Judge Taranto (00:00:03):

In Re Cirba. Mr. Clement.

Paul Clement (00:00:10):

Thank you, Your Honors, and may it please the Court, Paul Clement for Cirba, Inc. And I'm going to endeavor to reserve three minutes for rebuttal. Inc's constitutional standing is clear and indisputable, as the entity actually practicing the patents and directly competing with VMware, Inc.'s injuring fact is indisputable. Indeed, the District Court ordered a new trial because it thought the jury had heard too much about Inc's distinct injuries. In a post-*Lexmark* world, that conclusion is utterly incompatible with the Court's finding that Inc. lacked Constitutional standing.

Judge Taranto (00:00:42):

Can I ask—I have a number of questions—but can I just start with the aspect of Supreme Court constitutional standing cases that seems to continue to recite a notion of judicial cognoscibility or legally protected, sometimes in passing in a way that doesn't make the decision that the court is making turn on that, but it, but at least once last year, not that is not in *dicta*, namely the refusal to allow Texas and other states to file their election law challenge in December, which in one, the sentence says "It's the motion to leave to file is denied for lack of standing under Article III of the constitution, Texas has not demonstrated a judicially cognizable interest in the manner in which another state conducts its elections." Full—that's the entirety, the analysis; but it doesn't say no injury is fact. It says judicial cognoscibility, which suggests there's some life in that notion. I'd like you to explain what that life is.

Paul Clement (00:01:51):

Well, a couple of things, Your Honor, first,—that would be, I think, a difficult opinion to divine too much from, but—second with that preface, I would say that judicial cognoscibility, I don't think has disappeared. And I think it might still have some legs, as a doctrine of prudential standing or in the context of that Texas case, I suppose that almost might have been a political question doctrine flavor to that. So I think in that case, I'm not that surprised that the court might have whipped out a reference to judicial cognoscibility, but I don't think that you and, —I mean, I think it was Justice Ginsburg, in the contract against *Ryan*, maybe who said, you know, jurisdiction is a term of many meetings, maybe too many meetings, and we've sometimes been loose about how we refer to it. And I think I, I wouldn't be surprised if you can point me to another reference in a case to cognizable injury, but I don't think there is a post-*Lexmark* Supreme Court decision where they point to cognizable injury as a component of the core Article III injury and then fault a party for—

Judge Taranto (00:03:03):

—I thought some of the references like in what is it, the *Affordable Care Act* case, *California against Texas,* and also *TransUnion*, do recite legally protected or judicially cognizable or legally cognizable—I sort of understand those three things as being the same and as something additional to injury in fact, caused by the, the bad contact then—

Paul Clement (00:03:29):

—I don't think they are saying that with the conscious idea that by saying that something turns on it, and I think *TransUnion* is a perfect example. I mean the whole point of that case as Your Honor, no doubt knows, was to point out that a statutory injury, legally cognizable, I think, is what you'd often talk about when you have a statutory injury like that. So they had legal cognoscibility out, you know, —in large measure. But the problem was that have injury in fact—

Judge Taranto (00:04:00):

Right, but—

Paul Clement (00:04:00):

And so I can't imagine that Justice Kavanaugh in writing that opinion, whatever loose language he might have used, meant to say that the injury in fact requirement is something more than injury in fact, and that there is a sense that—

Judge Taranto (00:04:14):

Right but I, —but I, I guess I have understood your position to be that there is nothing to the Article III test—beyond satisfying injury in fact, causation, and redressability, and since Inc. has all of that, constitutional standing exists and everything else has been waived is, do I understand?

Paul Clement (00:04:33):

—I think that's a fair summary of our position, and I think that's a fair summary of where the court is, both this court and this Supreme Court, whenever it focuses on it. I think when the court's not focused like a laser beam on the issue—

Judge Taranto (00:04:47):

It may seem so.

Paul Clement (00:04:47):

It reverts to, I mean, you know, —I recently read a, you know, a dissent from one of the members of this court that used a whole bunch Pre-*Lexmark*, Pre-*LoanStar*, Pre-*Schwendimann* language about standing, but I don't think much turned on it. And —that's part of why I think mandamus is so important here is because, you know, with respect, for decades this court had conflated the Article III requirements and the statutory prerequisites of 281. And so it's not surprising that district courts continue to conflate them. I don't even think it's an accident that it's the judges who maybe had the most experience with patent cases under the [**inaudible**] regime, who are the ones that are maybe most likely to continue making the mistake; but it is a mistake.

Judge Stoll (00:05:36):

Counsel, Counsel you mentioned *TransUnion*. And that case, I noticed that the court, —talked about this, there's some language in there that was interesting, talking about any physical monetary or cognizable intangible harm, traditionally recognized as providing a basis for a lawsuit in American courts. And I was thinking about that language traditionally recognized as providing for the basis. But if your harm is competition, then how is that a traditionally recognized basis for a lawsuit? Let me try and explain further. So if you have exclusionary rights, then there's competition because someone is using your exclusionary rights. That seems to be a harm traditionally recognized as providing a basis; on the other hand, a harm that comes from not having exclusionary rights, but you know, someone is competing with you, nonetheless is not usually something that's the kind of injury that would be traditionally be recognized. I just wanted to get your thoughts on that.

Paul Clement (00:06:39):

Sure—and I think I would just disagree with you. And I think if you broaden the lens outside the patent context, competitive harm is one of the classic Article III injuries, like, you know, losing part of black acre or something. If this were an antitrust suit and we, and VMware were a monopolist and we sued them for monopolistic behavior, and part of the monopolistic behavior was infringing patents. I mean, it would be our loss of competition that would be the basis for Article III standing, and it wouldn't matter whether an exclusive license. If we were bringing a common law action in federal court on diversity, when we would still need to have Article III injury, if we were bringing an unfair competition action, I mean, as the name of the tort suggests, the classic Article III injury in that context is a loss of in injury. Monetary injury of course, is another sort of classic Article III injury, which we have certainly suffered. It's so classic that, of course, the whole doctrine of when equity jurisdiction takes over is when you don't have an adequate remedy of law and simply monetary damages, monetary injury, is a classic legal injury. So—

Judge Stoll (00:07:45):

What about, —just hypothetically, if there was a third party and it was had a acceptable, non-infringing alternative that it made, and could it sue for patent infringement where VMware, you know—VMware was no longer practicing the patent, but it would have an economic benefit if VMware was not able to practice the patent because it sells an acceptable non-infringing alternative, and it's harmed by the competition from VMware.

Paul Clement (00:08:19):

So, I think you asked your honor, would they have standing to bring a patent action, and—

Judge Stoll (00:08:24):

Under for service patent—they don't own service patent.

Paul Clement (00:08:28):

Right. But, but the reason I want to restate the question—

Judge Stoll (00:08:31):

I just am asking because—your view of injury is very broad. And so I'm just testing it.

Paul Clement (00:08:38):

Right.

Judge Stoll (00:08:38):

And under your view injury, I'm wondering whether someone who creates, an acceptable, loud infringing, alternative and competes with both Cirba and VMware, would have standing, or at least be injured.

Paul Clement (00:08:51):

So if I'm understanding the hypo, right. I think the answer is yes. The reason I wanted to sort of, because even the way you formulated the question, I think actually encompasses both Article III standing and maybe a statutory question. And on the statutory question, it might be a loser, but you said, —do they have standing to bring a patent case? And with all due respect, I don't even think that's the right question. The question is, do they have Article III injury? And the answer is yes. On the merits—

Judge Stoll (00:09:18):

They have Article III injury as a result of, just to make sure I'm being very clear, as a result of VMware using Cirba's patent?

Paul Clement (00:09:26):

Sure.

Judge Stoll (00:09:27):

Okay.

Paul Clement (00:09:28):

—I mean it, and maybe that seems odd to you, and I think if it seems odd to you, it's only because of one of two things. One is that claim would be a loser on the merits based on the fact that they're suing on the wrong patent or there's no infringement or what, you know, whatever the basis is for that to be a dead bang loser on the merits as a statutory matter, that may make it seem counterintuitive to you. Or it could be just because there's like three or four decades of these cases that conflate the two, but with all respect, I think, —it's standing Article III, standing is trans-substantiate. So even to say, well, is there Article III standing to bring a patent claim, is with all due respect, not right. It's just the questions, is there Article III standing, and if there is, we can talk about all the statutory prerequisites and we can bring (b)(6) motions and we can deal with issues of waiver in the, like under (b)(6), but not (b)(1).

Judge Stoll (00:10:23):

I understand, your point is that all of that is taken care of the statutory or prudential standing.

Paul Clement (00:10:29):

Absolutely. Absolutely.

Judge Stoll (00:10:30):

What about the fact that Judge Stark three times said, that he did not think that VMware weaved its argument of regarding prudential standing?

Paul Clement (00:10:42):

So, —we disagree with him on that. I think if you look for example at the place I ask you to look is appendix page 370, where the legal authority for VMware's argument about standing is presented. There's a reference to (b)(1), not (b)(6). There's a reference to subject matter jurisdiction, not failure to state a claim. And there are three separate references on that one page to constitutional standing. So one reference to prudential standing, and it never sort of sees the light of day again. Then of course, Judge Stark is emphatic that he's ruling on constitutional standing, but I do want to be equally emphatic that it really doesn't matter. I mean, at this juncture, because we were poured out of court and dismissed as a party to this lawsuit because we lacked Article III injury. That's his holding in his order dismissing us as a party. Now that's just wrong and it's mandamuosly wrong. If you can, if mandam—

Judge Taranto (00:11:37):

What on the assumption, which I know you disagree with, you just said, you disagree with that any kind of lack of statutory right to be a plaintiff here was preserved, why should we not affirm on the ground that you didn't belong—as a statutory matter for exactly the reasons that he, that Judge Stark relied on—but under the constitutional label, at least, at least initially. Well, so turn what practical differences there. Don't worry about the clock.

Paul Clement (00:12:15):

Okay. There's—I have two responses. One, it shows you the practical difference, but the other is, of course we think that we have an exclusive license.

Judge Taranto (00:12:24):

Right.

Paul Clement (00:12:25):

Because that's what Section Two of the licensing agreement says,

Judge Taranto (00:12:28):

Right. Assume that away too.

Paul Clement (00:12:29):

Okay. Okay. Then assume that away. Which of course I hate to do, assume that away. It still makes a world of difference because if it's statutory, if we have a statutory prerequisite problem, but not an Article III problem, we're still a party to the case. We can fix the standing problem. We can fix the standing problem by retroactively reforming the contract to reflect the party's intent. We can do that. We can then seek a preliminary injunction before this retrial happens in 2023, and we can get ourselves back in the case. So there's a huge difference between statutory standing and Article III standing. And I think, you know, I don't think any of this turns on policy arguments, but I do think getting this right and making clear—if there's any problem here, it's a statutory problem—

Paul Clement (00:13:19):

—and not an Article III problem—has a huge policy benefit, which is, it makes some of these defects in licensing agreements and the like, it makes them fixable. If they're statutory, they're fixable; that's the lesson of *Schwendimann*. The problem there was fixable because it was only statutory. Judge Reyna in dissent said, no, it's Article III, so it's not fixable. And with all due respect, as a generalist who doesn't understand all of the subtleties of some of these exclusive license things, I mean, I read this license and I think, wow, it grants an exclusive license, game over.

Judge Taranto (00:13:56):

Right. Unless the standard for having the statutory right suit—is not properly described as having an exclusive license, but rather having an exclusionary right. Namely a right to exclude others by going after those others. And then the question would be whether the, you don't have any proprietary rights portion, takes away what would otherwise be—a corollary of exclusive license by itself.

Paul Clement (00:14:24):

Yeah. And—

Judge Taranto (00:14:25):

—that's what I took to be Judge Stark's view of this license.

Paul Clement (00:14:29):

Sure. And I find that baffling. I mean, I'm just—a humble generalist. I find that conclusion baffling because Section Two gives us—gives Inc. an exclusive transferable license, worldwide license.

Judge Taranto (00:14:46):

To practice. But the—

Paul Clement (00:14:47):

Sure, but it's transferable, that's granting a patent, right? That's a clear, but I digress.

Judge Taranto (00:14:52):

Sorry, but the Title 35 in patent protection, doesn't give anybody a right to practice anything. It gives them only a right to exclude others. That's what 154 says. So, the fact that you have a right to practice, and you're the only one, and—you have a promise that you will be the only one does not automatically mean it so 154 right. There's been a longstanding sort of moral based implication that in the absence of anything else, it carries the right to go and exclude others. But, and—this provision, this no proprietary rights provision, I understand Judge Stark to have said, that essentially wipes out the presumptive implication that one thing means the other.

Paul Clement (00:15:34):

So two points, your honor. One is, I'll grant you all that, but again, as a generalist, the first principle of contract interpretation, the first principle of constitutional interpretation, it says it in *Marbury* is you don't interpret one provision of a document to render another provision nugatory. So I don't think that there's any problem with Section Eight and Section Two coexisting, and Inc. having an exclusive transferable license, which is after all what it says. And it seems if it's both exclusive and it's transferable, so I can essentially control whether I exclude somebody else by transferring the license, that seems like more than enough to give you exclusionary rights. But if I'm wrong about that, and maybe I am, it seems like, especially in a parent subrelationship where that is clearly what they intended the ability to fix it after the fact, when it's pointed out, as opposed to have a whole lawsuit after eight citizens of Delaware have wasted their time in a trial and there's a $236 million verdict, to at that point, sort of say, ah, you should have—if you had only started Section Two with, notwithstanding anything in Section Eight, then there'd be no problem at all.

Paul Clement (00:16:51):

It seems to me, my only point here it was that treating these things as statutory means they're fixable.

Judge Stoll (00:16:58):

Was there any attempt to fix it? I understand, maybe not because it was found to be a constitutional problem, but was there any proffer or suggestion that it would be fixed?

Paul Clement (00:17:08):

We have taken the trouble to figure out how we would fix it, and I'm happy to proffer to you right now that we'll fix it today—we'll fix it tomorrow if it's statutory. But we've been poured out a court for Article III injury. So because of that, there's no ability to fix it and there's no point in fixing it. But we'd be happy to do it. I think a notwithstanding clause would do the trick, myself. I don't even think we need that because boy, I think an exclusive transferable worldwide license ought to convey exclusionary rights, particularly when it's granted by a subsidiary. I mean, if you take a step back, the context of this is this, is it all part—

Judge Hughes (00:17:49):

Can I just the specific language, I understand what you're saying. And if we were just talking about language that said exclusive transferable, worldwide license, your argument would have a lot of force, I think even with Clause Eight, but the remainder of that sense is to use the products, which suggests to me that it is a use license or a more limited license to use the products, but not necessarily have any rights in the patent. So, I mean, that seems to me to be the plain reading of Section Two and Section Eight together is Inc. gets to use the patents, but the other company owns the patents. Now I understand your argument is even if that's true, you want to fix it, but doesn't that seem to be—that is the way I would read this license and it, to me that gives you statutory problems here.

Paul Clement (00:18:48):

Okay. Again, I will it—if it turns on that subtlety again, I think transfer the right to use is a right to grant

patent rights to other people to use would use to use. But that's one of the patent rights, I think.

Judge Taranto (00:19:04):

No—it isn't.

Judge Taranto (00:19:06):

The patent statute does not give anybody a right to use anything. The patent statute gives only a right to exclude others for using it.

Paul Clement (00:19:14):

Right. But if I have the exclusive worldwide right, and it's transferable, I get to decide who's excluded, and who's not. If I give you a transfer of this license—you can practice the patent. If I don't—

Judge Taranto (00:19:28):

I'm sorry you don't get to decide, if you don't want somebody else to practice, you don't get to decide whether they're excluded the patent owner does. You can decline to enable them to—but you don't get to exclude them just because you have an exclusive license.

Paul Clement (00:19:49):

I would understand that we would both get because of this license and to, forgive their infringement, which is part of an exclusionary right. And also what this court said in *Lone Star* is the other thing that gives you an exclusionary right is a right to essentially grant the ability to exercise the patent, which if it's transferable, it seems like it, it gives it to it. And that's my reading of the patent. I mean, that's my, the license, but in a sense, this [**inaudible**] makes my point, which is if it's this complicated, isn't it a better world, where it's fixable so that if you point this out, because you preserve it in 12(b)(6), and somebody, especially in a parent sub context where it's just incredibly easy to fix it. So somebody points it out—

Judge Taranto (00:20:34):

Is it incredibly easy to fix it without destroying whatever the tax or other benefits are, of the reason of—that led to this kind of transfer into this up?

Paul Clement (00:20:45):

I am informed that the answer is, yes, it's incredibly easy to fix this without under undermining the tax consequences of this at all.

Judge Taranto (00:20:54):

And—what do you understand from *Schwendimann* are necessary preconditions for a retroactive fix by way? Was *Schwendimann* like a contract reformation case?

Paul Clement (00:21:08):

Yes, contract reformation under Minnesota law and under Minnesota law. And it—

Judge Taranto (00:21:13):

And here, do I understand here, this license is governed by Canadian Ontario law.

Paul Clement (00:21:18):

That's correct.

Judge Taranto (00:21:18):

But nobody's made anything of any specific jurisdiction?

Paul Clement (00:21:21):

Nobody's made anything that, you know, turns on that.

Judge Taranto (00:21:23):

Okay. That as a substantive matter. Are there any preconditions for a retroactive fix from under the reformation law?

Paul Clement (00:21:31):

Not that I'm aware of.

Judge Taranto (00:21:33):

Okay.

Paul Clement (00:21:34):

And again—presumably if you underscore that this is statutory, underscore that statutory defects are fixable, at least potentially if the law allows, then we would fix it, and, you know, I'm sure my friends at VMware, if there's an argument to made under Ontario law, that it's not fixed or it's not retroactive enough, I'm sure they would be happy to make that argument so we could have all that. But right now we can't because—we've been dismissed as a party to the litigation in [**inaudible**] based on what seems to me to be a clear and indisputable error of what's required by Article III.

Judge Stoll (00:22:13):

In your briefing, you rely on *Lone Star*, and *Schwendimann*, and *Lexmark*. Do you have any other cases that support your view that there could be constitutional standing without exclusionary rights, you know, in other intellectual property areas? I just—

Paul Clement (00:22:32):

Well, I mean, there are other cases—under the, I mean, obviously *Lexmark*'s a trademark case. There have been—the Supreme Court since then has decided that the registration requirement under the Copyright Act is merely statutory. It's not jurisdictional. So, but I, I think if you look at this from a generalist perspective, as opposed to a patent specific perspective, there are tons of cases. I mean, injury to a competitor, loss of market share, forced firing of your employees, because you're having competitive disadvantages—all of that is the classic injury, in fact. And so, I think the only way that you could say that doesn't count here, is by basically saying there's a special rule for Article III injury in fact in patent cases or intellectual property cases, and with all due respect, that's kind of the opposite of the thrust of *Lexmark,* and *Schwendimann*, and *Lone Star*. And, you know, I mean, there's a broader obviously, so of Supreme Court cases, it sort of suggests that—when it comes to something like Article III, you don't have special patent rules. Article III is Article III is Article III.

Judge Stoll (00:23:46):

So for a non-practicing entity—

Paul Clement (00:23:48):

Right.

Judge Stoll (00:23:49):

—I would understand that their only injury could be their loss of their exclusive rights. It would be a different analysis and you can have different kinds of injury for different parties.

Paul Clement (00:23:57):

Yeah.

Judge Stoll (00:23:59):

Okay.

Paul Clement (00:23:59):

Yeah, absolutely. Absolutely. But, and if I could—I know we're over time here, so I don't want to overstate.

Judge Taranto (00:24:04):

Begin to wrap up.

Paul Clement (00:24:05):

Yeah. I'll begin to wrap up by finishing my answer to your question by saying as, as sort of another kind of policy argument for this result being sensible. I mean, what Judge Stark envisions in the retrial is that IP will be a party. And he even said at one point as a non-practicing entity. And you won't have the only entity that practices the patent and experiences the flesh and blood injuries in the case under his worldview. And that seems to be, especially if, and of course, if there's problem with the license agreement, we can fix it if it's statutory, but that seems like an odd result. And it seems to me like, you know, whatever is the case of a situation where you have a bare licensee and a thousand people are licensed under the patent. When you have parent subsidy relationship that you have the sole licensee, they are the only party practicing the patent. I mean, it's a bit odd to have a case without that party present. And if treating this as statutory allows you to make sure that that happens and doesn't not happen because of some defect in the way the licensing agreement was written, that seems to me to be an affirmative virtue of our position. That saved the rest of my remarks rebuttal. Thank you.

Judge Stoll (00:25:19):

Thank you. 20?

Judge Taranto (00:25:22):

30, to even it out.

Deanne Maynard (00:25:43):

May it please the Court, Deanne Maynard for VMware. I'm going to address the reasons, the rule that Cirba Inc. seeks is wrong, but mandamus should be denied here for three independent reasons in any event. First, they seek a new rule, a change in the law, not enforcement of a clear and indisputable, right. Second, they forfeited the very question they present to this court as Judge Stark found. And third, the answer to the question would not change Inc.'s dismissal, because Judge Stark found that VMware timely objected to Inc.'s bare licensee status, regardless of the label of the challenge.

Judge Taranto (00:26:23):

But just on that last point, if Mr. Clement is right,—that his client could fix the problem if it's a statutory problem and indeed fix it retroactively, although I'm not sure his argument depends on this, then his client might be able to come back into the case. Wouldn't that be a consequence?

Deanne Maynard (00:26:44):

So it's too late for Inc. to argue that they can fix this vis-à-vis trial that's already happened, Your Honor. They—we put at issue whether or not Inc. had an exclusive license in the pretrial order, as Judge Stark recognized, they came back and said, there are no facts we tried about that. And they asked Judge Stark to put it off and decided after the trial and significantly, they agreed with us, that if they were just a bare licensee, they would lack standing to sue. So they knew, and whether they thought it was constitutional or a statutory, they knew that they had to prove that they were more than a bare licensee to prove their claim. And they chose two sophisticated entities to rest on the agreements and push the issue to after trial. They've affirmatively weighed—

Judge Stoll (00:27:37):

Counsel, it it's your position that they would've had to have said we will, if we're found, if there is no prudential standing here, we will agree that we cannot fix this agreement—that we will not even try to submit a new agreement or try to fix it. They that's what you're saying. You're saying that they agreed that if the court found no statutory standing, that they would not take the time to fix their agreement—it seems like a little bit of a stretch, to be honest, with respect to just what they said, which was that we think it's not a bare license.

Deanne Maynard (00:28:11):

Well—I think I'm making two points, Judge Stoll. So one is, that we joined issue on this question before the trial, on whether or not they had an exclusive license or not, and they said three things about that. One, please decided after the trial. Two, there are no facts to be tried. That's at A363 and A364, and then four, they agreed that a bare licensee would lack standing. That's at A368. And so whether they have the burden to prove their infringement. And so whether it's a constitutional question, there's licensee standing, or whether it's a prudential statutory standing question, they had the burden to prove it. And they affirmatively waived any opportunity to prove it on the facts, which reformation would require and contrast this to *Schwendimann*.

Judge Taranto (00:29:03):

Okay, let you get, so what are the facts relevant to justifying a *Schwendimann*-like reformation?

Deanne Maynard (00:29:11):

Well, so in *Schwendimann*, as soon as her standing was challenged, she came in and said, I can reform it under Minnesota law; there's just a clerical error. I had legal title all along and there's a clerical error in the writing. That was her argument—

Judge Taranto (00:29:30):

It's not cause—this is quite important to me. So I don't want to go over this too quickly. Does the reformation standard require that something like a clerical error, as opposed to, of course we meant to do what this contract says, but boy, we didn't know the consequences. We weren't really want a different contract than the one that fairly interpreted we currently have. And we're now going to create that different one retroactively, because now that we understand the consequences we clearly would, would have done the new one.

Deanne Maynard (00:30:10):

Well so in *Schwendimann,* this court addressed it under the state law that governed bare—Minnesota law. This issue has never been—they've never explained how they could fix it here. They've this issue is like, it's like triple forfeited, Judge Taranto. So if they, they needed to raise it when we challenged their bare licensee status. If they wanted to prove something about their licensee status that went outside the documents or somehow fix the documents, then they needed to do that at the trial. They—

Judge Taranto (00:30:42):

Why—is it a forfeiture of the opportunity to correct? A consequence of an interpretation when all you, when, when you limit yourself to saying this is actually an incorrect interpretation that's being proposed, and we, we think that the right interpretation allows us to be here without change. What, why isn't, why doesn't the reformation possibility only ripen later in a way that would have to be raised?

Deanne Maynard (00:31:15):

Well. So—they never advanced it even in the district court, after Judge Stark dismissed them. So—they noted in a footnote, but they never explained how they could fix it. He's asserted here that he's going to offer to this court on the extraordinary writ of mandamus, how he can fix it under Canadian law. We've never heard that. And so it, this is not the forum to do it, whatever they might be able to do when they go back going forward. That's another issue. Nothing would undo their failure to prove it at this trial or the fact that Inc. stands dismissed. And we would argue and have arguments that it's law of the case that Inc. dismissed. They had their chance to prove that they had more than exclusive license. They didn't do it. And it's too late for them to come in with these new theories now about fixing it. But in any event, whatever these hypothetical arguments might be that they have, that would be an issue for Judge Stark going forward. But it's not going to undo the dismissal that's already happened because they—

Judge Taranto (00:32:13):

Let me just start. I think I stepped on your answer to my own question. What are the prerequisites for a reformation, let's assume under general contract reformation law?

Deanne Maynard (00:32:26):

Well, so that Judge Taranto—

Judge Taranto (00:32:28):

You, you referred to clerical error, which at least, when I hear it means, without exploring it, something much rarer than we understand now what this contract meant. It wasn't a transcribing error or something like that. It was, we didn't appreciate the consequences and we want to redo it. Does reformation cover that second possibility, which—I have not stated with precision, but maybe?

Deanne Maynard (00:32:58):

So I think this would present a question of Canadian law, maybe Ontario law. I don't purport to be an expert. I will tell you that in *Schwendimann*—what happened in under Minnesota law was held to be okay, was that the documents had basically a clerical error by the lawyer that filed the patent assignment and what the district court found in this court affirmed was that the party's intent all along had been to file a different assignment attached to that, and the wrong number was on it, but there was evidence that it was thing. So under Minnesota law, again, that was tried at the trial, after standing was challenged before the trial—or in, I guess it was in summary judgment proceedings, but she proved it on the facts when it was first challenged and it's too late for them to do that, here. We would argue that what they're trying to do here is effectively rewrite the agreement. The agreement—

Judge Taranto (00:33:48):

But—I mean, putting aside—

Deanne Maynard (00:33:51):

Yes.

Judge Taranto (00:33:51):

The triple forfeiture—why wouldn't the question—whether what they propose to do, they now try to do it effectuates properly a retrospective cure, be one for the district court to address.

Deanne Maynard (00:34:13):

Well, I mean, we can fight about this all with the District Court. It wouldn't be grounds to grant the extraordinary of writ of mandamus where there's, you know, the District Court has done nothing, but decide the arguments presented to him. They should have made these arguments in response, and so they did drop a footnote—in their response to the judge's you know, supplemental briefing request and, and Judge Stark said they had waived arguments they didn't make. They should have forfeited arguments, excuse me, forfeited arguments. They didn't make, they should have raised these arguments. There was no good reason for them not to have made all these arguments they're making now, I beg your pardon?

Judge Taranto (00:34:53):

Do you remember where the footnote is? What appendix page?

Deanne Maynard (00:35:20):

A325, footnote three.

Judge Taranto (00:35:32):

Okay. And what specifically is that referring to, A281 statutory issue was not timely raised, is that Cirba's issue or your issue?

Deanne Maynard (00:35:41):

So this is, I'm sorry, this is Cirba's brief in response to the judge's dismissal order. And what they're saying is, this isn't a constitutional issue. It's a statutory issue and VMware didn't timely object. And if they had—we would've put in these issues and Judge Stark has already like—

Judge Taranto (00:36:06):

And—this is what Judge Stark was also referring to when, in the transcript, on the request to certify, he said, one reason I don't think I'm going to certify is that I don't think the Federal Circuit could get to the question, whether the constitution from expanding even without exclusionary rights, because sort didn't timely make that argument indeed is, or is this something different?

Deanne Maynard (00:36:36):

In in the new trial order, the first place he says in the new trial order was, is when he denies their motion for reconsideration. And he basically says all of the arguments you are making now, you should have made to me sooner and they are waived. And that was his independent first ground. So it wasn't like, I'm not going to look at *Schwendimann*. It's not, I'm not going to look at precedent. It was like, you didn't make any of these arguments to me. And then at A515, he explains that in great detail.

Judge Taranto (00:37:02):

But—I want to understand what the, any of these arguments is. If the, any of the arguments is that he was saying Cirba didn't make is limited to the, the argument that I can get by, on Article III standing, even if I don't have exclusionary rights, that's one thing if, but if did it have anything to do with, if this is statutory, I can fix it?

Deanne Maynard (00:37:30):

Well. So what I would say is—what he says in the language is they've waived. They forfeited, or he says

wave, but forfeited the arguments with—

Judge Taranto (00:37:39):

We keep going back and forth. Some day we'll fix it.

Deanne Maynard (00:37:40):

Forfeited the arguments based on *Schwendimann* —

Judge Stoll (00:37:44):

But the argument based on *Schwendimann* was say, the first argument was, this is not a bare license. Then *Schwendimann* was argued for the purpose of saying, even if it is a bare license, you don't have to have exclusive rights or exclusionary rights in order to have constitutional standing. That's what I understood the reliance on *Schwendimann* to be, not necessarily making a reformation or argument that we could also engage in reformation like *Schwendimann*, right?

Deanne Maynard (00:38:11):

So two points about that. And I think that the footnote that in this point, this, this is A324 – 325 is—their supplemental brief—

Judge Stoll (00:38:22):

Right.

Deanne Maynard (00:38:22):

After the dismissal. And it's in the section called "**VMware Forfeited the 281 Issue**." And Judge Stark says for pages, he explains this, at 516 – 518, why we were timely raised, regardless of whether it's properly labeled a constitutional issue or a statutory issue. And—I think that's right, what my point is, Judge Taranto that we said before, the trial, you are only a bare licensee. You lack an exclusive license. They said, we have an exclusive license. And they chose to rely only on the language of the agreements. And that's where, if they had an alternative ground to defend their ability to bring the suit, because they agreed at that time before the trial, that if they only had a bare license, they didn't have a patent claim, could not suit for patent infringement. They had to bring it at the trial. And it's now too late to do that. What they might be able to do when we go back and go forward, that's a no raises, a whole host of, of complicated questions that parties haven't argued, but he shouldn't be able to come here and get the extraordinary writ of mandamus when Judge Stark decided the questions presented to him. We debated these issues in the trial court about who forfeited, what, and who was timely.

Judge Taranto (00:39:38):

Right it was—at least for me, it was a little hard to follow, but I mean, not, not your presentation here, but the sequence of, of exactly who was accusing whom of forfeiting, what I think both sides. But do you think Judge Stark ruled that, given understanding of the license agreement, Section Two and Section Eight, assuming that Inc. would lack statutory standing or did Judge Stark at the end of the day—yes—throughout the proceed—no, I'm not going to say this right—did he rule on the statutory question? Initially, obviously in a footnote, in his written his June ruling, he said, I'm only doing constitutional. Did he ever say, actually my conclusion stands on the basis of the statute and if so, where?

Deanne Maynard (00:40:44):

Footnote for A57 – 58, that's where Judge Stark goes through response to the arguments. I was just pointing you to by Cirba, that VMware did not timely raise it. And he gives two reasons for why we timely raised it. He says, first it's constitutional and it can be raised at any time. And I do believe he's right, that it's constitutional. But he says in any event, given how quickly this case was litigated—we timely made an

objection to their standing.

Judge Stoll (00:41:15):

But where there, just to follow up on Judge Taranto's question, I agree that he very clearly says that it was raised timely, but I don't see where he actually says, and not only that, but there is no statutory standing here. He doesn't say that.

Deanne Maynard (00:41:31):

Well, so two points, they've never contested that—they've never contested that they don't have statutory standing—

Judge Stoll (00:41:38):

I understand.

Deanne Maynard (00:41:38):

—If they're a bare licensee. But I think the implication Judge Stoll is in, is the sentence. This is hung on this footnote. And then the very next sentence. So the judge says this is at the end of the discussion where the judge says VMware was prejudiced at the trial, and the outcome would've high probability, the outcome would've been different if I had dismissed Inc. before the trial service says it's untimely, but it's not because it's constitutional in an event is timely. Based on these conclusions, I grant a new trial. So he was saying—even if it's just the statutory standing is timely, Inc, shouldn't have been in this case. It prejudiced at VMware. I'm granting a new trial.

Judge Stoll (00:42:19):

Okay. Can I ask you a different question? I just want to know you had a lot of different discussions and reasons why we shouldn't grant the written brief and you spent a little bit of time explaining why it was your view that constitutional standing requires not just an injury, but legally and judicially cognizable injury. I wanted to ask you, do you think that the lack of exclusionary rights has any impact on the analysis of causation or redressability?

Deanne Maynard (00:42:50):

So I think, yes, I do—I think it would also, it would also fail causation if you, so the patent rights as Your Honors were discussing with Mr. Clement, the right that the patent rights give is the right to exclude others. It's a limited right that's an exception to the background of market competition. As this court has rightly held for decades. You have to possess some of the exclusionary rights to sue for patent infringement. And—I may have gotten backed up too far, and I think I've forgotten your question. We—

Judge Stoll (00:43:25):

I really just wanted to know if you were relying on causation or—

Deanne Maynard (00:43:28):

Well I think you can frame it either way. So I think you can also say, you know, in this court has sometimes looked at these kinds of issues as redressability issues, but I think that most often this court has talked about it as Article III injury in fact, and to Judge Toronto's question and in response to your colleague who Mr. Clement, the Supreme Court has made clear since *Lexmark*, that the possession of invasion of a legally protected, right, is part of the Article III injury in fact, and I would point the court to Justice Chief—

Judge Stoll (00:43:55):

I would say that, I agree with Mr. Clement, that some of her older cases probably are incorrectly phrased in

view of *Lexmark*. So that's where I want to just know what your thoughts are on, you know, specifically, are there Supreme Court cases that we should be looking at on redressability and causation that might help us, you know, if we decide, you know, if we are or agree with Mr. Clement on injury, for example, I just want to make sure, I would like to know if you have specific cases or anything.

Deanne Maynard (00:44:23):

I—can't standing here give you cases on redressability, but I would like to fight the premise of your question—

Judge Stoll (00:44:28):

Sure.

Deanne Maynard (00:44:28):

Which is so in, in *Gill v. Whitford*, the chief justice explains that Article III's injury and fact requirement requires invasion of illegally protected interest, which is concrete and particularized. In cases, some cases are focused on different pieces of that, but in *Gill v. Whitford*, the failing of the plaintiffs there was that they didn't have invasion of a legally protected interest. Also in *House of Delegates*—

Judge Taranto (00:44:56):

Can you remind me what was the interest asserted and why was it not legally protected?

Deanne Maynard (00:45:00):

In *Gill v. Whitford* was a, the packing-cracking redistricting case, your honor.

Judge Taranto (00:45:05):

Got it.

Deanne Maynard (00:45:05):

And so they, the individuals had to show that their districts were individually impacted and they didn't prove that. And so, or they failed to show that they had a legally cognizable right. I would also point the court to *Virginia House of Delegates*, where the court held that what the failing there was the failure. This is also post-*Lexmark*, to show a legally cognizable injury. And that was the holding of the court. It was based on that prong of the Article III injury and fact test, and the chief justice in *Gill v. Whitford* explains why this is part of the Article III case and controversy requirement that invasion of illegally protected interest, which is concrete and particularized, is necessary to limit judges to the appropriate role of deciding based on legal principles, claims of legal, right.

Deanne Maynard (00:45:48):

And the, a pecuniary, private pecuniary interest is not to give you Article III injury in fact. Justice Scalia, who also wrote *Lexmark*, wrote *Vermont Natural Agency Resource*—may have backwards—the *U.S. [**Inaudible**] Stevens*. And he explained that a plaintiff who for example, had placed a wager on a loss suit, the outcome of a lawsuit would have a private economic interest in the outcome of that lawsuit, but would nevertheless not have an Article III injury in fact, because the, the economic, private economic interest that you have has to be tied to the legal claim that you are asserting, and here it's always—this is, we are not mixing and matching 281. We're not talking about the statutory [**Inaudible**]. We're talking about a level back from that, which is that the patent only gives a limited right to exclude.

Deanne Maynard (00:46:44):

It gives a—right to exclude others. If you don't possess any of the exclusionary rights, you have no invasion

of legally protected interest when someone infringes it. Mr. Clement mentions *Blackacre*, but somebody who had like, you know, an easement to walk across *Blackacre*, couldn't sue someone else who walked across *Blackacre* for trespass. This is like suing on somebody else's property, right. This court has held for decades. And it's correct. And it's still correct under Supreme Court precedent, that that is not Article III injury, in fact. And so Judge Stark was correct to label it a constitutional failing, but it's also a statutory failing because if they lack any rights under the patent, they also can't meet 281 and their claim fails for that reason as well.

Judge Taranto (00:47:38):

When—I think Mr. Clement, I think when I asked them the question about why couldn't this be, I'm affirm I'm using that incorrectly in the mandamus context, but why couldn't we let Judge Stark's ruling stand on a statutory basis, even if we—even if he was right about the constitutional basis, what, what what's I think he focused on, at least what I was in my, my mind was this disparity and the ability to fix the problem. Can you address that? Is there a disparity or what?

Deanne Maynard (00:48:19):

I don't think so, your honor, in this court's cases like *Enzo*, that talk about the reasons somebody can't grant like an exclusionary, right. Like after the fact after they've sued would go be beyond just Article III concerns. Like, you know, that you can't artificially create possession of the right to sue somebody for infringement after the fact. So whatever they might be able to do going forward you know, that that's a different question. We can fight about that below, but it wouldn't—change what you can do here. Although I think if you—agree with him about his Article III injury argument, which I do think is wrong, like, I think he's mistaken and we're not seeking a patent specific rule; we're seeking to apply the rule that applies tran-substantially across all claims—which as the chief justice explained in *Gill* is Article III injury in fact requires invasion of illegal protected interest.

Judge Taranto (00:49:12):

So that turns this phrase injury, in fact, into something that actually looks at the underlying legal right then, and who is, is in, within its protection, which I guess maybe Justice Thomas is pressing these days as a reformation. But I—

Deanne Maynard (00:49:28):

Well the court—has long said like in cases like [**inaudible**] and they repeated that sense is that it, that whether you have Article III injury, in fact does turn on the nature and source of the claim. So it is something that you do look because it, it is like if you look—at *House of Delegates* and—the dissent and *Gill*, like the question is the a match, is there a right match between what you're claiming as your injury? And this is—Justice Scalia's point in the *Vermont* case as well. There has to be, you can't just come in and say, I'm harmed by this person's conduct and sue for it to be a case or controversy. There has to be some tie between some legal invasion to your rights, and under the patent laws, if you don't have any of the rights to exclude, there's no legal invasion of your rights. So the norm is competition. So for someone who lacks any of the exclusionary rights—

Judge Taranto (00:50:22):

And what you just said, is that consistent with *Schwendimann*?

Deanne Maynard (00:50:27):

Yes. So I think *Schwendimann* reinforces—I think *Schwendimann* follows *Lone Star* and *Lone Star* back to a question you alluded to that point, you alluded to that. I think *Lone Star* has already aligned this court's precedent with *Lone Star*, I mean, *Lexmark*, I'm sorry. This *Lone Star* said exclusionary rights remains Article III. That remains the constitutional minimum. What we used to call prudential standing, which is, you

know, can somebody join, even though they don't have all of the exclusionary rights, they just have some, do they need to join the patentee to their case. That part it under *Lexmark* is more appropriately considered statutory standing or whatever one on what to label the non-Article III requirements.

Judge Stoll (00:51:09):

But with all due respect, I don't see where *Lone Star* says that you have to have exclusionary rights for constitutional standing. I think it says in that case, the party had exclusionary rights. So they had constitutional standing. But I didn't think it was saying, this is the minimum that you must have in order to have constitutional standing. So I just, I don't think that question's been answered post-*Lone Star*.

Deanne Maynard (00:51:30):

Post-*Lexmark*, you mean.

Judge Stoll (00:51:32):

Yeah. Yes, that is.

Deanne Maynard (00:51:32):

So I—would point you Judge Stoll, so the court in *Lone Star* goes through the Article III standing section at 1234 in section B. And then once it goes through and it discusses at length, this court's cases in *Morrow* and *WIV*, which I think have really thoughtful discussions on why exclusionary rights are required in order to have Article III standing. And I think those cases clearly are talking about what's required because if you don't have any, because they're talking about in the same with *Ortho*, like if you don't possess any of the bundle of sticks that allows you to exclude you, you don't have any invasion of, of illegally protected interest if somebody infringes. So after going through and discussing Article III, standing and *Morrow* and *WIV*, this court and *Lone Star* doesn't purport to say, okay, we now reframe all of that as statutory standing after *Lexmark*, instead on the top of page 1235 in the first full paragraph, the court says, although *Lone Star* cleared this constitutional threshold.

Deanne Maynard (00:52:39):

And I think the, this constitutional threshold, is the possession of exclusionary rights. And then it goes on to discuss. So, but because they have some, they shouldn't be dismissed for Article III standing, let let's decide whether we have to bring in the patentee and then under Lexmark, all of that law is now statutory.

Judge Taranto (00:52:56):

Okay. And *Schwendimann*.

Deanne Maynard (00:52:58):

And now there's *Schwendimann*. And *Schwindamen* says, we're following *Lone Star*. And—it says that, you know—it recounts *Lone Star*. It says that this patentee, this first plaintiff allege has ownership rights. And then once it can, it goes through this discussion. I think most of the discussion is about 261. And the debate between the, the dissent and the, and the majority is about 261, which, the writing requirement is clearly a statutory requirement—that isn't, you know—but I think in the end, the question of whether she was a patentee folded together with the question of whether she had exclusionary rights, because she either had all of them and therefore she had exclusionary rights and cleared Article III, and she was a patentee, or she had none of them and she wasn't, she wasn't either. So, but I, but *Schwendimann* won't get, Cirba what they need.

Judge Taranto (00:53:49):

If that was a constitutional requirement, if *Schwendimann* kind of kept what you said within your view, *Lone Star* confirm, namely possession of some, at least some exclusionary right is a constitutional then;

how, how does retroactive reformation work with the rule that constitutional standing must be possessed at the time of the filing of the court entry document?

Deanne Maynard (00:54:17):

Well, what the court held was, what this court held was, that she was the legal owner of the patents when she filed suit, as a matter of Minnesota law, that she had been assigned the patents in 2002, and that before she filed suit and that it, that the writing requirement could be fixed after. And the writing requirement is clearly statutory. So—I think the, the main takeaway Judge Taranto is that *Schwendimann* can't get, Cirba a clear and indisputable, right, to relief here and to a holding what they want—because it clearly doesn't hold that a party with no exclusionary rights has Article III standing. And that's what Judge Stark has held here.

Judge Taranto (00:54:59):

And on, on the kind of standards, which as you know, are flexible for I mean sometimes flexible for mandamus, when there is something of a mess causing somewhat widespread difficulty, which has happened before we try, if we can, to clear up the legal analysis, even if what we are doing is almost by definition, clearing up something that maybe wasn't so clear, why should this not be one of those cases?

Deanne Maynard (00:55:35):

I don't think this fits like the cases like *Micron* and *Google*, where this court has done it before for several different reasons. One there's nothing like the widespread disagreement that there was in those cases before this court decided—

Judge Taranto (00:55:47):

Isn't there substantial disagreement about this problem of fixing and retrospective fixing and whether it can be done at all. Which I think at least some courts think if it's a constitutional problem, it simply can't. Or do you think that maybe retroactive fixing at least if the standards are what *Schwendimann* relied on, could retrospectively fix a constitutional problem?

Deanne Maynard (00:56:19):

That's certainly not the divide that they have alleged in their petition. So I'm unaware of any such split, Your Honor, this isn't case like *TC Heartland*, post-*TC Heartland*, where the Supreme Court has reversed one of this court's precedence, and there's clear divide, like straight across the board. There's only a handful of cases they cite—

Judge Taranto (00:56:38):

Don't they have a paragraph where there's, I mean—it's not like 25 or cases or something in *Micron*, but don't, they cite six or seven or something and?

Deanne Maynard (00:56:45):

Well, they cite cases, your honor, but I don't think those cases show any kind of clear divide on the question that they're trying to present to this court. So, but in any event, even if the court wanted to clear up this question, this is a terrible vehicle to do it because they forfeited the issues they're trying to present here. So any sort of notion that you would clear that up is based on the idea that they should have told Judge Stark, you know, instead of just responding on the terms about their license. They should have told Judge Stark that, you know, these, all these arguments they're making now and they didn't, and he held that forfeited. And this court usually wouldn't review such a forfeited question, even on a final judgment appeal. And it shouldn't reach out to decide it, in this case. So we would request that this court deny the extraordinary relief of mandamus, unless the court has further questions.

Judge Taranto (00:57:35):

Thank you, Ms. Maynard.

Paul Clement (00:57:48):

Your Honors, I'd like to make a couple of points in rebuttal. But I'm obviously guided by anything that's a continuing source of concern for you just to pick up on the last point you made Judge Taranto. I think it's worth noting in this respect that even Judge Stark in his 129(2)(b) motion, although he denied relief recognized, there was a substantial ground for differences opinion on this issue, which I think underscores that there is widespread confusion and this court could helpfully clarify it. Judge Stoll, you asked about causation and redressability, and the reason that's not going to get the other side anywhere is because, another point that I think VMware loses sight of is that the standing inquiry is supposed to be independent of the merits. There are dozens of Supreme Court cases that say that standing is independent of the merits.

Paul Clement (00:58:33):

So, I suppose you could say, well, even if you have injury in fact, since you don't have a good statutory claim, you're not going to really be able to redress it at the end of the case, but that's not the right way to think about it. And you essentially assume for standing purposes that the statutory claim or the legal theory is okay. And then you just ask, is there injury in fact, would it be—is there causation or what they complaining about the defendant's conduct is that what's causing the injury—and traceability in the rest. So I—don't think that there's any problem there with causation or redressability. And I really think that's the key to deciding this case and providing clarity for the lower courts. Article III standing is trans-substantive. So, if Inc. had standing to bring a common law, unfair competition claim against VMware, because it's lost a hundred employees, and because it's lost market share, and it's had to lay people off, if that's Article III injury for a common law claim, which it certainly is, then it's good enough for a statutory claim, no matter what the statute is.

Paul Clement (00:59:36):

And then the second point to overlay on that, and you don't ask, are they going to win at the end of the case, or is there a statutory problem. You separate out the standing inquiry from the merits inquiry. And if you make that clear, then hopefully the lower courts will get the idea that even asking is there Article III injury in a patent case is no, no. Is there Article III injury? There's three requirements. I think it's revealing, actually that my friend who's very learned and knows the Supreme Court case very well, but you know, she, her example of a case where the court said something about cognoscibility was the *Gill* case. The next term, they come around and say, it's all a political question. I think that shows you that when the court is kind of playing around the, the margins, what's really a cause of action or political question—

Paul Clement (01:00:20):

Maybe they slip it in the cognizable word, but when they're dealing with real old fashioned common law injuries, the loss of flesh and blood employees, the loss of market share comp competitive injuries, that's just injury in fact, those are the easy cases. And this should have been an easy case from the perspective of Article III. I want to say a couple of things about forfeiture arguments. First of all, I think it's very unfair to say that my client forfeited its ability to object the statutory standing when they said let's deal with this after trial. When, if you look at appendix page 370, it is clear what we were being confronted with was an Article III objection to our standing. That's something we can't fix, and you can raise it at any time. So it's harmless to put it over until after the trial. Statutory issues are different. They have to be raised at trial. So if they had raised a statutory argument before trial, we would've said, let's bring it on. And if we lose on that issue, we can still fix it.

Judge Taranto (01:01:17):

Well. But what do you mean by bring by has to be raised at trial? If the question is whether under 281 or

this person is a patentee entitled to sue under the statute, isn't that a—does the judge decide that? Or, or if there are underlying facts, does that do the underlying facts like about what the agreements are and what they mean go to the jury?

Paul Clement (01:01:45):

I think if there was a dispute over the underlying facts that were relevant for the statutory claim, I think that would go to the jury, but either way it has to be preserved. I mean, there's no question if it's a statutory argument, it's a (b)(6) argument. I think it's Rule 12(h)(1) says that those kind of statutory arguments have to be raised at, at a bare minimum at trial. And that makes sense, because if you think about this as a statutory claim, what it really is, is a claim that Inc. and its evidence about damages. The jury shouldn't hear that because Inc. isn't really the injured party under the statute. That's a great argument to raise before the jury hears the evidence. But if you wait until after the trial, you can't raise it. It's too late. But—if it's Article III, you can raise it after the fact. And that's I mean, even if you, I think that's why it's really unfair to say that we forfeited our objection to a statutory argument, because they never made a statutory argument, but it's also an illustration of why it's important to get this right.

Judge Stoll (01:02:44):

Mr. Clement, can I ask you about that?

Paul Clement (01:02:45):

Yep.

Judge Stoll (01:02:45):

I was looking at page a 370 and 371 preparing for today and you know, I look and I see that on those pages, they talk about standing. Then they talk have some, they say standing is comprised of both constitutional and prudential components and then they have some law about constitutional standing and then they say prudential standing requires among other things—blah, blah, blah. So there's different parts where they refer to both kinds of standing, both constitutional and prudential. So I'm wondering, could you point me more specifically on why you think this is only raising constitutional? Because I'm reading it differently from you right now.

Paul Clement (01:03:21):

Okay. Well here's if, if you go at the beginning of 370.

Judge Stoll (01:03:24):

Mm-hmm.

Paul Clement (01:03:24):

They cite (b)(1), they don't cite (b)(6) and then they talk about the court's subject matter jurisdiction. They don't talk about failure to state a claim. And then there's three references to constitutional standing. There are what I take to be some loose references to prudential standing. There's certainly no references to statutory standing or anything of the like, and keep in mind that Judge Stark in footnote one of his opinion dismissing us for lack of standing says, it's a constitutional standing argument only. So he's reading these things the same way I am. And I think he reiterates that in footnote four with you've already discussed. If I could just indulge—with the court's indulgence, I do want to talk about the forfeiture issue with respect to whether somehow we forfeited the ability to say that even apart from exclusionary rights, we suffer Article III injury. There's three reasons that's not forfeited. One, you can't forfeit that kind of Article III argument at all, in the *Lexmark* case—

Judge Taranto (01:04:21):

Why is it different from the *Affordable Care Act* forfeiture of an affirmative ground for standing? You know what I mean?

Paul Clement (01:04:28):

I'm not sure I do, because as I understand the only thing that happened—

Judge Taranto (01:04:31):

There was a severability—

Paul Clement (01:04:32):

Yep.

Judge Taranto (01:04:32):

Non-severability argument for standing.

Paul Clement (01:04:34):

Right.

Judge Taranto (01:04:35):

—and the Supreme Court says that's an affirmative basis for standing. You did not present that to us. And so we're going to disregard it and find no standing.

Judge Taranto (01:04:47):

So you can, forfeit spaces for standing.

Paul Clement (01:04:49):

Yeah. And what I understand the Supreme Court did there is they didn't say it's forfeited in the sense that your failure to preserve it would prevent you from raising it in this court. If it were in the question presented. I read the court saying you can't argue that in because it's not in the question presented. And that's a special rule for the Supreme Court, and you can have an argument that's in the case, but if you didn't put it in the question presented and the Supreme Court doesn't want to reach it that day, they're not going to reach it. And they're going to point to the question presented. *Lexmark* is the perfect—

Judge Taranto (01:05:17):

So that so the Supreme court's remedy in that case would allow the Fifth Circuit or the District Court in that case to go back and say, oh, you do have standing after all—that can't be.

Paul Clement (01:05:25):

That probably can't be. But that has more to do with the fact that once that decision gets final 25 days and nobody files a rehearing petition, the case is over, I would think. But *Lexmark* is a better example. The Supreme Court went out of its way to say, all the parties are talking about this, like prudential standing or statutory standing. And yet the court said, Article III standing—in the *Lone Star* case, the allegation in the case and the district court seized on this was that—the plaintiff in that case said they were a patentee and didn't allege they had exclusionary rights. But in the *Lone Star* case, this court said, well, close enough. They have exclusionary rights and that's good enough for Article III standing, even though the principle basis they argued below was at as a patentee. You just can't—

Judge Taranto (01:06:11):

And, and you don't think 370 is close enough on their side?

Paul Clement (01:06:16):

I don't think it does, because I think it's an example of where the difference between constitutional and statutory arguments have big differences, because when they're raising a constitutional argument *in haec verba* constitutional standing, our reaction to that on the eve of trial is nothing we can do about it. And it's the kind of issue you can raise at any time in the case. So there's no problem with kicking it to after the trial. Whereas if it's statutory, we would be saying, let's fix it. Let's address it so we can fix it. And we would also be saying, and it's got to be preserved at trial. The rules say that. Did I just get my two other reasons? I mean—you can't forfeit. Yeah. I know for you, can't forfeit this kind of argument at all. But equally importantly, we didn't like, this is just an argument.

Paul Clement (01:07:08):

I mean, you know, the *City of Escondido*, the parties below only raised the physical taking argument. And yet the Supreme Court allowed them to raise a regulatory taking argument. This is far less aggressive. We make one argument for why we have Article III standing. We'd like to make a second one. And the last point is we did timely raise this. The sequence of this is important. Judge Stark, first dismisses as a party, he then asked for supplemental briefing on the effects of that order and whether it required a new trial. And that's the point at which we said before he ordered a new trial, we said, wait a second. You are wrong. This is only statutory. It's not constitutional. In the footnote that my friend averted to, we said, it's just statutory and we can fix it. And we also said, it's just statutory. And so you don't need a new trial. And he said, I disagree. You're wrong. It's just constitutional. I'm going to order a new trial. That should be fixed. Thank you.

Judge Stoll (01:08:02):

Thanks to both counsel. Cases submitted

Bailiff (01:08:07):

All rise.