face. But I worry that you

1 will sue me later.

2 MR. NEUSTADT: But how can I sue later if  
3 you're continuing to pay royalties? That was the  
4 MedImmune situation. MedImmune said, I've got to pay  
5 you royalties --

6 JUSTICE SCALIA: They don't want to -- they  
7 don't want to continue to pay royalties. That's the  
8 point. That's why they bring the Declaratory Judgment  
9 Act, so that the court can tell them: You don't have to  
10 pay royalties because this stuff is not covered.

11 MR. NEUSTADT: Well, that's absolutely  
12 right. But in that case -- and the Court didn't rule  
13 upon it because it got remanded -- they would have the  
14 burden of proof because they are the only party seeking  
15 relief. You can't say --

16 JUSTICE GINSBURG: You cite -- you cite the  
17 default rule and you rely on that totally. But there  
18 are other rules on burden of proof, for example, the  
19 party who has better access to the information. So it's  
20 not as though there is this firm rule with no  
21 exceptions.

22 I take it from your answers to  
23 Justice Scalia that you are saying in every declaratory  
24 judgment action where only one party is seeking relief,  
25 that party has the burden of proof. So you're not

1 limiting this to patent cases; is that right?

2 MR. NEUSTADT: Oh, that's correct. That's  
3 the normal default rule. And there should be no  
4 exception to that. I see my light is red.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Mr. Waxman, you have three minutes  
7 remaining.

8 REBUTTAL ARGUMENT OF SETH P. WAXMAN

9 ON BEHALF OF THE PETITIONER

10 MR. WAXMAN: I'd be happy to respond to any  
11 questions that the Court has.

12 Otherwise, I would submit on the briefs.

13 CHIEF JUSTICE ROBERTS: Okay. Thank you  
14 counsel. Counsel.

15 The case is submitted.

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

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