No. 19-43

IN THE

Supreme Court of the United States

POWER ANALYTICS CORPORATION,
Petitioner,

v.

OPERATION TECHNOLOGY INC.,
SCHNEIDER ELECTRIC USA, INC.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

As one basis for granting summary judgment of patent invalidity, the district court held that Petitioner's patent claims are analogous to those this Court held patent ineligible in *Parker v. Flook*, 437 U.S. 584 (1978). Pet. App. 19, 40–42. In comparing Petitioner's claims to those declared patent ineligible in *Flook*, the district court followed in this Court's footsteps. *E.g.*, *Mayo Collaborative Servs. v. Prometheus Labs.*, 566 U.S. 66, 82 (2012) ("The claim before us presents a case for patentability that is weaker than the (patent-eligible) claim in *Diehr* and no stronger than the (unpatentable) claim in *Flook*."). The petition, however, does not mention *Flook*.

The question presented is:

Whether the Federal Circuit correctly issued an unpublished summary affirmance of a district court order holding that Petitioner's patent claims are invalid under *Parker v. Flook*, 437 U.S. 584 (1978)?

RULE 29.6 STATEMENT

Respondent Operation Technology Inc. has no parent corporation and no publicly traded corporation owns 10% or more of its stock.

Schneider Electric USA, Inc. is a wholly owned subsidiary of Schneider Electric Holdings, Inc. Schneider Electric Holdings, Inc. is a wholly owned subsidiary of Schneider Electric Industries S.A.S. and Schneider Electric Holding Amerique du Nord. Schneider Electric Holding Amerique du Nord is a wholly owned subsidiary of Schneider Electric Industries S.A.S., which is a wholly owned subsidiary of Schneider Electric S.E. Schneider Electric S.E. is a publicly traded company.

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BRIEF IN OPPOSITION

Respondents Operation Technology Inc. and Schneider Electric USA, Inc. (collectively, "Respondents"), submit this brief in opposition to the petition for a writ of certiorari filed by Power Analytics Corporation.

INTRODUCTION

This case concerns the patent eligibility of claims directed to updating an abstract mathematical model for predicting data in electrical systems. The district court invalidated the claims, finding them indistinguishable from claims held patent ineligible in *Parker v. Flook*, 437 U.S. 584 (1978). That conclusion was so plainly correct that the Federal Circuit affirmed in an unpublished summary order.

The petition for certiorari is a generalized plea for this Court to issue additional guidance on patentability under 35 U.S.C. § 101. But the petition provides virtually no reason why this case is the right vehicle to provide such guidance—likely because under *any* approach to patent-eligibility under § 101, the patents here would be invalid.

Petitioner's contentions that the lower courts failed to follow *Berkheimer v. HP Inc.*, 881 F.3d 1360 (Fed. Cir. 2018) are inapposite and certainly not an issue appropriate for this Court. Further, the Court should not hold this petition pending *HP, Inc. v. Berkheimer*, No. 18-415. *Berkheimer* concerns the procedural question of whether patent-eligibility is a pure question of law, or instead may require fact-

finding. That question is irrelevant to this case for numerous reasons. First, the Federal Circuit adopted a *patentee-friendly* standard in *Berkheimer*—which HP is asking this Court to *overturn*—and the claims here were still found invalid under that favorable standard. Thus, Petitioner could not possibly benefit from a favorable ruling in *Berkheimer*. Second, Petitioner waived any argument that any additional facts now raised might advance its position. Third, Petitioner makes no coherent argument that any fact-finding could possibly change the result in this case, which turns in part on the dispositive legal similarity between the claims in suit and the claims declared patent-ineligible in *Flook* and other precedent.

STATEMENT OF THE CASE

The petition is long on general assertions that this Court should clarify its patent-eligibility jurisprudence, but short on information about this specific case. To describe the facts of this case is to decide it: the claims are directed to abstract data manipulation methods which are paradigmatic "abstract ideas" under § 101.

1. For millennia, humans have used mathematical models to predict physical events, adjusting those models when their predictions deviated from real-world observations. Johannes Kepler, for instance, observed that the path of Mars deviated from that predicted by an eccentric *circles* model of planetary motion, so he changed the model to eccentric *ellipses*.

The patents here are directed to this same idea of updating a prediction model to account for deviations between its predictions and real, live data, but in the field of electrical system monitoring. As the

district court found—based on its review of the claims and the specification—"the claims in the Asserted Patents focus on the idea of comparing live data to predicted data and updating a prediction model. They are directed to data manipulation …." Pet. App. 42. Petitioner described this central idea of the patents similarly in the district court. *See* Pet. App. 35.

Specifically, the claims recite that live data from conventional sensors monitoring an electrical system is compared to a conventional model's predictions and, if the deviation exceeds a threshold, the model is updated (*i.e.*, calibrated or synchronized) accordingly. (CAJA74, CAJA76–77 (e.g., 1:41–2:2, 2:39–59, 6:48–7:5, 7:24–34, 7:49–60, 8:9–19).)

2. Respondents moved for summary judgment of patent ineligibility, noting that the asserted claims are materially indistinguishable from those held ineligible in *Flook*. The patent claims at issue in *Flook* were directed to a "Method for Updating Alarm Limits." 437 U.S. at 585. They claimed a mathematical model that allowed for more accurate updates of "alarm limits," which were numerical values that indicated abnormal conditions. *Id.* This Court held that the patent was invalid because it was directed to a mathematical algorithm. *Id.* at 589–90. As Respondents explained, this case bears a remarkable resemblance to *Flook*—the claims also are directed to a mathematical algorithm of a physical process in light of current operating data. The district court held a hearing and issued a detailed opinion granting summary judgment, relying on *Flook* and other precedents.

Finding these data-manipulation claims patent ineligible under Section 101 was not a close call under

precedents of this Court and the Federal Circuit. The district court first found the claims directed to the abstract idea of "evaluating and reacting to prediction deviations," Pet. App. 35, 43, and then found that the claims lacked a saving "inventive concept." The district court particularly noted the similarity between the asserted claims and those held ineligible in *Flook*:

> The asserted claims are more like those in *Parker v. Flook*, 437 U.S. 584 (1978). There, the claimed idea was to collect data from a monitored industrial system, and analyze and compare it with other data. Depending on the outcome of that analysis, the claimed idea would update an alarm limit responsible for identifying alarm conditions to users. *Id.* at 596–98. Like the *Flook* claims, the claims here do not recite either unconventional physical elements or a functional relationship between abstract and physical elements. Rather, the "threshold, calibration, and synchronization" elements are abstract, generic steps that describe desired functions or outcomes, but do not, individually or in combination, constitute "inventive concepts."

Pet. App. 42; *see also id.* 19, 37–38, 40–41.

The district court again relied on *Flook* in rejecting Petitioner's assertion that the idea was novel and useful. "New abstract ideas are no more valid than old ones: abstract ideas are ineligible for

patenting even if they are 'novel and useful.'" Pet. App. 37 (quoting *Flook*, 437 U.S. at 588).

The district court considered each asserted patent claim in its opinion. Pet. App. 33–37, 40–43. It also properly considered one claim as representative of all asserted claims. It noted that Petitioner had "not shown how the other independent claims differ[ed] materially from" it, and that although Petitioner had "referred in passing to several of the dependent claims, it present[ed] no substantive arguments as to their separate patentability." Pet. App. 33 n.1.

3. Petitioner moved for reconsideration (CAJA2640–2672) and submitted an expert declaration (CAJA2674–2681), despite having submitted no expert declaration in its opposition to Respondents' summary judgment motion. The district court fully considered Petitioner's reconsideration request and rejected it both on the merits and for violating the Local Rules. Pet. App. at 6–22. The district court held that Petitioner had failed "to identify any disputed, material facts" in its opposition to the motion and made "no showing that [the expert declaration] could not have been timely submitted." Pet. App. 11.

On the merits, the district court again returned to *Flook*: "The claims at issue in this case are unlike those addressed in *Diehr* and more analogous to those considered in *Flook*. Thus, they simply took abstract data monitoring and analysis concepts and applied them to a particular industry." Pet. App. 19.

4. Petitioner appealed. After a hearing at which one circuit judge noted that the district court's Local Rule requiring the non-movant to identify disputed material facts was "important," the Federal Circuit

affirmed without opinion. Oral Argument at 25:33–26:48, No. 2018-1428, http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2018-1428.mp3 (Jan. 11, 2019); Pet. App. at 1–2. Petitioner moved for reconsideration *en banc* and no judge asked for a response from Respondents.

REASONS FOR DENYING THE PETITION

I. THE FEDERAL CIRCUIT'S DECISION IS CORRECT AND DOES NOT WARRANT PLENARY REVIEW.

A. THE UNCHALLENGED PRECEDENT OF *FLOOK* CONTROLS.

This Court's patent ineligibility decisions routinely compare the patent claims at issue to other claims the Court previously analyzed for patent eligibility. *E.g.*, *Mayo*, 566 U.S. at 82 ("The claim before us presents a case for patentability that is weaker than the (patent-eligible) claim in *Diehr* and no stronger than the (unpatentable) claim in *Flook*."). The district court here did the same. Of particular moment here, it analogized Petitioner's claims to those this Court declared patent ineligible in *Flook*.

This case is indistinguishable from *Flook*. In *Flook*, the claims described a method of monitoring chemical processes, including a formula "primarily useful for computerized calculations producing automatic adjustments in alarm settings." 437 U.S. at 586. To perform *Flook*'s claimed method, a computer needs to store a current alarm base, receive live data from a device monitoring the chemical process to determine the present value of a process variable, perform a calculation using this stored and live data, and output the result so that the alarm limit is

adjusted. *See generally id.* at 585–86. In effect, the claimed invention in *Flook* used real-time data collected from a physical system to update a mathematical model of that system, which model predicted when the process was approaching an alarm condition. That is the same abstract idea in the patent claims asserted here, only in a different technological environment.

As in *Flook*, the asserted data-manipulation patents do not purport to innovate in any physical, non-abstract realm. They describe no new sensors, computers, or other new equipment. Instead, they concede that it was conventional to collect "thousands of pieces of information per second from sensory data points that are distributed throughout the monitored electrical power system" (CAJA74 (2:20–24)), and conventional to use mathematical models to predict the performance of such electrical systems. (CAJA74 (1:31–50), CAJA77 (8:21–24)). *See* Pet. App. 28, 42. They proclaim that their idea can use "conventional" equipment and general-purpose computers. (*E.g.*, CAJA80 (13:39–42, 13:55–60, 14:25–28), CAJA91 (36:11–17,), CAJA94 (41:56–60).) Just as Kepler and Flook needed no new equipment to update their respective mathematical models, the patents' data-manipulation idea requires no new equipment to update the mathematical model.

Petitioner argues that the asserted claims provide a "technological solution" to solve "technological problems." Pet. 17, 18. But when these labels are peeled away, all that remains is the proposition that it was useful in this technological environment to update a prediction model when its predictions significantly deviate from live data. Of course, updating an out-of-date model is useful.

Johannes Kepler showed that, as did Dale Flook centuries later, and many others in between. But useful abstract ideas are no less abstract than useless ones, nor any more technological. *See Flook*, 437 U.S. at 588 ("For the purpose of our analysis, we assume that respondent's formula is novel and useful and that he discovered it.").

The petition does not challenge the holding or analysis in *Flook*, or even mention *Flook*, despite the district court's reliance on that controlling precedent. This case would be a poor vehicle to expand this Court's precedent given that the facts are indistinguishable from a case from this Court that Petitioner does not even cite.

B. A MERE ALLEGED MISAPPLICATION OF LAW IS UNFIT FOR REVIEW.

A lower court's alleged misapplication of its settled law is not worthy of this Court's review. *See* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). Yet, that is the thrust of this petition: "the district's finding of ineligibility conflicts with prior decisions of the Federal Circuit." Pet. 5. Specifically, Petitioner contends that the lower courts failed to follow the governing Federal Circuit precedent of *Berkheimer v. HP Inc.*, 881 F.3d 1360 (Fed. Cir. 2018) regarding:

1. "the established analysis for determining whether a claim is representative," Pet. at 6, and "the Federal Circuit's current guidance regarding representative claims," Pet. at 4.

2. "the governing 'clear and convincing' standard," Pet. at 5.

3. supposed questions of fact, Pet. at 5, 17–19.

It is not for this Court to police the lower courts' application of legal principles those courts already accept.

C. PETITIONER'S ARGUMENTS ARE EITHER WAIVED OR REFLECT MISCHARACTERIZATIONS OF LOWER-COURT PROCEEDINGS.

Petitioner advances several scattershot objections to the proceedings below. Those arguments are either waived or reflect mischaracterizations of the proceedings.

1. Petitioner complains that the district court did not engage in claim construction, Pet. at 4, and that the district court declined to "read into the claims" details from the patent's specification, *id.* at 6, or "consult[] the specification to understand the meaning of the claim language," *id.* at 24. But Petitioner waived these arguments in its opposition to the motion for summary judgment by identifying no claim construction dispute as being material to the motion. Even now, the petition fails to identify any claim construction that could alter the district court's decision.

2. Petitioner complains that the district court misunderstood the focus of the patent claims. Pet. at 24. It asserts that "the asserted claims are directed to a scalable hardware architecture…." Pet. at 3. But Petitioner waived that assertion in the district court. First, Petitioner did not mention "scalable" or "architecture" in its summary judgment opposition

brief or at the motion hearing. Second, it made a fatal admission about the "focus" of the alleged invention, on which the lower courts were entitled to rely. Petitioner admitted in its motion opposition that the patents' "inventions" "focus on" mere calculations and data manipulations:

> In the Asserted Patents, the collection of real-time data is a relatively minor (but necessary) element of the *inventions that focus on* the use of that data to calibrate and/or synchronize the model of the virtual electrical system, and use the new values to generate new calculations for the virtual system model.

CAJA1685 (emphasis added).

3. Petitioner objects that the district court distinguished patent eligibility from patentability under sections 102 and 103. Pet. at 7. But Petitioner waived this objection by taking the reverse position before the appeals court. There, Petitioner cited with approval Federal Circuit precedent distinguishing patent eligibility under section 101 of the Patent Act from patentability under sections 102 and 103: "this Court stated that the § 101 analysis was distinct from the § 102 and § 103 analyses, holding that '[n]or is it enough for subject-matter eligibility that claimed techniques be novel and nonobvious in light of prior art, passing muster under 35 U.S.C. §§ 102 and 103.'" (Case No. 18-1428, Doc. 43, pp. 24–25.). In any event, a change in that precedent would not alter the conclusion here.

4. Petitioner complains that there is inconsistency among Federal Circuit opinions

addressing similar technology. For example, Petitioner complains that claims in one case involving "internet-centric problems" were found invalid, while those in another case involving the same type of problems were found valid. Pet. at 21. But Petitioner never argued that the claims here were valid merely because of their technological environment. (And with good cause: mathematical algorithms, mental processes, data manipulations, etc. are patent-ineligible if not part of an inventive application of the abstract idea, whether used in this technological environment or not.)

5. The district court did *not* "ignore[] 137 of the asserted claims." Pet. at 24. Instead, it analyzed each asserted claim, expressly considering the claims "as a whole" (Pet. App. 21) and determining that *each* claim was "substantially similar and linked to the same abstract idea" (Pet. App. 17). The district court repeatedly referenced "each" asserted claim, holding, for example, that "each" claim "recites the idea of evaluating and reacting to prediction deviations along with functionally recited 'engines' and 'components.'" Pet. App. 35; *see also id.* 36–37, 38, 40–42, 42–43.

6. The district court did *not* "expressly decline[] to consult the specification for guidance as to whether the invention described routine and conventional activities." Pet. at 15; *see also id.* at 4, 15–16. The district court repeatedly and expressly cited the patent specification on that and other issues. *See* Pet. App. 28–30, 41. And, it relied on Petitioner's own characterizations of the alleged invention disclosed in the patent specification. Pet. App. 13–14, 35.

D. THIS CASE IS A POOR VEHICLE TO ISSUE GENERAL GUIDANCE ABOUT PATENT ELIGIBILITY.

Most of the petition consists of Petitioner's general complaints about the Federal Circuit's § 101 jurisprudence and practice of issuing summary affirmances. As explained above, even if this Court were inclined to revisit patent eligibility, this case is a poor vehicle to do so, in part, because it is indistinguishable from *Flook* and because Petitioner has waived most of its arguments.

In any event, Petitioner's assertions about the current state of law in the Federal Circuit are not persuasive. For instance, the Federal Circuit decisions cited by Petitioner are *not* irreconcilably opposed, Pet. at 8, 15–16, 20–21. For example, there is nothing inconsistent with construing a claim in the context of the patent's specification while also acknowledging that a patent's claims are not always limited to a particular embodiment disclosed in the specification. *See Berkheimer*, 881 F.3d at 1369–1370 (finding inventive features in specification reflected in some claims but not others).

Similarly, there are *not* only a "relatively few precedential Federal Circuit decisions on patent eligibility." Pet. at i. Post-*Alice*, the Federal Circuit has issued more than fifty precedential decisions on patent eligibility.

That hundreds of patents have been declared invalid for patent ineligibility is *not* something that needs correction. *Cf.* Pet. at 9. Instead, that is what happens when the Patent Office improperly issues thousands of bad patents encompassing subject matter ineligible for patenting under the trilogy of

Gottschalk v. Benson, 409 U.S. 63 (1972), *Flook* and *Diamond v. Diehr*, 450 U.S. 175 (1981)—and patent owners such as Petitioner refuse to acknowledge that their patents never should have issued in the first place, despite this Court reconfirming that trilogy.

Nor is there any empirical basis for Petitioner's (and others') assertion that patent eligibility is unpredictable. Pet. 10–15. *See* Jeremy Anapol and Andrew B. Schwaab, *How Unpredictable is the Alice Analysis?* Knobbe Martens (Oct. 16, 2018), https://www.knobbe.com/news/2018/10/how-unpredictable-alice-analysis#_ednref9.

II. THIS CASE SHOULD NOT BE HELD PENDING *BERKHEIMER* OR PENDING LEGISLATION.

Petitioner asks this Court to hold this petition for the petition in *HP v. Berkheimer*, No. 18-415. The Court should decline Petitioner's request. The question presented in *Berkheimer* is "whether patent eligibility is a question of law for the court based on the scope of the claims or a question of fact for the jury based on the state of the art at the time of the patent." There is no possible way the Court's resolution of that question could affect this case.

First, Petitioner overlooks that the patent owner Berkheimer *won* in the Federal Circuit, yet Petitioner *still lost*. Petitioner does not suggest that this Court might issue a decision that is somehow *more* patentee-favorable than *Berkheimer*. The best-case scenario for Petitioner would therefore be an affirmance in *Berkheimer*—which would leave Petitioner in the same place it is now. Notably, Petitioner expressly concedes that the Federal Circuit had a full and fair opportunity to consider whether Petitioner could

benefit from *Berkheimer*; it acknowledges having "expressly argu[ed]" in the Federal Circuit that it should prevail under *Berkheimer*. Pet. 19. Yet it lost anyway, demonstrating that it could not possibly benefit from a Supreme Court decision in Berkheimer's favor.

Second, the question in *Berkheimer* is whether district courts should conduct fact-finding in determining patent eligibility. But Petitioner waived the right to seek such fact-finding both in the district court and on appeal. In the district court, Respondents asserted that no material facts were genuinely disputed on its motion for summary judgment. (CAJA693, CAJA959.) In response, Petitioner did not dispute this, either in its motion opposition brief (*see, e.g.*, CAJA1701–1703) or in its statement of material facts required by the Local Rules (CAJA1982–2000). *See* Pet. App. 10–11. Only after the district court granted summary judgment to Respondents did Petitioner submit an expert declaration as part of its motion for reconsideration. (CAJA2640–2672, 2674–2681). The district court fully considered Petitioner's reconsideration request and rejected it on the merits and for violating the Local Rules. Pet. App. at 6–22. The district court held that Petitioner had failed "to identify any disputed, material facts" in its opposition to the motion and made "no showing that [the expert declaration] could not have been timely submitted." Pet. App. 11. This procedural ruling would bar Petitioner from relying on facts regardless of how *Berkheimer* turns out. In the Court of Appeals, Petitioner again waived its argument by failing to challenge the district court's waiver ruling in its opening brief. It is no wonder that the Federal Circuit

deemed this case sufficiently straightforward that a written decision was unwarranted.

Third, Petitioner identifies no coherent theory on how fact-finding could possibly affect the legal analysis. Merely attempting to insert an (untimely) expert declaration into the record is not enough to establish a factual issue; Petitioner must show that the fact-finding could actually affect the invalidity analysis. The district court thoroughly considered and rejected the argument that fact-finding could be relevant in the face of the undisputed Patent Office records, Pet. App. 10–11, and Petitioner does not even attempt to explain why this ruling is incorrect.

Petitioner also seeks delay in the hopes of a rescue from Congress. This Court's practice is not to hold cases pending hypothetical legislation. Here, that would be especially inappropriate because no bill has even been introduced. Rather, Petitioner cites the draft text of a hypothetical bill. It is unlikely that any bill will be passed in the near future, especially given that the last major patent legislation, the America Invents Act, took seven years of debate before it finally passed. It is doubly unlikely that Congress will overturn *Flook* and allow patentees to patent mathematical algorithms and mere data manipulations. And it is triply unlikely that Congress would make any such statute changing centuries of common law retroactive to undo existing district court judgments on appeal.

CONCLUSION

For the reasons above, the writ of certiorari should be denied.

Respectfully submitted,

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