

No. 19-400

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IN THE  
**Supreme Court of the United States**

GARMIN USA, INC., ET AL.,  
*Petitioners,*

v.

CELLSPIN SOFT, INC.,  
*Respondent.*

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

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**SUPPLEMENTAL BRIEF FOR PETITIONERS**

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RACHAEL D. LAMKIN  
LAMKIN IP DEFENSE  
One Harbor Drive  
Suite 304  
Sausalito, CA 94965

THOMAS P. SCHMIDT  
HOGAN LOVELLS US LLP  
390 Madison Ave.  
New York, NY 10017

NEAL KUMAR KATYAL  
*Counsel of Record*  
DANIELLE D. STEMPEL\*  
MICHAEL J. WEST  
HOGAN LOVELLS US LLP  
555 Thirteenth St., N.W.  
Washington, D.C. 20004  
(202) 637-5600  
neal.katyal@hoganlovells.com

*\* Admitted only in Maryland;  
practice supervised by principals  
of the firm admitted in D.C.*

*Counsel for Garmin USA, Inc.  
and Garmin International, Inc.*

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*Additional counsel listed on inside cover*

RYAN S. GOLDSTEIN  
JARED W. NEWTON  
QUINN EMANUEL  
URQUHART &  
SULLIVAN LLP  
865 S. Figueroa Street  
Los Angeles, CA 90015  
*Counsel for  
Canon U.S.A., Inc.*

SHANE BRUN  
VENABLE LLP  
101 California St., #3800  
San Francisco, CA 94111  
*Counsel for Fitbit, Inc.  
and Moov, Inc.*

RICARDO J. BONILLA  
DAVID B. CONRAD  
FISH & RICHARDSON P.C.  
1717 Main Street  
Suite 5000  
Dallas, TX 75201  
*Counsel for Fossil Group,  
Inc. and Misfit Inc.*

KARINEH KHACHATOURIAN  
NIKOLAUS A. WOLOSZCZUK  
RIMON LAW, P.C.  
2479 E. Bayshore Road  
Suite 210  
Palo Alto, CA 94303  
*Counsel for GoPro, Inc.*

IRFAN A. LATEEF  
DANIEL C. KIANG  
KNOBBE MARTENS  
OLSON & BEAR LLP  
2040 Main St., 14<sup>th</sup> Floor  
Irvine, CA 92614  
*Counsel for  
JK Imaging LTD.*

STANLEY J. PANIKOWSKI  
RICHARD T. MULLOY  
DLA PIPER LLP (US)  
401 B Street, Suite 1700  
San Diego, CA 92101  
*Counsel for NIKE, Inc.*

STEVEN J. ROUTH  
STEN JENSEN  
T. VANN PEARCE, JR.  
MELANIE L. BOSTWICK  
ORRICK, HERRINGTON &  
SUTCLIFFE LLP  
1152 15th Street NW  
Washington, DC 20005  
*Counsel for Panasonic  
Corporation of North  
America*

**RULE 29.6 DISCLOSURE STATEMENT**

The disclosure made in the petition for a writ of certiorari remains accurate.

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**INTRODUCTION**

Both this case and *HP Inc. v. Berkheimer*, No. 18-415, present the question whether patent eligibility is an issue of law that is amenable to early resolution in a patent case. At this Court's invitation, the United States has submitted a brief in *Berkheimer*, arguing that certiorari should not be granted there (and by extension here) until the Court "clarif[ies] the substantive Section 101 standards." Br. for the United States as Amicus Curiae at 10, *Berkheimer*, No. 18-415 (Dec. 6, 2019) ("U.S. Br."). That delay would be both unnecessary and wasteful.

It is unnecessary because the supposed “uncertainty” the Government invokes regarding the § 101 standard only affects a subset of cases involving the application of the law-of-nature limitation to certain medical innovations. Indeed, the Government suggests clarifying the § 101 standard by granting a case whose question presented is expressly confined to a “specific method of diagnosing a medical condition”—and is not addressed to the § 101 framework writ large or the application of *Alice* and *Mayo* in the technological context of this case. See Br. for the United States as Amicus Curiae at 22-23, *Hikma Pharm. USA Inc. v. Vanda Pharm.*, No. 18-817 (Dec. 6, 2019) (“*Hikma* U.S. Br.”); Pet. for a Writ of Cert. at i, *Athena Diagnostics, Inc. v. Mayo Collab. Servs., LLC*, No. 19-430 (Oct. 1, 2019) (“*Athena* Pet.”). Thus, the question presented here will not be affected by whatever narrow clarification the Court may provide elsewhere. And a more radical reworking of the eligibility doctrine would be not just misguided, but wholly inappropriate. This Court’s approach to patent eligibility, after all, traces back nearly two centuries, and *stare decisis* on questions of statutory interpretation (like the meaning of § 101) is especially strong. *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2410 (2015).

Waiting to decide the issue in this case would be wasteful, too: As explained in the petition, the decision below—in conjunction with *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F.3d 1121 (Fed. Cir. 2018), and *Berkheimer*—has undercut the capacity of § 101 to filter out weak patents early and efficiently. Pet. 29-32; CCIA and EFF Proposed Amici Br. 7-14. To delay answering the question



presented will only exacerbate opportunities for abuse of the patent system.

In short, any narrow uncertainty in the application of *Mayo* in one particular and unrelated context is no reason for this Court to decline to answer the question presented in this case. Petitioners—who represent a broad cross-section of industry—have to live with this unanswered question every day, unlike the Government. Indeed, the Government does even not dispute that the question presented—whether eligibility is an issue of law amenable to early resolution—is important and recurring, and has divided the Federal Circuit. Nor does the Government attempt to defend the Federal Circuit’s approach. Because the sole reason the Government offers to deny certiorari does not hold up, this Court should take up the case.

## ARGUMENT

### I. THE GOVERNMENT’S ARGUMENTS AGAINST CERTIORARI IN *BERKHEIMER* ARE UNPERSUASIVE.

The question presented in both this case and *Berkheimer* is whether eligibility under § 101 of the Patent Act is an issue of law amenable to early decision in patent litigation. Pet. i, 33. The Federal Circuit’s resolution of that question was as incorrect as it was consequential. *Id.* at 13-32. Yet the Government urges delay—not because the Federal Circuit was right, or the issue is unimportant, or this is a bad vehicle, or any of the other standard arguments against granting certiorari. Rather, according to the Government, “this Court’s recent decisions have fostered uncertainty concerning” the “substan-

tive standard for assessing patent-eligibility under Section 101.” U.S. Br. 10. And because of that “uncertainty,” the Government suggests that certiorari in *Berkheimer* (and by extension this case) would be “premature.” *See id.* Both the premise and conclusion of that argument are faulty.

1. To begin, the Government overstates the “uncertainty” affecting the patent eligibility doctrine as a whole. In the Government’s telling, this Court made a mistake in *Bilski v. Kappos*, 561 U.S. 593 (2010), and has never recovered. Specifically, the Government claims that “the current uncertainty stems \* \* \* fundamentally from the *Bilski* Court’s recasting of long-recognized inherent limitations on Section 101’s affirmative scope as atextual exceptions to the statute.” U.S. Br. 18. But that uncharitable account of *Bilski* bears little resemblance to what the Court actually did and said.

Here is the Court’s own description of its holding: “Today, the Court once again *declines* to impose limitations on the Patent Act that are inconsistent with the Act’s text.” *Bilski*, 561 U.S. at 612 (emphasis added). Indeed, while the Government now accuses the Court of endorsing “atextual exceptions” to § 101, U.S. Br. 18, the Court’s opinion explicitly “*reject[ed]*” the “atextual approach[]” to § 101 that the Federal Circuit had taken, *Bilski*, 561 U.S. at 609. And the Court simply “resolve[d] th[e] case narrowly on the basis of [its] decisions in *Benson*, *Flook*, and *Diehr*.” *Id.* In other words, it did nothing but apply—and hew particularly closely to—its own precedents.

The Court did, as the Government notes, describe laws of nature, physical phenomena, and abstract

ideas as “*exceptions*” to § 101, rather than glosses on the meaning of § 101. *Id.* at 601 (emphasis added); see U.S. Br. 4, 12-13, 18. But that vocabulary choice was hardly a revolution in this Court’s § 101 jurisprudence. After all, the Court plainly understood itself to be simply reiterating principles nearly as old as the Nation’s patent laws: “[T]hese exceptions have defined the reach of the statute as a matter of statutory *stare decisis* going back 150 years.” *Bilski*, 561 U.S. at 602 (citing *Le Roy v. Tatham*, 55 U.S. (14 How.) 156, 174-175 (1853)). And *Parker v. Flook*, thirty years before, had described § 101 in very similar terms. 437 U.S. 584, 588-589 (1978) (noting that this Court’s precedents “foreclose[] a purely literal reading of § 101”).<sup>1</sup>

The unanimous *Mayo* decision—which receives the brunt of the Government’s criticism—followed the same pattern. It carefully analyzed and grounded itself in this Court’s decisions in *Diehr*, *Flook*, and *Morse*, and a nineteenth-century English decision. *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66 (2012). And then *Alice* simply synthesized the Court’s prior cases addressing § 101. *Alice Corp. v. CLS Bank Int’l*, 573 U.S. 208 (2014).

To claim, then, that this Court’s recent and unanimous eligibility decisions have “decoupled the Section 101 analysis from the statutory text and con-

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<sup>1</sup> Indeed, to the extent the Government’s request for “clarity” on eligibility means only that the eligibility “exceptions” should be re-described as *interpretations* of the Patent Act, and should be sensitive to the Patent Act’s history and purposes, petitioners have no quarrel with that. But it is hard to see what practical effect that relabeling would have in the mine run of cases.

text,” *Hikma* U.S. Br. 17, or have failed to “bear in mind the provision’s history and context,” *id.* at 20, just blinkers reality. The basic eligibility framework that this Court has fashioned over centuries has been consistent and is sound. Thus, there is no reason to delay on deciding the question presented here, which involves a crucial procedural issue related to that framework.

The Government’s request to wait for some yet-to-be-revealed replacement for the present eligibility test is especially unconvincing in light of the strong version of *stare decisis* that applies to decisions interpreting statutes. To overcome “this superpowered form of *stare decisis*” requires “a superspecial justification.” *Kimble*, 135 S. Ct. at 2410. Here, there is not even a superweak justification to topple the doctrinal edifice that has been over a century and a half in the making. Further, the eligibility precedents in question involve not just statutory interpretation but also property rights—two situations in which “considerations favoring *stare decisis* are at their acme.” *Id.* at 2409-10 (internal quotation marks omitted).

And scrapping the *Bilski* through *Alice* line of cases could have disastrous consequences for the patent system. See CCIA and EFF Proposed Amici Br. 3, 7-8. Those cases “endeavor[ed] to right the ship and return the nation’s patent system to its constitutional moorings.” *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 720 (Fed. Cir. 2014) (Mayer, J., concurring). That endeavor had become necessary because of the Federal Circuit’s damagingly expansive understanding of patentable subject matter. Pet. 30. *Bilski* and its progeny were an essential corrective,

and have helped filter out weak patents and improve the efficiency of the patent system. There is no reason for the Court to undo that work—let alone a “superspecial justification” that would warrant overturning a settled interpretation of a statute. *Kimble*, 135 S. Ct. at 2410. And there is thus no reason to wait and not to grant certiorari in this case.

2. Moreover, the supposed uncertainties regarding § 101 identified by the Government affect the application of the eligibility framework to a narrow class of cases—medical innovations involving laws of nature. But some confusion regarding a specific application of the eligibility framework is not a reason to throw the whole thing out. Thus, even if the Court were to grant a case to clarify that particular aspect of § 101, the basic framework would remain intact, and the question presented in *this* case, and *Berkheimer*, would remain vital.

The Government’s brief in *Hikma* primarily takes issue with *Mayo*’s discussion of what constitutes a “law of nature,” and the degree of specificity with which it defined “natural law.” *Hikma* U.S. Br. 10-12. In its view, that portion of *Mayo* spawned “uncertainty” that has had “considerable practical consequences for various types of medical innovations.” *Id.* at 15; *accord* U.S. Br. 13. It reiterates that focus many times throughout its two briefs. *E.g.*, *Hikma* U.S. Br. 9 (expressing concern about uncertainty surrounding “the patent-eligibility of a method of using a drug to treat a medical condition”); *id.* at 21 (calling on the Court to “resolv[e] the internal tension within *Mayo* and reaffirm[] that Section 101 encompasses methods of medical treatment”);

U.S. Br. 12-13 (expressing concern about “uncertainty” surrounding “the patent-eligibility of a concrete method of medical treatment”).

Beyond that limited application of *Mayo* involving laws of nature, the Government has not identified a significant problem with the broader § 101 framework that would militate against granting certiorari in this case. Indeed, Judge Dyk has, like the Government, expressed “concerns” that “the language of *Mayo*” suggests a “too restrictive test \*\*\* with respect to laws of nature.” *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 809 F.3d 1282, 1287 (Fed. Cir. 2015) (Dyk, J., concurring in the denial of rehearing en banc). To the extent there is a “problem with § 101,” it “arises not in implementing the abstract idea approach of *Alice*, but rather in implementing the natural law approach of *Mayo*.” *Athena Diagnostics, Inc. v. Mayo Collaborative Servs., LLC*, 927 F.3d 1333, 1339 (Fed. Cir. 2019) (Dyk, J., concurring in the denial of rehearing en banc). And that problem has no bearing here, where natural laws are not implicated. The cure to the problem identified by Judge Dyk and the Government is simply “some further illumination as to the scope of *Mayo* \*\*\* in one limited aspect.” *Ariosa Diagnostics*, 809 F.3d at 1287 (Fed. Cir. 2015) (Dyk, J., concurring in the denial of rehearing en banc). It is not to jettison the eligibility framework that has by and large served its purpose admirably.

The Court should thus not throw out the baby with the bathwater. “[T]he framework of *Mayo* and *Alice* is an essential ingredient of a healthy patent system, allowing the invalidation of improperly issued and highly anticompetitive patents without the need for

protracted and expensive litigation,” and “works well with respect to abstract ideas.” *Id.* at 1287, 1289; accord *Athena Diagnostics*, 927 F.3d at 1339 (Dyk, J., concurring in the denial of rehearing en banc) (“*Mayo*’s framework is sound overall”). The *Mayo/Alice* framework continues to play an especially important role in the context of business methods and non-medical technologies. Because the fundamental framework is sound, and would not need to be disturbed even if the Court clarified *Mayo* in line with the Government’s request, the question presented by *this* case is as vital as ever.

The Government also suggests that determining the “overarching principles” that “govern Section 101 analysis” may be “challenging” in the “comparatively unfamiliar context” of “software invention[s].” U.S. Br. 17. But this Court has been considering the patentability of software inventions for nearly 50 years. See, e.g., *Gottschalk v. Benson*, 409 U.S. 63 (1972); *Alice*, 573 U.S. 208. Further, the Government offers no reason why the procedural question presented in this case—whether eligibility is an issue of law capable of early resolution—would be better resolved in a different technological context. And, to the extent the Court regards *Hikma* or *Athena* as a better vehicle to consider the *substantive* § 101 standard, it can still address whether that inquiry is legal or factual here.

In sum, nothing would be gained by waiting to decide the question presented in this case and *Berkheimer*. Tossing out centuries of eligibility jurisprudence is not realistically on the table. And granting certiorari to decide a narrow question of the application of *Mayo* in a particular medical context will not

significantly affect the question presented here—whether eligibility is an issue of law amenable to early decision. Certiorari is warranted.

**II. WHETHER OR NOT THE COURT HEARS  
*HIKMA* OR *ATHENA*, IT SHOULD GRANT  
THIS CASE.**

Regardless of how the Court resolves the pending petitions in *Hikma* and *Athena*, certiorari is warranted—indeed, essential—here. *See Hikma* U.S. Br. 22 (arguing that *Athena* is a better vehicle than *Hikma*).

If the Court denies certiorari in *Hikma* and *Athena*, then certiorari is warranted in this case for the reasons already addressed in the petition. Pet. 13-32. Denying certiorari in those cases will leave the patent eligibility framework—and the need for this Court’s guidance—undisturbed. *Id.* Indeed, even the Government does not give a reason to deny certiorari in that circumstance.

If the Court grants certiorari in *Hikma* or *Athena*, certiorari would still be warranted in this case. First, as explained above, those cases present only a narrow question about the application of the *Mayo* framework to certain medical innovations, and do not even ask for reconsideration of the patent eligibility framework as a whole. *See Athena* Pet. i (presenting the question “[w]hether a new and specific method of diagnosing a medical condition is patent-eligible subject matter”); Pet. for a Writ of Cert. at i, *Hikma*, No. 18-817 (Dec. 27, 2018) (similar). Thus, if the Court grants one of those cases, the basic doctrinal framework that has governed this Court’s eligibility cases, as summarized in *Alice*, will



endure, and clarity on the question presented in *this* case remains crucial.

Second, even if the Court were to somehow alter the broader eligibility doctrine, the Court should still grant this case, because it would be beneficial to provide comprehensive guidance on the substance and procedure of patent eligibility. That is precisely how this Court has handled disputes about the Patent Act's substantive and legal standards in the past: In *Octane Fitness*, the Court addressed the substantive standard for attorneys' fees under the Patent Act—that is, the framework for determining whether to award fees. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545 (2014). In *Highmark*, it considered a related procedural question—the standard of review for such fee awards. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559 (2014). The Court heard both cases on the same day, and in each, the Justices and counsel discussed the other. Tr. of Oral Argument at 5-6, 41, *Octane*, 572 U.S. 545 (No. 12-1184); Tr. of Oral Argument at 11-12, *Highmark*, 572 U.S. 559 (No. 12-1163). And it decided the cases on the same day, too. *Octane*, 572 U.S. 545; *Highmark*, 572 U.S. at 560-561 (relying on *Octane* to determine the standard of review). It can do the same thing here, or consolidate the cases if it sees fit. See, e.g., *Epic Sys. Corp. v. Lewis*, 137 S. Ct. 809 (2017) (Mem.).

As for *Berkheimer*, if the Court grants certiorari in that case, it should hear this one in tandem<sup>2</sup>; if the

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<sup>2</sup> Alternatively, because the outcome of *Berkheimer* will necessarily affect this one, the Court should hold this case in abey-

Court denies certiorari there, it should still grant certiorari here. Pet. 33-35. Nothing in the Government's briefs (or Cellspin's, for that matter) suggests otherwise. Pet. Reply 11-12.

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ance pending the resolution of that one. Pet. 35; *see* Pet. App. 24a.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RACHAEL D. LAMKIN  
LAMKIN IP DEFENSE  
One Harbor Drive  
Suite 304  
Sausalito, CA 94965  
*Counsel for Garmin USA,  
Inc. and Garmin  
International, Inc.*

RYAN S. GOLDSTEIN  
JARED W. NEWTON  
QUINN EMANUEL URQUHART  
& SULLIVAN LLP  
865 S. Figueroa Street  
Los Angeles, CA 90015  
*Counsel for  
Canon U.S.A., Inc.*

SHANE BRUN  
VENABLE LLP  
101 California St., #3800  
San Francisco, CA 94111  
*Counsel for Fitbit, Inc.  
and Moov, Inc.*

NEAL KUMAR KATYAL  
*Counsel of Record*  
DANIELLE D. STEMPEL\*  
MICHAEL J. WEST  
HOGAN LOVELLS US LLP  
555 Thirteenth St., N.W.  
Washington, D.C. 20004  
(202) 637-5600  
neal.katyal@hoganlovells.com

*\* Admitted only in Maryland;  
practice supervised by principals  
of the firm admitted in D.C.*

THOMAS P. SCHMIDT  
HOGAN LOVELLS US LLP  
390 Madison Ave.  
New York, NY 10017  
*Counsel for Garmin USA,  
Inc. and Garmin  
International, Inc.*

IRFAN A. LATEEF  
DANIEL C. KIANG  
KNOBBE MARTENS  
OLSON & BEAR LLP  
2040 Main St., 14<sup>th</sup> Floor  
Irvine, CA 92614  
*Counsel for  
JK Imaging LTD.*

RICARDO J. BONILLA  
DAVID B. CONRAD  
FISH & RICHARDSON P.C.  
1717 Main Street  
Suite 5000  
Dallas, TX 75201  
*Counsel for Fossil Group,  
Inc. and Misfit Inc.*

KARINEH KHACHATOURIAN  
NIKOLAUS A. WOLOSZCZUK  
RIMON LAW, P.C.  
2479 E. Bayshore Road  
Suite 210  
Palo Alto, CA 94303  
*Counsel for GoPro, Inc.*

STANLEY J. PANIKOWSKI  
RICHARD T. MULLOY  
DLA PIPER LLP (US)  
401 B Street, Suite 1700  
San Diego, CA 92101  
*Counsel for NIKE, Inc.*

STEVEN J. ROUTH  
STEN JENSEN  
T. VANN PEARCE, JR.  
MELANIE L. BOSTWICK  
ORRICK, HERRINGTON &  
SUTCLIFFE LLP  
1152 15th Street NW  
Washington, DC 20005  
*Counsel for Panasonic  
Corporation of North  
America*

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