

No. 19-571

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In The  
**Supreme Court of the United States**

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INTEL CORP., et al.,

*Petitioners,*

v.

CONTINENTAL CIRCUITS LLC,

*Respondent.*

—◆—  
**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Federal Circuit**

—◆—  
**BRIEF OF THE COMPUTER & COMMUNICATIONS  
INDUSTRY ASSOCIATION AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONERS**

—◆—  
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**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

The Computer & Communications Industry Association (“CCIA”) is an international nonprofit association representing a broad cross-section of computer, communications, and Internet industry firms that collectively employ nearly a million workers and generate annual revenues in excess of \$540 billion.<sup>2</sup> CCIA believes that open, competitive markets and original, independent, and free speech foster innovation. It regularly promotes that message through *amicus* briefs in this and other courts on issues including competition law, intellectual property, privacy, and cybersecurity.

CCIA believes that claim construction must operate in a predictable fashion that does not enlarge the scope of a patent beyond what the inventor truly invented. The Federal Circuit’s *Continental Circuits* decision creates an unpredictable rule of construction that enables patentees to recapture subject matter their specification criticizes. This rule of construction would frequently interpret a patent claim to have a scope which is not enabled by the specification, thus rendering the claim invalid.

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<sup>1</sup> Pursuant to Supreme Court Rule 37.2(a), this brief was filed with the written consent of both parties. Parties received at least 10 days notice of this brief. Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or part; no party or counsel made a monetary contribution intended to fund its preparation or submission; and no person other than *amicus* made such a contribution.

<sup>2</sup> A list of CCIA members is available at <http://www.ccianet.org/members>.

Upholding the Federal Circuit’s rule would render the patent grant less reliable for patent owners and less understandable to those who seek to understand the scope of a patent to license that patent or to avoid infringement. As product manufacturers, patent licensors and licensees, and patent owners, upholding the Federal Circuit’s *Continental Circuits* decision would subject CCIA’s members to increased costs, reduce their incentive and ability to invest in new technologies, and reduce the ability of the patent system to promote innovation.



### SUMMARY OF ARGUMENT

The claims of a patent “are to be construed in the light of the specification[] and both are to be read with a view to ascertaining the invention.” *U.S. v. Adams*, 383 U.S. 39, 49 (1966). The Federal Circuit’s *Continental Circuits* decision contradicts this fundamental principle of the patent system. This creates a rule of construction that, beyond the doctrinal error, makes it impossible for the public to clearly understand what it may or may not do without violating a patent. The same rule of construction also harms patent owners by rendering their patents potentially not enabled and therefore invalid.

*Continental Circuits* violates the requirement to read the specification and claims together by ignoring the specification unless it contradicts the claim language. In doing so, the public notice function of patents—to

“secure to [the patentee] all to which he is entitled, [and] apprise the public of what is still open to them”—is compromised. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 373 (1996) (quoting *McClain v. Ortmyer*, 141 U.S. 419, 424 (1891)). A person of ordinary skill in the art reads a patent as an integrated document. They understand the claims by reading the specification. When a patentee denigrates a prior art approach as incompatible or inferior, the public must be able to trust that this means that the patentee’s invention does not encompass the prior art approach.

Particularly given the exclusive control of the patent owner over the content of the specification and the decision of whether to denigrate prior art, patent law benefits from a rule that permits the public to rely on denigration as disclaimer, construing any doubt against the drafter of the instrument, the patent owner.

Beyond rendering patents unclear to the public and thus untrustworthy as an arbiter of what is and is not permissible, the Federal Circuit’s decision also construes patents in a way that renders them invalid. The *Continental Circuits* approach to construction creates claims that cannot be fully enabled by the specification because it construes claims to include scope that a person of ordinary skill in the art, reading the specification, would understand to be distinct from the invention. By ensuring that claims are construed in a way that they would not be fully enabled, the Federal Circuit’s rule of construction would lead to more patents being held invalid, reducing the value of a patent

grant. A rule of claim construction that leads to invalid claims is not a desirable rule of construction from a legal or practical standpoint and thus should be overturned by this Court.

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## ARGUMENT

### I. THE FEDERAL CIRCUIT’S RULE HARMS THE ABILITY OF COMPETITORS AND THE PUBLIC TO UNDERSTAND WHAT A PATENT DOES AND DOES NOT COVER

It has long been understood that one function of a patent is to “secure to [the patentee] all to which he is entitled, [and] apprise the public of what is still open to them.” *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 373 (1996) (quoting *McClain v. Ortmayer*, 141 U.S. 419, 424 (1891)). This ‘public notice’ function is accomplished by “two distinct elements of a patent document . . . a specification describing the invention . . . and one or more claims.” *Markman*, 517 U.S. at 373.

#### A. Proper construction of a patent requires reading the specification and claims together, each one in light of the other.

To understand what a patentee is entitled to, the meaning of the claim language is construed. In conducting this process of claim construction, it is “fundamental that claims are to be construed in the light of the specifications and both are to be read with a view to ascertaining the invention.” *U.S. v. Adams*, 383 U.S.

39, 49 (1966). In fact, it is more than just a requirement that each be read individually—“[t]he claims of a patent are **always** to be read or interpreted in the light of its specifications.” *Schriber-Schroth Co. v. Cleveland Trust Co.*, 311 U.S. 211, 217 (1940) (emphasis added).

This is consistent with this Court’s guidance that claims are to be construed according to the “standard construction rule that a term can be defined only in a way that comports with the instrument as a whole.” *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 389 (1996).

**B. The Federal Circuit ignores the specification in favor of the claims, contradicting this requirement.**

In contrast, *Continental Circuits* encourages courts to ignore the specification in favor of the claim language unless there is a “clear and unmistakable disclaimer” of some portion of the scope of the claim language. *Continental Circuits LLC v. Intel Corp.*, 915 F.3d 788, 797 (Fed. Cir. 2019). Such an approach, giving primacy to the claims over the specification, cannot be squared with the requirement to read both parts together and construe terms in a way that comports with the instrument as a whole.

**C. By placing primacy on the claim language, ordinary artisans cannot understand what the patent blocks them from doing.**

A person of ordinary skill in the art abides by this Court's guidance without knowing they do so. They naturally read a patent as an integrated document. They understand the claims by reading the specification, not by reading them standing alone and determining if the specification contradicts the claim language. As a result, when a patentee denigrates a prior art approach in the specification, a person of ordinary skill in the art understands that approach as not encompassed by the claim language. Especially when, as in this case, the specification contains no information as to how the prior art approach could be used to implement the claim, a person of ordinary skill in the art would not be able to use the patent document to create the patented product via a prior art method. And that person would thereby conclude that the patent claims do not cover the production of the product via the prior art method. The public must be able to trust that intuition. The counter-intuitive interpretive approach championed by the Federal Circuit in *Continental Circuits* would render the public unable to rely on the patentee's own description in the patent specification as useful guidance to what the patentee actually taught the public to do.

This Court's guidance and the approach taken by ordinary artisans reading a patent rely on reading the claims and specification as a single unitary whole. The Federal Circuit's *Continental Circuits* decision

contradicts this foundational principle of the patent system. By giving the claims primacy, only allowing the specification to govern where it clearly contradicts the claim, *Continental Circuits* violates this Court's guidance that courts should interpret the claims and specification as part of a unified whole.

## **II. THE CONTINENTAL CIRCUITS RULE OF CONSTRUCTION COMPROMISES THE ABILITY OF THE PUBLIC TO UNDERSTAND THE SCOPE OF AND RELY ON THE CONTENT OF THE PATENT DOCUMENT**

Patents serve to “apprise the public of what is still open to them.” *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 373 (1996) (quoting *McClain v. Ortmyer*, 141 U.S. 419, 424 (1891)). By reading the claims separate from the specification, only allowing the specification to govern when it clearly disclaims a portion of scope, this public notice function of the patent is compromised. Particularly given the exclusive control of the patent owner over the content of the specification and the decision to denigrate prior art, the public notice would be benefited by a rule that permits the public to rely on denigration as disclaimer.

**A. The public reads patents as an integrated document, relying on the specification to understand what the patentee controls.**

A person of ordinary skill in the art reads a patent as an integrated document, similar to the “standard construction rule” that defines a term in a way that “comports with the instrument as a whole.” *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 389 (1996). The ordinary person understands the claims in light of the description in the specification. They read them together as a single document, rather than dissecting them into claims and determining if the specification contradicts the claims.

When a patentee denigrates a prior art approach in the specification as incompatible with or inferior to the patentee’s invention, the public interprets it as not part of what the patentee invented. Such a statement “tells the public that [the denigrated approach] will not work.” *AK Steel Corp. v. Soliac and Ugine*, 344 F.3d 1234, 1244 (Fed. Cir. 2003). The public must be able to trust that this means that the invention does not encompass the products of the denigrated approach even if the denigration is not a clear disclaimer of claim scope.

To do otherwise would create a “zone of uncertainty which enterprise and experimentation may enter only at the risk of infringement claims.” *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2129 (2014) (citing *United Carbon Co. v. Binney & Smith Co.*,

317 U.S. 228, 236 (1942)). The harms of such uncertainty include increased patent litigation, increased gamesmanship in patent drafting, and reduced functionality of patent documents as a source of meaningful technical information, and are discussed in more detail in Section IV, *infra*.

**B. As a written instrument, it would be appropriate to construe uncertainty against the drafter of the instrument—the patent owner.**

The contract interpretation rule of *contra proferentem* construes ambiguity against the drafter of an instrument. This approach is “a default rule based on public policy considerations.” *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019).

Several Federal Circuit opinions have covertly or openly advocated for the application of this rule to claim interpretation. *See, e.g., Athletic Alternatives, Inc. v. Prince Mfg., Inc.*, 73 F.3d 1573, 1581 (Fed. Cir. 1996) (*en banc*) (“[w]here there is an equal choice between a broader and a narrower meaning of a claim, . . . we consider the notice function of the claim to be best served by adopting the narrower meaning.”); *3M Innovative Properties Co. v. Tredegar Corp.*, 725 F.3d 1315, 1336 (Fed. Cir. 2013) (Plager, J., concurring).

Claim construction is a process of construction of a written document. *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 382 (1996). A rule such as *contra proferentem* designed for the construction

of written documents—contracts—would be appropriately applied to the construction of the patent written document. The open adoption of such a rule, construing ambiguities in claim scope against the drafter of the claim, would serve the public notice function of a patent and help avoid the harms of claim drafting gamesmanship discussed *infra* in Section IV.

### **III. THE FEDERAL CIRCUIT’S RULE WOULD LEAD TO NON-ENABLED PATENTS, HARMING PATENT OWNERS BY RENDERING THEIR PATENTS INVALID**

As part of the patent bargain, a patent owner must teach the public how to do the full breadth of what the patent covers—the “enablement” requirement. Enablement serves the function of “preventing claims broader than the disclosed invention.” *MagSil Corp. v. Hitachi Global Storage Techs.*, 687 F.3d 1377, 1381 (Fed. Cir. 2012).

This is achieved by providing teachings in the specification—specifically, “[w]hat is claimed by the patent application must be the same as what is disclosed in the specification; otherwise the patent should not issue.” *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 736 (2002). By ignoring the specification in favor of the claims, the Federal Circuit’s *Continental Circuits* rule violates this prescription and creates the potential for widespread invalidation of patents as not enabled.

**A. The Federal Circuit creates a rule that inherently captures claim scope that the specification does not teach, leading to a lack of enablement.**

By allowing a claim to be construed to capture scope that a person of ordinary skill in the art, reading the specification, would understand to be distinct from the invention, the *Continental Circuits* approach to construction creates claims that cannot be fully enabled by the specification.

In the instant case, the specification makes clear that the invention is an advance over the prior art “single desmear” process which produces a particular toothed structure via a “repeated desmear.” In fact, the specification describes the claimed toothed structure solely in terms of its creation via a repeated desmear process. An ordinary artisan, reading this specification, would not understand how to create that toothed structure using a “single desmear” process. Any rule of construction that extends the scope of the claim to include a toothed structure produced by a “single desmear” process would render the full scope of the claim not enabled and therefore invalid.

This is precisely the construction the Federal Circuit rendered in the present case. The Federal Circuit construed the claim to cover toothed structures produced by a “single desmear” process, a method that the patent not only failed to teach a person of ordinary skill how to achieve but actually disparaged as incapable of producing that result.

The Federal Circuit ignored its own precedent to do so. In *AK Steel*, the Federal Circuit ruled that a specification was, as a matter of law, not enabling of a particular embodiment “primarily because it teaches against [the embodiment].” *AK Steel Corp. v. Soliac and Ugine*, 344 F.3d 1234, 1244 (Fed. Cir. 2003) (*en banc*). Such a teaching was considered “[w]orse than being silent as to that aspect of the invention” with regards to whether a person of ordinary skill in the art would understand how to make and use the invention. *Id.*

By construing claims to include scope that is not enabled, the Federal Circuit’s *Continental Circuits* approach leads to non-enabled—and therefore invalid—patents.

**B. Claim construction rules should not be designed to make patents invalid, but rather to preserve validity if reasonable.**

While there is no hard and fast rule that claim construction must preserve validity in all circumstances, there is a general principle that courts should “proceed in a liberal spirit, so as to sustain the patent . . . if this can be done consistently with the language which [the patent owner] has employed.” *Klein v. Russell*, 86 U.S. 433, 466 (1874). In part, this is done because of the presumption that the Commissioner for Patents has done his job correctly and would not have issued an invalid claim if a valid interpretation exists. *Id.*

The Federal Circuit has historically applied this principle to sustain the validity of claims where there is ambiguity in the scope of the claim. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1327-28 (Fed. Cir. 2005) (*en banc*).

That is an appropriate rule, and precisely the opposite of the rule the Federal Circuit applies here. By construing a patent claim to include its full scope unless clearly and unmistakably disclaimed in the specification, even if the specification denigrates a portion of that scope, the Federal Circuit creates a rule that tends to create non-enabled claims. Such a claim is invalid.

In contrast, a construction that excludes denigrated approaches or approaches on which the specification is silent from the scope of the patent ensures that ambiguity in claim scope is resolved in favor of rendering patents valid. That rule of construction will sustain, rather than invalidate, patents. It also appropriately respects the presumption that the United States Patent and Trademark Office has done its job appropriately and has not issued an invalid claim.

The Federal Circuit's contrary rule, broadening claim scope to the point of creating invalid patents, should be overturned.

**IV. THE *CONTINENTAL CIRCUITS* RULE CREATES REAL-WORLD HARMS BY REDUCING THE VALUE OF ISSUED PATENTS, REDUCING THE PROGRESS OF USEFUL ARTS, AND ENCOURAGING GAMESMANSHIP IN PATENT DRAFTING**

The Federal Circuit's ruling below, beyond the doctrinal and legal errors described above, creates significant practical harms to innovation.

**A. The *Continental Circuits* rule devalues patents by making findings of invalidity more likely.**

As described above, the Federal Circuit has created a rule that will invariably lead to some patents being invalid as not enabled. This means that patents become more, not less, likely to be invalid, thereby devaluing existing patents. In turn, this devaluation lessens one of the incentives to invest in technological research that may lead to future patents as the future patents are also less valuable.

By increasing the likelihood of invalidity, the resultant devaluation of patents harms patent owner incentives to invest.

**B. The *Continental Circuits* rule deters innovation by interpreting claims to cover non-enabled scope.**

Interpreting a claim to cover scope that a patent owner disparaged in its specification creates a situation in which whole areas of technology may be foreclosed from research interest. Such a rule allows a patent owner to claim a technology that no one knows how to perform, harming the progress of the useful arts.

A properly construed patent encourages others to determine alternative routes to create the desired effect, “designing around” the patent, producing additional innovation. Efforts to design around a patent are beneficial to the progress of innovation. The Federal Circuit’s rule forecloses such efforts by placing them under patent.

By construing the claim language broadly to encompass approaches denigrated in the specification, thereby encompassing approaches that the patent owner did not actually invent, the Federal Circuit forecloses design around efforts by placing them under patent. Further, the Federal Circuit’s rule creates a “blocking patent” that also deters research and investment in that area. *See Acorda Therapeutics v. Roxane Labs.*, 903 F.3d 1310 (Fed. Cir. 2018), *cert. denied*, \_\_\_ U.S. \_\_\_ (Oct. 7, 2019).

These concerns were one of the animating factors in the Telegraph Patent Case, where the Court worried that “some future inventor, in the march of science,

may discover a mode of writing or printing at a distance by means of the electric or galvanic current, without using any part of the process or combination set forth in the patent's specification." *O'Reilly v. Morse*, 56 U.S. 62, 113 (1853). If the patent extended to include these alternative modes, which the Court notes the inventor "has not described and indeed had not invented," the public would be foreclosed from pursuing these alternatives without the patent owner's permission. *Id.*

The Federal Circuit has thus created a rule of construction that deters, rather than promotes, the progress of the useful arts, contrary to both the practical and Constitutional aims of the patent system.

**C. The Federal Circuit's rule encourages gamesmanship in patent drafting, increasing patent litigation and reducing the ability of patents to serve as useful technical disclosures.**

By creating a rule that permits ambiguous claim language to extend even to technology disparaged in the specification, the *Continental Circuits* rule contributes to the general problem of unclear boundaries of patent scope. This problem was well-summarized nearly 80 years ago. In *United Carbon*, the Court worried about the creation of a "zone of uncertainty which enterprise and experimentation may enter only at the risk of infringement claims," thereby "discourag[ing] invention only a little less than unequivocal foreclosure

of the field.” *United Carbon Co. v. Binney & Smith Co.*, 317 U.S. 228 (1942).

The Federal Circuit’s ruling creates such a zone of uncertainty. The rule promotes the “fuzzy boundaries” that have contributed to the patent litigation explosion over the past two decades by creating “a business opportunity based on acquiring patents that can be read to cover existing technologies and asserting those patents.” James Bessen *et al.*, *The Private and Social Costs of Patent Trolls*, Regulation, Winter 2011-2012, at 26, 34. This type of rule helped lead to the more than doubling of the amount of patent litigation since 2000. Shawn Miller *et al.*, *Who’s Suing Us? Decoding Patent Plaintiffs since 2000 with the Stanford NPE Litigation Dataset*, 21 Stan. Tech. L. Rev. 235, 258, 260-61 (2018).

Such a rule also encourages a lack of clarity of the disclosures in the specification. This, in turn, contributes to the widely recognized problem of patent documents being of at best limited use as technical documents. In one survey, even the most positive scientific researchers who read patents called them “vague” and “very hard to read.” Lisa Larrimore Ouellette, *Who reads patents?*, 35 Nature Biotechnology 421 (2017). Others were less positive, calling patents “bloated with vagueness and useless information” or “deliberately written in a manner that makes it very hard work to find what you’re looking for.” *Id.* Most damning, the majority of researchers did not think they could replicate a claimed invention using the information contained in the patent. *Id.* By encouraging disclosures to become even more vague and self-contradictory, the

Federal Circuit's rule would only accelerate the failures identified in this study.

These real-world harms to innovation merit this Court's attention to this case and the overturning of the Federal Circuit's approach to claim construction.



## CONCLUSION

The Federal Circuit's ruling in *Continental Circuits* undermines foundational principles of the patent system, making patents less effective as documents that inform the public of their rights and of technical information, and creating real-world harms to innovation.

For the foregoing reasons, this Court should grant *certiorari* in order to overturn the Federal Circuit's decision.

Respectfully submitted,

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