

No. 24-764

IN THE

Supreme Court of the United States

HARRIS BRUMFIELD, TRUSTEE FOR ASCENT
TRUST,

Petitioner,

v.

IBG LLC, INTERACTIVE BROKERS LLC,

Respondents.

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

PETITION FOR REHEARING

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May 16, 2025

RULE 29.6 STATEMENT

Petitioner's Statement pursuant to Rule 29.6 was set forth on page iii of the Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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REASONS FOR GRANTING THE PETITION

Pursuant to Rule 44.2 of this Court, Petitioner respectfully presents this Petition for Rehearing of the Court's order dated April 21, 2025, which denied Petitioner's Petition for a Writ of Certiorari.¹

I. THE COURT SHOULD REHEAR PATENT ELIGIBILITY DUE TO NEW AND SIGNIFICANT DEVELOPMENTS

Since this Court's denial of TT's Petition on April 21, 2025, there have been two key developments that go to the heart of this § 101 issue, which is of exceptional national importance. First, the U.S. Government admitted in another case pending before this Court dealing with § 101, after TT's Petition was denied, that TT's patents recite scientific or technological inventions that are eligible under § 101. Second, Congress is considering legislation that will change the landscape on patent eligibility. This Court should rehear this issue, or at a minimum, hold TT's Petition in abeyance until the pending petitions before this Court on § 101 are resolved and until the outcome of the pending legislation is known.

¹ Harris Brumfield, the trustee for Ascent Trust, was substituted for TT in the underlying action. For consistency, Petitioner is referred to herein as TT.

A. The U.S. Government Recently Admitted That TT’s Patents Are “Quintessentially Scientific or Technological Inventions” and Eligible Under § 101, Mandating the Urgent Need for Review of This Question

On April 30, 2025, the U.S. Government filed its response brief to Audio Evolution’s² pending petition for a writ of certiorari, which asked this Court to clarify the *Alice/Mayo* patent eligibility test. (Brief for the United States in Opposition at 9, *Audio Evolution Diagnostics, Inc. v. United States*, No. 24-806 (U.S. Apr. 30, 2025).) In its brief, the Government for the first time admitted that TT’s patents are technological inventions that are patent eligible under § 101. *Id.* at 12. Specifically, it cited to TT’s Petition as an example of a case “involving quintessentially scientific or technological inventions that raise questions of patent-eligibility under Section 101.” *Id.* (citing this case and arguing that TT’s “software interface for electronic trading” was a “technological” invention).

This remarkable revelation is reason alone to rehear this case. But it is also the latest chapter in the tortured history of these patents that demonstrates how unworkable the *Alice/Mayo* framework has become. It all started in 2017, when the U.S. Government in a Patent Office proceeding before the PTAB invalidated the patents at issue as ineligible under § 101 based on its finding that the claims did not recite a technological invention. *IBG LLC v. Trading Techs. Int’l, Inc.*, 757 F. App’x 1004, 1006 (Fed. Cir. 2019). Then, two years later in 2019, the Federal

² Audio Evolution Diagnostics, Inc. (“Audio Evolution”).

Circuit vacated this ruling, finding that TT's patents recited a "technological invention." *Id.* Five years later in 2024, a different panel of the Federal Circuit invalidated the *same claims* based on its finding that the claims do not recite a technological invention. (Pet. App. 27a.) Now, in *Audio Evolution*, eight years after the Government said the patents are not eligible in the PTAB proceeding referenced above, and after millions of dollars have been spent, the Government flip-flops and says that the claims are in fact "quintessentially scientific or technological inventions" and "should be patent-eligible." (Brief for the United States in Opposition at 11-12, *Audio Evolution*, No. 24-806.) These facts speak for themselves—§ 101 law is in shambles.

Audio Evolution is also instructive because it highlights another example of how the Government cannot apply the *Alice/Mayo* framework in a consistent manner. Specifically, in its brief, the Government argued that if the Supreme Court grants *Audio Evolution's* petition, it will argue that *Audio Evolution's* claims are patent-eligible under § 101. *Id.* at 9. But, remarkably, the Government took this position after it had already prevailed on its motion to dismiss the case below based on its conflicting argument that the patents were ineligible. *Id.* at 7. During the hearing at the Federal Circuit in *Audio Evolution*, the Government refused to tell the panel what position it would take at the Supreme Court in view of the Government's conflicting positions. Oral Argument at 11:52, *Audio Evolution Diagnostics, Inc. v. United States*, No. 2023-1096, 2024 WL 2143376 (Fed. Cir. May 14, 2024), https://oralarguments.cafc.uscourts.gov/default.aspx?fl=23-1096_05102024.mp3. But now it is clear—the Government believes that *Audio*

Evolution's patents are patent eligible. (Brief for the United States in Opposition at 9, *Audio Evolution*, No. 24-806.)

Finally, *Audio Evolution* is instructive because it highlights the Government's view that the § 101 law needs to be fixed. The Government went as far as to criticize the Federal Circuit for treating even "quintessentially *technological* inventions as patent-ineligible" when such "quintessentially technological innovation should be patent-eligible." *Id.* at 10-11. Indeed, the Government warned that efforts to apply the *Alice* formulation "have led to confusion, and the approach can cause Section 101 analysis to bleed into separate statutory requirements of novelty, obviousness over the prior art, and enablement." *Id.* at 10. The Government stated that "current uncertainty concerning Section 101's requirements has had deleterious consequences, and that clarification by this Court would be useful." *Id.* at 9.

In sum, the Government's series of conflicting positions on the very same property right confirms every point made in TT's Petition and demonstrates that the uncertainty surrounding § 101 is not merely academic—it is a crisis affecting innovation policy, the global competitiveness of the U.S. patent system, and is creating core constitutional concerns. It cannot be that one branch of government grants rights that another branch consistently takes away based on judicial exceptions not supported by the statutory text. (See Pet. 28-31.) It cannot be that the same court finds the same claims technological and later not technological. It cannot be that the same government grants a patent, later finds that patent not technological, and then later determines that the same patent is in fact, technological. Accordingly, this Court

should rehear the Petition to clarify the *Alice/Mayo* test and address such issues because the “judicial exceptions” have swallowed the rule of patent eligibility.

At a minimum, this Court should hold TT’s Petition open until after the resolution of the co-pending *Audio Evolution* petition.³

B. This Petition Should Be Re-Heard and Held in Abeyance Pending New Legislation Before Congress

Alternatively, this Court should rehear TT’s Petition and hold it in abeyance pending action by the Legislative Branch. In the last two weeks, starting on May 1, 2025, Senators Coons and Tillis reintroduced the Patent Eligibility Restoration Act (PERA) and were also joined by Senators Durbin and Hirono in reintroducing the Promoting and Respecting Economically Vital American Innovation Leadership Act (PREVAIL). Dani Kass, *Senators Reintroduce Patent Eligibility, PTAB Reform Bills*, Law360 (May 1, 2025, 6:59 PM), <https://www.law360.com/ip/articles/2332720/senators-reintroduce-patent-eligibility-ptab-reform-bills>. A companion bill was filed by Representatives Moran and Ross in the House of Representatives. *Id.* These bipartisan bills, which specifically target the inconsistencies and overreach of current § 101 jurisprudence, reflect a consensus that the judicial exceptions must be either eliminated or cabined. Namely, PERA seeks to eliminate the judicial exceptions all together, and exclude from patent protection only certain categories, such as a “mathematical formula,” a “process that is substantially economic,” a “mental process,” an “unmodified human

³ The petition will not be heard until the end of May 2025.

gene,” and an “unmodified natural material.” PERA, S. 1546, 119th Cong. § 3 (2025). PERA is consistent with TT’s Petition and would confirm that the claimed inventions set forth in TT’s patents are valid. *Id.*

As Congress has indicated a renewed interest in addressing patent eligibility, this underscores the urgent need for the Supreme Court to hold TT’s Petition in abeyance to permit Congress to act. Indeed, this Court has recognized that when the law is in flux, particularly in matters involving legislative action, it may be prudent to grant review or hold a case open to allow Congress to act. *See Massey v. United States*, 291 U.S. 608, 610 (1934). With renewed bipartisan momentum, this Court should not foreclose review just as Congress is poised to amend the statutory text in a manner directly relevant to this case.

In sum, the continuing legal uncertainty, the Government’s express support for reform, and Congress’ current and active efforts, all point to the necessity of rehearing. *Hearings to examine foreign threats to American innovation and economic leadership* (2025), <https://www.congress.gov/event/119th-congress/senate-event/336955> (statement of Sen. Tillis) (“Patent eligibility law: it’s broken.”). The question presented—whether the judicial exceptions to § 101 are consistent with the statutory text—goes to the heart of patent law and merits this Court’s full consideration.

II. THE COURT SHOULD REHEAR THE CIRCUIT SPLIT OVER RULE 60(b)(3) AND IBG’S FRAUD IN VIEW OF NEW INFORMATION

TT’s Petition asked this Court to resolve an important issue that only this Court can fix, namely, the

circuit split concerning the interpretation of Rule 60(b)(3). (Pet. 21-24.) After TT filed its Petition and even after this Court’s denial of TT’s Petition on April 21, 2025, there have been several additional cases from the Ninth Circuit that have continued to apply the diligence requirement to Rule 60(b)(3), even though the rule itself has no such diligence requirement, and even though the other circuits (including the Seventh Circuit that was supposed to apply in this case) has no such diligence requirement. In addition, after TT’s Petition was denied, new evidence has come to light supporting TT’s claim that IBG committed massive fraud. This Court should grant rehearing, resolve the circuit split, and address IBG’s fraud.

A. Courts in the Ninth Circuit Continue to Improperly Apply the Diligence Standard to Rule 60(b)(3)

As explained in TT’s original Petition, unlike Rule 60(b)(2), which requires “reasonable diligence” in discovery of the grounds for relief from judgment, Rule 60(b)(3) has no similar diligence requirement. (Pet. 22.) Yet in a departure from the majority of circuits, the Federal Circuit denied Petitioner’s request for relief under Rule 60(b)(3) for want of diligence. (Pet. App. 56a-57a.) This ruling departs from Seventh Circuit law, which the Federal Circuit purported to apply, and conflicts with the law of all other circuits. Only the Ninth Circuit also requires diligence.

Since this Court has denied TT’s Certiorari Petition, district courts in the Ninth Circuit continue to apply the diligence standard. For example, in *Sec. & Exch. Comm’n v. SHE Beverage Co., Inc.*, No. 2:21-cv-07339-CAS-ASX, 2025 WL 1249165, at *6 (C.D. Cal. Apr. 28, 2025), the court found that:

A plaintiff seeking relief pursuant to Rule 60(b)(3) must prove by clear and convincing evidence that (1) the prevailing litigants obtained the verdict through fraud, misrepresentation, or other misconduct, and (2) the conduct complained of prevented the losing party from fully and fairly presenting the defense. *It also requires that the fraud “not be discoverable by due diligence before or during the proceedings.”*

(emphasis added) (quoting *Casey v. Albertson’s Inc.*, 362 F.3d 1254, 1260 (9th Cir. 2004)).

Similarly, in *In re Nazemi*, No. AP 24-90015-LT, 2025 WL 863216, at *5 (B.A.P. 9th Cir. Mar. 19, 2025), the Bankruptcy Appellate Panel of the Ninth Circuit recently held (well after TT filed its Petition) that for relief under Rule 60(b)(3), “[t]he fraud must not have been discoverable with the *exercise of due diligence*.” (emphasis added) (citing *Casey*, 362 F.3d at 1260).

Finally, in *Roditi v. New River Invs. Inc.*, the court held that the movant “*failed to show the alleged misrepresentation was not discoverable by due diligence* and prevented him from fully and fairly presenting his arguments.” No. 20-cv-01908-RBM-MSB, 2025 WL 345926, at *4 (S.D. Cal. Jan. 29, 2025) (emphasis added). The court denied Rule 60(b)(3) relief on this ground. *Id.* These cases further demonstrate that diligence continues to be applied on a regular basis in the Ninth Circuit. On the contrary, the other circuits continue to address rule 60(b)(3) motions pursuant to the plain text of the rule, without requiring diligence at all. *E.g.*, *Morgan v. Tinch*, 90 F.4th 172, 177 (4th

Cir. 2024); *Triantos v. Guaetta & Benson, LLC*, 52 F.4th 440, 445 (1st Cir. 2022). This demonstrates that the circuit split is still a recurring and significant problem across the circuits.

The Ninth Circuit’s logic cannot be correct. If a party is committing fraud, by definition, they are already concealing facts or evidence that could be uncovered with normal discovery in a case. It is fundamentally unfair to shift this burden to the aggrieved party as there is no telling what a party would do to cover up fraud if they are willing to commit fraud in the first place. *Lonsdorf v. Seefeldt*, 47 F.3d 893, 898 (7th Cir. 1995) (“A litigant . . . should not be required to assume that [misrepresentations] are being produced by an opposing party.”) (footnote omitted). TT tried to take discovery of IBG’s full data set, but the district court blocked TT from doing so. TT tried to take discovery of all of IBG’s source code, but the district court again denied the request. TT tried to take discovery of all of IBG’s customers, and the district court denied the request yet again. Without full access to IBG’s data and source code, TT had both hands tied behind its back in uncovering IBG’s fraud sooner. (CAFC App. 135569-135572; CAFC App. 93237 n.2.) This alone demonstrates why there should be no diligence requirement where there is fraud. There is a substantial and urgent need for this Court to intervene.

B. TT Has Discovered New Evidence That Shows IBG’s Fraud and Requires Review

In its Petition, TT explained that at trial, IBG (through IBG’s CEO, Mr. Galik’s testimony) testified that IBG tracked orders and trades in TWS by what

tools submit the orders to the exchange. (Pet. 17.) But after trial, IBG was forced to admit that it is tracking orders and trades by what tools originate (i.e., start) the orders, and not any other way. *Id.* at 17-18.

TT then explained that evidence related to IBG's Accumulate/Distribute product proves that IBG committed fraud. Specifically, according to Mr. Peterffy (the head of IBG), Accumulate/Distribute is IBG's best, most advanced, and arguably the most important tool. (Pet. 19.) And yet, IBG's own internal reports show that Accumulate/Distribute was only responsible for a virtually non-existent 0.08% of the trades in TWS from June 2008-April 2019 (i.e., one in every 1250 trades). *Id.*

Tellingly, IBG never addresses the merits of fraud. For instance, IBG never disputes that it always represented up until and during trial that it tracked orders and trades in TWS by the tool that submits the order to the exchange, and that this representation was false. (Pet. App. 59a.) IBG never disputes that Accumulate/Distribute is its most important tool, yet is only responsible for 0.08% of the trades through TWS, which demonstrates that IBG's data is not what IBG represented it to be. (CAFC App. 98647-98648; CAFC App. 103658.) And yet, IBG represented that BookTrader was only responsible for 3-5% of trades through TWS when the evidence demonstrates that this simply could not be true. And these misrepresentations came from the highest level of IBG's organization—founder Mr. Peterffy and CEO Mr. Galik. This is further evidence of this Court's need to intervene.

In addition to the above, TT has uncovered *new* evidence showing that IBG lied about

Accumulate/Distribute, which further supports a finding that IBG has committed fraud. Specifically, IBG engineer Mr. Stetsenko said the following in paragraph 24 of his declaration:

Mr. Brumfield's next error is that he equates Mr. Peterffy's statement that one of IB's tools is the "best" and "most advanced" with trade volume. *See id.* (discussing the tool Accumulate/Distribute). The two do not equate. Just because Accumulate/Distribute is an advanced tool doesn't mean that users understand how to use it and utilize it frequently for trading. IB offered rebates to try to increase use of the tool yet the stats show that it was never a well utilized tool despite its sophistication.

(CAFC App. 98647-98648.) In other words, Mr. Stetsenko tries to explain away Mr. Peterffy's admission about Accumulate/Distribute by claiming that "best" and "most advanced" does not equate with trade volume because (1) users do not "understand how to use it" and (2) users do not "utilize it frequently for trading." *Id.*

But in a recent X post by IBG, IBG continues to tout Accumulate/Distribute in a manner that shows Mr. Stetsenko was lying to the court. Specifically, the post states that users can "[e]asily create" and "manage" orders "simultaneously." Interactive Brokers (@IBKR), X (Apr. 29, 2025, 10:00 AM), <https://x.com/IBKR/status/1917217488753906145> (emphasis added). This contradicts Mr. Stetsenko's claim that user's do not understand how to use Accumulate/Distribute. Moreover, the post states that

Accumulate/Distribute is “[o]ne algo [that] has it all!” and can be used to create, submit and manage “**large volume orders** simultaneously.” *Id.* (emphasis added). This flatly contradicts Mr. Stetsenko’s testimony that there is minimal volume/usage of Accumulate/Distribute.

In addition, the post provides a link to IBG’s website, which also touts Accumulate/Distribute as an easy-to-use and high-volume tool:

Trade like a Team

The Accumulate/Distribute algo gives one trader ***the power of a team***. The comprehensive algo interface allows a single trader to ***easily*** create, submit, and manage ***multiple large volume orders*** simultaneously. . . .

One Algo Has It All

IBKR’s Accumulate/Distribute algo slices your ***large order*** into smaller, non-uniform increments and releases them at random intervals over time. It can help to achieve the best price for your ***large volume orders*** without being noticed in the market, and the robust interface allows a single trader to ***easily*** and effectively manage ***multiple large volume orders*** simultaneously.

Accumulate / Distribute, INTERACTIVE BROKERS, <https://www.interactivebrokers.com/en/index.php?f=1088> (last visited May 16, 2025) (emphasis added). This newly discovered evidence unequivocally indicates that IBG lied about its trading data.

CONCLUSION

For the foregoing reasons, the Petition for Rehearing should be granted.

Respectfully submitted,

MAY 16, 2025

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The undersigned hereby certifies that this Petition for Rehearing is restricted to the grounds specified in Rule 44.2 of the Rules of the Supreme Court and is presented in good faith and not for delay.

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