

No. 19-1062

IN THE
Supreme Court of the United States

CJ CHEILJEDANG CORP., et al.,

Petitioners,

v.

INTERNATIONAL TRADE COMMISSION, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

**BRIEF OF THE R STREET INSTITUTE AS *AMICUS*
CURIAE IN SUPPORT OF THE PETITION**

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INTEREST OF *AMICUS CURIAE*

The R Street Institute¹ is a nonprofit, nonpartisan public-policy research organization. R Street's mission is to engage in policy research and educational outreach that promotes free markets as well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support economic growth and individual liberty.

SUMMARY OF ARGUMENT

The question presented, relating to whether the Court of Appeals has erred in inferring a rebuttal of a presumption of prosecution history estoppel despite the written record of a patent's prosecution history lacking any explicit statement supporting the rebuttal, is of broad importance to the overall patent system and the entire public. The Federal Circuit's prevailing erroneous answer to it continues to cause significant injury to the public interest. This Court should accordingly grant the petition for certiorari in this case, as well as the copending petitions in *Hospira, Inc. v. Eli Lilly & Co.* and *Dr. Reddy's Laboratories, Ltd. v. Eli Lilly & Co.*, Nos. 19-1058 and -1061.

I–II. The scope of every patent, that is, the breadth of articles or processes that would fall within infringement of that patent, must be appropriately limited. This premise is central to the patent system, which is founded

¹Pursuant to Supreme Court Rule 37.2(a), all parties received appropriate notice of and consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

on a carefully crafted bargain between inventors and the public: inventors create new inventions and reveal new knowledge to the world, and in exchange those inventors receive a limited monopoly on their inventions. *Limited* is the operative word in that bargain. The public would not have agreed, per the patent bargain, to a patent monopoly that rewards the inventor too much.

Patent examiners are delegated with the power to negotiate on behalf of the public for those appropriate limits on patents during the process of patent prosecution. To the extent that examiners are successful in reducing the scope of patent applications in service of the statutory patent requirements, those examiners perform an important public service. And maintenance of the fundamental patent bargain thus requires maintenance of the results of patent examiners' negotiations.

The doctrine of prosecution history estoppel, as this Court has repeatedly recognized, effectuates the public interest in patent examiners' negotiations by preventing patent owners from recapturing claim scope surrendered in response to examiners' rejections. Yet in the cases on petitions for certiorari, the Federal Circuit sharply constrained this important public-serving doctrine by allowing post-hoc reasoning to overcome prosecution history estoppel under the tangentiality exception, even where the prosecution history lacks documented support for tangentiality. This apparently novel rule fails to account for the important actions of patent examiners, and consequently it fails to account for the public interest in adequate limits on patent monopolies. This dismissal of the public interest is harmful beyond just the parties to litigation. By construing a patent to be broader than intended, the Federal Circuit denies the public access to technolo-

gies that ought not to have been patented, a result that directly contravenes the basic patent bargain.

III. That harm to the public of improperly broad patents is exacerbated by the fact that the Federal Circuit's rule permits—indeed invites—patent attorneys to engage in strategies that introduce ambiguity during patent prosecution in order to obtain those improperly broad patents.

Under the Federal Circuit's specific rule, prosecution history will not limit the scope of a patent, even where the record of prosecution history plainly supports application of prosecution history estoppel, so long as the patent owner can manufacture a post-hoc argument that the actions in the prosecution history were “tangential” to the examiner's rejection. In other words, ambiguity in the record will suffice to leave open the possibility of avoiding this Court's precedents on prosecution history estoppel. This naturally encourages patent applicants and their attorneys to enter ambiguities in the record. At least three strategies, discussed in detail below, are well known among the patent practitioner community to introduce this sort of ambiguity and avoid disavowal of patent scope.

Besides undesirably turning the Patent Office into a tactical ground for gamesmanship, the Federal Circuit's rule thus opens the door for patent applicants to obtain patents broader than a properly functioning patent system would have intended. These widespread practices undermine the innovation economy that patents are supposed to advance, and they ought to be deterred by correcting the flawed rule of patent law that allows them. To review that rule, certiorari should be granted.

ARGUMENT

I. THE FEDERAL CIRCUIT'S EXPANSION OF THE TANGENTIALITY RULE UNDERMINES THE PUBLIC'S SIDE OF THE PATENT BARGAIN

The Federal Circuit's refusal to accord adequate weight to the documented history of a patent's prosecution substantially implicates the public interest. The patent system entails a bargain between inventors and the general public, and central to that bargain is the notion that the patent monopoly is limited to serve the public. Examiners represent the public in negotiations for limitations on patents during the examination procedure. By allowing the patent owner to avoid surrenders of patent claim scope, even when they are plain in the record of the prosecution history, through post-hoc tangentiality arguments devised for litigation, the Federal Circuit ignores this basic aspect of the patent bargain and imposes upon the public interest the improper cost of excessive patent scope.

A. THE UTILITARIAN JUSTIFICATION FOR THE PATENT SYSTEM REQUIRES STRICT LIMITS ON PATENT SCOPE

Patents are fundamentally premised on a “carefully crafted bargain” between inventors and the public. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150 (1989). “The balance between the interest in motivating innovation and enlightenment . . . and the interest in avoiding monopolies that unnecessarily stifle competition . . . has been a feature of the federal laws since their inception.” *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 63 (1998). Rewarding inventors has always been a sec-

ondary concern of patents; “the benefit to the public or community at large was . . . doubtless the primary object in granting and securing that monopoly.” *Kendall v. Winsor*, 62 U.S. (21 How.) 322, 328 (1859).

The “quid pro quo” of patent law, specifically, is that in exchange for receiving a temporary monopoly on exploitation of their inventions, inventors agree to invest time in inventing, to reveal the workings of their inventions in public disclosures, and ultimately to dedicate those inventions to the public for all to use for free. See *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124, 142 (2001) (quoting *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 470 (1974)); *Universal Oil Co. v. Globe Co.*, 322 U.S. 471, 484 (1944).

Consequent and inherent to the patent bargain, then, is the notion that the monopoly must be limited. The public “has a ‘paramount interest in seeing that patent monopolies . . . are kept within their legitimate scope.’” *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843, 851 (2014) (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 816 (1945)). Thus, the Patent Act “seeks to guard against unreasonable advantages to the patentee,” *United Carbon Co. v. Binney & Smith Co.*, 317 U.S. 228, 232 (1942), and aims toward “the larger object of securing patents for valuable inventions without transgressing the public domain,” *Bilski v. Kappos*, 130 S. Ct. 3218, 3227 (2010). To do otherwise would tip the balance too far from the public interest; the public would not have bargained for such a result.

Since not all inventions are equal, there is a need to assess the proper limits of the monopoly for every individual patent grant. The duration of the patent right, the *length*, is fixed by statute and not adjustable to the

particular circumstances of each invention. *See* 35 U.S.C. § 154(a)(2). As a result, the scope of the patent bargain is calibrated by patent *breadth*—that is, the extent of what is covered by the claims of the patent. *See generally* Richard Gilbert & Carl Shapiro, *Optimal Patent Length and Breadth*, 21 RAND J. Econ. 106 (1990).

That the breadth of patent claims must be limited is among the most basic of concepts in patent law. A patent claim may not be granted if the subject matter claimed is anticipated by the prior art; that is, if the subject matter was publicly known or described in the literature before the patent was first sought. *See* 35 U.S.C. § 102. “Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available.” *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966); *see also Pennock v. Dialogue*, 27 U.S. (2 Pet.) 1, 23 (1829) (“[T]he legislature did not intend to grant an exclusive right to any one to monopolize that which was already common.”).

Patents are further limited by the nonobviousness requirement, which prohibits a patent from claiming subject matter merely representing an improvement over known technologies that would have been obvious to those of ordinary skill in the relevant field of technological art. 35 U.S.C. § 103. This limitation ensures that patents are reserved for significant advances, and that ordinary innovation is not tangled in patent monopolies. A patent should not issue when there is “an absence of that degree of skill and ingenuity which constitute essential elements of every invention.” *Hotchkiss v. Greenwood*, 52 U.S. (11 How.) 248, 267 (1851); *see also Great Atl. & Pac. Tea Co. v. Supermarket Equip. Corp.*, 340 U.S. 147, 154 (1950) (Dou-

glas, J., concurring) (“The invention, to justify a patent, had to serve the ends of science—to push back the frontiers of chemistry, physics, and the like; to make a distinctive contribution to scientific knowledge.”).

This Court has taken a special interest in disapproving those patents that fail the public bargain. Case after case has affirmed the importance to the general public of invalidating those patents that have been wrongly issued to avert “opportunities for holders of invalid patents to exact licensing agreements.” *See Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 342 (1971) (expanding collateral estoppel effect of patent invalidity holding); *Cardinal Chem. Co. v. Morton Int’l, Inc.*, 508 U.S. 83, 102–03 (1993) (rejecting Federal Circuit practice of automatically vacating certain invalidity determinations); *Lear, Inc. v. Adkins*, 395 U.S. 653, 670–71 (1969) (public interest in patent validity determinations overrides private interest in contract enforcement).

Accordingly, correct limits on the scope of the claims of each individual patent are fundamental to the overall patent system.

B. PATENT EXAMINATION, DOCUMENTED IN THE PROSECUTION HISTORY, IMPLEMENTS THOSE REQUIRED PATENT SCOPE LIMITS

Authority to set the proper scope of patents is delegated to the United States Patent and Trademark Office and specifically to the patent examiners employed thereby. *See* 35 U.S.C. § 2(a)(1); 37 C.F.R. § 1.104(a)(1). This means that the negotiation between a patent examiner and a patent applicant bears special importance, because the patent examiner effectively represents the entire public in that negotiation.

The role of patent examiners as representatives of the public interest has long been recognized. Courts have described patent examiners as “quasi-judicial officials trained in law,” because they perform what is essentially an adjudicatory role. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 986 (Fed. Cir. 1995), *aff’d*, 517 U.S. 370 (1996); *W. Elec. Co. v. Piezo Tech., Inc.*, 860 F.2d 428, 431 (Fed. Cir. 1988) (citing *Butterworth v. United States ex rel. Hoe*, 112 U.S. 50, 67 (1884); *United States v. Am. Bell Tel. Co.*, 128 U.S. 315, 363 (1888)). Furthermore, courts have noted that patent examiners are those “whose duty it is to issue only valid patents.” *PowerOasis, Inc. v. T-Mobile USA, Inc.*, 522 F.3d 1299, 1304 (Fed. Cir. 2008) (quoting *Am. Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1359 (Fed. Cir. 1984)). “[I]t must be remembered that the primary responsibility for sifting out unpatentable material lies in the Patent Office.” *Graham*, 383 U.S. at 18.

Thus, the former chief judge of the Federal Circuit explained that patent examiners are “the guardian of the public domain.” Paul R. Michel, Remarks at the USPTO Patent Quality Summit 1:37 (Mar. 25, 2015) (transcript available at <https://perma.cc/J9R6-WVFS>), *available online*;² *see also* Sue A. Purvis, Innovation & Outreach Coordinator, USPTO, *The Role of the Patent Examiner 9* (Apr. 8, 2013), *available online* (role of patent examiner is to “serve as advocate/protector of public interest with respect to intellectual property”).

Patent examiners’ role as representatives of the public domain indicates the weight of the actions they take

²Locations of authorities available online are shown in the Table of Authorities.

during prosecution. An examiner is charged with the responsibility of rejecting improperly broad patent claims, demanding amendments that narrow and clarify those claims, and negotiating a patent of scope that meets the important interests of the public as described above. Those actions are not merely bureaucratic functions; rather, they put into practice the theoretical patent bargain that justifies the existence of patents in the first place.

C. ALLOWING POST-HOC LITIGATION ARGUMENTS TO TRUMP THE PROSECUTION HISTORY IMPINGES ON THE PUBLIC INTEREST

Because patent prosecution as thus described is a process of narrowing the scope of a patent application in defense of the public interest, a failure to treat amendments in the prosecution history as limiting in patent scope is to deny that public interest and improperly shift the balance of the patent bargain away from the public and toward patent owners.

In the cases on petition, the Federal Circuit treated amendments in the prosecution history of the patent as “tangential” and thus effectively irrelevant, despite those amendments being surrenders of claim scope in order to overcome rejections during examination—the classic situation for prosecution history estoppel. *See Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 30–31 (1997). So even if an examiner succeeds in forcing a patent applicant to concede some patent claim scope during the negotiation of patent prosecution, that forced concession may be given no effect if the reasons for the concession are left ambiguous, leaving room for litigation at-

torneys to craft arguments of tangentiality perhaps years after the patent was issued.

Insofar as the examiner argues for and obtains that concession on behalf of the public interest in appropriately tailored patents, this expansion of the tangentiality doctrine thus fails to give due regard to that public interest, and as a result expands the breadth of patents beyond what the examiner intended. *Cf. McClain v. Ort-mayer*, 141 U.S. 419, 424 (1891) (“But the courts have no right to enlarge a patent beyond the scope of its claim as allowed by the Patent Office . . .”). In other contexts, this Court has refused to give post-hoc litigation arguments priority over the evidence in the plain record. *See, e.g., Foster v. Chatman*, 136 S. Ct. 1737, 1755 (2016) (finding that a state’s explanation that a prosecutor’s peremptory strikes were not discriminatory “reeks of afterthought,” where prosecutorial documents showed the opposite) (citing *Miller-El v. Dretke*, 545 U.S. 231, 246 (2005)). There is no reason why patent law should receive different treatment.

It is particularly important that the written prosecution history not be overcome by attorney argument on tangentiality, because unlike other disputes in litigation, there is no opportunity for testimony from the opposing side of the patent negotiation. Ordinarily, if documentary evidence is ambiguous, litigants on opposing sides may call testimonial witnesses to explain that documentary evidence. Fed. R. Civ. P. 45(a)(1)(A)(iii). But in the case of the patent prosecution history, the examiner cannot be called to testify, as courts have repeatedly refused subpoena power over patent examiners. The Federal Circuit has followed the “general rule” that “a patent examiner cannot be compelled to testify regarding his ‘men-

tal processes’ in reaching a decision on a patent application.” *W. Elec.*, 860 F.2d at 432; *cf. United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468–69 (1951); 37 C.F.R. § 104.22(b) (examiner “may not give testimony . . . without the approval of the General Counsel”). As a result, it is more important to fully consider the written prosecution history to understand the nature of the agreement between the patent examiner and the patent applicant. The Federal Circuit’s expanded tangentiality rule, by prioritizing post-hoc attorney argument over the prosecution history record, allows patent owners and their lawyers to run rhetorical circles around the prosecution history while the patent examiner, counterparty to the negotiation—and the representative and defender of the public interest—has no opportunity to respond.

II. THE EXPANDED TANGENTIALITY RULE AT ISSUE IS JUST ONE OF MANY WAYS IN WHICH THE FEDERAL CIRCUIT HAS SIDESTEPPED PROSECUTION HISTORY ESTOPPEL

The Federal Circuit’s acceptance of post-hoc litigation arguments on tangentiality is just one hole in the appellate court’s Swiss-cheese approach to prosecution history estoppel. Despite this Court’s repeated warnings that the estoppel doctrine effectuates “the PTO’s gatekeeping role” and that ignoring estoppel would allow patent owners “to recapture . . . the very subject matter surrendered as a condition of receiving the patent,” *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 734 (2002), the Federal Circuit appears systematically bent on disregarding the prosecution history as a limitation on patent scope.

For example, the Federal Circuit has repeatedly (though inconsistently) applied a “clear and unambiguous disavowal” rule, holding that the prosecution history will not limit the scope of interpretation for a term in a patent claim, even where a scope-surrendering amendment is entered, so long as the patent attorney’s explanation of the amendment “is subject to more than one reasonable interpretation.” *Storage Tech. Corp. v. Cisco Sys., Inc.*, 329 F.3d 823, 833 (Fed. Cir. 2003); *Cioffi v. Google, Inc.*, No. 15-1194, slip op. at 16 (Fed. Cir. Nov. 17, 2015) (citing *Sandisk Corp. v. Memorex Prodsucts, Inc.*, 415 F.3d 1278, 1287 (Fed. Cir. 2005)); *see also IMS Tech., Inc. v. Haas Automation, Inc.*, 206 F.3d 1422, 1439 (Fed. Cir. 2000) (“ambiguity of the patentee’s statements” prevent conclusion “that the patentee clearly disavowed coverage”); *N. Telecom Ltd. v. Samsung Elecs. Co.*, 215 F.3d 1281, 1294 (Fed. Cir. 2000); *Schwing GmbH v. Putzmeister AG*, 305 F.3d 1318, 1324–25 (Fed. Cir. 2002).

Similarly, the Federal Circuit accords nearly no weight when an examiner explains the intended scope of the claims in so-called statements of reasons for allowance. A patent examiner enters such a statement into the record at the time that the examiner allows (that is, approves) a patent application, when the examiner believes that the extant record is insufficient to explain why the invention is patentable. *See* 37 C.F.R. § 1.104(e). One would think this statement, perhaps analogous to a judge’s opinion stating reasons for deciding a case, would be highly probative of the proper construction of the resulting patent in the same way that judicial opinions are probative of the law.

Yet incredibly, the Federal Circuit accords such statements practically no weight: Even when left unrebut-

ted, examiners' statements "do not amount to a clear disavowal of claim scope by the applicant." *Salazar v. Procter & Gamble Co.*, 424 F.3d 1342, 1347 (Fed. Cir. 2005); see also *ACCO Brands, Inc. v. Micro Sec. Devices, Inc.*, 346 F.3d 1075, 1079 (Fed. Cir. 2003) ("[T]he statement of an examiner will not necessarily limit a claim . . .") (citing *Bell Atl. Network Servs., Inc. v. Covad Commc'ns Grp., Inc.*, 262 F.3d 1258, 1273 (2001)).³ One commentator has described this rule, under which "courts are required to all but ignore an examiner's statement of reasons for allowance," as one that "makes no sense" and "should be reversed." Doug Lichtman & Mark A. Lemley, *Rethinking Patent Law's Presumption of Validity*, 60 *Stan. L. Rev.* 45, 46 n.11 (2007). That the reasoning of the patent examiner is wholly discounted in determining the result of patent examination is truly remarkable.

The Federal Circuit thus disregards the prosecution history as a tool for understanding and limiting the scope of patent claims in multiple contexts, of which the recent expansion of the tangentiality doctrine is just one example. The present petitions for certiorari are thus symptomatic of a widespread, generalized defect in the Federal Circuit's approach to patent law and this Court's precedents on use of the prosecution history.

³There does appear to be some inconsistency within the Federal Circuit on this point. See *TorPharm, Inc. v. Ranbaxy Pharm., Inc.*, 336 F.3d 1322, 1330 (Fed. Cir. 2003) ("[T]he public is entitled to equate an inventor's acquiescence to the examiner's narrow view of patentable subject matter with abandonment of the rest."); *Elkay Mfg. Co. v. Ebco Mfg. Co.*, 192 F.3d 973, 979 (Fed. Cir. 1999) (finding disavowal where patent applicant did not respond to examiner's statement of reasons for allowance).

III. PATENT PROSECUTORS TAKE ADVANTAGE OF THE FEDERAL CIRCUIT'S RULES, TO THE DETRIMENT OF THE PUBLIC

These cases are further of national importance because the expanded tangentiality rule allows, and even encourages, patent prosecutors to employ strategic maneuvers to prevent amendments from invoking prosecution history estoppel. This allows patent applicants to unilaterally negate patent claim limitations that an examiner successfully negotiated, further injuring the public interest in maintaining appropriate limits on patents.

Patent applicants can circumvent their disavowals of patent claim scope in at least three ways:

1. Applicants can easily omit information from the written record, even while still presenting substantial arguments to the patent examiner. The petition notes the use of interviews, which allow applicants to explain to the examiner the application and the meaning of the claims off the record. *See* Pet. Cert. 26–27. In one instance when the Patent Office sought to do a better job of recording the content of interviews, a well-known patent attorney published a strategy for circumventing that effort. *See* Gene Quinn, *Examiner Interview Changes Favor In Person Meeting*, IPWatchdog (July 13, 2009), *available online*. Patent applicants can also contact the examiner's supervisor or a special office known as the USPTO Ombudsman to try to facilitate allowance of their patent applications; these communications likely go unrecorded as well. *See* Mindy Bickel, *Keeping the Road Clear: The Patents Ombudsman Program*, Inventors Eye (USPTO), Oct. 2012, *available online*.

2. Even where a diligent examiner does record the agreements reached during patent prosecution, an appli-

cant can still enter further material into the record to confuse the understanding of the examiner's statements. Patent applicants may enter statements into the patent prosecution history record at any relevant time. *See* 37 C.F.R. §§ 1.111–1.127 (providing for applicant's responses and amendments during patent prosecution); § 1.104(e) (permitting applicant to file a response to examiner's statement of reasons for allowance, *see supra* p. 12).

Every one of these responses offers an opportunity for an applicant to introduce ambiguity into the record or to foil an examiner's attempt to explain the record. *See* Richard S. Meyer & James L. Reed, *Respond or Regret: Reasons for Allowance May Prove Damaging If Not Responded to by Applicants Under the New Rule 104(e) Presumption*, 12 Fed. Cir. B.J. 89, 104 (2002) (suggesting “boilerplate response that might be useful in rebutting later presumptions”). In view of such opportunities, an applicant would practically be remiss to make a clear record on whether an amendment is tangential—indeed, to make a clear record on any aspect of an amendment.

3. In cases where the prosecution history of a patent does make clear that an amendment was a non-tangential surrender of claim scope, the applicant can later sidestep that result through a continuation application. In accordance with statutory and Patent Office rules, a patent applicant may file a “continuation” patent application that is treated as if it had been filed at the time of the original application. *See* 35 U.S.C. § 120. Although the original application's file history will be consulted in interpreting a patent resulting from the continuation application, *see Omega Eng'g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1333 (Fed. Cir. 2003), the Federal Circuit has held that a continuation patent that does not share claim terms with

the original may receive a different, potentially broader construction, see *Advanced Cardiovascular Sys., Inc. v. Medtronic, Inc.*, 265 F.3d 1294, 1305–06 (Fed. Cir. 2001).

By filing a continuation patent application and varying the language of the claims (using synonyms of words, for example), the patent applicant can whitewash any undesirable statements in the original patent’s prosecution history, injecting ambiguity into whether prior amendments were tangential among other things. This is a common practice that patent practitioners recommend. See, e.g., *Meyer & Reed, supra*, at 104 n.72; *Hakim v. Cannon Avent Grp., PLC*, 479 F.3d 1313, 1318 (Fed. Cir. 2007) (in continuation, “a disclaimer made during prosecution can be rescinded, permitting recapture of the disclaimed scope”).⁴

These strategies all suggest that, in view of a rule that allows patent owners’ litigation arguments to overcome plain disavowals of claim scope, patent applicants have numerous avenues to obtain patents broader than those permitted by the examiner. This draftsman’s gamesmanship defeats the most basic goals of the patent system, and it should not be tolerated by the patent laws.

⁴So-called “*Hakim* statements” are now routinely filed in continuation patent applications. See Jason B. Scher, *Rescinding Estoppel: The Most Overlooked Means to a Broader Claim Construction*, Carter DeLuca Farrell & Schmidt LLP (July 2, 2015), available online.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari in this case and in *Hospira, Inc. v. Eli Lilly & Co.* and *Dr. Reddy's Laboratories, Ltd. v. Eli Lilly & Co.*, Nos. 19-1058 and -1061, should be granted.

Respectfully submitted,

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