

No. 20-891

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In The  
**Supreme Court of the United States**

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AMERICAN AXLE & MANUFACTURING, INC.,  
*Petitioner,*

v.

NEAPCO HOLDINGS LLC AND  
NEAPCODRIVELINES LLC,  
*Respondents.*

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

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**AMICUS CURIAE BRIEF OF AMERANTH, INC.  
SUPPORTING PETITIONER**

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March 1, 2021

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**CORPORATE DISCLOSURE STATEMENT**

Amicus Ameranth, Inc. has no parent corporation. No publicly held company owns 10% or more of the stock of Ameranth, Inc.

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**INTEREST OF AMICUS CURIAE<sup>1</sup>**

Ameranth, Inc. is a small San Diego, California based innovator that has developed, patented and deployed award-winning wireless and Internet-based solutions for the hospitality and gaming industries. Its innovative applications include Wireless POS, Table Management, Reservations Management, Mobile Concierge, Electronic Menus, Guest Surveys, Inventory Management, Health Care Services and 401k Enrollment Assistance. Judicial decisions interpreting patent eligibility under 35 U.S.C. § 101 have directly and adversely impacted Ameranth's ability to protect and defend its strong intellectual property portfolio.

Ameranth's recent litigation paralleled key aspects of this case so closely that it requested the Federal Circuit to rehear *Ameranth, Inc. v. Domino's, Inc.*, 792 Fed. App'x 780 (Fed. Cir. 2019) *cert. denied* 141 S. Ct. 249 (2020), together with the petition for rehearing in *American Axle* because they presented "the same legal issues." *Ameranth, Inc. v. Domino's Pizza, LLC*, Nos. 2019-1141, 2019-1144, Dkt. 44, at \*4 (Fed. Cir. Dec. 2, 2019) (Appellant's Combined Petition for Panel Rehearing and Rehearing *En Banc*). Other ongoing litigation in which Ameranth is a party will be affected by this Court's decision. *Ameranth, Inc. v. Domino's Pizza, LLC*, Nos. 2019-1141, 2019-

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<sup>1</sup> Counsel of record received notice of Ameranth's intent to file this amicus brief at least 10 days prior to the due date and all parties have consented. As Supreme Court Rule 37.6 prescribes, amicus curiae states that no counsel for a party has written this brief in whole or in part, and no person or entity, other than the amicus curiae or its counsel, has made a monetary contribution to the preparation or submission of this brief.

1144 (Fed. Cir. 2019); *Ameranth, Inc. v. Olo Inc.*, No. 2021-1211 (Fed Cir. 2020).

The persistent impasse in the Federal Circuit on Section 101 standards negatively affects Ameranth in multiple ways:

As a litigant, Ameranth has experienced the deleterious effects of the same substantive and procedural shortcomings presented in this case. These include:

- The Federal Circuit’s opaque, inconsistent construction of Section 101 and of this Court’s judicially-created exemptions;

- The Federal Circuit’s blurring of legal and factual questions inherent in assessing patent eligibility; and

- The Federal Circuit’s *sua sponte* imposition—on appeal—of new, changing, and unpredictable standards for patent eligibility never considered by the trial court.

As an innovator, Ameranth faces the now-unsolvable practical difficulty of drafting patent claims that will actually protect valuable intellectual property rights in its inventions. The judges of the Federal Circuit are split, irreconcilably, on the core issues of patent eligibility in this case. How can inventors meet a standard that even the ultimate arbiters of patent eligibility cannot articulate and apply uniformly?

The unworkable standard for determining whether a patent claim is “directed to” a natural law or abstract idea has put broad categories of innovative technology in jeopardy. And that innovation-chilling jeopardy is amplified by the risk that the Federal Circuit will decide issues—including factual disputes—not presented to, considered, or resolved by the trial court.

Ameranth’s involvement in patent prosecution and patent litigation—past, present and future—provides this Court some insight on how an individual innovator is actually affected by the pervasive practical issues in this case. Ameranth may be only a small voice in the massive chorus imploring this Court to address vital questions of patent eligibility. But having experienced the direct impact of shifting, unclear and ill-considered standards of patent eligibility, Ameranth’s history exemplifies the real-life consequences of today’s Section 101 morass.

Ameranth is a small development company founded 25 years ago and still led by its principal inventor. It has seen long-issued and successfully licensed patents, representing true innovation that the industry recognized, retroactively eviscerated under standards and procedures recently created by district courts and the Federal Circuit. When first introduced, Ameranth’s inventions for mobile-wireless ordering and payment processing in restaurants were hailed as almost like science fiction and “poised to become the industry standard.” Rita Gunther McGrath and Ian C. MacMillan, *Market Busters: 40 Strategic Moves that Drive Exceptional Business Growth*, Harvard Bus. School Press 34-35 (2004). *See*

*Wireless Finds a Welcome in Hospitality*, Bloomberg Businessweek (Feb. 8, 2004), <https://www.bloomberg.com/news/articles/2004-02-08/wireless-finds-a-welcome-in-hospitality> (“not quite Star Trek”). Key luminaries in the field recognized Ameranth’s scientific achievements. In nominating Ameranth for one on the many honors it was awarded, Bill Gates put it succinctly: “Ameranth is one of the leading pioneers of the information technology age for the betterment of mankind.” CISION PR Newswire, “Ameranth Significantly Expands Enforcement of Its Patented 21st Century Communications™ Web/Wireless Data/Display Synchronization Inventions,” (July 2 2012), <https://www.prnewswire.com/news-releases/ameranth-significantly-expands-enforcement-of-its-patented-21st-century-communications-webwireless-datadisplay-synchronization-inventions-161049605.html>.

Numerous patents issued. Ameranth’s inventions began to revolutionize the restaurant and hospitality industries. But years later, innovations that leading minds with keen understanding of the relevant science had lauded as pioneering technology were deemed by courts applying new standards of patent eligibility to be merely conventional and invalid.

The world of innovation and invention changed when the Federal Circuit started interpreting this Court’s §101 decisions, especially *Alice Corp. v. CLS Bank Int’l*, 573 U.S. 208 (2014). Pioneering inventions that had been—and should have continued to be—protected by their duly issued patents became vulnerable to claims of invalidity. Scientific advances

praised as breakthroughs by the most knowledgeable people in their fields were now subject to losing patent protection as alleged mere abstractions. Often, that protection was lost. Too often.

As the ultimate decision-making body on patent eligibility, the Federal Circuit sent increasingly blurred messages to litigants and inventors. Today, when the fate of patent claims worth millions or billions of dollars hang in the balance, the outcome depends on which side of the 6-6 *American Axle* divide comprises the panel majority in your case. To inventors and litigants, that becomes a very expensive, very perilous coin flip.

That is Ameranth's interest in the issues in this case. It shares that interest with countless inventors, litigants, judges, scholars and business leaders.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

This Court should recognize the Federal Circuit's disposition of American Axle's '911 Patent for what it really is: a 9-1-1 emergency call for help.

The Court should respond. The need is urgent. The situation is critical.

Section 101 patent eligibility is a foundational issue that broadly affects technology and the economy. The recently outgoing USPTO Director's valedictory comments focused on the "quandary" of Section 101 that has "plagued our system for the past decade:"

The most important technologies of the future are being impacted, including diagnostics, bioinformatics, artificial intelligence, digital processing and many more. We must resolve this issue, and we must resolve it now. If not, we risk our nation being left behind as others fortify their IP laws and race toward technological dominance.

Dani Kass, *Iancu Resigns As USPTO Director, Urges Eligibility Reform*, Law360.com (January 19, 2021), [https://www.law360.com/ip/articles/1343992/iancu-resigns-as-uspto-director-urges-eligibility-reform?nl\\_pk=7545a5b5-6a94-47d3-8aa3-2e19884905c5&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=ip](https://www.law360.com/ip/articles/1343992/iancu-resigns-as-uspto-director-urges-eligibility-reform?nl_pk=7545a5b5-6a94-47d3-8aa3-2e19884905c5&utm_source=newsletter&utm_medium=email&utm_campaign=ip).

This case lays bare the futility of further percolation in the Federal Circuit. Between its initial opinion and its modified opinion, the panel majority altered the legal standard of eligibility, changed the application of that standard to the facts, and reached a different result on some patent claims. In denying rehearing *en banc* by a 6-6 vote, the full court was hopelessly divided on core questions:

- Did the panel create a new standard for patent eligibility under Section 101?
- What is the standard?
- In assessing §101 patent eligibility, which determinations are factual and which are legal?

• Whatever the nature of those determinations, and whatever standards govern their resolution, should the determinations be made first by the trial court or the court of appeals?

The multiple opinions accompanying the 6-6 vote denying rehearing *en banc* reveal a grim reality. The Federal Circuit has reached the end of the line on §101. And it was a trip to nowhere.

In their pleas for guidance, the Federal Circuit judges add a strong voice to the universal chorus imploring this Court to grant review. As the §101 patent-eligibility crisis emerged and worsened, the clamor for judicial resolution grew from every affected constituency in science and technology, the economy, government, academia and the judiciary. The time is now.

And this is the right case—for multiple reasons. The patent claims cover an invention akin to many that have easily satisfied eligibility tests. Because the case is firmly within traditional bounds of eligibility a decision will have a broader impact than an outlier case at the fringe of patentability.

Another factor favoring review is that the case highlights frequently occurring problems in §101 litigation. Defining the fact/law line and the trial court/appellate court line are common points of contention in §101 cases, including sharp disagreement among judges on Federal Circuit panels.

This Court's review is necessary to provide consistency, uniformity, predictability, regularity and

sound decision making to issues that impact the country's technological and economic stature in the 21st century world.

## ARGUMENT

### I. THE JUDGES OF THE FEDERAL CIRCUIT HAVE REACHED A DEAD END ON THESE ISSUES AND ARE BESEECHING THIS COURT FOR DIRECTION.

This Court has previously recognized the importance of the question presented in this case. In *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014), the Court prescribed standards and a mode of analysis for determining patent eligibility under 35 U.S.C. § 101. *Alice* left to the Federal Circuit the responsibility to implement those standards and guide the application of that analysis nationwide. Two principal consequences ensued:

1. Section 101 challenges multiplied exponentially. An avalanche of litigation attacking the patent eligibility of inventions across a wide swath of technologies has affected multiple industries.<sup>2</sup>

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<sup>2</sup> According to Docket Navigator's Special Report, *Alice Through the Looking Glass, the Impact of Alice Corp. Pty. v. CLS Bank International*, 134 S. Ct. 2347 (2014) on the patent enforcement landscape ("Alice Report"), available at <http://brochure.docketnavigator.com/alice/> (accessed on Feb. 26, 2021): "In the four and a half years prior to the Federal Circuit's initial Alice decision [*CLS Bank Int'l v. Alice Corp. Pty.*, 685 F.3d 1341 (Fed. Cir. 2012)] district courts addressed subject matter eligibility in only 69 decisions." *Alice Report* at 2. But from the Federal Circuit's opinion in *Alice* through the end of 2018,

2. The Federal Circuit's conflicting decisions on patent eligibility have not provided uniformity or consistency. Utter chaos has resulted instead.

That lack of effective guidance has prompted concerned calls for this Court's continued oversight. Judges, scholars, legal commentators, and practitioners lamented how opaque the law on patent eligibility had become. Former Chief Judge of the Federal Circuit Paul Michel testified before the House Judiciary Committee that "[p]atent eligibility law under § 101 has descended into chaos ... that is devastating American business, including high tech, manufacturing, biotech, and pharmaceutical industries." Supplemental Statement of Judge Paul R. Michel (Ret.) to the United States House of Representatives Committee on the Judiciary, September 12, 2017, available at: <https://innovationalliance.net/wp-content/uploads/2017/09/Supplemental-Statement-of-Paul-R-Michel-Sept-12-2017.pdf> (accessed on Feb. 26, 2021).

Sitting judges on the Federal Circuit also commented on the unsettled nature of the law. *E.g.*, *Interval Licensing LLC v. AOL, Inc.*, 896 F.3d 1335, 1348, 1350 (Fed. Cir. 2018) (Plager, J. concurring in part and dissenting in part) ("[t]he law ... renders it near impossible to know with any certainty whether the invention is or is not patent-eligible" and, specifically, that the "abstract idea" element of patent

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"subject matter eligibility has been raised in 480 cases against 1,497 patents and has generated more than 1,200 district court decisions." *Id.*

eligibility analysis is a “definitional morass” . . . . “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”); *Smart Sys. Innovations, LLC v. Chi. Transit Auth.*, 873 F.3d 1364, 1377 (Fed. Cir. 2017) (Linn, J. concurring in part and dissenting in part) (“[T]he abstract idea exception is almost impossible to apply consistently and coherently”); *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 890 F.3d 1354, 1360 (Fed. Cir. 2018) (Lourie, J. and Newman, J. concurring in the denial of the petition for rehearing *en banc*) (the law governing patent eligibility “needs clarification by higher authority, perhaps by Congress, to work its way out of what so many in the innovation field consider are § 101 problems”); *Berkheimer v. HP Inc.*, 890 F.3d 1369, 1376 (Fed. Cir. 2018) (Lourie, J. and Newman, J., concurring in the denial of the petition for rehearing *en banc*) (calling for “higher intervention, hopefully with ideas reflective of the best thinking that can be brought to bear on the subject”).

The United States sounded the alert that the “confusion created by this Court’s recent Section 101 precedents warrants review in an appropriate case.” U.S. Amicus Br. at 8, *Hikma Pharm. USA Inc. v. Vanda Pharm. Inc.*, No. 18-817 (cert. denied Jan. 13, 2020). Scholars, practitioners, and scientists beseeched the Court to end the chaos.

Then came *American Axle*.

A bad situation worsened. This case's progress through the Federal Circuit exposed and magnified the existing problems generated by unsettled standards, inconsistently applied through flawed procedures.

A divided Federal Circuit panel initially affirmed a judgment finding that multiple patent claims describing methods for manufacturing automobile driveshafts were ineligible under 35 U.S.C. § 101. In response to a petition for rehearing and rehearing *en banc*, the panel issued modified majority and dissenting opinions. 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.<sup>3</sup>

On the same day the modified panel opinion issued, the full court denied rehearing *en banc* by a vote of 6-6 (with two concurring opinions and three

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<sup>3</sup> 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-axleopinion-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://rus.wolterskluwer.com/news/ip-law-daily/court-modifiesopinion-finding-claims-for-reducing-vehicle-vibrationsineligible/117600/>; Allison 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/ininsights/publications/2020/08/federal-circuit-narrows-its-priordecision-court-is-still-torn>.

dissenting opinions). The opinions accompanying the denial of rehearing *en banc* highlighted the total impasse existing in the Federal Circuit. The Federal Circuit judges are irreconcilably divided even on such fundamental threshold questions as whether the panel majority in *American Axle* crafted a new standard for § 101 eligibility. 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 & Mfg. v. Neapco Holdings LLC*, 966 F.3d 1347, 1362, 1360 (Fed. Cir. 2020) (Stoll, J., dissenting). And the dissenters explained that the panel majority opinion resulted in “the debilitation 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 1361 (Newman, J., dissenting).<sup>4</sup>

This is an archetypical untenable situation. Not only did a single divided panel articulate different legal standards and employ different analyses in the same appeal, but half of the full Federal Circuit

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<sup>4</sup> Judge O’Malley (joined by Judges Newman, Moore and Stoll) enumerated key flaws in the modified 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 1366.

disagrees with the panel's standard and how it was applied.

Even worse, this impasse leaves the law in a place this Court expressly cautioned the Federal Circuit to avoid. *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 70 (2012) held that under § 101 “laws of nature, natural phenomena, and abstract ideas are not patentable.” And the Court recognized in *Alice*, that *all* inventions implicate laws of nature, natural phenomena, or abstract ideas, and expanded upon this conception by stating that what is patent-eligible is really the “applications of such concepts to a new and useful end.” *Alice Corp.*, 573 U.S. at 217 (internal quotation marks omitted). For precisely that reason, the Court explained, “an invention is not rendered ineligible ... simply because it involves an abstract concept.” *Id.* The operative instruction was stated clearly and simply: “we tread carefully in construing this exclusionary principle lest it swallow all of patent law.” *Id.* See *Mayo*, 566 U.S. at 71 (“too broad an interpretation of this exclusionary principle could eviscerate patent law”).

The “evisceration” this Court feared and cautioned against has now come to pass. Patent eligibility under *Diamond v. Diehr*, 450 U.S. 175 (1981) has become *ineligibility* under *American Axle*. The need for this Court's review is manifest and urgent.

**II. THIS CASE PRESENTS THE BEST VEHICLE FOR THIS COURT TO DECIDE THE VITAL QUESTIONS OF PATENT ELIGIBILITY IN THE BROADEST CONTEXT WITH THE GREATEST IMPACT.**

Why this case? Although the Court has forgone past opportunities to quell the § 101 chaos, why is *American Axle* a better vehicle?

Let's start with the obvious answer that the splintered panel opinions in this case and the equally divided *en banc* vote have materially worsened the situation. The Federal Circuit is now bound by precedent with which half the judges on that court fervently disagree. They do not agree on the substantive test. They do not agree with the mode of analysis. They do not agree with the procedures used in applying the newly fabricated test—even assuming it might be appropriate at all.

Equally as important for the *certiorari* equation, this case satisfies criteria that prior cases did not. In its amicus briefs in *Berkheimer* and *Hikma* the United States identified characteristics that made those cases less than ideal candidates for resolving the important substantive question at the core § 101. None applies to *American Axle*.

In recommending against *certiorari* in *Hikma*, the Government pointed to the fact that the case involved a pharmaceutical method patent, which would narrow its precedential value. U.S. Amicus Br. at 21, *Hikma Pharm. USA Inc. v. Vanda Pharm. Inc.*,

No. 18-817 (cert. denied Jan. 13, 2020). That is not a concern here. American Axle's patent allows the Court to address basic § 101 eligibility issues in traditional and familiar territory, akin to *Diehr*, with the widest application.

In the government's view, the fact/law dispute in *Berkheimer* should be addressed only after the substantive § 101 standard was settled. *Id.* at 22 (citing *Athena Diagnostics, Inc. v. Mayo Collaborative Servs., LLC*, 927 F.3d 1333 (Fed. Cir. 2019)). Since *Berkheimer* did not present the substantive question, the government advised against review. That concern does not exist in this case. The substantive question of § 101's eligibility standard is squarely presented. And *American Axle* offers the distinct benefit of allowing the Court to resolve the fact/law dispute at the same time. With a potentially broader impact of a decision resolving key doctrinal and practical issues in patent litigation, the justification for review in this case is enhanced.

As a litigant and innovator, Ameranth has endured the post-*Alice* explosion of § 101 challenges and the vagaries of inconsistent judicial decisions applying shifting standards. From that first-hand experience, Ameranth knows that this Court's review is critical.

The guidance that only this Court can provide is needed to replace the existing chaos with uniformity, regularity, predictability and the protections for scientific advances that the Constitution and Congress prescribe.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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