

No. 17A_____

IN THE
SUPREME COURT OF THE UNITED STATES

SMARTFLASH LLC,
Applicant,

v.

SAMSUNG ELECTRONICS AMERICA, INC.; SAMSUNG ELECTRONICS CO., LTD.;
APPLE INC.; GOOGLE LLC; AND ANDREI IANCU, UNDER SECRETARY OF COMMERCE
FOR INTELLECTUAL PROPERTY AND DIRECTOR OF THE UNITED STATES
PATENT AND TRADEMARK OFFICE,
Respondents.

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

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Counsel for Applicant

June 28, 2018

PARTIES TO THE PROCEEDINGS

Applicant Smartflash LLC was the plaintiff in the district court, the patent owner in proceedings before the Patent and Trademark Office and the Patent Trial and Appeal Board, and the appellant in proceedings before the Federal Circuit.

Respondents Samsung Electronics America, Inc., Samsung Electronics Co., Ltd., Apple Inc., and Google LLC were defendants in the district court, petitioners in proceedings before the Patent and Trademark Office and the Patent Trial and Appeal Board, and appellees in proceedings before the Federal Circuit.

Respondent Andrei Iancu, Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, was the intervenor in proceedings before the Federal Circuit.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, petitioner Smartflash LLC states the following:

Smartflash LLC is a wholly owned subsidiary of Smartflash Technologies Limited. The following entities own 10% or more of the shares of Smartflash Technologies Limited: Latitude Investments Limited, Celtic Trust Company Limited, and Eastbrook Business Inc.

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

Pursuant to 28 U.S.C. § 2101(c) and Rules 13.5, 22, and 30.3 of the Rules of
this Court, applicant Smartflash LLC respectfully requests a 30-day extension of
time, up to and including August 9, 2018, within which to file a petition for a writ of
certiorari in this case to review the judgment of the United States Court of Appeals
for the Federal Circuit. The Federal Circuit entered its judgment on April 11, 2018
(the court of appeals' judgment is unreported, but it is available at 718 F. App'x 985
and attached hereto as Exhibit A). The petition would be due on July 10, 2018.
This application is made at least 10 days before that date. This Court's jurisdiction
would be invoked under 28 U.S.C. § 1254(1).

1. This case presents at least two important questions concerning the
constitutionality and scope of the “covered business method” (“CBM”) review
procedure adopted as part of the Leahy-Smith America Invents Act (“AIA”), Pub. L.
No. 112-29, 125 Stat. 284 (2011). CBM review is procedurally akin to the inter
partes review procedure at issue in *Oil States Energy Services, LLC v. Greene's
Energy Group, LLC*, 138 S. Ct. 1365 (2018), with certain statutory exceptions and
modifications.¹ CBM review is available only for patents “that claim[] a method or
corresponding apparatus for performing data processing or other operations used in

¹ CBM review is a “transitional program” that will sunset for new petitions on September 16, 2020.

the practice, administration, or management of a financial product or service” and that are not “patents for technological inventions.” AIA § 18(d)(1), 125 Stat. 331. A petitioner may initiate CBM review if it has been sued for infringement “or has been charged with infringement under that patent.” *Id.* § 18(a)(1)(B). And while the grounds for seeking inter partes review are limited to anticipation and obviousness under 35 U.S.C. §§ 102 and 103, a petitioner challenging a CBM patent may also raise grounds including (among others) patent ineligibility under 35 U.S.C. § 101.

2. At issue are seven patents claiming inventive architectures for a computer network, and for devices within such a network, that provide solutions to technological problems associated with the distribution of digital content over computer networks, including digital data piracy. As this Court has observed, “digital distribution of copyrighted material” created an unprecedented threat to copyright holders “because every copy is identical to the original, copying is easy, and many people . . . use file-sharing software to download copyrighted works.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928-29 (2005). The patents and claims at issue in the underlying proceedings offered a narrowly defined solution to address that threat.

3. Smartflash filed patent-infringement actions against Apple Inc., Google Inc., Samsung Electronics America, Inc., and Samsung Electronics Co., Ltd. in district court. Those companies subsequently filed a large number of petitions at the Patent and Trademark Office (“PTO”) seeking CBM review of various claims in

Smartflash's patents. The Patent Trial and Appeal Board (the "Board") decided to institute CBM review, determining, over Smartflash's objection, that the challenged patents met the definition of a "covered business method patent." See AIA § 18(d)(1), 125 Stat. 284. After hearing, the Board issued final decisions invalidating the challenged claims as covering ineligible subject matter under 35 U.S.C. § 101.

4. Smartflash appealed, raising three basic arguments. *First*, Smartflash argued that the CBM procedure was unconstitutional because it improperly deprived Smartflash of its property without the required judicial process. Smartflash argued in particular that the CBM procedure suffers from greater constitutional infirmities than the inter partes review procedure at issue in *Oil States*. *Second*, Smartflash argued that the Board lacked statutory authority to invalidate its patents because they do not fall within the statutory definition of "covered business method patent." *Third*, Smartflash challenged the Board's patent eligibility determinations on the merits. The Federal Circuit affirmed in a summary order.

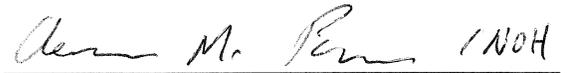
5. Smartflash intends to raise at least two issues in its petition for certiorari. First, this Court's decision in *Oil States* emphasized "the narrowness" of its holding. 138 S. Ct. at 1379. Its decision addressed "the constitutionality of inter partes review only"; it "address[ed] only the precise constitutional challenges that *Oil States* raised"; it did not address "the retroactive application of inter partes review"; and it did not address a potential due process challenge. *Id.* Smartflash's

case implicates those open constitutional issues. Second, the Federal Circuit has been sharply divided over the proper interpretation of the statutory definition of “covered business method”; in this case, and in others, the Board has improperly relied on legislative history to expand the availability of the procedure beyond the scope that Congress permitted. This Court should provide the clear guidance that the Federal Circuit has failed to provide.

6. The 30-day extension to file a certiorari petition is necessary because undersigned counsel needs the additional time to review the record and to prepare the petition and appendix because of other, previously engaged matters, including: (1) a supplemental and merits brief in *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*, No. 17-571 (U.S.); (2) trial and post-trial proceedings in *United States v. AT&T*, No. 17-cv-02511 (D.D.C.); (3) oral argument in *Kleen Products LLC v. Georgia-Pacific LLC*, No. 17-2808 (7th Cir.); and (4) expert reports in *UFCW & Employers Benefit Trust v. Sutter Health*, No. CGC-14-538451 (Cal. Sup. Ct.). In addition, counsel has a long-scheduled family vacation planned for this period.

Accordingly, applicant respectfully requests a 30-day extension of time, up to and including August 9, 2018, within which to file a petition for a writ of certiorari in this case to review the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

Handwritten signature of Aaron M. Panner in cursive script, with the initials "1NOH" written to the right of the signature.

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