

No. 11-1182

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IN THE  
**Supreme Court of the United States**

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R.J. REYNOLDS TOBACCO COMPANY (A NORTH  
CAROLINA CORPORATION) AND R.J. REYNOLDS  
TOBACCO COMPANY (A NEW JERSEY CORPORATION),

*Petitioners,*

v.

STAR SCIENTIFIC, INC.,

*Respondent.*

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On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Federal Circuit

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**BRIEF OF WASHINGTON LEGAL  
FOUNDATION AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONERS**

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## **QUESTION PRESENTED**

Whether the Federal Circuit's novel test for patent definiteness, which upholds patents whose construed claims fail to inform a skilled artisan of the outer limits of the patent's claimed monopoly, faithfully implements § 112, ¶ 2 of the Patent Act as interpreted by this Court.

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**INTERESTS OF THE *AMICUS CURIAE***

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 States.<sup>1</sup> WLF devotes a substantial portion

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in

of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. To that end, WLF has regularly appeared before this Court and other federal courts in cases raising important patent law issues, particularly cases in which enforcement of broad or ambiguous patent claims might serve to inhibit innovation. See, e.g., *Ariad Pharm., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336 (Fed. Cir. 2010); *i4i Limited P'ship v. Microsoft Corp.*, 589 F.3d 1246 (Fed. Cir. 2009), *withdrawn and superseded on reh'g*, 598 F.3d 831 (Fed. Cir. 2010), *aff'd* 131 S. Ct. 2238 (2011).

WLF values a robust patent system that preserves and rewards the innovation that is necessary for the free market to flourish. Nevertheless, WLF is concerned that patents may serve to stifle such innovation if patentees are permitted to create infringement liability merely by drafting vague, ambiguous patent claims. From that perspective, WLF submits the following views on the essential role of the definiteness requirement found in 35 U.S.C. § 112, ¶ 2.

As *amicus curiae*, WLF believes that the arguments set forth in this brief will assist the Court in evaluating the issues presented by the Petition.

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part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for WLF provided counsel for Respondent with notice of intent to file. All parties to this dispute have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of Court.

WLF has no direct interest, financial or otherwise, in the outcome of this case. Because of its lack of a direct interest, WLF believes that it can provide the Court with a perspective that is distinct from that of the parties.

### STATEMENT OF THE CASE

As part of its Constitutional charge to “promote the Progress of Science and useful Arts,” U.S. Const. art. I, § 8, cl. 8, Congress enacted the Patent Act, which requires, *inter alia*, that every patent applicant must “particularly point[ ] out and distinctly claim[ ] the subject matter which the applicant regards as his invention.” 35 U.S.C. § 112, ¶ 2. This “definiteness” requirement was not satisfied in this case, and the Federal Circuit’s holding to the contrary raises serious questions about the continued viability of this Court’s requirement that a patent’s claims fully and clearly disclose the scope of the patented invention so as to allow other inventors to continue to innovate while avoiding infringement.

Because freshly harvested tobacco leaves are unsuitable for human consumption, tobacco must be properly “cured” before it can be used to manufacture cigarettes and other tobacco products. In the 1990s, researchers discovered a link between certain tobacco curing techniques and the formation of carcinogens known as tobacco specific nitrosamines, or TSNAs. This case arises from a dispute over a patented process for the curing of tobacco that would help minimize TSNA formation.

In May 2001, Star Scientific, Inc. (Star) sued Petitioners in the United States District Court for the District of Maryland, alleging infringements of United States Patents No. 6,202,649 and No. 6,425,401. *See* Pet. App. 7a. These patents claim a method for drying uncured tobacco in a “controlled environment” in order “to substantially prevent the formation of at least one [TSNA].” JA 174.

Following a *Markman* hearing, the district court construed the claim term “controlled environment” to mean “controlling one or more of humidity, temperature, and airflow in the curing barn in a manner different from conventional curing, in order to substantially prevent the formation of TSNA’s.” Pet. App. 16a. The district court also construed the phrase “substantially prevent the formation of at least one [TSNA]” to mean “the level of at least one of the nitrosamines falls within the following ranges: less than about 0.05 µg/g [or parts permillion] for NNN, less than about 0.10 µg/g for NAT plus NAG, and less than about 0.05 µg/g for NNK.” *Id.* at 49a.

Neither the patents’ specifications nor claims explain how to create a “controlled environment” to cure tobacco in accordance with the claimed method. Not only do they fail to describe any particular techniques or equipment to be used, but they also fail to distinguish the necessary humidity, temperature, or airflow levels of the “controlled environment” from those customary in conventional tobacco curing processes. *Id.* at 32a. In fact, the patents define the prior art of “conventional curing” in a tautological fashion as “air-cur[ing] or flue-cur[ing], without the controlled conditions described

herein, according to conventional methods commonly and commercially used in the U.S.” *Id.* at 30a, 32a.

The district court granted summary judgment in favor of Petitioners, holding that the patents were invalid for indefiniteness. The court found that the patents did not sufficiently define the boundaries of the patented method so as to enable “one of ordinary skill in the art” to “carry out the invention.” *Id.* at 73a. As a result, the district court explained, “the skilled artisan would not be able to know, in advance, whether a particular curing operation would infringe.” *Id.* at 73a-74a. Notably, the court found that the “only way to ascertain whether a curing operation process would infringe is to examine the result and, if successful in reducing TSNA production, then the operation would have infringed.” *Id.* at 73a-74a.

On appeal, the U.S. Court of Appeals for the Federal Circuit reversed, holding that the claim term “anaerobic condition” was not indefinite. In the view of the appeals court, the district court’s holding was “based on its misunderstanding that claim definiteness requires that a potential infringer be able to determine if a process infringes *before* practicing the claimed process.” *Id.* at 67a. The panel remanded the case for further proceedings on the question of infringement. *Id.* at 68a-69a.

On remand, the district court held a jury trial on the issues of infringement and patent validity. The expert evidence adduced at trial demonstrated that the patents do not provide enough information to enable a skilled artisan to create the “controlled environment” claimed in the patents. JA 46658.

Neither the patents' named inventor, Jonnie Williams, nor Star's own expert witness, James Sturgill, could distinguish the necessary humidity, temperature, or airflow levels of the claimed "controlled environment" from those customary in conventional curing processes. Pet. App. 32a, 79a-80a. Tellingly, Mr. Sturgill was unable to explain to the jury how others could possibly know whether they were practicing the claimed "controlled environment" or not. *Id.*

After twenty days of trial, the jury found for Petitioners on the grounds that Star had failed to prove infringement and that the claimed patents were indefinite and therefore invalid. Star moved unsuccessfully for judgment as a matter of law or for a new trial. *Id.* at 39a. Star appealed.

Although the Federal Circuit affirmed the jury's verdict on infringement as well as the district court's denial of Star's post-trial motions, the appeals court reversed the jury's verdict of patent invalidity and reinstated the patents that are currently the basis of a separate suit against Petitioners in federal district court. As to indefiniteness, the appeals court held that "indefiniteness requires a showing that a person of ordinary skill would find 'controlled environment' to be insolubly ambiguous." *Id.* at 17a. The panel majority held that because the district court had construed the term "controlled environment," that term was obviously amenable to construction and not "insolubly ambiguous." *Id.* at 16a.

Judge Dyk dissented. He emphasized that the expert testimony adduced at trial established that "a

person of ordinary skill in art would be unable to draw the line between conventional curing methods and the ‘controlled environment’ required by the claims.” *Id.* at 31a. Judge Dyk emphasized that while “the patents describe the claimed ‘controlled environment’ as something different from conventional curing methods,” they nevertheless “fail to explain those differences in a way that would permit a skilled artisan to determine the bounds of the claims.” *Id.* at 32a. Furthermore, he pointed out that the patents define conventional curing methods as merely curing “without the controlled conditions” required by the claims. Such circularity, he insisted, is insufficient to inform skilled artisans of the bounds of the claims. *Id.*

Petitioners unsuccessfully sought rehearing and rehearing en banc.

### **REASONS FOR GRANTING THE PETITION**

Federal law requires every patent applicant to “particularly point[ ] out and distinctly claim[ ] the subject matter which the applicant regards as his invention.” 35 U.S.C. § 112, ¶ 2. This Court has long held that the proper standard for judging this statutory “definiteness” requirement derives from the very purpose of that requirement—putting the public on notice by fully and clearly disclosing the scope of the patented invention in order to allow other inventors to continue to innovate while avoiding infringement.

As this case starkly illustrates, this Court’s longstanding approach to patent definiteness is *not* the Federal Circuit’s approach. In 2001, the Federal

Circuit announced an entirely new standard for determining whether a patent claim satisfies the statutory definiteness requirement, stating that a claim is indefinite only if it “is insolubly ambiguous, and no narrowing construction can properly be adopted.” *Exxon Research & Eng’g v. United States*, 265 F.3d 1371, 1375 (Fed. Cir. 2001). In other words, so long as a claim is susceptible to *any* construction, no matter how vague—even multiple, contradictory constructions—it is a valid claim.

But the question of definiteness is a question about the proper boundaries of a patent claim, while the test the Federal Circuit has announced is directed only to deciding whether there is *some* scope that the claim might reasonably be construed to cover. As a result, the Federal Circuit has abandoned the important public-notice function upheld by this Court and is severely undermining that requirement such that a patent’s claims no longer must fully and clearly disclose the scope of the patented invention in order to be valid.

Perhaps most disappointing is the appeals court’s refusal even to address the troubling lack of notice given by the patent claims at issue in this case. The appeals court fails to explain, for instance, what possible purpose could ever be served by a patent claim that does not allow an innovator to know *in advance* which practices constitute infringement and which do not. If a reasonable person of ordinary skill in the art could not be expected to know the limits of a claim, *i.e.*, what is foreclosed from *future* endeavors, such a claim is not sufficiently definite to provide adequate public

notice. Such notice, as this Court has repeatedly made clear, is central to a functioning patent system.

By abandoning the important public-notice function of patent claims, the Federal Circuit has created perverse incentives that actually stifle rather than foster important innovation. Given the imprecise boundaries made possible by ambiguous claims, patentees are increasingly free to file suit against products they never invented. Patentees seeking to stretch their claims beyond the intended bounds of the patent are too easily able to avoid the indefiniteness defense, thereby increasing a defendant's costs to defend the suit. As a result, innovative competitors and those desiring to avoid infringement liability can no longer rely on the words of the patent claims themselves, but must incur the risks and high costs of litigation to learn whether there is some "soluble" meaning, no matter how elusive, that some court somewhere can construe for the claim at issue.

**I. THIS COURT SHOULD GRANT THE PETITION TO VINDICATE ITS OWN PRECEDENTS EMPHASIZING THE PUBLIC-NOTICE PURPOSE OF PATENT CLAIMS**

Federal law requires every patent applicant to "particularly point[ ] out and distinctly claim[ ] the subject matter which the applicant regards as his invention." 35 U.S.C. § 112, ¶ 2. This Court has long held that the proper standard for judging this statutory "definiteness" requirement derives from the very purpose of that requirement. Over 125 years ago, this Court explained that "[t]he claim is a

statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is.” *White v. Dunbar*, 119 U.S. 47, 52 (1886). The novel test for definiteness adopted by the Federal Circuit abandons that important public-notice function.

In this Court’s most recent analysis of the definiteness standard, the Court emphasized that “[t]he statutory requirement of particularity and distinctness in claims is met only when they clearly distinguish what is claimed from what went before in the art *and clearly circumscribe what is foreclosed from future enterprise.*” *United Carbon v. Binney & Smith*, 317 U.S. 228, 236 (1942) (emphasis added). Under this Court’s commonsense approach, then, a patent’s claims must both distinguish the invention from prior art as well as clarify the invention’s boundaries. *See, e.g., McClain v. Ortmyer*, 141 U.S. 419, 424 (1891) (holding that a patent’s claims secure “all to which [the patentee] is entitled” while “apprising the public of what is still open to them”).

As this case starkly illustrates, however, the Court’s longstanding approach is *not* the Federal Circuit’s approach. In 2001, the Federal Circuit announced an entirely new standard for determining whether a patent claim satisfies the statutory definiteness requirement, stating that “[i]f a claim is insolubly ambiguous, and no narrowing construction can properly be adopted, we have held the claim indefinite.” *Exxon Research*, 265 F.3d at 1375. Before it was first announced in *Exxon Research*, this “insolubly ambiguous” test had never been used or even articulated by any other court to evaluate the notice requirement imposed by § 112, ¶ 2.

Seemingly drawn from whole cloth, the Federal Circuit's "insolubly ambiguous" standard is wholly inconsistent with this Court's longstanding precedents.

So while this Court has consistently held that "[a] patent holder should know what he owns, and the public should know what he does not," *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 731 (2002), the Federal Circuit's "insolubly ambiguous" test now undermines that requirement such that a patent's claims no longer must fully and clearly disclose the scope of the patented invention in order to allow other inventors to continue to innovate while avoiding infringement.

This Court's holding in *United Carbon* illustrates this point well. In that case, although the claim terms "substantially pure," "comparatively small," and "approximately one sixteenth of an inch in diameter" were amenable to construction, the Court nevertheless held that the claims were invalid because they failed to provide notice to the public of what constituted an infringement. 317 U.S. at 233. But in the case below, the Federal Circuit found nothing indefinite about terms as opaque as "anaerobic condition" or "controlled environment," even though Star's own expert witness was unable to distinguish the necessary humidity, temperature, or airflow levels of the claimed "controlled environment" from those used in conventional curing processes. As *United Carbon* demonstrates, however, simply because a claim might be "amenable to construction" does not mean that the claim automatically satisfies the statutory definiteness requirement. Indeed, it is not a stretch to suggest

that under the Federal Circuit’s “insolubly ambiguous” test, *United Carbon* would have been decided the other way.

WLF is especially troubled by the appeals court’s apparent total lack of concern over the paucity of notice given by the patent claims at issue in this case. The panel majority fails to explain, for example, what possible purpose could ever be served by a patent claim that does not allow an innovator to know *in advance* which practices constitute infringement and which do not. Simply put, if a reasonable person of ordinary skill in the art could not be expected to know the limits of a claim, *i.e.*, what is “foreclosed from *future* enterprise,” such a claim is not sufficiently definite to provide adequate public notice. That is why this Court has repeatedly recognized that “[t]he claim is required to be specific for the very purpose of protecting the public against extension of the scope of the patent.” *Universal Oil Prods. Co. v. Globe Oil & Ref. Co.*, 322 U.S. 471, 484-85 (1944). Indeed, “[t]o sustain claims so indefinite as not to give the notice required by the statute would be a direct contravention of the public interest which Congress therein recognized and sought to protect.” *United Carbon*, 317 U.S. at 233.

By adopting a standard that holds claims indefinite only if they are “insolubly ambiguous” and “not amenable to construction,” the Federal Circuit has only increased the amount of uncertainty surrounding patent claims. Under this Court’s precedent, however, the patent statute requires much more from claims than that they simply be “amenable to construction.” Not only should a patent inform the courts “of what they are called

upon to construe,” it must also apprise “competing manufacturers and dealers of exactly what they are bound to avoid.” *Consol. Elec. Light Co. v. McKeesport Light Co.*, 159 U.S. 465, 474 (1895). Indeed, “[t]he developed and improved condition of the patent law, and of the principles which govern the exclusive rights conferred by it, leave no excuse for ambiguous language or vague descriptions.” *Merrill v. Yeomans*, 94 U.S. 568, 573 (1877). A more rigorous standard than the Federal Circuit’s “insolubly ambiguous” test is needed to honor this goal. Only discretionary review by this Court can guarantee that the public will “not be deprived of rights supposed to belong to it, without being clearly told what it is that limits these rights.” *Id.*

## II. THE FEDERAL CIRCUIT’S TEST FOR DEFINITENESS STIFLES RATHER THAN ENCOURAGES INNOVATION

Not only does the Federal Circuit’s approach to definiteness contradict this Court’s clear holdings, it also drastically undermines the patent system’s laudable goal of fostering robust innovation. If allowed to stand, the Federal Circuit’s unexacting standard will lead to further mischief by encouraging patent applicants to draft deliberately ambiguous claims. By taking advantage of the imprecise boundaries made possible by such claims, patentees are increasingly free to file suit against products they never invented. Such a result is neither fair nor just. *See Merrill*, 94 U.S. at 573-74 (“It seems to us that nothing can be more just and fair both to the patentee and the public, than that the former should understand and correctly describe

just what he has invented, and for what he claims a patent.”).

In exchange for their monopoly, patentees should bear the burden of drafting clear patent claims so as to put the rest of the world on notice of “the limits of the monopoly asserted” so the public can know what aspects of the invention can be “safely used or manufactured without a license and which may not.” *Permutit Co. v. Graver Corp.*, 284 U.S. 52, 60 (1931). The Federal Circuit’s “insolubly ambiguous” test severely undermines this balanced approach. As a result, innovative competitors and others desiring to avoid infringement liability can no longer rely on the words of the patent claims themselves, but must incur the risks and high costs of litigation to learn whether there is some “soluble” meaning, no matter how elusive, that some court somewhere can construe for the relevant claim.

By abandoning the important public-notice function of patent claims, the Federal Circuit has created perverse incentives that actually stifle rather than foster important innovation. As this Court recognized over 75 years ago:

The limits of a patent must be known for the protection of the patentee, the encouragement of the inventive genius of others[,] and the assurance that the subject of the patent will be dedicated ultimately to the public. The statute seeks to guard against unreasonable advantages to the patentee and disadvantages to others arising from uncertainty as to their rights.

*Gen. Elec. Co. v. Wabash Appliance Corp.*, 304 U.S. 364, 369 (1938) (citation omitted).

In contrast, the Federal Circuit’s “insolubly ambiguous” test has created a “zone of uncertainty which enterprise and experimentation may enter only at the risk of infringement claims.” *United Carbon*, 317 U.S. at 236. Under this muddled standard, claims are upheld as valid even when they are susceptible to multiple, contradictory constructions. Such uncertainty “discourage[s] invention only a little less than unequivocal foreclosure of the field.” *Id.*

Because the Federal Circuit’s test allows any claim construed by a court to satisfy, *per se*, the statutory definiteness standard, patentees seeking to stretch their claims beyond the intended bounds of the patent are too easily able to avoid the indefiniteness defense, thereby increasing a defendant’s costs to defend the suit. The end result of the Federal Circuit’s novel test is that patent claims are rarely held indefinite, even where, as here, there is no reasonable way for people reading the patent to know which construction is correct and what is *not* covered by the claims.

The available data on federal patent litigation further bolsters this concern, as indefiniteness challenges are unsuccessful with increasing frequency. Indeed, according to at least one empirical study, the overall percentage of patents upheld as definite has skyrocketed in recent years. Between 1998 and 2008, for example, the percentage of district court decisions upholding challenged claims as definite increased by an astounding sixty

percent, from 24% to approximately 84%. See Christa J. Laser, *A Definite Claim on Claim Indefiniteness: An Empirical Study of Definiteness Cases of the Past Decade with a Focus on the Federal Circuit and the Insolubly Ambiguous Standard*, 10 Chi.-Kent J. Intell. Prop. 25, 30 (2010). The Federal Circuit's approach has had an obvious impact on the outcome of definiteness determinations.

Where, as here, claims are so ambiguous that no one can tell in advance what innovations the claims properly cover, the resulting uncertainty is often costly to companies who must decide whether to litigate or license the patent. Because the scope of the asserted patent's claim is unclear but amenable to *some* construction, the case is no longer subject to summary judgment on invalidity grounds. This is highly undesirable from a public policy perspective. After all, companies should be encouraged and rewarded for their efforts at innovation. Instead, defendants are frequently forced to choose between spending a great deal in litigation costs and attorney's fees to defend a product they believe to be innovative or else settling with the plaintiff. This trend poses "a real problem for innovators" and "impose[s] a cost on investment in innovation." James Bessen & Michael J. Meurer, *Patent Failure: How Judges, Bureaucrats and Lawyers Put Innovators at Risk* 127 (2008).

In sum, the Federal Circuit's definiteness standard fails to put the rest of the world on notice of a patent's true scope, thereby inviting opportunistic patent applicants and plaintiffs to litigate over innovative techniques they never invented, never claimed, and never disclosed. Even

in those instances where a patent is weak, plaintiffs too often succeed in forcing settlements or driving up litigation costs. The resulting uncertainty threatens to harm not only a particular industry or company, but American innovation as a whole.

### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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