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In the  
Supreme Court of the United States

ALICE CORPORATION PTY. LTD.,

*Petitioner,*

v.

CLS BANK INTERNATIONAL, *et al.*,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICI CURIAE* STUDENTS OF  
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KATHERINE D. STEPANOVA, AND JACOB J. TRUE  
IN SUPPORT OF PETITIONER

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**INTEREST OF THE AMICI CURIAE<sup>1</sup>**

*Amici curiae* respectfully submit this brief pursuant to Supreme Court Rule 37 in support of Petitioners. *Amici* are upper-division J.D. and M.S.L. candidates attending the University of California, Hastings College of the Law (“UC Hastings”), currently enrolled in a patent-focused seminar exploring recent developments in patent law.<sup>2</sup> *Amici* have also worked in the patent field both in-house at well-known Silicon Valley technology companies and at a law firm specializing in patent litigation. Finally, as law students studying patent law, *amici* have a strong interest in the proper understanding and interpretation of patentability of software following the Federal Circuit decision in *CLS Bank International v. Alice Corporation Pty. Ltd.*, 717 F.3d 1269 (Fed. Cir. 2013) (*en banc*).

*Amici* have no interest in any party to this litigation, nor do they have a stake in the outcome of this case other than their interest in correct, consistent interpretation of the patent laws.

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<sup>1</sup> *Amici* provided counsel of record with notice of its intent to file this brief ten days prior to the due date, as required by Supreme Court Rule 37.2(a). The parties have submitted letters to the Clerk granting blanket consent to the filing of amicus briefs. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made a monetary contribution intended to fund the preparation or submission of this brief.

<sup>2</sup> University of California, Hastings College of the Law is a top-tier ABA-accredited law school located in San Francisco, California. No part of this brief purports to present UC Hastings’s views, if any.



## SUMMARY OF THE ARGUMENT

We urge the Court to grant *certiorari* to clarify issues of deep importance to patent owners, particularly in the software industry. Specifically, are claims to computer-implemented inventions directed to patent-eligible subject matter within the meaning of 35 U.S.C. § 101, and if so, what standard should the Courts use to determine when an otherwise abstract idea crosses the threshold to patentable subject matter?

This Court has repeatedly granted *certiorari* in cases involving abstract subject matter, but it has declined to explicitly address what standard should be used in cases where the patented invention is computer-implemented. This left the door open for the Federal Circuit to issue its terse opinion in *CLS Bank International v. Alice Corporation Pty. Ltd.*, 717 F.3d 1269 (Fed. Cir. 2013) (*en banc*), which provided no clear standard to be applied in subsequent cases and further added to the instability of the patent system. Meanwhile, the federal courts are deeply divided on this important patent issue.

The petition should be granted for at least three reasons. First, the Federal Circuit's precedents are irreconcilably divided on the issue of patentability of software. The Federal Circuit has articulated a number of tests that are inconsistent with each other, and that contravene this Court's prior rulings. The Court should take up this opportunity to clarify this area of law and reconcile precedent by articulating a

“data manipulation test.” Under this standard, a claim would not be directed to an abstract idea if the computer’s role in the invention is (1) to manipulate data as opposed to merely facilitating the process, and (2) the data manipulation (a) has to do with a particular application within the invention and (b) is necessarily carried out on a computer rather than acting as a proxy for data existing in the world around us.

Second, a clear legal test is needed to prevent gamesmanship in both patent prosecution and patent litigation. Without strong guidance from this Court, patent practitioners will be emboldened to draft around the Federal Circuit’s conflicting precedents, to seek patents on claimed inventions that may otherwise be unpatentable, with the result of unnecessarily crowding federal courts’ dockets with what would be, if not for the Federal Circuit’s confusing and divided opinions, frivolous lawsuits. Finally, it is an economic imperative that such standards are clarified. The intellectual property community requires a predictable legal standard to minimize costly disputes and encourage legitimate competition in the technology industry. Thus, this Court’s uniform guidance is needed at this time to settle the conflicting and inefficient lines of precedent coming from the lower courts.

**ARGUMENT****I. THE FEDERAL CIRCUIT'S 5-5 *EN BANC* DECISION IN *CLS BANK* LEAVES A VOID FOR A CLEAR STANDARD DUE TO THE VARYING INTERPRETATIONS OF 35 U.S.C. § 101.**

The Federal Circuit's conflicting rulings regarding what constitutes "patentable subject-matter" under 35 U.S.C. § 101 in the context of computer-implemented systems or software, has left a lack of clear guidance and an air of uncertainty in the patent and technology communities. Multiple fractured opinions proposing approaches that no majority could agree on have caused, and will continue to cause, confusion among patent practitioners and in the lower courts (not to mention in law school classes). Similarly, these opinions will be an impediment on the proper direction of the United States Patent and Trademark Office ("USPTO"). The lack of clarity in this area of patent law has frustrated the Federal Circuit and led it to explicitly seek guidance from this Court. *See CLS Bank*, 717 F.3d at 1276 (*en banc*) (Lourie, J.) ("§ 101 appears deceptively simple on its face, yet its proper application . . . has long vexed this and other courts"); *id.* at 1314 (Moore, J., dissenting in part) ("Our court is irreconcilably fractured over these system claims . . . . This case presents the opportunity for the Supreme Court to distinguish between claims that *are* and *are not* patent subject matter."); *id.* at 1321 (Newman, J., concurring in part and dissenting in part) (noting the three incompatible standards "serv[e] simply to add to

the unreliability and cost of the system of patents”); *id.* at 1335 (Rader, C.J.) (“The intervening commotion leaves us with little, if any, agreement amongst us”).

This Court traditionally grants *certiorari* in two circumstances: (1) when addressing with an important federal question, and (2) when there is a split amongst the circuits. *See Rogers v. Mo. Pac R. Co.*, 352 U.S. 521, 530 (1957). The Federal Circuit is a unique institution, in that it is “the only institution of its kind where the development and enforcement of one critical body of international commercial law is committed to a small group of judicial officers.” Randall R. Rader, *The United States Court of Appeals for the Federal Circuit: The Promise and Perils of a Court of Limited Jurisdiction*, 5 Marq. Intell. Prop. L. Rev. 1, 3 (2001). Due to its special status, the Federal Circuit must keep pace with not only the rapid speed of technology advancements, but also the high speed of legal developments in the important areas it is charged with overseeing. *Id.* at 7-9. This combination that the court must manage at an accelerated pace also increases the probability of “intra-circuit conflicts” arising. *Id.* at 9. And, because no other circuit has the judicial authority to decide such cases, “intra-circuit conflicts” within the Federal Circuit on patent law issues are the equivalents of circuit splits between two or more of the other Circuit Courts of Appeals in other areas of federal law. *Id.* Here, in the *CLS Bank* petition, this Court is faced with a crucial intra-circuit split in the Federal Circuit and faces the vital task of sorting out the competing visions of computer-assisted patentable subject matter under section 101.

Even when the Federal Circuit has come to a consensus in this area, it has had difficulty consistently applying any single test to evaluate computer-implemented inventions. For example, the Circuit has written that “breadth and lack of specificity does not render the claimed subject matter impermissibly abstract.” *Ultramercial LLC v. Hulu, LLC*, 657 F.3d 1323, 1330 (Fed. Cir. 2011) (holding “as a practical application of the general concept of advertising as currency and an improvement to prior art technology, the claimed invention is not ‘so manifestly abstract as to override the statutory language of section 101’”). However, in another decision, the Federal Circuit panel opined that “the incidental use of a computer to perform the mental process of claim 3 does not impose a sufficiently meaningful limit on the claim’s scope.” *Cybersource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1375 (Fed. Cir. 2011) (questioning whether computer-focused limitation “impose[d] a sufficiently meaningful limit on the claim’s scope,” and whether the computer “play[ed] a significant part in permitting the claim method to be performed.”). The Federal Circuit’s ongoing failure to provide a unified and consistent standard highlights the inefficient uncertainty in this vital area of the patent law.

**A. This Court Should Reinforce its Position That Section 101 Provides a Threshold Test Required to be Implemented During the Pleading or Summary Judgment Stage.**

This Court has previously spoken of patentable subject matter as a “threshold test,” *Bilski v. Kappos*, 130 S. Ct. 3218, 3225 (2010), as well as a “screening”

mechanism. *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 132 S. Ct. 1289, 1303 (2012). By applying such a label, this Court meant for the section 101 “patentable subject matter” inquiry to be posed prior to other statutory inquiries. See *Parker v. Flook*, 437 U.S. 584, 593 (1978) (stressing “[t]he obligation to determine what type of discovery is sought to be patented must precede the determination of whether that discovery is . . . new or obvious.”).

Section 101’s screening process for patentable subject matter can only be effective if courts are instructed to distinguish patentable subject matter from unpatentable subject matter at the outset of litigation. To include section 101 as merely one of many patentability-determining factors, and to group it with novelty (35 U.S.C. § 102) and obviousness (35 U.S.C. § 103) among other factors and then apply those factors in no particular order, is inconsistent with the purpose of the patentable subject matter inquiry. Some Federal Circuit Judges have even recommended that courts stay clear of section 101’s “murky morass” altogether and skip straight to one of the other sections encompassing patentability, even though this Court expressly directed courts to apply section 101 as a “threshold test” in *Bilski*. See *MySpace, Inc. v. GraphOn Corp.*, 672 F.3d 1250, 1260 (Fed. Cir. 2012). Others have interpreted this Court’s ruling in *Prometheus* to have established that sections 101, 102, 103 and 112 each “serve[] a different role” towards the same purpose of assessing patentability, and that because a district court is “master of its own docket,” it can choose which provision to apply first in determining whether a patent is valid. *CLS Bank Int’l v. Alice*

*Corp. Pty. Ltd.*, 685 F.3d 1341, 1348, *reh'g en banc granted, opinion vacated*, 484 F. App'x 559 (Fed. Cir. 2012) (citing *Prometheus*, 132 S. Ct. at 1303-04).

This Court has stated its position on section 101: it is a threshold test for patent-eligibility and has priority in being applied before other sections dealing with patentability. But the Federal Circuit, following *Bilski*, has continued to express its doubt about the absoluteness and necessity of section 101 as a threshold test. *Smartgene, Inc. v. Advanced Biological Lab., SA*, 852 F. Supp. 2d 42, 51 (Fed. Cir. 2012). The Federal Circuit's continuing questioning of section 101's threshold status, and that court's aversion to motions to dismiss based on patentable subject matter, goes against this Court's articulated role for the doctrine as a screening mechanism to eliminate bad patents in the early stages of litigation. For this reason, this Court should grant *certiorari* to clarify that the proper role of patentable subject matter is as a threshold inquiry.

**B. This Court Should Clearly Define What it Means For a Computer to Play an "Integral" Role in a System, Method or Process.**

The Federal Circuit first attempted to explain how the implementation of a computer could make an otherwise patent-ineligible process patent-eligible, in the last case it decided before that Circuit granted the *en banc* petition in this case. *Bancorp Services, L.L.C. v. Sun Life Assurance Co. of Canada*, 687 F.3d 1266 (Fed. Cir. 2012). The court in *Bancorp* stated that "[t]o salvage an otherwise patent-ineligible process, a computer must be integral to the claimed invention, facilitating the process in a way that a

person making calculations or computations could not.” This approach seems to focus more on the computer’s role in the process and is less concerned with the claim’s scope, although the *Bancorp* court appeared to apply computer integration as a meaningful limit on the claim’s scope. Although the court applied computer “integration” as a test to clear the confusion when confronting an invention that utilizes computer processes on an abstract idea, its failure to define clearly “integral” makes the test impossible to apply consistently. It is unclear what the Federal Circuit meant when it specified that in order for a computer to be integral it must “facilitate[e] the process in a way that a person making calculations or computations could not.” *Id.* at 1278. This language works toward the exclusion of inventions that employ a general-purpose computer, but the vague requirement fails to identify exactly what a computer serving more than a general purpose is.

In *Bilski*, this Court had an opportunity to prevent the ambiguity of computer system-tied processes, but instead chose to only narrowly address the patentable subject matter issue, holding that the machine or transformation test was a “useful and important clue” but “*not* the *sole* test for deciding whether an invention is a patent-eligible ‘process.’” 130 S. Ct. at 3221 (emphasis added); *c.f.* *In re Bilski*, 545 F.3d 943, 954 (Fed. Cir. 2008) (“[a] claimed patent process is surely patent-eligible under § 101 if: (1) it is tied to a particular machine or apparatus, or (2) it transforms a particular article into a different state or thing”).



This Court decided in *Bilski* that it was not necessary to provide any further guidance, stating that it “need not define further what constitutes a patentable ‘process,’ beyond pointing to the definition of that term provided in § 100(b), and looking to the guideposts in *Benson*, *Flook* and *Diehr*.” *Id.* at 3231. Subsequent to this Court’s narrow ruling disapproving the machine or transformation test as the sole test for process claims, the Federal Circuit and many district courts have struggled to come up with a consistent and unifying standard for analyzing the patent-eligibility of a computer-tied process.

This Court should thus grant *certiorari* to also state a clear standard and correct the conflicting Federal Circuit guidance concerning the subject matter eligibility of computer-implemented inventions. Rather than defining what is not patentable subject matter in the negative, this Court should affirmatively articulate what is patentable subject matter, so that practitioners and the Federal Circuit can distinguish when the use of a computer as a limitation in a method claim plays “a significant part” in the invention as opposed to acting merely as “an obvious mechanism for permitting a solution to be achieved more quickly.” *SiRF Tech., Inc. v. Int’l Trade Comm’n*, 601 F.3d 1319, 1333 (Fed. Cir. 2010).

It is in the best interest of the patent community that this Court establish a clear standard, derived from its existing jurisprudence, that any computer implementation of a method conceivably performable without a computer is nevertheless patent-eligible if the computer provides some functional benefit in addition to mere efficiency and convenience.

This Court has held that a specified process that incorporates an abstract idea (such as a mathematical equation) with additional steps, which “do not pre-empt the [broader] use of [the] equation” can be patentable. *Diamond v. Diehr*, 450 U.S. 175, 187 (1981) (holding patent for a process that integrated a mathematical equation in molding raw rubber into a cured, molded rubber product constituted patentable subject matter). By contrast, in *Prometheus*, this Court made clear that a process simply directing a natural law or abstract idea to be applied is not patent-eligible because it would preempt use of the idea and preclude further discoveries even if the law of nature is narrow in scope, 132 S. Ct. at 1301, or the formula is limited “to a particular technology environment.” *Bilski*, 130 S. Ct. at 3230. In the present case, this Court should articulate a limiting standard that not only addresses the narrowness of the scope, but also the computer’s integral involvement in the process limiting the abstract idea to a specific purpose.

The courts and the patent community would be best served by a standard that sets forth the type of computer involvement in a system method or process patent that will limit an abstract idea sufficiently to transform it into a patentable process. Such a standard should posit that the computer must do more than merely be present as a connector, and must actually manipulate the data that is inherent to the computer. The manipulated data must be narrowly focused on the internal functionality of the computer and not represent information taken from the external world (i.e.

credit card numbers, bank accounts, etc.). Finally, the data manipulated must be directed to specific applications.<sup>3</sup>

Applying this standard to a patentability case, *Research Corp. Technologies v. Microsoft*, that was found to have a patent-eligible system process, the process focused on pixels (as data), which were directly manipulated by the computer system. Those pixels were a step removed from the real-world image the pixels created, making it inherent to the computer; and the claim had no scope beyond the computer because the computer was necessary for the implementation of the pixels. 627 F.3d 859, 868 (Fed. Cir. 2010) (process involved a comparison of pixels and a blue noise mask; while the pixels make up an image, which is potentially a direct representation of the world, the process operates one level lower, on the pixels themselves). A standard similar to the one described above would resolve confusion in the Federal Circuit, while continuing to allow for the inclusive patent system that the Constitution, Congress, and this Court have sought to maintain.

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<sup>3</sup> See Robert D. Swanson, *Note: Section 101 and Computer-Implemented Inventions*, 16 *Stan. Tech. L. Rev.* 161, 177 (2012) (noting the “data manipulation test” is simple to administer, difficult to draft around, and is drawn from current precedent).

**II. CERTAINTY IS NEEDED TO DISCOURAGE LITIGATION AND PATENT PROSECUTION BASED SOLELY ON TECHNICALITIES, WHICH UNNECESSARILY ADDS TO AN ALREADY CROWDED PATENT DOCKET.**

The Federal Circuit issued its 5-5 *en banc* decision with accompanying concurrences and dissents in *CLS Bank Int'l v. Alice Corp.*, spanning over 135 pages, while providing as the precedential portion only a one-page *per curiam* opinion (which affirmed the district court's ruling that the asserted method, computer-readable medium, and system claims were not eligible subject matter under section 101). Notably, the Federal Circuit was unable to decide what the test for determining whether a computer-implemented invention is a patent-ineligible "abstract idea" really is – and whether the presence of a computer in a claim leads to patent-eligibility for an otherwise patent-ineligible "abstract idea." Further adding to the confusion, the Circuit's various non-precedential opinions proposed three different tests for evaluating patent-eligibility under section 101. The one paragraph *per curiam* opinion in this case leaves more questions than answers. As Chief Judge Rader explained, "nothing said today beyond our judgment has the weight of precedent." *CLS Bank*, 717 F.3d at 1292 n.1. Judge Newman opined, "we have propounded at least three incompatible standards, devoid of consensus, serving simply to add to the unreliability and cost of the system of patents as an incentive for innovation." *Id.* at 1321 (Newman, J., concurring in part and dissenting in part). Judge Moore claimed that the opinion could have a negative impact on a whole

field of patents: "if all of these claims, including the system claims, are not patent-eligible, this case is the death of hundreds of thousands of patents, including all business method, financial system, and software patents as well as many computer implemented and telecommunications patents." *Id.* at 1313 (Moore, J., dissenting in part).

While software patents continue to be challenged on subject matter patent-eligibility grounds, patentees are still without a solid answer as to how far section 101 reaches to disqualify software or business-method patents as "abstract ideas." Without a precedential opinion, district courts may conclude that they must employ all three tests when assessing patent-eligibility under section 101. This Court should grant *certiorari* to eliminate this confusion and provide clear and much-needed guidance on these issues. As even Judge Moore pointed out, this Court could take this case as an opportunity to "distinguish between claims that *are* and *are not* directed to patentable subject matter." *Id.* at 1314. The lead opinion (by Judge Lourie and joined by Judges Dyk, Prost, Reyna, and Wallach, which would have affirmed the district court's decision striking down several patents related to a computerized trading platform used for conducting financial transactions in which a third party settles obligations between a first and a second party in a way that eliminates risk) sought to develop "a consistent, cohesive, and accessible approach to the § 101 analysis—a framework that will provide guidance and predictability for patent applicants and examiners, litigants, and the courts." *Id.* at 1277. But unfortunately, that is exactly what the collection of separate opinions failed to do: articulate

a clear patent-eligibility standard for computer-implemented inventions, something patentees and practitioners were sorely hoping for.

The *en banc* Federal Circuit's divided opinions has created a vacuum rather than a standard. Unsurprisingly, prospective patentees are not incentivized to consider strategies and engage in gamesmanship to keep pending cases before the USPTO and/or court in order to try to draft and present claims best suited for any of the three tests or any future test yet to be articulated. As articulated by Judge Newman, "with [the] judicial deadlock, the only assurance is that any successful innovation is likely to be challenged in opportunistic litigation, whose result will depend on the random selection of the panel." *Id.* at 1321. Patentees in the process of drafting or filing new applications may consider including as many unnecessary details for their claims as possible, adding work for the USPTO and the courts, hoping that the details might mask what might otherwise be flagged as "abstract idea" claims. Furthermore, "[r]eliable application of legal principles underlies the economic incentive purpose of patent law. . . . Today's irresolution concerning section 101 affects not only this Court and the trial courts, but also the USPTO examiners and agency tribunals, and all who invent and invest in new technology." *Id.*

There simply should not be a 5-5 tie with respect to federal law as it applies to software and computer-implemented technologies. Such a tie leaves the USPTO without a clear direction regarding how to process patent applications and to apply the *CLS Bank* decision. Patent practitioners will

understandably be at a loss as to how to write patent applications covering important innovations in the area of software and computer implemented technologies. While the impact of the *CLS Bank* case may be unclear for those seeking real guidance and clear standard, those who thrive on the idea that there is no standard may engage in filing frivolous lawsuits and invalid patent application filings, claiming that their “abstract ideas” are tied to computer implementations and have a true “inventive concept” under the subject matter test articulated in the *CLS Bank* lead – but non-precedential – opinion.

Such a trend had already been exhibited in the debate regarding business-method patents. The definition of a business method is sufficiently vague that any attempt to limit its patentability can be evaded with skillful claim drafting. See John R. Allison & Starling D. Hunter, *On the Feasibility of Improving Patent Quality One Technology at a Time: The Case of Business Methods*, 21 BERKELEY TECH. L. J. 729, 736 n.17 (2006) (“Carving out business method patent applications for harsher treatment would ultimately prove largely futile and possibly even counterproductive – futile because skilled patent attorneys can often draft applications so as to opt out of a predefined category”); see also Julie E. Cohen & Mark A. Lemley, *Patent Scope and Innovation in the Software Industry*, 89 CAL. L. REV. 1, 9 n.29 (2001) (describing “the doctrine of the magic words,” that prevailed during the 1980s and early 1990s, under which “software was patentable subject matter, but only if the applicant recited the magic words and pretended that she was patenting something else”).

Lower courts also will now be likely to see an emergence of new claims in which challengers attack the validity of others' patents by saying that the computer-implemented claims are not well-supported in the patents' specifications. The accused infringers then would look to invalidate software or business method patents as patent-ineligible under section 101 when the claims fail to recite computer implementation limitations. For claims that do recite some computer implementation, accused infringers may still succeed by determining and focusing on whether the inventions are truly directed to an abstract idea or concept central to the field of science or technology at issue, which otherwise might be wholly preempted if the patent were enforced. One study establishes that software and business-method patents account for nearly forty percent of the total cost of patent litigation and that such costs are increasing. See James Bessen & Michael J. Meurer, *Patent Failure: How Judges, Bureaucrats, and Lawyers Put Innovators at Risk*, 22 n.1 (2008). What makes business-method patents prone to attract litigation is their abstract quality, which provides little notice for firms and increases the probability of inadvertent infringement. *Id.* at 23 ("Software patents are much more likely than other patents to have their claim construction reviewed on appeal – an implicit indication that parties to lawsuits have fundamental uncertainty over the boundaries of these patents."). As Bessen and Meurer observe, "it is well-known among computer scientists that software technologies (algorithms, system structures) can be represented in many different



ways, and . . . this means that the technology claimed in a patent can be difficult to distinguish from alternatives.” *Id.* The same holds true for most business methods, which often incorporate software or cover processes dealing with information management (e.g., financial instruments, negotiation tactics, styles of legal argument) that are subjective – an art rather than a science -- and far less precise than a machine or a drug that can be described in concrete terms. *See Id.* at 198.

### **III. THIS COURT’S GUIDANCE IS NEEDED TO CURB THE OVERALL INCREASES IN LITIGATION COSTS RELATED TO SOFTWARE PATENTS.**

Litigation costs money and time to the parties as well as to the courts. The median cost of litigation is reported to be more than \$2.6 million, for cases where the amount sought was between one million dollars and twenty-five million dollars. American Intellectual Property Law Association, *AIPLA Report of the Economic Survey* I-131 (2013). In cases where the contested amount was over twenty-five million dollars, the median costs of litigation were twice as much as for claims in the lower range.<sup>4</sup> *Id.* at I-133. Perhaps most importantly, in cases where less than one million dollars was in dispute, the cost of litigation sometimes surpassed the amount actually at stake. *Id.* at I-129. This last statistic poses a challenge to individual inventors and other small

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<sup>4</sup> These litigation cost figures cover mostly attorneys’ fees, including discovery. The figures account also for expert witness fees, travel, and document management and production. *Id.* at 34.

entities whose ingenuity and inventive contributions can be valuable to society as a whole. It is somewhat of an assumption that a smaller disputed amount should correspond to smaller-sized inventive parties. But clarity on patentability should help all parties, small or big, to be more selective in entering litigation, thereby saving money, energy, court resources, and technical bandwidth, for development rather than litigation.

From 1995 to 2011, software was the seventh-highest subject matter for patent litigation cases, composing 5.8% of patent cases out of 1,751 decisions by district courts. Price WaterhouseCoopers LLP, *2012 Patent Litigation Study* 13, available at <http://www.pwc.com/us/en/forensic-services/publications/2012-patent-litigation-study.jhtml> (accessed October 2, 2013). The number of cases from the software industry has risen since 1995, jumping from fourteen identified decisions in the period 1995–2000, to twenty-three identified decisions in the period 2001–2005, and growing to a subtotal of sixty-five identified decisions in the period 2006–2011. *Id.* at 14. In terms of amount of litigation relative to that in other industries, software rose in rank from tenth in the 1995–2000 period, to eighth in the 2001–2005 period, to sixth in the 2006–2011 period. *Id.* The number of software patent disputes that end up in court is clearly on an upward trend.

Some portion of patent disputes invariably will continue to go to trial. Even a clear elucidation of both the patent-eligibility threshold and the appraisable meanings for “integral” or “integrated” will not eliminate all patent issue trials – and

*amici* do not suggest or expect an extreme shift such as that. A clarifying decision from this Court would also not guarantee the cessation of dubious patent-infringement claims leveled by non-practicing entities (NPEs). But a considered and thorough opinion from this Court will nevertheless establish adept precedent, something that the Federal Circuit, despite toil and earnest scrutiny, has been unable to do. *CLS Bank* poses a suitable and representative case for review, as its scenario includes issues that are common potential quarrels with software-embodied intellectual works. A firm ruling from this Court would, it is hoped, proactively trim the frequency of litigation of software patent disputes – in particular those that fall into a repetitive pattern – and advance the hygiene of the software patents area. The increased volume of software patent litigation and the costs attendant to unclear or conflicting legal standards merit that the Court take up this case for detailed review.

#### CONCLUSION

To ignore the question of patentability of computer-implemented patents is to acquiesce in continued uncertainty in the patent community and to passively endorse more crowded USPTO and patent court dockets. *Amici* urge this Court to grant Petitioners' writ of *certiorari* to clarify the Questions that the Petitioner presents.

Respectfully submitted,

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