

No. 13-298

IN THE
Supreme Court of the United States

ALICE CORPORATION PTY LTD.,
Petitioner,

v.

CLS BANK INTERNATIONAL, ET AL.,
Respondents.

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

**BRIEF FOR RICHRELEVANCE, INC.,
COUPA SOFTWARE, INC., AND TRULIA, INC.,
AS AMICI CURIAE
SUPPORTING RESPONDENTS**

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**BRIEF FOR RICHRELEVANCE, INC.,
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INTEREST OF THE AMICI CURIAE¹

Amici are leading technology companies. Each of them has brought innovative products and services to market. And each of them has faced aggressive litigation from plaintiffs claiming that amici infringe their patents by practicing the plaintiffs' patented business methods, or by running software programs on a computer or encoding software on a disk.

RichRelevance, Inc., is the global leader in omnichannel personalization. RichRelevance works with the world's leading retail brands to customize the experience of shopping those brands' websites. RichRelevance's software can provide personalized product recommendations, offer consumer-targeted promotions, and display products in an order based on each shopper's preferences.

Coupa Software, Inc., delivers an innovative software-as-a-service (SaaS) suite of financial applications that help organizations effectively manage their spending. Coupa works with a broad range of customers, from Fortune 100 to medium-sized business across many industries. The Coupa applications help employees purchase the items they require in

¹ Letters reflecting the parties' consent to the filing of amicus briefs are on file with the Clerk. No counsel for a party authored any portion of this brief. No party and no other entity, except *amici* and their counsel, made any monetary contribution toward the preparation or submission of this brief.

an efficient, intuitive manner while maintaining appropriate controls.

Trulia, Inc. is a leading online real estate marketplace that is redefining the home search experience for consumers and changing the way that real estate professionals build their businesses.

SUMMARY OF ARGUMENT

The Court should reaffirm the central requirement that to be patent-eligible, a claimed invention based on an abstract idea must concretely apply and build on the idea, not merely yoke it to a general-purpose computer or a disk containing software. Robust scrutiny of computer and software patents founded on abstract ideas will meaningfully protect the technology industry by reinforcing the important early escape from expensive infringement litigation that Section 101 of the Patent Act provides.

I. Patents protect inventions, not ideas. Just as a patent cannot claim an abstract idea, it cannot claim an abstract idea limited to a particular context. Yet despite this prohibition, patentees increasingly seek to patent computer software by describing a real-world process and claiming *any* computer, or *any* disk containing *any* instructions, capable of carrying out that process in any way. Such patents add nothing to the real-world process but a self-imposed scope limitation. Where the real-world process is an ineligible abstract idea, tying it generally to a computer does nothing to change that. Allowing abstract ideas to be made patentable by such means would allow “the drafter’s art” to triumph over this Court’s patent-eligibility doctrine

and, potentially, broadly preempt all productive use of certain abstract ideas.

The Federal Circuit has left considerable room for manipulation by merely asking, *e.g.*, whether the computer “plays a meaningful role” in the patented process. *Ultramercial, Inc. v. HULU, LLC*, 722 F.3d 1335, 1349 (Fed. Cir. 2013). But a computer can play a meaningful role even in clearly ineligible claims—imagine patents for any use of a computer in solving trigonometric equations, or the use of a computer in playing Bingo. The latter example is no exaggeration. *See Planet Bingo, LLC v. VKGS, LLC*, No. 1:12-CV-219, 2013 WL 4427811 (W.D. Mich. Aug. 19, 2013).

For a computer-based limitation to make an otherwise abstract idea patentable, the limitation must be addressed to the *how* and not just the *what*. Claiming a computer that performs certain real-world steps, by any path or process, is no different from claiming the real-world steps themselves. And when those real-world steps are as abstract as communication, calculation, or memory, the computer does nothing to solve the abstraction. To be patent-eligible, the invention must explain and claim the way in which the computer or software implements the idea, not the mere combination of the computer and the idea.

II. A potent patent-eligibility doctrine is critical, because it provides an early exit from increasingly expensive patent litigation. All litigation is expensive, but patent litigation is especially expensive. The expense is intensified by the fact that many patent cases are brought in districts with highly compressed pretrial schedules, where litigants must pre-

pare for trial even while summary judgment motions are still being briefed. Holders of invalid patents seek to use this expense to their advantage, calculating that litigants will agree to settle even claims based on weak patents rather than face the expense of defense or the risk of a ruinous injunction if the defense fails. The result is a *de facto* tax on innovation, and one that hits growing technology companies like *amici* especially hard.

Almost alone among patent defenses, Section 101 can cut off this expense via early review as a matter of law. District courts can often decide Section 101 questions on motions to dismiss, or alternatively on early, pre-claim-construction motions for summary judgment. Section 101 defenses also lend themselves to interlocutory review. In contrast, claim construction and additional factual development are required for most Section 102 and 103 patentability defenses. In many cases, factual disputes mean that such defenses can be resolved only at trial, or with trial looming. That does nothing to combat the incentive to settle for substantial figures even when the patent-in-suit is plainly weak.

By providing an early check on ineligible patents and reducing the chance that patent litigation will be punitively expensive regardless of outcome, Section 101 increases the chance that ineligible patents will be reviewed and invalidated. Such invalidations return abstract ideas to the public domain where they belong, opening them up for further innovation.

ARGUMENT

I. Claiming A Computer Does Not Render An Abstract Idea Patentable

Far too often, lower courts applying this Court’s test have treated the mere *involvement* of a computer, or computer software, as sufficient to render an abstract idea concrete. Those decisions do not faithfully apply this Court’s robust approach to examining patent eligibility. The mere presence of a computer in a “meaningful role” is not a significant limitation; neither is a recitation that the computer’s involvement makes the abstract idea more rapid or more marketable. What separates patentable computer-based applications from abstract ideas is giving the computer an *indispensable* role. In general, the invention must specify *how* the computer or software implements the invention, using particular steps and not others, not just *what* the end product of the computer’s implementation is. Claiming every conceivable way (and teaching none of the ways) by which a computer implements a real-world step, such as electronic communication or data storage, is no different from a patent on human interaction or memory—clearly too abstract to be patent-eligible.

A. Ideas Are Not Patentable; Only Applications of Ideas Are

Ideas are not patentable, standing alone—not even good ideas. That is especially true of ideas that exist at such a high level of abstraction that they are properly deemed to be part of the general “storehouse of knowledge.” *Funk Bros. Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127, 130 (1948). Ideas such as “I buy low and sell high” (Tr. of Oral Arg. 10:9,

Bilski v. Kappos, No. 08-964) may not be laws of nature like $E=mc^2$, but they are not patentable, and for essentially the same reason: no inventor deserves the credit for isolating that general notion, and no patentee deserves the right to exclude others from using it during the term of a U.S. patent. They are treated “as though [they] were a familiar part of the prior art.” *Parker v. Flook*, 437 U.S. 584, 592 (1978) (*Flook*).

Only when an abstract idea is applied as a concrete invention in a particular context does a patentable invention emerge. In this way, an abstract idea is “a motive” for further development into a patentable invention. *Gottschalk v. Benson*, 409 U.S. 63, 67 (1972) (*Benson*) (quoting *Le Roy v. Tatham* 55 U.S. (14 How.) 156, 175 (1852)). Thus, this Court has held, patent protection exists for “the *application* of [a non-patentable concept] to a new and useful end.” *Id.* (quoting *Funk Bros.*, 333 U.S. at 130) (emphasis added).

Moreover, this Court has properly distinguished “applications” of an abstract idea, which can be patentable, from mere self-restraint in claiming only a portion of an abstract idea, which cannot. The patentable invention must *add something* to the abstract idea, not take something away from it. *Flook*, 437 U.S. at 591. “Buy low, sell high *in the sorghum market*” is just as unpatentable as “buy low, sell high” would be as a general matter. In other words, just because a patentee has made a more specific *claim*, by limiting it to a particular context, does not mean that the patentee has made a specific *invention* rather than merely restating the abstract idea in a limited context. In particular, an inventor cannot

establish patent eligibility by “attempting to limit the use of the formula,” or the abstract idea, “to a particular technological environment.” *Bilski v. Kappos*, 130 S. Ct. 3218, 3230 (2010).

Thus, for example, in *Flook* the invention consisted of a mathematical algorithm or formula. 437 U.S. at 585-86. “[T]he claims cover[ed] a broad range of potential uses of the method”—every use involving the catalytic conversion of hydrocarbons—but did not “cover every conceivable application of the formula.” *Id.* at 586. The patent applicant’s self-restraint in limiting himself to one (capacious) context, catalytic conversion of hydrocarbons, did not make his claim patentable. *Id.* at 594-95. This Court made clear that this context-limitation added nothing to the formula—the patent application did not, for example, explain a particular means of using the formula in that context, but covered any process implementing the formula for hydrocarbon catalytic conversion. *Id.* at 586. As this Court cautioned, allowing that sort of limitation to convert an abstract idea into a patentable process “would make the determination of patentable subject matter *depend simply on the draftsman’s art* and would ill serve the principles underlying the prohibition against patents for ‘ideas’ or phenomena of nature.” *Id.* at 593 (emphasis added).

**B. Clever Patentees Frequently Use
Computer Or Software Elements To
Disguise Their Attempts To Claim
Abstract Ideas**

Patentees have not given up seeking to use “the draftsman’s art” to circumvent the prohibition on pa-

tenting abstract ideas. Computers and their software have become favorite tools of the draftsman's art. All too often, a reference to a computer or a CD-ROM is affixed to a claim that does not involve computers, software, or the Internet in *any other way*. That is just the sort of self-imposed limitation that the Court rejected in *Flook*. Yet it is a common strategy.

This strategy is at its most transparent in patents in which the independent patent claim concerns a method of doing something that has nothing to do with a computer (*e.g.*, managing a life insurance policy). The independent claim may then be followed by a dependent claim “requiring that the method be ‘performed by a computer.’” *Bancorp Servs., L.L.C. v. Sun Life Assurance Co. of Can.*, 687 F.3d 1266, 1271 (Fed. Cir. 2012); *cf.* Pet. App. 167a (Prost, J., panel dissent) (“[T]he representative method claim does not even recite the use of a computer. And while some of the dependent claims recite computers, the specification shows that the use of computers is simply incidental.”). The patent does not specify in any way *how* the method is to be performed by a computer: no hardware specifications, no software programming instructions, and no discussion of how the computer would carry out particular real-world steps such as “storing the policy unit value for the current day.” *Bancorp Servs.*, 687 F.3d at 1272.

Software patents follow the same trend. The Federal Circuit and Patent Office have for a number of years allowed patentees to obtain patents containing “a so-called ‘Beauregard claim.’” *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1373 (Fed. Cir. 2011). “A Beauregard claim—named after *In re*

Beauregard, 53 F.3d 1583 (Fed. Cir. 1995)—is a claim to a computer readable medium (e.g., a disk, hard drive, or other data storage device) containing program instructions for a computer to perform a particular process.” *Id.* Such claims are a way of trying to turn method claims into “manufacture” claims. *Id.* at 1374. But some *Beauregard* claims do not claim any *particular* instructions, or specify how the real-world steps of the method are to be implemented through software.

Thus, for instance, in *CyberSource*, the patent claimed *any disk* containing *any software* that in *any way* carried out the steps specified in the patent. And those steps were real-world steps rather than software steps: “obtaining information” about transactions, “constructing a map” from that information, and “utilizing the map” to answer a question. 654 F.3d at 1374. These steps, of course, describe nothing more than a general approach to thinking about and solving a problem. *Id.* at 1373. As the Federal Circuit explained, “[s]uch a method that can be performed by human thought alone is merely an abstract idea and is not patent-eligible.” *Id.* The patentee’s self-imposed limitation on this general approach—confining the claim to any computer program implementing it by any path—added nothing to the abstract idea, and could not render it patentable. *See id.* at 1375.

The same is true in this case: petitioner’s computer-readable medium claims are “merely method claims in the guise of a device,” and the method in question has no essential connection to a computer. Pet. App. 34a (Lourie, J.). Far from building a concrete application on the abstract idea of an “escrow

service,” the computer-readable medium claims here represent nothing more than a self-imposed limitation of the “escrow” idea to the computer context.

C. Involving A Computer Does Not Make An Idea Less Abstract

The Federal Circuit has tried to respond to this problem, but the verbal formulation it has developed—requiring that the computer “play[] a meaningful role” in the patented process—is inadequate. *Ultramercial*, 722 F.3d at 1349. There are various ways in which a computer can be *involved* without being part of the patentable *innovation*. Consider, for example, applying mathematical principles or other abstract ideas to manipulate certain data that exist only on a computer. The computer “plays a . . . role” in the claimed invention, but the computer does not meaningfully add to the abstract idea. Rather, what is claimed is the mathematical or other abstract principle by which the data are manipulated. And that is no different from the patent application this Court rejected in *Benson*, 409 U.S. at 71-72, for converting data using a computer. Thus, it did not matter in *CyberSource* that the data being mapped and analyzed were *IP address* data, rather than *street address data*, even though the involvement of computers is necessary to generate or identify an IP address. 654 F.3d at 1370.

Similarly, a method of estimating an object’s location that involves measuring the distance between the object and certain specified points, and then doing the necessary calculations to triangulate the object’s position, could be implemented equally well whether the object to be located is a computer or a

toaster. The idea may be more *useful* or *marketable* for a computer than for a toaster. But it is still an abstract idea involving mathematical formulae. A patent’s claim for such a method gains nothing from a limit for use only to locate computers—such a limit is a mere self-imposed limitation.

Yet under the Federal Circuit’s current haphazard law, all too often the wholly superficial involvement of a machine such as a computer is deemed sufficient. The method of estimating location just discussed is a real-world example: the Federal Circuit upheld a patent for calculating position and time using a GPS receiver, and it emphasized that a “GPS receiver is a machine and is integral to each of the claims at issue.” *SiRF Tech., Inc. v. ITC*, 601 F.3d 1319, 1332 (Fed. Cir. 2010). Without the receiver, the Federal Circuit said, it would be impossible to estimate the distance between that receiver and the satellite sending signals to it. *Id.* That is wholly circular logic that in no way distinguishes the GPS receiver from a toaster. Perhaps the GPS invention was patentable under a proper analysis, *e.g.*, if it relied on data that *only a GPS receiver* could provide. But that is not what the Federal Circuit said.

The federal courts have regularly seen this phenomenon in the context of doing business over the Internet. E-commerce is still commerce, and “the common storehouse of knowledge” includes centuries of information about how vendors and customers do business with one another. Taking orders or complaints over the Internet is not *intrinsically* any different from taking orders or complaints over the telephone or by mail—patents for such activities are abstract ideas, and patents for such activities *on the*

Internet merely add a self-imposed limitation to those underlying ideas. See, e.g., *Whitserve, LLC v. Computer Packages, Inc.*, 694 F.3d 10, 40 (Fed. Cir. 2012) (Mayer, J., dissenting) (contending that patents-in-suit were invalid under Section 101 because they “simply describe[d] a basic and widely-understood concept—that it is useful to provide people with reminders of important due dates and deadlines—and then appl[ied] that concept using conventional computer technology and the Internet”), *cert. denied*, 133 S. Ct. 1291 (2013). On the other hand, an invention likely is patent-eligible if it directs its claims to some aspect specific to e-commerce or computing that makes the invention an improvement over the prior art, adding a specific application to the underlying abstract idea.

D. If Patent Eligibility Depends On The Presence Of A Computer, The Invention Must Be Directed To The Computer As A Meaningful Limitation On The Claim

If patent eligibility depends on the presence of a computer—*i.e.*, the patentee claims that the computer takes the invention out of the realm of abstract ideas—the presence of the computer must impose “meaningful limits on the claim’s scope.” *In re Bilski*, 545 F.3d 943, 961 (Fed. Cir. 2008), *aff’d*, 130 S. Ct. 3218 (2010). Thus, the invention must be directed to the computer as a unique part of the solution or as an improvement in computer technology. *Cf. Ultra-mercial*, 722 F.3d at 1348 (reciting these concepts but ultimately allowing a much more permissive test). For example, an invention that specified *how* it will be implemented on a computer, using particular steps and not others, would be patentable. An inven-

tion that claims *what* the computer will accomplish but not *how* cannot be patentable under this Court's cases.

For instance, software patents that actually *claim particular software*, rather than what the software *accomplishes*, are more likely directed to the software than to the (abstract) method being implemented. Patentees are perfectly capable of claiming particular details of software architecture, specific to particular software environments. *See, e.g., Nazomi Commc'ns, Inc. v. Samsung Telecomms., Inc.*, No. C-10-05545, 2012 U.S. Dist. LEXIS 39468, at *7 (N.D. Cal. Mar. 21, 2012). Such a claim does not broadly preempt every possible way of accomplishing a particular goal; it leaves inventors free to develop and market their own design to accomplish the same goal. And, crucial to the patent-eligibility analysis, they add content to any underlying abstract ideas by specifying a particular way of implementing them.

Similarly, inventions that claim a particular, improved way of performing a particular function using a computer do not pose the preemption problem—almost by definition, because they leave available the old way of doing things. For instance, in *Research Corp. Technologies v. Microsoft Corp.*, 627 F.3d 859 (Fed. Cir. 2010), the challenged methods produced “higher quality halftone images while using less processor power and memory space,” *id.* at 865. Because those methods “plainly represented improvements to computer technologies in the marketplace,” *Bancorp*, 687 F.3d at 1279 (citing *Research Corp.*, 627 F.3d at 865), the computer-implemented aspect of the claim added significantly to the algorithms in-

volved in the rendering process, and was a meaningful limitation on the claim.

Improving what computers do differs dramatically from improving on what *humans* do. As this Court has explained, and the Federal Circuit sometimes has agreed: simply because a computer does a task faster and better than a human could, or an army of humans could, does not make the use of “a computer,” writ large, into a limiting application of an otherwise abstract idea. *See, e.g., Benson*, 409 U.S. at 65 (noting that a computer “solv[es] a problem by doing arithmetic as a person would do it by head and hand”); *Bancorp*, 687 F.3d at 1279 (a computer does not make invention patent-eligible where “the computer simply performs more efficiently what could otherwise be accomplished manually”); *Planet Bingo, LLC*, 2013 WL 4427811, at *11 (“[T]he use of a computer in the method claims adds nothing more than the ability to manage a game of Bingo more efficiently.”). Were it otherwise, virtually *every* complex natural law would become patentable, because as a practical matter the intensive calculations necessary to calculate complex statistical relationships or galactic movements can be done only by computers. That is not the law.

II. Robust Patentability Doctrine Provides Patent Defendants With Needed Protection Against Skyrocketing Litigation Costs

Petitioner argues for a lenient rule of patent eligibility that would allow its claims to survive review under Section 101. But never fear, petitioner insists—other defenses under the Patent Act will solve

the problem that a lenient rule of patent-eligibility would create, by invalidating patents that are anticipated, obvious, or subject to some other statutory defense. *See, e.g.*, Pet. Br. 2-4, 42; *see also, e.g.*, AIPLA Br. 12-13; Pet. App. 111a (Newman, J., concurring in part, dissenting in part) (asserting that any patent that recites a statutory subject matter should survive the test of Section 101); *id.* at 129a-130a (Rader, C.J., additional reflections). This Court has heard such reassurances before, and has properly—and unanimously—rejected them because they would leave Section 101 “a dead letter.” *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1303-04 (2012).

Section 101 is not just one of the “explicit conditions” on which patentability depends. *Graham v. John Deere Co.*, 383 U.S. 1, 12 (1966). It is a crucial one. Weakening that limitation would remove an important brake from a patent-litigation system that is already threatening to careen out of control. Section 101, almost uniquely among the defenses that a patent defendant can raise, can spare the defendant much of the cost of *litigation* as well as the threat of *liability*. It is a question of law; it is susceptible to early resolution by the court before money is sunk into the most extensive phases of the case; and it may even be suitable for interlocutory review. By contrast, the defenses that petitioner cites, given their frequently fact-intensive nature, may cost more to litigate than the infringement case. They generally will be submitted to a jury at the same time as the infringement case and, often, the damages evidence. And appellate review most often comes only after an

adverse verdict—which in patent cases can be in the billions.²

The Court cautioned in *Bilski* that “[i]f a high enough bar is not set when considering patent applications” for business methods under Section 101, “patent examiners and courts could be flooded with claims that would put a chill on creative endeavor and dynamic change.” 130 S. Ct. at 3229. One key reason why that “high . . . bar” is useful is that a patent must clear it relatively early in the process. Lowering the “high . . . bar” of Section 101, on the theory that defendants can rely on anticipation, obviousness, and other such defenses, risks allowing litigation costs to impose exactly the “chill on creative endeavor” that this Court feared.

A. The Cost Of Patent Litigation Poses A Grave Threat To The Technology Industry

Patent litigation is a tax on innovation—a hefty one that only keeps increasing. A high-stakes patent case can easily cost the defendant \$4 million or more to litigate through trial.³ And because modern products embody hundreds or even thousands of different

² See, e.g., *Carnegie Mellon Univ. v. Marvell Tech. Grp., Ltd.*, No. 09-290, ECF No. 762 (W.D. Pa. Dec. 26, 2012) (jury award of \$1.17 billion, potentially subject to enhancement under 35 U.S.C. § 284).

³ In a 2013 survey, the *median* cost of trying a patent case against a non-practicing entity (“patent troll”), with more than \$25 million at stake, was \$4 million. That means half of the 87 cases included in the survey cost more. Cases in some geographic areas cost more than \$9 million. See Am. Intellectual Prop. Law Ass’n, *Report of the Economic Survey 2013*, at I-148 (2013) (AIPLA *Economic Survey*).

technological innovations,⁴ technology companies like *amici* may face repeated patent lawsuits, any one of which could conceivably result in an injunction crippling a key product, or a massive damages award. Patent litigation continues to be the fastest-growing category of litigation, with the number of cases filed more than doubling between 2003 and 2013.⁵

Many of these lawsuits are brought by entities that seek to use the cost of litigation to their advantage: because testing even a weak patent in court can be both expensive and risky, they calculate that many defendants will agree to pay a monetary settlement and an ongoing royalty.⁶ The cost of litigating or settling thus becomes deadweight loss, increasing the costs for consumers and damaging the incentives to invest in innovation. See Nat'l Research Council of the Nat'l Academies, *A Patent System for the 21st Century* 95 (Stephen A. Merrill, Richard C. Levin & Mark B. Myers eds., 2004). Conversely, facilitating early resolution of weak patent cases lowers the expected litigation costs and promotes innovation.

⁴ “A single computer program may contain hundreds or thousands of components or elements; a computer chip may have millions of parts.” *Perspectives on Patents: Post-Grant Review Procedures and Other Litigation Reforms: Hearing before the Subcomm. on Intellectual Prop. of the S. Comm. on the Judiciary*, 109th Cong. 44-45 (2006) (statement of Mark Chandler, Senior Vice President and General Counsel, Cisco Systems).

⁵ Compare Admin. Office of U.S. Courts, *Caseload Statistics 2003*, Table C-2 (Mar. 31, 2003), at 44, with Admin. Office of U.S. Courts, *Caseload Statistics 2013*, Table C-2 (Mar. 31, 2013), at 4.

⁶ Jeremiah Chan & Matthew Fawcett, *Footsteps of the Patent Troll*, 10 *Intell. Prop. L. Bull.* 1, 3, 4 (2005) (Chan & Fawcett).

Validity challenges are particularly important in this context, precisely because many of the patents in question are so broadly drafted as to preempt entire areas of scientific exploration.⁷ But as this Court has observed, “it is often more difficult”—and hence more expensive—“to determine whether a patent is valid than whether it has been infringed.” *Cardinal Chem. Co. v. Morton Int’l*, 508 U.S. 83, 99 (1993).

A substantial amount of the cost of litigation is attributable to trial and preparing for trial after the close of discovery. A recent survey found that the median cost of patent litigation was almost double the median cost of getting through discovery.⁸ And discovery itself contributes to soaring costs. For the highest-dollar cases, the median cost of getting through discovery was \$3 million.⁹ As this Court has observed, especially in cases that do not go to trial, the expense of discovery is the primary driver of cost. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007).

While summary-judgment motions on other defenses sometimes are an option, as discussed further below, as a practical matter much of the pretrial expense has already been incurred before a summary judgment motion can be filed or decided. *See, e.g.*, Jay P. Kesan & Gwendolyn G. Ball, *How Are Patent Cases Resolved? An Empirical Examination of the Adjudication and Settlement of Patent Disputes*, 84 Wash. U. L. Rev. 237, 246 (2006) (concluding based on the empirical evidence that “all rulings, including

⁷ Chan & Fawcett at 4.

⁸ *See* AIPLA *Economic Survey* I-135, I-136.

⁹ AIPLA *Economic Survey* I-135.

grants of summary judgment, appear to be expensive”).

Indeed, in some circumstances a portion of the *trial* expense has already been incurred before summary judgment. That problem is attributable in part to the rise of “rocket dockets,” such as the Eastern District of Texas, which force patent litigation into a compressed schedule. While “compressed” might sound like the same thing as “cheap,” in practice a rocket-docket schedule deprives the parties of the ability to sequence their case to litigate defenses early, even very strong defenses. “[T]he high volume of work and the limited period of time does not permit incrementalism,” so litigants generally must “allocate trial-sized teams from the outset.” Saurabh Vishnubhakat, *Reconceiving the Patent Rocket Docket: An Empirical Study of Infringement Litigation 1985–2010*, 11 J. Marshall Rev. Intell. Prop. L. 58, 62 (2011). Summary judgment motions may not be briefed until just a few weeks before trial,¹⁰ and decided on the very eve of trial.

Thus, any tool allowing for early challenges to weak patents is potentially extremely valuable—not just to particular defendants, but to the technology industry as a whole. The prospect of an early challenge diminishes the *in terrorem* effect of litigation. And when such a challenge is successful, it may provide relief to more than one defendant. See *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313 (1971) (once a patent is invalidated, issue pre-

¹⁰ See, e.g., Dabney J. Carr, IV & Robert A. Angle, *Litigating Patent Infringement Cases in the “Rocket Docket” of the Eastern District of Virginia*, Intell. Prop. & Tech. L.J., June 2010, at 16.

clusion bars asserting it against other defendants as well).

As discussed below, this Court's jurisprudence under Section 101, particularly in recent years, has offered an increasingly useful means to challenge weak patents and to avoid potentially millions of dollars in legal expenses.

B. Patentability Under Section 101 Is A Question Of Law, Which The Courts Decide Free Of Any Presumptions

Eligibility under Section 101 lends itself to early resolution. It requires no factually intensive comparison between the patent claims and the prior art, and it is ultimately a question of law: do the patent claims fit the statutory subject matter, or do they fall into one of the exceptions, as construed by this Court?

For that reason, district courts have been willing to resolve Section 101 questions on motion to dismiss, often quite early in the case.¹¹ While in almost any other area of the law a motion to dismiss would hardly be remarkable, these Section 101 decisions are notable in the patent context because successful motions to dismiss are relatively rare in patent litigation. *See* Fed. Jud. Ctr., *Manual for Complex Litiga-*

¹¹ *See, e.g., Cardpool, Inc. v. Plastic Jungle, Inc.*, No. C 12-04182, 2013 WL 245026, at *1 (N.D. Cal. Jan. 22, 2013), *aff'd*, No. 2013-1227, 2014 WL 322026 (Fed. Cir. Jan. 30, 2014); *OIP Techs., Inc. v. Amazon.com, Inc.*, No. C-12-1233, 2012 WL 3985118, at *1 (N.D. Cal. Sept. 11, 2012); *see also Clear with Computers, LLC v. Dick's Sporting Goods, Inc.*, No. 6:12-CV-674, ECF No. 116 (E.D. Tex. Jan. 21, 2014) (granting Rule 12(c) motion for judgment on the pleadings).

tion (Fourth) § 33.23, at 618 (2004) (*Manual for Complex Litigation*) (noting that complaints and answers in patent cases are usually so “generalized” as to be “of little assistance to the court or the parties”). Unlike most other patent questions, failure to satisfy Section 101 is the sort of “basic deficiency” that can and should be identified on a Rule 12 motion, “at the point of minimum expenditure of time and money by the parties and the court.” *Twombly*, 550 U.S. at 558 (citations omitted).

A panel of the Federal Circuit has recently sought to throw cold water on the notion that patent eligibility can be litigated at the pleading stage. See *Ultra-mercil, Inc.*, 722 F.3d at 1338-40. The Federal Circuit opined that dismissal is improper unless “the *only* plausible reading of the patent [is] that there is clear and convincing evidence of ineligibility.” *Id.* at 1339. That rationale is—to say the least—in considerable tension with the well-established principle that both patentability and claim construction are questions of law.

Congress has codified a statutory presumption that a patent is valid, 35 U.S.C. § 282, and this Court has interpreted that statute to incorporate a heightened “clear and convincing” burden. *Microsoft Corp. v. i4i Ltd. P’ship*, 131 S. Ct. 2238, 2246 (2011). But as several Members of this Court took the trouble to explain in *Microsoft*, the federal courts resolve questions of law without regard to a burden of persuasion or a quantum of proof. “[T]he evidentiary standard of proof applies to questions of fact and not to questions of law.” *Id.* at 2253 (Breyer, J., concurring). And the relevant questions—what a patent claims, and whether that claim is patent-eligible—are ques-

tions of law. Courts construing a patent decide what the patent claims, not what it clearly and convincingly claims.

Accordingly, this Court said nothing in *Microsoft* to endorse the notion that the courts should presume that an invention is patent-eligible.¹² Nor did the Court advert to the presumption of validity in any of its cases invalidating patents (or upholding them) under Section 101. Indeed, to the extent that the presumption is based on the notion that the Patent Office probably has done its job right, *see id.* at 2243, 2249, no such rationale applies to a patent-eligibility decision: the Federal Circuit has made clear that precisely because patent-eligibility is a pure question of law, it will not defer to the Patent Office's determination that a claim is or is not patent-eligible, but will review it *de novo*. *See In re Comiskey*, 554 F.3d 967, 975 (Fed. Cir. 2009).

Thus, the presumption of validity in no way relieves a district court of its duty to decide the legal question of what a patent covers, using the accepted tools of patent interpretation—just as a district court can and must construe a contract on a motion to dismiss. And in resolving that question of law, elevated burdens like “clear and convincing” have no place in the legal analysis. Moreover, the district court need not accept the patentee's reading of the patent on a motion to dismiss, except to the extent it rests on competing plausible *factual* issues (such as how a person of ordinary skill in the relevant art

¹² *See Microsoft*, 131 S. Ct. at 2242-43 (mentioning other invalidity defenses but not eligibility).

would have interpreted a relevant claim term).¹³ And in the context of patent eligibility, such plausible factual disputes are likely to be less common than the Federal Circuit forecast in *Ultramercial*, because the court confused the existence of a factual dispute with the existence of legal ambiguity. 722 F.3d at 1339. A contract or a statute may be ambiguous in the sense that there is more than one permissible reading, but that does not mean that a court cannot arrive at a correct construction as a matter of law. Even in those contexts where factual information may shed light on the ambiguity, the facts may not be *contested* facts; rather, the resolution often will turn on the legal *significance* of those facts, a question of law.

C. Patentability Often Can Be Decided Before The Most Costly Phases Of Patent Litigation

Even where patent eligibility under Section 101 is not litigated on the pleadings under Rule 12, it can still be resolved in a targeted way before the defendant must incur the full cost of litigating a patent case with multimillion-dollar sums at stake. As this case illustrates, patentability can often be resolved on summary judgment with a relatively modest investment of resources by the defendant. Other defenses under the Patent Act require much greater factual development, much more time—and much more money.

¹³ See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“[T]he tenet that a court must accept as true [at the pleading stage] all of the allegations contained in a complaint is inapplicable to legal conclusions.”).

Patent eligibility under Section 101 can often be resolved without undertaking a full claim construction—either on motion to dismiss, as discussed above, *see* note 11, *supra* (citing cases), or at summary judgment. *See, e.g., Ultramercial*, 722 F.3d at 1339 (acknowledging that “claim construction may not always be necessary for a § 101 analysis”); *accord, e.g., Cyberfone Sys., LLC v. Cellco P’ship*, 885 F. Supp. 2d 710, 715 (D. Del. 2012) (granting summary judgment without claim construction), *aff’d*, No. 2012-1673 (Fed. Cir. Feb. 26, 2014). Even if the parties will dispute the meaning of the claims in other phases of the litigation, they may well be able to ignore that dispute for purposes of Section 101. In this case, for example, respondents simply stipulated for purposes of summary judgment to petitioner’s plausible claim constructions, and contended that the patent failed to claim eligible subject matter no matter how it was construed. Pet. App. 6a; *accord, e.g., Compression Tech. Solutions LLC v. EMC Corp.*, No. C-12-01746, 2013 WL 2368039, at *3, *8 (N.D. Cal. May, 29, 2013) (granting summary judgment of invalidity on Section 101 grounds, because even accepting the patentee’s proposed claim construction, the claims were not patent eligible).

By contrast, for many if not all of the defenses that petitioner urges are a sufficient safeguard, a full claim construction is a prerequisite. *See, e.g., Key Pharm. v. Hercon Labs. Corp.*, 161 F.3d 709, 714 (Fed. Cir. 1998) (explaining that “the first step” in “[a] determination of anticipation, as well as obviousness,” “is construing the claim”). And even though, as noted, the Federal Circuit treats claim

construction as a question of law,¹⁴ a district court’s resolution of that question can be “lengthy and expensive.” *Manual for Complex Litigation* § 33.223, at 609. As Judge O’Malley of the Federal Circuit (a former district judge and veteran of patent trials) recently explained, district courts undertaking claim construction often “conduct live hearings with argument and testimony, sometimes covering several days,” in addition to receiving written briefing. *Restractable Techs., Inc. v. Becton, Dickinson & Co.*, 659 F.3d 1369, 1374 (Fed. Cir. 2011) (O’Malley, J., dissenting from denial of rehearing en banc), *cert. denied*, 133 S. Ct. 833 (2013).

But claim construction is only the beginning. The application of other statutory defenses to the patent as construed certainly will require fact development. Anticipation under 35 U.S.C. § 102 is entirely a question of fact.¹⁵ And several of the other defenses may be styled questions of law, but as this Court has said, that legal conclusion invariably rests on the outcome of “several basic factual inquiries.” *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966) (obviousness under 35 U.S.C. § 103).¹⁶ For instance, obviousness and anticipation both involve a factual comparison of the invention to the prior art. *Key*, 161 F.3d at 714. These defenses, therefore, are tried to the jury if there is any dispute over the material facts.

¹⁴ See, e.g., *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448 (Fed. Cir. 1998) (en banc).

¹⁵ E.g., *Taurus IP, LLC v. DaimlerChrysler Corp.*, 726 F.3d 1306, 1322 (Fed. Cir. 2013).

¹⁶ *Accord*, e.g., *Hamilton Beach Brands, Inc. v. Sunbeam Prods., Inc.*, 726 F. 3d 1370, 1375 (Fed. Cir. 2013) (on-sale bar under 35 U.S.C. § 102(b)).

Thus, by the time the jury resolves defenses such as obviousness or anticipation, the case is over: the jury may already have found infringement, damages, and perhaps even willful infringement permitting an enhancement of damages. Submitting the invalidity case to the jury means submitting the *whole* case to the jury, with the attendant expense of trial and risk of an adverse verdict. Thus, even if the defendant is confident in its obviousness or anticipation defense, those defenses frequently are not resolved until too late to be fully useful. Far too often, the incentives are to settle rather than test the patent, especially when settlement is just less than the cost of mounting the necessary defense. *See generally* Kesan & Ball, *supra*, at 246, 272 (finding that “the vast majority of [patent] cases settle”). And with no judgment of invalidity against it, the patentee is left free to assert the patent against the next target.

D. Patent-Eligibility Challenges Facilitate Interlocutory Review That Can Help Hasten The Termination Of Litigation

The expense of patent litigation is compounded by the fact that appellate review, even of case-dispositive issues, is not available until the end of the case, after both infringement and invalidity may well have been tried to a jury over many days. While the Federal Circuit has the authority to review “controlling question[s] of law” that may “materially advance the ultimate termination of the litigation,” 28 U.S.C. § 1292(b); *see id.* § 1292(c)(1), it has been extraordinarily sparing in its exercise of that discretionary power. For instance, in its entire history, the court has decided only *one* claim-construction appeal on an interlocutory basis, and then only under “pecu-

liar circumstances.” *Portney v. CIBA Vision Corp.*, 401 F. App’x 526, 529 (Fed. Cir. 2010). The Federal Circuit even declined to take up threshold legal issues in this very litigation. 411 F. App’x 306 (2010).

But Section 101 issues, more than any other invalidity issue that district courts confront in patent litigation, lend themselves to judicial resolution on interlocutory review. Preserving a robust role for Section 101 may encourage the Federal Circuit to take up more of these issues on an interlocutory basis, rather than wait for an appeal from final judgment after the parties have invested considerable effort in a full-blown trial.

In addition, deciding Section 101 challenges will allow the Federal Circuit to provide guidance on legal questions of patent eligibility (consistent with this Court’s judgment in this case) that affect the Patent Office’s consideration of patents. Since the recent amendments to the Patent Act, administrative tribunals within the Patent Office can now consider questions of patentability as part of the new procedures of post grant review and inter partes review.

* * * * *

Throughout petitioner’s brief is the theme that the abstract-idea test is a “judicial” or “judicially crafted” exception, and that the Court should therefore apply it more leniently than the defenses such as obviousness and anticipation to which petitioner points. Perhaps that argument might have had some force before the Civil War, when this Court first held that “a principle is not patentable.” *Le Roy*, 55 U.S. (14 How.) at 175. But now the abstract-idea exception, and other exceptions, to patent eligibility are firmly

enshrined in patent law. *Cf. Microsoft*, 131 S. Ct. at 2246 (concluding that Congress silently ratified the clear-and-convincing standard). Significantly, Congress has recently given extensive attention to the Patent Act, including the problem of business method patents. It voiced extensive concern about the drag that non-inventive patent litigation creates on the economy. And it created new procedures allowing flawed patents to be challenged.

In short, Congress not only has left this Court's "abstract idea" jurisprudence in place, it has *ratified* it and *relied on it*. This Court's interpretation of Section 101 sets forth the Court's "understanding of what the statute has meant continuously since the date when it became law." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994). And Congress has, after extensive examination, left that consistent understanding in place. The most recent comprehensive revision, the Leahy-Smith America Invents Act, was adopted in 2011, after this Court's most recent reaffirmation of the abstract-idea principle in *Bilski*. There can be no doubt that Congress was well aware of this Court's jurisprudence on the subject of patentability. And far from disturbing that doctrine, Congress made absolutely clear that it did not want to shift patentability doctrine in either direction. *See, e.g.*, AIA § 18(e), 125 Stat. at 331 (adoption of special procedure for review of certain business-method patents shall not "be construed as amending or interpreting categories of patent-eligible subject matter set forth under section 101"); *id.* § 14(d), 125 Stat. at 328 (after invalidating one class of business-method patents, providing that "[n]othing in this section shall be construed to imply

that other business methods are patentable or that other business method patents are valid”).

For this Court to continue applying the law as laid down is not some kind of disfavored judicial exception-making, any more than its application of the clear-and-convincing standard is. Indeed, it would be far more disruptive for this Court now to shrink from enforcing the robust doctrine that the Court has laid down over the years.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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