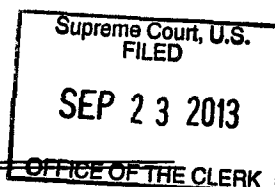


No. 13-255



In The
Supreme Court of the United States

—◆—
WILDTANGENT, INC.,

Petitioner,

v.

ULTRAMERCIAL, LLC, ET AL.,

Respondents.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit**

—◆—
**BRIEF *AMICUS CURIAE* ON BEHALF
OF THE APPLICATION DEVELOPERS
ALLIANCE IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

—◆—
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INTEREST OF AMICUS CURIAE¹

The Application Developers Alliance (ADA) is a nonprofit industry association comprising more than 25,000 individual software developers and more than 135 companies who design and build applications (“apps”) for consumers to use on mobile devices like smartphones and tablets. Apps run on software platforms, including Google’s Android, Apple’s iOS, and Facebook, and are sold or distributed through virtual stores like Google’s Play Store. ADA is dedicated to meeting the needs of app developers as creators, innovators, and entrepreneurs, by delivering essential information and resources and by advocating for public policies that promote the app ecosystem. App developers represent an increasingly robust force in the economy; the app economy is now globally valued at over \$53 billion²

¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or their counsel, made a monetary contribution intended to fund its preparation or submission. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* provided at least ten days’ notice of its intent to file this brief to counsel of record for all parties. The parties have consented to the filing of this brief and such consents are being submitted.

² Andreas Pappas, *App Economy Forecasts 2013-2016*, DEVELOPER ECONOMICS, July 22, 2013.

and has created approximately 466,000 jobs in the United States since 2007.³

Many ADA members are struggling as a result of patent assertion entities' abuse of overly broad patents via unfounded infringement allegations and aggressive litigation threats, which deeply chill innovation. ADA is concerned that conflicting precedent in the Federal Circuit, combined with an overly permissive standard for patentable subject matter, will amplify and exacerbate these problems by further encouraging baseless patent assertion and discouraging entrepreneurs and innovation.



SUMMARY OF ARGUMENT

With this decision, the Federal Circuit has worsened critical flaws in the patent system that deeply affect application developers. Unlike other innovators, app developers work exclusively with software, and most are small businesses with little capital. As overly broad software patents have proliferated in recent years, non-practicing patent assertion entities have launched a wave of litigation and intimidation that has made it extremely difficult for many app developers to operate. The Federal Circuit's decision in this case exacerbates these problems by adding to its deep internal divisions over the proper threshold

³ MICHAEL MANDEL, WHERE THE JOBS ARE: THE APP ECONOMY 13 (2012).

for patent eligibility. Furthermore, by announcing an overly permissive standard for eligibility, the Federal Circuit has immeasurably worsened the patent litigation crisis for app developers and small innovators everywhere.

◆

ARGUMENT

I. The proliferation of overly broad software patents and their ruthless exploitation by patent assertion entities are harming application developers and hindering innovation.

The proliferation of overly broad software patents has been deeply destructive to the application development industry.

Amid rapid growth of the internet, thousands of software patents have issued over the past several years. In fact, software patents now represent more than half of all issued patents.⁴ Along with the rise in software patents, patent litigation has exploded, fueled by non-practicing patent assertion entities (PAEs)⁵ that ruthlessly exploit overly broad software

⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-465, INTELLECTUAL PROPERTY: ASSESSING FACTORS THAT AFFECT PATENT LITIGATION 13 (2013).

⁵ *Id.* at 17-18.

patents.⁶ These entities, often called patent trolls, do not produce goods or services, but rather, seek to monetize their patent portfolios by obtaining awards in litigation or settlement.⁷

For PAEs, patent infringement litigation has been called a “one-sided game” in which they routinely benefit from systemic advantages.⁸ They almost always can choose the forum for litigation, have relatively low discovery burdens, often operate through judgment-proof shell corporations with no assets, and in any single infringement action risk invalidation of only a few patents in a large patent portfolio.⁹

With app developers specifically in mind, PAEs specialize in asserting overbroad or abstract software

⁶ James Bessen et al., *The Private and Social Costs of Patent Trolls* 1 (Bos. Univ. Sch. of Law, Working Paper 2011), available at <http://www.bu.edu/law/faculty/scholarship/workingpapers/documents/BessenJFordJMeurerM091911.pdf>.

⁷ EXEC. OFFICE OF THE PRESIDENT, PATENT ASSERTION AND U.S. INNOVATION 2 (2013); Press Release, Office of the Press Sec’y, White House Task Force on High-Tech Patent Issues, The White House (June 4, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/06/04/fact-sheet-white-house-task-force-high-tech-patent-issues>); Sen. Patrick Leahy & Sen. Mike Lee, *America’s Patent Problem*, POLITICO (Sept. 15, 2013), <http://www.politico.com/story/2013/09/patrick-leahy-war-on-patent-trolls-96822.html>; GAO Report, *supra* note 4, at 2.

⁸ Jason Williams et al., *Strategies for Combating Patent Trolls*, 17 J. INTELL. PROP. L. 367, 368 (2010).

⁹ *Id.*; Catherine Tucker, *Patent Trolls and Technology Diffusion* (Mass. Inst. of Tech., Working Paper 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1976593.

patents that could relate to almost any process within apps, games, websites, or other software.¹⁰ Software patents are inherently conceptual to some degree, and artful applicants will seek broadly written software patents.¹¹ Furthermore, as the Government Accountability Office has observed, owners of overly broad software patents often argue that their patent covers either “(1) an entire technology when it may only cover a small improvement, or (2) future technologies that their patent did not originally intend to cover.”¹² The GAO further noted that “[u]nclear and overly broad patents do not provide notice about their boundaries and the uncertainty of a patent’s scope then usually needs to be resolved in court.”¹³ As a result, it is often exceedingly difficult for developers to distinguish meritorious patent claims from unmeritorious ones without engaging in costly litigation.¹⁴

¹⁰ James Bessen, *The Patent Troll Crisis is Really a Software Patent Crisis*, WASH. POST (Sept. 3, 2013), <http://www.washingtonpost.com/blogs/the-switch/wp/2013/09/03/the-patent-troll-crisis-is-really-a-software-patent-crisis/>.

¹¹ *Id.*

¹² GAO Report, *supra* note 4, at 29.

¹³ *Id.* at 28.

¹⁴ *Attorneys on Patents: Reform Needs to Happen*, DEVSBUILD.IT (Aug. 7, 2013), <http://devsbuild.it/resources/type/video/attorneys-patents-reform-needs-happen>; *Attorneys on Patents: The Dysfunctional Software Patent System*, DEVSBUILD.IT (July 30, 2013), <http://devsbuild.it/resources/type/interview/attorneys-patents-dysfunctional-software-patent-system-0>; Colleen V. Chien, *Startups and Patent Trolls* 3 (Santa Clara Univ. Legal Studies Research Paper Series 2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2146251.

To make matters worse, PAEs regularly refuse to inform accused infringers of the factual basis of their infringement claim prior to litigation. This makes it difficult to contest a patent in any way before incurring the burdens of discovery.¹⁵ App developers are especially vulnerable to this type of litigation because they operate exclusively with software and are certain to trip over many processes that can be read into overly abstract software patents.

PAEs also use predatory tactics such as targeting app developers early in their business lives, while they are still in their startup and emerging growth stages and generally have small budgets and few cash reserves.¹⁶ Given that most app developers work independently or in groups of three or less and report making less than \$15,000 per year,¹⁷ many cannot afford to defend an infringement lawsuit that will cost between \$650,000 and \$5 million.¹⁸ Instead, they must pay extortionate settlements disguised as licensing

¹⁵ *Attorneys on Patents: The Dysfunctional Software Patent System*, *supra* note 14.

¹⁶ Chien, *supra* note 14, at 3-4. See also James Bessen & Michael J. Meurer, *The Direct Costs from NPE Disputes* (Bos. Univ. Sch. of Law, Working Paper 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2091210.

¹⁷ AMY CRAVENS, A DEMOGRAPHIC AND BUSINESS MODEL ANALYSIS OF TODAY'S APP DEVELOPER, GIGAOM PRO at 11-12 (2012).

¹⁸ GAO Report, *supra* note 4, at 26.

fees, which can be fatal to companies that have not received outside investment.¹⁹

The exploitation of overly broad patents has caused the patent system to become a hindrance rather than a help to many app developers who experience real operational impacts far beyond mere legal fees.²⁰ These include lost productivity as the company's leadership must focus on responding to litigation threats, and lost customer and supplier relationships.²¹ Moreover, when companies are targeted by patent trolls, many investors will refuse to back them.²² Finally, if a developer does engage a PAE in litigation, it may then be targeted by other PAEs that perceive the developer as vulnerable.²³

Predatory tactics such as these have led many developers to invest in lawyers rather than innovation, to redirect limited funds into filing patents to

¹⁹ Chien, *supra* note 14, at 12 (“Receiving a demand [for litigation from a PAE] was described as potentially representing a ‘death knell’ for a prefunded company”).

²⁰ Haydn Shaughnessy, *Patent Trolls Are Now Crushing Parts of the Developer Economy*, FORBES (July 4, 2013), <http://www.forbes.com/sites/haydnshaughnessy/2013/07/04/patent-trolls-are-now-crushing-parts-of-the-developer-economy/>; Tucker, *supra* note 9, at 4-5.

²¹ *Attorneys on Patents: The Dysfunctional Software Patent System*, *supra* note 14.

²² Chien, *supra* note 14, at 12.

²³ *Developers on Patents: Five Employees, Six Lawyers*, DEVSBUILD.IT (Apr. 26, 2013), <http://devsbuild.it/resources/type/interview/podcast-developers-patents-five-employees-six-lawyers>.

use defensively, or simply to avoid developing or releasing certain products.²⁴

Patent litigation threats are now endemic to the app development industry. Take, for example, the campaign by Lodsys to threaten or sue hundreds of app developers for infringement of a 1992 patent covering “methods and systems for gathering information from units of a commodity across a network.”²⁵ Although the patent issued years before smartphones even existed, the ambiguity surrounding the scope of the patent has allowed Lodsys to target a wide range of companies, from mobile developers to game developers.²⁶ Worse, Lodsys has made claims against scores of developers simply because they use in-app purchasing technology embedded in Apple, Inc.’s iOS operating system – despite the fact that Apple has licensed the technology directly from Lodsys.²⁷

²⁴ *Id.*; Chien, *supra* note 14, at 12-13.

²⁵ James Bessen, *Patent Troll Crisis*, *supra* note 10.

²⁶ Joe Mullin, *Patent Troll Lodsys Sues Mobile Game Makers, Despite Apple’s Intervention*, ARS TECHNICA, Apr. 7, 2013, <http://arstechnica.com/tech-policy/2013/04/patent-troll-lodsys-sues-10-mobile-game-makers-despite-apples-intervention>.

²⁷ Steven Musil, *Lodsys Claims Progress in Fight Over In-App Purchase Patents*, CNET, Oct. 8, 2012, http://news.cnet.com/8301-13579_3-57528409-37/lodsys-claims-progress-in-fight-over-in-app-purchase-patents/; Brief for Application Developers Alliance and Electronic Frontier Foundation as Amici Curiae Supporting Intervenor-Respondent, *Lodsys, LLC v. Bro. Int’l Corp.*, 2013 WL 1338767 (E.D. Tex. Jan. 14, 2013) (No. 2:11-cv-00090).

The experience of Smart Ride, Inc., which makes a transit tracking app, presents another instructive example. Smart Ride's user base was growing by 20% per month in the beginning of 2013 and the app had gained regional attention. This good news ended when the company received a patent infringement notice in late March. Although Smart Ride's team believed the patent and infringement assertion were invalid, it lacked funds to fight the claim. Smart Ride was forced to settle, but not before spending thousands on legal expenses, losing months of development time, and delaying release of the next version of the app.²⁸ Smart Ride's experience is part of a disturbing larger trend, as public transit agencies across the country have themselves been targeted by PAEs.²⁹

Ditto Technologies, an app developer that allows users to try on glasses virtually, has experienced severe business disruption at the hands of PAEs. Since it was sued for patent infringement earlier this year, Ditto has lost twelve business development opportunities because those businesses did not want to expend time and other resources to build a relationship with a company whose existence is arguably

²⁸ James Temple, *Patent Trolls Put Brakes on S.F. Transit App*, SFGATE (Aug. 31, 2013), <http://www.sfgate.com/technology/dotcommentary/article/Patent-trolls-put-brakes-on-S-F-transit-app-4778304.php>.

²⁹ Tanya Snyder, *Patent Troll Sues Transit Agencies for Releasing Real-Time Transit Info*, STREETS BLOG DC (Apr. 16, 2012), <http://dc.streetsblog.org/2012/04/16/patent-troll-sues-transit-agencies-for-releasing-real-time-transit-info/>.

in jeopardy. These potential business partners also feared that they would be targeted in similar suits by virtue of their association with Ditto.³⁰

Though Ditto approached 72 lawyers who each agreed the company would win in litigation, Ditto could not afford any of them. Ditto's founders then sought to finance the litigation by selling equity in the company, only to find that the lawsuit had dramatically depressed the company's valuation. The next best alternative was for Ditto's founders to stop paying themselves and to lay off employees in order to pay litigation counsel – which is what they have done.³¹

Stories like these are common not just in the app development industry, but across all areas of software development. According to a 2013 MIT study, patent troll activity caused a 33% decline in medical imaging software sales from 2005 to 2008 as software developers spent time and resources defending against litigation rather than improving their products.³² In addition, many United Kingdom-based app developers have withdrawn their products from United

³⁰ *The Broken System: Innovators at Risk*, APPLICATION DEVELOPERS ALLIANCE (Sept. 17, 2013), <http://www.devsbuild.it/devpatentsummit/livestream>.

³¹ *Id.*

³² Tucker, *supra* note 9.

States app stores altogether for fear of patent litigation.³³

The Federal Circuit's decision in this case will severely aggravate these problems, emboldening PAEs to seek overly abstract patents and use them to preempt wide swaths of activity. If this Court does not accept certiorari in this case, app developers and many other small innovators will be left deeply uncertain as to the appropriate scope of patent eligibility and will be even more vulnerable to exploitation by aggressive PAEs, impeding innovation across the app development industry.

II. The Federal Circuit's divided jurisprudence on patent eligibility has left app developers adrift in uncertainty, compounding the problems with overly broad software patents.

If left standing, the Federal Circuit's decision in this case will add to the confusion created by its seven-opinion decision in *CLS Bank v. Alice Corp.*, 717 F.3d 1269 (Fed. Cir. 2013) and other *post-Bilski* decisions. *CLS Bank* made it abundantly clear that Federal Circuit judges are "irreconcilably fractured" over which standards should be used to exclude

³³ Charles Arthur, *App Developers Withdraw From US as Patent Fears Reach Tipping Point*, THE GUARDIAN (July 15, 2011), <http://www.theguardian.com/technology/appsblog/2011/jul/15/app-developers-withdraw-us-patents>.

patent applications and the appropriate role of 35 U.S.C. § 101.³⁴ *Id.* at 1314. In fact, several judges specifically requested clarification from this Court. *Id.* (Moore, J., concurring, joined by Rader, Lin, and O'Malley, JJ).

The Federal Circuit's decision in this case adds to the confusion. Here, the court applies a test that was not discussed in *CLS Bank*, holding that Ultramercial's claims are patentable under § 101 because they are not "manifestly abstract." *Ultramercial, Inc. v. Hulu, LLC*, 722 F.3d 1335, 1354 (Fed. Cir. 2013). The decision also conflicts with several other post-*Bilski* rulings, such as *CyberSource v. Retail Decisions, Inc.*, 654 F.3d 1366, 1375 (Fed. Cir. 2011) (rejecting eligibility of patent claims because "the incidental use of a computer to perform the mental process . . . [did] not impose a sufficiently meaningful limit on the claim's scope") and *Bancorp v. Sun Life*, 687 F.3d 1266, 1278 (Fed. Cir. 2012) (finding patent claims ineligible because "[t]he computer required by some of Bancorp's claims is employed only for its most basic function,

³⁴ For example, Judge Lourie advocated for an "inventive concept" test in which the patent claim must represent a "non-trivial, human contribution" to the abstract idea or materially narrow the scope to exclude the abstract idea from which the claim is derived, 717 F.3d at 1283, while Judge Rader rejected the "inventive concept" test and instead proposed a "meaningful limitations" test to ask whether the patent claim "covers all practical applications of a abstract idea" or "pre-empt[s] essentially all uses of the idea," *id.* at 1300. Judge Newman, in dissent, suggested that courts should consider § 102 and § 103 within the § 101 analysis to determine patentability. *Id.* at 1321.

the performance of repetitive calculations, and as such does not impose meaningful limits on the scope of those claims”).

The Federal Circuit’s deep internal divisions as to the applicable standard for eligibility leave application developers adrift amid a conflicting set of tests and standards. The result will be yet more exploitation by PAEs, greater litigation costs, and a deepening chill on innovation and investment. Because judges and lawyers will be unable to interpret and advise app developers on the correct test for patent eligibility, app developers will be unable to patent around them. Fear of litigation will drive some app developers to default to the most permissive standard, forcing them to divert more funds to extortionate “licensing agreements” instead of research and development. Those who cannot afford such agreements may cease to innovate altogether.

III. By announcing an overly permissive patent eligibility standard, the Federal Circuit has opened the door to more overly broad patents, immeasurably worsening the patent crisis for app developers and other small innovators.

Abstract patents cast long shadows. The standard announced here will encourage open-ended, vague patents that claim basic concepts and tread on wide swaths of app development activity, and will make it difficult for developers (even when they can afford quality legal counsel) to determine where patent

protection begins and ends. Furthermore, the decision will signal to lower courts that broad patents should continue to survive legal challenges. All of this will further embolden PAEs to target and exploit small app developers, creating significant operational impacts across this industry and for small innovators everywhere.

Disregarding well-established Supreme Court jurisprudence, the Federal Circuit's decision seeks to diminish § 101 as a meaningful threshold for patentable subject matter. Writing for the majority, Judge Rader repeatedly suggests that § 101 should not be the basis for dismissal at the pleading stage, using phrases such as "rare" and "the exception," and claiming that dismissal is "normally" "improper." *Ultramercial*, 722 F.3d at 1339. But that reasoning directly contradicts this Court's guidance in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.* that § 101 "contains an important implicit exception," 132 S.Ct. 1289, 1293 (2012), and to read § 101 any other way would make the "exception[s] to § 101 patentability a dead letter," *id.* at 1303. If this Court does not intervene to make clear that § 101 is meaningful and must be thoughtfully applied, this decision could devastate the app development industry because it will make it nearly impossible to contest patent eligibility at the motion to dismiss stage – significantly undermining app developers' ability to fight PAEs.

The Federal Circuit's decision threatens to solidify an improperly permissive standard for patent eligibility, in spite of this Court's instruction to reconsider

the case in light of its decision in *Mayo* – also with devastating effect for app developers. In *Mayo*, this Court reiterated that phenomena of nature, natural laws, and abstract ideas are the “tools of scientific and technological work” and are not patent-eligible subject matter. It is only when a process appropriately applies an abstract idea that it can transform “an unpatentable law of nature into a patent-eligible application of such a law.” *Id.* at 1298 (quoting *Parker v. Flook*, 437 U.S. 584, 590 (1978)). In particular, the steps in a claimed process must not involve “well-understood, routine, conventional activity,” *id.* at 1294, and merely limiting the claim to a particular technological environment is not sufficient, *id.* at 1291 (quoting *Diamond v. Diehr*, 450 U.S. 175, 191-92 (1981)).

But the '545 patent that the Federal Circuit approved does just that. The patent claims a clearly abstract idea – advertising as a substitute for payment – followed by a series of wholly conventional steps such as “receiving . . . media products that are covered by intellectual property rights protection and are available for purchase” and “receiving payment from the sponsor of the sponsor message displayed,” combined with some internet-based “facilitator.”³⁵

³⁵ The term “facilitator” is so vague that the District Court found it to be of no help when attempting to discern the limitations of the '545 patent. *Ultramercial, LLC v. Hulu, LLC*, 2010 WL 3360098, 4 (C.D. Cal. Aug. 13, 2010) (explaining that the term “facilitator” could include many other devices or media besides a computer). Indeed, the '545 patent is so abstract that it

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Ultramercial, 722 F.3d at 1337. If routine, well-known steps such as these are all it takes to turn an abstract idea into a patent-eligible invention, then any number of simple e-commerce concepts – such as sweepstakes giveaways, banner ads, and internet surveys – could also become patent eligible.

Amicus is particularly alarmed by the court's decision to limit the abstract idea at the heart of the '545 patent based on an assumption that it involves "intricate and complex computer programming." *Id.* at 1350. Under this reasoning, any method "over the Internet via a facilitator" involving a combination of steps could be patent-eligible. *Id.* Indeed, *any* method that suggests some sort of "intricate and complex computer programming" could be eligible. *Id.* For app developers, the implications are staggering.

This precedent will invite yet more overly abstract software patents, exponentially worsening the patent crisis for tens of thousands of app developers. The resulting flood of lawsuits and litigation threats could cripple the app developer economy.



will directly, significantly, and negatively impact the growing majority of consumer apps that monetize through advertising.

CONCLUSION

For the reasons set forth above, *amicus curiae* Application Developers Alliance respectfully urges this Court to grant certiorari in this case.

Respectfully submitted,

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