

Case No. 2021-112

IN THE

*United States Court of Appeals
for the Federal Circuit*

IN RE: VOIP-PAL.COM, INC.,

PETITIONER

*On Appeal from the United States District Court for the Northern District of
California in Nos. 20-CV-02460-LHK, 20-CV-02995-LHK, 20-CV-03092-LHK
United States District Judge Lucy H. Koh*

**BRIEF OF *AMICUS CURIAE* RAYMOND A. MERCADO, PH.D. IN SUPPORT OF
PETITIONER'S PETITION FOR WRIT OF MANDAMUS**

CORRECTED

Kevin Christopher
Jerry Canada
Rockridge Venture Law
*Counsel for Amicus Curiae
Raymond A. Mercado, Ph.D.*

CERTIFICATE OF INTEREST

In accordance with Federal Circuit Rule 47.4, counsel for *amicus curiae* Raymond A. Mercado, Ph.D., certifies the following:

1. The full name of every party or amicus represented by me: Raymond A. Mercado, Ph.D.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me: N/A.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me: N/A.

4. The names of all law firms and the partners or associates that have appeared for the party in the lower tribunal or are expected to appear for the party in this court and who are not already listed on the docket for the current case: None.

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal: None.

6. The names of any relevant organizational victims or bankruptcy parties: None.

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae Raymond A. Mercado, Ph.D., is a political scientist and patent law scholar who has written on a number of patent law issues, and is interested in the wholesome development of the law. In particular, *amicus curiae* has written on the law of patent eligibility, which arises in this case due to the different procedures for adjudicating eligibility in the two fora at issue in this dispute, the Northern District of California and the Western District of Texas. *See, e.g.,* Raymond A. Mercado, *Resolving Patent Eligibility and Indefiniteness in Proper Context, Applying Alice and Aristocrat*, 20 Va. J. L & Tech. 240 (2016). *Amicus curiae* submits this brief to assist the Court in considering the practical implications for the resolution of patent eligibility of the rules it chooses to establish in venue disputes like the present case.

Pursuant to Federal Rule of Appellate Procedure 29(a), *amicus curiae* hereby states that Petitioner Voip-Pal.com, Inc. as well as Respondents Apple Inc., AT&T Corp., AT&T Services, Inc., AT&T Mobility LLC, and Cellco Partnership have consented to the filing of this brief.

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting

this brief, and no person—other than *amicus curiae*—contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

I. INTRODUCTION

Section 101 looms large in this dispute. Indeed, Petitioner’s petition for writ of mandamus comes at a critical moment in the state of patent eligibility doctrine, when the “[C]ourt’s rulings on patent eligibility have become so diverse and unpredictable as to have a serious effect on the innovation incentive in all fields of technology.” *American Axle & Manufacturing, Inc. v. Neapco Holdings LLC*, 966 F.3d 1347 (Fed. Cir. Jul. 31, 2020) (Newman, J., joined by Moore, O’Malley, Reyna, and Stoll, JJ., dissenting from denial of reh’g en banc). In an attempt to address the difficulty of resolving § 101 under current law, Petitioner’s chosen forum—the Western District of Texas—has, like a growing number of district courts, adopted procedures that generally defer resolution of § 101 issues until after claim construction and the opening of fact discovery. This trend is part of the broader scramble of district courts to adopt local patent rules in the wake of *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S.Ct. 1514 (2017), which has resulted in a wide variety of local patent rules around the country.

The Northern District of California, by contrast, has not responded to § 101 with such changes in rule or policy.¹ Instead, judges in that district continue to decide many § 101 motions at the Rule 12 stage, a practice which (while permissible under this Court’s precedent at least where no factual disputes prevent it) remains deeply controversial.

Here, the district court created a novel exception to the first-to-file rule, according to which a court may disregard a first-filed action in another venue and retain jurisdiction over a second-filed action involving a continuation patent merely on the basis of the court’s “familiarity,” not with the continuation patent itself, but with the patent’s “family”—despite the fact that the continuation patent **did not even exist** at the time of previous litigation before the court. Moreover, the district court

¹ By comparison with the Northern District of California, many jurisdictions place claim construction before § 101 invalidity considerations. *See infra* Sec. III (identifying the Western District of Texas, Court of Federal Claims, and Middle District of Florida as districts with judges adopting this procedure as a matter of policy). The Southern District of California does not even identify § 101 as a statutory basis for invalidity contentions under its Patent L.R. 3-3 which is otherwise based on the text of its northern neighbor. Likewise, the Western District of Tennessee in its Local Patent Rules identifies §§ 102, 103, 112, and even inequitable conduct as bases for invalidity contentions, but fails anywhere to address § 101. The Western District of North Carolina considers initial invalidity contention submissions but prioritizes claim construction hearings prior to pretrial orders. The Eastern District of North Carolina affords judicial discretion in L.R. 301.2(c) whether to defer 12(b) motions until after claim construction hearings. Nevada requires in its Local Rules of Patent Practice LPR 1-4(c) any § 101 invalidity motion to demonstrate “no factual issue, claim construction or otherwise.”

here premised its “familiarity” with the patent family on a series of § 101 decisions made at the Rule 12 stage, without claim construction or the development of a significant evidentiary record in the previous litigation. Those previous § 101 decisions are not a sufficient basis to retain jurisdiction over the ‘606 Patent under the district court’s novel exception to the first-to-file rule, particularly when the ‘606 Patent was examined for compliance with § 101 by examiners pursuant to the PTO’s § 101 Guidelines. This is a far cry from the early days of *Mayo/Alice*, and the ‘606 Patent’s presumption of validity should not be lightly cast aside, nor should previous § 101 decisions from the patent family be deemed applicable to the ‘606 Patent.

The decision below does nothing to promote the objectives of the first-to-file rule—such as avoiding “conflicting decisions” between the Northern District of California and the Western District of Texas—because any eventual § 101 decision as to the ‘606 Patent here cannot “conflict” with earlier decisions involving other patents from the same family. Indeed, it is commonplace that different claims among patents in the same family, or different claims of the same patent, may be held valid under § 101.² Thus, the real import of the decision below is to deprive Petitioner of

² See, e.g., *Exergen Corporation v. Kaz USA, Inc.*, 2015 WL 8082402, at *5 (D. Mass. 2015) (rejecting “sweeping argument” that prior decision holding some claims of a patent ineligible meant that its other claims, or those of related patent, were ineligible, because this “amounts to an impermissible bypass of the required claim-by-claim analysis”)

the procedural rules for adjudicating § 101 of the forum it selected as true first-filer (i.e., the Western District of Texas), when those rules were adopted to ensure a fairer and more accurate resolution of § 101 issues.

This Court should grant mandamus and reverse the decision below for three reasons. **First**, the district court created a novel exception to the first-to-file rule for continuation patents, which does nothing to avoid “conflicting decisions” and contravenes the general rule in favor of adjudicating the first-filed action. **Second**, given the increasingly well-recognized disarray of § 101 doctrine, the district court’s basis for “familiarity” with the patent family—its Rule 12 stage § 101 decisions made prior to claim construction—does not demonstrate sufficient familiarity with the ‘606 Patent (which was not subject to the earlier § 101 decisions and issued under the PTO’s § 101 Guidelines). Nor does it promote judicial efficiency in this case, particularly when Petitioner identified for the district court below several key differences between the ‘606 Patent and the previous patents.³ **Third**, the procedures for adjudicating § 101 adopted by the Western District of Texas represent a legitimate and desirable means for contending with doctrinal problems associated with § 101.

³ To the extent not already part of the record on appeal, *amicus* would urge the Court to take judicial notice of the differences between the ‘606 Patent and the related patents which Petitioner pointed out to the district court below. *See Apple Inc. v. Voip-Pal.com, Inc.*, No. 20-CV-02460-LHK, Dkt. No. 32 at 12-13 (Jul. 10, 2020); Dkt. No. 44 at 3-6; Dkt. No. 44-8 at 1-9.

Petitioner, as the true first-filer, should not be deprived of the advantages of its chosen forum, particularly when those procedures are gaining wider currency among district courts as a sensible approach to resolving § 101 issues.

II. THIS COURT SHOULD GRANT MANDAMUS AND REVERSE THE DISTRICT COURT’S CREATION OF A NEW EXCEPTION TO THE FIRST-TO-FILE RULE FOR CONTINUATION PATENTS THAT DID NOT EXIST AT THE TIME OF EARLIER-FILED LITIGATION.

As this Court made clear in *Merial*, the “‘first-to-file’ rule is a doctrine of federal comity, intended to avoid conflicting decisions...when multiple lawsuits involving **the same claims** are filed in different jurisdictions.” *Merial Ltd. v. Cipla Ltd.*, 681 F.3d 1283, 1299 (Fed. Cir. 2012) (emphasis added). By definition, there cannot be “conflicting decisions...involving the same claims” where two different actions involve **different** patents, as in the present case. *Id.*

Here, however, the district court created an altogether new exception to the first-to-file rule: it held that a court may keep a second-filed declaratory judgment action based—not on previous litigation involving the same patent—but on its “familiarity” during earlier litigation in the same venue with **different** patents from the same family, even where the patent **did not even exist** at the time the prior litigation was filed. Indeed, the ‘606 Patent was not asserted in the cases filed in 2016 and 2018, because it did not even issue until 2019.

Thus, the district court’s decision in this case is completely contrary to first-to-file analyses with factually similar circumstances, in which district courts have

consistently distinguished between actions involving “different” patents—even when the patent in question was a continuation of previously litigated parent patents. *See, e.g., Abbott Laboratories v. Johnson and Johnson, Inc.*, 524 F.Supp.2d 553, 558 (D. Del. 2007) (rejecting argument that an earlier filed action “should be deemed first-filed” where the “patent did not exist” at the time of the earlier filed action, though patent was of the same family as those named in the earlier filed action), *aff’d*, 297 F. App’x 966 (Fed. Cir. 2008); *Sefac USA, Inc. v. Gray Manufacturing Company, Inc.*, 2020 WL 4557062, at *1 n. 1 (E.D. Pa. 2020) (finding first-filed suit involving a continuation patent to be the earlier filed case, though two other cases involving parent patents were pending, because the continuation patent was “different” from the parent patents).

Indeed, whereas the district court here found the fact that the ‘606 Patent is a continuation of previously-litigated patents to weigh in favor of its retaining jurisdiction, the *Abbott* and *Sefac* courts found this fact to weigh in the opposite direction. As the *Abbott* court pointed out and the district court here failed to consider, there could be no “controversy” with respect to a continuation patent prior to its existence. *Abbott*, 524 F.Supp.2d at 558 & n. 10. Thus, in a first-to-file analysis it makes little sense to treat a newly issued continuation patent as “inextricably intertwined” with previous litigation involving a parent patent that commenced before the continuation even issued. *Id.*

Here, the district court justified its holding based on the court’s “familiarity with [the previous] disputes” involving related patents “shar[ing] a common specification, title, parent applications, inventors, and owner.” Appx11. By this reasoning, the fact that a patent has been litigated in a given venue would become a strong presumption (perhaps a conclusive one) favoring the adjudication in the same venue of all subsequently issued patents from the same family. This Court should reject such a distortion of the first-to-file doctrine, which contravenes the “general rule favor[ing] the forum of the first-filed action.” *Innovative Therapies, Inc. v. Kinetic Concepts, Inc.*, 599 F.3d 1377 (Fed. Cir. 2010) (citation omitted). Recognizing such an exception to the first-to-file rule could lead to inequitable results, unduly elevating the existence of previous litigation as a factor and restricting venue for cases involving later-issued patents from the same family.

This Court made a closely related point in *In re Vistaprint*. There, the district court had denied a transfer motion based on its “substantial experience with the patent-in-suit.” *In re Vistaprint Ltd.*, 628 F.3d 1342, 1344 (Fed. Cir. 2010). While this Court denied mandamus to the transfer movant, the Court expressly stated that “[o]ur holding today does not mean that, once a patent is litigated in a particular venue the patent owner will necessarily have a free pass to maintain all future litigation involving that patent in that venue.” *Id.* at 1347 n. 3. The same point holds true here *a fortiori*, since the ‘606 Patent did not even exist at the time of the 2016

and 2018 litigation emphasized by the district court. This Court should not countenance the “free pass” the district court granted in this case to maintain all future litigation for the entire patent family in the Northern District of California.

Although the district court correctly noted that it is an objective of the first-to-file rule to “avoid[] conflicting decisions,” Appx12 (quoting *Meril*, 681 F.3d at 1299), by definition courts cannot issue “conflicting decisions” involving different patents. Under the reasoning of *Abbott* and *Sefac*, the fact that the ‘606 Patent is a continuation patent and was not asserted in the 2016 and 2018 cases should be dispositive. It is a “different” patent than those involved in the 2016 and 2018 cases, and even did not exist at the time those cases were filed. *See Abbott Laboratories*, 524 F.Supp.2d at 558 & n. 10; *Sefac USA*, 2020 WL 4557062, at *1 n.1. This fact alone warrants mandamus and reversal.

III. IN LIGHT OF THE WELL-RECOGNIZED DIFFICULTIES OF PATENT ELIGIBILITY DOCTRINE, THE DISTRICT COURT’S PRIOR § 101 DECISIONS AS TO THE PARENT PATENTS DO NOT DEMONSTRATE ITS FAMILIARITY WITH THE ‘606 PATENT OR PROMOTE JUDICIAL EFFICIENCY, AND PETITIONER SHOULD NOT BE DEPRIVED OF THE PROCEDURAL ADVANTAGES OF ITS CHOSEN FORUM.

Even if the fact that the ‘606 Patent is a continuation patent and thus different from the patents involved in the earlier litigation were not dispositive, the district court’s “familiarity” with this patent family should be given little weight in the first-to-file analysis for two reasons. *First*, the district court’s “familiarity” is not premised on any claim construction as to the parent patents, but rather on the district

court's prior § 101 decisions, which were conducted at the Rule 12 stage without a developed factual record. In light of the increasingly well-recognized arbitrariness of § 101 doctrine, those decisions do not demonstrate the court's "familiarity" with the '606 Patent, nor do they promote judicial efficiency, and should be given little weight. Moreover, the '606 Patent issued under the PTO's § 101 Guidelines, and earlier § 101 decisions as to related patents should not be presumed applicable to it. **Second**, the approach of the Western District of Texas for adjudicating § 101 issues would ensure a fairer and more accurate procedure for reaching a correct result on any looming § 101 issues as to the '606 Patent.

As this Court is well aware, district court judges across the nation as well as members of this Court have bemoaned the difficulty and subjectivity of the test for § 101 under current law. See *Interval Licensing LLC v. AOL, Inc.*, 86 F.3d 1335, 1348 (Fed. Cir. 2018) (Plager, J., concurring-in-part and dissenting-in-part) ("the law...renders it near impossible whether to know with any certainty whether the invention is or is not patent eligible."); *Smart Systems Innovations, LLC v. Chicago Transit Authority*, 873 F.3d 1364, 1378 (Fed. Cir. 2017) (Linn, J., dissenting in part and concurring in part) (observing that "great uncertainty yet remains" in the application of § 101 and characterizing § 101 doctrine as "indeterminate and often lead[ing] to arbitrary results"); *Athena Diagnostics, Inc. v. Mayo Collaborative Services, LLC*, 927 F.3d 1333, 1371 (Fed. Cir. 2019) (O'Malley, J., dissenting from

denial of reh’g en banc) (referring to the “‘inventive concept’ requirement” as a “baffling standard”); *SecureNet Solutions Group, LLC v. Senstar Corporation*, 2020 WL 2557625, at *9 (D. Colo. 2020) (“neither the Supreme Court nor the Federal Circuit have established a ‘definitive rule’ to determine what constitutes an ‘abstract idea’...I must say this is really no meaningful standard at all”). Judge Koh herself has acknowledged that § 101 is “a complex and developing area of law.” *Papst Licensing GmbH & Co. KG v. Xilinx Inc.*, 2016 WL 4398376, at *3 (N.D. Cal. 2016).

In light of the increasingly well-recognized arbitrariness and indeterminacy of § 101 doctrine, the district court’s “familiarity” with the parent patents on the basis of its prior Rule 12 stage § 101 decisions should be taken with a grain of salt. Certainly, it should be given little weight in the first-to-file analysis as to the ‘606 Patent here, which was not part of those earlier cases. Moreover, Petitioner (despite not having the burden to do so) pointed out to the district court below several significant differences between the claims of the ‘606 Patent and the previously litigated parent patents.⁴

A growing number of district courts—including the Western District of Texas—are responding to the continuing difficulties in § 101 doctrine by adopting an expressed preference conducting claim construction prior to resolving § 101

⁴ *See supra* note 3.

issues. *See Slyce Acquisition Inc. v. Syte – Visual Conception Ltd.*, 2020 WL 278481, at *7-8 (W.D. Tex. 2020) (noting that “*Alice* is a difficult test to apply and yields inconsistent results,” and that this “widely known and extremely problematic” “lack of predictability and consistency” is a factor favoring delay of the § 101 determination until after “claim construction” and “after fact discovery has opened,” so that the court can “spend more time understanding the patents” before it, especially where “even small technical details could loom large.”). The Court of Federal Claims and the Middle District of Florida have expressed a similar preference. *See e-Numerate Solutions, Inc. v. United States*, 149 Fed.Cl. 563, 579 (2020) (noting that § 101 already lacks doctrinal clarity” and stating that “[t]he Court agrees with other judges that ‘it is wiser and more efficient to wait to determine a patent’s § 101 eligibility until after fact discovery has opened’ and ‘after issuing its claim construction order.’”) (quoting *Slyce*, at *6); *Lexmark International Inc. v. Universal Imaging Industries, LLC*, 2020 WL 3640535, at *1 (M.D. Fla. 2020) (“this Court avoids resolving patent eligibility disputes at the motion to dismiss stage absent claim construction”). At least one member of this Court, too, has considered adopting this approach *en banc*. *See Natural Alternatives Int’l, Inc. v. Creative Compounds, LLC*, 918 F.3d 1338, 1354 (Fed. Cir. 2019) (Reyna, J., concurring-in-part, dissenting-in-part) (“This case, and the general development of the law concerning § 101 analysis at the pleading stage, causes me to ask whether the time

has come for this court to reconsider whether a Rule 12(c) motion based on § 101 should be decided before claim construction.”).

These sensible procedures are, arguably, likelier to lead to correct results in resolving § 101 issues. Petitioner should not be deprived of the procedural advantages of its chosen forum, as the true first-filer.

Finally, the district court’s speculation that Petitioner “may be forum shopping” was based on little evidence and not sufficient to support its departure from a proper first-to-file analysis. Appx13. See *Shire U.S., Inc. v. Johnson Matthey, Inc.*, 543 F. Supp. 2d 404, 410 (E.D. Pa. 2008) (finding “conclusory statements cannot support a finding of forum shopping by the Court” and that “[i]n any event, the Federal Circuit has stated that its advent has generally tempered the impact of forum shopping in patent matters such as this, rendering unclear whether forum shopping alone could suffice as a basis for an exception to the first-to-file rule,” such that “allegations of forum shopping...do not justify making such an exception here”) (citing *Serco Servs. Co., L.P. v. Kelley Co.*, 51 F.3d 1037, 1040 (Fed. Cir. 1995) (“The creation of this court has in large part tempered the impact of traditional forum shopping in patent cases.”)).

CONCLUSION

For the foregoing reasons, the Court should grant Petitioner’s petition for writ of mandamus and reverse the decision below.

Dated: January 22, 2021

Respectfully submitted,

/s/ Kevin Christopher

Kevin Christopher
Jerry Canada
Rockridge Venture Law
(423) 800-8855
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of January 2021, I caused the foregoing *Corrected Brief of Amicus Curiae Raymond A. Mercado, Ph.D. in Support of Petitioner's Petition for Writ of Mandamus* to be filed via CM/ECF with the Clerk of Courts, thereby electronically serving it on all counsel of record in this matter.

/s/ Kevin Christopher

Kevin Christopher
Jerry Canada
Rockridge Venture Law
(423) 800-8855
Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c)(7) and 32(a)(7), the undersigned certifies that this brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(d) and 37(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B)(iii), Federal Circuit Rule 32(b), and Federal Circuit Rule 21(e), this brief includes 3,609 words.

2. This brief has been prepared in proportional space typeface using Microsoft Word in 14-point font. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word count of this word processing system in preparing this certificate.

/s/ Kevin Christopher

Kevin Christopher
Jerry Canada
Rockridge Venture Law
(423) 800-8855
Counsel for Amici Curiae