

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BOARD OF TRUSTEES OF THE LELAND :

4 STANFORD JUNIOR UNIVERSITY :

5 Petitioner : No. 09-1159

6 v. :

7 ROCHE MOLECULAR SYSTEMS, INC., :

8 ET AL. :

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10 Washington, D.C.

11 Monday, February 28, 2011

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 11:07 a.m.

16 APPEARANCES:

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18 Petitioner.

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20 Department of Justice, Washington, D.C.; on behalf of
21 United States, as amicus curae, supporting
22 Petitioner.

23 MARK C. FLEMING, ESQ., Boston, Massachusetts; on
24 behalf of Respondents.

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P R O C E E D I N G S

(11:07 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next this morning in Case 09-1159, the Board of Trustees of Stanford v. Roche Molecular Systems.

Mr. Ayer.

ORAL ARGUMENT OF DONALD B. AYER

ON BEHALF OF THE PETITIONER

MR. AYER: Thank you, Mr. Chief Justice, and may it please the Court:

The Bayh-Dole Act sets forth a comprehensive disposition of rights in inventions made by nonprofit organizations and small business organizations under Federal funding agreements. That disposition specifically defines the rights of inventors and it puts them in the third position behind the contractor, the nonprofit contractor, and behind the government, and specifically says that the inventor may only receive rights -- that is to say, take title -- when the -- when the contractor has declined to take title or defaulted in some respect, and the government itself has -- has likewise declined to take title.

In this case Roche's sole claim rests on an assignment from an inventor who was at that time I think without question a Stanford employee who was working on

1 a project under a Federal funding agreement.

2 JUSTICE SOTOMAYOR: What if the inventor had
3 not been an employee? If it had been an independent
4 contractor who was working in combination with the
5 university, how does this automatic vesting --

6 MR. AYER: Well, Your Honor, the act deals
7 specifically with independent contractors, and -- the
8 regulations at least do. And they indicate that the --
9 that the contractor in that instance, if in fact working
10 on a Federally funded project, would step into the shoes
11 of the contractor. But I don't believe it would affect
12 the outcome in terms of whether it would be a Bayh-Dole
13 invention.

14 The -- the critical fact here is that the
15 inventor was working on a project that was already
16 funded, his work at Cetus was part of that project. And
17 then that result was --

18 JUSTICE GINSBURG: That seems to be a
19 factual dispute, so maybe you can be clear on that.
20 According to Cetus or Roche, at the time that this
21 scientist came to Cetus to work, there was no Federal
22 funding; that that Federal funding for this project, the
23 Stanford project, came about after the scientist had
24 spent his 9 months at Cetus. At least that's the
25 picture that -- that they draw, that the Federal -- that

1 they got their assignment from the scientist at a time
2 when there was no Federally funded project.

3 MR. AYER: That's what they say, Your Honor,
4 and I would submit that is plainly not correct. We deal
5 with this at pages 21 and 22 of our yellow brief, and we
6 specifically talk about the fact -- there's several
7 critical facts here. One is that the article which was
8 written about the work at Cetus, the JID article at page
9 135 of the joint appendix, specifically has a footnote
10 indicating that the work reported on -- that is the work
11 at Cetus on the assay -- was funded by the two specific
12 grants in issue.

13 Dr. Merigan, who is the head of the lab at
14 Stanford that Dr. Holodniy worked in, talks in his
15 declaration at 98 and 99 of the joint appendix --
16 specifically talks about how Dr. Holodniy's work was
17 part of the AIDS research center at Stanford and part of
18 an AIDS clinical trial at Stanford, and all of that work
19 was federally funded.

20 JUSTICE SCALIA: Just -- just as a
21 hypothetical, suppose -- suppose it was as Justice
22 Ginsburg suggested; or indeed suppose this individual
23 even before he was employed by Stanford at all, much
24 less employed by a Stanford project funded by the
25 Federal Government, entered into this kind of an

1 agreement with somebody that he had been working for.

2 How -- how would it --

3 MR. AYER: Well, I think you have to look
4 very carefully at the facts, and I don't want to speak
5 loosely and categorically about the facts, but what --
6 what I will say is that in a situation where -- and this
7 is very clearly true -- in a situation where prior work
8 is done by persons who are, to start with a clearer set
9 of facts, not affiliated with the university, and
10 they -- let's say that person conceives of an invention,
11 and that later the university takes that conception of
12 an invention and reduces it to practice. The conception
13 by a person who is not a university employee, if -- if
14 there's no university person involved in the conception,
15 then it can't be an invention of the contractor, because
16 you can't be an inventor without being part of the
17 conception.

18 So that's a variation on Your Honor's -- on
19 Your Honor's question, but it's a -- it's a clear
20 example where Bayh-Dole would not apply.

21 JUSTICE SCALIA: How does that change when
22 you -- when you alter the hypothetical so that he was
23 already an employee of Stanford, but was not working as
24 an employee of Stanford when he was at this other
25 company? You could still say that -- that Stanford was

1 not the inventor.

2 MR. AYER: Well, you would -- you -- I think
3 you are now in a zone where one of the things that has
4 to be considered is the equitable character of any
5 assignment of a future interest, that is to say a future
6 invention. Because if in fact what was assigned was, as
7 here, the possibility that there might at some future
8 time be an invention, then equitable considerations come
9 into play; and one of the equitable considerations we
10 think the one that is of paramount significance, is the
11 fact that the Congress of the United States has said in
12 the context of Bayh-Dole that when the United States
13 invests money in research, it wants certain things to
14 happen that are very carefully set out in the -- in the
15 Bayh-Dole Act.

16 JUSTICE KENNEDY: Could you tell me, assume
17 no Federal act, let's just talk about two -- or parties
18 that are not involved with the Federal Government.
19 Inventor agrees to assign to A; then inventor --
20 inventor in fact assigns to B; then A gets the patent --

21 MR. AYER: Well, it depends what's assigned,
22 Your Honor. If -- if B is a bona fide to purchaser
23 under 35 U.S.C. 261, then B would prevail. If B is not
24 a bona fide purchaser, and that can only apply under
25 261, where you are dealing with an assignment in law of

1 a patent or a patent application, then I think you are
2 in the difficult zone where there are two competing
3 interests in the future possibility of an invention; and
4 I don't know that I can, without knowing all the facts,
5 even intelligently try to tell you what would end up
6 happening.

7 JUSTICE KENNEDY: In this case, if you do
8 not prevail on your principal argument, have you
9 preserved the point that the assignment to Cetus was
10 contrary to public policy?

11 MR. AYER: I think we have, Your Honor. I
12 think -- essentially I would say, frankly that that
13 is --

14 JUSTICE KENNEDY: But the court of appeals
15 didn't seem to discuss that.

16 MR. AYER: Well, I think that is at the
17 heart of -- of our -- of our core argument and of the
18 government's argument, and it is that, as the trial
19 court here held, and as we've said in our brief several
20 times, the inventor, because he is working here at the
21 time of the assignment on a Federally funded project as
22 an employee of Stanford University, is essentially
23 working on something covered by Bayh-Dole; and being
24 covered by Bayh-Dole means that he lacks the power to
25 transfer title to this future invention to someone else

1 because the statute has already spoken for it.

2 JUSTICE GINSBURG: Mr. Ayer, it seems the
3 Federal Circuit emphasized a distinction between the
4 scientist saying "I will assign," which was the language
5 used in the agreement with Stanford, and "I hereby do
6 assign," and it seems that that was critical to the --
7 to the Federal Circuit's decision.

8 They say -- they cite a whole bunch of
9 cases. The suggestion seems to be that if Stanford had
10 said "I hereby do assign," there would be no case
11 because Stanford would have been first in time.

12 MR. AYER: Well, one interesting thing about
13 that discussion is that the very first case that we know
14 anything about, that we're aware of, making that
15 distinction and relying upon the immediate effect of an
16 assignment using the words "I hereby assign," was the
17 FilmTec case in 1991. That was 2 years after the events
18 in this case, so how was Stanford supposed to know that
19 that fine distinction was going to be made?

20 We think the critical -- the critical issue
21 here is whether the inventor, while working on a
22 federally funded project as an employee of the
23 contractor -- and there's no doubt that his work at
24 Cetus was part of his Stanford research. All you have
25 to do is look at pages 16a to 18a of the petition

1 appendix for the court of appeals decision or pages 62a
2 and 69a for the district court opinion. It's perfectly
3 clear that everyone knew he came to Cetus to advance his
4 work on his Stanford research, which was in fact funded,
5 as we show at pages 21 and 22. And the Bayh-Dole --

6 JUSTICE ALITO: What have universities been
7 doing for the last 30 years? Have they been proceeding
8 on the assumption that title to inventions vested in
9 them automatically or have they been very careful about
10 getting assignments from all of their employees?

11 MR. AYER: Universities, and -- and I think
12 everybody engaged in research, is generally careful.
13 They have policies in place to get assignments, and
14 there are lots of reasons why that would be true. It
15 was true before the Bayh-Dole Act. It's a -- it's a
16 wise and prudent practice to have an understanding with
17 your employees about who is going to own what.

18 JUSTICE KAGAN: Do those policies ever
19 distinguish between Federally funded projects and
20 Non-Federally funded projects?

21 MR. AYER: I don't -- I don't know about the
22 universe of them. I -- I know that the -- that the
23 Stanford policy in this case relevant at this time was a
24 policy that indicated employees could retain title in
25 many instances, but not where Federal law, applicable

1 law, says that they can't retain title; and in that
2 sense they do.

3 But those policies I think are very
4 clearly in virtually every case I know anything about
5 policies that are signed by an employee pretty much the
6 day they walk in the door, as I think was the case here
7 with Dr. Holodniy back in 1988. And it's a general
8 understanding of what the expectations are, and I don't
9 want to here be heard to say at all that we think this
10 is an unwise thing or that it isn't a good thing that it
11 goes on. It's a very good thing that it goes on,
12 because people need to understand what the situation is.

13 The critical issue is whether, in the event
14 that that fails to happen for some reason or that there
15 is a slip-up here where a fellow going to visit
16 somewhere on the first day there has something put under
17 his nose called a visitor's confidentiality agreement
18 which he happens to sign, and down in paragraph 2 it
19 talks about assigning away everything that he ever might
20 do as a consequence of this.

21 The point is that in that situation you
22 can't have the interest of the United States, which is
23 the critical paramount interest in this case -- I want
24 to make that very clear. It's the interest in the
25 United States when it spends millions and billions of

1 dollars on research in having that research handled in a
2 certain way, having the fruits of it dealt with in a
3 certain way and having it go where Congress says it
4 should go. Now, the critical --

5 JUSTICE SOTOMAYOR: Don't you think that
6 the --

7 CHIEF JUSTICE ROBERTS: Well, in theory -- I
8 mean, you're cloaking yourself in the interests of the
9 United States, but we're going to hear from their lawyer
10 shortly.

11 MR. AYER: Right.

12 CHIEF JUSTICE ROBERTS: Do you ever have
13 different arrangements with respect to the assignments
14 depending upon who the researcher is? I mean, I suppose
15 -- I would have supposed there are very prominent
16 researchers that you would like to have at Stanford, and
17 you would be willing to negotiate less than a
18 requirement of full assignment of their inventions in
19 order to -- to get that person there.

20 MR. AYER: I don't know -- I wouldn't tell
21 you categorically --

22 CHIEF JUSTICE ROBERTS: In other words,
23 you'd be willing -- wouldn't you be willing to sell the
24 interests of the United States down the river to get --
25 to advance your interests?

1 MR. AYER: Well, we would not, I think, be
2 willing, and I wouldn't think anybody would be willing,
3 to break the law. And we would submit that that's
4 what's going on here.

5 CHIEF JUSTICE ROBERTS: Well, but I thought
6 the law meant that the United States got whatever
7 interest the contractor got, right? And if -- it
8 doesn't say what the contractor can or can't do with
9 respect to the employees it has.

10 MR. AYER: The statute -- the statute
11 defines a universe of covered cases which are inventions
12 of the contractor, which we think the other side uses
13 those words to argue that -- that inventions of the
14 contractor are only the ones the -- the contractor
15 already owns by virtue of --

16 JUSTICE SCALIA: Plus the word "retained,"
17 don't forget that, too.

18 MR. AYER: Right. Those two provisions are
19 essentially their argument for narrowing the universe of
20 inventions that is covered.

21 And I want to just say at the outset, the
22 critical thing about narrowing the universe of
23 inventions covered is that it narrows the universe of
24 inventions in which the government's rights to, number
25 one, itself receive title under several provisions of

1 the act; number two, itself to enforce a whole series of
2 requirements under 202(c)(4), (5), (6), (7) and a
3 variety of other provisions, to itself march in and do
4 things.

5 When you define out of that category
6 instances where inventions exist and were produced with
7 Federal money, then you're limiting the coverage of the
8 government's interests. But on the two provisions at
9 issue, we think clearly they do not mean what the other
10 side says they mean. The word "invention of" someone is
11 conventionally understood, if you hear the light bulb
12 was an invention of Thomas Edison, you don't think
13 Thomas Edison owns the patent; you think he invented it.
14 The same thing is true. Even though --

15 JUSTICE ALITO: There are two things that
16 cut very strongly against your argument. I mean, there
17 are many things that cut in favor of it, but the two
18 things that seem to me to cut pretty strongly against
19 your argument are: First, that it has long been the
20 rule that inventors have title to their patents
21 initially, even if they make those inventions while
22 working for somebody else.

23 And the second is that you are relying on a
24 provision that says that the nonprofit organization may
25 elect to retain title, which means hold onto a title,

1 that the -- the organization already has. There's just
2 no accepted definition of the word "retain" that
3 corresponds to the meaning that you want to assign to
4 that word. "Retain" does not mean obtain.

5 MR. AYER: Thank you, Your Honor. Can I
6 answer? Basically, what I would say is, on the first
7 point: You're quite correct, obviously, that that's the
8 general rule, that inventors receive title. However,
9 just in this case, in this fact pattern, the array of
10 so-called vesting statutes that predated the Bayh-Dole
11 Act throughout the 30 years in between are statutes that
12 specifically, in most instances without any discussion
13 of an assignment, simply vested title directly in the
14 United States. So Congress clearly had the power to do
15 that, and they did it, and no one ever seriously argued
16 that they couldn't.

17 JUSTICE SCALIA: But this isn't vesting it
18 in the United States. This is -- this is speaking of
19 the -- the university retaining title. If -- if the
20 government was going to make such a huge change from
21 normal patent law where the inventor owns his invention
22 until he assigns it to his employer, why wasn't that set
23 forth clearly? All they needed was one paragraph.

24 MR. AYER: Well, Your Honor --

25 JUSTICE SCALIA: It says when you're working

1 on a -- on a government-funded project, you have no
2 right to your invention as an -- as an employee. It
3 automatically vests in the -- in the university. I
4 would have expected that to be set forth very clearly
5 if -- if they were making such an immense change in
6 patent law.

7 MR. AYER: Well, Your Honor, I would take
8 exception to how immense it is, given the prior history
9 in which the government simply took title to these very
10 same inventions.

11 But on the issue of the meaning of the word
12 "retain," that's actually a word that has a lot of
13 potential connotations. The one thing we can be sure of
14 here without any doubt is that it doesn't mean that you
15 had to have ownership before, because in section 202(d)
16 of the act, the act specifically talks about the
17 inventor's opportunity to itself be considered for
18 retention of title, and everyone agrees that that phrase
19 is one that never applies when the inventor already has
20 title. So "retain" doesn't mean that.

21 We would submit that what the word "retain"
22 means is --

23 JUSTICE SCALIA: Excuse me. I lost you. Go
24 over that again.

25 MR. AYER: Okay. 202(d) --

1 JUSTICE SCALIA: Yes, where is that?

2 MR. AYER: 202(d) is -- is the section --
3 where is it in the -- okay. It is -- it is on page 9a.
4 And it says that if a contractor does not elect to
5 retain title -- 9a of the blue brief, I'm sorry.

6 JUSTICE SCALIA: Got you.

7 MR. AYER: -- "does not elect to retain
8 title to a subject invention in cases subject to this
9 section, the Federal agency may consider and, after
10 consultation with the contractor, grant a request for
11 retention of rights by the inventor."

12 On 38 of the red brief, you will see the
13 other side vehemently arguing that that only applies
14 when the inventor doesn't have title to start with. So
15 you can't have "retain" mean one thing in one place and
16 place -- and one thing in the other.

17 Your Honor, if I could, I would like to save
18 the rest of my time.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Mr. Stewart.

21 ORAL ARGUMENT OF MALCOLM L. STEWART,
22 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
23 SUPPORTING THE PETITIONER

24 MR. STEWART: Mr. Chief Justice, and may it
25 please the Court:

1 As the Chief Justice's question suggests,
2 although Stanford and the government's interests are
3 aligned in this case, that won't invariably be so, and
4 the government has perhaps different reasons for
5 supporting the same position that Stanford is
6 supporting.

7 JUSTICE KAGAN: Mr. Stewart, could I ask you
8 just a factual question?

9 When the Federal Government contracts with
10 universities or other nonprofits, does it require those
11 universities to get assignments from their employees?
12 And if so, how?

13 MR. STEWART: The government-wide regulation
14 that -- which was promulgated by the Department of
15 Commerce and which identifies certain things that should
16 be in the funding agreements, it does not require an
17 assignment of title from the university's employees.

18 The regulation does require the university
19 to make assurance -- give assurances that it has
20 contractual obligations from its employees to cooperate
21 in filing the documents necessary to process a completed
22 patent application. But that would be necessary --

23 JUSTICE KAGAN: So why doesn't the Federal
24 Government just require assignments from employees to
25 the university?

1 MR. STEWART: Well, under our theory --
2 first, under our theory it wouldn't be necessary,
3 because the statute itself would give the university
4 title. And second, under Respondent's theory I think
5 there is a substantial doubt whether it would be
6 permissible. That is, Respondent's vision of the
7 Bayh-Dole Act is that Congress imposed elaborate
8 requirements on inventions as to which the contractor
9 has obtained title from the researcher, but that
10 Congress left entirely to private ordering, was
11 indifferent as to whether the contractor took title in
12 the first instance.

13 And if that view of the statute were
14 accepted, there would at least be a substantial doubt
15 whether the Commerce Department could promulgate
16 regulations that would validly require the contractor to
17 do something that, in Respondent's view, Congress left
18 to private ordering.

19 Now, I don't want to argue that point too
20 vigorously, because certainly, if this Court holds that
21 assignments from the inventors are required, we would
22 like to have the opportunity to require the contractor
23 to get them, but it isn't clear to me how you would get
24 there if Respondent's view of the statute were accepted.

25 JUSTICE SCALIA: I don't understand that.

1 Why can't the Federal government just say: We're not
2 going to fund your project unless you get assignments of
3 inventions by all the employees working on it? What's
4 the problem?

5 MR. STEWART: We would certainly like to
6 have the opportunity to do that, but to use an analogy,
7 the Bayh-Dole Act is triggered by voluntary choices of
8 small businesses and nonprofits to accept Federal funds.

9 JUSTICE SCALIA: And by -- and by the
10 Federal 0 voluntary decision to provide funds. I mean,
11 certainly you can condition your grant of funds on that.
12 I -- I really don't see the problem.

13 MR. STEWART: If -- certainly if this Court,
14 as I say, holds that the -- an assignment from the
15 inventor is required, then we would like to be able to
16 have regulations that would require that to be done. As
17 I say --

18 JUSTICE SOTOMAYOR: Does the -- as a
19 practical matter, when a university is seeking a patent,
20 doesn't it have to identify the inventors and get
21 their -- proof of their assignment before it can claim
22 ownership of the patent?

23 MR. STEWART: Well, typically it would -- it
24 would certainly have to identify the inventors on the
25 patent application, and typically the university

1 would -- whether it felt an assignment was legally
2 required or not, it would attempt to --

3 JUSTICE SOTOMAYOR: That's a different
4 question than mine.

5 MR. STEWART: It would --

6 JUSTICE SOTOMAYOR: Does the Patent Office
7 require the assignment for purposes of showing ownership
8 of the patent?

9 MR. STEWART: Not -- in most cases, but not
10 necessarily. There's a provision of the Patent Act, 35
11 U.S.C. 118, which says that if an inventor refuses to
12 execute an assignment or cannot be found after
13 reasonable diligence, a person to whom the patent
14 application has been assigned or to whom the inventor
15 has promised to assign it, or some other person with a
16 sufficient proprietary interest in the invention, can
17 file its own patent application. It will identify the
18 inventor as the inventor, and it will provide
19 documentation that establishes its own interest in the
20 invention.

21 And this is the kind of thing that we might
22 in some instances have to do with respect to Federal
23 employees. That is, there's an executive order that
24 says basically as a condition of Federal employment, if
25 you conceive -- if you create or conceive an invention

1 on the job, it -- the Federal Government is entitled to
2 take title to it.

3 JUSTICE SOTOMAYOR: Could I ask -- that all
4 sounds to me like there's an assumption about
5 assignments, even in the patent law, that you -- the
6 section that you just recited to me says a promise to
7 assign will get you an assignment if the inventor won't
8 give it to you.

9 MR. STEWART: It could be a -- I mean, there
10 are two different things. It could be a promise to
11 assign at the formation of the employment arrangement,
12 where the employee is not -- doesn't necessarily have in
13 mind any particular invention, but he exercises a
14 contractual commitment to assign to the -- to the
15 employer at a later date.

16 JUSTICE GINSBURG: Is that what we're
17 dealing with in this case? I mean, there was a -- an
18 agreement, a standard Stanford agreement, that said I
19 will assign any -- any patent.

20 MR. STEWART: He agreed to that, and he also
21 agreed that he would not enter into any other
22 arrangement that placed him in conflict with the
23 agreement he had made --

24 JUSTICE GINSBURG: So why isn't that the
25 beginning and end of this case? I mean you -- there are

1 important questions presented. But the Federal Circuit
2 said everything turns on the difference between "I will
3 assign" and "I hereby assign." Cetus would have come
4 second in time, therefore would not have prevailed over
5 Stanford, but for, except, the Federal Circuit said, one
6 is a future conveyance and one is an immediate
7 conveyance. You know --

8 MR. STEWART: Leaving aside the question of
9 whether that is right or wrong is a matter of contract
10 law, our view is it was not within Stanford's power to
11 essentially convey to the inventor or allow the inventor
12 to retain title, and that's clear in a couple of
13 different respects. The provision that Mr. Ayer was
14 reading, section 202(d), says that if the contractor
15 does not elect to retain title, then the inventor can
16 make a request for retention of title, which the agency
17 will consider after consultation with the contractor.
18 So the statute doesn't say to the contractor --

19 JUSTICE KENNEDY: Well, but Justice
20 Ginsburg's question, and I have the same concern, is
21 that why can't we resolve this case in a simple way?
22 What you're asking for, based on submissions to us of
23 amici, of amicus briefs, means a very great change in
24 how -- how -- how patents are held. If we can resolve
25 this case on a simple contract basis, why not do it?

1 MR. STEWART: Well, I -- if the Court were
2 to hold that the agreement made with Stanford took
3 precedence over the contractual commitment to Cetus,
4 based either on general contract law or on the view that
5 Bayh-Dole would prohibit the enforcement of the -- of
6 the agreement with Cetus under these circumstances, that
7 would satisfactorily resolve the case from the
8 government's perspective. The one --

9 JUSTICE KAGAN: Mr. Stewart, do you know, is
10 this a Stanford-specific problem or is it a more general
11 problem? In other words, are there many universities
12 that have agreements like Stanford's that would be
13 subject to the Federal Circuit's ruling? Or is this
14 just an example of one university that unfortunately has
15 a bad agreement?

16 MR. STEWART: I think there are probably a
17 lot of universities that use this language, and indeed,
18 as one of the amicus briefs points out, it's very
19 natural to distinguish between a present assignment and
20 a promise to assign in the future with respect to an
21 invention that now exists. It seems a little ethereal
22 to distinguish between a present assignment of an
23 invention that has not yet been created and an agreement
24 to assign that in the future.

25 Now, certainly universities could change

1 their contracts if that was what was necessary. I think
2 one of the concerns that the government has, and this
3 was hinted at by the Chief Justice's question, is that
4 we're -- we're worried not just about what can be done
5 to universities, but what universities could do to us.
6 That is, it's standard university practice to say
7 employees agree to assign their inventions to the
8 university, and the two parties will divide the
9 royalties; and if that is done, then even under
10 Respondent's view it becomes a subject invention; and
11 the university's commercialization of the invention is
12 subject to all the requirements of Bayh-Dole. The
13 government --

14 JUSTICE ALITO: Isn't it the case that at
15 least some components, possibly many components, of the
16 Federal Government for the last 30 years have been
17 proceeding on that assumption that assignments were
18 necessary? The grants here were -- were from NIH, isn't
19 that right?

20 MR. STEWART: Right.

21 JUSTICE ALITO: And one of the amicus briefs
22 points out that the NIH compliance guidelines say by law
23 an inventor has initial ownership of invention; however,
24 awardee organizations are required by the Bayh-Dole Act
25 to have in place employee -- employee agreements

1 requiring an inventor to assign or give ownership of an
2 invention to the organization --

3 MR. STEWART: -- well, the -- the NIH
4 document is internally inconsistent, because it says at
5 the beginning that title passes automatically to the
6 university, but then, as you say, it states later on
7 that an assignment is required, but that the contractor
8 is required to get it.

9 And I think some people have proceeded on
10 that assumption because it never -- so long as
11 assignments were in place and were enforceable, it never
12 really mattered whether they were needed.

13 But to continue my answer to Justice Kagan,
14 I wanted to point out, under Respondent's theory,
15 universities could make a conscious, calculated decision
16 that, rather than obtain an assignment for their
17 inventors, they would simply agree with the inventor
18 that royalties would be split in -- in the same manner
19 as previously, but that the inventor would retain title
20 and, perhaps with the assistance of the university's
21 technology transfer office, would negotiate with
22 commercial entities. And the effect would be to
23 contract around Bayh-Dole; commercialization could occur
24 without complying with any of the prerequisites.

25 CHIEF JUSTICE ROBERTS: Thank you, Mr.

1 Stewart.

2 Mr. Fleming.

3 ORAL ARGUMENT OF MARK C. FLEMING

4 ON BEHALF OF THE RESPONDENTS

5 MR. FLEMING: Mr. Chief Justice, and may it
6 please the Court:

7 The Bayh-Dole Act had the laudable objective
8 of taking inventions off of government shelves and
9 putting them into the market, and it succeeded; but it
10 did not change the long-standing rule dating back to
11 this Court's decisions in Hapgood and Dubilier that
12 title to an invention vests in the inventor, subject to
13 assignment, not in the inventor's employer. We submit
14 that, in light of this long-settled rule which Congress
15 nowhere purported to change, the Act should be given its
16 straightforward meaning.

17 CHIEF JUSTICE ROBERTS: Is there a reason
18 that the Federal Government can't just say, from now on
19 we're not going to give any money to Stanford or anybody
20 else until they have an agreement making clear that the
21 inventor is going to ensure sure that title rests with
22 the university, which then triggers the Bayh-Dole Act?

23 MR. FLEMING: Mr. Chief Justice, I know of
24 no reason why the Federal Government cannot make that
25 requirement. In fact, in the case of FilmTec v.

1 Hydranautics, a Federal Circuit decision, the decision
2 reflects that the Federal agency there did exactly that.

3 CHIEF JUSTICE ROBERTS: So you have no
4 problem -- I mean, Mr. Stewart is being careful for his
5 client, but you're comfortable with the idea that the
6 government could impose that, even though there's
7 nothing in the statute that requires it, and even though
8 somebody could argue that the statute's somewhat
9 inconsistent with it, in the -- in the sense that it
10 wants to promote commercialization.

11 MR. FLEMING: As far as I know that has
12 never been litigated, but I know of no reason why a
13 Federal agency couldn't say to a contractor, we want to
14 be absolutely certain that the assumption that underlay
15 not only Bayh-Dole contracting, but contracting going
16 all the way back to Attorney General Biddle's report in
17 1947, that everyone assumed was in place, which is an
18 assignment from an employee, whether it's a Federally
19 funded invention or a privately funded invention --

20 JUSTICE BREYER: Well, though --

21 MR. FLEMING: -- would go to the contractor.

22 JUSTICE BREYER: Well, that's where I
23 exactly am. I mean, the -- the brief that I found very,
24 very interesting is that filed by the Association of
25 American Universities and the Advancement For Science

1 and the Council on Education, and they seem to take the
2 line that you are -- I don't know how far you want to
3 pursue it.

4 They say the strongest analogy is with
5 government employees, and if you look at government
6 employees the basic rule is, the Federal Government paid
7 for it, they should have the invention. And the way
8 they do it is not to deny the employee the right to have
9 the invention, but they insist upon an assignment,
10 assignment of an exclusive license.

11 And there are cases which are cited here
12 that suggest that, even if the employee tries to run his
13 way around that and simply goes and before the
14 government can get it assigns the interest to a third
15 party, that that third party assignment is void as a
16 matter of public policy; and that the assignment to the
17 government of the exclusive right is valid as a matter
18 of law, a legal implication from the executive order in
19 the circumstance.

20 That brings me back to where Justice
21 Ginsburg was, and Justice Kennedy. The analogy is so
22 strong. The government has paid for it. There is a
23 statute here that really seems to assume, though not
24 explicitly say, that the universities will have title --
25 that we simply copy what happened in this other area and

1 say that an effort to assign by the employee in
2 contravention of what this statute takes as its basic
3 assumption, and a contract, is void as a matter of
4 public policy, because the exclusive license is assumed
5 to be assumed -- to be assigned to the university,
6 though I don't need the second part; for this case, the
7 first part suffices.

8 MR. FLEMING: Justice Breyer, let me begin
9 with the assumption that I agree underlies the AAU brief
10 about the situation with respect to government
11 employees. Actually, I think the situation of
12 government employees supports our side, because, as this
13 Court ruled in *Dubilier*, just because the government
14 pays for an invention does not mean that it
15 automatically owns it.

16 In *Dubilier*, there were employees of the
17 Bureau of Standards who came up with particular
18 inventions and they got patents on them, and the
19 government said: We own that because these are
20 government employees. And this Court ruled that's not
21 the case. Government employees are in no different
22 position from employees of private entities with respect
23 to ownership of their inventions.

24 JUSTICE BREYER: Is that before the
25 executive order or after?

1 MR. FLEMING: The executive order simply
2 says that there can be regulations where the employment
3 agreement, which is essentially regulatory between the
4 government agency and the individual, can result in an
5 assignment from the individual to the government, just
6 as the same applies in private industry. Employees sign
7 either an agreement to assign, as happened with
8 Dr. Holodniy and Stanford here, or, as happened with
9 Cetus, there's a present assignment of future expected
10 interest.

11 CHIEF JUSTICE ROBERTS: Well, but the
12 problem with --

13 MR. FLEMING: I'm sorry, Mr. Chief Justice.

14 CHIEF JUSTICE ROBERTS: Are you finished
15 answering Justice Breyer?

16 MR. FLEMING: What I was going to say is
17 that there was no rule of automatic vesting of title,
18 which is what --

19 JUSTICE BREYER: No, no. I understand that.

20 MR. FLEMING: There's a requirement of an
21 assignment. And the regulations actually give the
22 government employee the right to refuse to assign an
23 invention to the government, and there are appeal
24 procedures, as set out in many of the regulations. We
25 quote the Air Force regulations in our brief, but there

1 are many others, where it's possible that the employee
2 will wind up retaining his rights to an invention that
3 was made, even though he's a government employee.

4 JUSTICE BREYER: And if the employee seeks
5 to assign to a third party in contravention of his
6 agreement, rules and regulations, et cetera, what
7 happens to that assignment?

8 MR. FLEMING: Well, there can be -- it
9 depends on the facts, Justice Breyer.

10 JUSTICE BREYER: The facts are that he was
11 supposed to give it to --

12 MR. FLEMING: There could be a situation
13 where there's an order to reassign, as there was in the
14 Heinemann case.

15 JUSTICE BREYER: No, there's no -- what
16 there is, is an agreement with the government that says
17 any invention you will assign to the government. That's
18 the agreement.

19 MR. FLEMING: Uh-huh.

20 JUSTICE BREYER: And now, in violation of
21 that agreement, he assigns it to a third party. What
22 happens to that assignment?

23 MR. FLEMING: The question will be whether
24 that assignment can be void under ordinary equitable
25 principles, just as it said here.

1 JUSTICE BREYER: And what the Court said --
2 my reading of it, must be yours -- is in the cases they
3 cite, that assignment to the third party is void as a
4 matter of law because it's contrary to public policy.
5 That was my reading of it, and I'm questioning you about
6 that because I might not have read it correctly.

7 MR. FLEMING: I'm not sure which case Your
8 Honor is referring to. If it's the Heinemann case --

9 JUSTICE BREYER: Well, you have -- you have
10 here L-I v. Montgomery, Li v. Montgomery --

11 MR. FLEMING: Well, Li v. Montgomery, is I
12 believe --

13 JUSTICE BREYER: Well, am I right or not in
14 your opinion.

15 MR. FLEMING: I -- I don't think so, Justice
16 Breyer. I think Li v. Montgomery is the unpublished
17 decision of the D.C. Circuit, which has less than a
18 sentence of discussion of this. The only one in which
19 there -- this was actually covered in any respect I
20 think is the Heinemann decision in the Federal Circuit.
21 But there, there was no assignment to a third party.

22 JUSTICE SOTOMAYOR: How --

23 MR. FLEMING: It was just a question whether
24 the -- I'm sorry, Justice Sotomayor.

25 JUSTICE SOTOMAYOR: Is there any conceivable

1 reason that, under the Bayh-Dole Act, whose intent was
2 to protect the government's interests after it's funded
3 the discovery or implementation of an invention, that
4 Congress would have ever wanted the university and the
5 inventor to be able to circumvent the act by failing to
6 secure an assignment?

7 MR. FLEMING: The purpose of the act,
8 Justice Sotomayor, was to clarify the relationship
9 between the contractor on the one hand and the Federal
10 government on the other on the basis of uniform
11 Federal --

12 JUSTICE SOTOMAYOR: But frankly, every act
13 before this one -- actually, the IPA -- required that
14 the contractor seek assignments from inventors. Why
15 would this act omit such a critical term if it didn't
16 intend to vest title in the contractor?

17 MR. FLEMING: The answer, Justice Sotomayor,
18 is given by the IPA, which is: There was no need for
19 such a requirement. Universities had shown that they
20 were perfectly able under existing law --

21 JUSTICE SOTOMAYOR: The government just
22 said -- if we say that the contractor and the inventor
23 can do what they want, what sane university wouldn't
24 enter into agreements with employees letting the
25 employees retain title to their inventions and just

1 sharing royalties thereafter? It wouldn't make any
2 sense for universities to do what you're saying -- get
3 assignments -- because they could just continue taking
4 the bulk of the royalties.

5 MR. FLEMING: If that were to happen,
6 Justice Sotomayor, the remedy that Mr. Stewart kept in
7 his pocket, which is that the agency would say to the
8 university: You're not getting any more Federal money
9 until we are assured that the assumption that has
10 underlaid Federal contracting since 1947 and before is
11 in place, namely, that --

12 CHIEF JUSTICE ROBERTS: But that might lead
13 to the same thing that the Bayh-Dole Act was intended to
14 get away from, which is a variety of different
15 arrangements across the vast array of government
16 agencies, because they will have differing degrees of
17 interest, differing leverage with respect to what they
18 insist on from the different contractors.

19 MR. FLEMING: Well, Congress, Mr. Chief
20 Justice, in the Bayh-Dole Act, was considered with a
21 particular type of uncertainty. It didn't do anything
22 and everything that could be argued to create
23 uncertainty in tech licensing.

24 CHIEF JUSTICE ROBERTS: Do you -- are you
25 aware of situations where the universities enter into

1 different types of arrangements with different types of
2 professors and researchers?

3 MR. FLEMING: Certainly.

4 CHIEF JUSTICE ROBERTS: Presumably some of
5 them have greater degree of leverage than others and can
6 say: Look, you've got to make sure I get this much of
7 the royalties, and I'm only going to give you that much.

8 MR. FLEMING: Well, certainly there are
9 different approaches, and that is the system that
10 Bayh-Dole left in place, which is that the relationship
11 between the contractor and the inventor would be
12 governed under ordinary patent contract law principles.
13 MIT and Caltech, for instance -- I'm sorry, I was going
14 to answer the question with examples, but --

15 CHIEF JUSTICE ROBERTS: No, go ahead.

16 MR. FLEMING: MIT and Caltech get present
17 assignments of future interest. We cite those policies
18 in the brief. Stanford, for its own reasons --

19 JUSTICE GINSBURG: The whole thing that was
20 wrong here is that Stanford, instead of drafting the
21 agreement "I agree to assign," should have said "I
22 hereby assign" and then there would be no case. Is
23 that -- the Cetus agreement said "I hereby assign," and
24 the Federal Circuit said for that reason, even though it
25 was second in time, it takes precedence. Stanford just

1 said "I will assign."

2 So if Stanford had instead used exactly the
3 formula that Cetus used -- "I agree to assign and hereby
4 do assign" -- would you have any case?

5 MR. FLEMING: The question presented before
6 this Court would not be presented. There would be other
7 arguments we might have as to whether that earlier
8 assignment was enforceable as against Cetus in light of
9 representations that were made at the time Dr. Holodniy
10 came in.

11 But Justice Ginsburg, your question is -- is
12 sound, which is that there is this distinction between
13 an agreement to assign and a present assignment of
14 future expected interests. That has been the law for
15 decades. There are plenty of settled expectations based
16 on that. That has not been challenged, not in the
17 petition for certiorari, not in the opening brief of
18 Stanford, and it only comes up in a footnote on the
19 penultimate page of the reply brief. So I would
20 submit --

21 JUSTICE GINSBURG: So if the Cetus agreement
22 that came second in time had said "I will assign," then
23 again, you would have no case?

24 MR. FLEMING: The question presented here
25 would not arise, because the only effective assignment

1 of the invention would have been the assignment that
2 Stanford got subsequently from all three coinventors and
3 filed in the Patent Office in 1995, recognizing that it
4 couldn't simply say: Bayh-Dole Act vests title in
5 Stanford, but rather, we need an assignment, and it got
6 one.

7 JUSTICE GINSBURG: We -- we have a number of
8 sample clauses in this record, and some say "I will
9 assign." Some say "I hereby do assign." The notion
10 that the -- that answer, who is it who loses, should
11 turn on whether one drafter says "I agree to assign" and
12 the other says "I hereby assign" does seem very odd.

13 MR. FLEMING: That's a distinction, Justice
14 Ginsburg, that goes back to the Federal Circuit decision
15 in Arachnid by Judge Giles Rich, who is a notable
16 authority on the patent act. He relied on the Curtis
17 treatise from 1873. But if that were an issue that the
18 Court wished to reconsider, I think --

19 JUSTICE SCALIA: Is that patent law or is it
20 regular contract law? Doesn't it apply in other fields
21 as well? I mean, I'm -- I'm not aware that this is a
22 peculiar doctrine applicable to patent law.

23 MR. FLEMING: No, not in particular. An
24 agreement to assign is specifically that. It's an
25 agreement to do an assignment in the future.

1 JUSTICE SCALIA: To do it in the future. If
2 somebody else gets an assignment before that agreement
3 is -- is executed, the assignment prevails.

4 MR. FLEMING: That's --

5 JUSTICE GINSBURG: Then we're talking about
6 nonexistent property; property that may never, in fact,
7 exist?

8 MR. FLEMING: That comes from the FilmTec
9 decision, which relied on Justice Storey's decision in
10 Mitchell, and it's used, again, by universities like
11 Caltech and MIT that rely on the validity of a present
12 assignment of future expected interest.

13 I mean, I know that the issue of the
14 interpretation of agreements to assign was addressed in
15 the cert petition in ProStar v. IP Venture, which this
16 Court denied cert on three terms ago. But if this Court
17 were to wish to reconsider that doctrine, I would submit
18 it can be done in an appropriate case where there is an
19 amicus briefing on that issue. That's not been
20 considered here at all.

21 JUSTICE GINSBURG: So in the future, the
22 universities would be protected against a third party
23 simply by changing the form of contract with their
24 employees to say "I hereby assign," so we would have no
25 continuing problem? Is that all this --

1 MR. FLEMING: I -- they -- they would be
2 protected from this particular constellation of facts
3 that came up in this case. There might be other
4 problems --

5 JUSTICE BREYER: Yes, and then your clients
6 would be out there arguing, oh, but you, see you can't
7 assign a future interests in the fruits from black acre;
8 I mean, you can promise to do it, but black acre isn't
9 even around yet. And so when somebody ran in and got
10 those fruits, well, then now we have a fight; and in law
11 the second person wins, and in equity maybe the first
12 person can get an injunction. I don't know. But I
13 guess people would raise that kind of argument, wouldn't
14 they?

15 MR. FLEMING: The point, Justice Breyer, is
16 that all these questions are resolved in the exactly
17 same way when we're not talking about a federally funded
18 invention. The Bayh-Dole Act has nothing to say about
19 this.

20 JUSTICE BREYER: So if fact --

21 MR. FLEMING: Those questions might be
22 relevant --

23 JUSTICE BREYER: The reason it's relevant
24 you to, of course, if that's so, Senator Bayh and
25 Senator Dole passed a law which could so easily be

1 subverted by individual inventions and third-party
2 companies that there might be a large class of cases
3 where neither the university nor the government would
4 actually get much of a benefit from research that the
5 taxpayer had funded.

6 MR. FLEMING: I don't think that's a fair
7 inference, Justice Breyer.

8 JUSTICE BREYER: Because?

9 MR. FLEMING: The fact that this has not
10 happened at all in 30 years of the Bayh-Dole Act.

11 JUSTICE BREYER: Because most people perhaps
12 thought that they had made a valid assignment.

13 MR. FLEMING: Well, in most situations there
14 will be a valid assignment, but the fact that Stanford
15 here did not get an effective assignment from Dr.
16 Holodniy is no reason to read the Bayh-Dole Act that
17 Congress did not intend to draft it. And --

18 CHIEF JUSTICE ROBERTS: But it's just --

19 MR. FLEMING: -- it that it doesn't --

20 CHIEF JUSTICE ROBERTS: -- it's not just
21 that there may or may not be an effective assignment.

22 The problem is you may get together, you the inventor
23 get together with the university and say, look, the one
24 -- we share an interest in making sure none of this goes
25 to the government. Why would we want to do that? So

1 you make an arrangement.

2 Your theory -- your theory is that whatever
3 the contractor gets is what the government can get and
4 nothing more, so the contractor and you work out a deal
5 to make sure that the contractor doesn't get the
6 invention or the patent, it just gets royalties.

7 MR. FLEMING: I think --

8 CHIEF JUSTICE ROBERTS: And they're happy
9 because they're -- the value of the patent is not
10 diluted by the fact that the government is going to be
11 doing something with it.

12 MR. FLEMING: I think in that situation, Mr.
13 Chief Justice, there would be other doctrines that the
14 government or a bona fide third-party purchaser could
15 invoke, including section 261 of the Patent Act or a
16 lawsuit for a reassignment, as is happening in Fenn v.
17 Yale or a --

18 CHIEF JUSTICE ROBERTS: So at the end of the
19 day, though, your theory is that Congress passed a law
20 that could -- I guess this is Justice Breyer's point --
21 be easily circumvented not only by the inventor but by
22 the inventor and the contractor working together.

23 MR. FLEMING: It's not that it can be
24 circumvented. It's -- there are efforts, there are ways
25 in which if there is an inequitable assignment, it can

1 be attacked in equity.

2 CHIEF JUSTICE ROBERTS: There's nothing
3 inequitable about it. It's a perfectly fair deal
4 between the university and the inventor.

5 Mr. Fleming: In that event the government
6 has all the remedies that Mr. Stewart was talking about.
7 As a matter of leverage, it could take the patent by
8 eminent domain, and just compensation might be quite low
9 if in fact it has funded all of the research.

10 JUSTICE SCALIA: It could refuse to fund.

11 MR. FLEMING: Absolutely, Justice Scalia.

12 JUSTICE SCALIA: It could refuse to fund
13 without a clear assignment upfront.

14 MR. FLEMING: That's quite right. What it
15 can't do is relitigate Dubilier and just say that
16 because we funded it, we own it. It doesn't make that
17 rule even for Federal employees. An assignment is
18 required. I mean, I think --

19 JUSTICE KAGAN: Do you have an explanation,
20 Mr. Fleming, of why it is that Congress left such a big
21 problem off the table?

22 MR. FLEMING: I --

23 JUSTICE KAGAN: In other words, clearly
24 Congress was thinking about how to protect the
25 government's interests with respect to these patents,

1 and to say, well, we have these interests with respect
2 to patents that the university owns, but we don't have
3 those same interests with respect to patents that the
4 individual researcher owns, just seems bizarre.

5 MR. FLEMING: There is an explanation,
6 Justice Kagan. Which is that the universities had shown
7 they didn't need a vesting rule in order to get title
8 from their inventors, just the same as private industry
9 does not need a vesting rule to get title to
10 nonfederally funded inventions. This was something that
11 Attorney General Biddle in 1947 --

12 JUSTICE SOTOMAYOR: Sorry. They -- they do.
13 I mean, the general rule is that the inventor owns the
14 patent.

15 MR. FLEMING: Correct, Justice Sotomayor.

16 JUSTICE SOTOMAYOR: And there -- there is
17 proof that they can go into court, an employer can go
18 into court and show that the inventor was hired for this
19 specific item and the law would presume or recognize the
20 employer's rights; but why would Congress leave all of
21 that up to the nature of the contract that the
22 university entered into with its inventors?

23 MR. FLEMING: That's precisely what happens
24 in the context of Federal employees, it's governed by
25 the employment relationship between the Federal

1 Government and the employee, and it was shown in the IPA
2 system, in the system that Attorney General Biddle
3 talked about in '47, that the assignment came under
4 ordinary patent law. There was no need for a new --

5 JUSTICE SOTOMAYOR: But the -- but the
6 question I started with and Justice Kagan has picked up
7 on, why would Congress create this act relying on
8 assignments and not have a provision requiring one?
9 Nothing in the Act, nothing in its regulations, nowhere
10 is there a requirement that Federal contractors seek
11 assignments.

12 MR. FLEMING: Because there was no need for
13 such a requirement. The universities and industry were
14 able to do it without the vesting rule.

15 I think in order for Stanford to prevail
16 here, to Justice Scalia's point, the Court would have to
17 be satisfied that -- that Congress worked a highly
18 transformative change in the law of patent ownership and
19 assignment and did it in a very obscure and indirect
20 way. It didn't do it through an express provision, like
21 it does in section 201 of the Copyright Act, which
22 expressly says that an employer can be treated like an
23 author for purposes of the copyright. It didn't do it
24 in the way that was done under the IPAs, which is it was
25 left entirely up to private contract.

1 Supposedly it created this brand-new vesting
2 rule, not through a clear provision, but through a
3 questionable implications from the preamble or other
4 provisions of the Act that don't directly apply, and it
5 did it without a peep in the legislative history that
6 Congress was trying to do this. I think it's remarkable
7 that for 30 years of Bayh-Dole, no one noticed this
8 supposedly all-encompassing vesting rule until this case
9 arose. As Justice Alito --

10 JUSTICE BREYER: But it's also remarkable
11 the other way, that here we have many statutes that took
12 the principle that when the government pays for an
13 invention, the invention vests in the government. Now,
14 there's that statute, that background. Not all of them,
15 but some. NASA, various others.

16 MR. FLEMING: There are three of them,
17 Justice Breyer --

18 JUSTICE BREYER: All right, that's fine.

19 MR. FLEMING: -- and they all specifically
20 say in terms that title shall vest.

21 JUSTICE BREYER: Yes, I know that; I know
22 that; that isn't my point.

23 MR. FLEMING: I'm sorry.

24 JUSTICE BREYER: My point is that it's
25 somewhat remarkable because of this new statute, now

1 that happens to only to inventions in those areas that
2 are inventions of the contractor who, by the way,
3 invents nothing. Human beings invent things, not
4 entities like universities.

5 MR. FLEMING: That's quite so.

6 JUSTICE BREYER: And on your view what that
7 means is it applies to nothing. It only applies to
8 those things that the contractor freely or not freely
9 decides to get from his employee -- if he uses the right
10 words and so forth.

11 That also seems a little surprising, that
12 there could be such a hole in what used to be public
13 ownership of such matters. I'm not -- I don't mean to
14 be -- I started off sounding a little sarcastic. I
15 didn't mean to be. I mean to be -- serious question.

16 MR. FLEMING: No, no, I -- I appreciate the
17 question, Justice Breyer.

18 The point about the vesting statutes, it's
19 important to make a distinction between statutes that
20 expressly vested title, of which we know of three, and
21 statutes under which the government was entitled to ask
22 for an assignment from the employee or the contractor,
23 which were --

24 JUSTICE BREYER: Your answer is not as bad
25 as I think.

1 MR. FLEMING: Thank you.

2 JUSTICE BREYER: And -- okay. Now.

3 (Laughter.)

4 JUSTICE BREYER: What about -- what about
5 the provision that says there shall be -- this is a
6 provision of the law, that the universities are supposed
7 to enter into contracts, funding contracts with the
8 government to make this thing effective.

9 Hmm -- effective. Effective for what?
10 Effective just to apply to some of the things that
11 universities got money to pay for? Or to a lot of them,
12 to all of them?

13 MR. FLEMING: Effective in terms of
14 inventions of the contractor to which the university has
15 the right to retain title. Try as Stanford may,
16 "retain" does not mean "get." It doesn't mean to take
17 away from somebody. An invention of the contractor for
18 exactly the reason you say, Justice Breyer, is not an
19 invention created by a contractor employee. Contractors
20 don't invent.

21 When Congress wanted to refer to employees
22 in the Act, it did; in section 202(c)(7), it refers to
23 contractor employees. In 202(e), it refers to employees
24 of Federal agencies. If -- if Congress had wanted to
25 pass a law that completely wiped out the practice of

1 leaving the relationship between contractor and inventor
2 to private contract, it had plenty of examples of how to
3 do so. It had the NASA statutes, it had the Copyright
4 Act, or it could have just written something clear that
5 said that.

6 It did none of those things because it
7 didn't need to. Over \$200 billion of -- of funding
8 comes from the private sector to -- to technology and
9 inventions like this without the benefit of a vesting
10 rule. If there's any lack of clarity or lack of
11 certainty in this world, it is worked out through the
12 patent law, ordinary provisions, or through the common
13 law, and that is exactly the way Congress envisioned it
14 would be done in -- in the federally funded situation.

15 JUSTICE ALITO: Well, isn't there a --

16 MR. FLEMING: There's no need to state a
17 separate rule for Stanford for -- for inventions that
18 funded out of its endowment, versus inventions that are
19 funded out of a Federal grant.

20 JUSTICE ALITO: Isn't there a big difference
21 between the statute and the prior vesting statutes? The
22 prior vesting statutes said if the government pays for
23 the research, then the taxpayers ought to get the
24 benefit of the patent. But this statute says if the
25 taxpayers pay for the research, if the research is 100

1 percent funded by the taxpayers, taxpayers don't get the
2 first priority. The first priority goes to the
3 universities.

4 So it's totally different from the vesting
5 statute. This is a Federal subsidy for universities and
6 other nonprofits, isn't it?

7 MR. FLEMING: In some ways, Justice Alito,
8 that's right. And the point is that the statute is
9 limited to inventions where the contractor has gotten
10 title from its inventors. It is certain different --

11 JUSTICE SCALIA: The Federal Government
12 hadn't been doing much with the patents that it acquired
13 automatically?

14 MR. FLEMING: Absolutely not, Justice
15 Scalia. That's exactly --

16 JUSTICE SCALIA: That's the reason they gave
17 it to the university or to the private sector.

18 MR. FLEMING: That is exactly the reason
19 this act was -- was enacted, is to get rid of the
20 inconsistent practices among agencies as to the terms of
21 contracts with contractors. It has to do with the quid
22 pro quo. The Federal government gives the money, it
23 agrees not to demand title, and in return the contractor
24 takes on certain obligations. It isn't -- the
25 obligations are not opposable against a noncontractor,

1 like Cetus or Roche in this case. And that's exactly
2 the same as the situations that we cite on page 35 of
3 our brief, which we've offered to lodge with the Court,
4 where Stanford co-owns patents with noncontractor
5 companies like the --

6 CHIEF JUSTICE ROBERTS: What are the
7 obligations -- what are the obligations that the
8 contractor undertakes?

9 MR. FLEMING: The contractor agrees to give
10 the government a nonexclusive paid-up irrevocable
11 license. It agree to be subject to march-in rights if
12 the government feels that the invention is not being
13 sufficiently commercialized.

14 CHIEF JUSTICE ROBERTS: All things -- all
15 things that the government had and more under the prior
16 system?

17 MR. FLEMING: Yes. That's -- well, that's
18 certainly right. It will all depend on what the
19 individual Federal contract has, but yes, in many ways
20 the government was giving up rights in the Bayh-Dole
21 Act, and that was deliberate, because it was felt that
22 the -- that private entities would do a better job of
23 commercializing inventions than the Federal government
24 was doing, and that's not disputed, but it has nothing
25 to do with the rights that apply to a third party that

1 has not taken on obligations from the government, like
2 Cetus, that simply invited Mr. Holodniy in, in order to
3 collaborate, but before it did so, said: We need an
4 agreement to protect our intellectual property.

5 One of the hypotheticals that underlies
6 Mr. Ayer's presentation here is that Dr. Holodniy was
7 some kind of rogue, faithless employee who was out on a
8 frolic of his own and simply decided to assign away all
9 his inventions in satisfaction of a personal debt. But
10 the record is quite the contrary. He showed up because
11 he did not know how to do the PCR technique that is at
12 the core of this invention. The Court only needs to
13 read pages 55 to 57 of the Joint Appendix, where he has
14 marched through each of the steps of this invention
15 that's ultimately claimed in the patents and admits that
16 he had not done any one of them.

17 He went to Cetus, he took the -- he had the
18 benefit of a free flow of information from Cetus
19 scientists, and he also got confidential, proprietary
20 materials that were not available in stores, including,
21 particularly, the RNA standard, which is used every
22 single time one of these assays is run. It's the thing
23 that gives you the standard curve against which you can
24 measure the data from your unknown sample and figure out
25 what the quantity of HIV is in your patient's sample.

1 That was, you know, not available at Stanford. It was
2 designed by Alice Lang of Cetus. It was built by
3 Clayton Casipit in the Cetus lab. It was named after
4 him, using his initials, CC 2, and Mr. Casipit handed it
5 to Dr. Holodniy in a tube for free.

6 JUSTICE SOTOMAYOR: Do you think that Cetus
7 would have let the doctor in absent the agreement
8 between Cetus and Stanford? Wasn't that the primary
9 reason they permitted the doctor in? It wasn't for this
10 ephemeral assignment of an unknown invention. It was
11 because the university and the company had entered into
12 a share agreement of what would happen if they
13 contributed to a Stanford invention.

14 MR. FLEMING: I wouldn't quite agree with
15 the end of the question, Justice Sotomayor. What
16 happened is that Dr. Holodniy's supervisor at Stanford,
17 Dr. Merigan, sat on Cetus's scientific advisory board.
18 When it became clear that Dr. Holodniy could not figure
19 out how to do a PC assay that would quantitate HIV at
20 Stanford, he arranged for Dr. Holodniy to visit Cetus in
21 order to learn how to do that.

22 JUSTICE SOTOMAYOR: But they had a
23 preexisting cooperative arrangement, correct?

24 MR. FLEMING: It was a materials transfer
25 agreement, that's right. So when Dr. Holodniy went

1 there, he signed a separate assignment, the one that
2 assigned his inventions, as a result of the
3 collaboration or as a consequence of the collaboration,
4 to Cetus. And that was the consideration.

5 To this day, Stanford has not explained what
6 Cetus could have done to protect its intellectual
7 property so that it could have been able to practice its
8 invention without having to go to Stanford for a license
9 and pay a royalty. As far as I know, the only thing
10 under Stanford's theory that Cetus could have done is
11 told Dr. Holodniy to take a hike, because they couldn't
12 have any assurance that his employer would subsequently
13 say, You know what? There was a thousand dollars, ten
14 dollars, one dollar -- we don't know -- of Federal
15 funding under an agreement that has never been produced,
16 that is of indeterminate scope, and they suggest, simply
17 by averring in a patent application, that this is all of
18 a sudden a Bayh-Dole invention, even though it was --
19 indisputably now, under the findings of the District
20 Court, conceived before Dr. Holodniy left Cetus and
21 subject to this agreement, and it was done at a time
22 when Dr. Holodniy was being paid not by a
23 Bayh-Dole-related grant, but by a National Research
24 Service Award, which the Bayh-Dole expressly exempts
25 from its provisions in section 212.

1 So the notion that Cetus somehow has lost
2 the private right to the invention conceived using its
3 proprietary materials and information simply by the
4 subsequent use of an unknown amount of Federal funds,
5 that that works as a divestiture --

6 JUSTICE GINSBURG: You were here,
7 Mr. Fleming, when I asked Mr. Ayer about that --

8 MR. FLEMING: Yes.

9 JUSTICE GINSBURG: That's not -- so that the
10 federally funded project existed at Stanford before
11 Dr. Holodniy ever went to Cetus?

12 MR. FLEMING: This, Justice Ginsburg, is a
13 question that was raised in front of the Federal
14 Circuit. The Federal Circuit didn't reach it. It is
15 open on any remand. Of course, we don't think there
16 should be a remand, but it's certainly not before this
17 Court. But to answer the question, here's the record on
18 this point. The salary was not paid by NIH grants. It
19 was paid by a National Research Service Award that is
20 exempted. The grants were never produced. The grant
21 titles, on their face, do not apply to the work that was
22 done at Stanford. One of them deals with establishing a
23 center for AIDS research. Of course, this is work that
24 was not done at the Stanford Center; it was done at
25 Cetus.

1 The second one deals with AIDS clinical
2 trials, and it's undisputed that there were no clinical
3 trials at Cetus. The clinical trials only happened when
4 Dr. Holodniy went back to Stanford. Dr. Merigan's
5 declaration, which Mr. Ayer referenced on JA98, says
6 only that Dr. Holodniy's research at the lab at Stanford
7 was covered by Bayh-Dole Act. It says nothing about the
8 work at Cetus.

9 And if there was any doubt, Stanford argued
10 repeatedly to the Federal Circuit that the federally
11 funded research started in 1990, and this issue was
12 decided on summary judgment against Roche when all
13 factual inferences should have taken in our favor.

14 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

15 MR. FLEMING: Thank you, Mr. Chief Justice.

16 CHIEF JUSTICE ROBERTS: Mr. Ayer, you have
17 two minutes remaining.

18 REBUTTAL ARGUMENT OF DONALD B. AYER

19 ON BEHALF OF THE PETITIONER

20 MR. AYER: Thank you, Your Honor.

21 The -- I think the place to start here is
22 with the fact that Congress, faced with a history under
23 which the Federal government had taken ownership
24 outright of federally funded inventions in approximately
25 80 percent of the cases, enacted a statute to change

1 that because the government wasn't any good at getting
2 the stuff developed. And so they -- they defined the
3 coverage in terms of -- to cover these two phrases,
4 inventions of the contractor.

5 There is no question, if you look at section
6 200 on 1A of the blue brief, you will see in the middle
7 of this initial policy and objective section a reference
8 to what they thought they were talking about. At the
9 very bottom of that page, on the bottom line, they talk
10 about ensuring that inventions made by nonprofit
11 organizations and small business organizations. That's
12 the universe they wanted to cover. The same words --
13 "inventions made by those organizations" -- are in the
14 heading of the regulations, and they appear elsewhere
15 throughout the regulations. So they meant to cover the
16 universe of inventions that those institutions create.

17 We talked earlier about the word "retain."
18 The word "retain" cannot, consistent with its usage in
19 202(d), mean that whoever is retaining it must have
20 owned it before they started, because it's a hundred
21 percent clear, just from thinking about the statute and
22 from reading page 38 of the red brief, that when an
23 inventor is allowed to be considered for retention of
24 title, he never has ownership of it. And so the word
25 "retain" can't mean that.

1 What does the word "retain" mean? I would
2 submit the word "retain" means what it often means. It
3 means that sometimes in a situation, someone is allowed
4 to continue holding something subject to conditions that
5 may change, and perhaps in spite of realities that make
6 you think that's surprising. For example, a parent may
7 be allowed to retain custody after a disputed custody
8 hearing. That's a temporary thing, perhaps. The court
9 may allow it to change.

10 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
11 The case is submitted.

12 MR. AYER: Thank you, Your Honor.

13 (Whereupon, at 12:08 p.m., the case in the
14 above-entitled matter was submitted.)

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