No. 08-964

In The
Supreme Court of the United States

BERNARD L. BILSKI and RAND A. WARSAW,

Petitioners,

v.

JOHN J. DOLL, ACTING UNDER SECRETARY of COMMERCE and INTELLECTUAL PROPERTY and ACTING DIRECTOR, PATENT AND TRADEMARK OFFICE

Respondent.

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

BRIEF OF *AMICUS CURIAE*
CONEJO VALLEY BAR ASSOCIATION
IN SUPPORT OF NEITHER PARTY

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Brief Of *Amicus Curiae*
Conejo Valley Bar Association
In Support Of Neither Party [1]

INTEREST OF THE *AMICUS CURIAE*

Based in the heart of Southern California's 101 Technology Corridor, the Conejo Valley Bar Association draws its membership from local law firms and in-house attorneys serving small, mid-market and large companies. Our members' clients are predominantly high tech, high growth companies in fields such as software, biotech, computer networking, telecommunications and semiconductors. Our members' clients are innovators who vend in some of the world's most competitive markets.

When public policies of the patent system are at issue, the Conejo Valley Bar Association regularly participates as *amicus curiae* in cases before the Court and *en banc* panels of the Court of Appeals for the Federal Circuit. We are unconcerned with the outcome of the cases, though decidedly concerned about the issues. We wish to see the American public benefit from innovation, from technical

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[1] Pursuant to Supreme Court Rule 37.6, Amicus states that no counsel for a party authorized this brief in whole or in part and that no person or entity other than Amicus, its members, and its counsel contributed monetarily to the preparation or submission of this brief. With the consent of the parties, the Conejo Valley Bar Association submits this brief amicus curiae in support of neither party. Copies of the letters of consent are filed with the Clerk of the Court herewith. Originals will be provided in due course.

disclosure, and from competition in product and service markets. In short, we support the purpose of the patent system. The Conejo Valley Bar Association believes that the patent laws should be interpreted in ways that best serve these important public policies.

INTRODUCTION AND SUMMARY OF ARGUMENT

The underlying purpose of patent law is to encourage the development of inventions that provide value and benefit for society. The Patent Act makes clear that if a process is new and useful, it is patentable. Any test to determine which kinds of processes are patentable is unnecessary; all are patentable. Through scrupulous application of other key provisions in the Patent Act, especially 35 U.S.C. §§ 102 (novelty), 103 (obviousness) and 112 (specification), the Patent and Trademark Office and the courts can protect the public from patents that seek to take too much from society. These other provisions of the patent act, not Section 101, serve as a gatekeeper to restrict patents to those inventions that meet the requirements of other key provisions in the Patent Act. If a patent application passes muster under all provisions of the Patent Act, the inventor receives a patent – but only for the "limited times" of the grant mandated by the Constitution and embodied in 35 U.S.C. § 154. Limiting the kinds of patentable processes will reduce the incentive to patent and decrease the number of patentable inventions, causing vital and important inventions to be lost or otherwise secreted from society contrary to the purpose of patent law.

ARGUMENT

"The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and the useful Arts.'"[2]

I. The Statutory Language of § 101 and the Legislative Intent Support a Broad Interpretation of the Term "Process."

The Constitution grants Congress broad power to legislate to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[3] The Constitution expresses a public policy of promoting innovation. In exchange for innovation, the inventor gets ownership of the commercialization of an idea for a limited period of time.

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[2] *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

[3] *Diamond v. Chakrabarty*, 447 U.S. 303, 307 (1980) (citing Art. I, § 8, cl. 8).

Abraham Lincoln stated in his "Second Lecture on Discoveries and Inventions":

> Next came the Patent laws. These began in England in 1624; and, in this country, with the adoption of our constitution. Before then, any man might instantly use what another had invented; so that the inventor had no special advantage from his own invention. The patent system changed this; **secured to the inventor, for a limited time, the exclusive use of his invention; and thereby added the fuel of interest to the fire of genius, in the discovery and production of new and useful things**. (emphasis added)

Congress created the Patent Act to embody these ideals. The law struck a careful balance between competing public and private interests in order to promote innovation. In this regard, the statute promises:

> Whoever invents or discovers **any new and useful process**, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the

> conditions and requirements of this title.[4]

The central inquiry in this case turns on how broadly to construe "*process*" when determining what constitutes patentable subject matter. The Court in *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*[5] and in *Diamond v. Chakrabarty*[6] recognized that § 101 has broad scope.[7] The Court in *Chakrabarty* stated:

> The subject-matter provisions of the patent law have been cast in broad terms to fulfill the constitutional and statutory goal of promoting "the Progress of Science and the useful Arts" with all that means for the social and economic benefits envisioned by Jefferson. Broad general language is not necessarily ambiguous when congressional objectives require broad terms.[8]

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[4] 35 U.S.C. § 101 (emphasis added).

[5] *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124 (2001).

[6] *Chakrabarty*, 447 U.S. 303.

[7] *J.E.M. Ag Supply, Inc.*, 534 U.S. 130-131.

[8] *Chakrabarty*, 447 U.S. 315.

In the middle of the 19th Century, the Court stated: "[A process] is included under the general term 'useful art'. An art may require one or more processes or machines to produce a certain result or manufacture."[9] Later in the 19th Century the Court explained: "A process is an act or mode of acting, . .a conception of the mind, seen only by its effects when being executed or performed."[10] Though these cases do not address the term "process" in § 101, they demonstrate the historically broad interpretation of § 101.

In addition, the legislative intent calls for "process" to be interpreted broadly. In *Chakrabarty*, the Court noted that by choosing expansive terms such as "manufacture," "compositions of matter" and the comprehensive modifier "any" in § 101, Congress intended the patent laws would receive broad scope.[11] Similarly, Congress' intent in choosing an expansive word such as "process" ensured that § 101 would be construed broadly for processes that could be patented.

Section 100(b) also supports a broad construction of "process." The section states that "process" "means process, art, or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material."[12]

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[9] *Corning v. Burden*, 56 U.S. 252, 267 (1854).

[10] *Tilghman v. Proctor*, 102 U.S. 707, 728 (1881).

[11] *Chakrabarty*, 447 U.S. 308.

[12] 35 U.S.C. § 100(b).

If Congress intended a narrow interpretation of "process," it could have defined the term with limiting language. However, Congress nowhere expresses such intent. Instead, §§ 100(b) and 101 use expansive language to define "process." Thus, any narrow interpretation of the term "process," even if only limited to a machine or transformation of matter, is contrary to the language of § 101.

Further, the Court in *Chakrabarty* explained that the legislative history also supported a broad construction of the § 101.[13] In particular, the Court stated:

> The Patent Act of 1793, authored by Thomas Jefferson, defined statutory subject matter as "any new and useful art, machine, manufacture, or composition of matter, or any new or useful improvement [thereof]." The Act embodied Jefferson's philosophy that "ingenuity should receive a liberal encouragement." Subsequent patent statutes in 1836, 1870, and 1874 employed this same broad language. In 1952, when the patent laws were recodified, Congress replaced the word "art" with "process," but otherwise left Jefferson's language intact. The Committee Reports accompanying the 1952 Act inform us that Congress

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[13] *Chakrabarty*, 447 U.S. 308.

> intended statutory subject matter to "**include anything under the sun that is made by man.**"

Thus, an examination of the patent laws and the legislative intent all indicate that the term "process" was included to ensure that any process or method is patentable so long as it withstands the Patent Act's other requirements.

II. The Patent Act Already Limits What Inventions May Be Patented

Instead of the courts inventing their own restrictions on patentable subject matter through interpretation of § 101, the public policy of promoting innovation is best served by allowing the rest of the Patent Act, §§ 102, 103 and 112, to provide the only limits on the types of patentable processes.

A. Inventions Must Be Novel

Section 102 describes the statutory novelty required for patentability:[14]

> A person shall be entitled to a patent unless --
>
> (a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the

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[14] *In re Bergstrom*, 57 C.C.P.A. 1240, 1249 (CCPA 1970).

> invention thereof by the applicant for patent, or
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country more than one year prior to the date of application for patent in the United States. . .[15]

In *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, [16] the Court stated:

> Sections 102(a) and (b) operate in tandem to exclude from consideration for patent protection knowledge that is already available to the public. They express a congressional determination that the creation of a monopoly in such information would not only serve no socially useful purpose, but would in fact injure the public by removing existing knowledge from public use.[17]

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[15] 35 U.S.C. § 102(a) and (b).

[16] *Bonito Boats, Inc.*, 489 U.S. 141 (1989).

[17] *Bonito Boats, Inc.*, 489 U.S. at 148.

Further, in *Pfaff v. Wells Elecs*[18] the Court stated:

> Consistent with these ends, § 102 of the Patent Act serves as a limiting provision, both excluding ideas that are in the public domain from patent protection and confining the duration of the monopoly to the statutory term.

That is, § 102 ensures that even processes that may constitute patentable subject matter under § 101, nonetheless may not deserve patent protection because these processes are not "novel" under § 102. Thus, § 102 serves as one constraint on ensuring that not *any* process receives patent protection.

B. Inventions Cannot Be Obvious Variations of the Prior Art

Section 103's "nonobviousness" requirement further limits patent protection to material that cannot be readily created from publicly available material.[19] Specifically, § 103(a) forbids issuance of a patent when "the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which

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[18] *Pfaff v. Wells Elecs, Inc.*, 525 U.S. 55, 64 (1998).

[19] *Id.* at 150.

said subject matter pertains."[20] Thus, processes that may constitute patentable subject matter under § 101 still may not receive patent protection because they do not withstand the nonobviousness requirements of § 103. The Patent Act therefore provides the necessary limits on the broad term "process" used in § 101.

The Court's recent decision in *KSR* further protects the public from the over breadth concerns that may arise from construing the term "process" broadly:

> The principles underlying these cases are instructive when the question is whether a patent claiming the combination of elements of prior art is obvious. When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability. For the same reason, if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is

[20] *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007).

> obvious unless its actual application is beyond his or her skill.[21]

The Court further recognized that as technologies continue to advance, a new threshold will be used to determine whether the innovation is ordinary or nonobvious.[22] Specifically, the Court stated:

> We build and create by bringing to the tangible and palpable reality around us new works based on instinct, simple logic, ordinary inferences, extraordinary ideas, and sometimes even genius. These advances, once part of our shared knowledge, define a new threshold from which innovation starts once more. And as progress beginning from higher levels of achievement is expected in the normal course, the results of ordinary innovation are not the subject of exclusive rights under the patent laws. Were it otherwise patents might stifle, rather than promote, the progress of useful arts. See U.S. Const., Art. I, § 8, cl. 8. These premises led to the bar on patents claiming obvious subject matter established in Hotchkiss and codified in § 103. **Application of the bar must not be confined**

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[21] *KSR*, 550 U.S. 417.

[22] *Id.* at 427.

> **within a test or formulation too constrained to serve its purpose**.[23]

As the Court recognized in *KSR*, imposing constraints risks not achieving the constraint's purpose. Just as the "teaching, suggestion, motivation" (TSM) test for nonobviousness was too constraining, a narrow interpretation of "process" also will be too constraining when deciding what constitutes patentable subject matter.

C. The Invention Must Be Fully Disclosed

Section 112 limits patents to those which provide full disclosure of the invention:

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.[24]

Thus, through § 112, Congress limited patent protection only to those patents having a clear

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[23] *Id.* (emphasis added).

[24] 35 U.S.C. § 112, ¶ 1 .

description of the invention. The patent must provide enough description to enable others to make and use the invention. Finally, the patent must also disclose the best mode of carrying out the invention. These requirements ensure that patentees do not receive overly broad scope in patent protection. Instead, they only receive protection for what they really invented. Consequently, the public receives a full and fair disclosure in exchange. Therefore, *any* process may constitute patentable subject matter, but it will receive patent protection only if it meets all other requirements of the Patent Act, including §§ 102, 103 and 112.

D. Inventions Must Be Useful

In *Brenner v. Manson*[25], the Court explained:

> The basic *quid pro quo* contemplated by the Constitution and the Congress for granting a patent monopoly is the benefit derived by the public from an invention with substantial utility. Unless and until a process is refined and developed to this point - where specific benefit exists in currently available form - there is insufficient justification for permitting an applicant to engross what may prove to be a broad field.[26]

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[25] *Brenner v. Manson*, 383 U.S. 519 (1966).

[26] *Id.* at 534-35.

Section 101 explicitly limits patent protection to those processes that have utility by requiring, "Whoever invents or discovers any new and *useful* process" should be entitled to patent protection.[27] As such, § 101 does not allow all processes to receive patent protection -- only those processes that provide some *utility*. The Court in *Brenner* recognized that allowing inventors to receive a patent on a process that did not have any utility would enable inventors to obtain a hunting license.[28] That is, it would reward them merely for searching for some invention, regardless of whether the invention provided any benefit to the public.[29]

III. The Patent Act Includes an Absolute Limit on Any Patent that Overcomes the Hurdles of Novelty, Nonobviousness and Disclosure

Patents are not diamonds: unlike diamonds, patents do not last forever. In time, patents expire. Through the simple mechanism of expiration, the framers in the Constitution and Congress in the Patent Act provided absolute limits on what is patented. Under § 154, most patents expire twenty years after the inventor first applied for patent protection. Thus, even if an invention passes the novelty, nonobviousness and usefulness tests, and

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[27] 35 U.S.C. § 101

[28] *Brenner*, 383 U.S. at 534-35.

[29] *Id.*

the patent specification satisfies the disclosure requirements, no matter how big or small the invention, the patent will expire.

Experience shows that patent applications are not all treated equally, and, in practice, patent pendency varies. The PTO's published statistics demonstrate that examination of applications for patents in some areas of technology take longer than applications in other areas. Congress and the PTO through resource allocation have in effect controlled the patent term of different types of inventions. The time from filing of a patent application to its grant for business methods are the longest. Pendency can grow for many different reasons. The PTO's own backlog leads to deferral of the start of examination on many patent applications. PTO procedures requiring several patent examiners to review allowance of patents in some fields also delays the grant of patents and limits the scope of their claims. Although informal, these procedures suppress some types of patents and have been particularly effective against business method applications. This is long-standing practice, and one which Congress certainly knows and can control. Clearly, there is no need for the Judiciary Branch to intervene.

IV. Limiting the Kinds of Patentable Processes Can Only Be Overreaching Judicial Legislation

Any tests by the judiciary to limit processes deemed patentable are directly contrary to the language and intent of the Patent Act. The Patent Act says what it means and means what it says

when it states that a patent may be obtained for "**any** new and useful process."

The Patent Act does not recite that only chemical processes may be patented. The Patent Act does not recite that only processes performed by a machine may be patented. The Patent Act does not recite that only processes performed by a human may be patented. The Patent Act does not recite that business methods and software may not be patented. The Patent Act simply recites that "**any** new and useful process" may be patented.

There is no basis in the Patent Act or its history that hints that the kinds of processes that are patentable subject matter should be less than "any." Reading limitations that Congress did not intend into the statute runs the risk of stifling innovation instead of encouraging innovation. Inventors and investors need encouragement to invest in research and innovation. They should know their successful research and innovation will be rewarded. Narrowly interpreting "process" hinders inventors from passionately pursuing their ideas since there would be no reward for investing time, capital, resources and effort in pursuing their innovative ideas.

The Patent Act reflects a balance created by Congress between public and private interests, one which this Court has been loathe to alter.[30] By

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[30] *See Stewart v Abend*, 495 U.S. 207, 230 (1990) ("it is not our role to alter the delicate balance Congress has labored to achieve").

excluding business method inventions and other kinds of processes from patentability, companies will be forced to maintain more valuable knowledge in secrecy. This will decrease the pool of prior art and will create little incentive for inventors to disclose their inventions. The underlying Constitutional purpose of the patent system and Congress' balances will be upset. "Calibrating rational economic incentives, however, like fashioning new rules in light of new technology is a task primarily for Congress not the courts."[31]

It is within the purview of Congress to change what constitutes patentable subject matter.[32] This is not a judicial task.

CONCLUSION

In sum, a broad interpretation of the term "process" is essential to maintain the public policy of promoting innovation. If the process passes the tests Congress established in §§ 102, 103 and 112, it is patentable. The Patent Act neither expresses nor mandates any further test. "[T]he applicant whose invention satisfies the requirements of novelty, nonobviousness, and utility, and who is willing to reveal to the public the substance of his discovery

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[31] *Eldred v. Ashcroft*, 537 U.S. 186, 207 (2003).

[32] In addressing changes to the Copyright Act, the Court reached the same conclusion: "The [Copyright Term Extension Act] reflects judgments of a kind Congress typically makes, judgments we cannot dismiss as outside the Legislature's domain." *Id*. at 205.

and 'the best mode . . . of carrying out his invention,' is granted 'the right to exclude others from making, using, or selling the invention throughout the United States' for a limited time."[33] Accordingly, the public policy of promoting innovation is best served by defining the term "process" broadly in § 101 and not limiting the term in any manner. Let §§ 102, 103, and 112 remain the limitation on patentable subject matter.

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[33] *Bonito Boats*, 489 U.S. at 150 (citation omitted).

For the foregoing reasons, we, the Conejo Valley Bar Association, urge the Court to reject the Federal Circuit's machine-or-transformation test, and any test for patentability, except those expressed in the Patent Act.

Respectfully submitted,

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***Respondent*.**

AFFIDAVIT OF SERVICE

I, Teodora I. Mihaylova, of lawful age, being duly sworn, upon my oath state that I did, on the August 3, 2009, hand filed with the Clerk's Office of the Supreme Court of the United States forty (40) copies of this Brief of *Amicus Curiae*, and further sent, via UPS Ground, three (3) copies of said Petition to:

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***Respondent*.**

AFFIDAVIT OF COMPLIANCE

This Brief of *Amicus Curiae* has been prepared using:

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