

No. \_\_\_\_\_

**In the  
Supreme Court of the United States**

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SONOS, INC.,  
*Petitioner,*

v.

IMPLICIT, LLC; AND  
ANDREW HIRSHFELD,  
DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE,  
*Respondents.*

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**On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Federal Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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COLE B. RICHTER  
richter@ls3ip.com  
*Counsel of Record*

GEORGE I. LEE  
LEE SULLIVAN SHEA & SMITH LLP  
656 West Randolph, Suite 5W  
Chicago, Illinois 60661  
Tel.: (312) 754-9602  
*Counsel for Petitioner*

**QUESTION PRESENTED FOR REVIEW**

Whether administrative patent judges are “principal” or “inferior” Officers of the United States within the meaning of the Appointments Clause.

**PARTIES TO THE PROCEEDINGS BELOW**

Petitioner Sonos, Inc., was the petitioner in proceedings before the Patent Trial and Appeal Board and the appellee in the court of appeals in Nos. 2020-1173, -1174 (consolidated).

Respondent Implicit, LLC was the patent owner in proceedings before the Patent Trial and Appeal Board and the appellant in the court of appeals in Nos. 2020-1173, -1174 (consolidated).

Respondent Andrew Hirshfeld, Performing the Functions and Duties of the Director of the United States Patent and Trademark Office, was an intervenor in the court of appeals in Nos. 2020-1173, -1174 (consolidated).

**RULE 29.6 STATEMENT**

Pursuant to this Court's Rule 29.6, petitioner states that it has no parent corporation and no publicly-held corporation owns 10% or more of the stock of petitioner.

### RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Implicit, LLC v. Sonos, Inc.*, Nos. 20-1173, -1174 (consolidated) (Fed. Cir.), order terminating appeal through remand entered on December 23, 2020;
- *Sonos, Inc. v. Implicit, LLC*, IPR2018-00766, (P.T.A.B.), final written decision entered on September 16, 2019; and
- *Sonos, Inc. v. Implicit, LLC*, IPR2018-00767, (P.T.A.B.), final written decision entered on September 16, 2019.

## TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW .....	i
PARTIES TO THE PROCEEDINGS BELOW .....	ii
RULE 29.6 STATEMENT .....	iii
RELATED PROCEEDINGS .....	iv
TABLE OF CONTENTS .....	v
TABLE OF AUTHORITIES .....	vii
PETITION FOR A WRIT OF CERTIORARI .....	1
OPINIONS AND ORDERS BELOW .....	1
STATEMENT OF JURISDICTION .....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS .....	2
STATEMENT OF THE CASE .....	2
ARGUMENT .....	4
CONCLUSION .....	5
Appendix A: Order of The Federal Circuit to Vacate and Remand (December 23, 2020) ....	1a
Appendix B: Final Written Decision of the Patent Trial and Appeal Board in IPR2018-00766 (September 16, 2019) .....	4a

Appendix C: Final Written Decision of the Patent Trial and Appeal Board in IPR2018-00767 (September 16, 2019) .....	61a
Appendix D: Constitutional Provision Involved .....	121a

## TABLE OF AUTHORITIES

### CASES

<i>Arthrex, Inc. v. Smith and Nephew, Inc.</i> , 941 F. 3d 1320 (Fed. Cir. 2019) .....	1, 2, 3
<i>Emerson Elec. Co. v. Sipco, LLC</i> , No. 19-966, 2020 WL 3146672 (U.S. June 15, 2020) .....	4
<i>Implicit, LLC v. Sonos, Inc.</i> , No. 17-cv-259 (D. Del. filed Mar. 10, 2017).....	2
<i>Thryv, Inc. v. Click-To-Call Techs., LP</i> , 140 S. Ct. 1367 (2020) .....	4

### STATUTES

28 U.S.C. § 1254(1).....	2
5 U.S.C. § 7513(a).....	4

### OTHER AUTHORITIES

Pet. for a Writ of Certorari, <i>United States v. Arthrex, Inc.</i> , No. 19- 1434 (June 25, 2020) .....	5
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### PATENT TRIAL AND APPEAL BOARD DECISIONS

<i>Sonos, Inc. v. Implicit, LLC</i> , IPR2018-00766, 2019 WL 4439131 (P.T.A.B. Sept. 16, 2019).....	1
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<i>Sonos, Inc. v. Implicit, LLC</i> , No. IPR2018-00767, 2019 WL 4419356 (P.T.A.B. Sept. 16, 2019) .....	1
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## PETITION FOR A WRIT OF CERTIORARI

Sonos, Inc., respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Federal Circuit in a set of consolidated appeals. These appeals stem from decisions issued by the Patent Trial and Appeal Board (“the Board”), which determined in respective *inter partes* review proceedings that the challenged claims of two patents owned by Implicit, LLC were unpatentable. The Federal Circuit vacated each of these decisions and remanded to the Board for proceedings by a new three-judge panel in view of its holding in *Arthrex, Inc. v. Smith and Nephew, Inc.*, 941 F. 3d 1320 (Fed. Cir. 2019).

This Court has now granted certiorari in Nos. 19-1434, 19-1452, and 19-1458 to review the holdings in *Arthrex*. Sonos respectfully requests that the Court hold this petition and dispose of it as appropriate in light of this Court’s ultimate determination in *Arthrex*.

## OPINIONS AND ORDERS BELOW

The Federal Circuit’s order granting Implicit’s motion to remand to the Patent Trial and Appeal Board is not reported and is reproduced at Pet. App. 1a-3a.

The final written decisions of the Board are reproduced at Pet. App. 4a-120a and are available at *Sonos, Inc. v. Implicit, LLC*, IPR2018-00766, 2019 WL 4439131 (P.T.A.B. Sept. 16, 2019) and *Sonos, Inc. v. Implicit, LLC*, No. IPR2018-00767, 2019 WL 4419356 (P.T.A.B. Sept. 16, 2019).

## STATEMENT OF JURISDICTION

The Federal Circuit entered its order granting Implicit's motion to terminate the appeal through remand to the Board on December 23, 2020. Pet. App. 1a. This Court's March 19, 2020 order extended the deadline for filing a petition for a writ of certiorari in these cases to May 24, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Appointments Clause of the U.S. Constitution, U.S. Const. art. II, § 2, is reproduced in the Appendix at 121a.

## STATEMENT OF THE CASE

In March 2017, Implicit sued Sonos in the U.S. District Court for the District of Delaware. *See Implicit, LLC v. Sonos, Inc.*, No. 17-cv-259 (D. Del. filed Mar. 10, 2017). In March 2018, Sonos filed two *inter partes* review (IPR) petitions timely challenging claims 1-3, 6-9, 12, 16, 19, and 23-25 of U.S. Pat. No. 7,391,791 and claims 1-3, 8, 11, and 17 of U.S. Pat. No. 8,942,252. Pet. App. 5a, 62a. On September 16, 2019, a three-judge panel of the Board issued final written decisions in these IPR proceedings holding unpatentable all challenged claims of each patent. Pet. App. 59a, 119a.

On October 31, 2019, the Federal Circuit issued its opinion and order in *Arthrex, Inc. v. Smith and Nephew, Inc.* 941 F.3d 1320. In *Arthrex*, the Federal Circuit determined that the Board's administrative

patent judges were “principal” Officers under the Appointments Clause of the Constitution. *Id.* at 1335. Because these judges were not appointed by the President and confirmed by the Senate, the Federal Circuit held that “the current structure of the Board violates the Appointments Clause.” *Id.* To remedy this violation, the Federal Circuit severed the provisions of 5 U.S.C. § 7513(a) as applied to these judges and concluded that this severance rendered these judges inferior Officers. *Id.* at 1335-38. As a remedy to the patent owner in *Arthrex*, the Federal Circuit vacated the decision of the Board in that case and remanded for rehearing before a new panel of purportedly now-constitutional judges. *Id.* at 1338-40.

On November 8, 2019, Implicit appealed the Board’s final written decisions to the Federal Circuit. *See* Pet. App. 1a. In May 2020, Implicit filed its opening brief raising just one issue and raising this issue for the first time: whether the three-judge panel that was assigned to the IPR proceedings and that issued the final written decisions in September 2019 was Constitutional under *Arthrex*. Sonos filed its responsive brief in September 2020.

Despite proceeding through nearly the entire appeal process, on October 26, 2020 Implicit suddenly moved to terminate the appeal by remand under *Arthrex*. Pet. App. 2a. Over Sonos’s and the PTO’s objection, the Federal Circuit granted Implicit’s motion vacating the Board’s final written decisions and remanding proceedings back to the Board under *Arthrex*.

Meanwhile, on October 13, 2020, this Court granted certiorari in Nos. 19-1434, 19-1452, and 19-

1458 to review the holdings in *Arthrex*. Specifically, the Court has determined to review (1) whether the PTO’s administrative patent judges are principal officers for purposes of the Appointments Clause and, (2) if so, whether the Federal Circuit’s remedy of severing the application of 5 U.S.C. § 7513(a) to those judges properly cured any constitutional defect. *See* Mem. For the United States at 6-7, *Arthrex*, No. 19-1458 (July 22, 2020). The Court heard argument in these cases on March 1, 2021 and a decision is forthcoming.

Sonos files this petition seeking certiorari review of the Federal Circuit’s decision to vacate and remand Implicit’s appeals under *Arthrex*.

## ARGUMENT

The question presented by this petition—whether APJs are principal or inferior Officers—is directly presented in *Smith & Nephew, Inc., et al. v. Arthrex, Inc., et al.* (U.S. No. 19-1452). Accordingly, this petition should be held pending final disposition of *Arthrex*, and then disposed of as appropriate. *See, e.g., Emerson Elec. Co. v. Sipco, LLC*, No. 19-966, 2020 WL 3146672, at \*1 (U.S. June 15, 2020) (petition raised a question closely related to that presented in *Thryv, Inc. v. Click-To-Call Techs., LP*, 140 S. Ct. 1367 (2020), and was held pending the Court’s disposition of that case).

The Federal Circuit’s December 23, 2020 order vacating and remanding the Board’s final written decisions regarding Implicit’s patents was based entirely on the Federal Circuit’s ruling in *Arthrex*—a ruling that this Court is now reviewing in Nos. 19-

1434, 19-1452, and 19-1458. The Federal Circuit's order was erroneous because, as the United States and many other private parties have demonstrated, administrative patent judges were inferior Officers under this Court's precedent. *See, e.g.*, Pet. for a Writ of Certiorari at 16-26, *United States v. Arthrex, Inc.*, No. 19-1434 (June 25, 2020).

If this Court agrees and overturns all or part of *Arthrex*, then the Federal Circuit's December 23, 2020 remand order in Implicit's appeal must be overturned as well and the case must return to the Federal Circuit for appropriate resolution of that appeal. In such a case, this Court should grant this Petition, vacate the Federal Circuit's December 23, 2020 remand order, and remand to the Federal Circuit for appropriate resolution of Implicit's appeal.

If the Court affirms *Arthrex* and determines that the remedy of a new hearing at the Board is appropriate, then this petition should be denied.

### CONCLUSION

The petition for a writ of certiorari should be held pending disposition of *Smith & Nephew, Inc., et al. v. Arthrex, Inc., et al.* (U.S. No. 19-1452) and then disposed of accordingly.

Respectfully submitted,

COLE B. RICHTER  
richter@ls3ip.com  
*Counsel of Record*

GEORGE I. LEE  
LEE SULLIVAN SHEA & SMITH LLP  
656 West Randolph, Suite 5W  
Chicago, Illinois 60661  
Tel.: (312) 754-9602  
*Counsel for Petitioner*

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