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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument this morning in Case 17-1594, Return
5 Mail, Inc. versus the United States Postal
6 Service.

7 Ms. Brinkmann.

8 ORAL ARGUMENT OF BETH S. BRINKMANN

9 ON BEHALF OF THE PETITIONER

10 MS. BRINKMANN: Mr. Chief Justice, and
11 may it please the Court:

12 The term "person" in this case does
13 not extend to include the government for three
14 reasons. First, the other branches rely on the
15 Dictionary Act definition of person and this
16 Court's presumptive definition of "person" to
17 not include the government. That is a stable
18 framework that's critical to that communication
19 between the branches.

20 Second, the estoppel that was enacted
21 by Congress specifically references the
22 jurisdiction of the district court and the
23 International Trade Commission, not the Court
24 of Federal Claims, where the government's
25 patent litigation takes place, reinforcing the

1 definition of "person" not to include the
2 government. That was a linchpin to the
3 structure that Congress set up. It created a
4 new adversarial administrative process, and
5 part of that balance was to ensure that patent
6 holders that were subject to that new
7 adversarial process could then be protected
8 from having to go back and relitigate in court,
9 in district court or the International Trade
10 Commission.

11 JUSTICE GINSBURG: Your position is
12 that it's -- the estoppel provision is the
13 linchpin, you just said, but your position
14 would be the same even if there were no
15 estoppel provision. Is that not so?

16 MS. BRINKMANN: That is correct, Your
17 Honor. It's just the linchpin to the balance.
18 It's a reinforcement. The Dictionary Act
19 definition and the presumptive definition would
20 do the work here because that is the reliance
21 by Congress and the give-and-take before the
22 branches so Congress knows how the word
23 "person" is going to be interpreted when they
24 use it.

25 So the linchpin part of the estoppel,

1 though, reinforces that because it only refers
2 specifically to the court -- the district court
3 and International Trade Commission.

4 And the third point I wanted to make,
5 Your Honor, was that this does not exclude the
6 government from going after bad patents.

7 To the contrary, the government is
8 different, has the most powerful tools to do
9 that. First, the Patent and Trademark Office
10 director has the power to sua sponte initiate
11 ex parte reexaminations and can go after
12 patents after they've been issued.

13 JUSTICE SOTOMAYOR: What if -- would
14 the government or the Postal Service be able to
15 initiate ex parte reexamination? Because,
16 under your theory, "person" doesn't include the
17 Postal Service. How do you punish them if they
18 send a letter saying there was this prior art,
19 do you want to look at this?

20 MS. BRINKMANN: The statute does not
21 preclude a communication, Section 303, that
22 allows the sua sponte reexamination by the
23 government through the PTO. It does not
24 preclude someone bringing a matter to the
25 attention of the director. In fact --

1 JUSTICE SOTOMAYOR: But someone is
2 not -- according to you, a person is not the
3 government.

4 MS. BRINKMANN: That's a different --

5 JUSTICE SOTOMAYOR: So where do the --
6 where does the government get its permission?

7 MS. BRINKMANN: Under --

8 JUSTICE SOTOMAYOR: In the form -- the
9 government in the form of the Postal Service,
10 where does it get the permission to initiate
11 that process?

12 MS. BRINKMANN: Well, there are two
13 different ways that an ex parte reexamination
14 could be initiated by a person or, sua sponte,
15 by the director of the PTO. And the way
16 Congress set up the structure for the
17 government to go after bad patents was through
18 the sua sponte director.

19 As far as -- that's 303. 301, where a
20 person can bring it -- request it, the same
21 starting point would be here under the
22 presumptive definitions that it likely would be
23 construed not to include the government.

24 The -- there's a different history to
25 that provision than the three AIA provisions,

1 the America Invents Act that was enacted in
2 2011. The reexamination provision was enacted
3 back in 1980, and it is different because it's
4 not an adversarial process at all. All that
5 happens is that a person can ask that it be
6 initiated. But that is very different, and
7 it's much like the original issuance of a
8 patent. It's a back-and-forth with an
9 examiner.

10 JUSTICE ALITO: But do you think it
11 would be proper for the Postal Service or some
12 other federal agency to contact the PTO ex
13 parte and say, hey, why don't you, sua sponte,
14 look into the validity of this patent? Is that
15 what you're saying? That would be proper?

16 MS. BRINKMANN: I think it is
17 allowable, Your Honor. The statute does not
18 prohibit that. And, in fact, that's 303, and
19 there's a regulation, 1.520, that says that
20 normally -- normally, the director would not
21 institute, sua sponte, in response to a
22 suggestion.

23 JUSTICE ALITO: Well, that -- I mean,
24 that's an argument that makes me doubt your --
25 your argument on the statutory language because

1 I think if -- if this were prevented --
2 presented to Congress, and the issue before
3 Congress was do we want a federal agency to be
4 able to initiate one of these AIA proceedings
5 in the open, in accordance with the law, or do
6 we want to allow them to pick up the phone to
7 the PTO and say -- Patent and Trademark Office
8 and say, hey, why don't you sua sponte look
9 into this? Which of those -- do you think they
10 chose the latter?

11 MS. BRINKMANN: The sua sponte
12 reexamination process is very different because
13 the government would not come in then and be a
14 litigant as they are here. There was no
15 estoppel provision, for example. And that's
16 why the analysis for the reexamination is
17 different.

18 What we know here is, though, as far
19 as the government goes, going after bad
20 patents, there's two very forceful tools that
21 Congress has. One, the PTO director, who
22 Congress has vested with the expertise over
23 patent law, is the one that, sua sponte, does
24 that.

25 And then the government doesn't need

1 to go after -- they can use the patent. They
2 -- then the person who holds the patent, the
3 patented invention, has to come over to the
4 Court of Federal Claims and request
5 compensation.

6 And that shows how Congress created
7 this different structure for the government in
8 1498 before the Court of Federal Claims. Very
9 different, no jury. You can't get an
10 injunction against the government. They can
11 use it, and then you have to come to 1498 and
12 recover compensation from them.

13 So it's a very --

14 JUSTICE GINSBURG: But why -- why
15 would -- why would the government -- why -- why
16 would Congress want to leave a government
17 agency out of this second look if the idea is
18 to weed out patents that never should have been
19 given in the first place?

20 MS. BRINKMANN: Because the government
21 already has opportunities through both the
22 reexamination and through challenging the
23 validity. All of the grounds for validity can
24 be challenged in the Court of Federal Claims.

25 But moreover, Your Honor, when we go

1 back to the principles in which Congress used
2 the word "person," the question isn't whether
3 or not why they would have excluded. The
4 question is, is there any indication that
5 Congress intended to extend this to include the
6 government?

7 CHIEF JUSTICE ROBERTS: Your -- your
8 argument on the Dictionary Act, you know, the
9 idea that everybody knows this is what it means
10 and so you start from common ground, that
11 really has to be based on a legal fiction,
12 right? Nobody would think, when Congress wrote
13 this, that, okay, we're using "person"
14 according to the Dictionary Act, except
15 sometimes we're not, because you agree there
16 are some times when it does include the
17 government. And in those situations, we'll
18 just leave it up to the courts to figure out,
19 even though we don't say this, that here we're
20 not following the Dictionary Act.

21 MS. BRINKMANN: I don't think it's
22 leaving it up to the courts, Your Honor. I
23 think it's that Congress has to indicate
24 through the context that it means otherwise.

25 And it's very akin to --

1 CHIEF JUSTICE ROBERTS: Well, I know,
2 but that's my point, is that you rely on the
3 Dictionary Act, but then you say except when
4 the context suggests something else. And it
5 seems to me that if people were, in fact,
6 looking to the Dictionary Act and they want to
7 depart from it, they would have used something
8 a little more clear than the context.

9 MS. BRINKMANN: Well, certainly, Your
10 Honor, there are examples. We know that
11 "person" is not used consistently in the
12 America Invents Act or in the Patent Act. And
13 that -- that's -- the government really turns
14 that on its head when it says, oh, well, why
15 would you exclude it?

16 Instead, the question is, is there
17 anything affirmative to indicate that the
18 government was included? And I think when you
19 look at the -- the two aspects that the
20 government invokes, oh, you know, the
21 government gets to own patents; oh, and we get
22 to raise this defense about intervening rights,
23 both of those have very strong contextual
24 affirmative statements.

25 207 makes clear that each federal

1 agency can own a patent, obtain a patent. And
2 we know from 1498 and its predecessor statute
3 that the government can raise all defenses. So
4 there is nothing to suggest from that context
5 that there was an affirmative indication to
6 extend this to the government.

7 JUSTICE GORSUCH: Well, counsel, the
8 argument on the other side I know we're going
9 to hear is Section 207 allows the government to
10 participate in a lot of aspects of the patent
11 system affirmatively, and given that, it would
12 be natural to extend it to IPR review as well.

13 Do you care to respond to that
14 argument?

15 MS. BRINKMANN: Well, I think a very
16 useful guide here would be to look at the
17 Cooper case. The Cooper case was about whether
18 or not the government could use another tool,
19 like here, whether they could seek treble
20 damages in a civil damage action under the
21 antitrust laws.

22 There was a very similar definition
23 there to the Dictionary Act. And this Court
24 looked to the presumptive meaning of "person"
25 not to include the government and said: We're

1 looking to what Congress said here and there is
2 nothing affirmative to include it, even though
3 it could be an additional tool.

4 And I think it's such a good example
5 because that decision was in 1941. In 1955,
6 Congress enacted a provision that gave Congress
7 -- gave the government that tool to seek civil
8 damages. Two other things, though. They
9 didn't do it through redefining the word
10 "person." They set up another provision
11 governing -- to have the government bring
12 actions, civil actions, and they did not
13 provide for treble damages.

14 It was not until 1990 that Congress
15 provided for treble damages.

16 JUSTICE BREYER: This is --

17 MS. BRINKMANN: This is case -- excuse
18 me.

19 JUSTICE BREYER: Sorry. I mean,
20 you're talking about antitrust law. Now let's
21 think of the patent statute, and -- and you've
22 read in their brief and elsewhere that they're
23 -- that, one, as you said, the government's
24 free to obtain patents, like anyone else.
25 Agencies, et cetera.

1 Moreover, there are quite a few or
2 several provisions in the patent law where the
3 word "person" seems to include the government.
4 For example, you can't get a patent if -- any
5 person, you know, can't get a patent if there's
6 prior art or whatever. You know, there are
7 quite a few like that or several like that.

8 Now what are your best one or two
9 examples of the opposite, where, in fact, the
10 -- the patent statute uses the word "person"
11 and it's pretty clear that "person" does not
12 include the government? What would you -- not
13 antitrust examples but patent examples.

14 MS. BRINKMANN: Your Honor, I can give
15 you three examples that we discuss in our reply
16 brief. The first one would be Section 317.
17 It's contemporaneous with the review provisions
18 we're talking about here.

19 That has to do with obtaining
20 information from the agency about settlement,
21 and it provides that the government can do it
22 just by a request, but then it explains that
23 persons must make more of a showing to get it.
24 That is a distinction. So that's a clear
25 example.

1 This -- and that's not just 317. It's
2 also in 327 and 135 having to do with the
3 different review provisions.

4 The second one I would refer to is
5 292. There's subsection (a) and (b). That has
6 to do with the remedies in false marking. It's
7 kind of parallel to the Cooper case, in fact,
8 because (a) provides for a penalty for the
9 government to obtain; (b) applies for persons
10 to seek damages. That does not include the
11 government.

12 The third one I would point to is 257.
13 That has to do with when the director is
14 referring a person to the attorney general for
15 fraud. And that clearly refers not to the
16 government.

17 So, if there's one thing we know is
18 that the word "person," the term "person," is
19 not used the same throughout the Act, and
20 that's because Congress has a backdrop and
21 knows that it does not include the government
22 unless it makes an affirmative showing to the
23 contrary.

24 And I should say, in addition to the
25 two we talked about where there was an

1 affirmative showing, 207, federal agencies can
2 own patents, so things flow from that, and you
3 can -- the government can raise defenses
4 through 1498.

5 There's another provision that's very
6 informative. It's the provision that was at
7 issue in the Florida Prepaid case that was held
8 unconstitutional, trying to waive the sovereign
9 immunity for states. The other part of that
10 provision, though, in 296 was, who could sue?
11 And it said persons could sue, including
12 governmental entities.

13 So, again, Congress is enacting -- in
14 this dialogue between the branches, Congress
15 and the President, when they're enacting laws,
16 know that if they mean to extend the term
17 "person" to include the government, they have
18 to provide such.

19 JUSTICE KAGAN: Ms. Brinkmann --

20 JUSTICE SOTOMAYOR: So, if the Act
21 permits the government to sue for infringement
22 -- to be sued for infringement, which it does,
23 what do you think it means to take away a
24 defense? Meaning this is a defense tool for
25 infringers. Does it make logical sense to

1 deprive the government of the tool of being
2 able to invoke this proceeding?

3 MS. BRINKMANN: A couple things there
4 I'd say, Your Honor.

5 The Court did not grant cert on this
6 and I'm not here to argue it, but we have a
7 different view. We don't believe actions for
8 compensation in 1498 in the Court of Federal
9 Claims are actions for infringement. They're
10 for use without authority, so -- but just to
11 put a fine point on that.

12 But going back to the tool, I would
13 also say that this is not a defense. When you
14 raise a defense in litigation, you're
15 litigating against your opponent and you're
16 defending to get a judgment that you haven't
17 infringed. This is an affirmative action to
18 send federal agencies under the government's
19 view into another federal agency to expand
20 their power, and that power, to invalidate
21 patents for all time, for everyone.

22 The government does have that power.
23 It's in the expert Patent and Trademark Office
24 director through reexaminations that they can
25 do sua sponte. And regardless of what one

1 thinks of the policy undergirding that, you
2 would think it would be quite remarkable for
3 Congress to have set up this whole structure
4 without saying a word, in silence. And that
5 too reinforces the fact that we have to read
6 the word "person" as the other branches
7 understood it be, to not include the government
8 here.

9 CHIEF JUSTICE ROBERTS: You --

10 JUSTICE KAGAN: Ms. Brinkmann, I -- I
11 take it you agree that 207 does indicate that
12 the government counts as a person for a variety
13 of provisions, is that right? So 102, 118,
14 119, all of those provisions, because the Act
15 specifically says the government can obtain a
16 patent, it follows that those provisions apply
17 to the government as well. Do agree with that?

18 MS. BRINKMANN: It -- what the
19 provision -- it references each federal agency.
20 And it was part of the Bayh-Dole Act to try and
21 figure out how that the government could --
22 could handle research patents. And we do think
23 that because of that provision, the provisions
24 that then apply to patent owners would apply to
25 them. But many research universities and much

1 of the government get patents through
2 assignments, for example.

3 So the government is different in many
4 ways. That doesn't mean, though, because, in
5 one way, Congress wanted to allow the -- the
6 government to have this exercise of handling
7 patents, that that gives any inference to other
8 aspects.

9 This has nothing to --

10 JUSTICE KAGAN: Right, but I guess
11 what I'm -- I wanted to ask was whether those
12 provisions, the 207(a)(1) that the government
13 can obtain a patent, 207(a)(3), which is that
14 the government can protect its rights to
15 inventions, whether those might also lead you
16 to say that the -- that the -- the -- that the
17 government is a person for means of bringing
18 these challenges, because the idea, I think,
19 would be something like these challenges to the
20 PTO are a means of -- enable the government to
21 innovate and to obtain patents itself.

22 In other words, the government is
23 looking at an area, it says somebody is
24 claiming a patent on this, that's preventing us
25 from inventing, that's preventing us from

1 getting a patent, so we have to kind of clear
2 the field in order to innovate.

3 And that's what these challenges
4 enable the government to do, so that they are a
5 kind of function of 207(a)(1) and 207(a)(3).
6 What would you think of that argument?

7 MS. BRINKMANN: It might be a policy
8 argument that someone might consider, but it's
9 not what Congress did. There's no evidence --
10 the backdrop at which Congress enacted it was
11 not perceived that way.

12 The idea of going against bad patents
13 is something that the government has robust
14 authority to do, again, through the Patent and
15 Trademark Office director, through
16 reexamination, and that is a much more
17 appropriate avenue for that, Your Honor,
18 because that isn't litigation amongst
19 adversaries. If you're thinking, oh, this
20 isn't a good patent for the government, the PTO
21 director can look at this, and then there's an
22 examiner who goes back and forth and there's
23 more liberal amendment procedures, for example.
24 And that's where you really need to see if there
25 anything here that, you know, can be patented?

1 So that is amply already covered and
2 has been through the reexamination process.

3 CHIEF JUSTICE ROBERTS: What -- what
4 is the director of the PTO supposed to do when
5 he gets one of these calls from the government
6 and says, we want you to reexamine this? Is --
7 is he or she supposed to make an independent
8 determination, or is he or she supposed to
9 salute and go ahead and do it?

10 MS. BRINKMANN: Under the statute,
11 under 303, it explains that the director can on
12 his own initiative at any time, as discovered
13 by him or cited to him, it can even rely on art
14 that was cited in a actual request that someone
15 filed, or the regulation provides anything
16 that's been brought to his attention.

17 So there's a very broad area because
18 that's only about beginning the process. Then
19 there are other regulations and statutes that
20 require things to be put on the record and
21 explained and why the reexamination is brought
22 under.

23 And I should also say, I mean, there's
24 nothing to preclude, in fact, the PTAB
25 recently, for example, had amicus briefs. It's

1 not a barrier to information being provided.
2 It's really the authority and how -- where the
3 government has its --

4 JUSTICE GORSUCH: Ms. Brinkmann --

5 MS. BRINKMANN: -- authority to
6 exercise that.

7 JUSTICE GORSUCH: But, Ms. Brinkmann,
8 I guess the question I'm struggling with, and I
9 -- I think some of my colleagues are as well,
10 is one could understand why a rational Congress
11 wouldn't want the government to go before its
12 own agency to kill private party patents. I
13 can understand that argument.

14 What's less clear to me is why a
15 rational Congress would allow ex parte review
16 initiated by the government before a
17 governmental agency, that kind of a situation,
18 but not allow a more robust adversarial process
19 involving the government as a party?

20 So what's the -- what's the rational
21 line that one could draw between those two
22 arrangements? I -- I think that's where I'm
23 struggling.

24 MS. BRINKMANN: I would say on the
25 reexamination, Your Honor, it's much more of a

1 consideration, the agency's own
2 reconsideration. And it's a back-and-forth, an
3 interaction, as very much the original
4 interaction between the examiner and the patent
5 applicant is.

6 And in a reexamination, often the
7 patent comes out stronger. It's not just to
8 challenge it. It's to figure out where the
9 strength is. And it can be reissued as a
10 stronger patent, in fact. And that really
11 furthers the interests that are at the crux of
12 the patent system in our country.

13 JUSTICE SOTOMAYOR: But one thing you
14 haven't said is, why not simply say the
15 government can't? Meaning, if you're going to
16 be consistent, then why do you need to give a
17 different reading to "person" in the ex parte
18 examination context?

19 I'm not quite sure why you're doing
20 that, but --

21 MS. BRINKMANN: And as I --

22 JUSTICE SOTOMAYOR: -- perhaps in
23 answering -- because --

24 MS. BRINKMANN: And let me just say,
25 Your Honor, also, I do think that if you're --

1 the starting point for the person in the ex
2 parte reexamination is the same. It would not
3 normally be construed to be part of the term
4 "person."

5 If you're looking for context and any
6 affirmative indications from Congress, there is
7 a different history and structure from the --
8 for the ex parte reexam. It was from 1980.
9 It's not adversarial. The only role the
10 person, whether it's the government or someone
11 else, plays in an ex parte reexam is to request
12 the reexam.

13 There was no discovery. There was no
14 briefing. There was no adversarial process.
15 So it could be different, Your Honor. We don't
16 think it need be.

17 We think that the power of the
18 government and the authority and the structure
19 that was set up, in addition to the reliance on
20 the dialogue between the branches in the use of
21 the term "person," that really reinforces that
22 this use in the AIA review provisions does not
23 include "person."

24 JUSTICE ALITO: But you're one --

25 JUSTICE BREYER: A very small firm

1 would like to go ahead with an invention, but
2 it's afraid that Google owns a patent on it,
3 but it thinks Google's patent is invalid. And
4 so they start this procedure, which is supposed
5 to be more efficient -- I don't know if it
6 is -- but they start it because they want
7 Google's patent to be declared that was no
8 good. And then they can go ahead.

9 Well, a government agency, either
10 directly or because they've hired under
11 contract the same person, owns a patent or
12 doesn't but would like -- doesn't own a patent
13 but would like this same group under contract
14 to go ahead, but they're afraid Google's patent
15 blocks it.

16 Now, since the agency could own a
17 patent, it may not, it seems like it's in the
18 same situation as that small company or
19 medium-sized company or big company. So why
20 would Congress not want to allow that agency to
21 use this fairly efficient method to get rid of
22 what they see as an invalid patent that blocks
23 their way?

24 Now you have one reason, which is this
25 Court of Claims or, as I take it, the

1 government in the Court of Claims would --
2 would not be estopped for what it might have
3 brought, though it probably would be estopped
4 for what it did bring in accordance -- bring
5 before this quick procedure.

6 Now that's one, and I've got that, and
7 that's a point. And the reason I'm asking this
8 complicated question is I want to be sure there
9 aren't others.

10 MS. BRINKMANN: A couple points I'd
11 like to respond to, Your Honor.

12 First of all, on our answer, you know,
13 that the government can defend in the Court of
14 Federal Claims, true, but also the government,
15 through the expert office of the Patent and
16 Trademark Office director, has the ability to
17 sua sponte reexamine a patent, just like that.
18 And that certainly is something that could be
19 done.

20 The second thing I would say is --

21 JUSTICE BREYER: Well, yeah, but, I
22 mean, that's equally true of Joe Smith. I
23 mean, unless the government, let's say the FTC,
24 the EPA, the government's a huge organization
25 of many, many different parts. DARPA. Who

1 knows? I mean, any of these agencies can want
2 to, under contract or not, develop something.

3 MS. BRINKMANN: But, Your Honor --

4 JUSTICE BREYER: What's the
5 difference?

6 MS. BRINKMANN: Well, it's not true
7 for Joe Smith. Joe Smith cannot start -- he
8 can ask the reexamination.

9 JUSTICE BREYER: And what can the
10 government do -- what can DARPA do that Joe
11 Smith can't do?

12 MS. BRINKMANN: Well, if I can just
13 flip for a moment to just explain what the AIA
14 review provisions are because I don't think
15 they're as broad as would be believed through
16 that kind of scenario.

17 First of all, the covered business
18 method patent that's at review here, no one can
19 bring this kind of review unless they've
20 already been sued for infringement or charged
21 with infringement. So no one -- DARPA could
22 not go in and bring this review procedure.

23 JUSTICE BREYER: That isn't my
24 question. My question is, what is it that
25 DARPA could do or not do that Joe Smith, who

1 has his company, could do or not do? And I've
2 got one of them, which is the Court of Claims,
3 where there is a difference.

4 Where else is there a difference?

5 MS. BRINKMANN: The other difference
6 is that DARPA can use it. It can't get
7 enjoined from using it. It can just use a
8 patented invention. No one else can do that.

9 And then the burden is on the patent
10 owner to go into the Court of Federal Claims
11 and seek it. And the government there, very
12 different, treated very differently. No jury.
13 No induced infringement. No enhanced damages.
14 No enhanced fees. A very different structure.

15 And that, again, is a very important
16 backdrop for what Congress was doing when it
17 used the word "person."

18 JUSTICE KAVANAUGH: I was -- I was
19 trying to figure out the difference between ex
20 parte reexamination and these review procedures
21 from your perspective, and I gather that the
22 difference is that the PTO will be the final
23 word within the executive branch if the ex
24 parte reexamination procedure were the only
25 avenue, whereas the Postal Service could seek

1 judicial review against the office if
2 dissatisfied, if the government's position
3 prevailed? Is that the difference in the two
4 review proceedings?

5 MS. BRINKMANN: Well, there also are
6 all the litigation that's available if there's
7 an action against the government for using the
8 patented invention. And, certainly, that, as I
9 just explained, is a very robust process for
10 the government also.

11 If I could, I'd like to save the
12 remainder of our time -- my time for rebuttal.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 MS. BRINKMANN: Thank you.

16 CHIEF JUSTICE ROBERTS: Mr. Stewart.

17 ORAL ARGUMENT OF MALCOLM L. STEWART

18 ON BEHALF OF THE RESPONDENTS

19 MR. STEWART: Mr. Chief Justice, and
20 may it please the Court:

21 This Court has said on a variety of
22 occasions that the term "person" does not
23 ordinarily include governmental bodies, but
24 it's also made clear that this is not a
25 hard-and-fast rule. And consistent with the

1 text of the Dictionary Act, the definition of
2 "person" as not uncover -- not including
3 governmental units can vary depending on the
4 context.

5 And one way -- and this is something
6 well short of a clear statement requirement.
7 The Dictionary Act doesn't say if a particular
8 law expressly provides otherwise the term will
9 be given a different meaning. It says, unless
10 the context provides, indicates otherwise.

11 And one way in which --

12 JUSTICE SOTOMAYOR: Except this is a
13 very different situation. The Cato Institute
14 in their amici brief suggests that in a
15 situation in which the government is basically
16 two branches of the government or two agencies
17 of the government are disputing one another or
18 -- or before one another, that that's a special
19 situation that requires a closer look and a
20 more express statement.

21 It does seem like the deck is stacked
22 against a private citizen who is dragged into
23 these proceedings. They've got an executive
24 agency acting as judge with an executive
25 director who can pick the judges, who can

1 substitute judges, can reexamine what those
2 judges say, and change the ruling, and you've
3 got another government agency being the
4 prosecutor at the same time.

5 In those situations, shouldn't you
6 have a clear and express rule?

7 MR. STEWART: I -- I guess the first
8 thing I would say is that regardless of how
9 this case comes out, regardless of whether
10 governmental units, federal governmental units
11 are thought of as persons who can invoke inter
12 partes and CBM review, there are at least two
13 scenarios in which governmental bodies could
14 wind up in PTAB proceedings.

15 The first is, as Justice Kagan alluded
16 to, Section 207 expressly authorizes each
17 federal agency to seek a patent. And the
18 statute doesn't say so in so many words, but
19 everybody understands that the same substantive
20 and procedural provisions that govern anyone
21 else's patent application will apply when a
22 federal agency applies for a patent.

23 So, when the federal application is
24 considered by an examiner, the examiner applies
25 the same substantive standards and is -- is

1 trusted to do that, is trusted not to give
2 special weight to the representation --

3 JUSTICE GORSUCH: Well, but --

4 MR. STEWART: -- of a federal agency.

5 JUSTICE GORSUCH: -- but, Mr. Stewart,
6 there we have the express language of 207 that
7 does that work. And, here, you're asking us to
8 imply it.

9 And I think Justice Sotomayor raises a
10 really important question. Normally, we -- we
11 think of the executive branch as able to
12 resolve its own disputes and speak with one
13 voice.

14 And as Justice Kavanaugh alluded to
15 with ex parte communication -- ex parte review,
16 you have the final word of the PTO director as
17 the final word of the executive branch on the
18 status of a patent.

19 And, here, the scenario would be that
20 the government speaks out of both sides of its
21 mouth potentially. The PTO director resolving
22 a case against, say, the Postal Service and
23 coming to Court for us to resolve that dispute
24 about the executive department's view of the
25 law, that's unusual. Not to say unprecedented,

1 but unusual. And shouldn't we, as Justice
2 Sotomayor suggested, at least expect some sort
3 of clarity from Congress when it wants that
4 unusual arrangement to reign?

5 MR. STEWART: Let me say two things,
6 the first of which is a continuation of what I
7 was saying to Justice Sotomayor, that, clearly,
8 Congress did contemplate that there would be
9 situations in which a federal agency could come
10 before the PTAB because, in the initial
11 examination context, if --

12 JUSTICE GORSUCH: If you could get to
13 my question, Mr. Stewart. We acknowledge in
14 207 -- nobody's here disputing that the
15 executive can come before the PTAB -- before
16 the PTO to -- to secure a patent.

17 MR. STEWART: And --

18 JUSTICE GORSUCH: That's in the
19 language of 207.

20 MR. STEWART: Exactly. And -- and the
21 statute doesn't say in so many words if a
22 federal agency as patent applicant is
23 dissatisfied with the examiner's decision, it
24 can appeal to the PTAB and potentially appeal
25 to the Federal Circuit. But everybody

1 understands that those provisions apply equally
2 to federal agencies.

3 But the second thing I would say is,
4 although there is a theoretical possibility
5 that a federal agency could file such a suit,
6 on balance, on net, I think our position is
7 very likely to reduce the incidence of
8 executive branch agencies disagreeing in court,
9 because what you have in 1498 is a provision
10 for the United States to be sued for
11 unauthorized use of the patented invention, and
12 one of the defenses we can raise is that the
13 patent was invalid. And it's very clear that
14 Congress intended for all the defenses,
15 including that one, to be available to the
16 United States.

17 Now that wouldn't involve the
18 spectacle of the PTO actually participating as
19 -- as a party in the 1498 proceeding because,
20 usually, the PTO wouldn't be in the
21 infringement suit, but it would be a case of
22 the Postal Service asking a court to rule that
23 the PTO was mistaken in issuing the patent.
24 And by a --

25 JUSTICE KAVANAUGH: That's -- that's

1 the difference that Justice Gorsuch is
2 identifying. You have agency versus agency in
3 federal court. And, again, not unprecedented,
4 but unusual.

5 And why should we go down that road
6 when there's ex parte reexamination process
7 available? And why should we think that
8 Congress wanted us to go down that road when
9 they didn't put the estoppel protection in the
10 -- in the -- at the back end?

11 MR. STEWART: Well, let me -- let me
12 address that in -- in two parts. The first is,
13 to -- to finish the answer I was giving to
14 Justice Gorsuch, that by invoking CBM review in
15 this case, the -- the Postal Service was able
16 to avoid the situation in which the Court of
17 Federal Claims would be asked to rule on the
18 Postal Service's assertion that a PTO patent
19 was invalid.

20 The matter was effectively resolved
21 within the executive branch in the sense that
22 the Postal Service initiated -- asked that CBM
23 review be instituted. The director agreed. At
24 the conclusion of those proceedings, the PTAB
25 concluded that the -- the patent was invalid.

1 At that point, Return Mail was --

2 JUSTICE GORSUCH: Mr. Stewart, I hate
3 to interrupt you, but I -- I'd really like an
4 answer to the -- it's the same question I asked
5 and Justice Kavanaugh asked, and perhaps you
6 could get to it.

7 MR. STEWART: My -- my answer is it is
8 theoretically possible that there could be an
9 appeal from a PTAB decision -- by a federal
10 agency from a PTAB decision that was
11 unfavorable to the government. It hasn't
12 happened yet. Presumably, in deciding whether
13 such an appeal would be taken, the government
14 and specifically --

15 JUSTICE KAVANAUGH: And you
16 acknowledge that's unusual?

17 MR. STEWART: I acknowledge that it's
18 unusual, but as I --

19 JUSTICE KAVANAUGH: And you
20 acknowledge also, I think, that ex parte
21 reexamination is a process available to the
22 Postal Service in this instance to ask the PTO
23 to engage in?

24 MR. STEWART: I don't see how it would
25 be under Petitioner's theory; that is,

1 Petitioner says that the word "person"
2 presumptively excludes the --

3 JUSTICE KAVANAUGH: Well, can't --
4 can't the -- I'm sorry to interrupt. Can't the
5 executive branch agencies always communicate
6 with one another?

7 MR. STEWART: In -- in general, that
8 happens, but as Justice Alito's question was
9 indicating previously, it would be -- it would
10 be quite problematic for that to occur in -- in
11 this context. For example --

12 JUSTICE KAVANAUGH: Well, why is that?
13 Under Article II, I would think all components
14 of the executive branch always are able to
15 communicate with one another absent some rule
16 to the contrary that Congress might try to
17 insert.

18 MR. STEWART: Well, for example,
19 Section 301 says that any person can bring to
20 the PTO's attention information -- prior art
21 that potentially bears on the validity of an
22 issued patent. But it also says that if that
23 person explains in writing its reasons for
24 thinking that the new prior art is relevant,
25 that material shall be included in the file.

1 And Section 302 says that a person may
2 request ex parte reexamination but that any
3 such request will be communicated to the patent
4 holder. And so it would be peculiar to say
5 that an executive branch agency could
6 short-circuit those mechanisms that are
7 designed to make the process transparent, make
8 it a part of the official record, simply by an
9 end run.

10 It would also be peculiar to -- to
11 kind of make up a regime in which one federal
12 -- a federal official from one agency will call
13 a counterpart at the PTO and say: Don't treat
14 this as a request for ex parte reexamination,
15 but put it in the file, deal with it in the
16 same ways that Congress intended requests for
17 ex parte reexamination to be made.

18 And the other -- the point I was
19 trying to make about the -- the two points I
20 was trying to make about the potential for an
21 appeal are, first, we know from the statute
22 that Congress didn't intend to rule that out,
23 because if the PT -- if a federal agency loses
24 its appeal at the PTAB when it's trying to get
25 a patent initially, the statute provides any

1 disappointed patent applicant with a right of
2 appeal to the Federal Circuit, and we'd have to
3 decide whether it was appropriate to pursue
4 such an appeal.

5 Second, it's entirely clear from the
6 statute that federal agencies can own patents.
7 And those patents are potentially subject to
8 other parties' requests for inter partes review
9 or CBM review.

10 So, if Return Mail felt that the
11 Postal Service had a patent that was invalid,
12 it could have requested inter partes review or
13 CBM review. If that decision by -- if the PTO
14 had -- I'm sorry, if the PTAB had instituted
15 review and had ruled against the Postal
16 Service, the Postal Service as a party to the
17 proceedings would have had a statutory right to
18 appeal.

19 Again, we would have to decide as a
20 matter of executive branch governance whether
21 it was appropriate to take --

22 JUSTICE KAVANAUGH: I think the --

23 JUSTICE KAGAN: Mr. --

24 JUSTICE KAVANAUGH: Go ahead.

25 JUSTICE KAGAN: I think, Mr. Stewart,

1 I'm -- I'm not really understanding your
2 affirmative argument here. I mean, let's
3 assume that you have a presumption running
4 against you. And we can argue about how strong
5 the presumption is, but there's at least some
6 presumption coming from the Dictionary Act,
7 coming from just our cases on this topic, which
8 says that the government isn't a person unless
9 we see evidence that it is a person.

10 So what would you point to in this
11 statute to tell us that the government is a
12 person? And -- and, you know, what text are we
13 talking about?

14 MR. STEWART: I would say that the
15 strongest contextual evidence is that the word
16 "person" in the provisions that define IPR and
17 CBM review is used to make available to the
18 general public a procedural mechanism, an
19 advantage. It's made available on a -- a
20 widespread basis.

21 Second, all of the reasons for making
22 that mechanism --

23 JUSTICE KAGAN: Well, that doesn't
24 seem -- I mean, that just is saying everybody
25 else gets to do this.

1 MR. STEWART: Which is basically --

2 JUSTICE KAGAN: But --

3 MR. STEWART: Which is basically what
4 the Court said in Georgia versus Evans and
5 in --

6 JUSTICE GORSUCH: Isn't that flipping
7 the presumption? I mean, the presumption is
8 that "person" doesn't include the government,
9 and you're suggesting, well, because "person"
10 is broad and it's a big term, it includes the
11 government.

12 MR. STEWART: I think there are --
13 there are at least two or three different
14 prerequisites -- prerequisites to -- to my
15 theory about the context. The first is that it
16 is making available a benefit as opposed to
17 imposing a disadvantage. And that goes all the
18 way back to Dollar Savings Bank in the 19th
19 Century.

20 The second is that the benefit is
21 broadly available. And in this -- that sense,
22 this case, for instance, is distinguishable
23 from Primate Protection League, where, in
24 Primate Protection League, the agency was
25 arguing that it was a person acting under an

1 officer of the United States.

2 And if that argument had prevailed,
3 the agency would have gotten a benefit that no
4 private party has, namely --

5 JUSTICE KAGAN: What's -- what's the
6 third?

7 MR. STEWART: The third is that there
8 is no evident reason that Congress -- that
9 Congress would have wanted to exclude federal
10 agencies because the rationales for creating
11 these mechanisms in the first place apply
12 equally when the federal agency is the
13 requestor.

14 JUSTICE KAGAN: I mean, when I hear
15 you say this, Mr. Stewart, I -- I -- I guess
16 what I was hoping for was that you would have
17 an argument from particular statutory
18 provisions.

19 I mean, I was trying to run an
20 argument to Ms. Brinkmann about 207(a)(1) and
21 (a)(3) and how those might suggest that the
22 government was a person. But -- but I don't
23 hear you saying anything like that. I hear you
24 just saying, look, this is a broad provision
25 and we can't think of a reason why the

1 government shouldn't be treated like everybody
2 else, so the government should be treated like
3 everybody else.

4 MR. STEWART: Let -- let me make one
5 very quick general observation, and then I'll
6 try to go to something more specific in the
7 statute.

8 The very general observation is that
9 the argument I was fleshing out was basically
10 what the Court said in Georgia versus Evans and
11 in Pfizer. It said, yes, the word "person"
12 would not ordinarily include a state or a
13 foreign government, but we can't see any reason
14 why Congress would have wanted these units
15 almost alone among potential plaintiffs not to
16 be able to sue under the antitrust laws.

17 But, to be more specific, Section 1498
18 authorizes suits against the United States for
19 unauthorized use of a patented invention. And
20 it has been -- a previous version of the
21 statute expressly said that the United States
22 had all available -- all defenses available to
23 a private party. That language was deleted as
24 unnecessary in the 1948 revision.

25 JUSTICE KAVANAUGH: But who deleted

1 that, though? That -- that wasn't deleted by
2 Congress, was it?

3 MR. STEWART: That was deleted as part
4 of the 1948 recodification. And the reviser's
5 note explained that the -- the --

6 JUSTICE KAVANAUGH: It was the reviser
7 who did that, right?

8 MR. STEWART: Yes.

9 JUSTICE KAVANAUGH: Congress didn't do
10 that?

11 MR. STEWART: Well, Congress reenacted
12 the -- the statute.

13 JUSTICE BREYER: Isn't there some kind
14 of basic statutory canon interpretation --
15 canon of interpretation that says where the
16 reason for the rule applies, the rule applies?

17 And, here, we have the government,
18 NASA, which might, in fact, want to do
19 something, and they're being sued for
20 infringing a patent.

21 Now we have a speedy way of resolving
22 that. What reason would there be for not
23 applying it? And now we have two. One is the
24 Court of Claims difference, which is
25 undoubtedly a difference, and the other is --

1 well, I'm not sure. Okay. But I'm going to go
2 back and look at all those provisions that were
3 cited to me.

4 Okay. That's, I would have thought,
5 the statutory argument. Am I right?

6 MR. STEWART: I -- I think that's
7 correct. And I think, to take it to 1498
8 specifically, because that is the provision
9 that subjects the government --

10 JUSTICE BREYER: 1498, by the way, is
11 when I think they invented this canon of
12 interpretation.

13 (Laughter.)

14 MR. STEWART: 1498 is the provision of
15 Title 28 that subjects the United States to
16 liability for unauthorized use of a patented
17 invention. And it's established that the
18 United States can invoke all available
19 defenses.

20 Now one of the defenses that we might
21 want to invoke is that the patent is invalid.
22 This Court has held that the invalidity of a
23 patent has to be proved by clear and convincing
24 evidence.

25 That was not in a case involving the

1 federal government. The Court was not
2 construing a statutory provision that was
3 specific to the federal government. It was
4 construing 35 U.S.C. 282, which says that a
5 patent has been -- is presumed valid.

6 That understanding of patent validity
7 and the -- the standard of proof necessary to
8 show invalidity has been understood to carry
9 over to Section 1498 suits, even though there's
10 nothing in 1498 that says that in so many
11 words, because, except to the extent that
12 Congress specifies otherwise, these suits are
13 conducted in basically the same way as ordinary
14 infringement suits.

15 Now one of the prime reasons that
16 people who invoke IPR or CBM do it is to -- is
17 because they have actually been sued or expect
18 to be sued for infringement and would prefer
19 not to have to overcome the hurdle of proving
20 invalidity by clear and convincing evidence.

21 And if they can get before the PTO,
22 they will have a de novo standard of review,
23 they'll be before the expert agency, they
24 perceive that their chances of establishing
25 invalidity will be greater.

1 It's not -- and that is particularly
2 integral to the CBM review scheme, which, as
3 Ms. Brinkmann was pointing out, is limited by
4 statute to people who have been sued for or
5 charged with infringement. It is designed --

6 JUSTICE GINSBURG: What does "charged
7 with" mean?

8 MR. STEWART: I'm sorry?

9 JUSTICE GINSBURG: What does "charged
10 with" mean?

11 MR. STEWART: "Charged with" is -- it
12 basically means you received a cease and desist
13 letter. You have been informed by the patent
14 owner that it believes you to be infringing the
15 patent, even though you haven't yet been sued.

16 The PTO has promulgated a regulation
17 that says, in order to establish that you've
18 been charged with infringement, you have to
19 demonstrate that the likelihood of an
20 infringement suit against you is sufficiently
21 real and immediate that you would satisfy the
22 standards of a declaratory judgment. It's --

23 JUSTICE GINSBURG: What about Ms.
24 Brinkmann's linchpin that the estoppel
25 provision -- that the government effectively

1 gets two bites of the apple; everybody else
2 gets just one?

3 MR. STEWART: I -- I think we can be
4 estopped in subsequent PTO proceedings. So we
5 can't file successive IPR requests or CBM
6 requests. And that category of estoppel would
7 apply to us in full force.

8 It's true that the estoppel provision
9 doesn't govern proceedings in the Court of
10 Federal Claims. We would still be subject to
11 common law estoppel, that the primary
12 difference between the two is that, for IPR
13 purposes, statutory estoppel encompasses
14 arguments that could have been made but
15 weren't, whereas common law estoppel
16 encompasses only arguments that were actually
17 made --

18 JUSTICE GINSBURG: By common law
19 estoppel, what do you mean? You mean issue
20 preclusion?

21 MR. STEWART: Issue preclusion, that's
22 correct.

23 JUSTICE ALITO: And what -- what would
24 you --

25 JUSTICE SOTOMAYOR: Could you tell me

1 why is that?

2 JUSTICE ALITO: If we -- you know, if
3 we indulge the -- the possible fiction that
4 Congress actually gave a second of thought to
5 the issue that's before us --

6 (Laughter.)

7 JUSTICE ALITO: -- I -- I'm not sure
8 Petitioner has a pretty good -- has much of an
9 explanation as to why it would treat -- why
10 Congress would have wanted to treat the
11 government differently from a private party as
12 to these AIA proceedings.

13 But, on the other side, do you have an
14 explanation why Congress would have wanted
15 different estoppel rules to apply to the
16 government?

17 MR. STEWART: I mean, obviously, the
18 government in a variety of contexts is subject
19 to different estoppel rules, not only equitable
20 estoppel but also regular issue preclusion, the
21 -- whereas non-mutual collateral estoppel could
22 apply to most parties, the federal government
23 is not subject to non-mutual collateral
24 estoppel. So it could be that Congress thought
25 it through and thought common law estoppel is

1 good enough.

2 I take the point of your question to
3 be it may well be the case that Congress didn't
4 think about this one way or the other, and what
5 should we do then? And, indeed, the Court in
6 Pfizer said it is apparent that Congress didn't
7 consider the question whether a foreign
8 government should be able to sue under the
9 antitrust laws.

10 So it didn't rest its decision on any
11 affirmative evidence that Congress considered
12 that question and affirmatively wanted foreign
13 governments to be able to sue.

14 JUSTICE SOTOMAYOR: Well, doesn't that
15 counsel in favor of the presumption? Shouldn't
16 we make the government think about this issue?

17 It could very easily decide that we
18 were wrong, if we were to decide in your
19 adversary's favor, it's a hypothetical, but it
20 would then be in a position to decide what kind
21 of estoppel should be applicable or not in the
22 Court of Federal Claims, but if it hasn't,
23 assuming Justice Alito's process, wouldn't we
24 be trumping the assumption by making a policy
25 judgment to include the government because it

1 makes sense to some of us?

2 MR. STEWART: I -- I don't think you
3 would be making your own policy judgment. And,
4 indeed, in Pfizer, the same presumption was at
5 issue, the same ordinary rule that the term
6 "person" doesn't include foreign government --
7 doesn't include governmental bodies, and the
8 Court acknowledged that that principle was
9 implicated by its decision, but it -- it found
10 the fact that everybody else or practically
11 everybody else could sue and that nobody could
12 think of a good reason that foreign governments
13 should be excluded to be a sufficient basis for
14 rejecting the ordinary rule.

15 JUSTICE SOTOMAYOR: But there is a
16 purported good reason here. There's a
17 different estoppel that applies to the
18 government. And that might be okay with
19 Congress, but we're not sure of that.

20 MR. STEWART: I think that is -- that
21 has been identified as a disadvantage of our
22 proposed rule, but nobody thinks that that's
23 the chain of thinking that Congress went
24 through.

25 That is, Congress, in deciding whether

1 the -- if Congress were thinking about whether
2 the government should be included in these
3 provisions, presumably, it would first decide,
4 do we want the government to be able to invoke
5 IPR and CBM? And if the answer to that was
6 yes, it would decide, okay, now what should the
7 estoppel rule be for the government?

8 Congress would never say we'll first
9 decide in what fora should estoppel be
10 enforceable and then, having made that
11 decision, we'll decide --

12 JUSTICE GORSUCH: So --

13 MR. STEWART: -- does it make sense to
14 --

15 JUSTICE GORSUCH: -- Mr. Stewart, does
16 it -- does the estoppel point become just even
17 a little odder still when we consider that, in
18 the IPR proceedings, it's the government that
19 would be the plaintiff, as it were, seeking to
20 cancel a patent before the government as judge,
21 so both prosecutor and judge in these
22 proceedings, and then not be bound by its own
23 findings brought in a case by its own
24 prosecutor, effectively, later in a Court of
25 Claims proceeding?

1 So I understand the government's often
2 not bound by estoppel, but it's usually in the
3 role of a defendant in those circumstances, and
4 certainly not before its own tribunal. Isn't
5 it a little unseemly to say that the executive
6 branch shouldn't be bound by its own decisions?

7 MR. STEWART: Well, our position still
8 is that, under common law estoppel, we would be
9 bound by whatever adverse ruling the PTAB made
10 --

11 JUSTICE GORSUCH: I understand that.

12 MR. STEWART: -- with respect to the
13 arguments we actually advanced.

14 JUSTICE GORSUCH: We all -- we
15 understand that. That wasn't the question.

16 MR. STEWART: And I say I don't think
17 it would be unusual for Congress to decide
18 there will be somewhat different estoppel rules
19 with respect to the government than with
20 respect to private parties.

21 Again, people were alluding in earlier
22 parts of the argument to the possible anomaly
23 of the government appealing from an adverse
24 PTAB decision. And the Court in United States
25 versus Mendoza said one of the reasons that the

1 government is sometimes subject to different
2 estoppel rules than private parties is that the
3 government's appeal calculus is different.

4 And so, to the extent that we might
5 deem it inappropriate or might be reluctant to
6 pursue an appeal from an adverse PTAB decision,
7 Congress could say: Well, they should still be
8 bound by what the PTAB actually decided with
9 respect to the claims, the arguments they
10 actually made, but not with respect to
11 additional claims they could have made.

12 JUSTICE KAVANAUGH: When you take a
13 step back here and think about this case, there
14 are provisions that specifically give the
15 government the same rights as persons, 207 and
16 other provisions in this statute.

17 We don't have them here, obviously.
18 That's what raises the question. So, as
19 Justice Sotomayor says, we have the presumption
20 that the government is not a person.

21 And then we look at the context. And
22 you've said the context supports you. But
23 there are contextual points that seem to cut
24 the other way.

25 And just to summarize them, you still

1 have ex parte reexamination available, so it's
2 not as if Congress would have thought the
3 government's cut out entirely. If your
4 position wins, you have the anomaly, which can
5 be overcome, but it is an anomaly of government
6 against government lawsuits in federal court.

7 And, third, even though you're trying
8 to make the best of it, the estoppel would be
9 very different and not part of the bargain that
10 seems to have been part of what Congress put in
11 place here in terms of the system.

12 So those are all contextual points
13 that actually cut against you, it seems to me,
14 where your burden, because we start from the
15 baseline of the government's not a person, is
16 you need the context to strongly support you.

17 So that's just the kind of stepping
18 back summary of things I see as problems. You
19 can respond to them as you see fit.

20 MR. STEWART: Let me make a couple of
21 additional contextual points, one of which is a
22 continuation of an answer I was giving to
23 Justice Kagan and then another is a new one.

24 What I was saying to Justice Kagan is
25 everybody accepts that the government in

1 litigation bears the same burden of showing
2 patent invalidity by clear and convincing
3 evidence.

4 Now private parties have available to
5 them an alternative, IPR/CBM proceedings, to
6 try to escape that burden, to try to come
7 before a different decisionmaker who will apply
8 a de novo standard of review.

9 You could think of it as roughly
10 analogous to a primary jurisdiction mechanism,
11 where one issue in the lawsuit is referred to
12 an agency that has expertise in -- in the
13 relevant area.

14 And the Court, in applying various
15 presumptions and clear statements rules --
16 clear statement rules, has been especially
17 solicitous of the government as defendant; that
18 is, resolving in the government's favor
19 ambiguities about whether the government can be
20 sued, what is the scope of its liability, et
21 cetera.

22 This is not quite that. But
23 Petitioner is still arguing that the government
24 should be denied access to a procedural
25 mechanism in its capacity as defendant that is

1 available to all private parties.

2 If somebody argued that the patent
3 laws allowed any other defendant to show patent
4 invalidity by a preponderance of the evidence
5 but allowed -- but required a federal agency as
6 defendant to prove it by clear and convincing
7 evidence, I think the Court's reaction would be
8 it's conceivable, but we would need pretty
9 clear language that Congress intended that
10 result.

11 This is not quite that, but the
12 Petitioner's argument is still we don't get
13 access to a mechanism for a more favorable
14 burden of proof.

15 The second thing I would say is we've
16 been looking at the case up to this point from
17 the perspective of the Postal Service, and, in
18 part, Congress created the IPR and CBM
19 mechanisms with the interests of private
20 parties in mind, the interests in mind of
21 people who might be sued for infringement and
22 would want an avenue for seeking invalidation
23 of the patent. But Congress also wanted to
24 assist the PTO in doing its job.

25 And one impetus for the AIA was the

1 belief that ex parte reexamination simply
2 hadn't been affected -- effective, I'm sorry,
3 that not enough people had invoked it, and that
4 because the people who invoked it didn't have a
5 right to participate in the proceedings, the
6 PTO wasn't getting enough information to do its
7 job of not just issuing good patents in the
8 first instance but weeding out patents that
9 were both bad and of commercial --

10 JUSTICE KAGAN: May I ask, Mr.
11 Stewart, just a couple factual questions? This
12 case is about the post office, but let's say it
13 wasn't the post office. Let's say it was just
14 a regular executive branch agency.

15 Who would it be that would be making
16 the decision whether to seek a proceeding like
17 this? I mean, are -- is there a patent officer
18 in every agency whose -- whose -- whose job it
19 would be to decide when this was appropriate?

20 MR. STEWART: I don't know the answer
21 to that. I know we have a unit in the Civil
22 Division that will sometimes defend the
23 government in CFC litigation but also at least
24 on some occasions will be representing the
25 interests of a federal agency in PTAB

1 proceedings.

2 JUSTICE KAGAN: I guess what I'm
3 trying to figure out is, to the extent that you
4 think that maybe Congress treated the
5 government differently here because they were
6 afraid that the government in front of the PTAB
7 is -- has a kind of home court advantage and
8 that they didn't want that, I guess the
9 question is, is that true?

10 I mean, is this a community of patent
11 officials who talk to each other all the time
12 across the government, who know each other, who
13 deal with each other, or is this really
14 stovepiped so that none of these people -- the
15 PTAB would have no clue of who it was before
16 them when the Department of HHS walks in?

17 MR. STEWART: I mean, I have been to
18 the Federal Circuit bench and bar conference
19 and there -- there is a community thought of as
20 the patent bar, and so there probably is some
21 form of a professional acquaintance between the
22 -- the various types of governmental members.

23 But I think the one thing I would
24 stress most is, in other respects, Congress
25 evidently didn't see that as a problem because,

1 in authorizing federal agencies to apply for
2 patents, it didn't create a special patent
3 examination process or even a special
4 administrative appeal process so that the
5 government would come before people who were
6 unusually impervious to that sort of
7 overreaching.

8 And, similarly, Congress made
9 federal-owned patents susceptible to potential
10 IPR and CBM requests by private parties. And
11 it didn't create any special mechanism out of
12 concern that the government would have a home
13 court advantage in those areas.

14 And so I think the overriding theme of
15 the legislation is you have the authorization
16 in Section 207 to apply for a patent, and
17 everybody understands that all the statutory
18 provisions that flesh out the details of how
19 that system will be administered will be done
20 the same way with respect to governmental
21 applicants.

22 JUSTICE KAVANAUGH: If you were -- if
23 you were not to prevail here, what would the
24 real world problems be for the government?

25 MR. STEWART: You know, I'm told by

1 the PTO that in the years since the AIA was
2 enacted, federal agencies have submitted 20
3 requests for all forms of AIA post-issuance
4 review combined.

5 I mean, if you look at it from the
6 standpoint of the government's overall
7 litigation efforts across all subject matters,
8 it's pretty small.

9 But, if you ask would the Court
10 naturally or likely construe a statute to say
11 the government has to surmount a higher burden
12 of proof than a private party, it seems
13 unlikely even if it's a narrow class of suits.

14 Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you, Mr.
16 Stewart.

17 Three minutes, Ms. Brinkmann.

18 REBUTTAL ARGUMENT OF BETH S. BRINKMANN

19 ON BEHALF OF THE PETITIONER

20 MS. BRINKMANN: Thank you, Your Honor.

21 I have four points I'd like to make very
22 quickly.

23 The first one, I just want to clarify
24 the thing about trying to short-circuit the
25 reexam process.

1 Actually, under 301, there's a
2 provision that says, when a person requests a
3 reexamination, it can actually be confidential.
4 So this idea that somehow there's going to be a
5 secret person asking if the statute already
6 says that doesn't have to be disclosed, I think
7 that's 301(e).

8 The second thing I would point about,
9 just the anomaly of the agency versus agency.
10 Whatever anyone thinks of that, it would be
11 extraordinary for Congress to do that through
12 silence.

13 And to go to this question about who
14 would represent the government, I do know that
15 in the Civil Division, there, of course, is an
16 office that handles the patent litigation. In
17 fact, that is the office, the appellate
18 division that handles amicus briefs for the PTO
19 before the Federal Circuit, so there is
20 significant interaction.

21 I mean, I'm not suggesting that no one
22 would follow their roles and, you know, the law
23 and all, but just to answer your question,
24 Justice Kagan.

25 The other thing I would point out is

1 that the idea of why it would be the
2 reexamination instead of this process, the PTO
3 is the patent expert for the government. I
4 mean, that -- are there other people in the
5 government who know about patents? Sure.

6 But, when the Congress is thinking and
7 acting against these backdrop principles, and
8 thinking, well, the PTO is the expert that
9 would handle this.

10 The last point I would just make is
11 about this Court's long-standing presumptive
12 definition. It's the traditional legal
13 definition of "person" not to include the
14 government.

15 And in our reply brief, we have four
16 examples of over a century where this Court has
17 held that there were benefits that the
18 government wanted, could have gotten, but, no,
19 that was not what the word "person" meant.

20 And they were sometimes when the
21 government was the defendant. For example, in
22 the International Primate case, the NIH wanted
23 to be able to remove a case. And the Court
24 said no.

25 In Cooper, we already spoke about

1 that, the government wanted treble -- civil
2 damages at all and treble. No.

3 Davis versus Pringle was a case where
4 the government wanted priority in a bankruptcy
5 for its claims, and the presumptive definition
6 of "person" excluded it.

7 And then it dates all the way back to
8 the Fox case. That involved a state, a New
9 York law, but that was the traditional legal
10 presumption that "person" who could inherit and
11 own land did not include the government.

12 So we submit here --

13 JUSTICE KAGAN: Does that presumption
14 make any sense anymore, Ms. Brinkmann? I mean,
15 the idea of a presumption like this is that
16 it's a stable default rule against which
17 Congress can operate.

18 But does anybody really think -- this
19 perhaps goes back to Justice Alito's question
20 -- does anybody really think that Congress
21 thinks about this as a default rule and
22 legislates against it? And if not, shouldn't
23 we just do what strikes us as the thing
24 Congress would have wanted done with respect to
25 any particular statute?

1 MS. BRINKMANN: Your Honor, we think
2 there's a very good reason for it. Using
3 "person," knowing that it doesn't include the
4 government, fine.

5 When Congress and the President enact
6 laws that involve the government, a lot of
7 other things come into play. Sovereign
8 immunity, prosecutorial authority, there are
9 all kinds of other things.

10 So, yes, it makes all kinds of sense
11 because you just don't want to have these
12 scenarios all of a sudden: Wow, the
13 government's in there now, how does that play
14 out? Rather, they're not included. That is
15 the presumption.

16 And when they are intended to be
17 included, they can be enacted. And Congress
18 can change this if they want. That's what they
19 did in Cooper and, indeed, did it in a
20 different way and provided, not treble damages
21 initially, but a different remedy for the
22 government.

23 Thank you, Your Honor.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel. The case is submitted.

1 (Whereupon, at 11:05 a.m., the case
2 was submitted.)
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