#### 2. Strength is measured by scope of a law

Webber 98, District Judge for the United States District Court in the Eastern District of Missouri (Richard, Westlaw, “Jones v. Bellerive Country Club,” 1998 WL 1157063)

II. § 1981 Claim

The Civil Rights Act of 1866, 42 U.S.C. § 1981, provides in pertinent part, “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts,...and to the full equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens....” Bellerive contends that Title VII's bona fide private club exemption applies to § 1981 as well, barring Jones's § 1981 claim against Bellerive. In response, Jones argues that the scope of § 1981 is not limited by Title VII's private club exemption.

The plain language of § 1981 contains no exemption for private clubs. 42 U.S.C. § 1981. Additionally, when Congress amended the federal civil rights laws in the Civil Rights Act of 1991, it did not alter § 1981 to include Title VII's exemptions; instead, Congress added to § 1981 a section, (c), protecting § 1981 rights “against impairment by nongovernmental discrimination and impairment under color of State law.” 105 Stat 1071, 1072. Moreover, at the time that Congress amended § 1981, there existed a conflict among the lower federal courts as to whether Title VII's private club exemption applied to § 1981. Compare Baptiste v. Cavendish Club, Inc., 670 F.Supp. 108, 110 (S.D.N.Y.1987) (Title VII's exemption for private clubs does not apply to § 1981) with Hudson v. Charlotte Country Club, Inc., 535 F.Supp. 313, 317 (W.D.N.C.1982) (Title VII's exemption for private clubs does apply to § 1981). In light of this conflict, Congress could have explicitly added Title VII's exemptions to § 1981 had it chosen to do so. Instead, by stating in its findings that Supreme Court decisions had weakened federal civil rights protections and additional guards against unlawful employment discrimination were necessary, Congress appears to have intended to broaden, to “strengthen and improve,” § 1981 and other federal civil rights laws, rather than to limit their scope. 105 Stat 1071.

The Court's reading of § 1981 is supported by the Supreme Court's analysis of the relationship between Title VII and § 1981 in Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975). In Johnson, the Court joined the lower federal courts to hold that § 1981 “affords a federal remedy against discrimination in private employment on the basis of race.” Id. at 459–60. Comparing § 1981 with Title VII, the Court noted that “the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes,” and that Title VII and § 1981 “augment each other and are not mutually exclusive.” Id. at 459. Most important to the issue here, the Court stated, “§ 1981 is not coextensive in its coverage with Title VII. The latter is made inapplicable to certain employers.” Id. at 460 (citing 42 U.S.C. § 2000e-b) (emphasis added). This statement indicates that the Court did not read Title VII's exemptions into § 1981.1

#### In the context of CBR, that means it’s measured by the number of workers included

Birkenhauer 23, Employment & Labor Partner at DBL Law (Nick, “Labor Board’s Ruling Reversal, Widening the Definition of Employee,” DB Law, https://www.dbllaw.com/labor-boards-ruling-reversal-widening-the-definition-of-employee/)

The recent NLRB decision overturning the Trump era independent contractor test holds significant implications for worker classification and labor rights. The previous test, established during the Trump administration, made it easier for companies to classify workers as independent contractors, precluding those workers from receiving certain benefits and protections afforded to workers classified as employees.

By overturning this test, the NLRB has expanded the scope of workers eligible for unionization and extended the reach of collective bargaining rights. This decision may lead to increased labor protections, such as minimum wage guarantees, workers’ compensation, and the ability to organize for better working conditions. The decision re-establishes the previous, long-standing common law test for differentiating between employees and independent contractors which had been overruled by the Trump-era NLRB.

#### It can’t be a potential right under a future employer, it must exist at present time

Pryor 14, JD (Appellant Brief filed in: NEESE v. LYON 05-13-01597-CV COURT OF APPEALS OF TEXAS, FIFTH DISTRICT January 15, 2014, Lexis)

Defendants also misstated in their summary judgment motion the holdings of the cases and authorities they cite for the proposition that Section 82.065, the pre-amendment law, only allows that statute as a defense to a lawyer's suit for his fee. Each of the cases cited relies upon that law to void a fee contract, but none of them address the issue of whether an affirmative claim may be made to void a barratrous contingency fee agreement. See Tillery & Tillery v. Zurich Ins. Co., 54 S.W.3d 356, 359 (Tex. App.-Dallas 2001, pet. denied); Cobb, 305 S.W.3d at 43. Defendants' citation to Charles Herring's treatise on lawyer discipline is likewise misleading: Defendants quote the statement that no "express private remedy" existed against a lawyer or other person who engaged in barratry but ignore Mr. Herring's qualification following that statement that the Original Statute allowed a client to void a contract obtained through barratry and explaining that the 2011 Amendment only served to "strengthen civil remedies for clients and to create a new civil remedy for nonclients" subjected to illegal solicitation. [\*41] See Charles F. Herring, Jr., 2013 Texas Legal Malpractice & Lawyer Discipline § 3.20.5 (12th ed. 2013). 91 The word "strengthen" confirms that remedies already existed for clients, especially in contrast to the "new civil remedy" for the non-clients Herring references, making Defendants' citation of Herring's treatise for the proposition that there was no remedy before the 2011 Amendment simply inaccurate. Defendants' contention that the Legislature would have been "wasting its time enacting" the 2011 Amendment if a barratry cause of action already existed 92 is refuted by the fact that the remedies it enacted were greater than those that were previously in place by adding a cause of action for non-clients, expanding the remedy for clients beyond contingency fee contracts to all contracts for legal services, and adding additional statutory categories of damages beyond what would have existed at common law.

#### 3. Our interp is grammatically logical.

Gaziano 18, associate justice of the Massachusetts Supreme Judicial Court. (Frank, May 14, 2018, “COMMONWEALTH v. JOHN CASSIDY.” Supreme Judicial Court of Massachusetts, Bristol, SJC-12350, https://scholar.google.com/scholar\_case?case=14433079760120585093)

When an adverb such as "knowingly" is explicitly inserted in a statute to modify a verb, it necessarily must modify the object of that verb: it matters what the defendant knowingly had in his or her possession. Then, "once [the adverb] is understood to modify the object of [that] verb[ ], there is no reason to believe it does not extend to the phrase which limits that object." Flores-Figueroa, 556 U.S. at 657 (Scalia, J., concurring in part and concurring in the judgment). Thus, in G. L. c. 269, § 10 (m), "knowingly" is an adverb that modifies both the transitive verb phrase, "has in his possession," and the entire direct object of the verb, "large capacity weapon." Accordingly, as one of the elements of a charge under G. L. c. 269, § 10 (m), the Commonwealth must prove that a defendant either knew a firearm or feeding device he or she possessed qualifies as having a large capacity under the statute or knew that the firearm or feeding device is capable of holding more than ten rounds of ammunition.

#### Despite initial skepticism, our interp checks out and has no counterexamples.

Breyer 9, justice on the Supreme Court of the United States. (Stephen, May 4, 2009, “Ignacio Carlos FLORES-FIGUEROA, Petitioner, v. UNITED STATES.” No 08-108, https://scholar.google.com/scholar\_case?case=6608436244167650159)

More recently, we had to interpret a statute that penalizes "[a]ny person who — (1) knowingly transports or ships [using any means or facility of] interstate or foreign commerce by any means including by computer or mails, any visual depiction, if — (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct," 18 U.S.C. § 2252(a)(1)(A). *X-Citement Video, supra.* In issue was whether the term "knowingly" in paragraph (1) modified the phrase "the use of a minor" in subparagraph (A). *Id.,* at 69, 115 S.Ct. 464. The language in issue in *X-Citement Video* (like the language in *Liparota*) was more ambiguous than the language here not only because the phrase "the use of a minor" was not the direct object of the verbs modified by "knowingly," but also because it appeared in a different subsection. 513 U.S., at 68-69, 115 S.Ct. 464. Moreover, the fact that many sex crimes involving minors do not ordinarily require that a perpetrator know that his victim is a minor supported the Government's position. Nonetheless, we again found that the intent element applied to "the use of a minor." *Id.,* at 72, and n. 2, 115 S.Ct. 464. Again the Government, while pointing to what it believes are special features of each of these cases, provides us with no convincing counterexample, although there may be such statutory instances.

#### 1. They don’t meet. Considerable means 50%.

Widley Online ND, (“Reviewer Guidelines,” https://onlinelibrary.wiley.com/page/journal/15213773/homepage/reviewer-guidelines)

When evaluating the importance of the work, please put the reported findings into the context of impact on the subject area and breadth of interest to the scientific community. The level of importance can be rated outstanding (top 5% compared to published work in the same subject area), high (top 20%), considerable (top 50%), moderate (bottom 50%), low (bottom 20%). You should give reasons for your judgment of the importance in line with the following guidelines:

#### 2. Links to our offense. Considerable is arbitrary and totally unlimiting.

Virginia Supreme Court 60 (202 Va. 86 (1960) CITY OF RICHMOND v. RICHMOND MEMORIAL HOSPITAL, ET AL. Record No. 5099. Supreme Court of Virginia. September 2, 1960. Google scholar caselaw, date accessed 1/14/21)

The city in its brief states that free patients are not cared for in "considerable numbers", and then argues that this alone deprives the hospitals of the tax exemption.

The word "considerable" is a relative term. The record discloses that both hospitals render free service to patients. The exemption provided in Section 183(e) of the Constitution is one of law. For this the city would substitute a rule of arbitrary discretion which would of necessity have to be exercised by local tax authorities throughout the Commonwealth where hospitals of this character are located. Such arbitrary discretion would be without objective standards. A tax exemption cannot depend upon any such vague and illusory concept as the percentage of free service actually rendered. This would produce chaotic uncertainty and infinite confusion, permitting a hodgepodge of views on the subject. Thus there would be no certainty nor uniformity in the application of the section involved.

#### Even if their evidence is predictable, it’s implication is not.

FWS 14 (Fish and Wildlife Service. “Interagency Cooperation-Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat” A Proposed Rule by the Fish and Wildlife Service and the National Oceanic and Atmospheric Administration on 05/12/2014. Federal Register. <https://www.federalregister.gov/documents/2014/05/12/2014-10503/interagency-cooperation-endangered-species-act-of-1973-as-amended-definition-of-destruction-or> , Date Accessed 1/13/21)

We find this definition to be no longer valid in light of the courts' rulings with regard to the regulatory definition of “destruction or adverse modification.” That is, that portion of the definition that requires a reduction in the likelihood of “both the survival and recovery” of listed species is no longer valid. Further, we think the use of the term “considerable” to modify “appreciably” does not add any real value to help interpret what “appreciably diminish” means with regard to the modification of critical habitat, and may lead to disparate outcomes in consultations. For example, the word “considerable” can mean “large in amount or extent” but it can also mean “worthy of consideration” or “significant.” To further complicate matters, “significant” can mean “measurable.” So, some could interpret a “considerable” reduction to mean a massive reduction in the value of critical habitat and others could interpret it to mean a measurable reduction in the value of critical habitat. In light of the range of results various interpretations of “considerable” could lead one to, we have set out below a more detailed interpretation of the phrase “appreciably diminish the conservation value.”

#### 3. Their Prost evidence is from a trade case in which a dispute arose over the “substantial proportion approach” to measuring imports—which is why the court says it doesn’t imply a specific number or situation based on the URAA and SAA legislation at issue (YELLOW FOR REFERENCE)

Prost 4 (Judge – United States Court of Appeals for the Federal Circuit, “Committee For Fairly Traded Venezuelan Cement v. United States”, 6-18, http://www.ll.georgetown.edu/federal/judicial/fed/opinions/04opinions/04-1016.html)

The URAA and the SAA neither amend nor refine the language of § 1677(4)(C).  In fact, they merely suggest, without disqualifying other alternatives, a “clearly higher/substantial proportion” approach.  Indeed, the SAA specifically mentions that no “precise mathematical formula” or “‘benchmark’ proportion” is to be used for a dumping concentration analysis.  SAA at 860 (citations omitted); see also Venez. Cement, 279 F. Supp. 2d at 1329-30.  Furthermore, as the Court of International Trade noted, the SAA emphasizes that the Commission retains the discretion to determine concentration of imports on a “case-by-case basis.”  SAA at 860.  Finally, the definition of the word “substantial” undercuts the CFTVC’s argument.  The word “substantial” generally means “considerable in amount, value or worth.”  Webster’s Third New International Dictionary 2280 (1993).  It does not imply a specific number or cut-off.  What may be substantial in one situation may not be in another situation.  The very breadth of the term “substantial” undercuts the CFTVC’s argument that Congress spoke clearly in establishing a standard for the Commission’s regional antidumping and countervailing duty analyses.  It therefore supports the conclusion that the Commission is owed deference in its interpretation of “substantial proportion.”  The Commission clearly embarked on its analysis having been given considerable leeway to interpret a particularly broad term.

#### And courts have rejected blanket appeals to that specific case—if you think the aff isn’t T vote neg

US CIT 20 (Katzmann, Judge. Opinion in 429 F.Supp.3d 1325 (2020) ASOCIACIÓN DE EXPORTADORES E INDUSTRIALES DE ACEITUNAS DE MESA, Aceitunas Guadalquivir, S.L.U., Agro Sevilla Aceitunas S. Coop. And., and Angel Camacho Alimentación, S.L., Plaintiff, v. UNITED STATES, Defendant, and Coalition for Fair Trade in Ripe Olives, Defendant-intervenor. Slip Op. 20-8 Court No. 18-00195. United States Court of International Trade. January 17, 2020.Google scholar caselaw, date accessed 1/18/21)

\*The defendants cited Committee For Fairly Traded Venezuelan Cement v. United States

[11] Although the court finds that Section 1677-2(1) is unambiguous under Chevron step one, the court will address the Government's arguments pursuant to Chevron step two. See supra, Jurisdiction, Standard of Review, and Interpretative Framework. The Government does not cite to case law interpreting the specific statute in question but rather argues that case law supports Commerce's interpretation of the word "substantial". Def.'s Br. at 17-18 (citing Committee for Fairly Traded Venezuelan Cement v. United States, 372 F.3d 1284, 1289-1290 (Fed. Cir. 2004) ("[The word substantial] does not imply a specific number or cut-off. What may be substantial in one situation may not be in another situation. The very breadth of the term `substantial' undercuts [Plaintiff's] argument that Congress spoke clearly in establishing a standard for the Commission's regional antidumping and countervailing duty analyses. It therefore supports the conclusion that the Commission is owed deference in its interpretation of `substantial proportion.'")). This view of "substantial" is inapposite in light of the legislative history specific to this statute, discussed below. As such, Commerce's application of the term "substantially dependent" is not reasonable and not in accordance with law under step two of Chevron.

#### There’s a sizable literature controversy with breadth of AFF choice along each step of the negotiation process.

Gely 17, James E. Campbell Missouri Endowed Professor of Law, Director of the Center for the Study of Dispute Resolution, University of Missouri School of Law (Rafael Gely, Winter 2017, “Article: Collective Bargaining and Dispute System Design,” 13 U. St. Thomas L.J. 218, University of Kansas Libraries, Lexis)

IV. REFLECTIONS FROM A LABOR LAW PROFESSOR

Like the proverbial "kid in the candy store," my brief expedition into the dispute system design field leaves me both excited and unsatisfied: excited because of what seems like a broad set of possibilities in renewing the interest in exploring the system design features of the collective bargaining process; unsatisfied because there are many nuances I am just beginning to appreciate and am thus afraid to take a misstep that might expose my inexperience. With that as a background, I offer two observations which hopefully will be of some interest to both labor relations and system design scholars. The above discussion briefly summarizes key aspects of our understanding of the collective bargaining process and of the field of dispute system design. In terms of collective bargaining, Part II made clear that collective bargaining is a multi-stage process embedded with a variety of dispute resolution processes. Part III provides a framework that helps us appreciate the system design components of the collective bargaining process.

A. The relationship between collective bargaining and dispute system design

As noted earlier, the origins of the dispute system design field are closely connected to the study of collective bargaining. However, over the years a strange bifurcation developed in the literature. Scholarly discussions of dispute resolution in the collective bargaining context tend to focus on the grievance procedure process as the only part that involves dispute resolution. Less attention is paid to other collective bargaining that has a dispute resolution dimension. This divide has resulted in reluctance by commentators to think about the use of other dispute resolution mechanisms in workplaces where there is a union, as well as a tendency to ignore the possibility that collective bargaining structures can cross over into the non-unionized workplace. My initial observation in this article is that collective bargaining is very much a dispute system, and a system that is much broader than just the grievance procedure piece on which scholars traditionally focus. 39 In particular, if we expand our understanding of negotiation and grievance arbitration, we can quickly see that collective bargaining writ large encompasses a variety of dispute resolution processes. Below, I use the diagram [\*225] used by Professors Smith and Martinez in order to illustrate this observation.

[[FIGURE 2 OMITTED]]

The revised diagram illustrates that the collective bargaining process involves a wide variety of dispute resolution processes. These processes might take place simultaneously and in a fluid, non-linear manner. For instance, negotiations over a collective bargaining agreement are often accompanied by a number of activities designed to exert pressure on the opposing side, such as strikes, sick-outs, lockouts, or corporate campaigns. 40 These tactics, which might seem tantamount to aggression, are common. At the same time, the parties are engaged in other "milder" forms of dispute resolution, such as formal and informal negotiations, or even mediation. The same is true regarding the contract administration process. Before the parties reach the arbitration stage of the grievance process, they have already engaged in a variety of other forms of dispute resolution, both formally and informally. 41

The above discussion thus suggests that the collective bargaining process, writ large, is a complex and dynamic dispute system that involves a variety of dispute resolution processes. While traditionally these processes have been discussed in the context of a unionized workplace, one can think of scenarios in which similar dynamics could play out in a non-unionized workplace. Of course, all of the individual processes described in the diagram can and do take place in non-unionized workplaces. However, when taking place in a non-unionized workplace, those processes are rarely discussed in the context of a collective bargaining experience. I suggest that while these various processes are certainly linked by the presence of a union in the context of traditional collective bargaining, one could take a fresh look at the various processes to explore whether they can exist in a non-unionized environment as a different kind of dispute system.

Consider the contract negotiation stage of the collective bargaining process. Traditionally, the discussion of collective negotiations has focused on the conduct that occurs at the bargaining table once the employees have [\*226] chosen to be represented by the union. While interesting in their own right, these negotiations tend to be fairly scripted in the sense that they occur in a fairly traditional format with the parties sitting across a table, exchanging proposals over a prolonged period of time, and usually reaching an agreement (when they do) at the eleventh hour. 42 But as Figure 2 indicates, employers, unions, and employees are constantly negotiating in a wide variety of contexts. The distinction between negotiation on the one hand and a strike on the other has been generally described as a clear bright-line dichotomy, easy to identify and clearly distinguishable. However, the figure illustrates the multiple ways in which employees and unions can exert pressure on employers, and consequently advance their negotiation interests, short of going on strike. Whether through corporate campaigns, the grievance process, or other collective action, employees are negotiating with their employers more often than we think.

#### b. It’s from the comptroller general. That means it holds inter-agency sway.

CG = Comptroller General

NAPA 9 (National Academy of Public Administration, For the U.S. Congress and the U.S. Government Accountability Office, https://napawash.org/uploads/Academy\_Studies/09-19.pdf)

The CG has the crucial responsibility of serving as the lead auditor of the U.S. Government, as well as heading an agency responsible for evaluating programs, analyzing policy, and rendering legal opinions and decisions on government programs and activities.26 GAO is Congress’ largest support agency and has a nationwide field structure.27 For Fiscal Year 2008, GAO had an annual budget of $507.2 million and claimed $58.1 billion in measurable financial benefits as a result of its work ($114 for every dollar spent).28 The CG and other GAO officials testified to Congress 304 times in Fiscal Year 2008 on various issues ranging from Homeland Security to Air Force Procurement to District of Columbia Public Schools.29

The CG’s authority “spans the entire Federal Government and touches state and local governments and many nongovernmental activities as well.”30 The CG served on the Hurricane Katrina Contract Audit Task Force, chaired the Commercial Activities Panel, and continues to serve on the Federal Accounting Standards Advisory Board.31 Historically, the CG has been given other specific responsibilities in public law, such as the power to bring suit to require the release of impounded funds (2 U.S.C. 687); the duty to impose civil penalties under the Energy Policy and Conservation Act of 1975 (42 U.S.C. § 6385(a); and assignments to serve as a member of the Chrysler Corporation Loan Guarantee Board (15 U.S.C. § 1862) and the Board of Directors of the United States Railway Association (45 U.S.C. § 711(d).32 In addition, the CG represents the United States in international forums involving professional audit standards and responsibilities.

The CG, as the Chief Executive Officer of GAO, is the chief accountability officer of the U.S. Government.33 As such, the CG’s role is unique and of utmost importance in providing strong and independent leadership to GAO, which has been described as “a behemoth that is far more than an arm of Congress. It is the watchdog of Congress, and it has been as reliable, thorough, and alert as any watchdog could be.”34

#### The only 2AC quality is “plain meaning” – our interp solves that. Ordinary meaning

US District Court 8 (UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN, GREEN BAY DIVISION, ALWIN MFG. CO. v. GLOBAL PLASTICS, 2008 U.S. Dist. Ct. Motions LEXIS 78240)

What the parties do not agree on is the meaning of the word "substantially" as has always been in claim 1 and the import of that word [\*23] on the structure of the actuator means in claim 1 of the '898 Patent. For the reasons which follow, the term "substantially" should be interpreted by its ordinary meaning which the PTO Primary Examiner understood was "more than half."

#### The answer to potential imprecision is to give “substantially” meaning, not act like it has none.

Devinsky 2, JD @ McDermott (Paul, “Is Claim "Substantially" Definite?  Ask Person of Skill in the Art”, IP Update, 5(11), November, http://www.mwe.com/index.cfm/fuseaction/publications.nldetail/object\_id/c2c73bdb-9b1a-42bf-a2b7-075812dc0e2d.cfm)

In reversing a summary judgment of invalidity, the U.S. Court of Appeals for the Federal Circuit found that the district court, by failing to look beyond the intrinsic claim construction evidence to consider what a person of skill in the art would understand in a "technologic context," erroneously concluded the term "substantially" made a claim fatally indefinite.  Verve, LLC v. Crane Cams, Inc., Case No. 01-1417 (Fed. Cir. November 14, 2002). The patent in suit related to an improved push rod for an internal combustion engine.  The patent claims a hollow push rod whose overall diameter is larger at the middle than at the ends and has "substantially constant wall thickness" throughout the rod and rounded seats at the tips.  The district court found that the expression "substantially constant wall thickness" was not supported in the specification and prosecution history by a sufficiently clear definition of "substantially" and was, therefore, indefinite.  The district court recognized that the use of the term "substantially" may be definite in some cases but ruled that in this case it was indefinite because it was not further defined. The Federal Circuit reversed, concluding that the district court erred in requiring that the meaning of the term "substantially" in a particular "technologic context" be found solely in intrinsic evidence:  "While reference to intrinsic evidence is primary in interpreting claims, the criterion is the meaning of words as they would be understood by persons in the field of the invention."  Thus, the Federal Circuit instructed that "resolution of any ambiguity arising from the claims and specification may be aided by extrinsic evidence of usage and meaning of a term in the context of the invention."  The Federal Circuit remanded the case to the district court with instruction that "[t]he question is not whether the word 'substantially' has a fixed meaning as applied to 'constant wall thickness,' but how the phrase would be understood by persons experienced in this field of mechanics, upon reading the patent documents."

#### No reasonable person can conclude substantially means “less than half”

Miller 9, JD, et al (Filed in US District Court for the District of New Jersey, Astrazenca vs Dr. Reddy’s Laboratories, Lexis)

Astra further argues that, based on this secret Swedish document, "substantially crystalline form" could mean esomeprazole that has less than half crystallinity, üle rest being amorphous. Astra supports its construction by citing Example 6 of the '504 patent specification, which it now says exhibits an X-ray diffraction pattern was mostly noncrystalline. However, neither one of ordinary skill in the art reading Example 6, nor the patent Examiner who granted the patent, could have known this, since Astra elected not to include this information in the patent or prosecution history. Had Astra disclosed the secret Swedish document to the Patent Office, the Examiner might never have issued claim 4. Had Astra informed the Patent Office that Astra considered something less than half crystalline still to be "substantially crystalline," the Examiner might have rejected claim 4 as indefinite since a person of ordinary skill in the art would not interpret less than half to be substantial. See Brittain Decl. at para. 16. DRL is aware of no authority where secret extrinsic evidence formed the basis of a claim construction.

Astra may not simply seize upon the secret Swedish document to contradict the plain meaning of “substantial” because that contradiction enhances its infringement claim against DRL’s proposed ANDA product. See Southwall Techs., Inc. v. Cardinal IG Co., 54 F.3d 1570, 1578 (Fed. Cir. 1995) (“A patentee may not proffer an interpretation for the purposes of litigation that would alter the indisputable public record consisting of the claims, the specification and the prosecution history, and treat the claims as a ‘nose of wax.’”) (internal citations omitted.) Astra’s secret Swedish document was not part of the public record. Astra may therefore not rely on it here.

Astra’s interpretation of “substantially” also conflicts with Federal Circuit precedent. Words of approximation, such as “substantially,” may render a claim invalid as indefinite if the scope of the claimed invention would not be understood by persons of ordinary skill or fail to distinguish the claimed invention from the prior art. Verve LLC v. Crane Cams, Inc., 311 F.3d 1116, 1120 (Fed. Cir. 2002). However, if “substantially” “serves reasonably to describe the subject matter so that its scope would be understood by persons in the field of the invention … it is not indefinite.” Id. Here, no reasonable person, much less a person of ordinary skill in the art, could ever interpret the term “substantially” less than half. To the extent the Court could interpret “substantially” to cover such a broad range, the claim would be indefinite.

#### Reasonability obviates the term completely---which allows aff-creep into the smallest possible areas

Brennan 88, Justice for the Supreme Court (Justice, Pierce v. Underwood (Supreme Court Decision), 487 U.S. 552, http://socsec.law. cornell.edu/cgi-bin/foliocgi.exe/socsec\_case\_full/query=%5Bjump!3A!27487+u!2Es!2E+552+opinion+n1!2 7%5D/doc/%7B@ 825%7D?)

The underlying problem with the Court's methodology is that it uses words or terms with similar, but not identical, meanings as a substitute standard, rather than as an aid in choosing among the assertedly different meanings of the statutory language. Thus, instead of relying on the legislative history and other tools of interpretation to help resolve the ambiguity in the word "substantial," the Court uses those tools essentially to jettison the phrase crafted by Congress. This point is well illustrated by the Government's position in this case. Not content with the term "substantially justified," the Government asks us to hold that it may avoid fees if its position was "reasonable." Not satisfied even with that substitution, we are asked to hold that a position is "reasonable" if "it has some substance and a fair possibility of success." Brief for Petitioner 13. While each of the Government's successive definitions may not stray too far from the one before, the end product is significantly removed from "substantially justified." I believe that Congress intended the EAJA to do more than award fees where the Government's position was one having no substance, or only a slight possibility of success; I would hope that the Government rarely engages in litigation fitting that definition, and surely not often enough to warrant the $ 100 million in attorney's fees Congress expected to spend over the original EAJA's 5-year life.

My view that "substantially justified" means more than merely reasonable, aside from conforming to the words Congress actually chose, is bolstered by the EAJA's legislative history. The phrase "substantially justified" was a congressional attempt to fashion a "middle ground" between an earlier, unsuccessful proposal to award fees in all cases in which the Government did not prevail, and the Department of Justice's proposal to award fees only when the Government's position was "arbitrary, frivolous, unreasonable, or groundless." S. Rep., at 2-3. Far from occupying the middle ground, "the test of reasonableness" is firmly encamped near the position espoused by the Justice Department. Moreover, the 1985 House Committee Report pertaining to the EAJA's reenactment expressly states that "substantially justified" means more than "mere reasonableness." H. R. Rep. No. 99-120, p. 9 (1985). Although I agree with the Court that this Report is not dispositive, the Committee's unequivocal rejection of a pure "reasonableness" standard in the course of considering the bill reenacting the EAJA is deserving of some weight.

Finally, however lopsided the weight of authority in the lower courts over the meaning of "substantially justified" might once have been, lower court opinions are no longer nearly unanimous. The District of Columbia, Third, Eighth, and Federal Circuits have all adopted a standard higher than mere reasonableness, and the Sixth Circuit is considering the question en banc. See Riddle v. Secretary of Health and Human Services, 817 F.2d 1238 (CA6) (adopting a higher standard), vacated for rehearing en banc, 823 F.2d 164 (1987); Lee v. Johnson, 799 F.2d 31 (CA3 1986); United States v. 1,378.65 Acres of Land, 794 F.2d 1313 (CA8 1986); Gavette v. OPM, 785 F.2d 1568 (CA Fed. 1986) (en banc); Spencer v. NLRB, 229 U. S. App. D. C. 225, 712 F.2d 539 (1983). In sum, the Court's journey from "substantially justified" to "reasonable basis both in law and fact" to "the test of reasonableness" does not crystallize the law, nor is it true to Congress' intent. Instead, it allows the Government to creep the standard towards "having some substance and a fair possibility of success," a position I believe Congress intentionally avoided. In my view, we should hold that the Government can avoid fees only where it makes a clear showing that its position had a solid basis (as opposed to a marginal basis or a not unreasonable basis) in both law and fact. That it may be less "anchored" than "the test of reasonableness," a debatable proposition, is no excuse to abandon the test Congress enacted. n2

#### That’s bad for every standard above

Words and Phrases 60 (Vol. 40, State – Subway, p. 762)

“Substantial” is a relative word, which, while it must be used with care and discrimination, must nevertheless be given effect, and in a claim of patent allowed considerable latitude of meaning where it is applied to such subject as thickness, as by requiring two parts of a device to be substantially the same thickness, and cannot be held to require them to be of exactly the same thickness. Todd. V. Sears Roebuck & Co., D.C.N.C., 199 F.Supp. 38, 41.