

No. _____

In The
Supreme Court of the United States

EOLAS TECHNOLOGIES INCORPORATED,

Petitioner

v.

AMAZON.COM, INC., ET AL.,

Respondents

*On Petition for Writ of Certiorari from the United States
Court of Appeals for the Federal Circuit*

***AMICUS BRIEF OF US INVENTOR INC. IN
SUPPORT OF PETITIONER***

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QUESTIONS PRESENTED

The questions presented by U.S. Inventor are as follows:

I. Why does the Supreme Court allow the Court of Appeals of the Federal Circuit (hereinafter “the Federal Circuit”) to violate the due process of appellants merely because a matter before the Federal Circuit involves the *Alice/Mayo* doctrine?

II. Do the exceptions created by Article III courts of Title 35 U.S.C. § 101 exceed the constitutional authority of the courts?

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I. INTERESTS OF AMICUS CURIAE

Amicus US Inventor¹ is a non-profit 501(c)(4) membership organization founded in 2015 with the mission of restoring the ability of an inventor to stop the theft of a patented invention. US Inventor opposes the erosion of inventor rights in recent years due in part to judicial decisions. US Inventor educates, supports, and inspires inventors, and advocates on their behalf in order to protect inventor rights and strengthen the patent system. Amicus therefore has strong interests in this Petition for a Writ of Certiorari.

¹ Pursuant to Rule 37.6, counsel for amicus curiae authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity – other than amicus, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

II. Summary of Argument

U.S. Inventor's arguments are three-fold.

The first contention is that the Supreme Court has no valid basis to refuse to provide clarity on the *Alice/Mayo* doctrine.

The second contention is that *Alice/Mayo* is satisfied by nothing more than a bald assertion that defies evidence, common-sense analysis, and scientific principles.

The third contention is that the term "inventive concept" under step two of *Alice/Mayo* is capricious, and this capriciousness cannot be remedied.

III. Argument

A. The *Alice/Mayo* Doctrine Demands Clarity

Petitioner Eolas makes the case that this Court is long overdue to provide clarity on *Alice/Mayo*. No litigant to the U.S. Supreme Court or any other court has ever made an argument against clarity in an *Alice/Mayo* setting. The Supreme Court is the only entity on Earth resisting clarity.

The corpus of *Alice/Mayo* decisions have defied clarity and consistency have caused significant negative jurisprudence and real-world consequences. U.S. Inventor is unaware of a single law review article or academic that speaks positively of the

Alice/Mayo doctrine. Since this Court's decision in *Mayo*, the Federal Circuit has invalidated every diagnostic claim to come before it as ineligible subject matter. Not a single *Alice/Mayo* rejection appealed to the Federal Circuit from the USPTO has ever been set aside. Not a single medical diagnostic claim has survived the judiciary. Name a single Federal Circuit case favoring patent eligibility, and any competent patent attorney can name no less than two Federal Circuit decisions that say the exact opposite.

Alice/Mayo has swallowed nearly all of the Patent Law to the point where technical realities no longer have sway in the courts. "Abstract" can mean anything a technically uninformed judge say it means. The lower courts can assert that a claim of any detail preempts all ways of achieving an abstract idea by ignoring claim limitations.

One notorious example of this confusion is *American Axle & Manufacturing, Inc. v. Neapco Holdings LLC, et al.*, No. 20-891 (2021) where the lower courts came to an irrational conclusion that a method for designing vibration dampeners for automobile engines preempted all uses of Hooke's Law. See Opening Brief, p. 3, ll. 9-16. Petitioner says "irrational" because the *American Axle* holding is a physical impossibility that the lower court judges, lacking rudimentary technical knowledge, could appreciate. Even more telling evidence is the brief provide to this Court by the Solicitor of the DOJ and

the Solicitor of the USPTO in *American Axle* where, instead of the DOJ and USPTO providing helpful guidance after thirteen months of contemplation, this Court received a brief that outlined the many problems of *Alice/Mayo* and concluded that clarification is desperately needed stating (page 20):

“Applying this Court’s recent Section 101 decisions ‘in a consistent manner has proven to be difficult’; ‘has caused uncertainty in this area of the law’; has made it difficult for ‘inventors, businesses, and other patent stakeholders to reliably and predictably determine what subject matter is patent eligible’; and ‘poses unique challenges for the USPTO’ itself.”

Amicus cannot think of a better advocate for clarity than the DOJ and USPTO so politely opining that *Alice/Mayo* has devolved into a chaotic failure. Unfortunately, the Solicitors (see pp. 21-22) missed the bigger issue: it is impossible for any court or the USPTO to come to a sound determination that a claim preempts previously existing man-made things without evidence.

Without question, clarity is overdue, and clarity need only relate to evidence.

B. The Alice/Mayo Doctrine Violates Due Process

Turning to Step Two of *Alice/Mayo*, this process was fated for failure the moment the courts resurrected “invention,” a term that has defied definition for over 173 years. As with the standard of “flash of creative genius,”² the requirement of an “inventive concept” is a rebranding of “invention” which Congress wrote out of the Patent Law³ and which this Court three times acknowledged is meaningless. “The truth is, the word [‘invention’] cannot be defined in such manner as to afford any substantial aid in determining whether a particular device involves an exercise of the inventive faculty.” *McClain v. Ortmyer*, 141 U.S. 419, 427 (1891); *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*, 340 U.S. 147, 154 (1950) at fn 6; *Graham v. John Deere Co.*, 383 U.S. 1, 11 (1966). The Federal Circuit’s Step Two Analysis Is Capricious

The term “inventive concept” is meaningless. How is it possible for any patent applicant or patentee to draft a patent claim to incorporate an “inventive concept” if the USPTO and Federal Circuit refuse to

² See *Cuno Eng. Corp. v. Automatic Devices Corp.* 314 U.S. 84, 91 (1941).

³ Rich, Giles S., *The Vague Concept of “Invention” as Replaced by Section 103 of the 1952 Patent Act* (1964) (Reprinted with permission in *Nonobviousness – The Ultimate Condition of Patentability* (1978) at pp. 1:401-416).

define the term? The closest the Federal Circuit has ever addressed this issue occurs in *In re Killian*, 45 F. 4th 1373, 1382 (Fed.Cir. 2022) where the Federal Circuit stated:

Although there is no single, inflexible rule for the abstract idea inquiry, our court has provided guidance as to what constitutes an abstract idea. We have explained that, first, “[t]he ‘abstract idea’ step of the inquiry calls upon us to look at the ‘focus of the claimed advance over the prior art’ to determine if the claim’s ‘character as a whole’ is directed to excluded subject matter.”

This is a blatant departure from reality as the Federal Circuit never once addressed claims as a whole in the history of *Alice/Mayo*. In fact, the Federal Circuit ignored 99% of the 400+ words in Killian’s claims to hold that the mere fact that a computer was involved was sufficient to condemn the claims while asserting a factual impossibility that generic computer networks “comprehend” data.

As to the Federal Circuits later assertion in *Killian* that “Examination of earlier cases ‘is the classic common law methodology for creating law when a single governing definitional context is not available’” (*Id.* at 1383), this is a revelation of the source of errors of the Federal Circuit. ***Any error in a Federal Circuit decision is passed down to all subsequent cases.*** If the Federal Circuit got it wrong

in *Electric Power Group*, then all decisions citing *Electric Power Group* as authority are wrong. Similarly, any case citing a case that cited *Electric Power Group* as authority are wrong. *Electric Power Group*, by the way, is fully inconsistent with both *Berkheimer v. HP Inc.*, 881 F. 3d 1360 (2018) (holding that a computer-based system that takes data, processes data, and displays data is patent eligible) and *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327 (Fed. Cir. 2016)(holding that a computer-based system that takes data and processes data is patent eligible). ***For every Federal Circuit holding that declares something qualifies as an “inventive concept,” present counsel can name two Federal Circuit decisions that hold the opposite.***

Another example of evidence-free capriciousness is *Affinity Labs of Texas, LLC v. DIRECTV, LLC*, 838 F.3d 1253, 1257 (Fed. Cir. 2016), where the Federal Circuit declared that “[t]he ‘abstract idea’ step of the inquiry calls upon us to look at the ‘**focus of the claimed advance over the prior art**’ to determine if the claim’s ‘character as a whole’ is directed to excluded subject matter” (emphasis added). Two questions arise:

Where did the Federal Circuit ‘focus of the claimed advance over the prior art’ in *Affinity Labs*? The answer is never. In fact, the term “evidence” never once appears in *Affinity Labs*.

Where did the Federal Circuit ‘focus of the claimed advance over the prior art’ in the present case? The answer is never. *How is it possible to determine an advance over the prior art without evidence as to what “the prior art” is?* Do judges simply stare into the sky until some divine epiphany is revealed, or do judges suddenly achieve God-like omniscience? So long as the lower courts refuse to incorporate this Court’s guidance on evidence, *Alice/Mayo* will remain legerdemain disguised as law.

The failing of this idea of this judge-made standard of “inventive concept” is that “inventive concept” is “invention” rebranded, and (as shown above) this Court thrice acknowledged that “invention” useless as a standard for patentability. The vice of “inventive concept,” however, is much more insidious. Inventive concept is a quality that cannot be, and has never been, described or measured, and thus leaves every judge free to decide what the term means and how to apply it according to said judge’s personal biases and level of technical ignorance. This is too great a power for individual judges to hold because the standard of “invention” was written out of the Patent Law in 1952, because judges lack the education to understand the various technologies they declare lack the quality of “invention,” and because the controlling policies of the patent system should be determined by Congress.

Alice/Mayo as practiced by the lower courts is capricious.

C. The Constitution and the Patent Law Do Not Empower Judges to Create Exceptions to Patent Eligibility

Article I, Section 8, Clause 8, of the Constitution expressly provides Congress the sole authority to “promote the progress of science and useful arts.” Using its constitutional authority, Congress passed the Patent Act of 1952, which includes Title 35 U.S.C. § 101 (“Inventions Patentable”). Section 101 recites: “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 therefor, *subject to the conditions and requirements of this title*” (emphasis added).

Nowhere under the Constitution or under § 101 or any section of Title 35 are the courts granted authority to create exceptions to patent eligibility. This is not an issue of statutory interpretation as the Patent Law makes no mention of exceptions to patent eligibility, and the word “abstract” occurs nowhere in § 101. Despite the lack of empowering language, the courts nonetheless created an ever-growing number of exceptions to patent eligibility including scientific principles, naturally occurring phenomena, mathematical algorithms, computer-based devices,

and (most recently) computer networks that comprehend data and have opinions. However, such exceptions violate congressional prerogative and ignore the express limits Congress actually created under, *inter alia*, Title 35 U.S.C. § 102 of the Patent Act of 1952, which precludes the patenting of any invention that “was known or used by others in this country . . . before the invention thereof by the applicant for patent.”⁴

For example, hemoglobin cannot be patented because it’s a “naturally occurring phenomena,” but because hemoglobin is precluded under § 102 due to its use “by others” and “in public use” long before people knew hemoglobin existed. Similarly, the equation of $f = m \times a$ (force = mass \times acceleration) cannot be patented as mankind has used this law of physics since before written language existed.

An idea in and of itself, which is truly “abstract” within the plain meaning of the word, cannot be patented because such ideas fail the written description and enablement clauses of 35 U.S.C. § 112(a). That is, the drafters of the 1952 Patent Act knew what they were doing, and it is not within the authority of Article III courts to rewrite the Patent Law in a way that bypasses the safeguards placed into the law by Congress. For instance, the eighth

⁴ The American Invents Act revised this language to “in public use . . . or otherwise available to the public.”

claim of *O'Reilly v. Morse*, 15 How 62 (1853) was not rejected because the claim involved a law of nature, but because the eighth claim failed to comply with what would be later codified as Title 35 U.S.C. § 112(a) of the Patent Law.

“In fine, [Morse’s] claims an exclusive right to use a manner and process which he has not described and indeed had not invented, and therefore could not describe when he obtained his patent. The court is of opinion that the claim is too broad, and not warranted by law.” *Id.* at p. 113.

The Patent Law works as Congress designed it.

Title 35 U.S.C. § 103 also provides its exclusions to patentability (not patent ineligibility), and every legitimate concern of the courts in limiting patentability can be taken from the existing language if §§ 102/103/112. If a concern of the courts cannot be met by the existing patent law, the courts have no authority to impose their policy preferences.

The single possible legitimate exception to patent eligibility is an exclusion of an actual human mental process. Freedom of human thought is arguably a right “objectively, deeply rooted in this Nation’s history and tradition.” *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997). Freedom of human thought, however, does not extend to the operations of a computer, which courts still bizarrely equate to human thought. Computers, like hammers, are but

things. There is nothing in the Constitution or this nation's history or traditions that hints that the workings of "things" should be protected the same as human thought.

D. Supreme Court Jurisprudence on Patent Eligibility Makes no Reference to the Constitution

This Court has never identified its authority to create judicial exceptions to patent eligibility. For example, *Gottschalk v. Benson* makes no reference to the Constitution. With regard to *Benson*, there were two separate theories of patent ineligibility. The first theory is whether or not software was a "process" under § 101.

Unfortunately, *Benson's* process analysis had no nexus to the plain, contemporary, and ordinary meaning of the word "process," but was instead determined using erroneous criteria, such as the USPTO's inability to address a new technology. "The Patent Office now cannot examine applications for programs because of a lack of a classification technique and the requisite search files." *Benson*, 409 U.S. at 72. "Even if these were available, reliable searches would not be feasible or economic because of the tremendous volume of prior art being generated." *Id.* "If these programs are to be patentable, considerable problems are raised . . ." *Id.* at 73. That is, the *Benson* holding was based on the

idea that the Patent Office was too incompetent to address new and emerging technologies.

Turning to *Parker v. Flook*, 437 U.S. 584 (1978), no mention of the Supreme Court's authority to create exceptions to patent eligibility was made. It was merely assumed. While the *Flook* decision states that "[t]he plain language of § 101 does not answer the question of whether the discovery of a novel and useful feature 'makes an otherwise conventional method eligible for patent protection,'" ⁵ most respectfully this is untrue. The plain language of § 101 provides express categories for patent eligibility, and to merely assume a new and useful process or machine is not patent eligible because math or a computer is used is a denial of the plain language of § 101.

The decision of *Bilski* at least applied the modern, common use of the word "process" as this Court held that at least some business methods were patent eligible. Unfortunately, instead of addressing a well-known and ubiquitous business method under §§ 102/103/112 as Congress intended, the Supreme Court twisted the word "abstract" (which again does not occur in the Constitution or § 101) to an unrecognizable form. That is, in one breath the Supreme Court observed the importance of using the plain and contemporaneous meaning of words, then

⁵ *Flook*, 437 U.S. at 588.

in the next breath mangled the word “abstract” to mean something unrecognizable.

Turning to *Alice Corp.*, the Supreme Court recognized the absurdity of precluding a claim from patent eligibility merely because a computer was used while at the same time departing from the plain language of § 101 and again twisting the word “abstract.” Unfortunately, rather than follow the Patent Law as Congress intended and dispose of the *Alice Corp.* claims under § 103 using the well-thought-out principles of, *inter alia*, *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007), this Court chose a path the Supreme Court had no constitutional authority to take. *Mayo* similarly could have and should have been addressed under §§ 102/103/112.

In sum, the quality of every single holding limiting patent eligibility to date is extraordinarily poor both from a constitutional perspective and from the idea that every single issue could have and should have been addressed under the statutory framework Congress created. Accordingly, the judicial exceptions to patent eligibility represent raw abuses of power, and *stare decisis* does not compel adherence to these judicial abuses.

E. *Alice/Mayo* Contravenes Congressional Intent

Prior to the 1952 Patent Act, U.S. Courts relied on the arbitrary standard of “invention” where patents

were routinely immolated for lacking “invention,” without ever defining “invention.” In response, Congress passed the 1952 Patent Act of 1952 with the intent that patentability would be determined on an objective basis. To this end, the non-obviousness standard of Title 35 U.S.C. § 103 was codified whereby patentability was determined using the objective standard of a person of ordinary skill in the art. In the same legislative act, Congress wrote out “invention” from the Patent Law.⁶

Unfortunately, rather than adhering to congressional intent, Article III courts have destroyed Congress’s intended scope of patent eligibility by importing the exact same “invention” requirement that Congress excluded. Unfortunately, the § 101 jurisprudence of the courts have re-introduced subjective “invention” approach by conflating the evidence-based tests of 35 U.S.C. §§ 102, 103, and 112 with a subjective § 101 analysis.

The first instance of the term “inventive concept” occurred in *Flook* where Justice Steven’s opined that a discovery “cannot support a patent unless there is some other inventive concept in its application.” *Flook*, 437 U.S. at 594. No authority was cited for this aberration. Shortly thereafter, Judge Giles Rich recognized that inventive concept is invention

⁶ See, Rich, Giles S., The Vague Concept of “Invention” as Replaced by Section 103 of the 1952 Patent Act, *supra*.

rebranded stating, “[t]erms like . . . ‘inventive concept’ no longer have any useful place in deciding questions [of patentability] in the 1952 Patent Act, notwithstanding their universal use in cases from the last century and the first half of this one.” *In re Bergy*, 596 F.2d 952, 961 (C.C.P.A. 1979).

The only attempt any court attempting to define “inventive concept” occurred in the *en banc CLS Bank v. Alice Corp.* decision where Judge Lourie stated:

“An ‘inventive concept’ in the § 101 context refers to a genuine human contribution to the claimed subject matter. . . . Accordingly, an ‘inventive concept’ under § 101—in contrast to whatever fundamental concept is also represented in the claim—*must be ‘a product of human ingenuity’*” (emphasis added) *CLS Bank, Int’l v. Alice Corp.*, 717 F.3d 1269, 1283 (Fed. Cir. 2012).

The immediate problem with this human ingenuity standard is that “ingenuity” is a synonym for “inventiveness.” Such a definition makes the test for inventive concept an exercise in circular logic.

Judge Rader (joined by Judges Linn, Moore, and O’Malley) recognized the problem of “inventive concept” issuing a lengthy warning on “invention” and the havoc it wrought before the 1952 Patent Act while stating that “[i]t is inconceivable to us that the Supreme Court would choose to undo so much of what

Congress tried to accomplish in the 1952 Patent Act, and to do so by the use of one phrase in one opinion.” *Id.* at 1303, fn 5.

Further, the public is increasingly aware (and the lower courts do not dispute) that “inventive concept” is “invention.” “[W]hatever else one can say about the Court’s ‘inventive concept’ test, one certainly can say it runs afoul of Congressional intent” Andrew F. Halaby, *The “Inventive Concept” Test for Patent Eligibility Contravenes Congressional Intent*. 61 *IDEA* 38: *The Law Review of the Franklin Pierce Center for Intellectual Property*, p. 61 (2020); “The Supreme Court’s subjective interpretation of patent eligibility law is undermining the fundamental principles underlying the 1952 Patent Act on which our modern innovation economy rests.” *AIPLA Legislative Proposal and Report on Patent Eligible Subject Matter*, p. 1 (2017); “Congress, . . . has not granted the USPTO or courts the ability to create conditions and requirements of patentability that are not set forth in the patent statute.” *Id.* at p. 12. “The analysis developed in the 101 Decisions is contrary to Congressional intent, too restrictive, technologically incorrect, unsound from a policy standpoint, and bad law.” *Intellectual Property Owners Association, Proposed Amendments to Patent Eligible Subject Matter under 35 U.S.C. § 101* (2017) at p. 2.

F. The *Alice/Mayo* Doctrine is Unworkable

As stated above, the prior decisions to create judicial exceptions to patent eligibility have caused significant negative jurisprudence and real-world consequences. Petitioner is unaware of a single law review article or academic that speaks positively of the *Alice/Mayo* doctrine. Since this Court's decision in *Mayo*, the Federal Circuit has invalidated every diagnostic claim to come before it as ineligible subject matter. Not a single *Alice/Mayo* rejection appealed to the Federal Circuit from the USPTO has ever been set aside. Not a single medical diagnostic claim has survived the judiciary. Name a single Federal Circuit case favoring patent eligibility, and any competent patent attorney can name no less than two Federal Circuit decisions that say the exact opposite.

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Other past petitions to this Court are further evidence of the confusion regarding step one of *Alice/Mayo*. One notorious example of this confusion is *American Axle & Manufacturing, Inc. v. Neapco Holdings LLC, et al.*, No. 20-891 (2021) where the lower courts came to an irrational conclusion that a

method for designing vibration dampeners for automobile engines preempted all uses of Hooke's Law. See Opening Brief, p. 3, ll. 9-16. Petitioner says "irrational" because the *American Axle* holding is a physical impossibility that the lower court judges, lacking rudimentary technical knowledge, could appreciate. Even more telling evidence is the brief provide to this Court by the Solicitor of the DOJ and the Solicitor of the USPTO in *American Axle* where, instead of the DOJ and UPSTO providing helpful guidance after thirteen months of contemplation, this Court received a brief that outlined the many problems of *Alice/Mayo* and concluded that clarification is desperately needed stating (page 20):

"Applying this Court's recent Section 101 decisions 'in a consistent manner has proven to be difficult'; 'has caused uncertainty in this area of the law'; has made it difficult for 'inventors, businesses, and other patent stakeholders to reliably and predictably determine what subject matter is patent eligible'; and 'poses unique challenges for the USPTO' itself."

Petitioner cannot think of a better example of the futility of Step One of *Alice/Mayo* than the best legal minds of the DOJ and USPTO so politely opining that *Alice/Mayo* has devolved into a chaotic failure. Unfortunately, the Solicitors (see pp. 21-22) missed the bigger issue: it is impossible for any court or the

USPTO to come to a sound determination that a claim preempts previously existing man-made things without evidence.

Without question, the prior decisions to create judicial exceptions to patent eligibility under § 101 have caused significant negative jurisprudence and real-world consequences.

IV. Conclusion

Most respectfully, this Court must provide clarity on *Alice/Mayo* or end it.

/s/ *Burman Y. Mathis*

Burman Y. Mathis

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