1 IN THE SUPREME COURT OF THE UNITED STATES

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3 STEPHEN KIMBLE, ET AL., :

4 Petitioners : No. 13-720

5 v. :

6 MARVEL ENTERPRISES, INC. :

7 - - - - - - - - - - - - - - - - - - x

8 Washington, D.C.

9 Tuesday, March 31, 2015

10

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 11:15 a.m.

14 APPEARANCES:

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16 Petitioners.

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18 behalf of Respondent.

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

2 (11:15 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 next this morning in Case 13-720, Kimble v. Marvel

5 Enterprises.

6 Mr. Melnik.

7 ORAL ARGUMENT OF ROMAN MELNIK

8 ON BEHALF OF THE PETITIONERS

9 MR. MELNIK: Thank you, Mr. Chief Justice,

10 and may it please the Court:

11 Brulotte's per se ban on patent royalties on

12 post-expiration use should be discarded because it is a

13 rule without a reason. Brulotte is widely recognized as

14 an outdated and misguided decision that prohibits

15 royalty arrangements that are frequently socially

16 beneficial.

17 Brulotte suppresses innovation and

18 interferes with the goals of the patent system,

19 increasing the likelihood that potentially breakthrough

20 discoveries by universities and research hospitals such

21 as Memorial Sloan Kettering Center will never reach

22 patients and consumers. Discarding --

23 JUSTICE SOTOMAYOR: They are now, so what

24 are they doing?

25 MR. MELNIK: I apologize.

1 JUSTICE SOTOMAYOR: I -- I mean, it's not
2 like the industry has fallen apart. I don't see any
3 examples of -- of this.
4 MR. MELNIK: Well, the -- the examples that
5 we have are the amicus briefs. In other words, the
6 entities that are -- that do this licensing on a
7 day-to-day basis are telling the Court in their amicus
8 briefs that the -- the Brulotte rule is having this
9 suppressed effect; in other words, that certain
10 licensing arrangements that would otherwise --
11 JUSTICE GINSBURG: Why -- why should that be
12 so, given what you say? In -- in your brief you say,
13 license -- this is at 9 and 10, bottom of 9 -- the
14 "license payment terms, consequently, reflect the
15 anticipated value of the authorization to use the
16 patented invention before the patent expires."
17 All you have to do is make it clear that,
18 although the payments continue after expiration, they
19 are for the pre-expiration period.
20 So it's -- it's -- I don't understand why
21 this should be so troublesome if the contract says these
22 payments will be spread out over whatever period of
23 time, but they are for the patent during the period when
24 it was valid. If you say the next sentence is even if
25 they're nominally measured by post-expiration use, "they

1 nonetheless represent an amortization of the predicted
2 value of the pre-expiration authorization." If you say
3 that in the contract, then I don't see where there's a
4 problem.
5 MR. MELNIK: The distinction, Justice
6 Ginsburg, is between what you're paying for and how
7 you're paying for it. The what that you're paying for
8 is an estimate of the value of the use of the patent
9 during the patent term.
10 What Brulotte currently permits is one
11 method of how to pay for it, which is to defer payment
12 into the post-expiration period. What Brulotte doesn't
13 currently permit is to defer -- is to stretch the
14 royalty base, to defer accrual into the post-expiration
15 period. And deferred accrual allows parties to do
16 something that deferred payment does not, which is to
17 shift the risk of commercialization failure and
18 innovation failure from the licensee to the licensor.
19 JUSTICE KAGAN: Aren't there ways to get
20 around that as well? I mean, why don't you just enter
21 into a joint venture?
22 MR. MELNIK: So, Justice Kagan, I guess my
23 first answer to that is that's not the right question.
24 The right question is, if you're prohibiting something
25 that doesn't make sense, the initial question should be

1 why are you prohibiting it? But --

2 JUSTICE KAGAN: Well, possibly, except that

3 we have statutory stare decisis, and to the extent that

4 we think something is not really causing a problem in

5 the real world, why overrule something against that

6 basic backdrop principle?

7 MR. MELNIK: So the -- the next answer to

8 your question, then, is that the -- the alternative

9 arrangements are not risk redistributive in the same way

10 that royalty -- that the deferral of accrual is

11 risk-free distributive. What do I mean by that? If you

12 stretch the royalty base into the post-expiration period

13 in situations where you're -- where early stage

14 technology is involved where there may not be any sales

15 until fairly late and stretching into the

16 post-expiration period, you allow the licensee to say,

17 I'm going to take on this risk but in exchange,

18 licensor, you're going to bear the risk that if the

19 product fails, I won't have to pay much because if there

20 aren't any sales, I don't have to pay you.

21 Payment postponement, for example, doesn't

22 allow the parties to do that because even if you

23 postpone the payment, you still owe. The obligation to

24 pay has accrued during the term, and even if you have to

25 pay later, you still have to pay. That's the

1 fundamental difference between payment postponement,
2 which is not risk redistributive and -- which is
3 permitted by Brulotte. And accrual postponement
4 which --
5 JUSTICE KAGAN: Yes, but I was suggesting
6 that either could be accomplished, both could be
7 accomplished through other means, and particularly
8 through just entering into a joint venture rather than
9 having a license arrangement.
10 MR. MELNIK: So those kinds of arrangements
11 may not be realistic for the kinds of entities that are
12 most directly impacted by the Brulotte prohibition;
13 universities, research hospitals particular --
14 JUSTICE KAGAN: Is that what it is? Because
15 when I was looking at the amicus briefs here, I was
16 struck by the fact that there really are -- are not
17 companies on the amicus brief. There are not for-profit
18 entities. It's all nonprofit entities. And is that
19 because nonprofit entities have this particular problem,
20 that they can't make the arrangements that would
21 otherwise get around the Brulotte rule?
22 MR. MELNIK: Well, it's not all nonprofits.
23 We had -- we had an amicus brief from Biotime which was
24 a -- a private company's. But one of the -- one of the
25 groups of entities that are most directly impacted are

1 universities, research hospitals, and the like because
2 they're the ones where the -- the -- not all license --
3 licensing situations are going to be a good fit for --
4 for accrual deferral. In many situations, this kind of
5 arrangement may not make sense for the parties, and they
6 wouldn't enter into it.
7 One paradigmatic example in the situation
8 where the parties may desire to defer accrual but are
9 prohibited by Brulotte from doing so are very early
10 stage technology. And who generates early stage
11 technology? It's frequently universities, research
12 hospitals, and the like. So, yes, those are entities --
13 one of the groups of entities that are most directly
14 affected by the --
15 JUSTICE KENNEDY: Well -- well, you -- you
16 quoted in -- in your brief extensively about quotes from
17 the hospital briefs and -- and the -- and the research
18 briefs. But these parties have recently been to
19 Congress with reference to the whole drug and
20 pharmaceutical industry, and Congress is certainly aware
21 of this rule and has left it alone. And you're asking
22 us now to add on to the remedies Congress has already
23 given.
24 MR. MELNIK: Well, Justice Kennedy, I would
25 say that not so recently -- and I think that we have

1 demonstrated special justification within the meaning of
2 this Court's case law for overruling this kind of
3 precedent, and I would say that we have demonstrated it
4 in four ways.
5 First, we have shown that since the Court
6 considered Brulotte, the patent equals market power
7 presumption has fallen, and it -- and it has fallen
8 actually since the time -- last time that Congress
9 looked at this in 1988.
10 There has been a foundational shift --
11 second, there has been a foundational shift in
12 competition law away from per se rules and toward
13 contextualized rules such as the rule of reason.
14 Third, economists and other experts in the
15 licensing and -- and patent field have reached a much
16 more nuanced understanding of the economics of
17 post-expiration royalties, an understanding that didn't
18 exist at the time this Court has found --
19 JUSTICE BREYER: Is that -- you -- those are
20 the three points, and I just wonder, imagine I have a
21 piece of intellectual property which I have patented and
22 now I have 55 potential licensees. And I say to each of
23 them, I will license to you and you will pay me next to
24 nothing for any use up to 20 years while you're figuring
25 out how to use it. But if it turns out you use it, in

1 years 20 to 30, you pay me a lot for each use. Okay?
2 That's the problem, isn't it?
3 MR. MELNIK: Yes.
4 JUSTICE BREYER: Now I've done it for 55,
5 and there are a lot of good reasons for getting them to
6 do that. I understand the reasons. I just wonder how
7 you reconcile that with the Constitution's requirement
8 that patents are for limited terms, and statute which
9 says the limited term is 20 years. Because if that
10 means something, I suppose it means that after that
11 statutory period of 20 limited years, people can use
12 that intellectual property for free.
13 Now -- now, if it doesn't mean that, what
14 does it mean? And if it does mean that, I mean, how did
15 my example allow people to use it for free? Not -- I
16 mean, they couldn't use it for free. They had to pay.
17 MR. MELNIK: The way that I would reconcile
18 it, Justice Breyer, is -- is to decouple the notion of
19 the right to exclude, which is what the statutory term
20 is about, the right to prevent the public as a whole
21 from using the patented invention from the specific
22 royalty arrangement. Once, as -- as Chief Justice --
23 Chief Justice Posner put it in Scheiber, once the patent
24 expires --
25 JUSTICE BREYER: It is. And everybody who

1 might use this, by the way, any conceivable person,
2 there were only 53 people who might ever use it, and I
3 got 55 to sign up. And therefore, nobody's going to use
4 it without paying. I'm just saying how, in my example,
5 do we reconcile that with the constitutional and
6 statutory mandate that after 20 years it's free?
7 MR. MELNIK: So, let me make two points.
8 First is we have to remember that what we're
9 dealing with here is a per se rule. A per se rule
10 prohibits all hypotheticals, not just one hypothetical.
11 We're not advocating per se legality.
12 JUSTICE BREYER: In my case, it would be
13 unlawful.
14 MR. MELNIK: I'm -- I'm not saying that. I
15 was -- I was getting to the second point.
16 JUSTICE BREYER: What's the second point?
17 MR. MELNIK: The second point is that -- is
18 that in the -- in the post-expiration period, even in
19 your situation, what we're really dealing with are the
20 prices and outputs at which the public is going to
21 access the invention.
22 JUSTICE BREYER: And I'll tell you, in my
23 example, the price and output is a big payment to the
24 owner of the patent in year 29. That's the price and
25 output. And the output is restricted because the price

1 is up.

2 MR. MELNIK: So by -- during the term, the

3 license -- the -- the licensees got to use the

4 invention.

5 JUSTICE BREYER: Well, I know there are a

6 lot of good reasons for it. My simple question was how

7 you reconcile the fact that everybody is paying a lot of

8 money to use this intellectual property in year 29 with

9 what seems a statute and a Constitution that say it

10 should be free at that time. That's what I'm asking. I

11 don't want to ask it again because I don't like to ask a

12 question more than four times.

13 MR. MELNIK: I -- I apologize if I have not

14 been clear in my answer. Let me take another shot at

15 this.

16 The -- the answer to your question is that

17 one needs to -- in our view, is that one needs to

18 de-couple the right -- the right to exclude, which is

19 what the term is about, from the royalty arrangement.

20 Understand --

21 CHIEF JUSTICE ROBERTS: If by that -- if by

22 that you mean that there will be a lot of new people

23 coming in who -- because they don't have to pay the

24 license fee in year 29, and it's very easy for them to

25 figure out what to do because they can copy the patent

1 and anybody can come and see, I can make one of these.
2 All the competition -- in fact, everybody who was in the
3 business is paying an extra -- has to charge an extra $2
4 because of this license fee, I won't have to charge an
5 extra $2. I'll go into that business and make a lot of
6 money.
7 MR. MELNIK: That's certainly correct, Mr.
8 Chief Justice. And that's a point that we made in the
9 brief.
10 JUSTICE BREYER: It's correct only if,
11 unfortunately, to get into this business because the
12 patent happens to be -- to do with a gizmo, and the
13 gizmo is 14 feet deep buried inside a computer and the
14 computer is 19,000 meters tall, and so there are only 55
15 people, conceivably, who could get into this business,
16 and they are all licensed.
17 MR. MELNIK: So if the question is can
18 one -- can one come up with a hypothetical where the
19 arrangement would be impermissible because it would
20 violate the rule of reason, the answer is yes.
21 JUSTICE SOTOMAYOR: But why are we
22 importing -- it's a fair question by the Respondents and
23 others. Why are we importing antitrust principles,
24 which already have their own set of problems. We have a
25 rule of reason, and we've now done a quick look instead

1 of a per se look, and everybody complains about the
2 expense related to the rule of reason. Why are we
3 importing into patent law the economic principle? You
4 fault us for doing that in our original decision, but
5 you're asking us to perpetuate that anyway. Antitrust
6 law could take care of this by itself. We don't have to
7 import this into patent law at all.
8 MR. MELNIK: So the -- I guess I would
9 question the premise that -- Justice Sotomayor, that
10 we're asking you to import the rule of reason because
11 the current standard that the Federal circuit and other
12 courts of appeals have applied to -- to analyze patent
13 misuse and have been doing it for decades is already the
14 rule of reason.
15 JUSTICE SOTOMAYOR: Well, they use it for --
16 for coercion and fraud. So why don't we do what one of
17 your amici suggested or one of the amici suggested,
18 which is to say reverse Brulotte -- Brulotte, and let
19 coercion and fraud exist.
20 MR. MELNIK: That would be an approach that
21 we also would think would make sense. That would be
22 drawn on this Court's precedent in Zenith, and we
23 would --
24 JUSTICE SOTOMAYOR: And I bet that in -- how
25 long has Brulotte been around?

1 MR. MELNIK: 50 years.

2 JUSTICE SOTOMAYOR: In another 50 years,

3 there'll be an attorney sitting here telling us that we

4 were wrong in that presumption, too. Why don't we just

5 let Congress fix it, because if it's wrong, people can

6 complain to it.

7 MR. MELNIK: Well, so the answer to the

8 question is that we -- I would submit that we have

9 demonstrated the special -- special justification that

10 this Court's precedent requires.

11 JUSTICE KAGAN: Well, could you go back to

12 that?

13 MR. MELNIK: Yes.

14 JUSTICE KAGAN: Because you -- you named

15 three things, and honestly, it all seemed to my ears

16 different variants of Brulotte is wrong. But, of

17 course, special justifications demand more than the

18 decision is wrong. So let's even say the decision is

19 wrong. Economists think the decision is wrong by --

20 everybody thinks the decision is wrong. That's not a

21 special justification. What's the special

22 justification?

23 MR. MELNIK: The distinction that I would

24 draw, Justice Kagan, is -- is between the -- the -- the

25 decision is wrong argument is these arguments were

1 presented to the Court at the time the Court made the
2 decision, and now you are rearguing those arguments.
3 That's the decision is the wrong argument. The points
4 that I were making were new things that had emerged
5 since the Court decided Brulotte. None of those
6 arguments were presented to the Court.
7 JUSTICE KAGAN: Well, but usually we ask for
8 more than that. Usually we ask for something that says
9 this is just unworkable. We thought it was right
10 before, but we can't make it work now. That's not this.
11 Or we say this is completely anomalous. It just
12 can't -- it -- it's a relic of a past system that is
13 utterly out of kilter. I don't think that's this
14 either, you know. It may or may not be right, but
15 there's nothing incredibly sort of weird and -- and
16 anomalous about it. I mean, usually we look for things
17 like that. And where are those things?
18 MR. MELNIK: Well, one thing that we do have
19 in this case that's -- that's unusual is the complete
20 lack of reliance impact that this Court has overruled.
21 That make -- for example, that makes --
22 JUSTICE KAGAN: Well, even if I assume that
23 that's right, that there's no special reliance push,
24 still we have a very strong rule of statutory stare
25 decisis. We need some special justification to break

1 away from that rule. I guess I'm still waiting to hear
2 what it is other than, you know, we now know better than
3 we knew before.
4 MR. MELNIK: So the -- I had 4 points. I
5 didn't get to get my fourth point out.
6 So the fourth point was that we have a
7 better understanding of the real world impact, of the
8 innovation suppressing effect of these kinds of royalty
9 arrangements that we're hearing from the amicus briefs.
10 JUSTICE KAGAN: But that surely is a
11 question for Congress, to go back to what Justice
12 Sotomayor was saying, you know, to the extent that
13 there's a real world problem, and maybe there is and
14 maybe there's not, it's a little bit hard to tell from
15 the amicus briefs. I mean, they're surely better
16 equipped than we are to deal with that.
17 MR. MELNIK: So the same thing could have
18 been said, for example, in Illinois Tool Works which
19 dealt with the exact same prior congressional enactment,
20 with the same exact -- one of the same bills that was --
21 that was referred to in the red brief. And this Court,
22 nevertheless, overruled that that equals market power
23 presumption responding to the overwhelming criticism of
24 that presumption in the expert literature.
25 We have the same here. We have near

1 unanimous consensus in the expert literature that all of
2 these new understandings have emerged since Brulotte has
3 been decided that undermine every single premise on
4 which Brulotte was based.
5 And the same was true in Blonder-Tongue,
6 which was the subject of the discussion in the first
7 case this morning where this Court overruled prior
8 decisions in -- and changed a judge-made rule in the
9 patent law context. And the government in that case
10 filed an amicus brief that said the fact that Congress
11 has failed to act even though it has considered the
12 issue is, quote-unquote, "of no significance."
13 So if the Court could do it in
14 Blonder-Tongue and the Court could do it in Illinois
15 Tool Works, the Court could do it here.
16 JUSTICE GINSBURG: That was a case about
17 preclusion. It was -- it was really not a patent issue
18 like we were discussing.
19 MR. MELNIK: Well, you're -- you're correct,
20 Justice Ginsburg, that it was a case about mutuality of
21 estoppel in patent litigation, but it -- it implicated
22 very important patent policy issues because it asked the
23 question of if you invalidate the patent once, is it
24 invalid for all time, or can you relitigate the issue?
25 So yes, you can say that it was a procedural issue, but

1 it was an issue that implicated core patent law.

2 JUSTICE GINSBURG: But it was a -- it was a

3 decision that applies -- generally applies across the

4 board, not just in patent litigation mutuality.

5 MR. MELNIK: My recollection -- and I

6 apologize because it's been a few weeks since I read

7 Blonder-Tongue -- my recollection is that the issue was

8 specific to mutuality of estoppel in patent litigation.

9 JUSTICE KAGAN: I guess what it seems to me

10 you are arguing, and maybe we've done this before, and

11 maybe we haven't, but what it seems to me you are

12 arguing is a sort of new rationale for when to depart

13 from statutory stare decisis, and that new rationale is

14 when a prior decision is based on what we now view to be

15 naive economics. I mean, that's the fundamental

16 argument here, isn't it?

17 MR. MELNIK: It's -- it's one of the

18 arguments. I think it's -- you also have to look at a

19 new understanding of the real-world impact. And it's

20 not -- it's not -- it's not just the impact that -- that

21 Chief Judge Posner and the other --

22 JUSTICE KAGAN: Okay, so let's say it's

23 those two things, because we think a prior decision is

24 based on naive economics, and because we think that that

25 decision has some bad real-world consequences. But

1 again, both of those things seem to me to be
2 congressional choices, much more than judicial choices,
3 that it's Congress that's better positioned to assess
4 the real-world impact, and it's Congress that's better
5 positioned to say whether these economic theories are
6 indeed so naive.
7 MR. MELNIK: If -- I guess I would submit
8 that if that were the case, then the results in Illinois
9 Tool Works and Blonder-Tongue would be different than
10 they were. The principle that you're espousing can't be
11 a categorical principle. Stare decisis is after all a
12 practical doctrine.
13 JUSTICE BREYER: Economics certainly plays
14 an important role in antitrust. But what I have learned
15 that economists frequently don't take account of is the
16 administrative cost of administering by judges a complex
17 rule. The point of my questions was to suggest to you
18 how complex that would be. I mean, when, under a rule
19 of reason, which you advocate, would something like this
20 be lawful or unlawful? Does it depend upon how many
21 people you license? Does it depend upon the height of
22 entry barriers, something that is notoriously difficult
23 to estimate? Does -- and what is the principle under
24 which a rule of reason is violated?
25 None of those things are decided. The --

1 you're asking us to decide things under your system that
2 I would find very difficult to decide. And the virtues
3 of a simple rule are obvious. So it isn't even obvious
4 to me that putting stare decisis to the side, it would
5 be wise, since none of the economists, even including
6 Judge Posner, do, in fact, discuss this problem of
7 administering a complex rule of reason rule -- rule of
8 reason in a complicated area, 50 years after the simple
9 rule has been in effect.
10 MR. MELNIK: So two responses to your point,
11 Justice Breyer. One is I think it's again important to
12 remember that the rule -- the question is not whether
13 the rule of reason should apply to patent misuse. The
14 rule of reason already applies to patent misuse under
15 decades of Federal Circuit precedent. That's the state
16 of the world right now. The question is only whether
17 these particular types of royalty arrangements should be
18 aligned with the existing rule of reason regime for
19 patent misuse that already exists in the world.
20 The second point is that I think we need to
21 remember that these are negotiated transactions, that
22 this kind of royalty arrangement will only exist if the
23 licensor and the licensee both agree that it makes sense
24 for them. And any answer can be priced into the
25 license. After all, who is going to bear the risk of

1 the rule of reason analysis? It's primarily going to be
2 the licensor, because the licensee will at some point,
3 presumably after expiration, will say, I don't want to
4 pay royalties anymore. And it will -- would be the
5 licensor who will, at that point, have to initiate the
6 lawsuit to collect the royalties.
7 CHIEF JUSTICE ROBERTS: I -- it seems to me
8 that the logic of your position is going to govern most
9 of what you -- you say, oh, you can always look at it
10 under rule of reason, but it's hard for me to imagine
11 what type of case would fail the rule of reason given
12 your logic for overturning Brulotte in the first place.
13 MR. MELNIK: Well --
14 CHIEF JUSTICE ROBERTS: Just give me an
15 example, that this would be permitted under your
16 position but would violate the rule of reason.
17 MR. MELNIK: So I suppose the classic
18 example would be the one that Professor Hovenkamp and
19 his coauthors give at page 3-34 of the IP and Antitrust
20 Treatise. This is at the end of Section 3.3c.
21 CHIEF JUSTICE ROBERTS: Maybe you could
22 remind me which one it is.
23 MR. MELNIK: I was giving the citation just
24 so that you could look it up later, because I won't be
25 as able to summarize it as ably as they can, but they

1 basically set out four conditions: One, the patent
2 gives the patent owner market power in the relevant
3 market; two, the license requires licensees to pay
4 royalties on all products sold in the market regardless
5 of whether or not they use the patented technology, so
6 there is no -- even if you stop paying the technology --
7 using the technology, you still have to pay. There are
8 substantial entry barriers, and the licensees make up
9 most of the market. I --
10 JUSTICE SOTOMAYOR: I failed the antitrust
11 case. Couldn't the licensee come in and file an
12 antitrust case?
13 MR. MELNIK: That would -- Professor
14 Hovenkamp and his coauthors raised that as -- as a
15 situation where there -- where there would be questions
16 raised about whether that would violate the rule of
17 reason. That was their example. Mr. Chief Justice
18 asked me for an example from the literature. That
19 was -- that's an example in the academic literature.
20 JUSTICE SOTOMAYOR: It goes back to my
21 original question. Wouldn't the antitrust laws
22 themselves already address that situation?
23 MR. MELNIK: The antitrust --
24 JUSTICE SOTOMAYOR: Independent of Brulotte
25 or independent of patent law.

1 MR. MELNIK: The antitrust laws would also
2 address that situation.
3 If I may reserve the balance of my time.
4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Saunders.
6 ORAL ARGUMENT OF THOMAS G. SAUNDERS
7 ON BEHALF OF RESPONDENT
8 MR. SAUNDERS: Mr. Chief Justice, and may it
9 please the Court:
10 This case should begin and end with stare
11 decisis. Brulotte remains correctly decided and serves
12 an important public interest grounded in patent law.
13 But at this point, were any change needed, Congress
14 would be the appropriate institution to balance the
15 competing arguments, and if you consider the public and
16 private reliance interests. Indeed Congress
17 specifically considered proposals to modify Brulotte,
18 and declined to do so even while making other changes to
19 patent misuse.
20 JUSTICE GINSBURG: After 1988? How recently
21 has Congress taken a look at Brulotte?
22 MR. SAUNDERS: The -- the example I'm
23 speaking of is 1988. I -- I don't know more recently,
24 but of course, even without that specific compelling
25 example of them having taken a look at it, made other

1 changes to patent misuse, and not changed it, the point
2 remains that Congress could look at it at any time, and
3 all of the complicated economic --
4 CHIEF JUSTICE ROBERTS: Well, that really
5 proves too much. I mean, we overruled, you know,
6 Lowe's, Albrecht, Arnold, Schwinn, those are all cases
7 from the mid 1960's, just like this one was. It's a
8 problem with the '60s, and we're going -- the same
9 argument you make now should have prevented us from
10 doing that in all those other cases.
11 MR. SAUNDERS: I -- I think that this Court
12 has recognized that in the antitrust context, where you
13 have such a barebones statute and a long history of very
14 minimal congressional action in that area, this Court
15 has had a greater willingness to overturn its precedent.
16 In the Patent Act, this is an area where Congress has
17 revisited it frequently, 33 times since 1952; important
18 to this case, has revisited the patent term, changed the
19 patent term, added patent term extensions, patent term
20 adjustments, carefully calibrating the incentives to
21 strike what it considers to be the correct balance with
22 Brulotte as settled law. And so there's a risk in
23 overturning Brulotte of upsetting that balance.
24 I would also say as the antitrust cases, and
25 this point's made very nicely in the Washington Legal

1 Foundation amicus brief, that the reliance interests in
2 that situation looks different. From the perspective of
3 the party that's going to be held liable for paying out,
4 there is a big difference in moving from a per se rule
5 of liability -- no one's out there relying and saying,
6 well, I'm certainly going to be liable if I do this --
7 moving from that to rule of reason analysis. Whereas
8 here, for the party that's going to be required to pay
9 the perpetual royalties, what you have under existing
10 law is the shield of Brulotte in place. And you'd be
11 talking about removing that shield after the fact.
12 And we have a law here, you know, there's a
13 reason that, in addition to the idea of statutory stare
14 decisis, we give particular effect to stare decisis when
15 we're talking about contracts and property right,
16 because for 50 years, parties have entered into
17 agreements and made post-expiration business decisions
18 with Brulotte as settled law.
19 JUSTICE GINSBURG: But these parties didn't
20 even know about Brulotte. I mean --
21 MR. SAUNDERS: Right, in this particular
22 case, but I think it would be hazardous to extrapolate
23 from that to -- to disregard the reliance interest for
24 something that's been in law -- been in place for so
25 long, and which there have been so many patent licenses,

1 and in which, as we cite in our brief, you have
2 treatises.
3 JUSTICE SCALIA: I don't understand what
4 the -- what the reliance was -- what -- what -- how did
5 they rely?
6 MR. SAUNDERS: They --
7 JUSTICE SCALIA: By not including a
8 provision for post-expiration payments?
9 MR. SAUNDERS: That would be one form, and
10 the treatise we cite in our brief says, quote, "it's not
11 always necessary to specify the term."
12 JUSTICE SCALIA: How would we be
13 disappointing that reliance? I don't understand what
14 reliance we would be disappointing.
15 MR. SAUNDERS: If someone doesn't specify
16 the term in their -- the licensee, because of the -- the
17 rule of Brulotte cuts off the royalties after patent
18 expiration, if because of that they don't specify the
19 expiration term --
20 JUSTICE SCALIA: The -- the only person I
21 think we could be disappointing is the person who knows
22 of this exotic law and enters a contract which provides
23 for post-termination payments knowing that that will be
24 invalid. Now, him we would disappoint, wouldn't we?
25 (Laughter.)

1 MR. SAUNDERS: Someone who in these
2 complicated negotiations may not think it's necessary to
3 ask for a particular term --
4 JUSTICE SOTOMAYOR: That's been conceded
5 here. Marvel has said in this litigation, in your
6 brief, I believe, that they didn't know about Brulotte.
7 MR. SAUNDERS: That -- that's correct in
8 this litigation.
9 JUSTICE SOTOMAYOR: So this hasn't -- this
10 is no reliance by them.
11 MR. SAUNDERS: No direct reliance by them.
12 I think it's -- which doesn't mean it's not happening
13 for other people, and I also think it's important to
14 remember that the idea of indirect reliance --
15 JUSTICE SOTOMAYOR: I guess the only person
16 who would be injured would be the licensor because
17 they'd be the only one acting in negotiation without
18 knowing the legal rule.
19 MR. SAUNDERS: No, I --
20 JUSTICE SOTOMAYOR: It should be Mr. Kimble
21 who would be disappointed if we upheld Brulotte, because
22 he's going to be deprived of royalties that he thought
23 he was going to earn.
24 MR. SAUNDERS: No. I don't think
25 that that's the correct way of looking at it. And I

1 also think it's important to remember that when you have
2 a settled legal rule like this, it affects whether
3 people even spot the issue. This issue has been taken
4 off the table for 5 decades. No one's reading cases
5 about the horrors of perpetual royalties. No one is
6 going to continuing legal education courses and being
7 told about this issue. Maybe --
8 CHIEF JUSTICE ROBERTS: The economists are.
9 I mean, the economists are almost unanimous that this is
10 a very bad rule.
11 MR. SAUNDERS: I --
12 CHIEF JUSTICE ROBERTS: So it's not as if
13 nobody is thinking about it.
14 MR. SAUNDERS: I'm talking about the parties
15 that are engaging in those negotiations. But I also
16 think that the economics here are disputed. I would
17 refer the Court to the Baxter article that we cite,
18 William Baxter. The William Baxter, before he was head
19 of the antitrust division, does the economic analysis
20 here looking at the effects on the marginal costs after
21 patent expiration.
22 CHIEF JUSTICE ROBERTS: What's the date of
23 that article?
24 MR. SAUNDERS: 1966.
25 CHIEF JUSTICE ROBERTS: The whole point of

1 the other side is that there's been a development in
2 economic thought in the intervening 50 years.
3 MR. SAUNDERS: I -- there has been -- there
4 have been developments in economic thought, but those
5 developments themselves are currently being challenged
6 in terms of analysis of -- that the -- the
7 hyper-rational model --
8 JUSTICE KENNEDY: Is one of the arguments
9 that there have been years of reliance with making joint
10 venture agreements, with making other contracts that
11 don't -- that don't depend on royalty payments, or that
12 there's ways of getting around this? Because if that's
13 an argument, it seems to me that that cuts both ways.
14 It's easy to get around this rule I -- I take it in many
15 instances by just having a joint venture agreement.
16 MR. SAUNDERS: There -- there are many
17 alternatives that would achieve the --
18 JUSTICE KENNEDY: But doesn't that --
19 doesn't that cut against you as much as it cuts in your
20 favor?
21 MR. SAUNDERS: No, I don't think so, because
22 you still may have the parties out there who will be
23 left exposed. You also have had what I would say is the
24 legislative reliance in terms of Congress tinkering with
25 the Patent Act and setting very specific balances with

1 Brulotte as settled law.

2 And in addition to all this, I mean, the --

3 we've been talking in the -- the economic criticism

4 coming from the antitrust perspective, but it's

5 important to remember here that this is originally

6 grounded in patent policy. And what you have is

7 Congress has set a limited window of opportunity in

8 which you have the opportunity to capture, quite

9 frankly, not just the value of your own invention, but a

10 certain amount of follow-on invention that may build on

11 and incorporate your invention, and that is set within

12 that particular window.

13 And once you begin going beyond that, by

14 contract, there's increased risk that what's going to

15 cause sales to spike in the 30th year is not your own

16 original innovation, but the follow-on innovation, the

17 innovation of your licensee.

18 CHIEF JUSTICE ROBERTS: But everybody is --

19 can do -- can practice the patent after its expiration.

20 And to the extent a licensee has to pay higher -- charge

21 higher prices because it has to make the license

22 payments, that's an open invitation to people to enter.

23 MR. SAUNDERS: It may be, but the

24 licensee --

25 CHIEF JUSTICE ROBERTS: And those people are

1 not inhibited by the patent because the patent term
2 has -- was limited to the 20 years specified by
3 Congress.
4 MR. SAUNDERS: The -- the licensee though
5 is -- may be in the best position to be engaging in that
6 follow-on innovation and indeed, the same thing could
7 have been said about this Court's decision in Scott
8 Paper or even in Lear v. Adkins before Blonder-Tongue,
9 which you would say, well, that person is the only
10 person who is on the hook and they may continue paying,
11 but the rest of the public could practice the expired
12 patent in Scott Paper. Or the rest of the public could
13 bring their own invalidity challenge --
14 CHIEF JUSTICE ROBERTS: I suppose there
15 would be barriers to entry in particular cases and
16 perhaps those are situations in which the rule of reason
17 could be applied. But otherwise, in a competitive
18 economy, the idea that you know exactly what you have to
19 do to make a product and this other person is selling
20 it, you know, for $2 a widget more than you can, that
21 seems to me to be a powerful incentive for -- for entry.
22 MR. SAUNDERS: It may be an incentive for
23 entry, but it still conflicts with the long line of
24 cases recognizing the patent policy interest in a
25 completely free public domain and the issue that is

1 established in Scott Paper. This -- Brulotte followed
2 very logically from Scott Paper, which is that we are
3 not indifferent to the individual licensee. When that
4 licensee ties their hands and obligates themselves to
5 that ongoing royalty obligation, that in turn is
6 affected by the public interest. And so Scott Paper --
7 it was no accident that the courts of appeals were all
8 reaching the same result as Brulotte based on the
9 authority of Scott Paper, which Petitioners have not
10 asked this Court to overrule.
11 So I think that although there -- there can
12 be nuanced economic arguments when we look at this in
13 the antitrust frame, we may be talking about market
14 entry in some situations and not in others. That wasn't
15 the way that Brulotte was approaching the question. And
16 that if you move solely to a rule of reason analysis,
17 all you're offering is a remedy that's already
18 available. There could already be an antitrust suit in
19 this case. So it effectively eliminates any separate
20 patent-based doctrine in this area.
21 And that is a big step that affects the
22 balance --
23 JUSTICE SOTOMAYOR: Well, that's an
24 interesting issue because I agree with you, that I don't
25 know why we need an antitrust test that already exists

1 with respect to any patent and its use after its
2 expiration date. But what do we substitute it with?
3 Meaning, you -- you're saying a patent-based system. So
4 if we're thinking of substituting it, how would you do
5 it?
6 MR. SAUNDERS: Well, it's not -- it's not a
7 substitution. It's that the Brulotte rule --
8 JUSTICE SOTOMAYOR: Well, it has -- the
9 Brulotte rule was to ensure no patent owner extended its
10 -- its monopoly against the licensee. That the
11 licensee, like the general public, should be free to use
12 the patent. So what do we say to keep that up without
13 using the rule of reason?
14 MR. SAUNDERS: Well, it's free -- that
15 they're free to use the patent --
16 JUSTICE SOTOMAYOR: Yes.
17 MR. SAUNDERS: -- and that to charge
18 royalties for that is -- is -- it conflicts with that
19 policy because it's affecting their decision-making.
20 It's an ongoing marginal cost and I think that it's very
21 artificial to drive this -- this wedge between the right
22 to exclude and royalties. The patent right is a bundle
23 of rights. You can have a right to exclude, you could
24 push everyone out of the market and practice yourself.
25 As a practical matter, the real value of the

1 vast majority of patents, particularly after eBay where
2 you may not get injunctive relief, is the statutory
3 right to damages. Damages defined in Section 284 as
4 being, at a minimum, a reasonable royalty.
5 So you have a system set up in which one of
6 the sticks in that bundle of rights being given to you
7 by Congress for that limited term is your right to
8 engage in royalties.
9 And so I don't think we can drive this
10 artificial wedge between --
11 JUSTICE SOTOMAYOR: Well, I know you don't
12 want us to. But let's assume someone wants to, that we
13 think Brulotte was wrong economically. We buy the
14 arguments of the other side, that it hurts the market.
15 How would you substitute? How would you think you would
16 protect your interest without using the rule of reason?
17 MR. SAUNDERS: Without -- I mean, if we are
18 talking about fallbacks and I assume the question is
19 assuming that we've gotten past stare decisis.
20 JUSTICE SOTOMAYOR: Exactly.
21 MR. SAUNDERS: Then I think that, at a -- a
22 minimum, you need to have what we have discussed as
23 being a presumption against this practice. And if there
24 are specific instances in which someone can come in and
25 show that this comports with patent policy, and this is

1 going to be pro-innovative, then they can litigate that.
2 But I think to go to Justice Breyer's
3 points, you're -- you're talking about, on one hand, as
4 Justice Kagan's questions are eliciting, very
5 speculative and uncertain harm, given the flexibility
6 that's already allowed to amortize payments under
7 Brulotte; and, on the other hand, the certainty and
8 expense of a very difficult to apply legal regime.
9 CHIEF JUSTICE ROBERTS: If you -- but
10 amortizing the payments under Brulotte is very
11 restrictive. What you're saying, those payments have to
12 be related in some sense to the patent period, you
13 cannot take into account events after that. Again, I
14 would think one of the risks are, well, maybe we'll be
15 able to turn this invention into something or maybe we
16 won't, and so we have to give, you know, license fees
17 that take that contingency into account. But you can't
18 do that under Brulotte, because that can only refer to
19 the period that's left on the patent.
20 MR. SAUNDERS: Right. Under Brulotte, you
21 have -- you have 20 years in which you can do absolutely
22 anything, can account for all -- all of your risks in
23 that period in terms of whether the product is taken
24 off. And what you can't do under Brulotte is say, if
25 the success, if -- if this is accruing on use after that

1 20-year period, then we're going to be capturing that.
2 But I think that -- that crystallizes the problem, the
3 conflict between Petitioner's position and the patent
4 policy here, because what you're saying really saying
5 is, my invention is such that 20 years isn't long enough
6 for me, it's not going to realize a success until after
7 the 20-year period.
8 The fact that you may not be able to capture
9 that is a direct consequence of the decision Congress
10 made when it set the patent term. And, in fact, for the
11 concerns that are raised by particular industries,
12 those -- those are concerns that Congress has not been
13 deaf to it -- to them. It passed the Hatch-Waxman Act
14 in 1984 specifically targeted to the pharmaceutical
15 context. People had concerns about patent life being
16 consumed during patent examination. Congress came back
17 in 1999, and set up a series of patent term adjustments
18 to compensate for that.
19 And if there are any industry-specific
20 concerns, given the complexity of the economics here,
21 given the disputes that we're having about the reliance
22 interest, this is quintessentially a task for Congress
23 to weigh at this point, particularly since we're talking
24 about a rule that has stood for 50 years, and during
25 that time, has become part of the fabric of the law.

1 If this Court has other questions?

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Stewart.

4 ORAL ARGUMENT OF MALCOLM STEWART

5 FOR THE UNITED STATES, AS AMICUS CURIAE,

6 SUPPORTING RESPONDENT

7 MR. STEWART: Mr. Chief Justice, and may it

8 please the Court:

9 This Court's decision in Brulotte is not an

10 outlier, but instead fits comfortably within a

11 substantial body of decisions that recognize a strong

12 Patent Act policy favoring unrestricted public access to

13 unpatented and previously patented inventions, and these

14 cases fall into two basic categories.

15 The -- the first is cases like Bonito Boats,

16 Compco, Sears Roebuck, where the Court held to be

17 preempted State laws that would provide patent-like

18 protection to inventions that either were not patentable

19 under Federal law or inventions as to which a Federal

20 patent had expired. And typically, those State laws

21 that were held to be preempted took the form of

22 prohibitions on the copying of products that were

23 already in -- in the market. And -- and the Court in

24 those decisions didn't apply anything that looked like

25 rule of reason analysis. It really didn't apply

1 economic analysis at all.
2 It didn't purport to say that the economy
3 would be worse off if these laws were allowed to be
4 enforced. It simply said those laws are inconsistent
5 with the balance that Congress has struck, both between
6 what is patentable and what is unpatentable, and the
7 balance that Congress has struck as to what the length
8 of patent protection should be.
9 And the Court could have drawn a sharp
10 distinction between prescriptive State laws and private
11 contractual arrangements, but it didn't.
12 And I think in addition to Brulotte, the two
13 cases that I would point to that fall into the second
14 category are the cases that Mr. Saunders has mentioned,
15 Scott Paper and Lear. In Scott Paper, the Court said
16 that if even a single licensee was allowed to enter into
17 a binding restriction on his use of the patented
18 invention after the patent expires, the consuming public
19 would be deprived of full unrestricted access to the
20 patented invention.
21 And -- and two points there are crucial.
22 The first is the Court recognized that even though the
23 restriction that was sought to be applied in Sears would
24 bind only a single person, would -- wouldn't prevent
25 others from using the patented invention after the

1 patent expires. Nevertheless, that was regarded as a
2 restriction inconsistent with Federal patent policy.
3 And the Court explained that was so in part because when
4 a single licensee is restricted in his ability to use
5 the formerly patented invention, it's not only he who
6 suffers; it's the consuming public who could otherwise
7 hope to buy the products that he manufactures.
8 And -- and the second case is Lear, where
9 the Court held after Brulotte that even when the -- a
10 licensee has entered into a contractual promise not to
11 challenge the patent and to continue to pay royalties
12 during the pendency of any challenge that may arise, the
13 licensee can repudiate the license, can challenge the
14 patent itself, can cease paying royalties. Obviously,
15 it take -- the licensee, in that circumstance, takes the
16 chance that it may have to pay damages if the patent is
17 held to be valid -- if the patent is held to be valid.
18 But if a licensee is correct, if the patent is invalid,
19 its contractual arrangement will not prevent it --
20 JUSTICE SOTOMAYOR: Mr. Stewart, do you take
21 issue at all with the economic theory of all of the
22 amici that have filed in the antitrust area saying this
23 makes no sense --
24 MR. STEWART: I -- I --
25 JUSTICE SOTOMAYOR: -- economically?

1 MR. STEWART: I'd say three -- we -- we do
2 take issue to some extent, because at least some of the
3 criticisms are based on the misconception that Brulotte
4 prohibits extending royalty payments out past the date
5 of patent expiration, and Brulotte properly understood,
6 as the Petitioners recognize, prohibits royalties that
7 accrue based on post-expiration use, but it doesn't
8 prohibit the post-expiration payments of royalties that
9 are calculated based on use during the patent. So to --
10 to that extent, we do disagree.
11 We -- I think also, a lot of the antitrust
12 criticism has been to the effect that -- and -- and we
13 agree with this as far as it goes -- that viewed as a
14 matter of modern antitrust law, a -- a per se rule of
15 illegality would not be warranted because the per se
16 rule is reserved for situations in which rule of reason
17 analysis would always or almost always condemn the
18 practice.
19 And so if a particular practice is
20 procompetitive and even of significant range of cases,
21 it should be analyzed under the rule of reason for
22 antitrust purposes, and -- and we don't disagree with
23 the -- the critique that Brulotte -- the Brulotte rule
24 would not be a sound one of antitrust policy.
25 But even to say rule of reason should be

1 applied because this is not always anticompetitive is
2 not going as far as saying that, on balance, the
3 Brulotte rule causes more economic harm than benefit.
4 I -- we don't -- I don't know to what extent the
5 economists have really made that case. We don't think
6 it's been proved one way or the other. It seems to us
7 to be a criticism that -- that's much more soundly
8 directed at -- at -- to -- to Congress.
9 That the other thing that I would say
10 about --
11 JUSTICE SCALIA: Excuse me. What -- what
12 benefit do -- do you see coming from the rule? I mean,
13 if you're just analyzing it, you know, economically as
14 we would do for antitrust analysis --
15 MR. STEWART: The --
16 JUSTICE SCALIA: -- what -- what are the
17 economic benefits of the rule?
18 MR. STEWART: Arrangements like the ones at
19 issue here can cause economic harm in the sense that
20 they prevent the licensee from making unrestricted use
21 of the product after the license expires. The licensee
22 may, in certain circumstances, determine that it's --
23 it's not feasible to sell the thing at a profit if it
24 has to pay the royalties. At the very least, it will
25 presumably bake the royalties into the price it charges

1 to consumers.

2 Now, there -- there is an argument on the

3 other side, this is more than made up for by the fact

4 that the licensee will presumably be charged less while

5 the patent is in force.

6 JUSTICE SCALIA: That -- they are the harms.

7 What -- what are the benefits?

8 MR. STEWART: The benefits in -- in terms of

9 economics are that the licensee or after the -- the

10 patent expires can make decisions about whether to

11 exploit the invention, what sort of follow-on products

12 to devise that may incorporate the patented invention

13 without any disincentive created by the obligation to

14 pay royalties.

15 JUSTICE BREYER: In a word, you have a

16 higher price after the 20 years is up, and a higher

17 price means a restricted output.

18 MR. STEWART: That's correct.

19 JUSTICE BREYER: Any other antitrust --

20 MR. STEWART: That's correct.

21 But I -- I think the other point I would

22 make is, and I -- I take your point, Mr. Chief Justice,

23 that the 1960s are often associated with loose economic

24 analysis, but I think -- I think Brulotte not only was

25 not an antitrust decision. I think, for better or

1 worse, the Court really didn't rely on economic analysis
2 of any sort. That is, it said the balance that Congress
3 struck was that during the period when the patent is in
4 force, you can basically charge whatever royalties the
5 market will bear; after the patent expires, the
6 invention is supposed to be available for free,
7 unrestricted use for the public, and you can't trade one
8 for the other.
9 It's essentially the same mode of reasoning
10 that the Court used in cases like Bonito Boats v. Sears
11 Roebuck. The -- the analysis was not -- although it
12 might or might have not have been true, this will cause
13 economic harm to allow States to restrict copying in
14 this manner, the argument was simply this is not the
15 balance that Congress has struck.
16 And I wanted to return to -- to
17 Leer for a second because this was a case in which the
18 Court applied the same basic mode of reasoning to a
19 private contractual arrangement; that is, the Court
20 recognized in Leer that the agreement potentially bound
21 only the licensee; that is, any other member of the
22 public could have challenged the validity of the patent.
23 But as Mr. Saunders said, the Court pointed out that the
24 licensee may often be in the best position both because
25 it has knowledge of the patent's workings and because it

1 has the economic incentive to try to escape the royalty
2 obligation. The licensee may be in the best position to
3 challenge the validity of the patent, and therefore, a
4 restriction that binds only the licensee is less
5 sweeping than one that binds the -- the whole State or
6 the whole country, but it's still not just like a
7 restriction on a randomly selected individual.
8 I guess the -- the other thing I would say
9 about the -- the Sloan-Kettering brief and the argument
10 that is made there is that undoubtedly, the Brulotte
11 rule sometimes prevents contracting parties from
12 agreeing to the precise mix of burdens and benefits that
13 they would prefer. But there's really been no evidence
14 that the effect of the Brulotte rule is to prevent these
15 agreements from being formed at all as opposed to their
16 being -- causing them to be formed on terms that are
17 somewhat suboptimal from the -- the standpoint of the
18 contracting parties. That -- the second thing we would
19 say is to the extent that there's a -- evidence to show
20 real substantial harm in terms of impairment of
21 licensing agreements, again, that evidence is better
22 considered and evaluated by Congress.
23 The -- the other thing I would say is that
24 the situation in which the Sloan-Kettering brief is --
25 is most clearly directed at is one in which it's

1 necessary to do substantial non-remunerative work as a
2 preliminary matter during the period while the patent is
3 in force in order to be able to monetize the invention
4 down the road. And that's why they say, well, use
5 during the period while the patent is in force is not a
6 real sound estimate of the value of being able to
7 exploit the patent. But those are precisely the cases
8 in which it's most likely that after patent expiration,
9 competitors will face barriers to entry. I mean, to say
10 that you need to do a lot of preliminary work before you
11 can make money is to say that people who haven't done
12 the preliminary work may face difficulties in -- in
13 becoming competitors. And so on the one hand, that's a
14 situation where the licensees might prefer not to have
15 the Brulotte rule in place, but it's also a situation in
16 which a burden on the licensee is most substantial.
17 If there are no further questions.
18 CHIEF JUSTICE ROBERTS: Thank you, counsel.
19 You have 4 minutes remaining, Mr. Melnik.
20 REBUTTAL ARGUMENT OF ROMAN MELNIK
21 ON BEHALF OF PETITIONERS
22 MR. MELNIK: Thank you, Mr. Chief Justice.
23 I think it bears reemphasis that what we're
24 dealing with here is a per se rule. Petitioners are not
25 asking this Court to shift to a regime where patent

1 royalties are -- on post-expiration use are always
2 permissible. Petitioners are asking this Court to lift
3 a barrier -- a per se barrier against these royalty
4 arrangements.
5 And under this Court's precedent --
6 JUSTICE SCALIA: Would that -- would that
7 rule of reason be a patent rule or a -- an antitrust
8 rule?
9 MR. MELNIK: Well, I think --
10 JUSTICE SCALIA: And if a patent rule, where
11 does it come from? Where -- where is it in the patent
12 statutes?
13 MR. MELNIK: Well, Justice Scalia, patent
14 misuse, when it initially originated, wasn't in the
15 patent statutes either. It didn't appear in -- in the
16 narrow sense until the 1952 act when Congress acted to
17 overrule certain decisions of this Court. So the -- as
18 the law stands today, the rule of reason is the standard
19 that the Federal circuit uses to assess patent misuse.
20 So where does it exist today? It exists in
21 the Federal circuit's case law on patent misuse. So
22 the -- the question I think that needs to be asked is
23 even if you -- even if you view it as solely an
24 antitrust rule, which it -- which it's not on the
25 current state of the law because of the Federal

1 circuit's case law. The question then needs to be asked
2 is: What patent policy exists that would justify some
3 rule beyond the rule of reason? And I would submit that
4 neither the government nor Respondents have demonstrated
5 any patent policy that is not at its core an economic
6 policy. If you look -- take a close look at
7 Respondent's patent policy argument, it ultimately
8 reduces to a question of prices and outputs in the
9 post-expiration period versus pre-expiration period, and
10 that is essentially an economic question.
11 But to follow up on -- on something that
12 Justice Sotomayor earlier said, Petitioners would be
13 content with an alternative that draws on this Court's
14 Zenith decision and a -- a test that focused on coercion
15 as an alternative to a rule of reason analysis. I think
16 either would be appropriate.
17 If the Court has no more questions.
18 CHIEF JUSTICE ROBERTS: Thank you, counsel.
19 The case is submitted.
20 (Whereupon, at 12:11 p.m., the case in the
21 above-entitled matter was submitted.)
22
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24
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