Amicus Brief in Killian SCOTUS Case Urges Textualist Interpretation of Section 101 (ipwatchdog.com)

“Because Congress defined the scope of patentable subject matter eligibility in § 101, its express terms should have ended the judicial inquiry.” – US Inventor/Eagle Forum ELDF

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On July 17, inventor advocacy organization US Inventor and conservative interest group Eagle Forum Education and Legal Defense Fund filed a

joint *amicus* brief at the U.S. Supreme Court urging the nation's highest court to grant the petition for writ of *certiorari* filed in *Killian v. Vidal*. US Inventor and Eagle Forum ELDF's brief is the latest call upon SCOTUS to address the "dire consequences" flowing from the dramatic expansion to judicial exceptions to patent eligibility under 35 U.S.C. § 101.

Courts Should Infer Textual Exception as Express Limit to Statutory Exceptions

Inventor Jeffrey Killian filed his petition for writ at the Supreme Court this April following a decision last August by the U.S. Court of Appeals for the Federal Circuit invalidating his patent claims to computer systems for identifying a person's eligibility for Social Security disability benefits. Relevant to the US Inventor/Eagle Forum ELDF brief, Killian's petition asks SCOTUS whether judicial exceptions to Section 101 subject matter eligibility created by Article III courts exceed those courts' constitutional authority.

Amici note that the broad statutory language of Section 101 already includes textual exceptions, excluding patentability for inventions that do not satisfy "the conditions and requirements of [Title 35]" of the U.S. Code. Such textual exceptions established by Congress do not provide the judiciary with authority to create its own exceptions. Indeed, US Inventor/Eagle Forum ELDF cited the Supreme Court's 2000 ruling in *U.S. v. Johnson* for the premise that "[w]hen Congress provides exceptions in a statute… [t]he proper inference… is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth."

The Supreme Court could address patent eligibility's "raging fire in lower courts" by granting Killian's petition for writ and adopting a textualist approach to Section 101. Amici argue that courts are poorly

situated for crafting policy exceptions as they operate without congressional hearings or public feedback. The other "conditions and requirements" of Title 35, including novelty, obviousness and enablement, are capable of weeding out the "bad" patents that led to the Supreme Court's expansion of judicial exceptions to Section 101.

Broad Patent Eligibility Correlates With Greater Increases to U.S. Real Wages

In the line of Section 101 cases from *Bilski v. Kappos* (2010) to *Alice Corp. v. CLS Bank International* (2014), US Inventor/Eagle Forum ELDF contend that the Supreme Court has judicial rewritten the subject matter eligibility statute in the face of admonitions against such rewritings in opinions like Justice Antonin Scalia's dissent in *National Federation of Independent Business v. Sibelius* (2012). The judiciary's revisions to Section 101 of the patent statute have led to major uncertainty among the U.S. Patent and Trademark Office's patent examining corps, who have to apply more than 50 pages of material from the Manual of Patent Examining Procedure (MPEP) when assessing patent applications for subject matter eligibility.

While the United States had the world's top-ranked patent system prior to *Alice*, the nation's ranking had fallen as far as 12th place in the U.S. Chamber of Commerce's 2018 Global IP Index, and amici argue that drop has resulted in economic stagnation. US Inventor/Eagle Forum ELDF contend that real wages in the United States have only increased by 1 percent per year since *Alice*, contrasting poorly with the 32 percent increase in real wages for manufacturing jobs experienced between 1869 and 1891, when broad eligibility standards enabled innovators like Thomas Alva Edison and Alexander Graham Bell to obtain many patents, a few of which held the great majority of their patent portfolio's value.

“Because Congress defined the scope of patentable subject matter eligibility in § 101, its express terms should have ended the judicial inquiry,” the brief reads. Judicial exceptions to Section 101 amount to judicial legislation that flouts the separation of powers mandated by Articles I and III of the U.S. Constitution. Amici contend that this case at its core is about the allocation of powers between the federal judiciary and the federal legislature. Application of judicial exceptions to Section 101 arguably violates both the Bicameral and Presentment Clauses of the Constitution, which respectively vest all legislative powers in the two houses of Congress and require legislation passed by both houses to be presented to the U.S. President.

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