

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC.,
Petitioner,

v.

SMITH INTERFACE TECHNOLOGIES, LLC.,
Patent Owner.

IPR2024-01083
Patent 10,642,413 B1

Record of Oral Hearing
Held: November 5, 2025

Before JAMESON LEE, JEFFREY S. SMITH, and SHARON FENICK,
Administrative Patent Judges.

IPR2024-01083
Patent 10,642,413 B1

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P R O C E E D I N G S

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JUDGE SMITH: Welcome to the Patent Trial and Appeal Board. My name is Jeffrey Smith. With me in person is Judge Jameson Lee, and by video is Judge Sharon Fenick. We are here today for IPR2024-01083, which challenges Claims 1 through 4, 8 through 18, 22 through 30, and 34 through 39 of U.S. Patent Number 10,649,578 (sic).

Each party will have sixty minutes total to present its case. Petitioner will present its case first, and Patent Owner may respond to Petitioner's arguments. Petitioner may reserve rebuttal time of no more than half of its total argument time. Patent Owner may also reserve rebuttal time of no more than half of its total argument time.

Petitioner, please state your name and the names of those who are here with you both in person and remote.

MR. HOLT: Thank you, Your Honor. Davd Holt for Petitioner, Apple. I'm joined by Lead Counsel Karl Renner, who may also give remarks today.

JUDGE SMITH: Thank you.

MR. HOLT: And behind me, just for the record, is Andrew Stein, who is Counsel at Apple.

MR. STEIN: Good morning.

JUDGE SMITH: Good morning. Thank you. Do you wish to reserve time for rebuttal?

MR. HOLT: Yes, Your Honor. Probably about 20 minutes is what I'll be shooting for.

JUDGE SMITH: Okay. Thank you.

1 Patent Owner, please state your name and the names of those here
2 with you both in person and remotely.

3 MR. ROBINSON: Your Honor, Eagle Robinson, Lead Counsel
4 for Patent Owner. With me is Mr. Chad Wallis, who will be arguing for the
5 '413 patent. Remotely, I believe Daniel Leventhal has joined as well.

6 Your Honor, may I ask one clarifying question?

7 JUDGE SMITH: Yes.

8 MR. ROBINSON: Our understanding was that the '413 patent, the
9 1083 proceeding, would be starting --

10 JUDGE SMITH: I'm sorry. Did I say the wrong patent number?

11 MR. ROBINSON: I thought I heard '578. I just wanted to make
12 sure.

13 JUDGE SMITH: Yeah. I apologize. So, for 1083, it's Patent
14 Number 10,642,413.

15 MR. ROBINSON: Okay. Thank you, Your Honor.

16 JUDGE SMITH: Sorry about that. Thank you. And do you wish
17 to reserve time for rebuttal?

18 MR. WALLIS: Fifteen minutes, Your Honor.

19 JUDGE SMITH: Thank you.

20 We ask the parties to remain muted unless speaking. We have
21 your slides on our computers. We can follow along with you. When you are
22 discussing a slide, please identify the slide by page number so that we can
23 follow along during the hearing and again when we read the transcript.

24 Petitioner, you may begin when ready.

25 MR. HOLT: Thank you, Your Honors. May it please the Board,
26 again, my name is David Holt, appearing on behalf of Petitioner, Apple.

1 And Lead Counsel, Karl Renner, may also offer some remarks today.

2 On Slide 2, we direct your attention to the three issues that we plan
3 to discuss today. In looking at these three issues, I'll offer three
4 observations. First, none of these issues focus on the dependent claims. In
5 fact, none of Smith's challenges to the grounds directly implicate the
6 dependent claims.

7 Second, all three issues relate to the language appearing in
8 Independent Claims 1 and 101 and relate to the single ground advanced in
9 the petition. Third, just one of these issues implicate claim construction. It's
10 the first issue, and because of this, we'll address the second and third issues
11 before addressing the first issue.

12 Ground 1, the only ground advanced in the petition, relies on a
13 combination of three prior art references: Ahn, Chaudhri-842, and Hinckley,
14 all -- which you can see on Slide 4. We want to directly jump into the
15 second issue, so we'd like to look at the claim language at issue on Slide 6.

16 Here, we reproduce Independent Claim 1. And within Independent
17 Claim 1, we highlight two aspects implicated by the arguments we plan to
18 discuss today. In blue, we highlight the part of Claim 1 that relates to Issue
19 2, where we'll be starting. This part of the claim relates to progressively
20 blurring at least a portion of a graphical user interface as a function of a
21 magnitude of a gesture.

22 In green, we highlight the part of Claim 1 that relates to Issue 1,
23 which we'll return to at the end. This part of the claim relates to detecting a
24 duration of contact on at least one of one or more menu items and
25 performing two operations in response to when the duration does and does
26 not surpass a threshold.

1 So let's jump directly into Issue 2 and down to Slide 29. The Ahn-
2 Chaudhri-Hinckley combination renders obvious progressively blurring at
3 least a portion of the user interface as a function of an increase in magnitude
4 of the user's gesture.

5 As we see on Slide 29, Ahn teaches a touch-and-drag operation in
6 which a user touches down near an edge of the screen, moves their finger
7 towards the center of the screen, and it remains in contact throughout that
8 gesture. This gesture results in the opening of a menu associated with that
9 edge of the screen.

10 The petition presented two theories regarding how the Ahn-
11 Chaudhri-Hinckley combination renders this progressively blurring
12 limitation obvious. The first theory says that Ahn teaches that its menu can
13 be either transparent, translucent, or opaque. The figures we see in Ahn
14 show the menu as transparent. But in the case that it were translucent, as the
15 menu is brought onto the screen progressively with a gesture, which we'll
16 talk about in a moment, it would progressively blur more and more of the
17 user interface as it emerges onto the screen.

18 The second theory relates to blurring as we see in Figure 13b on
19 this slide. As we see at right, when a user performs a touch-and-drag
20 gesture, Ahn illustrates that user interface objects underneath the menu, like
21 the clock widget, are blurred. And based on the teachings of Chaudhri-842,
22 which we'll get to in a moment, it would have been obvious that this blurring
23 would have been progressive and as a function of the user's gesture.

24 In an attempt to overcome both of these theories, Smith argues that
25 Ahn's menu does not emerge as a function of the user's touch-and-drag
26 gesture but instead is only displayed after the gesture is complete. First,

1 that's incorrect, as we'll discuss. Second, the petition relied upon the
2 teachings of Ahn, Hinckley, and corroborating evidence in arguing that it
3 would have been obvious that the menu emerges in concert with the user's
4 gesture.

5 But let's start with Ahn on Slide 30. Ahn describes an
6 implementation with respect to Figures 18a and b in which an identifier such
7 as a graphical shadow is used to notify the user, one, that a menu is
8 associated with a side of the touch screen, and two, the start position for the
9 gesture to open the menu.

10 With these figures, Ahn describes two ways a user might perform a
11 gesture in relation to the identifier in order to open the menu. The temporal
12 language employed by Ahn for each reveals Ahn's intention for the menu for
13 the -- it following the user's gesture. And you can see that in the highlighted
14 text here on Slide 30.

15 In paragraph 118, we see at the bottom Ahn teach that, quote, in
16 this case, as the user drags the graphic shadow 1800, the menu list 1500 can
17 be displayed along the dragged graphic. Similar temporal language is shown
18 in paragraph 119. In the highlighted section we see, in this case, as the user
19 may press the graphic 1800 with a finger, the graphic 1800 gradually
20 disappears in the display 40, and the menu list 1500 can be displayed as
21 emerging from the left side of the menu -- or, I'm sorry -- of the left side of
22 the display 40, while the graphic 1800 disappears in the display 40.

23 In paragraphs 84 through 86 of his declaration, Apple's expert, Dr.
24 Terveen, tells us that these teachings would have at least made it obvious to
25 a POSITA that the menu emerges as a function of the user's gesture.

26 Any questions about Ahn's teachings?

1 Okay. But the petition didn't stop at Ahn. It also turned to
2 Hinckley's teachings. As shown on Slide 31, Hinckley teaches that its bezel
3 menu slides out and tracks with the user's finger. This is shown in the
4 Figure 6 at left. In the top and bottom figure, the user's hand or finger
5 remains in contact with the display, and the menu tracks the user's finger as
6 the menu opens.

7 At paragraphs 87 and 88 of his original declaration, Dr. Terveen
8 tells us that a POSITA would have clearly understood that Hinckley's menu
9 follows the user's finger as the gesture is performed. And if there had been
10 any doubt about whether Hinckley's menu moves along with the user's
11 finger, Hinckley himself puts that to rest. On Slide 32, a paper authored by
12 Hinckley describes a nearly identical bezel menu that explicitly illustrates
13 the menu opening along with the user's gesture.

14 To add suspenders to belt, Dr. Terveen cited even further
15 corroborating evidence in his original declaration to support his position of
16 the obviousness of the menu following the user's finger. On the lower left,
17 the Hisatomi reference also relates to opening menus from the edge of the
18 display. It teaches that, quote, the display amount of the pull-out menu will
19 be updated corresponding to the x-coordinate value generated by the input
20 device 05.

21 And on the lower left, the Nan reference specifically describes
22 displaying a user interface progressively as the gesture is received.

23 JUDGE SMITH: Which -- I'm sorry. Which slide are you on?

24 MR. HOLT: This is Slide 34. I apologize. I might not have called
25 it out.

26 JUDGE SMITH: Okay.

1 MR. HOLT: So, on the lower right of Slide 34, the Nan reference
2 specifically describes displaying a user interface progressively following a
3 user's gesture. This appears to the user as though the user interface, quote
4 unquote, sticks to the user's gesture.

5 Smith has never directly addressed either of these corroborating
6 references. All of the teachings -- Ahn, Hinckley, and these corroborating
7 references -- taken together demonstrate the menu would have emerged
8 along with the user's gesture.

9 Any questions, Your Honors?

10 Assuming you agree it would have been obvious that the menu
11 would follow a user's finger, the petition's first theory renders the
12 progressive blurring limitation obvious. Yet the petition provided an
13 additional theory of obviousness.

14 As we see on Slide 36, Ahn illustrates --

15 JUDGE SMITH: I'm sorry. Just real quick --

16 MR. HOLT: Yes. Please.

17 JUDGE SMITH: -- it's progressively blurring because the amount
18 of the menu progressively increases? Is that why it's progressively blurring?

19 MR. HOLT: Yes, Your Honor.

20 JUDGE SMITH: Okay. All right. Thank you.

21 MR. HOLT: So you start near the edge, and as your finger moves
22 towards the center of the screen, the menu would look as if it was stuck to
23 your finger, and it would move onto the screen with your gesture.

24 JUDGE SMITH: Okay. But the appearance of -- the amount of, I
25 guess, translucency of both the menu and anything behind it remain constant
26 in the first theory?

1 MR. HOLT: Yes.

2 JUDGE SMITH: Okay.

3 MR. HOLT: This first theory does not require that the amount of
4 translucency of the menu itself changes, but rather the area of the screen
5 covered by that translucency.

6 JUDGE SMITH: Okay.

7 MR. HOLT: Any other questions about the first theory?

8 Okay. If we turn to Slide 36, Ahn illustrates that when a user
9 opens a menu, user interface objects that would appear under the menu, such
10 as the clock widget we see here, are blurred. Smith does not debate that the
11 clock widget is blurred.

12 The only question, then, is how the clock widget is blurred. And
13 Chaudhri provides an answer. If you turn to Slide 37, you'll see at the top
14 right that Chaudhri teaches that, quote, there is a need for more efficient,
15 user-friendly procedures for transitioning devices between user interface
16 states.

17 And at the middle right, Chaudhri broadly defines what it is to be a
18 user interface state when it says that quote, a user interface state is a state in
19 which the device 100 responds in a predefined manner to user input. So, as
20 you can see with these two excerpts of Chaudhri, its teachings are very
21 broadly applicable to user interface state transitions like those we saw in
22 Ahn with the opening of its menu.

23 Chaudhri provides examples of transmissions related to unlocking
24 a device and changing between applications, but Chaudhri takes pains to
25 state that those are just some embodiments. As we see at left, to achieve its
26 goal of a more efficient and user-friendly UI transition, Chaudhri teaches

1 progressively transitioning the optical intensity of user interface objects as a
2 function of the user's progress toward completion of the gesture that causes
3 the UI transition.

4 In the excerpt of paragraph 79 at the bottom right, Chaudhri
5 teaches an example where this may involve fading in the second user --

6 JUDGE SMITH: I'm sorry, 79 of --

7 MR. HOLT: It's at the bottom right of Slide 37 that we were on.

8 JUDGE SMITH: Bottom right? Oh, that last box is --

9 MR. HOLT: Paragraph 79.

10 JUDGE SMITH: I see.

11 MR. HOLT: Excerpt of 79.

12 JUDGE SMITH: Okay.

13 MR. HOLT: And that excerpt teaches an example where the
14 transition in optical intensity involves fading the second user interface and
15 fading out the first user interface. This example has to do with transitions
16 between applications, but it shows that Chaudhri's teachings are not limited
17 to transitions in optical intensity with respect to user interface objects just in
18 one or the other of the user interface states.

19 Applying these teachings to the Ahn-Chaudhri-Hinckley
20 combination would have resulted in user interface objects like Ahn's clock
21 widget fading out as the user drags their finger to open the menu. The
22 petition provided several motivations for this combination. One of those
23 motivations is shown on Slide 38.

24 Supported by testimony of Dr. Terveen, which we see cited here,
25 the petition explained that progressively varying the blur as a function of the
26 user's gesture is one of a limited number of ways of implementing the

1 blurring shown in Ahn. Nowhere in the POR or its supporting declaration
2 did Smith provide any evidence to the contrary. This motivation remains
3 un rebutted by evidence.

4 JUDGE SMITH: The blurring in Ahn, does Ahn say whether it's
5 instant or progressive?

6 MR. HOLT: It does not, Your Honor.

7 JUDGE SMITH: So it could -- we don't know. It could be either,
8 I guess.

9 MR. HOLT: It could be either, and that's exactly what this
10 motivation that we see on Slide 38 is saying.

11 JUDGE SMITH: Okay.

12 MR. HOLT: A POSITA could choose to do it binary, as Your
13 Honor is indicating, or it could be progressive, just like how Chaudhri
14 teaches. But it's a limited number of ways a POSITA might implement the
15 blurring that we do see in the figures.

16 JUDGE FENICK: Mr. Holt, can you speak to how the blur
17 increases as a function of the detection of the first gesture? I hear some of
18 your arguments as being related to the progress of the first gesture, and I
19 know Patent Owner has made some arguments about the question of whether
20 the first gesture -- there's progress in the first gesture towards some end goal
21 or some progress of the detection of the gesture rather than an operation of
22 the user, you know, showing the progress of what the user is doing.

23 MR. HOLT: Yes, Your Honor. I believe those arguments in the
24 POR are premised on the idea that, as we talked about in Smith's first
25 argument, the menu is not shown as progressively sliding onto the display as
26 the user's finger moves and only that the fading is shown. And as we just

1 discussed, that's not the case.

2 But in either instance, the -- and we can actually see this in
3 teachings of Chaudhri on Slide 40. The goals of Chaudhri are to give visual
4 cues to the user about what their gesture is going to accomplish and what
5 gestures are available.

6 And so we saw in Ahn earlier that there is this indication, this
7 graphical shadow, that's one of those types of visual cues. It tells you that a
8 menu is on the side of the display. And the menu progressively opening
9 with the gesture is another visual cue. As you start the gesture and as you
10 continue it, the user is going to see that menu begin to emerge from the side
11 of the display, and they're going to know, oh, this gesture is opening this
12 menu. If they don't want to do that, they can close it.

13 The other aspect of this is the fact that, as we see in Ahn's figures,
14 once the menu is fully open, the clock widget is going to be blurred. If for
15 some reason the user wanted to be able to continue to see the clock widget,
16 they're not going to want to open the menu.

17 And so what we're seeing with this transition, this kind of
18 progressive transition, is a progressive cue to the user about what's going to
19 happen from the user interface they started in, which is the closed menu and
20 fully visible clock widget, to a fully open menu and a blurred clock widget.

21 Does that answer Your Honor's question?

22 JUDGE FENICK: Thank you.

23 MR. HOLT: I'll say this is somewhat akin to what we actually see
24 in Chaudhri with respect to the unlock gesture and graphic. As we see there,
25 the user touches down on the arrow portion of that lock screen and slides
26 that arrow to the right in order to unlock the gesture. And that arrow graphic

1 follows along with the user's finger just as the menu would as you open the
2 menu with your gesture.

3 And then Chaudhri is teaching that certain aspects of the next user
4 interface will fade in, and also, aspects of the current user interface can fade
5 out. And that's what's happening with the clock widget. You're seeing a
6 slow and progressive fade-out of the clock widget that is in correspondence
7 with the user's gesture.

8 And that is the second theory about how the combination renders
9 the progressive blurring obvious. Are there any further questions about that
10 theory? Excellent.

11 So I'd like to take just a couple of minutes to very quickly hit on
12 the third issue, and we can see this on Slide 7, the claim language that's
13 being implicated. This is Independent Claim 101. And in purple, we
14 highlight language found only in Claim 101 that relates to the third issue
15 we'll discuss.

16 The part of Claim 1 highlighted on the left relates to displaying a
17 first menu in response to a first gesture having particular attributes, where
18 the first menu includes menu items and at least one of those menu items
19 includes a particular application icon. The inclusion of a particular
20 application icon is actually what distinguishes this limitation from a very
21 similar limitation with respect to a first menu in Independent Claim 1.

22 The part of Claim 1 highlighted on the right relates to displaying a
23 second menu in response to a second gesture. This limitation is the same as
24 a similar limitation in Independent Claim 1.

25 Turning to Slide 44, Smith argues that in addressing Claim 101,
26 the petition relied upon the same left-hand menu shown in Figure 8c for both

1 the first and second menus of Independent Claim 101. But that's not the
2 case. The petition's analysis of the first menu of Limitation 101.d starts with
3 a reference to Limitation 1.d.i.

4 In addressing Limitation 1.d.i, the petition relies upon Ahn's right-
5 hand menu shown in Figure 13, which we see on the lower left. And that's
6 the claimed first menu, not the left-hand menu of Figure 8c. As we
7 discussed, the only difference between Limitation 1.d.i that's referenced here
8 and 101.d that's being addressed is that Limitation 101.d also recites that the
9 one or more menu items include a particular application icon.

10 All of the explanation in this portion of the petition that is after the
11 reference to Limitation 1.d.i. relates to that particular feature, the application
12 icons. In this explanation, the petition cites generally to various portions of
13 Ahn, including both Figures 8c and 13, to explain why it would have been
14 obvious that at least one menu item would include a particular application
15 icon.

16 But importantly, none of this explanation in the petition alters the
17 mapping provided in Limitation 1.d.i; thus, there are no inconsistencies in
18 the petition's mapping of the first and second menu items.

19 JUDGE SMITH: So the icons in Figures 13a and 13b -- well, I
20 guess it's 13b -- those aren't application icons? Is that why you went to
21 Figure 8c?

22 MR. HOLT: Ahn does not actually directly address with language
23 what those icons are, doesn't even mention them in the writing.

24 JUDGE SMITH: Okay.

25 MR. HOLT: And so, because we wanted to refer to Ahn's
26 description of what's being displayed, we turned to its description with

1 respect to Figure 8c. That's the only place in Ahn that's --

2 JUDGE SMITH: Figure 8c has particular application icons. It
3 describes them using words, what they are.

4 MR. HOLT: That's correct. It actually calls them icons, and this
5 portion of the petition explains how they are application icons.

6 JUDGE SMITH: Thank you.

7 MR. HOLT: So, really, this part of the petition -- the only thing
8 that's happening here is that we are saying the first menu, which is the right-
9 hand menu 1300, will include -- it would have been obvious that they would
10 have included these application icons.

11 Any questions about that issue? Okay.

12 So we can turn back to Issue 1, and let's go ahead and return to
13 Slide 6, briefly, to remind ourselves of the relevant claim language. And it's
14 highlighted here in green. These green limitations relate to detecting a
15 duration of contact on at least one of one or more first menu items and
16 performing two operations in response to when the duration does and does
17 not surpass a threshold.

18 The parties provide arguments about the proper interpretation of
19 this claim language. However, as we explain in the reply, the Ahn-
20 Chaudhri-Hinckley combination renders these limitations obvious under
21 either of those constructions. If Your Honors agree, the Wellman case tells
22 us that no construction is necessary and the decision here is made much
23 easier.

24 JUDGE SMITH: I'm sorry. What case?

25 MR. HOLT: The Wellman case.

26 JUDGE SMITH: What's the Wellman case?

1 MR. HOLT: This is cited in the petition in the Claim Construction
2 section.

3 JUDGE SMITH: Okay.

4 MR. HOLT: And it says that claim constructions are not required
5 to be given where there is not a dispute that's necessary to be settled with
6 that claim construction.

7 JUDGE SMITH: Okay.

8 MR. HOLT: So, again, if Your Honors agree that the combination
9 renders these limitations obvious under either of the constructions, the
10 inquiry can end there.

11 JUDGE LEE: Mr. Holt, this is Judge Lee. I'm just wondering,
12 what makes the Petitioner think that you can pick different contacts to
13 evaluate the duration to satisfy either exceeding the threshold or not?
14 Doesn't the claim refer to detecting a duration of contact, and shouldn't that
15 stay the same throughout the claim?

16 MR. HOLT: You're talking about the claim construction of --

17 JUDGE LEE: Yeah.

18 MR. HOLT: -- this limitation? Sure, we can have a look at that.
19 And if it's helpful, I think Slide -- sorry, let me just jump to it really quickly
20 -- 13 shows the claim language. We see here that there are two "in response
21 to" clauses before the performing steps that are recited. We wanted to
22 acknowledge the difference between "in response to" and other claim
23 language in this claim, as well as some of the claims that I believe, Judge
24 Lee and Judge Smith, you might have heard about in a previous proceeding
25 with respect to related patents.

26 The "when" language is -- excuse me. It dictates that the step is

1 taken when a condition exists, not that the condition itself causes the step to
2 be taken. So language like "when" does not, for example, dictate that the
3 step is not taken when the condition is not present, just that it has to happen
4 when the condition is present.

5 We acknowledge that this language we see here on Slide 13 is
6 different in that "in response to" language requires more, and yet we don't
7 believe that this language that we see here actually results in, Judge Lee,
8 what you were just speaking to, that it has to be a single contact that can
9 perform either of the first or second operations.

10 And the reason for that is the claim language here talks about the
11 "at least one of" one or more menu items. And so this isn't about a single
12 menu item, as Smith's arguments suggest that it is. We see Smith's
13 interpretation there in the clip at the bottom, and their argument is a given
14 contact with a single menu item must be capable of doing either of the two
15 functions depending on whether its duration surpasses a threshold. But that's
16 not what we see in the claim. The claim actually says at least one of the one
17 or more menu items. So this can be multiple menu items we're looking at, a
18 set of menu items.

19 Further, Smith seeks to limit the claim language to this decision
20 tree in which a single instance of contact may result in either operation,
21 depending on the outcome of the decision. But that's, again, not what the
22 claim language says. The claim recites performance of two operations under
23 two different circumstances, and as we see at the top of Slide 14, Smith
24 admits that these two single instances of contact -- or no single instance of
25 contact, excuse me -- can actually perform both of these operations. They
26 cannot satisfy the two limitations the clause -- the "in response to" clause.

1 How does that impact the construction? Well, if we look back at
2 Slide 13 and the claim language, each of the "in response to" clauses use
3 antecedent basis, as Your Honor Judge Lee noted, to refer back to detected
4 first duration of contact. But if no single instance of contact can exhibit the
5 properties or characteristics necessary to satisfy the detection recited in each
6 of those limitations, then we have to be looking at multiple instances of
7 contact.

8 JUDGE LEE: Well, not -- it's Judge Lee. Not really. We're
9 talking about an apparatus claim, right? So the logic has to be able to look at
10 the same contact and then evaluate and see which way it comes out so there's
11 no conflict there. It doesn't have to -- I mean, the circuitry has -- all it has to
12 do is determine which way it is. It doesn't have to satisfy both in every
13 instance. But for this instance, it can determine whether the threshold is
14 above or the threshold is below. So the circuitry has to be able to do it.

15 If it were method, then the method -- then you're right. It can only
16 perform one or the other. But if it's the circuitry, the structure and operation
17 of the circuit has to be able to determine both.

18 MR. HOLT: I agree in part, Your Honor. I agree that both of
19 these steps would need to actually be shown. But our position is that the "in
20 response to" language isn't a decision that would result in one of the either
21 two, again, because you can't have a first instance that actually does both.

22 But we do show in our apparatus, at the very least, that you can
23 touch one user interface element, which would be one of the one or more,
24 and that touch would be below threshold, and you'd get an operation. And a
25 touch on a second menu item that would be above threshold, like a tap and
26 hold, would get you a second operation. So the apparatus we're talking

1 about actually does perform those steps. We're not relying upon just
2 performing one or the other. We are performing both.

3 JUDGE LEE: Yeah, and that's depending on the "at least"
4 language, right?

5 MR. HOLT: Yes.

6 JUDGE LEE: Without the "at least," then there would be a
7 problem because --

8 MR. HOLT: Exactly.

9 JUDGE LEE: Yeah.

10 MR. HOLT: If Smith wanted this claim language to be the
11 interpretation that we see at the bottom of Slide 13, they could have just
12 done away with the "at least one of," and we'd be exactly dealing with the
13 issue that Your Honor is talking about.

14 JUDGE LEE: Okay. Thank you.

15 JUDGE SMITH: Let me -- you're getting kind of low on your
16 case-in-chief time. You're free to continue in your rebuttal time, but before
17 your nine minutes run out, I want to actually get to Patent Owner's
18 construction, like on Slide -- if you don't mind --

19 MR. HOLT: Sure. Of course not.

20 JUDGE SMITH: -- on Slide 16. So Patent Owner gave us this
21 construction where these two claim terms mean that the touch has to have
22 -- for both of those limitations, the touch has to have a common starting
23 point. And we addressed this, in your petition it looks like you mapped the
24 reference to the claim using the construction you just gave us now.

25 But then Patent Owner, in the preliminary response, came up with
26 the proposed construction. We kind of went through in our decision to

1 institute saying, you know, even under Patent Owner's construction, the
2 reference still has it. Patent Owner took issue with that in the Patent Owner
3 response.

4 And then, in your reply, you also showed how the reference meets
5 the claim under Patent Owner's construction. Patent Owner again took
6 issue. And can you tell us, like, looking at Claim 16, why this -- so, if we
7 look, for example, the icon 1714, you press and hold; it opens up the radial
8 menu. You tap it; it does some other function.

9 MR. HOLT: Mm-hmm.

10 JUDGE SMITH: Why is -- that mapping is timely?

11 MR. HOLT: Well, Your Honors, I would say that that mapping is
12 consistent with the mapping in the petition. The petition's position and our
13 position remains that everything within 1712, including 1714, are a single
14 user interface object. That's how we see, on Slide 16, Hinckley talking
15 about it. It says icon or slot 1712 includes a radial menu icon 1714, and then
16 it goes on to say that the radial menu is associated with this particular icon or
17 slot; that is 1712, not 1714.

18 So the radial menu is actually associated with 1712, is what we see
19 at the bottom of paragraph 107. And that is an indication that Hinckley
20 views 1712 and everything inside of it, including the portion that is 1714, the
21 radial menu icon, to be all part of the same slot.

22 JUDGE SMITH: So, even under Patent Owner's construction
23 where Patent Owner says that the common starting point means that the user
24 contacts the same menu item, your point is that 1712 is the menu item, and
25 touching anywhere within 1712 is touching the -- making contact with the
26 menu item within the scope of the claim.

1 Did you also -- and correct me if I'm wrong, but -- and I
2 understand in your reply you also presented the argument that touching
3 1714, the radial icon -- touching and holding it opens the radial menu, and
4 then tapping 1714 does some function other than open the radial menu? Is
5 that correct?

6 MR. HOLT: That's correct, Your Honor.

7 JUDGE SMITH: And was that argument made in response to
8 Patent Owner's proposed construction, or --

9 MR. HOLT: Yes. We view that as a clarifying argument as to
10 what happens with respect specifically to 1714. And that argument was
11 primarily made in response to both the construction as well as Patent
12 Owner's argument that 1712 and 1714 are completely separate and distinct
13 user interface objects. And so what we're saying is, if your construction is
14 correct, and also that 1712 and 1714 are in fact two entirely distinct user
15 interface objects, the teachings of Hinckley still render the claim language
16 obvious under that narrow construction.

17 And so that is responsive to this construction, and we've been told
18 by the Federal Circuit a number of times that responsive arguments, even if
19 they do differ from the petition, which, again, we don't believe this argument
20 does, but to the extent that it does, it would be proper because it's responsive
21 to that construction.

22 JUDGE SMITH: And just real quickly, one last question -- there's
23 a lot of argument between the parties about the difference between whether
24 tapping 1712 performs the same function as tapping 1714 or performing a
25 different function. Honestly, I'm having a hard time seeing why that
26 matters, given that the claim just requires a tap results in one function and a

1 tap and hold results in another function. What's the point of 1714 tap
2 performing a different function than 1712 tap?

3 MR. HOLT: Hinckley covers that. We have not actually relied
4 upon a tap on 1714 being different. There is a portion of the petition that's
5 referenced by Smith in their POR arguments where we utilize this sentence
6 to talk about how there can be differences in functionality. But our
7 argument has always been it's a tap and hold on 1714 and a tap generally on
8 1712, or even, you know, if you have to say 1714 is different than Hinckley,
9 again -- and we see this on Slide 19. This is the sentence that matters in
10 Hinckley, the green sentence.

11 Hinckley is fairly open-ended as to how you would implement this.
12 It does say, though, that a tap on 1714 would have the same default function
13 as a tap on 1712, which means anywhere inside of the boundaries of that
14 1712 box or slot in the figure would give you that default tap.

15 JUDGE SMITH: It says it may or may not --

16 MR. HOLT: Correct.

17 JUDGE SMITH: -- be different, right?

18 MR. HOLT: Correct.

19 JUDGE SMITH: So it could be the same; it could be different.

20 MR. HOLT: Exactly, Your Honor.

21 JUDGE SMITH: Okay. And I guess in the petition, you quoted
22 the "may not" part, and then in the reply, you quoted the "may" part, is that
23 --

24 MR. HOLT: Yes, Your Honor. I think if you read that sentence in
25 context of the petition, the reason we were utilizing the "may be different"
26 there was actually with respect to the tap and hold of 1714. We took the tap

1 language of that sentence out, and we were trying to show that Hinckley
2 broadly talks about these two aspects of 1712 possibly having the same or
3 different functionalities.

4 JUDGE SMITH: Okay.

5 MR. HOLT: But that part of the petition was really focused on the
6 tap and hold. And I think that's clear, again, if you go further down on that
7 same page. I believe it's page 51 of the petition. You'll see that that's
8 exactly what the conclusion is. Now -- excuse me. Sorry, Your Honor. We
9 believe that that portion where we were quoting the sentence probably could
10 have been made clearer. Instead of saying "selecting," we should have
11 written "tap and hold." But when you look in context, we think it's
12 abundantly clear that it was about the tap and hold.

13 JUDGE SMITH: And then just, you know, if you don't mind, one
14 last question about the Ground 2, the combination. There's language from
15 column 7 of the Nan reference about the software can distinguish between a
16 long swipe and a short swipe to switch user -- it'll switch to one user
17 interface for a long swipe. A short swipe will cause it to switch to a
18 different user interface.

19 And Patent Owner is again saying that those arguments are
20 untimely. Can you speak to that?

21 MR. HOLT: I believe, Your Honor, the reference to Nan in the
22 reply was primarily to simply show the knowledge of a POSITA with
23 respect to how these systems are capable of distinguishing between many
24 different gestures. But we don't rely upon Nan here. This is purely coming
25 --

26 JUDGE SMITH: The movement threshold, I think, was the point

1 of Nan, right, that --

2 MR. HOLT: Yes, and that, for what it's worth, I believe, is the
3 next proceeding for the '578 patent.

4 JUDGE SMITH: Oh. Okay. Okay. I'm sorry. It's hard to keep
5 these things separate.

6 MR. HOLT: No, no. That's okay.

7 JUDGE SMITH: Okay.

8 MR. HOLT: I'm getting mixed up, too.

9 JUDGE SMITH: Sorry. Okay.

10 JUDGE LEE: Mr. Holt, it's Judge Lee. So, hypothetically, we
11 disagree with your claim construction; then the reply comes back to say,
12 well, okay, well, we made it anyway because a tap on 1714 gives you one
13 thing, and a hold on 1714 gives you something else. In a nutshell, that's the
14 reply?

15 MR. HOLT: Yes, Your Honor.

16 JUDGE LEE: Okay. Thank you.

17 MR. HOLT: Any other questions?

18 JUDGE SMITH: Judge Fenick, any questions?

19 Thank you.

20 MR. HOLT: I'll reserve the rest of my time.

21 JUDGE SMITH: Thank you.

22 MR. HOLT: Thank you, Your Honors.

23 JUDGE SMITH: And who's presenting for Patent Owner?

24 MR. WALLIS: Chad Wallis.

25 JUDGE SMITH: Mr. Wallis, you asked for -- how much time
26 again did you ask for? You asked for --

1 MR. WALLIS: Fifteen minutes.

2 JUDGE SMITH: Fifteen minutes in rebuttal, so 45 minutes for
3 your case in chief.

4 MR. WALLIS: Yes, Your Honor.

5 JUDGE SMITH: Okay. Mr. Wallis, you may begin when ready.

6 MR. WALLIS: Thank you, Your Honors. And may it please the
7 Board, before we get to Patent Owner's slides, I want to briefly touch on
8 Petitioner's Slide 13 and the claim language and the alleged claim
9 construction dispute here.

10 So, if you look at their Slide 13, you'll see they're underlining "at
11 least one of one or more menu items." So I think there's really a
12 misunderstanding here on what Patent Owner is saying. This quote that
13 they're selecting -- we are not disputing whether the claim requires a single
14 menu item or more than one menu items. I think the "at least one" makes
15 clear that this can apply to multiple menu items.

16 Our issue is that it requires detecting a first duration of contact and,
17 in response to the first duration of contact, which is the same contact,
18 performing a first operation when it does not surpass the threshold, and in
19 response to the first duration, right, the same first duration of contact,
20 performing a second operation when it surpasses a threshold.

21 So I think, Judge Lee, like you said, this is a device claim where
22 the operation is responding to the duration of contact. So it's the same
23 contact, a single contact, throughout the entire gesture. Now, we are only
24 saying that the Petitioner's mapping doesn't meet the claim because it's not a
25 single menu item because they're relying on specific contacts that do not
26 move, right? They have a tap and a tap and hold at different locations.

1 So our issue is the different location, not that they're on different
2 menu items, because if you tap your finger, you press it and you lift up,
3 right, in one location, 1712. And then you have to move your finger to
4 another location not on the screen; tap and hold again, right? That duration
5 of contact -- there's two durations there, right? There's not a first duration,
6 the first duration, the first duration. It's a first duration and then a second
7 duration of contact, a new, different duration of contact. So --

8 JUDGE LEE: This is Judge Lee. I understand what you're saying,
9 but the other side is saying, well, you're allowing it by putting in the word
10 "at least," right? So there are two items for this contact. Then they are able
11 to say, well, I'm touching one now; I'm touching the other item now at two
12 different times. And it counts as the contact. So what's your response?

13 MR. WALLIS: My response is those are two separate contacts.
14 Those are not the same contact, and the claim requires the same. So --

15 JUDGE LEE: I see. So you would read this claim like it has to be
16 one contact, even if it touches two items? It would be like two fingers, one
17 here, one here, and you're touching two items, but it's still one contact?

18 MR. WALLIS: So I'm not sure about that scenario. I haven't
19 thought through that. But you could certainly touch in between two items
20 where your finger is on both. But I think if you look -- now we'll turn to my
21 slides -- Claim 101, Slide 12. If you want to look at this, I think this might
22 help clarify the position.

23 So this Claim 101 has an additional limitation --

24 JUDGE SMITH: You mean Claim 1?

25 MR. WALLIS: Sorry, Claim 101 on --

26 JUDGE SMITH: Oh, Claim 101. I see. I see.

1 MR. WALLIS: -- on Patent Owner's Slide 12. I'm sorry. So
2 there's this 101.e.iv, and there's this highlighted language here, right, where
3 the first duration of contact being detected includes a slide gesture
4 component.

5 So, to make it make sense in Petitioner's mapping, you'd have to
6 touch icon 1712, slide over to 1714 -- that would be the same contact, and
7 that would go to two menu items. But there's no duration requirement,
8 right? If you slide from 1712 to 1714, it's not performing two different
9 functions based on the duration. That would be a single contact.

10 JUDGE LEE: I see. I understand. So, if the item is really small,
11 with your thumb you can actually, with one thumb, contact-touch more than
12 one item.

13 MR. WALLIS: Or if there's a slide gesture involved, you could
14 slide all the way across, you know, five, ten items, however you want to go.
15 But all that's required is it be the same contact, same duration of contact, and
16 based on, in response to the duration, performing two different operations.

17 JUDGE LEE: I see. Thank you.

18 MR. WALLIS: So I think the confusion of the -- at least, you
19 know, multiple items is, really, we don't dispute that it can happen on two
20 different menu items. That's not the issue. It's one contact, and in response
21 to the duration of that contact, doing two different functions. Here, again,
22 tap and hold here and a tap here -- two different contacts. It doesn't matter,
23 right? It's not the same contact, as required by antecedent basis, as required
24 by the plain meaning of the claims.

25 So we don't think there's a real material dispute here, right? We
26 agree with them that it can happen on two menu items. It doesn't need to be

1 a single menu item. That's never been our construction, right? The quote
2 you see here on their Slide 13, we're just saying that because they're pointing
3 at taps and taps and holds, right? And if a tap and a tap and hold are your
4 gestures and they're on two different menu items, they must be on -- well, in
5 this scenario, they must be at two different locations and they can't be the
6 same contact. So that's our point.

7 JUDGE LEE: I understand. It's Judge Lee again. Can you, then,
8 respond to their response? They seem to have a logical one presented in
9 their reply that if you tap the small button, you get one result, and if you tap
10 and hold on the small button, you get a different result.

11 MR. WALLIS: Yes, Your Honor. So, before I -- can I add one
12 more thing before I turn to that?

13 JUDGE LEE: Yeah, sure.

14 MR. WALLIS: So, in our Slide 15, there's this undisputed
15 conditional limitations that you asked us to address. And that's simply
16 whether you have to perform both of these items. Like we said, they can't be
17 done in the same method, but it's a device that's programmed to do it in
18 response to. So, you know, that was an issue where we said both the claims
19 need to be shown in their apparatus to show patentability. So that was a
20 distinct issue that has no dispute that you asked us to address.

21 And so then, turning to, I believe, Slide -- let's go to Slide 34. So I
22 think that there's two issues here, Your Honor. And one is, is this a new
23 mapping? Is this a new theory that is improper to introduce for the first time
24 on a reply? And the second is, even if we accept that it's new, is it correct?
25 So would you like me to address the "is it correct" first before I get into the
26 new? Because I know you asked me about that. So I have two theories. Do

1 you prefer one way or the other --

2 JUDGE LEE: Whichever order you'd like to talk about.

3 MR. WALLIS: So our first issue is whether it's new. And if you
4 look at our Slide 34, you will see the petition and the reply. And so, Your
5 Honor, Judge Smith had referenced this may or may not be different
6 language, and what's the big deal about that? Well, the issue is that in the
7 petition, there's the sentence 107 that says, in some embodiments, tapping
8 the radial menu triggers a default action which may or may not be different
9 than an action associated with tapping on the bezel menu slot 1712.

10 In the petition, they read that default action to be opening the radial
11 menu, right? So they ignore tapping. Like I think Petitioner just said, we
12 didn't use tapping. We used this default action being different as opening
13 the radial menu. So, in their minds, that 107, the default action being
14 different, in that embodiment, it's opening --

15 JUDGE SMITH: I'm sorry. Where did they say the default action
16 is opening the radial menu?

17 MR. WALLIS: So, if you look at Slide 34, the petition on the left-
18 hand side, right, they change out "tapping" and put "selecting," and then they
19 quote this sentence --

20 JUDGE SMITH: Which line are you reading?

21 MR. WALLIS: Sorry. There's the yellow highlighted line in the
22 middle.

23 JUDGE SMITH: Okay, selecting. Okay.

24 MR. WALLIS: Selecting -- right? So they change "tapping" out
25 for "selecting," indicating they're not relying on this tapping, but they are
26 relying on -- that the radial menu can trigger a different action, right, a

1 default action which may be different. Then skip to the next yellow line,
2 right? And they were underlining "different" at the same time, right? This
3 different action is opening the radial menu. So, in their first theory, that
4 clause, the different action is opening a radial menu icon -- or opening the
5 radial menu.

6 JUDGE SMITH: I'm not following you. I'm sorry. You're saying
7 that that highlighted in yellow, where it says selecting the radial menu
8 -- you're saying that means it opens the radial menu?

9 MR. WALLIS: So they identify -- so there's this sentence that says
10 it can perform a default action.

11 JUDGE SMITH: Right.

12 MR. WALLIS: And then that default action could be the same or
13 different.

14 JUDGE SMITH: From tapping?

15 MR. WALLIS: From tapping on the radial -- from tapping on the
16 icon 1712, yes.

17 JUDGE SMITH: Right.

18 MR. WALLIS: And they say, if it's different, it would result in a
19 default action of opening the radial menu.

20 JUDGE SMITH: No. They're saying that the tap and hold opens
21 the radial menu.

22 MR. WALLIS: But they're quoting that language to get to that.
23 They're saying, look, we're not relying on the tapping, as Petitioner just told
24 you. We're relying on the -- it can perform a different action, and that action
25 would be the tap and hold. So there's --

26 JUDGE SMITH: But the tap and hold is a gesture that -- the action

1 is opening the radial menu.

2 MR. WALLIS: Yes. But originally, their theory was the tap also
3 opens the radial menu, and that's why they didn't map 1714 in the beginning.

4 JUDGE SMITH: I'm looking at what you have on the left side of
5 Screen 34, and I don't see anything that says tapping opens the radial menu.

6 MR. WALLIS: Well, that's because they didn't map to any tapping
7 because they couldn't, because -- so --

8 JUDGE SMITH: I --

9 MR. WALLIS: It's a bit nuanced, yes. So I will --

10 JUDGE SMITH: Okay.

11 MR. WALLIS: -- say, so they first mapped to a tap on 1712. They
12 didn't map to a tap on 1714. But now, in response, they have to map to a tap
13 on 1714 that was never discussed in the petition. So at least they've moved
14 the tap from 1712 to 1714, and that is clear.

15 JUDGE SMITH: Okay.

16 JUDGE LEE: Yeah, it's Judge Lee. So all you're saying is they
17 changed their position.

18 MR. WALLIS: Yes.

19 JUDGE LEE: Well, that I can see. They didn't rely on a tap on
20 1714 before --

21 MR. WALLIS: Correct.

22 JUDGE LEE: -- is what you're saying --

23 MR. WALLIS: Yes.

24 JUDGE LEE: -- in the petition. Okay.

25 MR. WALLIS: Yes.

26 JUDGE LEE: Well, go ahead.

1 MR. WALLIS: Okay. And so I guess the issue here is they're
2 relying -- they're changing this "may or may not" language. And it's really,
3 frankly, not clear to me exactly what they're trying to do, but they're picking
4 different things, right? These are mutually exclusive embodiments that we
5 know are in -- that their expert, if you look on Slide 35, has testified it can be
6 one or the other; it cannot be both.

7 So, in the first one, they've excluded, right, this may not be the
8 same. And now they're relying on it being the same. So it was different,
9 and now it's the same.

10 JUDGE SMITH: But whether it's different or not, it's still not
11 opening the radial menu. The tap and hold opens the radial menu.

12 MR. WALLIS: My point is just they're relying on different
13 embodiments now. They're just switching -- they're relying on a different
14 location of the tap being -- they moved it from 1712 to 1714. And now
15 they're quoting different language to get a different result. So I guess my
16 point is that's all new.

17 And I guess to address why that is deficient is that's not in response
18 to the claim construction. We haven't proposed a claim construction that's
19 different here than anywhere else. In the POR, we said the same thing. In
20 the POPR we said the same thing. In the surreply, we said the same thing.
21 In the institution decision, if you look at Slide 38, you guys said that
22 Petitioner and Patent Owner contend that no claims need to be construed in
23 order to resolve a controversy.

24 JUDGE SMITH: I'm sorry. Which slide are you looking at?

25 MR. WALLIS: 38, Your Honor, at the very bottom. Right? In the
26 institution decision, you said, we agree with the parties that no terms need to

1 be construed.

2 We still don't ask you to construe any terms. We're not proposing
3 any claim construction. And if you look at this Axonics decision, which was
4 cited --

5 JUDGE SMITH: I think we said in the institution decision -- we
6 said no terms need to be construed for the decision to institute. And then we
7 went on to say we discussed claim interpretation to the extent necessary in
8 the context of analyzing the asserted grounds. And then we went on to
9 invite the parties to address construction of these limitations.

10 So we just said in order to determine whether to institute or not, we
11 don't need to consider these terms. We --

12 MR. WALLIS: Yes, Your Honor. And I believe I was making a
13 distinction earlier when I was talking about the conditional limitations.

14 JUDGE SMITH: Yeah.

15 MR. WALLIS: So you had asked us to address whether, you
16 know, you have to show these two elements both exist in the device to
17 establish obviousness for patentability. No one is disputing that. Both of
18 them have to be shown in the art. Now, this separate construction that we're
19 talking about now, whether a first duration means -- or whether the first
20 duration means a first duration, which is the same duration of contact, that
21 has been the position we have advanced since the beginning. And that's not
22 -- we don't need a construction for that.

23 JUDGE SMITH: But Petitioner didn't have a chance to address it
24 until the reply. The first time Petitioner had a chance to address that
25 construction was in the reply.

26 MR. WALLIS: I guess our position is we haven't advanced a

1 claim construction. We haven't changed the construction. So maybe if I
2 could --

3 JUDGE SMITH: Well, you know, I think part of it -- when I said
4 in the decision, I said we discussed claim interpretation to the extent
5 necessary in the context of analyzing the grounds, you know, in our decision
6 itself, we addressed your point that it requires a common starting point. And
7 we said, look, you know, to the extent it requires a common starting point,
8 the prior art has it.

9 And then you came back in the reply and took issue with that, and
10 then Petitioner came back and addressed that, your proposed construction.
11 And now you're taking -- so I guess I'm trying to understand -- and help me
12 out here, why -- I guess, A, why it's not a new construction, and B, why
13 Petitioner isn't entitled to address it.

14 MR. WALLIS: So I think, to address your second point, right,
15 Petitioners -- this is a streamlined proceeding, and Petitioners have a burden
16 to set out their theory with particularity at the outset, right? They must make
17 all their case in the petition. And if there is an error in that, they don't just
18 get to fix it on the back end, right?

19 So I will talk about the Axonics case because I think it's a good
20 analogy to what's happened, right? In the petition, Axonics adopted this
21 one-input claim construction. They didn't say plain and ordinary meaning.
22 They said this particular limitation has a one-input claim construction that
23 we're going to use. And then the Patent Owner agreed, and the Board
24 agreed. And they issued the institution based on that one-input claim
25 construction, which is not plain and ordinary meeting.

26 Then on the Patent Owner response, for the first time, they

1 advanced an alternative claim construction, specifically not plain and
2 ordinary meaning. They said the second input -- or the two-input
3 construction. So they went from the construction that Petitioner advanced,
4 and they advanced a totally different construction. And the Board said,
5 right, if you're going to change constructions, you have to let the Petitioner
6 have a reply.

7 But here, that's not the case. We're not arguing that it needs to be a
8 claim construction. A first duration of contact and the first duration of
9 contact being the same is just antecedent basis.

10 JUDGE SMITH: You're arguing that the claim requires a common
11 starting point for both limitations. And Petitioner didn't have a chance to
12 address that until the reply. I mean, the claim doesn't say common starting
13 point. Yet you're asking us to --

14 MR. WALLIS: So --

15 JUDGE SMITH: -- construe the claim to require a common
16 starting point.

17 MR. WALLIS: We're asking you to construe the claim that a first
18 duration of contact and the first duration of contact are the same.

19 JUDGE LEE: This is Judge Lee. I see what you're saying, but
20 Axonics seems to tell us that -- I mean, we used to do this a lot in previous
21 cases, force the Petitioner to come up with everything. And then, if we
22 disagree on the basis of something Patent Owner said about claim
23 construction, then they lose. But doesn't Axonics turn that totally around to
24 say, hey, Patent Owner has a different view on what the claim means, and
25 now Petitioner gets to come back and explain why they win anyway?

26 MR. WALLIS: So I think it's a matter of degree, Your Honor. So,

1 in that, right -- in Axonics, there were two different, completely different,
2 constructions. Here, we're just saying they erred to show that their
3 combination meets the claim. There's no claim construction needed, they
4 -- right? The claim is a first duration of --

5 JUDGE SMITH: You keep saying there's no claim construction
6 needed. I mean, if there was no claim construction needed, you wouldn't
7 have to write us a proposed claim construction that says the claims require a
8 common starting point. We would have just gathered that from the claim.

9 MR. WALLIS: Well, if the first duration of contact is the same
10 contact as a first duration of contact -- if they're the same, then they would
11 start at the same place. If it's the same contact, it's going to be the same --

12 JUDGE SMITH: Under your construction.

13 MR. WALLIS: Well, yes. Yes, Your Honor. I don't think it's our
14 --

15 JUDGE SMITH: Yeah. Okay.

16 MR. WALLIS: Yes. I think you understand my point, but I don't
17 think it's the actual construction. I think it's an error that they cannot correct
18 on the back end. So, if they --

19 JUDGE SMITH: Okay. Let's see --

20 MR. WALLIS: Got it.

21 JUDGE SMITH: Yeah. Let's get to the substance, then. If they
22 are entitled to do it, does that mean you lose?

23 MR. WALLIS: No, that does not mean we lose. So, if you find
24 that it is a proper reply, the theory is also still wrong. So we've talked about
25 -- if you'll look at my Slide 45, I think we can dig into this. There's only one
26 sentence where it's talking about tapping on the radial menu icon, which

1 they've now turned to in their reply, so the very last sentence of 107 on the
2 left-hand side, right? In some embodiments, tapping on the radial menu icon
3 triggers a default action which may or may not be different than the action
4 associated with tapping on the bezel menu slot.

5 So, if we look at this using context clues, we see, right, the four
6 sentences leading up to this, they're talking about opening the radial menu,
7 right? It tells you you can access the radial menu, and it says for example,
8 right, it can be accessed by hovering a pen. Alternatively or additionally
9 -- so we're still doing the examples of how to open it, right -- you can pull
10 down. Alternatively or additionally -- so we're still doing the same example
11 -- you can tap and hold on the radial menu icon.

12 And then, after it tells you how to open the menu, right, multiple
13 times, you've opened the menu -- it says, in some embodiments, tapping on
14 the radial menu icon triggers default action. So, if I say to you open the
15 menu, tap on the slot -- or tap on that radial menu icon -- that conveys to you
16 or infers that the menu should be open when you do it.

17 Now, Petitioner makes some points in Claim 108 --

18 JUDGE SMITH: I'm sorry. Could you take a step back? How do
19 we infer from that that the menu is open when you tap on the icon?

20 MR. WALLIS: Because in the previous menu, it told you to open
21 the menu. It told you how to open the menu. So, if you're following along,
22 if it's in logical temporal order, right, you've just opened the menu. And
23 now it says, in some embodiments, tapping on the radial menu icon triggers
24 a default action.

25 JUDGE SMITH: Okay.

26 MR. WALLIS: So all of this discussion, before and after it, are

1 talking about applications where the radial menu is open. Their theory is
2 essentially that it tells you how to open the menu; then it completely shifts to
3 talking about tapping on it when it's closed. And then it shifts back to it
4 being open.

5 And they use this paragraph 108 to kind of infer the point that it
6 would be closed, but just because paragraph 108 says once the radial menu
7 is exposed, the user can touch down and stroke in a particular direction, that
8 doesn't mean that it wasn't open when it taps. This is just showing that once
9 the radial menu is exposed, that radial menu icon can receive inputs, right?
10 Paragraph 108 is saying you touch it, and then you stroke.

11 So, similarly, the previous sentence -- instead of touching and
12 stroking, you just press it.

13 JUDGE SMITH: Why can't it be both? Why can't it be both, tap
14 when the radial menu is closed and then tap when the radial menu is open?
15 Why can't 1714 receive the tap regardless of whether the menu is open or
16 closed?

17 MR. WALLIS: Well, I think, practically, Your Honor, it doesn't
18 make sense. So I think we'll turn to Slide 42. So there's essentially two
19 scenarios we're talking about here. We're talking about, right, a tap before
20 the menu is open and a tap after the menu is open. And this paragraph 107
21 describes two embodiments, right, where the function may or may not be
22 different. So, in one, it's different, and one it's the same.

23 If we start with the function where it's different, if you're tapping
24 on this radial menu icon as shown in Slide 42, before the menu is open, both
25 experts agree, right, that it would result in errors, that it would result in
26 inadvertent operations because this button is very small. So you might

1 accidentally tap 1712.

2 So, if that's how you read it beforehand, it would undisputedly
3 cause errors. But if the menu --

4 JUDGE LEE: Wait. Wait. I'm sorry. I'm going to stop you. I
5 thought it's not disputed that if you tap on the small button, Hinckley says
6 the same or different action may result as if you tapped on the bezel.

7 MR. WALLIS: Right. The dispute here is whether the tap can
8 occur before the radial menu shows or whether it can occur -- so I guess my
9 --

10 JUDGE LEE: What happens before when the user taps on the
11 small button?

12 MR. WALLIS: So Hinckley doesn't say. But I think it would lead
13 to no action, right? To prevent these inadvertent errors, you would --

14 JUDGE LEE: Doesn't Hinckley say the same or different action
15 may result when you tap on the blue, 1714?

16 JUDGE SMITH: I mean, what you're talking about contradicts the
17 literal disclosure of the reference itself. That's why we're having a hard time
18 following you.

19 MR. WALLIS: I don't believe so because you can still tap on it,
20 right?

21 If you look at Slide 42 which you're on, if you look, it shows two
22 pictures, one before the menu is open and one after the menu is open on the
23 left hand of the slide. After the menu is open, you can still tap on the radial
24 menu icon.

25 JUDGE LEE: But that's not what they're talking about. They're
26 talking about before it opens. They're talking about a tap on the small one

1 before the menu opens up.

2 MR. WALLIS: But it doesn't say before the menu opens.

3 JUDGE LEE: Oh, you mean the -- let's go to your Slide 45, the
4 last three lines on the left.

5 MR. WALLIS: Mm-hmm.

6 JUDGE LEE: It says, in some embodiments, tapping on the radial
7 menu icon triggers a default action.

8 Doesn't that mean it's before the menu opens? It's the radial menu
9 icon which is a small dot.

10 MR. WALLIS: Right. So I guess two points. One, the sentence
11 before it just told you to open the menu, right?

12 And if you look at paragraph 108, it also tells you to touch down
13 on radial menu icon 1714. But in this one --

14 JUDGE SMITH: Well, I mean, it's not --

15 JUDGE SMITH: Sorry to interrupt. But it's not telling you to
16 open it. It's telling you how you can open it. It's not saying the menu is
17 open. It's saying if you want to open it, tap and hold. If you want to do
18 something else, tap. The menu isn't open anywhere in this paragraph.

19 MR. WALLIS: After you finish the sentence, the menu would be
20 open. It tells you how to open the menu.

21 JUDGE SMITH: No, it just says if you want to open it, you can
22 tap and hold it. It doesn't say -- it's not giving you a flow chart of steps to
23 perform some action.

24 It's saying if you want to open the radial menu icon, tap and hold.
25 If you want to do something else, tap it.

26 MR. WALLIS: Well, I disagree that it says if you want to do

1 something else, right? Because it uses the alternatively language before. So
2 it tells you, you can open the menu. For example, it gives you a way to do
3 it. And it says, alternative --

4 JUDGE SMITH: There are several ways of opening it.

5 MR. WALLIS: Yeah, and it says alternatively or additionally. So
6 it's giving you an alternative, right, before you open the menu.

7 JUDGE SMITH: Before you open it.

8 MR. WALLIS: And it doesn't say, right, alternatively you can tap
9 on it.

10 JUDGE SMITH: It doesn't say the menu is open. It says
11 alternatively, the menu can be accessed through tap and hold, period.

12 But it doesn't say the menu at that point is open. You're reading
13 language into this paragraph that's not there.

14 MR. WALLIS: Well, Your Honor, I don't believe it says the menu
15 is closed either is my issue.

16 So I think at best, it would be ambiguous whether the menu is open
17 or closed. And I think --

18 JUDGE SMITH: No, I think this is just giving you an instruction
19 if you want to access the menu how to do it.

20 MR. WALLIS: Yes, I agree with that. But then it says, right -- it's
21 talking about tapping after it tells you to do that.

22 So I think my point is it does not say, right, when the menu is
23 closed that you tap on it. So at best, it's ambiguous.

24 JUDGE SMITH: But does it -- I mean, does it need to? I mean,
25 just from me reading this, is just like a regular person.

26 This is the way I read it. Who would read it as anything other than

1 --

2 MR. WALLIS: Well, Your Honor, our expert read it that way.

3 JUDGE SMITH: Okay. What evidence did he use to support that
4 opinion?

5 MR. WALLIS: Well, he's telling you. So if you take my position
6 that it's ambiguous, right, it doesn't say if it's closed or it doesn't say if it's
7 open, right? Let's look at it through a practical --

8 JUDGE SMITH: I'm asking you what evidence did your expert
9 have to support his position?

10 MR. WALLIS: Sorry, he's reading that paragraph and interpreting
11 it.

12 JUDGE SMITH: So it's his opinion with no corroborating
13 evidence?

14 MR. WALLIS: Well, I think he provides a detailed explanation on
15 it.

16 JUDGE SMITH: Based on what? His opinion?

17 MR. WALLIS: Yes.

18 JUDGE SMITH: With no corroboration?

19 MR. WALLIS: Certainly, I don't think there's any evidence that
20 you can point to that says Hinckley is saying one way or the other.

21 JUDGE SMITH: Well, it's just your expert. You're just asking us
22 to take your expert's word for it.

23 MR. WALLIS: Yes. So I guess in addition to just taking his word
24 for it, he provides explanations of why he thinks that, right?

25 Because it would cause errors if you interpret it Petitioner's way.
26 And also if it's --

1 JUDGE SMITH: What evidence does he have to show it would
2 cause errors?

3 MR. WALLIS: Well, both experts agree that it would cause errors.

4 JUDGE SMITH: And how many errors would it cause? Would it
5 cause a lot, a little, somewhere in between?

6 MR. WALLIS: It would cause --

7 JUDGE SMITH: How many errors would it cause?

8 MR. WALLIS: -- more than it would if you interpret it --

9 JUDGE SMITH: If you touch it 100 times, would it cause 10
10 errors, one error?

11 I mean, I understand your point that it would cause errors. But
12 maybe this is something Hinckley was willing to live with or Hinckley never
13 implemented it. It sounds like you're modifying Hinckley to improve it so it
14 works better. But Hinckley itself -- anyway.

15 MR. WALLIS: Your Honor, your point is taken. I would say
16 we're not modifying it. We're reading it in a way that it wouldn't have these
17 detriments into it.

18 JUDGE SMITH: Okay.

19 MR. WALLIS: And one more quick thing before I go. We're
20 talking about practically if it's doing the same thing, right, if the 1714 tap is
21 doing the same as 1712, then it provides no additional functionality. It blurs
22 the spatial distinction between why the object exists.

23 Now if you look at it where the menu is open, then it provides
24 actual functionality because once this menu opens, you can no longer tap
25 1712 because it's covered by a radial menu.

26 And if you can look at the picture on Slide 42, right? Once the

1 menu is open, you tap and hold and then it's open. You can no longer select
2 the 1712. You're prevented from doing so.

3 But if that 1714 performs the same function, then you can now tap
4 it and access that function without having to go back and reset the menu
5 process. So that, to me, makes more sense than it doing essentially a
6 superfluous function of doing the exact same thing.

7 JUDGE LEE: Counsel, it's Judge Lee. I'm not sure why we're
8 talking about the menu being open. Their case doesn't depend on the menu
9 being open at all. They're saying before the menu is open, there is a blue
10 dot. You tap on it. Something happens. If you tap and hold on it,
11 something else happens. There's no opening up the menu. So why are you
12 focusing on things that happen after the menu opens?

13 MR. WALLIS: So for their theory to hold, that tap must be before
14 the menu is open. And if it happens after, then it doesn't meet the claim
15 anymore because you would have to tap and hold and then tap again. But if
16 nothing happens before like we've testified, then it wouldn't perform
17 different functions.

18 JUDGE LEE: No, but when you tap on it, it's the same as tapping
19 on the larger bezel. And then if you tap and hold on it, it opens up the menu.
20 So doesn't that meet the claim?

21 MR. WALLIS: Yes, if you read Hinckley that way, but we don't
22 dispute that. We just said a POSITA would not read it that way.

23 JUDGE LEE: Okay.

24 MR. WALLIS: So I think we can move on. So even if you agree
25 that their theory is not new and even if you agree if their theory is correct,
26 that's all they show is two independent pieces of prior art that would

1 allegedly teach the claimed elements.

2 But KSR tells us that is not enough, right? There must be some
3 motivation. There must be some explanation or reasoning how or why a
4 POSITA would've modified these two teachings in order to meet the claims.

5 Now if you look at Slide 49, it provides only one reason for
6 integrating this radial menu into Ahn. And you'll see there's a section in
7 their petition from 24 to 26 that talks about the reasonings for the Ahn-
8 Hinckley combination.

9 The first, as you'll see in the top left, is that -- focusing on the side
10 menus, right? And the bezel menu is described in Hinckley being similar.
11 So this is talking about -- and if you read the petition at 24 and 25, at no
12 point does this discuss the radial menu. This is talking about bezel menus,
13 bezel gestures, things that are not the radial menu. It does not use the words
14 radial menu at all. So this provides no motivation or reasoning that I can
15 pick out as to why you would take this radial menu.

16 Now they give us a second reason which you'll see on the right on
17 Slide 49, right? They say the similarity of essentially the menus of Ahn and
18 the similarity of the menus of Hinckley, right?

19 Based on those, a POSITA would've understood that implementing
20 or utilizing the techniques described in Hinckley, e.g., implementation of the
21 radial menu would've been a simple substitution of one known element for
22 another to obtain predictable results.

23 But the issue here is that there's several pieces of evidence. I'll
24 direct you maybe backwards a bit to Slide 24. The radial menus were
25 known to be unpredictable, right? We have a POSITA at the time in Exhibit
26 2012, Andreas Schuderer, talking about how applications for pie menus are

1 rare, right? One shouldn't be tempted to replace ordinary links or navigation
2 with pie menus.

3 And it talks about where it can't be used, right? Don't use pie
4 menus, right, if they're near a border where a part of the menu may be cut
5 off. Don't use pie menus if they can't be placed around the mouse cursor,
6 right? Possible applications are not on ordinary not-particularly-interactive
7 web sites. So it's telling you that you can't just simply place this.

8 And if we look, I think the most important piece of evidence is
9 Mozilla Labs, Exhibit 2009. This is a blog post where a POSITA is trying to
10 do exactly what they say. He's trying to change a radial menu into a radial
11 one. And he says, at the end of it, I don't have a good solution to do this,
12 right? He cannot do this in a way that would actually make it work. So he's
13 trying to make a simple substitution, and I think it's small. But if you see the
14 first sentence there, just replacing a rectangular context menu with a pie
15 menu doesn't magically make everything better. In fact, it introduces a new
16 set of problems that need to be solved. He tries an iteration. "Give it a try.
17 Annoying, isn't it? I don't have a good solution to this yet."

18 JUDGE LEE: Counsel, it's Judge Lee. You may have something
19 there. I want to probe this some more. Axonics language says at least where
20 it relies on the same embodiment.

21 So if you're able to persuade us that between the petition and the
22 reply they have switched embodiments, then you may win on this issue. So
23 can you tell us whether they have changed reliance on -- in the petition, they
24 relied on one embodiment but in the reply presentation, they're actually
25 relying on a different embodiment, not the same embodiment.

26 MR. WALLIS: Right. So Your Honor, that's what I was talking

1 about with the may or may not language. That's why that was in there
2 because at first they're relying on 107 where, in this embodiment where it
3 may be different, right? The default gesture may be different. And now
4 they switched to a totally mutually exclusive embodiment where it may be
5 the same. And so that's --

6 JUDGE LEE: The same thing may be different? It's the same --

7 MR. WALLIS: Or may not the same. Sorry. It's confusing
8 because it's using a negative limitation. But one is the same and one is the
9 different. So in the reply, they're only using it where, right, the touch of the
10 1714, it produces the same function as the touch on 1712.

11 JUDGE LEE: Sounds like such a small difference. One is may or
12 may not be different. And now you're saying, well, it's changing to a
13 different embodiment when they say definitely they pick the different route.
14 Is that switching an embodiment?

15 MR. WALLIS: Well, they -- I mean, they excluded that language
16 when they did it. They, right, may or may not be different. They chose the
17 one where it was different first by excluding that language. And then in the
18 reply, they're saying, oh, it's actually the same.

19 JUDGE LEE: Does that rise to the level of changing embodiment?
20 Or is that really the same embodiment?

21 MR. WALLIS: They're mutually exclusive embodiments.

22 JUDGE SMITH: Are they, though? The word may, if I say, I may
23 meet you outside versus I say, I may not meet you outside, have I really said
24 anything different? Aren't those two statements the same?

25 MR. WALLIS: I think in the context of a patent application, I
26 don't think you're ever going to have something that definitive.

1 JUDGE SMITH: So if the reference says, it may do this versus it
2 may not do this, I mean, can't we read from the normal meaning of the word
3 may that it can do it or it cannot do it? It can do both. It may do it. It may
4 not. I mean, you're trying to draw a distinction between may and may not.

5 MR. WALLIS: Sorry to interrupt.

6 JUDGE SMITH: No, go ahead.

7 MR. WALLIS: Well, they're mutually exclusive embodiments.
8 You can't have both, right? It can't do the same thing and different thing at
9 the same time.

10 JUDGE LEE: Why isn't the embodiment may or may not, either
11 way? That's the embodiment.

12 MR. WALLIS: It doesn't make sense. So if you tap it, it can't do
13 something both different than 1712 and --

14 JUDGE LEE: I understand. But can't they have a -- isn't this a
15 broader embodiment where it doesn't care? You have a tap and you can
16 make it do the same or you can make it do something different. That
17 broader concept is the embodiment.

18 MR. WALLIS: I guess that doesn't make sense to me. I guess the
19 broader concept of the embodiments because they are two different
20 embodiments. So I'm not sure that, to me, that would be an interpretation
21 that I would make.

22 JUDGE SMITH: But either way when you tap it, whether that tap
23 performs the same function as the bigger icon or not, it still performs the
24 function that's different than tap and hold, either way.

25 MR. WALLIS: Well, if you tap it and the radial menu comes up,
26 then it doesn't perform and it doesn't --

1 JUDGE SMITH: And if we agree with you that tap causes the
2 radial menu to come up. If we don't agree with you on that point, if we find
3 that the reference discloses that the tap and hold brings the radial menu up
4 and tap performs some function other than bringing the radial menu up, then
5 it doesn't matter, does it?

6 MR. WALLIS: Correct. But I think Hinckley doesn't say any
7 other function that it would do. The radial menu icon is to bring up the
8 radial menu.

9 JUDGE SMITH: Through the tap and hold?

10 MR. WALLIS: Yes. But if you want to say that tapping performs
11 an action, why would it not bring up the radial menu? It doesn't say it
12 performs anything else.

13 JUDGE SMITH: Why would it require tap and hold if the tap is
14 enough?

15 MR. WALLIS: Well, it gives you three different examples of how
16 to do it. So it tells you, you can hover above it, you can pull it down, or you
17 can tap and hold on it. So it's already giving you options. If a tap is another
18 option, I think that's entirely consistent. It doesn't say it does anything else.

19 JUDGE SMITH: It may be consistent, but it's not disclosed in the
20 reference. You're just reading that into the reference yourself.

21 MR. WALLIS: So I think one other thing is if there's any
22 ambiguity in the reference, this is Petitioner's burden. It's not our burden to
23 prove --

24 JUDGE SMITH: But there's not ambiguity. The reference doesn't
25 say tap brings up the radial menu. That's not ambiguous.

26 MR. WALLIS: Well, it just says it performs a different action than

1 the tap on 1712. It doesn't say what it is. It doesn't say it's different than
2 bringing up the radial menu --

3 JUDGE SMITH: Okay.

4 MR. WALLIS: -- because 1712 doesn't bring up the radial menu.
5 So if you tap on -- if it is different, right, then it would -- bringing up the
6 radial menu must be different than a tap on 1712 necessarily.

7 JUDGE SMITH: Okay.

8 MR. WALLIS: So I think that was my point. So that was my
9 point about the embodiments that I was trying to bring up, Judge Lee.

10 JUDGE LEE: Thank you.

11 MR. WALLIS: And so going back to the simple substitution
12 argument, if you go to Slide 49. We had just talked about how this Mozilla
13 Labs document tried to replace a radial menu or a rectangular menu with a
14 radial menu and found that there was no good solution. I think that's
15 external evidence other than what our expert says, right?

16 You don't want to just rely on his opinion. But there are several
17 documents here that say you cannot just simply substitute a radial menu for a
18 rectangular one. But this is exactly what Petitioner is asking you to do for
19 their sole motivation to combine these two things, a simple substitution of
20 one known element for another to obtain predictable results.

21 Now if we do a simple substitution and actually look at it, we'll see
22 that it's not a simple substitution. It doesn't work. So if you'll look to Slide
23 51, we had talked about this right-hand menu. This brings up a submenu
24 setting. You'll see on the left-hand side there's an alarm setting menu and on
25 the right-hand side, there's a wallpaper menu. Now if you want to look in
26 detail, our expert declaration at 115 through 116, this describes in very detail

1 why this would not work.

2 But essentially, you cannot implement this a.m., p.m., 1 through
3 24, 1 through 12, 01 through 60 in a radial menu. It's simply not possible to
4 do. Again, with the wallpaper, you cannot right? This is multiple
5 wallpapers that have the scrollable icon where you can scroll through several
6 different wallpapers that are housed in the memory. This can't be
7 implemented in a radial menu in any functional way that's shown in the art.
8 It simply would not work.

9 So this is the first menu, right? These items 420c are the first
10 menu items where the contact must be on. But it would make no sense to
11 have these be radial menus. It would not perform the functions that they're
12 set up to perform. And Ahn specifically says that these right-hand menus
13 are shortcuts the user can do to easily select kind of these options that he
14 uses most of the time. And so the way that these are displayed is a benefit to
15 Ahn. But if you use a radial menu, you cannot use this functionality.

16 Now Petitioner also points further down in its combination -- this
17 is Slide 45 -- 49, sorry. Petition at 52, it's talking about the radial submenu
18 is largely consistent with the menu 1700 and 1715. And so now if we jump
19 back to Slide 52 and we talk about 17, the left menu that they're talking
20 about, we find that implementing a radial menu would significantly limit the
21 functionality of these menus if it could be implemented at all, right?

22 They're right here on the left-hand side. There are four bullet
23 points that Dr. Rosenberg talks about, again, in explicit detail, if you want to
24 look at paragraphs 118 through 125. He goes through and weighs out every
25 step with evidence and tells you why he thinks that it's this way. And it's not
26 just his opinion, right? He's citing external evidence that supports it, right?

1 It lacks the functionality to display further submenus. So if you look, there's
2 answer options with an arrow.

3 And Ahn tells us that brings up another submenu, right? If you
4 want to implement this as a radial menu, you can't do it or it's going to cause
5 significant other modifications that aren't explained in the petition. The
6 cramped spacing would lose the benefits of Hinckley's radial menu.

7 So you might read that there are -- we don't disagree that there are
8 benefits in certain contexts, right? And the key word is radial menus have
9 benefits in certain contexts. They are not global benefits that apply to every
10 single implementation or radial menu. They are specifically tailored, and
11 that's why the applications are rare.

12 That's why a POSITA at the time of filing tried to implement, tried
13 to substitute a radial menu and found no good solution. Because the benefits
14 don't necessarily transfer, because things happen that are unpredictable that
15 don't make it work, right?

16 It wouldn't have been appropriate. You wouldn't have been able to
17 access the icon 1700 because your radial menu would've covered them. So
18 it's limiting the functionality severely. It is not a simple substitution.

19 And additionally, it's unexplained. They simply say it's a simple
20 substitution, but what does that mean? How does it actually work? We've
21 shown you two ways, right? Both menus that they've talked about is -- one
22 is the claimed first menu items on the right-hand side and the other is the
23 menu that they say it's parallel to. But it doesn't work with either of those
24 menus.

25 So we're showing, right, that this is not a simple substitution. You
26 don't just plug in the radial menu and you're good to go. You have to

1 actually show how it would work. But they do not do that.

2 There is no genuine analysis in their petition, in their expert
3 declaration, in their reply and their expert declaration reply. At no point do
4 they actually articulate a single combination which would work to meet the
5 claims by implementing a radial menu. It's just not there.

6 Now instead of rebutting, right, the facts that I just showed how it
7 would lose functionality, how it wouldn't work, they simply say, well,
8 obviousness does not require bodily incorporation. And we agree with that.

9 But their modification was a simple substitution. And what we did
10 was a simple substitution, right? They did not articulate what their
11 substitution was. So we substituted the radial menu for Ahn's menu. And
12 we showed that it wasn't a simple substitution. So we're simply responding
13 to their motivation that it was simple when expert testimony and external
14 evidence shows it was not simple.

15 Now they cite on reply to several different things about how the
16 benefits of other things would apply to radial menus. They talk about
17 gestural mode which doesn't apply necessarily to radial menu. They talk
18 about bezel gestures which are independent and not related to radial menus.
19 They say visual guidance in the novice mode on the reply would be a benefit
20 of why to use that.

21 And if you look at our Slide 57, visual guidance in the novice
22 mode is not anything that is groundbreaking. Everything has visual
23 guidance, right? Ahn already has visual guidance.

24 You wouldn't simply implement a radial icon just because it also
25 has visual guidance. Every graphic user interface has visual guidance to
26 some extent. So this can't adequately explain why a POSITA would've

1 implemented a radial menu into Ahn.

2 Now Petitioner also cites to marking menus as allegedly showing
3 benefits that would be implemented into the radial menus. If you look to
4 Slide 59, right, we have our expert saying that radial menus are distinct from
5 marking menus, and we have Exhibit 1031 that they cite to where they cite
6 to these advantages of marking menus.

7 But here it's showing you, right, in the highlighted portion marking
8 menus have significant advantages over regular pie slash radial menus.

9 So these marking menus that they're touting as having advantages
10 that would somehow apply to Hinckley's radial menu do not apply to regular
11 radial menus, right? It's saying these marking menus are advantageous over
12 regular radial menus like Hinckley. So how are those advantages applying
13 to Hinckley's radial menu when you implement it?

14 There's simply no explanation and no discussion of how any of the
15 advantages of these marking menus would apply. If you look to Slide 60 it
16 will show some examples of the marking menus that we're talking about.
17 But these are entirely different, entirely different from the radial menu of
18 Hinckley, right? We're not trying to pull hairs here. We're not trying to be
19 cute here.

20 They do not prove any analysis or explanation to show why it
21 would've been a simple substitution or why any benefits of any of these
22 marking menus would apply to Hinckley's radial menu when implemented
23 into Ahn. And because of that, they cannot show obviousness. They cannot
24 establish obviousness.

25 All the evidence points to it not being a simple substitution, but
26 that was what Petitioner relied on for their motivation to combine.

1 And if that is not true, right, if that premise fails, then all we have
2 is two independent disclosures of alleged claim functions without any
3 explanation as to how or why a POSITA would've combined them. If we
4 look to, I think, a particularly relevant case on Slide 54, this Visa, Inc. which
5 is penned by Judge Benoit who was on this panel beforehand, is talking
6 about the distinction between bodily incorporation and this need to actually
7 explain and do your work, right?

8 So proof of bodily incorporation is not required. But the
9 satisfactory explanation of how the combination of the references is
10 supposed to work is necessary to support a conclusion that a POSITA
11 would've been motivated to make the combination and reasonably expect
12 success in doing so. But that is not in the record here. And again, that's a
13 PTAB decision. But it is quoting the Personal Web Techs Federal Circuit
14 case.

15 And I think that will conclude -- sorry, one more thing unless you
16 have any questions. I'm going to move to Claim 101 real quickly. I'll give
17 you the slide number in just a second.

18 So at Slide 76, and so once you're there, you'll see that I had talked
19 about this a little bit at the very beginning where there is this 101.e.iv. This
20 101.e.i through iii are the same as we talked about for Claim 1, but it adds
21 this additional limitation where -- and you'll see it highlighted in yellow.
22 The first duration of contact being detected to include a slide gesture
23 component after the first duration of contact on the particular application
24 icon is detected to surpass the threshold. So what we have is after, right, the
25 threshold is surpassed and it performs a second operation, then we're going
26 to have a slide gesture component involved.

1 Now what Petitioner cites to, if you look on Slide 77, is 108 of
2 Hinckley that we already talked about. Now we know -- I had made a
3 previous argument about this before that this is not related to that.

4 We know here it talks about 108, right? We previously talked
5 about a tap and hold would open the radial menu, correct? So once the
6 radial menu is open, right, it's talking about what's going to happen, right?

7 So we tapped and hold and then 108 is starting. Once the radial
8 menu is exposed, the user can access various functionalities or command by
9 touching down on or near the radial menu icon and stroking it a particular
10 direction. So this as it's described, you have to tap and hold. Then you have
11 to lift your finger up, touch back down, right, touching down, and then
12 making a stroking direction.

13 And Dr. Terveen, their expert, confirms this, right? In the
14 highlighted section in his deposition, the user's finger was not in contact
15 before because it says you have to -- the user is now touching down. So he's
16 saying you have to lift your finger. But again, this is not -- as we talked
17 about at the very beginning, this is not the same contact. This is a different
18 duration of contact. You tap and hold. The radial menu appears. You lift
19 up, you tap down, and swipe. This is not the same duration of contact that is
20 required in Claim 101.e.iv where the duration of contact -- we talked about
21 the same duration of contact being detected to include a slide gesture after
22 the duration of contact is passing the threshold.

23 So you have to wait and then slide down. But Hinckley doesn't
24 disclose that. Hinckley does -- although the Petitioner doesn't cite to it,
25 Hinckley described an expert mode. That's on Slide 78. But this is a quick
26 --

1 JUDGE SMITH: You're well into your rebuttal time.

2 MR. WALLIS: Yes, Your Honor.

3 JUDGE SMITH: If you want to keep going, I won't stop you, it's
4 up to you.

5 MR. WALLIS: That's all I had. And unless you have any specific
6 questions on the blurring limitation, I'll save it and touch on it in rebuttal.

7 JUDGE LEE: It's Judge Lee. Before you sit down, I want to ask
8 you a very quick question. If you have a quick answer, then answer it.
9 Radial icon, the only distinction from regular icon menus is that it's circular,
10 pie-shaped. That's all, right?

11 MR. WALLIS: No. So do you want me to explain?

12 JUDGE LEE: Is it going to be a long answer?

13 MR. WALLIS: Essentially, well, it is circular. But it's also
14 depending on how you select it. So you're swiping in a direction and the
15 angle you're choosing is what's giving you the icon. So it's not like a tap on
16 a specific menu, but you're going in a direction and the angle that you're
17 moving is what's going to --

18 JUDGE LEE: Angular movement?

19 MR. WALLIS: Yes.

20 JUDGE LEE: Okay. Thank you.

21 MR. WALLIS: Any other further questions, Your Honor?

22 JUDGE SMITH: No.

23 MR. WALLIS: I'll reserve the rest of my time.

24 JUDGE SMITH: Okay. Thank you. We asked you a lot of
25 questions. So I'll add some extra time to your rebuttal. I think, Petitioner,
26 you asked for 20 minutes' rebuttal time. Is that right? Okay. You may

1 begin when ready.

2 MR. HOLT: One note at the outset, I believe I heard my colleague
3 mention that he might talk about the progressive blur limitation in his
4 rebuttal. We've not heard that and would then not have an opportunity to
5 respond to what he said.

6 If Your Honors want to hear from him on that, we'd simply request
7 a short amount of time to respond to what he says about it.

8 JUDGE SMITH: Okay. Yeah, that's fine. Are there no
9 objections?

10 MR. WALLIS: No, no objection.

11 JUDGE SMITH: Okay.

12 MR. HOLT: With that, I will begin with the claim construction
13 issue. I think it might be useful to consider an example where this apparatus
14 is operating. So we can have an example where you have your screen open
15 and you perform first contact with the first duration.

16 And that is the detecting step you see here. Now what these steps
17 say happens is that in response to that first duration of contact on at least one
18 of the one or more first menu items being detected to not surpass the
19 threshold performing a first operation. So let's assume that first contact that
20 we have is a tap. Okay. That's going to have a short duration that's below a
21 threshold. So if my first contact is a tap, I've detected the contact and then
22 the contact is detected to be below the threshold and I'm performing an
23 operation.

24 I do nothing with respect to the third limitation. My contact is not
25 above the threshold as the third limitation says. So I don't do the second
26 operation. The same would hold true for a long tap and hold. If I have a

1 menu item and I have contact with it, it's going to have a duration. And if
2 it's tap and hold, it's a long duration. And let's say it's above a threshold. I
3 will have met the first step of detecting that there is a contact that has a first
4 duration. The first step talks about what happens when I'm responding to it
5 being a long contact. That's not the case here. So I'm skipping past that to
6 the next limitation that tells us what we do in response to that contact being
7 above the threshold which it is and we're performing a second operation.

8 It's not possible for either of those durations of contact to satisfy
9 both of those in response to limitations. And if you look at Slide 39 -- I'm
10 sorry, 14, excuse me, 14, that's exactly what is happening in the example we
11 provide at the bottom. It's just that you're doing this with respect to multiple
12 menu items which they admit their claim allows.

13 There can be no instance where a single contact actually satisfies
14 both of those limitations. And our example shows that the device of the
15 combination, even if you accept that the icon 1712 and the radial menu icon
16 1714 are indeed completely separate from one another. We are showing that
17 a tap on one is detected. It's detected via tap, and you get an operation
18 consistent with that tap.

19 And then in another instance, you're detecting a tap and hold on
20 1714. And that tap and hold is detected. There is actually logic within the
21 apparatus that knows it's a tap and hold. And that's what Hinckley describes.
22 And then as a result of that tap and hold, you get a second operation.

23 And so if Smith had wanted this claim language to be about two
24 possible options for a single comparison, they could've written in that way.
25 They could have written this claim language in a much clearer decision tree-
26 like format that they've talked about in their POR. It could have been

1 detecting the duration and then comparing that duration to the threshold and
2 then based on that comparison doing these operations when you have
3 different possible outcomes.

4 But they didn't claim that comparison to a threshold step. And
5 they didn't then have a reference back to that same comparison step for each
6 of the two possible outcomes. This could have been written differently.
7 Now we're not arguing that a contact on one menu item having two different
8 possible options based on two different thresholds is also within the scope of
9 the claim. It's simply that this claim language being what it is, is broad
10 enough to encompass both. Any questions about that?

11 JUDGE LEE: Counsel, it's Judge Lee. Before you wind up I'd like
12 to hear about the benefits about a radial menu icon and why Ahn would
13 benefit from including that.

14 MR. HOLT: Certainly, Your Honor. And happy to start there. So
15 what I heard my colleague say is that the petition relies solely upon simple
16 substitution, and that's not true. There is a substitution argument. But there
17 is also another motivation. And that motivation is the use of the novice and
18 expert modes described by Hinckley.

19 And Hinckley describes these novice and expert modes with
20 respect to both the actual pull out menu, like the one in Ahn, but also with
21 respect to the radial menus. You can see that in paragraph 110 of Hinckley.
22 It talks about how radial menus can be implemented to include both novice
23 and expert mode. And we talked about that, novice and expert mode, being
24 the motivation for utilizing Hinckley's menus and radial menus in the
25 petition.

26 So it wasn't just about simple substitution. It was Hinckley telling

1 us benefits about using novice and expert modes and wanting to build those
2 into Ahn which does not talk about novice and expert modes. Does that
3 make sense, Your Honor?

4 JUDGE SMITH: So why -- let me ask you this. Patent owner
5 made some points about these radial menus are difficult to work with. And
6 then I see Hinckley here saying you use them for novices. Can you -- so it
7 gives us one sentence. In novice mode, the radial menu can be fully exposed
8 to enable users who are unfamiliar with its accessible functionalities or
9 commands to be visually guided through the selection process. But that's
10 true of the non-radial menus also. They would also be visually exposed,
11 wouldn't they?

12 MR. HOLT: They would in the novice mode. Yes, Your Honor.
13 But it's the expert mode of the radial menu that is not possible with a linear
14 menu.

15 So if you look at Ahn's linear menus, imagine that you tap on one
16 of the available options and another menu pops out. There's a figure in Ahn
17 that shows kind of a two-level menu. Now if your second-level menu is a
18 linear menu as opposed to a radial menu as we see in Hinckley, you have to
19 touch it and then you have to find your menu item even if you're an expert.
20 And if your menu item is down at the end of a very long list, you're going to
21 have to go all the way down to the end of that list to pick your option.

22 The difference with radial menu -- and this is talked about even
23 their own evidence. You can see it on Slide 21 -- our Slide 21. Their own
24 evidence that they're citing to explains why radial and pie menus are good.
25 They allow for faster interaction of the user. You are able to hit any one of
26 those menu items at the same speed.

1 I don't have to go to the bottom of the list. No matter which one I
2 see, I can select it just as fast as any other. Whereas with a linear menu, if
3 my option is at the top, sure, it's quick. But if my option is way at the
4 bottom, it's not fast.

5 JUDGE SMITH: Let me ask you this. Patent Owner made these
6 points about if you look at the menus in Ahn and you try to implement them
7 using radial menus, it wouldn't work.

8 MR. HOLT: First off, I disagree with that, Your Honor. I don't
9 think there's anything explicitly in Ahn in its discussion of its menus.

10 JUDGE SMITH: Can you show us a menu in Ahn that would
11 work with a radial menu?

12 MR. HOLT: So I think initially what I would say and I can give an
13 example, for instance, Figure 3c. Figure 3c shows a menu. I believe it's
14 labeled 340, and it's got four options. Their main argument is that all of the
15 menus in Ahn have too many options for a radial menu. It also assumes, by
16 the way, that in a combination, you have to be able to implement Ahn's exact
17 menus as they're shown even though Ahn talks about them as examples.
18 And so there's nothing in the law that requires that in the combination
19 Hinckley's radial menu be able to perform the exact function of the menus
20 that we see in Ahn.

21 But even if that were true, the main issue that they talk about is
22 there's not enough spaces on a radial menu to be able to actually create any
23 of these menus. But there are menus, examples shown with fewer options,
24 even if that were required. But again, Your Honors, that's not required of the
25 law. This isn't about bodily incorporation.

26 What they are describing is, in fact, bodily incorporation. It is that

1 you would have to be able to recreate the exact menu shown in the figures of
2 Ahn with Hinckley's radial menu. And that's not the combination nor the
3 law of obviousness.

4 JUDGE SMITH: But you would agree there are disadvantages to
5 radial menus?

6 MR. HOLT: Absolutely, Your Honor, as there are disadvantages
7 to linear menus. And our evidence that we cited in the reply actually
8 provides specific discussions of the disadvantages of linear menus, one of
9 them being the long time it takes to select options that are low on the list.

10 And so there are disadvantages to both and there are advantages to
11 both. And what we cited on Page 1 of our reply was the Intel case. And the
12 Intel case tells us it's not necessary to show that a combination is the best
13 option, only that it is a suitable option.

14 And the evidence, even their evidence as we see on Slide 21, tells
15 us it's a suitable option. The very reference that my colleague was speaking
16 about, 2009 when he was suggesting that this POSITA which, by the way,
17 we have no idea who the author of this blog post is, could not implement pie
18 menus. It starts out with the reason why pie menus are good. There are
19 instances where they're good, and there are many papers that show that.
20 And we've included a number of them in the reply.

21 JUDGE LEE: Counsel, it's Judge Lee. Let's say you have a linear
22 menu and you have a long list of items. How would that be implemented on
23 a radial menu?

24 MR. HOLT: So if you were implementing a simple radial menu,
25 you wouldn't necessarily be able to implement all of those options if it was a
26 single layer radial menu. We've not gone into this because this level of

1 implementation detail isn't required for the combination. But assuming you
2 did want to, in fact, have long lists of options, there are papers in the
3 evidence that we supplied with the reply that actually show tiered radial
4 menus.

5 So you'd actually be able to maybe categorize your items into
6 categories. And you'd select a category which would, in turn, open up
7 another radial menu. And so you can actually stack your radial menus the
8 same way you stack --

9 JUDGE LEE: So you simultaneously see all the items even with
10 the radial?

11 MR. HOLT: That's correct. And in fact, honestly, depending on
12 the size of your screen, your list menu, you might not be able to see all of
13 your items at once. That being said, again, I would suggest that it is a
14 known disadvantage of radial menus that being able to select from, say, 30
15 options on a single screen is not available.

16 You only have a certain number of slots. But again, that gets
17 replaced by the speed -- the equal speed with which you're able to select
18 them. And again, the papers talk also about how that selection process when
19 you see it is very intuitive to the user as well. And so again, there are
20 advantages to pie and radial menus. There's advantages to linear menus.
21 There's disadvantages to both as well. And a POSITA would have been able
22 to choose between them depending on the context of what they were trying
23 to implement.

24 JUDGE LEE: Thank you.

25 MR. HOLT: I believe we did have some discussion of the Axonics
26 case. And Judge Lee, I believe you were correct when you categorized

1 Axonics as being for the proposition that you get to respond to the claim
2 construction.

3 I have a quote from it. There is no rule, for example, requiring a
4 petition to describe all possible or reasonable claim constructions and to
5 present invalidity theories under those constructions. We continue to
6 recognize that a Petitioner is entitled under the APA to respond to new
7 construction arguments made by Patent Owner.

8 The distinction of that case is that in its petition, Petitioner adopted
9 Patent Owner's construction and applied against that construction and then in
10 the reply change to a different construction. So the Petitioner changed. Here
11 we have not changed. Our arguments about the plain meaning of this claim
12 language is as I've described today, as we've described in the reply, and as
13 we applied the argument in the petition.

14 JUDGE LEE: I'm sorry. You've kind of changed, right, because
15 now you're going to say, well, even under that construction, I still went
16 under the I'm pressing the blue button tap and then I'm pressing and hold.
17 So that wasn't the position originally.

18 MR. HOLT: So the key, Your Honor, is that the construction has
19 not changed. Our advocated construction has remained the same
20 throughout. And that's what Axonics is talking about that as long as we're
21 not advocating a different claim construction, we are allowed to respond to
22 their construction which is why we're allowed to point to another theory or
23 again --

24 JUDGE SMITH: Another mapping, I guess, would be --

25 MR. HOLT: Yes.

26 JUDGE SMITH: -- more accurate to describe what you're doing.

1 You're mapping to the 1714 icon for both the tap and the tap and hold
2 whereas in the petition, not so much.

3 MR. HOLT: What I would say, Your Honor, is that the petition
4 did not specifically call out what would happen if you tapped on 1714. But
5 that mapping does say that a tap on 1712 gives you a function.

6 JUDGE SMITH: But let me -- I want to make sure you respond to
7 what Patent Owner is saying because their point is -- what they're advocating
8 by saying that the claims require a common starting point is not a claim
9 construction. That's the plain meaning of the claim. They're actually not
10 introducing a new claim construction. And therefore, the petition should've
11 already had this mapping for the contact that's both below and above the
12 threshold.

13 MR. HOLT: I would say I respectfully disagree that this isn't a
14 claim construction issue. Yes, both parties are talking about the plain
15 meaning. But we're disagreeing on what the plain meaning is, which then
16 makes this a claim construction issue. And if you look at their POR, all of
17 this is described under a section called claim construction. Use their own
18 language from the POR. This is a matter of claim construction. They
19 believe that you have to be able to have to be able to have a common starting
20 position. We're saying that's not the plain meaning of the claims as I've
21 explained today as we explained in the reply. And that is a claim
22 construction issue.

23 JUDGE LEE: It's Judge Lee. Can you respond to their point that
24 under Axonics, you're okay if you don't change embodiments, but by going
25 to a different mapping, you have changed reliance onto a different
26 embodiment. Can you respond?

1 MR. HOLT: My understanding of Axonics -- and I don't have the
2 full case in front of me to be able to point to the right parts of it. But my
3 understanding is that you cannot suddenly change to a new embodiment to
4 hit a new claim construction that you've proposed. And you can't change to
5 a new embodiment to meet the claim construction you originally proposed,
6 right? You have to stick with the theory you had for your construction. But
7 where Patent Owner has introduced a new construction and they talked
8 about consistency, sure, it's consistency, POPR, institution, POR, that all
9 happened after the petition slide. We never had an opportunity to see this
10 idea of a common starting place until after we had filed the petition.

11 And it's my understanding that Axonics does not stand for the
12 proposition that in responding to a new claim construction by Patent Owner,
13 you cannot change to a different embodiment. And again, I do not believe
14 -- we do not believe that we are pointing to a new embodiment.

15 JUDGE LEE: Yeah, can you tell me about that, why -- you haven't
16 changed to a different embodiment? But also what's interesting what you
17 just mentioned because if what you just said is right, then Patent Owner can
18 come up with some construction.

19 And then you can completely jettison your petition and start the
20 petition all over again at the stage of the reply simply by saying, well, they
21 just proposed something new and I can go to whatever new evidence and
22 new embodiment I'd like to as long as I stick with the same reference. It
23 doesn't sound right.

24 MR. HOLT: I understand your point, Your Honor. I think there
25 probably are edge cases where reasonable minds looking at the facts of that
26 specific case would understand that what's being done in a reply is truly so

1 different and so disjoint from what was in the petition as to be this change
2 that you're talking about.

3 However, I don't believe that's this case. And I don't believe it's
4 the vast majority of cases that are addressed by the Federal Circuit. Here
5 again --

6 JUDGE LEE: I know -- you haven't done that here. But I'm just
7 responding to what you said which is pretty broad.

8 MR. HOLT: Yes, understood. I don't know of a case where the
9 Federal Circuit has dealt with such a vast change. If the possible claim
10 construction was so different and required such a different mapping in the
11 reply, I suppose I'd ask the question of how did that get instituted in the first
12 place, right?

13 If what they applied to the claim was so out in left field, I don't
14 know that you'd often find that you've been instituted and given an
15 opportunity to make --

16 JUDGE LEE: I won't waste your time. It's not here or there.

17 MR. HOLT: Understood.

18 JUDGE LEE: But what is here is, have you turned to a different
19 embodiment? It sounds like a small difference to me. But they're saying it's
20 a new embodiment that you've relied on.

21 MR. HOLT: It's not, Your Honors. Again, when you look at the
22 petition, what was talked about was a tap on 1712 and a tap on 1714.
23 Admittedly, there was no specific discussion of a tap on 1714. But the
24 mapping and explanation provided in the petition was applying Hinckley's
25 discussion of a tap and hold on 1714 and a tap on 1712.

26 And all we're doing with the reply is saying, you know what?

1 When we said a tap on 1712, that actually, Hinckley tells us, can be all of
2 1712, including the radial menu icon 1714. Now they, again, made a huge
3 discussion of that sentence from the petition.

4 And Your Honors walked through it and we walked through it
5 earlier. Again, put it in context and what we're talking about there is a tap
6 and hold on the radial menu icon. Nothing in the petition limits what
7 happens when you tap on a radial menu icon.

8 JUDGE LEE: Thank you.

9 MR. HOLT: One other quick note. I know I'm over.

10 JUDGE SMITH: Yeah, we'll give Patent Owner some extra time
11 too if Patent Owner doesn't object to letting him finish. Okay. Go ahead.

12 MR. HOLT: There was a discussion of errors, and I just wanted to
13 touch on that very quickly.

14 MR. HOLT: If you logically think about our example, there
15 wouldn't be errors because what we're saying is for that whole icon, a tap
16 anywhere in it gives you an outcome whereas a tap and hold in a portion of
17 it gives you a different outcome, yes. They're arguing that on 1714 nothing
18 would happen if you tapped. We have no idea, which is not true. But even
19 if it were true, that's where errors can come in. Imagine a case where I'm
20 trying to tap 1712 but it's a small icon on a small screen and my finger is big.
21 And I accidentally tap on 1714. Now I'm not going to get anything. I'm
22 going to be frustrated.

23 And we talk about it in the reply, and Dr. Terveen talks about that.
24 If you had a dead space within 1712 which is what they're saying would
25 happen, then you tap on 1712 or try to tap on 1712. And if you didn't
26 happen to hit in the part of 1712 that wasn't 1714, you wouldn't get an

1 outcome.

2 JUDGE SMITH: Okay. Thank you.

3 JUDGE SMITH: Thank you, Your Honors.

4 JUDGE SMITH: Patent Owner, I'll give you 20 minutes. I know
5 we asked a lot of questions and Petitioner went a little over. So I'll give you
6 20 minutes time for rebuttal.

7 And if you need more time, just let us know. You may begin when
8 ready.

9 MR. ROBINSON: Thank you, Your Honor. Eagle Robinson for
10 Patent Owner. I'd like to briefly address this claim construction and
11 timeliness issue, and then we'll turn it back over to Mr. Wallis.

12 I think the focus on sort of a common starting point is an artifact of
13 the way that the Petitioner mapped these two different contacts, one on 1712
14 and one on 1714.

15 I think what Patent Owner is saying in this claim construction
16 section and really in this argument is not that two contacts need to have a
17 common starting point. It's that the claim says what the claim says. And
18 here's what's wrong with the mapping is that claim 1 says executable
19 instructions for taking a contact. And then based on whether that contact
20 exceeds the threshold or doesn't, taking two different actions.

21 And so the problem is both of those contacts that are mapped in the
22 petition, Petitioner doesn't show that there are instructions for taking two
23 different actions based on whether either of those contacts exceeds the
24 threshold. And so we'll start with the tap on 1712 that's mapped on pages 50
25 to 51 of the petition.

26 That tap on 1712, Petitioner maps to not exceeding the threshold.

1 Nowhere does the petition say that if that tap were held longer and exceeded
2 a threshold that it would take a different action. Same thing with the tap and
3 hold on 1714. Nowhere does the petition say that there are instructions that
4 would've taken a different action if it were only a tap.

5 And so nowhere does the petition actually map to instructions that
6 can take two different actions based on whether a given contact exceeds or
7 doesn't exceed the threshold. So it doesn't necessarily require a common
8 starting point. I think that's a way of explaining or helping to illustrate why
9 the two contacts that are mapped can't meet what's claimed.

10 So the claim construction here that Patent Owner is taking is really
11 just that the claim means what it says, that instructions have to be able to
12 take one action or the other. And so, that's why the mapping in the petition
13 doesn't meet the plain language of the claims.

14 So then we get to this point of sort of whether it's timely or
15 whether it's not timely. Axonics clearly says, okay, in response to a claim
16 construction, implicit in that is a claim construction that wasn't foreseeable,
17 right? There Patent Owner changed tack, right? Petitioner started out by
18 adopting Patent Owner's construction. Patent Owner came back with a
19 different construction. Okay. As a matter of fairness there, it makes sense.
20 Adapt to that construction.

21 Patent Owner has been consistent. There is no change in position
22 here. The claims mean what the claims say, the petition fails to map
23 instructions that can take two different actions based on whether a given
24 contact meets or doesn't exceed -- or sorry, exceeds or doesn't exceed a
25 threshold.

26 So that's why the petition falls short and why Axonics doesn't

1 apply here. There isn't some unforeseeable sort of change in claim
2 construction position that is inconsistent with the claim language or is
3 inconsistent with something that Patent Owner has done previously.

4 And then ultimately if you look at Patent Owner Slide 34, this new
5 mapping actually does rely on a different embodiment. So if you look at the
6 petition at Pages 50 to 51, it cites the sentence, the may or may not sentence
7 in 107.

8 But it does that to then go on to say, and so it would've been
9 obvious that a tap on 1712 and a tap and hold on 1714 would've done these
10 two different things. It doesn't say, we're relying on this tap on 1714. And
11 so the notion -- now the reply explicitly relies on that sentence.

12 And that sentence starts with in some embodiments. Even if you
13 say that sentence may or may not be is one embodiment, that embodiment
14 wasn't relied on for a mapping to the claim. And the petition at 50 to 51, it
15 just looks at that to try to explain its initial theory of a tap on 1712 or a tap
16 and hold on 1714.

17 So ultimately, the circumstances of Axonics are not present here.
18 The mapping has changed from the petition to the reply. And the petition
19 failed to show instructions that could take two different actions based on a
20 determination in response to a single contact. With that, I'm going to sit
21 down. Unless there are any specific questions on that, I'll sit down and let
22 Mr. Wallis return. Thank you.

23 MR. WALLIS: Your Honor, I want to briefly touch on the
24 discussion that was happening about the benefits for implementing a radial
25 menu into Ahn.

26 Petitioner alleged that the use of novice and expert modes were the

1 reasons why you return to the menu. So to give you a bit of an example of
2 these novice and expert modes, the novice mode simply means that you tap
3 it to launch the radial menu so then you can see the options. And then once
4 you see the options, you can do the angular swipe to pick it.

5 The expert mode is simply that it doesn't appear at all. So you
6 press it and if you swipe fast enough, you don't get this display. It's the same
7 functionality. You just don't see it.

8 Now radial menus can be implemented in a manner that are expert
9 modes, right? You can just have it always display. So the fact that this
10 particular radial menu can be implemented in novice or expert modes doesn't
11 explain why you would use the radial menu in the first place.

12 I think Petitioner talks about in the petition, if you look at 24 and
13 25, what it's talking about these gestural modes, at no point does it ever
14 mention the radial menu in this part. The only time it ever mentions the
15 radial menu is in the simple substitution. And so to the extent, one, that
16 these gestural modes apply, it doesn't explain you pick out and implement
17 the radial menu to begin with.

18 And second, if the radial menu doesn't work at all, it doesn't matter
19 if there's a novice or expert mode. If it's not functional, it doesn't matter if
20 you can see it and then not see it because it won't work entirely.

21 Now Petitioner said that a radial menu in Figure 3c of Ahn would
22 work. But again, there's nothing in the record that has ever talked about this
23 menu 3c or the thing that's shown in Figure 3c. There's no expert testimony.
24 It's not in the reply. It's not in the petition. It's not anywhere in the record.
25 That was something that he said on the spot that is attorney argument. So
26 there's nothing supporting that it would work. And I'll briefly explain.

1 Also, if you want to turn to Figure 3, I'll kind of explain my point.
2 So I have two points here. One is that if you look at limitations 1.d and 1.e.
3 They're somewhat combined. So 1.d has the blurring limitation that we've
4 talked about where a gesture is sliding in and a first menu occurs.

5 Now the only menu that possible blurs the clock is the right menu.
6 So we know that's the first menu. Limitation 1.e is talking about the contact
7 on the first menu items. So this must be the same menu, right, that comes
8 out to blur the clock.

9 Well, the issue here in Figure 3c is this is not the first menu the
10 Petitioner has identified. This is a different menu. And as you can see in
11 Figure 3c, this menu does not blur the clock. So if they're relying on this
12 being the first menu and you can implement a radial menu here, well, it still
13 doesn't meet the claims because it doesn't meet the blurring limitation.

14 They rely on some unexplained amalgamation of what Ahn and
15 Hinckley are. But they don't ever actually say what it is. They bash us for
16 bodily incorporation, but if they had actually articulated a modification, we
17 would've addressed it. But they did not. They just said simple substitution.

18 Now the second thing is as we've discussed before, the claims
19 require this duration. So you must -- if the duration does not meet the
20 threshold, it must perform a function. And if the duration meets the
21 threshold, it must perform a second operation or a second function.

22 Now you'll see in Figure 3c if you click 330B, it opens a menu. So
23 in their implementation, right, I guess, if you've tapped and either tapped or
24 tapped and hold, right, opening this menu would be one function. But then
25 you also must have a tap or tap and hold --

26 JUDGE SMITH: Let me just take a step back without getting

1 bogged down into details. I understand your point that there are certain
2 menus in Ahn that would be better off with the drop down menu rather than
3 a radial menu. But I think to Petitioner's point is that both the drop down
4 menu and the radial menu have advantages in some cases and disadvantages
5 in some cases.

6 And that a person of skill in the art is going to weigh the
7 advantages against the disadvantages and determine, is this an appropriate
8 time to use a drop down menu? Is this an appropriate time to use a radial
9 menu? Sometimes the answer will be yes, sometimes no. I mean, they're
10 not saying in every case use a radial menu.

11 MR. WALLIS: They are saying to implement one in Ahn. And in
12 no case in Ahn will a radial menu have the benefits that outweigh its
13 disadvantages. There is simply no implementation where these benefits
14 could occur.

15 JUDGE SMITH: Did your expert say that?

16 MR. WALLIS: Yes, if you look at the expert declaration on pages
17 I think 125 through 126, he talks about --

18 JUDGE SMITH: Which -- I'm sorry. Which exhibit number is
19 that?

20 MR. WALLIS: 2006, Your Honor.

21 JUDGE SMITH: 2006. And which paragraph?

22 MR. WALLIS: Let me pull it up. I'm sorry, Your Honor. If you
23 look at 115 through 125, it explains for each of these menus how the benefits
24 would not actually appear, right? Petitioner in a vacuum says there are
25 advantages and then simply assumes that they would apply to Ahn. But they
26 do not.

1 So if there's any weighing involved, there are no benefits that
2 would ever be implemented into the actual modification. That's not ever
3 articulated, which is in and of itself deficient. They cannot simply say there
4 are advantages and therefore our combination has advantages.

5 That's not what a POSITA does. In Exhibit 2009, I think Petitioner
6 mentioned we don't even know who he is. Well, his resume is cited as an
7 exhibit. And then we have --

8 JUDGE SMITH: Which -- I'm sorry. Which exhibit is he citing?
9 Is it in 2009?

10 MR. WALLIS: 2016 is the bio. And then our expert testifies that
11 he knows, the company he works at, his resume, how many years he's
12 worked in this design area, and that he would qualify as a POSITA under the
13 definition that is produced by Petitioner.

14 So this is not some random guy on a blog. This is actually a well-
15 known figure that's telling you he can't find a good solution for
16 implementing a radial menu icon in this context because the benefits again
17 all fall apart when you're implementing it in the manner that Petitioner
18 proposes.

19 And so that's the issue is, just like KSR says we cannot do, they
20 just pointed at two things and said that you can combine them because it
21 would be simple and it would produce predictable results, that the evidence
22 cannot support that. If there are any specific questions about the blurring, I
23 believe that our theory is written in the brief.

24 But I don't want to take up too much time. I know you're giving
25 me extra time. But if you want me to just briefly highlight my position, I
26 can. But if you have any specific questions.

1 JUDGE SMITH: Does anyone have questions about the blurring?
2 No, I think we're good with the blurring.

3 MR. WALLIS: And I think with that, I just want to, before I go,
4 highlight the point that I was about to make when you said the advantages
5 were weighed. And I think one of the things that I still can't wrap my head
6 around is how Ahn's -- if we look back at this Figure 3c that I was
7 discussing, right, to meet the claims and disregarding that it's a totally
8 different menu that needs to be mapped to, to meet the first menu that's in
9 the claims.

10 It still requires contact if there's a duration that's less than the
11 threshold to perform the first operation. And if there's a duration that's more
12 than a threshold, perform a second operation. But if you look at this, right,
13 330B, if you click it, it only does one thing. It only shows the menu.

14 So to the extent Petitioner is saying you would tap and hold it and
15 it would bring out a radial menu with these options, again, we disagree with
16 that strongly. But let's just take it for what it is right now and say, okay,
17 what happens when you tap it? The only function it does is show a menu.
18 And the tap and hold is assigned to bringing out a menu. But what would a
19 tap do? There's nothing else to do, right? So implementing it into Ahn,
20 again, is not explained. It doesn't make logical sense.

21 If you look into -- I think if you read the expert declarations, you'll
22 see one side is much more detailed than the other and explains things in
23 explicit detail and the reasons why. And the other side is relying mainly on
24 conclusory assertions that are unsupported by the evidence of record.

25 And with that, unless you have any further questions, I think I can
26 cede my time.

1 JUDGE SMITH: Thank you. We're off the record.
2 (Whereupon, the above-entitled matter went off the record at 12:19
3 p.m.)

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