No. 21-1228

IN THE

Supreme Court of the United States

AMERANTH, INC.,

Petitioner,

v.

OLO, INC.,

Respondent.

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner Ameranth, Inc. submits this Rule 15.8 supplemental brief to inform the Court of new and intervening developments subsequent to the filing of the reply brief supporting certiorari. The recent filing of the Solicitor General's amicus brief in *American Axle & Mfg., Inc. v. Neapco Holdings LLC*, No. 20-891 should weigh heavily in favor of review in this case and provides further reasons to align this petition with No. 20-891.

Given the extensive overlap of certiorari factors in *Ameranth* and *American Axle*, it would advance efficiency, fairness and uniformity of decisions for both petitions to be considered together. To that end, the Court should reschedule this petition (No. 21-1228) from its June 9, 2022 conference to the conference at which it considers No. 20-891 (and other pending petitions raising the exact same §101 issues).

On behalf of the United States, the Solicitor General's May 24, 2022 amicus brief in *American Axle* confirms key points in Ameranth's petition, and adds the government's powerful institutional voice to the overwhelming calls for this Court to resolve the confusion plaguing implementation of §101's test of patent eligibility. This recent development bears directly on and illuminates the questions presented in Ameranth's petition. It strengthens petitioner's arguments favoring review. And it confirms that, at the very least, this Court should consider this case at the same time as or in light of its decision in *American Axle*.

In recommending that certiorari be granted in No. 20-891, the Solicitor General confirmed multiple points raised in Ameranth's petition and reply brief:

- that a critical need exists for this Court to clarify the test for §101 patent eligibility (SG Br. at 19-21; Ameranth Pet. at 1-19,23-26, Reply Br. at 1-2);

- that *American Axle* is a suitable vehicle for guiding the deeply divided Federal Circuit's implementation of §101 (SG Br. at 21; Ameranth Pet. at 17-9; Reply Br. at 3-4);

- that the test for patent eligibility of inventions challenged for depending on natural laws (*American Axle*) will inform the analysis of inventions challenged as "abstract" (*Ameranth*) (SG Br. at 21; Ameranth Pet. 15-17; Reply Br. at 3);

- that clarifying the test for §101 patent eligibility is a necessary predicate for determining whether the analytical steps of *Alice/Mayo* are questions of fact or of law (SG Br. at 19-20; Ameranth Pet. at 19-22; Reply Br. at 9-10).

1. *Ameranth* and *American Axle* share many common attributes and litigation history. Both were decided by the same district judge in the District of Delaware, applying the same precedents from this Court and the Federal Circuit. Reply Br. at 9-10. In their briefs to the Federal Circuit, both parties in this case cited the panel decision in *American Axle* that is pending before this Court in No. 20-891. Ameranth CAFC No. 21-1211 Br. at 36, 45; Olo CAFC No. 21-1211 Br. at 32. When *American Axle*

filed its petition for a writ of certiorari in December 2020, Ameranth filed an amicus brief that specifically identified this case (then recently filed in the Federal Circuit) as one that would be affected by the decision in No. 20-891. Ameranth Amicus Br. in No. 20-891 at 1-2. Both petitions present the identical legal questions for this Court to decide. Pet. 20-891 at *i*; Ameranth Pet. at *i*.

2. That the two cases present identical legal issues in similar but different factual contexts only amplifies the reasons for considering both petitions at the same time. Where *American Axle* posits a mechanical patent held ineligible because it depends on natural law, Ameranth's software patent was held ineligible as depending on an abstraction. The Solicitor General's brief explains why the decision in one context will guide cases in the other. SG Br. at 19-21. The Court may choose to decide the key questions seriatim in separate cases, or at the same time. But the only path to framing the questions and the scope of review for the broadest impact is for the Court to have a full range of options when it decides on certiorari.

3. The same consideration applies to the second question presented in both petitions (questions of fact/questions of law). The Solicitor General recommends leaving that issue for the future, after the Court clarifies the substantive test for §101 patent eligibility. The Court may follow that recommendation, or it may conclude that deliberations would benefit from addressing the merits of both questions simultaneously. In either event, having a broader range of options available at the certiorari stage will assist the Court in making a sound choice.

4. There can be no doubt that the Court's decision in *American Axle* will affect the outcome here. The Solicitor

General raises multiple relevant principles on which the courts below erred in *American Axle*. The same courts made the same errors on the same principles here:

- The government's amicus brief explains that "laws of nature, natural phenomena, [and] abstract ideas" are not patent-eligible, but "'[a]pplications' of such concepts 'to a new and useful end'" are "eligible for patent protection." SG Br. 10 (brackets and citation omitted); see *Mayo Collaborative Servs. v. Prometheus Labs.*, 566 U.S. 66, 77 (2012). A principal purpose of the *Mayo*/*Alice* framework is to distinguish between those two types of claimed inventions. SG Br. 11; *Mayo*, 566 U.S. at 72, 79; see *id.* at 77, 80, 87; *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. at 217, 221, 223. That principle is at the heart of this case.

- Courts therefore must "tread carefully in construing th[e] exclusionary principle lest it swallow all of patent law," and "an invention is not rendered ineligible for patent simply because it involves" a patent-ineligible concept. SG Br. 12; *Alice*, 573 U.S. at 217 (citing *Diamond v. Diehr*, 450 U.S. 175, 187 (1981)). That caution applies here as well, where a layperson reading of the patent specification and claims disregarded—on a motion to dismiss—the explanation from one skilled in the art of how the invention did more. Ameranth Pet. at 20.

- In describing the concern that "undergirds [the Court's] § 101 jurisprudence," the Solicitor General explained that the relevant inquiry seeks "practical assurance that the process" claimed "is

more than a drafting effort designed to monopolize [a] law of nature itself." SG Br. 13, quoting *Mayo*, 566 U.S. at 77. See *Diehr*, 450 U.S. at 187 (patentees "s[ought] only to foreclose from others the use of that equation in conjunction with all of the other steps in their claimed process"). The government's brief highlights the need for this principle to be employed wisely. This principle applies in the context of challenges based on either natural law or abstraction and affects the substantive outcome of this case.

- The government's amicus brief also stresses the need—reiterated in *Alice*— to "consider the elements of each claim both individually and 'as an ordered combination'" in resolving issues of patent-eligibility. SG Br. 18; *Alice*, 573 U.S. at 217 (quoting *Mayo*, 566 U.S. at 79). That has particular significance here, where the ordered combination of elements in Ameranth's patent claims should be at the heart of assessing §101 eligibility. Further elucidating this point, the Solicitor General pointed to the opinion that *Mayo* quoted with approval, *i.e.*, *Diehr's* guidance that a "new combination of steps in a process may be patentable even though all the constituents of the combination were well known and in common use before the combination was made." SG Br. 18; *Mayo*, 566 U.S. at 79 (quoting *Diehr*, 450 U.S. at 188).

5. Considering this petition at the same conference with *American Axle* is the most efficient—and plainly correct—way to proceed. This case followed *American Axle* through the District of Delaware and the Federal

Circuit. In a more typical chronological trajectory, the decision on certiorari in *American Axle*—and on the merits as well—would have been made before Ameranth's petition reached this stage and *Ameranth* would result in a GVR order here.

In the current circumstances, the Court has the opportunity to weigh the cases together and choose the optimal way to proceed. As the Solicitor General explained, the legal issues have major practical impact, the need for guiding the "fractured" Federal Circuit is great (SG Br. at 20), and the Court is presented with a suitable vehicle for decision. Certiorari should be granted in this case, whether the Court does so before, simultaneously with, or subsequent to *American Axle.* Alternatively, No. 21-1228 should be held pending the disposition of No. 20-891 and remanded for the Federal Circuit to review in light of *American Axle.*

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the Court should consider prudent ways to coordinate its disposition of this petition with other pending cases presenting the same questions under 35 U.S.C. § 101, including rescheduling the conference at which this case is currently to be considered so that it can be assessed together with *American Axle* (and others) at the same conference, or holding this case pending resolution of the identical questions in *American Axle*.

Respectfully submitted,

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