

No. 24-764

In the Supreme Court of the United States

HARRIS BRUMFIELD, TRUSTEE FOR ASCENT TRUST,
PETITIONER

v.

IBG LLC; INTERACTIVE BROKERS LLC

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

BRIEF IN OPPOSITION TO CERTIORARI

MICHAEL S. SOMMER
*Wilson Sonsini
Goodrich & Rosati, PC
1301 Ave. of the Americas
New York, NY 10019*

NATALIE J. MORGAN
NAOYA SON
*Wilson Sonsini
Goodrich & Rosati, PC
12235 El Camino Real
San Diego, CA 92130*

STEFFEN N. JOHNSON
Counsel of Record
KELSEY C. CATINA
*Wilson Sonsini
Goodrich & Rosati, P.C.
1700 K Street, N.W.
Washington, DC 20006
(202) 973-8800
sjohnson@wsgr.com*

Counsel for Respondents

QUESTIONS PRESENTED

1. Whether this Court should grant review to rule on the standard for obtaining relief from judgment in cases of “fraud,” Fed. R. Civ. P. 60(b)(3), where the district court correctly found, and the court of appeals affirmed, that there was “no fraud.” Pet. 7.

2. Whether this Court should grant review to rule on the standards for patent eligibility under Section 101 of the Patent Act, where the patents in suit recite using software run on generic computers used in ordinary ways to automate and display a longstanding business practice formerly done by hand, and the patent owner’s damages expert admits that its damages “would be the same” if it prevailed on the two patents invalidated under Section 101, or even on all four of its patents, rather than just the two that went to trial and produced a damages verdict below.

3. Whether this Court should grant review to exercise its “supervisory authority” under Rule 10(a), where the court of appeals issued a unanimous 57-page published opinion thoroughly addressing the issues, applying the very same standards that petitioner asks this Court to reapply, and affirming the district court’s own painstaking analysis.

RULE 29.6 STATEMENT

The parent companies of IBG LLC are IBG Holdings, LLC and Interactive Brokers Group, Inc. The parent company of Interactive Brokers LLC is IBG LLC.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
RULE 29.6 STATEMENT	ii
INTRODUCTION	1
STATEMENT.....	3
A. TT’s patents and IBG’s product.....	3
B. The district court proceedings	4
C. The court of appeals proceedings	8
REASONS FOR DENYING THE PETITION	9
I. Review should be denied on TT’s Rule 60(b) question.....	9
II. Review should be denied on TT’s Section 101 question.....	19
III. Review should be denied on TT’s “supervisory authority” question.....	27
IV. Alternative grounds for affirmance and the equities support denying review.....	33
CONCLUSION	33

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Alice Corp. Pty. Ltd. v. CLS Bank Int’l</i> , 573 U.S. 208 (2014)	2, 4-5, 19-20, 22, 24-25, 33
<i>Am. Axle & Mfgs., Inc. v. Neapco Holdings LLC</i> , 967 F.3d 1285 (Fed. Cir. 2020).....	30
<i>Am. Tel. & Tel. Co. v. United Computer Sys., Inc.</i> , 5 F.3d 534 (9th Cir. 1993)	14
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)	29
<i>Arcadia v. Ohio Power Co.</i> , 498 U.S. 73 (1990)	31
<i>Ass’n for Molecular Pathology v. Myriad Genetics, Inc.</i> , 569 U.S. 576 (2013)	19
<i>Assmann v. Fleming</i> , 159 F.2d 332 (8th Cir. 1947)	17
<i>Atchison, T. & S.F. Ry. Co. v. Barrett</i> , 246 F.2d 846 (9th Cir. 1957)	13, 18
<i>Baker v. City of McKinney</i> , 145 S. Ct. 11 (2024)	13
<i>Bilski v. Kappos</i> , 561 U.S. 593 (2010)	19, 23-24, 26
<i>Bunting v. Mellen</i> , 541 U.S. 1019 (2004)	31
<i>Cap Export, LLC v. Zinus, Inc.</i> , 996 F.3d 1332 (Fed. Cir. 2021).....	14

<i>Casey v. Albertson’s Inc.</i> , 362 F.3d 1254 (9th Cir. 2004)	14
<i>Cook Cnty. v. Texas</i> , 37 F.4th 1335 (7th Cir. 2022).....	18
<i>Cusano v. Klein</i> , 485 F. App’x 175 (9th Cir. 2012)	14
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005)	12
<i>De Saracho v. Custom Food Mach., Inc.</i> , 206 F.3d 874 (9th Cir. 2000)	15
<i>Diamond v. Chakrabarty</i> , 447 U.S. 303 (1980)	25-26
<i>Diamond v. Diehr</i> , 450 U.S. 175 (1981)	26
<i>Diaz v. United States</i> , 602 U.S. 526 (2024)	17
<i>Ericsson Inc. v. TCL Commc’ns Tech. Holdings Ltd.</i> , 955 F.3d 1317 (Fed. Cir. 2020).....	20-21
<i>Funk Bros. Seed Co. v. Kalo Co.</i> , 333 U.S. 127 (1948)	23
<i>Georgia v. Public.Resource.Org, Inc.</i> , 590 U.S. 255 (2020)	25
<i>Gottschalk v. Benson</i> , 409 U.S. 63 (1972)	23, 26
<i>Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.</i> , 586 U.S. 123 (2019)	26
<i>Hormel v. Helvering</i> , 312 U.S. 552 (1941)	31

<i>IBG LLC v. Trading Techs. Int’l, Inc.</i> , 757 F. App’x 1004 (Fed. Cir. 2019)	4, 26
<i>IBM Corp. v. Zillow Grp., Inc.</i> , 50 F.4th 1371 (Fed. Cir. 2022)	22
<i>Island Intell. Prop. LLC v. TD Ameritrade, Inc.</i> , 2024 WL 2207311 (Fed. Cir. May 16, 2024)	30
<i>Jenkins v. Marlowe</i> , 308 F. App’x 227 (9th Cir. 2009)	14
<i>Kamen v. Kemper Fin. Servs., Inc.</i> , 500 U.S. 90 (1991)	31
<i>Krock v. Elec. Motor & Repair Co.</i> , 339 F.2d 73 (1st Cir. 1964)	12-13
<i>Le Roy v. Tatham</i> , 55 U.S. (14 How.) 156 (1852)	25
<i>Lonsdorf v. Seefeldt</i> , 47 F.3d 893 (7th Cir. 1995)	18
<i>Mayo Collaborative Servs. v. Prometheus Labs., Inc.</i> , 566 U.S. 66 (2012)	19, 20, 23-25
<i>McNabb v. United States</i> , 318 U.S. 332 (1943)	28
<i>Microsoft Corp. v. AT&T Corp.</i> , 550 U.S. 437 (2007)	30
<i>O’Reilly v. Morse</i> , 56 U.S. (15 How.) 62 (1853)	24-25
<i>OIP Techs., Inc. v. Amazon.com, Inc.</i> , 788 F.3d 1359 (Fed. Cir.)	20-21
<i>Pac. & Arctic Ry. & Navigation Co. v. United Trans. Union</i> , 952 F.2d 1144 (9th Cir. 1991)	14

<i>Parker v. Flook</i> , 437 U.S. 584 (1978)	24, 26
<i>Pat. Rts. Prot. Grp., LLC v. Video Gaming Techs., Inc.</i> , 603 F.3d 1364 (Fed. Cir. 2010).....	32
<i>Patton v. First Light Prop. Mgmt., Inc.</i> , 808 F. App'x 506 (9th Cir. 2020)	15
<i>Philip Morris Prods. S.A. v. Int'l Trade Comm'n</i> , 63 F.4th 1328 (Fed. Cir. 2023)	32
<i>Rea v. United States</i> , 350 U.S. 214 (1956)	28
<i>Rutledge v. United States</i> , 230 F.3d 1041 (7th Cir. 2000)	13
<i>SAP Am., Inc. v. InvestPic, LLC</i> , 898 F.3d 1161 (Fed. Cir. 2018).....	20
<i>Singleton v. Wulff</i> , 428 U.S. 106 (1976)	32
<i>Tolan v. Cotton</i> , 572 U.S. 650 (2014)	29
<i>Trading Techs. Int'l, Inc. v. CQG, Inc.</i> , 675 F. App'x 1001 (Fed. Cir. 2017)	4
<i>Trading Techs. Int'l, Inc. v. IBG LLC</i> , 921 F.3d 1084 (Fed. Cir. 2019).....	20-22, 27
<i>Trading Techs. Int'l, Inc. v. IBG LLC</i> , 921 F.3d 1378 (Fed. Cir. 2019).....	20, 22, 27
<i>Trendsettah USA, Inc. v. Swisher Int'l, Inc.</i> , 31 F.4th 1124 (9th Cir. 2022).....	15
<i>Ultramercial, Inc. v. Hulu, LLC</i> , 772 F.3d 709 (Fed. Cir. 2014).....	20

<i>United States v. Hasting</i> , 461 U.S. 499 (1983)	28
<i>Universal Health Servs., Inc. v. United States</i> , 577 U.S. 1025 (2015)	32
<i>WesternGeco LLC v. ION Geophysical Corp.</i> , 585 U.S. 407 (2018)	6, 9, 30
<i>Worlds Inc. v. Activision Blizzard Inc.</i> , 2022 WL 726969 (Fed. Cir. Mar. 10, 2022)	30
Statutes and Constitutional Provision	
9 U.S.C. § 10.....	14
35 U.S.C. § 101.....	2, 4-5, 8, 19, 21-22, 26-27
35 U.S.C. § 271(a)	5-6, 30
35 U.S.C. § 271(f)(2).....	6
35 U.S.C. § 321.....	26
U.S. Const., Art. I, § 8, cl. 8.....	24
Rules	
Fed. Cir. R. 36.....	30
Fed. R. Civ. P. 56	27, 29
Fed. R. Civ. P. 59	6
Fed. R. Civ. P. 60	6, 17
Fed. R. Civ. P. 60(b)	1, 9-10, 15, 17
Fed. R. Civ. P. 60(b)(2).....	17
Fed. R. Civ. P. 60(b)(3).....	1, 9-15, 17-18, 33
S. Ct. R. 10	3, 11, 13, 21, 28-29, 32

Other Authorities

- A. Coney Barrett,
The Supervisory Power of the Supreme Court,
106 Colum. L. Rev. 324 (2006) 28
- Funk & Wagnalls*,
*The Practical Standard Dictionary of the
English Language* (1934) 17
- S. SHAPIRO, ET AL.,
SUPREME COURT PRACTICE (11th ed. 2019)..... 11
- Webster's*
*New Int'l Dictionary of the English
Language* (1925) 17

INTRODUCTION

Petitioner (TT) has not begun to justify certiorari. The petition raises no important question subject to a genuine circuit split. The questions that TT raises are fact-bound and plagued by vehicle problems. The courts below correctly resolved the merits of TT's Rule 60(b)(3) motion and the patent and damages questions at play. And the equities powerfully support bringing this 15-year-old litigation to an end.

TT's lead question presented rests on the premise that respondents (IBG) committed "fraud" in discovery and at trial by misrepresenting how its software tracks orders (Pet. i), but TT was improperly denied relief from the judgment because, the theory goes, the courts below read Rule 60(b)(3) to mean TT had to act diligently in discovering the alleged fraud. The most glaring problem with this argument is that, as TT itself notes, both courts below found "no fraud by IBG." Pet. 7. In other words, TT's first "question presented" is not in fact presented—it is a fact-bound appeal for error correction. Having found no fraud, the court below did not deepen a circuit split on Rule 60(b)(3)'s application in fraud cases. But examining TT's cases confirms that the alleged split is illusory, and TT ignores Rule 60(b)'s mandate that courts may grant relief from judgment, an extraordinary remedy, only "on just terms" not present here.

On its second question, TT argues both that 150 years of this Court's precedents recognizing exceptions to patent-eligibility for abstract ideas are "nonsensical," and that the court below simply misapplied settled precedent, requiring "clarification" of the law. Pet. 25, 34. Either way, review should be denied.

TT ignores the Court's explanations of the basis for the exceptions, which Congress in any event has consistently preserved. Since *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208, 223 (2014), moreover, the Court has repeatedly declined to review materially identical cases involving weak, "apply it with a computer"-style software patents that both this Court and a diverse array of Federal Circuit panels have long held patent-ineligible, regardless of the test applied. Most notably, there is "no material distinction" between the patents here and those invalidated in a related case (Pet. App. 26a), after which TT unsuccessfully sought review. Further, the Federal Circuit cases that TT says conflict with the ruling below did not apply Section 101, and TT admits its damages "would be the same" if it won on the patents here rather than (or in addition to) those that produced the verdict below, making review an academic exercise. Thus, even if the Court at some point wishes to take up Section 101, it should await a case involving a strong patent, where review will contribute meaningfully to the law and potentially affect the outcome.

Finally, the notion that this case is a candidate for the Court to exercise its "supervisory authority"—the subject of TT's third question—is frivolous. The court below issued a unanimous, 57-page opinion thoroughly addressing the issues, applying the very standards that TT asks this Court to reapply, and affirming the district court's own painstaking analysis. TT says the court below "ignored materially disputed facts," yet it cites no specific fact that was neglected—just "800 pages" of "evidence." Pet. 37. And TT's gripe about one (of several) grounds on which the court below affirmed the judgment ignores this Court's teaching that courts of appeals have discretion to

apply new rules to the cases before them. TT’s third question thus boils down to a fact-bound challenge asserting “misapplication of a properly stated rule of law.” S. Ct. R. 10. If such arguments warranted review, the Court would do little else.

Certiorari should be denied.

STATEMENT

A. TT’s patents and IBG’s product

This fifteen-year-old litigation involves four now-expired TT software patents. Two were invalidated at summary judgment, and two went to trial.

All four patents belong to the same family, share a specification, and are “directed to the electronic trading of commodities.” C.A. App. 63489-63510, 63611-63627, 63631-63652, 63656-63674. The patents recite “[a] method and system for reducing the time it takes for a trader to place a trade.” *Ibid.* Specifically, the patents claim a graphical user interface (GUI) that “can be implemented on any existing or future terminal or device,” using “any technique known to those skilled in the art.” *Ibid.*

The invalidated patents claimed a “non-static” price axis—one that automatically moves or recenters (C.A. App. 70797-70798, 70800-70802);¹ the patents that went to trial, in contrast, claimed a “static” price axis—one that moves only in response to manual commands (Pet. App. 4a-5a).² The static price axis differentiates the patents: it might keep traders from

¹ U.S. Patent Nos. 7,676,411 and 7,813,996 (the “non-static patents”).

² U.S. Patent Nos. 6,772,132 and 6,766,304 (the “static patents”).

missing the intended price, which can otherwise happen when the price moves as a trader clicks to place a trade. Long before electronic trading, traders at prominent stock exchanges such as New York and Tokyo placed trades “by hand,” using similar “[p]en-and-paper” methods. Pet. App. 94a.

IBG sells the Trader Workstation (TWS) platform, which includes 38 software trading tools and is available in Europe, Asia, and the Americas. C.A. App. 88457. TT accuses one TWS trading tool, BookTrader, of infringement. C.A. App. 63419-63420, 63427-63428. To obtain a copy of BookTrader, one must download the TWS platform from IBG’s website. C.A. App. 88457. Traders typically use a mouse to place orders via BookTrader. C.A. App. 88457.

B. The district court proceedings

After years of discovery, IBG sought summary judgment, arguing that the non-static patent claims were patent-ineligible under 35 U.S.C. § 101, as they recited only the use of generic computers, used in ordinary ways, to automate conventional steps of a fundamental economic practice. C.A. App. 67392, 67401-67406. In response, TT cited two unpublished opinions, one involving different (though related) patents (*IBG LLC v. Trading Techs. Int’l, Inc.*, 757 F. App’x 1004 (Fed. Cir. 2019) (*IBG I*)), and one involving “covered business method” review (*Trading Techs. Int’l, Inc. v. CQG, Inc.*, 675 F. App’x 1001 (Fed. Cir. 2017)). C.A. App. 70761-70777. Neither decision addressed Section 101.

The district court granted IBG summary judgment. C.A. App. 12-16. At *Alice* step one, the court held that the non-static patents were “directed to the abstract idea of placing orders on an electronic ex-

change.” Pet. App. 103a. The court was “hesitant to rely” on TT’s non-precedential cases “particularly in light of subsequent Federal Circuit decisions finding related TT patents ineligible under § 101.” *Ibid.* TT did not explain how, in contrast to the static patents, the non-static patents, “which include price axes that automatically move, solve[d] the missing-the-price problem.” Pet. App. 102a (citations omitted). At *Alice* step two, the court held that TT “merely claim[ed] a rearrangement of market information known to be displayed in a different format,” which was “not innovative.” Pet. App. 104a. In so holding, the court considered “the underlying evidence itself to glean the material facts” (Pet. App. 85a n.1) and relied principally on the patents’ own disclosures (Pet. App. 103a-104a).

Before the two static patents went to trial, IBG filed a *Daubert* motion to exclude portions of the opinion of TT’s damages expert, Catharine Lawton. C.A. App. 85127-85150. Three of Lawton’s four damages theories captured TWS users worldwide in her royalty base. IBG sought to exclude those theories, contending that the territorial limitation of 35 U.S.C. § 271(a), which prohibits making, using, offering to sell, and selling patented inventions only “within the United States,” barred recovering foreign damages. C.A. App. 85134-85135, 85143.

The district court largely sided with TT, allowing Lawton to present a royalty base including *all* foreign users. Pet. App. 80a-83a. There was just one exception—the court barred her theory based on “making’ [BookTrader] in the United States with foreign damages” (the “*WesternGeco* theory”), which included foreign use “premised on a theory of foreseeable foreign consequences of infringement.” Pet. App. 20a, 82a.

The court rejected TT's position that this issue was governed by the framework of *WesternGeco LLC v. ION Geophysical Corp.*, 585 U.S. 407 (2018), explaining that *WesternGeco* involved § 271(f)(2), which was “of limited value” (Pet. App. 81a) because, unlike § 271(a), it prohibits “the act of exporting components” (*WesternGeco*, 585 U.S. at 415).

At trial, Lawton testified about both domestic and foreign damages, including *all* foreign users in her royalty base. IBG's damages expert took a different approach, using a per-trade royalty instead of a per-user royalty. C.A. App. 102577-102580. He presented damages calculations for both foreign and domestic damages. C.A. App. 102578. The jury adopted IBG's suggested per-trade royalty and limited its award to domestic damages. C.A. App. 93222-93227.

TT sought a new trial under Federal Rules of Civil Procedure 59 and 60. C.A. App. 93235. At first, TT alleged that IBG had committed misconduct related to how the accused software counted orders by “not mak[ing] TT aware of the [Hot Key Framework] until near the very end of trial.” C.A. App. 93233. TT also complained that, “for the first time” at trial, IBG's in-house coding witness revealed that “the [Hot Key Framework] allowed IB to track orders ‘attributable to trading tools, not order entry tools.’” C.A. App. 93239 (emphasis omitted). Finally, TT accused IBG's witnesses of lying. C.A. App. 93241. The supporting declaration of Harris Brumfield, then TT's majority owner, claimed he could “back into how IB [was] tracking orders/trades,” describing a dizzying system of “parent,” “children,” and “grandchildren” trading tools. C.A. App. 97513.

IBG denied any discovery misconduct (C.A. App. 97788-97792) or false testimony (C.A. App. 97792-97796), noting that it produced the Hot Key Framework code 1.5 years *before* trial and that its in-house coding witness discussed it in his deposition (C.A. App. 97788). IBG also submitted a confirming declaration from an outside coding expert (C.A. App. 97806, 98653-98655) and another from its in-house coding witness explaining that because BookTrader has its own “order entry mechanism,” and thus is “self-contained,” how IBG tracks tools that lack their own order entry mechanism was “completely irrelevant” to how trades are counted (C.A. App. 98646-98647).

On reply, TT dramatically shifted its “fraud” theory, and Brumfield submitted a second (contradictory) declaration. TT’s reply barely mentioned the Hot Key Framework. Instead, it newly argued that IBG had “always led Plaintiff to believe that it was tracking orders and trades in TWS by what tools the orders are submitted from,” when in reality IBG was tracking orders based on “the order originators.” C.A. App. 103487.

The district court denied TT’s motion, finding that TT’s own coding expert “admits that prior to trial, TT knew of and understood ‘the term ‘hotkey.’”” C.A. App. 35. “All of the materials Brumfield relied on” to perform his post-trial analysis, the court found, “were produced prior to trial and admitted into evidence at trial.” C.A. App. 36. “It is unclear,” the court thus continued, “why this investigation could not have been performed earlier” and used to “cross[] IB’s witnesses.” *Ibid.* In sum, “TT fail[ed] to demonstrate by clear and convincing evidence that IB’s failure to produce the hot key code, as opposed to its own failure to

ferret out information during discovery, prevented it from fully and fairly litigating its case.” C.A. App. 37.

The court also rejected TT’s argument that IBG’s witnesses had testified falsely, finding no evidence that IBG “does not track BookTrader orders based on order entry tool,” or “that IB’s misconduct, as opposed to [TT’s] own actions, prejudiced TT.” C.A. App. 38-41. As TT concedes, “[t]he district court denied this motion” after finding “no fraud by IBG.” Pet. 7.

C. The court of appeals proceedings

The court of appeals affirmed. On the fraud issue, it stated that the district court’s decision was reviewed for “abuse of discretion” and that a new trial was “an extraordinary remedy” “granted only in exceptional circumstances.” Pet. App. 55a-56a (citation omitted). Noting that TT’s argument “reduce[d] to” asserting that IBG “failed to give TT enough information about how IBG was counting trades,” the court found “no clear error” in the district court’s “careful evaluation of the evidence” (Pet. App. 56a-57a & n.11), and it affirmed the finding of “no fraud by IBG” (Pet. 7). The court also emphasized that “[i]t is institutionally important that parties generally be held to the duty to conduct needed investigations of facts before trial,” finding “no abuse of discretion in the district court’s denial of TT’s post-trial motion.” Pet. App. 57a (citation omitted).

On Section 101, the court found “no legally material facts in dispute” and held that TT’s non-static patents “are directed to abstract ideas” and “add nothing (no inventive concept) that transforms them into claims to eligible subject matter.” Pet. App. 25a. The court saw “no material distinction between” this case and its “two precedential decisions in cases involving

four other TT patents” that reached “the same conclusion.” Pet. App. 25a-26a. The court also stressed, however, that “[t]he principles that control here are amply supported by numerous other precedents.” Pet. App. 28a.

Finally, in affirming that Lawton’s testimony was “properly excluded,” the court held it “dispositive” that her excluded theory did not focus on any infringement relevant to that theory. Pet. App. 32a, 49a-52a. In other words, regardless of whether the *WesternGeco* framework applied, “Lawton’s proposal [wa]s legally insufficient, even under the *WesternGeco* framework,” as “it d[id] not start from an act of ‘infringement.’” Pet. App. 52a. “That deficiency suffice[d] for affirmance.” *Ibid.*

REASONS FOR DENYING THE PETITION

I. Review should be denied on TT’s Rule 60(b) question.

TT’s first question presented is plagued by myriad problems, each of which independently warrants denying review. First, TT admittedly seeks certiorari “to correct the errors” allegedly made below on a fact-bound issue lacking any importance beyond this case. Pet. 4. Even if that question were otherwise certworthy, it rests on the factual premise that IBG committed “fraud” (Pet. i)—a premise correctly rejected by both courts below (Pet. 7).

Second, having found no fraud, neither court below decided whether, in cases that *do* involve fraud, Rule 60(b)(3) movants must act diligently to uncover it. TT’s petition thus rests on not only a false *factual* premise, but a false *legal* premise. It follows that this case provides no occasion to address TT’s alleged circuit split, even if it were real. But it is not. TT’s only

Ninth Circuit case is an unpublished ruling that applied the test for vacating an award under the Federal Arbitration Act, and a host of Ninth Circuit cases applying Rule 60(b)(3) impose no diligence requirement. Regardless, it would be silly to review the Federal Circuit’s alleged misapplication of *Seventh* Circuit precedent when TT’s cases confirm that in cases that (unlike this one) actually involve fraud, the Seventh Circuit applies TT’s preferred rule.

Third, not only did the courts below correctly find that respondents committed no fraud, but TT ignores language in Rule 60(b), applicable to all six of its subparts, that directs district courts to grant relief only “on just terms.” If this record had shown fraud, that language would have granted the district court broad discretion to consider equitable factors like diligence—particularly where, as here, one side claims to have been misled in the very process of discovery and trial overseen by the judge herself, who personally saw all the documents and heard every witness.

A. While numbered as one question, TT’s leading question presented in fact tees up two: “[1] [w]hether the lower courts abused their discretion by denying the meritorious Rule 60(b)(3) motion, *and* [2] whether Rule 60(b)(3) requires a showing that a moving party was diligent in uncovering fraud, misrepresentation, or misconduct to obtain relief from a judgment?” Pet. i (emphasis added). Those questions are distinct, and only the second raises a legal issue alleged to have split the circuits. But both rest on the premise that IBG committed “fraud” in disclosing how its product counts trades. Pet. 16 (the courts below “err[ed] and abused their discretion [in] ruling” that IBG committed no “fraud”). And since the district court found otherwise (Pet. App. 59a-76a) and the Federal Circuit

affirmed (*id.* at 56a-57a), TT is making a naked appeal for error correction on a case-specific factual issue. Pet. 4 (“This Court should use this case to correct the errors made by the district court in denying, and the Federal Circuit in affirming, the Petitioner’s meritorious Rule 60(b)(3) motion.”). Under Rule 10, that is not the stuff of certiorari. S. SHAPIRO, ET AL., SUPREME COURT PRACTICE 5-45 (11th ed. 2019) (“error correction” is “outside the mainstream of the Court’s functions”).

TT acknowledges that the district court gave two independent reasons for its Rule 60(b)(3) ruling, both affirmed below: “The district court denied this motion *based on no fraud by IBG and TT’s* lack of due diligence, and the CAFC affirmed *on both fronts.*” Pet. 7 (emphasis added). Yet TT never grapples with the significance of the finding of “no fraud.” Granted, TT spends five pages relitigating that finding in excruciating (one-sided) detail. Pet. 16-21. But that only confirms that this Court cannot answer the question presented in TT’s favor without reversing a case-specific factual finding on which every judge below agreed.

As explained below (at 15-17), the record shows that IBG committed no fraud. But even if that were debatable, the need to resolve a disputed factual issue before the question presented could be reached confirms that certiorari should be denied. Review is not warranted where “the asserted error consists of erroneous factual findings.” S. Ct. R. 10. That only makes sense because, if (as is likely) the Court agrees with all four judges below that there was no fraud, it cannot decide “whether Rule 60(b)(3) requires a showing that a moving party was diligent in uncovering fraud” (Pet. i) and must dismiss the petition as

improvidently granted. Thus, this case is a terrible vehicle to take up the meaning of Rule 60(b)(3).

B. Because there is no fraud, TT’s alleged “circuit split” over the meaning of Rule 60(b)(3) (Pet. 21) is not implicated, even assuming it exists. Having found no fraud, neither court below held that Rule 60(b)(3) movants must act diligently to uncover fraud, where it does exist. They viewed this case as raising routine allegations of misconduct in discovery and evidence presentation at trial, and they found that it was TT’s “own actions”—in particular, the “shortcomings in its own trial preparation,” and not “misconduct” by IBG—that caused TT’s “alleged inability to fully and fairly litigate its case.” Pet. App. 75a-76a. One searches the opinions below in vain for any suggestion that Rule 60(b)(3) requires parties to exercise reasonable diligence in uncovering *fraud*. And since this Court is “a court of review, not of first view” (*Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)), there is no basis for the Court to address that question in the first instance.

Regardless, TT’s alleged circuit split is illusory. TT says “the majority of circuits” follow its view (Pet. 21), but its alleged split involves at most two circuits. The court below applied Seventh Circuit precedent, and TT’s only other case that actually mentions Rule 60(b)(3) comes from the Ninth. Pet. 21.³ Thus, even

³ *Krock v. Elec. Motor & Repair Co.*, 339 F.2d 73 (1st Cir. 1964) (Pet. 23), never mentions Rule 60(b)(3), and the language cited by TT is dictum. The court there “express[ed] no opinion” on whether “failure to pursue” various “pre-trial discovery procedures” was culpable “negligence on the part of counsel” and ultimately found “no sufficient merit”

taken at face value, the alleged split would not justify review. *E.g.*, *Baker v. City of McKinney*, 145 S. Ct. 11, 13 (2024) (Mem.) (statement of Sotomayor, J., joined by Gorsuch, J., respecting denial of certiorari) (calling for “further percolation in the lower courts prior to this Court’s intervention” where “[o]nly a few Courts of Appeals” are split).

Second, although TT says the Federal Circuit’s decision “diverges from Seventh Circuit law, which the Federal Circuit was required to apply” on this procedural issue (Pet. 21), TT also notes that “the Seventh Circuit has unequivocally held that there is no diligence requirement under Rule 60(b)(3) for discovering fraud” (Pet. 22). In fact, TT asserts that the case cited by the court below, *Rutledge v. United States*, 230 F.3d 1041 (7th Cir. 2000) (Pet. App. 56a-57a), “required diligence in view of newly discovered evidence under Rule 60(b)(2)—not fraud or misrepresentation under Rule 60(b)(3).” Pet. 10.

The Federal Circuit’s citation of *Rutledge* confirms that the court did not view this as a fraud case. But regardless, TT’s cases demonstrate that the Seventh Circuit would likely agree with TT’s position in future cases. Review is not warranted to correct the alleged misapplication of another circuit’s procedural law, especially when “[d]iscretion is peculiarly and properly left in the trial court in matters of this kind.” See *Atchison, T. & S.F. Ry. Co. v. Barrett*, 246 F.2d 846, 849 (9th Cir. 1957); *infra* at 17-18; see also S. Ct. R. 10 (“certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law”).

in the defendant’s contention that the plaintiff had been “untruthful.” *Krock*, 339 F.2d at 74-75.

TT also misrepresents the other side of the alleged split. TT cites just one Ninth Circuit case—an unpublished decision that mentions Rule 60(b)(3), but involves a motion to vacate an arbitration award governed by the Federal Arbitration Act, 9 U.S.C. § 10. See *Am. Tel. & Tel. Co. v. United Computer Sys., Inc.*, 5 F.3d 534, at *4 (9th Cir. 1993). The same is true of the case that *United Computer* cited as establishing the diligence requirement, *Pac. & Arctic Ry. & Navigation Co. v. United Trans. Union*, 952 F.2d 1144 (9th Cir. 1991). And although the latter case too mentions Rule 60(b)(3), it *relies on* the test that governs vacatur of arbitration awards *under the FAA*—which “require[s] that fraud be proven by clear and convincing evidence, not be discoverable by due diligence before or during the proceeding, and be materially related to the submitted issue.” *Pac. & Arctic Ry.*, 952 F.2d at 1148 (citations omitted). The underlying Ninth Circuit authority in this area thus arises under a different legal framework.

Although the Federal Circuit in *Cap Export, LLC v. Zinus, Inc.*, 996 F.3d 1332, 1338-1339 (Fed. Cir. 2021) (Pet. 21), cited a published non-arbitration case from the Ninth Circuit that says Rule 60(b)(3) requires diligence (*Casey v. Albertson’s Inc.*, 362 F.3d 1254, 1260 (9th Cir. 2004)), the court in *Zinus* simply cited *Pacific’s* discussion of the arbitration test without analysis—probably because the court quickly found (as here) that there was no fraud, making any statement requiring diligence in fraud cases dictum. *Id.* at 1339. Other Ninth Circuit cases cite *Casey* for the Rule 60(b)(3) standard *without* mentioning any diligence requirement. *E.g.*, *Cusano v. Klein*, 485 F. App’x 175, 179 (9th Cir. 2012) (Mem); *Jenkins v. Marlowe*, 308 F. App’x 227, 227-228 (9th Cir. 2009).

More generally, numerous other Ninth Circuit decisions, both published and unpublished, describe the Rule 60(b)(3) standard without reciting any diligence requirement. *E.g.*, *Trendsettah USA, Inc. v. Swisher Int'l, Inc.*, 31 F.4th 1124, 1136 (9th Cir. 2022); *De Saracho v. Custom Food Mach., Inc.*, 206 F.3d 874, 880 (9th Cir. 2000); *Patton v. First Light Prop. Mgmt., Inc.*, 808 F. App'x 506, 507 (9th Cir. 2020) (Mem). Thus, it is unclear even that the Ninth Circuit imposes a diligence requirement under Rule 60(b)(3), and it will be time enough to consider the issue if the Ninth Circuit squarely so holds in a case that actually involves fraud and otherwise warrants review.

C. Finally, the decision below is plainly correct on the merits. The record confirms that the district court did not err (much less clearly) in finding no fraud, and language in Rule 60(b) that TT ignores confirms that, even if there had been fraud, the district court could consider whether TT acted diligently.

As to the facts, TT claims that “IBG’s representation about tracking orders and trades by what tools submit the orders was false,” and that it learned this only “[a]fter trial.” Pet. 17. But the judge who oversaw discovery and heard every trial witness correctly rejected that view after painstakingly reviewing the record. Pet. App. 59a-76a. As she found, TT not only “fail[ed] to present clear and convincing evidence that [1] IB does not track BookTrader orders based on order entry tool”—and thus “to demonstrate that IB presented false testimony”—but also “[2] that IB’s misconduct, as opposed to its own actions, prejudiced TT.” Pet. App. 76a. The court cited extensive support for these findings, including:

- “TT knew about the hot key framework prior to trial,” and respondents’ “trial [testimony] is entirely consistent with TT’s understanding of hot keys prior to trial”;
- any “information gap” was due to “[TT’s] own failure to ask adequate questions during discovery”;
- Brumfield’s “hundreds of hours” of “post-trial” analysis could have been “performed earlier,” as “the materials [he] relied on were produced prior to trial and admitted into evidence”;
- “[n]othing prevented Brumfield from comparing IB’s assertion that Accumulate/Distribute is its most valuable tool with the stat reports prior to trial”;
- “TT cannot claim it had no reason to question IB’s assertion that it accurately tracks orders,” as “TT vehemently challenged the accuracy of IB’s transaction data” and “could have crossed IB’s witnesses about this” too; and
- “[a]t best, there is conflicting expert testimony” on this issue, “which is insufficient to satisfy the clear and convincing evidence standard.”

Pet. App. 68a-72a.

Not surprisingly, the court below found “no clear error” in the district court’s “careful evaluation of the evidence available to TT through discovery,” in “its determination that IBG did disclose the key information that TT alleged was withheld,” or in its “rejection of TT’s assertion that IBG sponsored false testimony.” Pet. App. 56a & n.11. As the court affirmed, “TT had ample reason and opportunity before trial to uncover the now-asserted problems with IBG’s evi-

dence that TT says it uncovered only through its post-trial investigation,” and parties should “generally be held to the duty to conduct needed investigations of facts before trial.” Pet. App. 57a.

As to the law, the Federal Rules of Civil Procedure must be read “as a whole” (*Diaz v. United States*, 602 U.S. 526, 537 (2024)), but TT ignores the rest of Rule 60(b). TT focuses on two subparts of the rule in isolation; its entire argument is that, unlike Rule 60(b)(2), Rule 60(b)(3) does not ask whether the alleged fraud was discoverable with “reasonable diligence” “in time to move for a new trial.” Pet. 22. But as the balance of Rule 60(b) confirms, all six of the rule’s subparts are available only on “just terms.”

That expansive equitable language gives courts discretion to consider factors like diligence. *Assmann v. Fleming*, 159 F.2d 332, 336 (8th Cir. 1947) (“[Rule 60(b)(3)] relief is equitable in character and must be administered upon equitable principles.”).⁴ That is especially so where, as here, the claim is that one party misled another in discovery, but the record

⁴ Leading dictionaries from the era of the Rule’s adoption in 1937 define “just” in relevant part as “equitable in action or judgment; fair; impartial” (*Webster’s New Int’l Dictionary of the English Language* 1174 (1925)) or “1. Doing or actuated by justice; righteous; upright; honest; 2. Based on or conforming to the principles of justice; impartial; legitimate. * * * 4. Consistent with what is proper or reasonable.” (*Funk & Wagnalls, The Practical Standard Dictionary of the English Language* 628 (1934)). Originally, Rule 60(b)(3) authorized relief from judgment “upon such terms as are just.” In 2007, that language was amended to say simply on “just terms,” a change “intended to be stylistic only.” Fed. R. Civ. P. 60, Advis. Comm. Notes.

shows that the supposedly withheld materials were both “produced prior to trial and admitted into evidence.” Pet. App. 69a. Whether to grant Rule 60(b)(3) relief rests “particularly [within] the discretion of the trial judge who ‘presided in the litigation in which the judgment (now alleged as fraudulent) was entered.’” *Barrett*, 246 F.2d at 849. And in the Seventh Circuit, courts considering Rule 60(b)(3) motions “*must* weigh the competing policy interest of the finality of judgment against fundamental fairness in light of all of the facts.” *Lonsdorf v. Seefeldt*, 47 F.3d 893, 897 (7th Cir. 1995) (emphasis added).

The district judge here oversaw the entire case, heard every trial witness, and in exercising her discretion found that “TT vehemently challenged the accuracy of IB’s transaction data at trial,” but failed “to ask adequate questions during discovery” or to “cross[] IB’s witnesses about this” at trial. Pet. App. 69a, 71a. Under the Seventh Circuit’s “extremely deferential abuse of discretion standard”—which TT does not challenge, and “is met ‘only when no reasonable person could agree with the decision to deny relief’”—there was no abuse of discretion. *Cook Cnty. v. Texas*, 37 F.4th 1335, 1344 (7th Cir. 2022); see also *Barrett*, 246 F.2d at 850 (“Our research fails to disclose a single case in [the Ninth] Circuit where this Court has reversed a trial judge on a matter of this kind.”) Thus, the court below rightly held that this case presents no “exceptional circumstances” warranting the “extraordinary remedy” of Rule 60(b)(3) relief. Pet. App. 56a (citations omitted).

II. Review should be denied on TT's Section 101 question.

Review of TT's second question presented is equally unwarranted. TT appears to launch a broad attack on exceptions to patentability that go back "more than 150 years" and have been repeatedly preserved by Congress and reaffirmed by this Court, including several times since 2010. *Alice*, 573 U.S. at 216; see *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 589 (2013); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 70 (2012); *Bilski v. Kappos*, 561 U.S. 593, 601 (2010). We say "appears" because TT does not ask that any decisions be overruled, and TT at times seems to say the court below simply misapplied precedent, requiring "clarification" of the law. Pet. 34. Generally, however, TT says Section 101's exceptions are "fundamental[ly] flaw[ed]," "wholly groundless," and "nonsensical." Pet. 25, 28, 32.

Either way, review should be denied. This Court has repeatedly declined to review similar Section 101 cases; insofar as TT's petition can be read narrowly, it simply claims that the Federal Circuit misapplied settled law—in a case involving a weak "apply it on a computer" patent that makes this case a poor vehicle to consider Section 101; TT admits that "the reasonable royalty would be the same" regardless of which of its patents are infringed (C.A. App. 94113), making review of the Section 101 issues an academic exercise; TT ignores this Court's explanations of the basis for the exceptions, which Congress in any event has blessed; and TT's cases supposedly reflecting an intra-circuit split over the "same claims" (Pet. 34) are not Section 101 cases.

A. Since *Alice* and *Mayo*, this Court has denied dozens of petitions asking the Court to clarify, modify, or upend those decisions. More importantly, many cases on that long list of denials—including five cited by the court below⁵—invalidated claims much like those here.

Most notably, the Court denied certiorari in *IBG II*, a closely related case that arose out of this one and involved essentially identical patent claims. “Here,” as there, TT’s patents claim the “receipt and display of information” to “engage in the fundamental economic practice of placing an order.” Pet. App. 26a. Here, as there, the claims do not “call[] for anything but preexisting computers and displays, programmed using techniques known to skilled artisans.” *Ibid.* Here, as there, the “purportedly new arrangement of generic information” is “directed to the abstract idea of graphing bids and offers.” *Ibid.* (quoting *IBG II*, 921 F.3d at 1093). Here, as there, TT claims no improvement in computer functionality, only “automation of manual processes using generic computers.” Pet. App. 26a-27a. Here, as there, “receiving market

⁵ *Trading Techs. Int’l, Inc. v. IBG LLC*, 921 F.3d 1084 (Fed. Cir. 2019) (*IBG II*), cert. denied, 140 S. Ct. 954 (2020); *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709 (Fed. Cir. 2014), cert. denied, 576 U.S. 1057 (2015); *OIP Techs., Inc. v. Amazon.com, Inc.*, 788 F.3d 1359 (Fed. Cir.), cert. denied, 577 U.S. 1050 (2015); *SAP Am., Inc. v. InvestPic, LLC*, 898 F.3d 1161 (Fed. Cir. 2018), cert. denied, 140 S. Ct. 27 (2019); *Ericsson Inc. v. TCL Commc’ns Tech. Holdings Ltd.*, 955 F.3d 1317 (Fed. Cir. 2020), cert. denied, 141 S. Ct. 2624 (2021). TT received extra time to seek certiorari in *Trading Techs. Int’l, Inc. v. IBG LLC*, 921 F.3d 1378 (Fed. Cir. 2019) (*IBG III*), but filed no petition (see No. 19A95).

information” and “displaying [it] as indicators along a scaled price axis is well-understood, routine, conventional activity that does not add something significantly more to the abstract idea.” Pet. App. 27a (quoting *IBG II*, 921 F.3d at 1093).

Not surprisingly, the court below saw “no material distinction” between this case and *IBG II* (Pet. App. 26a), confirming that here, as there, certiorari should be denied. Indeed, the only thing that has changed since *IBG II* is that the Federal Circuit has decided scores of similar cases, precipitating even more denials of certiorari. See n.5, *supra*; *OIP Techs.*, 788 F.3d at 1362 (collecting cases); *Ericsson*, 955 F.3d at 1327 (such claims have “repeatedly” been held “unpatentable”). There is no basis for a different result here.

B. Insofar as TT is advocating a narrower position that Section 101 should invalidate less patents in this field of technology, that is in substance an argument that the court below misapplied precedent, which does not satisfy Rule 10. But this case is an especially poor vehicle to break from the practice of allowing Section 101 doctrine to develop in the lower courts.

First, TT’s damages expert admitted below that, whichever “one or more than one of the Patents-in-Suit” were infringed, “the reasonable royalty would be the same.” C.A. App. 94113 (report); accord Dkt. No. 1668-5, Ex. CC, at 43 (N.D. Ill.) (deposition). And because TT has no distinct damages theory for these patents than the theory it already presented to the jury below, which already determined the appropriate royalty rate, nothing would change if this Court reviewed the Section 101 question and reversed, and TT then prevailed at trial.

Second, TT's patents recite using software run on generic computers to automate and display a longstanding business practice formerly done by hand. *Supra* at 4. That is exactly the type of “apply it with a computer”-style claim that this Court and the Federal Circuit have long held patent-ineligible, regardless of the test applied. *Alice*, 573 U.S. at 223.

Alice sharply distinguished between claims that “purport to improve the functioning of the computer itself,” which can satisfy Section 101, and claims that “amount to ‘nothing significantly more’ than an instruction to apply [an] abstract idea” using “generic computer[s],” which cannot. 573 U.S. at 225-226. TT criticizes the Federal Circuit for applying that distinction to invalidate “claims that do not purport to ‘improve the functioning of the computer itself.’” Pet. 29. But the distinction originated with *Alice*, and “numerous other precedents, cited in or postdating” *IBG II* and *III* apply it to invalidate claims like TT's. Pet. App. 28a. The court below cited ten such published decisions (Pet. App. 28a), issued by a wide variety of Federal Circuit panels, “repeatedly” invalidating “claims ‘directed to collection of information, comprehending the meaning of that collected information, and indication of the results, all on a generic computer network operating in its normal, expected manner.’” *IBM Corp. v. Zillow Grp., Inc.*, 50 F.4th 1371, 1378 (Fed. Cir. 2022).

That TT has no argument that can satisfy existing doctrine may explain why it attacks 175 years of precedent. But regardless, the ruling below was unanimous and TT's en banc petition did not even produce a call for a vote. Pet. App. 106a. If and when the Court concludes that a Section 101 case warrants review, it should choose a case involving a far strong-

er patent, not one that would fail any conceivable test, and a case in which reversal would potentially change the outcome.

C. TT asserts no conflict between the decisions below and this Court's precedents. Rather, TT admits that "[t]his Court has long held that the text of § 101 inherently excludes from patent protection certain subject matter," while insisting the Court has never considered whether these exceptions to eligibility satisfy "the language of the Patent Act." Pet. 26, 24. TT is mistaken; and even if it were correct, Congress has consistently preserved this Court's precedents.

TT's own cases confirm that this Court has not ignored Section 101's text. For example, *Gottschalk v. Benson*, 409 U.S. 63 (1972), and *Funk Bros. Seed Co. v. Kalo Co.*, 333 U.S. 127 (1948), teach that the settled exceptions to patentability further Section 101's "new and useful" language, which TT acknowledges (Pet. 27-28) is important to a properly limited statute. See *Benson*, 409 U.S. at 67 ("If there is to be invention from such a discovery, it must come from the application of the law of nature to a new and useful end." (quoting *Funk Bros.*, 333 U.S. at 130)); see also *Bilski*, 561 U.S. at 601-602 (the exceptions are consistent with the "new and useful" text).

TT says novelty and the like should exclusively be the domain of Sections 102 and 103. Pet. 29. Yet there is nothing incongruous about the idea that Section 101 calls for a threshold inquiry into whether a patent claims, say, an abstract idea that has long existed, and thus is not new, while Sections 102 and 103 require detailed analysis of claims in light of the prior art. These inquiries "might sometimes overlap," but "to shift the patent-eligibility inquiry entirely to

these later sections risks creating significantly greater legal uncertainty, while assuming that those sections can do work that they are not equipped to do.” *Mayo*, 566 U.S. at 90; see *Parker v. Flook*, 437 U.S. 584, 592-593 (1978) (rejecting arguments that the Court’s “approach improperly imports into § 101 the considerations of ‘inventiveness’” embodied in §§ 102 and 103).

TT also ignores the other grounds that this Court has provided for recognizing exceptions to patentability. For example, citing the Constitution’s Patent and Copyright Clause—which directs Congress “[t]o promote the Progress of Science and useful Arts” (U.S. Const., Art. I, § 8, cl. 8)—*Alice* explained that exceptions to patentability for “abstract ideas” and the like reflect concern that “[m]onopolization of those tools through the grant of a patent might tend to impede innovation more than it would tend to promote it, thereby thwarting the primary object of the patent laws.” 573 U.S. at 216 (quoting *Mayo*, 566 U.S. at 71). Other decisions agree. *E.g.*, *Bilski*, 561 U.S. at 612 (allowing that process patent on risk-hedging “would pre-empt use of this approach in all fields”). This Court has been expressing such concerns for nearly 175 years. See *Mayo*, 566 U.S. at 71-73 (reviewing precedents).

O’Reilly v. Morse, 56 U.S. (15 How.) 62 (1853), for example, held that similar language in the Patent Act of 1836 could not be read to validate Samuel Morse’s expansive claim to “electro-magnetism, however developed, for making or printing intelligible characters, signs, or letters, at any distances.” *Id.* at 112. “[T]he act of Congress [could] not be * * * construed” to violate the rule “that a principle was not patentable,” as that would “shut[] the door against inventions

of other[s]” and allow Morse alone “to avail himself of new discoveries in the properties and powers of electro-magnetism.” *Id.* at 120, 115, 113. Likewise, *Le Roy v. Tatham*, 55 U.S. (14 How.) 156, 175 (1852), held that “[a] principle, in the abstract, is a fundamental truth; an original cause; a motive; these cannot be patented,” as “creating [such] monopolies, would discourage arts and manufactures, against the avowed policy of the patent laws.”

Just as this Court has “repeatedly emphasized” that the patent law may “not inhibit further discovery by improperly tying up the future use of these building blocks of human ingenuity” (*Alice*, 573 U.S. at 216), Congress has repeatedly revisited the Patent Act, making other changes but leaving these exceptions to patentability intact. And this Court is “particularly reluctant to disrupt precedents interpreting language that Congress has since reenacted”; the Court instead “presume[s] that Congress ‘adopted also the construction given by this Court to such language, and made it a part of the enactment.’” *Georgia v. Public.Resource.Org, Inc.*, 590 U.S. 255, 270 (2020).

That is the situation here. The exceptions to patentability were well settled when Congress adopted the Patent Act of 1952, a major reorganization of U.S. law that largely “left [the earlier patent-eligibility] language intact.” *Diamond v. Chakrabarty*, 447 U.S. 303, 308-309 (1980). Contrary to TT’s assertions (Pet. 25), Congress did not disturb the Court’s patent-eligibility precedents. *Mayo*, 566 U.S. at 70-72. Further, the Court repeatedly reaffirmed those decisions between 1952 and 2011, when Congress passed the

America Invents Act.⁶ “In light of this settled pre-AIA precedent on [Section 101’s] meaning,” the Court must “presume that when Congress reenacted the same language in the AIA, it adopted the earlier judicial construction.” *Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, 586 U.S. 123, 131 (2019).

D. Aware of this difficulty, TT’s last gasp for review is an argument that the Federal Circuit is internally divided over *its* claims, as the court below held that the focus of those claims “is not on improving computers,” whereas an earlier panel purportedly “found that the same claims * * * specifically improve the way computers operate.” Pet. 30 (emphasis omitted). Even taken at face value, that is at best a fact-bound argument that the court below misapplied the *Alice-Mayo* framework. But TT fails to mention that the earlier decision, which was unpublished, involved an entirely different issue—subject matter jurisdiction—under an entirely different statute, not Section 101.

Specifically, TT says the court below should have followed one sentence in an earlier nonprecedential decision arising under Section 18(d)(1) of the American Invents Act, 35 U.S.C. §321 Notes—a finding that the non-static patents’ claims, which had not even been construed, were directed to “technological” improvements in computers and thus were ineligible for covered business method (CBM) review. Pet. 30, 33-34 (citing *IBG I*, 757 F. App’x at 1007-1008). According to TT, that sentence—which contains “no elaboration” (Pet. App. 16a)—trumps precedential decisions

⁶ See *Bilski*, 561 U.S. at 601-602; *Diamond v. Diehr*, 450 U.S. 175, 185 (1981); *Chakrabarty*, 447 U.S. at 309; *Flook*, 437 U.S. at 589; *Gottschalk*, 409 U.S. at 67.

holding, after careful analysis, that similar TT claims flunked Section 101. *IBG II*, 921 F.3d 1084; *IBG III*, 921 F.3d 1378. But that argument falsely presumes that CBM and Section 101 analyses are identical, and certiorari should be denied regardless.

As the court below recognized, the idea “that non-qualification for CBM review implies eligibility” under Section 101 “is not found in *IBG I* or in any other authority,” and there is “no good reason to adopt it.” Pet. App. 30a. The “‘technological inventions’ language” of § 18(d)(1) cabined PTAB *jurisdiction* under “a special, temporary” statute; it did not “alter the substantive standards” for “§ 101 eligibility” under the “extensive body of [Section 101] case law.” Pet. App. 30a-31a. Because the issues are distinct, there is no “consisten[cy]” problem. Pet. 34. And as the court below recognized, it was “not bound by non-precedential decisions at all, much less ones” involving “different claims.” Pet. App. 28a.

TT’s claim of an intra-circuit split thus rests on the idea that off-point non-precedent trumps on-point precedent. There is no conflict between the ruling below and the court of appeals’ earlier decisions under another statute. And even if there were, CBM review “expired” in 2020 (Pet. App. 30a), so the relationship between CBM and Section 101 lacks ongoing importance. Certiorari should be denied.

III. Review should be denied on TT’s “supervisory authority” question.

Finally, the Court should decline the invitation to exercise its “supervisory authority” to “correct the Federal Circuit’s improper (1) application of Rule 56 to patent cases and (2) practice of deciding issues that

were never argued or briefed on appeal.” Pet. ii. TT’s arguments on this score are frivolous.

This Court exercises its supervisory authority to “formulate procedural rules not specifically required by the Constitution or the Congress.” *United States v. Hastings*, 461 U.S. 499, 505 (1983) (citing *McNabb v. United States*, 318 U.S. 332, 340 (1943); *Rea v. United States*, 350 U.S. 214, 217 (1956)). Further, Rule 10(a) provides that the Court does so only when a lower court has “so far departed from the accepted and usual course of judicial proceedings” that “considerations of justice” demand intervention. *Hasting*, 461 U.S. at 505 (quoting *McNabb*, 318 U.S. at 341); see A. Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 Colum. L. Rev. 324, 332-333, 340 (2006) (the Court’s supervisory authority authorizes it to make (1) “generally applicable” (2) “procedural rules not otherwise required by Congress or the Constitution” that (3) “govern[] procedure in inferior courts” and to “measure[] the inferior court’s action for consistency with the * * * newly announced standard”). As even a cursory review of the unanimous 57-page decision below confirms, this is not remotely such a case.

For starters, TT does not ask the Court to adopt a new procedural rule; it seeks only error correction on “misapplication” of settled “procedural standards.” Pet. 5. Specifically, TT asks this Court to reapply the “well-established standards governing summary judgment” and an already “declared” rule stating the grounds on which federal courts of appeals may decide cases. Pet. 36-40. But the courts below correctly applied these rules. Pet. App. 25a-27a, 94a-95, 51a-52a. And even if they had erred, that would not warrant exercise of this Court’s supervisory

power. If it did, the Court would do little else. *Tolan v. Cotton*, 572 U.S. 650, 661 (2014) (Alito, J., concurring in judgment) (reviewing cases where lower courts “invoked the correct [summary judgment] standard” and “the only issue is whether the relevant evidence, viewed in the light most favorable to the nonmoving party, is sufficient to support [the] judgment” would “very substantially alter the Court’s practice”).

A. TT’s complaints about summary judgment are a fact-bound challenge asserting “misapplication of a properly stated rule of law.” S. Ct. R. 10. The court below applied the very rules that TT advocates. Compare Pet. App. 94a (“Summary judgment is proper when ‘the movant shows that there is no genuine dispute as to any material fact.’” (quoting Fed. R. Civ. P. 56(a))) with Pet. 36 (“The Federal Rules provide that [t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact.” (quoting Fed. R. Civ. P. 56(a))); compare Pet. App. 95a (“In determining whether a genuine issue of material fact exists, the Court draws all reasonable inferences in favor of the party opposing the motion.” (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986))) with Pet. 36-37 (“Courts must view the facts with ‘all justifiable inferences’ drawn in favor of the nonmoving party.” (quoting *Anderson*, 477 U.S. at 255)).

For its part, the district court expressly “glean[ed] the material facts” from “the underlying evidence,” including the patents’ disclosures. Pet. App. 85a n.1, 103a-104a. The court below rightly affirmed, finding “no legally material facts in dispute.” Pet. App. 25a. Unhappy, TT questions that court’s application of the

settled summary judgment standard, saying it “was flawed because it ignored materially disputed facts.” Pet. 37. But beyond the fact that error correction does not warrant review, TT cites *not one* specific disputed material fact that either court ignored—only “800 pages” of undifferentiated “evidence.” *Ibid.* (citing C.A. App. 66492-67335).

In a last-ditch effort to make its request appear important, TT cites petitions for certiorari in recent patent cases decided on summary judgment. Pet. 37-38. Yet all but one of them has been denied, even where (unlike here) the Federal Circuit issued one-word affirmances under Circuit Rule 36.⁷ The same result is certainly warranted here, where the court’s published opinion addressed the issues in depth.

B. TT’s complaint about the court of appeals’ grounds for affirmance fare no better. In considering the proper framework for foreign damages, the court first stated (in dictum) that the “*WesternGeco* extraterritoriality framework” governs infringement “under § 271(a).” Pet. App. 41a-42a. But the court then held that the testimony of TT’s expert (Lawton) was “properly excluded” regardless, as it did not focus on a proper act of infringement under *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007), and thus was “legally insufficient, even under the *WesternGeco*

⁷ See *Am. Axle & Mfgs., Inc. v. Neapco Holdings LLC*, 967 F.3d 1285 (Fed. Cir. 2020), cert. denied, 142 S. Ct. 2902 (2022); *Worlds Inc. v. Activision Blizzard Inc.*, 2022 WL 726969 (Fed. Cir. Mar. 10, 2022) (Cir. R. 36 affirmance), cert. denied, 143 S. Ct. 110 (2022); *Island Intell. Prop. LLC v. TD Ameritrade, Inc.*, 2024 WL 2207311 (Fed. Cir. May 16, 2024) (Cir. R. 36 affirmance), cert. filed Oct. 21, 2024 (No. 24-461).

framework.” Pet. App. 32a, 52a. That case-specific ruling was correct. But regardless, review is not warranted.⁸

The court below was free to affirm based on any ground supported by the record, and certainly one that (as here) was fully briefed in the district court. “When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.” *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) (citing *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990)). As this Court observed in *Hormel v. Helvering*: “A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with th[e] policy” that “[r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them.” 312 U.S. 552, 557 (1941).

TT does not challenge (or cite) these precedents. Rather, citing three unexplained cases, it baldly asserts that this Court has “declared it improper for appellate courts to decide issues neither party raised on appeal.” Pet. 39. But two of those cases were lower court decisions; two involved arguments that

⁸ Contrary to TT’s claims (Pet. 39), the court below did not decide causation. It mentioned causation only in a passage that TT has called “dicta” (No. 22-1630, Dkt. 100 at 19), and it did not “definitively draw a conclusion” (Pet. App. 55a). Dicta cannot justify certiorari. *Bunting v. Mellen*, 541 U.S. 1019, 1023 (2004) (Scalia, J., dissenting) (“We sit, after all, not to correct errors in dicta.”).

the parties *did* raise on appeal; and all three focused on whether the court of appeals should decide an issue neither raised nor decided in the court below. *Singleton v. Wulff*, 428 U.S. 106, 120-121 (1976); *Pat. Rts. Prot. Grp., LLC v. Video Gaming Techs., Inc.*, 603 F.3d 1364, 1368 (Fed. Cir. 2010); *Philip Morris Prods. S.A. v. Int’l Trade Comm’n*, 63 F.4th 1328, 1347-1348 (Fed. Cir. 2023).

In all events, the “matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.” *Singleton*, 428 U.S. at 121; *ibid.* (“Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt.”). Given the extensive precedent affirming the courts of appeals’ “discretion” in this regard (*ibid.*), the Federal Circuit’s decision to avoid a futile remand is anything but a “far depart[ure] from the accepted and usual course of judicial proceedings” (S. Ct. R. 10(a)). See also Br. in Opp. for United States 11, in *Universal Health Servs., Inc. v. United States* (No. 15-7) (calling it “extraordinary” to “ask[] this Court to invoke its supervisory authority to require Courts of Appeals to only decide cases on the grounds presented by the parties” and “to explicitly limit how federal appellate courts reach their decisions, precluding them from arriving at a correct answer” based on their “breadth of experience or wisdom”); *Universal Health Servs., Inc. v. United States*, 577 U.S. 1025 (2015) (denying review on that question, while granting review on others raised in the same petition).

IV. Alternative grounds for affirmance and the equities support denying review.

Alternative grounds for affirmance further counsel against granting review. On the Rule 60(b)(3) issue, even if TT were correct that the court below incorrectly applied a diligence standard (it did not), both courts below found that IBG committed no fraud, so the outcome would not change. On foreign damages, the Federal Circuit not only affirmed the exclusion of the damages expert’s testimony for failing to focus on a proper act of infringement, but also “not[ed] at least one other seeming deficiency”—the testimony considered IBG’s product as infringing even “before TT’s patents issued.” Pet. App. 52a-55a.

Finally, the equities weigh against certiorari. TT’s patents recite weak “apply it with a computer”-type claims that are routinely invalidated under *Alice*. See 573 U.S. at 223; *supra* at 22-23. Moreover, this litigation has gone on for 15 years, with four trips to the Federal Circuit, all initiated by TT,⁹ and three TT filings with this Court (No. 19-353; 19A95; 24-764). It is time for this case to end.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

⁹ See Dist. Ct. Dkt. 1:10-cv-715, Dkts. 486 (July 31, 2012) (appealing partial grant of summary judgment); 585 (March 27, 2015) (appealing order to stay cases pending CBM Review); 770 (May 17, 2016) (same); 2235 (March 24, 2022) (taking current appeal).

Respectfully submitted.

MICHAEL S. SOMMER
*Wilson Sonsini
Goodrich & Rosati, PC
1301 Ave. of the Americas
New York, NY 10019*

NATALIE J. MORGAN
NAOYA SON
*Wilson Sonsini
Goodrich & Rosati, PC
12235 El Camino Real
San Diego, CA 92130*

STEFFEN N. JOHNSON
Counsel of Record
KELSEY C. CATINA
*Wilson Sonsini
Goodrich & Rosati, P.C.
1700 K Street, N.W.
Washington, DC 20006
(202) 973-8800
sjohnson@wsgr.com*

Counsel for Respondents

MARCH 2025