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

2 (11:27 a.m.)

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

6 Mr. Walters.

7 ORAL ARGUMENT OF MARK P. WALTERS

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

1 second generation seeds have nothing to do with it. If
2 he went into a room and had a box that he bought from a
3 lab and he put rocks in it and he said, hocus-pocus and
4 lo and behold out came the third generation of seeds, he
5 would 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 two. That has just a
21 coincidence. But that is in fact the way he made these
22 seeds. But he can sell, resell generation 2, he can do
23 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 -- you have no
21 exhaustion at all for someone to practice the invention.
22 Sure, you can do all the things that you talked about,
23 Mr. Breyer -- or Justice Breyer, but that has nothing to
24 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
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 by
11 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
21 comes generation 2. And generation 2, on the basis of
22 what I 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 purely insufficient in this kind of a case, because all
11 that has to happen is that one seed escapes the web of
12 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 one and
8 saying, ah, that's the exact one that I need for my
9 field, I'm going to cultivate that and let it grow into
10 enough seeds so I can plant my first crop, that would
11 take a number of years to grow a 1,000-acre farm, and
12 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 so
9 that all that was left was the Roundup Ready-resistance
10 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 protection -- 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 respect
23 to that seed but with respect to all the progeny seed,
24 we would have to go all the way back to the very first
25 Roundup Ready plant that was created as part of the

1 transformation event. Every single Roundup Ready seed
2 in existence today is the progeny of that one parent
3 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 a grain elevator, because at
21 least a few of those seeds will always be patented
22 seeds, and no farmer could ever plant anything from a
23 grain elevator, which means -- I gather they use it for
24 second plantings where the risks are so high that it
25 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 -- and that's why farmers want to
23 use it, for a cheap planting.

24 MS. ARBUS SHERRY: But farmers wouldn't be
25 able to use it for another reason as well. Even if you

1 take patent law and you put it entirely to the side,
2 there is still the Plant Variety Protection Act.

3 JUSTICE KENNEDY: But correct me if I am
4 wrong; I thought that is what Bowman did.

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

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

20 And Petitioner's argument again isn't
21 limited to the grain elevators. It would apply to
22 saving your own seed and planting it generation after
23 generation. It would apply to selling seeds to your
24 neighboring farmer, and it would allow seed companies to
25 essentially compete with Monsanto upon the first sale.

1 Now to the extent --

2 CHIEF JUSTICE ROBERTS: So when -- when are
3 the patent rights exhausted in the seed?

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

13 But you do need permission from the
14 patentholder in order to make a new generation of seed.
15 To the extent, you know, any middle ground is warranted,
16 with all due respect, we would point to Congress as the
17 appropriate body. This Court said --

18 CHIEF JUSTICE ROBERTS: I'm sorry. Just so
19 I can follow your -- just so I can follow your answer,
20 Monsanto sells the seed to the farmer. And you are
21 saying if the farmer grows the seed he can sell it to
22 anybody he wants, right?

23 MS. ARBUS SHERRY: If Monsanto authorizes --

24 CHIEF JUSTICE ROBERTS: I'm putting aside
25 all the contracts and stuff.

1 MS. ARBUS SHERRY: Right. So if Monsanto
2 authorized that first sale and authorized the planting,
3 they would also have to authorize the sale of the second
4 generation seed because it's a new article. And that's
5 exactly what happened here. If you look at the
6 technology agreement -- and it's not just because it's a
7 contract because I think it's significant to the
8 analysis -- Monsanto, upon the first sale of the bag of
9 Roundup Ready seed, authorizes the planting for one
10 commercial crop and it authorizes the farmer to sell
11 that as a commercial crop or to use it for any purpose
12 other than replanting.

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

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

23 MS. ARBUS SHERRY: They have been exhausted
24 with respect to the particular article sold. When the
25 Court's talked about patent exhaustion, you are not

1 exhausting the rights with respect to the patented
2 invention. You're exhausting --

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

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

8 CHIEF JUSTICE ROBERTS: That's always the
9 case because it's a very -- the other cases haven't
10 involved this situation where you are talking about a
11 self-regenerating product.

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

20 CHIEF JUSTICE ROBERTS: Well, we haven't had
21 that case either.

22 MS. ARBUS SHERRY: The Court hasn't had that
23 case exactly, but it did decide Microsoft v. AT&T, and
24 granted that was on a slightly different issue, but in
25 that case the Court recognized -- that case, it was

1 copies from a master disk and it treated them as
2 separate copies because they were actually separate
3 articles, even though it was really easy to do, even
4 though the actual copying is not done by human hands,
5 it's done by mechanical processes. In fact, in that
6 case the Court talked and compared the making of
7 software to the reproduction through biological
8 processes, which is what we are talking about here.

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

18 JUSTICE KAGAN: I'm sorry. In everything
19 you've said you agree with Mr. Waxman. There is this
20 issue in the case where you disagree, which is the
21 conditional sale doctrine. I am just wondering, before
22 you finish up, could you say a bit about whether that
23 doctrine is causing trouble as it presently exists in
24 the Federal Circuit? In other words, could we just
25 ignore that doctrine if we wanted to, or is it a very

1 problematic one that we should take this opportunity to
2 do something about?

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

4 CHIEF JUSTICE ROBERTS: Sure.

5 MS. ARBUS SHERRY: I think the Court does
6 not need to do something about it in this case. I think
7 Quanta largely decided the issue, even though it didn't
8 say so explicitly, and as far as I'm aware the Federal
9 Circuit has not applied their previous version of the
10 conditional sale doctrine to enforce the post-sale
11 restrictions since this Court's decision in Quanta.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 Mr. Waxman.

14 ORAL ARGUMENT OF SETH P. WAXMAN

15 ON BEHALF OF THE RESPONDENTS

16 MR. WAXMAN: Mr. Chief Justice, and may it
17 please the Court:

18 Let me start by answering a couple of, I
19 guess, science or technology questions that came up
20 before launching into our doctrinal position.

21 First of all, Justice Kennedy, soybeans are
22 soybeans. They are harvested at a particular point in
23 time, whatever use is going to be made for them. It is
24 not a plant like a flower, geranium for example, which
25 has to be left to go to seed, or alfalfa. The bean is

1 the seed.

2 All soybeans have to be processed to be used
3 in any way. If they are going to be planted, they have
4 to be cleaned before they are put in the ground at the
5 right time. If they are being fed to either humans or
6 animals, they have to be processed in a way that
7 eliminates an enzyme that makes them indigestible by
8 animals.

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

19 But more to the point, farmers -- I mean,
20 the planting of second crops, that is crop rotation of
21 interspersing soybeans and winter wheat, is very, very
22 common. There are hundreds of thousands of soybean
23 farmers who do this every year.

24 Mr. Bowman has acknowledged that so far as
25 he knows, he's the only one who's doing it this way.

1 But there are plenty of other ways in which he could
2 obtain a much less expensive crop of -- you know, a
3 particular variety of soybean, so one that will all grow
4 to the same height and germinate at the same time. And
5 in fact, he explained this to the district court in his
6 response to the motion for summary judgment at page 152a
7 of the joint appendix.

8 He said defendant wanted a cheap source of
9 seed for his second crop beans because of the normal
10 risks in growing "wheat beans;" that is, the second crop
11 that follows the harvesting of winter wheat.

12 Quote, "defendant simply wasn't going to
13 plant the high priced soybean seed after his wheat
14 crop." And here's the relevant sentence. "Defendant
15 could have purchased conventional seed, that is,
16 non-patented seed, and then saved its offspring for
17 wheat beans."

18 In other words, he could have gone and
19 bought a non-patented -- a bag of non-patented seed for
20 much less money, and used it as his second crop, or
21 harvested a portion of it -- and soybeans replicate at a
22 rate between 20 and 80 times in each generation -- and
23 have a perpetual source for his second crop thereafter.

24 JUSTICE GINSBURG: But he couldn't put the
25 herbicide on -- he couldn't -- if he went and bought

1 conventional seeds, not the genetically improved seed --

2 MR. WAXMAN: Exactly.

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

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

14 And here's the very next sentence in his
15 response to the Court. "Defendant" -- that is, instead
16 of purchasing conventional seeds and saving them, he
17 says "Defendant decided to purchase a grain dealer's
18 commodity grain because he felt there was a good chance
19 he would obtain mostly grain that would be resistant to
20 glyphosate," and therefore, he could use Monsanto's
21 technology without having to pay for it.

22 Mr. Chief Justice, your question about this
23 is a new case and -- let me go first to your first
24 question in the case, which is why would a company ever
25 want to do this? I think the answer is that without the

1 ability -- let's talk about soybeans and then broaden it
2 to other kinds of readily replicable technologies --
3 without the ability to limit reproduction of soybeans
4 containing this patented trait, Monsanto could not have
5 commercialized its invention, and never would have
6 produced what is, by now, the most popular agricultural
7 technology in America, because as Ms. Sherry was
8 pointing out, the sale of the very first Roundup Ready
9 soybean seed, from which all the trillions of Roundup
10 Ready soybean seeds in existence now derive, would have
11 under, Mr. Bowman's theory, fully exhausted not only
12 Monsanto's rights in that seed that was sold, but in all
13 progeny unto the -- however many generations
14 Justice Breyer thinks is "not too many."

15 I think it's important to understand how
16 this technology works. The Department of Agriculture
17 licensed Monsanto to engage in a transformation event;
18 that is, to introduce its recombinant gene into soybean
19 germ plasma. It's illegal to do it unless you get a
20 government license to do it. And you can do it once.
21 And that is done by the technology company, use --
22 taking something what's called a gene gun and using the
23 gene gun to inject recombinant DNA into regular germ
24 plasma.

25 JUSTICE SCALIA: What do you mean you can do

1 it once? I don't know what you --

2 MR. WAXMAN: The -- the Department of
3 Agriculture authorized Monsanto to engage in -- to
4 transform natural -- natural plant material with its
5 recombinant gene in one single event that is referred to
6 as a transformation.

7 JUSTICE SCALIA: One shot of a gun.

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

12 (Laughter.)

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

15 (Laughter.)

16 MR. WAXMAN: I, in my mind, have been trying
17 to figure out what a gene gun looks like. And I don't
18 know -- I don't know if you could use it to rob a bank.
19 But the point is -- and the -- the Federal Register site
20 for the transformation event with respect to Roundup
21 Ready is -- is provided in a footnote in our brief.
22 What happens then is that Monsanto uses those
23 transformed cells to grow a soybean plant.

24 And that soybean plant produces genetic --
25 produces seeds or soybeans that have the recombinant

1 Roundup Ready technology in it. Monsanto then provides
2 -- in almost all of the cases, Monsanto engages in
3 licensed sales of those transformed seeds to hundreds of
4 different seed companies that produce different
5 varieties, and they make both conventional seed with a
6 particular varietal makeup and a Roundup Ready version
7 of that variety.

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

17 In other words, by go at -- having committed
18 hundreds of millions of dollars in 13 years to develop
19 this technology in the very first sale of an article
20 that practices the patent, it would have exhausted its
21 rights in perpetuity.

22 Now, we --

23 JUSTICE KAGAN: Mr. Waxman, there is a
24 worrisome thing on the other side, though, too. And
25 that is the Bureau position has the -- has the capacity

1 to make infringers out of everybody. And that is
2 highlighted actually in this case by how successful this
3 product is and how large a percentage of the market it
4 has had.

5 So that -- you know, seeds can be blown onto
6 a farmer's farm by wind, and all of a sudden you have
7 Roundup seeds there and the farmer is infringing, or
8 there's a 10-year-old who wants to do a science project
9 of creating a soybean plant, and he goes to the
10 supermarket and gets an edamame, and it turns out that
11 it's Roundup seeds.

12 (Laughter.)

13 JUSTICE KAGAN: And, you know, these Roundup
14 seeds are everywhere, it seems to me. There's, what,
15 90 percent of all the seeds that are around? So it
16 seems as though -- like pretty much everybody is an
17 infringer at this point, aren't they?

18 MR. WAXMAN: Certainly not. Let me make --
19 let me make three points, starting with the edamame and
20 moving up to inadvertent infringers.

21 Edamame is an immature form of the soybean
22 seed. You can plant edamame --

23 JUSTICE KAGAN: Okay. I'll change my
24 hypothetical.

25 (Laughter.)

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

4 JUSTICE KAGAN: And I thought I was being so
5 clever, too.

6 (Laughter.)

7 MR. WAXMAN: Well, it also reminds me that
8 my original answer to Justice Kennedy is wrong, which is
9 that edamame is taken from the pods before the -- the
10 thing becomes actually a seed that can be processed in
11 any other way.

12 Your point about the ubiquity of Roundup
13 Ready's use is a fair one. I mean, this is probably the
14 most rapidly adopted technological advance in history.
15 The very first Roundup Ready soybean seed was only made
16 in 1996. And it now is grown by more than 90 percent of
17 the 275,000 soybean farms in the United States.

18 But size -- that is, success -- has never
19 been thought and can't be thought to affect the contour
20 of patent rights. You may very -- with soybeans, the
21 problem of blowing seed is not an issue for soybeans.
22 Soybeans don't -- I mean, it would take Hurricane Sandy
23 to blow a soybean into some other farmer's field. And
24 soybeans, in any event, are -- you know, have perfect
25 flowers; that is, they contain both the pollen and the

1 stamen, so that they -- which is the reason that they
2 breed free and true, unlike, for example, corn.

3 The point that there may be many farmers
4 with respect to other crops like alfalfa that may have
5 some inadvertent Roundup Ready alfalfa in their fields
6 may be true, although it's -- it is not well documented.
7 There would be inadvertent infringement if the farmer
8 was cultivating a patented crop, but there would be no
9 enforcement of that.

10 The farmer wouldn't know, Monsanto wouldn't
11 know, and in any event, the damages would be zero
12 because you would ask what the reasonable royalty would
13 be, and if the farmer doesn't want Roundup Ready
14 technology and isn't using Roundup Ready technology to
15 save costs and increase productivity, the -- the royalty
16 value would be zero.

17 JUSTICE BREYER: Well, is -- I mean, that is
18 an interesting question, because you can imagine -- you
19 see, this is -- your answer -- this really deals with
20 all -- it could be with genetic patents, with -- with
21 hosts of things which are self-replicating.

22 MR. WAXMAN: Mm-hmm.

23 JUSTICE BREYER: And some of the
24 self-replicating items, which are infringing items, end
25 up inadvertently all over the place. Is there anything

1 in the patent law that deals with that? Is an
2 involuntary infringer treated the same under patent law
3 as a voluntary infringer?

4 MR. WAXMAN: Well --

5 JUSTICE BREYER: Is -- is there precautions
6 that you take? I mean, is there anything in patent law
7 that helps?

8 MR. WAXMAN: So infringement is -- unlike
9 contributory infringement or induced infringement, the
10 act of infringement, that is a violation of Section
11 271 --

12 JUSTICE BREYER: Right.

13 MR. WAXMAN: -- is a strict liability tort,
14 but it requires affirmative volitional contact --
15 conduct. That is, it's not that -- a thing doesn't
16 infringe; a person infringes.

17 JUSTICE BREYER: Well, the person plants it.

18 MR. WAXMAN: The person --

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

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

24 JUSTICE BREYER: But you're just saying that
25 would need a --

1 MR. WAXMAN: Sure.

2 JUSTICE BREYER: -- modification in patent
3 law.

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

15 And this Court held that, although the
16 writing of the Windows Operating System into computers
17 in the United States would have infringed the patent,
18 and when Microsoft did that it did infringe AT&T's
19 patent, the fact that the copies were made onto the hard
20 drives of the computer overseas meant that the act of
21 infringement occurred overseas and there was not an
22 export of -- of an infringing product for the purposes
23 of infringing overseas for purposes of Section 271(f).

24 So I think you have decided in the context
25 of software, which of course replicates even more

1 readily than soybeans do or vaccines or cell lines or
2 plasmids, that the copies that are actually made when
3 a -- a software is written onto the hard drive of a
4 computer is a different thing than the disk that was
5 sent and is infringing if it occurs within the United
6 States.

7 JUSTICE BREYER: What about -- what about
8 the other question --

9 MR. WAXMAN: So the other one --

10 JUSTICE BREYER: No, no, no, I want to go
11 back to a different question that was asked, which was
12 the question what do you think we should do about this
13 other aspect of the case, the licensing aspect? I mean,
14 I would have thought it doesn't concern Monsanto's
15 license of generation 1, because insofar as it's
16 relevant here generation 1 carries the license that is
17 just permissive.

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

23 Now, they -- they thought, the circuit, that
24 there's some restriction in a license and they have a
25 doctrine that seems to say that you can restrict

1 licenses -- through licenses the use of a product after
2 it's been sold. And that would seem contrary to the
3 first sale doctrine.

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

14 "Even if Monsanto's patent rights in the
15 commodity seeds are exhausted, such a conclusion would
16 be of no consequence, because once a grower like Bowman
17 plants the commodity seeds containing Monsanto's Roundup
18 Ready technology and the next generation of seed
19 develops, the grower has created a newly infringing
20 article."

21 In other words, what the Federal Circuit
22 decided, and it is entirely correct and it should be
23 affirmed on that basis, is what you're calling I think
24 generation 3, let's say that for simplicity's sake,
25 since generation 1 is the original soybean sold by

1 Monsanto to seed companies, let's just say that the bags
2 of soybean seeds that farmers go to purchase from seed
3 dealers is called generation N and they are licensed to
4 produce generation N plus 1. But then, what about N
5 plus 2?

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

11 Alternatively, the Federal Circuit said in
12 any event, even when exhaustion applies, it only
13 privileges the using or selling of the article sold; as
14 Your Honor's questions pointed out originally, it never
15 privileges the making of a new infringing product.

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

18 MR. WAXMAN: If you're referring to
19 generation N plus 2, the answer is yes, because those
20 are newly infringing products with no exhaustion of
21 Monsanto's rights, and as a consequence farmers have no
22 authority to use, make, sell, or offer to sell without
23 Monsanto's authorization. That is a -- just a
24 straightforward application of section 271.

25 JUSTICE SOTOMAYOR: Mr. Waxman, I want to go

1 back to Justice Breyer's question and reformulate it as
2 a different question, with I think the same answer --

3 MR. WAXMAN: Okay.

4 JUSTICE SOTOMAYOR: -- but I just want to
5 make sure you and the Government are exactly on the same
6 page.

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

12 MR. WAXMAN: I --

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

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

17 JUSTICE SOTOMAYOR: I understand we don't
18 need to, but the question is should we? Is there a
19 need --

20 MR. WAXMAN: Well, I think --

21 JUSTICE SOTOMAYOR: -- generally in -- in
22 clarifying some lingering confusion?

23 MR. WAXMAN: I think that -- I think that an
24 appropriate case will come up where it will be important
25 for you to determine that. And our third argument,

1 which wasn't addressed by the Federal Circuit and isn't
2 necessary to affirm, is that conditional sales are not
3 ipso facto unenforceable; that is, a -- in an instant --
4 everybody understands that if instead of selling
5 technology, you lease it, and you sign a license that
6 imposes conditions on that lease, you know, unless they
7 are unreasonable, conditions that are reasonably related
8 to exploitation of the invention are enforceable. Mr.
9 Bowman acknowledges that. Everyone acknowledges that.

10 Our single submission here is that where you
11 have a technology that cannot be leased because it will
12 consume itself in whatever use one makes of it, and
13 therefore has to be -- an article embodying the
14 invention has to be sold and where the invention cannot
15 be commercialized if it -- if the inventor has to
16 realize its full costs of development and a reasonable
17 rate of return on the first sale, the fact that there is
18 this necessary sale in order to commercialize the
19 invention cannot ipso facto make all such conditions
20 unenforceable. And that's all -- if you were to reach
21 the conditional sale issue in this case, that is all we
22 think this case stands for. And the reason I think --

23 JUSTICE SOTOMAYOR: Actually then you do
24 have a different position than the Government does.

25 MR. WAXMAN: Yes, and I think the reason, if

1 we take it out of the soybean area, let's look at
2 vaccines. Because the Roundup Ready gene essentially
3 immunizes soybean plants from the herbicide in the same
4 way that a life-saving vaccine will immunize individuals
5 that receive it from some external -- it wouldn't be a
6 herbicide -- a life threat.

7 Okay. Vaccines are live. They are live
8 cultures; they can regenerate themselves. If a company
9 develops the vaccine for, you know, H1 -- I shouldn't be
10 using -- an important life-saving vaccine --

11 (Laughter.)

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

15 I mean, when Schering-Plough or
16 Bristol-Myers develops a vaccine and sells some of it to
17 CVS so I can go in and get injected, they haven't lost
18 all of their patent rights in that vaccine. CVS can't
19 turn around and become a competitor.

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

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

1 CHIEF JUSTICE ROBERTS: Well, is that how it
2 works?

3 (Laughter.)

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

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

17 JUSTICE BREYER: But you don't need that
18 because in each instance, as you say, you are making new
19 ones. It's the making of the new ones, not the use of
20 the old ones, where you prevent that from being done.

21 MR. WAXMAN: Yeah. Well, let me -- the
22 example that comes to mind is, of course, poor
23 Dr. Chakrabarty who, you know, invented a new man-made
24 bacteria. Bacteria replicate themselves, unlike
25 soybeans which require human intervention. I mean, the

1 notion --

2 JUSTICE BREYER: Then you use the word

3 "use."

4 MR. WAXMAN: Excuse me?

5 JUSTICE BREYER: Then you use the word "use"

6 and you get to the same place.

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

8 JUSTICE BREYER: I don't think you can think
9 of an example. I mean, you say -- I don't think you can
10 think of an example where if you win on the other
11 ground, you can produce a bad result for the
12 manufacturer or the inventor because you haven't treated
13 the conditional sale like a license. I'm not saying you
14 can't, I just can't think of one.

15 MR. WAXMAN: Okay. Here's one. I will use
16 something that doesn't make itself, because we think
17 that is covered by the new article. Let's say that I
18 invent a new, miraculous new machine. I get a patent
19 for it.

20 I want people to be able -- I'm going to
21 commercialize it or I'm going to license with people to
22 commercialize it, but I want people to be able to study
23 it and research it. And so, like Monsanto with its
24 seeds, I sign -- I provide a copy of the machine to MIT
25 with a research-only license; that is, you can use this

1 machine to figure out how it works and develop new
2 applications and all that sort of stuff.

3 If that sale is exhausting for all purposes,
4 I can't prevent MIT or a third party that MIT provides
5 the machine for --

6 JUSTICE BREYER: So lease it.

7 MR. WAXMAN: -- to go into competition with
8 it.

9 JUSTICE BREYER: So lease it.

10 MR. WAXMAN: Yes, but you can't lease
11 articles like software and, you know, soybeans that
12 consume themselves in any use other than an art
13 experiment.

14 JUSTICE KENNEDY: I do have this problem
15 that goes back to Justice Scalia's example. What about
16 the commodity bin that has 2 percent of the patented
17 seeds in them? Now, you get away from the article by
18 saying, oh, well, almost all seeds are Roundup these
19 days. But let's have some different commodity where
20 there are three or four different patented items but 1
21 percent or 2 percent of the seeds are in the bin. You
22 can't -- you can't sell those. That seems to me a very
23 extreme result.

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

1 JUSTICE KENNEDY: You can't sell them if
2 they know they are going to be used for seeds, and you
3 can't use them for seeds even though there is only
4 1 percent of the seeds?

5 MR. WAXMAN: That would be true even if this
6 case came out another way, Justice Kennedy. First of
7 all because grain elevators are prohibited by state and
8 federal law from selling seed, period. They sell --
9 they buy grain and they sell grain. They can't sell
10 seed.

11 Number 2, almost all varieties of soybeans
12 or other crop plants are currently protected by the --
13 under the patent -- the Plant Variety Protection Act.
14 As this Court and Congress recognized, the requisites
15 for getting a certificate are -- I mean, it's like a
16 registration requirement.

17 And we know from J.E.M. and the relevant
18 provision of the PVPA that it is unlawful to divert
19 crops that are protected by a PVPA certificate for
20 reproductive uses. So irrespective of all of this,
21 whatever happens, even if there is only 1 percent of
22 patented soybeans in a grain elevator, the grain
23 elevator can't sell it as seed both under the federal
24 and state seed laws and under the Patent Variety
25 Protection Act.

1 That's why the solution for farmers like
2 Monsanto -- like Mr. Bowman is to simply buy
3 conventional seed, multiply it, you know, 20, 30, 40,
4 50, 80 times in a single generation and save 1/80th of
5 it to replant in his second crop, if he doesn't want to
6 buy Roundup Ready technology for his second crop and use
7 the glyphosate aerially.

8 Unless the Court has further questions, we
9 will submit.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 Mr. Waxman.

12 Mr. Walters, you have five minutes
13 remaining.

14 REBUTTAL ARGUMENT OF MARK P. WALTERS
15 ON BEHALF OF THE PETITIONER

16 MR. WALTERS: I'd like to first address the
17 statement that this is not a traditional farming
18 practice. It may be occasional, when a farmer is in a
19 real desperate situation, or it may apply to
20 Mr. Bowman's situation, where he wanted a very cheap
21 source of seed for his second crop.

22 But in the record at 153a, among other
23 places, he discusses how he's gone to the grain elevator
24 over the years a number of times, and how other farmers
25 have gone to the grain elevator for generations. So a

1 ruling in favor of Monsanto here would effectively
2 eliminate that seed --

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

5 MR. WALTERS: No. I do not. And what he is
6 referring to is State labeling laws that prevent grain
7 elevators from actually scooping up grain, packaging it
8 up and saying this is seed, because they all look alike
9 to -- to the eye. And so grain elevators are certainly
10 not allowed to dupe seed purchasers, but those laws are
11 there to protect the seed purchasers.

12 Mr. Bowman bought grain without any
13 restrictions on how he could use it. That broke no
14 laws, and it does not violate the PVPA. I mean,
15 Monsanto didn't assert a PVPA certificate. Surely it
16 has them. Did not assert them in this case and could
17 not assert them in this case because there's no single
18 variety that Mr. Bowman planted. So that's not a good
19 argument.

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

23 MR. WALTERS: That case is not on point,
24 Your Honor. That had to do with 271(f), and actually
25 came out on the side of more restrictive patent rights.

1 And this is not like software. This is an invention
2 that the only way to use the invention -- now, repeat,
3 the only way to use the invention -- is to plant it and
4 to grow more seeds.

5 So if you don't apply the exhaustion
6 doctrine and allow someone to use it, you're choosing
7 patent rights over personal property rights, and that's
8 never been done in 150 years of this Court's exhaustion
9 cases.

10 JUSTICE BREYER: Don't people or animals eat
11 them?

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

14 JUSTICE BREYER: Well, then why is it the
15 only way you can do is to plant them? That isn't the
16 only thing you could do with it --

17 MR. WALTERS: Well, that's not use.

18 JUSTICE BREYER: You can buy them from the
19 grain elevator and sell them for other things.

20 MR. WALTERS: That's not use of the
21 invention, Justice Breyer. And exhaustion is about
22 conferring on the purchaser a right to use the
23 invention. There's no limit to Monsanto's --

24 JUSTICE BREYER: The invented thing. The
25 invented thing. The invented aspect of the seed is it

1 has a gene in it that repels some other insecticide or
2 something that they have. I understand that.

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

5 JUSTICE BREYER: You don't use that. I
6 don't think they used that particular -- well, go ahead.
7 You go ahead.

8 MR. WALTERS: There were other uses for the
9 computer chips, of course, that were asserted. And the
10 key was that those computer chips practiced the patent.
11 And you would swallow up the Exhaustion Doctrine
12 entirely if we just could think of other uses for these
13 things that have been sold.

14 The key is, does it use -- is the purchaser
15 allowed to use the invention? And under Monsanto's
16 theory, the purchaser isn't allowed to do that. And
17 that's no Exhaustion Doctrine at all --

18 JUSTICE BREYER: The people buying from
19 grain elevators are mostly people who take these
20 chips -- whatever they are, the seeds -- and they sell
21 them for making tofu, or they sell them to eat, or
22 this -- there are loads of uses, aren't there?

23 MR. WALTERS: But the only use of the
24 invention is to plant it, and that's the use that
25 Mr. Bowman makes.

1 JUSTICE SCALIA: Yes, but -- but that's --
2 nothing prevents him from planting it. What he is
3 prevented from doing is using the -- the consequences of
4 that planting, the second generation seeds, for another
5 planting. That's all he is prevented from doing. He
6 can plant and harvest and eat or sell. He just can't
7 plant, harvest, and then replant.

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

18 The other thing --

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

21 MR. WALTERS: Could you ask it again?

22 JUSTICE SCALIA: You know, you're saying
23 that you are preventing him from using it. He's not
24 prevented from using it. He can use it for what it's
25 meant for, for raising a crop. He just cannot use the

1 product -- that new crop -- for replanting. That's all.
2 He has to sell that new crop for feed or for some other
3 purpose. But to say that -- that he's prevented from
4 using what he has bought is simply not true. He can use
5 it, plant it, and harvest the crop.

6 MR. WALTERS: But you're saying that there's
7 no exhaustion in the progeny where he owns that seed
8 outright.

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

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 The case is submitted.

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

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