No. 19-1452

IN THE
Supreme Court of the United States

SMITH & NEPHEW, INC.
AND ARTHROCARE CORP.,

Petitioners,

v.

ARTHREX, INC.
AND UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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All parties agree that this petition should be granted to decide "[w]hether administrative patent judges are 'principal' or 'inferior' Officers of the United States." S&N Pet. i; *see* U.S. Mem. 4 ("Smith & Nephew's petition should be granted"); Arthrex Mem. 10 ("Arthrex agrees with the government and Smith & Nephew that the Court should grant review" on that question). The parties further agree that *this* case is "the ideal vehicle" for deciding that important question because it is "the lead case," Arthrex Mem. 12, and the question was raised, decided, and addressed in multiple reasoned opinions below, U.S. Pet. 33; *see also* S&N Pet. 30–31.

To be sure, the parties are not in agreement on all issues raised by the Federal Circuit's disposition of this case. But rather than rehash those arguments here, S&N notes that the petition-stage briefing establishes the desirability—indeed, the necessity—of plenary review by the Court. This case involves structural constitutional concerns of the first order.

S&N does not object to the government's reformulated questions, which collectively include all issues presented by the three petitions filed by the parties to this case. U.S. Mem. 6–7. S&N adds only that, even if the Court does not review the government's separate question on forfeiture, the Court can and should address what case-specific remedy, if any, is available to Arthrex in light of its failure to preserve its constitutional challenge before the agency. S&N Pet. 32; *see also* Comcast Amicus Br. 3. The government does not dispute this point, which S&N made in its petition, and Arthrex did not object to—and therefore conceded—the point in its response. *See Franchise Tax*

Bd. v. *Hyatt*, 139 S. Ct. 1485, 1491 n.1 (2019) (nonjurisdictional objections waived if not raised in response to petition). Because "[c]ounsel . . . have an obligation to the Court to point out in the brief in opposition, *and not later*, any perceived misstatement made in the petition" that "bears on what issues properly would be before the Court if certiorari were granted," Sup. Ct. R. 15.2 (emphasis added), Arthrex's belated attempt to address this point in a reply brief in support of its *own* petition is both improper and ineffectual. And because any case-specific remedy is subsumed within the principal/inferior Officer question, there is no need for a separate question on this issue.

S&N agrees with the government's suggestion that the Court "consolidate the cases and realign the parties for purposes of briefing and argument." U.S. Mem. 6–7. Consistent with that suggestion, S&N proposes the following briefing sequence: (1) S&N and the government file opening briefs addressing the government's reformulated questions on the Appointments Clause and (if granted) forfeiture; (2) Arthrex files an opening and response brief addressing all questions on which certiorari is granted; (3) S&N and the government file response and reply briefs addressing all such questions; and (4) Arthrex files a reply brief addressing only the reformulated question on severance.

CONCLUSION

The three petitions for writs of certiorari in *Arthrex* (Nos. 19-1434, 19-1452, 19-1458) should be granted and set for consolidated briefing and argument.

Respectfully submitted.

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