

No. 19-400

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IN THE  
**Supreme Court of the United States**

GARMIN USA, INC., ET AL.,  
*Petitioners,*

v.

CELLSPIN SOFT, INC.,  
*Respondent.*

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

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**REPLY BRIEF IN SUPPORT OF CERTIORARI**

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**RULE 29.6 DISCLOSURE STATEMENT**

The disclosure made in the petition for a writ of certiorari remains accurate.

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**INTRODUCTION**

Respondent Cellspin’s brief in opposition is most notable for what it does not dispute. First, it does not dispute that the patent claims at issue are directed to an abstract idea, and therefore fail the first step of *Alice*. Second, Cellspin does not contest that the two patent claims addressed in the petition are representative of all the patent claims asserted in this litigation. The brief in opposition has therefore simplified the issues before the Court and confirmed this case as an ideal vehicle: The Court can bracket *Alice* step one and focus on the Federal Circuit’s consequential errors related to *Alice* step two. And it can illustrate those errors by analyzing two specific—and plainly ineligible—claims.

As for what Cellspin *does* say, the opposition leads off with the incorrect assertion that the question presented has been waived. The primary issue below was whether the patent claims are eligible, and petitioners may raise any argument in support of that point here. *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Petitioners were not required to make the futile argument that the panel should overturn circuit precedent. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007). And the decision below plainly reached the question presented, which alone is enough to put the issue squarely before this Court.

On the merits of that question: The Federal Circuit's approach to *Alice* is "unmoored" from this Court's precedent and the consequences have been "staggering." *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 890 F.3d 1354, 1365 (Fed. Cir. 2018) (Reyna, J., dissenting from denial of rehearing en banc). The issue of whether eligibility is a question of law amenable to decision on the pleadings comes up in hundreds of cases a year, and the decision below will result in tremendous inefficiencies and deadweight losses. CCIA and EFF Proposed Amici Br. 7-14. Cellspin has no compelling legal or empirical response. The Federal Circuit's wrong turn should be righted.

## ARGUMENT

### I. THE DECISION BELOW CANNOT BE RECONCILED WITH THIS COURT'S PRECEDENT.

1. As a preliminary matter, Cellspin wrongly claims (at 18) that the question presented is waived



because petitioners did not ask the panel below to overturn *Aatrix* and *Berkheimer*. The focus of the Federal Circuit appeal was whether the patent claims asserted are subject-matter eligible. Petitioners now are merely making further “argument[s] in support of that claim,” which is entirely proper. *Yee*, 503 U.S. at 534. Indeed, it would have been “futile” to urge the panel to overturn circuit precedent because “the panel below had no authority to” do so. *MedImmune*, 549 U.S. at 125. There is thus no conceivable basis to find waiver. And “even if this were a claim not raised by petitioner[s] below,” the Court could “address it, since it was addressed by the court below.” *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); see Pet. App. 23a-24a. It is thus properly before the Court.

2. Next, Cellspin does not dispute two key points, which are therefore established as this case comes to the Court. First, the Petition noted that “Claims 1 and 16 of the ’794 Patent are representative of all the asserted claims for eligibility purposes.” Pet. 8. Cellspin nowhere disputes that, and in fact notes (without disagreement) that the Federal Circuit had “deemed” Claim 1 “as exemplary.” Opp. 10. Cellspin then specifically discusses only Claim 1 in the brief in opposition. Thus, the patents-in-suit rise and fall with Claims 1 and 16 of the ’794 Patent. See S. Ct. R. 15.2. Second, Cellspin does not dispute that Claims 1 and 16 are directed to an abstract idea under step one of *Alice*. That issue is thus also settled in this Court. *Id.* This case, then, is an unusually clean vehicle for this Court to answer the question presented. The Court should seize the opportunity.

3. Now for the merits. Cellspin begins (at 18-19) by faulting petitioners for suggesting that the Federal Circuit held that the issue of eligibility is not a question of law, when the panel stated that the *ultimate* issue is one of law. But petitioners were clear about the nature of the Federal Circuit’s error: It held that a key piece of the eligibility analysis is a question of fact, which effectively disables judges from resolving eligibility disputes efficiently and early. The Federal Circuit thus “alter[ed] the § 101 analysis in a significant and fundamental manner by presenting patent eligibility under § 101 as predominately a question of fact.” *Aatrix*, 890 F.3d at 1362 (Reyna, J., dissenting from denial of rehearing en banc). The fact that the Federal Circuit nodded toward the ultimate question of eligibility being one of law does not undo the damage done.

Cellspin also points out (as did petitioners) that this Court has consulted several secondary sources like textbooks and articles when performing its eligibility analyses. In Cellspin’s view, that shows that eligibility must involve questions of fact. Opp. 19. That is exactly backwards. The Court did not consult those sources to resolve a question of *adjudicative* fact. Indeed, it could not have, because those sources were not in the record, and the Court did not formally take judicial notice. *See* Fed. R. Evid. 201. Those sources could only have been relevant to establish legislative facts—that is, “general historical observations, the sort of findings routinely made by courts deciding legal questions.” *In re Marco Guldenaar Holding B.V.*, 911 F.3d 1157, 1164 (Fed. Cir. 2018) (Mayer, J., concurring in the judgment) (internal quotation marks omitted); *see also* Fed. R. Evid. 201 advisory committee’s notes to 1972 proposed

rules (“Legislative facts \* \* \* are those which have relevance to legal reasoning and the lawmaking process”).

Cellspin then offers that claim construction “involves extrinsic evidence and fact-finding,” and that “the Federal Circuit conceptualized patent eligibility the same way.” Opp. 20. But claim construction and § 101 are different analyses, and the fact that claim construction may sometimes involve subsidiary fact questions does not imply that § 101 does as well. Section 101 centers on whether a particular claim embodies “the kind of ‘discover[y]’ that the statute was enacted to protect.” *Parker v. Flook*, 437 U.S. 584, 593 (1978). That is a legal question through and through. And even if § 101 involved subsidiary questions of fact, certiorari would still be warranted to confirm that all aspects of the § 101 inquiry—including those denominated factual—are for decision by the judge rather than the jury and capable of early resolution. Pet. 20-22.

Cellspin counters that the Federal Circuit did not “state that the ultimate fact finder could not be a judge.” Opp. 20. True—but it did not have to. By likening the § 101 inquiry to “other type[s] of validity challenge[s],” the court sent a strong signal that it should be treated procedurally the same way. *Berkheimer v. HP Inc.*, 890 F.3d 1369, 1370 (Fed. Cir. 2018) (Moore, J., concurring in the denial of rehearing en banc). And that is exactly what has happened in the wake of *Berkheimer* and *Aatrix*. In the Eastern District of Texas, for instance—which still hears an outsized percentage of the Nation’s patent cases—the second step of the eligibility inquiry has been sent to the jury. *See, e.g., Verdict Form, PPS Data,*

*LLC v. Jack Henry & Assocs., Inc.*, No. 2:18-cv-00007-JRG (E.D. Tex. Sept. 12, 2019). This trend will likely accelerate without this Court’s intervention.

Cellspin then tries to distinguish *Alice* and *Mayo* because “there were no disputed facts in those cases.” Opp. 21. First of all, if Cellspin were correct, that would just mean there have been no disputed facts in the key recent eligibility decisions of this Court—a strong signal that there is no such thing as a dispute of fact that can defeat early dismissal on eligibility grounds. Further, to take *Alice* as an example, the parties *did* contest whether the patentee’s claims satisfied the second step of the eligibility analysis. See Br. for Respondents at 40-53, *Alice Corp. Pty. v. CLS Bank Int’l*, 573 U.S. 208 (2014) (No. 13-298). More to the point, the Court actually decided that the additional elements of the patentee’s claims were “[p]urely conventional,” not because that point was undisputed, but because it was true. *Alice*, 573 U.S. at 222.

Finally, Cellspin contends (at 23) that petitioners’ position violates the notion that well-pled facts in a complaint must be accepted as true. That argument simply begs the question. Of course such facts must generally be taken as true; the issue here is whether any part of the eligibility analysis *is* a factual question of that sort.

2. Cellspin then makes several attempts to defend the Federal Circuit’s errors in applying *Alice* step two. First, Cellspin suggests that petitioners make too much of the Federal Circuit’s treatment of the “conventionality” prong. According to Cellspin, the upshot of the Federal Circuit’s decision was just that

the District Court had erred by “fail[ing] to consider well pled facts indicating unconventionality.” Opp. 22-23. But the Federal Circuit clearly stated that “allegations that aspects of the claims are inventive are *sufficient*” to defeat a motion to dismiss. Pet. App. 23a-24a (emphasis added). By erroneously elevating the importance of conventionality in that way—and turning it into a question of fact—the Federal Circuit hamstrung subject-matter eligibility as a useful screen.

Cellspin then turns to whether its claims merely utilized conventional equipment and techniques to implement an abstract idea. But rather than discuss any specific claim limitation, it retreats to generalities. It says that “common devices such as mobile phones \* \* \* can be programmed to perform inventive methods and functions.” Opp. 26. Perhaps, but Cellspin does not identify the particular inventive method or function at issue here. Indeed, Cellspin declines even to attempt to defend the grounds relied upon by the Federal Circuit to find an inventive concept.

Instead, Cellspin opines that, “under Petitioners’ flawed logic, no software application acting on a computer, cellular phone or camera could ever be patent eligible.” *Id.* at 30. That is obviously not petitioners’ argument, and the Court does not need to reach the question of software patentability here. It suffices to say that where, as here, “the claims at issue amount to nothing significantly more than an instruction to apply [an] abstract idea \* \* \* using some unspecified, generic computer,” that is not enough. *Alice*, 573 U.S. at 225-226 (internal quotation marks omitted).

Finally, in its statement of facts, Cellspin touts (at 11) “[m]ultiple meaningful benefits” that supposedly “flow” from the claimed invention. But if a patent claim is ineligible under § 101, it does not matter whether “benefits” flow from it: It cannot be patented. “Groundbreaking, innovative, or even brilliant discovery does not by itself satisfy the § 101 inquiry.” *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 591 (2013).

4. Cellspin also insists that patentability of the particular claims is “far afield from the[] question presented.” Opp. 22, 25, 28, 29, 30. Wrong. One possible answer to the question presented by the petition is that the issue of eligibility is entirely one of law. *See* Pet. i. But another possible answer is that, while the issue of eligibility may involve subsidiary issues of fact, it is *still* amenable to resolution at the motion to dismiss stage in the mine run of cases if the motion to dismiss standard is correctly applied. *Id.* And this case is an ideal vehicle for this Court to provide either answer.

Nor is there any merit to the suggestion that determining the eligibility of the patent claims asserted here is beyond the scope of the question presented. The Court has often granted certiorari on a broad question of the law of patent eligibility, and then answered that broad question by analyzing the eligibility of the particular patent claims asserted. *See* Petition for Certiorari at i, *Bilski v. Kappos*, 561 U.S. 593 (2010) (No. 08-964); Petition for Certiorari at i, *Myriad*, 569 U.S. 576 (No. 12-398); Petition for Certiorari at i, *Alice*, 573 U.S. 208 (No. 13-298).

## II. THE FEDERAL CIRCUIT IS INTERNALLY DIVIDED ON THE QUESTION PRESENTED.

The Federal Circuit is deeply divided on the question presented. Pet. 25-28. Cellspin suggests that Judge Reyna was merely taking issue with certain “broad statements” in *Berkheimer* and *Aatrix* that were not repeated in the decision below. Opp. 32. Incorrect: What concerned Judge Reyna was that *Aatrix* and *Berkheimer* “shoehorn[ed] a significant factual component into the *Alice* § 101 analysis,” *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F.3d 1121, 1130 (Fed. Cir. 2018) (Reyna, J., concurring in part and dissenting in part), and that is precisely the component of *Aatrix* and *Berkheimer* that propelled the decision below. Further, Cellspin tellingly does not even address Judge Mayer’s dissent in *In re Marco Guldenaar Holding B.V.*, let alone the ways in which *Aatrix* and *Berkheimer* departed from prior Federal Circuit precedent. See Pet. 25-28.

Cellspin also claims that the internal division is “speculat[ive]” because the panel decision below was unanimous and petitioners did not seek en banc review. Opp. 31-32. But the decision *had* to be unanimous on the issues already resolved in *Aatrix* and *Berkheimer*. And it would have been futile to seek *en banc* review because the Federal Circuit had already denied *en banc* review of the question pre-

sented.<sup>1</sup> Thus, these issues are settled in the Federal Circuit until this Court intervenes.

### **III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.**

Petitioners adduced reams of evidence to substantiate what Judge Reyna described as the “staggering” consequences of the Federal Circuit’s wrong turn. Pet. 29-32. Cellspin has no evidence-based response. Instead, Cellspin faults petitioners for calling for the “summary execution of patents on eligibility grounds” as an alternative to these damaging consequences. Opp. 34. That is not, of course, petitioners’ position. Petitioners merely ask that this Court restore the subject-matter eligibility test to its proper function, as defined by this Court’s own precedents. There is nothing “summary” or “unfair[]” about courts taking a close—and early—look to ensure that asserted patent claims are “the kind of ‘discover[y]’ that the statute was enacted to protect.” *Flook*, 437 U.S. at 593.

Cellspin also suggests that petitioners overstate the importance of eligibility at the motion to dismiss stage because “nothing stops [defendants] from further challenging \* \* \* eligibility \* \* \* as th[e] case moves forward.” Opp. 35. But the issue is not that defendants will never have another opportunity to raise eligibility; it is that it may be brutally expensive to get to that point. As (proposed) amici show with detailed statistics, going from a motion to

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<sup>1</sup> The Federal Circuit’s Rules state plainly that “[f]iling a petition for \* \* \* rehearing en banc is not a prerequisite to filing a petition for a writ of certiorari.” Fed. Cir. R. 35 practice note.



dismiss to summary judgment or trial can be costly. CCIA and EFF Proposed Amici Br. 8-10. And that cost can be leveraged to “increase[] the *in terrorem* power of patent trolls.” *Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1932 (2015) (Scalia, J., dissenting).

Cellspin also casts doubt (at 36) on the impact that *Berkheimer* and *Aatrix* have had on the capacity to win on eligibility issues before trial. But, as noted in the petition, in the five years prior to *Berkheimer*, motions to dismiss on eligibility grounds were successful 70% of the time; in the year and a half after, they were successful 45% of the time. Pet. 31-32. That sizable drop-off *perfectly* coincides with *Aatrix* and *Berkheimer*; it beggars belief that the fall is unconnected to those decisions.

Finally, Cellspin takes issue with the “implication that [it] is somehow a bad actor.” Opp. 33. Petitioners’ point is not to single out Cellspin for special opprobrium. But Cellspin *is* currently a non-practicing entity with no business other than asserting patents. As such, it is a representative example of a broader phenomenon that has damaged the patent system. *Commil*, 135 S. Ct. at 1930.

#### **IV. WHETHER OR NOT THE COURT GRANTS CERTIORARI IN *BERKHEIMER*, IT SHOULD HEAR THIS CASE.**

The Court is considering a petition for certiorari in *Berkheimer* that presents a closely allied question—whether eligibility is an issue of law that is amenable to resolution at the summary judgment stage. The issue in this case is whether it is amenable to resolution at the pleading stage. The Court has

called for the views of the United States in *Berkheimer*. If the Court grants *Berkheimer*, it should grant this case and have the two cases argued in tandem. At the very least, it should hold this petition and grant, vacate, and remand in light of *Berkheimer*. Finally, if the Court denies certiorari in *Berkheimer*, it should grant this petition, because it is independently cert-worthy.

Cellspin's only answer to this (other than its debunked waiver theory) is to claim that the "issues implicated by *Berkheimer* are not sufficiently similar to the judgment on the pleadings issues in this case." Opp. 37. But both concern whether eligibility is an issue of law, simply in different postures. Moreover, the Federal Circuit issued *identical* opinions denying en banc review in both *Berkheimer* and *Aatrix*, indicating the close logical relationship. See *Berkheimer*, 890 F.3d at 1370 (Moore, J., concurring in denial of rehearing en banc). If this Court grants certiorari in *Berkheimer*, it will necessarily implicate the holding in *Aatrix*—and thus this case—as well. And the difference in procedural posture that Cellspin emphasizes is precisely why this Court should grant this petition too and set the case for argument together with *Berkheimer*.<sup>2</sup>

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<sup>2</sup> Cellspin also suggests that the fact that the Federal Circuit's mandate has issued is a reason not to GVR. That is wrong. If this Court vacates the Federal Circuit's decision, the mandate will automatically be recalled so that the Federal Circuit can dispose of the case on remand as appropriate. See, e.g., *Simple Tech., Inc. v. Dense-Pac Microsystems, Inc.*, 57 F. App'x 436 (Fed. Cir. 2003).

**CONCLUSION**

The petition for a writ of certiorari should be granted.

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NOVEMBER 2019