

No. _____

IN THE
Supreme Court of the United States

ACCLARENT, INC.,

Applicant,

v.

FORD ALBRITTON, IV,

Respondent.

**APPLICATION FOR EXTENSION OF TIME
TO FILE A PETITION FOR A WRIT OF CERTIORARI**

TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT AND CIRCUIT JUSTICE FOR THE FEDERAL CIRCUIT:

Pursuant to Rule 13.5, Acclarent, Inc. respectfully requests a 60-day extension of time, to and including March 2, 2020, within which to file a petition for a writ of certiorari in this case. The United States Court of Appeals for the Federal Circuit entered its judgment on October 4, 2019. A copy of that decision is attached as Appendix A. Absent an extension of time, Acclarent's petition for certiorari is due on or before January 2, 2020. This Application for Extension of Time is timely because Acclarent is filing it more than ten days prior to the current final filing date. *See* S. Ct. R. 30.2. This Court's jurisdiction will be invoked under 28 U.S.C. § 1254(1).

1. The case involves inter partes review of U.S. Patent No. 9,011,412 owned by Respondent Ford Albritton, IV. The Patent Trial and Appeal Board (“PTAB”) issued its Final Written Decision on July 9, 2018, concluding that the challenged claims were not unpatentable. The Federal Circuit affirmed on October 4, 2019.

On October 31, 2019, the Federal Circuit issued its decision in *Arthrex, Inc. v. Smith & Nephew, Inc.*, holding that the PTAB’s Administrative Patent Judges (“APJ’s) were appointed in violation of the Appointments Clause of the U.S. Constitution. 941 F.3d 1320, 1335 (Fed. Cir. 2019). Although the court remedied this defect going forward, it concluded that vacatur and remand were necessary to remedy the defect in “those cases where final written decisions were [already] issued and where litigants present an Appointments Clause challenge on appeal.” *Id.* at 1340. The Court held that, on remand, “a new panel of APJs must be designated and a new hearing granted.” *Id.*

Here, the PTAB issued its Final Written Decision on July 9, 2018. Thus, when the APJs heard arguments and rendered their Final Written Decision in this case, they were principal officers who were not appointed in conformance with the Appointments Clause. Pursuant to the Federal Circuit’s ruling in *Arthrex*, Acclarent is constitutionally entitled to a new hearing before a new panel of APJs.

Although Acclarent did not present the *Arthrex* Appointments Clause issue in its opening brief before the Federal Circuit, it intends to present it to this Court in a petition for a writ of certiorari to review the judgment of the Federal Circuit. Acclarent need not have raised this argument in its opening brief in the court of appeals to receive the benefit of a favorable decision before this Court. This Court has considered constitutional challenges to officers even when the issue was not raised below. *See, e.g., Freytag v. Comm'r*, 501 U.S. 868, 878–80 (1991) (declining to find waiver despite petitioners' "failing to raise a timely objection to the assignment of their cases to a special trial judge" and "consenting to the assignment"); *Glidden Co. v. Zdanok*, 370 U.S. 530, 535–36 (1962) (plurality opinion).

2. Acclarent requests a 60-day extension of time within which to file a petition for a writ of certiorari. Acclarent has good cause for an extension of time. If, according to *Arthrex*, the PTAB's APJs were appointed in violation of the Appointments Clause of the U.S. Constitution, then the PTAB's patentability determinations here are unconstitutional, and the Federal Circuit's judgment affirming them should be set aside. But the *Arthrex* litigation remains ongoing. The government has announced it will seek rehearing en banc of the *Arthrex* decision. *See* Motion of United States to Stay Proceedings at 2, *Steuben Foods, Inc. v. Nestle USA, Inc.*, No. 2020-1082 (Fed. Cir. Nov. 13, 2019), Doc. No. 15. And another Federal Circuit panel has ordered supplemental briefing on the same issues addressed by *Arthrex*. *See* Order at 2, *Polaris Innovations*

Ltd. v. Kingston Tech. Co., No. 2018-1768 (Fed. Cir. Nov. 8, 2019), Doc. No. 90. A 60-day extension of time is warranted to permit Acclarent to track further developments of this unsettled issue. Acclarent does not seek any unnecessary delay from the extension requested here. Rather, it seeks to insure its ability to make fully developed and appropriate arguments in its petition.

This extension is also requested because Acclarent's counsel has other pressing obligations in the weeks leading up to and immediately following the current filing deadline. These include, among other things, filing Appellants' Reply Brief in *Western Digital Corporation v. SPEX Technologies, Inc.*, No. 19-1831 (Fed. Cir.), currently due on December 27, 2019.

For the foregoing reasons, Acclarent respectfully requests that the time for filing a petition for a writ of certiorari in this case be extended by 60 days, to and including March 2, 2020.

Respectfully submitted,

/s/ William C. Rookridge
William C. Rookridge
GIBSON, DUNN & CRUTCHER LLP
3161 Michelson Drive, Suite 1200
Irvine, California 92612
(949) 451-3800
WRookridge@gibsondunn.com

DECEMBER 2019

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Acclarent states that its parent corporation is Johnson & Johnson.

Respectfully submitted,

/s/ *William C. Rookridge*
William C. Rookridge
GIBSON, DUNN & CRUTCHER LLP
3161 Michelson Drive, Suite 1200
Irvine, California 92612
(949) 451-3800
WRookridge@gibsondunn.com

DECEMBER 2019

APPENDIX A

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

ACCLARENT, INC.,
Appellant

v.

FORD ALBRITTON, IV,
Appellee

2018-2377

Appeal from the United States Patent and Trademark Office, Patent Trial and Appeal Board in No. IPR2017-00498.

JUDGMENT

WILLIAM C. ROOKLIDGE, Gibson, Dunn & Crutcher LLP, Irvine, CA, argued for appellant. Also represented by TAYLOR KING; LISA J. ADAMS, PETER CUOMO, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., Boston, MA.

ASHLEY NICOLE MOORE, McKool Smith, PC, Dallas, TX, argued for appellee. Also represented by ALEXANDRA FIGARI EASLEY, MEREDITH ANNE ELKINS.

THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (PROST, *Chief Judge*, WALLACH and HUGHES, *Circuit Judges*).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

October 4, 2019
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court