

No. 18-1223

**In the
Supreme Court of the United States**

MARIO VILLENA AND JOSE VILLENA
Petitioners,

v.

**ANDREI IANCU, DIRECTOR, UNITED STATES
PATENT AND TRADEMARK OFFICE,**
Respondent.

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

Reply to Brief in Opposition

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Parties to the Proceedings

The initial statement included in the petition for a writ of certiorari remains accurate.

Argument

While the Solicitor's Brief in Opposition is mercifully short, the Solicitor's arguments amount to a series of conclusory statements followed by a series of misstatements. Respectfully, the Solicitor's Opposition Brief ("OppBr") opposes everything while addressing nothing.

For example, the Solicitor (OppBr at p. 5) asserts that "the [Federal Circuit] correctly determined that the claims are 'directed to an abstract idea' . . . 'which is a fundamental economic practice.'" However, the Solicitor provides no insight as to how the USPTO and Federal Circuit" came to such a conclusion. The Solicitor (OppBr at p. 5) then asserts that "the court correctly found that the claims 'do[] not contain an inventive concept'" without bothering to opine on what constitutes an "inventive concept" or citing some authority that defines "inventive concept" or "invention" in general.

The entire position on the correctness of the Federal Circuit's decision is naught but conclusion devoid of anything approaching analysis or insight as to how the Federal Circuit determines what is a fundamental economic practice or what is an inventive concept..

However, Petitioners do not expect the Solicitor to answer how the USPTO and the Federal Circuit determine what kinds of business practices are abstract in an evidentiary vacuum. This is not the Solicitor's fault as the Federal Circuit refuses to explain how they receive such epiphanies. Further, Petitioners do not expect the Solicitor to answer a question no court answered in nearly one-hundred and seventy (170) years of jurisprudence. Specifically, how do judges determine whether a claim includes an inventive concept? Certainly no judge from any court has bothered to define the term "invention" or "inventive concept" since 35 U.S.C. § 101 was enacted by Congress almost seventy (70) years ago in the 1952 Patent Act.

The reality is that "invention" as used by the Federal Circuit is a term of mysticism. There is a reason that authors of the 1952 Patent Act, which include the legendary Judge Giles Rich, openly mocked "invention" and intentionally wrote the term out of the Patent Law in favor of nonobviousness under Title 35 U.S.C. § 103.

As to the Solicitor's comment (OppBr at p. 6) on Petitioners' "colorful" remarks on the USPTO's and Federal Circuit's near endless stream of inexcusable failures, the Solicitor states that "[t]hose fact-bound case-specific assertions of error . . . do not warrant this Court's review." To this Petitioners respectfully reply that the Solicitor fails to understand what Petitioners clearly conveyed. Specifically, these "errors," which the Solicitor does not contest, are not "errors" but official policy of the Federal Circuit. For example, for reasons clearly outlined in Petitioners' Opening Brief (starting on page ii), the Federal

Circuit has abrogated the preemption doctrine. According to the Federal Circuit, preemption has no place in the preemption concern that underlies the exceptions to patent-eligibility under § 101.

The Solicitor (OppBr at p. 6) erroneously characterizes Petitioners as inviting this Court to “abandon its longstanding precedent.” Quite to the contrary, it is the Federal Circuit (not Petitioners) that officially abandoned the preemption doctrine in *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015). Indeed, a cursory review of several cases presently before this Court, including *HP Inc. v. Berkheimer*, Docket No. 18-415, *Investpic v. SAP America*, Docket No. 18-1199, *In re Urvashi Bhagat*, No. 18-1274,¹ and *Hikma Pharms v. Vanda Pharms, Inc.*, No. 18-817, reveal that preemption is not even an issue when determining the exceptions to patent eligibility under § 101.

In addition to preemption, it is the Federal Circuit (not Petitioners) that champions the abrogation of longstanding Supreme Court precedent to address claims as a whole, ordered combination when determining patent eligibility under § 101. Compare *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S.Ct. 2347, 2355 (2014). Indeed, the Federal Circuit

¹ While *In re Bhagat* is not presented as an *Alice/Mayo* case, the Federal Circuit’s analysis is yet another example of the Federal Circuit abrogating the statutory language of § 101 in a manner that violates this Court’s precedent in, *inter alia*, *Bilski v. Kappos*. *In re Bhagat* is also an example of the Federal Circuit openly *refusing* to address the claims as a whole as required by *Alice Corp. v. CLS Bank*.

has long ignored any limitation that gets in the way of their preconceived ideas of what should be patentable.

In addition, unlike the Federal Circuit, Petitioners champion the Supreme Court's holding that the courts may only interpret statutes and are not empowered to rewrite § 101. See, e.g., *Bilski v. Kappos*, 561 U.S. 593, 594 (2010).

The only thing that Petitioner ask this Court to “abandon” (if this is the correct word) is any requirement of “invention” and “improvement” when determining patent eligibility. Requiring “improvement” necessarily obviates half the language in § 101. In addition, “longstanding precedent” conclusively demonstrates that “invention” has no place in the Patent Law. *Graham v. John Deere Co.*, 383 U.S. 1, 11-18 (1966) (discussing the history of “invention” and holding that the term has no place in the Patent Law).

The Federal Circuit treats the language of § 101 as wholly optional, and because of the Federal Circuit's poor jurisprudence the state of patent-eligibility is in chaos. Patent-eligibility under the Federal Circuit's jurisprudence is naught more than a function of what Federal Circuit panel hears a case, and apparently few in the Federal Circuit bother to actually read § 101 even as they cite it as authority.

Title 35 U.S.C. § 101 states “[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements

of this title.” Title 35 U.S.C. § 100(b) states that “[t]he term ‘process’ means process, art or method, and includes a new use of a known . . . machine.”

The present claims provably amount to a new, useful, and nonobvious process of a known machine. The present claims preempt no abstract idea. Without question the present claims constitute a patent-eligible process under § 100(b) and § 101.

Thus, Petitioners restate two critical issues:

How do the USPTO and Federal Circuit determine whether a process constitutes a “fundamental economic practice long prevalent in our system of commerce” under § 101 without evidence?

and

How can as many as five claim limitations (by the USPTO’s own professional analysis) be new and nonobvious under 35 U.S.C. §§ 102/103 yet also be well-understood, routine, and conventional as a whole, ordered combination under § 101?

Plea to Hold Petition or Consolidate Cases

The Solicitor (OppBr at p. 6) concludes that this case should be held pending the disposition of *HP Inc. v. Berkheimer*, and *Hikma Pharmaceuticals v. Vanda Pharmaceuticals*. Petitioners are certainly in agreement that a resolution in those cases consistent

with the statutory language of § 101 will benefit Petitioners, and to that end abeyance at a minimum is warranted. The Solicitor's request is a recognition that the issues in this case pose a fundamental wrong done to Petitioners, and likely foreshadow the Solicitor's forthcoming assessments in *Berkheimer* and *Vanda Pharmaceuticals* requested by this Court.

However, this honored Court should recognize that this case presents issues not found in *Berkheimer* and *Vanda* that need to be addressed if the problems plaguing the lower courts are to be fully resolved. It is Petitioners' position that all of the *Berkheimer*, *Investpic*, *Bhagat*, and *Vanda Pharmaceuticals* cases mentioned above should be consolidated with this matter in some fashion for consideration by this Court. All these cases share common issues while bringing unique perspective on the overall problem.

Section 101 jurisprudence needs serious fixing in a manner consistent with the statutory scheme Congress enacted. It therefore makes sense to consolidate.

Conclusion

Certiorari is necessary to address the insanity that has swallowed the statutory standard of patent-eligibility.

/s/ Burman Y. Mathis
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