No. A-_____

In the

Supreme Court of the United States

Ameranth, Inc., *Applicant*,

v.

Olo, Inc.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Federal Circuit

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To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Federal Circuit:

Pursuant to Rules 13.5 and 30.2 of this Court, Applicant Ameranth, Inc. respectfully requests a 60-day extension of time, to and including March 7, 2022, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case. The court of appeals entered its judgment on October 8, 2021, App. infra, 1a-2a. No petition for rehearing was filed. Unless extended, the time for filing a petition for a writ of certiorari will expire on January 6, 2022. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1). This application for an extension is timely under Rules 13(5) and 30.2 and Ameranth has not previously sought to extend this filing deadline.

1. This case presents important questions concerning patent eligibility under 35 U.S.C. § 101, including the substantive standards and procedural devices employed by the Federal Circuit and district courts nationwide in applying this Court's Section 101 precedents. Implementation of the two-step test for determining patent eligibility that this Court articulated in *Alice Corp. Pty. v. CLS Bank Int'l*, 573 U.S. 208, 216 (2014) has proven to be particularly nettlesome for the Federal Circuit—and troubling to innovators. Step one of the *Alice* test asks whether the claims as a whole are directed to a patent ineligible concept under § 101 (*e.g.*, an abstract idea or a law of nature). If so, then step two requires courts to determine whether the limitations add significantly more to "transform a patent ineligible abstract idea into a patent eligible invention." *Alice*, 573 U.S. at 223; *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 70 (2012) (same for laws of nature). Courts engaged in step two analysis must "examine the elements of the claim to determine whether it contains an "'inventive concept' sufficient to 'transform' the claimed abstract idea into a patent-eligible application." *Alice*, 573 U.S. at 221. The inquiry must focus on "the steps in the claimed processes" "apart from the [patent-ineligible concept]." *Mayo*, 566 U.S. at 73.

2. Ameranth is the owner of U.S. Patent No. 9,747,651 (issued August 29, 2017), invented by its founder and president, Keith McNally. As recognized by the inventor and confirmed by expert testimony, the '651

patent's intelligent automated technologies relate to wireless protocols, communication conversions, such as free-format messaging and fixed-format messaging, that were then in their infancy and being researched, but not commercialized, for practical applications. This was, in part, because of issues with computer processing power, wireless connection speeds to the internet, and the inability to perform natural language processing. Innovations described in the '651 patent addressed these concerns in ways that enabled commercialization of technologies utilized in restaurant reservations and other aspects of the hospitality industry, including online ordering systems accessible by cellphone.

3. Ameranth sued Olo, Inc. in 2020 in the United States District Court for the District of Delaware, alleging infringement of multiple claims of the '651 patent. In granting Olo's motion to dismiss the complaint, the district court's analysis exemplified some of the most significant shortcomings in current Section 101 jurisprudence. As Ameranth argued to the Federal Circuit, those shortcomings included:

• The district court ignored express terms of the asserted claims and relied instead on terms that were deleted during patent prosecution. This faulty premise informed the court's conclusion that the asserted claims of the '651 patent are directed to subject matter that the inventor had unequivocally disclaimed. The resulting errors in claim construction and in ascertaining

what the '651 patent was actually directed to undercut the court's entire *Alice* analysis in steps 1 and 2.

• Although the asserted claims of the '651 patent set out an ordered combination of elements, the district court analyzed only individual claim elements. In short, the court did not view the claims as a whole.

• In failing to view the asserted claims as a whole, the district court's analysis overlooked multiple inventive non-abstract concepts that should have been dispositive in finding the subject matter of the '651 patent to be eligible under *Alice*.

4. The Federal Circuit's Rule 36 affirmance in this case is another of the many manifestations of the maelstrom that exists in the judicial interpretation of Section 101. Surely, this Court's guidance in *Alice* was not intended to create the intractable impasse currently besetting the federal courts on this critical aspect of patent law. Two examples illustrate the state of affairs that requires this Court's review:

Example 1: Currently pending before this Court is a petition for a writ of certiorari in *American Axle & Mfg., Inc. v. Neapco Holdings LLC,* No. 20-891. The multiple opinions accompanying the Federal Circuit's denial of rehearing en banc in *American Axle*—by a six-six vote—demonstrate that even among the Federal Circuit judges there is no agreement on what the correct standard for Section 101 adjudication is, much less how it should applied. *See* 966 F.3d 1347 (Fed. Cir. 2020). This Court has invited the

Solicitor General to file an amicus brief expressing the government's views on certiorari in *American Axle* and is awaiting the submission of that brief.

Example 2: The district judge who deemed Ameranth's invention ineligible for patent protection in this case employed the same flawed analysis (failing to account for specific claim elements) in another case. But in that other case, the Federal Circuit recently reversed (*Meltone Solutions LLC v. Digi International, Inc.*, No. 2021-1203 (Fed. Cir. Nov. 15, 2021)), for precisely that reason. It held that under proper Section 101 analysis Meltone's invention was directed to patent-eligible subject matter. Yet, when the same district judge followed the same flawed process in *Ameranth v. Olo,* the Federal Circuit affirmed the finding of patent ineligibility.

5. The level of confusion, conflict and randomness that characterize the lower courts' implementation of this Court's Section 101 precedents is undeniable. Ameranth's petition for a writ of certiorari will explain why this Court's review is needed. And it will discuss why this case warrants further review—either on its own or as a companion to *American Axle* in this Court, or on remand to the Federal Circuit in light of this Court's eventual disposition in *American Axle.*

6. Ameranth recently retained new counsel to represent the company in petitioning for certiorari. The undersigned counsel did not participate in this case in the lower courts and must review the record below to present this

case in a way that will be most helpful to the Court. Additional time is therefore needed to prepare and print the petition in this case.

7. Counsel for applicant therefore respectfully requests a 60-day extension of time, to and including March 7, 2022, within which to file a petition for a writ of certiorari.

Respectfully submitted.

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