

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.)

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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.

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25

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

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.

18 The question presented here is whether
19 those expenses include money that the PTO spends
20 to employ lawyers and paralegals who assist with
21 the agency's defense of the suit.

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 --

12 JUSTICE GORSUCH: Well, the --

13 MR. STEWART: -- appeal fee to the
14 PTAB -- for the PTAB proceeding.

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

24 MR. STEWART: Well, the statute refers
25 to expenses of the proceeding. And so we would

1 have to show the requisite connection --

2 JUSTICE GORSUCH: Well --

3 MR. STEWART: -- to the --

4 JUSTICE GORSUCH: -- you have a lawyer
5 here, right, who works for the government
6 anyway. It's not like you went out and hired a
7 lawyer. So you're allocating some personnel
8 expenses to this proceeding. What would
9 prohibit the government from allocating other
10 expenses to this proceeding?

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

16 JUSTICE GORSUCH: Right.

17 MR. STEWART: -- where we're talking
18 not just about the salary but to some additional
19 increments of money that are -- that go along
20 with hiring a --

21 JUSTICE GORSUCH: So nothing, in other
22 words, right? A fully burdened rate would
23 include this other form of overhead that we're
24 talking about, right?

25 MR. STEWART: I guess the point I

1 would make is we -- we do that in the
2 application process already.

3 JUSTICE GORSUCH: Oh, okay. So you're
4 already doing this?

5 MR. STEWART: We're -- we're doing
6 that in the application process in -- in the
7 sense that we are under a congressional mandate
8 to collect fees that, in the aggregate, are
9 sufficient to cover --

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

13 MR. STEWART: That's right.

14 JUSTICE GORSUCH: How did the
15 government just figure this out?

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

21 JUSTICE GINSBURG: But you would --
22 you would say that in all the years that you
23 weren't doing it, you were violating the statute
24 because the statute is mandatory and not
25 discretionary?

1 MR. STEWART: I wouldn't -- I wouldn't
2 say that we were violating the statute. That
3 is, this is somewhat analogous to what the Court
4 often refers to as a mandatory claim processing
5 rule as opposed to a jurisdictional requirement.

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

14 And nobody would say that the
15 defendant violates the statute by failing to
16 assert a limitations defense that it could have
17 asserted.

18 JUSTICE KAVANAUGH: You --

19 MR. STEWART: So you -- I think we
20 would have to say that for that 170-year period,
21 we were foregoing a source of income that we
22 were entitled to get.

23 CHIEF JUSTICE ROBERTS: Are you going
24 to --

25 JUSTICE KAVANAUGH: You started by

1 saying that the statutory term expenses
2 unambiguously covers attorneys' fees. So two
3 questions on that.

4 First, the cases seem to suggest that
5 there is something of a clear statement rule in
6 this area that has to explicitly, expressly
7 cover fees and, two, all of the statutes that
8 seem to satisfy that refer to attorneys,
9 attorneys' fees, or fees, and not the term
10 expenses.

11 So which part of that do you disagree
12 with?

13 MR. STEWART: Oh, well, the Court has
14 made clear that, even though a relatively clear
15 indication of congressional intent is necessary,
16 there's no magic words requirement. And the
17 point I was making about expenses being
18 unambiguous is that there is no ordinary, plain
19 language understanding of the word "expenses"
20 that doesn't encompass the money that you use to
21 hire a person to accomplish a particular task.

22 And sometimes in situations like this,
23 where Congress has used expansive general
24 language, the Court has said the failure to
25 specify particular items doesn't indicate

1 ambiguity, it indicates breadth, that Congress
2 could have --

3 JUSTICE KAVANAUGH: I think that would
4 be true if there weren't some kind of clear
5 statement backdrop to this. But my question is,
6 you agree there is something of a clear
7 statement requirement; is that correct?

8 MR. STEWART: That's correct.

9 JUSTICE KAVANAUGH: Okay. And then --

10 JUSTICE KAGAN: Does -- does -- may I
11 interrupt for a second?

12 JUSTICE KAVANAUGH: Go -- go ahead.

13 JUSTICE KAGAN: Does that mean you are
14 dropping your argument in your initial brief
15 that the American Rule doesn't apply to this
16 kind of case, because in your reply brief you
17 don't make any mention of that, and here in
18 responding to Justice Kavanaugh's questions and
19 in your first two minutes, you also don't make
20 that argument again, have you effectively
21 dropped that argument so we're now within the
22 American Rule presumption?

23 MR. STEWART: We -- we would certainly
24 acknowledge that if this sentence didn't appear
25 in Section 145 at all, we would need -- we would

1 not be able to recoup personnel expenses.

2 Now, the Fourth Circuit held that
3 because the Section 145 mandate applies without
4 regard to the ultimate outcome of the
5 litigation, the American Rule doesn't apply.
6 And we think the Federal Circuit -- the Fourth
7 Circuit was right at least to the extent of
8 saying the absence -- not only the absence of a
9 prevailing party requirement, but the specific
10 mandate that the expenses be paid regardless of
11 the outcome of the proceedings is a good
12 indication that this provision is trying to
13 accomplish something very different from what an
14 ordinary fee shifting provision is intended to
15 accomplish.

16 And so you can conclude on that basis
17 the American Rule doesn't apply or you can
18 conclude this is one of the contextual factors
19 that leads you to the conclusion that personnel
20 expenses are -- are encompassed. And --

21 CHIEF JUSTICE ROBERTS: Are you -- are
22 you going to send the Respondent a bill for your
23 time today?

24 MR. STEWART: We -- we are not. And I
25 think that's -- there -- there are really three

1 different potential obstacles to our claiming an
2 incremental share of my salary.

3 The first is that the PTO has, even in
4 the most recent years, has sought only expenses
5 of PTO personnel, not of Department of Justice
6 lawyers who's assisted -- who have assisted in
7 the representation of Section 145 suits.

8 And I think that's based on the idea
9 this is a provision that is intended to help in
10 making the PTO a self-financing agency. It
11 complements the requirement that the PTO collect
12 fees to cover its own operating expenses, not
13 that of other agencies.

14 There -- there's a separate question
15 also about whether an appellate stage of the
16 case would fall within the -- the term
17 proceedings in Section 145, and it's noteworthy
18 in this regard that Section 141, which provides
19 for direct appeal to the Federal Circuit,
20 doesn't include an expense recoupment mandate.

21 And I think you could infer from that
22 fact that Congress intended only that the trial
23 stage of the Section 145 proceedings, the thing
24 that was distinctive to a Section 145 suit, to
25 be subject to -- to this mandate.

1 And the third thing is, even in the
2 trial -- with respect to the trial court
3 proceedings in this case, the PTO didn't seek
4 recoupment of expenses for attorney time spent
5 arguing about the fees.

6 It -- it requested recoupment of
7 expenses only for the attorney time that was
8 devoted to the issue of patentability. And the
9 only issue before this Court, obviously, is
10 recoupment of fees, not the original dispute.

11 JUSTICE SOTOMAYOR: Mr. Stewart --

12 JUSTICE GINSBURG: I can see the
13 argument, Mr. -- Mr. Stewart, that the word
14 "expenses" could include attorneys' fees, but I
15 don't understand the argument that expenses
16 alone must include attorneys' fees.

17 MR. STEWART: I think the argument --
18 the argument is simply, as a matter of plain
19 language, no one would doubt that the money
20 paid, excuse me, the money paid to PTO personnel
21 in the course of the suit were part of the
22 expenses that the PTO incurred.

23 And the only question is whether the
24 term expenses, like the term costs, has acquired
25 a status as a legal term of art that has a legal

1 meaning narrower than its common meaning. And
2 the Court has never used the term in that way.

3 Indeed, in elucidating the term costs,
4 the court has sometimes said, as in *Taniguchi*,
5 cost has an ordinary meaning that's synonymous
6 with expenses, but for purposes of federal cost
7 shifting statute, it has a more narrow meaning.

8 The -- the other thing I would say
9 about costs is that when the Court says that the
10 word "costs" is a term of art, it has a limited
11 meaning, the Court has a source of law to look
12 to to see whether particular items are or are
13 not costs. It looks to 28 U.S.C. 1821 and 28
14 U.S.C. 1920.

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

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

21 MR. STEWART: Whereas here, I think
22 *NantKwest* has really given no guidance as to
23 what it thinks the term "expenses" means, other
24 than it doesn't include attorneys' fees, but we
25 can't fault *NantKwest* for that because there

1 really is no alternative source for determining
2 what the term "expenses" means, if not its
3 ordinary meaning.

4 JUSTICE BREYER: How should I deal
5 with this fact. As far as I can tell, if you go
6 back to the 1830s when this was enacted, the
7 patent litigants paid the costs, including the
8 attorneys' fees of the Patent Office, didn't
9 they?

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

13 But then in the 1860s, the government
14 decides to pay for all these expenses. Now it
15 doesn't make much sense any more to have this
16 group pay.

17 Then in 1990 it goes back to the first
18 system. All right.

19 So if it were just the one system or
20 the other, I could make a lot of sense out of
21 it, either saying these have special costs, the
22 patent litigants pay anyway, let them pay, or I
23 could say you are putting a special burden on
24 this and it has to be clearer before you break
25 the American Rule.

1 But we have some of one and some of
2 the other. So what -- should I put -- use that
3 to put weight on the fact nobody has ever
4 thought of this before?

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

9 JUSTICE BREYER: I --

10 MR. STEWART: -- for --

11 JUSTICE BREYER: Don't know if it
12 could have been made between 1865 and 18 -- and
13 1990.

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

15 JUSTICE BREYER: Because during that
16 time it was the Congress that paid these costs.

17 MR. STEWART: Well -- well, there was
18 still the objective of making the PTO a
19 self-funded agency, an agency whose receipts
20 were equivalent to its --

21 JUSTICE SOTOMAYOR: It already is.

22 MR. STEWART: -- expenses.

23 JUSTICE SOTOMAYOR: It already is.
24 You're -- you're paying from the fees, meaning
25 the time you're attributing to the attorneys and

1 the paralegals is already being paid. Without
2 these fees, the patent application fee itself is
3 covering it.

4 You haven't had a shortfall.

5 MR. STEWART: Well, the -- the PTO is
6 under a congressional mandate to ensure that
7 it's aggregate receipts match up with it's
8 aggregate --

9 JUSTICE BREYER: Now.

10 MR. STEWART: -- expenditures.

11 JUSTICE BREYER: But was that true
12 between 1865 and 1990?

13 MR. STEWART: No, no. It -- it --

14 JUSTICE BREYER: No, it wasn't. And,
15 therefore, I'm having a big -- oddly enough,
16 that's sort of what is giving me a problem here
17 because -- and the long delay -- because I
18 couldn't have said what you want me to say for
19 over, well over 100 years.

20 MR. STEWART: Well, the -- the mandate
21 to pay the, I think it was the whole of the
22 expenses of the proceeding under the original
23 statute, the mandate was there all along and it
24 was part of Congress's objective that the PTO be
25 self-financing.

1 Now, for a prolonged period of time,
2 the way that Congress went about that was that,
3 for the most part, Congress was determining the
4 amount of the fees for particular services. And
5 it was trying to set fees at a level that would,
6 as closely as possible, match up with PTO
7 expenses. Often there was a shortfall and an
8 appropriation would be needed to fill the gap.

9 In 2011, Congress essentially made it
10 the PTO's responsibility to balance the books.
11 It put the PTO under a mandate to make sure that
12 your aggregate receipts equal your aggregate
13 expenditures. And once that responsibility was
14 placed upon the agency, the agency felt a -- a
15 greater duty to look for other sources --

16 JUSTICE BREYER: I look to 1930, for
17 example. I'll discover that even in 1930
18 Congress was trying to get the patent fees to
19 match the patent expenses. They just didn't
20 always do it right.

21 MR. STEWART: It was certainly trying
22 as much as possible --

23 JUSTICE BREYER: Okay.

24 MR. STEWART: -- to --

25 JUSTICE BREYER: How do I -- where do

1 I look for that.

2 MR. STEWART: I -- I'm -- I'm not sure
3 whether you would look for -- to -- to that.
4 But the -- even in the 1830 act, '36 act, the
5 statute said that fees that are paid into the
6 Treasury, fees for patent application services,
7 will be placed in a fund to be known as a patent
8 -- as the patent fund to be used for the -- the
9 salaries of the officers and clerks and other
10 expenses of the agency. And --

11 JUSTICE GINSBURG: Mr. Stewart, do you
12 dispute the Federal Circuit's estimate that if
13 this cost of the PTO attorneys is spread among
14 all patent applicants, even the ones who don't
15 use 145, that the added cost per applicant would
16 be \$1.60?

17 MR. STEWART: We don't. And I think
18 that the -- we don't dispute that. And I think
19 the PTO's motivation here is really more one of
20 equity than of financial necessity. That is, it
21 is certainly true that the number of Section 145
22 suits is small enough that if the -- the
23 applicant was not required to pay PTO personnel
24 expenses, those could be allocated among all the
25 hundreds of thousands of patent applicants and

1 none of them would -- all of them would pay a
2 very small amount.

3 I think the PTO's motivation really
4 is -- in -- in this case, for example, we sought
5 about \$111,000 in combined personnel expenses
6 and expert witness fees. It was a little under
7 80,000 for the -- the lawyers and paralegals, a
8 little over 30,000 for the expert witnesses.

9 And the PTO tells me that that -- that
10 the fee application and examination fee for the
11 typical patent application is about \$3300. So
12 here we're dealing with a situation in which the
13 Section 145 suit caused us to incur about 30
14 times the expenses that would ordinarily attend
15 -- that would ordinarily be the fees for a
16 patent application and examination.

17 And it's one thing for the PTO to say:
18 We're not going to fine tune this absolutely.
19 We're going to accept the idea that some
20 applicants will pay a little bit more; some
21 applicants will pay a little bit less than their
22 fair share of our operating expenses.

23 But when we have this congressional
24 mandate and when we have a situation whereby
25 filing suit under Section 145, you've caused the

1 PTO to incur 30 times the expenses that -- that
2 go with a typical patent examination, it -- it
3 seems fair and appropriate to make the applicant
4 pay.

5 And, again, part of our fairness
6 argument is that Section 141 is available. It
7 provides exactly the type -- same type of
8 judicial review that is ordinarily the only mode
9 of judicial review that's available to somebody
10 who's aggrieved by federal agency action.

11 And so the applicant who -- who
12 doesn't believe -- either doesn't want to pay
13 the expenses or doesn't believe that its chances
14 of success will be enhanced by filing suit in
15 district court is -- the -- the 145 -- 141
16 mechanism is available --

17 JUSTICE KAVANAUGH: I think you
18 covered this, but just to confirm, however we
19 rule in this case, will cover -- will affect
20 only two statutory provisions?

21 MR. STEWART: That's correct. We're
22 -- it -- it will certainly affect the -- the
23 trademark statute and -- you know, basically our
24 pitch in the certiorari petition was even though
25 they are technically different statutes, our

1 position would stand or fall together.

2 We're not aware of any other statute
3 that uses the term "expenses" standing alone in
4 this context.

5 JUSTICE KAVANAUGH: And then in terms
6 of your overall purpose argument, Congress
7 wanted it to be a self-sustaining agency, but
8 what sense does it make to think that Congress
9 wanted the winning party to turn around and pay
10 the government's legal fees, given how unusual
11 that is? Why would Congress have thought to do
12 it that way is, I -- I guess, what I'm asking.

13 MR. STEWART: I guess the two reasons
14 are Congress -- since the very beginning -- and
15 the first iteration of the statute enacted in
16 1839 specifically said whether the decision is
17 in its favor or not. And the trademark statute
18 continues to include that language.

19 And even if you interpreted the term
20 "expenses" very restrictively, as limited to
21 costs under 1821 and 1920, it is no more usual
22 to require the winning party to pay the other
23 party's costs than for the winning party to have
24 to pay the losing party's attorneys' fees.

25 And so interpreting the --

1 JUSTICE KAVANAUGH: You're saying the
2 costs are obviously a far -- far smaller amount
3 than --

4 MR. STEWART: They -- they --

5 JUSTICE KAVANAUGH: -- attorneys'
6 fees?

7 MR. STEWART: -- yeah -- that's
8 correct, but the --

9 JUSTICE KAVANAUGH: It's unusual but
10 not to the degree?

11 MR. STEWART: It doesn't have the same
12 practical effects. But, again, the -- the point
13 I would make, and I think this is in a sense our
14 primary point, is you should -- the Court has
15 described a Section 145 suit as a continuation
16 of the examination process.

17 And there is language in the statute
18 to that effect. It refers -- it says that the
19 applicant shall pay all the expenses of the
20 proceeding, rather than the plaintiff. And so
21 the applicant continues to retain that status
22 throughout the lawsuit. It says that the Court
23 can adjudge that the applicant is entitled to a
24 patent.

25 And so when -- when you look to see is

1 this unusual or not, you should compare it not
2 just to other adversarial litigation involving
3 the government; you should compare it to other
4 stages of the patent application process. And
5 as I've said, at every other stage, your
6 obligation to pay fees depends in part on how
7 much work you're making the PTO do, but it
8 doesn't depend at all on the ultimate outcome of
9 the process.

10 And so if you file a successful PTAB
11 appeal and persuade the PTAB that the examiner
12 got it wrong, you still have to pay the fees for
13 the PTAB appeal even though in a sense you could
14 say that's requiring the winning party to pay.

15 If I may, I'll reserve the balance of
16 my time.

17 CHIEF JUSTICE ROBERTS: Certainly.

18 Mr. Chu.

19 ORAL ARGUMENT OF MORGAN CHU

20 ON BEHALF OF THE RESPONDENT

21 MR. CHU: Mr. Chief Justice, and may
22 it please the Court:

23 There are three important
24 considerations. First, the American Rule is a
25 bedrock principle, and this Court has recognized

1 and applied that rule for two centuries.

2 Second, the government is arguing for
3 a radical departure from the American Rule. It
4 is arguing that when a private party sues the
5 government for its improper action, then that
6 private party must pay for the government's
7 attorneys, even if the government and its
8 attorneys are flatly wrong.

9 Third, and this responds to some of
10 the questions from the justices that were put to
11 the government, today there are 3,274 federal
12 statutory provisions that use the word
13 "expenses" without any reference to attorneys'
14 fees or counsel fees.

15 Some of those provisions are
16 open-ended, as is the case here. The government
17 can point to not a one of those other provisions
18 to say that the word "expenses" includes
19 attorneys' fees, save for the two exceptions,
20 radical exceptions, it is arguing here.

21 And I would invite questions from the
22 Court.

23 CHIEF JUSTICE ROBERTS: Why -- why
24 isn't this just like a filing fee? In other
25 words, the applicant can take the normal appeal

1 to the court of appeals, but if he or she wants
2 to go through the much more elaborate proceeding
3 of trying the case, bringing in new evidence,
4 they have to pay a filing fee?

5 I mean, in some agencies, I don't
6 remember from long ago, the filing fee for a
7 particular proceeding before the ICC was
8 \$100,000 because they figured most of the people
9 who are going to be doing this, it's going to be
10 corporations that can afford it, and we're --
11 you know, they're putting us out to a
12 significant extent.

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

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

1 Second, this is not inside the Patent
2 Office. This is adversarial litigation. This
3 is where a private party says the government
4 made a mistake, and I, private party, I am going
5 to sue the government in the United States
6 district court.

7 And once it's adversarial litigation,
8 there can be no doubt that the American Rule
9 applies with its full force and effect over the
10 last two centuries.

11 JUSTICE GINSBURG: Is there any
12 language short of saying explicitly "attorneys'
13 fees" that would overcome the American Rule?
14 We're told there are no magic words, but what
15 short of saying "including attorneys' fees" or
16 "and attorneys' fees" would do?

17 MR. CHU: The answer to the question
18 is no, that either the words attorneys' fees,
19 counsel fees, reasonable compensation for
20 services of a lawyer for a bankrupt estate,
21 which was true in the Baker Botts case, there
22 would be words that would be specific and
23 explicit, to refer to Justice Kavanaugh's point,
24 where Baker Botts, this Court made clear, that
25 to have an exception because of a statute under

1 the American Rule, it must be specific and
2 explicit. And well before that, in the Alyeska
3 case, a decision by this Court was to the same
4 effect as well as other decisions.

5 JUSTICE SOTOMAYOR: Well, I presume
6 that if the Congress wrote a provision that said
7 the pro rata share of all the services of its
8 personnel, that would be enough, because you
9 wouldn't exclude lawyers from that?

10 MR. CHU: If Congress had a specific
11 provision that showed it was intending to
12 include lawyers, Congress has the authority to
13 enact such legislation.

14 But as in your exact example, I would
15 say there would still be an ambiguity because of
16 the American Rule. And let me give you an
17 example from history.

18 Three years before the enactment of
19 what we now call Section 145, there was a
20 statute enacted by Congress with respect to the
21 expenses of the Patent Office. It was an
22 appropriations statute.

23 And Congress said we have five new
24 positions. We have the Commissioner of Patents,
25 we have a chief examining clerk, we have another

1 examining clerk, and we have two other clerks.
2 And Congress said we need to pay for their
3 salaries and said these are expenses of the
4 office.

5 Note: Three years later, when Section
6 145 was first enacted, the language was
7 different in several respects. The language is
8 all the expenses of the proceeding as distinct
9 from expenses of the Patent Office, which it was
10 addressing three years --

11 JUSTICE KAGAN: But --

12 MR. CHU: -- earlier.

13 JUSTICE KAGAN: -- Mr. Chu, are you
14 saying that expenses of the office is not enough
15 to get you lawyers' fees? Suppose it was just
16 expenses of the Patent Office, which would
17 presumably give you the expenses, you know, the
18 -- the -- the costs of personnel.

19 MR. CHU: Yes. I --

20 JUSTICE KAGAN: Does that not -- does
21 that not include lawyers?

22 MR. CHU: Yes, I am saying under this
23 backdrop of the American Rule, this Court has
24 made clear Congress needs to enact a statute
25 that is specific and explicit.

1 JUSTICE KAGAN: It basically has to
2 say lawyers?

3 MR. CHU: Or words to that effect,
4 yes.

5 JUSTICE KAGAN: Well, what does words
6 to that effect mean?

7 MR. CHU: Counsel, compensation for
8 legal counsel, for advice, whatever. In other
9 words --

10 JUSTICE KAVANAUGH: Fees? The word
11 "fees" alone?

12 MR. CHU: I do not believe the word
13 fees alone would cover it, because fees can
14 refer to many, many other things, docket fees,
15 marshal fees, filing fees, fees of other
16 personnel, perhaps, but not attorneys' fees.

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

20 JUSTICE GINSBURG: What -- what
21 expenses in your view does Section 145 impose on
22 the person who invokes that proceeding?

23 MR. CHU: Travel expenses, lodging
24 expenses, parking expenses, expenses with
25 respect to court reporters, printing expenses,

1 marshal fees, docket fees, court interpreters.
2 That's not an exhaustive list but it does not
3 include attorneys' fees.

4 JUSTICE SOTOMAYOR: Is it --

5 JUSTICE BREYER: Are experts?

6 JUSTICE SOTOMAYOR: I'm sorry.

7 JUSTICE BREYER: Experts?

8 MR. CHU: I do not think it should
9 include expert witness fees, whether they are
10 internal experts or external experts, but I want
11 to note for the Court in this particular
12 instance, for practical reasons, NantKwest did
13 not challenge the government's request for
14 expert witness fees and they were paid.

15 JUSTICE BREYER: Well, that's -- see,
16 then you put your finger on, yes, the American
17 Rule, yes, yes, yes, but you have a special kind
18 of case. And Congress was saying, it seemed,
19 and says again, look, present all your evidence
20 to the Patent Office. And if you don't like the
21 result, go to the Federal Circuit. You want a
22 second bite, you forgot to bring in somebody or
23 you didn't, and then they'll have to bring in
24 people, and before you know it, you have some
25 big expense here, experts.

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

4 I mean, did it carve out a separate
5 special thing here or do we just use the
6 American Rule?

7 MR. CHU: Yes.

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

10 (Laughter.)

11 JUSTICE BREYER: And I'm the one who's
12 puzzled by it.

13 MR. CHU: If I -- if I look puzzled --
14 I would like --

15 JUSTICE BREYER: You don't look
16 puzzled.

17 MR. CHU: -- to withdraw my puzzled
18 look.

19 JUSTICE BREYER: I'm the one who is
20 puzzled by it.

21 MR. CHU: But I will say that in every
22 case where a party wanted attorneys' fees under
23 a statute, this Court has always applied the
24 American Rule.

25 JUSTICE BREYER: Yeah, I know that's

1 true.

2 MR. CHU: Either the general rule,
3 each party bears their own attorneys' fees, or
4 the part of the American Rule that says if
5 there's a specific and explicit statutory
6 exception, that can apply.

7 And the government points to no
8 exception. The government points to no case
9 decided by this Court involving a claim for fees
10 under a statute that says the American Rule did
11 not apply.

12 JUSTICE ALITO: Well, as you --

13 JUSTICE SOTOMAYOR: And which leaves
14 -- I'm sorry.

15 JUSTICE ALITO: As you just said, in
16 the typical American Rule case, the rule is each
17 party to the case bears its own expenses, but
18 that's not the situation here, is it? It's a
19 question of whether you pay or other people who
20 are not involved in this litigation at all pay.

21 And maybe it is only going to be
22 \$1.60, but still other people are paying this
23 expenses. Doesn't that make that different from
24 the American Rule?

25 MR. CHU: I would state the rule

1 differently than Your Honor. The American Rule
2 doesn't apply to expenses generally. The
3 American Rule applies to a claim for attorneys'
4 fees, period.

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

10 MR. CHU: If we were Congress -- and
11 we're not -- Congress could decide what it
12 thinks is fair or wise or good public policy.
13 But as this Court has said in *Alyeska*, and *Baker*
14 and *Botts*, no matter how good that policy might
15 be, this Court does not have the roving
16 authority to make those decisions. It is up to
17 Congress.

18 JUSTICE BREYER: Well -

19 JUSTICE SOTOMAYOR: Could you --

20 JUSTICE BREYER: Go ahead.

21 JUSTICE SOTOMAYOR: Could you tell me
22 what the difference is between expenses and
23 cost? We have a whole statutory system of
24 costs.

25 MR. CHU: Yes.

1 JUSTICE SOTOMAYOR: I believe some of
2 the items that you mentioned earlier as being
3 expenses are not covered under the traditional
4 sense. Give me a definition of expenses. It
5 doesn't --

6 MR. CHU: Yes.

7 JUSTICE SOTOMAYOR: As you understand
8 it.

9 MR. CHU: Yes. Let me do this in two
10 parts. First in 1839, what did expenses mean?
11 The Bouvier Legal Dictionary define "expensae
12 litis," which literally means expenses of
13 litigation. And it actually defined those
14 expenses to be the costs that could be awarded
15 to the prevailing party.

16 To the same effect are two other legal
17 definitions from legal dictionaries, both before
18 and after 1839. And, in fact, one of those was
19 the first Black's Law Dictionary, which was in
20 1891.

21 Now, the second part of the answer is
22 today. The meaning of "costs" has taken on a
23 term of art in federal litigation. And there
24 are certain things that are considered to be
25 costs and other things not to be costs, but,

1 overall, I think any litigator today in federal
2 court would say the word "expenses" floating by
3 itself alone is probably a broader term than
4 "costs."

5 JUSTICE BREYER: Is -- is -- this you
6 might have looked up, and it -- it might help me
7 actually and help you -- or not. But -- but did
8 you find any -- in any area where an agency,
9 say, has proceeded along path one for 150 years,
10 and then suddenly changes its mind and says now
11 we're going to go on path two, and the court
12 either said oh, well, that makes no difference
13 whatsoever or the court said: No, it's too
14 late, now we take into account the way you have
15 carried this out? Did you find anything else --

16 MR. CHU: We found no case --

17 JUSTICE BREYER: Nothing on that?

18 MR. CHU: -- no case, no instance
19 where an agency has done anything like that,
20 even for considerably shorter periods of time.

21 JUSTICE BREYER: Or did you find some
22 in a shorter period of time and the court said
23 we're going to follow your habit; we're not
24 going to follow going into a deep -- deep,
25 difficult statutory analysis with an old

1 statute? It's good enough for you; it's good
2 enough for us. Anything like that?

3 MR. CHU: Not for any period of time.
4 I can give you an example, but it's a relatively
5 short period of time.

6 This case -- this Court decided the
7 Adams Fruit case. The Labor Department was
8 dealing with a statute passed by Congress that
9 gave workers, under certain circumstances, a
10 private right of suit.

11 And the Labor Department said: Aha,
12 we have the ability to interpret that statute
13 and we should get deference. And it interpreted
14 the statute to mean that the workers couldn't
15 sue in federal court; they had to go through
16 state law procedures.

17 And the question that came up to this
18 Court -- it was a Chevron question -- should
19 this Court defer to the agency's interpretation
20 of the statute? And this Court said no, this is
21 a judicial matter. This isn't a matter of an
22 agency having its own discretion.

23 So too here. This is district court
24 litigation where the parties are adversaries.
25 The proceeding in the Patent Office is quite

1 different from that. The American Rule has
2 always applied in federal court litigation.

3 I'd like to point out --

4 JUSTICE ALITO: Picking up on -- on
5 Justice Breyer's question, if you have a
6 situation where there's a statute and it's
7 pretty evident -- and certain parties, here it
8 would be the PTO, for some period of time do not
9 advance an interpretation of the statute that
10 would benefit them, and a period of time passes,
11 should we adopt a rule that that's strong
12 evidence of what the statute means, that it
13 doesn't mean the thing that -- the
14 interpretation that would have benefited these
15 parties that failed to take advantage of it?

16 MR. CHU: I would say yes, in the
17 following sense: The beginning part of
18 statutory interpretation is always plain and
19 ordinary meaning of the language on the date of
20 enactment. There can be other factors.

21 But the over 170 years involve scores,
22 maybe hundreds, of senior Patent Office
23 officials. Not a one of them thought that the
24 plain and ordinary meaning of "expenses" in
25 Section 145 or its predecessors included

1 attorneys' fees. So that should be considered
2 by this Court.

3 Now, I wanted to point out --

4 JUSTICE KAVANAUGH: Just in ordinary
5 English, though, "expenses" would encompass
6 attorneys' fees, wouldn't it? That's
7 Mr. Stewart's point to the contrary.

8 MR. CHU: It might or might not, but
9 it would ignore the American Rule for 200 years,
10 ignore the consistent case law of this Court
11 always applying the American Rule, including
12 applying the American Rule when in the National
13 Childhood Vaccine Injury Act, the unsuccessful
14 petitioner, under that Act of Congress, could be
15 awarded attorneys' fees.

16 Although this Court didn't use the
17 words "American Rule," the government's reply
18 brief, I believe at page 18, I would say takes
19 the position in the reply brief different from
20 earlier positions and says, in effect, this
21 Court was applying the American Rule.

22 JUSTICE BREYER: Is -- is -- you --
23 you probably, I'm just looking at your resume
24 here, have experience in this patent area. Is
25 that true?

1 MR. CHU: Yes.

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

16 MR. CHU: I can think of no instance
17 by my personal experience or through reading or
18 otherwise where a contract would say you bring
19 this up and you pay for the whole thing, no
20 matter what, including attorneys' fees.

21 But there certainly are agreements
22 that are silent on attorneys' fees in
23 recognition of the American Rule, or that
24 expressly say attorneys' fees may be shifted
25 under certain circumstances, or expressly say

1 not at all.

2 I would say what's interesting here is
3 that Congress in 1952 first enacted what we now
4 know as Section 285 of the Patent Act. And that
5 provides for an award of "attorneys' fees" --
6 using those words -- that may be awarded in
7 exceptional cases.

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

11 The prior 145 has the exact same
12 language that the current 145 has, but it added
13 a clause where the entire statute at the time
14 was "all the expenses of the proceeding shall be
15 paid by the applicant, whether he shall prevail
16 or not, prevail or otherwise," or words to that
17 effect.

18 So Congress, in adding this attorneys'
19 fees provision for Section 285, where they use
20 the word "attorneys' fees," took out that last
21 clause. So it wasn't just carelessness, we're
22 not worrying about the rest of the Patent Act.
23 They were focused and focused in particular on
24 145.

25 I want to point out also that the

1 government argued that there is no other statute
2 that would be affected. We respectfully
3 disagree. The word "expenses" standing alone
4 without a reference to attorneys' fees in an
5 open-ended fashion appears elsewhere.

6 Let me give you an example: 19 U.S.C.
7 1608. 19 U.S.C. 1608. It relates to customs
8 forfeitures. So a party saying, Customs
9 Department, you shouldn't have caused my
10 property to be forfeited, I want it back, must
11 pay "all" -- the word "all" appears -- "all the
12 costs and expenses."

13 It's pretty closely analogous to this
14 statute here. No party, no one, not the
15 government or anyone else, not an academician
16 has ever raised the question about "all the
17 expenses" in that statute includes attorneys'
18 fees.

19 Here's another example: This is 19
20 U.S.C. 6337. The IRS can levy on a taxpayer's
21 property, if the taxes weren't paid. So the
22 private taxpayer says: I want my property back.
23 And the statute provides: Taxpayer, you get
24 your property back if you pay the expenses and
25 the unpaid tax.

1 CHIEF JUSTICE ROBERTS: I suppose a
2 difference there is -- and maybe there is -- but
3 I gather in those situations there weren't
4 alternative proceedings that you could go
5 through.

6 MR. CHU: I do not know before the
7 statutes whether there were or were not
8 alternative proceedings. My main point is in
9 those two examples, one that refers to all
10 expenses and the other that refers to expenses,
11 they are open-ended.

12 CHIEF JUSTICE ROBERTS: Yeah, I -- I
13 -- I don't want to preempt him, but I suspect
14 Mr. Stewart will say don't worry about those,
15 because those are different. Here, you know,
16 the -- the applicant has two different routes,
17 and if he wants to take the route that imposes
18 more -- excuse me -- more costs on the
19 government, then he should be expected to pay
20 for it.

21 MR. CHU: Well, that is their
22 argument. But that is rewriting the statute
23 that Congress actually enacted in 1839. Because
24 it may sound sensible to the government today.

25 JUSTICE BREYER: In 1839 -- you've

1 gone to a lot of work here, but in 1839, say
2 1840 to 1865, they did have a fund where the
3 patentees paid all the expenses, et cetera. And
4 then they had this too for the 145 equivalent to
5 145.

6 During that period of time, that
7 period of time, did the government ever try to
8 collect attorneys' fees as part of the expenses?

9 MR. CHU: No.

10 JUSTICE BREYER: No. Okay.

11 MR. CHU: I thank the Court very much.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Mr. Stewart, you have six minutes
15 remaining.

16 REBUTTAL ARGUMENT OF MALCOLM L. STEWART
17 ON BEHALF OF THE PETITIONER

18 MR. STEWART: Thank you, Mr. Chief
19 Justice.

20 I mean, there were -- there were
21 various questions concerning the -- the legal
22 significance of the PTO's, and formerly the
23 Patent Office's, failure to take this position
24 over an extended period of time.

25 And there is no question this is an

1 atmosphmerically unhelpful point for us, but I --
2 I --

3 (Laughter.)

4 MR. STEWART: I -- I don't -- I don't
5 think that it fits in any established doctrinal
6 category, that -- that is, there are cases in
7 which the Court has said when you have a body of
8 court of appeals precedent that adopts a
9 particular interpretation of a particular term,
10 and then Congress reenacts the provision without
11 changing that term, then Congress can be
12 supposed to have acquiesced in or ratified the
13 -- the prior judicial interpretation.

14 We don't have anything like that here.
15 We don't have a body of lower court case law
16 saying that the term expenses doesn't include
17 personnel expenses.

18 JUSTICE BREYER: You do have that
19 interpretation through action by the agency
20 itself over the period of 190 years or
21 something.

22 MR. STEWART: I mean, you could -- you
23 could say at the most that a -- a view that
24 these expenses were not recoverable is implicit
25 in what the PTO has done or not done. Even with

1 respect to the PTO, it's not as though the
2 agency ever promulgated a regulation or issued
3 some similarly formal statement to the effect
4 that we think expenses means the following
5 things and it doesn't include --

6 JUSTICE SOTOMAYOR: But we do have a
7 doctrine, the American Rule, that says that
8 unless a clear statement of attorneys' fees is
9 encompassed, we won't impose them. So for 170
10 years the PTO didn't think of expenses,
11 including attorneys' fees. Very consistent with
12 the American Rule.

13 MR. STEWART: Okay. The -- the two
14 things I would say are it -- it might be that
15 part of the PTO's motivation, we don't know, but
16 it's a reasonable speculation, is that the PTO
17 didn't seek these expenses in part because it
18 wondered whether the term was sufficiently clear
19 to overcome the American Rule. But on close
20 examination, we think that it is.

21 That is, NantKwest has offered various
22 examples of things that it would be covered --
23 thinks that it would be covered, things that it
24 thinks wouldn't be covered, but it hasn't
25 propounded a test. It hasn't pointed the Court

1 to a dictionary that would include some things
2 and not the others.

3 The other --

4 JUSTICE BREYER: What about your -- I
5 know this is slightly frivolous, but, I mean, we
6 say we finally figured out what Justinian meant
7 by this particular thing, a thousand years ago.
8 Do you see the --

9 MR. STEWART: I -- I -- I see the
10 point, but, you know, the Court -- the Court --

11 CHIEF JUSTICE ROBERTS: Can you share
12 it with the rest of us?

13 (Laughter.)

14 MR. STEWART: The -- the -- the Court
15 has said in cases like United States versus
16 Fausto that the implications of existing
17 statutory provisions may be clarified by
18 newly-enacted provisions, and the PTO has
19 examined this matter afresh in light of the
20 totality of the statutory scheme.

21 And the last thing I would want to
22 say, and it's in -- in part a continuation of
23 the point I was making earlier about the Section
24 145 suit being, in a very meaningful sense, in a
25 legal sense, a continuation of the examination

1 process.

2 Up to this point, Congress has
3 directed the PTO to ensure that its aggregate
4 intake equals its aggregate expenses. It hasn't
5 directed the PTO to fine-tune the process to
6 ensure that each patent applicant pays his or
7 her fair share.

8 But suppose it did. Suppose Congress
9 said each applicant shall pay all the expenses
10 of the application and examination process. If
11 -- if the argument was made, that shouldn't
12 include a pro rata share of the salary of the
13 PTO examiner who worked on the case. The Court
14 would say that's crazy. How could -- how could
15 the PTO possibly effectuate its congressional
16 mandate to collect aggregate expenses in a way
17 that equals costs if it didn't -- if it didn't
18 collect the single greatest expense that it
19 incurs when a PTO examiner does his or her work?

20 And, similarly, an appeal to the
21 Board. If each patent applicant was required to
22 pay all the expenses of the Board proceeding, of
23 course that would include an increment of money
24 that was attributable to the time spent on the
25 case by the Board judges, even though those

1 judges are lawyers.

2 No one would think that the American
3 Rule required some clearer statement than that,
4 that Congress intended the person who invoked
5 that process to pay the extra expenses that the
6 PTO incurs by virtue of that process.

7 Similarly, the examiners on the patent
8 side are typically not lawyers. Trademark
9 examiners are lawyers. And the work that they
10 do in examination is, therefore, lawyers' work.
11 But nobody imagines that the American Rule has
12 anything to do with the PTO's ability to make
13 sure that people who invoke the examination
14 services pay their fair share of the PTO's
15 overall expenses.

16 JUSTICE KAGAN: I think this goes back
17 to a question that you got at the very
18 beginning. But setting attorneys' fees aside,
19 could you tell us, Mr. Stewart, exactly what
20 expenses you charge for and exactly what
21 expenses you don't?

22 MR. STEWART: I mean, sometimes we
23 have charged for travel expenses. We didn't in
24 this case. I don't believe we charged for
25 printing costs, although I think we could have.

1 With respect to personnel expenses
2 specifically, we would charge for the lawyers.
3 We would charge for the legal -- for the
4 paralegals.

5 In this case we had an outside expert
6 who was -- was kind of paid money out of the
7 agency's funds, and we did charge for that.
8 There are other circumstances in which, rather
9 than retain an outside expert, we get expertise
10 from within the agency.

11 So it could be the patent examiner who
12 worked on the case or it could be somebody else,
13 and we would charge a pro rata share of that
14 person's time.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel. The case is submitted.

17 (Whereupon, at 12:05 p.m., the case
18 was submitted.)

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