No. 13-255

IN THE

Supreme Court of the United States

WILDTANGENT, INC.,

Petitioner,

v.

ULTRAMERCIAL, LLC AND ULTRAMERCIAL, INC.,

Respondents.

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

BRIEF OF ALTERA CORPORATION, NAUTILUS, INC., SAP AMERICA, INC., AND TRAVELOCITY.COM LP AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are a diverse group of innovative technology companies who are frequent targets of costly infringement lawsuits based on patents of questionable validity.

Altera Corporation is the pioneer and leader in innovative programmable logic solutions, enabling system and semiconductor companies to rapidly and cost effectively innovate, differentiate, and win in their markets.

Nautilus, Inc. is a pure fitness company that manufactures and markets a complete line of innovative health and fitness products.

SAP America, Inc. is a leading technology company developing computer software and computer-based business solutions.

Travelocity.com LP is one of the largest online travel companies in the world.

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1. Counsel of record for both petitioner and respondents received timely notice of the intent to file this brief pursuant to Supreme Court rule 37.2. Petitioner filed on September 5, 2013, a consent to the filing of any *amicus curiae* briefs. Consent to filing this brief was granted by counsel for respondents via e-mail on September 5, 2013. A copy of that email is submitted with this brief. In accordance with Supreme Court rule 37.6, *amici curiae* state that this brief was not authored, in whole or in part, by counsel to a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than the amici curiae or their counsel.

ARGUMENT

The exclusions to patent eligibility have fractured the Federal Circuit. Its last 13 panel opinions on this issue are charted below, in reverse-chronological order. They split over at least two basic questions. *Amici* urge this Court to grant *certiorari* and to definitively guide trial judges on each question.

Panel (# of opinions)	Coarse Filter?	Factual Issue?
Accenture (2)	**NO**	**YES**
Ultramercial II (2)	**YES**	**YES**
Perkin-Elmer (1)	**NO**	**NO**
Assn. Molec. II (2)	**NO**	**?**
Bancorp (1)	**NO**	**NO**
CLS Bank (2)	**YES**	**?**
MySpace (2)	**YES**	**YES**
Fort Prop. (1)	**NO**	**NO**
DealerTrack (2)	**YES**	**NO**
Fuzzysharp (1)	**?**	**?**
Classen (3)	**YES**	**?**
Cybersource (1)	**NO**	**NO**
Assn. Molec. I (3)	**YES**	**?**

YES	Expressly asserts this view.
?	No clear position on this view.
NO	Inconsistent with this view.

The questions fracturing the Federal Circuit are:

Coarse Filter?: Are the exclusions to patent eligibility merely a "coarse eligibility filter" and "merely a threshold check" which courts "should apply narrowly," e.g., requiring a showing that the claimed invention is "manifestly abstract," because these "narrow" exceptions "must be rare"? *Ultramercial, Inc. v. Hulu, LLC*, No. 2010-1544, 2013 WL 3111303, *5, 6, 17 (Fed. Cir. June 21, 2013) ("*Ultramercial II*"); *accord CLS Bank Int'l v. Alice Corp.*, 685 F.3d 1341, 1347, 1348-49, 1352 (Fed. Cir. 2012) (the exceptions "should arise infrequently" and have become a "serious problem" devaluing inventions of practical utility, so a challenger must show that it is "manifestly evident" that the claim is directed to an abstract idea), *vacated*, 717 F.3d 1269 (Fed. Cir. 2013) (*en banc*); *DealerTrack, Inc. v. Huber,* 674 F.3d 1315, 1333 (Fed. Cir. 2012) ("for abstractness to invalidate a claim it must 'exhibit itself so manifestly as to override the broad statutory categories of eligible subject matter and the statutory context that directs primary attention on the patentability criteria of the rest of the Patent Act.'") (citations omitted); *Classen Immunotherapies, Inc. v. Biogen IDEC,* 659 F.3d 1057, 1059, 1066 (Fed. Cir. 2011) (applying "coarse eligibility filter," "manifestly abstract," and "applied narrowly" standards to patent-eligibility exclusions); *Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office,* 653 F.3d 1329, 1358 (Fed. Cir. 2011) ("*Assn. for Molec. I*") (applying "manifestly abstract" standard), *vacated*, 132 S. Ct. 1794 (2012).

Factual Issue?: Is patent eligibility "rife with underlying factual issues," "rare[ly]" suitable for resolution on the pleadings, and governed by the "clear

and convincing evidence" standard? *Ultramercial II*, 2013 WL 3111303, * 2, 3, 6; *accord Accenture Global Serv., GmbH v. Guidewire Software, Inc.,* No. 2011-1486, 2013 WL 4749919, * 10 (Fed. Cir. Sept. 5, 2013) ("this legal conclusion may contain underlying factual issues"); *MySpace, Inc. v. Graphon Corp.*, 672 F.3d 1250, 1261 (Fed. Cir. 2012) (requiring a "clear and convincing" showing of abstractness).

This fracture is not healing itself. The Federal Circuit is not consolidating around a single view. On the contrary, the panel opinions in *Ultramercial II* show that this fracture is as severe as ever. The majority opinion in *Ultramercial II* takes perhaps the most extreme view of any of these 13 panel decisions on these questions dividing the Federal Circuit, in stark contrast to the three panel rulings immediately preceding it.

All agree that the *CLS Bank en banc* effort to mend this fracture failed. 717 F.3d 1269 (Fed. Cir. 2013). It demonstrates that the Federal Circuit's judges are evenly split about the role, and wisdom, of the exclusions on patent eligibility.

This fracture debilitates our patent system in all its venues. It weakens patent practice before the Patent Office whose patent-examination decisions are subject to review by the Federal Circuit. It weakens administrative trial practice before the Patent Office and the International Trade Commission (ITC), whose adjudicatory decisions are subject to review by the Federal Circuit. And, it weakens practice before U.S. District Courts whose decisions also, of course, are subject to review by the Federal Circuit. No trial judge or patent examiner can

know which panel will be the reviewing court or, therefore, which view of Sec. 101 the reviewing court will apply.

This uncertainty may cause some trial judges to avoid or delay deciding patent-eligibility disputes. Ironically, at least one Federal Circuit panel has urged trial courts to avoid enforcing these exclusions for this very reason. *MySpace,* 672 F.3d at 1260, 1261 (Fed. Cir. 2012) ("courts should avoid" the "murky morass that is § 101 jurisprudence," except in "rather unusual and infrequent circumstance[s]").

The stakeholders in our patent system need this Court to expressly guide trial judges on these two questions and expressly reject Federal Circuit panel opinions contrary to that guidance. Only such a definitive ruling can heal this debilitating fracture.

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Respectfully submitted,

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