No. 19-619

In the
Supreme Court of the United States

CISCO SYSTEMS, INC.,

Petitioner,

V.

SRI INTERNATIONAL, INC.,

Respondent.

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

Whether both the Federal Circuit and district court below correctly found that respondent's patent claims are *not* directed to "only the abstract idea of collecting and analyzing data" (Pet. i) and, instead, are directed to a "specific technique" (Pet. App. 12a-13a) of data analysis that solves a technological problem and improves computer functionality?

RULE 29.6 STATEMENT

Respondent SRI International, Inc. states that there is no parent or publicly held company owning 10% or more of its stock.

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INTRODUCTION

Both the Federal Circuit and the district court carefully analyzed the scope of respondent's patent claims, and recognized that, "[c]ontrary to Cisco's assertion," the claims were "*not* directed to just analyzing data from multiple sources to detect suspicious activity." Pet. App. 12a-13a (emphasis added); *see id.* at 50a-51a. Rather, as the Federal Circuit explained, the claims are "directed to using a specific technique," for preventing large-scale cyberattacks by "analyz[ing] specific types of data on the network" and "integrating those reports using hierarchical monitors." *Id.* at 12a-13a; *see id.* at 51a-52a. That "specific technique" represented a significant improvement in computer functionality—even being described by the Department of Defense as "a quantum leap improvement over" previous efforts. *Id.* at 7a (quoting CAJA1273 (273:7-9)).[1]

The petition, starting with the Question Presented, is framed on an entirely different premise. It asks "[w]hether patent claims that recite *only* the abstract idea of collecting and analyzing data are patent-ineligible under 35 U.S.C. § 101 and *Alice* [*Corp. Pty. Ltd. v. CLS Bank Int'l,* 573 U.S. 208 (2014)]." Pet. i (emphasis added). Likewise, throughout its petition, petitioner repeatedly characterizes the claims as "merely" (*id.* at 10), "only" (*id.* at 18), and "simply" (*id.* at 22) reciting the abstract idea of collecting and analyzing data. Yet this case presents no such question, and it involves no such patent. As both the Federal Circuit and district court found below, the claims at issue involve a

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[1] Citations to "CAJA" refer to the Joint Appendix filed below.

"specific technique" "directed to an improvement in computer network technology." Pet. App. 12a-13a; *see also id.* at 51a-52a. At most, this case presents the question whether that claim-specific determination is correct. But petitioner does not even ask this Court to review that determination. Instead, petitioner asks this Court to decide a made-up question.

There is no reason to do so. Applying settled precedent from this Court that petitioner does not challenge—the *Alice* framework (*see* 573 U.S. at 217)—both the Federal Circuit and district court correctly concluded that the claims at issue are patent eligible. *See* Pet. App. 11a-15a; *id.* at 51a-52a. That application of settled law to the particular claims at issue does not warrant further review in this Court. And that no doubt explains why petitioner has tried to invent an entirely different case to present to this Court. The petition should be denied.

STATEMENT OF THE CASE

1. Respondent SRI International, founded in 1946 as Stanford Research Institute (SRI), is a non-profit organization devoted to the research and development of socially beneficial technologies. CAJA1225-26. SRI has patented numerous ground-breaking inventions over the years, including the computer mouse, HDTV, and touch types for the deaf. CAJA1227.

Since 1980, respondent has led significant research in the area of computer network security. CAJA1228. In 1996, respondent began working on a program to address a persistent problem in cybersecurity: the difficulty of detecting hacking attacks on an interconnected network of computers. CAJA1229-30. One example of a way this problem

arises is when "a hacker may try logging in to several computers or monitors in a network," but the "number of login attempts for each computer may be below the threshold to trigger an alert, making it difficult to detect such an attack by looking at only a single monitor location in the network." Pet. App. 6a. Existing network defense systems struggled to prevent large-scale attacks on interconnected networks because they were unable to sift through and analyze the quantity of incoming information without sacrificing the performance and speed of the overall network. CAJA33198.

After "perform[ing] considerable research and development," respondent conceived a novel solution to this problem. Pet. App. 7a. This solution involved, identifying the "'particular categories of network traffic data . . . well suited [to] determining whether network traffic was suspicious,'" and then conducting a "hierarchical analysis," which involved a unique arrangement of network monitors correlating data in a way that made it possible to "'profile global malicious or anomalous activity that is not visible locally.'" *Id.* at 51a (first alteration in original) (citations omitted).

As embodied by SRI's scientists, this development was considered revolutionary. The Department of Defense's Advanced Research Projects Agency, which partially funded the project, described it as a "gem in the world of cyber defense" and "a quantum leap improvement over" previous technology. CAJA1234-1235 (234:21-235:3), CAJA1240 (240:22-25), CAJA1272-1273 (272:13-273:17). Private businesses also recognized the importance of SRI's technology, with licenses eventually being taken by IBM,

Intel/McAfee, and Oki. CAJA1253 (253:6-12), CAJA1291 (291:2-11).

Respondent's research eventually led to the two patents at issue in this case: the '615 patent, titled "Network Surveillance," and the '203 patent, titled "Hierarchical Event Monitoring and Analysis." The Federal Circuit used claim 1 of the '615 patent as the "representative claim," which reads as follows:

> A computer-automated method of hierarchical event monitoring and analysis within an enterprise network comprising:
>
> > deploying a plurality of network monitors in the enterprise network;
> >
> > detecting, by the network monitors, suspicious network activity based on analysis of network traffic data selected from one or more of the following categories: {network packet data transfer commands, network packet data transfer errors, network packet data volume, network connection requests, network connection denials, error codes included in a network packet, network connection acknowledgements, and network packets indicative of well-known network-service protocols};
> >
> > generating, by the monitors, reports of said suspicious activity; and
> >
> > automatically receiving and integrating the reports of suspicious activity, by one or more hierarchical monitors.

Pet. App. 8a-9a.

The validity of these patents have been litigated and upheld on numerous occasions. In *SRI*

International Inc. v. Internet Security Systems, Inc., 647 F. Supp. 2d 323 (D. Del. 2009), a jury found the patents valid and infringed, a decision the Federal Circuit affirmed on appeal, *SRI International Inc. v. Internet Security Systems, Inc.*, 401 F. App'x 530 (Fed. Cir. 2010). The patents have also undergone two reexaminations each before the Patent Office, which reached the same result as the jury and confirmed the patentability of all claims. CAJA32734 ¶ 47, CAJA32745 ¶ 65, CAJA32814 ¶ 207; Pet. App. 9a.

2. Petitioner Cisco is the world's largest computer networking company. Although petitioner wrote to SRI expressing interest in respondent's technology and met with one of its inventors, petitioner did not ultimately pursue a license to use the technology. CAJA1484-1486 (484:13-486:25), CAJA5027. Instead, it developed a series of commercially available products which were functionally identical to it. Pet. App. 10a (noting "[t]he jury found that Cisco intrusion protection system ('IPS') products, Cisco remote management services, Cisco IPS services, Sourcefire IPS products, and Sourcefire professional services directly and indirectly infringed [respondent's patents]" (footnote omitted)).

After first informing petitioner of its infringement, respondent filed suit in the District Court for the District of Delaware alleging that petitioner had infringed the '203 and '615 patents. Petitioner unsuccessfully moved for summary judgment on several issues, including that the claims are ineligible for patent protection and that the claims had been anticipated. *Id.* at 9a. In rejecting the former argument, the court rejected petitioner's assertion that the claims were directed to the abstract idea of monitoring and analyzing data. *Id.* at 50a-51a.

Instead, the court stressed that the claims are "more complex" and "are better understood as being 'necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks.'" *Id.* at 51a (citation omitted).

Following a trial, a jury found that various Cisco products directly and indirectly infringed the asserted claims. The jury awarded respondent a 3.5% reasonable royalty for a total of $23,660,000 in compensatory damages. The jury also found by clear and convincing evidence that petitioner's infringement was willful. *Id.* at 10a.

Following the verdict, the district court awarded enhanced damages of twice the verdict. *See id.* As support for this ruling, the court cited "Cisco's litigation conduct, its status as the world's largest networking company, its apparent disdain for SRI and its business model, and the fact that Cisco lost on all issues during summary judgment and trial, despite its formidable efforts to the contrary." *SRI Int'l, Inc. v. Cisco Sys., Inc.*, 254 F. Supp. 3d 680, 723 (D. Del. 2017), *aff'd in part and vacated in part*, 918 F.3d 1368 (Fed. Cir. 2019). The court also awarded attorneys' fees based on petitioner's willful infringement and egregious litigation conduct. *Id.* at 723-24.

The district court explained that, while it had "rarely awarded fees" in patent cases, it determined that attorneys' fees were appropriate here because "Cisco's litigation strategies . . . created a substantial amount of work for both SRI and the court, much of which work was needlessly repetitive or irrelevant or frivolous." *Id.* at 723 (footnotes omitted). "[E]ven a cursory review of the record," the court stressed, showed that Cisco "crossed the line in several

regards" and "pursued litigation about as aggressively as the court has seen in its judicial experience." *Id.* at 722. The court further "inventoried Cisco's aggressive tactics, including maintaining nineteen invalidity theories until the eve of trial but only presenting two at trial and pursuing defenses at trial that were contrary to the court's rulings or Cisco's internal documents." Pet. App. 28a.

3. The Federal Circuit affirmed the district court's rulings regarding anticipation, enhanced damages and patent-eligibility. *Id.* at 1a-35a.

As to patent eligibility, the Federal Circuit applied the two-step framework set forth in *Alice*. The Federal Circuit resolved the issue at "*Alice* step one"—which considers "whether the claims at issue are directed to a patent-ineligible concept such as an abstract idea"—and held that the claims are "not directed to an abstract idea." *Id.* at 12a. Accordingly, the court did not reach *Alice*'s second step, which "'consider[s] the elements of each claim both individually and "as an ordered combination" to determine whether the additional elements "transform the nature of the claim" into a patent-eligible application.'" *Id.* (quoting *Alice*, 573 U.S. at 217); *see also id.* at 15a.

The court noted that "Cisco argues that the claims are analogous to those in *Electric Power Group, LLC v. Alstom S.A.*, 830 F.3d 1350 (Fed. Cir. 2016), and are simply directed to generic steps required to collect and analyze data." Pet. App. 13a-14a. But the Court "disagree[d]" with this characterization. *Id.* at 14a. "Contrary to Cisco's assertion," the court found that respondent's claims were "*not* directed to just analyzing data from multiple sources to detect suspicious activity." *Id.* at 12a-13a (emphasis added).

Rather, the court stressed, the claims were "directed to using a specific technique," for preventing large-scale cyberattacks by "analyz[ing] specific types of data on the network" and "integrating those reports using hierarchical monitors." *Id.* at 11a-12a. Moreover, "the claims are directed to an improvement in computer network technology"—which are patent eligible under well-settled law. *Id.* at 13a.

The court rejected petitioner's effort to analogize this case to the Federal Circuit's prior decision in *Electric Power*. There, the court explained, the patent "claims were drawn to using computers as tools to solve a power grid problem, rather than improving the functionality of computers and computer networks themselves." *Id.* at 14a. By contrast, the Federal Circuit explained, here "the claims are more like the patent-eligible claims in *DDR* [*Holdings, LLC v. Hotels.com, L.P.,* 773 F.3d 1245, 1258 (Fed. Cir. 2014)]," because they "improve[] the technical functioning of the computer and computer networks by reciting a specific technique," rather than simply "automating a conventional idea on a computer." *Id.*

Judge Lourie dissented. *Id.* at 32a-35a. He did not disagree with the panel as to the applicable legal standard or criticize the panel for adopting any new rule of law. Rather, Judge Lourie disagreed only with the panel majority's reading of the particular claims at issue and, specifically, whether those claims, in fact, described a "specific technique . . . for improving computer network security." *Id.* at 34a. Based on his view of the claims, Judge Lourie would have found that the claims were ineligible under *Alice. Id.* at 35a.

The Federal Circuit denied petitioner's petition for rehearing en banc, with no judge dissenting.[2]

REASONS FOR DENYING THE PETITION

I. THE QUESTION PRESENTED IS PREMISED ON A MISCHARACTERIZATION OF THE DECISION BELOW

The most obvious reason to deny the petition is that this case does not even present the question raised by petitioner. The Question Presented in the petition is whether "patent claims that recite *only* the abstract idea of collecting and analyzing data" are patent eligible. Pet. i (emphasis added). Petitioner seeks review of whether this "new rule of patent law" is correct, and asserts an "intra-circuit" split with Federal Circuit precedent rejecting such a "rule." *Id.* at 12, 22. But the decision below adopts no such rule. To the contrary, the Federal Circuit, like the district court before it, concluded that the patent claims did *not* in fact recite only the abstract idea of collecting and analyzing data. Pet. App. 12a-13a, 51a. The petition does not even seek review of that claim-specific determination. But if it did, the petition would seek no more than fact-bound error correction. The petition should be denied on that basis alone.

1. The decision below does no more than apply this Court's settled precedent to the particular claims at issue. As this Court has explained, a "generic computer implementation" of "an abstract idea is not patentable." *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208, 216 (2014). No one disputes that.

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[2] Remand proceedings are underway in the district court related to willfulness, enhanced damages, and fees owing to a timing issue not relevant to this petition.

Before both the district court and the Federal Circuit, petitioner argued that the claims at issue in this case simply recite the abstract idea of "collecting and analyzing data" on a computer network. Pet. App. 12a-13a, 51a. But the courts below correctly rejected that characterization. As the Federal Circuit explained, "contrary to Cisco's assertion, the claims [here] are *not* directed to just analyzing data from multiple sources to detect suspicious activity." *Id.* at 12a-13a (emphasis added). Rather, they "are directed to using a *specific technique*"—"analyz[ing] *specific* types of data on the network" and "integrating those reports using hierarchical monitors." *Id.* (emphasis added). The district court likewise concluded that the claims were "more complex" than characterized by petitioner. *Id.* at 51a.

Petitioner never directly acknowledges those determinations. Instead, petitioner repeatedly characterizes the decision below (at i, 10, 12, 16, 18, 22) as *agreeing* with its factual premise that the claims involve *only* the "abstract idea of collecting and analyzing data"; and then characterizes the decision below (at 22, 4) as adopting a "a new rule of patent law" that such a "basic concept" is patentable. But that is the exact opposite of what occurred below. As noted above, both the Federal Circuit and district court *rejected* the premise that respondent's patent claims recite only the collecting and analyzing of data. Pet. App. 12a-13a, 50a. The Federal Circuit (*id.* at 11a-15a) and district court (*id.* at 50a-52a) then applied settled and undisputed principles of patent law to hold the claims were eligible for patent protection. Nothing about those case-specific determinations warrants this Court's review.

2. Petitioner's mischaracterization of the claims at issue hinges on omitting or ignoring key limiting features that define the innovative aspects of respondent's technology.

First, the claim identifies the *specific network traffic data categories* that the inventors determined were well-suited for automatic monitoring of suspicious activity, thereby greatly reducing the volume of data to be analyzed. Pet. App. 8a (quoting '615 patent claiming only "analysis of network traffic data selected from . . . the *following categories*" and setting forth a limited number of data categories to search (emphasis added)). Before respondent's invention, network defense systems struggled to prevent large-scale attacks due to the very real problem of having to sift and analyze an unmanageable amount of data without sacrificing the performance of the network itself. CAJA33198 ¶ 4. The identification of specific network traffic data categories that were well-suited for automatically identifying suspicious activity greatly reduced the volume of data to be analyzed, and thus made the system functional for the first time. CAJA33198-99 ¶ 5.

Second, the claim identifies an innovative structure of *hierarchical* monitors to first identify, and then integrate and correlate reports reflecting, suspicious activity. This innovation allows respondent's technology to detect patterns of suspicious activity from multiple sources, in a manner designed to defeat hacking attacks on an integrated network. Pet. App. 51a.

Thus, as the district court explained, the inventive concept in respondent's technology is *what* is being monitored (the network traffic categories specifically

identified as being well-suited to hierarchical analysis), *where* that monitoring happens (the lower level network monitors), and *how* the monitoring is used (via integration at the hierarchical monitors). *Id.* at 51a-52a. As it did below, petitioner argues that the patents in fact "do *not* list any 'specific means' for detecting suspicious activity or describe a 'specific technique' for 'improving computer network security.'" Pet. 14-15 (emphasis added) (citation omitted). Petitioner is wrong about that, as both the Federal Circuit and district court concluded. But even if petitioner were correct, the petition would at best be seeking fact-bound error correction on a highly technical issue unique to this case: whether the claims at issue in fact contain limitations that define a "specific method" of detecting hacking attacks. That issue would in no way warrant this Court's review.

3. Petitioner tries to transform this case into something more than a fact-bound dispute by repeatedly mischaracterizing the decision below, and construing disputed or adverse facts in its favor.

For example, the petition asserts that "[t]he panel majority (Judge Stoll, joined by Judge O'Malley) acknowledged that the claims merely 'recite[] using network monitors to detect suspicious network activity ... , generating reports of that suspicious activity, and integrating those reports using hierarchical monitors.'" Pet. 10 (alterations in original) (citation omitted). But the panel did not use the word "merely" and the petitioner's use of an ellipsis (highlighted above) is misleading. The ellipsis omits the phrase "based on analysis of network traffic data"—which is a key limitation. *See* Pet. App. 13a. In fact, the court explained that the patents do *not* claim every method of "using network monitors to

detect suspicious network activity," *id*., and, instead, relate to a "specific technique" that enumerates "specific types of data" that are to be analyzed, *id.* at 12a. The *selection* of the data to analyze—from all the many possible sources of data—was a critical innovation.

Petitioner repeats this error throughout the petition. It mischaracterizes the patent claims as "only" reciting the act of collecting and analyzing data no fewer than seven times in the petition. *See* Pet i ("only . . ."), 5 ("standing alone . . ."), 10 ("merely . . ."), 12 ("simply . . ."), 16 ("without more . . ."), 18 ("only . . ."), 22 ("simply . . ."). But no matter how many times petitioner repeats it, this is not what the claims recite, as both courts below recognized.

Petitioner likewise characterizes contested facts in its favor. For example, petitioner asserts (at 7) that "[t]here is no dispute that hierarchical network monitoring— and, indeed, all elements of the asserted claims—were well known before the patents were filed." But not only is there a "dispute" about that question, that dispute was actually resolved in *respondent's favor* when the courts below rejected petitioner's argument that the patents were invalid because they were "anticipat[ed]." *See* Pet. App. 6a; *also id.* at 9a n.2 (noting the patents also previously "survived multiple anticipation challenges"). And despite pursuing an inordinate number of invalidity theories below, petitioner did not even *attempt* to argue at trial that the patents were invalid on the ground of obviousness. Indeed, respondent's patents have been found non-obvious and non-anticipated by *every* fact-finder to have considered them. That could not have been the case if, as petitioner asserts, "all

elements of the asserted claims" "were well known before the patents were filed." Pet. 7.

Petitioner's mischaracterization of these critical facts, and attempt to secure review based on a false premise, alone calls for denying the petition.

II. THERE IS NO "INTRA-CIRCUIT SPLIT"

When all is said and done, petitioner's claim of an "intra-circuit split" (Pet. 12, 15, 18) boils down to one case—*Electric Power Group, LLC v. Alstom S.A.*, 830 F.3d 1350 (Fed. Cir. 2016). As the panel below itself explained, however, there is no conflict between its holding here and that in *Electric Power* because of the differences in the claim terms. And, even if there were, any disagreement would be limited to the factual similarity or dissimilarity between the patent claims in the two cases, *not* any dispute over the governing law, which all sides agree upon.

1. *Electric Power* involved patents that claimed a "method of detecting events on an interconnected electric power grid . . . and automatically analyzing the events on [that] grid." 830 F.3d at 1351. Unlike the patents here, those in *Electric Power* did not involve a specific method of analyzing the data, nor did they specify—and narrow down—the data to be investigated. Rather, the claims in *Electric Power* generically referenced information from a "plurality of data streams" without ever identifying what those data streams were. *Id.* Nor did the applicant in *Electric Power* claim any specific *method* for analyzing the data—such as the hierarchical structure claimed here. As the panel below explained, "[t]he *Electric Power* claims were drawn to using computers as tools to solve a power grid problem, rather than improving the functionality of computers

and computer networks themselves." Pet. App. 14a. Here, by contrast, "the representative claim improves the technical functioning of the computer and computer networks by reciting a *specific technique* for improving computer network security." *Id.* (emphasis added).

In any event, the Federal Circuit below did not hold that the legal principle applied in *Electric Power* was incorrect or required modification; it held that the claims at issue in this case are different. *Id.* Petitioner thus overreaches again in asserting that the decision below "will permit individual panels to choose whether to follow the *Electric Power* rule" or the "rule crafted by the majority in this case." Pet. 16. The Federal Circuit in both this case and *Electric Power* applied the same "rule"; it just reached a different result based on the particular patent claims before it. A subsequent panel will simply have to inquire whether the claim before it involves only "collecting and analyzing information," *Electric Power*, 830 F.3d at 1354, or whether, as the Federal Circuit found here, it advances a "specific technique" of collection and analysis, limited to enumerated and carefully defined "specific types of data." Pet. App. 12a.[3] That is, a panel will simply have to apply the law to the particular claims before it.

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[3] Petitioner similarly asserts (at 16) that the decision will "place the imprimatur of the Federal Circuit on patents that claim nothing more than the basic 'moving of information.'" But, again, that argument assumes a false premise—that the panel established a legal rule that the mere "moving of information" is patent-eligible. The Federal Circuit here disagreed with petitioner that respondent's claims in fact involved "the mere moving of information." *See* Pet. App. 12a-13a.

2. Petitioner also attempts (at 20-21 nn.5-6) to bury the cases to which the panel analogized this case—*Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327 (Fed. Cir. 2016) and *DDR Holdings, LLC v. Hotels.com, L.P.,* 773 F3d 1245 (Fed. Cir. 2014), discussed at Pet. App. 14a. Those cases, like the decision below, illustrate the line between claims that involve a "specific asserted improvement in computer capabilities" (which is patent eligible) and an otherwise "'abstract idea' for which computers are invoked merely as a tool" (which is not). *Enfish*, 822 F.3d at 1335-36; *see DDR Holdings*, 773 F.3d at 1257 (distinguishing claims that "merely recite the performance of some business practice known from the pre-Internet world along with the requirement to perform it on the Internet," with those that provide a "solution . . . necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks").

The petition itself appears to embrace this distinction, stating (at 13) that "the *Electric Power* court followed *Alice* in drawing a careful line between patents that claim 'computer-functionality improvements' and those that merely use 'existing computers as tools in aid of processes focused on 'abstract ideas.'" But, as the petition concedes, that is the very distinction relied upon by the panel below. *See* Pet. 15 ("The majority asserted generally that this case involved a 'specific technique' for improving the functionality of computers . . . rather than simply using a computer as a tool . . . ."). Petitioner's objection is again not to the validity of the legal rule, but to how to apply the rule to the facts here—in petitioner's view, the panel "did not identify precisely how th[e] specific technique" improved computer

functionality and "went beyond the abstract idea of collecting and analyzing data." *Id.* Again, even assuming petitioner were correct, its challenge is limited to the fact-bound application of a settled legal principle.

Indeed, the panel's reliance on *Enfish* and *DDR Holdings*, and petitioner's own assertion that those cases align with *Electric Power* and *Alice*, only underscores that the panel did not adopt any sort of new categorical rule, but rather carefully applied established legal principles to the different facts presented by each of these cases. That is not an "intra-circuit split"; it represents the conventional application of settled law to different facts. Nothing about the panel's application of prior Federal Circuit precedent here will have an effect on subsequent cases involving different claims; nor does it warrant this Court's review.

3. Going further afield, petitioner asserts that this Court should grant review so it can correct a guidance from the United States Patent and Trademark Office (USPTO or PTO), which it claims "has created an entirely new doctrinal distinction in its difficult bid to make sense of the ruling in this case." Pet. 17. That argument fails, too. First, the distinction petitioner attacks—between claims that merely recite a "mental process" and claims that cannot "'practically be performed in the human mind'"—is neither novel nor incorrect. *Id.* at 12, 17 (citation omitted). The section of the PTO Guidance that petitioner quotes lists the decision below—in a "*see also*" cite—as one of *eight* cases in support of that principle. *Id.* at 9, 12-18 (citing USPTO, *October 2019 Update: Subject Matter Eligibility* (Oct. 17, 2019), https://www.uspto.gov/sites/default/files/documents/

`peg_oct_2019_update.pdf`).   That hardly reflects a "bid to make sense of the ruling in this case." *Id.* at 17. Second, and in any event, petitioner states that "the panel majority . . . relied on an *entirely different* . . . ground" than this distinction.   *Id.* (emphasis added).

In short, the decision below presents no conflict with any decision warranting this Court's review.

III. THE DECISION BELOW IS CORRECT AND A ROUTINE APPLICATION OF *ALICE*

Review is also not warranted because the decision below faithfully and correctly applies this Court's settled precedents to the particular claims at issue.

In *Alice*, this Court held that a claim was ineligible for patent protection because it was merely a "generic computer implementation" of "intermediated settlement, *i.e.*, the use of a third party to mitigate settlement risk"—"'a fundamental economic practice long prevalent in our system of commerce.'" 573 U.S. at 219 (citation omitted). The Court rejected the notion that the "abstract-ideas category is confined to 'preexisting, fundamental truth[s]' that 'exis[t] in principle apart from any human action.'" *Id.* at 220 (alterations in original) (citation omitted). Instead, the Court recognized that a "longstanding . . . practice" or "method of organizing human activity" would—without more—be ineligible for protection. *Id.* And the fact that the claim involved a "generic computer implementation" of this "longstanding" practice, the Court explained, did not transform it into a patent-eligible innovation. *Id.* at 221. At the same time, however, the Court recognized—as even petitioner begrudgingly acknowledges (at 19)—that an idea that "improve[d] the functioning of the

computer itself" can be patent eligible. 573 U.S. at 225.

The Federal Circuit decision below is fully consistent with those principles. As explained above, the claims here do not involve a "generic" implementation of a "longstanding . . . practice," but a specific method for addressing a previously intractable problem in computer security—one that "improve[d] the functioning of the computer itself." *Id.* at 220, 225. Prior to respondent's claimed invention, network defense systems that monitored network traffic were unable to automatically detect large-scale attacks in real-time. The claims recite a specific way to address this problem: using a structure of monitors, arrayed in a specific way (in a hierarchy), that are programmed to detect suspicious activity based on analysis of only certain types of data. *Supra* at 11-12.

That technology took years to develop, through partial funding by the Department of Defense, which called it a "gem in the world of cyber defense" and "a quantum leap improvement over" previous technology. Pet. App. 7a (citations omitted). And multiple industry-leading businesses have taken licenses to the patents. The relevant patents have also been found to be novel and nonobvious numerous times; indeed, as noted above, petitioner did not even present an obviousness defense at trial, and its anticipation defense has twice been rejected by the Patent Office, and by a district court in prior litigation, as well as by the courts below. Unsurprisingly, petitioner does not challenge these obviousness and anticipation rulings here. But those rulings would have made no sense if, as petitioner asserts, the claimed technology was merely a "generic

computer implementation" of a "longstanding" practice. Pet. 18. Rather, as the panel below recognized, respondent's technology does *not* merely use a computer to perform certain tasks more efficiently, but actually improves the functioning of the computer itself. Pet. App. 14a. The panel's decision thus fits hand-in-glove with *Alice.*

Petitioner's argument on the merits rests, again, on characterizing the claims as "only the abstract idea of collecting and analyzing data to detect suspicious activity." Pet. 18. In petitioner's view, "[t]his is no different from a city's police force monitoring ongoing criminal behavior and pooling data to be alert to largescale dangers." *Id.* at 18-19. But that is a gross oversimplification. Indeed, as this Court has explained, "[a]t some level, '*all* inventions . . . embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas.'" *Alice*, 573 U.S. at 217 (emphasis added) (alteration in original) (citation omitted). Accordingly, any invention, defined sufficiently broadly, can be characterized as an "abstract idea[]" or an analogue to some human activity. *Id. Alice* thus cautions against such overgeneralizations and, instead, calls on the courts to carefully review the claims at issue.

As the Federal Circuit and district court found, the claims at issue here in fact are subject to specific limitations: they involve a specific method of hierarchical monitoring and identify specific categories of network traffic data to be analyzed. Those limitations have been central to the conclusions of the numerous fact-finders who have uniformly come to the conclusion that respondent's invention is innovative and entitled to patent protection. The

lower courts' fact-bound application of this Court's *Alice* framework does not warrant further review.

IV. THIS CASE IS A POOR VEHICLE FOR THE COURT'S REVIEW

The petition suffers from glaring vehicle defects as well. The most obvious is that the decision below does not in fact present the Question Presented. As discussed, the Federal Circuit did *not* hold "patent claims that recite only the abstract idea of collecting and analyzing data are patent-ineligible under 35 U.S.C. § 101 and *Alice*." Pet. i. Respondent has never even argued that "collecting and analyzing data" "without more" constitutes a patent-eligible innovation. *Id.* at 19. If certiorari were granted, both sides would agree as to the applicable legal standard, and the dispute would simply be over the facts of this case and the scope of the relevant technology. The Question Presented is simply not implicated. Even if there were cause to address or clarify the *Alice* framework, the Court should wait for a case where there is an actual dispute between the parties as to the applicable legal standard.[4]

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[4] The United States has recently suggested that this Court address, in an appropriate case, confusion regarding the application of Section 101's "law of nature" exception in the context of medical device patents. U.S. Invitation Br. 10-13, *Hikma Pharm. USA Inc. v. Vanda Pharm. Inc.*, No. 18-817 (Dec. 6, 2019); U.S. Invitation Br. 12-13, *Hewlett-Packard Co. v. Berkheimer*, No. 18-415 (Dec. 6, 2019). That issue bears little relevance to the Question Presented here or this case, which does not involve a medical device patent. And the United States' broader suggestion that this Court re-visit whether exceptions for "laws of nature, physical phenomena, and abstract ideas" are warranted *at all* would, of course, not benefit petitioner—and, in

Furthermore, the panel here only assessed eligibility under the first step of the *Alice* framework. But, as this Court has explained, even if a claim is directed to a patent ineligible idea, a court must "consider the elements of each claim both individually and 'as an ordered combination' to determine whether the additional elements 'transform the nature of the claim' into a patent-eligible application." *Alice*, 573 U.S. at 217 (citations omitted). The Federal Circuit did not reach this second step because it held that the claims here were not directed to a patent-ineligible idea. Thus, even if the Court were to reverse that holding, the claims would be entitled to patent protection on the basis of the multiple specified "additional elements" beyond the "processing and analyzing of data." The fact that the Question Presented (even if actually presented) would not be outcome-determinative in this case provides another reason for this Court to decline review.

Finally, the manner in which petitioner has litigated this case also counsels against certiorari. As the district court found and the panel recognized, "'Cisco pursued [this] litigation about as aggressively as the court has seen in its judicial experience,'"

any event, it is not fairly included in the Question Presented. Nor has it been pressed by any party here or addressed below. This case is not an appropriate vehicle to address that issue. Moreover, this Court recently denied certiorari in a medical device case in which the United States recommended certiorari, along with several other cases presenting Section 101 issues. *See Athena Diagnostics, Inc. v. Mayo Collaborative Servs., LLC*, No. 19-430 (certiorari denied Jan 13, 2020); *Hikma Pharm. USA Inc. v. Vanda Pharm. Inc.*, No. 18-817 (certiorari denied Jan 13, 2020); *HP Inc., fka Hewlett-Packard Co. v. Berkheimer*, No. 18-415 (certiorari denied Jan 13, 2020). There is no reason to do any different here.

including by "maintaining nineteen invalidity theories until the eve of trial but only presenting two at trial and pursuing defenses at trial that were contrary to the court's rulings or Cisco's internal documents." Pet. App. 28a (citation omitted). Petitioner's aggressiveness has continued in this Court, where it has mischaracterized both the Federal Circuit's decision and the Question Presented. *See supra* at 9-10. The only argument petitioner chose to renew here, its Section 101 claim, is in fact a late bloomer in this case. The Federal Circuit correctly rejected that argument, and there is no basis for this Court to reward petitioner's aggressive litigation tactics by granting review here.[5]

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[5] Petitioner's attempt (at 5 n.1) to link its petition with the petition in *Trading Technologies International, Inc. v. IBG LLC,* No. 19-353, also fails. The cases involve very different underlying technologies, and the Questions Presented are entirely different. The dispute in that case is over whether "computer-implemented inventions that provide useful user functionality but do not improve the basic functions of the computer itself" are eligible for patent protection. Pet. i, *Trading Techs. Int'l, Inc. v. IBG LLC,* No. 19-353 (Sept. 16, 2019). But petitioner's Question Presented here does not implicate that distinction at all. And, in fact, both courts below found that respondent's technology not only provides useful functionality, but also *does* "improve[] the technical functioning of the computer [itself]." Pet App. 14a; *see id.* at 51a-52a. In any event, nothing in *Trading Technologies* alters or eliminates the reasons against granting certiorari in this fact and claim-specific case. No matter how this Court disposes of the petition in *Trading Technologies,* the petition in this case should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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