

No. _____

In the
Supreme Court of the United States

AMERANTH, INC.,
Petitioner,

v.

DOMINO'S PIZZA, LLC, DOMINO'S PIZZA, INC.,
Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Rule 16(d), Fed. R. Civ. P., states that a pretrial order “controls the course of the action unless the court modifies it.” Rule 56(f) requires a court to “giv[e] notice and a reasonable time to respond” before granting summary judgment “on grounds not raised by a party.” In this patent case, the district court’s pretrial order limited the plaintiff patentholder to asserting only five claims that respondents infringed. Respondents moved for summary judgment on only the five claims asserted; their motion sought no relief and offered no evidence on any other patent claim. The district court granted summary judgment on the five asserted claims, and on nine other patent claims that respondents’ summary judgment motion did not present. In conflict with decisions of the majority of other Circuits on the primacy of pretrial orders and the requirements of adequate notice prior to entry of summary judgment, the Federal Circuit affirmed. The question presented is:

1. Does the *sua sponte* judicial resolution on summary judgment of issues expressly excluded by pretrial order, and on which the moving party submitted no evidence to meet its burden, deprive petitioner of valuable property rights in violation of the Due Process Clause and the Federal Rules of Civil Procedure? Alternatively, should the case be remanded to the Federal Circuit in light of this Court’s recent holding on the party presentment rule in *United States v. Sineneng-Smith*, 206 L. Ed. 2d 866 (2020)?

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

CORPORATE DISCLOSURE STATEMENT

Petitioner Ameranth, Inc. certifies that it is the real party in interest and that there are no parent corporations and no publicly held companies that own 10% or more of the stock of Ameranth, Inc.

LIST OF RELATED PROCEEDINGS

Ameranth, Inc. v. Live Nation Ent., Inc., Case No. 3:12-cv-1648-DMS (WVG) (S.D. Cal., filed June 29, 2012); *Ameranth, Inc. v. Papa John's USA, Inc.*, Case No. 3:12-cv-729 DMS (WVG) (S.D. Cal., filed Mar. 27, 2012); *Ameranth, Inc. v. Open Table, Inc.*, Case No. 3:12-cv-731 DMS (WVG) (S S.D. Cal., filed Mar. 27, 2012); *Ameranth, Inc. v. O-Web Techs. Ltd.*, Case No. 3:12-cv-732 DMS (WVG) (S.D. Cal., filed Mar. 27, 2012); *Ameranth, Inc. v. GrubHub, Inc.*, Case No. 3:12-cv-739 DMS (WVG) (S.D. Cal., filed Mar. 27, 2012); *Ameranth, Inc. v. Agilysys, Inc.*, Case No. 3:12-cv-858 H (MDD) (S.D. Cal., filed Apr. 6, 2012); *Ameranth, Inc. v. Hyatt Hotels Corp.*, Case No. 3:12-cv-1627 DMS (WVG) (S.D. Cal., filed June 29, 2012); *Ameranth, Inc v. Starwood Hotels and Resorts Worldwide, Inc.*, Case No. 3:12-cv-1629 DMS (WVG) (S.D. Cal., filed June 29, 2012); *Ameranth, Inc. v. Best Western International, Inc.*, Case No. 3:12-cv-1630 DMS (WVG) (S.D. Cal., filed June 29, 2012); *Ameranth, Inc. v. Marriott Internat'l, Inc.*, Case No. 3:12-cv-1631 DMS (WVG) (S.D. Cal., filed June 29, 2012); *Ameranth, Inc. v. Hotel Tonight, Inc.*, Case No. 3:12-cv-1633 DMS

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ameranth, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The decision of the Federal Circuit (App. *infra* at 1-20) is reported at 792 Fed. App'x 780 (Fed. Cir. 2019). The decision of the district court granting summary judgment (App. *infra* at 21-39) is not reported.

JURISDICTION

The judgment of the Federal Circuit issued on November 1, 2019 (App. *infra* at 20). Ameranth's timely petition for rehearing was denied on January 6, 2020. (App. *infra* at 67-69). A petition for a writ of certiorari would have been due on April 4, 2020. On March 19, 2020, this Court's Miscellaneous Order extended the time to file petitions for writs of certiorari to 150 days after the denial of a timely petition for rehearing in light of COVID-19 public health concerns. The Miscellaneous Order extended the time to file this petition to and including June 4, 2020. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Amendment Five

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Patent Law, 35 U.S.C. § 101: Inventions Patentable

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

Federal Rules of Civil Procedure, Rule 16(d) and (e)

Rule 16. Pretrial Conferences; Scheduling; Management

(d) PRETRIAL ORDERS. After any conference under this rule, the court should issue an order

reciting the action taken. This order controls the course of the action unless the court modifies it.

(e) FINAL PRETRIAL CONFERENCE AND ORDERS. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.

Federal Rules of Civil Procedure, Rule 56 (a) and (f)

(a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(f) JUDGEMENT INDEPENDENT OF THE MOTION. After giving notice and a reasonable time to respond, the court may: (1) grant summary judgment for a nonmovant; (2) grant the motion on grounds not raised by a party; or (3) consider

summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

INTRODUCTION

Something is profoundly wrong when a court rules on matters that – at the court’s explicit direction – were not contested by the litigants; matters on which the party seeking summary judgment presented no evidence or legal argument; and on which the opponent therefore had no reason or fair opportunity to respond. The judicial system and the constitutional protection of due process do not work that way.

Yet that is precisely what happened in this case. The district court – having limited the patentholder plaintiff to asserting only five patent claims under a duly issued patent – declared as patent ineligible multiple other claims that were not presented for decision; that the alleged infringer did not mention, proffer evidence or present argument about in its motion for summary judgment; and that the patentholder lacked notice were even before the court as well as lacking anything to which it could respond. In conflict with nine Circuits that have held that pretrial orders supersede and control, the Federal Circuit affirmed. It did so even though there was no dispute in the appellate briefing or in the repeated statements by both parties at oral argument that these additional claims were never part of the pretrial order or the summary judgment motion and were not presented for decision. When procedural and property rights become so ephemeral, this Court’s review is needed.

Certiorari would be warranted even if the issue were limited to this very common practice in patent cases. When a patentholder alleges infringement by asserting multiple patent claims, each one under the law a separate invention, courts routinely choose in the early stages of the case to restrict the patentee to a smaller, limited number of claims. The few claims isolated for initial consideration may or may not be representative of the remaining claims. Thus, the conclusions reached on only the limited sampling of claims may or may not be applicable to – much less dispositive of – the remaining claims. Before the *entire* case is resolved it is therefore essential for the parties to have a fair opportunity to (1) address the critical additional issue of the relationship – if any – between the limited selected questions and other aspects of the case and (2) litigate any remaining issues or claims. In omitting that necessary step in this case, the district court invalidated claims far beyond the five to which, as the court itself directed, the parties were restricted. And although all parties expressly confirmed to the court of appeals that the pretrial order had excluded these claims, and that respondents’ summary judgment motion sought no relief on the non-asserted claims, the Federal Circuit’s affirmance invalidated claims that the parties had not presented for decision.

This case is an ideal vehicle for review because the errors were not mere technicalities with scant practical impact on the outcome. They profoundly affected the result: respondents obtained summary judgment invalidating multiple patent claims on which they offered no evidence or argument. Absent any showing by respondents that they were entitled to relief on

claims not presented in their motion, the district court and the Federal Circuit lacked any evidentiary record on which to base summary judgment. Respondents submitted no statement of undisputed facts on the non-asserted patent claims. And they offered no evidence at all on those claims, much less the clear and convincing evidence that should have been required to overcome the presumption of patent validity. This is therefore a case in which the correct application of the Rules of Civil Procedure and the Constitutional protection of due process compel a different result.

The procedural deficiencies and constitutional concerns in this case have broad practical ramifications. Consider the consequences of a regime in which a party can obtain summary judgment without ever presenting evidence or argument; in which, conversely, a party can summarily be deprived of property without notice, and without an opportunity to be heard at all, much less “at a meaningful time and in a meaningful manner.” *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). That is not a hypothetical. It happened in this case.

Or consider a case in which a plaintiff alleges breach of contract as well as violations of federal securities, antitrust and environmental law, and the Racketeer Influenced and Corrupt Organizations Act (“RICO”). Could a court limit discovery to only the RICO allegations and then, in deciding a summary judgment motion targeting only the RICO claim, resolve all the other claims (perhaps dismissing all claims or perhaps holding the defendant liable for all)?

Without notice to the parties that the other claims were in play? Without giving the parties the opportunity to present evidence or argument on the other claims? Without giving the parties any opportunity to address whether the grounds on which the RICO claim is attacked apply to the other alleged bases for liability?

The practical ramifications run deeper and wider. A “small-sampling approach” or a “limited-issue approach” has become commonplace for structuring discovery, motions practice, and trial sequencing in many types of cases. Class actions, mass tort and product liability cases, and Multidistrict Litigation (“MDL”) proceedings are among the numerous litigation contexts that would be turned upside down if motions limited to specific defined issues could – without notice and without any evidentiary record – lead to broad rulings on other matters. Following this Court’s recent holding on the party presentment rule in *United States v. Sineneng-Smith*, 206 L. Ed. 2d 866 (2020), there is a pressing need for this Court to instruct the lower courts on how they can fairly employ litigation shortcuts in ways that do not violate substantive and procedural rights.

STATEMENT OF THE CASE

- A. The district court *sua sponte* granted summary judgment on patent claims that had been expressly excluded by pretrial orders, that respondents did not address in their motion, and on which neither party presented evidence.**

Petitioner Ameranth brought this case against two Domino's-related entities for infringement of U.S. Patent No. 8,146,077 (the "077 patent"). This case was one of several separate patent infringement lawsuits Ameranth filed against different defendants, all of which were consolidated for pretrial proceedings. C.A. App. 337-367.

The '077 patent claims an information management and real-time synchronous communications system invented by Keith McNally for configuring and transmitting hospitality menus, reservations, and other applications that use equipment with nonstandard graphical formats, display sizes and/or applications. Ameranth initially asserted thirteen claims under the '077 patent against Domino's. C.A. App. 298.

Early in the proceedings, by pretrial order dated October 10, 2013, the court required Ameranth to limit its asserted claims to five for purposes of discovery. App. *infra* at 63. Ameranth did as directed. Its Amended Disclosure of Asserted Claims and Infringement Contentions asserted only five claims and reserved "the right to assert additional and/or different claims in the future by Court Order" C.A. App.

2196. The five claims asserted against Domino's were 1, 6, 9, 13 and 17. And in response Domino's also limited its invalidity contentions and expert report solely to these five asserted claims.

These same five asserted claims were also the only claims at issue in a second pretrial order, a joint pretrial order agreed upon and filed by the parties on July 27, 2018. App. *infra* at 40-43. A month later – and although the time for filing such motions had expired – the court permitted respondents to join in a summary judgment motion addressing patent ineligibility previously filed by Pizza Hut, a defendant in a related case. Pizza Hut's summary judgment motion sought to invalidate four of the same five claims Ameranth asserted against Domino's. So Domino's relied on Pizza Hut's written submission and supplemented only on the one claim (Claim 9) that was unique to Domino's.¹

The summary judgment motion presented evidence and argument only on the asserted claims and no others. Domino's submissions did not mention any other claim, nor did it contend that the asserted claims were “representative” of any others. Petitioner Ameranth responded with evidence only on the five claims targeted in the summary judgment motion,

¹ After filing its motion for summary judgment, Pizza Hut settled with Ameranth. Domino's later requested and received court approval to substitute itself into the summary judgment motion filed by Pizza Hut. The only difference between the claims asserted against Pizza Hut and Domino's was that Claim 8 was asserted against Pizza Hut and Claim 9 against Domino's. The other four claims (1, 6, 13, and 17) had been asserted against both. C.A. App. 10228-10229.

reminding the court that no other claims “are challenged in the MSJ” and that the non-asserted claims “are not subject to the pending MSJ.”² C.A. App. 10258-10259.

The district court’s summary judgment ruling invalidated not only the five claims presented for decision, but also nine additional claims that were never the subject of respondents’ motion. The parties proffered no evidence on any these additional claims, nor were they contested in briefing or argument. In sum, as to the claims of the ’077 patent:

² Under the heading “CLAIMS 2-5, 7,10-12, 14-16 and 18 Are Patent Eligible,” Ameranth stated that “None of these claims are challenged in the MSJ. These claims include additional unique technology, such as POS importation, multiple hospitality application integration, and ‘communications systemic relationship’ interactivity. Consequently, they are not subject to the pending MSJ and have additional functionality and elements that render them non-conventional and patent-eligible.” C.A. App. 10258-10259. In the district court proceedings, Domino’s did not contest Ameranth’s enumeration of the non-asserted claims that were “not subject to” the summary judgment motion. Nor did Domino’s submit evidence or argument on the validity of the non-asserted claims.

Claims Asserted by Ameranth at Early Stages of the Case	1, 3, 6-9, 11-18
Claims Litigated in Compliance with Pretrial Orders dated July 27, 2018 and October 10, 2018 Limiting Claims	1, 6, 9, 13, and 17
Claims Addressed in Summary Judgment Motions	1, 6, 9, 13, and 17
Claims Invalidated by District Court	1, 4-9, 11, 13-18

B. The Federal Circuit affirmed the invalidation of non-asserted claims that were in neither the joint pre-trial order nor respondents' motion for summary judgment.

The briefs filed in the Federal Circuit focused on the lack of notice and even lack of Article III case-and-controversy jurisdiction over the non-asserted claims. Oral argument was dominated by questions from the bench and clarification by counsel on the threshold point: that Domino's summary judgment motion presented and challenged only the five asserted claims. Oral Argument, *Ameranth, Inc. v. Domino's Pizza, LLC*, (No. 2019-1141), <http://oralarguments.ca9.uscourts.gov/default.aspx?fl=2019-1141.mp3>.

The Federal Circuit affirmed the finding of patent invalidity as to all claims except (on jurisdictional grounds) claims 4 and 5.³ Despite the district court's explicit pretrial order limiting the number of claims, Ameranth's compliance with that limitation, and both parties' express confirmation at oral argument that respondents' summary judgment motion presented evidence only on the five asserted claims, the Federal Circuit upheld the ruling of patent ineligibility on additional claims. Citing a submission by Ameranth early in the case—long before the district court limited the number of claims and long before the summary judgment motion addressing only the five permitted claims was filed—the Federal Circuit stated that “there was no indication that Ameranth altered its position that Domino's Ordering System infringes claims 7-8, 11, 14-16 and 18.” App. *infra* at 7. On that basis, the Federal Circuit concluded that the patentholder had both notice and the opportunity to defend the eligibility of claims that the pretrial order had excluded and that Domino's summary judgment motion did not even mention. Having thus resolved the issue of notice, the Federal Circuit did not address the substantive merits whether the record supported entry of summary judgment on the non-asserted claims; whether factual disputes precluded summary judgment; whether Domino's met its burden of showing its entitlement to relief on issues where clear and convincing evidence is

³The Federal Circuit concluded that because Ameranth had never accused Domino's of infringing claims 4 and 5, there was no case or controversy as to those claims. The court therefore lacked jurisdiction to determine the patent eligibility of claims 4 and 5. App. *infra* at 9-10.

required to overcome the presumption of patent validity.

REASONS TO GRANT THE PETITION

In its incorrect judgment in this case, the court of appeals exposed multiple procedural and substantive rifts with far-ranging ramifications and immense practical impact. This Court’s review is fully warranted. At a minimum, certiorari should be granted and the case remanded for the Federal Circuit to consider in light of this Court’s recent decision in *United States v. Sineneng-Smith*, 206 L. Ed. 2d 866 (2020).

Basic procedural rules and foundational principles of due process require that a party be given notice and a meaningful opportunity to be heard before its rights are adjudicated. That did not happen here. The Federal Circuit decision is flatly contrary to the normal rule of party presentment and to the express language of Rules 16(d)-(e) and 56(f), Fed. R. Civ. P. It fashioned a “notice” standard that conflicts with rules the Federal Circuit itself employs in other, but similarly applicable, patent contexts. *E.g.*, *Nike, Inc. v. Adidas AG*, 955 F.3d 45, 51-54 (Fed. Cir. 2020) (appeal from the Patent Trial and Appeals Board) (“[T]he notice provisions of the APA and our case law require that . . . [p]ersons entitled to notice of a[] hearing shall be timely informed of . . . the matters of fact and law asserted,” and “all interested parties” “shall [be] give[n] opportunity for . . . the submission and consideration of facts [and] arguments[.]”) (quoting 5 U.S.C. §§ 554(b)(3), 554(c)(1)). Because the requirement of fair notice is inherent in the constitutional protection of due

process, the court of appeals should have applied a standard compatible with *Nike* – or at least articulated a rationale for providing less due process in judicial proceedings than in agency proceedings. By ignoring the constitutional underpinning of *Nike*'s statutory holding, the Federal Circuit has created a conflict and granted license to district courts to employ case-management devices that deprive parties of their right to be heard on dispositive issues. Since these case-management devices are routinely employed in a wide variety of cases, the impact of this decision extends well beyond the patent context.

On the substantive side of the ledger, this case adds to the growing confusion about patent eligibility under 35 U.S.C. § 101. Even if the ultimate resolution of core eligibility questions must await new legislation and implementation by the United States Patent and Trademark Office (“USPTO”), this case exemplifies the ways federal courts use Section 101 as a wrecking ball to demolish large swaths of patents, reshape industries, and deprive generations of innovative technology of patent protection. When an alleged infringer can get summary judgment invalidating as ineligible patent claims its motion has not challenged and on which it presented no evidence, something is wrong. When a patentholder can be deprived of valuable patent property rights without notice that the patent claims were even being considered by the court and without a meaningful opportunity to present evidence or argument, something is wrong. And something is also wrong when an alleged infringer can obtain summary judgment, overcoming the presumption of patent validity and defeating—without

evidence and without a trial—the invention’s novelty and patent eligibility. These procedural flaws in the ways federal courts adjudicate Section 101 claims is something the Court can address and cure. It should. And this case is the right vehicle.

A. Granting summary judgment on issues that had been expressly excluded from consideration by pretrial order conflicts with decisions of nine other Circuits and denies the non-moving party core due process rights.

It is, of course, common practice for courts to streamline cases for management purposes and administrative efficiency. But when court-ordered shortcuts impede the fair and orderly administration of justice by denying patentees their well-established due process right to defend the patentability of each patent claim, this Court’s review is warranted. Once a court decides the questions posed by only a limited sampling of the entire case (or only a portion of the entire patent), what is necessary to satisfy due process requirements and applicable legal standards before additional claims are resolved against the non-moving party (or patentholder)?

Only by adhering to procedural rules and standards that are the foundation of an appropriate adjudicative process can this Court assure that substantive principles of law will be protected, that plaintiffs will have a full and fair opportunity to present their cases, and that defendants will have a full and fair opportunity to present their defenses. And only by providing these essential procedural protections can

this Court ensure that no parties will be subject to *sua sponte* rulings on issues and claims to which, at the trial judge's direction and order, zero evidence was submitted.

Notice is a fundamental right inherent in judicial dispute resolution. "For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (internal marks omitted). And "[a]n elementary and fundamental requirement of due process in any proceeding . . . is notice reasonably calculated, . . . [to] afford [interested parties] an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "[W]ithout notice, without disclosure of any reasons justifying [a decision affecting the rights of Parties], without opportunity to meet the undisclosed evidence or suspicion on which [said decision] may have been based, and without opportunity to [object affirmatively,] . . . the mere say-so of [the decisionmaker] . . . is so devoid of fundamental fairness as to offend the Due Process Clause of the Fifth Amendment." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring).

Notice is not (and cannot be), as the Federal Circuit concluded here, satisfied merely by the fact that an

issue was mentioned sometime earlier in the case. App. *infra* at 10-12. Due process and the Rules of Civil Procedure require more.

1. Invalidation of patent claims excluded from assertion by pretrial orders is contrary to Rules 16 and 56, conflicts with decisions of a majority of federal courts of appeals, and violates the patent owner's rights to fair notice and due process.

Federal Rule of Civil Procedure 16 authorizes district courts to govern disputes by issuing pretrial orders, and specifically to formulate and simplify the issues in controversy. Fed. R. Civ. P. 16(c)(2)(A). Unless modified by the court, pretrial orders control the course of the action and supersede all prior pleadings. Fed. R. Civ. P. 16(d); *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 474 (2007). This binding effect is particularly strong where, as here, a joint pretrial order is agreed upon and signed by both parties. *Elvis Presley Enters. v. Capece*, 141 F.3d 188, 206 (5th Cir. 1998); *see also Tucker v. United States*, 498 Fed. App'x 303, 307-308 (4th Cir. 2012) (affirmed district court prohibiting evidence at trial on matters not included in the joint pretrial order).

The Ninth Circuit (which the Federal Circuit was bound to follow on this appeal from the Southern District of California) has spoken directly to this point: “[T]he pretrial order, which under Federal Rule of Civil Procedure 16(d) ‘controls the course of the action unless the court modifies it,’ and which may not be modified after a final pretrial conference except ‘to prevent

manifest justice[.]” *Foster Poultry Farms, Inc. v. SunTrust Bank*, 377 Fed. App’x 665, 670 (9th Cir. 2010). “We have consistently held that issues not preserved in the pretrial order have been eliminated from the action.” *Rio Props. v. Armstrong Hirsch Jackoway Tyerman & Wertheimer*, 254 Fed. App’x 600, 601 (9th Cir. 2007) (quoting *S. Cal. Retail Clerks Union and Food Employers Joint Pension Fund v. Bjorklund*, 728 F.2d 1262, 1264 (9th Cir. 1984)). “The existence of references to [an] issue in the record of the case compiled before the pretrial orders is irrelevant. The very purpose of the pretrial order is to narrow the scope of the suit to those issues that are actually disputed and, thus, to eliminate other would-be issues that appear in other portions of the record of the case.” *Bjorklund*, 728 F.2d at 1264. And “[a] primary purpose of pretrial orders is to prevent unfair surprise by providing ‘fair notice’ and ‘a fair opportunity to present evidence refuting’ the opposing party’s theories of liability or non-liability.” *TDN Money Sys. v. Everi Payments, Inc.*, 796 Fed. App’x 329 (9th Cir. 2019) (citing *Miller v. Safeco Title Ins. Co.*, 758 F.2d 364, 468 (9th Cir. 1985); *DP Aviation v. Smiths Indus. Aerospace & Def. Sys.*, 268 F.3d 829, 842-44 (9th Cir. 2001)). Could anything be more counterproductive to the goal of simplifying the judicial process than a ruling that encourages – and effectively requires – parties to keep litigating issues long after they were excised from the case (or held in abeyance for disposition after front-burner issues are resolved)?

In affirming the invalidation of patent claims beyond those permitted by the pretrial orders, the Federal Circuit decision conflicts not only with the

Ninth Circuit but also with at least eight other Circuits.⁴ But there is no separate, different procedural standard for patent cases. “[A]ll [] Rules of Civil Procedure . . . appl[y] in patent cases just as fully as it applies in all other federal civil actions.” *Advanced Video Techs. LLC v. HTC Corp. et al.*, 879 F.3d 1314, 1319-20 (Fed. Cir. 2018) (O’Malley, J., concurring) (rejecting the district court’s attempt to develop a rule regarding the right to injunctive relief “unique to patent disputes”) (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 393-94 (2006)). See also *Bank of*

⁴ See also *Ramirez Pomales v. Becton Dickinson & Co., S.A.*, 839 F.2d 1, 6 (1st Cir. 1988) (affirming the district court’s decision to limit the scope of the case to the one specified in the pretrial order); *Phoenix Canada Oil Co. v. Texaco, Inc.*, 842 F.2d 1466, 1476 (3d Cir. 1988) (pretrial orders bind the parties; affirming district court rejection of claim for damages not in the pretrial order) (citing *Trujillo v. Uniroyal Corp.*, 608 F.2d 815, 817 (10th Cir. 1979) and *Moore v. Sylvania Elec. Prods., Inc.*, 454 F.2d 81, 84 (3d Cir. 1972)); *Tucker v. United States*, 498 Fed. App’x 303, 307-308 (4th Cir. 2012) (affirmed district court prohibiting evidence at trial because plaintiff-appellant did not include the matters in the joint pretrial order); *Scot Lad Foods v. Ayar*, No. 96-1036, 1997 U.S. App. LEXIS 8560, at *7-8 (6th Cir. 1997) (affirmed district court’s limiting issues based on Rule 16 mandate that pretrial order ‘shall control the subsequent course of the action’); *Gorlikowski v. Tolbert*, 52 F.3d 1439, 1443-44 (7th Cir. 1995) (a pretrial order under Rule 16 is treated as superseding the pleadings and establishes the issues to be considered at trial); *In re Control Data Corp. Sec. Litig.*, 933 F.2d 616, 621 (8th Cir. 1991) (Rule 16 pre-trial orders control the subsequent course of the action and a party may not offer evidence or advance theories which violate the terms of a pre-trial order) (quoting *Gilsmann v. AT&T Techs.*, 827 F.2d 262, 267 (8th Cir. 1987)); *Randolph County v. Alabama Power Co.*, 784 F.2d 1067, 1072 (11th Cir. 1986) (judge properly excluded matters not set forth in a joint pretrial order pursuant to Rule 16).

Nova Scotia v. United States, 487 U.S. 250, 255 (1988) (Federal Rules of Civil Procedure are “as binding as any federal statute”).

It is of great practical importance that the law be settled. Having limited the issues by pretrial order, both the parties and the court should be held to them.

The purpose of [pretrial] orders is to eliminate the need to address matters that are not in dispute, and thereby to save the valuable time of judges and lawyers. . . . Orders that are designed to limit the issues would serve no purpose if counsel acted at their peril when they complied with the orders’ limitations. . . . The question, however, is whether it can be said that counsel had adequate notice of the critical issue that the judge was debating. Our answer to that question must reflect the importance that we attach to the concept of fair notice as the bedrock of any constitutionally fair procedure.

Lankford v. Idaho, 500 U.S. 110, 120-21 (1991).

More important is the core principle of due process behind this rule. In *Lankford*, the Court relied extensively on Justice Frankfurter’s concurring opinion in *Joint Anti-Fascist Refugee Comm.* (500 U.S. at 121-22 quoting 341 U.S. at 163, 170-72):

Due process is not a mechanical instrument. . . . It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process. . . . The heart of the matter is that democracy implies respect for the

elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . The validity and moral authority of a conclusion largely depend on the mode by which it was reached. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

The lower courts' treatment of the non-asserted claims presents a clear and precise example of the problem this Court should resolve. Consistent with the district court's order limiting the number of claims, petitioner subsequently asserted only five claims against respondents. And the parties stipulated in the joint pretrial order that these were the only five claims being litigated. App. *infra* at 40-43. Nor did respondents' summary judgment motion contend either that (1) any non-asserted claim was ineligible under Section 101 or (2) that an asserted claim was "representative" of any other claim in the '077 patent.⁵

⁵ Nor did Ameranth ever agree that any of the asserted claims was or could be "representative." Indeed, Ameranth told the district court that none of the five asserted claims was representative of the non-asserted claims. On this record, the district court's *sua sponte* ruling the Claim 1 was representative of all 18 claims conflicts with *HP Inc., FKA Hewlett-Packard Co. v. Berkheimer*, 881 F.3d 1360 (Fed. Cir. 2018), *cert. denied* (No. 18-415, Jan. 13, 2020).

Domino's offered no evidence addressing the unique elements or ordered combination of elements for any non-asserted claim. With no evidence or argument directed to any non-asserted claim, there was nothing to which Ameranth could respond. It surely had no obligation to defend the eligibility of claims that were not being challenged; no requirement to submit evidence where respondents offered none. Especially where the court's limiting directive, the pretrial orders, and the summary judgment motion itself had confined the proceedings to the five asserted claims—and the district court never entered a Rule 56(f) notice informing the parties that any other claim was under consideration on summary judgment.

The district court's *sua sponte* decision finding the non-asserted claims ineligible under Section 101 is multiply flawed. Given the consistent pretrial orders and stipulations, neither party could present the non-asserted claims for decision. And Domino's summary judgment motion sought no relief – or even mentioned – the non-asserted claims; Ameranth expressly stated the non-asserted claims were not included in the motion. No one disagreed. In ruling on the non-asserted claims, the district court recited no evidence (since there was none) that addressed the unique elements of any non-asserted claim, alone or in combination. Nor did the district court find that the evidence was “clear and convincing” on this point to overcome the presumption of validity. The ruling simply failed to address these essential standards, and necessarily so given the nonexistent record.

The situation got even worse in the court of appeals. It was undisputed that the pretrial order limited Ameranth to only five claims; that Domino's summary judgment motion sought no relief or ruling on the non-asserted claims; that Domino's submitted no evidence or argument on the non-asserted claims. These points were never contested. Indeed, they were confirmed during the Federal Circuit oral argument. Oral Argument, *Ameranth, Inc. v. Domino's Pizza, LLC*, (Fed. Cir. No. 2019-1141), <http://oralarguments.ca9.uscourts.gov/default.aspx?fl=2019-1141.mp3>. In response to the panel's pointed questioning, counsel for both sides stated clearly and repeatedly that Domino's summary judgment motion did not present the non-asserted claims for decision. The Federal Circuit's opinion recited that Ameranth had excluded the non-asserted claims "because it was compelled to limit the claims by order of the district court." App. *infra* at 8.

Despite all of that, the Federal Circuit affirmed the ineligibility ruling. The stated predicate for that conclusion was the view that Ninth Circuit law conferred broad "*sua sponte* power" (even without notice) to do so if the party had a "full and fair opportunity to ventilate the issues." App. *infra* at 11 (citing *Arce v. Douglas*, 793 F.3d 968, 976 (9th Cir. 2015) and *United States v. Grayson*, 879 F.2d 620, 625 (9th Cir. 1989)). The court of appeals then canvassed the record for any indicia of "notice." It found an early pleading in the case—filed long before the case was limited to five claims by the court's pretrial order, long before Ameranth selected the five claims it would assert, long before Domino's contested the validity of only the five claims in invalidity contentions, long

before the second pretrial order recited the five claims at issue, and long before respondents moved for summary judgment on only the five asserted claims. Based solely on that long-since superseded filing, the Federal Circuit concluded that Ameranth somehow had been given sufficient “notice” that the non-asserted claims would be considered as part of the summary judgment motion. In the court’s view, this sufficed to advise Ameranth of the need to present evidence on the validity of non-asserted claims and to provide “a full and fair opportunity to ventilate the issues raised.” App. *infra* at 11. It reached this conclusion despite the fact that Domino’s summary judgment motion neither met the burden any movant must satisfy nor did it present any evidence or argument to which Ameranth could respond. Nonetheless, on that basis it found “no procedural error” by the district court. App. *infra* at 12.

This summary justification of its actions by the court conflicts with its own and Ninth Circuit precedent. Where no motion regarding a claim is before it “a trial court may not invalidate a claim *sua sponte* . . . without prior notice to the non-movant and an opportunity for the non-movant to address such an unanticipated action.” *Osram Sylvania, Inc. v. Am. Induction Techs., Inc.*, 701 F.3d 698, 707 (Fed. Cir. 2012) (citing *Portland Retail Druggists Ass’n v. Kaiser Found. Health Plan*, 662 F.2d 641, 645 (9th Cir. 1981)). See also *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (summary judgment can be granted *sua sponte* “so long as the losing party was on notice that she had to come forward with all of her evidence”); *Buckingham v. United States*, 998 F.2d 735, 742 (9th Cir. 1993) (before *sua sponte* summary judgment is proper, the

losing party “must be given reasonable notice that the sufficiency of his or her claim will be in issue . . .”).

In addition to overlooking the clear procedural deficiencies, the Federal Circuit omitted the substantive legal steps essential for a finding of invalidity. In depriving Ameranth of its valuable property rights in the non-asserted claims, the court did not address the “presumption of validity” to which the non-asserted claims are entitled. Nor did it address the standard of clear and convincing evidence needed to overcome that presumption. Nor did it examine or address any evidence on whether the five claims at issue were “representative” of the non-asserted claims. How could it? There was *no* evidence. No basis—procedurally or substantively—on which summary judgment could be entered in Domino’s favor on the non-asserted claims. Yet it was. And the Federal Circuit—on *de novo* review of a silent record—affirmed.

2. Judicial invalidation of claims that have not been presented by the parties for consideration and resolution poses pressing practical risks that warrant this Court’s review.

This Court recently addressed the critical issue of party presentment that the Federal Circuit contravened. *Sineneng-Smith*, 206 L. Ed. 2d at 868-69, reaffirmed the principle announced in *Greenlaw v. United States*, 554 U.S. 237 (2008) that “[i]n both civil and criminal cases, in the first instance and on appeal, . . . we rely on the parties to frame the issues for decision and assign to courts the role of arbiter.”

Justice Scalia addressed this very defect in his concurring opinion in *Castro v. United States*, 540 U.S. 375, 386 (2003). Our system “is designed around the premise that parties [represented by competent counsel] know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.” (Scalia, J., concurring in part and concurring in judgment).

In significant practical ways, the situation in this case is worse than the error in *Sineneng-Smith*. The Ninth Circuit at least gave the parties some notice that it was considering an issue no party had presented; the Ninth Circuit gave both parties an opportunity to address that new issue before it was decided; and all parties did so. Here, the district court *sua sponte* invalidated a patent claim that the parties had clearly not presented for decision. No evidence or legal support was submitted supporting the court’s summary judgment ruling. No notice or opportunity to be heard was provided to the patent owner whose patent was declared invalid. Unlike this Court, which discerned and emphatically corrected the Ninth Circuit’s error, the Federal Circuit in this case simply plowed ahead and affirmed. Since the Federal Circuit did not have the benefit of this Court’s more recent decision in *Sineneng-Smith*, this case should, at a minimum, be remanded for reconsideration by the court of appeals. In any event, the Federal Circuit’s incorrectly expansive assessment of the Ninth Circuit’s views on *sua sponte* adjudication should be revisited in light of this Court’s vacating the Ninth Circuit’s ruling in *Sineneng-Smith*.

B. This Court should grant review to assure that a frequently-employed judicial streamlining device does not result in summary judgment invalidating patent claims absent clear and convincing evidence presented by the moving party to overcome the presumption of eligibility, and absent a meaningful opportunity for the patent owner to contest that evidence.

Given the practical significance of the issues in this case, additional factors weigh heavily in favor of certiorari, and full examination by this Court. The need for review is particularly acute because patent eligibility, and therefore validity, under 35 U.S.C. § 101 is the issue on which Ameranth was denied notice and an opportunity to present its evidence. In applying this Court's precedents on Section 101, the Federal Circuit and district courts around the nation have encountered great difficulty and generated much confusion. The state of disarray on the substantive standards of Section 101 has been the subject of extensive commentary, including Federal Circuit opinions earnestly beseeching guidance. *See Amdocs (Isr.) Ltd. v. Openet Telecom, Inc.*, 841 F.3d 1288, 1306 (Fed. Cir. 2016) (holding that the specification must be considered to analyze the claims in a Section 101 analysis); *but see Intellectual Ventures I LLC v. Symantec Corp.*, 838 F.3d 1307, 1322 (Fed. Cir. 2016). *See also Aatrix Software, Inc. v. Green Shades Software, Inc.*, 890 F.3d 1354, 1360 (Fed. Cir. 2018); *Smart Sys. Innovations, LLC v. Chi. Transit Auth.*, 873 F.3d 1364, 1377 (Fed. Cir. 2017); *Interval Licensing LLC v. AOL, Inc.*, 896 F.3d 1335, 1348, 1354-55 (Fed.

Cir. 2018) (Plager J., concurring in part and dissenting in part) (“The law renders it near impossible to know with any certainty whether the invention is or is not patent-ineligible.” . . . “There is little consensus among trial judges (or appellate judges for that matter) regarding whether a particular case will prove to have a patent with claims directed to an abstract idea, and if so whether there is an ‘inventive concept’ in the patent to save it.”).

The upsurge of petitions in Section 101 cases highlights the chaotic application of substantive standards for patent eligibility. This is an area of law that urgently needs to be revisited and settled. Recent filings by the Solicitor General in *Berkheimer*, No. 18-415 (cert. denied Jan. 13, 2020) confirm that decisions on patent-eligibility under Section 101 have “generated substantial uncertainty in the lower courts concerning the scope of the exceptions [to the statute] and the proper methodology for determining whether a particular patent implicates them.” U.S. Amicus Br. at 12-13, *Berkheimer, supra* (No. 18-415). This uncertainty is also reflected in considerable confusion in the Federal Circuit. For example, the government’s amicus brief in *Hikma* pointed to a recent action by the Federal Circuit that “was accompanied by multiple separate opinions articulating different understandings of *Mayo* and seeking clarification from this Court.” U.S. Amicus Br. at 22, *Hikma Pharmaceuticals USA Inc. v. Vanda Pharmaceuticals Inc.*, No. 18-817 (cert. denied Jan. 13, 2020) (citing *Athena Diagnostics, Inc. v. Mayo Collaborative Servs., LLC*, 927 F.3d 1333 (Fed. Cir. 2019)).

The disarray extends beyond the lack of substantive uniformity. It also includes procedural peculiarities since some lower courts seemingly have accepted the premise that recent Section 101 precedent justifies wholesale findings of ineligibility. This case is a stark example. On *de novo* review of a nonexistent factual record, the Federal Circuit affirmed summary judgment in favor of a party that did not even mention the non-asserted claims, did not submit any evidence that could have (or did) overcome the presumption of eligibility to which all issued patent claims are individually entitled, much less by the “clear and convincing” evidentiary standard required to overcome that presumption.

Claims allowed by the USPTO are afforded a presumption of validity as a matter of law, and the “clear and convincing” evidentiary standard applies to all challenges to a patent’s validity. *See Commil USA, LLC v. Cisco Sys.*, 191 L. Ed. 2d 883, 893-94 (2015). On summary judgment the moving party bears the burden of providing such “clear and convincing evidence” and of showing that there are “no genuine issues of material fact,” with all reasonable inferences in favor of the non-moving party. Fed. R. Civ. P. 56(c); *Pernell v. Southall Realty*, 416 U.S. 363 (1974); *see Osram Sylvania, Inc. v. Am. Induction Techs., Inc.*, 701 F.3d 698 (Fed. Cir. 2012) (“This court reviews the evidence in the light most favorable to the non-moving party.”) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). *See also Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 & n. 10 (1986).

Unless claims of a patent are entirely duplicative, the unique elements of each claim must be considered individually (or with the claim's other limitations in ordered combination), since each patent claim is afforded separate protection under the law. *See Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605, 607 (1950) (a claim in a patent provides the metes and bounds of the right which the patent confers on the patentee to exclude others from making, using, or selling the protected invention); *Kara Tech. Inc. v. Stamps.com Inc.*, 582 F.3d 1341 (Fed. Cir. 2009) ("It is the claims that define the metes and bounds of the patentee's invention. The claims [] define the scope of patent protection. The patentee is entitled to the full scope of his claims[.]"); *Corning Glass Works v. Sumitomo Elec. U.S.A., Inc.*, 868 F.2d 1251, 1257 (Fed. Cir. 1989) ("A claim in a patent provides the metes and bounds of the right which the patent confers on the patentee to exclude others from making, using or selling the protected invention."). These principles constrain a court from summarily considering any one of a patent's claims as "representative" or "duplicative," to invalidate other claims without proof. This is error even when the other claims are placed in issue. But the error is magnified when, as here, the other claims are not at issue, not the subject of any proof or evidence, and there is no meaningful opportunity for the patent owner to address their validity with material factual evidence.

The burden of proof lies with the moving party seeking invalidation. And the standard of proof requires clear and convincing evidence to overcome the presumption of patent validity. How then can a patent

claim with unique limitations and elements be found invalid without any evidence addressing that claim? How can a moving party prevail without submitting any evidence addressing the claim? How can the patent owner's property be summarily taken without an opportunity to rebut any purported evidence of invalidity for each claim? The answer is that they cannot. Yet the district court did just that here. And the Federal Circuit affirmed.

These basic requirements cannot be eviscerated by doing what the district court did here: basing its decision invalidating the non-asserted claims on the summary conclusion, without explanation, that independent Claim 1 of the '077 patent was "representative" of all 18 claims of the '077 patent. Respondents' motion did not contend that independent Claim 1 was representative of others. Nor did Ameranth ever agree that any of the asserted claims could be "representative." Indeed, Ameranth's briefing affirmatively confirmed its position that *none* of the five asserted claims was representative of the non-asserted '077 claims. C.A. App. 10258-10259. Domino's summary judgment motion and briefing offered nothing to the contrary. C.A. App. 4905.

The district court's predicate conclusion is therefore contrary to the Federal Circuit's decision in *Berkheimer*, 881 F.3d at 1365-68. *Berkheimer* makes clear that "[a] claim is not representative simply because it is an independent claim." "The question of whether a claim element or combination of elements is well-understood, routine or conventional to a skilled artisan in the relevant field is a question of fact. Any

fact, such as this one, that is pertinent to the invalidity conclusion must be proven by clear and convincing evidence.” *Id.* (citing *Microsoft v. i4i Ltd P’ship*, 564 U.S. 91, 95 (2011)). *Berkheimer* held that the district court erred in concluding there were no underlying factual questions to the Section 101 inquiry, where the moving party, HP, offered no evidence. *Id.* at 1368. Here, in conflict with *Berkheimer*, the Federal Circuit affirmed despite critical evidentiary issues being overlooked and unaddressed by the district court. On appeal, the Federal Circuit, again *sua sponte*, simply concluded, without evidence by the movant or non-movant, that all of the features and elements of the non-asserted patent claims were “conventional.” The pervasive randomness of conflicting decisions creates a compelling need for this Court to at least prescribe procedural regularity in patent eligibility cases. It should do so before additional generations of technology are stripped of the patent protection to which they are entitled.

C. Because commonly-used litigation shortcuts put at risk the protections embodied in the Due Process Clause and the Federal Rules of Civil Procedure, the issue in this case has broad application in patent disputes and many other litigation contexts.

The procedural and evidentiary issue presented here goes far beyond the context of applying Section 101 to summary judgment proceedings. It applies equally to any patent case in which validity is challenged. Under each relevant section of the patent

laws there is a presumption of validity, under each there must be proof of invalidity by clear and convincing evidence, and under each the patent owner must be apprised of such evidence and have the a meaningful opportunity to offer evidence of validity.

If the issue were confined to patent cases, there would be ample reason for this Court to grant certiorari. In fact, the ramifications are even broader. This case illustrates the challenge confronting litigants in complex cases, where courts understandably seek efficiencies and shortcuts to create judicial economies and speed up the overall process. But courts must protect each litigant's right to notice, to due process in confronting issues and evidence against them, and to present the issues for review and judicial resolution in an orderly and fair manner. Speed and efficiency cannot trample core rights. Nor can Rules 16 and 56.

Similar procedural shortcuts are employed in a wide variety of cases. In "sample," "test" or "issue selection" proceedings, questions often arise on whether the sample, test or selected issue is "representative" of those reserved or excluded from an initial determination. The principle that must be applied is simple: unless the parties agree that the issue is "representative," then it must be established through adversary proceedings, based on evidence assessed under the appropriate standard of proof, with the procedural safeguards that permit the parties to rebut the adversary's evidence.

Consider, for example, the selection of "lead" or "sample" plaintiffs in multi-plaintiff litigation. If the selected plaintiffs win, the court cannot simply enter

judgment in favor or all remaining plaintiffs without giving defendant an opportunity to offer individual defenses that were not part of the test cases; and if the selected plaintiffs lose, the court cannot simply dismiss all the remaining plaintiffs without hearing from the others and without determining that the rationale for decision in the lead case necessarily applies to all.

Mass tort cases or multidistrict court litigations may result in selective issue resolution by the court or the identification of “test cases” as a subset or sampling of the larger litigation. But courts have repeatedly recognized that the “test case” will not necessarily resolve all others. The others will still have their day in court and be able to raise and litigate issues not covered or addressed in the test case:

A representation that a pending case should be dispositive, however, does not deprive parties of the right to argue that the ensuing decision failed to settle all the issues to be resolved in their case. To apply judicial estoppel in cases such as these would raise the specter of forfeiture of appellate rights whenever a party requests a stay to allow a “representative” case to go forward separately for the purpose of revolving issues common to all of the related cases.

Prati v. United States, 603 F.3d 1301, 1304-1305 (Fed. Cir. 2010) (citing *Whiting v. Krassner*, 391 F.3d 540, 543-33 (3d Cir. 2004)). See *Bendet v. Sandoz Pharms. Corp.*, 308 F.3d 907, 910 (8th Cir. 2002) (party that based its argument on the assertion that its evidence was “essentially the same” as the evidence in another

case, was not judicially estopped from seeking to distinguish the other case after an adverse decision in that case).

Suppose, for example, that at the outset of a case a defendant moves to dismiss on statute of limitations grounds; and the court then permits discovery only on that issue, holding the rest of the case in abeyance until that threshold issue is resolved. Having thus limited discovery, received evidence, and heard argument on only that one issue and concluding that the case was timely, the court's ruling on the statute of limitations could not forge ahead and decide the merits. And suppose the court did so without notice to the parties that anything other than the statute of limitations was on the table for decision. In addition to all the other problems, consider the impact on the parties and courts sorting out the resulting confusion on the collateral estoppel and res judicata status of such judgments.

Another example: suppose a defendant's answer to a complaint asserts multiple affirmative defenses. The case proceeds through discovery, summary judgment motions, pretrial order, and trial without a specific affirmative defense being mentioned again. The court cannot enter judgment in the defendant's favor on that affirmative defense, concluding that one line in the long-superseded initial pleading gave "notice" to the plaintiff. Why? Because orders limiting discovery control. Because the pretrial order controls. Because the evidence and argument presented by the parties at trial control.

Here, both the district court and the Federal Circuit failed to adhere to these core precepts of fair adjudication. They departed from the requirements of Rules 16 and 56 in ways that conflict with decisions of this Court and the majority of circuit courts. They departed from the requirements of due process. They used flawed procedures to reach incorrect results. And because such risks are inherent in the frequently employed case-management shortcuts used here, the issues arising in this case are likely to recur. This Court's guidance is needed.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the Court should summarily vacate and remand to the Federal Circuit for consideration in light of *United States v. Sineneng-Smith*, 206 L. Ed. 2d 866 (2020).

Respectfully submitted.

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