

1                   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - -X

3   J.E.M. AG SUPPLY, INC., DBA       :

4       FARM ADVANTAGE INC., ET AL.,   :

5                   Petitioners               :

6               v.                               :   No. 99-1996

7   PIONEER HI-BRED                       :

8       INTERNATIONAL, INC.               :

9   - - - - -X

10   Washington, D.C.

11   Wednesday, October 3, 2001

12               The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States at  
14 11:14 a.m.

15 APPEARANCES:

16 BRUCE E. JOHNSON, ESQ., Des Moines, Iowa; on behalf of the  
17       Petitioners.

18 EDMUND J. SEASE, ESQ., Des Moines, Iowa; on behalf of the  
19       Respondent.

20 LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General,  
21       Department of Justice, Washington, D.C.; on behalf  
22       of the United States, as amicus curiae, in support of  
23       the Respondent.

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| ORAL ARGUMENT OF                                  |      |
| BRUCE E. JOHNSON, ESQ.                            |      |
| On behalf of the Petitioners                      | 3    |
| EDMUND J. SEASE, ESQ.                             |      |
| On behalf of the Respondent                       | 23   |
| LAWRENCE G. WALLACE, ESQ.                         |      |
| On behalf of the United States, as amicus curiae, |      |
| in support of the Respondent                      | 39   |

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in No. 99-1996, J.E.M. Supply, Inc. v. Pioneer Hi-  
5 Bred International.

6 Mr. Johnson.

7 ORAL ARGUMENT OF BRUCE E. JOHNSON

8 ON BEHALF OF THE PETITIONERS

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

11 35 U.S.C., section 101 is set out at page 19a in  
12 the appendix of the blue brief.

13 The patents in this case that have been issued  
14 on plant varieties under section 101 of title 35 are  
15 invalid. They're invalid because Congress has enacted a  
16 specific statutory scheme that it crafted to govern  
17 Federal statutory protection over this particular type of  
18 living thing, plant varieties.

19 The enactment of Congress by this specific  
20 statutory scheme that it designed to provide the Federal  
21 right to exclude others from reproducing plant varieties  
22 evidences Congress' intent that it plant-specific Federal  
23 statutory scheme is intended to provide the exclusive  
24 Federal statutory means of excluding others from  
25 reproducing plant varieties.

1                   QUESTION:  The rights conferred by the statute  
2   you're referring to are somewhat different than the patent  
3   statute, aren't they?

4                   MR. JOHNSON:  I do not -- no, that is not  
5   correct, Mr. Chief Justice.  The right that the patents  
6   claim in this case, the plant patent -- or the 101 patents  
7   claim in this -- in this case, is the right to exclude  
8   others from sexually multiplying the corn plant varieties  
9   in this case or to use or sell corn plant varieties that  
10  have been developed by sexual multiplication and -- and  
11  produced by sexual multiplication.  So, without using  
12  these patents to exclude others from the right of sexually  
13  multiplying these corn plants, the patent rights contended  
14  for in this case would be of no value whatsoever.

15                  QUESTION:  But I -- I had understood from the  
16  briefs that the rights conferred under the Plant Act are  
17  different in some respects from that under the general  
18  patent section.  Am I wrong in that?

19                  MR. JOHNSON:  Yes, Mr. Chief Justice.

20                  The attribute that is protected under the plant-  
21  specific acts is under the Plant Right of Protection Act  
22  of 1970, the right to exclude others from sexually  
23  multiplying that plant.

24                  Now, this -- the statute is designed for  
25  particular types of plants that require the ability to

1 sexually reproduce on a large scale in order to be  
2 commercially valuable, and these are plants that are only  
3 valuable if they can be produced commercially by seed.

4 Now, the -- the corn plants at issue in this  
5 case -- the patents seek to protect the same utilitarian  
6 feature or attribute of these corn plants, and that is the  
7 right to sexually multiply -- exclude others from sexually  
8 multiplying these corn plants.

9 QUESTION: Let me ask you a specific question.  
10 Under the PVP, can a farmer who buys the -- raises a crop  
11 one year save seed to use for himself the next year? If  
12 that's the only protection that the -- that the developer  
13 has is under the PVP, can the farmer do that?

14 MR. JOHNSON: Yes, Mr. Justice Souter.

15 QUESTION: All right. Can the farmer do that if  
16 the protection is under section 101?

17 MR. JOHNSON: No, Mr. Justice.

18 QUESTION: Then isn't the answer to the Chief  
19 Justice's question yes, there is a difference in the  
20 rights which are conveyed by 101 and by a PVP license,  
21 respectively?

22 MR. JOHNSON: Yes, Justice Souter.

23 QUESTION: Well, then why didn't you answer me  
24 that way in the first place?

25 MR. JOHNSON: I -- Mr. Chief Justice, because I

1 misapprehended the nature of the question and I thought  
2 that you were asking about the attributes -- the  
3 attributes protected.

4 And yes, the rights that are contended for under  
5 the patent would be rights that do not -- that do not  
6 include the exceptions that Congress has specifically  
7 legislated in the Plant Variety Protection Act, one of  
8 which would be the seed saving exemption, which was  
9 reaffirmed in the '94 amendments.

10 And another crucial exception is the research  
11 exception because by the -- the use of patents, the free  
12 exchange of plant genetic material which had occurred  
13 prior to the use of patents, is prohibited by patents  
14 because the seed companies now contend that under the  
15 patent statute, since there's no research exemption, then  
16 they can lock up the genes of the plant varieties on which  
17 they have obtained patents.

18 Those are two important distinctions between the  
19 rights conferred.

20 Now, section 2541 -- section 2402 of the Plant  
21 Variety Protection Act --

22 QUESTION: Before you go on, has any court ever  
23 held that it would be patent infringement for the farmer  
24 to save the seeds?

25 MR. JOHNSON: Yes, Your Honor. There are many

1 suits in litigation now where district courts have held in  
2 a judgment against farmers for saving seed that are  
3 subject to patents. And this is -- this is even true in  
4 cases of -- for example, one of the amici in this case,  
5 Delta and Pine Land Company --

6 QUESTION: These are cases in the district  
7 courts. How about courts of appeals?

8 MR. JOHNSON: I do not believe that -- that I  
9 know of -- that a seed saving case has reached a court of  
10 appeal -- a court of appeal yet.

11 QUESTION: Does the PTO have a position on it?

12 MR. JOHNSON: The Government is arguing as an  
13 amici for Pioneer, for the -- for the appellee in this  
14 case.

15 QUESTION: Yes, but this case doesn't focus on  
16 the saving seed exception.

17 But in distinguishing the utility patent from a  
18 PVP certificate, or whatever it is, you have pointed out  
19 that the utility patent is more beneficial to the patent  
20 holder because the farmer can't even use the descendants  
21 of the first seeds to plant again. So that -- that's --  
22 and I asked you if the -- that -- that was the position,  
23 that that's the interpretation of the utility patent, that  
24 is the interpretation of the PTO. And I think you said  
25 yes.

1                   MR. JOHNSON: I have not seen anything on that  
2 position -- that position, one way or another, from the  
3 PTO.

4                   QUESTION: As far as the -- the issue that is  
5 before us, we do have a position of the PTO and of the  
6 Federal circuit, both having more expertise than the rest  
7 of the Federal court we're on in these questions. Don't  
8 we owe those decision makers some deference?

9                   MR. JOHNSON: Justice Ginsburg, I believe that  
10 this case is a case of statutory construction. With  
11 regard to the Chevron deference to the PTO, the Congress  
12 has specifically legislated on the precise issue that the  
13 PTO has decided, that is, the issue of whether or not it  
14 has authority under section 101 to grant patent -- utility  
15 patents on plant varieties. Congress has specifically  
16 addressed this issue on three different occasions  
17 historically and ruled on it. And I do not believe that  
18 Chevron deference is -- can be accorded to an agency when  
19 Congress has specifically legislated.

20                   Further, we are --

21                   QUESTION: Where has Congress said you can't get  
22 a utility patent on a plant? Congress has set up two  
23 other protective regimes that are different from the  
24 utility patent. But where has it ever says -- said these  
25 exclude a patent?



1           MR. JOHNSON: It has explicitly stated this in  
2 legislative acts on two occasions. In 1930, when it  
3 enacted the Townsend-Purnell Plant Patent Act, it amended  
4 section 4886 of revised statutes by adding to it language  
5 allowing --

6           QUESTION: Because it thought, at least in part  
7 -- it thought that a plant couldn't qualify for a utility  
8 patent. So, it wanted to have something. Science has  
9 advanced. This Court acknowledged that you could get a  
10 utility patent for whatever was the bacteria that was in  
11 the Chakrabarty case.

12           MR. JOHNSON: Let me go back, if I may, for a  
13 moment, and I'll answer your question on Chakrabarty.

14           In 1930, Congress placed -- or added to section  
15 4884 of revised statutes the limitation on the -- that it  
16 was -- the right was limited to asexual reproduction --  
17 excluding others from asexually reproducing the plant.  
18 But it is important to note -- and this is set out at  
19 cert. app., page -- appendix 42.

20           You will also see section -- I think it's 4888  
21 of revised statutes. And in that section, Congress in  
22 1930 inserted the -- or put in the provision that relaxed  
23 the written description requirement. Now, if --

24           QUESTION: This is section 4884?

25           MR. JOHNSON: This is in the petition

1 appendix --

2 QUESTION: Page 42 of the --

3 MR. JOHNSON: Page 42.

4 QUESTION: And which of the sections that are  
5 cited there are you referring to?

6 MR. JOHNSON: Just a moment here. Section 4888.  
7 It put in the relaxed written description requirement.

8 Now, there were two reasons why, as Justice  
9 Ginsburg points out, there was some historic -- there was  
10 some historic feeling against patents on plants. It was a  
11 living thing, a product of nature doctrine, written  
12 description. It relaxed the written description in 4888.

13 If the language that Thomas Jefferson penned in  
14 1793, which is the definitional language for utility  
15 patents -- and he was a plant breeder, knew what plants  
16 were -- if that language already subsumed plants, then the  
17 only thing that Congress needed to do in 1930 was to add  
18 section 4888.

19 And if it decided that it wanted to somehow --  
20 if -- if the language that -- that Thomas Jefferson penned  
21 included plants in 1930 and it included sexual  
22 multiplication of plants and they wanted to limit it, then  
23 they could have just put in the asexual limitation. But  
24 what they did is, they put in all three sections in 1930  
25 because it was their intent to expand the definitional

1 limits of section 4886, which was the definitional  
2 language that Thomas Jefferson originally wrote.

3 QUESTION: Well, in other words, there's the  
4 scheme established in 1930 and it is both more inclusive  
5 than a 101 patent, and it gives you fewer rights. But  
6 that isn't -- doesn't mean, to track Justice Ginsburg's  
7 initial question, that this is an explicit prohibition on  
8 issuing a patent under 101.

9 MR. JOHNSON: We have to give meaning to what  
10 Congress did in 1930. It did not --

11 QUESTION: If you want to say if -- that we  
12 should infer it, fine. That's your argument, but it's not  
13 an explicit prohibition.

14 MR. JOHNSON: In 1950, in the revision of the  
15 Patent Act, Congress disassembled section 4886 and placed  
16 the plant patent language from 4886 in a separate chapter,  
17 and kept the Thomas Jefferson language in -- and placed  
18 that in section 101. And the other language from 486 and  
19 488 -- or 4888 and 4884 were also placed in chapter 15, a  
20 separate plant-specific act.

21 Now, if the language -- if the definitional  
22 language of 101, the other definitional language, subsumed  
23 plants, there would be no reason to -- to take that  
24 legislative action.

25 QUESTION: Then why -- why shouldn't Chakrabarty

1 have come out the other way? Because Chakrabarty involved  
2 a plant. It involved, I guess, an asexually reducing  
3 plant. I don't think bacteria reproduce sexually. And it  
4 seems to me on your reasoning, the Court in Chakrabarty  
5 should have said this is the paradigm example of what was  
6 covered by the -- or what is covered by the PPA and  
7 therefore it shouldn't fall under 101. And the Court went  
8 the other way. So, explain to me why -- why Chakrabarty  
9 is not a problem for you.

10 MR. JOHNSON: What the Court did in Chakrabarty  
11 was affirm Judge Giles Rich's footnote 25 in the  
12 underlying circuit court case, Application of Bergy. In  
13 Chakrabarty, the patented item was an oil-eating bacteria.  
14 Now, the Court discusses in Chakrabarty. Nobody knows  
15 exactly why, but bacteria are specifically excluded from  
16 the Plant Variety Protection Act.

17 QUESTION: They're -- they're -- yes, the PVP  
18 but they're not expressly -- I guess the -- the PPA  
19 doesn't say anything about them one way or the other. It  
20 simply remains the case that under the PPA, this is a --  
21 the PPA deals with a -- with a plant insofar as it is a  
22 non-sexually reproducing or a non-sexually reproduced --  
23 and I think that's the -- the fact that the Court had  
24 before it in Chakrabarty.

25 MR. JOHNSON: Well, in Chakrabarty, Justice

1 Souter, the dissent argued that the existence of the  
2 plant-specific acts evidenced Congress' intent that no  
3 living thing could be subject to a 101 patent. The  
4 majority, 5 to 4, the tie-breaking vote said, that's not  
5 true. It -- it doesn't mean that the mere fact that  
6 something is living denies that item potential or possible  
7 section 101 -- a section 101 patent. And it -- it  
8 discussed these plant-specific acts.

9 Then in the last paragraph of Chakrabarty, it  
10 tells us the two ways in which Congress can evidence its  
11 intent to exclude a specific type of living thing from  
12 section 101 coverage. It says, one, it can just -- it  
13 could explicitly do -- it can explicitly state that carve-  
14 out, and it used the carve-out of patenting of materials  
15 that could be employed in nuclear weapons as an example of  
16 a specific carve-out.

17 And then it said secondly it can craft a  
18 specific statute designed to provide protection for a  
19 particular type of living organism. And in that -- in  
20 this case, that -- in the case of the PVP and the PPA,  
21 that is plant varieties.

22 And Justice Rich stated this explicitly in the  
23 underlying opinion, Application of Bergy, which the  
24 Chakrabarty Court, of course, read and -- and was aware of  
25 when it wrote this paragraph. Justice -- or Judge Giles

1     quoted this -- this piece of legislative history where the  
2     Senator said, anything under the sun that is made by man.  
3     It is this piece of legislative history that Pioneer's  
4     case is built upon. That's the foundation.

5             QUESTION: No, but could we go back, though, to  
6     the facts of -- of Chakrabarty? Because the problem that  
7     I -- I have is it seems to me that on -- on just the  
8     authorities that you're speaking of, Chakrabarty probably  
9     should have come out the other way because you had a  
10    specific statute, the PPA, which covered this asexually  
11    reproducing plant, a bacterium, and yet the Court did not  
12    say that the coverage of 101 was thereby defeated. And --  
13    and maybe I'm missing something. I don't understand why,  
14    on your theory, it shouldn't have come out the other way.

15            MR. JOHNSON: I don't believe that the  
16    Chakrabarty Court viewed the bacterium as a plant.

17            QUESTION: Well, what else could it view it as?  
18    I mean, I --

19            MR. JOHNSON: They spoke --

20            QUESTION: I went to the dictionary. I -- I  
21    wasn't sure myself, and I went to the dictionary, and the  
22    dictionary says it's a plant.

23            MR. JOHNSON: I -- the Chakrabarty Court spoke  
24    of it as a microorganism.

25            QUESTION: Which is a generic term.

1 MR. JOHNSON: And the -- as -- as I read  
2 Chakrabarty, their discussion of the PVPA and their  
3 discussion of the PPA was for the purposes of explaining  
4 historically how they evolved and to disassemble the  
5 dissent's argument that those two -- that those two  
6 specific acts meant you couldn't patent any living thing.  
7 I do not think --

8 QUESTION: Well, I don't want to prolong this.

9 MR. JOHNSON: Yes.

10 QUESTION: But I take it then on -- on your  
11 position, if we assume that the bacterium is a plant and  
12 it asexually reproduces, the decision in Chakrabarty  
13 should have been that it's covered by the PPA and there's  
14 no 101 patent.

15 MR. JOHNSON: If it would -- if it would be a  
16 plant variety and if reproducing by dividing, which is not  
17 sexual -- it's certainly not sexual multiplication as --  
18 as plants do it, then that would be -- then the decision  
19 should have been that it could have qualified for a PPA  
20 patent.

21 QUESTION: And therefore, it couldn't qualify  
22 for a 101. Right?

23 MR. JOHNSON: Yes. It would not -- well --

24 QUESTION: On -- on your --

25 MR. JOHNSON: It would not be blocked. It would

1 not be blocked from a 101 patent simply on the basis that  
2 it is alive.

3 QUESTION: No, but it would be blocked by the  
4 fact, on your reasoning, that it was covered by PPA.

5 MR. JOHNSON: Yes.

6 QUESTION: Okay.

7 QUESTION: But is -- has anybody ever held it  
8 was a -- a bacterium is a plant? I mean --

9 MR. JOHNSON: I have not --

10 QUESTION: -- did any court ever say that or the  
11 Patent Office or somebody?

12 MR. JOHNSON: I have never seen anything, you  
13 know, of that.

14 QUESTION: So, the dictionary --

15 QUESTION: My -- my dictionary holds that.

16 (Laughter.)

17 QUESTION: Maybe when Chakrabarty was decided  
18 people didn't look so carefully at dictionaries as they do  
19 now.

20 (Laughter.)

21 QUESTION: Because certainly the opinion doesn't  
22 say this, does it? The opinion doesn't call the bacteria  
23 a plant.

24 MR. JOHNSON: I certainly didn't -- it took  
25 pains to point out that -- well, it said one of the



1 reasons why the PVPA may have exclusive -- or explicitly  
2 excluded it was because it may have felt that it wasn't a  
3 plant. I think there was some case somewhere that they  
4 cited that had alluded to that.

5 QUESTION: Mr. Johnson, there's one piece of  
6 this case that's somewhat disturbing in that -- in that am  
7 I right in thinking that it is relatively harder to get a  
8 utility patent, that you have to convince the PTO and you  
9 have to have more documentation and involve yourself with  
10 a lawyer's fee -- much harder to get a 101 registration  
11 than it is to get a certificate under the PVPA?

12 MR. JOHNSON: Well, I saw a lot of that in amici  
13 briefs, but there's not a scintilla of evidence on it in  
14 the record.

15 QUESTION: But are you --

16 MR. JOHNSON: I think the --

17 QUESTION: Are you suggesting that -- let's take  
18 this case -- that this particular item could not have  
19 qualified, maybe it wouldn't qualify for a PVPA  
20 certificate?

21 MR. JOHNSON: Every -- all 17 corn plant  
22 varieties that are the subjects of the patents that we  
23 have challenged in this case also applied for and obtained  
24 Plant Variety Protection certificates.

25 QUESTION: Oh, so they do have both. They do

1 have the dual protection.

2 MR. JOHNSON: In this case, they do have both,  
3 and there's --

4 QUESTION: And I thought that the infringing  
5 action here would infringe a PVP certificate as well. I  
6 thought your position was -- was -- and I must be wrong  
7 about that -- that -- that you would be an infringer if  
8 they had a 101 patent.

9 MR. JOHNSON: First --

10 QUESTION: But they don't have a 101 patent, so  
11 they have nothing.

12 MR. JOHNSON: Right. We weren't sued under the  
13 PVP Act. We were sued under the Patent Act, number one.

14 Number two, we never sexually multiplied the  
15 seed nor did we engage in any act which involves further  
16 multiplication or propagation of the plant. And under the  
17 Plant Variety --

18 QUESTION: So, you're telling me they did have  
19 the dual protection, but either they chose not to charge  
20 you with -- with infringing on the PVP protection or you  
21 didn't do anything that would infringe that protection.

22 MR. JOHNSON: We -- we didn't do anything to  
23 infringe it. The -- the section 2541(d) is set out at  
24 page 18 of the appendix of the blue brief. And it says  
25 that any of the above acts -- and all the other acts that

1 are listed as infringement, which would include selling --  
2 are not infringements unless they involve further  
3 propagation of the protected variety.

4 The reason that that provision is in there is  
5 because in 1970, the brokerage business in seed corn and  
6 cotton seed, soybean seed was already a thriving business.  
7 It was not the intent of Congress to inject itself into  
8 marketing situations that are governed by State law or by  
9 the Federal Seed Act. It had one thing in mind and that  
10 was to regulate the right to exclude others from sexually  
11 multiplying plant varieties. It wasn't in the market of  
12 suing people who just bought the bagged seed, didn't do  
13 anything with it, sold it to farmers who just planted that  
14 seed and took it to the elevator.

15 So, it's not a PVP violation, number one, and  
16 number two, we weren't sued under the Plant Variety  
17 Protection Act anyway. We were sued under the Patent Act.  
18 It was the act of choice.

19 Now, the 1970 Plant Variety Protection Act  
20 provides at section 2581 that the purpose of the act is to  
21 provide adequate encouragement for research. Congress --  
22 the presidential commission was convened in 1965 to decide  
23 what sort of protection should we give to sexually  
24 reproducing plants. '68 the Senate Patent Subcommittee  
25 had hearings on amending title 35. There was -- there

1     were objections.  It took no further action.

2                     Hearings continued in the Agriculture  
3     Department, and this 1970 PVP Act came out to -- to  
4     provide adequate protection to encourage research.  That  
5     was Congress' intent in crafting this statute.  They set  
6     up a separate agency.  They set up a separate board with  
7     mandated representation of affected political interests,  
8     including farmers, including the public sector, including  
9     researchers.  They set up the seed saving exemption, the  
10    research exemption.

11                    Now, if -- if the argument is accepted that,  
12    well, the reason that Congress did this was because they  
13    misapprehended the ability to -- of technology to advance  
14    and make it easier to, say, identify or describe a plant  
15    variety or because of some other technological advance,  
16    well, if -- that is simply saying that the intent of  
17    Congress in 1970 was based on a mistaken apprehension or  
18    something that's proved mistaken today.

19                    But to take that position assumes that if  
20    Congress had apprehended correctly, as Pioneer's amici  
21    said they should have, then that Congress would have  
22    simply adopted section 101 without the special agency,  
23    which -- without the board, which is -- which has to have  
24    representatives of experts from the various varieties,  
25    without seed saving, without research, without all of the

1     distinctions that it specifically intentionally enacted in  
2     the Plant Variety Protection Act, and that is too great a  
3     leap for us to take in my -- in a judicial setting.

4             It's a political question.  It's a question for  
5     Congress to answer and Congress has answered it.  
6     Everything that went into the crafting of the Plant  
7     Variety Protection Act was the result of politics.

8             And that is if -- if in some fashion, which I  
9     see a lot -- a lot of the -- of Pioneer's and its amici's  
10    argument points out that, well, it now looks like its a  
11    better idea to have patent protection than Plant Variety  
12    Protection Act protection.  Well, that is an argument to  
13    be made in the -- on the Hill to the Congress where they  
14    have the resources to examine all of this evidence that  
15    has been put before this Court in the amici briefs that is  
16    not in the record in this case.

17            As far as the ease -- the record -- the evidence  
18    that's in the record in this case is that it's harder to  
19    get a Plant Variety Protection certificate because there  
20    was the corn hybrids that were patented in this case.  The  
21    inbred parents were not deposited, only the hybrid seed.  
22    The hybrid seed, when you plant it, you get all different  
23    types of plants.  You cannot recreate the hybrid without  
24    having the inbred parents' deposit.  The PVP requires  
25    deposit of the inbred seed.

1                   The PVP requires that you give the breeding  
2 history. There's no requirement of that for the patent.  
3                   The PVP allows the research exemption. Why is  
4 that important? Because of this. The DNA in plants is a  
5 storehouse of knowledge, a storehouse of genetic  
6 knowledge. The RNA conveys that message and the message  
7 is manifested in the characteristics of the offspring of  
8 the plant. Only when you have -- when a plant breeder has  
9 the opportunity to actually grow the plant, observe it,  
10 cross it, observe and test the offspring can the plant  
11 breeder obtain the knowledge that is in the ostensibly  
12 patented plant. And without that -- without that  
13 opportunity, then the full disclosure that supposedly is  
14 made under the Patent Act when they patent plant varieties  
15 is not -- is not made.

16                   And it is -- it is an extremely important matter  
17 that the Plant Variety Protection Act guarantees to the  
18 public, and that is the free use and transmission of  
19 genetic material, which patents are being used to stop.  
20 There's been, as you know, a extreme consolidation of the  
21 agricultural industry, and the switch to patents and the  
22 locking up of plant germ plasm is a key impetus in that  
23 consolidation.

24                   If there are no further questions, I'll reserve  
25 the rest of my time.

1 QUESTION: Very well, Mr. Johnson.

2 Mr. Sease, we'll hear from you.

3 ORAL ARGUMENT OF EDMUND J. SEASE

4 ON BEHALF OF THE RESPONDENT

5 MR. SEASE: Thank you, Mr. Chief Justice, and  
6 may it please the Court:

7 In response to my colleague's representation  
8 that Pioneer's sole case here rests upon a snippet of  
9 statement in the legislative history of the '52 act,  
10 quoted in Chakrabarty where the Court said, machined or  
11 manufactured can include anything under the sun made by  
12 man, we do, of course, rely on that piece of legislative  
13 history, as did Chakrabarty.

14 But our case rests not upon that. Our case  
15 rests upon 35 U.S.C., section 101, which is in the regular  
16 patent statute that says, and the plain meaning of those  
17 words, as confirmed in Chakrabarty, that the corn plants  
18 that are patented here are either articles of manufacture  
19 or compositions of matter. Or the fact of the matter is,  
20 under the definitions cited with approval in Chakrabarty,  
21 they're both because these categories of statutory subject  
22 matter, under section 101 -- that is, they are sort of a  
23 gatekeeper. You got to pass through that gate to go on to  
24 the next criteria of whether you are new, useful, or  
25 nonobvious and can get a patent.

1                   QUESTION: Well, I -- I suppose their point was  
2     that in many statutes, if A, B, and C are covered and C is  
3     then removed, we make the inference that C is not intended  
4     to be covered any longer. But in this case, the under the  
5     sun language shows that they are such expansive terms in  
6     101, that perhaps we don't apply that usual rule and that  
7     you would prevail because of the terms being so general  
8     and so universal in their -- in their coverage.

9                   MR. SEASE: Justice Kennedy --

10                  QUESTION: I take it that's your position.

11                  MR. SEASE: They -- that is our position. They  
12     need to be general because the patent law needs to fit  
13     ever-changing circumstances because today's science  
14     fiction is tomorrow's science, and we are not in a  
15     position to foresee what tomorrow's inventions will be.  
16     And so, from 1793 till now, the statute has been crafted  
17     and interpreted broadly. And the -- the terms, indeed,  
18     have been construed to overlap. And so, the categories  
19     that are expressed there are not necessarily exclusive --

20                  QUESTION: May I --

21                  MR. SEASE: -- something to fit one or more.

22                  QUESTION: I didn't mean to interrupt you.

23                  Will you comment? Would you go on from what  
24     you're saying to comment on -- on a point that Mr. Johnson  
25     made a moment ago? As I understand it, the -- the outline



1 of the argument is even though the language in 101 is  
2 indeed just as broad as -- as you say and even though  
3 Chakrabarty said living things aren't excluded, the  
4 existence of -- of a separate statute dealing with the  
5 same subject matter may be taken as -- as an implied  
6 repeal to some extent if there's a conflict.

7 And one argument for saying that there is no  
8 conflict here, as I understand it, is the argument that  
9 what is set up by section 101 on the one hand and the two  
10 separate plant statutes on the other are really two  
11 separate regimes. It's harder to get a 101 patent, so you  
12 get more protection. It's easier to get a -- we'll say, a  
13 PVP certificate, so you get less protection. And  
14 therefore, you shouldn't see them as -- as conflicting.  
15 You should see them as kind of hierarchical and the -- the  
16 applicant can choose what he wants.

17 Mr. Johnson says, as I understood him a minute  
18 ago, that that's not a sound argument because in fact he  
19 says it's more difficult to get a PVP certificate than it  
20 is to get a -- a 101 patent. And he -- he mentioned a  
21 couple of things that you have to do that you might not  
22 have to do under 101.

23 Would you comment on -- on that -- that  
24 difficulty point of his?

25 MR. SEASE: Yes. With all due respect to my

1 colleague, I believe he's wrong. The title 35 patents,  
2 the regular utility patents, require novelty, usefulness,  
3 and nonobviousness. This Court defined how one determines  
4 nonobviousness in Graham v. Deere in 1966, and it has been  
5 universally applied by the Patent Office and by the courts  
6 since that date. And as a matter of fact, the patents  
7 that we're sued on here, if you look in their file  
8 histories, one would see that they were routinely rejected  
9 for obviousness by the Patent Office, and that was the big  
10 hurdle that had to be overcome before they could issue.

11 The Plant Patent Act requires asexual and  
12 requires new, distinct, and probably also nonobviousness.  
13 The Patent Variety Protection Act requires new, distinct,  
14 uniform, and stable. There is no requirement whatsoever  
15 akin to nonobviousness in the Plant Variety Protection  
16 Act. And it in fact, Your Honor, is almost a registration  
17 system, very similar to like the copyright system where  
18 you file, you fill out a form, and it's granted without  
19 any kind of a rigorous examination as utility patents  
20 undergo in the United States. And our system, I might  
21 add, is recognized as one of the stronger ones in the  
22 world primarily because of our unobviousness requirement.

23 QUESTION: Is there any other situation in the  
24 realm of intellectual property where you have this kind of  
25 dual regime, where you have both the standard kind of

1 patents, then you have to the side of that a patent-like  
2 protection?

3 MR. SEASE: Justice Ginsburg, the answer to that  
4 is there's nothing like it in the patent world, but there  
5 are analogous dual systems, if you will, in the  
6 intellectual property world, whereas it's common, for  
7 example, for the same tangible item to have both design  
8 patent protection and to have copyright protection. That  
9 was looked at in the case of Mazer v. Stein. It is common  
10 for trade secret protection and patent protection to  
11 peacefully coexist --

12 QUESTION: You can have overlapping patents,  
13 trade secrets. But -- but this is kind of a specialized  
14 patent. It's called a plant patent. That, you say, is  
15 unique to plants.

16 MR. SEASE: I -- I think it is, Your Honor.

17 And the reason historically that it came about  
18 that we have these three separate regimes that occur for  
19 plants is that plant inventors, if you will, were being  
20 discriminated against in that they were unable to comply  
21 with the rigorous requirements of title 35 for a regular  
22 utility patent not because there was any definitional  
23 wrong in section 101, but because in application, the  
24 Patent Office was routinely rejecting them -- and I'm  
25 talking about prior to 1930 -- as products of nature, and

1 the inventors were unable to meet the written description  
2 requirement necessary to get a patent, so important to a  
3 patent because the written description requirement is how  
4 the public benefits from the knowledge from the patent so  
5 that they can use it to advance and build greater  
6 knowledge. And so, the Plant Patent Act of 1930 was  
7 passed to allow some limited rights for asexually  
8 reproduced plants, and the Plant Variety Protection Act of  
9 1970 was passed to allow again some rights for sexually  
10 produced plants.

11 Now, this petitioner would turn those two acts  
12 and their legislative history on their head and use them  
13 to limit patent coverage when, in fact, they were passed  
14 by Congress for the purpose of granting some coverage that  
15 was like a patent in order to get over the two historical  
16 hurdles of section 112, written description requirement,  
17 and the so-called product of nature doctrine.

18 QUESTION: Why is it --

19 QUESTION: May I ask a question about -- about  
20 this particular case? Is it true, as Mr. Johnson told us,  
21 that you have dual protection and that you sued only under  
22 section 101, that all these 17 varieties also have Plant  
23 Variety Protection certificates?

24 MR. SEASE: Justice Ginsburg, I -- there is no  
25 real record on that. At the trial court, the complaint

1 was filed, the answer was filed, and then the motion for  
2 summary judgment was filed, and that's where we are.

3 There was, however, a transcript at the trial  
4 court where a Pioneer lawyer was asked by the judge if  
5 Pioneer gets PVPA certificates routinely with respect to  
6 matters that they also get utility patents, and I believe  
7 the question was answered yes with respect to inbreds.  
8 But in this instance, there are hybrid patents as well,  
9 that there are no corresponding PVPA certificates, and the  
10 suit was filed on only the utility patents.

11 QUESTION: You -- consistently with your answer  
12 to me a moment ago that the PVPA certificate is almost a  
13 kind of registration mechanism, I -- I'm assuming that  
14 therefore it probably doesn't take long to get it.

15 MR. SEASE: They take much less time, yes,  
16 through the Department of --

17 QUESTION: So that you would -- if you -- let's  
18 assume you filed for both. You would -- if -- if you're  
19 plant breeder, you would expect to get your certificate  
20 rather quickly, and you'd expect to wait longer for the  
21 101 process to wend its way.

22 MR. SEASE: If at all you ever get through the  
23 101 process.

24 QUESTION: Yes.

25 MR. SEASE: One never knows, at the time you

1 make the invention, whether you are going to meet  
2 successfully the higher standards of the Patent Utility  
3 Act or not. And so, I mean, the unique -- the truth is  
4 that I think everybody in this world, not unique to just  
5 this client -- they try for both and see what happens.  
6 Sometimes they are successful, sometimes they are not.

7 I -- I would like to --

8 QUESTION: Well, wait. On that particular  
9 point, the only way in which it would seem to be of some  
10 significance that the patent statute would be stricter  
11 is in respect to what you just said, nonobviousness. And  
12 -- and the other you could -- you have to show it's new.  
13 So, in the one, the more detailed one, you have to show  
14 it's new, and in the patent one, you have to show it's new  
15 and nonobvious.

16 MR. SEASE: That's right.

17 QUESTION: All right. That's a little bit of a  
18 difference.

19 MR. SEASE: That's correct.

20 QUESTION: Fine.

21 Now, what conceivable thought would have been  
22 going through a Congressman's mind to enact the following?  
23 He says, okay, I see there's this difference here. So, if  
24 a seed is new, but obviously new, I'll let the farmers  
25 save the seeds for next year, and I will let people do

1 research. But if the seed is new and nonobviously new, I  
2 won't let the farmers keep the seeds for next year, and I  
3 won't let people do research.

4 Now, in other words, what could anybody have  
5 been thinking who would write that? And on your theory,  
6 that's what they must have been thinking.

7 MR. SEASE: Your Honor, I -- I would disagree  
8 with that, respectfully. Under --

9 QUESTION: But the question was not -- what was  
10 the theory? That isn't a question you could disagree with  
11 or not disagree with.

12 MR. SEASE: The theory -- the theory was -- and  
13 one must look at the statute, Your Honor. The save seed  
14 exemption and the research exemption under the Plant  
15 Variety Protection Act are -- are not grants of rights to  
16 anybody. They are simply saying that by doing these,  
17 these are not infringing acts under the Plant Variety  
18 Protection Act.

19 QUESTION: But you see -- let me show where I'm  
20 coming from. A property -- intellectual property involves  
21 the following: copyright, a tax on readers for producing  
22 books; patent, a tax on users for the purpose of  
23 encouraging invention. Those are the wholesale statutes.  
24 Patent, copyright. Sometimes Congress -- and quite often  
25 -- says, the wholesale statutes, they're too wholesale.

1 We're going to go into this thing and retail. Now, that's  
2 what they did here, and they came up with a slightly  
3 different kind of protection.

4 So, having done that for whatever reason,  
5 whether because of mistake or because of this or because  
6 of that, they did it. So, why should we assume they'd  
7 like to go back to the wholesale statute, once having gone  
8 through the work of written the retail and indeed created  
9 special exemptions of importance that don't exist at  
10 wholesale?

11 MR. SEASE: Well, nothing in the Plant Variety  
12 Protection Act or the Plant Patent Act or its legislative  
13 history shows that Congress ever intended to take anything  
14 out of section 101 that was already included in section  
15 101, and that included these plants. They were articles  
16 of manufacture and they were compositions of matter.

17 QUESTION: Well, they had before them, quoted in  
18 your brief I think, Simon Rifkin's committee's report,  
19 which says all provisions in the patent statute for plant  
20 patents should be deleted and another form of protection  
21 provided. That was the President's commission's  
22 recommendation. And having received that recommendation,  
23 they didn't follow it completely, but they did write some  
24 things in detail. So why, given that in front of them,  
25 should we assume Congress wanted to go back to this



1     wholesale statute?

2                   MR. SEASE:   Because if you were to say that the  
3     passing of the Plant Variety Protection Act in 1970  
4     somehow is an implicit narrowing of 35 U.S.C., section 101  
5     or an implicit exclusion of subject matter from that, you  
6     need a far greater signal than just that.

7                   QUESTION:   You've got the principle in your  
8     favor that repeals, by implication, are not favored.

9                   MR. SEASE:   Yes.

10                  And the case law of this Court says that there  
11     must be -- they must be plainly inconsistent in order to  
12     have a repeal by implication.   And that is an important  
13     standard, that plainly inconsistent, because Congress  
14     needs to be able to rely on that in order to understand  
15     the consequences of acts that they are -- they are  
16     passing.

17                  QUESTION:   So, what does the farmer do who wants  
18     to save his seeds?

19                  MR. SEASE:   What the farmer does who wants to  
20     save his seed is he can, indeed, save those seed if they  
21     are protected under the Plant Variety Protection Act only,  
22     but not if they are protected under the utility patent  
23     statute.

24                  QUESTION:   Well, he can get permission.   He can  
25     pay for permission.

1                   MR. SEASE: He can pay for permission. That's  
2 correct.

3                   QUESTION: Is it your view -- nobody has really  
4 talked about the infringement under the basic patent  
5 statute, but if I was a farmer and I just bought the  
6 seeds, you tell me it's a patented product and I plant the  
7 seeds. The next year I want to use the product of the --  
8 that plant and save some of those seeds to plant the next  
9 year. That's an infringement?

10                  MR. SEASE: That's an infringement of the  
11 utility patent.

12                  QUESTION: Why is that an infringement? Why  
13 doesn't he just own -- own what he purchased?

14                  MR. SEASE: He does own what he purchased but  
15 only in the volume that he purchased. He cannot self-  
16 replicate that because the right to exclude --

17                  QUESTION: You're -- you're saying that -- that  
18 the infringement -- it's not just an infringement of a  
19 license agreement or anything like a contractual  
20 undertaking, but the patent statute itself is sufficient  
21 to make his saving seeds an infringement in your view.

22                  MR. SEASE: Under the utility patent statute  
23 because the utility patent statute gives the right to  
24 exclude others from making, using, or selling.

25                  QUESTION: But he's not -- but he's purchased

1       it.   He's purchased the product.

2               MR. SEASE:   He purchased -- he purchased one set  
3       volume of the product.

4               QUESTION:   Correct.

5               MR. SEASE:   The recreation of that by planting  
6       and regrowth is a subsequent infringing act.

7               QUESTION:   What is the best authority you have  
8       for that proposition?

9               MR. SEASE:   Pardon?

10              QUESTION:   Is there any case holding that, any  
11       appellate court case holding that?

12              MR. SEASE:   There is no specific case in the  
13       seed area that -- that I'm aware of that holds that, but  
14       it -- it is sort of analogous to the repair/reconstruction  
15       doctrine in the utility patent statute.

16              QUESTION:   It's not analogous to running a -- a  
17       mimeograph machine and requiring the user to use your  
18       paper.   It's not analogous to that.

19              MR. SEASE:   It isn't.

20              But one of the reasons why utility patent  
21       protection is so critically important to people in this  
22       industry is because that seeds are so easily copied by  
23       self-replicating.   And so, if you can qualify for the  
24       higher standard, you need to have that higher standard  
25       because of the ease of replication.

1                   And may I point out, Your Honor, we know --  
2                   QUESTION: What -- what do they do with the  
3 seeds? They throw them in the river or what?  
4                   MR. SEASE: What does who do?  
5                   QUESTION: What -- do they throw -- have to  
6 throw the seeds away or something?  
7                   MR. SEASE: Well, hybrid seed is only good --  
8 and these patents are on hybrid seed, most of them -- is  
9 only good for 1 year because you cannot take the seed from  
10 a hybrid seed and then plant it and get the same plant  
11 back. That does not work with a hybrid.  
12                  QUESTION: But for something that it does work  
13 for, is -- is the answer but you can't use the descendants  
14 of your original seed, so you have to throw them away?  
15                  MR. SEASE: You can't use the descendants of  
16 your original seed to plant a new crop. You sell your  
17 crop.  
18                  QUESTION: Yes. But what can -- what can you  
19 use them for?  
20                  MR. SEASE: You -- you can use them for their  
21 ordinary intended purpose which, for example, if the seed  
22 is soybean, you -- you sell your crop at the end of the  
23 year like a farmer does. You buy more seed for the  
24 following year.  
25                  QUESTION: Yes, but the seeds that you would

1 otherwise have saved, the seeds that you would have saved  
2 if -- if it were only plant variety protection, you can't  
3 do anything with them.

4 MR. SEASE: If there --

5 QUESTION: As Justice Kennedy said, you just  
6 have to throw them out?

7 MR. SEASE: If -- if there is utility patent  
8 coverage, you can't do anything with them unless you make  
9 some sort of arrangement with the patent owner.

10 QUESTION: You could put them out for the birds.  
11 Yes.

12 (Laughter.)

13 QUESTION: Yes. The one thing you can do is  
14 sell them so some creature can eat them.

15 MR. SEASE: We are not operating in a vacuum  
16 here about what Congress believes is correct, Your Honors,  
17 and I would like to make that point. In 1999 in an  
18 amendment to section 119 of the patent statute, which  
19 allows foreign inventors to take advantage of their  
20 foreign filing date when they come here and file in the  
21 United States, we passed an amendment under section 119(f)  
22 that allowed foreign breeders, certificate holders,  
23 analogous to these Plant Variety Protection Act  
24 certificates, to use that filing date in their foreign  
25 country to get utility patents when they come into the

1 United States. So, Congress passed a law which is  
2 implementing and enhancing the very thing that is  
3 occurring here.

4 And to make any doubt about that crystal clear,  
5 in 1994, when there were amendments to the Patent Variety  
6 Protection Act, Senator Kerrey set out the whole regime in  
7 the legislative history of that modification that occurred  
8 in 1994, explaining utility patents, explaining Plant  
9 Variety Protection Act certificates, and explaining the  
10 PPA, and noting the differences between them. And he did  
11 that on the floor of the Congress. So, it is hardly news  
12 to Congress that this is and has been occurring.

13 QUESTION: Yes, but that's -- that's  
14 inconsistent with the argument you make on the first half  
15 of the case, that Congress' understanding of the -- of the  
16 statute is irrelevant in light of our interpretation. You  
17 can't have it both ways.

18 MR. SEASE: Well, I don't say that Congress'  
19 understanding of the statute is irrelevant. I point out  
20 that corn plants, which are the subject matter of these  
21 patents, fall within the plain meaning of the terms of  
22 section 101, and therefore are a patentable subject  
23 matter.

24 QUESTION: Thank you, Mr. Sease.

25 Mr. Wallace, we'll hear from you.

1 ORAL ARGUMENT OF LAWRENCE G. WALLACE  
2 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,  
3 IN SUPPORT OF THE RESPONDENT

4 MR. WALLACE: Thank you, Mr. Chief Justice, and  
5 may it please the Court:

6 In Diamond against Chakrabarty, the Plant Patent  
7 Act and the Plant Variety Protection Act played a central  
8 role in the debates between counsel and between the  
9 Court's opinion and the dissenting opinions. The Court in  
10 Chakrabarty rejected the position of the Government and of  
11 the dissenting Justices that those two statutes showed a  
12 congressional understanding that living things are not  
13 protectable under section 101 and could be protected only  
14 insofar as that subject matter was covered in those two  
15 statutes and to the extent to which it was covered. The  
16 Court, instead, adopted a -- a broad interpretation based  
17 on the plain meaning of section 101 referring to the  
18 anything under the sun quotation, but also said quite  
19 specifically at page 313 of volume 447 that the relevant  
20 distinction is not between living and inanimate things for  
21 purposes of applying 101, but between products of nature,  
22 whether living or not, and human-made inventions. So,  
23 there is no doubt that all categories of living things are  
24 within the interpretation of 101 that the Court adopted.

25 And the anomaly of this case is that in

1 petitioners' contention, the Court is being asked to  
2 disfavor, for purposes of applying section 101, and  
3 indeed, to exclude from eligibility for section 101  
4 protection the very subject matter for which Congress had  
5 shown special solicitude and saw a particular need for  
6 patent protection in these two acts at a time when it was  
7 doubtful whether living things could get section 101  
8 protection.

9 QUESTION: Is there any -- anywhere have you  
10 come across in your research any empirical estimate of how  
11 many of the things that qualify under the two special acts  
12 might also qualify under the Patent Act where you would  
13 have to show it was nonobvious as well as new? Is there  
14 any guess? Did anybody ever make -- you know, in the  
15 Government have any idea on that?

16 MR. WALLACE: Well, we do -- I can't give you  
17 any direct answer to that, but there -- there are certain  
18 -- there have been more plant variety certificates issued  
19 than there have been utility patents issued on plants.  
20 The --

21 QUESTION: I noticed that there is a document  
22 filed, which I got, that they referred to in the briefs.  
23 This is Mr. Rifkin's report that went to Congress, and it  
24 makes the recommendation I've referred to: no protection.  
25 Then it says backup documents will explain all the



1 reasons. So, I've been trying to -- they're Government  
2 reports. I've been trying to find them. I can't. Does  
3 anyone know where they are? I'd like to read it, frankly.

4 MR. WALLACE: We perhaps could provide some help  
5 on that, but I cannot at the moment. I'll see what we can  
6 do on that -- on that question.

7 As of September 30th of this year, the  
8 Department of Agriculture had issued 5,022 plant variety  
9 certificates, whereas, as we explain in our brief, there  
10 have been a total of 1,800 utility patents issued for  
11 plants or plant components such as seeds and the like.

12 The -- the PVPA protection, the Plant Variety  
13 Protection Act, is only on the plant variety itself so  
14 that the availability of patents on seeds and other plant  
15 parts is available only under section 101.

16 The court in Chakrabarty itself said that  
17 nothing in the language or legislative history of the  
18 Plant Variety Protection Act indicated any intention to  
19 limit section 101 availability for patents when the  
20 standards of section 101 are met. And as a matter of  
21 fact, the relevant committee report on the PVPA in 1970,  
22 which we quote on page 22 in our brief in the middle of  
23 the page, said quite specifically that that statute, the  
24 PVPA, quote, does not alter protection currently available  
25 within the patent system. So, we see no incompatibility

1     between the two systems of protection.

2                 QUESTION:  Mr. Wallace, can I ask you your view  
3     on the question of whether a person who buys a patented  
4     seed and plants it and then gets some seeds and saves them  
5     and then replants them the following year, would he be an  
6     infringer?

7                 MR. WALLACE:  That depends on the terms of the  
8     license agreement.  That -- that is within the -- the  
9     power of the patent holder to --

10                QUESTION:  Supposing the -- supposing the  
11    license agreement is -- is silent on the matter, but  
12    merely identifies it as a patented seed.

13                MR. WALLACE:  Well, that -- to the -- you'd have  
14    to interpret what the arrangement is and what has been  
15    granted and what has been withheld.

16                QUESTION:  The arrangement is that the -- the  
17    farmer bought some seeds knowing they were patented.  
18    That's the whole arrangement.  Would he be -- would he  
19    violate the terms of the patent and infringe the patent if  
20    he saved the seeds?

21                MR. WALLACE:  If the -- if the plant could  
22    reproduce the same seeds that are patented, he could not  
23    make and use the patented seeds without permission from  
24    the license holder.

25                This license is not silent.  It appears on page

1 51 in the large appendix.

2 QUESTION: Well, I know, but I'm not asking a  
3 question about the license.

4 MR. WALLACE: Yes.

5 QUESTION: I'm asking a question about the law.

6 MR. WALLACE: Right, yes. And the license says  
7 -- I think this tells you something about the law. The  
8 license says it is granted solely to produce grain and/or  
9 forage, which could include any seeds that are produced.  
10 For other licenses --

11 QUESTION: Why is that not like a license to use  
12 a patented mimeograph machine that's licensed only to use  
13 with -- with the seller's paper? Why isn't that the same  
14 kind of thing?

15 MR. WALLACE: Well, because your crop can be  
16 used as a means of producing patented seeds and  
17 reproducing the patented plant product, and it becomes a  
18 form of manufacturing of the patented item without the  
19 patent holder's permission unless arrangements have been  
20 made.

21 QUESTION: I -- I can't think of a machine that  
22 can replicate itself. I've been trying to do that.

23 (Laughter.)

24 QUESTION: Now, maybe -- maybe that indicates  
25 that plants are -- are different --

1 MR. WALLACE: Well --

2 QUESTION: -- and -- and that we should pay  
3 careful attention before saying that the -- the new acts,  
4 the 1930 act and the later act, were -- were not intended  
5 to supersede patent protection.

6 MR. WALLACE: Well, plants are -- are different  
7 in that Congress, while saying that nothing was intended  
8 to limit section 101 availability, saw a special need to  
9 assure that for plants there would be protections  
10 available even when it was doubtful, whether for  
11 microorganisms or animals, there would be. We now have --

12 QUESTION: They also -- they also wanted to be  
13 sure that people could do research. You see, that's --  
14 that's actually bothering me as much as the seeds. They  
15 wanted to be sure that people could do research, so they  
16 create a special exemption. And now your reading of the  
17 patent law will wipe out what sounds like a very important  
18 special exemption.

19 MR. WALLACE: The exemption is for purposes of  
20 that act only. When greater research and development,  
21 greater disclosure, and higher standards for qualifying a  
22 patent have been met, there has been more of a  
23 contribution to public knowledge which, under our  
24 intellectual property laws, justifies a greater exclusive  
25 right for a limited period of time.

1                   QUESTION: Which is why I wanted to know the  
2     empirical contours of that argument.

3                   MR. WALLACE: And then the public benefits from  
4     all of that. It's -- ultimately these intellectual  
5     property protections are for the benefit of the public.

6                   QUESTION: Mr. Wallace, what would it take to  
7     craft a statute specifically designed for such living  
8     things? When I read that sentence in Chakrabarty, I was a  
9     little puzzled because I said, well, why isn't this PVPA a  
10    statute specifically designed for such living things?

11                  MR. WALLACE: It is to the extent it goes, but  
12    of course, it has a much less -- lower threshold of  
13    qualifying for eligibility and a lesser standard of  
14    protections. The anomaly would be to say that the  
15    microorganism and animal patents issued under section 101  
16    should have rights that are not available for those who  
17    invent plants when it was plants that Congress wanted to  
18    give special assurance for in -- in enacting this  
19    legislation at a time when it was thought that, either for  
20    practical reasons or because of doubt about the  
21    applicability of --

22                  QUESTION: Thank you, Mr. Wallace.

23                  MR. WALLACE: -- all the plants, patents --

24                  QUESTION: Mr. Johnson, you have 10 seconds  
25    left. We'll round it off and submit the case, and we'll

1 all go to lunch.

2 MR. JOHNSON: Whitman, section 119(f),  
3 Congress --

4 CHIEF JUSTICE REHNQUIST: The case is submitted.  
5 (Whereupon, at 12:14 p.m., the case in the  
6 above-entitled matter was submitted.)

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