

1           IN THE SUPREME COURT OF THE UNITED STATES

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3   STEPHEN KIMBLE, ET AL.,                                 :

4           Petitioners   :   No. 13-720

5           v.   :

6   MARVEL ENTERPRISES, INC.                                 :

7   - - - - - x

8                         Washington, D.C.

9                         Tuesday, March 31, 2015

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11           The above-entitled matter came on for oral

12   argument before the Supreme Court of the United States

13   at 11:15 a.m.

14   APPEARANCES:

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16   Petitioners.

17   THOMAS G. SAUNDERS, ESQ., Washington, D.C.; on

18   behalf of Respondent.

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20   Department of Justice, Washington, D.C.; for United

21   States, as amicus curiae, supporting Respondent.

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

2 (11:15 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next this morning in Case 13-720, Kimble v. Marvel  
5 Enterprises.

6 Mr. Melnik.

7 ORAL ARGUMENT OF ROMAN MELNIK

8 ON BEHALF OF THE PETITIONERS

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

11 Brulotte's per se ban on patent royalties on  
12 post-expiration use should be discarded because it is a  
13 rule without a reason. Brulotte is widely recognized as  
14 an outdated and misguided decision that prohibits  
15 royalty arrangements that are frequently socially  
16 beneficial.

17 Brulotte suppresses innovation and  
18 interferes with the goals of the patent system,  
19 increasing the likelihood that potentially breakthrough  
20 discoveries by universities and research hospitals such  
21 as the Memorial Sloan Kettering Center will never reach  
22 patients and consumers. Discarding --

23 JUSTICE SOTOMAYOR: They are now, so what  
24 are they doing?

25 MR. MELNIK: I apologize.

1 JUSTICE SOTOMAYOR: I -- I mean, it's not  
2 like the industry has fallen apart. I don't see any  
3 examples of -- of this.

4 MR. MELNIK: Well, the -- the examples that  
5 we have are the amicus briefs. In other words, the  
6 entities that are -- that do this licensing on a  
7 day-to-day basis are telling the Court in their amicus  
8 briefs that the -- the Brulotte rule is having this  
9 suppressed effect; in other words, that certain  
10 licensing arrangements that would otherwise --

11 JUSTICE GINSBURG: Why -- why should that be  
12 so, given what you say? In -- in your brief you say,  
13 license -- this is at 9 and 10, bottom of 9 -- the  
14 "license payment terms, consequently, reflect the  
15 anticipated value of the authorization to use the  
16 patented invention before the patent expires."

17 All you have to do is make it clear that,  
18 although the payments continue after expiration, they  
19 are for the pre-expiration period.

20 So it's -- it's -- I don't understand why  
21 this should be so troublesome if the contract says these  
22 payments will be spread out over whatever period of  
23 time, but they are for the patent during the period when  
24 it was valid. If you say the next sentence is "even if  
25 they're nominally measured by post-expiration use, they

1     nonetheless represent an amortization of the predicted  
2     value of the pre-expiration authorization." If you say  
3     that in the contract, then I don't see where there's a  
4     problem.

5             MR. MELNIK:             The distinction, Justice  
6     Ginsburg, is between what you're paying for and how  
7     you're paying for it. The what that you're paying for  
8     is an estimate of the value of the use of the patent  
9     during the patent term.

10            What Brulotte currently permits is one  
11     method of how to pay for it, which is to defer payment  
12     into the post-expiration period. What Brulotte doesn't  
13     currently permit is to defer -- is to stretch the  
14     royalty base, to defer accrual into the post-expiration  
15     period. And deferred accrual allows parties to do  
16     something that deferred payment does not, which is to  
17     shift the risk of commercialization failure and  
18     innovation failure from the licensee to the licensor.

19            JUSTICE KAGAN:           Aren't there ways to get  
20     around that as well? I mean, why don't you just enter  
21     into a joint venture?

22            MR. MELNIK:             So, Justice Kagan, I guess my  
23     first answer to that is that's not the right question.  
24     The right question is, if you're prohibiting something  
25     that doesn't make sense, the initial question should be

1     why are you prohibiting it? But --

2             JUSTICE KAGAN:             Well, possibly, except that  
3     we have statutory stare decisis, and to the extent that  
4     we think something is not really causing a problem in  
5     the real world, why overrule something against that  
6     basic backdrop principle?

7             MR. MELNIK:             So the -- the next answer to  
8     your question, then, is that the -- the alternative  
9     arrangements are not risk redistributive in the same way  
10    that royalty -- that the deferral of accrual is  
11    risk-free distributive. What do I mean by that? If you  
12    stretch the royalty base into the post-expiration period  
13    in situations where you're -- where early stage  
14    technology is involved where there may not be any sales  
15    until fairly late and stretching into the  
16    post-expiration period, you allow the licensee to say,  
17    I'm going to take on this risk but in exchange,  
18    licensor, you're going to bear the risk that if the  
19    product fails, I won't have to pay much because if there  
20    aren't any sales, I don't have to pay you.

21            Payment postponement, for example, doesn't  
22    allow the parties to do that because even if you  
23    postpone the payment, you still owe. The obligation to  
24    pay has accrued during the term, and even if you have to  
25    pay later, you still have to pay. That's the

1 fundamental difference between payment postponement,  
2 which is not risk redistributive and -- which is  
3 permitted by Brulotte. And accrual postponement  
4 which --

5 JUSTICE KAGAN: Yes, but I was suggesting  
6 that either could be accomplished, both could be  
7 accomplished through other means, and particularly  
8 through just entering into a joint venture rather than  
9 having a license arrangement.

10 MR. MELNIK: So those kinds of arrangements  
11 may not be realistic for the kinds of entities that are  
12 most directly impacted by the Brulotte prohibition;  
13 universities, research hospitals particular --

14 JUSTICE KAGAN: Is that what it is? Because  
15 when I was looking at the amicus briefs here, I was  
16 struck by the fact that there really are -- are not  
17 companies on the amicus brief. There are not for-profit  
18 entities. It's all nonprofit entities. And is that  
19 because nonprofit entities have this particular problem,  
20 that they can't make the arrangements that would  
21 otherwise get around the Brulotte rule?

22 MR. MELNIK: Well, it's not all nonprofits.  
23 We had -- we had an amicus brief from Biotime which was  
24 a -- a private company's. But one of the -- one of the  
25 groups of entities that are most directly impacted are

1 universities, research hospitals, and the like because  
2 they're the ones where the -- the -- not all license --  
3 licensing situations are going to be a good fit for --  
4 for accrual deferral. In many situations, this kind of  
5 arrangement may not make sense for the parties, and they  
6 wouldn't enter into it.

7       One paradigmatic example in the situation  
8 where the parties may desire to defer accrual but are  
9 prohibited by Brulotte from doing so are very early  
10 stage technology. And who generates early stage  
11 technology? It's frequently universities, research  
12 hospitals, and the like. So, yes, those are entities --  
13 one of the groups of entities that are most directly  
14 affected by the --

15       JUSTICE KENNEDY:       Well -- well, you -- you  
16 quoted in -- in your brief extensively about quotes from  
17 the hospital briefs and -- and the -- and the research  
18 briefs. But these parties have recently been to  
19 Congress with reference to the whole drug and  
20 pharmaceutical industry, and Congress is certainly aware  
21 of this rule and has left it alone. And you're asking  
22 us now to add on to the remedies Congress has already  
23 given.

24       MR. MELNIK:       Well, Justice Kennedy, I would  
25 say that not so recently -- and I think that we have



1 demonstrated special justification within the meaning of  
2 this Court's case law for overruling this kind of  
3 precedent, and I would say that we have demonstrated it  
4 in four ways.

5 First, we have shown that since the Court  
6 considered *Brulotte*, the patent equals market power  
7 presumption has fallen, and it -- and it has fallen  
8 actually since the time -- last time that Congress  
9 looked at this in 1988.

10 There has been a foundational shift --  
11 second, there has been a foundational shift in  
12 competition law away from per se rules and toward  
13 contextualized rules such as the rule of reason.

14 Third, economists and other experts in the  
15 licensing and -- and patent field have reached a much  
16 more nuanced understanding of the economics of  
17 post-expiration royalties, an understanding that didn't  
18 exist at the time this Court has found --

19 JUSTICE BREYER: Is that -- you -- those are  
20 the three points, and I just wonder, imagine I have a  
21 piece of intellectual property which I have patented and  
22 now I have 55 potential licensees. And I say to each of  
23 them, I will license to you and you will pay me next to  
24 nothing for any use up to 20 years while you're figuring  
25 out how to use it. But if it turns out you use it, in

1 years 20 to 30, you pay me a lot for each use. Okay?

2 That's the problem, isn't it?

3 MR. MELNIK: Yes.

4 JUSTICE BREYER: Now I've done it for 55,  
5 and there are a lot of good reasons for getting them to  
6 do that. I understand the reasons. I just wonder how  
7 you reconcile that with the Constitution's requirement  
8 that patents are for limited terms, and statute which  
9 says the limited term is 20 years. Because if that  
10 means something, I suppose it means that after that  
11 statutory period of 20 limited years, people can use  
12 that intellectual property for free.

13 Now -- now, if it doesn't mean that, what  
14 does it mean? And if it does mean that, I mean, how did  
15 my example allow people to use it for free? Not -- I  
16 mean, they couldn't use it for free. They had to pay.

17 MR. MELNIK: The way that I would reconcile  
18 it, Justice Breyer, is -- is to decouple the notion of  
19 the right to exclude, which is what the statutory term  
20 is about, the right to prevent the public as a whole  
21 from using the patented invention from the specific  
22 royalty arrangement. Once, as -- as Chief Justice --  
23 Chief Justice Posner put it in Scheiber, once the patent  
24 expires expiration is accomplished what it was supposed  
25 to --

1 JUSTICE BREYER: It is. And everybody who  
2 might use this, by the way, any conceivable person,  
3 there were only 53 people who might ever use it, and I  
4 got 55 to sign up. And therefore, nobody's going to use  
5 it without paying. I'm just saying how, in my example,  
6 do we reconcile that with the constitutional and  
7 statutory mandate that after 20 years it's free?

8 MR. MELNIK: So, let me make two points.

9 First is we have to remember that what we're  
10 dealing with here is a per se rule. A per se rule  
11 prohibits all hypotheticals, not just one hypothetical.  
12 We're not advocating per se legality.

13 JUSTICE BREYER: In my case, it would be  
14 unlawful.

15 MR. MELNIK: I'm -- I'm not saying that. I  
16 was -- I was getting to the second point.

17 JUSTICE BREYER: What's the second point?

18 MR. MELNIK: The second point is that -- is  
19 that in the -- in the post-expiration period, even in  
20 your situation, what we're really dealing with are the  
21 prices and outputs at which the public is going to  
22 access the invention.

23 JUSTICE BREYER: And I'll tell you, in my  
24 example, the price and output is a big payment to the  
25 owner of the patent in year 29. That's the price and

1 output. And the output is restricted because the price  
2 is up.

3 MR. MELNIK: So by -- during the term, the  
4 license -- the -- the licensees got to use the  
5 invention.

6 JUSTICE BREYER: Well, I know there are a  
7 lot of good reasons for it. My simple question was how  
8 you reconcile the fact that everybody is paying a lot of  
9 money to use this intellectual property in year 29 with  
10 what seems a statute and a Constitution that say it  
11 should be free at that time. That's what I'm asking. I  
12 don't want to ask it again because I don't like to ask a  
13 question more than four times.

14 MR. MELNIK: I -- I apologize if I have not  
15 been clear in my answer. Let me take another shot at  
16 this.

17 The -- the answer to your question is that  
18 one needs to -- in our view, is that one needs to  
19 de-couple the right -- the right to exclude, which is  
20 what the term is about, from the royalty arrangement.  
21 Understand --

22 CHIEF JUSTICE ROBERTS: If by that -- if by  
23 that you mean that there will be a lot of new people  
24 coming in who -- because they don't have to pay the  
25 license fee in year 29, and it's very easy for them to

1 figure out what to do because they can copy the patent  
2 and anybody can come and see, I can make one of these.  
3 All the competition -- in fact, everybody who was in the  
4 business is paying an extra -- has to charge an extra \$2  
5 because of this license fee, I won't have to charge an  
6 extra \$2. I'll go into that business and make a lot of  
7 money.

8 MR. MELNIK: That's certainly correct, Mr.  
9 Chief Justice. And that's a point that we made in the  
10 brief.

11 JUSTICE BREYER: It's correct only if,  
12 unfortunately, to get into this business because the  
13 patent happens to be -- to do with a gizmo, and the  
14 gizmo is 14 feet deep buried inside a computer and the  
15 computer is 19,000 meters tall, and so there are only 55  
16 people, conceivably, who could get into this business,  
17 and they are all licensed.

18 MR. MELNIK: So if the question is can  
19 one -- can one come up with a hypothetical where the  
20 arrangement would be impermissible because it would  
21 violate the rule of reason, the answer is yes.

22 JUSTICE SOTOMAYOR: But why are we  
23 importing -- it's a fair question by the Respondents and  
24 others. Why are we importing antitrust principles,  
25 which already have their own set of problems. We have a

1 rule of reason, and we've now done a quick look instead  
 2 of a per se look, and everybody complains about the  
 3 expense related to the rule of reason. Why are we  
 4 importing into patent law the economic principle? You  
 5 fault us for doing that in our original decision, but  
 6 you're asking us to perpetuate that anyway. Antitrust  
 7 law could take care of this by itself. We don't have to  
 8 import this into patent law at all.

9 MR. MELNIK: So the -- I guess I would  
 10 question the premise that -- Justice Sotomayor, that  
 11 we're asking you to import the rule of reason because  
 12 the current standard that the Federal circuit and other  
 13 courts of appeals have applied to -- to analyze patent  
 14 misuse and have been doing it for decades is already the  
 15 rule of reason.

16 JUSTICE SOTOMAYOR: Well, they use it for --  
 17 for coercion and fraud. So why don't we do what one of  
 18 your amici suggested or one of the amici suggested,  
 19 which is to say reverse Brulotte -- Brulotte, and let  
 20 coercion and fraud exist.

21 MR. MELNIK: That would be an approach that  
 22 we also would think would make sense. That would be  
 23 drawn on this Court's precedent in Zenith, and we  
 24 would --

25 JUSTICE SOTOMAYOR: And I bet that in -- how

1 long has Brulotte been around?

2 MR. MELNIK: 50 years.

3 JUSTICE SOTOMAYOR: In another 50 years,  
4 there'll be an attorney sitting here telling us that we  
5 were wrong in that presumption, too. Why don't we just  
6 let Congress fix it, because if it's wrong, people can  
7 complain to it.

8 MR. MELNIK: Well, so the answer to the  
9 question is that we -- I would submit that we have  
10 demonstrated the special -- special justification that  
11 this Court's precedent requires.

12 JUSTICE KAGAN: Well, could you go back to  
13 that?

14 MR. MELNIK: Yes.

15 JUSTICE KAGAN: Because you -- you named  
16 three things, and honestly, it all seemed to my ears  
17 different variants of Brulotte is wrong. But, of  
18 course, special justifications demand more than the  
19 decision is wrong. So let's even say the decision is  
20 wrong. Economists think the decision is wrong by --  
21 everybody thinks the decision is wrong. That's not a  
22 special justification. What's the special  
23 justification?

24 MR. MELNIK: The distinction that I would  
25 draw, Justice Kagan, is -- is between the -- the -- the

1 decision is wrong argument is these arguments were  
2 presented to the Court at the time the Court made the  
3 decision, and now you are rearguing those arguments.  
4 That's the decision is the wrong argument. The points  
5 that I were making were new things that had emerged  
6 since the Court decided Brulotte. None of those  
7 arguments were presented to the Court.

8 JUSTICE KAGAN: Well, but usually we ask for  
9 more than that. Usually we ask for something that says  
10 this is just unworkable. We thought it was right  
11 before, but we can't make it work now. That's not this.  
12 Or we say this is completely anomalous. It just  
13 can't -- it -- it's a relic of a past system that is  
14 utterly out of kilter. I don't think that's this  
15 either, you know. It may or may not be right, but  
16 there's nothing incredibly sort of weird and -- and  
17 anomalous about it. I mean, usually we look for things  
18 like that. And where are those things?

19 MR. MELNIK: Well, one thing that we do have  
20 in this case that's -- that's unusual is the complete  
21 lack of reliance impact that this Court has overruled.  
22 That make -- for example, that makes --

23 JUSTICE KAGAN: Well, even if I assume that  
24 that's right, that there's no special reliance push,  
25 still we have a very strong rule of statutory stare



1     decisis. We need some special justification to break  
2     away from that rule. I guess I'm still waiting to hear  
3     what it is other than, you know, we now know better than  
4     we knew before.

5             MR. MELNIK:             So the -- I had 4 points. I  
6     didn't get to get my fourth point out.

7             So the fourth point was that we have a  
8     better understanding of the real world impact, of the  
9     innovation suppressing effect of these kinds of royalty  
10    arrangements that we're hearing from the amicus briefs.

11            JUSTICE KAGAN:            But that surely is a  
12    question for Congress, to go back to what Justice  
13    Sotomayor was saying, you know, to the extent that  
14    there's a real world problem, and maybe there is and  
15    maybe there's not, it's a little bit hard to tell from  
16    the amicus briefs. I mean, they're surely better  
17    equipped than we are to deal with that.

18            MR. MELNIK:            So the same thing could have  
19    been said, for example, in Illinois Tool Works which  
20    dealt with the exact same prior congressional enactment,  
21    with the exact same-- one of the same bills that was --  
22    that was referred to in the red brief. And this Court,  
23    nevertheless, overruled that that equals market power  
24    presumption responding to the overwhelming criticism of  
25    that presumption in the expert literature.

1           We have the same here.           We have near  
2 unanimous consensus in the expert literature that all of  
3 these new understandings have emerged since Brulotte has  
4 been decided that undermine every single premise on  
5 which Brulotte was based.

6           And the same was true in *Blonder-Tongue*,  
7 which was the subject of the discussion in the first  
8 case this morning where this Court overruled prior  
9 decisions in -- and changed a judge-made rule in the  
10 patent law context. And the government in that case  
11 filed an amicus brief that said the fact that Congress  
12 has failed to act even though it has considered the  
13 issue is, quote-unquote, "of no significance."

14           So if the Court could do it in  
15 *Blonder-Tongue* and the Court could do it in *Illinois*  
16 *Tool Works*, the Court could do it here.

17           JUSTICE GINSBURG:           That was a case about  
18 preclusion. It was -- it was really not a patent issue  
19 like we were discussing.

20           MR. MELNIK:           Well, you're -- you're correct,  
21 Justice Ginsburg, that it was a case about mutuality of  
22 estoppel in patent litigation, but it -- it implicated  
23 very important patent policy issues because it asked the  
24 question of if you invalidate the patent once, is it  
25 invalid for all time, or can you relitigate the issue?

1     So yes, you can say that it was a procedural issue, but  
2     it was an issue that implicated core patent law.

3             JUSTICE GINSBURG:             But it was a -- it was a  
4     decision that applies -- generally applies across the  
5     board, not just in patent litigation .

6             MR. MELNIK:             My recollection -- and I  
7     apologize because it's been a few weeks since I read  
8     Blonder-Tongue -- my recollection is that the issue was  
9     specific to mutuality of estoppel in patent litigation.

10            JUSTICE KAGAN:            I guess what it seems to me  
11    you are arguing, and maybe we've done this before, and  
12    maybe we haven't, but what it seems to me you are  
13    arguing is a sort of new rationale for when to depart  
14    from statutory stare decisis, and that new rationale is  
15    when a prior decision is based on what we now view to be  
16    naive economics. I mean, that's the fundamental  
17    argument here, isn't it?

18            MR. MELNIK:            It's -- it's one of the  
19    arguments. I think it's -- you also have to look at a  
20    new understanding of the real-world impact. And it's  
21    not -- it's not -- it's not just the impact that -- that  
22    Chief Judge Posner and the other --

23            JUSTICE KAGAN:            Okay, so let's say it's  
24    those two things, because we think a prior decision is  
25    based on naive economics, and because we think that that

1 decision has some bad real-world consequences. But  
2 again, both of those things seem to me to be  
3 congressional choices, much more than judicial choices,  
4 that it's Congress that's better positioned to assess  
5 the real-world impact, and it's Congress that's better  
6 positioned to say whether these economic theories are  
7 indeed so naive.

8 MR. MELNIK: If -- I guess I would submit  
9 that if that were the case, then the results in Illinois  
10 Tool Works and Blonder-Tongue would be different than  
11 they were. The principle that you're espousing can't be  
12 a categorical principle. Stare decisis is after all a  
13 practical doctrine.

14 JUSTICE BREYER: Economics certainly plays  
15 an important role in antitrust. But what I have learned  
16 that economists frequently don't take account of is the  
17 administrative cost of administering by judges a complex  
18 rule. The point of my questions was to suggest to you  
19 how complex that would be. I mean, when, under a rule  
20 of reason, which you advocate, would something like this  
21 be lawful or unlawful? Does it depend upon how many  
22 people you license? Does it depend upon the height of  
23 entry barriers, something that is notoriously difficult  
24 to estimate? Does -- and what is the principle under  
25 which a rule of reason is violated?

1           None of those things are decided.           The --  
2   you're asking us to decide things under your system that  
3   I would find very difficult to decide. And the virtues  
4   of a simple rule are obvious. So it isn't even obvious  
5   to me that putting stare decisis to the side, it would  
6   be wise, since none of the economists, even including  
7   Judge Posner, do, in fact, discuss this problem of  
8   administering a complex rule of reason rule -- rule of  
9   reason in a complicated area, 50 years after the simple  
10   rule has been in effect.

11           MR. MELNIK:           So two responses to your point,  
12   Justice Breyer. One is I think it's again important to  
13   remember that the rule -- the question is not whether  
14   the rule of reason should apply to patent misuse. The  
15   rule of reason already applies to patent misuse under  
16   decades of Federal Circuit precedent. That's the state  
17   of the world right now. The question is only whether  
18   these particular types of royalty arrangements should be  
19   aligned with the existing rule of reason regime for  
20   patent misuse that already exists in the world.

21           The second point is that I think we need to  
22   remember that these are negotiated transactions, that  
23   this kind of royalty arrangement will only exist if the  
24   licensor and the licensee both agree that it makes sense  
25   for them. And any answer can be priced into the

1 license. After all, who is going to bear the risk of  
2 the rule of reason analysis? It's primarily going to be  
3 the licensor, because the licensee will at some point,  
4 presumably after expiration, will say, I don't want to  
5 pay royalties anymore. And it will -- would be the  
6 licensor who will, at that point, have to initiate the  
7 lawsuit to collect the royalties.

8 CHIEF JUSTICE ROBERTS: I -- it seems to me  
9 that the logic of your position is going to govern most  
10 of what you -- you say, oh, you can always look at it  
11 under rule of reason, but it's hard for me to imagine  
12 what type of case would fail the rule of reason given  
13 your logic for overturning Brulotte in the first place.

14 MR. MELNIK: Well --

15 CHIEF JUSTICE ROBERTS: Just give me an  
16 example, that this would be permitted under your  
17 position but would violate the rule of reason.

18 MR. MELNIK: So I suppose the classic  
19 example would be the one that Professor Hovenkamp and  
20 his coauthors give at page 3-34 of the IP and Antitrust  
21 Treatise. This is at the end of Section 3.3c.

22 CHIEF JUSTICE ROBERTS: Maybe you could  
23 remind me which one it is.

24 MR. MELNIK: I was giving the citation just  
25 so that you could look it up later, because I'm sure I

1     won't be as able to summarize it as ably as they can,  
 2     but they basically set out four conditions: One, the  
 3     patent gives the patent owner market power in the  
 4     relevant market; two, the license requires licensees to  
 5     pay royalties on all products sold in the market  
 6     regardless of whether or not they use the patented  
 7     technology, so there is no -- even if you stop paying  
 8     the technology -- using the technology, you still have  
 9     to pay. There are substantial entry barriers, and the  
 10    licensees make up most of the market. I --

11           JUSTICE SOTOMAYOR:           I failed the antitrust  
 12    case. Couldn't the licensee come in and file an  
 13    antitrust case?

14           MR. MELNIK:           That would -- Professor  
 15    Hovenkamp and his coauthors raised that as -- as a  
 16    situation where there -- where there would be questions  
 17    raised about whether that would violate the rule of  
 18    reason. That was their example. The Chief Justice  
 19    asked me for an example from the literature. That  
 20    was -- that's an example in the academic literature.

21           JUSTICE SOTOMAYOR:           It goes back to my  
 22    original question. Wouldn't the antitrust laws  
 23    themselves already address that situation?

24           MR. MELNIK:           The antitrust --

25           JUSTICE SOTOMAYOR:           Independent of Brulotte

1 or independent of patent law.

2 MR. MELNIK: The antitrust laws would also  
3 address that situation.

4 If I may reserve the balance of my time.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
6 Mr. Saunders.

7 ORAL ARGUMENT OF THOMAS G. SAUNDERS

8 ON BEHALF OF RESPONDENT

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

11 This case should begin and end with stare  
12 decisis. Brulotte remains correctly decided and serves  
13 important public interest grounded in patent law.  
14 But at this point, were any change needed, Congress  
15 would be the appropriate institution to balance the  
16 competing arguments, and if you consider the public and  
17 private reliance interests. Indeed Congress  
18 specifically considered proposals to modify Brulotte,  
19 and declined to do so even while making other changes to  
20 patent misuse.

21 JUSTICE GINSBURG: After 1988? How recently  
22 has Congress taken a look at Brulotte?

23 MR. SAUNDERS: The -- the example I'm  
24 speaking of is 1988. I -- I don't know more recently,  
25 but of course, even without that specific compelling



1 example of them having taken a look at it, made other  
2 changes to patent misuse, and not changed it, the point  
3 remains that Congress could look at it at any time, and  
4 all of the complicated economic --

5 CHIEF JUSTICE ROBERTS: Well, that really  
6 proves too much. I mean, we overruled, you know,  
7 Lowe's, Albrecht, Arnold, Schwinn, those are all cases  
8 from the mid 1960's, just like this one was. It's a  
9 problem with the '60s, and we're going -- the same  
10 argument you make now should have prevented us from  
11 doing that in all those other cases.

12 MR. SAUNDERS: I -- I think that this Court  
13 has recognized that in the antitrust context, where you  
14 have such a barebones statute and a long history of very  
15 minimal congressional action in that area, this Court  
16 has had a greater willingness to overturn its precedent.  
17 In the Patent Act, this is an area where Congress has  
18 revisited it frequently, 33 times since 1952; important  
19 to this case, has revisited the patent term, changed the  
20 patent term, added patent term extensions, patent term  
21 adjustments, carefully calibrating the incentives to  
22 strike what it considers to be the correct balance with  
23 Brulotte as settled law. And so there's a risk in  
24 overturning Brulotte of upsetting that balance.

25 I would also say as the antitrust cases, and

1    this point's made very nicely in the Washington Legal  
2    Foundation amicus brief, that the reliance interests in  
3    that situation looks different. From the perspective of  
4    the party that's going to be held liable for paying out,  
5    there is a big difference in moving from a per se rule  
6    of liability -- no one's out there relying and saying,  
7    well, I'm certainly going to be liable if I do this --  
8    moving from that to rule of reason analysis. Whereas  
9    here, for the party that's going to be required to pay  
10   the perpetual royalties, what you have under existing  
11   law is the shield of Brulotte in place. And you'd be  
12   talking about removing that shield after the fact.

13           And we have a law here, you know, there's a  
14   reason that, in addition to the idea of statutory stare  
15   decisis, we give particular effect to stare decisis when  
16   we're talking about contracts and property right,  
17   because for 50 years, parties have entered into  
18   agreements and made post-expiration business decisions  
19   with Brulotte as settled law.

20           JUSTICE GINSBURG:           But these parties didn't  
21   even know about Brulotte. I mean --

22           MR. SAUNDERS:           Right, in this particular  
23   case, but I think it would be hazardous to extrapolate  
24   from that to -- to disregard the reliance interest for  
25   something that's been in law -- been in place for so

1 long, and which there have been so many patent licenses,  
2 and in which, as we cite in our brief, you have  
3 treatises.

4 JUSTICE SCALIA: I don't understand what  
5 the -- what the reliance was -- what -- what -- how did  
6 they rely?

7 MR. SAUNDERS: They --

8 JUSTICE SCALIA: By not including a  
9 provision for post-expiration payments?

10 MR. SAUNDERS: That would be one form, and  
11 the treatise we cite in our brief says, quote, "it's not  
12 always necessary to specify the term."

13 JUSTICE SCALIA: How would we be  
14 disappointing that reliance? I don't understand what  
15 reliance we would be disappointing.

16 MR. SAUNDERS: If someone doesn't specify  
17 the term in their -- the licensee, because of the -- the  
18 rule of Brulotte cuts off the royalties after patent  
19 expiration, if because of that they don't specify the  
20 expiration term --

21 JUSTICE SCALIA: The -- the only person I  
22 think we could be disappointing is the person who knows  
23 of this exotic law and enters a contract which provides  
24 for post-termination payments knowing that that will be  
25 invalid. Now, him we would disappoint, wouldn't we?

1 (Laughter.)

2 MR. SAUNDERS: Someone who in these  
3 complicated negotiations may not think it's necessary to  
4 ask for a particular term --

5 JUSTICE SOTOMAYOR: That's been conceded  
6 here. Marvel has said in this litigation, in your  
7 brief, I believe, that they didn't know about Brulotte.

8 MR. SAUNDERS: That -- that's correct in  
9 this litigation.

10 JUSTICE SOTOMAYOR: So this hasn't -- this  
11 is no reliance by them.

12 MR. SAUNDERS: No direct reliance by them.  
13 I think it's -- which doesn't mean it's not happening  
14 for other people, and I also think it's important to  
15 remember that the idea of indirect reliance --

16 JUSTICE SOTOMAYOR: I guess the only person  
17 who would be injured would be the licensor because  
18 they'd be the only one acting in negotiation without  
19 knowing the legal rule.

20 MR. SAUNDERS: No, I --

21 JUSTICE SOTOMAYOR: It should be Mr. Kimble  
22 who would be disappointed if we upheld Brulotte, because  
23 he's going to be deprived of royalties that he thought  
24 he was going to earn.

25 MR. SAUNDERS: No. I don't think

1     that that's the correct way of looking at it. And I  
2     also think it's important to remember that when you have  
3     a settled legal rule like this, it affects whether  
4     people even spot the issue. This issue has been taken  
5     off the table for 5 decades. No one's reading cases  
6     about the horrors of perpetual royalties. No one is  
7     going to continuing legal education courses and being  
8     told about this issue. Maybe --

9             CHIEF JUSTICE ROBERTS:             The economists are.  
10    I mean, the economists are almost unanimous that this is  
11    a very bad rule.

12            MR. SAUNDERS:             I --

13            CHIEF JUSTICE ROBERTS:             So it's not as if  
14    nobody is thinking about it.

15            MR. SAUNDERS:             I'm talking about the parties  
16    that are engaging in those negotiations. But I also  
17    think that the economics here are disputed. I would  
18    refer the Court to the Baxter article that we cite,  
19    William Baxter. The William Baxter, before he was head  
20    of the antitrust division, does the economic analysis  
21    here looking at the effects on the marginal costs after  
22    patent expiration.

23            CHIEF JUSTICE ROBERTS:             What's the date of  
24    that article?

25            MR. SAUNDERS:             1966.

1 CHIEF JUSTICE ROBERTS: The whole point of  
2 the other side is that there's been a development in  
3 economic thought in the intervening 50 years.

4 MR. SAUNDERS: I -- there has been -- there  
5 have been developments in economic thought, but those  
6 developments themselves are currently being challenged  
7 in terms of analysis of -- that the -- the  
8 hyper-rational model --

9 JUSTICE KENNEDY: Is one of the arguments  
10 that there have been years of reliance with making joint  
11 venture agreements, with making other contracts that  
12 don't -- that don't depend on royalty payments, or that  
13 there's ways of getting around this? Because if that's  
14 an argument, it seems to me that that cuts both ways.  
15 It's easy to get around this rule I -- I take it in many  
16 instances by just having a joint venture agreement.

17 MR. SAUNDERS: There -- there are many  
18 alternatives that would achieve the --

19 JUSTICE KENNEDY: But doesn't that --  
20 doesn't that cut against you as much as it cuts in your  
21 favor?

22 MR. SAUNDERS: No, I don't think so, because  
23 you still may have the parties out there who will be  
24 left exposed. You also have had what I would say is the  
25 legislative reliance in terms of Congress tinkering with

1 the Patent Act and setting very specific balances with  
2 Brulotte as settled law.

3 And in addition to all this, I mean, the --  
4 we've been talking in the -- the economic criticism  
5 coming from the antitrust perspective, but it's  
6 important to remember here that this is originally  
7 grounded in patent policy. And what you have is  
8 Congress has set a limited window of opportunity in  
9 which you have the opportunity to capture, quite  
10 frankly, not just the value of your own invention, but a  
11 certain amount of follow-on invention that may build on  
12 and incorporate your invention, and that is set within  
13 that particular window.

14 And once you begin going beyond that, by  
15 contract, there's increased risk that what's going to  
16 cause sales to spike in the 30th year is not your own  
17 original innovation, but the follow-on innovation, the  
18 innovation of your licensee.

19 CHIEF JUSTICE ROBERTS: But everybody is --  
20 can do -- can practice the patent after its expiration.  
21 And to the extent a licensee has to pay higher -- charge  
22 higher prices because it has to make the license  
23 payments, that's an open invitation to people to enter.

24 MR. SAUNDERS: It may be, but the  
25 licensee --

1 CHIEF JUSTICE ROBERTS: And those people are  
2 not inhibited by the patent because the patent term  
3 has -- was limited to the 20 years specified by  
4 Congress.

5 MR. SAUNDERS: The -- the licensee though  
6 is -- may be in the best position to be engaging in that  
7 follow-on innovation and indeed, the same thing could  
8 have been said about this Court's decision in Scott  
9 Paper or even in Lear v. Adkins before Blonder-Tongue,  
10 which you would say, well, that person is the only  
11 person who is on the hook and they may continue paying,  
12 but the rest of the public could practice the expired  
13 patent in Scott Paper. Or the rest of the public could  
14 bring their own invalidity challenge --

15 CHIEF JUSTICE ROBERTS: I suppose there  
16 would be barriers to entry in particular cases and  
17 perhaps those are situations in which the rule of reason  
18 could be applied. But otherwise, in a competitive  
19 economy, the idea that you know exactly what you have to  
20 do to make a product and this other person is selling  
21 it, you know, for \$2 a widget more than you can, that  
22 seems to me to be a powerful incentive for -- for entry.

23 MR. SAUNDERS: It may be an incentive for  
24 entry, but it still conflicts with the long line of  
25 cases recognizing the patent policy interest in a



1 completely free public domain and the issue that is  
2 established in Scott Paper. This -- Brulotte followed  
3 very logically from Scott Paper, which is that we are  
4 not indifferent to the individual licensee. When that  
5 licensee ties their hands and obligates themselves to  
6 that ongoing royalty obligation, that in turn is  
7 affected by the public interest. And so Scott Paper --  
8 it was no accident that the courts of appeals were all  
9 reaching the same result as Brulotte based on the  
10 authority of Scott Paper, which Petitioners have not  
11 asked this Court to overrule.

12         So I think that although there -- there can  
13 be nuanced economic arguments when we look at this in  
14 the antitrust frame, we may be talking about market  
15 entry in some situations and not in others. That wasn't  
16 the way that Brulotte was approaching the question. And  
17 that if you move solely to a rule of reason analysis,  
18 all you're offering is a remedy that's already  
19 available. There could already be an antitrust suit in  
20 this case. So it effectively eliminates any separate  
21 patent-based doctrine in this area.

22         And that is a big step that affects the  
23 balance --

24         JUSTICE SOTOMAYOR:             Well, that's an  
25 interesting issue because I agree with you, that I don't

1 know why we need an antitrust test that already exists  
2 with respect to any patent and its use after its  
3 expiration date. But what do we substitute it with?  
4 Meaning, you -- you're saying a patent-based system. So  
5 if we're thinking of substituting it, how would you do  
6 it?

7 MR. SAUNDERS: Well, it's not -- it's not a  
8 substitution. It's that the Brulotte rule --

9 JUSTICE SOTOMAYOR: Well, it has -- the  
10 Brulotte rule was to ensure no patent owner extended its  
11 -- its monopoly against the licensee. That the  
12 licensee, like the general public, should be free to use  
13 the patent. So what do we say to keep that up without  
14 using the rule of reason?

15 MR. SAUNDERS: Well, it's free -- that  
16 they're free to use the patent --

17 JUSTICE SOTOMAYOR: Yes.

18 MR. SAUNDERS: -- and that to charge  
19 royalties for that is -- is -- it conflicts with that  
20 policy because it's affecting their decision-making.  
21 It's an ongoing marginal cost and I think that it's very  
22 artificial to drive this -- this wedge between the right  
23 to exclude and royalties. The patent right is a bundle  
24 of rights. You can have a right to exclude, you could  
25 push everyone out of the market and practice yourself.

1           As a practical matter, the real value of the  
2   vast majority of patents, particularly after eBay where  
3   you may not get injunctive relief, is the statutory  
4   right to damages. Damages defined in Section 284 as  
5   being, at a minimum, a reasonable royalty.

6           So you have a system set up in which one of  
7   the sticks in that bundle of rights being given to you  
8   by Congress for that limited term is your right to  
9   engage in royalties.

10          And so I don't think we can drive this  
11   artificial wedge between --

12          JUSTICE SOTOMAYOR:           Well, I know you don't  
13   want us to. But let's assume someone wants to, that we  
14   think Brulotte was wrong economically. We buy the  
15   arguments of the other side, that it hurts the market.  
16   How would you substitute? How would you think you would  
17   protect your interest without using the rule of reason?

18          MR. SAUNDERS:                Without -- I mean, if we are  
19   talking about fallbacks and I assume the question is  
20   assuming that we've gotten past stare decisis.

21          JUSTICE SOTOMAYOR:           Exactly.

22          MR. SAUNDERS:                Then I think that, at a -- a  
23   minimum, you need to have what we have discussed as  
24   being a presumption against this practice. And if there  
25   are specific instances in which someone can come in and

1 show that this comports with patent policy, and this is  
2 going to be pro-innovative, then they can litigate that.

3 But I think to go to Justice Breyer's  
4 points, you're -- you're talking about, on one hand, as  
5 Justice Kagan's questions are eliciting, very  
6 speculative and uncertain harm, given the flexibility  
7 that's already allowed to amortize payments under  
8 Brulotte; and, on the other hand, the certainty and  
9 expense of a very difficult to apply legal regime.

10 CHIEF JUSTICE ROBERTS: If you -- but  
11 amortizing the payments under Brulotte is very  
12 restrictive. What you're saying, those payments have to  
13 be related in some sense to the patent period, you  
14 cannot take into account events after that. And yet I  
15 would think one of the risks are, well, maybe we'll be  
16 able to turn this invention into something or maybe we  
17 won't, and so we have to give, you know, license fees  
18 that take that contingency into account. But you can't  
19 do that under Brulotte, because that can only refer to  
20 the period that's left on the patent.

21 MR. SAUNDERS: Right. Under Brulotte, you  
22 have -- you have 20 years in which you can do absolutely  
23 anything, can account for all -- all of your risks in  
24 that period in terms of whether the product is taken  
25 off. And what you can't do under Brulotte is say, if

1 the success, if -- if this is accruing on use after that  
2 20-year period, then we're going to be capturing that.  
3 But I think that -- that crystallizes the problem, the  
4 conflict between Petitioner's position and the patent  
5 policy here, because what you're saying really saying  
6 is, my invention is such that 20 years isn't long enough  
7 for me, it's not going to realize a success until after  
8 the 20-year period.

9       The fact that you may not be able to capture  
10 that is a direct consequence of the decision Congress  
11 made when it set the patent term. And, in fact, for the  
12 concerns that are raised by particular industries,  
13 those -- those are concerns that Congress has not been  
14 deaf to it -- to them. It passed the Hatch-Waxman Act  
15 in 1984 specifically targeted to the pharmaceutical  
16 context. People had concerns about patent life being  
17 consumed during patent examination. Congress came back  
18 in 1999, and set up a series of patent term adjustments  
19 to compensate for that.

20       And if there are any industry-specific  
21 concerns, given the complexity of the economics here,  
22 given the disputes that we're having about the reliance  
23 interest, this is quintessentially a task for Congress  
24 to weigh at this point, particularly since we're talking  
25 about a rule that has stood for 50 years, and during

1 that time, has become part of the fabric of the law.

2 If this Court has other questions?

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Stewart.

5 ORAL ARGUMENT OF MALCOLM STEWART

6 FOR THE UNITED STATES, AS AMICUS CURIAE,

7 SUPPORTING RESPONDENT

8 MR. STEWART: Mr. Chief Justice, and may it  
9 please the Court:

10 This Court's decision in Brulotte is not an  
11 outlier, but instead fits comfortably within a  
12 substantial body of decisions that recognize a strong  
13 Patent Act policy favoring unrestricted public access to  
14 unpatented and previously patented inventions, and these  
15 cases fall into two basic categories.

16 The -- the first is cases like Bonito Boats,  
17 Compco, Sears Roebuck, where the Court held to be  
18 preempted State laws that would provide patent-like  
19 protection to inventions that either were not patentable  
20 under Federal law or inventions as to which a Federal  
21 patent had expired. And typically, those State laws  
22 that were held to be preempted took the form of  
23 prohibitions on the copying of products that were  
24 already in -- in the market. And -- and the Court in  
25 those decisions didn't apply anything that looked like

1 rule of reason analysis. It really didn't apply  
2 economic analysis at all.

3 It didn't purport to say that the economy  
4 would be worse off if these laws were allowed to be  
5 enforced. It simply said those laws are inconsistent  
6 with the balance that Congress has struck, both between  
7 what is patentable and what is unpatentable, and the  
8 balance that Congress has struck as to what the length  
9 of patent protection should be.

10 And the Court could have drawn a sharp  
11 distinction between prescriptive State laws and private  
12 contractual arrangements, but it didn't.

13 And I think in addition to Brulotte, the two  
14 cases that I would point to that fall into the second  
15 category are the cases that Mr. Saunders has mentioned,  
16 Scott Paper and Lear. In Scott Paper, the Court said  
17 that if even a single licensee was allowed to enter into  
18 a binding restriction on his use of the patented  
19 invention after the patent expires, the consuming public  
20 would be deprived of full unrestricted access to the  
21 patented invention.

22 And -- and two points there are crucial.  
23 The first is the Court recognized that even though the  
24 restriction that was sought to be applied in Sears would  
25 bind only a single person, would -- wouldn't prevent

1 others from using the patented invention after the  
2 patent expires. Nevertheless, that was regarded as a  
3 restriction inconsistent with Federal patent policy.  
4 And the Court explained that was so in part because when  
5 a single licensee is restricted in his ability to use  
6 the formerly patented invention, it's not only he who  
7 suffers; it's the consuming public who could otherwise  
8 hope to buy the products that he manufactures.

9 And -- and the second case is Lear, where  
10 the Court held after Brulotte that even when the -- a  
11 licensee has entered into a contractual promise not to  
12 challenge the patent and to continue to pay royalties  
13 during the pendency of any challenge that may arise, the  
14 licensee can repudiate the license, can challenge the  
15 patent itself, can cease paying royalties. Obviously,  
16 it take -- the licensee, in that circumstance, takes the  
17 chance that it may have to pay damages if the patent is  
18 held to be valid -- if the patent is held to be valid.  
19 But if a licensee is correct, if the patent is invalid,  
20 its contractual arrangement will not prevent it --

21 JUSTICE SOTOMAYOR: Mr. Stewart, do you take  
22 issue at all with the economic theory of all of the  
23 amici that have filed in the antitrust area saying this  
24 makes no sense --

25 MR. STEWART: I -- I --



1 JUSTICE SOTOMAYOR: -- economically?

2 MR. STEWART: I'd say three -- we -- we do  
3 take issue to some extent, because at least some of the  
4 criticisms are based on the misconception that Brulotte  
5 prohibits extending royalty payments out past the date  
6 of patent expiration, and Brulotte properly understood,  
7 as the Petitioners recognize, prohibits royalties that  
8 accrue based on post-expiration use, but it doesn't  
9 prohibit the post-expiration payments of royalties that  
10 are calculated based on use during the patent. So to --  
11 to that extent, we do disagree.

12 We -- I think also, a lot of the antitrust  
13 criticism has been to the effect that -- and -- and we  
14 agree with this as far as it goes -- that viewed as a  
15 matter of modern antitrust law, a -- a per se rule of  
16 illegality would not be warranted because the per se  
17 rule is reserved for situations in which rule of reason  
18 analysis would always or almost always condemn the  
19 practice.

20 And so if a particular practice is  
21 procompetitive and even of significant range of cases,  
22 it should be analyzed under the rule of reason for  
23 antitrust purposes, and -- and we don't disagree with  
24 the -- the critique that Brulotte -- the Brulotte rule  
25 would not be a sound one of antitrust policy.

1           But even to say rule of reason should be  
2   applied because this is not always anticompetitive is  
3   not going as far as saying that, on balance, the  
4   Brulotte rule causes more economic harm than benefit.  
5   I -- we don't -- I don't know to what extent the  
6   economists have really made that case. We don't think  
7   it's been proved one way or the other. It seems to us  
8   to be a criticism that -- that's much more soundly  
9   directed at -- at -- to -- to Congress.

10           That the other thing that I would say  
11   about --

12           JUSTICE SCALIA:           Excuse me. What -- what  
13   benefit do -- do you see coming from the rule? I mean,  
14   if you're just analyzing it, you know, economically as  
15   we would do for antitrust analysis --

16           MR. STEWART:           The --

17           JUSTICE SCALIA:           -- what -- what are the  
18   economic benefits of the rule?

19           MR. STEWART:           Arrangements like the ones at  
20   issue here can cause economic harm in the sense that  
21   they prevent the licensee from making unrestricted use  
22   of the product after the license expires. The licensee  
23   may, in certain circumstances, determine that it's --  
24   it's not feasible to sell the thing at a profit if it  
25   has to pay the royalties. At the very least, it will

1     presumably bake the royalties into the price it charges  
2     to consumers.

3             Now, there -- there is an argument on the  
4     other side, this is more than made up for by the fact  
5     that the licensee will presumably be charged less while  
6     the patent is in force.

7             JUSTICE SCALIA:             That -- they are the harms.  
8     What -- what are the benefits?

9             MR. STEWART:             The benefits in -- in terms of  
10    economics are that the licensee or after the -- the  
11    patent expires can make decisions about whether to  
12    exploit the invention, what sort of follow-on products  
13    to devise that may incorporate the patented invention  
14    without any disincentive created by the obligation to  
15    pay royalties.

16            JUSTICE BREYER:            In a word, you have a  
17    higher price after the 20 years is up, and a higher  
18    price means a restricted output.

19            MR. STEWART:            That's correct.

20            JUSTICE BREYER:            Any other antitrust --

21            MR. STEWART:            That's correct.

22            But I -- I think the other point I would  
23    make is, and I -- I take your point, Mr. Chief Justice,  
24    that the 1960s are often associated with loose economic  
25    analysis, but I think -- I think Brulotte not only was

1 not an antitrust decision. I think, for better or  
2 worse, the Court really didn't rely on economic analysis  
3 of any sort. That is, it said the balance that Congress  
4 struck was that during the period when the patent is in  
5 force, you can basically charge whatever royalties the  
6 market will bear; after the patent expires, the  
7 invention is supposed to be available for free,  
8 unrestricted use for the public, and you can't trade one  
9 for the other.

10 It's essentially the same mode of reasoning  
11 that the Court used in cases like Bonito Boats and Sears  
12 Roebuck. The -- the analysis was not -- although it  
13 might or might have not have been true, this will cause  
14 economic harm to allow States to restrict copying in  
15 this manner, the argument was simply this is not the  
16 balance that Congress has struck.

17 And I wanted to return to -- to  
18 Lear for a second because this was a case in which the  
19 Court applied the same basic mode of reasoning to a  
20 private contractual arrangement; that is, the Court  
21 recognized in Lear that the agreement potentially bound  
22 only the licensee; that is, any other member of the  
23 public could have challenged the validity of the patent.  
24 But as Mr. Saunders said, the Court pointed out that the  
25 licensee may often be in the best position both because

1 it has knowledge of the patent's workings and because it  
2 has the economic incentive to try to escape the royalty  
3 obligation. The licensee may be in the best position to  
4 challenge the validity of the patent, and therefore, a  
5 restriction that binds only the licensee is less  
6 sweeping than one that binds the -- the whole State or  
7 the whole country, but it's still not just like a  
8 restriction on a randomly selected individual.

9 I guess the -- the other thing I would say  
10 about the -- the Sloan-Kettering brief and the argument  
11 that is made there is that undoubtedly, the Brulotte  
12 rule sometimes prevents contracting parties from  
13 agreeing to the precise mix of burdens and benefits that  
14 they would prefer. But there's really been no evidence  
15 that the effect of the Brulotte rule is to prevent these  
16 agreements from being formed at all as opposed to their  
17 being -- causing them to be formed on terms that are  
18 somewhat suboptimal from the -- the standpoint of the  
19 contracting parties. That -- the second thing we would  
20 say is to the extent that there's a -- evidence to show  
21 real substantial harm in terms of impairment of  
22 licensing agreements, again, that evidence is better  
23 considered and evaluated by Congress.

24 The -- the other thing I would say is that  
25 the situation in which the Sloan-Kettering brief is --

1 is most clearly directed at is one in which it's  
2 necessary to do substantial non-remunerative work as a  
3 preliminary matter during the period while the patent is  
4 in force in order to be able to monetize the invention  
5 down the road. And that's why they say, well, use  
6 during the period while the patent is in force is not a  
7 real sound estimate of the value of being able to  
8 exploit the patent. But those are precisely the cases  
9 in which it's most likely that after patent expiration,  
10 competitors will face barriers to entry. I mean, to say  
11 that you need to do a lot of preliminary work before you  
12 can make money is to say that people who haven't done  
13 the preliminary work may face difficulties in -- in  
14 becoming competitors. And so on the one hand, that's a  
15 situation where the licensees might prefer not to have  
16 the Brulotte rule in place, but it's also a situation in  
17 which a burden on the licensee is most substantial.

18 If there are no further questions.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
20 You have 4 minutes remaining, Mr. Melnik.

21 REBUTTAL ARGUMENT OF ROMAN MELNIK

22 ON BEHALF OF PETITIONERS

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

24 I think it bears reemphasis that what we're  
25 dealing with here is a per se rule. Petitioners are not

1 asking this Court to shift to a regime where patent  
2 royalties are -- on post-expiration use are always  
3 permissible. Petitioners are asking this Court to lift  
4 a barrier -- a per se barrier against these royalty  
5 arrangements.

6 And under this Court's precedent --

7 JUSTICE SCALIA: Would that -- would that  
8 rule of reason be a patent rule or a -- an antitrust  
9 rule?

10 MR. MELNIK: Well, I think --

11 JUSTICE SCALIA: And if a patent rule, where  
12 does it come from? Where -- where is it in the patent  
13 statutes?

14 MR. MELNIK: Well, Justice Scalia, patent  
15 misuse, when it initially originated, wasn't in the  
16 patent statutes either. It didn't appear in -- in the  
17 narrow sense until the 1952 act when Congress acted to  
18 overrule certain decisions of this Court. So the -- as  
19 the law stands today, the rule of reason is the standard  
20 that the Federal circuit uses to assess patent misuse.

21 So where does it exist today? It exists in  
22 the Federal circuit's case law on patent misuse. So  
23 the -- the question I think that needs to be asked is  
24 even if you -- even if you view it as solely an  
25 antitrust rule, which it -- which it's not on the

1 current state of the law because of the Federal  
2 circuit's case law. The question then needs to be asked  
3 is: What patent policy exists that would justify some  
4 rule beyond the rule of reason? And I would submit that  
5 neither the government nor Respondents have demonstrated  
6 any patent policy that is not at its core an economic  
7 policy. If you look -- take a close look at  
8 Respondent's patent policy argument, it ultimately  
9 reduces to a question of prices and outputs in the  
10 post-expiration period versus pre-expiration period, and  
11 that is essentially an economic question.

12 But to follow up on -- on something that  
13 Justice Sotomayor earlier said, Petitioners would be  
14 content with an alternative that draws on this Court's  
15 Zenith decision and a -- a test that focused on coercion  
16 as an alternative to a rule of reason analysis. I think  
17 either would be appropriate.

18 If the Court has no more questions.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
20 The case is submitted.

21 (Whereupon, at 12:11 p.m., the case in the  
22 above-entitled matter was submitted.)

23

24

25



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