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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BERNARD L. BILSKI AND RAND A. :

4 WARSAW, :

5 Petitioners :

6 v. : No. 08-964

7 DAVID J. KAPPOS, UNDER :

8 SECRETARY OF COMMERCE FOR :

9 INTELLECTUAL PROPERTY AND :

10 DIRECTOR, PATENT AND :

11 TRADEMARK OFFICE. :

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Washington, D.C.

Monday, November 9, 2009

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

19 APPEARANCES:

20 J. MICHAEL JAKES, ESQ., Washington, D.C.; on behalf of
21 the Petitioners.

22 MALCOLM L. STEWART, ESQ., Deputy Solicitor General,
23 Department of Justice, Washington, D.C.; on behalf of
24 the Respondent.

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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this afternoon in Case 08-964, *Bilski v. Kappos*.

Mr. Jakes.

ORAL ARGUMENT OF J. MICHAEL JAKES

ON BEHALF OF THE PETITIONERS

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

The Federal Circuit's rigid and narrow machine-or-transformation test for all patent-eligible methods should be reversed. The requirement that any and all methods must be either tied to a particular machine or transform specific subject matter doesn't find any basis in either the language of Section 101 or anywhere in the patent statute.

It's not required by this Court's precedence, and it's contrary to the established principle that Section 101 should be read broadly to accommodate unforeseen advances in the useful arts. There are recognized exclusions from Section 101 from that broad language, such as laws of nature, natural phenomenon, and abstract ideas. Those may not be patented.

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1 But these exceptions, which are drawn from
2 the Court's precedent, including this Court's Diehr
3 case, also finds support in the statutory language,
4 which says that any process must be new and useful.

5 So the prohibition against patenting laws of
6 nature or abstract principles, it applies equally to all
7 four categories of subject matter under 101, but, here,
8 the Federal circuit has created a new test just for
9 processes that are not bound in the statute or required
10 by this Court's decision.

11 JUSTICE SCALIA: Well, if the government
12 says that the -- that the term on which it hangs its hat
13 is the term useful arts and that that meant, originally,
14 and still means manufacturing arts, arts dealing with
15 workmen, with -- you know, inventors, like Lorenzo
16 Jones, not -- not somebody who writes a book on how to
17 win friends and influence people.

18 What is wrong with that analysis, that
19 that's what "useful arts" meant, that it always --
20 always was thought to deal with machines and inventions?

21 MR. JAKES: Certainly, "useful arts"
22 encompasses industrial processes, manufacturing
23 processes, but it has never been limited just to those
24 types of processes. I'll admit that during the
25 Industrial Revolution most of the inventions concerned

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1 machines and manufacturing processes. But we have cited
2 counter-examples that show that business was also within
3 the useful arts.

4 It's also up to Congress to decide how to
5 implement the patent system and the statutory --

6 JUSTICE BREYER: Well, if you leave
7 something out, Congress can put it back in, tailoring
8 the protection to what they feel is necessary. But if
9 it covers everything under the sun, I've never seen a
10 case where Congress would take something out.

11 Now, if we are relying on Congress, I guess
12 the circuit would say, let's go narrow, and we
13 wouldn't -- you know -- since you referred to Congress,
14 I thought I would bring that up and see what you think.

15 MR. JAKES: Congress has acted in certain
16 circumstances. One of them is in section 273, to
17 provide prior user rights for business methods. Another
18 area is 287(c), where medical activities are also
19 exempted from remedies under the statute.

20 There has been a bill introduced to exempt
21 tax avoidance methods, but that has not yet been passed.

22 JUSTICE GINSBURG: But you say you would say
23 tax avoidance methods are covered, just as the process
24 here is covered. So an estate plan, tax avoidance, how
25 to resist a corporate takeover, how to choose a jury,

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1 all of those are patentable?

2 MR. JAKES: They are eligible for patenting
3 as processes, assuming they meet the other statutory
4 requirements.

5 JUSTICE BREYER: So that would mean that
6 every -- every businessman -- perhaps not every, but
7 every successful businessman typically has something.
8 His firm wouldn't be successful if he didn't have
9 anything that others didn't have. He thinks of a new
10 way to organize. He thinks of a new thing to say on the
11 telephone. He thinks of something. That's how he made
12 his money.

13 And your view would be -- and it's new, too,
14 and it's useful, made him a fortune -- anything that
15 helps any businessman succeed is patentable because we
16 reduce it to a number of steps, explain it in general
17 terms, file our application, granted?

18 MR. JAKES: It is potentially patentable,
19 yes.

20 JUSTICE BREYER: Okay. Well then, if that
21 were so, we go back to the original purpose of the
22 Constitution. Do you think that the framers would have
23 wanted to require anyone successful in this great, vast,
24 new continent because he thinks of something new to have
25 had to run to Washington and to force any possible

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1 competitor to do a search and then stop the wheels of
2 progress unless they get permission?

3 Is that a plausible view of the patent
4 clause?

5 MR. JAKES: No, Your Honor. I wouldn't
6 characterize it that way, but I do believe that --

7 JUSTICE SOTOMAYOR: So how do we limit it to
8 something that is reasonable? Meaning, if we don't
9 limit it to inventions or to technology, as some amici
10 have, or to some tie or tether, borrowing the Solicitor
11 General's phraseology, to the sciences, to the useful
12 arts, then why not patent the method of speed dating?

13 MR. JAKES: Well, first of all, I think,
14 looking at what are useful arts, it does exclude some
15 things. It does exclude the fine arts. Speaking,
16 literature, poems, I think we all agree that those are
17 not included, and there are other things as well. For
18 example, a corporation, a human being, these are things
19 that are not covered by the statutory categories.

20 JUSTICE SOTOMAYOR: So why are human
21 activities covered by useful arts?

22 MR. JAKES: Human activities are covered.

23 JUSTICE SOTOMAYOR: Well, you are saying
24 they are covered, but why should they be?

25 MR. JAKES: I believe the statute provides

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1 for them to be covered by defining them as a process. I
2 can give you a -- one good example, which would be a
3 surgical method performed by a doctor. Those are
4 patentable. They are patent eligible. In section
5 287(c), Congress has carved out and said, you can't go
6 after the doctor for infringement, but that is an
7 entirely human activity, and it has long been
8 patentable.

9 JUSTICE SOTOMAYOR: Do you think that there
10 is some benefit to society from patenting a method to
11 cure someone that involves just human activity, as
12 opposed to some machine, substance, or other apparatus
13 to help that process?

14 MR. JAKES: Yes.

15 JUSTICE SOTOMAYOR: Do you believe that that
16 was the intent of the patent law?

17 MR. JAKES: I believe that falls within the
18 useful arts, and I believe that there is an advantage to
19 that. There are really two advantages to the patent
20 system. One is encouraging people to come up with new
21 things, such as a surgical method or method of hedging
22 consumption risk.

23 The other is the disclosure aspect. A
24 doctor might choose to keep it secret.

25 JUSTICE BREYER: So you are going to answer

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1 this question yes. You know, I have a great, wonderful,
2 really original method of teaching antitrust law, and it
3 kept 80 percent of the students awake. They learned
4 things --

5 (Laughter.)

6 JUSTICE BREYER: It was fabulous. And I
7 could probably have reduced it to a set of steps and
8 other teachers could have followed it. That you are
9 going to say is patentable, too?

10 MR. JAKES: Potentially.

11 JUSTICE BREYER: Okay. Fine. Now, suppose
12 I reject that view, hypothetically, and suppose I were
13 to take the view that this is way too far, that that is
14 not the purpose of the statute. Suppose for
15 hypothetical's sake I'm still a little nervous about
16 that -- that circuit's decision there. Have you any
17 suggestion for me?

18 MR. JAKES: I think that we should go back
19 to the first principles that were enunciated in Diehr
20 and other cases, that abstract ideas per se are not
21 patentable. That's my position, and what I would
22 advocate in this case and any case, as long as you're --

23 CHIEF JUSTICE ROBERTS: What -- I'm looking
24 at your Claim 1, in Joint Appendix page 19 to 20. How
25 is that not an abstract idea? You initiate a series of

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1 transactions between commodity providers and commodity
2 consumers. You set a fixed price at the consumer end,
3 you set a fixed price at the other end, and that's it.

4 I mean, I could patent a process where I do
5 the same thing. I initiate a series of transactions
6 with sellers. I initiate a series of transactions with
7 buyers. I buy low and sell high. That's my patent for
8 maximizing wealth.

9 I don't see how that's different than your
10 claim number 1.

11 MR. JAKES: If that was a novel and
12 unobvious method, then it should be patentable, but it's
13 eligible as subject matter --

14 CHIEF JUSTICE ROBERTS: Well, but your Claim
15 1 it seems to me is classic commodity hedging that has
16 been going on for centuries.

17 MR. JAKES: Your Honor, if that were true,
18 then we should run afoul of the obviousness provision
19 under section 103. Now, the Patent Office did initially
20 allow some of our claims over the prior art.

21 JUSTICE KENNEDY: But you know, the
22 insurance industry -- the insurance business, as we know
23 it, really began in England in 1680, when they
24 discovered differential calculus, and they had
25 expectancy and actuarial tables, actuarial for life,

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1 expectancy for shipping, and this really created a whole
2 new industry.

3 In your view, I think, clearly those would
4 be patentable, the -- the explanation of how to compile
5 an actuarial table and -- and apply it to risk. That
6 certainly would be patentable under your view, and
7 it's -- it's difficult for me to think that Congress
8 would want to -- would have wanted to give only one
9 person the capacity to issue insurance.

10 MR. JAKES: I think that method would be
11 patent eligible. But, as you said, it would have to be
12 reduced to a concrete set of steps, like our claim 1.
13 Now, claim 1 may be written in broad terms and it may
14 some day run into the prior art, but it does require
15 people to do actual things.

16 I think even the Patent Office agreed that
17 there are physical steps in our method here. And in the
18 insurance method --

19 CHIEF JUSTICE ROBERTS: I'm sorry.
20 Just what are the physical steps? Initiating a series
21 of transactions between commodity provider and market
22 participants?

23 MR. JAKES: That would be one.

24 CHIEF JUSTICE ROBERTS: You get on the phone
25 and you call the baker and you get on the phone and you

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1 call the grocer and say: I can set up a deal for both
2 of you?

3 MR. JAKES: It could be. It could be done
4 that way because it does take a person acting to do
5 that. It's not purely --

6 JUSTICE KENNEDY: And so in the insurance
7 case it takes a person to go over to the Bureau of
8 Statistics and compile statistics on -- on life -- on
9 life expectancy.

10 MR. JAKES: That could be. Now, the patent
11 on the data, that's another category that's not included
12 in the subject matter of those four categories. The
13 data itself is not patentable, but if it is a series of
14 steps, it should be eligible as long as it meets the
15 other statutory requirements as a process.

16 There is nothing in the useful arts -- now,
17 we have heard the word "technology." That can be a
18 difficult term, because technology in its broadest sense
19 means the application of knowledge as opposed to general
20 knowledge.

21 JUSTICE GINSBURG: Isn't that the basis on
22 which the patent law rests in Europe, in other
23 countries? They do not permit business method patents.
24 It has to be tied to technology, to science or
25 technology. So if other systems are able to work with

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1 the notion of technology-based, why not ours?

2 MR. JAKES: I would agree, Your Honor.

3 There are those systems that do have a requirement like
4 that. Ours does not. Ours speaks in very broad
5 terms about having --

6 JUSTICE GINSBURG: But I was talking about
7 -- you said that technology-based, that wouldn't work
8 because there are so many definitions. I'm simply
9 asking you the question: Does it work with these other
10 systems? That they -- they exclude business methods,
11 they include technology-based --

12 MR. JAKES: That's right. But they have
13 also defined "technology" in such a way as to exclude
14 business methods. And I don't think we can do that.

15 The fields of operations research,
16 industrial engineering, even financial engineering,
17 there has been an explosion in these particular fields,
18 and to now call them non-technological because they
19 didn't exist over 100 years ago wouldn't make --

20 JUSTICE SOTOMAYOR: Are you suggesting they
21 didn't exist because we didn't give them patents
22 100 years ago?

23 MR. JAKES: No.

24 JUSTICE SOTOMAYOR: Or they exist because
25 computers have increased --

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1 MR. JAKES: It's very much related to our
2 current economy and state of technology, with computers
3 and the Internet and the free flow of information. But
4 that's what --

5 JUSTICE SOTOMAYOR: But a patent limits the
6 free flow of information. It requires licensing fees
7 and other steps, legal steps. So you can't argue that
8 your definition is improving the free flow of
9 information.

10 MR. JAKES: Your Honor, I would, because of
11 the disclosure requirement of the patent laws. It
12 requires people to disclose their inventions rather than
13 keeping them secret, so there is a second benefit to the
14 patent system just other than encouraging people to
15 invent, and that is to have that information get to the
16 public generally. And in exchange for that --

17 JUSTICE SCALIA: Even though the public
18 can't use it, right, until the patent expires?

19 MR. JAKES: Until the patent expires, if a
20 valid patent issues on that, yes.

21 But that's our system. We do give exclusive
22 rights in exchange for that information being provided
23 to the public.

24 JUSTICE STEVENS: May I ask this question?
25 What do you think the strongest case from our

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1 jurisprudence is to support your position?

2 MR. JAKES: I would say it's the Diehr case.

3 JUSTICE STEVENS: Which one?

4 MR. JAKES: Diehr. Diamond v. Diehr.

5 JUSTICE STEVENS: Diehr?

6 MR. JAKES: Yes.

7 JUSTICE STEVENS: That was nothing like this
8 patent.

9 MR. JAKES: No, it's not, but I think it --

10 JUSTICE STEVENS: There's language in the
11 opinion.

12 MR. JAKES: It outlines the general
13 principles and also tells us that there are only these
14 specific things that are not included within the subject
15 matter.

16 JUSTICE STEVENS: But is it correct that
17 there's none -- none of our cases have ever approved a
18 rule such as you advocate?

19 MR. JAKES: I don't think this particular
20 subject matter has been ruled on by the Court.

21 Now, in Dann v. Johnston in the 70s, there
22 was a case that could have been decided on the grounds
23 that it was a method of doing business, and instead the
24 Court close to decide that case based on obviousness.
25 And really --

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1 JUSTICE SCALIA: You know, you mention that
2 there are all these -- these new areas that didn't exist
3 in the past because of modern business and what-not, but
4 there are also areas that existed in the past that don't
5 exist today. Let's take training horses. Don't you
6 think that -- that some people, horse whisperers or
7 others, had some, you know, some insights into the best
8 way to train horses? And that should have been
9 patentable on your theory.

10 MR. JAKES: They might have, yes.

11 JUSTICE SCALIA: Well, why didn't anybody
12 patent those things?

13 MR. JAKES: I think our economy was based on
14 industrial process.

15 JUSTICE SCALIA: It was based on horses, for
16 Pete's sake. You -- I would really have thought
17 somebody would have patented that.

18 MR. JAKES: There are also issues with
19 enforcement. I can't really answer why somebody
20 wouldn't have.

21 There are teaching methods that were
22 patented. There are a number of them that we've
23 included in our brief where there were patents issued
24 for teaching methods, and I don't think that we've had a
25 serious enforcement problem with people being sued for

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1 using teaching methods. But there have been those
2 people who have sought to patent them rather than keep
3 them as secrets or just use them.

4 JUSTICE SCALIA: How old -- how old were
5 those, those cases?

6 MR. JAKES: They range. Some of them go
7 back quite a ways, to the last century.

8 JUSTICE STEVENS: May I ask this general
9 question, too? I have always admired Judge Rich, who
10 was very active in drafting the '52 amendments.

11 MR. JAKES: Yes.

12 JUSTICE STEVENS: Has he written anything on
13 this particular issue.

14 MR. JAKES: He has written a number of
15 things. And I think one of the things that the
16 Solicitor General quotes in their brief is from an
17 article that he wrote.

18 But he also wrote the Alappat decision and
19 the State Street Bank case as well. And those I think,
20 stand as his views, his latest views on what was
21 patent-eligible subject matter, looking at the State
22 Street Bank case.

23 JUSTICE KENNEDY: In the Diehr case, the
24 Court said that in the end the abstract idea must be in
25 a process that, oh, implements a proposal that the

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1 patent laws were designed to protect, which brings you
2 almost back to the beginning.

3 MR. JAKES: It does.

4 JUSTICE KENNEDY: You don't -- you don't
5 know much from that language. But that was something
6 that you could touch, that you could see, that looked
7 like a machine, the substance was different before the
8 process and after the process. And -- and none of
9 that's applicable here. It's --

10 MR. JAKES: The Diehr invention was an
11 industrial process of the conventional type, because it
12 was a method of curing rubber. But today the raw
13 materials are just as likely to be information or
14 electronic signals, and to simply root us in the
15 industrial era because that's what we knew I think would
16 be wrong and contrary to the forward-looking aspect of
17 the patent law.

18 JUSTICE SOTOMAYOR: Well, isn't the
19 manipulation of electronic signals a substance that is
20 different in kind from just a method of how to go about
21 doing business or a method of how to approach a
22 particular problem?

23 Isn't there -- isn't that what the Federal
24 Circuit was trying to explain, which is that there has
25 to be something more substantive than the mere exchange

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1 of information; that it has to involve -- it used the
2 word "transformation." It hasn't defined the outer
3 limits of what it means by that.

4 MR. JAKES: I think there is a difference.
5 But by rigidly looking at that transformation test, what
6 you do is you exclude lots of other things where the
7 transformation is not required --

8 JUSTICE BREYER: That's exactly what I --
9 maybe I can get you to inadvertently help my -- my
10 hypothesis you don't like. That's why I say it's
11 inadvertent.

12 You said there are two things. There are
13 actually four things in the patent law which everyone
14 accepts. There are two that are plus and two that are
15 minus. And the two that are plus is by giving people a
16 monopoly, you get them to produce more. As you said,
17 you get them to disclose.

18 The two minuses are they charge a higher
19 price, so people use the product less; and moreover, the
20 act of getting permissions and having to get permission
21 can really slow things down and destroy advance. So
22 there is a balance.

23 In the nineteenth century, they made it one
24 way with respect to machines. Now you're telling us:
25 Make it today in respect to information. And if you ask

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1 me as a person how to make that balance in respect to
2 information, if I am honest, I have to tell you: I
3 don't know. And I don't know whether across the board
4 or in this area or that area patent protection will do
5 no harm or more harm than good.

6 So that's the true situation in which I find
7 myself in respect to your argument. And it's in respect
8 to that, I would say: All right, so what do I do?

9 MR. JAKES: I think the answer is to follow
10 the statute.

11 JUSTICE BREYER: Well, thank you. I thought
12 that was the issue, not the answer.

13 (Laughter.)

14 MR. JAKES: Congress has spoken in broad
15 terms and given us those four categories, and by looking
16 at those I think that answers the question.

17 JUSTICE SOTOMAYOR: But it doesn't, because
18 we don't work in a vacuum. We work in a context.

19 MR. JAKES: Yes.

20 JUSTICE SOTOMAYOR: And so it begs the
21 question, because we go around in a circle: What does
22 "process" mean in a patent law that was passed in 1952
23 that had one set of manufacturing and other items that
24 are technologically tied and this is not? So how do we
25 discern Congress's intent, other than by the use of the

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1 word "process" in context?

2 MR. JAKES: I think that "process" is not by
3 itself. It says "any new and useful process." And so
4 we have -- we can look at those words and understand
5 that natural phenomena, laws of nature, which are not
6 really new because they are part of the storehouse of
7 knowledge available to everyone, and "useful," meaning
8 there has to be a practical application.

9 JUSTICE SOTOMAYOR: But the word "knowledge"
10 is not used in there. So it's not just useful
11 knowledge.

12 MR. JAKES: No.

13 JUSTICE SOTOMAYOR: It's useful knowledge in
14 relationship to something.

15 MR. JAKES: Practically applied, yes, in the
16 real world, whether that's the exchange of information
17 or electronic data transformation. One of the problems
18 with the transformation test is that it would exclude
19 some valuable inventions that I think everyone would
20 agree are technological under any test such as data
21 compression, such as FM radio. Even Bell's claim, the
22 claim to transmitting sound using undulating current,
23 wouldn't necessarily pass the transformation test. So I
24 think we need to look at --

25 JUSTICE KENNEDY: But it would be different,

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1 it seems to me, than what you are -- let's assume you
2 can't patent an alphabet. I assume that is true. And
3 you can take an alphabet to make beautiful words, and --
4 and so forth. You -- you want to say that these --
5 these electronic signals can be used in a way just like
6 the alphabet can be used.

7 And many of the scientific briefs say that
8 their process is different, that they are taking
9 electronic signals and turning them into some other sort
10 of signal. But that's not what you are doing.

11 MR. JAKES: That may be, but those signals
12 could also be transmitted. On -- on your question about
13 the alphabet you said look at the Morse claim 5, which
14 was an alphabet to Morse Code. That's exactly what it
15 was.

16 CHIEF JUSTICE ROBERTS: So you reject -- you
17 reject the substitute. You think you can patent an
18 alphabet because it is a process of forming words.

19 MR. JAKES: It could be, yes. Now, I think
20 you run into all kinds of other problems. And that's
21 really where the focus of the patent statute should be,
22 so that we have the fair give-and-take, the bargain that
23 is necessary, that we -- too much overpatenting as
24 opposed to too little. The test there is obviousness.
25 That's where it takes place, not at this threshold.

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1 JUSTICE SOTOMAYOR: Morse's Code was not
2 obvious.

3 MR. JAKES: What is that?

4 JUSTICE SOTOMAYOR: Morse's Code was not
5 obvious, and yet --

6 MR. JAKES: No, it wasn't.

7 JUSTICE SOTOMAYOR: As I understand that
8 case, the only thing patented was the use of his code
9 with respect to the telegraph machine that he proposed.
10 The Patent Office rejected -- maybe I am reading the
11 case wrong, but it rejected all of the claims except
12 those that related to the use of the code with a
13 particular machine.

14 MR. JAKES: It -- it does say used in
15 connection with telegraphy.

16 JUSTICE SOTOMAYOR: Of his claims --

17 MR. JAKES: Yes.

18 JUSTICE SOTOMAYOR: -- that was the only one
19 that was accepted, correct?

20 MR. JAKES: Right.

21 JUSTICE SOTOMAYOR: The same thing with --
22 well, Bell's patent was --

23 MR. JAKES: In Morse's claims, I believe it
24 was claim 8 was the one that was rejected, and the rest
25 of them were accepted. Claim 8 was the very broad claim

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1 to transmitting information over a distance, however
2 accomplished.

3 JUSTICE SOTOMAYOR: Let's not skip over
4 that, because the rest of the claim in Bell related to
5 how to transmit over the wire, correct?

6 MR. JAKES: His disclosure did, but his
7 actual claim was interpreted as being using undulating
8 current to transmit sound, however that was
9 accomplished. It was very broad, and that's why --

10 JUSTICE SOTOMAYOR: And that was what was
11 rejected.

12 MR. JAKES: No. Bell's claim was not
13 rejected. That one was approved, yes. The Morse claim,
14 claim 8, was the broad claim that really we would
15 probably look at today as being -- as having inadequate
16 disclosure because --

17 JUSTICE SCALIA: Well, it was -- it was
18 transforming sound into electrical current and then at
19 the other end electrical current back into sound. I
20 mean it met the transformation test, didn't it?

21 MR. JAKES: It might have. It might have.

22 JUSTICE SCALIA: It clearly did.

23 MR. JAKES: Well, it's not that clear from
24 the Federal Circuit's transformation test whether that
25 would apply or not, because although the Federal Circuit

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1 has said transformation of data might qualify, it said
2 it has to represent something physical, something -- a
3 real object. And sound doesn't necessarily have to be
4 that. Sound can be generated artificially. So --

5 JUSTICE SCALIA: Sound -- sound is not
6 physical, and electric current is not physical?

7 MR. JAKES: I think electric current is
8 physical.

9 JUSTICE SCALIA: Yes, I think so.

10 MR. JAKES: Yes.

11 JUSTICE SCALIA: Sound is, too.

12 MR. JAKES: It can be, but when it's
13 transmitted over a wire, it's not. It's something else.
14 It's an electrical current then.

15 JUSTICE SCALIA: Sound is not transmitted
16 over the wires. Sound has been transformed into
17 current, and current is transmitted over the wire and
18 then transformed back at the other end into sound.

19 MR. JAKES: Yes, and I would agree --

20 JUSTICE SCALIA: I think it clearly --
21 clearly would have been covered by -- by the test the
22 government --

23 MR. JAKES: I think that's more in the
24 nature of transmission, much like our data transmission.
25 You might transmit data in a packet without actually

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1 changing the underlying data, and that should be allowed
2 as well.

3 If there are no questions, I will reserve
4 the rest of my time. Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you, Mr.
6 Jakes.

7 Mr. Stewart.

8 ORAL ARGUMENT OF MALCOLM L. STEWART

9 ON BEHALF OF THE RESPONDENT

10 MR. STEWART: Mr. Chief Justice, and may it
11 please the Court:

12 Let me start by following up on the
13 discussion of the Morse and the telephone cases, because
14 it's certainly our view that those would come out the
15 same way under our test as -- as they actually did in
16 practice.

17 JUSTICE SCALIA: I certainly hope so.

18 MR. STEWART: And you know, Justice Scalia,
19 you mentioned how to win friends and influence people.
20 I think at a certain level of generality you could
21 describe both Dale Carnegie and Alexander Graham Bell as
22 people who devised methods of communicating more
23 effectively.

24 The reason that Bell's method was patentable
25 was that it operated in the realm of the physical. Bell

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1 had devised a process implemented through machines by
2 which sound was transformed into electronic current.
3 The current was then transmitted over a distance and
4 transformed back into sound.

5 Innovations as to new techniques of public
6 speaking, new techniques of negotiations, techniques
7 that go to the substance of what is said may be
8 innovative. They may be valuable. They are not patent
9 eligible because they don't deal in the realm of the
10 physical --

11 So while the industrial processes that we
12 discussed at some length in our brief were at the time
13 of the framing the paradigmatic patent eligible
14 processes, they were -- they are not the only processes
15 that can be patented.

16 JUSTICE ALITO: Near -- near the end of your
17 brief you argue that -- that the patent here is -- is
18 not -- is unpatentable on the independent ground that it
19 would preempt the abstract idea of hedging consumption
20 -- consumption risk. If you -- if you are right about
21 that, is this a good case for us to get into the -- into
22 the very broad issue that Petitioner has raised?

23 MR. STEWART: I -- I think we would
24 certainly prefer to win on our primary ground, and let
25 me say a couple of things about that. First, we would

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1 fairly vigorously resist the notion that the rule that
2 was announced by the Federal circuit is rigid or
3 inflexible. That is, all that the Federal circuit has
4 really said is that to have a patent-eligible process
5 you have to identify some link to a machine or a
6 transformation of matter. And the Federal circuit has
7 said with respect to some processes the link to the
8 machine may be so attenuated, the machine part of the
9 process may be such a small segment of the process as a
10 whole, that this wouldn't be enough. But the Federal
11 circuit said: We leave for another day the hard
12 questions that will arise when part of the process is
13 machine-implemented and another part is not.

14 And in order for the PTO and the Federal
15 circuit to go about the business of devising more
16 precise rules as to when particular links to machines
17 are sufficient to create patent eligibility, we first
18 need to establish the -- the basic principle that some
19 link to a machine or transformation is necessary. So I
20 think we -- we have made the alternative argument in our
21 brief, and I think it is a basis for affirmance.

22 But if the Court decided the case on that
23 basis, we would lose at least the -- the limited clarity
24 that the Federal circuit's opinion has provided; that
25 is, it would still be open to people in the future to

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1 devise new contractual arrangements designed to allocate
2 risks, new methods of teaching antitrust, and --

3 JUSTICE SOTOMAYOR: How about if we say
4 something as simple as patent law doesn't cover business
5 matters instead of what the Federal circuit has begun to
6 say, which is technology is tied to a machine or a
7 transformation of the substance, but I have no idea what
8 the limits of that ruling will impose in the computer
9 world, in the biomedical world, all of the amici who are
10 talking about how it will destroy industries? If we ar
11 unsure about that, wouldn't the safer practice be simply
12 to say it doesn't involve business methods?

13 MR. STEWART: I think that would be
14 incorrect, and it would create problems of its own.
15 That is, the -- the innovation that was held to be
16 patent eligible in State Street Bank was not a process.
17 The Federal circuit was not construing the statutory
18 term "process." It was construing the statutory term
19 "machine." And it said, in essence, a computer that has
20 been programmed to perform various calculations in
21 connection with the operation of this business is a
22 machine.

23 It went on to say the opposing party in that
24 case had not raised any objection under section 102 or
25 103, and, therefore, the Federal circuit --

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1 JUSTICE SOTOMAYOR: No ruling in this case
2 is going to change State Street. It wasn't looking at
3 process or the meaning of "process." It was looking at
4 something else.

5 MR. STEWART: Well, again, I think that the
6 invention that was held to be patent eligible in State
7 Street is commonly described as a business method, even
8 though it was held to be patent eligible as a machine
9 rather than as a process.

10 So to say that business methods are
11 categorically ineligible for patent protection would
12 eliminate new machines, including programmed computers,
13 that are useful because of their contributions to the
14 operation of businesses. And similarly, the court --
15 the Federal Circuit in other cases has held that a claim
16 to new and innovative computer software may be held
17 patentable as a process, as a method of accomplishing
18 particular tasks through the use of a computer and those
19 might be business-related tasks. So to say that
20 business methods were ruled out would itself be a fairly
21 sweeping holding.

22 JUSTICE SCALIA: Also you could say business
23 methods apart from machines are not patentable. How
24 about that?

25 MR. STEWART: If the Court said that in the

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1 limited area of business methods, if there is no machine
2 or transformation there is no patent eligibility --

3 JUSTICE BREYER: Suppose you say this. I'm
4 just sort of testing things out. Start with Diehr. I
5 mean, and Diehr has these words in it, similar words, it
6 just says e.g. -- are you following me?

7 MR. STEWART: Yes.

8 JUSTICE BREYER: Now, you say what is it
9 they have done in this case in the Federal Circuit?
10 They have pulled back. That's a move. That's a move.
11 They pulled back insofar as they are pulling back from
12 business methods, not machines, dah, dah, dah, dah, dah.
13 Okay, we see no problem with that.

14 Now, they have left much unresolved. One,
15 transformation; how broad or narrow is that? We don't
16 know. Many people's problems will be solved if it's
17 broad on the one hand or narrow in the other.

18 Two, are you automatically patented -- in
19 the patent statute, if you just sort of reduce this to a
20 machine by adding a computer on at the end? They've
21 flagged that as a problem. They haven't answered it.
22 Could there ever be a situation where it doesn't meet
23 this test but still is patentable? We are not sure.

24 MR. STEWART: Let me take those points --

25 JUSTICE BREYER: Do you see what I'm trying

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1 to do? I'm trying to note the things that have been
2 raised in these 80 briefs, insofar as possible say there
3 is a lot there for the future that we can't really
4 decide but say as a pull back, okay.

5 MR. STEWART: Let me address those points in
6 order. The first thing is that in Diehr when you had
7 the e.g. cite, it was "e.g. transforming an article into
8 a different" state of -- state or thing. And I think
9 the obvious inference is "e.g." was used because the
10 other prong of the machine-or-transformation test is use
11 as a machine. That is, in the context of Mr. Morse's
12 invention or Mr. Bell's invention, there is
13 transformation of a sort, but it wouldn't naturally be
14 characterized as transformation of matter.

15 Those things were held to be patent eligible
16 not because they transformed matter, but because they
17 involved the use of a machine. And so, what the Court
18 in Diehr said transformation of a matter or an article
19 into a different state or thing is the clue to the
20 patentability of a process that doesn't involve a
21 particular machine.

22 And the -- the type of process it had in
23 mind was the process that was described in Corning v.
24 Burden or the process in Cochrane v. Deener, situations
25 in which an individual had devised a method of, in one

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1 sense -- one case, it was manufacturing flour, and in
2 another case it was rolling puddle bowls, of
3 manufacturing items. And that person said, here is the
4 series of steps that you have to go through, but it is
5 not essential that you use any particular tool or
6 machine for each of these steps. That was why the
7 word --

8 CHIEF JUSTICE ROBERTS: Mr. Stewart, I
9 thought I understood your argument up until the very
10 last footnote in your brief. And you say this is not --
11 simply the method isn't patentable because it doesn't
12 involve a machine. But then you say but it might be if
13 you use a computer to identify the parties that you are
14 setting a price between and if you used a microprocessor
15 to calculate the price. That's like saying if you use a
16 typewriter to type out the -- the process then it is
17 patentable. I -- I -- it -- that takes away everything
18 that you spent 53 pages establishing.

19 MR. STEWART: Well, I guess there -- there
20 were two different places, I believe, at which we
21 identified ways in which this sort of hedging scheme
22 might be made patent eligible. The first is we
23 described a hypothetical interactive website in which
24 people -- parties and counterparties could essentially
25 find each other by the computer and could agree to terms

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1 on that basis. And in that situation, the -- the
2 computer would be at the heart of the innovation. It
3 would be --

4 CHIEF JUSTICE ROBERTS: No, no. That's just
5 saying instead of looking at the -- in the Yellow Pages,
6 you look on the computer; and that makes all the
7 difference to you?

8 MR. STEWART: I think an -- an interactive
9 computer technique, one in which you sign on and can
10 find people without tracking them down specifically, can
11 simply identify yourself on the website as somebody
12 whose interested in engaging in a particular transaction
13 and a potential counterparty can find you, is different
14 from the Yellow Pages.

15 But I guess the fundamental point I would
16 make is -- and this is really responsive to the second
17 part of Justice Breyer's question -- I think it is both
18 a virtue and a vice of the test that the Federal Circuit
19 has announced and that we are advocating that it doesn't
20 solve all the hard questions. That is, the Federal
21 Circuit has said since this particular patent applicant
22 didn't identify any machine or any transformation that
23 would be necessary to the accomplishment of its method,
24 that person is out of luck, and therefore, it's
25 inappropriate for us to go on to decide kind of the

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1 precise level of substantiality that a
2 machine-or-transformation must play --

3 CHIEF JUSTICE ROBERTS: But if you look at
4 your footnote, that involves the most tangential and
5 insignificant use of a machine. And yet you say that
6 might be enough to take something from patentability to
7 not patentable.

8 MR. STEWART: And all we've said is that it
9 might be enough; that is, hard questions will arise down
10 the road as to where do you draw the line, to what
11 extent must the machine or the transformation be
12 central --

13 CHIEF JUSTICE ROBERTS: So you think it's a
14 hard question. If you develop a process that says look
15 to the historical averages of oil consumption over a
16 certain period and divide it by 2, that process would
17 not be patentable. But if you say use a calculator,
18 then it -- then it is?

19 MR. STEWART: I think if it's simply using a
20 calculator for its preexisting functionality to crunch
21 numbers, very likely that would not be enough. But what
22 we see in some analogous areas is that the computer will
23 be programmed with new software, it will be given
24 functionality it didn't have before in order to allow it
25 to perform a series of calculations, and that gets

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1 closer to the line. And again --

2 CHIEF JUSTICE ROBERTS: Well, your
3 footnote -- I don't mean to dwell on it -- it says to
4 identify counterparties to the transactions. So that if
5 what you're trying to get is the -- the baker who sells
6 bread, because you are going to hook him up with the
7 grocer who sells, you know, in the grocery store, if you
8 punched in in your search station, you know, give me all
9 the bakers in Washington, that would make it patentable?

10 MR. STEWART: Again, we are -- we are not
11 saying it would be patent eligible. We would have to
12 review those facts, and the PTO would have to review
13 those facts in the context of an actual application.

14 I guess the point I'm trying to make is
15 simply that we don't want the Court, for instance, in
16 the area of software innovations or medical diagnostic
17 techniques to be trying to use this case as the vehicle
18 for identifying the circumstances in which innovations
19 of that sort would and would not be patent eligible,
20 because the case really doesn't present any -- any
21 question regarding those technologies. And therefore,
22 we --

23 JUSTICE SOTOMAYOR: Now, if it veers the
24 other way, which is by saying that we exclusively rely
25 on the machine-or-transformation test, that we're

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1 precluding applications of the patent law in those
2 fields, the things we can't imagine. Once you announce
3 an exclusive test, you're shoe-horning technologies that
4 might be different.

5 MR. STEWART: I guess I would say a couple
6 of different things. The first is that it seems
7 unlikely, even with new and rapidly emerging
8 technologies, that somebody would come up with a system
9 that seems for patent purposes analogous to the
10 inventions that have been patent eligible in the past
11 that didn't involve any machine and that didn't involve
12 any transformation.

13 Having said that, I would note that in both
14 Benson and in Flook the Court held open the possibility
15 that some unforeseen event could take place that
16 would -- as to which the application would be patent
17 eligible, even though the machine-or-transformation
18 test --

19 JUSTICE SOTOMAYOR: So help us with a test
20 that doesn't go to the extreme the Federal Circuit did,
21 which is to preclude any other items, something we held
22 open explicitly in two other cases, so we would have to
23 backtrack and say now we are ruling that we were wrong,
24 and still get at something like this?

25 MR. STEWART: Well, I think the Court could

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1 say -- could do essentially what was done in Benson and
2 Flook, namely acknowledge that there had never been a
3 case up to this point in which a process had been held
4 patent eligible that didn't involve a machine or a
5 transformation. It could leave open the possibility
6 that some new and as yet unforeseen technology could
7 necessitate the creation of an exception.

8 But -- and the point we would also make is
9 this seems to be a very unlikely candidate for such an
10 exception, because the hedging method that Petitioners
11 have -- for which they have sought a patent is in no
12 sense different in kind from risk management techniques
13 that have been undertaken for centuries.

14 JUSTICE SOTOMAYOR: Well, that -- that goes
15 back to, not 101 but 102 and 103. That goes back to
16 obviousness or the standard weeding mechanisms for
17 patent.

18 MR. STEWART: Well, this may or may not be a
19 novel or nonobvious method. But even if we assume that
20 this is obvious for purposes of Section 103, in that it
21 represent as sufficient advance over the prior art, that
22 people skilled in the art would not necessarily have
23 come up with it, it still is a different in kind from
24 risk management techniques that have taken place in this
25 country for -- for 200 years. It is -- it is --

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1 JUSTICE GINSBURG: Mr. Stewart, did you --
2 does the government put forward this
3 machine-or-transformation test? Was that your test, or
4 was it the Federal circuit's on its own?

5 MR. STEWART: The Federal circuit, sua
6 sponte, set the case for hearing en banc. I believe the
7 case had been argued to a panel, but had not been
8 decided, and the Federal circuit set the case for
9 reargument en banc, posed a number of questions to
10 the -- the parties and the government did advocate the
11 machine-or-transformation test.

12 JUSTICE GINSBURG: Tell me what --

13 CHIEF JUSTICE ROBERTS: I'm sorry. Did or
14 did not?

15 MR. STEWART: Did, it did advocate the
16 machine-or-transformation.

17 JUSTICE GINSBURG: You did -- and if you
18 read Judge Mayer's opinion, it has a simplicity to it.
19 It says, if it's technology, then its within the realm
20 of patent, and if it's not technology, it isn't, if it
21 is based on science or technology, and that seems to be
22 what is used in other places.

23 MR. STEWART: I don't know that our tests --
24 I think our test, in a sense, has a shorthand version of
25 that. I don't know that focusing the inquiry directly

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1 on whether technology is involved would make the inquiry
2 easier, and that is so for two reasons.

3 First, people could dispute whether
4 particular advances are properly regarded as
5 technological advances, and second, we would still have
6 the difficult problems that the Chief Justice has
7 referred to, where you have a process that is described
8 as involving technology at some step along the way, and
9 courts will still have to make the determination, is
10 that sufficiently substantial step to make the process,
11 as a whole, a technological one.

12 So I don't think that, by adopting a
13 technological arts test, the Court would avoid the
14 difficulties that it has appropriately identified with
15 the machine-or-transformation test. The other thing I
16 would say about the machine-or-transformation test is
17 this is not a government position of recent vintage;
18 that is, the government's brief to this court in
19 *Gottschalk v. Benson*, or its reply brief which was filed
20 around 1971, basically said that, although this Court
21 has never announced machine-or-transformation of the
22 test, that is the principle that can be abstracted from
23 the totality of the Court's decisions.

24 JUSTICE KENNEDY: Was the State Street case
25 a machine-or-transformation test?

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1 MR. STEWART: It would.

2 JUSTICE KENNEDY: You talk about the State
3 Street case in your brief, and it's complicated because
4 of the Federal statute that follows it, but if you had
5 just the facts of State Street before us, and forgetting
6 the Federal statute was enacted after it, how would you
7 decide this case?

8 MR. STEWART: Oh, it would come out the same
9 way. I mean, State Street Bank --

10 JUSTICE KENNEDY: That's what I thought.
11 And is it -- is it machine-or-transformation, in your
12 view?

13 MR. STEWART: Well, it was machine -- that
14 is, in State Street Bank, the claim was not to a process
15 within the meaning of Section 101. The claim was not to
16 a method of accomplishing things by means of a computer,
17 which would be, potentially, a process. It was to the
18 computer itself, the programmed computer, that the
19 innovation in State Street Bank was that the devising of
20 new computer programs that allowed the computer to
21 perform various tasks in association with the carrying
22 out of the hub-and-spokes investment -- investment
23 method. And, certainly --

24 CHIEF JUSTICE ROBERTS: So what did that --
25 what did that transform?

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1 MR. STEWART: It didn't transform anything,
2 but it would fit -- the transformation part would be
3 irrelevant because the machine-or-transformation test
4 is, in our view, the appropriate rubric to apply in
5 construing the statutory term process, that is, when the
6 person doesn't say, I have invented a new machine, but,
7 rather, says, I've identified a new process for
8 accomplishing things.

9 If a person claims to be -- to have invented
10 a new machine, then that -- it is either a machine or it
11 isn't. A computer is certainly a machine. Really, the
12 only -- I think the --

13 JUSTICE STEVENS: I don't understand how
14 that can be a patent on a machine if the only thing
15 novel is the process that the machine is using.
16 Isn't -- isn't the question -- really, the question
17 there was whether the new process was patentable.

18 MR. STEWART: Well, I think what -- the
19 argument that the other side, the person challenging the
20 patent in State Street could have made, but apparently
21 didn't, was the person could have said, of course, the
22 computer is a machine, but a computer programmed with
23 new software to perform different functions is not a new
24 machine.

25 It's not a different machine from the one

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1 that has always -- not always, but that has already
2 existed, and therefore, it doesn't satisfy Section 1 or
3 Section -- 102 or Section 103, but that --

4 JUSTICE KENNEDY: Well, that was one of the
5 reasons I asked you about it, I suppose. Just looking
6 at the whole case, do you think the State Street
7 holding -- the State Street invention was patentable?

8 MR. STEWART: It was -- the way I would put
9 it is: The State Street Bank analysis of the question
10 that was actually presented to it was correct; that is,
11 the argued was made, the programmed computer is
12 patentable as a --

13 JUSTICE KENNEDY: How would you come out in
14 the State Street case today, if all of the arguments
15 were made under your test?

16 MR. STEWART: Well, under our test, we would
17 come out the same way because the computer would be a
18 machine. The only question would be whether the
19 programming of the computer with new software caused it
20 to be a patentable different machine from the one that
21 existed previously.

22 Now -- now, we do think that software
23 innovations can have the effect of causing the computer
24 to be a different, special purpose computer, as the
25 phrase --

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1 JUSTICE STEVENS: I'm sorry. I must be
2 awfully stupid. You say it would come out the same way.
3 In the same way the court did or this way you argued?

4 MR. STEWART: I think the same -- the
5 Federal circuit's decision in State Street would come
6 out the same way under our test.

7 JUSTICE STEVENS: And you think it should?
8 You think it should?

9 MR. STEWART: Yes, but, again, the point I
10 would emphasize --

11 JUSTICE STEVENS: I don't understand why
12 that isn't just the application of a process, which --
13 which is not itself patentable subject matter, to a
14 particular machine that can use process --

15 JUSTICE KENNEDY: That's -- that's a problem
16 I have.

17 MR. STEWART: Well, I guess -- let me
18 backtrack. If you look at the text of the statute that
19 is reproduced at Page 2 of -- of the Blue Brief, and it
20 says -- it's right in the middle of the page. "Whoever
21 invents or discovers any new and useful process,
22 machine, manufacture, or composition of matter is
23 potentially entitled to" --

24 JUSTICE BREYER: So I thought you were
25 saying that the correct argument for the people

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1 attacking the patent in that case was to say, this is
2 not a machine. The machine there is a computer. This
3 is a program that changes switches, and that is a
4 different process for the use of the machine.

5 Now, whether that process is or is not
6 patentable depends upon a lot of things that we don't
7 have to go into in this case. Is that right?

8 MR. STEWART: I don't -- no.

9 JUSTICE BREYER: Okay. Well, then what is
10 right?

11 MR. STEWART: I don't think that's what I
12 saw saying. What I was saying is that -- and I guess
13 the -- the first point I would make is, when somebody
14 claims to have invented a new machine, the
15 transformation test really has nothing to do with the
16 inquiry because a -- a better television or a better DVD
17 player can be patented as a machine, even though
18 transformation of matter is no --

19 JUSTICE STEVENS: It's not on a computer,
20 which the only difference from the old computer is it's
21 using a new program. You can't say that's a new
22 machine.

23 MR. STEWART: Well, but my -- I think --
24 first, I think you can because I think if you -- if you
25 improved the hardware of the computer in order to enable

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1 it to perform --

2 JUSTICE STEVENS: But that patent didn't
3 require any change in the hardware, as I remember it
4 correctly.

5 MR. STEWART: But I -- but I think the
6 argument that has been made with success -- and PTO
7 agrees with this -- is that programming a computer by
8 means of software to produce -- to perform new functions
9 can create a novel --

10 JUSTICE BREYER: But then all we do is every
11 example that I just gave, that I thought were examples
12 that certainly would not be patented, you simply patent
13 them. All you do is just have a set of instructions for
14 saying how to set a computer to do it. Anyone can do
15 that. Now, it's a machine.

16 So all the business patents are all right
17 back in. Now, that -- what I think we were looking
18 for was -- or at least I was -- was why that isn't so,
19 and how you are going to later, down the road, deal with
20 this situation of all you do is you get somebody who
21 knows computers, and you turn every business patent into
22 a setting of switches on the machine because there are
23 no businesses that don't use those machines.

24 MR. STEWART: Well, first of all the only
25 ruling that we're -- backtrack a bit, to say, we oppose,

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1 sir, in this case because we recognize that there are
2 difficult problems out there in terms of patentability
3 of software innovations and medical diagnostics.

4 JUSTICE KENNEDY: You thought we -- you
5 thought we would mess it up.

6 MR. STEWART: I didn't think --

7 (Laughter.)

8 MR. STEWART: We didn't think the Court
9 would mess it up. We thought that this case would
10 provide an unsuitable vehicle for resolving the hard
11 questions because the case doesn't involve computer
12 software or medical diagnostic techniques, and
13 therefore, we thought the Court would arrive at the
14 position that I think, at least some members are feeling
15 that you have arrived at, that you will decide this
16 case, and most of the hard questions remain unresolved.

17 And, frankly, we think that's true.

18 JUSTICE GINSBURG: But this case could be
19 decided without making any bold steps.

20 MR. STEWART: Again, I don't -- I don't
21 think it would be a bold step to say that
22 machine-or-transformation is the test. That is, we have
23 gone for --

24 JUSTICE GINSBURG: But even the Federal
25 circuit didn't say it was a retest. It said it is for

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1 now. We know that things that we haven't yet
2 contemplated may be around the corner, and when they
3 happen, we will deal with them.

4 MR. STEWART: And we would -- we would be
5 entirely content with a ruling like that. And we would
6 say that the claimed hedging method here is not the sort
7 of Space Age innovation that might cause Justices to
8 say: This is just different in kind from anything that
9 the drafters of the patent statute could have imagined.

10 The other point I would make about the
11 programmed computer is, to follow up on my television
12 and DVD example, that when you claim a machine or a
13 manufacture, as the committee reports to the 1952 act
14 said, those words are broad. They encompass everything
15 under the sun that is made by man. And so a television
16 is indisputably a machine, even though its function is
17 not to transform matter. It's only when you get to the
18 term "process" that you are left with -- that the
19 machine-or-transformation test kicks in.

20 And really, the argument on the other side
21 is: The term "process" in ordinary speech is extremely
22 broad. It can literally be read to encompass any series
23 of steps, whether or not linked to technology, whether
24 or not linked to a machine or transformation. And the
25 other side argues you should construe it that way in the

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1 patent statute.

2 I guess the -- the three reasons we would
3 say that's not so are: First, under the canon of
4 noscitur a sociis, it is appropriate to construe the
5 term "process" in conjunction with the other terms.
6 Those other terms are broad, but they all refer to
7 physical objects that don't exist in nature and are
8 created by man. And a huge array of very productive,
9 innovative activity doesn't culminate in the creation of
10 any new physical substance, and the word "process"
11 surely was intended to add something, but it would be
12 quite strange to construe the word "process" to
13 encompass the whole range of human endeavor when the
14 other words are limited to the creation of new things in
15 the physical.

16 The second thing is that when this Court in
17 the past has explained the term "process," it's always
18 linked it to the operation of machines, as in the
19 telephone cases in Morse, or to the transformation of
20 matter in ways that may not be dependent on a particular
21 machine.

22 And the third thing I would say is that in a
23 sense, there is a strong dog that didn't bark in the
24 night quality to our argument. That is, even though the
25 Court has never said in so many words that a method of

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1 allocating risk by contract is a patent-eligible
2 process, the economic history of this country really
3 would have been fundamentally different if it had been
4 believed from the outset that innovations of this
5 character could be patented and potential competitors
6 could be foreclosed from engaging in the same method.

7 If the Court has nothing further?

8 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

9 Mr. Jakes, you have four minutes remaining.

10 REBUTTAL ARGUMENT OF J. MICHAEL JAKES

11 ON BEHALF OF THE PETITIONER

12 MR. JAKES: Thank you, Mr. Chief Justice.

13 The Federal Circuit did announce this test
14 as the sole test for all processes. It said it applied
15 no matter what the process was, so we do have to face
16 these difficult questions.

17 I think the question can be avoided, because
18 we don't need a rigid test of this type based on
19 machine-or-transformation. The question we are looking
20 at and should be looking at is: Are we trying to patent
21 an abstract idea?

22 Now, the government has gone farther than
23 that and really wants to exclude methods of organizing
24 human behavior. I think that's the way they describe
25 it. That's really the business method rejection in

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1 other words. And I think that runs contrary to section
2 273 of the statute, which recognized that there were
3 business methods that could fall within the patent
4 statute, and as a result prior user rights should be
5 granted.

6 To speak briefly about the State Street Bank
7 case that was a type of business method that was
8 implemented on a machine. The Federal Circuit said it
9 didn't matter. They weren't looking at whether it was
10 in machine form or method form. Their reasoning would
11 have applied the same either way, and to do otherwise
12 would be to place form over substance. And in a sense,
13 that's what some of the transformation debate is about.
14 It's form over substance. Why should transformation be
15 the key? The key should be: Is it a practical
16 application of a useful result?

17 Our method, we believe, is a practical
18 application. As the patent office has said, it does
19 involve physical steps. I think that was one of the
20 clues that the patent office has relied on in saying
21 whether or not something is abstract. Since it is not
22 an abstract method, it's rooted in the real world, we
23 think it should be eligible to have its examination at
24 the patent office and it shouldn't be thrown out on an
25 arbitrary test.

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1 CHIEF JUSTICE ROBERTS: The -- the physical
2 step that your process involves is picking -- picking up
3 the phone and calling people on both sides of the
4 transaction.

5 MR. JAKES: It could be. It also requires
6 the sale of a commodity on a fixed price. That is
7 something that takes place in the real world as opposed
8 to a mental process within somebody's head. Purely
9 mental processes that are done just solely in someone's
10 mind, I think we all agree, those are not
11 patent-eligible. That's not our method.

12 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
13 The case is submitted.

14 (Whereupon, at 1:55 p.m., the case in the
15 above-entitled matter was submitted.)

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