



October 27, 2015

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Alexandria, VA 22314

VIA EMAIL **ONLY**
2014_interim_guidance@uspto.gov

Re: Comment on Interim Subject Matter Eligibility Guidance

Dear Ms. Lee:

I write today to submit a comment regarding the recent guidance on subject matter eligibility ("Guidelines") found at the following link:

<http://www.uspto.gov/patent/laws-and-regulations/examination-policy/2014-interim-guidance-subject-matter-eligibility-0>

Summary

The Court stated in *Alice*, that if claims include something that the industry had not been able to obtain, they qualify as "significantly more." 134 S. Ct. at 2358 (citing *Diehr*). The Guidelines provide six categories that qualify as "significantly more." But, the Guidelines also allow Examiners to make rejections based on case law and without evidence. The result is that Applicant's cited evidence in a response can be ignored by the Examiner who then reiterates a legal conclusion in a second rejection that is now inconsistent with the evidence of record. This is true even if the submitted evidence and argument shows that the claims include: a specific limitation other than what is well-understood, routine and conventional in the field.

The result is that the Guidelines allow Examiners to ignore facts in the record because there are no guidelines as to when Applicant has submitted a persuasive argument or evidence of "significantly more." Once the *prima facie* case is rebutted with evidence, the examiner should not be able to make another rejection without rebutting the evidence.

The only way to determine if the industry has or has not been able to obtain a feature is on the evidence. Allowing the Examiner to reiterate a *prima facie* case based on a legal conclusion without rebutting Applicant's evidence makes the Step 2B analysis cursory such that it is nearly impossible to overcome an *Alice* rejection. This is surely not the intent.

Discussion

According to the Guidelines, the Claims are "significantly more" than the abstract idea if the claim includes:

- Improvements to another technology or technical field;
- Improvements to the functioning of the computer itself;
- Applying the judicial exception with, or by use of, a particular machine;
- Effecting a transformation or reduction of a particular article to a different state or thing;
- Adding a specific limitation other than what is well-understood, routine and conventional in the field, or adding unconventional steps that confine the claim to a particular useful application; or
- Other meaningful limitations beyond generally linking the use of the judicial exception to a particular technological environment.

Without evidence, it is impossible to know when a claim element fits into one of the above categories, especially when the category requires an understanding of what is “well-understood, routine and conventional in the field.” Examiners need to have guidance on how to determine when Applicant has submitted persuasive arguments.

The Court in *Alice* said:

The invention in *Diehr* used a “thermocouple” to record constant temperature measurements inside the rubber mold — **something “the industry ha[d] not been able to obtain.”** The temperature measurements were then fed into a computer, which repeatedly recalculated the remaining cure time by using the mathematical equation. These additional steps, we recently explained, “transformed the process into an inventive application of the formula.”¹

The only way to know if the industry has or has not been able to obtain a feature is with evidence. In contrast, a claim does not supply “significantly more” when a hypothetical programmer could be told about the abstract idea and then instructed to write a program to perform said idea. During oral argument of *Alice*, Justice Kennedy stated:

Well, let me put it this way. If you describe that to a second year college class in engineering and said here’s...my idea, now you go home and you program over this weekend, my guess is...that would be fairly easy to program.²

¹ 134 S.Ct. at 2358 (citations omitted, emphasis added).

² Transcript of Oral Argument at 5, *Alice*, 134 S.Ct. 2347 (No. 13-298) (See Exhibit A at Page 5 Lines 7-12).

The basic point Justice Kennedy made is that if someone told a developer to create a computer program to mitigate settlement risk, the computer programmer would program the claims. The same holds true for why the patent failed in *Ultramercial, LLC v. Hulu, LLC and WildTangent*, No. 2010-1544 (Fed. Cir. 2014). If a computer programmer was told to set up a system that displays advertisements before internet video content, the programmer would end up with the Claims in *Ultramercial*!

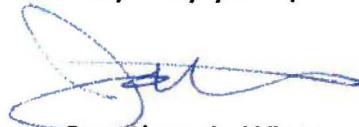
The Guidelines state that a *prima facie* case can be made without evidence. It appears the reasoning by the Office comes from a reading of Supreme Court opinions as not citing evidence. However, if something the industry had not been able to obtain is enough to qualify as "significantly more," there must be evidence in the record for the Supreme Court to know this. If Applicant cites evidence that a claim element or combination of claim elements is something the industry had not been able to obtain, Applicant has met the burden of rebutting the *prima facie* case. Otherwise, the Guidelines would be inconsistent with *Diehr*.

When a *prima facie* case can be made without evidence and Applicant points to evidence in the specification, the examiner returns to the July 2015 update that says that the evidence is not needed for a *prima facie* case. Examiners then submit another nearly identical rejection without evidence. The real problem is that the second rejection is inconsistent with the evidence of record cited by Applicant and inconsistent with *Diehr*.

Without guidance on what is persuasive and what examiners must do to respond to evidence, examiners cannot know what is a quality rejection and a quality allowance.

Thank you for taking the time to consider this letter.

Very truly yours,



Jonathan A. Winter
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GSW:SBS:JAW
Enclosure

Exhibit A

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - x

3 ALICE CORPORATION PTY. :

4 LTD. :

5 Petitioners, : No. 13-298

6 v. :

7 CLS BANK INTERNATIONAL, :

8 ET AL. :

9 - - - - - x

10 Washington, D.C.

11 Monday, March 31, 2014

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 10:04 a.m.

16 APPEARANCES:

17 CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf
18 of Petitioners.

19 MARK A. PERRY, ESQ., Washington, D.C.; on behalf of
20 Respondents.

21 DONALD B. VERRILLI, JR., ESQ., Solicitor General,
22 Department of Justice, Washington, D.C.; on behalf of
23 the United States, as amicus curiae, supporting
24 Respondents.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this morning in Case 13-298, Alice Corporation versus
5 CLS Bank International.

6 Mr. Phillips?

7 ORAL ARGUMENT OF CARTER G. PHILLIPS

8 ON BEHALF OF THE PETITIONERS

9 MR. PHILLIPS: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 It is common ground between the parties in
12 this case that Section 101, by its terms, and with the
13 sweeping interpretation this Court adopted in Bilski
14 applies directly to the patents here. These are system
15 and process patents that speak directly to Section 101.

16 The only issue, then, is whether the
17 judicially recognized exception that this Court adopted
18 many, many years ago applies under these circumstances.

19 JUSTICE KENNEDY: And just repeat, it is
20 common ground between the parties that --

21 MR. PHILLIPS: That -- that our -- our
22 patents speak directly to the language of Section 101,
23 that is, they are a process, and they are machines, and
24 they are -- and they are improvements to the process and
25 the machines. They don't -- they don't dispute that by

1 its terms 101 applies. The only argument between the
2 parties is the abstract idea exception that exists and
3 whether that bars us from otherwise satisfying
4 Section 101.

5 JUSTICE GINSBURG: Mr. Phillips, on the
6 abstract idea, you know that the Bilski case held that
7 hedging qualified as an abstract idea. So how is
8 intermediate settlement a less abstract than hedging?

9 MR. PHILLIPS: If our -- if our patent
10 merely claimed intermediated settlements, although I
11 have to say I don't really know exactly what that means
12 because I don't think that's the same kind of
13 economics -- basic economics concept that a hedge risk
14 treatment is. But if it claimed that, we wouldn't -- we
15 wouldn't have a distinction from Bilski.

16 What we claim is a very specific way of
17 dealing with a problem that came into being in the early
18 1970s of how to try to eliminate the risk of
19 non-settlement in these very massive multiparty problems
20 in which you need to deal with difficulties that exist
21 at different time zones simultaneously and to do it with
22 a computer so that you not only take them on
23 chronologically, deal with them sequentially, based on
24 the kind software analysis that the patent specifically
25 describes by function.

1 And it goes even further than that, and does
2 something that no escrow agent and -- and no
3 intermediated settlement that I know of -- settler that
4 I know of. It actually blocks specific transactions
5 that, in the shadow account, would violate the terms of
6 the settlement that would ultimately be implemented.

7 JUSTICE KENNEDY: Well, let me put it this
8 way. If you describe that to a second-year college
9 class in engineering and said here's -- here's my idea,
10 now you go home and you program over this weekend, my
11 guess is -- my guess is that that would be fairly easy
12 to program.

13 MR. PHILLIPS: I don't disagree with it,
14 Justice --

15 JUSTICE KENNEDY: So the fact that the
16 computer is involved, it -- it seems to me, is necessary
17 to make it work. But the -- but the innovative aspect
18 is certainly not in the creation of the program to make
19 that work. All you're talking about is -- if I can use
20 the word -- an "idea."

21 MR. PHILLIPS: I prefer not to use that word
22 for obvious reasons.

23 (Laughter.)

24 MR. PHILLIPS: But -- but if you -- but if
25 you look at the Solicitor --

1 JUSTICE KENNEDY: Or -- or a method or a
2 process.

3 MR. PHILLIPS: Right. But -- and -- and
4 obviously, methods and processes are precisely what
5 Section 101 permits to be subject --

6 JUSTICE BREYER: Why is that less abstract?

7 MR. PHILLIPS: I'm sorry?

8 JUSTICE BREYER: Why is that less abstract?
9 I mean, imagine King Tut sitting in front of the pyramid
10 where all his gold is stored, and he has the habit of
11 giving chits away. Good for the gold, which is given at
12 the end of the day. And he hires a man with an abacus,
13 and when the abacus keeping track sees that he's given
14 away more gold than he is in storage, he says, stop.
15 You see?

16 Or my mother, who used to look at my
17 checkbook, when she saw that, in fact, I had written
18 more checks than I had in the account, she would grab
19 it. Stop. You see?

20 So what is it here that's less abstract than
21 the computer says, stop?

22 MR. PHILLIPS: It is --

23 JUSTICE BREYER: How is that less abstract
24 than King Tut, if we had the same thing with a grain
25 elevator, if we had the same thing with a reservoir of

1 water, if we had the same thing with my checkbook? You
2 see the point.

3 MR. PHILLIPS: I do see the point, Justice
4 Breyer, and it seems to me that it goes to the question
5 of the methodology you're going to employ.

6 JUSTICE BREYER: Methodology is just that
7 you said, stop.

8 MR. PHILLIPS: Well, we could --

9 JUSTICE BREYER: So what we have different
10 here is the computer stops rather than the abacus man
11 stopping or my mother stopping or the guy that the grain
12 elevator has that says stop. So just saying, what -- is
13 that it? In other words, if you say, computer stop, you
14 have an invention. Useful add -- but if you say, mother
15 stop, you don't?

16 MR. PHILLIPS: No. Well, I mean, again, it
17 seems to me that in some ways what -- what you described
18 there is a caricature of what this invention is.

19 JUSTICE BREYER: Of course it's a
20 caricature. It's a caricature designed to suggest that
21 there is an abstract idea here. It's called solvency.

22 MR. PHILLIPS: But --

23 JUSTICE BREYER: And what you do is you take
24 the idea of solvency and you say apply it. And you say
25 apply it through the computer.

1 Is that enough to make it not just the
2 abstract idea? And now we're at the heart of why I used
3 my exaggerated examples --

4 MR PHILLIPS: Right.

5 JUSTICE BREYER: -- because you will tell me
6 why --

7 MR. PHILLIPS: Right.

8 JUSTICE BREYER: -- this is enough.

9 MR. PHILLIPS: Right. Because, Justice
10 Breyer, the -- the -- the concept here is not simply to
11 say stop. Stop is obviously part of the element of it.

12 But it's also designed to ensure that at the
13 end of the day, this transaction, in the midst of
14 literally a global set of -- of deals that are going on
15 simultaneously, will be implemented at the appropriate
16 time in the appropriate way. And whatever else that may
17 be, it seems to me it's difficult to say that's an
18 abstract idea as implemented.

19 JUSTICE SOTOMAYOR: I'm sorry. But -- but
20 what it appears to be, it sounds like you're trying to
21 revive the patenting of a function. You used the word
22 "function" earlier, and that's all I'm seeing in this
23 patent is the function of reconciling accounts, the
24 function of making sure they're paid on time. But in
25 what particular way, other than saying do it through a

1 computer, is this something new and not function?

2 MR. PHILLIPS: Well, it does it through --
3 it creates the shadow accounts because of the concerns
4 for security. You don't -- you're not going to allow
5 somebody to enter into a central bank's own accounts.
6 You create the shadow accounts. You monitor through the
7 software that allows you to do that. You evaluate each
8 of the transactions to ensure that the settlement will
9 be available. You do it sequentially, and you act on it
10 by the end of the day or whenever the transaction is to
11 take place, and you implement that transaction.

12 JUSTICE SCALIA: Why isn't it -- why isn't
13 doing it through a computer not enough? I mean, was the
14 cotton gin not an invention because it just means you're
15 doing through a machine what people used to do by hand?
16 It's not an invention. It's the same old, same old.

17 MR. PHILLIPS: Justice Scalia --

18 JUSTICE SCALIA: Why -- why is a computer
19 any different in that respect?

20 MR. PHILLIPS: At one level I agree with you
21 completely. There is no difference between them.

22 This Court has, however, said on more than a
23 few occasions, albeit in dicta, that coming up with an
24 idea and then say, use a computer, is not sufficient.
25 And what I'm trying to suggest to you is we don't fall

1 within that dicta.

2 Now, if you don't accept the dicta and you
3 say use a computer is fine, then I think we're done.

4 JUSTICE SCALIA: Well, I'm not saying use a
5 computer is -- is much of a novelty. I mean, that's --
6 that goes to whether it's novel or not. If you just say
7 use a computer, you haven't invented anything. But if
8 you come up with a serious program that -- that does it,
9 then, you know, that may be novel. But that's a novelty
10 issue, isn't it.

11 MR. PHILLIPS: To be sure, Justice Scalia.

12 JUSTICE BREYER: And this is exactly the
13 question I really would like to you to focus on for me.
14 Why is it -- and I'm not saying this from a point of
15 view, but it seems to me pretty clear that if what you
16 did was take the idea of solvency -- remember King Tut.
17 That's what I use the exaggeration -- and what you say
18 is implemented by having the abacus man keep track and
19 say stop, okay --

20 MR. PHILLIPS: Right.

21 JUSTICE BREYER: Then we implement it by
22 having somebody with a pencil and a piece of paper and
23 this is all that they add, you see. Say: Have a man
24 with a pencil and a piece of paper keeping track and
25 saying, stop, or we say, implement it in the computer,

1 which will automatically keep track and say stop, are
2 they all enough? Are some of them enough? What's the
3 rule?

4 And you realize I couldn't figure out much
5 in Prometheus to go beyond what I thought was an obvious
6 case, leaving it up to you and your colleagues to figure
7 out how to go further. Am I making enough -- making
8 clear enough what's bothering me? And I'd really like
9 to get your answer to this.

10 MR. PHILLIPS: And -- and look, there's
11 no -- I'll be the first one to -- to confess that trying
12 to use language to describe these things is not all that
13 easy. But the way I think you can meaningfully look at
14 this is to say that this is not simply something that
15 was a fundamental truth, this is not something that
16 simply says use a computer. It's not simply something
17 that says maintain solvency. It -- it operates in a
18 much more specific and concrete environment where you're
19 dealing with a problem that's been in existence since
20 the 1970s, a solution in the 1990s, that CLS itself
21 acknowledges needed a solution and came forward with
22 their own solution that looks a lot like ours.

23 JUSTICE KENNEDY: But my -- my initial
24 question, and I think I can work this into King Tut,
25 is --

1 (Laughter.)

2 JUSTICE KENNEDY: -- is -- is whether or not
3 you could have patented that system, idea, process,
4 method, without attaching a computer program.

5 MR. PHILLIPS: You cannot, absolutely cannot
6 do that with this system, because it is so complex and
7 so many interrelated parts.

8 JUSTICE KENNEDY: Suppose I thought -- and,
9 again, it's just a thought because I don't have the
10 expertise -- that any computer group of people sitting
11 around a coffee shop in Silicon Valley could do this
12 over a weekend. Suppose I thought that.

13 MR. PHILLIPS: You mean wrote the code?

14 JUSTICE KENNEDY: Yes, right.

15 MR. PHILLIPS: Well, that's absolutely --
16 I'm certain that's true.

17 JUSTICE KENNEDY: Well, then -- then --

18 MR. PHILLIPS: But that's true of almost all
19 software.

20 JUSTICE KENNEDY: Then why is the computer
21 program necessary to make the patent valid?

22 MR. PHILLIPS: Well, it's -- it's necessary
23 to make the invention effective. As the Solicitor
24 General said, the computer is essential to the efficacy
25 of this invention because of the complicated financial

1 arrangements that exist and that can only be resolved on
2 a -- on a realtime basis. Your abacus is great if you
3 happen to be waiting for the pyramids to be finished or
4 waiting for the gold to move in and out, but it doesn't
5 help with you an abacus if you're dealing with literally
6 thousands of transactions simultaneously going on in
7 different countries at different points in time.

8 JUSTICE KENNEDY: But that's just an idea,
9 hey, let's use a computer.

10 MR. PHILLIPS: But it's not just -- I mean,
11 obviously, part of it is use the computer, Justice
12 Kennedy. But more fundamentally, it goes beyond that.
13 See, I --

14 JUSTICE SOTOMAYOR: Is your software
15 copyrighted?

16 MR. PHILLIPS: No, I don't believe so.

17 JUSTICE GINSBURG: There is no special
18 software that comes with this -- that's part of this
19 patent, is it -- is there?

20 MR. PHILLIPS: No. Justice Ginsburg, what
21 we did here is what the Patent and Trademark Office
22 encourages us to do and encourages all software patent
23 writers to do, which is to identify the functions that
24 you want to be provided for with the software and leave
25 it then to the software writers, who I gather are, you

1 know, quite capable of converting these functions into
2 very specific code.

3 JUSTICE KAGAN: Mr. Phillips, could you --
4 could you disaggregate your argument for me? Because
5 you just said, look, this Court has said it's not
6 sufficient if you have an idea and then you say use a
7 computer to implement it; right? So are you saying that
8 your -- that -- are you saying that you're doing more
9 than saying use a computer to implement it or are you
10 saying that it's -- that the idea itself is more than an
11 idea?

12 MR. PHILLIPS: Yes. I'm saying --

13 JUSTICE KAGAN: Which part of what --

14 MR. PHILLIPS: I'm saying both actually. I
15 mean, I'm making both of those arguments. I -- I
16 believe that if you analyze the claims and you don't
17 caricature them and you don't strip them out of the
18 limitations that are embedded in there, this is not some
19 kind of an abstract concept. This is not some kind --
20 it's not an abstract idea. It's a vary --

21 JUSTICE KAGAN: So putting the computer
22 stuff aside completely --

23 MR. PHILLIPS: Right.

24 JUSTICE KAGAN: -- you're saying that you've
25 invented something or you --

1 MR. PHILIPS: Yes.

2 JUSTICE KAGAN: There is something that
3 you've patented that has -- that is not just simple use
4 a third party to do a settlement.

5 MR. PHILLIPS: Right.

6 JUSTICE KAGAN: And what is that, putting
7 the computer aside?

8 MR. PHILLIPS: It is -- well -- and again,
9 it's difficult to do that because you absolutely need
10 the computer in order to implement this. But the key to
11 the invention is the notion of being able
12 simultaneously, dealing with it on a chronological basis
13 to stop transactions that will otherwise interfere with
14 the ability to settle on time and under the appropriate
15 circumstances. And the only way you can do that in a
16 realtime basis when you're dealing with a global economy
17 is to use a computer. It is necessary to the efficacy
18 of this.

19 So in that sense, I can't -- I can't
20 disaggregate it the way in some sense you're suggesting.
21 It seems to me it's bound up with in -- it's bounds up
22 with the whole notion of is this an abstract concept.

23 JUSTICE BREYER: Can you in fact -- now,
24 this is -- look, there are 42 briefs in this case. I
25 actually read them and I found them very, very helpful

1 up to the point where I have to make a decision, because
 2 they're serious. I mean, you know -- now, the problem
 3 that I came away with is the one that you're beginning
 4 to discuss, that if you simply say, take an idea that's
 5 abstract and implement it on a computer, there are --
 6 you're going to get it much faster, you're going to be
 7 able to do many, many things, and if that's good enough,
 8 there is a risk that you will take business in the
 9 United States or large segments and instead of having
 10 competition on price, service and better production
 11 methods, we'll have competition on who has the best
 12 patent lawyer. You see where I'm going on that one?

13 MR. PHILLIPS: Yeah, of course.

14 JUSTICE BREYER: And if you go the other way
 15 and say never, then what you do is you rule out real
 16 inventions with computers.

17 MR. PHILLIPS: Right.

18 JUSTICE BREYER: And so in those 42 briefs,
 19 there are a number of suggestions as to how to go
 20 between Scylla and Charybdis. Now, I would like to
 21 know -- I don't know if you can step back from your
 22 representational model. That's a problem. You're all
 23 we have now. And -- and from my point of view, I need
 24 to know what in your opinion is the best way of sailing
 25 between these two serious arms.

1 MR. PHILLIPS: Well, Justice Breyer, I guess
2 I would suggest to you that you might want to deal with
3 the problem you know as opposed to the problems you
4 don't know at this stage. I mean, we have had business
5 method patents and software patents in existence for
6 well over a decade and they're obviously quite
7 significant in number. And -- and we know what the
8 system is we have. And Congress looked at that system,
9 right, and didn't say no to business methods patents,
10 didn't say no to software patents, instead said the
11 solution to this problem is to get it out of the
12 judicial process and create an administrative process,
13 but leave the substantive standards intact.

14 So my suggestion to you would be follow that
15 same advice, a liberal interpretation of 101 and not a
16 caricature of the claims, analyze the claims as written,
17 and therefore say that the solution is 102 and 103 and
18 use the administrative process. If you --

19 JUSTICE GINSBURG: Mr. Phillips, let me just
20 stop you there, because four Justices of this Court did
21 not read that legislative history the way you do. And
22 it was -- was in *Bilski*.

23 MR. PHILLIPS: But this is post-*Bilski*.

24 JUSTICE GINSBURG: Justice Stevens went
25 carefully through that and he said: Congress was

1 reacting to a decision. It had -- it was not addressing
2 101. So there are at least four Justices who say -- who
3 didn't buy that argument.

4 MR. PHILLIPS: Well, I mean, it still seems
5 to me that the -- the natural inference is Congress did
6 not change 101. Congress created an entire
7 administrative system to deal with 101, 102 and 103.
8 And -- and I would hope --

9 JUSTICE SCALIA: And four is not five
10 anyway, right?

11 MR. PHILLIPS: That's true.

12 JUSTICE SCALIA: Four is not five.

13 MR. PHILLIPS: And you've exhausted my math
14 skills, Your Honor.

15 JUSTICE SCALIA: By the way, we -- we have
16 said that you can't take an abstract idea and then say
17 use a computer to implement it. But we haven't said
18 that you can't take an abstract idea and then say here
19 is how you use a computer to implement it --

20 MR. PHILLIPS: Exactly.

21 JUSTICE SCALIA: -- which is basically what
22 you're doing.

23 MR. PHILLIPS: And that's the argument we're
24 doing and --

25 JUSTICE SCALIA: And that's a little

1 different.

2 MR. PHILLIPS: -- that's the line we're
3 asking the Court to draw here.

4 JUSTICE KAGAN: Well, how are you saying the
5 how? Because I thought that your computers -- that your
6 patents really did just say do this on a computer, as
7 opposed to saying anything substantive about how to do
8 it on a computer.

9 MR. PHILLIPS: I would urge the Court to
10 look at Joint Appendix 159, 285-286, where it goes
11 through the flow charts. This is -- and this is just a
12 specific example of the method by which you stop a
13 transaction, and it goes through a varied series of
14 detailed steps and what the computer has to do in order
15 to do that. It doesn't actually, obviously, put in the
16 code, but that's what the PTO says don't do. Don't put
17 in the code because nobody understands code, so -- but
18 put in the functions, and we know -- and we know that
19 someone skilled in the art will be able to put in the
20 code. And if they aren't, if they can't do that, then
21 it's not enabled and that's a 112 problem.

22 To go back, Justice Breyer, to your
23 question. So on the one hand, you've got a problem that
24 it seems to me Congress to some extent has said is okay
25 and we've got a solution and that solution's playing

1 through. On the other hand, if this Court were to say
2 much more categorically either that there's no such
3 thing as business method patents or adopt the Solicitor
4 General's interpretation, which is to say that there
5 cannot be software unless the software somehow actually
6 improves the computer, as opposed to software improving
7 every other device or any other mechanism that might be
8 out there.

9 What we know is that this would inherently
10 declare and in one fell swoop hundreds of thousands of
11 patents invalid, and the consequences of that it seems
12 to me are utterly unknowable. And before the Court goes
13 down that path, I would think it would think long and
14 hard about whether isn't that a judgment that Congress
15 ought to make. And It seems to me in that sense you're
16 essentially where the Court was in Chakrabarty, where
17 everybody was saying you've got to act in one way or the
18 other or the world comes to an end, and the courts have
19 said, we'll apply 101 directly.

20 JUSTICE KENNEDY: If we say that there's no
21 software patentability and agree with the Attorney
22 General, do you lose in this case?

23 MR. PHILLIPS: Well, it would be very hard
24 for me to see how that -- how -- how I can get around
25 that particular problem, because the computer is the

1 essence of it, so -- and a portion of it is clearly the
2 software. So I think if you say there is no such thing
3 as software patentability, I do lose in this case, yes,
4 Your Honor. As do a whole lot of other people.

5 JUSTICE KENNEDY: Is there any common ground
6 between you and the government -- maybe a better
7 question to ask the government -- a common ground
8 between you and the government on something in the
9 software area that's patentable, other than making the
10 computer itself work? You understand the government to
11 say no software patents.

12 MR. PHILLIPS: That's the way I interpret
13 the government's -- the government's brief.

14 JUSTICE BREYER: It was like -- there's a
15 Bloomberg brief out here that was on this, that said,
16 no, you can -- you can patent computer software when
17 it's an improvement in the computer, when it's an
18 improvement in software, when it's an improvement in a
19 technology that is developed out of computers like
20 robotics, when it is an improvement in a machine or
21 technology, but you cannot improve it where it is simply
22 an improvement in an activity that is engaged in
23 primarily through mental processes. But what they mean
24 by that is business, finance, and similar arts.
25 That's -- I mean, that's -- it wasn't quite what -- I

1 know. That's what I want to know what you don't agree
2 with about that, because it's a little more refined than
3 you suggested.

4 MR. PHILLIPS: I read the Solicitor
5 General's brief as broader than the Bloomberg brief
6 in -- in terms of the approach. And IBM's argument is
7 if you knock out software patents, you eliminate web
8 browsing, word processing, cellphones, e-mail. Those
9 are all activities that I don't think fall within the
10 meaning of the -- the meaning of the government's theory
11 of the case.

12 JUSTICE BREYER: But I'm asking you -- I'm
13 asking you, what about this one that I just mentioned?
14 You see, I went through those five steps --

15 MR. PHILLIPS: Right.

16 JUSTICE BREYER: -- and four of them you
17 could patent and the fifth one you can't.

18 MR. PHILLIPS: Right. But I -- and I guess
19 my answer to that is that's nowhere in the statute and
20 it doesn't seem to me to reflect an abstract idea. It's
21 a -- it's a line you draw that takes out business method
22 patents. If the Court wants to eliminate business
23 method patents, fine. But you just said no to that in
24 Bilski two, three terms ago.

25 Now, to be sure, give the Solicitor General

1 credit, he comes here and says to you: We didn't like
2 the result in Bilski; we want you to say don't use
3 process in order to get there, which is a statutory
4 interpretation; come up with an extraordinarily
5 complicated way of looking at the exception and use that
6 to get to the exact same result.

7 JUSTICE SOTOMAYOR: Well, you're doing a
8 very good job of proving --

9 JUSTICE GINSBURG: In Bilski, Justice Breyer
10 did try to say that there wasn't that -- a whole lot of
11 distance between the four who thought business methods
12 were not patentable. But he -- he also said something
13 else in -- in the other case, Mayo. Justice Scalia
14 asked you the question about doesn't that go to novelty,
15 but didn't Justice Breyer say in Mayo that novelty can
16 be relevant to patent -- to patent eligibility? He said
17 there's -- there's an overlap.

18 MR. PHILLIPS: Well, he said there's an
19 overlap. Here in this context, I think, basically the
20 Respondents' theory would mean that they are completely
21 coterminous. And I don't think that's what the Court
22 meant. And also, we know from Diehr that there's got to
23 be at least some significant limitations on the extent
24 to which novelty has to be built into 101. That is the
25 province of 102 and 103. And, as I said, Congress

1 modified the system of adjudication to create an
2 administrative mechanism that allows you to get to 102
3 and 103. And at least in context, it's important to
4 realize there have been 11 cases since that was created.
5 9 of the 11 have been knocked down on 102 or 103 grounds
6 and not on 101 grounds. And it seems to me that's the
7 answer to this problem, is leave 101 as the coarse
8 filter. If on its face it states these kinds of broad
9 abstract principles, fundamental truths, and even if it
10 says use a computer, those should be struck down.

11 JUSTICE SOTOMAYOR: Which of the -- which of
12 the opinions below captures your position most
13 accurately?

14 MR. PHILLIPS: I would guess it would be
15 Judge Moore's opinion below that would capture ours most
16 correctly.

17 JUSTICE SOTOMAYOR: And if we were to think
18 your method claim is ineligible, do you agree that your
19 systems and -- your medium and system claims fail as
20 well? Do they rise and fall together.

21 MR. PHILLIPS: No. No, I don't believe they
22 do rise and fall together. I mean, I think you could --
23 if you wanted to interpret our medium claim -- I mean,
24 our -- our method claims in a -- in particularly
25 abstract way, I think you could still say that the

1 system claims, which clearly are -- are how to create a
2 computer system and how to implement it using that
3 method, would be a much more concrete version of that in
4 a way that would take it out of 101. That said, I,
5 obviously, believe that all of our claims satisfy 101
6 and should go on to the next stage.

7 JUSTICE KAGAN: Can I give you a
8 hypothetical, Mr. Phillips, and you tell me how it's
9 different or the same. Let's say, you know, 30 years
10 somebody took a look around the world and said, a lot of
11 people seem to order products by mail. They get the
12 catalogues in the mail and then they send back their
13 return forms. And let's say that one of the founders of
14 the Internet said, wouldn't this be an amazing system,
15 we could actually do this by computer, and they had
16 patented that. Is that the same?

17 MR. PHILLIPS: I don't know if it's the
18 same, but I would -- I would argue that it could very
19 well be a patentable subject matter because -- but it
20 depends on how the claims play out.

21 JUSTICE KAGAN: No, but exactly. I mean,
22 the claim would have said something along the lines of,
23 you know, there's this process by which people order
24 products and we want to do it over the Internet, we want
25 to do it electronically, and we will use a computer to

1 do that, to essentially take the process of mail order
2 catalogues and make it electronic.

3 MR. PHILLIPS: I could certainly -- I think
4 I could write a claim -- a set of claims that I believe
5 would satisfy 101. And -- and to the extent that
6 you'd -- that you'd think those are no different than
7 the ones I have here, then my argument is simply I think
8 I satisfy 101 with the claims we have before us, Your
9 Honor.

10 If there are no further questions, then I'd
11 like to reserve the rest of my time.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 Mr. Phillips.

14 Mr. Perry.

15 ORAL ARGUMENT OF MARK A. PERRY

16 ON BEHALF OF THE RESPONDENTS

17 MR. PERRY: Mr. Chief Justice, and may it
18 please the Court:

19 That path between Scylla and Charybdis was
20 charted in Bilski and Mayo. Bilski holds that a
21 fundamental economic principle is an abstract idea and
22 Mayo holds that running such a principle on a computer
23 is, quote, "not a patentable application of that
24 principle." Those two propositions are sufficient to
25 dispose of this case.

1 If Bilski and Mayo stand, Alice's patents
2 fail. Therefore, Mr. Phillips and his friends are
3 asking this Court to change the standard, even though
4 this Court has had three unanimous decisions in the last
5 four terms establishing what the Court called a myriad,
6 a well-established standard.

7 On the abstract idea, Justice Ginsburg, you
8 asked Mr. Phillips what's the difference between hedging
9 and this claim. There is no difference. This is
10 hedging. It is hedging against credit default rather
11 than price fluctuation, but it is simply hedging.

12 And Mr. Phillips stood up for 26 minutes and
13 never once referred to the patent. Let's look at what
14 the inventor, the so-called inventor said about this
15 invention. This is at JA 293 to 94 in the
16 specification.

17 This claim has simply two steps. It's very
18 simple. "First, debiting and crediting on a realtime
19 basis the relevant shadow records; and second, by
20 periodically affecting corresponding payment
21 instructions." Those are direct quotes. Debit, credit,
22 and pay. Your Honor, you can't get much more simple
23 than that.

24 Mr. Phillips suggests, well, we have
25 multilateral transactions, global things, chronological,

1 time zones and so forth. None of those are claimed,
2 Your Honor. Those are all recited in specification.
3 The claims read on a single transaction involving two
4 parties.

5 JUSTICE BREYER: Can I ask you at some
6 point, not necessarily this second, to say in my -- this
7 is just -- you know, you have an opinion for a court.
8 Different judges can have different interpretations.
9 All you're getting is mine, okay?

10 But I think it's pretty easy to say that
11 Archimedes can't just go to a boat builder and say,
12 apply my idea. All right. Everybody agrees with that.
13 But now we try to take that word "apply" and give
14 content to it.

15 And what I suspect, in my opinion, Mayo did
16 and Bilski and the other cases is sketch an outer shell
17 of the content, hoping that the experts, you and the
18 other lawyers and the -- the circuit court, could fill
19 in a little better than we had done the content of that
20 shell.

21 So, so far you're saying, well, this is
22 close enough to Archimedes saying "apply it" that we
23 needn't go further.

24 Now, will you at some point in the next few
25 minutes give me your impression of, if it were necessary

1 to go further, what would the right words or example be?

2 MR. PERRY: Your Honor, as -- Justice
3 Breyer, as to abstract ideas, the PTO has filled in that
4 shell by listing economic concepts, legal concepts,
5 financial concepts, teaching concepts, dating and
6 interpersonal relationships and generally how business
7 should be conducted as examples of those things that are
8 likely abstract, which, of course, all follow directly
9 from Bilski and the discussion this Court had in Bilski.
10 And this patent -- these patents fall squarely within
11 that.

12 Congress, in the AIA, confirmed that
13 reading. Congress, in the CBM method, said business
14 methods that are subject to special scrutiny -- that is,
15 dubious patents -- include methods and corresponding
16 apparatus, which is what we have here, that pertain to
17 data processing in the financial services industry and
18 do not offer a technological solution. That describes
19 Alice's patents to a letter, Your Honor. So that we
20 have --

21 JUSTICE SOTOMAYOR: What do you think is a
22 technological solution?

23 MR. PERRY: Your Honor --

24 JUSTICE SOTOMAYOR: How could they, if at
25 all, written their patents to -- to make -- to make

1 their software eligible? What would -- what do they
2 need -- would have needed to have added?

3 MR. PERRY: Justice Sotomayor, they have no
4 software, first. They've never written software.
5 They've never programmed a computer. So that's a
6 nonexistent set.

7 Second, there are many technological
8 solutions to trading and settlement problems. For
9 example, data compression. These -- these trading
10 platforms involve the movement of very large quantities
11 of data around the world. The physical pipes, that is,
12 the fiber optic cables and data lines are limited.
13 There are very sophisticated algorithms for both
14 security and speed to move data through the transmission
15 lines in novel and useful ways that could well be
16 patented.

17 Nothing like that is claimed here. To come
18 back to where I started, if you look, for example, at
19 Claim 65 in the '510 patent, as Mr. Phillips reads it,
20 it literally reads on a two-party escrow to sell a
21 house, so long as the escrow agent is typing this stuff
22 into the HUD-1 using a computer. That has nothing to do
23 with multilevel --

24 CHIEF JUSTICE ROBERTS: Well, that's a
25 little more complicated. He referred us to Joint

1 Appendix Page 159, which is not a change in how
2 computers work. But it is -- constitutes the
3 instructions about how to use the computer and where it
4 needs to be affected. And just looking at it, it looks
5 pretty complicated. There are a lot of arrows and
6 they -- you know, different things that go --

7 (Laughter.)

8 CHIEF JUSTICE ROBERTS: Well, but I mean,
9 you know, it -- in different directions. And I
10 understand him to say that in each of those places,
11 that's where the computer is needed.

12 MR. PERRY: Mr. Chief Justice, Figure 16 has
13 nothing to do with the invention asserted against my
14 client in this case. There are two inventions in this
15 patent. One invention involving multilateral contract
16 formation is not asserted against my client. And all of
17 these drawings pertain to that. The only drawings that
18 pertain to the asserted claims are 25 and 33 to 37. And
19 that was established below, and it's established in this
20 Court. And Mr. Phillips has never disputed it.

21 So the claim he's pointed the Court -- the
22 figure he's pointed the Court to has nothing to do with
23 the invention. It's for a different invention that is
24 not at issue in this case.

25 Remember, there are hundreds and hundreds of

1 pages of these patents. They all pertain to the other
2 invention. That's why in the back of our red brief we
3 excerpted the very little bit that actually pertains to
4 this. You sort of tack on patent -- the tack on claim
5 that Mr. Phillips is asserting here. It's 4 columns.
6 It's less than five pages in the printed appendix that
7 actually pertains to this invention. And it contains no
8 disclosure whatever.

9 Justice Scalia, to your question about how
10 the computer does it. Of course, a patent that
11 describes sufficiently how a computer does a new and
12 useful thing, whether it's data compression or any other
13 technological solution to a business problem, a social
14 problem, or a technological problem, would be within the
15 realm of the -- of the patent laws. That is what the
16 patent laws have always been for.

17 This is not such a patent. And the reason
18 for that is this is a pre-Bilski set of patents. These
19 were prosecuted under the old State Street test, where
20 all the applicant had to claim was a result.

21 JUSTICE KENNEDY: Would you give me --
22 again, you already did it once -- an example of a
23 business process patent -- of a business process idea
24 and invention that is patentable.

25 MR. PERRY: Your Honor, there are many

1 examples. One would be a technological solution to a
2 business problem. So that, for example -- I'll give a
3 different example. There are many applications today.
4 The Court may be familiar with streaming video to watch
5 video on your computer.

6 It is not possible to get enough data
7 through existing lines in its raw format. The data has
8 to be manipulated in order to see live video. So if you
9 want to watch TV on your phone, for example.

10 Those algorithms, those inventions are
11 undoubtedly technological. And if they are used in a
12 trading platform or a hedging system or something else,
13 that wouldn't disable them. And this is what the Diehr
14 case --

15 JUSTICE KENNEDY: Well, I -- I -- in my
16 language, I've called that mechanical rather than
17 process. Can you give me an example of process?

18 MR. PERRY: Yes, Your Honor. The process in
19 that example would be a computer running the particular
20 data compression algorithm.

21 JUSTICE KENNEDY: But that's how to make
22 a -- that's how to make a machine work better.

23 MR. PERRY: Yes, Your Honor.

24 JUSTICE KENNEDY: I'm asking you: Is there
25 any business process, any business activity that is

1 susceptible to a patent, a pure patent, innovations that
2 deserve patents?

3 MR. PERRY: Your Honor, again, a
4 technological solution to a business problem could well
5 be, whether it's a method or a process, is equivalent.
6 Again, Congress said method in a corresponding --

7 JUSTICE KENNEDY: Can you give me an
8 example.

9 MR. PERRY: I thought the data compression
10 example was a good one. I'll try an encryption
11 technology. Many of these trading platforms, you know,
12 dealing with securities and money would require some
13 sort of security devices. You could have a process for
14 securely transmitting data, would be another computer
15 implemented technological solution to a business
16 problem. Again, nothing like that claimed here.

17 JUSTICE SOTOMAYOR: How about e-mail and
18 just word processing programs?

19 MR. PERRY: Your Honor, a program -- let me
20 try it this way to both of your questions. In our view,
21 if what is claimed as the inventive contribution under
22 Mayo -- in other words, if we have an abstract idea, as
23 we do here, and what is claimed is the inventive
24 contribution for Step 2 is the computer, then the
25 computer must be essential to that operation and

1 represent an advancement in computer science or other
2 technology. And we know that's not met here, Justice
3 Sotomayor, because --

4 JUSTICE SOTOMAYOR: So you're saying no to
5 e-mail and word processing.

6 MR. PERRY: Your Honor, I think at a
7 point --

8 JUSTICE SOTOMAYOR: They certainly have
9 functionality and -- and improvement of functionality
10 for the user.

11 MR. PERRY: At a point in time in the past,
12 I think both of those would have been technological
13 advances that were patentable.

14 JUSTICE SOTOMAYOR: How?

15 MR. PERRY: Today -- because they would have
16 provided a technological solution to a then unmet
17 problem. Today, reciting, and do it on a word processor
18 is no different than and do it on a typewriter or -- and
19 do it on a calculator.

20 The inventive contribution component, which
21 uses specifically the language of conventional and
22 routine and well understood, will evolve with
23 technology. That's why it's different than the abstract
24 idea component.

25 And here we know that these patents don't

1 claim anything that was not conventional, well
2 understood, and routine. We went through that in great
3 detail, and Alice has never disputed a word of it. They
4 just say you're not supposed to do that analysis, even
5 though the Court, 9-0 in Mayo said we should.

6 And in this case, it's very important to
7 look at what Alice's own experts said on the subject.
8 This is not our expert. This is Alice's expert. And
9 this is at Page 1327-28 of the Joint Appendix. "It is
10 possible to do the business methods of maintaining
11 accounts, adjusting accounts, and providing an
12 instruction without a computer or other hardware."

13 And then, Justice Breyer, directly to your
14 abacus. If someone had thought of this invention,
15 so-called invention, 100 years ago, they might have
16 implemented it in a nonelectronic manner using various
17 precomputing tools such as an abacus or handwritten
18 ledgers.

19 We know from Benson, the Court's seminal
20 computer implementation case, that if you can do it by
21 head and hand, then the computer doesn't add anything
22 inventive within the meaning of the 101 exception. That
23 is the holding of Benson. And the Court reiterated that
24 in Mayo.

25 Flook said exactly the same thing. If you

1 can do it with pencil and paper, then the computer is
2 not offering anything that the patent laws are or should
3 be concerned with.

4 It is only where the method will not work
5 without a computer, which is not these claims, and where
6 the computer itself is doing something that the patent
7 law is willing to protect.

8 CHIEF JUSTICE ROBERTS: What if -- what if
9 you can do it without a computer, but it's going to
10 take, you know, 20 people a hundred years? In other
11 words, theoretically, you can replicate what the
12 computer does --

13 MR. PERRY: Two answers.

14 CHIEF JUSTICE ROBERTS: -- but it's
15 impractical without looking to do it on the computer?

16 MR. PERRY: Mr. Chief Justice, first, these
17 claims literally read, as Alice reads them, on a single
18 transaction between two parties, so it's not 20 people
19 for a hundred years. It's one person sitting in a room,
20 so that's not a problem.

21 Second, if what is being claimed is the
22 necessary speed or efficiency or data crunching
23 capabilities, if you will, of a computer, then it would
24 have to be claimed, and there's nothing claimed here.
25 All that is claimed -- and my friend is going to stand

1 up on rebuttal and tell you all that the expert said,
2 well, what is claimed is a computer, but it's just a
3 computer. It just says a computer configured too. It
4 doesn't say that the computer actually has to --

5 JUSTICE BREYER: Yeah, but the trouble with
6 that particular test is, as I think partly the Chief
7 Justice said, how long, et cetera, and then add to that,
8 though you could do it without a computer, what happens
9 at the end of the line is the automobile engine goes off
10 or it begins to sputter or it turns left.

11 You see, it's possible to take Archimedes --
12 -- you know, I use that example purposely to call
13 attention to the problem. You can take those things,
14 and you're not just saying apply it, and you're not even
15 just saying -- you are saying use the computer, but at
16 the end of the road, something physical in the world
17 changes and everybody would say, now, that's -- that
18 will falls within, I mean, probably, I mean, my
19 hesitation shows I'm looking for the right words.

20 MR. PERRY: Justice Breyer, your point is
21 the reason that it is equally fallacious to suggest, on
22 the one hand, as Alice and IBM does, that simply
23 reciting a computer is a magic key that gets you through
24 101 and you never have to any other inquiry, and what
25 some of folks, the amici on the other side, say, which

1 is that computers or software are never eligible. Both
 2 of those things have to be wrong because what the Court
 3 said in Bilski was future innovation is too uncertain.
 4 We are not going to do that as a Court. And the Court
 5 laid out an approach using abstract ideas in Bilski and
 6 inventive contribution in Mayo that is flexible enough
 7 to take into account that innovation and to deal with
 8 particular claims in context, which is why, at the end
 9 of the day, we have to come back to these patents and
 10 decide which --

11 JUSTICE KAGAN: Mr. Perry, before we get
 12 back to these matters, you said to Justice Scalia if a
 13 patent sufficiently describes how a computer will
 14 implement an idea then it's patentable. So how
 15 sufficiently does one have to describe it? What do we
 16 want a judge to do at this threshold level in terms of
 17 trying to figure out whether the description is
 18 sufficient to get you past it?

19 MR. PERRY: If I can answer in two steps,
 20 Justice Kagan. First in the negative: What the
 21 applicant or patentee must do -- must not do is simply
 22 describe the desired result. That would take us back to
 23 State Street. That would simply say: I claim a magic
 24 box that buys high and sells low or vice versa, I
 25 suppose, I claim a magic box for investing. That's what

1 these patents do.

2 Then to put it in the affirmative and in the
3 language of Mayo, the claim has to recite something
4 significantly more, something significantly more than
5 the abstract idea itself. That would be a contextual
6 analysis based on the claims and specifications and file
7 history, and we know that some devices, some methods,
8 some programming will pass that.

9 It is not going to be a bright-line rule and
10 that's one of the tug-of-war issues that this Court and
11 the Federal Circuit have been having in these cases.
12 The Federal Circuit wants bright-line rules: All
13 computers are in or all computers are out.

14 This Court has been more contextual. This
15 Court has been more nuanced. This Court has looked at
16 things in a more robust way.

17 JUSTICE KAGAN: You're not suggesting that
18 specific code is necessary?

19 MR. PERRY: No, Your Honor. I think the --
20 actual description of the programming is a 112 problem.
21 I agree with that, A 112 issue. That is the realm of
22 the written description requirement. What is a 101
23 problem is it is on the applicant to do more than simply
24 describe the results, simply say: A magic box that does
25 intermediate settlement. And we can tie that back to

1 this particular prosecution, the '510 patent which is
2 the method patent.

3 The examiner rejected it. Under Section
4 101, the examiner said, this is an abstract idea. You
5 can't have this patent. And the only change that this
6 applicant made was to add in the adjusting step
7 "electronic adjustment." It put in one word,
8 "electronic adjustment." And under State Street, which
9 is what this patent is prosecuted under, that was
10 enough, because the result of adjusting run through a
11 computer is enough.

12 Under current law that can't be enough.
13 That just can't get a patent over the line, because this
14 Court said in Mayo, and I got to quote this language:
15 "Simply implementing a fundamental principle on a
16 physical machine, namely a computer, is not a patentable
17 application of that principle." That's all that Alice
18 has done.

19 These are pre-Bilski patents. They never
20 should have been issued. General Verrilli will stand up
21 and address that point. And certainly under current
22 law -- one point on the AIA. Congress did not send all
23 this to the administrative process. Congress created
24 two avenues, the courts and the PTO to use the
25 standards. Essentially it ratified Bilski and Mayo and

1 said, we agree with what you all are doing at the
2 Supreme Court and the existing standards are good enough
3 for us. This is a judicial problem. And that is a good
4 reason. The abstract --

5 JUSTICE GINSBURG: The Federal Circuit in
6 this case split in many ways, and it had our decisions
7 to deal with. You said, given Bilski and Mayo, this is
8 an easy case. What is the instruction that escaped a
9 good number of judges on the Federal Circuit? How would
10 you state the rule?

11 MR. PERRY: Your Honor, I think there's a
12 significant element to the Federal Circuit that
13 disagrees with Mayo and has been resistant in applying
14 it. Chief Judge -- former Chief Judge Michelle filed a
15 brief in this Court essentially saying Mayo is a
16 life-sciences case, You should limit it to that because
17 if you apply it to everything else, then these patents
18 are no good.

19 Mayo we submit is a technology-neutral,
20 industry-neutral, exception-neutral framework that can
21 be used to answer all of these questions. This is not
22 the death of software patents. The software industry is
23 all before this Court saying, this is fine with us.
24 Every company in the United States practically except
25 for IBM is saying, go ahead. This will not affect

1 software patents.

2 Justice Ginsburg, this Court's precedents
3 are clear. They are unanimous. They just need to be
4 applied. To suggest that there is confusion that needs
5 to be addressed by retreating, beating a retreat from
6 recent unanimous decisions, would simply reward
7 intransigence, difficulty, refusal to adhere to what are
8 clear precedents because --

9 JUSTICE KAGAN: Should we be concerned,
10 Mr. Perry, that there are old patents that in fact could
11 meet the test that you set forth but won't because they
12 were written in a different time and so used much more
13 general language?

14 MR. PERRY: Your Honor, the applicant or the
15 patent holder would have the opportunity to institute a
16 reexamination proceeding or some sort of administration
17 process to address that issue.

18 And second, it should be noted, this is a
19 very small problem. There are 2 million outstanding
20 patents in the United States. In the last four fiscal
21 years there were 22,000 infringement litigations
22 instituted, but since Bilski, there have only been 57
23 district court decisions on Section 101 issues. There
24 have only been 12 Federal Circuit decisions total on
25 computer implementation.

1 We are talking about a group of patents,
2 Justice Kagan, that's way out at the tail end of
3 distribution. Most patents never have a 101 challenge.
4 This is not an issue with cotton gins and other things.

5 This is a problem for the most marginal,
6 most dubious, most skeptical patents, the ones that this
7 Court in Bilski -- and remember what Bilski's holding
8 is. The majority said they are processes, but it did
9 not say they are eligible.

10 Thank you, Mr. Chief Justice.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.
12 General Verrilli.

13 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.

14 ON BEHALF OF THE UNITED STATES, AS AMICUS

15 CURIAE, SUPPORTING RESPONDENTS

16 GENERAL VERRILLI: Mr. Chief Justice, and
17 may it please the Court:

18 An abstract idea does not become
19 patent-eligible merely by tacking on an instruction to
20 use a computer to carry it out. A computer makes a
21 difference under Section 101 when it imposes a
22 meaningful limit on the patent claim. That occurs when
23 the claim is directed at improvement in computing
24 technology or an innovation that uses computing
25 technology to improve other technological functions.

1 That's the test that we believe is most faithful to this
 2 Court's precedents in *Bilski* and *Mayo*. It keeps patents
 3 within their traditional and appropriate domain and it
 4 is capable of being administered consistently by Courts
 5 and by PTO examiners.

6 JUSTICE GINSBURG: How do you answer the
 7 argument that your view would extinguish business-method
 8 patents and make all software ineligible for patent
 9 protection?

10 GENERAL VERRILLI: Yeah, with -- let me
 11 address software patents first because that, I think, is
 12 obviously a significant question. And it's just not
 13 correct to say that our approach would make software
 14 patenting ineligible. Any software patent that improves
 15 the functioning of the computer technology is eligible.
 16 Any software patent that improves -- that is used to
 17 improve another technology is eligible. For example,
 18 the patent in the -- in the *Diehr* case is one in
 19 which --

20 JUSTICE SOTOMAYOR: Why do we need to reach
 21 this in that -- reach software patents at all in this
 22 case?

23 GENERAL VERRILLI: Well --

24 JUSTICE SOTOMAYOR: What's the necessity for
 25 us to announce a general rule with respect to software?

1 There is no software being patented in this case.

2 GENERAL VERRILLI: Well, I --

3 JUSTICE SOTOMAYOR: There's a systems.

4 GENERAL VERRILLI: Well, I -- I think --

5 well, they -- they -- there's a process being and -- and

6 one can think of software patents as process patents.

7 And I think that's why my friends on the other side are

8 saying the sky is falling because they -- they are

9 interpreting what we're saying about that when a

10 computer makes -- when a computer's involvement makes

11 something eligible under 101, it's calling those into

12 question, and it doesn't.

13 JUSTICE SOTOMAYOR: Do you think we have to
14 reach the patentability of software to answer this case?

15 GENERAL VERRILLI: Well, I think you can --

16 I think the answer to that question is no, not

17 necessarily. You can decide it by saying that -- that

18 Bilski answers the question whether this is an abstract

19 idea, because this form of hedging is really no

20 different than the form of hedging as a conceptual

21 matter at issue in Bilski. And then Mayo answers the

22 question of whether the use of a computer in this case

23 adds enough to the abstract idea beyond conventional

24 steps, because here all we have, after all, is just

25 conventional use of computing technology, no computer

1 innovation, such that you don't qualify under 101. You
2 could take that approach.

3 But it is important to the United States
4 that we -- and to our patent examiners that we get some
5 clarity, if we can. I think the clarity could come from
6 the text that I propose, which I want to reiterate --

7 JUSTICE SOTOMAYOR: Well --

8 JUSTICE BREYER: Could -- could -- could you
9 go on with that because you were just getting to the
10 point where I think you say a computer improvement that,
11 in fact, leads to an improvement in harvesting cotton is
12 an improvement through a computer of technology, so it
13 qualifies.

14 But then I think you were going to say, or I
15 got this also from the brief, a computer improvement
16 that leads to an improvement in the methods of selling
17 bonds over the telephone is not an improvement in
18 technology reached by the computer. Am I right about
19 the distinction you're making?

20 GENERAL VERRILLI: I don't think there's a
21 yes or no answer to that question.

22 JUSTICE BREYER: What is your view? Yeah,
23 what is -- how do we deal with just that problem?

24 GENERAL VERRILLI: If there is a genuine
25 innovation in the functioning of the computer --

1 JUSTICE BREYER: Yes.

2 GENERAL VERRILLI: -- such that business
3 processes --

4 JUSTICE BREYER: We've got that. Yes, yes.
5 We got the computer. But then it doesn't improve the
6 computer, but rather, it improves through the computer
7 the harvesting of cotton.

8 Now you've got it in what you said was your
9 second category, which is an improvement through the
10 computer of a technology. And I thought in your brief
11 you were distinguishing an improvement through the
12 computer of a human activity that is not a technology
13 and, in particular, to pick an example of that,
14 something in finance or something in business.

15 Now, am I right about the distinction you're
16 making?

17 GENERAL VERRILLI: Yeah, that --

18 JUSTICE BREYER: If I'm not right, what is
19 the distinction?

20 GENERAL VERRILLI: That is generally the
21 line we're drawing. Frankly --

22 JUSTICE BREYER: And how is that justified?

23 GENERAL VERRILLI: I do want --

24 JUSTICE BREYER: That -- that is Judge Dyk
25 in -- in Bilski in the Federal circuit, 4 people sort of

1 picked it up maybe, 5 didn't pick it up. Would you say
2 a few words about it?

3 GENERAL VERRILLI: Sure. About -- let me go
4 to Bilski there in that I do think, while -- while
5 certainly the Court held that the term "process" got a
6 natural construction which could include business
7 methods, it seems to me that that's not all the Court
8 said in Bilski. The Court also said that it was
9 historically and traditionally quite rare that business
10 methods were patent eligible.

11 It also said that -- that the -- that courts
12 and the PTO examiners should use the abstract ideas
13 exception to 101 to police the appropriate boundary.

14 It also said that the
15 machine-or-transformation test that the United States
16 advocated remained a useful tool. And, of course, that
17 directs to you seeing whether there is a technology
18 application.

19 And, of course, the holding in Bilski was
20 that the -- the method for hedging risk was ineligible
21 because it was an abstract idea, and I can't imagine
22 that if in Bilski the -- the claim had been exactly the
23 same but had added use a computer to carry out some of
24 these standard random analysis functions that are
25 claimed by the patent, that you would have found it to

1 be patent eligible.

2 And I -- I would submit for the Court that
3 the key point here, I think, is that now, given where
4 the Court -- what the Court has held in Bilski, given
5 what it's held in Mayo, the abstract ideas exception is
6 really the only tool left to deal with what I -- what I
7 think I fairly read Bilski as saying is a significant
8 problem, the proliferation of patents of business
9 methods.

10 JUSTICE KENNEDY: Is there an example that
11 you can give us of a -- what we can call a business
12 process that is patentable, a process that doesn't
13 involve improving the workings of a computer?

14 GENERAL VERRILLI: I -- I think it's going
15 to be difficult for me to do that. I think, for
16 example, if you had a business method, a process for
17 additional security point-of-sale credit card
18 transactions using particular encryption technology,
19 that might well be patent eligible. It's a technology
20 that it makes conduct of business more efficient or
21 effective.

22 But there is a technological link here, and
23 we do think that's critical to our -- to our point of
24 view with respect to the case. And I -- and I do think,
25 remember, that when we say something is not patent

1 eligible, we're not saying they can't do it. We're
2 saying they can't monopolize it.

3 And the concern in a situation like this one
4 is that if this is patent eligible, it's hard to see
5 why, for example, the first person who came up with a
6 frequent flier program wouldn't have been able to claim
7 a patent there, because, after all, that's a business
8 method for improving customer loyalty implemented on a
9 computer.

10 CHIEF JUSTICE ROBERTS: General, I -- you
11 mentioned a while ago the need for greater clarity and
12 certainty in this area. And I'm just wondering, in your
13 brief, you've got a non-exhaustive of factors to
14 consider, and there are 6 different ones. And I'm just
15 doubtful that that's going to bring about greater
16 clarity and certainty.

17 GENERAL VERRILLI: I take -- I take the
18 point, Mr. Chief Justice, but I think the key is that
19 they are all directed to answering the question of
20 whether the innovation that is claimed and is an
21 innovation in either, A, the improvement of a computer's
22 functioning or, B, the use of computer technology to
23 improve the functioning of another technological
24 process, and a case like Diehr would be in the latter
25 category.

1 And so I do think that that's the key
2 benchmark. That's the baseline. That's the test that
3 we do think can be applied clearly and consistently by
4 the courts or the PTO. And it avoids the risk of things
5 like frequent flier programs or the Oakland A's money
6 ball methods for evaluating the contributions in
7 individual baseball players make or any one of a host of
8 other things that our intuitions tell us just don't
9 belong in the patent system.

10 That's the -- drawing that line keeps them
11 out; not drawing that line lets them in. And with all
12 due respect, I don't think that the novelty and
13 nonobviousness filters that 102 and 103 really deal with
14 that problem effectively, because when you get to
15 nonobviousness in 103, for example, you'll be asking a
16 different question.

17 If you take the frequent flier program, you
18 would say, well, is this innovation in building consumer
19 loyalty something that would have been obvious to
20 somebody who runs an airline? It's totally divorced
21 from the question of technology at that point and,
22 therefore, I don't think you're going to get the screen
23 that you need to get in order for the patent system to
24 be confined to its traditional and appropriate scope.

25 If there are no further questions, thank

1 you.

2 JUSTICE GINSBURG: I have a question about
3 how do you identify an abstract concept. The -- a
4 natural phenomenon, a mathematical formula, those are
5 easy to identify, but there has been some confusion on
6 what qualifies as an abstract concept.

7 GENERAL VERRILLI: We would define
8 abstract -- an abstract concept as a claim that is not
9 directed to a concrete innovation in technology,
10 science, or the industrial arts. So it's the -- it's
11 abstract in the sense that it is not a concrete
12 innovation in the traditional realm of patent law.

13 Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you, General.

15 Mr. Phillips, you have four minutes
16 remaining.

17 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

18 ON BEHALF OF THE PETITIONERS

19 MR. PHILLIPS: Thank you, Mr. Chief Justice.

20 I'd just like to make a few points.

21 First of all, with respect to the question
22 you asked, which is looking at 159, et cetera, all I can
23 tell you is that if you look at claim 33, it talks about
24 matched orders, the matched orders that are described in
25 286 and 287, and then makes specific reference to 159,

1 and that flow chart that's there. And it's all designed
2 as a package. It's only one element of the -- of the
3 invention, but it is a central element, and it's an easy
4 one to understand. And it goes well beyond simply the
5 notion of hedge -- hedge against settlement risk and do
6 it by a computer.

7 JUSTICE SOTOMAYOR: Your adversary says that
8 his -- the appendix to his brief are the only patents at
9 issue, that the flow charts are not at issue in this
10 case.

11 MR. PHILLIPS: There's no basis for that
12 statement, Your Honor. There -- remember, this went off
13 on a very truncated litigation process. So there's --
14 you know, we -- we got cut off at the beginning of it.
15 There's been no construction of the -- of the claims
16 and -- and obviously, these are specifications that go
17 to how you interpret the claim.

18 JUSTICE SOTOMAYOR: If we were to say that
19 there are no business patents --

20 MR. PHILLIPS: Yes.

21 JUSTICE SOTOMAYOR: -- would your patent
22 survive at all?

23 MR. PHILLIPS: No, I don't -- I don't
24 believe so. I think there's no question. And, you
25 know, General Verrilli could not have been any plainer

1 in his statement of how he wants to interpret the
2 abstract idea concept.

3 JUSTICE SOTOMAYOR: Yes, he wants to say no
4 business patents.

5 MR. PHILLIPS: No business -- just another
6 way of saying no business methods. And, you know, the
7 Court rejected that. And it seems to me extraordinary
8 to say Congress didn't reject no business methods in
9 101, but we're going to do -- we're going to manipulate
10 the judicial exception to accomplish precisely that same
11 thing. It seems to me that's wholly inappropriate.

12 Justice Ginsburg, you asked my -- my friend
13 here, you know, what's his test? He didn't answer that
14 question, you'll notice, because he doesn't have an
15 answer. His basic argument is, whatever you do, just
16 kill this patent.

17 And if I were in his shoes, I suppose I'd
18 take that same position. I think what's absolutely
19 clear is that the test ought to be one that is
20 structured as a very coarse filter, not the kind of
21 filter that he's pushing for where it changes over time.
22 I mean, I thought his -- I thought his response to one
23 of the questions about e-mail and word processing that
24 Justice Sotomayor asked is over time it would change.
25 Well, that's exactly what 102 and 103 are for. That is

1 not the purpose of -- of Section 101.

2 And then he uses the example of encryption.

3 I guarantee you if we were arguing about encryption in
4 this case, he would say to me that that's an abstract
5 principle because encryption is a concept that's been
6 around since time immemorial. George Washington used
7 it. Everybody has used encryption.

8 And a question again, that's not the
9 solution to these problems. The question is, how did we
10 go about doing it. And we go beyond the basics of
11 simply saying use a computer, and that's what we ask
12 this Court to focus on and to evaluate.

13 As to the frequent flier program, it's
14 pretty clear to me that even though it was a novel idea
15 in some sense, the concept itself would have been viewed
16 in -- in the KSR fashion as quite obvious as a means of
17 improving customer loyalty.

18 There are solutions here. Giving us 101
19 pass doesn't create a monopoly. It just gets us to the
20 102 and 103 inquiries that are at the heart of what the
21 patent laws -- and 112 that are at the heart of what the
22 patent laws ought to be dealing with.

23 If there are no further questions, Your
24 Honor, thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 The case is submitted.

2 (Whereupon, at 11:05 a.m., the case in the
3 above-entitled matter was submitted.)

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