No. 20-1261

IN THE

Supreme Court of the United States

WI-LAN, INC.; WI-LAN LABS, INC.;
AND WI-LAN USA, INC.,

Petitioners,

v.

DREW HIRSHFELD, ACTING UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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I. Forfeiture Poses No Bar To The Relief Wi-LAN Seeks.

Respondent's sole argument against granting this petition that squarely presents the questions presented in *Arthrex* is forfeiture. But forfeiture is excused where there is an intervening change in the law. As the petition observed (Pet. 9), "the mere failure to interpose [a constitutional] defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground." *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 142-43 (1967).

1. Counter to Respondent's assertion (Br. in Opp. 5), the Federal Circuit recognizes this exception, as demonstrated by cases cited in the petition (Pet. 11), which Respondent ignores. *E.g.*, *Biodelivery Scis. Int'l, Inc. v. Aquestive Therapeutics, Inc.*, 898 F.3d 1205, 1209 (Fed. Cir. 2018) (recognizing that "[*SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348 (2018)] represented a significant change in law" and thus that "[i]t is clear that waiver does not apply in the present case"); *Polaris Indus. Inc. v. Arctic Cat, Inc.*, 724 F. App'x 948, 949 (Fed. Cir. 2018) ("Precedent holds that a party does not waive an argument that arises from a significant change in law during the pendency of an appeal."). Because this Court's grant of certiorari on the constitutional *Arthrex* issues opens the door for a significant change in law while this case is still on direct review, the Federal Circuit would be positioned to grant relief as it did in similarly-situated cases post-

SAS. This Court should hold Wi-LAN's case pending resolution of the *Arthrex* cases.

If anything, the case against forfeiture here is even stronger than previous instances where the Federal Circuit has granted relief. In *BioDelivery Sciences*, for example, the government argued that BioDelivery had waived its right to relief not only by failing to raise the issue at earlier phases of the litigation, but also "upon the Supreme Court agreeing to hear *SAS* in May 2017." 898 F.3d at 1208-09. Yet the Federal Circuit still granted relief. *Id.* at 1209. Here, Wi-LAN did raise the issue at the earliest non-futile opportunity—when this Court granted certiorari. The Arthrex petition for certiorari was granted on October 13, 2020, four days after the court of appeals entered its judgment in this case. App. 2a. Wi-LAN timely raised its constitutional challenge in its petition to this Court.

Respondent's reliance (Br. in Opp. 5) on *Customedia Techs., LLC v. Dish Network Corp.*, 941 F.3d 1173 (Fed. Cir. 2019), is misplaced. There, the patent owner sought a vacatur of the Board's decision and a remand *in accordance with Arthrex*. *Customedia*, 941 F.3d at 1174. By contrast, Wi-LAN seeks contingent relief: to have the validity of its patent adjudicated by a properly constituted panel should this Court confirm there is an Appointments Clause violation but conclude that the Federal Circuit *erred in its choice of remedy*.

This relief was not available from the Federal Circuit when Wi-LAN briefed and argued its appeal. *See Infineum USA L.P. v. Chevron Oronite Co. LLC*, 844 F. App'x 297, 307-08 (Fed. Cir. 2021) (relying on *Arthrex* to foreclose the argument that "the remedy

this court adopted in *Arthrex* did not cure the Appointments Clause violation"); *Snyders Heart Valve LLC v. St. Jude Med., LLC*, 825 F. App'x 888, 889 n.1 (Fed. Cir. 2020) (declining to address the argument that "the *Arthrex* remedy is insufficient" because "we are bound by *Arthrex*"); *Fall Line Patents, LLC v. Unified Patents, LLC*, 818 F. App'x 1014, 1019 (Fed. Cir. 2020) ("[W]e are bound by our holding in *Arthrex* that severance is 'an appropriate cure for an Appointments Clause infirmity' … That Fall Line disagrees with the sufficiency of the constitutional fix is of no moment.").

2. Respondent similarly ignores that it would have been effectively futile for Wi-LAN to assert its Appointments Clause challenge at the Federal Circuit because the Federal Circuit would have done nothing more than vacate the Board's decision and—instead of remedying the constitutional violations—remand to the Board for a rehearing before another unconstitutionally-appointed panel of APJs. A Federal Circuit remand would not have remedied the constitutional violations, changed the outcome, or benefitted Wi-LAN. It would have only interposed more costs and delays and interfered with the direct route to the same end-point—reconsideration in light of this Court's eventual ruling in *Arthrex*.

Why? Because for the cases that the Federal Circuit *did* remand to the Board, a blanket order issued staying all Federal Circuit remands based on *Arthrex* pending this Court's disposition of a petition for a writ of certiorari to review the *Arthrex* decision. General Order in Cases Remanded Under *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), at 1-2 (P.T.A.B. May 1, 2020). Those remanded

cases are being held in administrative abeyance by the Board likely until this Court resolves the *Arthrex* cases (Nos. 19-1434, 19-1452, 19-1458). So, even if Wi-LAN had raised its Appointments Clause challenge at the Federal Circuit and obtained a remand, its case would be among those now still in limbo awaiting this Court's resolution of *Arthrex*.

And while quick to insist (Br. in Opp. 7) that Wi-LAN would have been entitled to a vacatur of the Board's decision had it raised the Appointments Clause challenge at the Federal Circuit, Respondent pointedly ignores Wi-LAN's contention that APJs remain unconstitutionally appointed, rendering this potential relief useless.

Moreover, the government also overlooks its own petition urging this Court to review the Federal Circuit *Arthrex* remands. *E.g.*, Petition for Certiorari, No. 20-74, *United States v. Image Proc. Techs. LLC* (July 23, 2020). Those remands too are currently being held while this Court considers the *Arthrex* cases. Yet Respondent insists that Wi-LAN be denied the same opportunity to receive this Court's guidance.

II. Respondent's Reliance On Previously Denied Petitions Is Inapt.

Respondent relies (Br. in Opp. 6) on this Court's denial of other, unrelated petitions for writs of certiorari to assert that the same result is warranted here. But Respondent fails to show that those petitions are factually or procedurally similar. They are not.

In contrast with the petitions identified by Respondent, Wi-LAN's petition neither seeks this Court's guidance on the forfeiture issue nor raises any issue unrelated to the Appointments Clause challenge.

Instead, Wi-LAN presents the *same* two questions currently being considered by this Court in the *Arthrex* cases (Nos. 19-1434, 19-1452, 19-1458). None of the four petitions cited by Respondent raised the affirmative Appointments Clause questions presented in Wi-LAN's petition.

Three of the four petitions identified by Respondent presented additional questions unrelated to any Appointments Clause forfeiture question. *See ThermoLife Int'l, LLC v. Iancu*, 141 S. Ct. 1049 (2021) (No. 20-150) (presenting a question involving the *Chenery* doctrine); *Arthrex, Inc. v. Smith & Nephew, Inc.*, 141 S. Ct. 236 (2020) (*Arthrex II*) (No. 19-1204) (presenting a question involving the Fifth Amendment); *Customedia Techs., LLC v. Dish Network Corp.*, 141 S. Ct. 555 (2020) (No. 20-135) (presenting questions involving due process and patent-eligible subject matter under 35 U.S.C. § 101). Additionally, the questions presented in a different group of three of the four petitions identified by Respondent expressly asked the Court to address whether a court of appeals can invoke forfeiture to refuse to address a constitutional claim in a pending appeal despite an intervening change in law. *See Arthrex II* (No. 19-1204); *Customedia* (No. 20-135); *IYM Techs., LLC v. RPX Corp.*, 141 S. Ct. 850 (2020) (No. 20-424).

Given that this Court is already considering the two questions presented in this petition, the petition should be held pending the resolution of those questions in the *Arthrex* cases, and then disposed of accordingly. Under Federal Circuit precedent ignored by Respondent, Wi-LAN would be entitled to relief if this Court concluded that there was a constitutional

violation and the Federal Circuit's remedy was inadequate. But this Court need not prejudge the outcome of Federal Circuit forfeiture doctrine to resolve this petition. Instead, a GVR would be appropriate if an Appointments Clause violation is found, and the Federal Circuit's severance remedy is vacated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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