No. A-

In the
Supreme Court of the United States

THADDEUS GABARA,

Petitioner,

-v.-

FACEBOOK, INC.,

Respondent.

On Application for Extension of Time to File a Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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APPLICATION TO THE CHIEF JUSTICE FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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To the Honorable John G. Roberts Jr., Chief Justice of the United States and Circuit Justice for the United States Court of Appeals for the Federal Circuit:

Pursuant to Supreme Court Rule 13.5, Applicant Thaddeus Gabara respectfully requests that the time to file a petition for a writ of certiorari in this matter be extended by 60 days, up to and including February 7, 2021. In support thereof, Applicant states as follows:

1. The judgement from which review is sought is *Gabara v. Facebook, Inc.*, Case No. 2020-2333, 2021 WL 2834565 (Fed. Cir. Jul. 8, 2021), which was decided by the Federal Circuit on July 8, 2021. A copy of that decision is attached as Appendix 1. Applicant sought rehearing by the Federal Circuit, which was denied on September 10, 2021. A copy of the Federal Circuit's order denying rehearing is attached as Appendix 2.

2. The current deadline for filing a petition for writ of certiorari is December 9, 2021. This Application has been filed at least 10 days prior to that date pursuant to Supreme Court Rule 13.5. Applicant has not previously sought an extension of time.

3. The jurisdiction of this Court is based on 28 U.S.C. §1254(1).

BACKGROUND

4. This case presents substantial and important questions involving § 101 of the Patent Act. As this Court has held, § 101 "contains an important implicit exception: Laws of nature, natural phenomena, and abstract ideas are not

patentable." *Alice Corp. Pty. v. CLS Bank Int'l*, 573 U.S. 208, 216 (2014). This Court has created a two-part test to determine patent eligibility: The first step is whether the claims (as a whole) are directed to a patent ineligible concept under § 101, such as an abstract idea or a law of nature. If they are, then the second step instructs courts to ask whether the limitations add significantly more to "transform a patent-ineligible abstract idea into a patent eligible invention." *Alice*, 573 U.S. at 223; *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 70 (2012) (same for laws of nature). The second step of the § 101 inquiry requires courts to "examine the elements of the claim to determine whether it contains an "'inventive concept' sufficient to 'transform' the claimed abstract idea into a patent-eligible application." *Alice*, 573 U.S. at 221. The inquiry must focus on "the steps in the claimed processes" "apart from the [patent-ineligible concept]." *Mayo*, 566 U.S. at 73.

5. Applicant Thaddeus Gabara is the owner of U.S. Patent Nos. 8,930,131; 8,620,545; 8,706,400; 8,836,698; and 9,299,348.

6. The district court's order invalidating a total of 84 claims of the five patents-in-suit under § 101—cursorily affirmed and endorsed by the Federal Circuit under FED. CIR. R. 36—relied on an abstraction of the inventions that excluded the "claimed advance" touted in the specification, repeated throughout the claims, and relied upon in related PTAB proceedings to distinguish prior art and justify denial of IPR institution. The Federal Circuit endorsed the district court's explicit failure to consider the lack of any risk of preemption, which the Supreme Court has instructed is vital to § 101 eligibility. The Federal Circuit's decision has obscured the proper

application of *Alice* and further distanced the Federal Circuit's evolving jurisprudence from the Supreme Court's opinions interpreting and applying § 101.

7. In other words, the District Court and Federal Circuit based their decision not on the invention as claimed, but rather on a purported abstraction of that invention that disregarded a key aspect of the invention—the very aspect that the UPSTO had found distinguished the invention over the prior art.

8. The District Court also erred by, *inter alia*, expressly concluding that it should not consider the issue of preemption—or lack thereof—simply because the accused infringer did not address it. As demonstrated by the PTAB's decision denying *inter partes* review challenges for four of the patents, alternate approaches other than the claims of the patents-in-suit existed in the field to "move a portable device itself to view different portions of images displayed on portable devices."

9. If an invention can be recast without any regard to the advance as claimed, or if preemption—the underlying concern in § 101—can be ignored, then the dispositive § 101 inquiry risks becoming an arbitrary weapon against patent validity.

10. The Federal Circuit's endorsement of these errors through its summary affirmance warrants review, as will be further set forth in Applicant's petition.

REASONS FOR GRANTING THE REQUESTED EXTENSION OF TIME

11. Applicant respectfully submits that a 60-day extension to the time within which to file a petition for writ of certiorari is necessary and appropriate for

the following reasons:

12. An extension of time will help to ensure that these vitally important and complicated issues are presented to the Court clearly and thoroughly. A key member of the Applicant's team recently departed Counsel's firm. Such extension of time will enable another colleague at Counsel's firm to become familiar with the issues raised by the Federal Circuit's opinion and prepare the petition.

13. Moreover, Applicant's counsel, Timothy Gilman, has been otherwise engaged in pressing personal and professional matters during the past few weeks and will continue to be engaged in such matters in the upcoming weeks, including but not limited to, briefing and arguing dispositive motions in *Kewazinga Corp. v. Microsoft, Inc.,* Case No. 18-cv-4500 (SDNY), *TrackThings LLC v. Netgear, Inc.*, Case No. 21-cv-5440 (SDNY); *TrackThings LLC v. Amazon.com et al.*, Case No. 6:21-00720 (WDTX); and *LoanStreet Inc. et al. v. Troia,* 1:21-cv-06166 (SDNY), as well as preparing and filing of a complaint alleging infringement of 17 patents in *Multifold Int'l Inc. Pte. Ltd. v. Samsung Elec. Co., et al.*, Case No. 2:21-cv-00371 (EDTX), and other pre-trial case activities in these and other matters.

14. Applicants submit that the requested extension of time would neither prejudice the Respondent nor result in undue delay in the Court's consideration of the petition, and that good cause exists to grant the requested extension.

CONCLUSION

For the foregoing reasons, Applicants respectfully request that an order be entered extending the time for filing a petition for writ of certiorari to and including February 7, 2022.

Dated: November 15, 2021

Respectfully submitted,

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