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P R O C E E D I N G S

(11:14 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 20-440, Minerva Surgical, Incorporated versus Hologic, Incorporated.

Mr. Hochman.

ORAL ARGUMENT OF ROBERT N. HOCHMAN

ON BEHALF OF THE PETITIONER

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

The Patent Act doesn't provide for assignor estoppel and never has. In fact, it says invalidity shall be a defense in any action. That's essential to the fundamental patent market. The public grants exclusive rights but only to the extent inventors publicly share useful advances in knowledge. Accused infringers who prove a patent is invalid vindicate the right of all to make and use and sell unpatented project -- products.

Hologic says Congress didn't have to write assignor estoppel into the Patent Act. It reads this Court's 1924 decision in Formica as having settled assignor estoppel into patent law. We don't think that's what Formica did,

1 but it doesn't matter because the world didn't
2 stop in 1924.

3 In 1945, this Court allowed an
4 assignor to invalidate a patent in Scott Paper.
5 That's squarely contrary to assignor estoppel.
6 In 1947, in Katzinger, this Court confirmed that
7 Scott Paper meant an assignor was free to
8 challenge the validity of a patent. And Lear,
9 looking back on the state of the law before
10 1952, said that this Court had by then
11 undermined the very basis of any general rule of
12 patent estoppel.

13 The logic of this Court's decisions
14 require abandoning assignor estoppel.

15 Exposing bad patents is vital patent
16 law policy, and allowing assignors to do so
17 carries no meaningful costs. No reliance
18 interests stand in the way of eliminating this
19 anomalous doctrine. And a patent-law-specific
20 limitation on the rights of assignors is nothing
21 like claim preclusion or issue preclusion or
22 even equitable estoppel, which are generally
23 applicable rules woven into our basic notions of
24 fair and efficient litigation.

25 At the very least, an inventor should

1 be allowed to show that the assignee is
2 asserting a claim broader than what the inventor
3 adequately described and enabled. Not even
4 estoppel by deed, assignor estoppel's supposed
5 model, supports preventing challenges that
6 appear on the face of the patent.

7 And when, as here, the assignee, not
8 the assignor, prosecuted the relevant claim nine
9 years after the patent rights were sold and did
10 so to prevent competition from the assignor's
11 new improved device, assignor estoppel is
12 particularly at odds with patent law policy.

13 This Court should order the Federal
14 Circuit to consider Minerva's Section 112
15 invalidity argument on the merits.

16 Be happy to take any questions.

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

19 I want to focus a little bit on your
20 -- your policy argument that getting rid of
21 assignor estoppel would help, you know, get rid
22 -- rid of bad patents in encouraging inventors
23 to -- to challenge particular claims.

24 But I thought strong patents was the
25 way we encourage invention and that assignor

1 estoppel helped ensure the strength and
2 stability of -- of those patents. How do you
3 sort out those competing policy arguments?

4 MR. HOCHMAN: Well, I think the main
5 policy point is that our -- our -- our patent
6 system absolutely believes in encouraging
7 innovation, but it's -- as I referred in my
8 opening to the patent bargain, it's for --
9 there's -- there's a -- there's a bargain on the
10 other side. The inventors have to provide,
11 among other things, a description and -- and
12 enablement of what they've done. They have to
13 give that to the public in order to get the
14 benefit.

15 And our patent system depends on
16 challenges to validity to make sure that we
17 don't over-protect, we don't provide the
18 benefits of patent exclusivity without the
19 parties doing all the things, without the
20 inventors doing all the things, necessary to
21 earn that substantial public benefit.

22 That includes the time-limited nature
23 of the -- of the exclusivity in Scott Paper, and
24 it includes, among other things, the written
25 description and enable -- enablement issues

1 involved here.

2 So it -- it's true that assignor
3 estoppel leads to challenging bad patents, but
4 that strengthens the overall policy of the
5 patent system and corrects -- and helps correct
6 for the over-patenting that is built into the
7 system and has been discussed by scholars for a
8 long time.

9 CHIEF JUSTICE ROBERTS: Counsel, if --
10 if we do not agree with you that we should get
11 rid of assignor estoppel altogether, do you have
12 any complaints about the position of the United
13 States on how to limit it?

14 MR. HOCHMAN: Yeah. I think -- I
15 think we would certainly prevail on the position
16 of the United States. I think the most
17 important thing to say about the position of the
18 United States is that we -- we do not agree that
19 this Court should simply send it back to the
20 Federal Circuit to figure out whether assignor
21 estoppel should apply in this case.

22 This Court should do that in this case
23 for a number of reasons. First, it's
24 exceedingly important that the assignor estoppel
25 issue, which is a threshold question -- it's

1 going to open up or close a -- a -- a -- a
2 complicated question about validity that
3 involves experts and litigation and all sorts of
4 other costly litigation processes. It's
5 important that that issue be decided clearly and
6 -- and decisively early on in the case. And it
7 --

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Thomas.

11 JUSTICE THOMAS: Yes, thank you,
12 Mr. Chief Justice.

13 Counsel, you said that the -- you
14 could not compare assignor estoppel to issue --
15 concepts such as issue preclusion or claim
16 preclusion, et cetera. You -- you distinguished
17 them, but I don't think you demonstrated why
18 those principles, which do not appear in the
19 Patent Act, are applicable or acceptable, but
20 assignor estoppel is not.

21 MR. HOCHMAN: Yeah. So, Justice --
22 thank you, Justice Thomas. Our argument with
23 respect to that is there are -- we don't dispute
24 that there are times when common law principles
25 inform the background assumptions against which

1 Congress legislates. It's just not everything
2 in the common law, and it's not every -- and
3 it's not every common law principle.

4 And issue preclusion and claim
5 preclusion, I think, are maybe unique both in
6 the length of which -- that they've been part of
7 the common law and the uniformity with which
8 they have been adopted not just in patent cases,
9 and -- and not need to be adapted to patent
10 cases, but are applicable generally across the
11 board.

12 I would think issue preclusion and
13 claim preclusion is a background assumption of
14 every statute, every cause of action Congress
15 writes, unless it says otherwise.

16 This Court, you know, for -- for
17 hundreds -- for more than 150 years has said
18 those doctrines are implicit in the notion of a
19 fair and efficient judicial system.

20 Assignor estoppel is nothing like
21 that.

22 JUSTICE THOMAS: Well, let's --
23 Petitioner here -- I'm really interested in
24 clarification more than anything else on this
25 point. But Petitioner here assigned a certain

1 patent. There were changes to that, and I
2 didn't quite get how much the patent was changed
3 or continued. If you could help me on that, I'd
4 appreciate it.

5 MR. HOCHMAN: Yeah, and -- and for
6 this, it -- it -- it -- it would help if you
7 could turn to the Joint Appendix at page 833,
8 the supplemental appendix. That's the patent.
9 And then maybe put a finger in the same
10 supplemental appendix, 903, which is Claim 31.

11 I mean, here -- here's the difference.
12 Okay? Their -- their position is that their
13 patent, claim -- which is Claim 1, it's Column
14 19 at page 833, and I'm going to focus on the
15 second paragraph there, an applicator -- which
16 -- which has the term "applicator head."

17 The -- the dispute is whether an
18 applicator head, the -- the -- the part that
19 comes into contact with the endometrial lining,
20 can be moisture-permeable, has to be
21 moisture-permeable, or can be
22 moisture-impermeable. They are --- their --
23 their invention, their -- their patent says --
24 has been construed to allow a
25 moisture-impermeable applicator head.

1 Now they don't -- they -- they have
2 exactly one thing they point to that suggests --
3 that they say suggests that the -- the inventor,
4 Csaba Truckai, when he originally filed his
5 application, had the same thing, and they point
6 to this page, 903.

7 And you'll notice one -- one most --
8 the most conspicuous and obvious thing about
9 this is that the term "applicator head" isn't
10 even in that claim. It's not even there.

11 And I hasten to add that if you go
12 back to 833 and you go down about line 13, it
13 says that "when the applicator head is in its
14 expanded state, it's configured to form to the
15 shape of the uterus." So it's coming into
16 contact. It's -- it's -- it's -- that claim --
17 that claim limitation is also not in Claim 31.

18 So what they have is a claim where a
19 -- a moisture-impermeable device traps moisture
20 by conforming to the shape of the uterus and
21 traps moisture there. And they're saying that
22 Truckai did that as well. And there's simply
23 nothing -- nothing at all in Claim 31 that even
24 remotely suggests that moisture should be
25 trapped.

1 That, by the way --

2 CHIEF JUSTICE ROBERTS: Thank --

3 MR. HOCHMAN: -- is another --

4 CHIEF JUSTICE ROBERTS: -- thank you,
5 counsel.

6 Justice Breyer.

7 JUSTICE BREYER: Thank you.

8 Counsel, I've seen -- I assume that
9 there is -- assume with me that there's quite a
10 lot of precedent in favor of some form of the --
11 of the -- of the -- of the doctrine.

12 Now you want to abolish it entirely,
13 but we have many briefs that suggest not
14 entirely but limited. Which set of limitations,
15 in your opinion, would be the best? And, in
16 particular, as the Chief asked, what's wrong
17 with the limitations set forth by the
18 government?

19 MR. HOCHMAN: Well, I'll start with
20 the -- I'll start with the government's
21 position.

22 JUSTICE BREYER: I don't want you to
23 go back to do nothing. I -- I got that point.

24 MR. HOCHMAN: Let me --

25 JUSTICE BREYER: I want you to choose

1 among them.

2 MR. HOCHMAN: Understood. Understood,
3 Justice Breyer.

4 I'm going to -- I'm going to start
5 with the government's position. My -- my
6 fundamental quibble -- and it's really -- it's
7 really in this case a quibble with the
8 government's position -- really turns on how --
9 how to implement this materially identical. I
10 think that's a pernicious introduction of
11 ambiguity in the application of the doctrine.

12 But here's how I understand the
13 government's position, and this may help. The
14 government seems to be focused on ensuring that
15 if an inventor has made a genuine representation
16 that his invention encompasses, you know, as
17 much as the assignee ultimately obtains, that
18 the inventor should be held to that.

19 And my concern is that if -- if -- if
20 you -- if you go back to the estoppel by deed
21 roots of this, the kind of genuineness, the kind
22 of representation has to be rock solid. It has
23 to be truly firm.

24 A warranty deed accompanied by a seal
25 is a special kind of assertion about a true fact

1 in the state of the world in all of the law.
2 And to allow debates over the scope of
3 never-issued patent claims like claim -- like
4 Application Claim 31 at Joint Appendix 903 is to
5 -- is to introduce a completely different sort
6 of ambiguity into the process than -- than --
7 than has any kind of basis for an estoppel.

8 So I would say it should be, you know,
9 very, very close to text -- would require very,
10 very close to textual identity and, importantly,
11 I would also add -- and the government's a
12 little ambiguous about this -- it has to have
13 been pending both at the time the party against
14 whom the estoppel is asserted assigned away the
15 rights and the party who is asserting the
16 estoppel obtained the rights.

17 In other words, it has to have been a
18 representation that was made and actually
19 somebody looking at the patent file at the time
20 thinks was still being made at the time of the
21 assignment.

22 I also --

23 JUSTICE THOMAS: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice Alito.

25 JUSTICE ALITO: Well, my fundamental

1 question is why is this a question for us and
2 not a question for Congress. It's a question of
3 statutory interpretation ultimately. There's
4 precedent supporting the doctrine in some form.
5 The Federal Circuit, which is the court that
6 Congress created to deal with these issues, has
7 worked out a body of precedent on it.

8 There are policy arguments in both
9 directions. There are potentially influential
10 supporters of both sides of this argument. Why
11 should we get into this? Would we not have to
12 overrule some of our precedents to do what you
13 ask?

14 MR. HOCHMAN: No, Justice Alito, I
15 don't think you would. The only precedent that
16 has been -- that is even purporting to require
17 being overruled is Formica. And, remember,
18 Formica allowed a party, an assignor, to use
19 prior art to narrow the scope of the claims.

20 The government agrees that today
21 that's an invalidity argument. This is exactly
22 the kind of doctrinal dinosaur, as -- as this
23 Court said in Kimble, that you -- you abandon,
24 that you give up on. Lear and Scott Paper have
25 already done all of the work. It's not --

1 JUSTICE ALITO: You think Kim -- you
2 think Kimble's approach to statute -- to stare
3 decisis supports you here?

4 MR. HOCHMAN: I actually think -- I
5 actually think it does, Your Honor, because I --
6 I don't think you have a square holding in
7 Formica in favor, as we've argued in our brief
8 and -- and we can -- we can get into this if you
9 want. We read Formica exactly the way the
10 United States read Formica in the Katzinger
11 case, as providing only implied approval.

12 This isn't -- this isn't the kind of
13 precedent that you have to -- you know, you have
14 to treat as settled and -- because it doesn't
15 appear to have been settled. And I would
16 emphasize also Scott Paper, you know, as this
17 Court said in Katzinger, expressly allowed --
18 already did the work, expressly allowed an
19 assignor to challenge invalidity.

20 It is exceedingly difficult to come up
21 with a principle, Lear said it's impossible to
22 come up with a principle, that can constrain the
23 rationale for allowing an assignor in -- the
24 assignor in Scott Paper to challenge validity
25 for the reasons asserted there and any other

1 invalidity challenges.

2 JUSTICE ALITO: All right. One -- one
3 other -- one other question if I can get it in.
4 Can parties contract around this? Can an
5 assignment specify whether the assignor can
6 challenge the patent or not, or would that be
7 against public policy in some sense?

8 MR. HOCHMAN: Yeah, I think -- you
9 know, this Court hasn't squarely answered that
10 question. I think, in fairness, this Court --
11 most of what this Court has had to say on the
12 subject of that question points away from
13 allowing parties to do that for the same reason
14 that this Court has repeated -- has -- has so
15 deeply undermined assignor estoppel.

16 This Court has said over and over for
17 more than 150 years going back -- you know, for
18 -- for roughly 150 years going way, way back
19 saying that it is critical that everyone be
20 available to challenge the validity of patents.

21 Assignors in particular are super well
22 positioned to do that and do the public service
23 of invalidating bad patents and freeing up
24 competition.

25 JUSTICE ALITO: All right. Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor.

3 JUSTICE SOTOMAYOR: Counsel, I will
4 ask the government about the limitations to its
5 theory -- to its proposal. But its proposal is
6 very close to Westinghouse, isn't it?

7 MR. HOCHMAN: I think that's a fair
8 characterization. I mean, I think, honestly --

9 JUSTICE SOTOMAYOR: In other words,
10 when -- when Westinghouse was decided, patent
11 overbreadth or patent narrowness was an issue
12 that came into claim construction, but now it
13 comes in under validity. Correct?

14 MR. HOCHMAN: Was allowed to come in
15 under -- there wasn't really as stark a
16 difference between infringe -- non-infringement
17 and validity as there is today so that the --
18 the arguments didn't quite --

19 JUSTICE SOTOMAYOR: Raise?

20 MR. HOCHMAN: -- way back when --

21 JUSTICE SOTOMAYOR: Yeah.

22 MR. HOCHMAN: -- hash out that way,
23 but now they do. So that --

24 JUSTICE SOTOMAYOR: Right.

25 MR. HOCHMAN: -- I believe that's --

1 JUSTICE SOTOMAYOR: That's part of the
2 problem, which is things have changed since
3 then.

4 MR. HOCHMAN: Yes, right.

5 JUSTICE SOTOMAYOR: So that the SG's
6 proposal is really to bring things back to where
7 Westinghouse left it, correct?

8 MR. HOCHMAN: Well, I don't think so,
9 because I think the SG's proposal, in fairness,
10 is very, very close to our view about exempting
11 1 -- Section 112 challenges like ours. And, you
12 know, obviously, the -- the -- the attorney for
13 the government will speak to that issue herself,
14 but, you know, they -- they say that the -- the
15 threshold question of whether estoppel can apply
16 in a case involving a 112 issue substantially
17 overlaps with the substance of the 112 issue
18 itself.

19 To be quite honest, I think it is
20 exactly the same, and I don't think there's any
21 space between --

22 JUSTICE SOTOMAYOR: I'll let them tell
23 us if there's a different space.

24 MR. HOCHMAN: Okay.

25 JUSTICE SOTOMAYOR: But my next

1 question for you is, going back to what Justice
2 Alito started with, there may have been a period
3 of -- of uncertainty between Lear and the Fed
4 Circuit ruling in 1988 that estoppel was --
5 assignor estoppel was still being used.

6 Given that Congress did a major
7 overhaul of the Patent Act -- was it 20 --

8 MR. HOCHMAN: 2011, Your Honor.

9 JUSTICE SOTOMAYOR: -- yeah, 2011 --
10 shouldn't -- why should we interfere when this
11 type of defense has been approved for such a
12 long period of time?

13 MR. HOCHMAN: Well, let's not
14 understate the gap. It's 30 years without
15 anybody thinking assignor estoppel was the law
16 between Lear and Diamond Scientific. And it
17 would be an astonishing inversion of the
18 judicial hierarchy for this Court to infer
19 congressional acquiescence to the Federal
20 Circuit's view on patent law even while this
21 Court's decisions in Scott Paper and Lear had,
22 for 30 years, left the doctrine dead.

23 I think that's -- I don't think
24 there's any basis for any kind of post-enactment
25 -- any kind of -- that would be a -- an uncommon

1 and never-before-seen standard of post-enactment
2 inference. And I also think, with respect, that
3 the Federal Circuit -- it -- it persisted for so
4 long only because the Federal Circuit has
5 exclusive jurisdiction over patent law.

6 CHIEF JUSTICE ROBERTS: Justice Kagan.

7 MR. HOCHMAN: And It would have been a
8 certain spin.

9 JUSTICE KAGAN: Mr. Hochman, I'd like
10 you to assume with me, as you did for Justice
11 Breyer, that there is a lot of precedent for
12 some form of this doctrine, that Westinghouse
13 called it a settled rule, that Scott Paper did
14 nothing more than create an exception to it, and
15 that Lear said that the equities were far more
16 compelling for assignor estoppel than for the
17 licensee estoppel that they eliminated.

18 So let's just say it's a settled rule,
19 and you need some special factor to justify
20 overturning the doctrine under our stare decisis
21 principles. What are your special factors?

22 MR. HOCHMAN: So I think the special
23 factors are that Scott Paper has already allowed
24 it to happen, as I mentioned at the argument as
25 to how --

1 JUSTICE KAGAN: Well, you're just
2 quibbling with my assumption, because my
3 assumption was that Scott Paper created an
4 exception to it, left the rule in place. So
5 what are your --

6 MR. HOCHMAN: Right.

7 JUSTICE KAGAN: -- what are your
8 special factors for overturning --

9 MR. HOCHMAN: Well --

10 JUSTICE KAGAN: -- the basic rule?

11 MR. HOCHMAN: Well, what makes it --
12 what makes it a doctrinal dinosaur is that what
13 Scott Paper and -- and Formica considered
14 non-infringement arguments are now, as we sit
15 here today, invalidity arguments. Practicing
16 the prior art defense is -- is actually an
17 invalidity argument.

18 Narrowing the claim in light of the
19 prior art is, you know, a kind of absolute
20 method of last resort and you -- in fact, is
21 preferred as an invalidity argument. So the law
22 has moved in -- in that respect in a significant
23 way.

24 Lear specifically said that looking --
25 that -- that it was not the general rule, so --

1 but, by the time, you know, that the -- the --
2 the case of -- you know, it's considering
3 licensee estoppel, the idea that patent estoppel
4 was a general rule had been -- has already been
5 declared by this Court no longer a general rule.

6 So I think, under these circumstances
7 -- oh, I would also add --

8 JUSTICE KAGAN: Okay. Let me -- let
9 me take you to a different place. Let's think
10 about the core application of assignor estoppel,
11 and I guess I want to know why it is that you
12 don't think that this core application makes a
13 lot of sense and accords with our basic
14 principles of fairness.

15 So let's say that an inventor invents
16 something. She obtains a patent. She later
17 sells the patent. And she then argues that the
18 invention was completely obvious all the time
19 and isn't patentable.

20 So the question is, why is it fair to
21 entertain that invalidity argument? It seems as
22 though it's a total bait-and-switch.

23 MR. HOCHMAN: Right. If it's a
24 bait-and-switch, then you have a very -- a
25 traditional equitable estoppel argument. But

1 assignor estoppel is different from equitable
2 estoppel, right? And the equitable -- you know,
3 equitable estoppel, which this Court recognized
4 in SCA Hygiene as available, you know, would --
5 would apply if, in that situation, the inventor
6 --

7 JUSTICE KAGAN: Well, I mean, that's
8 --

9 MR. HOCHMAN: -- knew all along --

10 JUSTICE KAGAN: -- semantics, Mr.
11 Hochman. That's semantics. Is -- is that
12 estopped?

13 MR. HOCHMAN: No, I don't think that
14 is semantics, though.

15 JUSTICE KAGAN: Well, is that
16 estopped, Mr. Hochman?

17 MR. HOCHMAN: If -- if she knew at the
18 time of the assignment that it was invalid and
19 she had -- and -- and she -- and she said, I --
20 I'm going to sneak this away, then it's a --
21 then it's fraud, and there's state law --
22 there's state law remedies and -- and she can be
23 prosecuted --

24 JUSTICE KAGAN: Mr. Hochman, I just
25 want to know if it's estopped or not.

1 MR. HOCHMAN: Sure, it can be
2 estopped, but --

3 JUSTICE KAGAN: Okay. Now let me --

4 MR. HOCHMAN: -- that's not the final
5 estop there is.

6 JUSTICE KAGAN: -- ask you about
7 another question, Mr. Hochman. So is there a
8 meaningful difference between that case and a
9 case where the inventor invents something, she
10 swears an oath, she transfers the application
11 before she receives a patent, and the final
12 patent is exactly the same as the application?

13 MR. HOCHMAN: Yes, I think there is
14 because, I mean, in that situation, if -- again,
15 if she knew at the time she swore the oath that
16 she had breached her duty of candor, then I
17 think you could have an estoppel. But there are
18 all sorts of --

19 JUSTICE KAGAN: Thank you, Mr.
20 Hochman.

21 MR. HOCHMAN: -- things that a
22 patentee can learn --

23 CHIEF JUSTICE ROBERTS: Justice --

24 MR. HOCHMAN: -- between then --

25 CHIEF JUSTICE ROBERTS: -- Justice

1 Gorsuch.

2 JUSTICE GORSUCH: Let me come at the
3 problem a different way. It -- it seems to me
4 that we all agree that the common law would have
5 had an equitable estoppel defense here
6 available. And you don't contest that.

7 The question is whether this Court
8 should create something more on the basis of
9 Formica and Scott Paper, which I understand the
10 criticisms of. And the -- but the SG says we --
11 we can -- we can save the day, we can fix it.
12 And it's going to be more than equitable
13 estoppel, but it isn't going to be that much
14 more. Arm's-length, valuable consideration,
15 materially identical claims.

16 I want to know what I'm buying there.
17 What -- what -- I know how to apply equitable
18 estoppel. What kinds of questions do you think
19 will arise that this Court will have to address
20 if we bless this new -- new revised and improved
21 version of assignor estoppel?

22 MR. HOCHMAN: Thank you, Justice
23 Gorsuch. My view on this is that the most
24 troubling question that you'd be buying is what
25 to do about the disputed meanings of

1 never-issued or -- or -- or the disputed
2 understanding of pending applications for
3 patents, pending patent claim terms.

4 Materially identical, again, I mean,
5 if it's given a really robust application by
6 this Court and it's made clear that it is, you
7 know, something in the nature of approaching
8 textually identical, well, then you have, I
9 think, a fairly strong basis for being assured
10 of consistent application.

11 But the -- the risk of inconsistent
12 application, the risk that an inventor never
13 intended something but is later, with the
14 benefit of hindsight and -- and -- you know, and
15 able -- able lawyering, as -- as -- you know,
16 attorneys for Hologic are obviously able
17 lawyers, going back and -- and -- and -- and
18 filling in inferences and assertions about what
19 was written down in an application in 1998 means
20 -- should be understood to mean today in light
21 of everything we know today, I think, is
22 pernicious, and I don't think we should be
23 getting into that.

24 JUSTICE GORSUCH: Why would equitable
25 estoppel solve that problem?

1 MR. HOCHMAN: Because equitable
2 estoppel is -- is focused on actual
3 representations, you -- you need to have an
4 actual representation, what is it, and you also
5 need to have reliance. So, because you need
6 both an actual representation and reliance --
7 and, you know, we've obviously briefed that we
8 think assignor estoppel too requires
9 representation and reliance with the questions
10 you've asked me --

11 JUSTICE GORSUCH: So let -- let me
12 interrupt you there, I'm sorry, just to see if I
13 understand the -- the -- the -- the delta here.
14 Most of these cases involve small inventors
15 assigning patents to very large corporations and
16 who are fully capable of examining the patent
17 and may be in better position to identify its
18 validity and who undoubtedly very rarely rely on
19 these individuals.

20 And if we get rid of material identity
21 -- if we require material identicality claims and
22 get rid of reliance, we're -- we're really just
23 advantaging the large inventors to the
24 disadvantage of the -- the -- the -- sorry, the
25 large purchasers to the disadvantage of the

1 individual inventors.

2 MR. HOCHMAN: That -- that's exactly
3 right. I think one of the things that makes
4 reliance so important is that it ensures that
5 there's a kind of -- of something -- something
6 akin to a meeting of the minds. Everybody knows
7 at the relevant time what they're talking about.

8 And having to figure that out with the
9 benefit of hindsight, you know, here we are
10 almost --

11 JUSTICE GORSUCH: Blowing away a
12 reliance requirement just gives a -- a -- a free
13 pass to the large purchasers?

14 MR. HOCHMAN: Exactly, exactly.

15 JUSTICE GORSUCH: All right. Thank
16 you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Kavanaugh.

19 JUSTICE KAVANAUGH: Thank you, Chief
20 Justice.

21 And good morning, Mr. Hochman. Your
22 lead argument in the brief from pages 17 to 41
23 is to eliminate the doctrine of assignor
24 estoppel, and I guess I want to pick up on
25 Justice Kagan's questions on that.

1 You have Chief Justice Taft, of
2 course, in Westinghouse referring to the
3 doctrine at that point in 1924 as well-settled
4 since 1880, and it's continued without
5 elimination since then. So what -- what is --
6 I'm not sure I heard exactly what is the special
7 justification and particularly in a statutory
8 case, whereas Justice Alito said, our -- our
9 doctrine of stare decisis is especially strong.
10 So why -- why get involved in overturning
11 something that was well-settled as of 1924?

12 MR. HOCHMAN: Because -- because it --
13 it didn't stay well settled because this Court
14 in Scott Paper very clearly allowed an
15 invalidity claim capping their -- agreed with
16 that characterization of it. The -- so the
17 result is you actually -- the -- the -- the rule
18 -- the rule of assignor estoppel is assignor
19 cannot challenge the validity of the patent.

20 Scott Paper says the assignor can
21 challenge the validity of the patent.

22 So now we have something that's no
23 longer actually a rule. And Lear already --
24 already recognized this. So, in other words,
25 this is the kind of, as -- as Kimble says,

1 doctrinal dinosaur. It has been whittled away.
2 It has been -- the arguments for it have not
3 only been undermined as a matter of policy,
4 assignors are -- are -- are available to do a
5 very -- a very important public service of
6 exposing bad patents.

7 The argument that it was just a --
8 that Formica sort of gave -- gave full
9 consideration, I think that doesn't hold up to
10 inspection. It didn't discuss the relevant
11 statutory language. It didn't cite Pope
12 Manufacturing, which was the principal case from
13 this Court 30 years earlier, that it said --

14 JUSTICE KAVANAUGH: Well, it went
15 through -- I mean, I'm looking right at it. It
16 went through a lot of the lower court cases and,
17 you know, starts with 1880, and I guess I'm not
18 sure about that, but let me ask you a different
19 question.

20 In the Respondents' brief, they say
21 that assignor estoppel has engendered serious
22 reliance interests, which is something we also
23 have to think about, and they say -- I just want
24 to get your reaction to -- for decades, millions
25 of patents and applications have been assigned

1 on the assumption that assignor estoppel bars
2 assignors from later challenging the validity of
3 the assigned patent rights.

4 Just want to get your reaction to
5 that.

6 MR. HOCHMAN: Yeah, I -- I think my
7 principal reaction to that is for nearly 30
8 years there was no case applying assignor
9 estoppel. Courts had said it was dead.
10 Commentators had said it was dead.

11 And for 30 years, between Lear and
12 Diamond Scientific, there was no issue about
13 patent assignments. There was nobody running
14 around claiming that their reliance interests
15 had been undermined.

16 And, true, you know, the Federal
17 Circuit's rule has been in place since Diamond
18 Scientific. But let's -- you know, there's been
19 no discussion of the magnitude. You know, the
20 -- the -- the notion that parties pay a premium
21 so that -- because assignors aren't going to be
22 able to challenge the validity of the patent is
23 pure speculation --

24 CHIEF JUSTICE ROBERTS: Justice
25 Barrett.

1 MR. HOCHMAN: -- and they have no
2 remedy for that.

3 JUSTICE KAVANAUGH: Thank you.

4 JUSTICE BARRETT: Mr. Hochman, I want
5 to ask you about equitable estoppel. So how
6 might equitable estoppel play out in this
7 particular case? Let's say there's no assignor
8 estoppel. You know, you have them alleging that
9 Mr. Truckai had lied in his inventor's oath and
10 then admitted that after the fact.

11 And then you have this dispute about
12 Claim 31 of his original application being
13 nearly identical to Claim 1 of the later patent.
14 So is there any way that it's just about a lack
15 of reliance interest? Or, if you assume that
16 those allegations that your friends on the other
17 side make are true, would there be any case for
18 equitable estoppel here?

19 MR. HOCHMAN: Yeah, I think the case
20 for equitable estoppel would be dead. I mean,
21 there would be no -- there would be no equitable
22 estoppel argument here at all, respectfully.

23 So, first off, there's no reason to
24 believe at the time -- in two -- in 2004 that
25 anybody thought or believed they were buying a

1 patent that could cover a moisture-impermeable
2 device. The only thing they've -- but they've
3 never said Mr. Truckai said anything to that
4 effect to them, and the only thing they pointed
5 to, again, is this Application Claim 31.

6 And, respectfully, it just doesn't do
7 that. It doesn't -- it not only doesn't have
8 the language in the -- in their claim. They
9 didn't pick up Application Claim 31 and
10 prosecute it. They wrote a different claim.

11 And they did it because it doesn't
12 have the claim term "applicator head." The
13 closest thing it has is the term "electrode
14 array." And the term "electrode array," their
15 view is, oh, because the term, it says
16 "electrode array," but it doesn't say
17 "moisture-impermeable" expressly, that means it
18 must be -- it must cover moisture-permeable.

19 But I don't even know what a
20 moisture-permeable electrode array would be.

21 That -- the electrode array is just
22 the positioning, how the electrodes are
23 positioned on some other part of the product,
24 whether it's the applicator -- called the
25 applicator head or sometimes called the

1 electrode carrying means. The electrode --

2 JUSTICE BARRETT: Can I ask you
3 something else about the estoppel?

4 MR. HOCHMAN: Yeah.

5 JUSTICE BARRETT: So, you know, I
6 think that the assignor estoppel doctrine, you
7 know, as estoppel doctrines often do when
8 they're thinking about fairness, you know,
9 punishes a turncoat assignor, right, and there's
10 something unseemly about representing to the
11 person to whom you're assigning a patent, it
12 doesn't cover this, you know, it's -- it's
13 valid, and then turning around and -- and we all
14 see the problem.

15 You suggest that there can really be
16 no reliance because people, especially
17 sophisticated parties, as Justice Gorsuch
18 suggests, are -- are doing their own
19 investigation of the patent's validity.

20 Is there any reason why the reliance
21 incurred or why there would be reliance by the
22 parties for the assignees that could hurt them?

23 I mean, you suggest that they're
24 perfectly capable of analyzing the patents and
25 they're not going to be, you know, led down the

1 primrose path by the assignor.

2 MR. HOCHMAN: Yeah, I mean, I think --
3 well, with respect to this issue in particular,
4 Section 112, all you have to do is pick up the
5 -- the patent specification and look at it, and
6 you can find that there's just no explanation at
7 all that could support a moisture-impermeable
8 device. So I don't -- if they -- if -- if -- I
9 don't know what they could have relied on under
10 these circumstances.

11 But I -- I -- I -- I also think it's
12 important to note, and one of the things that
13 hasn't come out, is that when you have a patent
14 application, there's all this turncoat concern.

15 Before a claim issues, the patent
16 prosecution process -- and both parties agree
17 about this -- necessarily involves a lot of give
18 and take with the patent examiner. Sometimes
19 you go back and you do your own further research
20 or further work on the product, and you discover
21 new things about the product, and that requires
22 changing the claims. Sometimes it requires
23 removing claims. Sometimes it requires
24 expanding them. Sometimes it requires narrowing
25 them. And it's that --

1 CHIEF JUSTICE ROBERTS: A minute to
2 wrap up, Mr. Hochman.

3 MR. HOCHMAN: Thank you.

4 And -- and just to complete that
5 question, the fact that you -- you have a patent
6 claim that ends up looking different, that the
7 -- that the inventor thinks, no longer thinks
8 that what they filed, you know, Paramount Publix
9 and Hawhee and other cases make clear that the
10 inventor oath is not -- is not violated by
11 simply deciding that it -- it -- it's not a
12 viable patent.

13 Look, as this discussion makes clear,
14 assignor estoppel is a doctrinal dinosaur. We
15 should abandon it. But, at a minimum, no
16 plausible justification supports applying
17 assignor estoppel here.

18 Hologic chose to draft and prosecute
19 its own broad claim that finds no support in
20 Truckai's then 15-year-old specification, and it
21 did so precisely because it wanted to frustrate
22 competition from Truckai's latest innovation.
23 Having gone beyond the specification, it has
24 also gone beyond the range of any even arguable
25 estoppel. As a matter of equitable estoppel or

1 any other kind of estoppel, this Court should
2 not allow assignor estoppel to be wielded as a
3 sword to frustrate legitimate competition.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Ms. Ratner.

7 ORAL ARGUMENT OF MORGAN L. RATNER
8 FOR THE UNITED STATES, AS AMICUS CURIAE

9 MS. RATNER: Mr. Chief Justice, and
10 may it please the Court:

11 As Petitioner has explained, the
12 Federal Circuit's test for assignor estoppel is
13 too broad. That court prevents an assignor from
14 challenging any claim relating to an assigned
15 invention, even if that claim looks nothing like
16 the claims that existed at the time of the
17 assignment.

18 That's not how estoppel ordinarily
19 works.

20 The foundational requirement for
21 estoppel is inconsistency, and an assignor acts
22 inconsistently only when the claims it
23 challenges at time two are the same as the
24 claims it sold at time one.

25 But, while we agree with Petitioner

1 that the Federal Circuit got it wrong, we don't
2 agree that this Court should get rid of assignor
3 estoppel altogether. Lower courts have applied
4 the doctrine for 140 years. This Court approved
5 it in 1924, and Congress hasn't seen fit to
6 eliminate it over all that time.

7 Assignor estoppel can still play an
8 important role but only if it's limited to a
9 true estoppel doctrine reflecting its origins in
10 estoppel by deed.

11 I welcome the Court's questions.

12 CHIEF JUSTICE ROBERTS: Ms. Ratner,
13 you say that the Court should only apply
14 assignor estoppel where the assignor sells
15 patent rights for valuable consideration.

16 How do you tell what valuable
17 consideration is?

18 MS. RATNER: Our basic point here, Mr.
19 Chief Justice, is that if there are
20 circumstances in which someone agrees to
21 transfer any rights to an invention before that
22 invention exists or before any bargaining over
23 the value of that invention, then you can't
24 really be said to implicitly represent that that
25 invention has value.

1 CHIEF JUSTICE ROBERTS: So the --

2 MS. RATNER: And it's that implicit --

3 CHIEF JUSTICE ROBERTS: I'm sorry, go
4 ahead.

5 MS. RATNER: I -- I -- it's that
6 implicit representation that there's value
7 that's really the key to assignor estoppel.

8 CHIEF JUSTICE ROBERTS: So the
9 familiar process where a company hires an
10 employee in a technical or whatever area and the
11 employee signs over inventions that they may
12 discover in the course of their employment to
13 the employer, that would be or wouldn't be
14 valuable consideration?

15 MS. RATNER: We think that that --
16 whether that would be valuable consideration in
17 terms of a -- the legal aspect of contract law,
18 we don't think that would be sufficient for
19 applying assignor estoppel because, if employees
20 have agreed up front to transfer any inventions
21 and leave it to their company to figure out
22 whether there's something patentable there and
23 pursue patent rights, then you wouldn't have any
24 sort of implicit warranty that what that
25 employee is transferring is patentable and

1 valuable.

2 CHIEF JUSTICE ROBERTS: Justice
3 Thomas.

4 JUSTICE THOMAS: Thank you, Mr. Chief
5 Justice.

6 Counsel, the -- could you give me your
7 best take on the difference between the original
8 -- what was originally assigned and what
9 Respondent has now?

10 MS. RATNER: Sure, Justice Thomas,
11 although I would emphasize this is exactly the
12 question that we think that the court of appeals
13 should address, because there are really three
14 questions here.

15 JUSTICE THOMAS: Hmm.

16 MS. RATNER: The first is, which is
17 the relevant assignment? There was an
18 assignment from Truckai in 1998 to NovaCept, and
19 we don't really know the circumstances of his
20 continued relationship with NovaCept to know
21 whether the next assignment from -- in 2004 is
22 also relevant.

23 So the court of appeals has to figure
24 out which of those two assignments, and then
25 what claims were pending at the time. And at

1 the time of the '98 assignment but not the 2004
2 assignment, there was this Claim 31. And then
3 the question would be, we think, is Claim 31
4 essentially the same as Claim 1? And I -- I
5 think Petitioner has point -- pointed to some
6 reasons why it might not be.

7 But -- but, again, we would leave the
8 court of appeals to sort those out.

9 JUSTICE THOMAS: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Breyer.

12 JUSTICE BREYER: Well, my question was
13 really the same as the Chief's, if you want to
14 say anything more about that, but I have a -- a
15 second question, which I'll say what it is, is
16 what I'm having trouble doing.

17 I can understand abolishing it. I can
18 understand keeping it. But limiting it, I'm
19 finding trouble in finding the right way to do
20 that. Why? Well, Smith invents a widget. He
21 goes to another company, having assigned the
22 widget to the first company, and the second
23 company wants to go ahead and sell widget prime.

24 The first company sues, and what they
25 want to argue, perhaps like here, is, wait a

1 minute, what we want to make has nothing to do
2 with that patent. Oh, no, it does. Go look at
3 the claims. Well, he can't because, if it did
4 include widget prime, the patent would be
5 unlawful. So you see it can't. Well, says the
6 Fed Circuit, you can't argue that; you're
7 attacking your own patent.

8 So I -- I think, my God, they're
9 foisting this invention on the public forever
10 and they can't argue even something like that
11 and they can't even make widget prime?

12 Do you see the problem?

13 MS. RATNER: I do, Justice Breyer.

14 JUSTICE BREYER: And how are you
15 solving that?

16 MS. RATNER: So I think we're solving
17 it in two ways. There are two basic questions
18 that we think need to be addressed before
19 assignor estoppel is applied.

20 The first is, is this a real
21 transaction? That's the -- the discussion I was
22 having with the Chief. Is this the type of
23 transaction that someone might be said to making
24 implicit warranties? Is this sort of an
25 arm's-length sale between party A and party B?

1 And -- and that could knock out any
2 circumstances like an employee who agrees up
3 front to give anything invented.

4 And then the second is, is there a
5 match between what someone said was valuable at
6 the time of the sale and what's at issue now?
7 And we think if after patent rights are assigned
8 that the assignee goes out and gets extremely
9 broad new patents, then the price for that is
10 they have to defend the breadth of that claim
11 against the world, including the person who
12 assigned those claims.

13 CHIEF JUSTICE ROBERTS: Justice Alito.

14 JUSTICE ALITO: Where does your test
15 come from? Is it just what you think is good
16 policy?

17 MS. RATNER: No, Justice Alito. We do
18 think it is -- is good policy, but we also think
19 that it derives both from this Court's decision
20 in Westinghouse and, before that, from basic
21 principles of estoppel by deed. And there has
22 been a lot of discussion about equitable
23 estoppel here, but I think it's important to
24 remember that at common law, estoppel consisted
25 of estoppel by deed, estoppel by conduct, or

1 estoppel by record. Estoppel by conduct is what
2 we now think of as equitable estoppel.

3 And -- and these are the basic
4 principles, we think, that control the estoppel
5 by deed such that what we're trying to do is
6 really apply a patent-specific version of
7 estoppel by deed.

8 JUSTICE ALITO: If you would think
9 about the second prong of your test, what
10 decision of a federal court has applied that
11 prong?

12 MS. RATNER: So there isn't a
13 decision. This is the question that the Court
14 left open in Westinghouse. And I think
15 Westinghouse identified the problem. It said,
16 look, it may be harder to know whether to do
17 estoppel when this is a pending patent claim as
18 opposed to an issued claim.

19 And so we're trying to answer that
20 question with the reasoning of Westinghouse and,
21 again, estoppel by deed. And we think the
22 answer is, well, you have -- that pending claim
23 has to look like or -- or be essentially the
24 same as the issued claim that you're now saying
25 is invalid.

1 JUSTICE ALITO: All right. Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Sotomayor.

4 JUSTICE SOTOMAYOR: Counsel,
5 Petitioner's counsel tried to do amendments to
6 your proposal. Could you respond to those,
7 number one?

8 And, number two, am I clear that
9 you're really not trying to return completely to
10 Westinghouse because Westinghouse seemed to
11 suggest that a court assignor estoppel would
12 reach questions of overbroad claims, and you're
13 not -- your test doesn't reach that at all,
14 meaning you would just look, it seems, as to the
15 time -- the claims as claimed at the time of
16 assignment and those issued in the patent, and
17 you don't even get to the question of whether or
18 not -- Justice Breyer's question, whether or not
19 that reading is overbroad.

20 MS. RATNER: So, on your first
21 question, Justice Sotomayor, in terms of
22 Petitioner's limitations, I think we are fine
23 with a requirement that this be rock solid, and
24 we chose the term "materially identical" and
25 think that means something.

1 And -- and as for the second proposed
2 limitation, they suggested that -- that there
3 should be -- that claim should exist both at the
4 time of the assignment from the assignor and at
5 the time of the assignment to the person
6 ultimately bringing the challenge, that
7 limitation, we don't agree with. We think this
8 is focused on the assignor's representations.

9 As to your second question about claim
10 construction, it's -- it's true that claim
11 construction has, I think, changed to some
12 degree over time. Prior art tends to be
13 relevant in narrowing a claim but only under a
14 canon of essentially narrowing an ambiguous
15 claim to preserve validity. What we don't think
16 is still viable anymore is sort of a
17 free-standing practicing-the-prior-art defense.

18 JUSTICE SOTOMAYOR: Well, that somehow
19 -- that, in my mind, gives credence to
20 Petitioner's counsel that maybe the doctrine has
21 lost its utility, because Westinghouse was
22 really premised on a claim not dissimilar from
23 this one, that if you read the claim in context,
24 it would be overbroad to the description in the
25 other claims.

1 But you've just admitted that -- that
2 things have gone -- have changed, how you read
3 patents has fundamentally issued -- has
4 fundamentally changed.

5 MS. RATNER: I -- I think it has
6 changed to some degree, Justice Sotomayor, but
7 that doesn't change the ultimate point of
8 Westinghouse, which was you can't have a core
9 attack on the value of something, the validity
10 of something that the day before you may have
11 implicitly represented has value.

12 CHIEF JUSTICE ROBERTS: Justice Kagan.

13 JUSTICE KAGAN: Ms. Ratner, you give
14 three examples in your brief of places where you
15 think, under your reformed doctrine, assignor
16 estoppel wouldn't apply or might not apply.
17 It's pre-invention assignments, continuation
18 applications, and changes in the law.

19 Is -- is -- is that it? Is that sort
20 of an exclusive list, or do you have other to
21 add to it?

22 MS. RATNER: So, Justice Kagan, I
23 don't have others that I'm hiding from you. I
24 -- I don't want to say it's exclusive if there's
25 some other unusual circumstances that would

1 arise that would undermine the basic notion that
2 what someone is saying at time two was
3 inconsistent with what they're saying at time
4 one.

5 JUSTICE KAGAN: But you think those
6 three are basically the world of -- of cases in
7 which that's true?

8 MS. RATNER: That covers the cases
9 that I -- I -- I can think of, yes.

10 JUSTICE KAGAN: Okay. Mr. Hochman
11 said -- when I gave him what I considered to be
12 the sort of paradigm cases of assignor estoppel
13 and asked whether they should be estopped, he
14 said yes, but they should be estopped under the
15 equitable estoppel doctrine.

16 And I take it what that would do for
17 him is that it would impose a reliance
18 requirement and that it would impose a sort of
19 extra special affirmative, clear representation,
20 so there could be nothing implicit about it,
21 maybe he wouldn't rely on the oath. I'm making
22 this up a little bit.

23 But I guess the question is, what's
24 the difference between equitable and assignor
25 estoppel in your mind as to these paradigmatic

1 cases, which we think of as bait-and-switch
2 cases, and does that difference make a
3 difference?

4 MS. RATNER: I -- I think you've put
5 your finger on the two main differences. The
6 first is a knowing affirmative
7 misrepresentation, and the second is justifiable
8 reliance on it. And we do think that would make
9 a -- a difference. It would be extremely
10 difficult to show that in most cases. And this
11 Court in Westinghouse specifically said, look,
12 that's estoppel by conduct, that's not estoppel
13 by deed. That's page 351 of Westinghouse.

14 And so I -- I think the Court has
15 already made clear that that's a different
16 branch of estoppel doctrine. And what we're
17 getting at here is not necessarily about one
18 party misleading another as much as confidence
19 and conclusiveness in a particular type of
20 formal transaction.

21 JUSTICE KAGAN: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Gorsuch.

24 JUSTICE GORSUCH: Ms. Ratner, as I
25 understand it, no court's ever applied the

1 version of estoppel that you're proposing now.
2 And so I -- I guess my first question is, why
3 doesn't it face the same stare decisis
4 challenges that the Petitioner has? So that's
5 one set of questions for you.

6 Second is, with respect to the -- the
7 choice of relying on estoppel by deed and the
8 analogy to physical property, it allows -- your
9 test would allow liability even when there's no
10 misrepresentation of fact and the buyer, often
11 in these cases large and sophisticated, more so
12 than the seller, could easily determine the
13 validity of the patent on its own and is better
14 positioned to do so. And you also get rid of
15 reliance. And I guess I don't understand why we
16 would impose liability on statements that even
17 you'd agree were utterly meaningless at the
18 time.

19 And all that points to my third
20 question, and then I'll stop, and that is, if
21 we're going to look at estoppel doctrine, I -- I
22 -- I guess I'm a little confused why we would
23 look to real -- physical real estate as the
24 example, where deeds, recorded deeds, have a
25 special role in our -- in our system and have a

1 special validity, rather than personal --
2 personal property, where these elements,
3 misrepresentation of facts and -- and reliance,
4 are required, given that patents are so easily
5 killable and challengeable in ways that physical
6 real estate, much harder to do so.

7 So those are my three questions. Have
8 at them in any order you want.

9 MS. RATNER: Sure. I'll take them in
10 order.

11 First, in terms of stare decisis, we
12 do think that we're applying the rationale of
13 Westinghouse to the one area that Westinghouse
14 --

15 JUSTICE GORSUCH: But you do agree
16 that no -- no court's ever applied anything like
17 the test you're proposing, right?

18 MS. RATNER: That's correct, Your
19 Honor, but this one --

20 JUSTICE GORSUCH: Okay. So let's move
21 on to the second one then.

22 MS. RATNER: Sure. The second one, I
23 -- I would strongly resist the idea that we're
24 suggesting you get rid of reliance. We're
25 talking about a different branch of estoppel

1 doctrine. Again, this Court made clear in
2 Westinghouse which branch --

3 JUSTICE GORSUCH: But you say no
4 reliance is required to prove your version of
5 assignor estoppel, right?

6 MS. RATNER: Correct, because no --

7 JUSTICE GORSUCH: Okay. So you are
8 getting rid of reliance then.

9 MS. RATNER: No. No, Justice Gorsuch,
10 because reliance is an aspect of estoppel by
11 conduct. It's not an --

12 JUSTICE GORSUCH: Yes. You're just
13 saying -- you're getting rid of it in this area.
14 You're not getting rid of it everywhere, I
15 accept that, but you're getting rid of it here.
16 And -- and I guess I'm just curious why -- why
17 we would get rid of that and the material
18 misrepresentation of fact in -- in this
19 particular context and -- and why the analogy to
20 -- to deeds and to real -- real property makes
21 sense more than -- than personal property?

22 MS. RATNER: So I'd point you to page
23 351 of Westinghouse and page 902 of the Faulks
24 decision, which was the first decision out of --

25 JUSTICE GORSUCH: Yes, but if -- if

1 we're -- if we're modifying and we're doing
2 something nobody's ever done before, why not get
3 it right?

4 MS. RATNER: Well, I think those give
5 the reasons, Your Honor, which is we're talking
6 about a particular formal transaction here, and
7 the point here is to --

8 JUSTICE GORSUCH: Well, a contract is
9 a formal transaction. There are lots of formal
10 transactions.

11 MS. RATNER: The point -- the point is
12 to preserve the conclusiveness of these
13 transactions, just as they would be for their --
14 if this -- if this were real property, and I
15 think in -- as for personal property, that there
16 might be other things like a warranty of
17 merchantability that would also prevent someone
18 from saying, at time one, this thing has value
19 and, at time two, that it's valueless.

20 CHIEF JUSTICE ROBERTS: Justice
21 Kavanaugh.

22 JUSTICE GORSUCH: Thank you.

23 JUSTICE KAVANAUGH: Thank you, Chief
24 Justice.

25 And good afternoon, Ms. Ratner. I

1 want to follow up on the three examples on page
2 20 of your brief that Justice Kagan was
3 referencing and focus in particular on the first
4 one and make sure I understand what you're
5 saying exactly.

6 The brief says if an employee assigns
7 to his employer all patent rights to any
8 inventions he may develop in the course of his
9 employment, the assignment generally would not
10 imply any representation as to the patentability
11 of particular inventions.

12 And I want to know what you mean by
13 the word "generally" or what's -- what's
14 captured there and what's not captured there.

15 MS. RATNER: Sure, Justice Kavanaugh.
16 Our -- our point is the same one that I made
17 earlier to the Chief Justice, which is, is this
18 the type of sale or assignment where someone
19 might be said to implicitly represent that the
20 patent rights have value?

21 And it's easy to see that if we're
22 talking about an arm's-length sale between A and
23 B. If we're talking about an ex ante assignment
24 of any inventions that haven't yet even been
25 invented, then you don't have that sort of

1 suggestion or -- or implicit warranty that
2 there's value there.

3 JUSTICE KAVANAUGH: Why do you say
4 "generally" instead of "not always" then?

5 MS. RATNER: I say "generally" because
6 we're talking about equitable doctrines where
7 there can always be fact-specific situations
8 that I -- I haven't thought of and that we don't
9 want to foreclose analysis of.

10 JUSTICE KAVANAUGH: Okay. There's
11 nothing you're -- you're thinking of, though?
12 You just want to be careful not to foreclose it?

13 MS. RATNER: As I said to Justice
14 Kagan, I'm not intending to hide anything in the
15 paragraph on this page.

16 JUSTICE KAVANAUGH: And then
17 Petitioners object to the phrase "materially
18 identical." And I just want to give you an
19 opportunity to respond to that again.

20 MS. RATNER: Yeah, again, to the
21 extent that they're talking about a rock-solid,
22 I think is the phrase Petitioner used, a
23 rock-solid textual similarity, we're perfectly
24 fine with that. Our -- our point is that there
25 may be some minor changes, say, in -- in

1 paragraphs or in commas or in a unimportant term
2 that doesn't actually change the claim
3 limitations. And -- and if that's the case,
4 then we don't think that should undermine the
5 application of assignor estoppel.

6 JUSTICE KAVANAUGH: Thank you,
7 Ms. Ratner.

8 CHIEF JUSTICE ROBERTS: Justice
9 Barrett.

10 JUSTICE BARRETT: Good afternoon,
11 Ms. Ratner. So I have a question about the
12 choice that -- the choice that we're facing
13 here. As Justice Breyer pointed out, you know,
14 we can keep -- or let's just assume for the sake
15 of this argument that I agree that stare decisis
16 establishes that the assignor -- assignor
17 doctrine exists.

18 We have a choice between two
19 bright-line rules, either we have it or we
20 don't, or we can do this middle course that
21 you're charting that, as you say, no court has
22 applied before.

23 It seems to me that your approach
24 doesn't give us the efficiency of -- of estoppel
25 doctrines generally. I mean, think about

1 Blonder Tongue, patent context, and, you know,
2 estoppel there, issue -- issue preclusion shuts
3 it down and makes litigation more efficient.
4 But, here, as I take it, your proposal would
5 probably enmire the parties in fights about
6 what's materially identical. I mean, would that
7 be a battle of the experts?

8 MS. RATNER: So I -- I think, as an
9 ordinary sense, no, if we're talking about the
10 simple assessment of, are these claims -- are
11 there the same claim limitations, or are there
12 extra claim limitations added? We think that
13 could be done in a relatively straightforward
14 way.

15 But I -- I would add, to the extent
16 there are some factual questions here, we think
17 that that's a benefit of our theory. The
18 problem of the -- with the Federal Circuit's
19 theory here is that it basically treats the
20 application of an equitable estoppel principle
21 as an on/off switch, and -- and that's the --
22 the underlying problem that we're trying to
23 resolve.

24 JUSTICE BARRETT: How much are you
25 driven by stare decisis here as opposed to, if

1 you were starting from scratch, this is what you
2 would propose that the Court adopt?

3 MS. RATNER: I think that we are
4 probably somewhere in between those two things
5 given the long period of time in which assignor
6 estoppel has existed and in which Congress could
7 have acted. We -- we give great weight to that.

8 That said, I do think that the
9 historical analogs here still provide support
10 from that if we were -- for the doctrine if we
11 were deciding in the first instance.

12 JUSTICE BARRETT: Thank you.

13 CHIEF JUSTICE ROBERTS: A minute to
14 wrap up, Ms. Ratner.

15 MS. RATNER: Thank you, Mr. Chief
16 Justice.

17 I guess I would just emphasize what we
18 think is the core advantage of our test, and
19 that's that it puts intellectual property on par
20 with other kinds of property, whereas the
21 parties' theory would create a mismatch in one
22 direction or the other.

23 So Minerva, on one side, wants to
24 eliminate assignor estoppel altogether, but that
25 would mean that sales of real property are

1 protected by estoppel by deed and personal
2 property may be protected by warranties of
3 merchantability, but there would be no analog
4 for intellectual property.

5 And, on the other side, the Federal
6 Circuit and Hologic would apply a reflexive rule
7 that covers all invalidity disputes. But, as
8 we've discussed, that would mean that estoppel
9 applies even in the absence of logically
10 inconsistent positions, and that's not
11 consistent with historical estoppel doctrines.

12 So we think that our approach here is
13 most consistent with Westinghouse, with that
14 historical development of assignor estoppel, and
15 with the animating principles behind estoppel
16 doctrines generally.

17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 Ms. Ratner.

20 Mr. Wolf.

21 ORAL ARGUMENT OF MATTHEW M. WOLF

22 ON BEHALF OF THE RESPONDENTS

23 MR. WOLF: Thank you, Mr. Chief
24 Justice, and may it please the Court:

25 In 1924 this Court held that assignor

1 estoppel was manifestly intended by Congress.
2 In the 100 years since, Congress has maintained
3 the relevant statutory language through multiple
4 revisions of patent law.

5 This Court has explicitly refused to
6 overrule the doctrine and dozens of lower courts
7 have applied assignor estoppel without
8 significant incident or controversy, including
9 recently in *Diamond Scientific*, which explicitly
10 incorporated the claim construction doctrines of
11 *Westinghouse*.

12 Minerva asks this Court to disregard
13 all of this in the service of the purportedly
14 paramount goal of eliminating bad patents. But
15 patent laws have other critical objectives,
16 including incentivizing scientific progress
17 through the protection of patents and fostering
18 predictability in commercial transactions.

19 Hologic respectfully submits that, if
20 the costs and benefits of assignor estoppel are
21 to be reweighed, it should be Congress handling
22 the scales. Whether couched in the principles
23 of *stare decisis* or ratification, this Court
24 should not undermine the hundreds of thousands
25 of still extant bargains struck against the

1 backdrop of assignor estoppel.

2 The bargain in this case included Mr.
3 Truckai and his co-inventors expressly selling
4 the rights to future patent applications. The
5 parties valued those rights based on the
6 understanding that Respondent would secure
7 whatever claims the Patent Office would allow,
8 in this case a claim just like the one that Mr.
9 Truckai successfully secured allowance of with
10 original claim 31, and that Mr. Truckai would
11 not subsequently challenge their validity.

12 And if Mr. Truckai wanted a different
13 deal, he was free to contract around assignor
14 estoppel, per Mentor Graphics, and accept a
15 concomitantly reduced purchase price. But Mr.
16 Truckai now wants to keep both the \$8 million he
17 pocketed and the right to undermine what those
18 millions purchased.

19 The inequity of that position has been
20 apparent since the founding of this country.
21 And the doctrine of assignor estoppel borne from
22 that recognition should not be cast aside.

23 CHIEF JUSTICE ROBERTS: Mr. Wolf, you
24 began by talking about stare decisis and cited
25 some authority for it, but you have to weigh

1 against that, don't you, the Court's description
2 of assignor estoppel as a failure and the
3 Court's statement that, to whatever extent that
4 doctrine may be deemed to have survived the --
5 the Formica decision or to be restricted by it,
6 it's not controlling. So it's -- it's not the
7 strongest stare decisis argument?

8 MR. WOLF: Your Honor, respectfully,
9 in -- in Scott Paper this Court considered
10 whether or not to reverse Westinghouse and
11 expressly said it was not doing so. Rather, it
12 created a narrow exception based on this Court's
13 long-held concerns about temporal expansions of
14 patent monopolies.

15 In Lear, respectfully to the Court in
16 that case, there was really no discussion of
17 stare decisis. There was no discussion of
18 congressional intent. And as was noted earlier,
19 the Court specifically held or noted that the
20 estoppel in the assignor context was far more
21 compelling than in the licensee context that
22 Lear addressed.

23 So while there has been critical
24 language, when the Court explicitly refute --
25 refuses to overturn a case, there's no

1 conclusion other than it remains good law.

2 CHIEF JUSTICE ROBERTS: I'd -- I'd
3 like to see if there's a difference between your
4 position and that of the solicitor -- solicitor
5 general, in particular, for the person who
6 enters employment and signs a general assignment
7 of all her inventions to her employer.

8 Does equitable or assignor estoppel
9 apply in that case?

10 MR. WOLF: Well, obviously, Your
11 Honor, that's -- that's not our case. We're not
12 an employee/employee -- employee/employer
13 context, but --

14 CHIEF JUSTICE ROBERTS: I wasn't -- I
15 wasn't confused about that.

16 MR. WOLF: Yes, Your Honor.
17 Apologies. I would suggest that -- that
18 employers pay employees for research and
19 development. They provide the resources to
20 perform that research and development. It is
21 not inequitable for them to expect that the
22 fruits of that research should be given to the
23 employer.

24 So I think we do disagree, at least to
25 some degree. I mean, I -- I can think of

1 circumstances where an employee would not be
2 estopped, putting -- putting privity issues
3 aside, for example, if they refused to sign the
4 oath, but there is some daylight between our
5 position and the government's position in that
6 regard.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel. Justice Thomas.

9 JUSTICE THOMAS: Thank you, Mr. Chief
10 Justice.

11 Counsel, it seems as though your view
12 of assignor estoppel begins to approach the
13 assignments that one would require from an
14 employee. It seems -- so how far would you go
15 from the original assignment?

16 Would you, in this case, in the
17 current case, the -- we're talking about a
18 patent that is quite different from the original
19 patent.

20 MR. WOLF: Respectfully, Your Honor,
21 we -- we disagree very strongly. Mr. Truckai --
22 and this is at JA 449 at trial -- acknowledged
23 that at the time he filed his application, he
24 did -- he thought that he was entitled to a
25 claim without moisture transport.

1 He fought for claim 31 and succeeded
2 in obtaining claim 31 that did not have moisture
3 transport before the assignment. And so when
4 Hologic took this portfolio over, when they were
5 assigned it, they had express representations
6 from Mr. Truckai that he was entitled to the
7 very claim that they now say we're not entitled
8 to.

9 It was only after the fact that he
10 purportedly changed his mind and realized the
11 error of his ways. Of course that kind of
12 financially-induced change of memory is
13 precisely the kind of morass that assignor
14 estoppel is designed to avoid.

15 JUSTICE THOMAS: You say that if there
16 are any changes to estoppel, assignor estoppel
17 it should be done by Congress. But couldn't you
18 say that, that if you want assignor estoppel,
19 Congress should amend the Patent Act?

20 MR. WOLF: Respectfully, Your Honor,
21 we believe that's backwards. When in
22 Westinghouse this Court said that assignor
23 estoppel was manifestly intended by Congress,
24 one, that's pretty strong language.

25 Congress in 1952 noted when the

1 Supreme Court weakened contributory
2 infringement, for example, and emphatically
3 rejected the Supreme Court's rejection -- I'm
4 not sure that's appropriate legal language --
5 but, in any event, the -- the Congress was put
6 on notice of the Supreme Court's view of its
7 intent and how it understood the assignment
8 provision, and it re-ratified it in 1952.

9 And then in 2011/2012, with the
10 America Invents Act, which wholesale changed
11 certain provisions of patent law, it once again
12 just reiterated the assignment provision as is.

13 JUSTICE THOMAS: But it seems as
14 though you are -- you want Congress by statute
15 to make changes to something that doesn't appear
16 in the Patent Act.

17 So I don't know how that's backwards
18 to say, well, maybe Congress should amend the
19 Patent Act to include assignor estoppel in the
20 first instance?

21 MR. WOLF: Your Honor, in *Kimble*, for
22 example, this Court noted that *stare decisis*
23 applies regardless of whether the decisions
24 focused only on statutory text or also relied on
25 the policies and purposes animating the law.

1 So whether or not one views the
2 holding of Westinghouse as expressly construing
3 Section 261 or understanding the animating
4 policy behind 261, either way it's subject to
5 the same deferral to Congress and it should be
6 up to Congress to change it.

7 JUSTICE THOMAS: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Breyer.

10 JUSTICE BREYER: How do you respond to
11 what I have gotten out of some of the -- the --
12 the briefs; there is precedent, it has problems,
13 but 80 years old, 100 years old, what's changed?

14 One, employment practices. So you
15 have general assignment. You go to work
16 somewhere else and the new company is afraid to
17 go anywhere near it.

18 Second, nature of invention.
19 Artificial intelligence, robots, dah, dah, dah,
20 dah, dah. Okay?

21 Third, complexity. And complexity
22 means this: Widget, patent. Assigned to A. Go
23 to work for B. B, widget prime. A sues B. All
24 he wants to argue is of course the patent on
25 widget doesn't cover widget prime because, if it

1 did, then since it wasn't described properly and
2 couldn't be practiced by someone, there wasn't
3 enough information, the patent would have been
4 unlawful. Okay?

5 No, says the Federal Circuit, you
6 can't even argue that. Result, result,
7 extension of many important patent monopolies
8 which shouldn't be there and which, in fact,
9 will cost the public, the loan advances, and you
10 can imagine that. All right.

11 Now, I may have overstated it. That's
12 how I'm understanding it now.

13 So they are saying do something. One
14 side says there's nothing you can do except
15 abolish it. Others say limit it.

16 I want to hear your response.

17 MR. WOLF: Your Honor, I have a number
18 of responses to that, that notion of how the
19 world has changed.

20 First, of course, Westinghouse itself
21 was an employer/employee case.

22 So it has changed in amount but not in
23 kind.

24 Secondly, one thing that has changed
25 is that the PTAB through the America Invents Act

1 now allows an inventor to challenge the very
2 thing you are concerned about, whether it be a
3 matter of prior art or under post-grant review
4 it'd be a matter of issues of written
5 description or enablement.

6 We also, Your Honor, have -- your
7 question hinted at privity issues. And, of
8 course, there is -- if -- if an employee goes
9 from company A to company B and is not
10 sufficiently directing the activities, then the
11 privity would break the chain, the privity
12 analysis would break the chain and you would not
13 have assignor estoppel.

14 And, finally, there are, as I noted
15 before, if the inventor thinks that the way
16 company A characterized his or her invention is
17 not right, he or she can refuse to sign the
18 oath. And in that case, again, you raise the
19 prospect of breaking the chain, but if an
20 employee at company A turns around and, for
21 example, founds a company to compete against the
22 very work he or she did, that, I think, offends
23 our traditional notice -- notions just as much
24 today as it did 100 years ago.

25 CHIEF JUSTICE ROBERTS: Justice Alito.

1 JUSTICE ALITO: I have no questions.

2 CHIEF JUSTICE ROBERTS: Justice
3 Sotomayor.

4 JUSTICE SOTOMAYOR: Counsel, I'd like
5 to pursue Justice Breyer's question on one
6 level, okay?

7 MR. WOLF: Yes, Your Honor.

8 JUSTICE SOTOMAYOR: You're resisting
9 any limitation to assignor estoppel, but as --
10 but there is a fairness element that you're not
11 responding to, which is if assignor estoppel
12 isn't tethered in some way to the scope of the
13 rights that were actually assigned, then I don't
14 know why it's fair to estop an assignor from
15 seeking to invalidate something that he or she
16 did not actually assign.

17 So, for example, if the original '072
18 application had only one claim that required
19 moisture permeability but later you change, if
20 Mr. Truckai assigned the patent that way and you
21 revised it deleting that reference, why should
22 Mr. Truckai be estopped?

23 You did something that he didn't
24 attest to, that wasn't within the claims
25 specified. What sense does it make not to let

1 him raise that defense?

2 MR. WOLF: So three responses, Your
3 Honor. First, from the reliance perspective, he
4 was paid and NovaCept was paid 325 million, he
5 personally pocketed 8 million, against the
6 backdrop of the current assignor estoppel
7 regime.

8 So whether you want to call this a
9 reliance interest or a fairness interest, it's
10 the same interest, which is he -- he was paid
11 knowing that Hologic would get what it would get
12 from the Patent Office.

13 And now having pocketed that money, he
14 says: Well, I want a different deal. So that's
15 -- that's a different component of fairness.
16 That's --

17 JUSTICE SOTOMAYOR: I'm sorry. He
18 pocketed money on a deal that included just one
19 item. You then changed it.

20 Are you saying he pocketed money
21 knowing you would and could change it, so you're
22 just out of luck?

23 MR. WOLF: I wouldn't phrase it as out
24 of luck, Your Honor. I'm assuming the facts you
25 are stating. Obviously we disagree with some of

1 the premises of what Petitioner has said.

2 But assuming the hypothetical, as
3 Diamond Scientific noted, what you're buying is
4 the full scope of what the specification will
5 bear.

6 There is no dispute in this case that
7 everything that's in claim 1, the infringed
8 claim, is identified in Mr. Truckai's
9 application. What he asserts is that it wasn't
10 novel, it wasn't new.

11 Well, if he was right, he is free to
12 rely upon Westinghouse and Diamond Scientific's
13 claim construction principles, but we know in
14 this case he's wrong. And we know he's wrong
15 for two reasons.

16 First, the Patent Office originally
17 allowed claim 31. And, second, they tried to
18 institute an IPR against claim 1, and they
19 didn't even achieve institution.

20 So the fairness here, we agree that
21 there are issues of fairness, but if you're
22 going to rebalance the equation, that is for
23 Congress, not the courts to do that balancing.

24 CHIEF JUSTICE ROBERTS: Justice Kagan.

25 JUSTICE KAGAN: Mr. -- Mr. Wolf, you

1 just talked to Justice Sotomayor and before that
2 to Justice Thomas about this case and -- and how
3 we should understand things to have played out
4 over time.

5 But let's just assume a hypothetical
6 case. And -- and I'm not meaning it to have any
7 necessary relationship to yours. And the
8 hypothetical is an inventor who assigns an
9 application, and then the assignee broadens the
10 patent claim beyond anything that the inventor
11 would have thought patentable in the first
12 instance.

13 Why -- why should she be estopped?

14 MR. WOLF: Your Honor, first of all,
15 she can go to the Patent Office and institute a
16 post-grant review and make that argument to the
17 Patent Office, to an organization that is not --
18 and I'm quoting here from the AIPLA brief, and,
19 of course, they are the folks that do this stuff
20 for a living, both for plaintiffs and
21 defendants, where they note that inventors "loom
22 large and have a greater influence over trier of
23 fact than anybody else."

24 And so Congress has decided that if
25 you're going to make a Section 112 challenge as

1 an inventor, you can go to the Patent Office
2 where they are not --

3 JUSTICE KAGAN: Wait. Well, she could
4 do that. I take the point, Mr. Wolf. She could
5 do that. But -- but why should she be estopped
6 under the assignor estoppel doctrine in any
7 event, regardless of that alternative path?

8 I mean, it does seem as though the
9 warranty that she made is not inconsistent with
10 what she is doing now. And I would think that
11 that's the critical question for -- for any
12 estoppel doctrine.

13 MR. WOLF: Well, one response, Your
14 Honor, is that no case that I'm aware of in this
15 Court or any other has distinguished Section 112
16 invalidity from any other form of invalidity.

17 So from a purely stare decisis or
18 ratification perspective, you -- you can't argue
19 invalidity, period.

20 JUSTICE KAGAN: Yeah, I didn't really
21 mean to be making a 112 argument, because I just
22 -- I think that this could be true under --
23 under 112 or not true under 112.

24 I mean, the -- the -- the point of my
25 hypothetical was just to say that something

1 meaningful has happened between time 1 and time
2 2 with respect to the claim.

3 MR. WOLF: If I understand your
4 hypothetical in your question correctly, Your
5 Honor, I would say that the -- the -- and,
6 again, putting the PTAB issue aside,
7 Westinghouse and Diamond Scientific just -- in
8 1988, make clear that as the inventor, you're
9 allowed to say that if you read the patent the
10 way the plaintiff wants to, it's invalid.

11 And so you should read it in a
12 narrower way. And that's exactly what happened
13 in Westinghouse and in any number of the
14 assignor estoppel cases. So that fairness
15 correction is already built into the
16 jurisprudence.

17 And if there -- if there is a way to
18 -- if there's an approach to rebalancing that we
19 want to do prospectively, I'm sure there are
20 good policy reasons behind what Your Honor is
21 suggesting, but that should be applied
22 prospectively through statute.

23 JUSTICE KAGAN: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Gorsuch.

1 JUSTICE GORSUCH: So, counsel, on the
2 stare decisis front, I think I heard the SG's
3 office acknowledge we're somewhere in between
4 things.

5 And as I come at it, and tell me
6 what's wrong with this, Westinghouse didn't
7 actually apply the doctrine. It acknowledged
8 its existence and allowed the challenges over
9 the scope of the -- of the patent.

10 Scott Paper called it a logical
11 embarrassment. Lear said that Scott had
12 undermined the basis for patent estoppel, even
13 more than Westinghouse had. It read
14 Westinghouse as undermining the basis for patent
15 estoppel.

16 The world has changed greatly since
17 then, as Justice Breyer pointed out in terms of
18 employee/employer relations and how these
19 contracts of adhesions are often used against
20 employees.

21 And now we have the Patent Office
22 itself refusing to apply patent estoppel in its
23 own proceedings, in IPR proceedings. So the
24 only place left that this doctrine seems to
25 apply is in court.

1 Isn't that a strange state of affairs
2 to rest on stare decisis?

3 MR. WOLF: Your Honor, respectfully, I
4 strongly disagree with the premise of your first
5 statement about Westinghouse. Westinghouse did
6 apply assignor estoppel. Now --

7 JUSTICE GORSUCH: Okay. Other than
8 that, do you have any other concerns besides
9 Westinghouse?

10 MR. WOLF: Well, we have Diamond
11 Scientific, again, in 1988, which is the --
12 every single currently existing patent
13 assignment is operating under Diamond
14 scientific. It is --

15 JUSTICE GORSUCH: Unless they get
16 challenged in the Patent Office, in the IPR,
17 which they could be. And then --

18 MR. WOLF: Right.

19 JUSTICE GORSUCH: -- it doesn't apply,
20 right?

21 MR. WOLF: Right. In ERISA, the --
22 the Court suggested that Congress unambiguously
23 --

24 JUSTICE GORSUCH: Okay. Sorry. So --
25 so -- so we got that. And then if we're going

1 to monkey with it, if we're going to change it,
2 the solicitor general says we should analogize
3 the patents by deed -- sorry, estoppel by deed,
4 which has to do with real estate. And it said
5 it only did that because that's kind of what
6 Westinghouse talked about.

7 Why wouldn't the more natural place to
8 look at is -- is just plain old estoppel with
9 respect to personal property, rather than real
10 estate transactions, given that, if you look at
11 estoppel by deed, there's no need for material
12 misrepresentations. There's no need for
13 reliance.

14 And this would be -- this seemingly
15 would be an area in which those would be very
16 critical considerations when a large purchaser
17 is taking a property off of a smaller inventor,
18 someone who's well positioned to see whether
19 there are any problems with the patent and who
20 may not rely on a stray misstatement or puffery.

21 MR. WOLF: Your Honor, first, on the
22 issue of estoppel by deed, estoppel by deed does
23 not just apply to land. It also applies to
24 personal property when there are the formalities
25 of transfer.

1 So a patent is as heightened a formal
2 transfer as one can imagine in the property
3 context. So I just want to put a pin in that.

4 On the reliance point, when Mr.
5 Truckai, to use our specific example, applies
6 for a claim, when the Patent Office originally
7 says no, and when Mr. Truckai then successfully
8 fights for allowance of that claim, it's hard to
9 see how that isn't a representation that can be
10 taken --

11 JUSTICE GORSUCH: You --

12 MR. WOLF: -- seriously by a potential
13 purchaser.

14 JUSTICE GORSUCH: -- would win under
15 that standard. I -- I -- I -- I was asking what
16 -- why you'd care about the standard. I
17 understand you think you'd win under it. Thank
18 you, counsel.

19 CHIEF JUSTICE ROBERTS: Justice
20 Kavanaugh.

21 JUSTICE KAVANAUGH: Thank you, Chief
22 Justice. Good afternoon, Mr. Wolf.

23 I want to explore the differences you
24 might have with the solicitor general. The
25 solicitor general wants to retain the doctrine

1 of assignor estoppel, but to limit it. And I
2 want to make sure I understand your concerns
3 about the SG's position.

4 What -- what -- how would you describe
5 your differences with the solicitor general's
6 position as articulated in the brief and today?

7 MR. WOLF: Yes, Your Honor. And
8 putting aside the reliance issues and the stare
9 decisis issues, if we were talking about ab
10 initio, what would we think about it, and I -- I
11 think, if I could answer that first at the -- at
12 the theoretical level and then give a very
13 specific example.

14 At the theoretical level, as worded,
15 the SG is more stringent than the invalidity
16 test itself. The question the law asks when
17 determining the validity of claims sought after
18 an original application was -- was filed is
19 whether they are supported by the original
20 specification.

21 Nowhere in the law can we find a
22 requirement that subsequent claims be materially
23 identical to original claims for Section 112 to
24 be satisfied.

25 So there is an incongruence between

1 the policy the government is espousing, and it's
2 a perfectly reasonable policy, if -- if -- if --
3 if Congress wanted to go there. It just doesn't
4 match up with the text.

5 And let me give the specific example.
6 It's common for a patent examiner to tell an
7 applicant that claims as written will not be
8 allowed, but that if they are modified in one
9 way or the other, the patent will issue.

10 If the applicant that takes the PTO up
11 on its suggestion under the government's test,
12 would that result in a loss of protection of
13 assignor estoppel? So it's a -- it -- it -- in
14 the real world, it presents a Hobson's Choice,
15 as phrased, given the way prosecution actually
16 works.

17 And, in fact, Pharma, in its amicus
18 brief, noted the unworkability of the
19 government's test and it said amended or
20 newly-added claims can differ from the original
21 claims in many dimensions, such that evaluating
22 the amount of their difference would be
23 practically impossible.

24 So it's a difficult test to implement.

25 JUSTICE KAVANAUGH: Thank you, Mr.

1 Wolf.

2 CHIEF JUSTICE ROBERTS: Justice
3 Barrett.

4 JUSTICE BARRETT: Mr. Wolf, do you see
5 this case as one about the reenactment canon
6 where we would say there is a settled
7 interpretation of an act and then Congress
8 reenacted the statute without touching it and,
9 therefore, you know, we assume that Congress
10 intended to ratify it or Congress acquiesced in
11 it, or do you see this as a case in which there
12 was a settled common law background assumption,
13 this assignor estoppel, and Congress took the
14 soil of the common law with it into the Act, and
15 does it matter which way you see it?

16 MR. WOLF: The answer is both and no.

17 JUSTICE BARRETT: Well, I -- I guess I
18 think it might matter because the reenactment
19 canon requires a pretty well-established line of
20 cases that would put Congress on notice. And
21 as, you know, we've talked about a lot this
22 morning, there's uncertainty in the cases,
23 especially ours.

24 MR. WOLF: Your -- Your Honor, prior
25 to 1952, we do not believe there is any

1 uncertainty. Westinghouse said it was
2 manifestly intended by Congress. Scott said
3 expressly and explicitly it was not overturning
4 the doctrine.

5 So when Congress -- and then between
6 1945 and 1952 we saw three cases and two
7 treatises all unanimously say that Westinghouse
8 was maintained by Scott. Petitioner can't point
9 to a single case because we're not aware of any
10 that --

11 JUSTICE BARRETT: But, counselor, the
12 -- the language -- and, you know, this has come
13 up already -- I mean, when you have the language
14 in Scott Paper and then in Lear saying that
15 Scott Paper undermined any basis for assignor
16 estoppel, I mean, you can't say that it was
17 completely embraced.

18 MR. WOLF: Well, obviously, Your
19 Honor, Lear was many years, 17 years after the
20 '52 Patent Act. But --

21 JUSTICE BARRETT: But it's showing how
22 the courts understood it. So it's still
23 relevant. Right?

24 MR. WOLF: Your Honor, I don't think
25 Lear suggested that Scott Paper overruled

1 Westinghouse. I mean, Lear was a policy-driven
2 case. It did not address stare decisis. It did
3 not address congressional intent, congressional
4 language.

5 And -- and, as I suggested, and I
6 don't want to belabor it, but the Third Circuit
7 and the Sixth Circuit in the intervening years
8 between Scott Paper and the Patent Act expressly
9 acknowledged that Westinghouse was the rule.

10 I mean, we have Hope Basket in 1951
11 saying the basic rule of estoppel may have been
12 somewhat modified by Scott Paper, but it was not
13 abolished. In fact, that case restated the
14 rule.

15 JUSTICE BARRETT: Well, we've -- we've
16 been very clear that, to the extent -- let's
17 assume that Formica/Westinghouse did lay down a
18 rule, although there's some dispute about
19 whether it did that. Let's assume that it did.

20 Let's assume that Scott Paper undercut
21 it. We've been very clear in telling lower
22 courts that, even if our precedents have made --
23 made it a virtual certainty that we would -- we
24 would overrule it, that that's our prerogative.

25 So the fact that lower courts

1 continued to apply it wouldn't necessarily mean
2 that, as we would view it, that it wasn't a dead
3 letter. But my -- my time is up. Thank you.

4 MR. WOLF: Thank you, Your Honor.

5 CHIEF JUSTICE ROBERTS: A minute to
6 wrap up, Mr. Wolf.

7 MR. WOLF: Your Honor, the facts of
8 this case comfortably satisfy the policies
9 underlying any of the modifications of assignor
10 estoppel proposed by Minerva or the amici.

11 But for many of the same reasons, the
12 doctrine should not be abrogated, it also should
13 not be modified by this Court.

14 Assignees have relied on the estoppel
15 when deciding whether, at what price, and under
16 what terms they wish to acquire patents and
17 patent applications.

18 Assignors have benefitted from that
19 reliance through the enhanced assignment value
20 the doctrine creates. And they have also been
21 free to reject the doctrine in whole or in part
22 when negotiating the terms of the assignment.

23 A retrospective change would mean a
24 windfall for assignors and radically
25 undercutting the return on the deal for a

1 quarter century's worth of assignees.

2 Any modification to assignor estoppel
3 should be made only after careful consideration
4 of the advantages, not just the disadvantages of
5 the doctrine. It should be made after input
6 from all of the stakeholders in the marketplace.

7 Given all this, and given this Court's
8 precedent, it should be Congress that decides
9 whether, what and when such changes should be
10 made. Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel. The case is submitted.

13 Oh? Oh, I'm sorry, Mr. Hochman. You
14 have rebuttal.

15 REBUTTAL ARGUMENT OF ROBERT N. HOCHMAN
16 ON BEHALF OF THE PETITIONER

17 MR. HOCHMAN: Thank you. Thank you,
18 Mr. Chief Justice.

19 CHIEF JUSTICE ROBERTS: Excuse me.

20 MR. HOCHMAN: I will be -- I will be
21 as quick as I can here. I'm -- I'm going to
22 start from the narrow and move to the broad.

23 I just want to correct a couple of, I
24 think, misstatements that -- that Mr. Wolf made.
25 He -- he -- he said repeatedly that claim 31 was

1 obtained. That's not true.

2 Claim 31 was canceled and it was
3 canceled two years, two full years before Cytyc
4 lost the patent. So it was not -- and -- and --
5 and that's just the way the patent prosecution
6 process goes. Sometimes you learn things after
7 a claim has been given the tentative allowance
8 by the Court and -- and you have to make
9 changes.

10 He pointed to the testimony in -- in
11 -- in -- in -- in the record about Truckai at
12 one time believing that his claim was more than
13 just moisture transport, but that's not the same
14 thing as covering an applicator head with a
15 moisture impermeable device.

16 Those are different points. And I
17 think -- and I think that that -- that this is
18 exactly the kind of backward-looking overreach
19 that the rules should prohibit.

20 I think Hologic's position makes claim
21 31 a red-herring. It, you know, it -- they were
22 very clear today. Whatever they can squeeze out
23 of the patent, the assignor is stuck with. And
24 that just doesn't make any sense.

25 You know, Scott allowed, Scott Paper

1 allowed a party, an assignor, to say that the
2 patent -- that what he was doing was outside of
3 the scope of patent protection because of the
4 time limited nature of patents. There is no
5 principled reason why an assignor shouldn't be
6 able to say that what he's doing is outside the
7 scope of the patent protection because it's
8 beyond the -- it's -- it's beyond the breadth of
9 the application that he sold.

10 And that's our argument, and -- and --
11 and it's also, by the way, the argument that
12 Westinghouse accepted, and this is toward the
13 end of the Westinghouse opinion. It's page 354,
14 toward the -- toward the bottom there, when it's
15 talking about Claim 6. Claim 6 in that case was
16 pending at the time of the assign -- of -- of
17 the assignment, was overbroad, and the assignor
18 was nonetheless allowed to dispute the breadth
19 of even narrower claims than the overbroad claim
20 that had been pending at the time.

21 And this is consistent, by the way,
22 with Kimble. Kimble says, in case after case,
23 the Court has construed these laws to preclude
24 measures that restrict free access to formerly
25 patent -- patented as well as unpatented

1 inventions, and it cites Scott Paper.

2 That's the point. If you're outside
3 the scope of patent protection, you should be
4 allowed to -- the inventor, even an assignor,
5 should be allowed to challenge it.

6 And then, final -- and, in addition,
7 the AIA and IPRs and post-grant review, that's
8 just another reason to abandon assignor
9 estoppel. That's another one of the significant
10 changes that has taken place. The doctrine
11 doesn't have any legs to stand on.

12 And the -- you know, the government
13 pushes towards the real property analogy and
14 estoppel by deed, but it's really important to
15 remember that assignor estoppel, unlike estoppel
16 by deed, is committing property to the public.
17 And so the analogy doesn't hold when -- when in
18 -- when, in estoppel by deed, somebody is trying
19 to take back what they had sold. But that's not
20 true here.

21 What we're trying to do is ensure that
22 they get to keep the substantial value of what
23 we sold them but no more. And to the extent
24 that there's any concern about real mischievous
25 behavior by assignors, equitable estoppel and

1 state law remedies remain available to address
2 them.

3 For all those reasons, we respectfully
4 request that you vacate the judgment and remand
5 with instructions to consider our Section 112
6 invalidity arguments on the merits.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel. Now the case is submitted.

9 (Whereupon, at 12:43 p.m., the case
10 was submitted.)

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