

Nos. 19-1434, 19-1458

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ARTHREX, INC., ET AL.,
Respondents.

ARTHREX, INC.,
Petitioner,

v.

SMITH & NEPHEW, INC., ET AL.,
Respondents.

**On Petitions For Writs Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit**

**BRIEF FOR RESPONDENTS
SMITH & NEPHEW, INC. AND
ARTHROCARE CORP.**

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QUESTIONS PRESENTED

The questions presented in *United States v. Arthrex, Inc.*, No. 19-1434, are:

1. Whether, for purposes of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, administrative patent judges of the U.S. Patent and Trademark Office are principal officers who must be appointed by the President with the Senate's advice and consent, or "inferior Officers" whose appointment Congress has permissibly vested in a department head.

2. Whether the court of appeals erred by adjudicating an Appointments Clause challenge brought by a litigant that had not presented the challenge to the agency.

The questions presented in *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 19-1458, are:

1. Whether the court of appeals' severance remedy is consistent with congressional intent.

2. Whether the court of appeals correctly held that the elimination of APJ tenure protections was sufficient to render APJs inferior officers.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, respondents Smith & Nephew, Inc. and ArthroCare Corp. state that Smith & Nephew PLC is respondents' parent corporation and no other publicly held corporation owns 10% or more of the stock of either respondent.

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BRIEF FOR RESPONDENTS

The Federal Circuit held in this case that administrative patent judges (APJs) are principal rather than inferior Officers of the United States; that severing APJs' statutory removal protections was sufficient to cure the Appointments Clause violation; and that the patent owner is entitled to a new hearing before different adjudicators notwithstanding its administrative forfeiture. U.S. Pet. App. 22a, 28a–33a.

All parties to that decision—the patent owner Arthrex, Inc. (Arthrex), the challengers Smith & Nephew, Inc. and ArthroCare Corp. (S&N), and the United States as intervenor—have petitioned for writs of certiorari to review the Federal Circuit's rulings. See Pet. for Cert., *United States v. Arthrex, Inc.*, No. 19-1434 (U.S. filed June 25, 2020) (“U.S. Pet.”); Pet. for Cert., *Smith & Nephew, Inc. v. Arthrex, Inc.*, No. 19-1452 (U.S. filed June 29, 2020) (“S&N Pet.”); Pet. for Cert., *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 19-1458 (U.S. filed June 30, 2020) (“Arthrex Pet.”). Although the parties have sought review of different aspects of the Federal Circuit's decision, S&N agrees that all three petitions should be granted.

The government's petition primarily challenges the Federal Circuit's erroneous ruling that APJs are principal Officers. See U.S. Pet. 14–26. Its first question presented is substantively the same as S&N's, and should be granted for the same reasons. *Infra* I.A. S&N also agrees that the ramifications of Arthrex's forfeiture are important. *Infra* I.B. The government's suggestion that this Court should review the decisions in both *Arthrex* and *Polaris* is well-taken only if the

Court reviews both questions presented in the government's petition; otherwise, the Court should review only the *Arthrex* decision. *Infra* I.C.

Arthrex devotes its petition to the consequences of the court of appeals' ruling that APJs are principal Officers. Arthrex Pet. 25–33. If the Court were to reach Arthrex's first question presented, Arthrex has not established error in the Federal Circuit's ruling that Congress would have preferred APJs without statutory removal protections to no APJs at all. *Infra* II.A. Arthrex's second question—whether the Federal Circuit cured any Appointments Clause violation by severing APJs' removal protections—is just another way of asking what distinguishes principal from inferior Officers. *Infra* II.B. And contrary to Arthrex's view, this Court has a number of potential alternatives for prospectively “fixing” any constitutional problems. *Infra* II.C. Although S&N disagrees with the premises of Arthrex's arguments and with Arthrex's proposed solutions, S&N does not dispute that these are important issues that should be decided, as and if necessary, after full briefing and argument.

The Court therefore should grant all three petitions for writs of certiorari in the *Arthrex* case.

I. THE COURT SHOULD GRANT THE GOVERNMENT'S PETITION.

S&N agrees with the United States that the Court should review the Federal Circuit's determination that APJs are principal Officers.

A. The Federal Circuit's Decision Is Wrong.

The government's first question presented is whether APJs are principal or inferior Officers under the Appointments Clause. U.S. Pet. I. This question

is substantively identical to the question presented by S&N's separate petition for a writ of certiorari. *See* S&N Pet. i. And the arguments set forth in Part I of the government's petition are congruent with the arguments in S&N's petition. *Compare* U.S. Pet. 14–26, *with* S&N Pet. 14–27.

S&N will not repeat the government's arguments here, but does wish to emphasize that the multiple opinions entered upon the Federal Circuit's denial of rehearing "both evince the need for definitive guidance from this Court and identify a range of potential analytic approaches for this Court's consideration." U.S. Pet. 16. The principal/inferior Officer distinction and its ramifications were well explored in the briefing and opinions in this case, and ought to be addressed and resolved by the Court in this case.

The Federal Circuit exercises exclusive jurisdiction over Board decisions, *see* 28 U.S.C. § 1295(a)(4)(A), and that court has extended *Arthrex* (which arose in the context of inter partes review) to other types of post-grant review proceedings, *see* S&N Pet. 12, and, most recently, to ex parte examination appeals, *In re Boloro Glob. Ltd.*, 963 F.3d 1380 (Fed. Cir. 2020). The decision below thus affects all aspects of patent practice reviewed by the Board. Because the underlying Appointments Clause issue will grow no better developed than it is now, the government's first question presented clearly warrants review by this Court at this time.

B. Arthrex's Forfeiture Raises Important Issues.

The government's second question presented is whether the court of appeals erred in excusing Arthrex's failure to raise its Appointments Clause chal-

lenge before the Board. U.S. Pet. I. Arthrex’s forfeiture gives rise to two distinct issues: (1) whether the court of appeals should have reached the merits of the constitutional challenge at all; and (2) whether Arthrex is entitled to a new hearing before a different panel of APJs. S&N Pet. 31–33. The former issue is addressed by the government in the context of its second question presented, U.S. Pet. 26–33; in S&N’s view, the latter issue is subsumed within the government’s first question presented.

1. The first forfeiture issue is whether the court of appeals should have reached the merits of Arthrex’s Appointments Clause challenge. *See* U.S. Pet. 29–30. Under established principles of forfeiture, the answer to that question is “no.” As the government explains, the court of appeals should not have “unwound the significant efforts of the agency and the litigants,” *id.* at 27, based on an objection that Arthrex failed to raise before the Board, *id.* at 29. The Federal Circuit’s contrary conclusion conflicts with this Court’s teachings and warrants review.

a. This Court has long held that “courts should not topple over administrative decisions unless the administrative body not only has erred, *but has erred against objection made at the time appropriate under its practice.*” *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)); *see also* *Hormel v. Helvering*, 312 U.S. 552, 556–57 (1941) (“[o]rdinarily,” a court should not consider an issue “neither pressed nor passed upon by the . . . administrative agency below”). That “general rule” should have resolved this case and provides an independent basis to vacate the decision below. *L.A. Tucker*, 344 U.S. at 37; *see* U.S. Pet. 29.

To be sure, this Court has held that appellate courts have “discretion,” in some instances, to consider an Appointments Clause challenge not raised before the agency. *Freytag v. Comm’r*, 501 U.S. 868, 879 (1991). The government recognizes as much, U.S. Pet. 30, and no party asks that *Freytag* be overruled. But “[d]iscretion is not whim.” *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005). A court cannot “deviate” from the normal rules of forfeiture—as the Federal Circuit purported to do here, U.S. Pet. App. 4a—without first inquiring into the particular circumstances of each case. Even *Freytag* expressly cabined the authority to overlook administrative forfeiture to “rare cases,” 501 U.S. at 879, and the precedent on which it relied was limited to “exceptional cases or particular circumstances” where “injustice” would arise from applying the “[o]rdinar[y]” rule of forfeiture, *Helvering*, 312 U.S. at 556–57.

b. The Federal Circuit nowhere undertook the case-specific inquiry mandated by this Court’s teachings. It did just the opposite: None of the justifications it offered—the “important structural interests” implicated and the “wide-ranging effect on property rights”—involved Arthrex’s particular circumstances. U.S. Pet. App. 4a–5a. And the court of appeals has adopted a blanket policy of affording relief to all patent holders (but not IPR petitioners) who “present[ed] an Appointments Clause challenge on appeal,” *id.* at 33a, regardless of whether such challenge had been preserved before the Board, U.S. Pet. 27; *see also, e.g., Ciena Corp. v. Oyster Optics, LLC*, 958 F.3d 1157, 1159 (Fed. Cir. 2020).

The particular circumstances of this case, moreover, do not remotely justify relieving Arthrex of the consequences of its forfeiture. Arthrex has repeatedly

sought inter partes review—including against a respondent in this case, *see Arthrex, Inc. v. ArthroCare Corp.*, No. IPR2016-01877 (P.T.A.B. filed Sept. 22, 2016)—and has even benefited from rulings by the exact panel of APJs who issued the Board’s decision below. *Compare* U.S. Pet. App. 60a, 83a (APJ panel in this case), *with Arthrex, Inc. v. Vite Techs., Inc.*, No. IPR2016-00382, Paper 15 (P.T.A.B. Nov. 7, 2016) (same panel holding claims challenged by Arthrex to be unpatentable), *and Arthrex, Inc. v. Vite Techs., Inc.*, No. IPR2016-00381, Paper 15 (P.T.A.B. Nov. 7, 2016) (same).

Arthrex can hardly cast itself as the “victim” of an administrative process it has employed, for years, to its own advantage. *See, e.g., Arthrex, Inc. v. KFx Med., LLC*, No. IPR2016-01697, 2018 WL 1100770 (P.T.A.B. Feb. 26, 2018) (holding claims challenged by Arthrex unpatentable); *Arthrex, Inc. v. KFx Med., LLC*, No. IPR2016-01698, 2018 WL 1128523 (P.T.A.B. Feb. 26, 2018) (same); *Arthrex, Inc. v. Bonutti Skeletal Innovations, LLC*, No. IPR2013-00633, 2014 WL 1877931 (P.T.A.B. May 6, 2014) (entering judgment for Arthrex). Accordingly, no “injustice” would result from subjecting Arthrex’s patent to the same procedures Arthrex has long invoked against patents owned by others. *Helvering*, 312 U.S. at 556–57.

Raising the Appointments Clause challenge before the Board would not have been “futile,” as the panel erroneously believed. U.S. Pet. App. 30a; *see* U.S. Pet. 32–33. For example, had Arthrex made a timely challenge, the Director could have assigned himself and the two Commissioners—who are all effectively removable at will, *see* 35 U.S.C. § 3(a)(4), (b)(2)(C)—to preside over Arthrex’s case.

There is, in short, no reason to relieve Arthrex of its obligation to raise arguments in the same manner as other litigants and to suffer the same consequences for its forfeiture.

2. The second issue raised by Arthrex’s forfeiture is what case-specific remedy, if any, Arthrex itself can receive in light of its failure to preserve its constitutional challenge before the agency. *See* U.S. Pet. App. 32a–33a. The Court can address this issue whether or not it grants certiorari on the government’s second question. *See* S&N Pet. 32; *cf. Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018) (addressing challenger-specific remedy after granting certiorari on merits of Appointments Clause challenge).

The remedy for a successful Appointments Clause challenge must be “appropriate” in light of the circumstances of the particular case. *Ryder v. United States*, 515 U.S. 177, 183 (1995). Even where a defect in an agency adjudicator’s appointment “would [have] invalidate[d] a resulting order . . . had . . . an appropriate objection [been] made during the [agency] hearings,” this Court has refused to “set aside” the adjudicator’s work in the absence of such a “timely objection.” *L.A. Tucker*, 344 U.S. at 38.

A new hearing before a different adjudicator is appropriate only for a party who makes a “timely” Appointments Clause challenge. *Lucia*, 138 S. Ct. at 2055; *Ryder*, 515 U.S. at 182; *L.A. Tucker*, 344 U.S. at 38. Arthrex’s challenge was not “timely” because it was not pressed “before the [agency].” *Lucia*, 138 S. Ct. at 2055; *see also Ryder*, 515 U.S. at 182. By nevertheless ordering a new hearing before a different adjudicator, the Federal Circuit gave Arthrex an undeserved windfall, while imposing unwarranted burdens on both the Board (which adjudicated patentability on

the merits without objection) and S&N (which prevailed in that adjudication). Arthrex should therefore be limited to, at most, declaratory relief. S&N Pet. 32–33.

C. The Court Should Grant Certiorari In *Polaris* Only If It Reviews Both Of The Government’s Questions.

The government suggests that the Court should review both *Arthrex* and *Polaris*. U.S. Pet. 33–34. S&N agrees that the Court should grant certiorari in both cases *if* (and only if) it elects to review both of the questions presented in the government’s petition. Otherwise, the Court should grant certiorari only in *Arthrex*.

1. If the Court reviews both questions presented by the government, it should grant certiorari in both *Arthrex* and *Polaris*. As the government explains, “[i]f the Court granted review only in *Arthrex*, . . . it might not reach the Appointments Clause question because it might first address and reverse the Federal Circuit’s decision to excuse Arthrex’s administrative forfeiture.” U.S. Pet. 33–34. *Polaris* thus would be needed as a backup vehicle to ensure the Court can decide next Term whether APJs are principal or inferior Officers. *See ibid.*

Because *Polaris* would come into play in these circumstances only if the Court were to reverse the Federal Circuit’s decision to reach the merits of the Appointments Clause issue despite Arthrex’s forfeiture, S&N respectfully submits that the Court should designate *Arthrex* as the principal case. Whereas *Arthrex* involved five considered opinions exploring all aspects of that issue, *see* S&N Pet. 30–31, *Polaris* was disposed of by a per curiam summary order that cited to *Arthrex*, *see* U.S. Pet. 12.

2. If the Court reviews only one of the government's two questions presented, there would be no need to grant certiorari in *Polaris*.

Obviously, if the Court reviews only the government's forfeiture question, there would be no reason to review *Polaris* because only "*Arthrex* presents both the constitutional and forfeiture issues," while "*Polaris* presents only the Appointments Clause issue." U.S. Pet. 33–34; *see also* S&N Pet. 33.

If the Court reviews only the government's principal/inferior Officer question, there still would be no need to review *Polaris*. *Arthrex* squarely presents that issue, as well as a robust suite of competing decisions on that issue. *Cf. Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (preferring "the benefit of thorough lower court opinions to guide [the Court's] analysis"). *Polaris* is redundant of *Arthrex* on the principal/inferior Officer question, and *Arthrex* is a manifestly better vehicle.

Even though *Arthrex* failed to raise its Appointments Clause challenge before the Board, that would be no obstacle to *this* Court's ability to review that challenge. S&N Pet. 32. Because the Appointments Clause question was "addressed by the court below," this Court is "free to address it." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (citation omitted). Moreover, because only "*Arthrex* presents . . . [the] forfeiture issue[]," U.S. Pet. 33, only *Arthrex* gives the Court the opportunity to decide what effect, if any, *Arthrex*'s forfeiture has on the remedy, *see supra* I.B.2.; S&N Pet. 32–34.

Polaris also is redundant of *Arthrex* on the Federal Circuit's judicial "fix." *Compare* *Arthrex* Pet. i, *with* Pet. for Cert. i, *Polaris Innovations Ltd. v. Kingston Tech. Co.*, No. 19-1459 (U.S. filed June 30, 2020)

(“Polaris Pet.”) (presenting same two questions as Arthrex). Polaris contends that Arthrex did not “preserve[] its objection to the *Arthrex* remedy.” Polaris Pet. 14–15. But in its supplemental brief before the panel below, Arthrex argued against severability on the basis that Congress would reject “a regime in which patent judges could be removed at will.” C.A. Dkt. 67 at 19. *Arthrex* thus is a better vehicle than *Polaris*—or any other case—for deciding the principal/inferior Officer question and questions about the Federal Circuit’s “fix.”

Accordingly, if the Court grants review on only one or the other of the questions presented in the government’s petition, the best vehicle is *Arthrex*.

II. THE COURT SHOULD GRANT ARTHREX’S PETITION.

Arthrex’s petition presents two questions challenging, respectively, the propriety and efficacy of the Federal Circuit’s decision to sever APJs’ for-cause removal protections. Arthrex Pet. i. Arthrex also proposes that the solution to any constitutional defect lies solely with Congress, and not this Court. *Id.* at 33–34. Of course, the Court need not address any of these issues if it concludes that APJs are inferior Officers. But if the Court were to hold that APJs are principal Officers, then it would be efficient to address the consequences of that ruling in the same case. Accordingly, S&N agrees that Arthrex’s petition should be granted—although S&N does not agree with Arthrex’s positions on the merits.

A. APJs' Removal Protections Are Presumptively Severable.

Arthrex's first question presented is whether the Federal Circuit erred in severing APJs' statutory restrictions on removal. Arthrex Pet. i.

1. The power to remove an Officer is only “incident to”—not determinative of—“the power of appointment.” *Myers v. United States*, 272 U.S. 52, 110 (1926). Thus, an official's status as a principal or inferior Officer dictates what type of removal restrictions are permissible, not the other way around. Where this Court has considered the constitutionality (and severability) of removal restrictions, therefore, the issue was always whether Congress's imposition of those restrictions violated the separation of powers. *See, e.g., Seila Law LLC v. CFPB*, No. 19-7, 2020 WL 3492641, at *9 (U.S. June 29, 2020); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010).

If the Court concludes that APJs are inferior Officers, Arthrex's first question would be moot. As the Court recently reiterated, “certain *inferior* officers with narrowly defined duties” may be subject to one layer of for-cause removal protections. *Seila Law*, 2020 WL 3492641, at *4; *see also Free Enter. Fund*, 561 U.S. at 498. S&N submits that APJs fit comfortably within that category, and their removal protections offend no separation-of-powers principles. There is thus nothing to sever.

If, however, the Court were to conclude that APJs are principal Officers, then it would face whether Congress transgressed the separation of powers by affording them limited protections from removal. Although principal Officers generally must be removable at will, this Court has recognized an exception for certain

multi-member adjudicatory bodies. *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935); cf. *Free Enter. Fund*, 561 U.S. at 507 n.10 (not deciding constitutionality of removal restrictions on ALJs who “perform adjudicative rather than enforcement or policymaking functions”). More recently, however, the Court indicated its unwillingness to expand the *Humphrey's Executor* exception beyond the unique situation addressed in that case. *Seila Law*, 2020 WL 3492641, at *10. Thus, if APJs are principal Officers, deciding whether their removal protections are unconstitutional would require the Court to enter “a field of doubt.” *Id.* at *11 (quoting *Humphrey's Ex'r*, 295 U.S. at 632).

2. Assuming this Court reaches the severability question, Arthrex has not carried its burden of showing that the Federal Circuit's decision to sever APJs' removal restrictions was inconsistent with congressional intent.

Arthrex argues that severance is impermissible because APJs' removal protections are “essential to independent and impartial adjudication.” Arthrex Pet. 24. S&N agrees that both the Administrative Procedure Act and the Due Process Clause ensure the *neutrality* of administrative adjudicators. *See, e.g., Ward v. Vill. of Monroeville*, 409 U.S. 57, 61–62 (1972) (due process requires “neutral and detached” decisionmakers); *Ramspeck v. Fed. Trial Exam'rs Conference*, 345 U.S. 128, 131 (1953) (noting the APA was enacted to prevent agency adjudicators from being “mere tools of the agency concerned”). But this Court has never held that *removal protections* are required to ensure such neutrality.

Unlike Article III judges, who are independent of the political branches by constitutional design, administrative adjudicators—including APJs—“exercis[e] the *executive* power.” *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1374 (2018) (emphasis added; citation omitted). IPRs and other post-grant review proceedings provide the Executive with “a second look at an earlier administrative grant of a patent,” *ibid.* (citation omitted), and Congress elected to assign this second look “to the very same bureaucracy that granted the patent in the first place,” *Thryv, Inc. v. Click-To-Call Techs., LP*, 140 S. Ct. 1367, 1374 n.7 (2020). As a result, APJs are necessarily dependent on, and accountable to, the agency (and ultimately the President) in a variety of ways. *See* S&N Pet. 18–21; U.S. Pet. 18–22. And unlike administrative law judges in other agencies, APJs’ compensation and tenure are subject to control by their superiors. *See, e.g.*, 5 U.S.C. § 7513(a); 35 U.S.C. § 3(b)(6); S&N Pet. 20; U.S. Pet. 19.

Contrary to Arthrex’s submission, the relevant question is not whether Congress intended APJs to be protected from removal. *See* Arthrex Pet. 24. Rather, the “critical question” is whether Congress would have passed the rest of the statute without the removal protections. *Seila Law*, 2020 WL 3492641, at *21 (plurality op.). In other words, Arthrex’s first question really asks whether the Federal Circuit erred in concluding that Congress “would have preferred a Board whose members are removable at will rather than no Board at all.” U.S. Pet. App. 27a. The answer to that question is “no.”

This Court has “developed a strong presumption of severability.” *Barr v. Am. Ass’n of Political Consultants, Inc.*, No. 19-631, 2020 WL 3633780, at *8

(U.S. July 6, 2020) (plurality op.); *see also id.* at *9 (“decisive preference” for severability). Indeed, the Court has twice decided to sever removal protections after finding them unconstitutional. *Seila Law*, 2020 WL 3492641, at *21 (plurality op.) (CFPB Director); *Free Enter. Fund*, 561 U.S. at 508–10 (PCAOB members). Arthrex’s rejoinder is that “Congress’s long history of providing tenure protections to administrative [adjudicators] was not at issue in *Free Enterprise Fund* or *Seila Law*. But it is the whole ball game here.” Arthrex Pet. 24 n.3. While Arthrex will lose that game, S&N does not dispute that it should be played.

B. The Constitution Does Not Require Unilateral Review Of Individual Decisions.

Arthrex’s second question presented is whether the Federal Circuit erred in concluding that severing APJs’ removal protections was sufficient to cure any Appointments Clause violation. Arthrex Pet. i. The body of Arthrex’s petition makes clear that its second question presented is the mirror image of the government’s first question and S&N’s sole question: What does it take to make—or, in Arthrex’s formulation, unmake—a principal Officer?

Arthrex argues that an official can be an inferior Officer only if all of her decisions are subject to unilateral review by a principal executive Officer. Arthrex Pet. 25–28, 32–33. S&N and the United States have already explained why this position is wrong. S&N Pet. 22–24; U.S. Pet. 25–26. The Appointments Clause is about political accountability—not error correction. This Court has never treated case-by-case review, or any other particular element of supervision, as dispositive. *See* S&N Pet. 21–23. To the contrary,

this Court has deemed as *inferior* Officers administrative adjudicators who could enter unreviewable decisions on behalf of their agency, *see Freytag*, 501 U.S. at 882—and their “near-carbon copies” with similar “last-word capacity,” *Lucia*, 138 S. Ct. at 2052, 2054.

Arthrex also ignores all the other mechanisms by which the Director and the Secretary direct and supervise APJs’ work, including by effectively reviewing their decisions. *See* S&N Pet. 18–19; U.S. Pet. 18–22. Moreover, APJ decisions are also subject to review by principal Officers in the Third Branch—the judges of the Federal Circuit. *See* 35 U.S.C. § 319. The Director may intervene in any such appeal, *id.* § 143, and cannot cancel or confirm any patent claims until the Federal Circuit has had the opportunity to review the Board’s final written decision, *id.* § 318(b).

At bottom, Arthrex argues that the principal/inferior Officer distinction should turn solely on whether a superior executive Officer can unilaterally review particular decisions, while S&N and the government advocate a more holistic approach to supervision. This Court has stated that an inferior Officer need only be supervised “at some level,” *Edmond v. United States*, 520 U.S. 651 (1997), as APJs indisputably are. That is enough to confirm that they are inferior Officers—with, or without, their removal protections.

C. The Court Has A Variety Of Tools To Redress Any Constitutional Defect.

Arthrex’s petition includes as a coda an argument that does not directly correspond to either of its questions presented, but rather appears to follow from both of them together: “Given the constitutional defect, the court of appeals should have left the solution to Congress, rather than trying to recraft the statute itself.” Arthrex Pet. 33.

Here, too, Arthrex is bucking the tide of this Court’s precedents. As this Court has explained, “the ‘normal rule’ is ‘that partial, rather than facial, invalidation is the required course.’” *Free Enter. Fund*, 561 U.S. at 508 (citation omitted). The Court’s strong preference is thus to “use a scalpel rather than a bulldozer in curing . . . constitutional defect[s].” *Seila Law*, 2020 WL 3492641, at *21 (plurality op.). In two recent cases, for example, this Court opted to cure the constitutional defect not by blowing up the entire agency, but by severing the relevant Officers’ for-cause removal protections. *See id.* at *21–22; *Free Enter. Fund*, 561 U.S. at 509–10.

Arthrex apparently hopes that Congress would “abandon inter partes review entirely” if this Court were to identify a constitutional problem with respect to APJs. Arthrex Pet. 34. But this Court should be loath to allow Arthrex to “ride a discrete constitutional flaw . . . to take down the whole, otherwise constitutional” review system. *Barr*, 2020 WL 3633780, at *9 (plurality op.); *see Oil States*, 138 S. Ct. at 1369 (sustaining the IPR system against a frontal constitutional attack).

In keeping with its prior teachings, the Court should instead “‘try to limit the solution to the problem,’ severing any ‘problematic portions while leaving the remainder intact.’” *Free Enter. Fund*, 561 U.S. at 508 (citation omitted). If this Court were to identify one or more constitutional defects in the statutory scheme governing the appointment and removal of APJs, there would be a number of surgical solutions available—depending, of course, on the nature of any problem.

For example, if the Court were to conclude that APJs are principal Officers, the Court could sever the

provision requiring that APJs be appointed by the Secretary of Commerce. 35 U.S.C. § 6(a). This would pave the way for presidential nomination and senatorial confirmation, allowing the Board to continue functioning once the APJs are reappointed.

Similarly, if the Court were to agree with the Federal Circuit that APJs' removal restrictions are unconstitutional, it could sever those restrictions—as the Court did in *Seila Law* and *Free Enterprise Fund*. See *Seila Law*, 2020 WL 3492641, at *21–22 (plurality op.); *Free Enter. Fund*, 561 U.S. at 509–10. Indeed, if the Court were to adopt the Federal Circuit's three-part test for principal-officer status, then it might also agree with the Federal Circuit that such severance is sufficient to cure any Appointments Clause violation.

Alternatively, if the Court were to agree with Arthrex that APJs are principal Officers *solely* because the Director cannot unilaterally review their decisions, the Court would have several potential options. The Court could clarify the availability of review by panels of non-APJ executive Officers—*i.e.*, the Director, Deputy Director, and two Commissioners—whether by confirming that the Deputy Director and Commissioners effectively serve at the Secretary's pleasure, see 35 U.S.C. § 3(b)(2)(C), or by noting that the Commissioners can be required as part of their annual “performance agreement,” *ibid.*, to rehear Board decisions if called upon to do so. The Court also could sever the provision requiring that any rehearing be conducted by three-member panels, see *id.* § 6(c)—thereby allowing (without requiring) the Director, a principal Officer, to rehear individual decisions by himself. Although the Federal Circuit declined to adopt a similar proposal, U.S. Pet. App. 24a, that

would be a far more limited intrusion into the congressional design than Arthrex’s proposal to throw out the baby with the bathwater.

Even if the Court were to agree with Arthrex that “Congress is far better positioned to determine how best to revise the statute,” Arthrex Pet. 33, that would not mean blowing up the IPR system in the meantime. The Court could instead stay its judgment for a sufficient time to “afford Congress an opportunity” to take any necessary action without impairing the Board’s ongoing functions. *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (per curiam); accord *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982).

To be clear, S&N’s position is that there is no constitutional “problem” to “solve” in this case—if the APJs are inferior Officers, then all these other issues evaporate. If, however, the Court were to find any constitutional shortcomings in the extant system of administrative patent review, S&N submits that it could consider a range of potential alternative solutions in addition to those adopted by the court below or advanced by Arthrex.

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.

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