

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

LAURA PETER, DEPUTY DIRECTOR,)
PATENT AND TRADEMARK OFFICE,)
Petitioner,)
v.) No. 18-801
NANTKWEST, INC.,)
Respondent.)

Pages: 1 through 53

Place: Washington, D.C.

Date: October 7, 2019

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1 IN THE SUPREME COURT OF THE UNITED STATES
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3 LAURA PETER, DEPUTY DIRECTOR,)
4 PATENT AND TRADEMARK OFFICE,)
5 Petitioner,)
6 v.) No. 18-801
7 NANTKWEST, INC.,)
8 Respondent.)
9 - - - - -

10 Washington, D.C.

11 Monday, October 7, 2019

12

13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 11:10 a.m.

16

17 APPEARANCES:

18

19 MALCOLM L. STEWART, Deputy Solicitor General,
20 Department of Justice, Washington, D.C.;
21 on behalf of the Petitioner.

22 MORGAN CHU, Los Angeles, California;
23 on behalf of the Respondent.

24

25

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1 PROCEEDINGS

2 (11:10 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 18-801, Peter versus
5 NantKwest.

6 Mr. Stewart.

7 ORAL ARGUMENT OF MALCOLM L. STEWART

8 ON BEHALF OF THE PETITIONER

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

11 An unsuccessful patent applicant may
12 seek judicial review through either a direct
13 appeal to the Federal Circuit under 35 U.S.C.
14 141 or a district court suit under Section 145.
15 Section 145 states that an applicant who files
16 suit under that provision must pay all the
17 expenses of the proceeding.

22 For three principal reasons, the
23 answer to that question is yes. First, the term
24 "expenses" unambiguously encompasses costs --
25 encompasses money paid to employees or other

1 personnel to accomplish an -- a particular task.
2 And unlike the term "costs," which has a
3 similarly broad common meaning, this Court has
4 not construed the term "expenses" as a legal
5 term of art with a more limited scope.

6 Second, requiring patent applicants
7 who file suit under Section 145 to pay personnel
8 expenses of the PTO is consistent with the
9 overall statutory scheme. Congress has directed
10 the PTO to charge fees that are sufficient to
11 cover its aggregate operating costs, including
12 personnel expenses.

13 And the PTO has developed fee
14 schedules that, in a rough and ready way,
15 require applicants who cause the agency to incur
16 greater expenses to -- to pay more in the way of
17 fees. And Section 145 applicants put the PTO to
18 a particular expenses, and it's therefore
19 consistent with the logic of the statute to
20 require them to pay more.

21 And, third, it's especially
22 appropriate to require Section 145 plaintiffs to
23 pay the PTO's personnel expenses because
24 Section 141 is available as an alternative means
25 of obtaining judicial review. Section 141 is

1 not a cut-rate or a substandard mode of judicial
2 review. It's ordinary, on the record, APA-style
3 judicial review. And it contains no requirement
4 that the -- the applicant who chooses that
5 course must pay the PTO's personnel expenses.

6 And so --

7 JUSTICE GINSBURG: Mr. -- Mr. Stewart,
8 is there any other federal statute that provides
9 for attorneys' fees on the basis of the word
10 "expenses" alone? As you know, there are
11 expenses and attorneys' fees, expenses including
12 attorneys' fees. But what other statute
13 provides for attorneys' fees simply on the basis
14 of the word "expenses"?

15 MR. STEWART: We're not aware of any,
16 unless you include the trademark analogue to
17 this provision. And, presumably, the
18 government's position on those two statutes will
19 rise or fall together.

20 We're -- we're frankly not aware of
21 any other federal statute that uses the term
22 "expenses" standing alone; that is, as -- as
23 Your Honor's question suggests, when Congress
24 has provided for shifting of expenses, it
25 typically makes clear that it intends to provide

1 for payment of attorneys' fees in -- in the
2 course of doing that. But sometimes it says
3 expenses including attorneys' fees, sometimes
4 expenses and attorneys' fees.

5 JUSTICE KAVANAUGH: How -- how about
6 to the losing party? Are there other statutes
7 that provide for fees, attorneys' fees, that are
8 awarded against the prevailing party?

9 MR. STEWART: I mean, the -- the only
10 one we're aware -- there are -- there are two
11 categories of those. There are -- there are
12 Sebelius versus Cloer, the vaccine act, and that
13 was an unusual situation.

14 There are also statutes that provide
15 discretion to award attorneys' fees without
16 specifying that the -- the person who receives
17 the fees must obtain some degree of litigation
18 success. And in that context, the -- the Court
19 has construed those discretionary provisions as
20 requiring a degree of litigation of success.

21 But I'd say a couple of things about
22 that --

23 JUSTICE KAVANAUGH: And it was called
24 it a radical departure to do otherwise?

25 MR. STEWART: Well, it -- it would be,

1 in the context of ordinary fee-shifting
2 provisions. And I think this is an important
3 point, that if you ask is it unusual, is it a
4 departure from the norm, either to require a --
5 an adverse litigant to pay the government's
6 personnel expenses or to require the prevailing
7 party to pay, the answer is if you compare it to
8 other adversarial litigation involving the
9 government, yes, it is unusual.

10 If you compare it to other stages of
11 the patent application process, it's not unusual
12 at all. And so the PTO charges particular fees
13 for application and examination. Those fees --
14 the PTO doesn't try to fine-tune the process.
15 It's determined that it would be
16 administratively overly cumbersome to say to
17 each applicant, you must pay in precise
18 proportion to the work that you make the PTO do.

19 But in a sort of rough and ready way,
20 it's tried to create a scenario in which
21 applicants who cause the PTO to pay -- to incur
22 greater expenses must pay more. So if your
23 proposed patent has an unusually large number of
24 claims, you may have to pay a larger fee. If
25 you seek continued examination or if you file an

1 administrative appeal to the PTAB, you have to
2 pay additional fees.

3 And none of that is contingent on how
4 the application is ultimately disposed of. And
5 so if your application is turned down by the
6 examiner and you file an appeal to the Patent
7 Trial and Appeal Board, the PTAB, and the PTAB
8 says yes, you're right, the examiner missed the
9 boat completely, you are entitled to your
10 patent, you get a favorable disposition, but you
11 still have to pay the appeal -- appeal fee to
12 the PTAB -- for the PTAB proceeding.

13 JUSTICE GORSUCH: Counsel, your --
14 your interpretation of "expenses" includes
15 attorneys' fees, you argue in this case. Is
16 there anything that would inhibit the government
17 from suggesting that other forms of overhead
18 might also be allocated to litigants? The
19 electric bill? The sewage bill? Other things
20 that were required in order to be able to
21 litigate these cases?

22 MR. STEWART: Well, the statute refers
23 to expenses of the proceeding. And so we would
24 have to show the requisite connection to the --

25 JUSTICE GORSUCH: Well, you have --

1 you had a lawyer here, right, who works for the
2 government anyway. It's not like you went out
3 and hired a lawyer. So you're allocating some
4 personnel expenses to this proceeding. What
5 would prohibit the government from allocating
6 other expenses to this proceeding?

7 MR. STEWART: Well, it certainly --
8 it's certainly true that, for some bookkeeping
9 purposes, when we talk about personnel expenses,
10 we will include what I think is referred to as a
11 fully burdened rate --

12 JUSTICE GORSUCH: Right.

13 MR. STEWART: -- where we're talking
14 not just about the salary but to some additional
15 increments of money that are -- that go along
16 with hiring a --

17 JUSTICE GORSUCH: So nothing, in other
18 words, right? A fully burdened rate would
19 include this other form of overhead that we're
20 talking about, correct?

21 MR. STEWART: I guess the point I
22 would make is we -- we do that in the
23 application process already.

24 JUSTICE GORSUCH: Oh, okay. So you're
25 already doing this?

1 MR. STEWART: We're -- we're doing
2 that in the application process in the sense
3 that we are under a congressional mandate to
4 collect fees that, in the aggregate, are
5 sufficient to cover --

6 JUSTICE GORSUCH: Well, that's helpful
7 to know that you're already doing this. And it
8 has been 170 years; is that right?

9 MR. STEWART: That's right.

10 JUSTICE GORSUCH: How did the
11 government just figure this out?

12 MR. STEWART: Well, I think -- we
13 don't have a good explanation for why we weren't
14 doing it before. We do have explanation -- good
15 explanations for why we focused on this matter
16 at the time that we did.

17 JUSTICE GINSBURG: But you would --
18 you would say that in all the years that you
19 weren't doing it, you were violating the statute
20 because the statute is mandatory?

21 MR. STEWART: I wouldn't -- I wouldn't
22 say that we were violating the statute. That
23 is, this is somewhat analogous to what the Court
24 often refers to as a mandatory claim processing
25 rule as opposed to a jurisdictional requirement.

1 So, for instance, statutes of
2 limitations are often phrased in terms of no
3 suit shall be filed more than three years after
4 the violation occurs. But everybody understands
5 that even though the -- the statute is phrased
6 in mandatory terms, the defendant can waive or
7 forfeit the limitations defense by failing to
8 raise it at the appropriate moment.

9 And nobody would say that the
10 defendant violates the statute by failing to
11 assert a limitations defense that it could have
12 asserted. So you -- I think we would have to
13 say that for that 170-year period, we were
14 foregoing a source of income that we were
15 entitled to get.

16 JUSTICE KAVANAUGH: You started by
17 saying that the statutory term expenses
18 unambiguously covers attorneys' fees. So two
19 questions on that.

20 First, the cases seem to suggest that
21 there is something of a clear statement rule in
22 this area that has to explicitly, expressly
23 cover fees and, two, all of the statutes that
24 seem to satisfy that refer to a attorneys,
25 attorneys' fees, or fees, and not the term

1 expenses.

2 So which part of that do you disagree
3 with?

4 MR. STEWART: Oh, well, the Court has
5 made clear that, even though a relatively clear
6 indication of congressional intent is necessary,
7 there's no magic words requirement. And the
8 point I was making about expenses being
9 unambiguous is that there is no ordinary, plain
10 language understanding of the word "expenses"
11 that doesn't encompass the money that you use to
12 hire a person to accomplish a particular task.

13 And sometimes in situations like this,
14 where Congress has viewed expansive general
15 language, the Court has said the failure to
16 specify particular items doesn't indicate
17 ambiguity, it indicates breadth, that Congress
18 could have --

19 JUSTICE KAVANAUGH: I think that would
20 be true if there weren't some kind of clear
21 statement backdrop to this. But my question is,
22 you agree there is something of a clear
23 statement requirement; is that correct?

24 MR. STEWART: That's correct.

25 JUSTICE KAVANAUGH: Okay. And then --

1 JUSTICE KAGAN: May I interrupt for a
2 second?

3 JUSTICE KAVANAUGH: Go ahead.

4 JUSTICE KAGAN: Does that mean you are
5 dropping your argument in your initial brief
6 that the American Rule doesn't apply to this
7 kind of case, because in your reply brief you
8 don't make any mention of that, and here in
9 responding to Justice Kavanaugh's questions and
10 in your first two minutes, you also don't make
11 that argument again, have you effectively
12 dropped that argument so we're now within the
13 American Rule presumption?

14 MR. STEWART: We -- we would certainly
15 acknowledge that if this sentence didn't appear
16 in Section 145 at all, we would need -- we would
17 not be able to recoup personnel expenses.

18 Now, the Fourth Circuit held that
19 because the Section 145 mandate applies without
20 regard to the ultimate outcome of the
21 litigation, the American Rule doesn't apply.
22 And we think the Federal Circuit -- the Fourth
23 Circuit was right at least to the extent of
24 saying the absence -- not only the absence of a
25 prevailing party requirement, but the specific

1 mandate that the expenses be paid regardless of
2 the outcome of the proceedings is a good
3 indication that this provision is trying to
4 accomplish something very different from what an
5 ordinary fee shifting provision is intended to
6 accomplish.

7 And so you can conclude on that basis
8 the American Rule doesn't apply or you can
9 conclude this is one of the contextual factors
10 that leads you to the conclusion that personnel
11 expenses are -- are encompassed.

12 CHIEF JUSTICE ROBERTS: Are you -- are
13 you going to send the Respondent a bill for your
14 time today?

15 MR. STEWART: We -- we are not. And I
16 think that's -- there -- there are really three
17 different potential obstacles to our claiming an
18 incremental share of my salary.

19 The first is that the PTO has, even in
20 the most recent years, has sought only expenses
21 of PTO personnel, not of Department of Justice
22 lawyers who's assisted -- who have assisted in
23 the representation of Section 145 suits.

24 And I think that's based on the idea
25 this is a provision that is intended to help in

1 making the PTO a self-financing agency. It
2 complements the requirement that the PTO collect
3 fees to cover its own operating expenses, not
4 that of other agencies.

5 There -- there's a separate question
6 also about whether an appellate stage of the
7 case would fall within the term proceedings in
8 Section 145, and it's noteworthy in this regard
9 that Section 141, which provides for direct
10 appeal to the Federal Circuit, doesn't include
11 an expense recoupment mandate.

12 And I think you could infer from that
13 fact that Congress intended only that the trial
14 stage of the Section 145 proceedings, the thing
15 that was distinctive to a Section 145 suit, to
16 be subject to this mandate.

17 And the third thing is, even in the
18 trial -- with respect to the trial court
19 proceedings in this case, the PTO didn't seek
20 recoupment of expenses for attorney time spent
21 arguing about the fees.

22 It -- it requested recoupment of
23 expenses only for the attorney time that was
24 devoted to the issue of patentability. And the
25 only issue before this Court, obviously, is

1 recoupment of fees, not the original dispute.

2 JUSTICE SOTOMAYOR: Mr. Stewart --

3 JUSTICE GINSBURG: I can see the

4 argument, Mr. -- Mr. Stewart, that the word

5 "expenses" could include attorneys' fees, but I

6 don't understand the argument that expenses

7 alone must include attorneys' fees.

8 MR. STEWART: I think the

IN THE COURSE OF THE DAY WERE PARTS OF ONE

15 EXPENSES THAT THE FIRM INCURRED.

And the only question is whether the

15 CEM EXPENSES, LIKE THE CEM COSTS, HAS ACQUIRED

to a status as a legal term of art that has a legal meaning.

meaning narrower than its common meaning. And

¹⁸ The Court has never used the term in that way.

Indeed, in elucidating the term cost

20 the court has sometimes said, as in *Taniguchi*,

21 cost has an ordinary meaning that's synonymous

22 with expenses, but for purposes of federal cost

23 shifting statute, it has a more narrow meaning.

24 The -- the other thing I would say

1 word "costs" is a term of art, it has a limited
2 meaning, the Court has a source of law to look
3 to to see whether particular items are or are
4 not costs. It looks to 28 U.S.C. 1821 and 28
5 U.S.C. 1920.

6 And so when the Court says we are
7 going to depart from the ordinary meaning of
8 costs, it doesn't have to make things up. It
9 has a source of law to determine whether --

10 JUSTICE BREYER: All right. Sorry. I
11 don't want to cut you off.

12 MR. STEWART: Whereas here, I think
13 NantKwest has really given no guidance as to
14 what it thinks the term "expenses" means, other
15 than it doesn't include attorneys' fees, but we
16 can't fault NantKwest for that because there
17 really is no alternative source for determining
18 what the term "expenses" means, if not its
19 ordinary meaning.

20 JUSTICE BREYER: How should I deal
21 with this fact. As far as I can tell, if you go
22 back to the 1830s when this was enacted, the
23 patent litigants paid the costs, including the
24 attorneys' fees of the Patent Office, didn't
25 they?

1 So you could say, well, this was just,
2 where there are special costs here, this group
3 should pay it, not everybody. That made sense.

4 But then in the 1860s, the government
5 decides to pay for all these expenses. Now it
6 doesn't make much sense any more to have this
7 group pay.

8 Then in 1990 it goes back to the first
9 system. All right.

10 So if it were just the one system or
11 the other, I could make a lot of sense out of
12 it, either saying these have special costs, the
13 patent litigants pay anyway, let them pay, or I
14 could say you are putting a special burden on
15 this and it has to be clearer before you break
16 the American Rule.

17 But we have some of one and some of
18 the other. So what -- should I put -- use that
19 to put weight on the fact nobody has ever
20 thought of this before?

21 MR. STEWART: Well, as I say, I think
22 this was an argument that could have been made
23 for an extended period of time. And we don't
24 have a good explanation for --

25 JUSTICE BREYER: I don't know if it

1 could have been made between 1865 and 18 -- and
2 1990.

3 MR. STEWART: Well, the -- the --

4 JUSTICE BREYER: Because during that
5 time it was the Congress that paid these costs.

6 MR. STEWART: Well -- well, there was
7 still the objective of making the PTO a
8 self-funded agency, an agency whose receipts
9 were equivalent to --

10 JUSTICE SOTOMAYOR: It already is.

11 MR. STEWART: -- its expenses.

12 JUSTICE SOTOMAYOR: It already is.

13 You're -- you're paying from the fees, meaning
14 the time you're attributing to the attorneys and
15 the paralegals is already being paid. Without
16 these fees, the patent application fee itself is
17 covering it.

18 You haven't had a shortfall.

19 MR. STEWART: Well, the -- the PTO is
20 under a congressional mandate to ensure that
21 it's aggregate receipts match up with it's
22 aggregate --

23 JUSTICE BREYER: Now.

24 MR. STEWART: -- expenditures.

25 JUSTICE BREYER: But was that true

1 between 1865 and 1990?

2 MR. STEWART: No, no. It --

3 JUSTICE BREYER: No, it wasn't. And,
4 therefore, I'm having a big -- oddly enough,
5 that's sort of what is giving me a problem here
6 because -- and the long delay -- because I
7 couldn't have said what you want me to say for
8 over, well over 100 years.

9 MR. STEWART: Well, the -- the mandate
10 to pay the, I think it was the whole of the
11 expenses of the proceeding under the original
12 statute, the mandate was there all along and it
13 was part of Congress's objective that the PTO be
14 self-financing.

15 Now, for a prolonged period of time,
16 the way that Congress went about that was that,
17 for the most part, Congress was determining the
18 amount of the fees for particular services. And
19 it was trying to set fees at a level that would,
20 as closely as possible, match up with PTO
21 expenses. Often there was a shortfall and an
22 appropriation would be needed to fill the gap.

23 In 2011, Congress essentially made it
24 the PTO's responsibility to balance the books.
25 It put the PTO under a mandate to make sure that

1 your aggregate receipts equal your aggregate
2 expenditures. And once that responsibility was
3 placed upon the agency, the agency felt a -- a
4 greater duty to look for other sources --

5 JUSTICE BREYER: I look to 1930, for
6 example. I'll discover that even in 1930
7 Congress was trying to get the patent fees to
8 match the patent expenses. They just didn't
9 always do it right.

10 MR. STEWART: It was certainly trying
11 as much as possible to --

12 JUSTICE BREYER: Okay. How do I --
13 where do I look for that?

14 MR. STEWART: I -- I'm -- I'm not sure
15 whether you would look for -- to that. But the
16 -- even in the 1830 act, '36 act, the statute
17 said that fees that are paid into the Treasury,
18 fees for patent application services, will be
19 placed in a fund to be known as a patent -- as
20 the patent fund to be used for the -- the
21 salaries of the officers and clerks and other
22 expenses of the agency. And --

23 JUSTICE GINSBURG: Mr. Stewart, do you
24 dispute the Federal Circuit's estimate that if
25 this cost of the PTO attorneys is spread among

1 all patent applicants, even the ones who don't
2 use 145, that the added cost per applicant would
3 be \$1.60?

4 MR. STEWART: We don't. And I think
5 that the -- we don't dispute that. And I think
6 the PTO's motivation here is really more one of
7 equity than of financial necessity. That is, it
8 is certainly true that the number of Section 145
9 suits is small enough that if the -- the
10 applicant was not required to pay PTO personnel
11 expenses, those could be allocated among all the
12 hundreds of thousands of patent applicants and
13 none of them would -- all of them would pay a
14 very small amount.

15 I think the PTO's motivation really
16 is -- in this case, for example, we sought about
17 \$111,000 in combined personnel expenses and
18 expert witness fees. It was a little under
19 80,000 for the -- the lawyers and paralegals, a
20 little over 30,000 for the expert witnesses.

21 And the PTO tells me that that -- that
22 the fee application and examination fee for the
23 typical patent application is about \$3300. So
24 here we're dealing with a situation in which the
25 Section 145 suit caused us to incur about 30

1 times the expenses that would ordinarily attend
2 -- that would ordinarily be the fees for a
3 patent application and examination.

4 And it's one thing for the PTO to say:
5 We're not going to fine tune this absolutely.
6 We're going to accept the idea that some
7 applicants will pay a little bit more; some
8 applicants will pay a little bit less than their
9 fair share of our operating expenses.

10 But when we have this congressional
11 mandate and when we have a situation whereby
12 filing suit under Section 145, you've caused the
13 PTO to incur 30 times the expenses that -- that
14 go with a typical patent examination, it -- it
15 seems fair and appropriate to make the applicant
16 pay.

17 And, again, part of our fairness
18 argument is that Section 141 is available. It
19 provides exactly the type -- same type of
20 judicial review that is ordinarily the only mode
21 of judicial review that's available to somebody
22 who's aggrieved by federal agency action.

23 And so the applicant who -- who
24 doesn't believe -- either doesn't want to pay
25 the expenses or doesn't believe that its chances

1 of success will be enhanced by filing suit in
2 district court is -- the 145 -- 141 mechanism is
3 available.

4 JUSTICE KAVANAUGH: I think you
5 covered this, but just to confirm, however we
6 rule in this case, will cover -- will affect
7 only two statutory provisions?

8 MR. STEWART: That's correct. We're
9 -- it will certainly affect the -- the trademark
10 statute and -- you know, basically our pitch in
11 the certiorari petition was even though they are
12 technically different statutes, our position
13 would stand or fall together.

14 We're not aware of any other statute
15 that uses the term "expenses" standing alone in
16 this context.

17 JUSTICE KAVANAUGH: And then in terms
18 of your overall purpose argument, Congress
19 wanted it to be a self-sustaining agency, but
20 what sense does it make to think that Congress
21 wanted the winning party to turn around and pay
22 the government's legal fees, given how unusual
23 that is? Why would Congress have thought to do
24 it that way is, I guess, what I'm asking.

25 MR. STEWART: I guess the two reasons

1 are Congress -- since the very beginning -- and
2 the first iteration of the statute enacted in
3 1839 specifically said whether the decision is
4 in its favor or not. And the trademark statute
5 continues to include that language.

6 And even if you interpreted the term
7 "expenses" very restrictively, as limited to
8 costs under 1821 and 1920, it is no more usual
9 to require the winning party to pay the other
10 party's costs than for the winning party to have
11 to pay the losing party's attorneys' fees.

12 And so interpreting the --

13 JUSTICE KAVANAUGH: You're saying the
14 costs are obviously a far -- far smaller amount
15 than --

16 MR. STEWART: They -- they --

17 JUSTICE KAVANAUGH: -- attorneys'
18 fees?

19 MR. STEWART: -- yeah -- that's
20 correct, but the --

21 JUSTICE KAVANAUGH: It's unusual but
22 not to the degree?

23 MR. STEWART: It doesn't have the same
24 practical effects. But, again, the -- the point
25 I would make, and I think this is in a sense our

1 primary point, is you should -- the Court has
2 described a Section 145 suit as a continuation
3 of the examination process.

4 And there is language in the statute
5 to that effect. It refers -- it says that the
6 applicant shall pay all the expenses of the
7 proceeding, rather than the plaintiff. And so
8 the applicant continues to retain that status
9 throughout the lawsuit. It says that the Court
10 can adjudge that the applicant is entitled to a
11 patent.

12 And so when you look to see is this
13 unusual or not, you should compare it not just
14 to other adversarial litigation involving the
15 government; you should compare it to other
16 stages of the patent application process. And
17 as I've said, at every other stage, your
18 obligation to pay fees depends in part on how
19 much work you're making the PTO do, but it
20 doesn't depend at all on the ultimate outcome of
21 the process.

22 And so if you file a successful PTAB
23 appeal and persuade the PTAB that the examiner
24 got it wrong, you still have to pay the fees for
25 the PTAB appeal even though in a sense you could

1 say that's requiring the winning party to pay.

2 If I may, I'll reserve the balance of
3 my time.

4 CHIEF JUSTICE ROBERTS: Certainly.

5 Mr. Chu.

6 ORAL ARGUMENT OF MORGAN CHU

7 ON BEHALF OF THE RESPONDENT

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

10 There are three important
11 considerations. First, the American Rule is a
12 bedrock principle, and this Court has recognized
13 and applied that rule for two centuries.

14 Second, the government is arguing for
15 a radical departure from the American Rule. It
16 is arguing that when a private party sues the
17 government for its improper action, then that
18 private party must pay for the government's
19 attorneys, even if the government and its
20 attorneys are flatly wrong.

21 Third, and this responds to some of
22 the questions from the justices that were put to
23 the government, today there are 3,274 federal
24 statutory provisions that use the word
25 "expenses" without any reference to attorneys'

1 fees or counsel fees.

2 Some of those provisions are
3 open-ended, as is the case here. The government
4 can point to not a one of those other provisions
5 to say that the word "expenses" includes
6 attorneys' fees, save for the two exceptions,
7 radical exceptions, it is arguing here.

8 And I would invite questions from the
9 Court.

10 CHIEF JUSTICE ROBERTS: Why -- why
11 isn't this just like a filing fee? In other
12 words, the applicant can take the normal appeal
13 to the court of appeals, but if he or she wants
14 to go through the much more elaborate proceeding
15 of trying the case, bringing in new evidence,
16 they have to pay a filing fee?

17 I mean, in some agencies, I don't
18 remember from long ago, the filing fee for a
19 particular proceeding before the ICC was
20 \$100,000 because they figured most of the people
21 who are going to be doing this, it's going to be
22 corporations that can afford it, and we're --
23 you know, they're putting us out to a
24 significant extent.

25 Why -- I gather -- I mean, would it be

-- would it be problematic in your case if they
said, okay, you can go to district court, but if
you're going to do this unusual proceeding, you
know, if you have three claims, that's going to
be 15,000; if you have six, it is going to be
30,000; or what -- in other words, a significant
filing fee for the very purpose of doing what
the statute seems to contemplate?

9 MR. CHU: First, this is not a filing
10 fee. It's a claim for attorneys' fees against
11 the strong backdrop of the American Rule.

18 And once it's adversarial litigation,
19 there can be no doubt that the American Rule
20 applies with its full force and effect over the
21 last two centuries.

22 JUSTICE GINSBURG: Is there any
23 language short of saying explicitly "attorneys'
24 fees" that would overcome the American Rule?
25 We're told there are no magic words, but what

1 short of saying "including attorneys' fees" or
2 "and attorneys' fees" would do?

3 MR. CHU: The answer to the question
4 is no, that either the words attorneys' fees,
5 counsel fees, reasonable compensation for
6 services of a lawyer for a bankrupt estate,
7 which was true in the Baker Botts case, there
8 would be words that would be specific and
9 explicit, to refer to Justice Kavanaugh's point,
10 where Baker Botts, this Court made clear, that
11 to have an exception because of a statute under
12 the American Rule, it must be specific and
13 explicit. And well before that, in the Alyeska
14 case, a decision by this Court was to the same
15 effect as well as other decisions.

16 JUSTICE SOTOMAYOR: Well, I presume
17 that if the Congress wrote a provision that said
18 the pro rata share of all the services of its
19 personnel, that would be enough, because you
20 wouldn't exclude lawyers from that?

21 MR. CHU: If Congress had a specific
22 provision that showed it was intending to
23 include lawyers, Congress has the authority to
24 enact such legislation.

25 But as in your exact example, I would

1 say there would still be an ambiguity because of
2 the American Rule. And let me give you an
3 example from history.

4 Three years before the enactment of
5 what we now call Section 145, there was a
6 statute enacted by Congress with respect to the
7 expenses of the Patent Office. It was an
8 appropriations statute.

9 And Congress said we have five new
10 positions. We have the Commissioner of Patents,
11 we have a chief examining clerk, we have another
12 examining clerk, and we have two other clerks.
13 And Congress said we need to pay for their
14 salaries and said these are expenses of the
15 office.

16 Note: Three years later, when Section
17 145 was first enacted, the language was
18 different in several respects. The language is
19 all the expenses of the proceeding as distinct
20 from expenses of the Patent Office, which it was
21 addressing --

22 JUSTICE KAGAN: But, Mr. Chu --

23 MR. CHU: -- three years earlier.

24 JUSTICE KAGAN: -- are you saying that
25 expenses of the office is not enough to get you

1 lawyers' fees? Suppose it was just expenses of
2 the Patent Office, which would presumably give
3 you the expenses, you know, the -- the -- the
4 costs of personnel.

5 MR. CHU: Yes. I --

6 JUSTICE KAGAN: Does that not include
7 lawyers?

8 MR. CHU: Yes, I am saying under this
9 backdrop of the American Rule, this Court has
10 made clear Congress needs to enact a statute
11 that is specific and explicit.

12 JUSTICE KAGAN: It basically has to
13 say lawyers?

14 MR. CHU: Or words to that effect,
15 yes.

16 JUSTICE KAGAN: Well, what does words
17 to that effect mean?

18 MR. CHU: Counsel, compensation for
19 legal counsel, for advice, whatever. In other
20 words --

21 JUSTICE KAVANAUGH: Fees? The word
22 "fees" alone?

23 MR. CHU: I do not believe the word
24 fees alone would cover it, because fees can
25 refer to many, many other things, docket fees,

1 marshal fees, filing fees, fees of other
2 personnel, perhaps, but not attorneys' fees.

3 If there is an ambiguity under the
4 American Rule, this Court has repeatedly made
5 clear it must be "specific and explicit."

6 JUSTICE GINSBURG: What -- what
7 expenses in your view does Section 145 impose on
8 the person who invokes that proceeding?

9 MR. CHU: Travel expenses, lodging
10 expenses, parking expenses, expenses with
11 respect to court reporters, printing expenses,
12 marshal fees, docket fees, court interpreters.
13 That's not an exhaustive list but it does not
14 include attorneys' fees.

15 JUSTICE SOTOMAYOR: Is it --

16 JUSTICE BREYER: Are experts?

17 JUSTICE SOTOMAYOR: I'm sorry.

18 JUSTICE BREYER: Experts?

19 MR. CHU: I do not think it should
20 include expert witness fees, whether they are
21 internal experts or external experts, but I want
22 to note for the Court in this particular
23 instance, for practical reasons, NantKwest did
24 not challenge the government's request for
25 expert witness fees and they were paid.

1 JUSTICE BREYER: Well, that's -- see,
2 then you put your finger on, yes, the American
3 Rule, yes, yes, yes, but you have a special kind
4 of case. And Congress was saying, it seemed,
5 and says again, look, present all your evidence
6 to the Patent Office. And if you don't like the
7 result, go to the Federal Circuit. You want a
8 second bite, you forgot to bring in somebody or
9 you didn't, and then they will have to bring in
10 people, and before you know it, you have some
11 big expense here, experts.

12 And, sure enough, you're saying, no,
13 don't cover those. Not very discouraging, if
14 they wanted to discourage you from using 145.

15 I mean, did it carve out a separate
16 special thing here or do we just use the
17 American Rule?

18 MR. CHU: Yes.

19 JUSTICE BREYER: I know what you're
20 going to say. That's the trouble.

21 (Laughter.)

22 JUSTICE BREYER: And I'm the one who's
23 puzzled by it.

24 MR. CHU: If I -- if I look puzzled --
25 I would like --

1 JUSTICE BREYER: You don't look
2 puzzled.

3 MR. CHU: -- to withdraw my puzzled
4 look.

5 JUSTICE BREYER: I'm the one who is
6 puzzled by it.

7 MR. CHU: But I will say that in every
8 case where a party wanted attorneys' fees under
9 a statute, this Court has always applied the
10 American Rule.

11 JUSTICE BREYER: Yeah, I know.

12 MR. CHU: Either the general rule,
13 each party bears their own attorneys' fees, or
14 the part of the American Rule that says if
15 there's a specific and explicit statutory
16 exception, that can apply.

22 JUSTICE ALITO: Well, as you --

23 JUSTICE SOTOMAYOR: And which leaves
24 -- I'm sorry.

25 JUSTICE ALITO: As you just said, in

1 the typical American Rule case, the rule is each
2 party to the case bears its own expenses, but
3 that's not the situation here, is it? It's a
4 question of whether you pay or other people who
5 are not involved in this litigation at all pay.

6 And maybe it is only going to be
7 \$1.60, but still other people are paying this
8 expenses. Doesn't that make that different from
9 the American Rule?

10 MR. CHU: I would state the rule
11 differently than Your Honor. The American Rule
12 doesn't apply to expenses generally. The
13 American Rule applies to a claim for attorneys'
14 fees, period.

15 JUSTICE ALITO: Well, let me -- let me
16 ask something that's related. Maybe it's the
17 same thing. Just as a matter of fairness, why
18 should these other people pay for the costs that
19 you have caused the Patent Office to incur?

20 MR. CHU: If we were Congress -- and
21 we're not -- Congress could decide what it
22 thinks is fair or wise or good public policy.
23 But as this Court has said in Alyeska, and Baker
24 and Botts, no matter how good that policy might
25 be, this Court does not have the roving

1 authority to make those decisions. It is up to
2 Congress.

3 JUSTICE BREYER: Well -

4 JUSTICE SOTOMAYOR: Could you --

5 JUSTICE BREYER: Go ahead.

6 JUSTICE SOTOMAYOR: Could you tell me
7 what the difference is between expenses and
8 cost? We have a whole statutory system of
9 costs.

10 MR. CHU: Yes.

11 JUSTICE SOTOMAYOR: I believe some of
12 the items that you mentioned earlier as being
13 expenses are not covered under the traditional
14 sense. Give me a definition of expenses. It
15 doesn't --

16 MR. CHU: Yes.

17 JUSTICE SOTOMAYOR: As you understand
18 it.

19 MR. CHU: Yes. Let me do this in two
20 parts. First in 1839, what did expenses mean?
21 The Bouvier Legal Dictionary define "expensae
22 litis," which literally means expenses of
23 litigation. And it actually defined those
24 expenses to be the costs that could be awarded
25 to the prevailing party.

1 To the same effect are two other legal
2 definitions from legal dictionaries, both before
3 and after 1839. And, in fact, one of those was
4 the first Black's Law Dictionary, which was in
5 1891.

6 Now, the second part of the answer is
7 today. The meaning of "costs" has taken on a
8 term of art in federal litigation. And there
9 are certain things that are considered to be
10 costs and other things not to be costs, but,
11 overall, I think any litigator today in federal
12 court would say the word "expenses" floating by
13 itself alone is probably a broader term than
14 "costs."

15 JUSTICE BREYER: Is -- is -- this you
16 might have looked up, and it -- it might help me
17 actually and help you -- or not. But -- but did
18 you find any -- in any area where an agency,
19 say, has proceeded along path one for 150 years,
20 and then suddenly changes its mind and says now
21 we're going to go on path two, and the court
22 either said oh, well, that makes no difference
23 whatsoever or the court said: No, it's too
24 late, now we take into account the way you have
25 carried this out? Did you find --

1 MR. CHU: We found no case --

2 JUSTICE BREYER: Nothing on that?

3 MR. CHU: -- no case, no instance

4 where an agency has done anything like that,

5 even for considerably shorter periods of time.

6 JUSTICE BREYER: Or did you find some

7 in a shorter period of time and the court said

8 we're going to follow your habit; we're not

9 going to follow going into a deep -- deep,

10 difficult statutory analysis with an old

11 statute? It's good enough for you; it's good

12 enough for us. Anything like that?

13 MR. CHU: Not for any period of time.

14 I can give you an example, but it's a relatively

15 short period of time.

16 This case -- this Court decided the

17 Adams Fruit case. The Labor Department was

18 dealing with a statute passed by Congress that

19 gave workers, under certain circumstances, a

20 private right of suit.

21 And the Labor Department said: Aha,

22 we have the ability to interpret that statute

23 and we should get deference. And it interpreted

24 the statute to mean that the workers couldn't

25 sue in federal court; they had to go through

1 state law procedures.

2 And the question that came up to this
3 Court -- it was a Chevron question -- should
4 this Court defer to the agency's interpretation
5 of the statute? And this Court said no, this is
6 a judicial matter. This isn't a matter of an
7 agency having its own discretion.

8 So too here. This is district court
9 litigation where the parties are adversaries.
10 The proceeding in the Patent Office is quite
11 different from that. The American Rule has
12 always applied in federal court litigation.

13 I'd like to point out --

14 JUSTICE ALITO: Picking up on -- on
15 Justice Breyer's question, if you have a
16 situation where there's a statute and it's
17 pretty evident -- and certain parties, here it
18 would be the PTO, for some period of time do not
19 advance an interpretation of the statute that
20 would benefit them, and a period of time passes,
21 should we adopt a rule that that's strong
22 evidence of what the statute means, that it
23 doesn't mean the thing that -- the
24 interpretation that would have benefited these
25 parties that failed to take advantage of it?

1 MR. CHU: I would say yes, in the
2 following sense: The beginning part of
3 statutory interpretation is always plain and
4 ordinary meaning of the language on the date of
5 enactment. There can be other factors.

6 But the over 170 years involve scores,
7 maybe hundreds, of senior Patent Office
8 officials. Not a one of them thought that the
9 plain and ordinary meaning of "expenses" in
10 Section 145 or its predecessors included
11 attorneys' fees. So that should be considered
12 by this Court.

13 Now, I wanted to point out --
14 JUSTICE KAVANAUGH: Just in ordinary
15 English, though, "expenses" would encompass
16 attorneys' fees, wouldn't it? That's
17 Mr. Stewart's point to the contrary.

18 MR. CHU: It might or might not, but
19 it would ignore the American Rule for 200 years,
20 ignore the consistent case law of this Court
21 always applying the American Rule, including
22 applying the American Rule when in the National
23 Childhood Vaccine Injury Act, the unsuccessful
24 petitioner, under that Act of Congress, could be
25 awarded attorneys' fees.

1 Although this Court didn't use the
2 words "American Rule," the government's reply
3 brief, I believe at page 18, I would say takes
4 the position in the reply brief different from
5 earlier positions and says, in effect, this
6 Court was applying the American Rule.

7 JUSTICE BREYER: Is -- you probably,
8 I'm just looking at your resume here, have
9 experience in this patent area. Is that true?

10 MR. CHU: Yes.

11 JUSTICE BREYER: Okay. And in your
12 experience, where you're settling out of court
13 or you're -- you're trying to work out a system
14 without going into court for resolving a
15 claimant who says this is infringing my patent,
16 or there are all kinds of people claiming it,
17 you set up private systems, and the private
18 systems, whether it's arbitration, mediation,
19 thousands of different systems, involve costs,
20 is it fairly common, not fairly common, unheard
21 of, or what, to say in the contract that, it's
22 doing this for future controversies, that you
23 bring up the controversy, you pay the whole
24 thing? Or maybe the opposite. What's it like?

25 MR. CHU: I can think of no instance

1 by my personal experience or through reading or
2 otherwise where a contract would say you bring
3 this up and you pay for the whole thing, no
4 matter what, including attorneys' fees.

5 But there certainly are agreements
6 that are silent on attorneys' fees in
7 recognition of the American Rule, or that
8 expressly say attorneys' fees may be shifted
9 under certain circumstances, or expressly say
10 not at all.

11 I would say what's interesting here is
12 that Congress in 1952 first enacted what we now
13 know as Section 285 of the Patent Act. And that
14 provides for an award of "attorneys' fees" --
15 using those words -- that may be awarded in
16 exceptional cases.

17 And at that same time, in the 1952
18 Act, Congress amended Section 145. It used to
19 be called R.S. 4915. It got codified as 145.

20 The prior 145 has the exact same
21 language that the current 145 has, but it added
22 a clause where the entire statute at the time
23 was "all the expenses of the proceeding shall be
24 paid by the applicant, whether he shall prevail
25 or not, prevail or otherwise," or words to that

1 effect.

2 So Congress, in adding this attorneys'
3 fees provision for Section 285, where they use
4 the word "attorneys' fees," took out that last
5 clause. So it wasn't just carelessness, we're
6 not worrying about the rest of the Patent Act.
7 They were focused and focused in particular on
8 145.

9 I want to point out also that the
10 government argued that there is no other statute
11 that would be affected. We respectfully
12 disagree. The word "expenses" standing alone
13 without a reference to attorneys' fees in an
14 open-ended fashion appears elsewhere.

15 Let me give you an example: 19 U.S.C.
16 1608. 19 U.S.C. 1608. It relates to customs
17 forfeitures. So a party saying, Customs
18 Department, you shouldn't have caused my
19 property to be forfeited, I want it back, must
20 pay "all" -- the word "all" appears -- "all the
21 costs and expenses."

22 It's pretty closely analogous to this
23 statute here. No party, no one, not the
24 government or anyone else, not an academician
25 has ever raised the question about "all the

1 expenses" in that statute includes attorneys'
2 fees.

3 Here's another example: This is 19
4 U.S.C. 6337. The IRS can levy on a taxpayer's
5 property, if the taxes weren't paid. So the
6 private taxpayer says: I want my property back.
7 And the statute provides: Taxpayer, you get
8 your property back if you pay the expenses and
9 the unpaid tax.

10 CHIEF JUSTICE ROBERTS: I suppose a
11 difference there is -- and maybe there is -- but
12 I gather in those situations there weren't
13 alternative proceedings that you could go
14 through.

15 MR. CHU: I do not know before the
16 statutes whether there were or were not
17 alternative proceedings. My main point is in
18 those two examples, one that refers to all
19 expenses and the other that refers to expenses,
20 they are open-ended.

21 CHIEF JUSTICE ROBERTS: Yeah, I
22 suspect -- I don't want to preempt him, but I
23 suspect Mr. Stewart will say don't worry about
24 those, because those are different. Here, you
25 know, the -- the applicant has two different

1 routes, and if he wants to take the route that
2 imposes more -- excuse me -- more costs on the
3 government, then he should be expected to pay
4 for it.

5 MR. CHU: Well, that is their
6 argument. But that is rewriting the statute
7 that Congress actually enacted in 1839. Because
8 it may sound sensible to the government today.

9 JUSTICE BREYER: In 1839 -- you've
10 gone to a lot of work here, but in 1839, say
11 1840 to 1865, they did have a fund where the
12 patentees paid all the expenses, et cetera. And
13 then they had this too for the 145 equivalent to
14 145.

15 During that period of time, that
16 period of time, did the government ever try to
17 collect attorneys' fees as part of the expenses?

18 MR. CHU: No.

19 JUSTICE BREYER: No. Okay.

20 MR. CHU: I thank the Court very much.
21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Mr. Stewart, you have six minutes
24 remaining.

25

1 REBUTTAL ARGUMENT OF MALCOLM L. STEWART

2 ON BEHALF OF THE PETITIONER

3 MR. STEWART: Thank you, Mr. Chief

4 Justice.

5 I mean, there were -- there were
6 various questions concerning the legal
7 significance of the PTO's, and formerly the
8 Patent Office's, failure to take this position
9 over an extended period of time.

10 And there is no question this is an
11 atmospherically unhelpful point for us, but I --
12 I --

13 (Laughter.)

14 MR. STEWART: I -- I don't think that
15 it fits in any established doctrinal category,
16 that is, there are cases in which the Court has
17 said when you have a body of court of appeals
18 precedent that adopts a particular
19 interpretation of a particular term, and then
20 Congress reenacts the provision without changing
21 that term, then Congress can be supposed to have
22 acquiesced in or ratified the -- the prior
23 judicial interpretation.

24 We don't have anything like that here.
25 We don't have a body of lower court case law

1 saying that the term expenses doesn't include
2 personnel expenses.

3 JUSTICE BREYER: You do have that
4 interpretation through action by the agency
5 itself over the period of 190 years or
6 something.

7 MR. STEWART: I mean, you could -- you
8 could say at the most that a -- a view that
9 these expenses were not recoverable is implicit
10 in what the PTO has done or not done. Even with
11 respect to the PTO, it's not as though the
12 agency ever promulgated a regulation or issued
13 some similarly formal statement to the effect
14 that we think expenses means the following
15 things and it doesn't include --

16 JUSTICE SOTOMAYOR: But we do have a
17 doctrine, the American Rule, that says that
18 unless a clear statement of attorneys' fees is
19 encompassed, we won't impose them. So for 170
20 years the PTO didn't think of expenses,
21 including attorneys' fees. Very consistent with
22 the American Rule.

23 MR. STEWART: Okay. The -- the two
24 things I would say are it -- it might be that
25 part of the PTO's motivation, we don't know, but

1 it's a reasonable speculation, is that the PTO
2 didn't seek these expenses in part because it
3 wondered whether the term was sufficiently clear
4 to overcome the American Rule. But on close
5 examination, we think that it is.

6 That is, NantKwest has offered various
7 examples of things that it would be covered --
8 thinks that it would be covered, things that it
9 thinks wouldn't be covered, but it hasn't
10 propounded a test. It hasn't pointed the Court
11 to a dictionary that would include some things
12 and not the others.

13 The other --

14 JUSTICE BREYER: What about your -- I
15 know this is slightly frivolous, but, I mean, we
16 say we finally figured out what Justinian meant
17 by this particular thing, a thousand years ago.
18 Do you see the --

19 MR. STEWART: I -- I -- I see the
20 point, but, you know, the Court -- the Court --

21 CHIEF JUSTICE ROBERTS: Can you share
22 it with the rest of us?

23 (Laughter.)

24 MR. STEWART: The -- the -- the Court
25 has said in cases like United States versus

1 Fausto that the implications of existing
2 statutory provisions may be clarified by
3 newly-enacted provisions, and the PTO has
4 examined this matter afresh in light of the
5 totality of the statutory scheme.

6 And the last thing I would want to
7 say, and it's in -- in part a continuation of
8 the point I was making earlier about the Section
9 145 suit being, in a very meaningful sense, in a
10 legal sense, a continuation of the examination
11 process.

12 Up to this point, Congress has
13 directed the PTO to ensure that its aggregate
14 intake equals its aggregate expenses. It hasn't
15 directed the PTO to fine-tune the process to
16 ensure that each patent applicant pays his or
17 her fair share.

18 But suppose it did. Suppose Congress
19 said each applicant shall pay all the expenses
20 of the application and examination process. If
21 -- if the argument was made, that shouldn't
22 include a pro rata share of the salary of the
23 PTO examiner who worked on the case. The Court
24 would say that's crazy. How could -- how could
25 the PTO possibly effectuate its congressional

1 mandate to collect aggregate expenses in a way
2 that equals costs if it didn't -- if it didn't
3 collect the single greatest expense that it
4 incurs when a PTO examiner does his or her work?

5 And, similarly, an appeal to the
6 Board. If each patent applicant was required to
7 pay all the expenses of the Board proceeding, of
8 course that would include an increment of money
9 that was attributable to the time spent on the
10 case by the Board judges, even though those
11 judges are lawyers.

12 No one would think that the American
13 Rule required some clearer statement than that,
14 that Congress intended the person who invoked
15 that process to pay the extra expenses that the
16 PTO incurs by virtue of that process.

17 Similarly, the examiners on the patent
18 side are typically not lawyers. Trademark
19 examiners are lawyers. And the work that they
20 do in examination is, therefore, lawyers' work.
21 But nobody imagines that the American Rule has
22 anything to do with the PTO's ability to make
23 sure that people who invoke the examination
24 services pay their fair share of the PTO's
25 overall expenses.

1 JUSTICE KAGAN: I think this goes back
2 to a question that you got at the very
3 beginning. But setting attorneys' fees aside,
4 could you tell us, Mr. Stewart, exactly what
5 expenses you charge for and exactly what
6 expenses you don't?

7 MR. STEWART: I mean, sometimes we
8 have charged for travel expenses. We didn't in
9 this case. I don't believe we charged for
10 printing costs, although I think we could have.

15 In this case we had an outside expert
16 who was -- was kind of paid money out of the
17 agency's funds, and we did charge for that.
18 There are other circumstances in which, rather
19 than retain an outside expert, we get expertise
20 from within the agency.

21 So it could be the patent examiner who
22 worked on the case or it could be somebody else,
23 and we would charge a pro rata share of that
24 person's time.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, at 12:05 p.m., the case
3 was submitted.)

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