

IN THE SUPREME COURT OF THE UNITED STATES

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VERNON HUGH BOWMAN, :

Petitioner : No. 11-796

v. :

MONSANTO COMPANY, ET AL. :

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Washington, D.C.  
Tuesday, February 19, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:27 a.m.

APPEARANCES:

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MELISSA ARBUS SHERRY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae.

SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of Respondents.

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P R O C E E D I N G S

(11:27 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next this morning in case 11-796, Bowman v. Monsanto Company.

Mr. Walters.

ORAL ARGUMENT OF MARK P. WALTERS

ON BEHALF OF THE PETITIONER

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

Patent exhaustion provides that once a patented article is sold, it passes outside the protection of the Patent Act. It is available to be used by the purchaser to practice the invention.

Now, what's the invention here? The invention is a bit of DNA that, when asserted into a soy bean seed, makes that seed and all the plants that grow from that seed resistant to the active ingredient in Roundup. Now, the only way to practice that invention is to plant the seed and to grow more seeds.

CHIEF JUSTICE ROBERTS: Why in the world would anybody spend any money to try to improve the seed if as soon as they sold the first one anybody could grow more and have as many of those seeds as they want?

MR. WALTERS: I agree no one would do that,

1 and I don't think that is the situation here. I think  
2 we have, and we have explained how Respondents here can  
3 protect their invention through contracts. They don't  
4 have to sell it outright. They can sell it through an  
5 agency model, but I think the more important --

6 CHIEF JUSTICE ROBERTS: That's true, that's  
7 true in the case of any patented article, right?

8 MR. WALTERS: Correct.

9 CHIEF JUSTICE ROBERTS: So the patent system  
10 is based, I think, on the recognition that contractual  
11 protection is inadequate to encourage invention.

12 MR. WALTERS: Well, part of the patent  
13 policy, as well, is to protect the purchaser, and that's  
14 been part of this Court's law for more than 150 years.

15 Under Respondent's theory, any farmer who  
16 grows a soy bean seed is infringing the patent, but for  
17 the grace of Monsanto. And that's -- a lot of farmers  
18 in this country, when we have over 90 percent of the  
19 acreage that is Roundup Ready. So under Monsanto's  
20 theory, there is really no limit by the Exhaustion  
21 Doctrine?

22 JUSTICE SCALIA: I didn't understand that  
23 last sentence. Any farmer who plants and grows soybeans  
24 is violating the patent?

25 MR. WALTERS: Is infringing under license by

1 Monsanto. Let's take the first --

2 JUSTICE SCALIA: I thought that their claim  
3 is he only violates the patent if he tries to grow  
4 additional seeds from his first crop. Right? Isn't  
5 that the only claim here?

6 MR. WALTERS: The reach of Monsanto's theory  
7 is that once that seed is sold, even though title has  
8 passed to the farmer, and the farmer assumes all risks  
9 associated with farming, that they can still control the  
10 ownership of that seed, control how that seed is used.

11 JUSTICE SCALIA: No, not that seed. It's  
12 different seed. That seed is done. It's been planted  
13 in the ground and has grown other seed. It's the other  
14 seed we are talking about. It's not the very seed that  
15 was sold. Right?

16 MR. WALTERS: That's correct, Your Honor,  
17 but if we don't apply -- if exhaustion is eliminated,  
18 rather, for the progeny seed, then you are taking away  
19 the ability of people to exchange these goods freely in  
20 commerce. You have essentially a servitude on these  
21 things that are exchanged, and every grain elevator who  
22 makes a sale is infringing.

23 JUSTICE KENNEDY: Well, I think you may be  
24 right in the way you characterize Monsanto's argument,  
25 and I have great difficulties with characterizing it

1 that way, as Justice Scalia's question indicates. But  
2 Monsanto can still prevail if you say that there's a  
3 patent infringement, if he plants it for seed and uses  
4 the seed to replant. That's not as far as Monsanto  
5 goes, but it seems to me it's one way to characterize  
6 their argument and to make it sensible.

7 MR. WALTERS: If you assume that there is  
8 exhaustion in the seeds that are sold to the farmer --  
9 let's take our particular case here. Mr. Bowman went to  
10 a grain elevator and he bought from the grain elevator  
11 without restriction seeds to -- with his purpose to  
12 plant them. Now, the only way that he can make use --  
13 if you assume in the first instance that there is  
14 exhaustion to the seeds that Mr. Bowman purchased from  
15 the grain elevator, you are taking away any ability for  
16 him to use that seed or use the invention.

17 Let's take for example Claim 130, which is  
18 at supplemental appendix 19, that is a method for  
19 selectively controlling weeds in a field. It has two  
20 elements; the first element is planting the crop seed  
21 and it's a particular crop seed with all the particular  
22 genetics that encode for resistance to Roundup, and then  
23 the next step is to apply to the crop and weeds in the  
24 field a sufficient amount of glyphosate herbicide.

25 Now, if you say that there is exhaustion in

1 the seeds that Mr. Bowman purchased from the grain  
2 elevator, but you say it doesn't apply to the progeny,  
3 you are not allowing him to actually practice the  
4 invention to grow more seeds.

5 JUSTICE BREYER: No, but you are allowing  
6 him to use those seeds for anything else he wants to do.  
7 It has nothing to do with those seeds.

8 There are three generations of seeds. Maybe  
9 three generations of seeds is enough.

10 (Laughter.)

11 JUSTICE BREYER: It is for this example.  
12 First of you have the Monsanto, the first generation  
13 they sold. They have children, which is the second  
14 generation. And those children have children, which is  
15 the third generation, okay? So bad joke.

16 (Laughter.)

17 JUSTICE BREYER: So we are talking here --  
18 he can do what he wants with the first generation.  
19 Anything he wants. And moreover, when he buys them from  
20 Monsanto, he can make new seeds. He can make generation  
21 2 because they've licensed him to do it.

22 Here, he buys generation 2. Now, he can do  
23 what he wants with those seeds. But I'll tell you,  
24 there is a problem because the coming about of the third  
25 generation is itself the infringement. So the second

1 generation seeds have nothing to do with it. If he went  
2 into a room and had a box that he bought from a lab and  
3 he put rocks in it and he said, hocus-pocus and lo and  
4 behold out came the third generation of seeds, he would  
5 have infringed Monsanto's patent with that third  
6 generation, would he not?

7 MR. WALTERS: No.

8 JUSTICE BREYER: No, he wouldn't have? You  
9 mean if he goes and finds a new way of making these  
10 seeds, which happens to be you pick some grass and you  
11 intertwine it and various things like that, and lo and  
12 behold you have a perfect copy of Monsanto's patented  
13 seed, he hasn't made it, he hasn't infringed? Why not?

14 MR. WALTERS: Well, I guess I misunderstood  
15 your question.

16 JUSTICE BREYER: My question is the same  
17 with the grass as with the magic box. I am saying the  
18 problem for you here, I think, is that, infringement  
19 lies in the fact that he made generation three. It has  
20 nothing to do with generation 2. That has just a  
21 coincidence. But that is, in fact, the way he made  
22 these seeds. But he can sell, resell generation 2, he  
23 can do whatever he wants with it.

24 If he sterilizes it and uses them in a  
25 circus, he can do it. The only thing he cannot do is he



1 cannot create generation 3, just as he couldn't use  
2 generation 2 seeds to rob a bank.

3           You know, there are certain things that the  
4 law prohibits. What it prohibits here is making a copy  
5 of the patented invention. And that is what he did. So  
6 it's generation 3 that concerns us. And that's the end  
7 of it.

8           Now, what is your response to that?

9           MR. WALTERS: Justice Breyer, my response  
10 is, if you applied the law that way to side making over  
11 use, you are eliminating the Exhaustion Doctrine in the  
12 context of -- of patented seeds. You're saying that he  
13 can do --

14           JUSTICE GINSBURG: But why --

15           MR. WALTERS: -- anything but practice the  
16 invention.

17           JUSTICE GINSBURG: But why -- you said  
18 making or use and it isn't an either-or thing then -- as  
19 the other side has pointed out. You can use the seed to  
20 make new seeds. So use and make aren't -- it's not  
21 either you use it or you make it. You can use it to  
22 make a new item.

23           MR. WALTERS: Justice Ginsburg, that is the  
24 point of the invention here. If you look at claim 130  
25 again, for example, you are saying he can't practice

1 claim 130, which is certainly embodied in the seeds he  
2 purchased from the grain elevator.

3 JUSTICE GINSBURG: Well, suppose he -- he  
4 had never bought any Monsanto seeds. He just goes to  
5 the grain elevator and 90-odd percent of those seeds  
6 have the genetic composition. So -- and he planted that  
7 and he harvested it. Would he be infringing on  
8 Monsanto's patents?

9 MR. WALTERS: No.

10 JUSTICE GINSBURG: So he never has to buy  
11 any seed, at all, from Monsanto.

12 MR. WALTERS: Well, in practical matters it  
13 doesn't work that way because the seed that's available  
14 at a grain elevator is not a very good source of seed  
15 and farmers are not going to be able to eliminate the  
16 need to go to Monsanto or the other seed companies every  
17 year by going to the grain elevator.

18 Great evidence of that is the fact that my  
19 client, every year that he planted a second crop using  
20 the grain elevator seed, he bought high quality seed  
21 from Pioneer. Now, if this grain elevator -- grain  
22 elevator seed was so good, why didn't he use it for his  
23 first crop?

24 JUSTICE BREYER: I'm still not getting the  
25 answer. I'm going to try once more. Now, when you buy

1 generation 2, well, there are a lot of things you can do  
2 with it. You can feed it to animals, you can feed it to  
3 your family, make tofu turkeys. I mean, you know, there  
4 are a lot of things you can do with it, all right.

5 But I'll give you two that you can't do.  
6 One, you can't pick up those seeds that you've just  
7 bought and throw them in a child's face. You can't do  
8 that because there's a law that says you can't do it.

9 Now, there's another law that says you  
10 cannot make copies of a patented invention. And that  
11 law you have violated when you use it to make generation  
12 3, just as you have violated the law against assault  
13 were you to use it to commit an assault.

14 Now, I think that's what the Federal Circuit  
15 is trying to get at. And so it really has nothing to do  
16 with the Exhaustion Doctrine. It has to do with some  
17 other doctrine, perhaps, that -- that somehow you think  
18 should give you the right to use something that has as a  
19 basic purpose making a copy of itself. Maybe you  
20 should, but I don't see that. Where is that in the law?

21 MR. WALTERS: Your Honor, that's an  
22 exception to the Exhaustion Doctrine for  
23 self-replicating inventions.

24 JUSTICE BREYER: Yes.

25 MR. WALTERS: The invention here is --

1 JUSTICE BREYER: Is that there? Is that --  
2 is that there in the Exhaustion Doctrine?

3 MR. WALTERS: It is not there. This -- this  
4 Court has -- has not created an exception to the  
5 Exhaustion Doctrine, and in fact it's explicitly said it  
6 won't do that and that's an act -- and that's an  
7 activity for Congress.

8 JUSTICE SOTOMAYOR: I'm sorry. The  
9 Exhaustion Doctrine permits you to use the good that you  
10 buy. It never permits you to make another item from  
11 that item you bought. So that's what I think  
12 Justice Breyer is saying, which is you can use the seed,  
13 you can plant it, but what you can't do is use its  
14 progeny unless you are licensed to because its progeny  
15 is a new item.

16 MR. WALTERS: This is obviously a brand-new  
17 case where we're dealing with the -- the doctrine of  
18 patent exhaustion in the context of self-replicating  
19 technologies. So what you have here is if you take the  
20 Federal Circuit's view, then you have no ability -- you  
21 have no exhaustion at all for someone to practice the  
22 invention. Sure, you can do all the things that you  
23 talked about, Mr. Breyer -- or Justice Breyer, but that  
24 has nothing to do with the -- or with the invention.

25 So you're taking the Exhaustion Doctrine for

1 self-replicating inventions, you're modifying this  
2 Court's case law substantially, and that's something  
3 that ought to be done in Congress. In fact --

4 JUSTICE GINSBURG: Well, you just said  
5 that -- that we haven't had a case involving  
6 self-replicating. I mean, the Exhaustion Doctrine was  
7 shaped with the idea of an article; there was an article  
8 that you could use and then you use it and it's used up.  
9 But we haven't applied the Exhaustion Doctrine when you  
10 have a new -- when you create a copy of the original.

11 So it's -- it's not that we have law in  
12 place. We've been dealing with an item with the  
13 Exhaustion Doctrine and now we have hundreds of items,  
14 thousands of items, all growing from that original seed.

15 MR. WALTERS: The Exhaustion Doctrine, the  
16 policy that underlies this Court's cases is -- is  
17 fundamentally a choice about the purchaser's rights in  
18 that personal property over the patentee's rights in the  
19 monopoly to use that monopoly and increase its sales.  
20 This Court has always chosen the purchaser's rights over  
21 the patentee's rights to increase sales. And we're just  
22 asking you to make the same choice here.

23 JUSTICE KAGAN: Well, except to the extent,  
24 as Justice Breyer suggested, except to the extent that  
25 the purchase is going to use the article just to create

1 a new one of the exact same kind. And it seems to me  
2 that what you're suggesting is that the basic rule that  
3 says that the purchaser does not get to do that should  
4 have an exception for self-replicating technologies.

5 MR. WALTERS: First, we disagree that the  
6 activity of basic farming could be considered making the  
7 invention. If you read the statute, it says making the  
8 invention, not just making a copy like it would be in  
9 the Copyright Act. We have the invention, which is a  
10 particular genetic sequence that was made, principally,  
11 by Monsanto's genetic engineers. And farmers, when they  
12 plant seeds, they don't exercise any control or dominion  
13 over -- over their crop. Otherwise, every year they'd  
14 have a bumper crop.

15 JUSTICE SOTOMAYOR: Do you mean they don't  
16 do any work, they don't lay the soil and the nutrients  
17 it needs, water when it needs watering, protect it from  
18 animals? They do no work --

19 MR. WALTERS: They absolutely --

20 JUSTICE SOTOMAYOR: -- in growing the seed?

21 MR. WALTERS: They absolutely do work, but  
22 they don't have control over the creative process. They  
23 plant, they spray and they pray.

24 JUSTICE SOTOMAYOR: I'm sure if they don't  
25 do all of the things I said, it doesn't grow. So aren't

1 they involved in its creative -- in its creation?

2 MR. WALTERS: They certainly aren't in  
3 control of it. You ask any farmer who's lived through a  
4 drought or through a terrible flood and they will say  
5 they're not the ones who are making these --

6 CHIEF JUSTICE ROBERTS: Well, you only need  
7 one -- I mean, you throw the seeds on the ground, one or  
8 two of them are going to grow and you still have the  
9 same case, right?

10 MR. WALTERS: Absolutely. And -- and that's  
11 how broad this position is. It doesn't matter how you  
12 come into possession with these seeds. You are  
13 committing patent infringement if you -- any cell  
14 division is patent infringement.

15 JUSTICE BREYER: That's true, but that's  
16 what I thought you were going to respond. I thought you  
17 were going to respond to me that my question then makes  
18 it infringement when your client buys generation 1 from  
19 Monsanto because they buy generation 1 from Monsanto,  
20 they plant it in the ground and lo and behold up comes  
21 generation 2. And generation 2, on the basis of what I  
22 was asking you, is just as much a violation.

23 But I think, though I'll find out from them,  
24 that the response of that is, yes, you're right, it is  
25 just as much a violation. That's why we, Monsanto, give

1 the buyer a license to do it.

2           And so it all seems to work out. You don't  
3 need any exception. There's no exception from anything.  
4 When you create a new generation, you have made a  
5 patented item, which you cannot do without the approval  
6 of the patent owner. Therefore, Monsanto gives that  
7 approval when you buy generation 1.

8           Now, it seems to me all to work out without  
9 any need for exception. And I'm putting to you my whole  
10 thought so that you can respond to it.

11           MR. WALTERS: Thank you, Justice Breyer.  
12 What Monsanto wants to do in your scenario is they want  
13 the farmer to assume all the risks of farming. They  
14 want -- but they still want to control and act as owners  
15 of the property that is owned, no doubt, by that farmer.  
16 When that farmer grows the progeny seed, they insure the  
17 risk that they're not going to have a crop in the first  
18 place. If they drive to the grain dealer to sell their  
19 harvest -- they get one paycheck a year, by the way --  
20 they, if they get into a wreck, that's not Monsanto's  
21 problem; that's the farmer's problem.

22           So what they're essentially asking for is  
23 for the farmers to bear all the risks of farming, yet  
24 they can sit back and control how that property is used.  
25 And that's fundamentally inconsistent with how this



1 Court has interpreted the Exhaustion Doctrine. The  
2 thing that's very important is this is not a license,  
3 this is an outright sale to the farmers of the first  
4 generation.

5 And then they are -- they plant those seeds  
6 because they have, under the Exhaustion Doctrine, a  
7 right to use the invention, and then those progeny seeds  
8 are owned outright by every farmer, and they assume all  
9 risk of loss. So if -- if -- Monsanto wants to  
10 control --

11 JUSTICE GINSBURG: And they may -- they may  
12 they own them, but that doesn't mean that they are  
13 infringing. They may -- the seeds are owned by the  
14 farmer. But when he uses them to grow more seeds, he's  
15 infringing on that patent. So I don't think that the  
16 ownership has anything to do with it.

17 MR. WALTERS: It's the servitude on the  
18 title. And those things get sold to the grain  
19 elevators, and now every time the grain elevator makes a  
20 sale, it's technically infringing. And -- and that's  
21 something that our law has never allowed for centuries.  
22 And one of the main problems is that you have farmers,  
23 their main livelihood here is to sell the seeds that  
24 they grow. Now, if they don't have clear title and if  
25 they don't have the ability to sell the property that

1 they -- that they grow, then that impinges upon their  
2 ability to make a living.

3 JUSTICE KENNEDY: I have only one question  
4 so far, and it's a farming question. With some crops if  
5 you are going to make seeds, you leave the crop in  
6 longer. In -- what about soybeans? If the farmer has  
7 the north 40 and the south 40, the north 40, he's going  
8 to plants soybeans to be used for flour, human  
9 consumption, and south 40, he wants seeds. Does he  
10 leave the plants in the ground the same amount of time?

11 MR. WALTERS: You know, most farmers are not  
12 growing soybeans for -- for seed. There are various  
13 types of --

14 JUSTICE KENNEDY: You would not? Okay.

15 MR. WALTERS: -- various types of farmers  
16 who are -- who are growing foundation seed, for example,  
17 that is very close to the -- to the first generation  
18 seed that's engineered.

19 JUSTICE SCALIA: I don't understand this. I  
20 thought soybeans are seeds.

21 MR. WALTERS: They are.

22 JUSTICE KENNEDY: But that's -- if you're  
23 going to use the soybeans for seeds as opposed to flour,  
24 do you leave them in the ground any longer?

25 MR. WALTERS: I don't know the answer to

1 that question.

2 JUSTICE KENNEDY: Okay.

3 JUSTICE KAGAN: Mr. Walters, can you go back  
4 to the Chief Justice's opening question because the  
5 Chief Justice asked you what incentive Monsanto would  
6 have to produce this kind of product if you were right.  
7 And you said, well, they can protect themselves by  
8 contract.

9 Actually, it seems to me that that answer is  
10 peculiarly insufficient in this kind of a case because  
11 all that has to happen is that one seed escapes the web  
12 of these contracts, and that seed because it can  
13 self-replicate in the way that it can, essentially makes  
14 all the contracts worthless. So again, we are back to  
15 the Chief Justice's problem, that Monsanto would have no  
16 incentive to create a product like this one.

17 MR. WALTERS: Taking our example here  
18 where -- where Petitioner bought commodity seeds, it's  
19 an undifferentiated mixture, it can't be overemphasized  
20 how different every single seed is, you don't know a  
21 Monsanto from a Pioneer from an Asgrow. You don't know  
22 the maturity rate. If I am a farmer, I need a  
23 particular maturity bean for my field because I don't  
24 want it to mature before it gets high enough for the  
25 combine to come around and cut it.

1           So you want to be able to have -- you have  
2 all these things dialed in, these different  
3 variabilities. So if you go to the grain elevator and  
4 you don't know what exactly it is that you want and you  
5 just get a mixture, that's not going to be real --  
6 competitive at all to Monsanto's first generation seed.

7           Now, the possibility of somebody selecting  
8 one and saying, ah, that's the exact one that I need for  
9 my field, I'm going to cultivate that and let it grow  
10 into enough seeds so I can plant my first crop, that  
11 would take a number of years to grow a 1,000-acre farm,  
12 and it's not -- and by that time, farmers -- the nature  
13 would have changed and evolved where you would want the  
14 latest disease resistance by that point.

15           So there are --

16           JUSTICE KENNEDY: Please correct me if I am  
17 wrong. I thought that's exactly what Bowman did here.  
18 He went to a grain elevator and he -- he used the seeds,  
19 and -- and he didn't know exactly the percentage mix,  
20 but he used them.

21           MR. WALTERS: Well, he --

22           JUSTICE KENNEDY: So he did exactly what you  
23 said is uneconomical.

24           MR. WALTERS: No. Actually, he did  
25 something quite different. He didn't select a

1 particular variety. He selected for the particular  
2 trait, Roundup Ready, but there are probably more than a  
3 dozen different ways in which the seed can vary --  
4 disease resistance, maturity rates. And if you are a  
5 farm --

6 CHIEF JUSTICE ROBERTS: I'm sorry, maybe I  
7 didn't read this right. I thought what he did was plant  
8 all the commodity seeds, and then applied the Roundup,  
9 so that all that was left was the Roundup  
10 Ready-resistance seeds, and then he used those.

11 MR. WALTERS: That's correct. But if you  
12 look at a field that you've planted with grain elevator  
13 seed, it's going to be all different colors because  
14 they're going to be all different varieties, they're all  
15 going to mature at a different rate. So that if -- when  
16 it comes harvest time, some of them are going to be too  
17 close to the ground so that your combine's going to  
18 miss --

19 JUSTICE SCALIA: Including the Monsanto  
20 seeds?

21 MR. WALTERS: Including the Monsanto seeds.

22 JUSTICE SCALIA: Some of them would -- would  
23 grow at different rates than others.

24 MR. WALTERS: Absolutely.

25 CHIEF JUSTICE ROBERTS: How come that's not

1 a problem the first time you plant?

2 MR. WALTERS: It's a problem each time.  
3 This is a very poor choice -- choice of seed, but it  
4 only makes sense to plant in a risky situation, like  
5 when a farmer has been washed out from a flood, for  
6 example, and it's late in the --

7 CHIEF JUSTICE ROBERTS: No, no. I mean the  
8 very first time, you get nothing but Monsanto Ready --  
9 Roundup Ready seeds and you plant those. Are you  
10 telling us you have the same problem with them growing  
11 at different rates and all that?

12 MR. WALTERS: Yes.

13 CHIEF JUSTICE ROBERTS: So that doesn't make  
14 the commodity seeds any different?

15 MR. WALTERS: I'm sorry. I must have  
16 misunderstood your question. The commodity seeds,  
17 with -- the Roundup Ready commodity seeds will all grow  
18 at different rates and have different disease  
19 resistance, different maturity rates.

20 JUSTICE SCALIA: But not the original batch  
21 that he buys from Monsanto?

22 MR. WALTERS: Correct. So --

23 JUSTICE SCALIA: The original batch that he  
24 buys from Monsanto, in addition to being resistant to  
25 the chemical that kills the weeds, in addition to that,

1 they all mature at the same rate.

2 MR. WALTERS: Exactly. They're a uniform  
3 variety. They are exactly what a farmer needs for  
4 their --

5 JUSTICE SCALIA: So all the Monsanto seeds  
6 are not -- are not fungible.

7 MR. WALTERS: That's correct.

8 JUSTICE SCALIA: There are some of them that  
9 mature early, some mature later.

10 MR. WALTERS: It makes sense. I mean, they  
11 allow these seeds to be dumped into the common grain  
12 elevator. They don't put any restrictions on what the  
13 elevator does with it. There were no restrictions on my  
14 client when he purchased them from the grain elevator.

15 So it's less of a problem for Monsanto for  
16 people going to the grain elevator to plant.  
17 Nevertheless, it's -- it's an outright sale, an  
18 exhaustion applies to that particular sale, and permits  
19 that farmer to use it. It's never going to be a threat  
20 to Monsanto's business -- people planting grain elevator  
21 seed.

22 Now, to answer your question, Justice Kagan,  
23 about -- well, under our theory, if somebody does breach  
24 a contract with Monsanto, they don't have to do it under  
25 contract law, they can actually do it under an agency

1 model, like General Electric did in the 1920s. And then  
2 that's only fair because there, the agent growers are  
3 assuming -- well, Monsanto was assuming the risk that  
4 the farmers are.

5 And there is some equitability there with  
6 the -- the risk sharing between the farmers and  
7 Monsanto. Now they want the farmers to take all the  
8 risks associated with farming, yet they want to control  
9 how they use those seeds all the way down the  
10 distribution chain.

11 I will reserve the balance of my time.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 Ms. Sherry?

14 ORAL ARGUMENT OF MELISSA ARBUS SHERRY,  
15 FOR UNITED STATES, AS AMICUS CURIAE

16 MS. ARBUS SHERRY: Mr. Chief Justice, and  
17 may it please the Court:

18 I'd like to start by talking about this  
19 Court's decision in J.E.M. because I think it largely  
20 resolves this case. J.E.M. was a patent case, and the  
21 issue there was whether or not you could get a utility  
22 patent on a plant. The argument was that you couldn't  
23 get a utility patent because the Plant Variety  
24 Protection Act implicitly repealed the Patent Act in  
25 that respect.



1           This Court rejected that argument, and the  
2 reason it rejected that argument was because it found no  
3 conflict between the two statutes. The reason it found  
4 no conflict between the two statutes is because it said  
5 that it is harder to get a utility patent, and for that  
6 reason, you get greater protections -- under the Patent  
7 Act, you get greater rights of exclusion under the  
8 Patent Act than you do under the PVPA.

9           And it said, most notably, there is no seed  
10 saving exemption in the Patent Act, there is no research  
11 exemption in the Patent Act. The consequence of  
12 Petitioner's argument would be that this Court would not  
13 only be reading a seed-saving exemption into the Patent  
14 Act, and a research exemption, it would be doing much,  
15 much, much more under the guise of patent exhaustion.

16           Justice Breyer, as you pointed out, the  
17 Exhaustion Doctrine really has nothing to do with this  
18 case, and that's because the Exhaustion Doctrine has  
19 always been limited to the particular article that was  
20 sold, and we are talking about a different article here.  
21 And it's never extended to the making of a new article.

22           CHIEF JUSTICE ROBERTS: Well, but I mean,  
23 this -- the reason it's never is because this is an  
24 entirely different case. It's the reason it's here  
25 because you have the intersection of the Exhaustion

1 Doctrine and the -- the normal protection of reinvented  
2 articles. So I don't think it gets you very far to say  
3 that we've never applied the Exhaustion Doctrine that  
4 way either. We have never applied the Reinvention  
5 Doctrine to articles that reinvent themselves like plant  
6 seed.

7 MS. ARBUS SHERRY: It's true that the Court  
8 hasn't had an exhaustion case specifically involving the  
9 sort of replicating technology, but when the Court has  
10 talked about exhaustion it has always focused on the  
11 specific article that's sold and it has done that for a  
12 reason. The concept underlying exhaustion is that when  
13 the patentholder controls that very first sale it gets  
14 the one royalty with respect to the actual article sold.

15 Petitioner's argument isn't limited to the  
16 commodity grain that we are talking about. It's not  
17 even limited -- when you talk -- Justice Breyer, you  
18 mentioned the three different generations of seeds.  
19 There is actually quite a few more generations than  
20 those three.

21 If the concept is the sale of a parent plant  
22 exhausts the patentholder's rights, not only with  
23 respect to that seed, but with respect to all the  
24 progeny seed, we would have to go all the way back to  
25 the very first Roundup Ready plant that was created as

1 part of the transformation event. Every single Roundup  
2 Ready seed in existence today is the progeny of that one  
3 parent plant and, as Your Honor pointed out, that would  
4 eviscerate patent protections. There would be no  
5 incentive to invest, not just in Roundup Ready soybeans  
6 or not even agricultural technology, but it's quite a  
7 bit broader than that.

8 In order to encourage investment, the Patent  
9 Act provides 20 years of exclusivity. This would be  
10 reducing the 20-year term to essentially one and only  
11 sale. It would be near impossible to recoup your  
12 investments with that first sale and so the more likely  
13 consequence is that research dollars would be put  
14 elsewhere.

15 The other --

16 JUSTICE SCALIA: That's a pretty horrible  
17 result, but let me give you another horrible result, and  
18 that is if -- if we agree with you, farmers will not be  
19 able to do a second planting by simply getting the  
20 undifferentiated seeds from -- from a grain elevator  
21 because at least a few of those seeds will always be  
22 patented seeds, and no farmer could ever plant anything  
23 from a grain elevator, which means -- I gather they use  
24 it for second plantings where the risks are so high that  
25 it doesn't pay to buy expensive seed. Now they can't do

1 that any more because there's practically no grain  
2 elevator that doesn't have at least one patented seed in  
3 it.

4 MS. ARBUS SHERRY: And the answer to that is  
5 this is actually not a traditional farming practice.  
6 Despite what Petitioner says, farmers do not generally  
7 go to grain elevators, buy commingled grain, plant it in  
8 the ground as seed. If you look at the American Soybean  
9 Association brief submitted on behalf of soybean  
10 farmers, it says as much. If you look at the CHS brief,  
11 which is submitted on behalf of grain elevators, it also  
12 explains that.

13 And there is a number of reasons why that is  
14 the case. There's the reasons that Petitioner talked  
15 about, which is that they an undifferentiated mix, but  
16 there are other reasons as well. The business of grain  
17 elevators is not to sell commingled grain as seed. If  
18 that was their business they would have to comply with  
19 seed labeling laws. They do not do so because it's not  
20 their business model.

21 JUSTICE SCALIA: That's why it's so cheap.  
22 And that's why farmers --

23 (Laughter.)

24 JUSTICE SCALIA: -- and that's why farmers  
25 want to use it, for a cheap planting.

1 MS. ARBUS SHERRY: But farmers wouldn't be  
2 able to use it for another reason as well. Even if you  
3 take patent law and you put it entirely to the side,  
4 there is still the Plant Variety Protection Act.

5 JUSTICE KENNEDY: But correct me -- correct  
6 me if I am wrong; I thought that is what Bowman did.

7 MS. ARBUS SHERRY: Bowman did, absolutely  
8 did it in this circumstance. But Bowman also said that  
9 he is not aware of other farmers who are engaging in  
10 this practice.

11 And again, there is another reason. Putting  
12 aside the labeling laws, there is the Plant Variety  
13 Protection Act and, as Pioneer points out in their  
14 amicus brief, it is quite likely that a large amount of  
15 the commingled grain is not only protected by patent,  
16 but is actually protected by a Plant Variety Protection  
17 Certificate, and what Petitioner did here would infringe  
18 the Plant Variety Protection Certificate. So even  
19 putting patent law to the side, this is not an  
20 economically viable source of seed for farmers,  
21 regardless.

22 And Petitioner's argument again isn't  
23 limited to the grain elevators. It would apply to  
24 saving your own seed and planting it generation after  
25 generation.

1 JUSTICE SCALIA: Sure, sure, I understand.

2 MS. ARBUS SHERRY: It would apply to selling  
3 seeds to your neighboring farmer, and it would allow  
4 seed companies to essentially compete with Monsanto upon  
5 the first sale.

6 Now to the extent --

7 CHIEF JUSTICE ROBERTS: So when -- when are  
8 the patent rights exhausted in the seed?

9 MS. ARBUS SHERRY: The patent rights are  
10 exhausted in the seed at the same time they are  
11 exhausted with respect to any other product, upon an  
12 authorized sale. And so, Justice Breyer, again you had  
13 it right when you were saying that you can do what you  
14 want. In our view, once there is an authorized sale,  
15 you can do what you want with respect to the seed that  
16 you've actually purchased. That is the tangible article  
17 you paid for.

18 But you do need permission from the  
19 patentholder in order to make a new generation of seed.  
20 If -- to the extent, you know, any middle ground is  
21 warranted, with all due respect, we would point to  
22 Congress as the appropriate body. This Court said --

23 CHIEF JUSTICE ROBERTS: I'm sorry. Just so  
24 I can follow your -- just so I can follow your answer,  
25 Monsanto sells the seed to the farmer. And you are

1 saying if the farmer grows the seed, he can sell it to  
2 anybody he wants, right?

3 MS. ARBUS SHERRY: If Monsanto authorizes --

4 CHIEF JUSTICE ROBERTS: I'm putting aside  
5 all the contracts and stuff.

6 MS. ARBUS SHERRY: Right. So if Monsanto  
7 authorized that first sale and authorized the planting,  
8 they would also have to authorize the sale of the second  
9 generation seed because it's a new article. And that's  
10 exactly what happened here.

11 If you look at the technology agreement --  
12 and it's not just because it's a contract because I  
13 think it's significant to the analysis -- Monsanto, upon  
14 the first sale of the bag of Roundup Ready seed,  
15 authorizes the planting for one commercial crop and it  
16 authorizes the farmer to sell that as a commercial crop  
17 or to use it for any purpose other than replanting.

18 That is an authorized sale. So if you take  
19 that second generation seed -- "second generation" is a  
20 bit of a misnomer, but if you take that seed and you  
21 follow it through, all of the patent rights with respect  
22 to that particular seed have been exhausted. But you  
23 cannot take that seed without separate authorization,  
24 plant it in the ground, and come up with the next  
25 generation of seed. That would be --

1 CHIEF JUSTICE ROBERTS: That sounds like the  
2 patent rights haven't been exhausted then.

3 MS. ARBUS SHERRY: They have been exhausted  
4 with respect to the particular article sold. When the  
5 Court's talked about patent exhaustion, you are not  
6 exhausting the rights with respect to the patented  
7 invention. You're exhausting --

8 CHIEF JUSTICE ROBERTS: You are saying it's  
9 exhausted with respect to the one bean?

10 MS. ARBUS SHERRY: Yes, and that's always  
11 the case just as if I sell -- I mean, even if you think  
12 in the copyright --

13 CHIEF JUSTICE ROBERTS: That's always the  
14 case because it's a very -- the other cases haven't  
15 involved the -- this situation where you are talking  
16 about a self-regenerating product.

17 MS. ARBUS SHERRY: But I think there is  
18 other technology out there. I mean, even if you think  
19 of software, for example, there are plenty of other  
20 products where one reasonable use is to make more. I  
21 can purchase software; one reasonable use would be to  
22 make a dozen other copies to give to my friends or sell  
23 on eBay. It's a reasonable use, but it's an infringing  
24 one.

25 CHIEF JUSTICE ROBERTS: Well, we haven't had



1 that case either.

2 (Laughter.)

3 MS. ARBUS SHERRY: The Court hasn't had that  
4 case exactly, but it did decide Microsoft v. AT&T, and  
5 granted that was on a slightly different issue, but in  
6 that case the Court recognized -- that case, it was  
7 copies from a master disk, and it treated them as  
8 separate copies because they were actually separate  
9 articles, even though it was really easy to do, even  
10 though the actual copying is not done by human hands,  
11 it's done by -- by mechanical processes. In fact, in  
12 that case the Court talked and compared the making of  
13 software to the reproduction through biological  
14 processes, which is what we are talking about here.

15 And so all we are asking the Court to do  
16 today -- I recognize it's a new technology and to the  
17 extent new technologies require different rules,  
18 Congress is the body that should be making those  
19 different rules. And when Congress has acted in this  
20 area, in the Plant Variety Protection Act and also in  
21 the software context in the Copyright Act, it has not  
22 adopted the wholesale exemption that Petitioner is  
23 talking for here.

24 JUSTICE KAGAN: Ms. Sherry -- I'm sorry. In  
25 everything you've said you agree with Mr. Waxman. There

1 is this issue in the case where you disagree, which is  
2 the Conditional Sale Doctrine. I am just wondering,  
3 before you finish up, could you say a bit about whether  
4 that doctrine is causing trouble as it presently exists  
5 in the Federal Circuit? In other words, could we just  
6 ignore that doctrine if we wanted to, or is it a very  
7 problematic one that we should take this opportunity to  
8 do something about?

9 MS. ARBUS SHERRY: Your Honor, may I?

10 CHIEF JUSTICE ROBERTS: Sure.

11 MS. ARBUS SHERRY: I think the Court does  
12 not need to do something about it in this case. I think  
13 Quanta largely decided the issue, even though it didn't  
14 say so explicitly, and as far as I'm aware the Federal  
15 Circuit has not applied their previous version of the  
16 Conditional Sale Doctrine to enforce the post-sale  
17 restrictions since this Court's decision in Quanta.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Waxman.

20 ORAL ARGUMENT OF SETH P. WAXMAN

21 ON BEHALF OF THE RESPONDENTS

22 MR. WAXMAN: Mr. Chief Justice, and may it  
23 please the Court:

24 Let me start by answering a couple of, I  
25 guess, science or technology questions that came up

1 before launching into our doctrinal position.

2 First of all, Justice Kennedy, soybeans are  
3 soybeans. They are harvested at a particular point in  
4 time, whatever use is going to be made for them. It is  
5 not a plant like a flower, geranium for example, which  
6 has to be left to go to seed, or alfalfa. The bean is  
7 the seed.

8 All soybeans have to be processed to be used  
9 in any way. If they are going to be planted, they have  
10 to be cleaned before they are put in the ground at the  
11 right time. If they are being fed to either humans or  
12 animals, they have to be processed in a way that  
13 eliminates an enzyme that makes them indigestible by  
14 animals.

15 Justice Scalia, your question about well,  
16 farmers now just can't do second plantings because  
17 soybeans are put in huge grain elevators and different  
18 varieties are mingled, that is true in the sense that if  
19 one or more of those soybeans were protected by a  
20 patent, the actual growing of the use of those patented  
21 inventions without a license would be infringement,  
22 although, of course, if no glyphosate were put on top of  
23 it, neither the farmer nor Monsanto would ever know that  
24 there was an act of infringement.

25 But more to the point, farmers -- I mean,

1 the planting of second crops, that is crop rotation of  
2 interspersing soybeans and winter wheat, is very, very  
3 common. There are hundreds of thousands of soybean  
4 farmers who do this every year.

5 Mr. Bowman has acknowledged that so far as  
6 he knows, he's the only one who's doing it this way.  
7 But there are plenty of other ways in which he could  
8 obtain a much less expensive crop of -- you know, a  
9 particular variety of soybean, so one that will all grow  
10 to the same height and germinate at the same time. And  
11 in fact, he explained this to the district court in his  
12 response to the motion for summary judgment at page 152a  
13 of the joint appendix.

14 He said defendant wanted a cheap source of  
15 seed for his second crop beans because of the normal  
16 risks in growing "wheat beans;" that is, the second crop  
17 that follows the harvesting of winter wheat.

18 Quote, "defendant simply wasn't going to  
19 plant the high priced soybean seed after his wheat  
20 crop." And here's the relevant sentence. "Defendant  
21 could have purchased conventional seed, that is,  
22 non-patented seed, and then saved its offspring for  
23 wheat beans."

24 In other words, he could have gone and  
25 bought a non-patented -- a bag of non-patented seed for

1 much less money, and used it as his second crop, or  
2 harvested a portion of it -- and soybeans replicate at a  
3 rate between 20 and 80 times in each generation -- and  
4 have a perpetual source for his second crop thereafter.

5 JUSTICE GINSBURG: But he couldn't put the  
6 herbicide on -- he couldn't -- if he went and bought  
7 conventional seeds, not the genetically improved seeds  
8 --

9 MR. WAXMAN: Exactly.

10 JUSTICE GINSBURG: -- then -- then he  
11 wouldn't -- what would the yield be if he put the  
12 herbicide on it and they were all killed?

13 MR. WAXMAN: Justice Ginsburg, the -- the  
14 glyphosate resistance doesn't change the yield of a  
15 particular plant, it changes the way you have to control  
16 weeds. And he would not be able to use Monsanto's  
17 technology that would allow aerial application of an  
18 herbicide. He would have to -- if he wanted to buy  
19 plain old, you know, conventional soybeans, he has to  
20 control for weeds in the conventional way.

21 And here's the very next sentence in his  
22 response to the Court. "Defendant" -- that is, instead  
23 of purchasing conventional seeds and saving them, he  
24 says "Defendant decided to purchase a grain dealer's  
25 commodity grain because he felt there was a good chance

1 he would obtain mostly grain that would be resistant to  
2 glyphosate," and therefore, he could use Monsanto's  
3 technology without having to pay for it.

4 Mr. Chief Justice, your question about this  
5 is a new case and -- let me go first to your first  
6 question in the case, which is why would a company ever  
7 want to do this? I think the answer is that without the  
8 ability -- let's talk about soybeans and then broaden it  
9 to other kinds of readily replicable technologies --  
10 without the ability to limit reproduction of soybeans  
11 containing this patented trait, Monsanto could not have  
12 commercialized its invention, and never would have  
13 produced what is, by now, the most popular agricultural  
14 technology in America because, as Ms. Sherry was  
15 pointing out, the sale of the very first Roundup Ready  
16 soybean seed, from which all the trillions of Roundup  
17 Ready soybean seeds in existence now derive, would have,  
18 under Mr. Bowman's theory, fully exhausted not only  
19 Monsanto's rights in that seed that was sold, but in all  
20 progeny unto the -- however many generations  
21 Justice Breyer thinks is "not too many."

22 I think it's important to understand how  
23 this technology works. The Department of Agriculture  
24 licensed Monsanto to engage in a transformation event;  
25 that is, to introduce its recombinant gene into soybean

1 germ plasma. It's illegal to do it unless you get a  
2 government license to do it. And you can do it once.  
3 And that is done by the technology company, use --  
4 taking something what's called a gene gun and using the  
5 gene gun to inject recombinant DNA into regular germ  
6 plasm.

7 JUSTICE SCALIA: What do you mean you can do  
8 it once? I don't know what you --

9 MR. WAXMAN: The -- the Department of  
10 Agriculture authorized Monsanto to engage in -- to  
11 transform natural -- natural plant material with its  
12 recombinant gene in one single event that is referred to  
13 as a transformation.

14 JUSTICE SCALIA: One shot of a gun.

15 MR. WAXMAN: I think you may be able to  
16 shoot several -- I don't know whether you can shoot a  
17 whole round or whatever. But in any event, it's one  
18 event.

19 (Laughter.)

20 JUSTICE SCALIA: You can't rob a bank with  
21 it, though, right?

22 (Laughter.)

23 MR. WAXMAN: I, in my mind, have been trying  
24 to figure out what a gene gun looks like. And I don't  
25 know -- I don't know if you could use it to rob a bank.

1 But the point is -- and the -- the Federal Register site  
2 for the transformation event with respect to Roundup  
3 Ready is -- is provided in a footnote in our brief.  
4 What happens then is that Monsanto uses those  
5 transformed cells to grow a soybean plant.

6           And that soybean plant produces genetic --  
7 produces seeds or soybeans that have the recombinant  
8 Roundup Ready technology in it. Monsanto then provides  
9 -- in almost all of the cases, Monsanto engages in  
10 licensed sales of those transformed seeds to hundreds of  
11 different seed companies that produce different  
12 varieties, and they make both conventional seed with a  
13 particular varietal makeup and a Roundup Ready version  
14 of that variety.

15           Monsanto provides the soybeans that it has  
16 transformed to the seed companies, to the hundreds of  
17 seed companies for consideration. Under Mr. Bowman's  
18 theory, that was it for all of Monsanto's rights with  
19 respect to this technology. The very first time it took  
20 an original transformed seed and sold it to a seed  
21 company so that it could bulk up and cross-breed and  
22 produce different varieties, Monsanto had lost all of  
23 its patent rights.

24           In other words, by go at -- having committed  
25 hundreds of millions of dollars in 13 years to develop



1 this technology in the very first sale of an article  
2 that practices the patent, it would have exhausted its  
3 rights in perpetuity.

4 Now, we --

5 JUSTICE KAGAN: Mr. Waxman, there is a  
6 worrisome thing on the other side, though, too. And  
7 that is that your position has the -- has the capacity  
8 to make infringers out of everybody. And that is  
9 highlighted actually in this case by how successful this  
10 product is and how large a percentage of the market it  
11 has had.

12 So that -- you know, seeds can be blown onto  
13 a farmer's farm by wind, and all of a sudden you have  
14 Roundup seeds there and the person -- farmer is  
15 infringing, or there's a 10-year-old who wants to do a  
16 science project of creating a soybean plant, and he goes  
17 to the supermarket and gets an edamame, and it turns out  
18 that it's Roundup seeds.

19 (Laughter.)

20 JUSTICE KAGAN: And, you know, these Roundup  
21 seeds are everywhere, it seems to me. There's, what,  
22 90 percent of all the seeds that are around? So it  
23 seems as though -- like pretty much everybody is an  
24 infringer at this point, aren't they?

25 MR. WAXMAN: Certainly not. Let me make --

1 let me make three points, starting with the edamame and  
2 moving up to inadvertent infringers.

3 Edamame is an immature form of the soybean  
4 seed. You can plant edamame --

5 JUSTICE KAGAN: Okay. I'll change my  
6 hypothetical.

7 (Laughter.)

8 MR. WAXMAN: If I take my -- you know, my  
9 Girl Scout troop and have them do a science experiment,  
10 it will rot, but it will not generate. And that --

11 JUSTICE KAGAN: And I thought I was being so  
12 clever, too.

13 (Laughter.)

14 MR. WAXMAN: Well, it also reminds me that  
15 my original answer to Justice Kennedy is wrong, which is  
16 that edamame is taken from the pods before the -- the  
17 thing becomes actually a seed that can be processed in  
18 any other way.

19 Your point about the ubiquity of Roundup  
20 Ready -- Roundup Ready's use is a fair one. I mean,  
21 this is probably the most rapidly adopted technological  
22 advance in history. The very first Roundup Ready  
23 soybean seed was only made in 1996. And it now is grown  
24 by more than 90 percent of the 275,000 soybean farms in  
25 the United States.

1           But size -- that is, success -- has never  
2 been thought and can't be thought to affect the contour  
3 of patent rights. You may very -- with soybeans, the  
4 problem of blowing seed is not an issue for soybeans.  
5 Soybeans don't -- I mean, it would take Hurricane Sandy  
6 to blow a soybean into some other farmer's field. And  
7 soybeans, in any event, are -- you know, have perfect  
8 flowers; that is, they contain both the pollen and the  
9 stamen, so that they -- which is the reason that they  
10 breed -- breed true, unlike, for example, corn.

11           The point that there may be many farmers  
12 with respect to other crops, like alfalfa, that may have  
13 some inadvertent Roundup Ready alfalfa in their fields  
14 may be true, although it's -- it is not well documented.  
15 There would be inadvertent infringement if the farmer  
16 was cultivating a patented crop, but there would be no  
17 enforcement of that.

18           The farmer wouldn't know, Monsanto wouldn't  
19 know, and in any event, the damages would be zero  
20 because you would ask what the reasonable royalty would  
21 be, and if the farmer doesn't want Roundup Ready  
22 technology and isn't using Roundup Ready technology to  
23 save costs and increase productivity, the -- the royalty  
24 value would be zero.

25           JUSTICE BREYER: Well, is -- I mean, that is

1 an interesting question because you can imagine -- you  
2 see, this is -- your answer -- this really deals with  
3 all -- it could be with genetic patents, with -- with  
4 hosts of things which are self-replicating.

5 MR. WAXMAN: Mm-hmm.

6 JUSTICE BREYER: And some of the  
7 self-replicating items, which are infringing items, end  
8 up inadvertently all over the place. Is there anything  
9 in the patent law that deals with that? Is an  
10 involuntary infringer treated the same under patent law  
11 as a voluntary infringer?

12 MR. WAXMAN: Well --

13 JUSTICE BREYER: Is -- is there precautions  
14 that you take? I mean, is there anything in patent law  
15 that helps?

16 MR. WAXMAN: So infringement is -- unlike  
17 contributory infringement or induced infringement, the  
18 act of infringement, that is a violation of Section  
19 271 --

20 JUSTICE BREYER: Right.

21 MR. WAXMAN: -- is a strict liability tort,  
22 but it requires affirmative volitional contact --  
23 conduct. That is, it's not that -- a thing doesn't  
24 infringe; a person infringes.

25 JUSTICE BREYER: Well, the person plants it.

1 MR. WAXMAN: The person --

2 JUSTICE BREYER: I mean, he plants it, but  
3 he doesn't even know, you know. He's just got -- we can  
4 imagine a lot of circumstances where this would be a --  
5 where Justice Kagan's question could apply.

6 MR. WAXMAN: I mean, take the --

7 JUSTICE BREYER: But you're just saying that  
8 would need a --

9 MR. WAXMAN: Sure.

10 JUSTICE BREYER: -- modification in patent  
11 law.

12 MR. WAXMAN: Of course. I mean, take the  
13 example, and this goes to I think the comment made by  
14 the Chief Justice, that even in the software context, we  
15 haven't had this case yet. You did have this case in --  
16 in Microsoft v. AT&T that involved, you know,  
17 Microsoft's golden disk that has the Windows Operating  
18 System on it, which is patented, and was being exported  
19 overseas for introduction into, you know, computers that  
20 were manufactured overseas. And AT&T's patent, which  
21 was a method of compressing speech, was practiced by the  
22 Windows software.

23 And this Court held that, although the  
24 writing of the Windows Operating System into computers  
25 in the United States would have infringed the patent,

1 and when Microsoft did that it did infringe AT&T's  
2 patent, the fact that the copies were made onto the hard  
3 drives of the computer overseas meant that the act of  
4 infringement occurred overseas and there was not an  
5 export of -- of an infringing product for the purposes  
6 of infringing overseas for purposes of Section 271(f).

7           So I think you have decided in the context  
8 of software, which of course replicates even more  
9 readily than soybeans do or vaccines or cell lines or  
10 plasmids, that the copies that are actually made when  
11 a -- a software is written onto the hard drive of a  
12 computer is a different thing than the disk that was  
13 sent and is infringing, if it occurs within the United  
14 States.

15           JUSTICE BREYER: What about -- what about  
16 the other question --

17           MR. WAXMAN: So the other one --

18           JUSTICE BREYER: No, no, no, I want to go  
19 back to a different question that was asked, which was  
20 the question what do you think we should do about this  
21 other aspect of the case, the licensing aspect? I mean,  
22 I would have thought it doesn't concern Monsanto's  
23 license of generation 1 because, insofar as it's  
24 relevant, here generation 1 carries the license that is  
25 just permissive.

1           It is to create generation 2. But -- but  
2 they also said something in the circuit about a  
3 license -- about a restriction, implied perhaps, on --  
4 on the use of generation 2 by the grain elevator for  
5 creating generation 3, namely you can't do that.

6           Now, they -- they thought, the circuit, that  
7 there's some restriction in a license and they have a  
8 doctrine that seems to say that you can restrict  
9 licenses -- through licenses the use of a product after  
10 it's been sold. And that would seem contrary to the  
11 First Sale Doctrine.

12           MR. WAXMAN: Okay. Let me -- let me answer  
13 your question this way: First of all, we don't think  
14 that there's any need whatsoever for this Court -- we  
15 agree with the government that there's no need for the  
16 Court to address the question of conditional sales and  
17 the extent to which patent law recognizes under some  
18 circumstances conditional sales because in this case the  
19 Federal Circuit did not address that ground which we  
20 advocated and we still advocate, but instead said -- and  
21 I'm reading from 14a of the petition appendix.

22           "Even if Monsanto's patent rights in the  
23 commodity seeds are exhausted, such a conclusion would  
24 be of no consequence because once a grower like Bowman  
25 plants the commodity seeds containing Monsanto's Roundup

1 Ready technology and the next generation of seed  
2 develops, the grower has created a newly infringing  
3 article."

4 In other words, what the Federal Circuit  
5 decided, and it is entirely correct and it should be  
6 affirmed on that basis, is what you're calling, I think  
7 generation 3, let's say that for simplicity's sake,  
8 since generation 1 is the original soybean sold by  
9 Monsanto to seed companies, let's just say that the bags  
10 of soybean seeds that farmers go to purchase from seed  
11 dealers is called generation N and they are licensed to  
12 produce generation N plus 1. But then, what about N  
13 plus 2?

14 So what the Federal Circuit held is N plus 2  
15 has never been sold. It was created, it exists without  
16 a sale, and because a sale is the sine qua non of patent  
17 exhaustion, which is also referred to as first sale,  
18 there is no exhaustion.

19 Alternatively, the Federal Circuit said in  
20 any event, even when exhaustion applies, it only  
21 privileges the using or selling of the article sold; as  
22 Your Honor's questions pointed out originally, it never  
23 privileges the making of a new infringing product.

24 JUSTICE KENNEDY: Could -- could you prevail  
25 in this case if we focused just on use rather than make?



1 MR. WAXMAN: If you're referring to  
2 generation N plus 2, the answer is yes, because those  
3 are newly infringing products with no exhaustion of  
4 Monsanto's rights, and as a consequence farmers have no  
5 authority to use, make, sell, or offer to sell without  
6 Monsanto's authorization. That is a -- just a  
7 straightforward application of Section 271.

8 JUSTICE SOTOMAYOR: Mr. Waxman, I want to go  
9 back to Justice Breyer's question and reformulate it as  
10 a different question, with I think the same answer --

11 MR. WAXMAN: Okay.

12 JUSTICE SOTOMAYOR: -- but I just want to  
13 make sure you and the government are exactly on the same  
14 page.

15 Both of you are suggesting, I think -- that  
16 was Ms. Sherry's last response -- that we were explicit  
17 enough in Quanta and we don't have to address whatever  
18 lingering confusion the Federal Circuit may have with  
19 respect to conditional sales at all in this case?

20 MR. WAXMAN: I --

21 JUSTICE SOTOMAYOR: You're -- you're telling  
22 us we don't need to reach that prong and we shouldn't.

23 MR. WAXMAN: I'm -- I agree that you don't  
24 need to reach the prong and you shouldn't.

25 JUSTICE SOTOMAYOR: I understand we don't

1 need to, but the question is should we? Is there a  
2 need --

3 MR. WAXMAN: Well, I think --

4 JUSTICE SOTOMAYOR: -- generally in -- in  
5 clarifying some lingering confusion?

6 MR. WAXMAN: I think that -- I think that an  
7 appropriate case will come up where it will be important  
8 for you to determine that. And our third argument,  
9 which wasn't addressed by the Federal Circuit and isn't  
10 necessary to affirm, is that conditional sales are not  
11 ipso facto unenforceable; that is, a -- in an instant --  
12 everybody understands that if instead of selling  
13 technology, you lease it, and you sign a license that  
14 imposes conditions on that lease, you know, unless they  
15 are unreasonable, conditions that are reasonably related  
16 to exploitation of the invention are enforceable. Mr.  
17 Bowman acknowledges that. Everyone acknowledges that.

18 Our single submission here is that where you  
19 have a technology that cannot be leased because it will  
20 consume itself in whatever use one makes of it, and  
21 therefore has to be -- an article embodying the  
22 invention has to be sold and where the invention cannot  
23 be commercialized if it -- if the inventor has to  
24 realize its full costs of development and a reasonable  
25 rate of return on the first sale, the fact that there is

1 this necessary sale in order to commercialize the  
2 invention cannot ipso facto make all such conditions  
3 unenforceable. And that's all -- if you were to reach  
4 the conditional sale issue in this case, that is all we  
5 think this case stands for. And the reason I think --

6 JUSTICE SOTOMAYOR: Actually then you do  
7 have a different position than the government does.

8 MR. WAXMAN: Yes, and I think the reason, if  
9 we take it out of the soybean area, let's look at  
10 vaccines. Because the Roundup Ready gene essentially  
11 immunizes soybean plants from the herbicide in the same  
12 way that a life-saving vaccine will immunize individuals  
13 that receive it from some external -- it wouldn't be a  
14 herbicide -- a life threat.

15 Okay. Vaccines are live. They have live  
16 cultures; they can regenerate themselves. If a company  
17 develops the vaccine for, you know, H1 -- I shouldn't be  
18 using -- an important life-saving vaccine --

19 (Laughter.)

20 MR. WAXMAN: -- it's unsupportable to say  
21 that you cannot sell a quantity of that vaccine without  
22 exhausting all of your rights in it.

23 I mean, when -- when Schering-Plough or  
24 Bristol-Myers develops a vaccine and sells some of it to  
25 CVS so I can go in and get injected, they haven't lost

1 all of their patent rights in that vaccine. CVS can't  
2 turn around and become a competitor.

3 JUSTICE SOTOMAYOR: Simplifying this case,  
4 you can't take the person who's been given the vaccine  
5 and take vials of their blood and keep selling it? Is  
6 that your --

7 MR. WAXMAN: Yes, and keep -- well, keep  
8 replicating it in competition. Take another example --

9 CHIEF JUSTICE ROBERTS: Well, is that how it  
10 works?

11 (Laughter.)

12 CHIEF JUSTICE ROBERTS: No, I'm serious. I  
13 mean, your example, it seems to me, is not quite on  
14 point because it's not a situation where the intended  
15 use of the vaccine necessarily results in regeneration  
16 of it. In your hypothetical, CVS was going to some lab  
17 and making more, right?

18 MR. WAXMAN: Well, CVS was presumably buying  
19 it either from the manufacturer or another lab. But the  
20 point here is, to take the software example, if I go to,  
21 you know, Staples and buy the Windows operating system  
22 on a disk, I don't have the authority to put it in a  
23 disk replicator and press a button and make a million  
24 copies of it. And --

25 JUSTICE BREYER: But you don't need that

1 because in each instance, as you say, you are making new  
2 ones. It's the making of the new ones, not the use of  
3 the old ones, where you prevent that from being done.

4 MR. WAXMAN: Yeah. Well, let me -- the  
5 example that comes to mind is, of course, poor  
6 Dr. Chakrabarty who, you know, invented a new man-made  
7 bacteria. Bacteria replicate themselves, unlike  
8 soybeans which require human intervention. I mean, the  
9 notion --

10 JUSTICE BREYER: Then you use the word  
11 "use."

12 MR. WAXMAN: Excuse me?

13 JUSTICE BREYER: Then you use the word "use"  
14 and you get to the same place.

15 MR. WAXMAN: I mean, my submission about --

16 JUSTICE BREYER: I don't think you can think  
17 of an example. I mean, you say -- I don't think you can  
18 think of an example where if you win on the other  
19 ground, you can produce a bad result for the  
20 manufacturer or the inventor because you haven't treated  
21 the conditional sale like a license. I'm not saying you  
22 can't, I just can't think of one.

23 MR. WAXMAN: Okay. Here's one. I will use  
24 something that doesn't make itself because we think that  
25 is covered by the new article. Let's say that I invent

1 a new, miraculous new machine. I get a patent for it.

2 I want people to be able -- I'm going to  
3 commercialize it. Or I'm going to license with people  
4 to commercialize it, but I want people to be able to  
5 study it and research it. And so, like Monsanto with  
6 its seeds, I sign -- I provide a copy of the machine to  
7 MIT, with a research-only license; that is, you can use  
8 this machine to figure out how it works and develop new  
9 applications and all that sort of stuff.

10 If that sale is exhausting for all purposes,  
11 I can't prevent MIT or a third party that MIT provides  
12 the machine for --

13 JUSTICE BREYER: So lease it.

14 MR. WAXMAN: -- to go into competition with  
15 it.

16 JUSTICE BREYER: So lease it.

17 MR. WAXMAN: Yes, but you can't lease  
18 articles like software and, you know, soybeans that  
19 consume themselves in any use, other than an art  
20 experiment.

21 JUSTICE KENNEDY: I do have this problem  
22 that goes back to Justice Scalia's example. What about  
23 the commodity bin that has 2 percent of the patented  
24 seeds in them? Now, you get away from the article by  
25 saying, oh, well, almost all seeds are Roundup these

1 days. But let's have some different commodity where  
2 there are three or four different patented items, but 1  
3 percent or 2 percent of the seeds are in the bin. You  
4 can't -- you can't sell those. That seems to me a very  
5 extreme result.

6 MR. WAXMAN: Well, I mean, when you say you  
7 can't sell them. So, as Ms. Sherry was pointing out --

8 JUSTICE KENNEDY: You can't sell them if  
9 they know they are going to be used for seeds, and you  
10 can't use them for seeds even though there is only  
11 1 percent of the seeds?

12 MR. WAXMAN: That would be true even if this  
13 case came out another way, Justice Kennedy. First of  
14 all, because grain elevators are prohibited by State and  
15 Federal law from selling seed, period. They sell --  
16 they buy grain and they sell grain. They can't sell  
17 seed.

18 Number 2, almost all varieties of soybeans  
19 or other crop plants are currently protected by the --  
20 under the patent -- the Plant Variety Protection Act.  
21 As this Court and Congress recognized, the requisites  
22 for getting a certificate are -- I mean, it's like a  
23 registration requirement.

24 And we know from J.E.M., and the relevant  
25 provision of the PVPA, that it is unlawful to divert

1 crops that are protected by a PVPA certificate for  
2 reproductive uses. So irrespective of all of this,  
3 whatever happens, even if there is only 1 percent of  
4 patented soybeans in a grain elevator, the grain  
5 elevator can't sell it as seed both under the Federal  
6 and State seed laws and under the Patent Variety  
7 Protection Act.

8 That's why the solution for farmers like  
9 Monsanto -- like Mr. Bowman, is to simply buy  
10 conventional seed, multiply it, you know, 20, 30, 40,  
11 50, 80 times in a single generation and save 1/80th of  
12 it to replant in his second crop, if he doesn't want to  
13 buy Roundup Ready technology for his second crop and use  
14 the glyphosate aerially.

15 Unless the Court has further questions, we  
16 will submit.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 Mr. Waxman.

19 Mr. Walters, you have five minutes  
20 remaining.

21 REBUTTAL ARGUMENT OF MARK P. WALTERS

22 ON BEHALF OF THE PETITIONER

23 MR. WALTERS: I'd like to first address the  
24 statement that this is not a traditional farming  
25 practice. It may be occasional, when a farmer is in a



1 real desperate situation, or it may apply to  
2 Mr. Bowman's situation, where he wanted a very cheap  
3 source of seed for his second crop.

4 But in the record at 153a, among other  
5 places, he discusses how he's gone to the grain elevator  
6 over the years a number of times, and how other farmers  
7 have gone to the grain elevator for generations. So a  
8 ruling in favor of Monsanto here would effectively  
9 eliminate that seed --

10 JUSTICE SCALIA: Do you agree that it's  
11 unlawful for grain elevators to sell it for replanting?

12 MR. WALTERS: No. I do not. And what he is  
13 referring to is State labeling laws that prevent grain  
14 elevators from actually scooping up grain, packaging it  
15 up and saying this is seed, because they all look alike  
16 to -- to the eye. And so grain elevators are certainly  
17 not allowed to dupe seed purchasers, but those laws are  
18 there to protect the seed purchasers.

19 Mr. Bowman bought grain without any  
20 restrictions on how he could use it. That broke no  
21 laws, and it does not violate the PVPA. I mean,  
22 Monsanto didn't assert a PVPA certificate. Surely it  
23 has them. Did not assert them in this case and could  
24 not assert them in this case because there's no single  
25 variety that Mr. Bowman planted. So that's not a good

1 argument.

2 CHIEF JUSTICE ROBERTS: What -- what about  
3 Mr. Waxman's suggestion that we've already decided this  
4 in Microsoft v. AT&T?

5 MR. WALTERS: That case is not on point,  
6 Your Honor. That had to do with 271(f), and actually  
7 came out on the side of more restrictive patent rights.  
8 And this is not like software. This is an invention  
9 that the only way to use the invention -- now, repeat,  
10 the only way to use the invention -- is to plant it and  
11 to grow more seeds.

12 So if you don't apply the Exhaustion  
13 Doctrine and allow someone to use it, you're choosing  
14 patent rights over personal property rights, and that's  
15 never been done in 150 years of this Court's exhaustion  
16 case law.

17 JUSTICE BREYER: Don't people or animals eat  
18 them?

19 MR. WALTERS: That is certainly a use, but  
20 it's not the invention.

21 JUSTICE BREYER: Well, then why is it the  
22 only way you can do is to plant them? That isn't the  
23 only thing you could do with it.

24 MR. WALTERS: Well, that's not use of the --

25 JUSTICE BREYER: You can buy them from the

1 grain elevator and sell them for other things.

2 MR. WALTERS: That's not use of the  
3 invention, Justice Breyer. And exhaustion is about  
4 conferring on the purchaser a right to use the  
5 invention. There's no limit to Monsanto's --

6 JUSTICE BREYER: The invented product. The  
7 invented thing. The invented aspect of the seed is it  
8 has a gene in it that repels some other insecticide or  
9 something that they have. I understand that.

10 MR. WALTERS: The same argument came up in  
11 Quanta, Your Honor, with --

12 JUSTICE BREYER: You don't use that. I  
13 don't think they used that particular -- well, go ahead.  
14 You go ahead.

15 MR. WALTERS: There were other uses for the  
16 computer chips, of course, that were asserted. And the  
17 key was that those computer chips practiced the patent.  
18 And you would swallow up the Exhaustion Doctrine  
19 entirely if we just could think of other uses for these  
20 things that have been sold.

21 The key is, does it use -- is the purchaser  
22 allowed to use the invention? And under Monsanto's  
23 theory, the purchaser isn't allowed to do that. And  
24 that's no Exhaustion Doctrine at all --

25 JUSTICE BREYER: The people buying from

1 grain elevators are mostly people who take these  
2 chips -- whatever they are, the seeds -- and they sell  
3 them for making tofu, or they sell them to eat, or  
4 this -- there are loads of uses, aren't there?

5 MR. WALTERS: But the only use of the  
6 invention is to plant it, and that's the use that  
7 Mr. Bowman makes.

8 JUSTICE SCALIA: Yes, but -- but that's --  
9 nothing prevents him from planting it. What he is  
10 prevented from doing is using the -- the consequences of  
11 that planting, the second generation seeds, for another  
12 planting. That's all he is prevented from doing. He  
13 can plant and harvest and eat or sell. He just can't  
14 plant, harvest, and then replant.

15 MR. WALTERS: So -- the judgment in this  
16 case was based on acres planted, and so I'm not sure how  
17 many -- we talked a bit about the N plus 2 generation,  
18 and we don't know in the record what the N plus 2  
19 generation was, in terms of his sales or his yields.  
20 That wasn't before the district court on summary  
21 judgment. So I'm not sure how you could affirm based on  
22 the judgment below, which was a finding that conditional  
23 sales prevented the application of the Exhaustion  
24 Doctrine.

25 The other thing --

1 CHIEF JUSTICE ROBERTS: I'm sorry, I didn't  
2 follow that answer to Justice Scalia's question.

3 MR. WALTERS: Could you ask it again?

4 JUSTICE SCALIA: You know, you're saying  
5 that you are preventing him from using it. He's not  
6 prevented from using it. He can use it for what it's  
7 meant for, for raising a crop. He just cannot use the  
8 product -- that new crop -- for replanting. That's all.  
9 He has to sell that new crop for feed or for some other  
10 purpose. But to say that -- that he's prevented from  
11 using what he has bought is simply not true. He can use  
12 it, plant it, and harvest the crop.

13 MR. WALTERS: But you're saying that there's  
14 no exhaustion in the progeny where he owns that seed  
15 outright.

16 With that, we'll submit, and we'll ask that  
17 the Court of Appeals be reversed.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 The case is submitted.

21 (Whereupon, at 12:37 p.m., the case in the  
22 above-entitled matter was submitted.)

23

24

25

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