No. 19-1351

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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Petitioner Ameranth, Inc. submits this Rule 15.8 supplemental brief to inform the Court of new case law and intervening developments subsequent to the filing of its petition for a writ of certiorari in this case. These recent matters bear directly on and illuminate the Due Process question presented in Ameranth's petition. They strengthen petitioner's arguments favoring review. And they confirm the need for this Court, at the very least, to summarily remand this case to the Federal Circuit for further proceedings.

The Federal Circuit's actions on rehearing in *Am. Axle & Mfg. v. Neapco Holdings LLC*, No. 2018-1763, 2020 U.S. App. LEXIS 24216 (Fed. Cir. July 31, 2020) impact this petition in three distinct ways.

Eight weeks after Ameranth filed its petition for a writ of certiorari, the Federal Circuit issued several orders and opinions in *Am. Axle & Mfg. v. Neapco Holdings LLC* that should inform this Court's deliberations.[1] A brief background sketch will set the matter in context. In a highly controversial decision in October 2019, a divided Federal Circuit panel had affirmed a judgment finding multiple patent claims describing methods for manufacturing automobile

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[1] Ameranth's petition for rehearing in the Federal Circuit had identified *American Axle* as a case presenting several of "the same legal issues" as in Ameranth's appeal. *Ameranth, Inc. v. Domino's Pizza, LLC*, No. 2019-1141, 2019-1144, Dkt. 44, at *4 (Dec. 2, 2019) (Appellant's Combined Petition for Panel Rehearing and Rehearing *En Banc*).

driveshafts to be ineligible under 35 U.S.C. § 101.[2] In response to a petition for rehearing and rehearing *en banc*, the panel issued modified majority and dissenting opinions on July 31, 2020. The modified majority opinion altered the former analysis and result in significant ways, affirming only some of the prior findings of ineligibility while vacating and remanding others for further proceedings in the district court. On the same day the modified opinion issued, the full court denied rehearing *en banc* by a vote of 6-6 (with two concurring opinions and three dissenting opinions). With the denial of rehearing *en banc*, the modified panel majority opinion in *American Axle* is new and binding Circuit precedent.

1. The Newly Modified Majority Opinion in *American Axle* Adopted and Applied Aspects of the Party Presentment Rule on Which Petitioner Ameranth Seeks this Court's Review.

The modified majority opinion in *American Axle* remanded for further proceedings on questions that had not previously been presented by the parties. Unlike the panel majority's initial opinion—which held claims 1, 22 and their dependent claims to be patent ineligible—the majority now recognized that claim 1

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[2] The initial majority and dissenting opinions of the panel in *American Axle* were filed on October 3, 2019. *Am. Axle & Mfg.*, 939 F.3d 1355 (Fed. Cir. 2019). The majority opinion by Judge Dyk was joined by Judge Taranto; Judge Moore dissented. On November 1, 2019, Judge Dyk authored the panel opinion in *Ameranth. Ameranth, Inc. v. Domino's Pizza, LLC*, 792 Fed. App'x 780 (Fed. Cir. 2019).

(and its dependent claims) had to be remanded because "the abstract idea basis was not adequately presented and litigated in the district court." The panel, accordingly, vacated the judgment and remanded claim 1 and its dependent claims "for the district court to address this alternative eligibility theory in the first instance." *Am. Axle*, No. 2018-1763, 2019 U.S. App. LEXIS 39385, at *28 (Fed. Cir. October 3, 2019). *Compare Am. Axle*, 939 F.3d 1355 (Fed. Cir. 2019) *with Am. Axle*, No. 2018-1763, 2020 U.S. App. LEXIS 24216 (Fed. Cir. July 31, 2020).[3]

By its stated terms, the Federal Circuit's new binding precedent on the party presentment rule now precludes holding petitioner Ameranth's patent claims ineligible on grounds not presented to either the district court or the Federal Circuit. *See* Pet. 25-26. This new development is central to the pending petition and Ameranth's ruling should be modified as well.

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[3] Further detailed analyses of differences between the initial and modified majority opinions can be found in Melissa Brand & Hans Sauer, *The Re-Written American Axle Opinion Does Not Bring Peace of Mind for Section 101 Stakeholders* (Aug. 9, 2020) at https://www.ipwatchdog.com/2020/08/09/re-written-american-axle-opinion-not-bring-peace-mind-section-101-stakeholders/id=123900/; Thomas Long, *Court Modifies Opinion Finding Claims For Reducing Vehicle Vibrations Ineligible* (July 31, 2020) at https://lrus.wolterskluwer.com/news/ip-law-daily/court-modifies-opinion-finding-claims-for-reducing-vehicle-vibrations-ineligible/117600/ ; Alison Lucier & Anthony Fuga, *Federal Circuit Narrows its Prior Decision; Court is Still Torn on Section 101 Patent Eligibility* (Aug. 20, 2020) at https://www.hklaw.com/en/in insights/publications/2020/08/federal-circuit-narrows-its-prior-decision-court-is-still-torn.

Basic principles of Due Process and procedural regularity mandate that Ameranth should not be deprived of intellectual property rights simply because its appeal was decided during the brief period between the Federal Circuit's varying panel opinions in *American Axle*. If Judge Dyk had the benefit of the views he expressed in the modified *American Axle* panel opinion when issuing his November 2019 opinion for the panel in *Ameranth,* the result in this case necessarily would have been different. *See* Pet. 15-25. But when this case was decided, the now superseded holding of the initial *American Axle* panel was detrimental to Ameranth in ways the Federal Circuit now realizes are incorrect. Nor did the Federal Circuit have the benefit of this Court's guidance in *United States v. Sineneng-Smith*, 206 L. Ed. 2d 866 (2020) when deciding *Ameranth*. All the more reason for this Court to vacate the judgment and remand this case for further consideration in light of *Sineneng-Smith* or *American Axle* (subject to the ultimate disposition of *American Axle* in the likely event that certiorari is sought in that case).

2. *American Axle* Accentuates the Federal Circuit's Entrenched Disagreement on the Procedural Issues and Constitutional Due Process Concerns That Ameranth's Petition Raises.

But that's not the end of the significance to this case of the recent developments in *American Axle*. Although the modified panel opinion itself requires that *Ameranth* be similarly modified, the ramifications are more extensive. Other aspects of the Federal

Circuit's disposition in *American Axle* highlight the need for this Court's review here. Judge Moore's dissent from the panel's modified majority opinion gets right to the point. As commentators have observed, in Judge Moore's view "the majority's decision is a deprivation of rights without due process." Lucier & Fuga, *supra*.

Although the majority in *American Axle* remanded claim 1 to the district court, it still held claim 22 ineligible based upon a new analysis that was not articulated in the initial panel opinion. Judge Moore identified three critical errors with the majority's treatment of claims held ineligible and not remanded. The first is that, having created a new test for assessing whether claims are directed to a natural law (despite no natural law being recited in the claims):

> "[t]he majority refuses to ask the parties for supplemental briefing on the application of its new *Nothing More* test or to remand to the district court to assess the applicability of the new test in the first instance. The majority instead holds that we appellate judges, based on our background and experience, will resolve questions of science de novo on appeal." *Am. Axle*, 2019 U.S. App. LEXIS 39385, at *37-38 (Moore, J., dissenting).

Judge Moore also criticized other procedural and due process flaws in the majority's treatment of claims held to be ineligible:

> "I am troubled by the deprivation of property rights without due process. The majority

> declares claims representative despite the fact that no party argued below or to this court that there were representative claims, and AAM argued the import to the § 101 analysis of dependent claim limitations throughout these proceedings. And the majority finds against the patentee by reaching a claim construction issue of the majority's own creation. The majority concludes, though no party argued it at any point in this litigation or appeal, that the claim terms "positioning" and "inserting" have different meanings. And only because of its newly proffered, completely sua sponte construction, claim 22 is deemed ineligible. There is simply no justification for the majority's application of its new *Nothing More* test other than result-oriented judicial activism. This is fundamentally unfair." *Id*. at *39-40.

To Judge Moore the absence of evidence, argument, record support or a meaningful opportunity for the parties to be heard rendered the majority's approach untenable:

> "The majority is *sua sponte* interpreting undisputed, unappealed claim terms with reference to nothing. Neither party ever suggested that the inserting and position limitations had different meanings … The majority's *sua sponte* appellate claim construction is improper, unfounded and unsupported by the record. It is not our job on appeal to create our own claim construction issues to hold claims ineligible especially when

> they were never briefed or argued by the parties."). *Id.* at *57.[4]

And under the heading "Fundamental Fairness," Judge Moore targeted the majority's conclusion that claims 1 and 22 are "representative" of their dependent claims:

> "First, Neapco never argued that claims 1 and 22 are representative and in fact argued the dependent claims separately… Second, AAM expressly argued that they are *not* representative.") *Id.* at *71; *see id.* at *73 ("Given that the majority now *sua sponte* holds that claim 22 does not contain location information, it is unfair to refuse to review the dependent claims which unquestionably have detained location information.").

These criticisms apply as well to the Federal Circuit's opinion in *Ameranth* that is the subject of the pending petition: the *sua sponte* disposition of issues not presented by the parties, including the designation of patent claims as "representative" and the resolution by trial and appellate judges at the summary judgment

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[4] *See also id.* at *49 ("contrary to all arguments in the case, the record, the district court's decision, and its own prior opinion, the majority concludes …"); *50 ("no party introduced evidence that the desired result of claim 22 … is accomplished by application of Hooke's law *and nothing more.* In fact, both parties' experts expressly and unequivocally testified to the contrary. All the evidence in this case is to the contrary") (emphasis in original); *53 n. 6 ("AAM has not been given an opportunity to respond to the majority's new *Nothing More* test") (emphasis in original); *54 (the majority "decides this question of physics as a matter of law on appeal in the first instance even at summary judgment").

stage of factual issues on which the parties lacked notice or a meaningful opportunity to offer evidence and argument. The problem is palpable and pervasive. The Federal Circuit needs this Court's guidance.

That need was heightened when the Federal Circuit split 6-6 to deny rehearing *en banc* of the modified panel opinion in *American Axle*. In addition to entrenched substantive disagreements among the judges, the opinions dissenting from the denial of *en banc* rehearing expressly criticized procedural shortcomings raised in *Ameranth*'s petition. Judge O'Malley (joined by Judges Newman, Moore and Stoll) emphasized "the procedural norms that the majority ignores." *Am. Axle*, 2020 U.S. App. LEXIS 24216, at *50. She lamented the frequent resort by appellate courts to *sua sponte* resolution of issues without sufficient opportunity for input by the parties. And she enumerated key procedural flaws in the panel majority opinion:

> "(1) it announces a new test for patentable subject matter at the eleventh hour and without adequate briefing; (2) rather than remand to the district court to decide the issue in the first instance, it applies the new law itself; and (3) it sua sponte construes previously undisputed terms in a goal-oriented effort to distinguish claims and render them patent ineligible, or effectively so. These obstacle-avoiding maneuvers fly in the face of our role as an appellate court." *Id.* at *50-51.

See id. at *53-54 ("Sua sponte, and without the aid of supplemental briefing, the majority construes claims 1

and 22 to have a patently distinct difference. . .. No one argued that these terms are meaningfully, much less patentably, different and no one asked the trial court to compare or assess them. . . .This unrequested second chance for Neapco Holdings LLC is unwarranted and leaves American Axle trapped in § 101 purgatory.").

The recent actions in *American Axle* confirm fundamental points in Ameranth's petition for writ of certiorari. The internal disharmony among Federal Circuit judges on basic issues of procedural fairness to litigants warrants this Court's review. That Federal Circuit precedent conflicts with the majority of circuits on the question raised in the petition amplifies the need for review even more. *See* Pet. 15.

3. The Federal Circuit's Impasse on Procedural and Due Process Issues Exacerbates the Unfairness Inherent in its Unsettled law on Patent Eligibility Under 35 U.S.C. § 101.

American Axle is all the more impactful here because, like *Ameranth,* the procedural deficiencies and constitutional concerns arise in the context of the continuing chaos that besets § 101 litigation. The multiple concurring and dissenting opinions accompanying the 6-6 denial of rehearing *en banc* in *American Axle* reify the intractable impasse at the Federal Circuit.

The Federal Circuit is irreconcilably divided even on such fundamental threshold questions as whether the panel majority in *American Axle* crafted a new standard for § 101 eligibility. In denying rehearing *en*

banc, only four judges joined concurring opinions saying that the panel's majority opinion is consistent with longstanding precedent; but five judges joined dissenting opinions decrying the majority's test as "a new development with potentially far-reaching implications in an already uncertain area of patent law" *Am Axle*, 2020 U.S. App. LEXIS 24216, at *40 (Stoll, J., dissenting) resulting in "the dehabilitation of Section 101" in ways that "moved the system of patents from its once-reliable incentive to innovation and commerce to a litigation gamble." *Id*. at *37 (Newman, J., dissenting).

This is not hyperbole from disappointed litigants. These are the words of almost half the active Federal Circuit judges deciding vital issues central to our patent system.

The existing chaos is well-known to this Court from many prior filings (briefly summarized at Pet. 27-32). Since this petition was filed, amicus submissions in *The Chamberlain Grp. Inc. v. Techtronic Indus. Co.*, No. 19-1299, have stressed the urgency for this Court's intervention. Knowledgeable commentators echo these concerns in their analyses of *Am. Axle*.[5] *Chamberlain*

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[5] *E.g.,* Judge Paul Michel (Ret.) & John Battaglia, *New Enablement Requirements for 101 Eligibility: AAM v. Neapco Takes Case Law Out Of Context, and Too Far – Part I* (Aug. 19, 2020) at https://www.ipwatchdog.com/2020/08/19/new-enablement-like-requirements-101-eligibility-aam-v-neapco-takes-case-law-context-far-part/id=124433/; Judge Paul Michel (Ret.) & John Battaglia, *AAM v. Neapco Misreads Federal Circuit Precedent to Create a New Section 101 Enablement-like Legal Requirement – Part II* in IP Watchdog (Aug. 23, 2020) at https://www.ipwatchdog.com/2020/

and other cases affected by the Federal Circuit's § 101 jurisprudence continue to stream onto this Court's docket. And the likely requests for certiorari in *American Axle* will provide yet another opportunity to address the important substantive § 101 questions. The Court should consider the appropriate steps to assure that all pending cases be decided under uniform substantive standards, applied consistently and with the procedural fairness that the Constitution prescribes.

Whatever and whenever the resolution of substantive § 101 standards, the need for this Court to cure procedural flaws in § 101 litigation is immediate and dire. The recent modified opinion and *en banc* denial in *American Axle* demonstrate why certiorari should be granted here. The judicial system works properly only when parties have a fair opportunity to provide courts with the evidence, arguments and information essential for sound adjudication.

Several paths are available. The Court could immediately grant certiorari, vacate and remand for

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08/23/aam-v-neapco-misreads-federal-circuit-precedent-create-new-section-101-enablement-like-legal-requirement-part-ii/id=124498/; Law 360, *Driveshaft Case Brings More Confusion To Patent Eligibility* (Aug. 6, 2020) at https://www.law360.com/ip/articles/1299093/driveshaft-case-brings-more-confusion-to-patent-eligibility?nl_pk=7545a5b5-6a94-47d3-8aa3-2e19884905c5&utm_source=newsletter&utm_medium=email&utm_campaign=ip; Ryan Davis, *American Axle -Driveshaft Patent Eligibility Has Full Fed. Circuit Bitterly Split,* Law 360 (Aug. 1, 2020) at http://www.amera nth.com/pdf/American%20Axle%20-%20Driveshaft%20Patent%20Eligibility%20Has%20Full%20Fed.%20Circuit%20Bitterly%20Split,%20Aug%201,%202020.pdf

reconsideration under the Federal Circuit's new approach to the party presentment rule in the modified *American Axle* majority opinion (and with the benefit of this Court's decision in *Sineneng-Smith*). Or the Court could grant plenary review to address the continuing issues of procedural regularity and constitutional due process on which the Federal Circuit still conflicts with the majority of federal appellate courts. Or the Court might consider holding this petition pending the resolution of common procedural, constitutional and substantive patent law issues in other pending cert petitions (for example, *Chamberlain*. No. 19-1299, and, in the likely event that petitions will be filed, *American Axle*). In any event, recent developments confirm the need for this Court to answer the urgent pleas from the Federal Circuit judges for further guidance.

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 both *United States v. Sineneng-Smith,* 206 L. Ed. 2d 866 (2020) and *Am. Axle & Mfg. v. Neapco Holdings LLC* (and any further proceedings in that case).

Respectfully submitted.

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