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IN THE SUPREME COURT OF THE UNITED STATES

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MEDIMMUNE, INC., :

Petitioner, :

v. : No. 05-608

GENENTECH, INC., ET AL. :

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Washington, D.C.

Wednesday, October 4, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

JOHN G. KESTER, ESQ., Washington, D.C.; on behalf of the Petitioner.

DEANNE E. MAYNARD, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

MAUREEN E. MAHONEY, ESQ., Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

[10:03 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in MedImmune, Incorporated, versus Genentech.

Mr. Kester.

ORAL ARGUMENT OF JOHN G. KESTER

ON BEHALF OF PETITIONER

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

As of this morning, it is exactly 70 years ago to the day, minus 4 months, that this Court heard argument challenging the new Federal Declaratory Judgment Act of 1934, in an action to construe an insurance contract.

And exactly 25 years -- 25 days later, in a unanimous opinion written by Chief Justice Hughes, joined by Justices Stone, Brandeis, and others, the Act was held fully consistent with Article III of the Constitution.

This morning, you are here because an action was brought for a declaratory judgment that a biomedical manufacturer need not play -- pay large sums, under a license as patent royalties, under a patent it contends is invalid, unenforceable, and not infringed, but is paying royalties under protest in the meantime. That complaint was ordered dismissed by the Federal Circuit as outside

1 the Article III judicial power of the United States.

2 In detail, the Petitioner, MedImmune, is a  
3 biotech company, formed in 1988. During the 1990s --

4 CHIEF JUSTICE ROBERTS: Mr. Kester, would it --

5 MR. KESTER: Yes?

6 CHIEF JUSTICE ROBERTS: -- would it -- would  
7 your position be different if the contract contained a  
8 specific -- the license -- a specific provision specifying  
9 that the licensee may not sue?

10 MR. KESTER: No, it would not, Your Honor,  
11 because --

12 CHIEF JUSTICE ROBERTS: You -- do you think such  
13 a provision would be enforceable?

14 MR. KESTER: I doubt it would be enforceable.  
15 It would be a matter -- under the Lear case, Lear against  
16 Adkins, it would be an -- it would be an affirmative  
17 defense if such -- if such a claim were raised. This case  
18 is here at the level of subject-matter jurisdiction.

19 JUSTICE SCALIA: Excuse me, I don't -- I don't  
20 understand what you just said. You mean, it would be  
21 enforceable; that if such a suit were brought, the  
22 licensor could raise that contractual provision as a basis  
23 for dismissing the suit. Is that --

24 MR. KESTER: Under 12- -- under 12(b)(6) --

25 JUSTICE SCALIA: Okay.

1 MR. KESTER: -- perhaps.

2 JUSTICE SCALIA: So, then it is enforceable.

3 JUSTICE SOUTER: No, but --

4 MR. KESTER: No.

5 JUSTICE SOUTER: -- your point is, it's not  
6 jurisdictional.

7 MR. KESTER: It's not jurisdictional, exactly,  
8 Justice Souter. This is a jurisdictional ruling. And  
9 that's all that this Court granted certiorari on.

10 JUSTICE KENNEDY: Well, but as a matter of  
11 policy, we, at some point, either in this case or some  
12 later case, may have to address the question of whether or  
13 not such a provision is enforceable. If it is, we may be  
14 -- not be talking about much. It's just going to be  
15 boilerplate in every license agreement, and that's the end  
16 of it. And it --

17 MR. KESTER: And so --

18 JUSTICE KENNEDY: -- but it -- on the other  
19 hand, it may be that there are reasons not to enforce  
20 this, so that we don't have courts flooded with lawsuits,  
21 et cetera, et cetera.

22 MR. KESTER: And those reasons, I would suggest,  
23 Justice Kennedy, were taken care of in Lear, for the most  
24 part, in 1969. Provisions in license contracts that  
25 prevent challenges to the contracts are not enforceable

1 under the patent laws of the United States. But then, I  
2 -- as I was saying, that is a matter of patent law.

3 That's not a matter of jurisdictional law. We're here --

4 CHIEF JUSTICE ROBERTS: Well, let's look at what  
5 might be a matter of jurisdictional law. I take it, from  
6 your position, there's nothing preventing Genentech from  
7 suing, either, is there? In other words, to establish the  
8 validity of their patent.

9 MR. KESTER: It has -- it has happened, on  
10 various occasions, that patentees have brought suit to  
11 establish the validity of --

12 CHIEF JUSTICE ROBERTS: Against licensees?

13 MR. KESTER: Against licensees and others. And  
14 the --

15 JUSTICE GINSBURG: Against licensees who are not  
16 claiming that the patent is invalid? And where is the  
17 controversy?

18 MR. KESTER: The controversy could arise in any  
19 number of ways.

20 JUSTICE GINSBURG: I mean, I can see, if the --  
21 if licensee says the patent is invalid, that the patentee  
22 says paying its royalties -- how does it --

23 MR. KESTER: The patentee could be paying his  
24 royalties. The patentee could also be putting ads in the  
25 paper saying, "This is not a valid patent." It could --

1 it could have acquired a lot of publicity. And, in the  
2 end, there could be reasons, and there have been such  
3 cases -- which we cited, 47 of, our brief -- where such  
4 suits have been brought. But --

5 JUSTICE GINSBURG: If it -- if the -- if the --  
6 if the licensee came into court and said, "I'm not  
7 contesting this patent," that would be the end of it,  
8 wouldn't it?

9 MR. KESTER: If the licensee said, "I am not  
10 contesting that patent," that could be.

11 CHIEF JUSTICE ROBERTS: Oh, but the patentee  
12 would just say, "Look, we have a license. I think the  
13 patent's valid, and you owe me a dollar a unit." The  
14 licensee said, "Well, I don't think they're -- it's valid,  
15 so I owe you nothing." And they settle on a license for  
16 50 cents. Why can't the patentee say, "You know, if I get  
17 a judicial decision establishing that the patent is valid,  
18 I can charge a higher license, either when this agreement  
19 expires or for other licenses"?

20 MR. KESTER: That -- I agree with that, Mr.  
21 Chief Justice. But the practicality is that a patentee  
22 starts out with, essentially, a judgment that the patent  
23 is valid. There is a presumption of validity. And to  
24 challenge that patent -- that presumption of validity, is  
25 a very difficult undertaking. Most of them don't bother.

1 Why would they? If they are receiving -- if they're  
2 receiving --

3 CHIEF JUSTICE ROBERTS: I'm trying to see how  
4 far you want -- are willing to push your argument that  
5 just because there's been an agreement, or perhaps even a  
6 settlement, that that somehow or another doesn't moot the  
7 controversy, the underlying legal dispute. And it -- I  
8 gather your answer to me is that Genentech, or a patentee,  
9 can sue, even though they have an existing -- they're  
10 getting royalties from the licensee, they can still sue  
11 the licensee.

12 MR. KESTER: A settlement does not deprive a  
13 Federal Court of subject-matter jurisdiction. That's the  
14 narrow point that is before this -- before this Court.

15 JUSTICE GINSBURG: Why aren't you -- you said,  
16 "The only question before the court is jurisdictional."  
17 If that's so, why isn't your position that the Federal  
18 Circuit put the wrong label on this, that license is  
19 listed in 8(c) as an affirmative defense; so, whatever the  
20 outcome should be, the wrong label should -- is -- was  
21 used. It shouldn't be a subject-matter jurisdiction,  
22 shouldn't be 12(b)(1); it should be an 8(c) affirmative  
23 defense. And then the -- you're out of the jurisdiction  
24 box, but you're left with the same underlying question.

25 MR. KESTER: But not the same underlying

1 question, Justice Ginsburg, with respect, because then you  
2 are in a situation like the business forms case in the  
3 Seventh Circuit, which came out shortly after the Lear.  
4 There was a settle -- settlement, and the -- and it was  
5 argued that the settlement was not effective because of  
6 the Lear decision, and parties can't settle themselves out  
7 of the Lear decision. But that is all under 12(b)(6), and  
8 not 12(b)(1). This case involves a 12(b)(1) motion, not a  
9 12(b)(6) --

10 JUSTICE GINSBURG: But what --

11 MR. KESTER: -- motion.

12 JUSTICE GINSBURG: -- good would it do? Suppose  
13 we said, "Federal Circuit, you put the wrong label on it.  
14 It should be 12(b)(6), not 12(b)(1), or perhaps even 8(c),  
15 affirmative defense"? Then you go back to the Federal  
16 Circuit, and they'll come up with the same decision, that,  
17 as long as you are licensed and are paying your royalties,  
18 you have -- and they just put a different label on it --  
19 you have --

20 MR. KESTER: They --

21 JUSTICE GINSBURG: -- you have no -- you have  
22 not stated a claim.

23 MR. KESTER: That would be effectively  
24 overruling Lear, which is what, I think, is what many of  
25 the parties in this case actually seek to do.

1           Lear does not allow inhibitions of challenges to  
2 patent licenses. A licensee can challenge the validity,  
3 the enforceability of the patent. That's because there's  
4 a public interest in this, as well. Parties cannot simply  
5 contract with each other and prevent a challenge to a --  
6 to a patent --

7           JUSTICE GINSBURG: But then --

8           MR. KESTER: -- license.

9           JUSTICE GINSBURG: -- the Federal Circuit  
10 distinguished Lear, and said what -- in Lear, the licensee  
11 had stopped paying royalties. Isn't that so?

12           MR. KESTER: That -- those were the facts of  
13 Lear. But -- it happened that way in Lear, but that  
14 wasn't the reasoning of Lear. Lear would not totally  
15 cover that situation, but we would submit to this Court,  
16 it shouldn't make any difference. The reasoning of Lear  
17 is the same. The licensee cannot, by contract, be  
18 estopped, licensee estoppel, from challenging a patent.

19           CHIEF JUSTICE ROBERTS: So, there's no way, I --  
20 under your view, that a patent holder can protect itself  
21 from suit through any license arrangement or any agreement  
22 of any kind.

23           MR. KESTER: I suspect there are many ways, Mr.  
24 Chief Justice, but not by throwing them out on a  
25 jurisdictional basis at the very first moment of the

1 lawsuit.

2 JUSTICE GINSBURG: How about --

3 MR. KESTER: There may be ways this could be  
4 arranged at the second level, through --

5 JUSTICE GINSBURG: Well, what are those ways --  
6 I mean, the ones that have been mentioned as possibilities  
7 in the Government brief -- one, you rejected, and the  
8 other that was mentioned was: if you sue -- if the  
9 licensee sues, then the royalty fees will be upped. Would  
10 that be effective?

11 MR. KESTER: That is a question that would arise  
12 under Lear against Adkins. And the question before this  
13 Court in that situation, if it got to this Court, would  
14 be, Is that kind of a provision compatible with the policy  
15 that was so firmly expressed by Justice Harlan in Lear,  
16 and has been reiterated in so many subsequent cases of  
17 this Court?

18 JUSTICE GINSBURG: So, you have rejected both of  
19 the Government's suggestions on what the patent holder  
20 might do to protect itself. Do you have anything concrete  
21 that you would concede the patent holder could do?

22 MR. KESTER: I don't think that I have rejected  
23 both the Government's suggestions. I've said that they  
24 raise problems on -- as to the scope of Lear.

25 JUSTICE SOUTER: With respect to -- whether we

1 are talking about a jurisdictional defense or whether we  
2 are talking about an affirmative defense, assuming  
3 jurisdiction, is there any -- is there any reason for us  
4 to accept your position, other than the reason that you  
5 have mentioned a number of times, and that is the adoption  
6 and encouragement of a public policy that allows patent  
7 challenges freely? Is that the nub of our reasoning, if  
8 we were to support your position, either jurisdictionally,  
9 in this case, or in recognizing -- or the -- in dealing  
10 with the affirmative defense in another case?

11 MR. KESTER: Not quite, Justice Souter. I would  
12 say the nub of your position is the Altvater case, the  
13 Aetna case, the Maryland --

14 JUSTICE SOUTER: Well, Altvater is difficult for  
15 you, isn't it? Because there was an injunction in  
16 Altvater, wasn't there?

17 MR. KESTER: That -- but that -- but was --

18 JUSTICE SOUTER: Which raises an entirely  
19 different policy issue?

20 MR. KESTER: Well, I would say what it -- what  
21 it raises is simply an extra fact, but it wasn't a  
22 necessary fact. Because this Court, in Altvater,  
23 specifically pointed out that even if there weren't an  
24 injunction there, there would be -- there would be the  
25 danger forced on the licensee, of an infringement suit;

1 and an infringement suit means, possibly, an injunction of  
2 the patent, treble damages, any number of sanctions. An  
3 injunction suit can put a company out of business,  
4 especially like a company like my client here. And --

5 JUSTICE SOUTER: But that is -- that is a good  
6 reason. And, I take it, it's your logic that that is a  
7 good reason to recognize a fairly broad right on the part  
8 of the licensee to challenge.

9 MR. KESTER: Right.

10 JUSTICE SOUTER: In other words, the nub of your  
11 position, as I understand it, is the public policy that  
12 favors relative --

13 MR. KESTER: It --

14 JUSTICE SOUTER: -- freedom to challenge --

15 MR. KESTER: It's more -- it's more than public  
16 policy, it's Article III. Article III says that you can  
17 bring a lawsuit in this situation. And that was settled --

18 JUSTICE SOUTER: No --

19 MR. KESTER: -- in Aetna.

20 JUSTICE SOUTER: No, I realize that. But, I  
21 mean, what we've got in this case, and in any of these  
22 cases, is a question of line-drawing under Article III.  
23 And your argument is, you want to draw the line where you  
24 want it drawn primarily because there are practical  
25 reasons to favor a public policy of free challenge.

1 MR. KESTER: What we are presenting in this case  
2 is a dispute about money. It's not abstract. It's not  
3 hypothetical. It's not conjectural. It is concrete,  
4 immediate. All the facts are in. It's definitely  
5 adversarial. It's legal.

6 JUSTICE SCALIA: You -- well, you can have such  
7 a dispute on a theoretical question between, I don't know,  
8 the ACLU and the National Rifle Association, but that  
9 doesn't create a case or controversy. What is the injury,  
10 the imminent injury to your -- to your client that is the  
11 basis for the case or controversy?

12 MR. KESTER: The --

13 JUSTICE SCALIA: Is it anything other than, "I  
14 have to pay the royalties that I agreed to pay."?

15 MR. KESTER: It is the -- it is that, "I am  
16 having to pay the royalties -- that I say I did not agree  
17 to pay, because this is an invalid patent." Money is  
18 being paid by my client every quarter, large amounts of  
19 money. That is a major injury.

20 JCHIEF JUSTICE ROBERTS: Well, if you don't --

21 MR. KESTER: And if --

22 CHIEF JUSTICE ROBERTS: -- think --

23 MR. KESTER: And if --

24 CHIEF JUSTICE ROBERTS: -- if you don't think --

25 JUSTICE SCALIA: Is it -- is it unlawful to

1 agree to pay somebody money who does not have a patent?

2 MR. KESTER: It is --

3 JUSTICE SCALIA: I mean, you're speaking as  
4 though somehow that -- such a contract is contrary to  
5 public policy, and void.

6 MR. KESTER: No, we're saying that that isn't  
7 what we agreed to. We're saying this is a contract  
8 dispute. And the whole purpose of the --

9 CHIEF JUSTICE ROBERTS: Well, then why are you  
10 paying it, if you -- if you don't think you owe it?

11 MR. KESTER: Because the --

12 CHIEF JUSTICE ROBERTS: Because of the threat of  
13 treble damages --

14 MR. KESTER: The threat --

15 CHIEF JUSTICE ROBERTS: -- and injunction.

16 MR. KESTER: -- of this --

17 CHIEF JUSTICE ROBERTS: If we're trying to  
18 figure out where the public policy is here, why don't we  
19 give some weight to those congressional enactments that  
20 obviously fortify the strength of the patent? In other  
21 words, Congress passed these provisions providing for  
22 treble damages for attorneys' fees. And --

23 MR. KESTER: But --

24 CHIEF JUSTICE ROBERTS: -- and to respond that  
25 there's got to be a public policy to counterbalance that,

1 Congress can always do that, if it wants; but it didn't --  
2 it thinks that you need these provisions to protect the  
3 patent holders.

4 MR. KESTER: But, Mr. Chief Justice,  
5 Congress can also amend the Declaratory Judgment Act, if  
6 it wants. And Congress was proud of the Declaratory  
7 Judgment Act when it was passed in 1934. And the  
8 legislative history of it -- and nothing in the text is  
9 contrary, says the purpose of this is so that contracts  
10 can be resolved without breach, and judicial  
11 determinations can be had. It's like a noninvasive, a  
12 less invasive kind of surgery.

13 JUSTICE STEVENS: Mr. Kester, may I ask you this  
14 question? Is it your view that Gen-Probe represented a  
15 change in the law?

16 MR. KESTER: Absolutely.

17 JUSTICE STEVENS: Were there -- before Gen-Probe  
18 was decided, were there any cases, like this case, that  
19 were decided?

20 MR. KESTER: There were many, Your Honor, and  
21 they were decided --

22 JUSTICE STEVENS: Where the -- where the  
23 licensee brought suit challenging validity while the  
24 license was still in full --

25 MR. KESTER: We --

1 JUSTICE STEVENS: -- force?

2 MR. KESTER: We had suits in the Third Circuit,  
3 the Seventh Circuit, the Second Circuit, and even in the  
4 Federal Circuit, in its early days, where it quoted those  
5 cases which said, "It is not necessary for the licensee to  
6 stop paying payments in order for Article III to be  
7 satisfied."

8 This case came as a shock in 2004. And, in  
9 fact, the judges below, in this series of cases, all said,  
10 "We thought it was settled law the other way." All this  
11 case represents, from our point of view, is, "Let's go  
12 back to the way it has always been."

13 I'd like to reserve the balance of my time.

14 CHIEF JUSTICE ROBERTS: Thank you, Mr. Kester.  
15 Ms. Maynard.

16 ORAL ARGUMENT OF DEANNE E. MAYNARD

17 ON BEHALF OF PETITIONER

18 MS. MAYNARD: Mr. Chief Justice, and may it  
19 please the Court:

20 There is a concrete dispute between the parties  
21 about their legal rights and obligations. If that dispute  
22 is resolved, money will change hands. That is an Article  
23 III case or controversy.

24 CHIEF JUSTICE ROBERTS: How do you ever end  
25 these things? Let's say they have this dispute, they

1 bring the litigation, and they settle it. They're saying,  
2 "Okay, we're going to settle it. Instead of paying a  
3 license fee of 50 cents, it's going to be 40 cents, and  
4 we'll go on." Then they can sue again, I take it.

5 MS. MAYNARD:: In that situation. Recognizing  
6 that's not the situation we have here --

7 CHIEF JUSTICE ROBERTS: Can they settle that, by  
8 the way? Is it all right to settle it, or is -- that  
9 interfere with the policy that patents have to be open to  
10 challenge?

11 MS. MAYNARD: May I -- if I can answer the first  
12 question first.

13 CHIEF JUSTICE ROBERTS: Either one.

14 MS. MAYNARD: If there were to be a settlement,  
15 in the second case, the -- it would not be an Article III  
16 case or controversy problem with the second case. And  
17 that suit should not be dismissed under 12(b)(1).

18 CHIEF JUSTICE ROBERTS: Okay.

19 MS. MAYNARD: The -- in that case, the patent  
20 holder might have a valid 12(b)(6) defense, and the suit,  
21 laying aside enforceability issues that you raised, may be  
22 easily resolved, on that ground. But, in terms of the  
23 question before the Court today, that wouldn't be an  
24 Article III matter.

25 I think, as a policy matter -- so, moving off

1 the question before the Court right now -- as a policy  
2 matter, the -- it's not clear from this Court's cases  
3 exactly what types of agreements would be enforceable. I  
4 think there's a spectrum of cases one can imagine, ranging  
5 from Pope -- the type of promise that was extracted in  
6 Pope, which this Court held was unenforceable --

7 CHIEF JUSTICE ROBERTS: Well, I think you  
8 overread Pope. All Pope said was that they're not going  
9 to grant specific performance. In fact, they've said,  
10 "Whatever you may think of the policy here, we don't --  
11 specific performance calls on the equitable discretion,  
12 and we're not going to do it." But, I don't read Pope as  
13 holding that the clauses are otherwise unenforceable. In  
14 --

15 MS. MAYNARD: Well --

16 CHIEF JUSTICE ROBERTS: -- other words you're  
17 maybe entitled to damages. And that may be measured by  
18 the license fee that you agreed to pay.

19 MS. MAYNARD: Well, there certainly would be a  
20 question, though, the way that Lear read Pope, and under  
21 Lear, about whether a bare agreement not to challenge  
22 licenses, especially ones like in Pope, where they agreed  
23 not to challenge the license, even beyond the term, would  
24 be enforceable. And the Government thinks there's a  
25 spectrum. One -- at one end of the spectrum would be

1 licenses like those in *Pope*, and at the other end of the  
2 spectrum would be a consent decree entered after  
3 settlement of a bona fide patent infringement suit where  
4 the -- which included an agreement not to settle. Now,  
5 that's clearly not what we have here.

6 JUSTICE BREYER: Now, is -- if -- I guess there  
7 are three possible positions on the question of whether a  
8 licensee can attack a contract, a patent where he has a  
9 license and wants to keep the contract. One, he can never  
10 do it. Two, he can always do it. Three, it depends on  
11 what the contract says. Now, do any of those questions  
12 have anything to do with the question before us, which is  
13 whether it is a case or controversy?

14 MS. MAYNARD: No, Your Honor.

15 JUSTICE BREYER: All right. If we were to reach  
16 the question, which is very interesting, "What is the  
17 Government's position as to which of those three positions  
18 is the right position?" -- were we to reach it -- I agree  
19 with you, I don't see it in front of us; but maybe it is  
20 -- if it were, what would be your view?

21 MS. MAYNARD: The Government's view is that  
22 there's a spectrum along the spectrum, and it would have  
23 -- you would have to consider each case on its terms. And  
24 it's not clear, from this Court's cases, where the  
25 policies in that --

1 JUSTICE BREYER: All right. So, basically,  
2 though, you're not certain. The Government's view would  
3 be, it is a matter as to whether you can sue claiming the  
4 patent is invalid, whether the licensee can do it, that  
5 probably -- but you're not certain, and you haven't made  
6 up your mind definitely, because it is not in this case --  
7 but you think it's going to be something they could  
8 regulate themselves by contract.

9 MS. MAYNARD: It's certainly not foreclosed by  
10 this Court's precedent, and it's an open question where  
11 the policies -- how they would weigh out. There's no  
12 language in this license, however, suggesting any type of  
13 settlement. And, moreover, I think it's important to  
14 recognize that the parties here actually have a concrete  
15 dispute about what the licensing agreement means. Count  
16 one in the complaint is asking for a declaration --

17 CHIEF JUSTICE ROBERTS: Well, you don't think  
18 that matters, though, do you? I mean, even if they all  
19 agree there's no dispute about what the license agreement  
20 means, your position is still the same, right? There is  
21 an Article III controversy because they challenge the  
22 validity of the patent?

23 MS. MAYNARD: If the parties have a concrete  
24 dispute about the validity of the patent, and it would  
25 affect their rights and obligations in the way that it

1 would here -- in other words, that money will no longer be  
2 due to the Respondents if the patent's invalid --

3 CHIEF JUSTICE ROBERTS: Is --

4 MS. MAYNARD: -- and the --

5 CHIEF JUSTICE ROBERTS: -- that always the case?  
6 I mean, could -- can you enforce a license agreement based  
7 on an invalid patent? You thought it was valid -- parties  
8 had a dispute about it -- whether it is valid. You  
9 entered into agreement, say, "Well, let's split the  
10 difference. We'll -- you know, 50 cents rather than a  
11 dollar or nothing." It's determined that the patent is  
12 invalid. Can the patentee then still say, "Well, you  
13 still owe me the money. We've, kind of, cut -- split the  
14 difference. That was part of the agreement"?

15 MS. MAYNARD: It might depend on whether there  
16 was consideration beyond the patent itself. In the -- in  
17 this -- in this case, though, the Petitioner claims that  
18 if the -- if the patent is invalid, they no longer owe  
19 licensing fees, and, under Lear, they would be entitled to  
20 the licensing fees, that they've paid since they began  
21 challenging, back. So, it's clear that under either the  
22 contract or a question of --

23 JUSTICE SCALIA: Contractually? They say that  
24 that's their contractual right?

25 MS. MAYNARD: They claim that, under the

1 licensing agreement, they only owe royalties on valid  
2 claims. That's count one of the complaint, in the (j) --

3 JUSTICE SCALIA: Where does that appear in the  
4 licensing agreement? Or --

5 MS. MAYNARD: Where does it appear in the  
6 licensing agreement?

7 JUSTICE SCALIA: Yes, I took them as just  
8 asserting a general proposition of law -- that, where  
9 they've agreed to pay royalties because of a patent, if  
10 the patent is invalid, they don't have to pay royalties --  
11 not because there's some special provision in this  
12 contract.

13 MS. MAYNARD: The parties actually have a  
14 concrete dispute about the meaning of the licensing  
15 agreement in that regard, Justice Scalia. On page 399 of  
16 the joint appendix is the provision about which they have  
17 a dispute. And the language in there provides that they  
18 will pay on substances which would, if not licensed under  
19 this agreement, infringe one or more claims of either or  
20 both of the Shamir patents, or coexpression patents, which  
21 have neither expired nor been held invalid by a court or  
22 other body of competent jurisdiction. There was similar  
23 language in --

24 JUSTICE SCALIA: So, there's really not much at  
25 issue in this case. And that's clearly a case of

1 controversy, isn't it? There is a dispute over the  
2 meaning of that provision of the agreement.

3 MS. MAYNARD: Yes, Your Honor.

4 JUSTICE SCALIA: Gee, there's less here than  
5 meets the eye.

6 MS. MAYNARD: That's what the Government  
7 believes, Your Honor.

8 It's also -- the licensee also does not need to  
9 breach the licensing agreement in order to create a case  
10 or controversy. The licensee is currently paying  
11 royalties that it does not believe it owes and that it  
12 believes it would be entitled to have back if it should  
13 prevail on its interpretation of the -- of the patent and  
14 the licensing agreement. It doesn't have to make that  
15 injury more severe by breaching. That's clear from this  
16 Court's decision in Altvater. In Altvater, royalties were  
17 being demanded and royalties were being paid, but,  
18 nevertheless, this Court held --

19 CHIEF JUSTICE ROBERTS: Well, but that -- it's  
20 been pointed out that was pursuant to an injunction.

21 MS. MAYNARD: Yes, it was pursuant to  
22 injunction, but that was not important to the Court's  
23 reasoning. What the Court said is, "You need not suffer  
24 patent damages in order to bring the suit." Not a  
25 contempt. "You need not breach the injunction and put

1 yourself at risk of treble damages for infringement." It  
2 was the patent damages that put the licensee at risk, and  
3 that's the same risk that the Petitioner faces here and  
4 should not have to bear in order to bring suit.

5 The case or controversy is whether or not the --  
6 they owe the royalties. The whole point of the  
7 Declaratory Judgment Act was to allow contracting parties  
8 not to have to sever their ongoing contractual relations  
9 in order to get disputes resolved between --

10 CHIEF JUSTICE ROBERTS: Do you think --

11 MS. MAYNARD: -- themselves.

12 CHIEF JUSTICE ROBERTS: Do you think there would  
13 be a case or controversy if Genentech were suing to  
14 establish the validity of its patent?

15 MS. MAYNARD: In the situation that we have  
16 here, Your Honor?

17 CHIEF JUSTICE ROBERTS: Yes.

18 MS. MAYNARD: Yes, I do. Where the Petitioner  
19 claims that the patent is invalid, that they could -- that  
20 the Petitioner's claims unsettles their right, damages  
21 their property value, potentially, and that they could  
22 bring a declaratory judgment action of validity.

23 JUSTICE SCALIA: And what would their -- what  
24 would their concrete injury be? What is the threatened  
25 imminent injury that they would assert in that -- in that

1 action?

2 MS. MAYNARD: Well, right now --

3 JUSTICE SCALIA: You have a licensee who's  
4 paying the license fees. What is their concrete injury?

5 MS. MAYNARD: It -- from the moment -- the  
6 Petitioner has an argument that from the moment it ceased  
7 -- it starts claiming that the patent is invalid and pays  
8 under protest, that it is entitled to those royalties  
9 back.

10 JUSTICE SCALIA: But --

11 MS. MAYNARD: The --

12 JUSTICE SCALIA: -- so long as they're still  
13 paying the royalties, isn't that sort of an abstract  
14 disagreement? I mean, it's sort of like the ACLU saying  
15 that the patent's invalid. You know, it's a nice  
16 theoretical question that we can argue about, but as long  
17 as they're paying the royalties, where's the concrete  
18 injury?

19 MS. MAYNARD: Well, I think, technically,  
20 Justice Scalia, they probably have a claim for patent  
21 infringement, to which the defense, as Justice Ginsburg --

22 JUSTICE SCALIA: I --

23 MS. MAYNARD: -- points out --

24 JUSTICE SCALIA: I find it --

25 MS. MAYNARD: -- would be an easy defense.

1 JUSTICE SCALIA: I --

2 MS. MAYNARD: So, there's not an Article III  
3 lack of case or controversy, which is --

4 JUSTICE SCALIA: I find it --

5 MS. MAYNARD: -- what's the question before --

6 JUSTICE SCALIA: -- very difficult --

7 MS. MAYNARD: -- the Court.

8 JUSTICE SCALIA: -- to see how there would be a  
9 proper declaratory judgment action brought by the patentee  
10 here. It's just not the kind of a situation where you can  
11 have a mirror-image suit. I don't see what the --

12 MS. MAYNARD: Well, you need --

13 JUSTICE SCALIA: -- patentee --

14 MS. MAYNARD: You -- may I answer that question?

15 You need not have a mirror-image suit, in that sense,  
16 Justice Scalia. And Altvater makes that clear. In  
17 Altvater, the patentee's claim was --

18 JUSTICE SCALIA: That's fine.

19 MS. MAYNARD: -- much narrower than the  
20 counterclaim; and, nevertheless, the Court allowed that  
21 counterclaim to proceed.

22 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

23 Ms. Mahoney.

24 ORAL ARGUMENT OF MAUREEN E. MAHONEY

25 ON BEHALF OF RESPONDENT

1 MS. MAHONEY: Mr. Chief Justice, and may it  
2 please the Court:

3 I'd like to start with the fact that there are  
4 four counts in the complaint for declaratory relief. The  
5 first one is styled as a -- contractual relations claims.  
6 The other three are styled as patent law claims. And it's  
7 important to emphasize, at the outset, that this Court, in  
8 *Skelly Oil*, in *Calderone*, and in, really, all of the  
9 cases, has said it's very important to look behind the  
10 labels that a Declaratory Judgment Act plaintiff puts on  
11 their claims. We need to actually see what is the cause  
12 of action they're trying to adjudicate so we can do an  
13 accurate assessment of justiciability -- standing,  
14 ripeness, Federal-question jurisdiction.

15 I want to start by explaining why there is no  
16 contract claim at issue here. You heard today, they're  
17 trying to salvage this, say that there's a contract  
18 dispute, a dispute about the terms of the contract. They  
19 didn't argue that below, and with good reason. And I'd  
20 just point you to the briefs in the Federal Circuit.  
21 Roman numeral I, which is all about the improper dismissal  
22 of the Declaratory Judgment Act claims, refers to the fact  
23 these are, quote, "patent-law claims," end quote, at page  
24 27. Nowhere do they say that there is a dispute about the  
25 proper interpretation of the contract terms. And let me

1 explain why.

2           The contract terms, which were just read to you,  
3 is Section 110 of -- 1.10 at JA-399 of the license -- says  
4 that there is an obligation to pay royalties for Synagis  
5 on any claim -- not any valid claim, any claim -- that has  
6 not been held invalid by a court or other competent  
7 jurisdiction from which no appeal has, or may, be taken.  
8 Now, they never said, below, "That clause means that we  
9 can come to court and have the court decide whether this  
10 patent is valid, and, depending on whether we win or not,  
11 then we can stop paying." And the reason they didn't make  
12 that argument is, it was rejected by this Court a hundred  
13 years ago, in United States versus Harvey Steel. Very  
14 similar clause. The United States says, "This means that  
15 we don't have to pay if the patent is invalid." And, in  
16 an opinion by Justice Holmes, this Court rejected it out  
17 of hand by -- and said, "This was a conventional proviso.  
18 We don't even need to look to evidence of the party's  
19 intent, because this is the standard proviso. It does not  
20 mean" -- and they said it was a "twisted interpretation"  
21 that the Government was offering -- it doesn't mean that  
22 the licensee, quote, "thought the patent bad and would  
23 like to have the Court say so now," end quote. Yet that  
24 is exactly --

25           JUSTICE GINSBURG: Was that a case about Article

1 III case or controversy?

2 MS. MAHONEY: It is, in the following sense,  
3 Your Honor. They can't just show up here today and say,  
4 "Well, there really is a dispute about the contract." But  
5 they never argued, below, and is foreclosed --

6 JUSTICE BREYER: Shouldn't we send that back? I  
7 mean, I thought we were here to decide one question, that  
8 the Federal Circuit has said that, "Unless there is a  
9 reasonable apprehension of a lawsuit, you can't bring a  
10 declaratory judgment action, because of the Constitution  
11 of the United States." Now, I have to admit, I've looked  
12 up, or I've had my law clerk look up, probably now  
13 hundreds of cases, and we can't find, in any case, such a  
14 requirement. Indeed, the very purpose -- as I -- we've  
15 just heard the SG say, of this act, the Declaratory  
16 Judgment Act, seems to be to allow people who -- a  
17 contract -- who are in a real concrete disagreement, to  
18 get a declaratory judgment without getting rid of the  
19 contract. But I might be wrong about that.

20 But you've now argued a different point.

21 MS. MAHONEY: Well --

22 JUSTICE BREYER: So, isn't the right thing for  
23 us to do, to decide the issue in front of us and then send  
24 it back? If you're right that they have to pay, whether  
25 they win or lose; if they're right that they promise not

1 to sue; if you're right on 14 other grounds, you might  
2 win. But should we decide those grounds today? Why?

3 MS. MAHONEY: Well, first of all, with respect  
4 to this issue, whether there would be jurisdiction over a  
5 real live contract dispute, they never argued it, Your  
6 Honor. It's not part of this case. The Federal Circuit  
7 didn't address it, because they didn't argue it, because  
8 it's foreclosed by --

9 JUSTICE GINSBURG: But the question --

10 MS. MAHONEY: -- a precedent a hundred --

11 JUSTICE GINSBURG: The question that is  
12 presented to us -- whatever they suggested at this oral  
13 argument that wasn't in III, the question it presented to  
14 us is, Was the Federal Circuit right when they said, "You  
15 have no access to a declaratory judgment unless there is a  
16 reasonable apprehension that you will be sued"?

17 MS. MAHONEY: Your Honor, that is the right --  
18 that is the right starting point for a test, depending on  
19 the cause of action they're seeking to adjudicate. In  
20 here, what the Federal Circuit properly understood is that  
21 they are seeking to adjudicate affirmative defenses to an  
22 infringement action under the patent laws.

23 And, just like in Steffel, if you're trying to  
24 adjudicate, on an anticipatory basis, an enforcement  
25 action, you have to show that you would reasonably fear

1 that enforcement action. And, in fact, Steffel uses that  
2 language, and Poe versus Ullman dismisses a case for  
3 failure to establish a genuine fear of prosecution. But  
4 then, you have to go one step beyond, and that is to say,  
5 Are they -- is the cause of action not ripening because  
6 the declaratory judgment plaintiff is forfeiting their  
7 legal rights in order to avoid some very severe harm that  
8 would be cognizable coercion? That's the test that's used  
9 in Steffel for -- in essence, being able to test a --  
10 defenses to a cause of action that --

11 JUSTICE SCALIA: And why --

12 MS. MAHONEY: -- an enforcement action.

13 JUSTICE SCALIA: -- doesn't that work here?

14 MS. MAHONEY: It doesn't work here, for several  
15 reasons. Most fundamentally, this is a settlement. I  
16 mean, Mr. Steffel did not enter into a settlement or a  
17 compromise with the prosecutor. He wasn't complying  
18 because he was under an agreement to do so. Here, it has  
19 been settled for -- forever, that if a -- an agreement --  
20 if you're making payments pursuant to an agreement, in the  
21 nature of a compromise, you can't come and say that it's  
22 been coerced or it's a form of duress.

23 JUSTICE SCALIA: What is the --

24 JUSTICE SOUTER: Why should we accept the  
25 characterization that it's a compromise? As I -- and

1 maybe I'm just factually wrong here? I thought, at the  
2 time they entered into the license agreement, they had  
3 some disagreements about the scope of the then-patent, the  
4 scope of the anticipated patent, and so on, and they  
5 couldn't very well be resolved. But they were -- they  
6 were not settling, in the -- in the classic sense of the  
7 word, a -- let us say, a focus claim, one against the  
8 other.

9 MS. MAHONEY: I think the answer, Your Honor,  
10 is, they weren't settling, for all time, in the sense that  
11 they could never get out of the deal. Certainly, they  
12 could repudiate and then go ahead and sue. But yet, at  
13 page 3 of their petition, they expressly say, the reason  
14 they entered into this agreement was in order to avoid the  
15 costs and risks of litigation. It is the reason --

16 JUSTICE SOUTER: But had they gotten to the  
17 point, prior to the execution of the contract, in which  
18 one party was saying, "You may not do this," and the other  
19 party was saying, "Oh, yes I can," so that there -- there  
20 was a focus controversy that would have been the subject  
21 matter of a conventional lawsuit, then and there, had  
22 there not been this license agreement?

23 MS. MAHONEY: Not exactly, but what they did was  
24 they headed it off at the pass. They understood that --

25 JUSTICE SOUTER: But the question is, How far

1 ahead of the pass can they get and still call it a  
2 settlement?" in the sense that you're using that term.

3 MS. MAHONEY: It's a compromise. It's a  
4 compromise of the very claims they're trying to adjudicate  
5 here. What they want to adjudicate are affirmative  
6 defenses to a patent infringement action. That is not a  
7 ripe claim, and there is not sufficient immediacy, because  
8 they are preventing that claim from ripening by continuing  
9 to make voluntary payments --

10 JUSTICE SOUTER: But --

11 MS. MAHONEY: -- under their --

12 JUSTICE SOUTER: But you --

13 MS. MAHONEY: -- agreement.

14 JUSTICE SOUTER: Right. But you were saying  
15 that the status of that agreement, for purposes of the  
16 jurisdictional question here, is exactly the same as the  
17 status of an agreement that they might have entered into  
18 after one party had brought suit against the other. And  
19 --

20 MS. MAHONEY: Well --

21 JUSTICE SOUTER: And they -- they had settled.  
22 And then, later on, somebody wanted to repudiate the  
23 settlement.

24 MS. MAHONEY: I don't know if it's exactly the  
25 status. For instance, in a settlement after litigation

1 has been filed, I think that Lear would say that you can't  
2 even repudiate that. But certainly -- so, there might be  
3 some differences -- but from --

4 JUSTICE SOUTER: In any event --

5 MS. MAHONEY: -- the standpoint of coercion --

6 JUSTICE SOUTER: -- it's equivalent to a  
7 settlement after a formal demand has been made.

8 MS. MAHONEY: It is equivalent to that, in the  
9 following sense. They understood that if they -- if they  
10 didn't get a license, that they would be exposed to  
11 Genentech's claims under the -- under the infringement  
12 laws. And in order to avoid that exposure, even though  
13 they had all the information they needed to assess the  
14 validity of this patent at the time --

15 JUSTICE KENNEDY: Suppose they didn't have all  
16 the information. Suppose you enter into a license  
17 agreement -- you're convinced, as the one that's going to  
18 pay the license fee, that it's a good patent -- after the  
19 agreement's signed, the technological advances, other  
20 disclosures, indicate that the patent is deficient. Could  
21 you sue then?

22 MS. MAHONEY: No, I don't think so, unless --

23 JUSTICE KENNEDY: Well, but then -- so then, the  
24 argument that you've made is just not --

25 MS. MAHONEY: No, I --

1 JUSTICE KENNEDY: -- relevant for us, the fact  
2 that they knew everything --

3 MS. MAHONEY: They did.

4 JUSTICE KENNEDY: And it also means that this  
5 isn't really a settlement, in any respect.

6 MS. MAHONEY: It's a compromise of claims that  
7 could be brought.

8 JUSTICE STEVENS: Ms. Mahoney, can I ask this  
9 question? Supposing at the time they negotiate the  
10 license agreement there's some uncertainty about whether  
11 the patent is valid or not. So, at the end of the license  
12 agreement -- they agree on the royalties, the term, and  
13 the -- everything it covers, but they put in a provision  
14 and say, "We're not entirely sure the patent is valid, so  
15 we reserve the right to bring an action challenging the  
16 validity of the patent. We will pay royalties in the  
17 meantime, and the -- you will accept these royalties as  
18 sufficient for the use of the patent, that, if we win, you  
19 don't have to pay royals, if we lose, you do." Would that  
20 be a valid provision?

21 MS. MAHONEY: I don't think so, but that would  
22 certainly be a closer case if there --

23 JUSTICE STEVENS: But would it --

24 MS. MAHONEY: But I --

25 JUSTICE STEVENS: -- not be precisely the same

1 issue as a jurisdictional matter as to whether there's a  
2 case or controversy?

3 MS. MAHONEY: No, I don't think so, because the  
4 real issue, in terms of Steffel, is whether you can say  
5 that the party is being coerced. And, at least in your  
6 hypothetical, you could say that they have --

7 JUSTICE STEVENS: He's not being coerced, but  
8 he's bargaining a little better royalty rate than he'll --  
9 otherwise would have to pay.

10 MS. MAHONEY: Well, in terms of whether they're  
11 -- if the parties expressly agreed that that was part of  
12 their deal, then you at least wouldn't say that there was  
13 an issue of coercion. But here, that isn't what happened.  
14 Instead, they used --

15 JUSTICE STEVENS: No, I'm really asking --

16 MS. MAHONEY: -- a standard proviso --

17 JUSTICE STEVENS: -- whether the parties could  
18 agree to create a case or controversy.

19 MS. MAHONEY: I think probably not, Your Honor.  
20 I think --

21 JUSTICE BREYER: Let's suppose --

22 MS. MAHONEY: -- that that's one of the --

23 JUSTICE BREYER: Well --

24 MS. MAHONEY: -- one of the problems --

25 JUSTICE BREYER: Will you assume Justice

1 Stevens' hypothetical? Assume it, take it as given. They  
2 did put that in. I know you think they didn't, but I want  
3 to assume it.

4 MS. MAHONEY: Uh-huh.

5 JUSTICE BREYER: Now, I'd like to also assume --

6 JUSTICE SCALIA: Could I have a review of the  
7 bidding? What --

8 [Laughter.]

9 JUSTICE SCALIA: Go back -- what is the  
10 hypothetical --

11 JUSTICE BREYER: The hypothetical is --

12 JUSTICE SCALIA: Continue on.

13 JUSTICE BREYER: -- that they write into the  
14 contract -- the party who's the licensee says, "And we  
15 stipulate that the licensee thinks that the patent is  
16 invalid." Nonetheless, the licensee wants a license, for  
17 business reasons. Therefore, the licensee and the  
18 licensor agrees that, after they sign the contract and  
19 he's paying a thousand dollars a month in royalties, he  
20 can go into court and challenge the patent." So, we  
21 assume that's written into the contract.

22 MS. MAHONEY: Uh-huh.

23 JUSTICE BREYER: And now, let us also assume a  
24 state of the law. The state of the law is that there is  
25 no public policy or any other policy that forbids such a

1 condition in a contract. All right?

2 Now, on those two assumptions, the next thing  
3 that happens is that the licensee asks for a declaratory  
4 judgment that the patent is invalid.

5 On those assumptions, is there a case or  
6 controversy under the Federal Constitution? If not, why  
7 not?

8 MS. MAHONEY: I don't think so, because I think  
9 what they're really asking for is advice about a business  
10 deal under those circumstances.

11 JUSTICE BREYER: But he says, by the way, "If I  
12 win, I will, in fact, save \$42 billion a year in licenses"  
13 --

14 MS. MAHONEY: Yes.

15 JUSTICE BREYER: -- "I would other have to pay."  
16 And the other side will -- or -- I was a thousand dollars,  
17 I meant 42 billion, okay?

18 [Laughter.]

19 MS. MAHONEY: But -- you know, but now -- but  
20 now, can they come even before they sign the deal? In  
21 other words, what's --

22 JUSTICE BREYER: No. Now, that's --

23 MS. MAHONEY: -- the line?

24 JUSTICE BREYER: I'm not asking --

25 MS. MAHONEY: In other words --

1 JUSTICE BREYER: -- your hypothetical.

2 MS. MAHONEY: -- I -- no. Oh, no, I'm just  
3 saying --

4 JUSTICE BREYER: I'm asking --

5 MS. MAHONEY: -- I think that --

6 JUSTICE BREYER: -- my hypothetical.

7 [Laughter.]

8 MS. MAHONEY: I think the problem -- I think the  
9 problem is, it -- is, it leads notion that parties can  
10 simply, sort of, set up a -- even if there's not true  
11 adversity, and come to court for answers to legal  
12 questions. And that has --

13 CHIEF JUSTICE ROBERTS: Well, isn't there --

14 MS. MAHONEY: -- is something --

15 CHIEF JUSTICE ROBERTS: -- true adversity? I  
16 thought the assumption underlying the -- everybody's  
17 hypothetical is that, if the patent is determined to be  
18 invalid, that the license -- then the license agreement is  
19 also invalid. Is that -- is that right?

20 MS. MAHONEY: I don't think so. I don't think  
21 the license agreement itself is invalid. It simply --

22 CHIEF JUSTICE ROBERTS: Can you -- can you --

23 MS. MAHONEY: -- means --

24 CHIEF JUSTICE ROBERTS: -- can you collect --  
25 can a patentee collect license fees based on an -- patent

1 that has been determined to be invalid?

2 MS. MAHONEY: Not on that patent. Right. The  
3 license --

4 CHIEF JUSTICE ROBERTS: It would --

5 MS. MAHONEY: -- made.

6 CHIEF JUSTICE ROBERTS: It would be pursuant to  
7 the agreement.

8 MS. MAHONEY: If the patent has been -- under  
9 Lear and other cases, if a patent has been held to be  
10 invalid by a final decision of a court, then I think it is  
11 improper for a licensee to seek to obtain --

12 CHIEF JUSTICE ROBERTS: Collective --

13 MS. MAHONEY: -- royalties --

14 CHIEF JUSTICE ROBERTS: Even if --

15 MS. MAHONEY: -- for that.

16 CHIEF JUSTICE ROBERTS: -- the royalty agreement  
17 says, you know, "We have a dispute about the validity of  
18 this patent. We don't know. We disagree. And so, we've  
19 entered into a compromise royalty rate that reflects the  
20 uncertainty." But once it's determined to be invalid, the  
21 license fees are not collectible.

22 MS. MAHONEY: I think that that is correct, Your  
23 Honor, under the -- under the current state of the law.

24 JUSTICE SOUTER: One further -- on further  
25 wrinkle. What if the contract goes the further step and

1 says, "Even if the patent were determined, in any action,  
2 to be invalid, there will still be a royalty payable,  
3 because that's what -- that's -- that is consideration for  
4 the fact that we are not going to start any controversy  
5 now." Let's assume they assume, precisely, the  
6 invalidity. Would you say the contract is unenforceable  
7 then, and the -- and the --

8 MS. MAHONEY: Well --

9 JUSTICE SOUTER: -- and, for jurisdictional  
10 purposes, there would be no case or controversy then?

11 MS. MAHONEY: That if, under the -- I'm sorry,  
12 to --

13 JUSTICE SOUTER: The --

14 MS. MAHONEY: The --

15 JUSTICE SOUTER: Take the Chief Justice's  
16 hypothetical, add the following. There is a provision in  
17 there to the effect that if, during the term of this  
18 contract, the license is determined to be invalid,  
19 royalties will still be payable under this contract --

20 MS. MAHONEY: Uh-huh.

21 JUSTICE SOUTER: -- because that is one of the  
22 contingencies, which is a consideration for our bargain.  
23 Would you say, in those circumstances, that your answer  
24 would be the same, that there's no -- there's no case or  
25 --

1 MS. MAHONEY: Well, I don't know what the  
2 dispute would be about, Your Honor, because it sounds like  
3 the contract terms would be clear. And if the contract  
4 terms are clear, they would simply go in accordance,  
5 unless they have an argument that the contract is --

6 JUSTICE SOUTER: No, but I'm talking about  
7 jurisdictional purposes.

8 MS. MAHONEY: -- unenforceable. If the -- if  
9 the point is that it is actually invalid, illegal, that --  
10 that may be a different case, although I think there would  
11 still be an estoppel argument, that they should not be  
12 permitted to bring that action without giving up the  
13 benefits of the bargain, which is the immunity from suit.  
14 I mean, that is one of the fundamental problems with this  
15 case.

16 JUSTICE SOUTER: But do you see --

17 CHIEF JUSTICE ROBERTS: I thought your argument  
18 -- I'm sorry.

19 JUSTICE SOUTER: Well, if -- do you see a  
20 difference between -- I guess you're saying there's no  
21 difference between my added wrinkle on the hypo and the  
22 Chief Justice's hypo, for jurisdictional purposes.

23 MS. MAHONEY: I don't think that there's a  
24 difference, from a jurisdictional perspective --

25 JUSTICE SOUTER: Okay.

1 MS. MAHONEY: -- but I think, here, that the  
2 major problem, from a jurisdictional perspective, is that  
3 there is not anything in the language of the contract that  
4 gives them a right to come to court to dispute validity.  
5 Instead, we're --

6 CHIEF JUSTICE ROBERTS: What about the fact that  
7 it's under protest?

8 MS. MAHONEY: That makes no difference, Your  
9 Honor. The fact is that they are making the payments  
10 pursuant to an agreement. They're not under compulsion of  
11 an injunction. They're doing it because they voluntarily  
12 entered into it. Altvater is completely different.  
13 There, there was no license agreement in force. The  
14 courts found that it -- that the reissue patents were  
15 never part of the agreement, to begin with. In other  
16 words, Altvater never agreed to pay royalties. Altvater  
17 had been sued, so there wasn't a counterclaim for  
18 invalidity.

19 JUSTICE GINSBURG: Could the --

20 MS. MAHONEY: And --

21 JUSTICE GINSBURG: -- patent holder take the  
22 position that, "I -- Sooner or later, I'm going to have to  
23 fight out validity with someone, and might as well do it  
24 sooner rather than later, so I am not going to raise the  
25 license as a defense"? Would that be a "case or

1 controversy"?

2 MS. MAHONEY: I don't think that the patent  
3 holder is allowed to come to court and seek a declaration  
4 of validity. I don't think any court has ever allowed  
5 that.

6 JUSTICE GINSBURG: Is it -- it's -- no, the  
7 patent -- the licensee is coming into court and wants a  
8 declaration of invalidity so it can manufacture without  
9 the fear of an infringement suit.

10 MS. MAHONEY: And they're under a license?

11 JUSTICE GINSBURG: Yes.

12 MS. MAHONEY: Yes.

13 JUSTICE GINSBURG: And the patent holder chooses  
14 not to plead the license -- chooses not to plead the  
15 license. Wouldn't the patent holder have that option?

16 MS. MAHONEY: Yes, the patent -- well, no. I  
17 mean, not necessarily. Their view is that, because of the  
18 terms of the agreement, that the patent holder has no  
19 choice but to -- because they're receiving the royalties,  
20 to simply --

21 JUSTICE GINSBURG: I don't mean their view. I  
22 mean, they start a lawsuit. They say, "We're -- we want"  
23 --

24 MS. MAHONEY: But that is -- that's what  
25 happened here.

1 JUSTICE GINSBURG: -- "we want a declaration of  
2 infringement." And the patent holder doesn't take the  
3 position that you're taking; instead says, "I'm prepared  
4 to fight this out now. I know that I have the license,  
5 which could be an affirmative defense, but I'm not going  
6 to raise it. I'm going to go head to head on the validity  
7 of this patent." Would that be a case or controversy?

8 MS. MAHONEY: I don't think so, Your Honor,  
9 because I don't think the parties are allowed to just  
10 decide, "Well, we'd like to do this now," when they're --

11 JUSTICE GINSBURG: So, even --

12 MS. MAHONEY: -- they've treated --

13 JUSTICE GINSBURG: -- even if the patent holder  
14 chooses not to raise the license, the court would have to,  
15 on its own motion, say, "Sorry, you didn't -- you're not  
16 the master of your defense. We decide that you have to  
17 effectively plead the license."

18 MS. MAHONEY: I think the plaintiff has to show  
19 that they are here pursuant to -- that they have a legal  
20 right that permits them to adjudicate the issue of  
21 validity. What the -- what the patent owner does, or not,  
22 I don't think turns this into a case or controversy; that,  
23 instead, we have to start with the fundamental question,  
24 "What is the cause of action that they are attempting to  
25 adjudicate? Is it a contract action or is it a -- an

1 action under the patent laws? Is it an infringement  
2 action?" Here, I don't think there's any question but  
3 that it is -- they're trying to adjudicate an action for  
4 an infringement that can't arise, because they're immune  
5 from suit, because they continue to make their payments.  
6 And, under those circumstances, it is not sufficiently  
7 immediate to establish jurisdiction in --

8 JUSTICE BREYER: It is --

9 MS. MAHONEY: -- this Court.

10 JUSTICE BREYER: -- it is, under other fields of  
11 the law, isn't it? I mean, I imagine that the very -- we  
12 see, all the time, declaratory judgments where a State  
13 passes a law and the individual says, "Well, I think this  
14 is unconstitutional, but my preferences are not to go to  
15 jail; my preferences are not to be penalized. So, my  
16 first choice is unconstitutional and my second is to obey  
17 it." There's no possibility in the world that he will  
18 violate that law. And yet, we've often held that, with  
19 regulations, you have to have the other requirements. You  
20 have to have the requirements that it's concrete, it's not  
21 just ideological, there's real harm. But, if those other  
22 requirements that are fulfilled, I've never seen any where  
23 it said that there also has to be a reasonable  
24 apprehension of a lawsuit in the absence of the  
25 declaratory judgment. I've just never found that phrase,

1 and I can't imagine why it would be part of the law.

2 MS. MAHONEY: Your Honor, Poe versus Ullman,  
3 this Court actually dismissed a declaratory judgment --

4 JUSTICE SOUTER: Oh, there are many dismissed,  
5 for the reasons that they aren't concrete, definite --  
6 there are a lot of reasons why to dismiss it. I'm just  
7 wondering if there is an additional reason that there has  
8 to be a reasonable apprehension of a lawsuit in the  
9 absence of the declaratory judgment action. It's that  
10 phrase that I've never found anywhere --

11 MS. MAHONEY: We --

12 JUSTICE SOUTER: -- and can't think of any  
13 reason why that would be an additional constitutional  
14 requirement. And I'm putting that directly to you,  
15 because I want to hear you give me the counterexamples.

16 MS. MAHONEY: Well -- but in Poe versus Ullman,  
17 it was a declaratory judgment action. They were seeking  
18 to have a statute declared unconstitutional. And this  
19 Court did dismiss, because they didn't have a reasonable  
20 fear that they would actually be prosecuted. Dismissed  
21 for lack of jurisdiction.

22 JUSTICE BREYER: And you say there has never  
23 been a declaratory judgment action, except in the instance  
24 where, in the absence of the action, the person would have  
25 violated the law, if it's a Government law. In other

1 words, if they're -- so, it's really not --

2 MS. MAHONEY: Even --

3 JUSTICE BREYER: Yes.

4 MS. MAHONEY: Well, you could -- you could --

5 I'm not -- it is possible that that framework could be  
6 extended. I -- it has not been done to date, and it would  
7 be --

8 JUSTICE BREYER: As I think as we --

9 MS. MAHONEY: But --

10 JUSTICE BREYER: -- both know --

11 MS. MAHONEY: But --

12 JUSTICE BREYER: -- in the Government area, it  
13 happens --

14 MS. MAHONEY: It --

15 JUSTICE BREYER: -- a lot.

16 MS. MAHONEY: It does.

17 JUSTICE BREYER: Yes.

18 MS. MAHONEY: But there is always a reasonable  
19 apprehension, and there was always a finding of coercion.  
20 Poe versus Ullman says you can't do it unless there is --

21 JUSTICE GINSBURG: Do I remember that --

22 JUSTICE KENNEDY: Well, Poe versus Ullman was a  
23 case in which, even if there was a violation of the law,  
24 there was going to be no prosecution.

25 MS. MAHONEY: That's why they didn't --

1 JUSTICE KENNEDY: He -- but, in this -- in this  
2 case, if there's a failure to -- of -- conform to the  
3 terms of the license agreement, there's going to be a  
4 lawsuit. So, I think Poe versus Ullman is just not  
5 relevant.

6 MS. MAHONEY: That -- it goes to the next point,  
7 which is that there still has to be a coercive choice.  
8 You have to choose -- there, they're choosing to give up  
9 constitutional rights in order to avoid jail and  
10 imprisonment, arrest and prosecution. Here --

11 JUSTICE KENNEDY: No, but --

12 MS. MAHONEY: -- what's at issue --

13 JUSTICE KENNEDY: -- but, in Poe versus Ullman,  
14 the ultimate action was basically like violating the  
15 contract here, and that's why it's not an applicable  
16 precedent.

17 MS. MAHONEY: I don't -- I don't think it's like  
18 violating the contract here, though, Your Honor, because,  
19 What are the consequences here? What is the choice?  
20 First of all, they actually owe the royalties under the  
21 agreement, so they're trying to escape their bargain, not  
22 enforce it. That's number one. So, they're not  
23 forfeiting any rights under the contract, they're simply  
24 trying to get out of the contract.

25 Number two, the consequences here, the choice

1 they're talking about, isn't in the nature of coercion.  
2 Again, they're not being arrested or prosecuted. All  
3 they're going to do if they walk out of this agreement, if  
4 they stop paying royalties -- yes, they may well be sued  
5 for infringement -- but, if they do, all they face is the  
6 loss of their discount.

7 JUSTICE ALITO: But your argument seems --

8 MS. MAHONEY: That's --

9 JUSTICE ALITO: -- to be based on their having  
10 implicitly given up their right to sue. Isn't that right?  
11 That was your main argument. This is a settlement. This  
12 is in the nature of the settlement. As part of the  
13 bargain, the patent holder promises not to sue for  
14 infringement.

15 MS. MAHONEY: It's not based on them giving up  
16 their right to sue, in the sense that all they have to do  
17 is stop paying royalties, and they can sue. They have to  
18 --

19 JUSTICE ALITO: But in answer to the  
20 hypotheticals, you seem to say it wouldn't matter if they  
21 explicitly did not give up their right to sue. So, what  
22 is left of this argument that what's involved here is  
23 essentially a settlement?

24 MS. MAHONEY: Well, it is in the nature of a  
25 compromise, Your Honor, and there's nothing in this

1 agreement that gives them a right to sue. They have to  
2 find some legal right. What they're really saying -- what  
3 their argument has always been is that Lear actually  
4 creates an implied right of action for a licensee to sue  
5 at any time of their choosing. That's been their argument  
6 from the beginning.

7 CHIEF JUSTICE ROBERTS: Well, their concrete  
8 right is, as I thought you conceded earlier, that if the  
9 patent is declared invalid, they will not owe license  
10 fees.

11 MS. MAHONEY: That's true. But that's getting  
12 the cart before the horse. What this Court said in --

13 CHIEF JUSTICE ROBERTS: Well, that's what --

14 MS. MAHONEY: -- U.S. v. Harvey Steel is --

15 CHIEF JUSTICE ROBERTS: -- a declaratory  
16 judgment action does, though, isn't it?

17 MS. MAHONEY: Well, I don't think so, Your  
18 Honor. I think every single contract case in the lower  
19 courts where they have allowed a suit to be brought on a  
20 contract prior to breach, there was a genuine dispute  
21 about the interpretation of the terms. Here, what they're  
22 trying to do is adjudicate a cause of action outside of  
23 the contract. They're trying to adjudicate an  
24 infringement action and then say, "Aha, see what I have?  
25 I have a judgment that the patent's invalid. And so, now

1 I'd like to say that I don't have to pay royalties under  
2 my contract."

3 JUSTICE SCALIA: Ms. Mahoney, the patent bar is  
4 sort of specialized -- more than "sort of" -- it's a  
5 specialized bar, and I've never -- I've never been a part  
6 of it. Do you agree with the statement of the  
7 Petitioner's counsel that Gen-Probe came as a -- as a  
8 shock to the --

9 MS. MAHONEY: As a -- I do not agree that it  
10 came as a shock. And, in fact, I think that Warner  
11 Jenkinson, which is a Second Circuit case that allowed  
12 this kind of action back in the '70s, was one of the only  
13 cases ever that allowed it. And other reasons were found  
14 to dismiss similar kinds of claims. In Gen-Probe, it was  
15 a surprise that a licensee could do this. It -- the law  
16 -- by the time that this license was executed in the  
17 Federal Circuit, there was a case, called Shell Oil, where  
18 the Court specifically held that a licensee cannot take  
19 advantage of the protections of Lear until it has  
20 repudiated the license, stopped paying, and said that it  
21 wants to challenge validity. So that was the background  
22 rule that was in force at the time of this license. And  
23 then, when you couple that with the fact that --

24 JUSTICE GINSBURG: But that wasn't -- the  
25 District Court, in this very case, seemed to say, "I think

1 this suit should go forward, but there's Gen-Probe, and I  
2 must follow Gen-Probe." The District Court, at least as I  
3 read it, seemed to think that Gen-Probe moved in a  
4 different direction from where the Federal Circuit was  
5 before.

6 MS. MAHONEY: In all of the prior Federal  
7 Circuit cases, the licensee had stopped paying royalties.  
8 And what the Court explained in Gen-Probe is that that is  
9 the sine qua non, that a licensee can't establish  
10 jurisdiction, and it can't establish a right to challenge  
11 validity, if it's still paying royalties.

12 CHIEF JUSTICE ROBERTS: Ms. Mahoney, you argue,  
13 in the alternative, that we should dismiss it on the basis  
14 of equitable considerations under the Declaratory Judgment  
15 Act. We can't reach that argument unless we rule against  
16 you on the Article III question. Is that right?

17 MS. MAHONEY: I don't think so, Your Honor. I  
18 think you can, because I think that you can do it as an  
19 alternative threshold prudential jurisdictional dismissal  
20 in the nature --

21 CHIEF JUSTICE ROBERTS: We would have to be  
22 assuming that we had jurisdiction, wouldn't we?

23 MS. MAHONEY: I think that --

24 CHIEF JUSTICE ROBERTS: Under Article III?

25 MS. MAHONEY: I think that a prudential

1 dismissal under Article III would also be fine, and that  
2 Steel Co. would allow for that kind of dismissal, because  
3 Wilton said that you can dismiss for lack of jurisdiction,  
4 at the front end, on prudential grounds if you know that  
5 there would not be relief allowed at the back end.

6 And I think that there's no need for a remand to  
7 do this. We are really talking about an equitable rule  
8 that has governed equitable actions for 300 years. It is  
9 a --

10 JUSTICE GINSBURG: But what -- but jurisdiction  
11 is a question of power, Does the Court have the power to  
12 do this? A discretion question is different. It's, "We  
13 have the power to entertain this case, but, as a matter of  
14 equity, we're not going to do so." The power question, I  
15 think, is a -- one that's -- it's either yes or no, either  
16 the court has the power, or doesn't.

17 MS. MAHONEY: But I don't think that the Court  
18 has to answer that question in order to dismiss on a  
19 prudential ground, a prudential jurisdictional ground, and  
20 nor is there a need for a remand in *Samuels* versus  
21 *Mackell*, and in *Cardinal*, for instance. Those are cases  
22 where the Court adopted prudential rules and went ahead  
23 and applied them without remand. I -- and no remand's  
24 necessary. The Federal Circuit has already looked at  
25 this. They --

1 JUSTICE STEVENS: Ms. Mahoney, can I ask you one  
2 question before your light goes off? I know it's not --  
3 goes to the "case or controversy" issue, but, in your  
4 view, was the bringing of this action a material breach of  
5 an implied condition of the contract that would justify a  
6 termination of a license?

7 MS. MAHONEY: It would depend on whether there  
8 is an implied covenant, Your Honor. It wasn't --

9 JUSTICE STEVENS: I'm asking you whether --

10 MS. MAHONEY: -- argued below.

11 JUSTICE STEVENS: -- you think there was.

12 MS. MAHONEY: I think it -- it may well be, but  
13 I don't think the answer in this case turns on it, because  
14 I think they have to have their own right to bring the  
15 action, whether it's a breach or not, and that they don't.  
16 Because they don't have an implied right of action under  
17 Lear, they don't have a right to bring this action. And  
18 that is an essential component of their ability to  
19 challenge the issue of validity. So, I think that's the  
20 first and fundamental --

21 JUSTICE KENNEDY: Well, if that's so, and it's a  
22 super-violation of an implied covenant, and I guess you  
23 could get damages.

24 MS. MAHONEY: I think that their theory, Your  
25 Honor, is that a licensee can do this at any time, and

1 that --

2 JUSTICE KENNEDY: But I think that your theory  
3 is that it's a super-violation of an implied covenant.

4 MS. MAHONEY: Your Honor, I don't think --  
5 whether it's an implied covenant or not --

6 JUSTICE KENNEDY: "Not only did we agree to it,  
7 but we you can't even do it if you agree to it."

8 MS. MAHONEY: I think that an additional factor  
9 that bears on this analysis is also the fact that Congress  
10 has never created an implied right of -- has never created  
11 a right of action --

12 Thank you, Your Honor.

13 CHIEF JUSTICE ROBERTS: Thank you, Ms. Mahoney.

14 Mr. Kester, you have 3 minutes remaining.

15 REBUTTAL ARGUMENT OF JOHN G. KESTER

16 ON BEHALF OF PETITIONER

17 MR. KESTER: Thank you, Mr. Chief Justice. Just  
18 several quick items.

19 I think -- I think, Mr. Chief Justice, you were,  
20 a while ago, putting the horse in front of the cart, which  
21 was right where it belongs. The contract claim is clear  
22 in the record. It's at page 136 of the joint appendix. I  
23 don't think more needs to be said about it.

24 Harvey Steel, on which Respondents rely, was, of  
25 course, overruled --

1 JUSTICE SCALIA: Wait, wait. Before you leave  
2 that, do you agree that it was not raised below?

3 MR. KESTER: No, we don't.

4 JUSTICE SCALIA: Where -- can you tell us where  
5 it was raised below?

6 MR. KESTER: Well, it -- it's raised in the --  
7 in the first remanded complaint. It's been a -- it's been  
8 here throughout. If it -- if it even matters. I mean, we  
9 wouldn't concede that that -- that that would even matter.

10 CHIEF JUSTICE ROBERTS: But was it raised before  
11 the Federal Circuit?

12 MR. KESTER: Yes. The whole record was -- you  
13 mean was it argued --

14 CHIEF JUSTICE ROBERTS: Yes.

15 MR. KESTER: I believe it was. I'd have to go  
16 back and -- you mean in terms of the oral argument. It  
17 was certainly in the briefs. It was certainly not waived.

18 There was never, of course, any -- anything in  
19 the license, or anyplace else, where Petitioner gave up  
20 the right to sue. Petitioner doesn't need permission in  
21 the license to sue.

22 And as for the shock in the lower courts when  
23 this case was decided, I would call to your attention what  
24 the Federal Circuit, in 1983, itself, said, and it quoted  
25 the Warner-Jenkinson case, which was the Second Circuit

1 case that my friend dismissed somewhat. The C.R. Bard  
2 case -- this is Federal Circuit, early -- starts out, the  
3 opening line -- it says, and I quote -- this is 716 F.2d  
4 875 -- "We hold that a patent license need not be  
5 terminated before a patent licensee may bring a Federal  
6 declaratory judgment action," close quote. And the last  
7 words of the same opinion, at 882 of 716 F.2d, are, "We  
8 hold that a patent licensee may bring a Federal  
9 declaratory judgment action to declare the Federal -- to  
10 declare the patent subject to the license invalid without  
11 prior termination of the -- of the license." That was  
12 1983. Gen-Probe was 2004. Something happened in the  
13 interval.

14 Finally, the discussion of settlements here  
15 strikes me as, indeed, strange, because if this -- if a  
16 license were to be redesignated as a settlement, we would  
17 have the situation here where -- a license was signed in  
18 1977; the only patent at issue in this case was not even  
19 issued until 2001.

20 CHIEF JUSTICE ROBERTS: Thank you, Mr. Kester.

21 MR. KESTER: Thank you, Mr. --

22 CHIEF JUSTICE ROBERTS: The case is submitted.

23 [Whereupon, at 11:05 a.m., the case in the  
24 above-entitled matter was submitted.]

25

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