No. 17-136

IN THE

Supreme Court of the United States

OPENET TELECOM, INC., ET AL.,
Petitioners,

v.

AMDOCS (ISRAEL) LIMITED,
Respondent.

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

BRIEF IN OPPOSITION

S. CALVIN WALDEN
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

GREGORY H. LANTIER
JONATHAN A. BRESSLER
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

MARK C. FLEMING
Counsel of Record
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
mark.fleming@wilmerhale.com

CORPORATE DISCLOSURE STATEMENT

Amdocs Limited is the parent company of Amdocs (Israel) Limited. No entity owns 10 percent or more of Amdocs Limited's stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES

OTHER AUTHORITIES

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BRIEF IN OPPOSITION

INTRODUCTION

Openet's question presented is based on an incorrect premise that mischaracterizes the decision below. Openet asks this Court to decide "[w]hether the Federal Circuit erred by looking beyond the claims to the patent specification to assess patent eligibility[.]" Pet. i. But the Federal Circuit *did* assess patent eligibility based on the claims, giving the claims the meaning they had been given in earlier claim construction proceedings—a meaning that *Openet itself* advocated by relying on the patent specification in an effort to avoid a finding of infringement. This case is thus an improper vehicle for the question presented; even if the Court were to answer Openet's question in the affirmative, the Federal Circuit's interlocutory decision would still

stand, because it clearly decided patent eligibility based on "the claims."

Openet's petition does not present any other question for this Court's review. No question is presented asking whether the claims are actually patent-eligible under 35 U.S.C. §101, nor does Openet challenge the Federal Circuit's application to the patents-in-suit of the principles in *Alice Corp.* v. *CLS Bank International*, 134 S. Ct. 2347 (2014), and *Mayo Collaborative Services* v. *Prometheus Laboratories Inc.*, 566 U.S. 66, 73 (2012). Even if Openet had presented such a question, it would merely address the application of correctly stated legal principles to the specific claims in Amdocs's patents, which would not warrant this Court's review. Notably, all three members of the Federal Circuit panel agreed that two of the four patents-in-suit were directed to eligible subject matter because they claim a specific, unconventional technological solution—distributed architecture—to address technological problems in tracking network usage that arose only because of the Internet. Thus, even under Judge Reyna's dissent, two patents would remain standing and require further proceedings in the district court.

Openet also presents no question challenging the proposition that the patent-eligibility assessment is directed to the claims as construed, as opposed to the bare claim language. Assessing claims as construed does not "look[] beyond the claims" (Pet. i), but instead considers the claims based on the judicial "determination of what the words in the claim mean," *Markman* v. *Westview Instruments, Inc.*, 517 U.S. 370, 374 (1996) (internal quotation marks omitted). And even if the Court were to reformulate Openet's petition to state a different question—*e.g.*, "whether patent-eligibility analysis should ignore claim construction altogether"—

certiorari still would not be warranted. Nothing in this Court's or the Federal Circuit's decisions supports Openet's absurd contention that patent claims should be given a different meaning for patent-eligibility purposes from that given for all other purposes. There is no conflict among courts or even Federal Circuit judges on that issue; indeed, the Federal Circuit denied Openet's petition for rehearing en banc with no recorded dissent.

The petition should be denied.

STATEMENT

A. The Internet Creates Previously Unaddressed Problems For Tracking Network Usage

Tracking network usage on traditional telephone systems is straightforward. Traditional telephone services are circuit-switched networks in which each communication creates a path, or "circuit," that transfers information from one fixed point to another. A1207 ¶¶6-8.[1] Telephone service providers can track usage from a single location by noting when the circuit was created and released (when a call began and ended) and where the information traveled (the caller's and recipient's physical locations). *Id.* They can also connect that usage to individual customers, because each customer can be assigned a unique, fixed identifier tied to a single location (a telephone number). Telephone service providers can then bill customers for individual network usage based on the length and locations of calls (whether calls were "local" or "long distance"). *Id.*

The Internet is not so simple. Online communications do not occur over a single circuit; instead, each

[1] "A" refers to the Court of Appeals Appendix.

communication is divided into small pieces or "packets," which are sent over various different paths in the network. A1209 ¶¶12-16, A1588 ¶21. Sending information online is thus less like a telephone call and more like mailing a book by separately sending each page in its own envelope, out of sequence and by different routes, to be reassembled at the destination point. During a single Web-browsing session, a network user will send and receive a massive number of data packets passing through different network devices, often distributed around the world. The process is further complicated because the network devices through which the packets pass—including routers, Web hosts, and authentication servers—operate using different languages or "protocols," making it even harder to assimilate information about network usage. A1589-1590 ¶26.

Moreover, there is no Internet analogue to telephone numbers permanently associated with individual customers. Although Internet Protocol (IP) addresses identify a computer or device using the network, those addresses are generally "dynamic" (assigned only temporarily), and the same numeric address may be reassigned to subsequent users. A1588-1589 ¶¶23-24.

Because of these technological differences, the Internet created unprecedented challenges for Internet service providers that wished to track network usage.

B. The Patents' Unconventional Solution Using Distributed Architecture

The patents-in-suit recite specific technological solutions to the problem of tracking the fragmented and ephemeral data transmitted over packet-based networks like the Internet, email, and SMS messaging. The inventors, who worked for Amdocs's affiliate

XaCCT Technologies, Inc., were the first to figure out how to generate meaningful records of network usage by collecting and processing the data from multiple devices close to the original data source, using a technique that the patents call "distributed architecture." A45. Amdocs, a company with 25,000 employees, employs the patented inventions to provide commercially successful network accounting software and services for major communications providers like AT&T, Sprint, T-Mobile, and Vodafone in more than 50 countries, including the United States. Amdocs C.A. Br. 7.

The patents disclose a system that allows Internet service providers to create detailed records for usage of their packet-based networks. Pet. App. 2a-5a. *First*, the system collects raw usage data (such as IP addresses, domain names accessed, and bandwidth used) from the different devices distributed throughout the network, using their own protocols. A31, A38-40. *Second*, the system aggregates and filters the data by standardizing it, grouping it (such as data for a single Web-browsing session), and discarding unnecessary data (like duplicative information obtained from multiple servers). A40-41. *Third*, the system correlates the data with a particular account so that usage is attributed to the correct user (such as by matching IP addresses with service provider records). A77-80. *Fourth*, the system enhances the data to generate a complete record needed for accounting by modifying information obtained from one type of source with that obtained from a different type (such as by combining an IP address from a router with a host name from an authentication server). A41-42, A1273. *Fifth*, the system sends the enhanced and completed record to a centralized database, which allows the Internet service provider to generate a single record of a customer's network usage. A41, A103.

A critical feature of this system is its distributed architecture. Pet. App. 4a-5a. That is, the system's tasks—the collecting, processing, and enhancing of data—occur not in a centralized location, as happened with conventional telephone systems, but "distributed" throughout the network in locations close to the data sources. This distributed architecture was a substantial improvement; it increased efficiency and scalability by reducing the volume of data sent across the network to a centralized database and avoiding capacity bottlenecks. *Id.*; A80, A1592-1593 ¶31.

The patents thus addressed a new technological problem created by the Internet and solved it through an inventive system—distributed architecture—that only networked computers can implement. They do not claim the use of computers as a means of implementing an existing solution. Nor do the patents preempt mental processes that can be performed by a human being or through conventional computations; they are limited to a specific implementation of collecting, processing, and enhancing raw data from disparate network devices close to those sources and using their protocols. Nor do the patents claim the broad "function" of generating accounting and billing records for packet-based networks; they claim only the specific architecture that implements the inventors' particular solution to execute that function. If others wish to perform the same function using other potential solutions—including computer-implemented solutions—they may do so without infringing the patents-in-suit.

The claims themselves concern the computer-program products, systems, and methods implementing the invention's architecture. Pet. App. 3a; A84-85. As relevant here, claim 1 of U.S. Patent No. 7,631,065 ("the '065 patent") is representative and recites a computer-

program product for processing network accounting information, in which information from one source is correlated with information from another source "to enhance the first network accounting record." A84. Representative claim 16 of U.S. Patent No. 7,412,510 ("the '510 patent") recites a computer-program product for reporting on network usage information collected from multiple network devices comprising code "for completing a plurality of data records from the filtered and aggregated network communications usage information." A65. Representative claim 1 of U.S. Patent No. 6,947,984 ("the '984 patent") recites a method for reporting on network usage information collected from multiple network devices that requires "completing a plurality of data records from the filtered and aggregated network communications usage information." A45. Representative claim 1 of U.S. Patent No. 6,836,797 ("the '797 patent") recites a method for generating a single record for accounting purposes reflecting data collected from multiple network services in which "the single record represents each of the plurality of services" and "the data is collected utilizing an enhancement procedure." A110-112.

C. Initial District Court Proceedings

In 2010, Amdocs sued Openet for infringement of each of the patents-in-suit. Openet's initial strategy was to move for summary judgment of noninfringement, arguing that the patent claims were sufficiently narrow as not to cover Openet's products. *Amdocs (Israel) Ltd.* v. *Openet Telecom, Inc.*, 761 F.3d 1329, 1331 (Fed. Cir. 2014) (*Amdocs I*). Because the parties disagreed about the meaning of several claim terms, the district court construed the claims to determine their

meaning before deciding whether Openet was entitled to summary judgment of noninfringement. *Id.* at 1337.

First, the district court construed the term "'enhance'" as used in the '065 patent claims "to mean 'to apply a number of field enhancements *in a distributed fashion*.'" 761 F.3d at 1338 (emphasis added). It concluded that "'[i]n this context, "distributed" means that the network usage records are processed close to their sources before being transmitted to a centralized manager.'" *Id.* Second, the district court construed the term "'completing' in the asserted '510 and '984 Patent claims to mean to 'enhance a record until all required fields have been populated,' incorporating its construction of 'enhance.'" *Id.* Third, it construed the phrase "'single record represent[ing] each of the plurality of services'" as used in the '797 patent claims to mean "'one record that includes customer usage data for each of the plurality of services used by the customer on the network,'" which it believed excluded "a record that aggregates usage data." *Id.* at 1340.

Because the '065, '510, and '984 patent claims each use the term "enhanced" or "completing," the district court's claim construction meant that each claim required enhancement of data in a distributed fashion. The district court granted summary judgment of noninfringement for those patents because it concluded that there were no genuine disputed factual issues about whether "Openet's products 'enhance' network records 'in a distributed fashion.'" 761 F.3d at 1337. It also granted summary judgment of noninfringement for the '797 patent because it ruled that Openet's products produced an "aggregate record" that did not satisfy its construction of "single record represent[ing] each of the plurality of services." *Id.*

D. Openet's Claim Construction Arguments During The Prior *Amdocs I* Appeal

Amdocs appealed the grant of summary judgment of noninfringement. Openet defended the district court's claim constructions, relying in large measure on the specifications as support. For example, Openet cited the specification for its contentions that "[t]he '065 patent teaches that the claimed enhancement occurs close to the source where data is collected" and "[t]he '065 patent further distinguishes its invention from prior art mediation systems that enhanced data records in a centralized, rather than distributed, manner." *Amdocs I* Openet Br. 47. Openet made clear its position that the claims should be construed in light of the specifications, arguing that Amdocs's proposed interpretation of "enhanced" improperly "invite[d] this Court to disregard the specification." *Id.* 48.[2]

The Federal Circuit agreed with Openet and affirmed the district court's construction of "enhance" and "completing." *Amdocs I*, 761 F.3d at 1340. In explaining its decision, the Federal Circuit noted that Openet "points to portions of the specification in support of the district court's conclusions" and "point[s] out" that "the specification repeatedly recites the advantages of distributed enhancement." *Id.* at 1338, 1340.

Although the Federal Circuit agreed with Openet and the district court regarding the construction of the '065, '510, and '984 patents, it disagreed that Openet

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[2] Although the district court had not relied on its "enhanced" construction with regard to the '797 patent, Openet argued that that patent's use of the claim term "enhancement procedure" meant that "the lack of enhancement that was fatal to the '065, '984, and '510 patents is also fatal to the '797 patent." *Amdocs I* Openet Br. 65.

was entitled to summary judgment of noninfringement as to those patents, because it ruled that genuine factual issues remained regarding whether Openet's products "enhance 'in a distributed fashion' 'close to the source' of the network information." 761 F.3d at 1341.

With respect to the '797 patent, the Federal Circuit disagreed with the district court's construction of "'single record represent[ing] each of the plurality of services.'" 761 F.3d at 1340. The Federal Circuit believed the term should be given a "plain meaning interpretation," under which it would include a record that "represent[ed] a plurality of services by aggregation." *Id.* at 1341. It accordingly vacated the summary judgment ruling on that patent and remanded for further proceedings. *Id.* at 1343.

E. District Court Proceedings On Remand

On remand, Openet pursued a different strategy, moving for judgment on the pleadings and arguing that the four patents-in-suit were not patent-eligible under 35 U.S.C. §101. A1511-1539. Amdocs responded that, under the district court's "claim construction of 'enhance' and 'completing'—which the Federal Circuit affirmed—the claims further require that [the system's] enhancement take place '*in a distributed fashion*'" and were thus "directed to concrete improvements to a specific, highly complex technology." A1545. Openet did not object that the claim construction was somehow irrelevant, nor did it dispute that the construed claims require distributed architecture (as Openet had successfully argued before the Federal Circuit in *Amdocs I*).

The district court granted Openet's motion. Pet. App. 100a. Under the *Alice/Mayo* framework, it concluded that each patent claim was directed to an ab-

stract idea and that none of the claims sufficiently added to its abstract idea to provide an inventive concept. *Id.* 86a, 92a, 94a-95a, 97a-98a.

F. The Federal Circuit Decision

Amdocs appealed, arguing that the claims were directed to "specific solutions to the technical problem of how to monitor and account for usage of the Internet, not to abstract ideas," and based its argument on the fact that the claims, "*as construed by the district court and confirmed by this Court*, must occur 'in a distributed fashion.'" Amdocs C.A. Br. 6-7 (emphasis added).

Openet again did not object to the claim construction's relevance, contending instead that the district court correctly "considered and rejected Amdocs's position that the claim construction requiring 'distributed' enhancement made the asserted claims any less abstract." Openet C.A. Br. 30. Nor did Openet deny the specifications' relevance to the Section 101 inquiry; instead, it argued that "Amdocs does not point to the claim language *or patent specification* to support [Amdocs's] contention" that the district court erred "in holding that the claims failed step two of the *Alice* framework." *Id.* 43 (emphasis added).

The Federal Circuit reversed, concluding that all asserted claims were directed to patent-eligible subject matter. Notably, the panel was unanimous in concluding that the '510 and '984 patent claims were patent-eligible, although Judge Reyna dissented as to the other two patents.

The Federal Circuit majority assumed without deciding that the district court correctly concluded that the representative claims for each patent-in-suit were directed to an abstract idea under step one of the *Al-*

ice/Mayo framework. Pet. App. 25a, 32a, 36a, 38a. The court proceeded to examine the representative claim for each patent under step two, asking whether the claim added an "'inventive concept'" that is "'sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself.'" *Id.* 9a (quoting *Alice*, 134 S. Ct. at 2355 (quoting *Mayo*, 566 U.S. at 73)).

Beginning with the '065 patent, the Federal Circuit first summarized the claim construction from *Amdocs I*, which explained the meaning of the representative claim. Pet. App. 25a. It noted that the claim includes the "'enhance'" term, which was construed in *Amdocs I* "as being dependent upon the invention's distributed architecture," "meaning 'to apply a number of field enhancements in a distributed fashion.'" *Id.* (quoting *Amdocs I*, 761 F.3d at 1340). The court added that "[w]e took care to note how the district court explained that '[i]n this context, "distributed" means that the network usage records are processed close to their sources before being transmitted to a centralized manager.'" *Id.* (quoting *Amdocs I*, 761 F.3d at 1338). The court explained that "we specifically approved of the district court's 'reading the "in a distributed fashion" and the "close to the source" of network information requirements into the term "enhance."'" *Id.* (quoting *Amdocs I*, 761 F.3d at 1340).

The Federal Circuit then analyzed whether the claim as construed was sufficiently inventive to qualify as patent-eligible. Pet. App. 26a-30a. It found that "this distributed enhancement was a critical advancement over the prior art" and "entails an unconventional technological solution (enhancing data in a distributed fashion) to a technological problem (massive record flows which previously required massive databases)."

Id. 26a. It therefore concluded that "Claim 1 [of the '065 patent] includes the enhancing limitation which is individually sufficient for eligibility." *Id.* 27a. The court added that the enhancing limitation "necessarily involves" several components "working in an unconventional distributed fashion to solve a particular technological problem," further demonstrating an inventive concept. *Id.* 27a-28a.

The Federal Circuit applied the same analysis for the other three patents. It noted that the '510 patent's representative claim contains the term "completing," and that *Amdocs I* "approved of the district court's construction of 'completing' to mean 'enhance a record until all required fields have been populated,' in which 'enhance' carried the same meaning as the same term in the '065 patent." Pet. App. 32a (quoting *Amdocs I*, 761 F.3d at 1340). The court concluded that the claim also "depend[s] upon the system's unconventional distributed architecture" and "recites a technological solution to a technological problem specific to computer networks—an unconventional solution that was an improvement over the prior art." *Id.* 33a, 34a. It thus concluded that "claim 16 [of the '510 patent] satisfies step two" of the *Alice/Mayo* framework. *Id.* 33a. The Federal Circuit similarly examined the other patents' representative claims as they had been "specifically construed," *id.* 39a, and found them patent-eligible, *see id.* 36a ('984 patent); *id.* 40a ('797 patent).

Judge Reyna dissented, but ultimately agreed that two of the four patents satisfied Section 101's eligibility requirement. Judge Reyna found the '510 patent patent-eligible based partly on "*the district court's construction* of 'completing' as requiring distributed enhancement," Pet. App. 63a (citing *Amdocs I*, 763 F.3d at 1338) (emphasis added), and found the '984 patent

patent-eligible for "the same reasons," *id.* 67a. For the '065 and '797 patents, Judge Reyna disagreed with the majority's conclusion that "the 'enhance' step provides an inventive concept." *Id.* 59a; *see also id.* 72a.

Openet petitioned for rehearing en banc. The Federal Circuit denied Openet's petition with no recorded dissent. Pet. App. 103a.

REASONS FOR DENYING THE PETITION

I. THE QUESTION ON WHICH OPENET SEEKS REVIEW IS NOT PRESENTED HERE

This Court may deny the petition simply because the Federal Circuit remanded the case for further proceedings, Pet. App. 42a, so the case has not reached final judgment. *See, e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court.").[3]

But regardless of timing, this case would be a poor vehicle for deciding "[w]hether the Federal Circuit erred by looking beyond the claims to the patent specification to assess patent eligibility" (Pet. i), for the simple reason that that question is not presented here. Contrary to Openet's contention, the Federal Circuit's analysis *was* focused on the claims as construed and sought to determine whether the claims contained the requisite inventive element. The Federal Circuit relied on the claim construction adopted by the district court,

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[3] *See also Abbott* v. *Veasey*, 137 S. Ct. 612, 613 (2017) (mem.) (Roberts, C.J., respecting denial of certiorari); *Mount Soledad Mem'l Ass'n* v. *Trunk*, 132 S. Ct. 2535, 2536 (2012) (mem.) (Alito, J., respecting denial of certiorari).

urged by Openet in *Amdocs I*, and affirmed by the Federal Circuit in *Amdocs I*, which limited the claims to a specific, distributed architecture. Consequently, even if the question presented merited this Court's review—though it does not, *see infra* pp. 21-34—this case would be an improper vehicle for it. And that question is the only one that Openet has asked this Court to decide.

A. The Federal Circuit *Did* Assess Patent Eligibility Based On The Claims

For each patent, the Federal Circuit examined an individual representative claim and found that it contained an inventive element sufficient to make it patent-eligible. In conducting this assessment, the Federal Circuit considered each claim as previously construed by the district court and affirmed by the Federal Circuit in *Amdocs I*—constructions that Openet itself had advocated by arguing that the claims should be construed in light of the patent specification. *See supra* pp. 8-14. Those constructions limited the claims to particular implementations in distributed architecture, a strategy Openet pursued in its effort to avoid a finding of infringement. Notably, Openet did not ask the Federal Circuit to alter the *Amdocs I* constructions for purposes of its Section 101 argument, nor could it have done so.[4] Nor does Openet ask this Court to review the *Amdocs I* constructions—indeed, it could scarcely do so here either, since it pressed those constructions itself.

[4] Judicial estoppel would have prevented Openet from changing its previously successful claim construction position, *see Interactive Gift Exp., Inc.* v. *Compuserve Inc.*, 256 F.3d 1323, 1349 (Fed. Cir. 2001), and the Federal Circuit would have been required to apply the *Amdocs I* constructions as law of the case, *see E-Pass Techs., Inc.* v. *3Com Corp.*, 473 F.3d 1213, 1219 (Fed. Cir. 2007).

See City of Springfield v. *Kibbe*, 480 U.S. 257, 259-260 (1987) (per curiam) (dismissing writ of certiorari as improvidently granted because "petitioner accepted, and indeed itself requested," instructions on which it later sought this Court's reversal).[5]

The Federal Circuit's decision on patent eligibility thus rested not on material drawn willy-nilly from the specifications, but on the scope of the claims as construed in *Amdocs I* at Openet's urging. While the Federal Circuit *discussed* the specifications, that was understandable because the claims had been construed in light of their specification, as Openet had successfully argued. Openet itself acknowledges that the Federal Circuit's decision was based on "the fact that an earlier claim construction relied on the specification" (Pet. 25) and tellingly does not identify a single specification reference in the Federal Circuit's patent-eligibility ruling that was not drawn from the construction of the claims themselves.

Review of the Federal Circuit's opinion reveals that it based its "inventive concept" ruling on the claims as construed. With respect to the '065 patent, on which Openet focuses (Pet. 2, 7-8, 16), the Federal Circuit explained that the district court construed the claim's "'enhance'" term to require "distributed architecture," meaning that distributed architecture was "'read[] … into the term "enhance"'" *in the claim*. Pet.

[5] Accordingly, Openet's occasional statements about the claims' scope are irrelevant to the question presented and, in any event, unreviewable because they rest on rulings Openet itself procured in *Amdocs I*. *E.g.*, Pet. 7 (asserting, contrary to claim construction, that patents "claim basic data compilation processes"); Pet. 17 (asserting, contrary to claim construction, that Amdocs did not claim a specific way of "performing the function of records correlation").

App. 25a (quoting *Amdocs I*, 761 F.3d at 1340). The Federal Circuit ruled that the claim's limitation to distributed architecture provided an inventive concept and thus "*this claim* entails an unconventional technological solution." *Id.* 26a (emphasis added). The Federal Circuit similarly assessed the other patents' claims, explaining, for example, that the '510 patent claim's "'completing'" term was construed to require "distributed architecture," *id.* 32a, and therefore "*[t]he claim* recites … an unconventional solution," *id.* 34a (emphasis added); *see also supra* pp. 13-14 (quoting Pet. App. 27a, 33a, 36a, 40a).

Nor does Judge Reyna's dissent suggest that the majority assessed patent eligibility by looking beyond the construed claims. To be sure, Judge Reyna disagreed with the *construction* that the majority applied to the claims, accusing the majority of "import[ing] innovative limitations *into the claims at issue*." Pet. App. 44a (emphasis added). But Judge Reyna did not deny that the majority applied the patent-eligibility inquiry to the claims, as the majority understood them to be construed. Nor did he suggest that the patent-eligibility assessment should somehow ignore claim construction. Like the majority, he assessed whether the claims *as construed in light of the specification* identified an inventive concept. *See supra* p. 14; *e.g.*, Pet. App. 63a (considering "the district court's construction of 'completing' as requiring distributed enhancement").

Accordingly, the decision below does exactly what Openet's question presented suggests it should have done: assess patent eligibility based on the claims, and not "look[] beyond the claims to the patent specifica-

tion." Pet. i. This case is accordingly not a vehicle for review of Openet's stated question.[6]

B. Openet Does Not Seek Review Of The Federal Circuit's Application Of This Court's *Alice/Mayo* Framework To The Claims As Construed—A Case-Specific Application Of Correctly Stated Law That Would Not Warrant Certiorari

Although Openet invokes various commentators' and lower courts' dissatisfaction with the state of the law interpreting and applying Section 101 (Pet. 4, 27-29), Openet does not actually seek this Court's review of the Federal Circuit's determination that the claims as construed contain an inventive concept sufficient to surmount the patent-eligibility hurdle. That is no surprise; the question whether Amdocs's patent claims as construed contain a sufficient inventive concept is case-specific, turning only on the application of this Court's settled precedents to the particular claims at issue. *See* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of … the misapplication of a properly stated rule of law.").

The Federal Circuit correctly stated the Section 101 analytical framework from this Court's decisions in *Alice* and *Mayo*. Pet. App. 8a-9a. And all three judges agreed that two of the four patents at issue contain a sufficient inventive concept and are directed to patent-

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[6] Although Judge Reyna faulted the panel majority for assuming without deciding that the claims were directed to an abstract idea under step one of the *Alice/Mayo* framework (Pet. App. 43a), Openet does not assert that as a basis for certiorari. There is nothing wrong with an appellate court assuming without deciding the correctness of a ruling below where doing so would not avoid reversal. *E.g.*, *NASA* v. *Nelson*, 562 U.S. 134, 138 (2011).

eligible subject matter. *Id.* 42a, 65a, 69a. The disagreement between the panel majority and Judge Reyna affects only two of the patents-in-suit, which ultimately will not affect the need for a remand and further proceedings regarding Openet's infringement of the other patents. Thus, even if this Court were inclined to give "additional direction" on how to distinguish patent-eligible claims from ineligible claims (Pet. 28), it should do so in a case that actually presents such a question. This is not such a case.[7]

C. Openet Presents No Question Challenging The Proposition That The Patent-Eligibility Inquiry Is Directed To The Claims As Construed

Notwithstanding the phrasing of its question presented, Openet at times appears to argue something different—namely, that the Federal Circuit should have based its patent-eligibility analysis not on the claims as construed, but on the bare claim language, irrespective of what the Federal Circuit had already held

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[7] Moreover, all three judges were correct that the '510 and '984 patent claims are patent-eligible, and the majority was correct that the '065 and '797 patent claims are also eligible. As explained above (pp. 4-6), the use of distributed architecture was a specific, unconventional technological solution to the new problem of collecting and processing usage data for packet-based networks, thus supplying an inventive concept. Openet's gesticulation toward an argument that the patents claim only "functions" (Pet. 2, 8-19, 26) is undeveloped and wrong. The patents claim the implementation of distributed architecture to collect and process packet-based network data—not the function of collecting and processing that data. The claims as construed are limited to one particular type of architecture; anyone could perform the same function by using different architecture without infringing the asserted claims. *See supra* p. 6.

(at Openet's urging) the claim language actually meant. *E.g.*, Pet. 25-27.

That issue, however, is not the question on which Openet has sought certiorari, which asks only whether the Federal Circuit "look[ed] beyond the claims to the patent specification to assess patent eligibility." Pet. i. An analysis of the claims as construed does not "look[] beyond the claims." Rather, it simply looks to the judicial "determination of what the words in the claim mean." *Markman*, 517 U.S. at 374 (internal quotation marks omitted). Of course, the determination of what the claim language means may turn on material other than the claim language itself, including not only the patent specification, but also "the patent's prosecution history" and relevant "extrinsic evidence." *Teva Pharm. USA, Inc.* v. *Sandoz, Inc.*, 135 S. Ct. 831, 841 (2015). The specification plays a particularly prominent role in claim construction, as this Court has repeatedly recognized. *E.g.*, *Nautilus, Inc.* v. *Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2130 (2014) ("[C]laim construction calls for the necessarily sophisticated analysis of the whole document[.]'" (internal quotation marks omitted)); *United States* v. *Adams*, 383 U.S. 39, 49 (1966) ("[I]t is fundamental that claims are to be construed in light of the specifications and both are to be read with a view to ascertaining the invention.").

But regardless of the material considered, the ultimate product of the claim construction exercise remains a "determination of [the] meaning" of the *claims*. *Markman*, 517 U.S. at 384; *see also Teva*, 135 S. Ct. at 841 (after resolving any factual disputes, "[t]he district judge … will then *interpret the patent claim* in light of the facts as he has found them" (emphasis added)). Accordingly, Openet's cursory effort to distinguish between the claims and their construction (Pet. 25-27) is

at war with both the law and Openet's own question presented, neither of which treats the claims and their construction as distinct.

Even if the Court were to reformulate Openet's question to ask whether the Federal Circuit's patent-eligibility analysis should have ignored the claim construction that Openet itself successfully urged, such a question still would not merit certiorari, as the balance of this brief demonstrates.

II. HAD OPENET SOUGHT REVIEW OF THE CORRECTNESS OF ASSESSING PATENT ELIGIBILITY BASED ON THE CLAIMS AS CONSTRUED, CERTIORARI WOULD STILL BE UNWARRANTED

The Federal Circuit's decision to give the claims the same meaning for Section 101 purposes as they are given under *Markman* for all other purposes is consistent with the decisions of this Court and the Federal Circuit, and is sound policy—indeed, any other approach would be nonsensical. Accordingly, even if Openet had asked this Court to decide whether the patent-eligibility analysis should be directed not toward the claims as construed, but toward the bare claim language independent of claim construction, such a question would still not warrant certiorari.

A. This Court Has Never Suggested That Patent Claims Can Mean One Thing For Patent-Eligibility Purposes And Another Thing For All Other Purposes

No precedent of this Court has ever suggested that the patent-eligibility analysis should ignore the ordinary principle that a patent claim's scope should be construed in light of (among other things) the specifica-

tion. Openet's alternative approach would produce absurd consequences.

1. Contrary to Openet's contention (Pet. 15-16), this Court's Section 101 cases have relied on patent specifications in assessing claim scope for patent-eligibility purposes. In *Mayo*, the Court considered the specification both in analyzing what the claims purported to cover, 566 U.S. at 73-74 (citing U.S. Patent No. 6,355,623, col. 8, ll. 37-40), and in determining whether they were inventive, *id.* at 79 (citing '623 patent, col. 9, ll. 12-65). The Court also noted that the district court had construed the claims before determining whether they were patentable. *Id.* at 75-76.

In *Alice*, the Court similarly examined what the invention purported to do "[a]ccording to the specification largely shared by the patents." 134 S. Ct. at 2352. In this regard, *Alice* followed *Parker* v. *Flook*, *see id.* at 2355 n.3, which explained that the Section 101 inquiry requires assessment of whether "the application, considered as a whole, contains no patentable invention," 437 U.S. 584, 594 (1978).[8]

Openet cites (Pet. 16) this Court's summary that the Section 101 analysis involves determining "whether the claims at issue are directed to" a patent-ineligible concept and, if so, inquiring what else is "in the claims." *Alice*, 134 S. Ct. at 2355. But claim construction is the process by which a court determines what the claims

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[8] Openet asserts that *Alice* and *Mayo* "reaffirmed that *only* claims *reciting* inventive elements are patent eligible." Pet. 5 (emphasis added). Openet identifies no language in either case containing such a holding. While both cases naturally looked to the recitations of the claim language, neither suggested (much less held) that Section 101 somehow forbade interpretation of claim language in light of the specification.

are "directed to" and what is "in the claims." *See Markman*, 517 U.S. at 374 (claim construction is a "determination of what the words in the claim mean" (internal quotation marks omitted)); Harmon et al., *Patents and The Federal Circuit* §6.1, at 379 (12th ed. 2016) ("The construction of claims is simply a way of elaborating the normally terse language of the claims, in order to understand and explain, but not to change, the scope of the claims."). Certainly nothing in *Alice*, *Mayo*, or any other decision of this Court ruled out consideration of the specification in determining what the claims are "directed to." Tellingly, when Openet asserts such a requirement, it cites nothing at all. *E.g.*, Pet. 18 (arguing that "[t]he claim language must be the focus of the patent eligibility analysis," citing nothing); *id.* 25 (asserting that "the eligibility analysis has always focused on the claim language itself," citing nothing); *id.* 26 (referring to a "requirement that a claim must recite specific inventive elements," misciting *Flook*[9]).

2. This Court's precedent also refutes Openet's argument (Pet. 14-15) that early cases restricted patent-eligibility assessment to unconstrued claims, without considering specifications. As this Court has recounted, nineteenth-century decisions resolved the meaning of patents through claim construction analogues that considered the specifications. *See Markman*, 517 U.S. at 379-382. Indeed, the Court has long

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[9] Openet's citation to "*Flook*, 437 U.S. at 584" (Pet. 26) appears to be an error. Openet may mean to cite the statement in *Diamond* v. *Diehr* that "[a] mathematical formula as such is not accorded the protection of our patent laws, … and this principle cannot be circumvented by attempting to limit the use of the formula to a particular technological environment." 450 U.S. 175, 191 (1981). That statement nowhere adopts a "requirement that a claim must *recite* specific inventive elements." Pet. 26 (emphasis added).

made clear that "[t]he claim … is not to be taken alone, but in connection with the specification and drawings; the whole instrument is to be construed together." *Brooks* v. *Fiske*, 56 U.S. (15 How.) 212, 215 (1853).

The cases that Openet cites (Pet. 14-15, 18) did not preclude consideration of the specifications, but actually relied on them. For instance, the Court considered Samuel Morse's request for a patent on eight "inventions set forth *in the specification* of his claims." *O'Reilly* v. *Morse*, 56 U.S. (15 How.) 62, 112 (1853) (emphasis added). The Court upheld the validity of Morse's first seven claims but invalidated the eighth claim because "some future inventor … may discover a mode of writing or printing at a distance by means of the electric or galvanic current, without using any part of the process or combination set forth *in the plaintiff's specification*." *Id.* at 113 (emphasis added).

Similarly, in *Burr* v. *Duryee*, the Court refused a patent because, "by the use of general and abstract terms, *the specification* is made so elastic that it may be construed to claim only the machine, or so expanded as to include all previous or future inventions for the same purpose." 68 U.S. (1 Wall.) 531, 576 (1863) (emphasis added). The Court did not consider the specification irrelevant; rather, it explained that a patent could still be too abstract even in light of the specification. And in *Fuller* v. *Yentzer*, the Court explained that "[w]here the claim immediately follows the description of the invention, it may be construed in connection with the explanations given in the description; and, if the claim contains words referring back to the specification, it cannot properly be construed in any other way." 94 U.S. 288, 288 (1876). Accordingly, Openet's own cases refute its argument that the speci-

fication is somehow off-limits in determining the claims' scope for purposes of assessing their patentability.

3. Openet's argument that courts undertaking a Section 101 inquiry must assess unconstrued claims, without considering the specification, would result in absurd consequences. When assessing patent claims for other purposes, including validity and infringement under other sections of the Patent Act, courts must examine claim scope under ordinary claim construction principles, one "fundamental" principle being "that claims are to be construed in the light of the specifications." *Adams*, 383 U.S. at 49 (discussing novelty requirement under Section 102). This principle also applies to other patentability criteria, such as definiteness under Section 112. *See Nautilus*, 134 S. Ct. at 2128 (citing *Adams*, 383 U.S. at 48-49). The Court specifically held that "a patent is invalid for indefiniteness if its claims, *read in light of the specification delineating the patent*, and the prosecution history, fail to inform, with reasonable certainty, those skilled in the art about the scope of the invention." *Id.* at 2124 (emphasis added).

Openet provides no reason a court assessing whether a patent claim is invalid under Section 102 or indefinite under Section 112 would examine the construed claim, read in light of the specification, but a court assessing whether a claim is unpatentable under Section 101 would examine the unconstrued claim language, without regard to the specification (or, presumably, the prosecution history or relevant extrinsic evidence, *see Teva*, 135 S. Ct. at 841). The consequence of Openet's position is that the patent claim would mean one thing for purposes of patent eligibility, and another thing for all other purposes (validity, infringement, inequitable conduct, etc.). This Court's precedents do not require that incongruous result.

B. No Federal Circuit Judge Has Suggested That Patent-Eligibility Analysis Should Ignore The Claims' Construction

Openet contends (Pet. 21-25) that other Federal Circuit decisions have ruled that courts assessing patent eligibility must consider only unconstrued claims, not the specification. That is wrong. The Federal Circuit consistently assesses whether there is an inventive concept in the claims as construed. The fact that not a single judge—not even Judge Reyna—dissented from denial of rehearing en banc in this case (Pet. App. 103a) confirms the lack of intra-circuit conflict on the issue.

1. The decision below does not conflict with *Synopsys, Inc.* v. *Mentor Graphics Corp.*, 839 F.3d 1138 (Fed. Cir. 2016), *cert. denied*, 2017 WL 1539155 (2017) (No. 16-1288). Contrary to Openet's contention (Pet. 21-22), *Synopsys*, like the decision below, examined the claims *as construed* in assessing patent eligibility. The Federal Circuit explained in *Synopsys* that "[n]otably, the [district] court did not construe any claim … to require the use of a computer," 839 F.3d at 1145, and added that "[p]erhaps more notably, none of Synopsys' proposed constructions required the use of a computer or any type of hardware," *id.* at 1145 n.9. The Federal Circuit emphasized that, on appeal, Synopsys "stop[ped] short of arguing that the Asserted Claims must be *construed* as requiring a computer to perform the recited steps. Synopsys never sought such a construction before the district court and it does not press for such a construction here." *Id.* at 1149. The Federal Circuit concluded that Synopsys's argument that the claims were patent-eligible because they were tied to computer design tools failed because "[b]y their terms *and the district court's unchallenged constructions*, the Asserted Claims do not involve the use of a computer in

any way." *Id.* at 1150 (emphasis added). It found no inventive concept "given that the claims are for a mental process" and "merely aid in mental translation as opposed to computer efficacy." *Id.* at 1152.

The decision below is fully consistent with *Synopsys*. In both cases, the Federal Circuit analyzed whether there was an inventive concept in the *construed* claims. In this case, the Federal Circuit found that there was; in *Synopsys*, it found that there was not. *Synopsys* simply explains that the specification cannot be used to supply an inventive concept where none is present in the construed claims, *see* 839 F.3d at 1149—a situation that does not arise here, because the Federal Circuit found the inventive concept in the claims as construed. Tellingly, and unsurprisingly, neither Synopsys's petition for certiorari nor its reply brief even cited the Federal Circuit's decision in this case, let alone asserted any conflict based on it. And the Court's recent denial of Synopsys's petition indicates that, even if the two cases were deemed similar, that would not warrant a grant of certiorari.

2. Openet's argument (Pet. 22-23) that the decision below is inconsistent with other Federal Circuit cases fails for the same reason: those decisions also assessed claims as they were or could have been construed. In *Accenture Global Services, GmbH* v. *Guidewire Software, Inc.*, the Federal Circuit explained that the district court "conducted formal discovery, c*onstrued the claims*, and ruled on a motion for summary judgment" that the claims were too abstract, and the patentee "does not point to any error in claim construction" that, if corrected, would establish patent eligibility. 728 F.3d 1336, 1346 (Fed. Cir. 2013) (emphasis added). And although no formal claim construction was done in *Content Extraction & Transmission LLC* v.

Wells Fargo Bank, National Ass'n, the Federal Circuit explained that it assessed the claims "when construed in a manner most favorable" to the patentee, including by "necessarily assuming that all of [its] claims required a machine, even though several claims do not expressly cite any hardware structures." 776 F.3d 1343, 1349 (Fed. Cir. 2014).

The *Affinity Labs* cases likewise did not rule out reference to the specification; on the contrary, they expressly considered it when reaching the conclusion of patent-ineligibility. *See Affinity Labs of Tex., LLC* v. *Amazon.com Inc.*, 838 F.3d 1266, 1271 (Fed. Cir. 2016) ("[T]here is nothing in the claims *or the specification* … that constitutes a concrete implementation of the abstract idea in the form of an 'inventive concept.'" (emphasis added)); *Affinity Labs of Tex., LLC* v. *DIRECTV, LLC*, 838 F.3d 1253, 1262 (Fed. Cir. 2016) ("Upon examining claim 1 *and the specification* of the '379 patent, we find no 'inventive concept' …." (emphasis added)). The same is true of *Intellectual Ventures I LLC* v. *Symantec Corp.*, where the Federal Circuit concluded that "*[t]he specification* thus confirms that the implementation of the abstract idea is routine and conventional." 838 F.3d 1307, 1318 (Fed. Cir. 2016) (emphasis added). Although the Federal Circuit noted that disclosures in the specification that were not in the claims could not provide an inventive concept, *id.* at 1322, its conclusion was clearly based on the claims as construed, *see id.* at 1319-1321 & n.11 (explaining that the patent-in-suit is "directed to the use of well-known virus screening software within the telephone network," and supporting that conclusion with reference to how the "district court construed 'within the telephone network'").

Openet asserts (Pet. 24) that the Federal Circuit's Section 101 cases have produced "inconsistent results," but notably does not identify any inconsistency *regarding the question presented*. At most, Openet tries to contrast this case with others where particular construed claims were found *not* to be sufficiently inventive. But as indicated above (pp. 18-19), Openet has not presented any question regarding the application of Section 101 to the construed claims in this case, and such a question would merely be one seeking case-specific correction of the application of a correctly stated rule. *See* S. Ct. R. 10.

Nor do the additional cases Openet cites as supposedly "inconsistent with the decision below" (Pet. 24) hold that patent-eligibility should be confined to the unconstrued claims, without considering the specification. In *Electric Power Group, LLC* v. *Alstom S.A.*, the Federal Circuit concluded that "[n]othing in the claims, *understood in light of the specification*," was even "arguably inventive." 830 F.3d 1350, 1355 (Fed. Cir. 2016) (emphasis added). And the decision below thoroughly distinguishes *Digitech Image Technologies, LLC* v. *Electronics for Imaging, Inc.*, 758 F.3d 1344 (Fed. Cir. 2014), because Amdocs's '065 patent claim "is narrowly drawn to not preempt any and all generic enhancement of data in a similar system, and does not merely combine the components in a generic manner, but instead purposefully arranges the components in a distributed architecture to achieve a technological solution to a technological problem specific to computer networks." Pet. App. 28a. Openet may well disagree with the Federal Circuit's distinction between this case and *Digitech*, but that does not create a conflict in the Federal Circuit's case law.

3. Numerous other cases show that the Federal Circuit consistently assesses patent-eligibility based on the claims as construed in light of the specification. The Federal Circuit follows that approach, as it did here, to ensure that patent-eligibility is evaluated based on the claimed invention's actual scope. *E.g.*, *McRO, Inc.* v. *Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1313 (Fed. Cir. 2016) ("*As the specification confirms*, the claimed improvement here is allowing computers to produce 'accurate and realistic lip synchronization and facial expressions in animated characters' that previously could only be produced by human animators." (emphasis added)); *Enfish, LLC* v. *Microsoft Corp.*, 822 F.3d 1327, 1337 (Fed. Cir. 2016) ("*The specification also teaches* that the self-referential table functions differently than conventional database structures." (emphasis added)). The Federal Circuit also considers the specification when concluding that claims do *not* contain an inventive concept. *E.g.*, *In re TLI Commc'ns LLC Patent Litig.*, 823 F.3d 607, 614 (Fed. Cir. 2016) ("[T]he specification confirms that the telephone unit itself behaves as expected …."); *Ultramercial, Inc.* v. *Hulu, LLC*, 772 F.3d 709, 717 (Fed. Cir. 2014) ("[T]he specification makes clear that the facilitator can be a person and not a machine. Thus, nowhere does the '545 patent tie the claims to a novel machine." (citation omitted)). There is no intra-circuit conflict.[10]

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[10] Openet's attack on "certain judges" whom it contends are mounting a "continued effort … to make patent eligibility virtually automatic" is baseless. Pet. 20. Both judges in the panel majority have authored and joined opinions applying this Court's *Alice/Mayo* framework to hold patent claims ineligible under Section 101—opinions that likewise considered the claim construction or specification. *E.g.*, *Smartflash LLC* v. *Apple Inc.*, 680 F. App'x 977, 982, 984 (Fed. Cir. 2017) (joined by Newman, J.); *FairWarn-*

C. Giving The Claims The Same Meaning For Patent-Eligibility Purposes As For Other Purposes Is Sound Policy

Openet ventures a handful of policy reasons that it believes support its petition. The fact that no amicus has stepped forward to urge grant of the petition speaks volumes regarding the weakness of Openet's assertions. Indeed, none of Openet's policy arguments holds water.

1. Contrary to Openet's suggestion (Pet. 25), the fact that "patent eligibility can be and often is assessed before claim construction has even occurred" does not mean that the specification should be or is ignored. Rather, when a court analyzes patent eligibility on a motion to dismiss, it assesses the claims as if construed, in light of the specification, in favor of the patentee as the nonmoving party. *See, e.g.*, *Visual Memory LLC* v. *NVIDIA Corp.*, 867 F.3d 1253, 1261-1262 (Fed. Cir. 2017); *Content Extraction*, 776 F.3d at 1349. Similarly, when analyzing patent eligibility at summary judgment before claim construction has occurred, the court may assess the claims as if construed with reasonable inferences drawn in the patentee's favor or may formally construe the claims in tandem with the patent-eligibility decision. *See Ultramercial, Inc.* v. *Hulu, LLC*, 722 F.3d 1335, 1339 (Fed. Cir. 2013), *vacated on other grounds*, 134 S. Ct. 2870 (2014); *Bancorp Servs., LLC* v. *Sun Life Assur. Co.*, 687 F.3d 1266, 1274 (Fed. Cir. 2012). The specification is relevant regardless of when patent-eligibility is assessed.

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ing IP, LLC v. *Iatric Sys., Inc.*, 839 F.3d 1089, 1093, 1097-1098 (Fed. Cir. 2016) (joined by Plager, J.); *Versata Dev. Grp., Inc.* v. *SAP Am., Inc.*, 793 F.3d 1306, 1335 (Fed. Cir. 2015) (authored by Plager, J.); *Internet Patents Corp.* v. *Active Network, Inc.*, 790 F.3d 1343, 1348 (Fed. Cir. 2015) (authored by Newman, J.).

2. Also contrary to Openet's speculation (Pet. 3-4, 18-20), consideration of the specification does not inject greater uncertainty about what a patent protects. "[P]atent claims concern a small portion of th[e] public," typically resting "upon consideration by a few private parties, experts, and administrators of more narrowly circumscribed facts related to specific technical matters." *Teva*, 135 S. Ct. at 840. The small portion of the public concerned with patent claims knows that "it is fundamental that claims are to be construed in light of the specifications and both are to be read with a view to ascertaining the invention." *Adams*, 383 U.S. at 49. Indeed, in *Amdocs I*, Openet itself "point[ed] to portions of the specification in support of" its argument that the patent claims are limited to distributed architecture. 761 F.3d at 1338; *see supra* pp. 9-10.

3. Although district courts have called for "more clarity" regarding "how to distinguish[] software and computer patents that are valid under §101 from those that are not" (Pet. 28 (internal quotation marks omitted)), resolution of Openet's arguments will not provide guidance on that issue. The cases Openet cites do not suggest that courts need more clarity regarding whether the *Alice/Mayo* framework applies to the *claims as construed*. On the contrary, they recognize the relevance of the specification. *See Synchronoss Techs., Inc.* v. *Dropbox Inc.*, 226 F. Supp. 3d 1000, 1007 (N.D. Cal. 2016) ("The Court finds … that the challenged claims, viewed in light of their respective specifications, are not directed to an abstract idea, and thus cover patentable subject matter."); *Device Enhancement LLC* v. *Amazon.com, Inc.*, 189 F. Supp. 3d 392, 401 (D. Del. 2016) (*Alice/Mayo* analysis considers "the claims (informed by the specification)"). Nor do the cases that cite the decision below (Pet. 28) assess pa-

tent eligibility any differently. *See Verint Sys., Inc.* v. *Red Box Recorders Ltd.*, 226 F. Supp. 3d 190, 195 (S.D.N.Y. 2016) ("[C]ourts look both to the language of the claim as well as the language of the specification."); *Finjan, Inc.* v. *Blue Coat Sys., LLC*, No. 15-3295, 2016 U.S. Dist. LEXIS 173116, at *22 (N.D. Cal. Dec. 13, 2016) (Section 101 inquiry focuses on claim language but "the specification, as a helpful tool in understanding claim scope, is not to be ignored entirely").

As for Openet's cited commentaries, most do not address the role of the specification, and those that do actually defeat Openet's argument. For example, the article that Openet cites on the "inventive element" requirement (Pet. 19) explains that "the required creativity and other inventive concept should—if the applicant has provided the required written description of the invention—*be apparent from the disclosure in the application's specification*." Sarnoff, *Patent-Eligible Inventions After* Bilski*: History and Theory*, 63 Hastings L.J. 53, 111 (2011) (footnote omitted; emphasis added). Another article that Openet cites (Pet. 19) argues that "by reading in the particular technologies *described in the patent specification*," courts can construe a claim to be "limited to the particular software implementation that the patentee actually built or described," such that it "should not be an unpatentable 'abstract idea.'" Lemley, *Software Patents and the Return of Functional Claiming*, 2013 Wis. L. Rev. 905, 917, 962 (emphasis added). The commentaries do not support Openet's contention that courts ignore the claim construction or the specification when assessing patent eligibility.

4. Openet's effort to make patent claims mean different things in different contexts, *see supra* pp. 25-26, would undermine settled patent policy. *See, e.g.*, 5A *Chisum on Patents* §18.01, at 18-7 (2017) ("A fundamental

tenet of patent law is that a claim must be interpreted consistently for purposes of infringement and validity."). Having successfully argued that Amdocs's claims are limited in light of the specification's disclosure—a construction that served its effort to avoid infringement—Openet should not now be heard to argue that a court must ignore the very inventive elements reflected in that claim construction. The Federal Circuit was right to direct the Section 101 analysis to the claims as construed, since it is the claim construction that determines "what the words in the claim mean." *Markman*, 517 U.S. at 374 (internal quotation marks omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

S. CALVIN WALDEN
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

GREGORY H. LANTIER
JONATHAN A. BRESSLER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

MARK C. FLEMING
Counsel of Record
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
mark.fleming@wilmerhale.com

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