

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ASGROW SEED COMPANY, Petitioner v.
DENNY WINTERBOER AND BECKY WINTERBOER,
dba DeeBees
CASE NO: 92-2038
PLACE: Washington, D.C.
DATE: Monday, November 7, 1994
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IN THE SUPREME COURT OF THE UNITED STATES

ASGROW SEED COMPANY, :
Petitioner :
v. : No. 92-2038
DENNY WINTERBOER AND :
BECKY WINTERBOER, dba DeeBees :

Washington, D.C.

Monday, November 7, 1994

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:01 a.m.

APPEARANCES:

RICHARD L. STANLEY, ESQ., Houston, Texas; on behalf of
the Petitioner.

RICHARD H. SEAMON, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the United States, as amicus curiae.

WILLIAM H. BODE, ESQ., Washington, D.C.; on behalf of the
Respondents.

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

2 (11:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 92-2038, Asgrow Seed Company v. Denny
5 Winterboer, et al.

6 Mr. Stanley. Where's counsel? You may proceed,
7 Mr. Stanley.

8 ORAL ARGUMENT OF RICHARD L. STANLEY

9 ON BEHALF OF THE PETITIONER

10 MR. STANLEY: Thank you, Mr. Chief Justice, and
11 may it please the Court:

12 This case is here from the United States Court
13 of Appeals for the Federal Circuit. The dominant issue in
14 this case is how much of a farmer's crop in a protected
15 novel plant variety can be sold as seed under the terms of
16 section 2543 of title VII in the Plant Variety Protection
17 Act.

18 That act provides exclusive rights to breeders
19 of sexually reproduced plants. Section 2543 provides
20 specific and limited exemptions from the acts of
21 infringement that are set forth in section 2541 of the
22 same title.

23 The text of sections 2541 and 2543 can be found
24 at adjoining pages 40a and 41a of the petitioner's
25 appendix in Asgrow's petition for certiorari. I will use

1 these pages as a reference as needed during my argument.

2 QUESTION: Will you repeat the pages number
3 again?

4 MR. STANLEY: Yes. It's 40a and 41a of the
5 petition for certiorari.

6 QUESTION: Thank you.

7 MR. STANLEY: They're also at pages 1a and 2a of
8 the merits brief, but they're not on facing pages.

9 In construing section 2543, the Federal Circuit
10 held that qualified farmers could sell up to 50 percent of
11 their crop to others for use in reproductive purposes. In
12 other words, to use it as seed. Because the language of
13 section 2543 does not support that interpretation, that
14 decision must be reversed. For proper -- in -- what the
15 Federal --

16 QUESTION: May I ask a preliminary question?
17 2543, the right to save seed crop exemption section,
18 there's a "provided" part of the sentence that says,
19 "provided," and then there's a sentence following that.
20 Do I understand that Congress has now amended this statute
21 and taken that proviso out?

22 MR. STANLEY: All right, on October 6 Congress
23 amended the first sentence of 2543 and removed everything
24 after the word -- outside the word provided through the
25 end of the sentence, such that the first sentence now ends

1 after as provided in this section.

2 QUESTION: And that takes effect not
3 retroactively, but sometime in the future?

4 MR. STANLEY: Right. It's a prospective
5 amendment. It applies to those certificates that are
6 applied for on the effective date of the act, which is 180
7 days after the day it was passed.

8 QUESTION: So this case is not moot.

9 MR. STANLEY: No. This case is not moot. The
10 both --

11 QUESTION: But if it were to come before us
12 under the new statute, it would govern, I suppose. I
13 mean, there wouldn't be this exception, this proviso.

14 MR. STANLEY: Yes. Under the new statute there
15 is no right to sell saved seed at all by somebody who
16 produces it.

17 QUESTION: It completely eliminates the so-
18 called brown bag exemption.

19 MR. STANLEY: It eliminates the right to sell
20 such safe seed under the statute.

21 QUESTION: Uh-huh. Thank you.

22 MR. STANLEY: It probably --

23 QUESTION: Does it continue to read, "or for
24 sale as provided in this section," or did they take out
25 that, too?

1 MR. STANLEY: No, they didn't. They put the
2 period right at the end of "section."

3 (Laughter.)

4 QUESTION: Who do you suppose --

5 QUESTION: I'm not surprised.

6 QUESTION: -- drafted this statute? Do we know
7 to whom we owe this debt of gratitude for perfect
8 language?

9 (Laughter.)

10 MR. STANLEY: I think maybe he intentionally
11 remained nameless. But basically the job I have today is
12 to --

13 QUESTION: Before you get into that, just one
14 more question about the amendment. Is it not true that
15 the two remaining sentences after the proviso has been
16 deleted did allow some sales of seed, so that there still
17 is some room for the sale as provided --

18 MR. STANLEY: Right. The second sentence allows
19 the sale of the protected variety to be used for
20 nonreproductive purposes. There's a distinction,
21 basically, between -- which isn't always consistent, the
22 statute between basically using a variety as a crop and as
23 a seed. A seed is what is planted, used to reproduce the
24 variety. When the soybean, the variety at issue in this
25 case, is sold for crop, it's sold to a meal-maker or

1 somebody to be used for consumption purposes --

2 QUESTION: It goes into cereal, or beanbags, or
3 something like that.

4 MR. STANLEY: Right. Then -- the classic
5 example we've been using is tofu, but that's use of it as
6 a crop. The saving seed aspect is when you use the
7 soybean for purposes of replanting it on the farm. In the
8 case of soybeans, the actual soybean is the same, whether
9 it's sent to the meal-maker or to the -- you know, to be
10 used for planting.

11 Other varieties under the act which this act
12 obviously applies to, the distinction of saving seed is an
13 intentional act. For purposes of that in vegetables, for
14 something like celery or tomatoes, the plant has to be
15 allowed to go to seed. At that point, the crop aspect,
16 the tomato or the celery stalk, no longer is marketable
17 for consumer reasons. In other words, the saving of seed
18 is an intentional act, because you had to let the seeds
19 develop to the point where they could be replanted.

20 QUESTION: But you concede that he can save the
21 seeds --

22 MR. STANLEY: Right, by --

23 QUESTION: -- for some purposes.

24 MR. STANLEY: Right. That they --

25 QUESTION: Well, for any purpose. Can't --

1 doesn't the -- don't you concede that a farmer can set
2 aside all the seed he has and decide later what he wants
3 to do with it?

4 He saves seed because he isn't sure how many
5 acres he wants to plant next year in soybeans, and how
6 much he might need would depend on that, or he might think
7 the price was going to go up, and if he saved the soybeans
8 he'd get more later. I suppose there are a lot of reasons
9 for saving seeds.

10 MR. STANLEY: There's a lot of reasons for
11 saving soybeans. The reason for saving seed, there's --
12 by itself, the saving of seed is not an act of
13 infringement. The act of infringement arises when a
14 farmer saves seed and sells seed, and sells seed above the
15 amount that Congress set forth in the statute that was the
16 quantity that he could save.

17 QUESTION: The statute doesn't come into play
18 until the sale is made.

19 MR. STANLEY: Right.

20 QUESTION: And then you have to look at the
21 purpose.

22 MR. STANLEY: Right. It's -- looking at the
23 purpose at the time of planting is not sufficient. You
24 have to look at the farmer's purpose at the time of
25 selling. When a decision is made --

1 QUESTION: At the time of sale.

2 MR. STANLEY: Right.

3 QUESTION: And the Federal Circuit, in deciding
4 this case, placed a lot of emphasis on the word, marketed,
5 didn't it, in the exception (3), is it, in 2541?

6 MR. STANLEY: Right. The Federal Circuit
7 defined the term, "marketing" very narrowly, and construed
8 marketing as being selling, but only selling that involved
9 advertising and sales representative or concentrated
10 marketing aspects.

11 QUESTION: And do you say the term, "marketing"
12 necessarily includes selling?

13 MR. STANLEY: Yes.

14 QUESTION: Then it's -- marketing should be the
15 broader term --

16 MR. STANLEY: It's marketing --

17 QUESTION: -- not the selling.

18 MR. STANLEY: It's marketing -- marketing at a
19 minimum includes selling. It includes selling, but is not
20 limited to selling.

21 QUESTION: If we agree with you on that, do we
22 have to reverse? I mean, is that what it turns on?

23 MR. STANLEY: If you agree with that, that
24 affects the amount of seed that can be saved. The
25 determinative question here is how much seed can be saved

1 and sold under this statute.

2 QUESTION: May I interrupt you there? I'm not
3 sure how you get the amount from that, because if there
4 was no violation of 2541(3), so that the farmer did not
5 sexually multiply the novel variety as a step in
6 marketing, including as a step toward selling, then
7 theoretically his whole crop, I suppose, is subject to
8 sale, is it not?

9 Now, we might very well say, or a jury might
10 very well say, if he sold the whole crop, well, we know
11 perfectly well he must have planted with that intent. He
12 must have sexually multiplied with that intent, and they
13 might find a violation. But in theory, if he did not
14 plant with the intent specified in 2541(3), in theory his
15 entire crop might be subject to sale without violation.
16 Isn't that so?

17 MR. STANLEY: No, Your Honor, that's not
18 correct.

19 QUESTION: Why not?

20 MR. STANLEY: Because the most that a farmer is
21 going to use on his own farm is that that he would need to
22 replant his farm. If he's saving seed, particularly where
23 he saves seed in a manner that requires an intentional
24 act --

25 QUESTION: Sure, but he might have planted a

1 crop and decided at the end of the season that he's
2 decided to get out of farming, so he doesn't -- and if the
3 market, let's say, for seed, is higher than the market for
4 meal, he might say, I'm going to get out of the business
5 completely, I'm just going to sell all my seed to my
6 neighbors. That wasn't my intent when I started out, but
7 that's my intent now. They can raise the stuff. Where is
8 that a violation?

9 MR. STANLEY: That is a violation because he is
10 selling more than is allowed under the statute. If I can
11 turn to the language of the statute, the key phrase in
12 this is the phrase, "such saved seed." The term "such
13 saved seed" appears at two places in the statute, one at
14 line 7, before the proviso, and one at line 13, after the
15 proviso, and two points about "such saved seed" are
16 important: 1) It's a particular and definable quantity
17 of seed. It is not any seed that is saved. It's not any
18 saved seed or any seed that's produced and saved.

19 The second thing is, it means the same thing
20 both before the proviso and after the proviso, such that
21 that term, "such saved seed" has the same meaning at both
22 places in the statute.

23 The definition of what "such saved seed" means
24 stems right from the opening clause of the statute.
25 Reading right at the beginning, it says, "Except to the

1 extent that such action may constitute an infringement
2 under subsections (3) and (4) of section 2541."

3 Now, that opening clause does not mean the
4 farmer is free to do whatever he wants except for
5 violating (3) and (4). What it means is that the farmer
6 can do that such action that is later described in that
7 first sentence, provided that action does not violate (3)
8 or (4). That action that's described in that sentence is
9 the saving of seed produced by him, and using such saved
10 seed in the production of a crop.

11 Now, if you read subsection (3), it's an act of
12 infringement to sexually multiply the novel variety as a
13 step in marketing the variety for growing purposes, so if
14 you look at how that's incorporated into the beginning of
15 section 2543, that means, except to the extent that such
16 action may constitute sexually multiplying the novel
17 variety as a step in marketing. It shall not infringe any
18 right for a person to save seed produced by him and use
19 such saved seed in the production of a crop for use on his
20 farm or for sale as provided.

21 QUESTION: No, but you've left of the -- if
22 saved seed in the production of a crop for use on his
23 farm, you left out the words, "or for sale as provided in
24 this section."

25 MR. STANLEY: Right.

1 QUESTION: That's critical also, isn't it?

2 MR. STANLEY: Right. The such saved seed can be
3 used in the production or for sale as provided. However,
4 the such saved seed --

5 QUESTION: And the question, then, is what is
6 provided in this section?

7 MR. STANLEY: Well, and also what is the amount
8 of such saved seed. That is a defined quantity, and the
9 first part before you get to the proviso is what defines
10 the amount of such saved seed, and what defines it is the
11 opening clause. You can save seed produced on the farm
12 and use it to produce a crop, but only to the extent that
13 it was not sexually multiplied as a step in marketing.
14 That --

15 QUESTION: But why do you say it's only in the
16 production of a crop, because in the very next phrase, "or
17 for sale as provided in this section." It seems to me
18 either purpose describes a kind of such saved seed.

19 MR. STANLEY: Right, but if such saved seed is a
20 definite amount, you could either use it in the production
21 of a crop, or sell it.

22 QUESTION: But where do you get the definite
23 amount?

24 MR. STANLEY: The definite amount comes from the
25 opening clause. Such --

1 QUESTION: Because you're reading the phrase to
2 mean, shall not infringe any right to save seed, and use
3 such saved seed in the -- (a) in the production of a crop
4 for use on his farm, or (b) for sale. That's your
5 reading.

6 MR. STANLEY: Right.

7 QUESTION: So that the for sale necessarily
8 relates back to the saved seed, and if that implies
9 quantity, then the amount that can be sold is subject to
10 that quantity. That's your argument.

11 MR. STANLEY: Yes. The such saved -- the word
12 "such" is what defines the quantity.

13 QUESTION: Well, I mean --

14 MR. STANLEY: The quantity is -- if I --

15 QUESTION: I think you place a lot of stress on
16 the "except" clause, "except to the extent that such
17 action may constitute an infringement under subsection
18 (3)."

19 If I understand your argument, it is that
20 provision which prevents a farmer from saving seed for
21 reproductive -- for crop production purposes, other than
22 his own crop. Isn't that right?

23 MR. STANLEY: Well, he's not going to --

24 QUESTION: Without that "except," he'd be able
25 to save as much seed as he wanted for crop production

1 purposes, for future seeding purposes. What prevents him
2 from saving an infinite quantity for future seeding
3 purposes is that if he set out with the intention of
4 selling it to somebody else for seeding as opposed to
5 using it for seeding himself, he would be violating the
6 "except" clause. That is, he'd be violating subsection
7 (3), multiplying the novel variety as a step in marketing.

8 MR. STANLEY: Well, basically a farmer can save
9 for his own use no more seed than he'll need to plant his
10 farm, sexually --

11 QUESTION: Why is it on the facts of this case
12 there's no dispute that the crop was grown specifically
13 for the purpose of marketing all of it to other -- excuse
14 me, not marketing, selling it to other farmers? There was
15 no pretense that this seed was going to be either used for
16 replanting --

17 MR. STANLEY: Right.

18 QUESTION: -- on the farmer's own farm, or was
19 going to be sold for nonreproductive use, that there was
20 an admission that all of it was sold to other farmers.

21 MR. STANLEY: Right. All the Asgrow variety,
22 protected variety seed that was produced by the
23 Winterboers minus the amount that was broken and not
24 usable as seed, was sold to others. I think they saved a
25 small amount for a test plot of less --

1 QUESTION: And it was sold to others as seed.

2 MR. STANLEY: For use as seed for reproductive
3 purposes.

4 QUESTION: And getting back to Justice Scalia's
5 question, or at least the section that he was focusing on,
6 I don't understand why his cultivation of that crop was
7 not a violation of the act under your theory, because this
8 was sexually multiplying a novel variety as a step in
9 marketing, but you told Justice O'Connor that you have to
10 wait till the sale before there's a violation, and I don't
11 understand that.

12 MR. STANLEY: No, no. At the time where -- one
13 of the questions pointed out that he may wait until the
14 following season to decide what he wants to do with it.
15 In that situation, you might have to wait till he decides
16 to market it.

17 At the point where it's clear that he has a
18 contract to sell all his production for seed, or
19 something, at that point there is no amount of seed that
20 can be saved. However, the quantitative limitation in
21 this case comes out of the fact that such saved seed is
22 that which was sexually multiplied but not as a step in
23 marketing. Almost by common sense the most that can be is
24 the amount he would need to replant on his own farm.

25 QUESTION: Why? Why couldn't he decide to --

1 you acknowledge that vegetable farmers save 5 years'
2 worth, typically.

3 MR. STANLEY: Right.

4 QUESTION: Why couldn't the soybean farmer
5 decide that he's -- you know, I'm going to save 5 years'
6 worth. I'll not just plant the crop next year, I'll plant
7 it the year -- are you placing stress on the word, and use
8 such saved seed in the production of a crop for use on his
9 farm? You mean only one crop, only 1 year's worth, is
10 that --

11 MR. STANLEY: Production of a crop, use such
12 saved seed in production of a crop shows that that's one
13 way the saved seeds can be used, and I think that's the --
14 that it helps limit the amount that can be sold.

15 QUESTION: Only 1 year's crop, you're saying.

16 MR. STANLEY: That can be sold. You can save --
17 the vegetable farmer can save seed, that the act of saving
18 is not an infringement. The act of infringement only
19 comes where it's sold, and the sexual multiplication that
20 led to having that seed to sell is a step in marketing
21 that seed.

22 Now, I need to use a --

23 QUESTION: You're saying that there is no
24 limitation on saving, the limitation is on save plus sell.

25 MR. STANLEY: Saving by itself, without --

1 QUESTION: He can save as many seeds, either to
2 plant himself or to sell for nonreproductive use. There's
3 no limitation on saving for those two purposes.

4 MR. STANLEY: Yes. Saving by itself, without
5 more, without intent to market, or without a contract, or
6 without turning around and selling more, if I can use a
7 hypothetical, soybeans generally we've been using 1 acre,
8 or 1 bushel per acre for planting.

9 The Winterboers have an 800-acre farm. If they
10 plant -- they planted their 265 acres and got 12,000
11 bushels of soybeans. Now, they only need 800 bushels to
12 plant those 800 acres on their farm, so the most seed they
13 can save to use on their farm is 800 bushels.

14 QUESTION: What -- even though they have more
15 acreage on that farm?

16 MR. STANLEY: They have 800 acres. That's the
17 total acreage they have. They planted only 265 acres in
18 our variety.

19 QUESTION: So the most they can save is enough
20 for 800?

21 MR. STANLEY: For 800, because there's -- they
22 can't plant any more. They only need 1 bushel per acre.
23 Therefore --

24 QUESTION: Suppose they're thinking of buying
25 the next farm.

1 MR. STANLEY: If they buy -- if they buy the
2 next farm and at the time that they're saving the seed, at
3 that point the saving is not a multiplication, but if that
4 plan falls through and they don't have a farm, they can
5 use as much saved seed as they need on their farm, and
6 their farm is still 800 acres.

7 I mean, you have a situation where you may end
8 up with a factual question if they really had that intent,
9 but it's argued that in the vegetable farmer situation you
10 can save 50 years' worth. Soybeans cannot be saved beyond
11 1 year. They're oil-based, and it's not practical to save
12 them.

13 Vegetables, you can put them in the
14 refrigerator, save them for 50 years, but the most you're
15 allowed to sell in any 1 year is what you would need to
16 produce a crop on your farm.

17 The vegetable farmers that appeared as an amicus
18 before the Federal Circuit were not -- they were saving
19 for their own use, but they were not selling. Without the
20 act of selling, the seed certificate owner has no problem.

21 QUESTION: But if you go out of business after
22 1 year and you have 4 years' worth of seeds left, you're
23 saying, tough luck, you can't do anything but eat it.

24 MR. STANLEY: Well, no. There would be a
25 question on whether or not the person who may be bought

1 your business would cede to your rights in that seed, but
2 you can't --

3 QUESTION: Oh, but --

4 QUESTION: You couldn't sell to --

5 QUESTION: -- you sell it to the developer.
6 He's going to put up condos.

7 QUESTION: You couldn't sell them to the
8 neighboring farm.

9 MR. STANLEY: You couldn't save more than would
10 be needed for that farm. That's the way --

11 QUESTION: Four years worth of seed. You've got
12 to --

13 MR. STANLEY: Right.

14 QUESTION: What do you do with tomato seeds --

15 MR. STANLEY: They may -- I mean, you can always
16 get the authorization of the owner. There may be a
17 situation where it can be explained there, or the owner,
18 if it's of sufficient quality, may well buy it back from
19 them. There are ways to handle that.

20 But from the standpoint of how much seed can be
21 sold, anything beyond what they need to produce on their
22 farm -- it assumes the rational farmer is going to save no
23 more seed than what he would need to replant his own farm
24 unless he was going to market it.

25 QUESTION: Mr. Stanley, am I correct in assuming

1 that the practical difference, at least in the soybean
2 business and barring unforeseen contingencies, between
3 your position and your opponent is that you say he can
4 only sell 1/45th of the seed he produces, and he says he
5 can sell up to a half?

6 MR. STANLEY: Right. That's what -- for
7 soybeans, for --

8 QUESTION: In this particular --

9 MR. STANLEY: -- the numbers involved in
10 soybeans.

11 QUESTION: And then the second question, if you
12 do have the time to address it before you finish is, could
13 you tell me to what extent you think the court of appeals
14 in its opinion relied, and presumably erroneously, on the
15 sentence after the proviso that Congress has now deleted?

16 MR. STANLEY: I don't think the Federal Circuit
17 relied on the second sentence, other than to come up with
18 the construction of "for seeding purposes," which I think
19 both parties are agreed modifies, obtained by -- from the
20 owner.

21 I think what the Federal Circuit did, the
22 Federal Circuit went wrong right at the beginning, where
23 they viewed the opening clause of the statute as being,
24 except to the extent such action constitutes infringement
25 under subsections (3) and (4). The Federal Circuit used

1 that as an exemption saying that (3) and (4) still apply
2 to farmers and the rest don't.

3 The key fact here is that "such saved seed" is a
4 defined quantity that means the same thing when it's sold
5 under the proviso, and it can only be that seed that was
6 sexually multiplied, but not as a step in marketing.

7 QUESTION: Let me ask you a question. If --
8 suppose we thought the Federal Circuit got it right,
9 except insofar as it defined "marketing." How does that
10 affect the outcome?

11 MR. STANLEY: The Federal Circuit's definition
12 of "marketing" --

13 QUESTION: That would mean the farmer could do
14 what, if we disagreed on the definition of "marketing"?

15 MR. STANLEY: The Federal Circuit's treatment of
16 the term "marketing" in itself is erroneous. You have to
17 look at the two references to section --

18 QUESTION: How would that affect the outcome in
19 this case at the bottom line?

20 MR. STANLEY: It would affect the amount of seed
21 that could be sold, because the broader the definition of
22 "marketing" to include all selling, if this Court
23 concludes that selling includes all forms of selling, I
24 think the answer comes up to be, you can sell no more than
25 what would be needed to replenish your farm.

1 QUESTION: Why -- if what Justice O'Connor
2 supposes is correct, we disagree with them on marketing,
3 why can't you win your case under 2541(3), that there was
4 a sexual multiplication of novel varieties, a step in
5 marketing, end of the case?

6 MR. STANLEY: That's what we have done here, but
7 the question in this case is, they're claiming that they
8 are under the exemption in 2543, and in order to determine
9 the meaning of 2543, the scope of it, that's -- they're
10 claiming an exemption. But for the exemption in --

11 QUESTION: Yes, but I'm just asking you, suppose
12 we think that the CAFC was basically correct except
13 insofar as erroneously defining marketing, what's the
14 bottom line outcome here, if that's our view?

15 MR. STANLEY: If marketing has a broader
16 definition than what's at the Federal Circuit, the amount
17 of seed that can be sold by a farmer is less than what the
18 Federal Circuit held. However, the Federal Circuit --

19 QUESTION: But more than what you say.

20 MR. STANLEY: The reason I'm having difficulty
21 answering that question is, the Federal Circuit, by
22 misconstruing the opening clause of the statute, their
23 definition of marketing is basically out on its own,
24 because it doesn't follow the structure of the statute, of
25 the two references to 2541(3). Therefore, the Federal

1 Circuit's interpretation in my view is so divorced from
2 the language of the statute that question doesn't solve
3 the problem.

4 QUESTION: You really haven't answered my
5 question, and if what we think is that the only error made
6 below was in the definition of the term, "marketing," what
7 do we do with this case, and how does it affect the
8 outcome at the bottom line?

9 MR. STANLEY: I think that the answer to that, I
10 think that at a minimum the case should be remanded at the
11 Federal Circuit to determine that issue, and basically let
12 them resort out the issue under a proper interpretation of
13 "marketing."

14 I believe that when "marketing" is given its
15 proper interpretation, that our position that you can sell
16 no more than needed to replant a farm is appropriate.

17 QUESTION: Even given the circuit's opinion and
18 interpretation of the "except" clause in the first few
19 lines of the statute?

20 MR. STANLEY: I think the Federal Circuit's
21 interpretation of the "except" clause cannot stand any
22 scrutiny at all.

23 QUESTION: No, what I

24 MR. STANLEY: -- and I think that's what caused
25 the problem with their interpretation. If marketing still

1 applies under the Federal Circuit's guideline, that a
2 farmer is still subject to prohibitions against marketing,
3 I think the Winterboers would be liable in this particular
4 case, but I think the structure of the statute would not
5 be solved for all other PVPA varieties.

6 If I can reserve the remaining moments I have
7 for rebuttal --

8 QUESTION: Very well, Mr. Stanley.

9 Mr. Seamon, we'll hear from you.

10 ORAL ARGUMENT OF RICHARD H. SEAMON

11 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

12 MR. SEAMON: Thank you, Mr. Chief Justice, and
13 may it please the Court:

14 I would like to begin by addressing a question
15 that arose previously, which is whether, if this Court
16 disagrees with the Federal Circuit's interpretation of the
17 term "marketing," what the proper disposition of the case
18 should be.

19 In that event, the case should be reversed,
20 because in that situation, it's quite clear, if the Court
21 rejects the very restrictive definition of --
22 interpretation of "marketing" that the Federal Circuit
23 adopted, respondents' sales of soybeans constituted
24 marketing under any reasonable interpretation of that
25 term.

1 The Federal Circuit's restrictive definition
2 that would say that "marketing" only involves the use of
3 middle men and extensive advertising isn't compatible --

4 QUESTION: And you disagree with that. You
5 think --

6 MR. SEAMON: We certainly do.

7 QUESTION: -- that at a minimum, "marketing" is
8 the larger term, and it includes selling.

9 MR. SEAMON: That's correct. The way in which
10 "marketing" differs from "selling" is that marketing
11 includes certain activities that lead up to the sale,
12 preparing goods for sale in the market.

13 QUESTION: Do you agree with the CAFC except
14 insofar as it defines marketing, or do you think it made
15 other errors?

16 MR. SEAMON: Our disagreement is not limited to
17 that point, but we -- but I do want to emphasize that we
18 think that the Federal Circuit was wrong on that point,
19 and in this case, it's particularly clear that what
20 respondents did violated subsection (3) of section 2541.
21 They were able to sell over 10,000 bushels of soybeans in
22 a single crop season.

23 QUESTION: May I interrupt you, Mr. Seamon, to
24 help me with one point? If one -- and I think this is way
25 the Federal Circuit -- construes the word "marketing" to

1 embrace all kinds of commercial distribution other than
2 brown bag sales to other farmers if that were a correct
3 reading of the word "marketing," then the Court was right,
4 wasn't it?

5 MR. SEAMON: I'm not sure that that's right,
6 because the Federal Circuit did make other errors.

7 QUESTION: They made other errors, but the
8 result would be correct, if one read it that way, and I
9 know you disagree with that reading, and it is kind of
10 counterintuitive, but if you do construe "marketing" as to
11 construe the universe other than brown bag sales, then I
12 think the judgment should be affirmed.

13 MR. SEAMON: I believe that's correct, but I'd
14 want to do more --

15 QUESTION: I understand.

16 MR. SEAMON: -- and I'll try to do that in the
17 course of addressing the other errors that the Federal
18 Circuit made.

19 One of the other errors that we believe that the
20 Federal Circuit made is in its reading of the language
21 that comes immediately before the word "provided," and I
22 will also refer to the copy of the statute which is
23 reproduced at pages 40a and 41a of the petition for writ
24 of certiorari.

25 We believe that the phrase, "for sale as

1 provided in this section," modifies the word "crop," so
2 that what it allows is a use of the crop for sale as --

3 QUESTION: Where are you reading now?

4 MR. SEAMON: I am reading the language of
5 section 2543 on page 41a, that immediately precedes the
6 italicized word, "proviso" -- "provided."

7 As we read the term, "for sale as provided in
8 this section," it modifies the noun, "crop." It specifies
9 one of the uses to which the crop can be put. For that
10 reason, under the language preceding the proviso, there is
11 only one use of saved seed, and that is its use in the
12 production of a crop.

13 The crop may then be used in two different ways.
14 It may be used on the farm, or it may be sold as provided
15 in the balance of the section, and we understand, and for
16 that reason we believe that "such saved seed" refers only
17 to such seed as is saved for the purpose of producing a
18 crop.

19 QUESTION: On his farm.

20 MR. SEAMON: On the farm.

21 QUESTION: What if he saves enough seed for 5
22 years' worth of crops?

23 MR. SEAMON: We would rely in that case on the
24 term, "a crop" to suggest that --

25 QUESTION: One season.

1 MR. SEAMON: -- what can be sold is one season's
2 worth of crop. Now, we recognize --

3 QUESTION: Do you agree that this is an academic
4 question, because the seeds don't last for more than a
5 year?

6 MR. SEAMON: I think, Justice Ginsburg, it
7 depends on the variety that you're speaking about. It may
8 well be that soybeans have a limited useful life, but
9 other crops --

10 QUESTION: Unlike vegetables, which you can keep
11 for 5 years, in some cases?

12 MR. SEAMON: That's my understanding. That's
13 correct.

14 But in any event, it is correct that a farmer
15 can save any amount of seed that he or she wants. The
16 rights of the owner are only implicated when the saved
17 seed is used in some way, and there are a couple of
18 different kinds of uses that may violate the owner's
19 rights.

20 One use is in the production of a crop as a step
21 in marketing the crop for sale as seed. In this case,
22 respondents clearly marketed, used their seed to produce
23 seed for the purpose of selling the resulting seed as
24 seed. They never had any intention of doing anything else
25 with it, and in fact all of the -- all of their production

1 was sold for use as seed.

2 QUESTION: Well, they had violated it even
3 before the sale, then, hadn't they?

4 MR. SEAMON: The production itself violated
5 subsection (3), and I would go on to say that even though
6 the proviso specifies that it operates without regard to
7 subsection (3), all the proviso does is to authorize the
8 sale. It doesn't speak to the question of whether the
9 precedent production of the crop was a violation of the
10 owner's right.

11 QUESTION: Very cleverly drafted, it really is.

12 (Laughter.)

13 MR. SEAMON: I won't -- I will concede the
14 point.

15 (Laughter.)

16 MR. SEAMON: The reason that we believe the
17 amount of seed that may be sold under the proviso is
18 limited is essentially because it can be put only to one
19 use in the production of a crop, and is that amount the
20 sale of which is permitted under the proviso.

21 We think that the primary intent of the proviso
22 was to allow a farmer who has held back enough seed from
23 one year's crop to plant the next year's crop to sell the
24 seed if the farmer's planting plans change.

25 The Federal Circuit's interpretation of the

1 proviso allows farmers to go beyond that narrow but still
2 very practical purpose and compete directly with the
3 owners of the novel variety, and that clearly could not
4 have been Congress' intent.

5 QUESTION: What about the second point?
6 Nobody's even talked about that. Is that not in the case?
7 There is a point on which you disagree with petitioners,
8 and that is --

9 MR. SEAMON: Yes.

10 QUESTION: Labeling.

11 QUESTION: Labeling, right. Right, whether you
12 have to give notice to the person to whom you sell.

13 MR. SEAMON: That's correct.

14 QUESTION: Is that in the case? Do we have to
15 decide that?

16 MR. SEAMON: It is in the case. We suggested in
17 our amicus submission that the issue has not been
18 completely briefed below. It's properly before the Court.

19 If the Court rules for the petitioner on the
20 question of how much saved seed can be sold under the
21 proviso, it wouldn't be necessary for the Court to reach
22 the second issue, because the second issue only arises
23 assuming that a sale is authorized under the proviso. If
24 the Court holds these sales were not authorized, it
25 doesn't come up.

1 If -- when a sale is authorized under the
2 proviso, the second question is whether notice has to be
3 provided to the purchaser of the brown bag seed that the
4 seed is a protected variety under the statute. We find
5 that issue to be a difficult one, although on balance we
6 do agree with respondents that notice isn't required. I
7 would just --

8 QUESTION: You say it is not?

9 MR. SEAMON: That notice is not required, that's
10 correct. Essentially, we believe there is a lot of force
11 to petitioner's argument that there are some types of
12 infringing conduct that are so unrelated to the act of
13 selling a crop that authority for the sale doesn't
14 encompass authority to do the further act.

15 As an example, under subsection (2) of section
16 2541, it violates an owner's rights to import or export
17 seed, so we would say that it would violate subsection (2)
18 for a farmer to export seed for sale to a farmer in
19 another country, even though the sale was otherwise -- met
20 the requirements of the proviso.

21 QUESTION: Because that's too remote from
22 selling, whereas notice is not too remote. Why make us
23 draw lines like that? Why not just say, selling is
24 selling, and you're exempted from that, but all the other
25 requirements continue to apply? I don't know why

1 exportation is more remote than notice is.

2 MR. SEAMON: Well, the -- the exportation is,
3 indeed, very remote from the act of selling, but what
4 subsection (6) and the notice requirement --

5 QUESTION: Why? I mean, you've got to sell to
6 somewhere. If you sell abroad, it's exportation.

7 MR. SEAMON: There is a lot of force to
8 petitioner's argument that sale is one thing and providing
9 notice is another. The reason that we ultimately, on
10 balance, side with respondents on that point is just that
11 subsection (6) doesn't just talk about giving notice, it
12 talks about dispensing a novel variety. It contemplates
13 that when the novel variety is dispensed in some form,
14 including by sale, the selling farmer should provide
15 notice to the purchasing farmer that the seed is a
16 protected type.

17 But it's important to this connection to note
18 that in the proviso itself, Congress required selling
19 farmers to comply with State laws governing the sale of
20 crops, and many of those State laws go to labeling and
21 providing certain information to the farmer in connection
22 with the sale.

23 We think that because Congress actually gave
24 attention in the proviso itself to the information that
25 purchasing farmers should have regarding the variety, if

1 it had intended purchasing farmers to have the further
2 information that this seed is a protected variety, it
3 would have spoken to that in the proviso itself.

4 QUESTION: This applies to all State laws, not
5 just State laws regarding notice, so your argument really,
6 if carried to its conclusion, would say all State laws are
7 covered, but none of the things listed in 2541 are
8 covered.

9 QUESTION: You may answer the question.

10 MR. SEAMON: It is true that it covers all State
11 laws --

12 QUESTION: There was a question.

13 MR. SEAMON: Most of the State laws governing
14 the sale of seed have to do with the labeling in which --
15 on which the seed is sold.

16 QUESTION: Thank you, Mr. Seamon.

17 Mr. Bode, we'll hear from you.

18 ORAL ARGUMENT OF WILLIAM H. BODE

19 ON BEHALF OF THE RESPONDENTS

20 MR. BODE: Mr. Chief Justice, and may it please
21 the Court:

22 Preliminarily, I'd like to note that the record
23 establishes that the Winterboers had no purpose in mind
24 for their crops when they planted their crops. That is in
25 the deposition of Mr. Winterboer.

1 QUESTION: I don't know what you mean by that.

2 They had no purpose in mind --

3 MR. BODE: They had no --

4 QUESTION: -- just went out --

5 MR. BODE: -- purpose with respect to whether
6 they would sell the seed later for reproductive or
7 nonreproductive purposes. That purpose wasn't established
8 until later, when market conditions at the time of harvest
9 were revealed.

10 I'd also like to correct a statement --

11 QUESTION: But can that be true? I mean, didn't
12 they produce enough seed so they couldn't have used it up
13 in 20 or 30 years, and you can't save seed that long.

14 MR. BODE: Well, first of all, you can save seed
15 for years and years, not just 1 year, certainly for 4 or 5
16 years.

17 QUESTION: Are you then disagreeing --

18 MR. BODE: Secondly, you can always --

19 QUESTION: Are you then disagreeing -- not
20 knowing much about farming, we were told by one person
21 that the soybean seed spoils in a year or so.

22 MR. BODE: That's incorrect.

23 QUESTION: And you're saying it saves -- you can
24 save it and still retain its quality for how long?

25 MR. BODE: That is correct.

1 QUESTION: For how long?

2 MR. BODE: Four to five years.

3 QUESTION: Four to five years?

4 MR. BODE: Yes. The only effect is the
5 germination rates deteriorate to some extent over time.

6 QUESTION: But is it not true that the amount of
7 seeds they produced was far in excess of enough for a crop
8 for four or five -- far in excess of four or five crops?

9 MR. BODE: That is correct, Your Honor.

10 QUESTION: So then is it not patent that they
11 had a purpose in mind that they would sell some of it to
12 their neighbors?

13 MR. BODE: No, Your Honor, because they could
14 sell all of their harvest for consumption purposes.

15 Now, the other point -- and I want to elaborate
16 on that --

17 QUESTION: I just don't understand that answer,
18 because you say they did produce enough seed they couldn't
19 use it all for their own production, even in 4 or 5 years,
20 and they didn't do it inadvertently, did they? I mean,
21 they didn't grow the amount inadvertently?

22 MR. BODE: Justice Stevens, that ties in with
23 the interpretation now propounded of this text by Asgrow.
24 This was an interpretation that was not discerned and
25 argued by Asgrow before the Federal district court, or the

1 Federal Circuit panel, and it wasn't discerned by 9 of the
2 10 amicus -- amici parties below.

3 QUESTION: Well, that may be, and it may not be
4 controlling, but it just is clear, it seems to me, that
5 they must have contemplated selling some of their seed at
6 the time they planted this crop.

7 MR. BODE: They contemplated selling their seed
8 either for reproductive or nonreproductive purposes.

9 QUESTION: Right.

10 MR. BODE: The point is this, and it's a point
11 that was broached by Justice O'Connor, in the Monsanto
12 brief below, which invented this interpretation which is
13 now adopted by Asgrow and presented before this Court,
14 there are two premises that are necessary as a matter of
15 textual analysis.

16 The first is that "marketing" has to equal
17 "selling," and the second is that "crop" has to be limited
18 to the amount of seed to plant an ensuing crop.

19 By way of an example, if a farmer plants 1 acre
20 and harvests 45 bushels of soybeans, then under the
21 recently found interpretation of this text by Asgrow, it
22 can save only 1 bushel, but what happens to the other
23 44 bushels?

24 QUESTION: They said you could save any amount
25 but couldn't sell any amount for sexual multiplication

1 purposes.

2 MR. BODE: Their analysis requires that the term
3 "saving" be limited to 1 bushel. In fact, Your Honor,
4 Monsanto in its brief makes this statement: "If saved
5 seed does equal harvested seed, then the right to save
6 seed would be unlimited in scope, as long as a farmer were
7 selling to another farmer." That's admitted by Monsanto,
8 whose --

9 QUESTION: You can --

10 MR. BODE: -- argument was adopted.

11 QUESTION: You can sell seed to make oil out of,
12 can't you, to be consumed?

13 MR. BODE: Absolutely.

14 QUESTION: But that's not reproductive.

15 MR. BODE: Absolutely, and let's assume that in
16 our example 45 bushels of soybean are harvested. Then the
17 issue is, how many can be sold for reproductive purposes,
18 and the statute tells us that. It tells us that so long
19 as the primary farming occupation is the sale of the
20 soybean for nonreproductive purposes, the farmer can
21 sale -- can sell the seed for growing purposes.

22 Note, if Asgrow's new interpretation is correct,
23 that phrase, that phrase or that test, whether -- what is
24 a farmer's primary growing occupation, would be written
25 entirely out of the act, because under our example, only

1 1 bushel --

2 QUESTION: Well, it now has been written out of
3 the act.

4 MR. BODE: It has been now by Congress,
5 prospectively only.

6 QUESTION: Well, on your view, then, if a farmer
7 made 51 percent of his income from growing melons, and he
8 devoted the remainder of his farm to growing soybeans, he
9 could be in the brown bag business with 100 percent of his
10 soybean crop because he would still be predominantly in
11 the business of -- or the predominant source of his income
12 would be that of farming rather than selling.

13 MR. BODE: Yes. We believe that the Federal
14 Circuit correctly parts -- parses the statute, and it
15 correctly interpreted the primary farming occupation be
16 satisfied when a farmer sells the majority of his or her
17 crop for nonreproductive purposes.

18 QUESTION: I'm puzzled. I thought that you lost
19 at least in part in the Federal Circuit because your view
20 of this was, as long as it's a farmer selling to another
21 farmer, you're home free, as long as most of what both
22 buyer and seller do, grow crops to sell the product, but
23 the Federal Circuit cut you back and said -- what percent
24 did they allow?

25 MR. BODE: 50 percent or more.

1 QUESTION: So you were arguing 100 percent.

2 MR. BODE: No, we were not, Your Honor.

3 QUESTION: You weren't?

4 MR. BODE: No, Your Honor.

5 QUESTION: What were you arguing?

6 MR. BODE: First of all, we had agreed for
7 purposes of the appeal that the primary farming occupation
8 of the Winterboers, the test was satisfied.

9 As we note in footnote 3, the Winterboers sold
10 more than 50 percent of each of the protected varieties
11 for nonreproductive purposes. Therefore, the Winterboers
12 have satisfied the primary farmer occupation test as laid
13 down by the federal Circuit.

14 QUESTION: I thought -- correct me on this. I
15 thought the Federal Circuit had made the primary farming
16 occupation test specific to each crop.

17 MR. BODE: That is correct --

18 QUESTION: Is that correct? All right.

19 MR. BODE: And I want to --

20 QUESTION: And was that your position from the
21 beginning, so that you conceded even in the district court
22 that you were in violation of the statute in part?

23 MR. BODE: It was never conceded. It wasn't an
24 issue before the appellate court because both parties
25 stipulated that Winterboers satisfied the primary farming

1 occupation, and they do under the test now established by
2 the Federal Circuit, because the Winterboers with respect
3 to each of the two varieties of seed never sold for
4 growing purposes more than 50 percent of the crop, so the
5 sales of the Winterboers are protected --

6 QUESTION: Mr. Bode --

7 MR. BODE: -- according to the Federal Circuit
8 test.

9 QUESTION: -- I don't understand what you said
10 just before we got into this discussion about under
11 petitioner's interpretation the limitation to primary
12 farming occupation is irrelevant. Why is that so?

13 MR. BODE: Because under petitioner's
14 interpretation, only the most trivial amount of seed could
15 be sold for reproductive purposes, in our example, just
16 1 bushel. Therefore, there would never be any occasion to
17 inquire whether the farmer -- primary farming occupation
18 test was satisfied, because in every instance, the farmer
19 would have sold the majority of his or her crop for
20 nonreproductive purposes. Their interpretation writes out
21 of the act the primary farming occupation test.

22 QUESTION: Only if -- only if you apply that
23 provision crop-by-crop, rather than across the board.

24 QUESTION: Well --

25 MR. BODE: I think --

1 QUESTION: Go ahead, answer Justice Scalia's
2 question.

3 MR. BODE: Justice -- yes. Justice Scalia,
4 regardless of whether the analysis is crop-by-crop, that
5 provision is written out of the statute by the
6 interpretation of Asgrow, because you never have occasion
7 to inquire what the primary farming occupation would be,
8 because under the interpretation that they now press
9 before this Court, you'd only sell 1/45th, you only could
10 sell 1/45th of your crop.

11 QUESTION: Where is the term primary farming
12 occupation found in the statute?

13 MR. BODE: Your Honor, it's found in the proviso
14 in the first section, and it says, provided without regard
15 to section 2541, subsection (3), a farmer whose primary
16 farming occupation is the growing of crops for
17 nonreproductive purposes may sell to other farmers
18 similarly situated for reproductive purposes.

19 QUESTION: But he --

20 QUESTION: How do we know who that is? Is it
21 the farmer when you look at the entire farm and see the
22 whole production of the farm and ask how much is sold --

23 MR. BODE: We --

24 QUESTION: -- for reproductive purposes?

25 MR. BODE: Justice O'Connor, we accept the

1 strict interpretation, the strict reading of the primary
2 farming occupation test by the Federal Circuit. That is,
3 it's a test that's applied variety by variety, based upon
4 the majority of the sales made.

5 QUESTION: Even under their reading, that
6 definition would at least limit the class of eligible
7 purchasers, though. You say it would be totally useless,
8 but not as to defining --

9 MR. BODE: That is correct. That is correct,
10 Your Honor.

11 I'd like to -- I'm not sure that I have properly
12 explained the crucial consequence of accepting that "saved
13 seed" means the whole harvest. You see, under Asgrow's
14 interpretation, they must conclude that "saved seed" means
15 only the amount of seed to plant the next crop.

16 Because otherwise, when a farmer later makes the
17 election to sell to other farmers, assuming he's qualified
18 to do that, unless "saved seed" means 1 bushel in our
19 example, unless it means that, then the farmer would be
20 able to sell the whole harvest, except to the extent that
21 he would be bound by the primary farming occupation test.

22 And that's admitted by Monsanto at page 10 in
23 their brief, and that's the argument that now Asgrow
24 propounds before this Court, and it's interesting to note
25 in the motion for summary judgment submitted by Asgrow

1 before the Federal district court, they admit that "saved
2 seed" encompasses the entire harvest, and that's at page 6
3 on their brief.

4 And where do we get that result textually? By
5 the phrase, or for sale as provided in this section.
6 There are two sales provided in the section. In the first
7 sentence, there's the sale from farmer to farmer for
8 reproductive purposes, and the second sentence, the sale
9 for consumption. Those are the two sales provided by
10 Congress.

11 QUESTION: You've lost me. What are the two
12 sentences? You consider the proviso a separate sentence?

13 MR. BODE: No. That's in the first sentence.

14 QUESTION: Okay.

15 MR. BODE: So the first sentence provides for
16 sales by farmers for reproductive purposes.

17 QUESTION: Yes.

18 MR. BODE: And the second sentence provides for
19 sales by --

20 QUESTION: A bona fide sale for other than
21 reproductive purposes, that's the sentence you're --

22 MR. BODE: For consumption.

23 QUESTION: Mr. Bode --

24 MR. BODE: So we can see that as a matter of
25 textual analysis, "saved seed" must include the whole

1 harvest.

2 QUESTION: Mr. Bode, Judge Newman called this an
3 ungainly statute, and I suppose that's a proposition that
4 everyone would agree with, and if we are of the mind that
5 there's more than one plausible reading to this statute,
6 your way is plausible, Asgrow's way is plausible, the
7 district court's way, how do we decide which is the one
8 that Congress meant?

9 MR. BODE: Well, first of all, I would disagree,
10 Justice Ginsburg, that Asgrow's interpretation is
11 reasonable. I don't think it is. I think it's very, very
12 contrived and results-oriented.

13 QUESTION: Then let's just stay with Judge Rader
14 and Judge Newman.

15 MR. BODE: I think that the --

16 QUESTION: If we think both of their
17 interpretations are reasonable interpretations,
18 interpretations that the words of this ungainly statute
19 will bear, then how do we decide?

20 MR. BODE: Justice Ginsburg, the unanimous
21 Federal Circuit panel had a very straightforward and
22 reasonable interpretation, and I think that's an
23 interpretation that should commend itself to this Court.

24 In that respect, I'd like to return to this --

25 QUESTION: That doesn't answer my question if we

1 think they're both reasonable. The Federal Circuit --

2 MR. BODE: I think --

3 QUESTION: -- did divide 6 to 5 whether to hear
4 this en banc, did they not?

5 MR. BODE: I would suggest, then, that the --
6 that this Court should defer to the Federal Circuit for
7 other reasons. Among those reasons is --

8 QUESTION: If we -- to accept your position,
9 must we say, Judge Newman's interpretation is wrong, that
10 there is a right interpretation of the statute, and it's
11 your interpretation?

12 MR. BODE: I think you should defer to the
13 Federal Circuit panel, Your Honor, because that is the
14 interpretation that was understood by the farming industry
15 for the last two decades. That's the interpretation that
16 was issued by the director of the Plant Variety Protection
17 Office.

18 QUESTION: But if we should think that Judge
19 Newman's interpretation is a plausible interpretation,
20 then you say one thing we might take into account is what
21 the farming community thought the statute meant. Anything
22 else?

23 MR. BODE: Yes. I think the Court should
24 consider that the balance between the rights of farmers
25 and breeders struck by Congress appropriately reflected

1 the limited showing that an applicant must make to obtain
2 a certificate.

3 An applicant need not show that this new variety
4 promotes agriculture, science, or the arts, or that it's
5 novel, or that it's not obvious, or that it has utility,
6 even, the customary showings that have to be made for a
7 patent. Rather, the most inconsequential change of a
8 morphological aspect of a plant, such as the color or
9 shape of its leaves, qualifies the applicant for a
10 certificate.

11 When we appreciate that, that's not unreasonable
12 for Congress to have retained for farmers their ancient
13 right to sell seed to other farmers.

14 QUESTION: Well, what do we do if we think that
15 the Federal Circuit's definition of marketing was wrong,
16 that it does include selling?

17 MR. BODE: I have two responses to that, Justice
18 O'Connor. First, if you look at the test, the proviso at
19 the -- and the first phrase of the proviso says, "without
20 regard to 2541 subsection (3)," so whatever bundle of
21 activities comprise marketing, Congress accepted farmer-
22 to-farmer sales from those infringing acts.

23 But I suggest that the reading of the Federal
24 Circuit is very reasonable. Let me explain why.

25 QUESTION: I don't understand your point. Don't

1 you think "without regard to," it means "despite"? Don't
2 you think "without regard to" means "despite"?

3 MR. BODE: No, I don't. I think it means --

4 QUESTION: No?

5 MR. BODE: -- without regard to these infringing
6 acts, sales can be made, that you can make sales, if
7 you're qualified, to another farmer for growing purposes
8 without encroaching any right established by 2541,
9 subsection (3), and that's marketing.

10 QUESTION: That's despite. Despite -- right,
11 okay.

12 MR. BODE: But I think here's the -- what the
13 Federal Circuit did is very reasonable. The Federal
14 Circuit interpreted that term, "marketing," to mean
15 coordinated and extended marketing activities. The
16 separate use --

17 QUESTION: Well, I just asked you, what if we
18 disagree with that, and I have not heard an answer.

19 MR. BODE: It has no consequence. You can still
20 uphold the Federal Circuit, because whatever bundle of
21 rights comprise "marketing," farmers are excepted from
22 them by the first phrase of the proviso in the section.
23 That is, that without regard to those infringing acts --

24 QUESTION: Yes, but --

25 MR. BODE: -- the farmer can make these sales.

1 QUESTION: -- that's assuming that the
2 definition of "such saved seed" totally ignores 2541(3),
3 right, which I'm not sure it does.

4 MR. BODE: It does not, and that's why the
5 interpretation of the Federal Circuit was reasonable.
6 Coordinating activities by agribusinesses and wholesalers
7 is prescribed, but not the limited marketing activities of
8 farmers incidental to farmer-to-farmer sales.

9 For example, a farmer could put out a seed-for-
10 sale sign on his property and entertain telephone
11 inquiries about the nature of the seed he has for sale.
12 That might be a marketing activity, but it wouldn't be the
13 concerted and extended activities, the use of middle men,
14 that's prescribed under the Federal Circuit's opinion, and
15 under the Fifth Circuit's opinion in Delta Pine.

16 Therefore, that's a way of rationalizing every
17 phrase in the second, making every phrase operative, and
18 it comports fully with the Federal Circuit's
19 interpretation, extended, coordinated selling activities
20 involving the multiplication of seed for growing purposes
21 is prohibited, and a farmer cannot enter contracts with
22 farm cooperatives and cotton gins and wholesalers to
23 multiply seed for that purpose, but a farmer can engage in
24 these incidental activities, incidental selling activities
25 associated with selling seed to another farmer directly.

1 QUESTION: Mr. Bode, you made an argument a
2 little earlier, I've been trying to figure it out, based
3 on the sentence -- I guess you say it's the second
4 sentence, a bona fide sale for other than reproductive
5 purposes made -- I think you said that under petitioner's
6 interpretation that becomes redundant, was that your
7 point, but why --

8 MR. BODE: That's our point. What happens --

9 QUESTION: Why isn't it redundant under yours as
10 well? I mean, it seems to me this is just an unnecessary
11 assertion in the statute that so long as you don't expect
12 it to be used for reproductive purposes, you're not going
13 to be held liable, but that would apply to a sale of more
14 than 50 percent by, you know, your interpretation as well,
15 wouldn't it?

16 MR. BODE: We concede that wording is
17 superfluous, and it's an artifact of the --

18 QUESTION: Under anybody's interpretation.

19 QUESTION: But really -- really, you were saying
20 that the first limitation is controlled by "such saved
21 seed," and in this second sentence that Justice Scalia is
22 now focusing on, they do not use the phrase, "such saved
23 seed."

24 MR. BODE: That is correct.

25 QUESTION: So the equivalency you seek between

1 the two sentences is absent.

2 MR. BODE: But as provided by the phrase, "or
3 for sales provided herein," and in petitioner's brief,
4 they concede before the Federal district court the saved
5 seed encompasses seed sold under the second sentence.

6 QUESTION: Well, it encompasses, but is not
7 limited to it, that's the point, and that was the point
8 you were trying to make, and I think the argument fails
9 because of the absence of that phrase in the second
10 sentence.

11 MR. BODE: We disagree, again, because the
12 specific phrase, or for sale as provided in that section,
13 but more broadly, because of this problem -- this problem,
14 Justice Kennedy: What is the farmer to do with the other
15 44 bushels? Unless the farmer is exempted from those
16 infringing acts in 2541, which is provided in the first
17 sentence, there's very little he can do with it, so if the
18 farmer is to sell --

19 QUESTION: Well, that's not true with soybeans.
20 That's not true --

21 MR. BODE: -- seed under the second sentence, he
22 has to be relieved of many or most of the infringing act.

23 QUESTION: He can sell them for soybean --

24 MR. BODE: For soybean consumption.

25 QUESTION: May I ask you one --

1 QUESTION: And that's what most people do, for
2 heaven's sakes, they grow soybeans to sell as crop. I
3 mean, the brown bag thing is really kind of a smaller
4 exception, isn't it, if you look overall?

5 MR. BODE: It is. The Winterboers operate on
6 the fringe of the market. They're selling to farmers who
7 are willing to buy seed that's perceived to be inferior.
8 Generally, farmers aren't going to trust their livelihood
9 to unproven seed without the imprimatur of a recognized
10 seed company.

11 QUESTION: What is the difference in the price?
12 They're selling it as brown bag seed. What would they get
13 for it, as opposed to they're selling it as soybean for
14 nonreproductive use?

15 MR. BODE: The record here discloses that the
16 Winterboers received approximately \$8.50 for their
17 soybeans, whereas Asgrow was charging \$15 to \$16 a bag.

18 QUESTION: But if they were selling it -- if the
19 Winterboers were selling it to sell to animals or for
20 human consumption, what would be the price they would --

21 MR. BODE: Approximately \$5 to \$6 a bag.

22 QUESTION: So they get much more selling it as
23 seed.

24 MR. BODE: They get essentially the amount which
25 represents the labor added for the cleaning activity

1 that's necessary prior to selling it for reproductive
2 purposes.

3 Justice Kennedy, if I might, if you look in that
4 second sentence again, you'll see there's a notice
5 provision. In other words, it springs into life a notice
6 provision if sales are made outside of the bona fide
7 charter.

8 I might suggest to you that --

9 QUESTION: That's obtained by the authority
10 language?

11 MR. BODE: Yes. I might suggest to you that
12 under the Asgrow's interpretation, that phrase is
13 superfluous. It certainly contradicts their
14 interpretation, and it's consistent with our
15 interpretation that that --

16 QUESTION: Is the phrase you're focusing on
17 "obtained by authority"?

18 MR. BODE: Yes. If there's -- it's in the last
19 sentence. The phrase that --

20 QUESTION: Oh, the last sentence.

21 MR. BODE: It's the phrase that states --

22 QUESTION: "A purchaser who diverts seed from
23 such channels" --

24 MR. BODE: -- "shall be deemed to have notice."
25 You see, that's consistent with our

1 interpretation, because there's no notice required. Why?
2 Because the first sentence exempts that infringing act
3 with respect to seed sold for reproductive purposes, seed
4 sold in the second sentence. If that weren't so, then you
5 would -- you would have no purpose for that last sentence.
6 It would -- it would be meaningless.

7 QUESTION: Well, I'm not sure that that's so.
8 I'll study that. But the third sentence could also apply
9 to the first sentence, could it not?

10 MR. BODE: That's my point. The first sentence
11 and the second sentence and the third sentence are all
12 one, unified section. There's no independent, separate
13 crop exemption, as Asgrow suggests at page 5 of its brief,
14 and therefore it's inapplicable to this case.

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bode.

16 MR. BODE: Thank you very much, Your Honor.

17 CHIEF JUSTICE REHNQUIST: The case is submitted.

18 (Whereupon, at 12:01 p.m., the case in the
19 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

ASGROW SEED COMPANY, Petitioner v. DENNY WINTERBOER AND BECKY WINTERBOER, dba DeeBees

CASE NO.:92-2038

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Am Mani Federico
(REPORTER)