

No. 21-1281

In the Supreme Court of the United States

INTERACTIVE WEARABLES, LLC, PETITIONER

v.

POLAR ELECTRO OY AND POLAR ELECTRO INC.

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

SUPPLEMENTAL BRIEF FOR PETITIONER

MICHAEL S. DEVINCENZO
CHARLES WIZENFELD
KING & WOOD MALLESONS LLP
500 Fifth Avenue, 50th Floor
New York, NY 10110
(212) 319-4735

JEFFREY B. WALL
Counsel of Record
MORGAN L. RATNER
SULLIVAN & CROMWELL LLP
1700 New York Avenue, N.W.
Suite 700
Washington, DC 20006
(202) 956-7660
wallj@sullcrom.com

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner states that the corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

In the Supreme Court of the United States

INTERACTIVE WEARABLES, LLC, PETITIONER

v.

POLAR ELECTRO OY AND POLAR ELECTRO INC.

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

SUPPLEMENTAL BRIEF FOR PETITIONER

The United States is right that Interactive Wearables’s petition for a writ of certiorari should be granted. U.S. Br. 1. This Court’s review is needed to clarify the “abstract-idea exception” to Section 101 of the Patent Act of 1952, 35 U.S.C. 1 *et seq.* As the United States explains, following this Court’s decisions in *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66 (2012), and *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 573 U.S. 208 (2014), “the Federal Circuit has repeatedly divided . . . over the content of the abstract-idea exception and the proper application of [Alice’s] two-step methodology.” Br. 11. That “[o]ngoing uncertainty has induced ‘every judge on [the Federal Circuit] to request Supreme Court clarification.’” *Id.* at 20 (quoting *American Axle & Mfg., Inc. v. Neapco Holdings LLC*, 977 F.3d 1379, 1382 (Fed. Cir. 2020) (Moore, J., concurring)).

This case presents the best vehicle for the Court to consider that important question. As the United States correctly observes, the decision below is wrong because the claimed invention—a two-way remote that both controls an audio/visual device and displays information about the content being played—is not an abstract idea. Br. 11. And as the United States further observes, the Federal Circuit’s mistake on that score is “representative of the difficulties” that court “has experienced in applying Section 101.” *Id.* at 20. This case is thus a “suitable vehicle[] for providing needed clarification” on what is and is not covered by Section 101. *Id.* at 19.

Interactive Wearables submits this supplemental brief to address two additional points raised by the United States and one raised by another private petitioner.

1. Interactive Wearables agrees with the United States’s reformulation of the question presented: “Whether the claimed invention is ineligible for patent protection under the abstract-idea exception to Section 101.” U.S. Br. I. Interactive Wearables filed its petition when *American Axle & Manufacturing, Inc. v. Neapco Holdings, LLC*, No. 20-891 (pet. filed December 28, 2020), *cert. denied*, 142 S. Ct. 2902 (2022), was still pending, and its original formulation of the questions presented largely tracked the *American Axle* petition. But the thrust of Interactive Wearables’s briefing has always been the question of patent eligibility under Section 101. See, *e.g.*, Pet. 3-4, 7-8, 12-13, 17-26; Pet. Reply 1-11. Interactive Wearables agrees that it makes sense to focus on that question rather than to address, for example, whether patent eligibility is a question of law or fact. See U.S. Br. 22-23.

2. Interactive Wearables also agrees with the United States’s recommendation that the Court grant review both here and in *Tropp v. Travel Sentry, Inc.*, No. 22-22 (pet. filed July 5, 2022), and hear them separately. See U.S. Br. 1, 11-12. If, however, the Court were to grant only one petition addressing Section 101’s abstract-idea exception, the United States’s brief confirms that the Court should grant this one.

The Federal Circuit’s erroneous view of Section 101 was most clearly outcome-determinative here. As the United States recognizes, the Federal Circuit’s “holding was erroneous in *Interactive*,” though, in the United States’s view, “correct in *Tropp*.” Br. 14. Section 101 authorizes the patenting of “any new and useful process, machine, manufacture, or composition of matter.” 35 U.S.C. 101. Interactive Wearables’s patent claims a “machine,” *ibid.*, comprising several concrete, tangible parts—a “quintessentially technological invention[.]” that falls within Section 101, U.S. Br. 10. See *Corning v. Burden*, 56 U.S. (15 How.) 252, 267 (1854) (“The term machine includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result.”). The patent in *Tropp*, by contrast, claims a “non-technological . . . luggage inspection method” that is less clearly covered by Section 101’s text. U.S. Br. 11.

As the United States also explains, this case typifies the Federal Circuit’s tendency to “apply[.] modified versions of other doctrines,” including enablement under Section 112, “in the guise of a Section 101 analysis.” Br. 18. The blending of Section 101 and Section 112 in particular has been a key concern for the Federal Circuit judges who have disagreed with that court’s current Section 101 approach. See *Amer-*

ican Axle & Mfg., Inc. v. Neapco Holdings LLC, 967 F.3d 1285, 1316-1317 (Fed. Cir. 2020) (Moore, J., dissenting) (criticizing the “majority’s new blended 101/112” analysis). That blending was on full display in this case. As one panel member acknowledged at oral argument: “I know I sound like I’m talking about enablement, I know, I understand the problem.” C.A. Oral Argument, at 15:30-46 (Oct. 7, 2021), https://oralarguments.cafc.uscourts.gov/default.aspx?fl=21-1491_10072021.mp3; see Pet. App. 17-21. This case allows the Court an opportunity to draw a line between eligibility under Section 101 and enablement under Section 112.

The claimed invention here also involves consumer electronics, and could offer a particularly useful precedent for future cases. As the United States observes, the claimed two-way remote is “comparatively less complex” than the inventions in many Section 101 disputes, which might allow the Court to “more readily draw on historical practice and precedent to clarify the governing principles.” Br. 22. At the same time, the claims are directed to electronics-oriented devices and would provide a more generalizable data point as courts grapple with emerging technologies, including in the software industry. See Mark A. Lemley & Samantha Zyontz, *Does Alice Target Patent Trolls?*, 18 J. Empirical Legal Stud. 47, 56, 67 (2021) (finding that the majority of post-*Alice* disputes about patent eligibility under Section 101 relate to “software” or “IT”).

3. Finally, Interactive Wearables is aware of one other Section 101 petition pending before this Court, *Avery Dennison Corp. v. ADASA, Inc.*, No. 22-822 (filed Feb. 27, 2023). The petitioner there recently suggested that “[t]his Court would benefit from hav-

ing all three petitions [*i.e.*, *Interactive Wearables*, *Tropp*, and *Avery Dennison*] before it when deciding which (if any) Section 101 cases it wishes to review.” *Avery Dennison* Pet. Resp. to Mot. to Extend Time (filed Apr. 7, 2023). That case is a far less appropriate vehicle for review. The petitioner there argues that the Federal Circuit construed the abstract-idea exception too *narrowly* and so “erroneously allowed a patent covering ineligible subject matter.” *Avery Dennison* Pet. 3. The contention that the Federal Circuit invalidates too *few* patents under Section 101 is not representative of the dispute among the judges on that court, nor does it reflect the concerns that the Patent and Trademark Office has raised here. See, *e.g.*, *American Axle*, 967 F.3d at 1304 (Moore, J., dissenting) (criticizing the majority’s expansion of Section 101 “well beyond its statutory gate-keeping function”); U.S. Br. 20. And the *Avery Dennison* petitioner does not demonstrate that Section 101 errors in that direction are a recurring problem in the Federal Circuit.

In any event, whatever the Court does in other cases, *Interactive Wearables* remains the petitioner most clearly harmed by the Federal Circuit’s misguided approach to the abstract-idea exception, and review here is warranted.

CONCLUSION

The petition should be granted.

Respectfully submitted.

MICHAEL S. DEVINCENZO
CHARLES WIZENFELD
KING & WOOD MALLESONS LLP
500 Fifth Avenue, 50th Floor
New York, NY 10110
(212) 319-4735

JEFFREY B. WALL
Counsel of Record
MORGAN L. RATNER
SULLIVAN & CROMWELL LLP
1700 New York Avenue, N.W.
Suite 700
Washington, DC 20006
(202) 956-7660
wallj@sullcrom.com

APRIL 2023