No. 20-728

IN THE

Supreme Court of the United States

ADIDAS AG,

Petitioner,

v.

NIKE, INC.,

Respondent.

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

PETITIONER'S REPLY BRIEF

MITCHELL G. STOCKWELL
KILPATRICK TOWNSEND & STOCKTON LLP
1100 Peachtree Street
Suite 2800
Atlanta, GA 30309
(404) 815-6500
mstockwell@kilpatricktownsend.com

ADAM H. CHARNES
Counsel of Record
KILPATRICK TOWNSEND & STOCKTON LLP
2001 Ross Avenue
Suite 4400
Dallas, TX 75201
(214) 922-7106
acharnes@kilpatricktownsend.com

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

PETITIONER'S REPLY BRIEF

This Court granted *certiorari* in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), to review whether (1) Administrative Patent Judges (APJs) are principal officers who must be appointed by the President with the Senate's advice and consent under the Appointments Clause; and, (2) if APJs are principal officers, the court of appeals properly cured any Appointments Clause defect prospectively by severing the application of 5 U.S.C. § 7513(a) for those judges. 592 U.S. __ (Oct. 13, 2020) (Order List). These same questions are raised in adidas's petition, which should be held pending the Court's decision.

Respondent urges this Court to reject the petition on grounds of forfeiture. But, neither this Court's precedent nor the actual record below support such an outcome. Respondent dismisses this Court's precedent holding that Appointment Clause challenges, in particular, should not be subject to normal waiver rules. But this Court has long had a practice of excusing forfeiture for these sorts of core constitutional challenges, and the relevant factors suggest the same outcome should apply here.

Respondent also objects to adidas's failure to raise the issue before the Federal Circuit. But, in actuality, the Federal Circuit's holding in *Arthrex* was an intervening change in law during the pendency of adidas's appeal. Likewise, according to Respondent, adidas should have predicted the change in law before it happened. But Respondent is incorrect in both its premises and conclusion— clairvoyance is no prerequisite for invoking a constitutional protection, and the Federal Circuit rejected the same Appointments Clause challenge at least twice before deciding *Arthrex*. The

fact that the law changed while adidas's appeal remained pending demonstrates forfeiture should not apply. Finally, for the same reasons, adidas's initiation of an *inter partes* review long before any Appointments Clause defect could possibly have arisen likewise does not support forfeiture.

A. The Constitutional Significance of Appointments Clause Challenges Cuts Against Forfeiture.

This Court has explained that Appointments Clause challenges are included within a small class of issues denominated as "nonjurisdictional structural constitutional objections." *Freytag v. Comm'r*, 501 U.S. 868, 878-79 (1991). The constitutional significance of these structural issues justifies the special attention the Court has paid to them notwithstanding a party's failure to raise them in the ordinary course.

The practice of excusing forfeiture for these sorts of core constitutional challenges has a long lineage at this Court. As the Court observed in *Freytag*, in *Lamar v. United States*, 241 U.S. 103 (1916), the Court reviewed an Appointments Clause challenge to an inter-circuit assignment "despite the fact that it had not been raised in the District Court or in the Court of Appeals or even in this Court until the filing of a supplemental brief upon a second request for review." *Freytag*, 501 U.S. at 879 (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, at 536 (1962)). Thus, for over a century, this Court has adhered to a flexible approach that favored enforcing constitutional limits over formalistic forfeiture rules.

Moreover, as the Court has further explained, what is required in considering whether to hear an otherwise forfeited Appointments Clause challenge is a balancing

of any perceived disruption to the appellate process against the important constitutional considerations at stake:

> Like the Court in *Glidden*, we are faced with a constitutional challenge that is neither frivolous nor disingenuous. The alleged defect in the appointment of the Special Trial Judge goes to the validity of the Tax Court proceeding that is the basis for this litigation. It is true that, as a general matter, a litigant must raise all issues and objections at trial. But the disruption to sound appellate process entailed by entertaining objections not raised below does not always overcome what Justice Harlan called "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers."

Id. (quoting *Glidden*, 370 U.S. at 536); *see also Nguyen v. United States*, 539 U.S. 69, 73, 80-81 (2003) (addressing challenge to territorial judge's participation on appellate panel raised for the first time in petition for certiorari).

Respondent seeks to dismiss these authorities by saying that any exception to forfeiture is rare and inapplicable. Respondent is incorrect and, moreover, it never addressed the relevant balancing factors. Assessing those demonstrates forfeiture is inapplicable.

Quite clearly, there is a demonstrated strong interest in addressing the Appointments Clause challenge given this Court's grant of certiorari in *Arthrex*. Likewise, any "disruption" to appellate process is minimal -- following this Court's grant of certiorari in *Arthrex*, the purely legal issue adidas raises required virtually no judicial resources to resolve—the work has already been done. And, whatever this Court's decision in *Arthrex*, the Federal Circuit will necessarily implement it in the various pending cases that *Arthrex's* outcome will affect.

B. Respondent's Claims of Clairvoyance Are Incorrect and Insufficient to Justify its Claim of Forfeiture.

Respondent claims that adidas both should have, and could have, predicted the substantial change in law the Arthrex decision announced. That is simply incorrect. Clairvoyance is not the standard -- a party cannot forfeit an argument or a constitutional claim that has not yet been recognized. *See, e.g., Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (effective waiver must be one of a "known right or privilege").

As adidas pointed out in its petition, before *Arthrex*, the Federal Circuit had characterized the APJs as "subordinate officers" to whom the Director could delegate his authority to institute *inter partes* reviews. *Ethicon Endo-Surgery, Inc. v. Covidien LP*, 812 F.3d 1023, 1032 (Fed. Cir. 2016). The court had twice reaffirmed that view—by summary affirmance—and rejected the very same Appointments Clause challenge it ultimately accepted in *Arthrex*. *See Trading Techs. Int'l, Inc. v. IBG LLC*, 771 F. App'x 493 (Fed. Cir. 2019) (summary affirmance rejecting Appointments Clause challenge); *Bedgear, LLC v. Fredman Bros. Furniture Co.*, 779 F. App'x 748 (Fed. Cir. 2019) (same). And this Court denied *certiorari* in a case presenting the same Appointments Clause question. *Smartflash LLC v. Samsung Elecs. Am., Inc.*, 139 S. Ct. 276 (2018); Petition for Writ of Certiorari at 18, Smartflash LLC, No. 18-189, 2018 WL 3913634 (U.S. Aug. 9, 2018).

Respondent did not address these authorities and it cannot. Respondent's 20/20 hindsight claims must be rejected. Requiring appellants to raise every possible potential change in law would further burden the Nation's appellate courts, and for no good reason. *See Joseph v. United States*, 135 S. Ct. 705, 706 (2014) (Kagan, J., respecting denial of certiorari) ("[I]nsisting on preservation of claims" when a new

claim is based on a change of law "forces every appellant to raise 'claims that are squarely foreclosed by circuit and [even] Supreme Court precedent on the off chance that [a new] decision will make them suddenly viable.'") (citation omitted). It is axiomatic that "an appellate court must apply the law in effect at the time it renders its decision." *Thorpe v. Hous. Auth. Of Durham*, 393 U.S. 268, 281 (1969). Thus, a new interpretation of federal law "is . . . controlling . . . and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 97 (1993).

The integrity of the judicial process fundamentally relies upon this principle of retroactivity. "[T]he Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation." *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987) (quoting *Mackey v. United States*, 401 U.S. 667, 679 (1971) (Harlan, J.) (concurring in the judgment). Accordingly, "it is the nature of judicial review that precludes [courts] from '[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule.'" *Id.* (quoting *Mackey*, *supra*). It follows that "each court, at every level, must 'decide according to existing laws.'" *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) (quoting *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801)).

In light of these considerations, this Court has recognized that a new judicial precedent creates an exception to the general rule of appellate waiver that otherwise flows from a litigant's failure to raise an issue below or in an opening brief on appeal. "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). "A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy." *Id.* Accordingly, a recognized exception to the rule of waiver applies where "there have been judicial interpretations of existing law after decision below and pending appeal—interpretations which if applied might have materially altered the result." *Id.* at 558-59 (internal citation omitted). Plainly that rule applies here, where the new precedent was issued only after adidas's opening brief and cut to the core of the Constitution's separation of powers.

Notably, the Federal Circuit has followed these precepts in other instances, for example refusing to apply the "opening brief" rule when addressing a change of statutory interpretation to the Patent Trial and Appeal Board's authority. In *SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348, 1359-60 (2018), this Court considered whether the Board's statutory discretion to grant or deny a challenger's request to institute an *inter partes* review extended to granting review only on selected issues. The Court struck down the Board's practice of partial institution, after which the Federal Circuit faced a slew of remand requests. Critically, in considering these requests the Federal

Circuit did not apply an "opening brief" rule; indeed it explicitly rejected that rule and held that a remand motion was timely even when filed long after submission because "*SAS* represented a significant change in law." *Biodelivery Scis. Int'l, Inc. v. Aquestive Therapeutics*, *Inc.*, 898 F.3d 1205, 1209 (Fed. Cir. 2018). Consistent with its sister courts, the Federal Circuit remarked that "[p]recedent holds that a party does not waive an argument that arises from a significant change in law during the pendency of an appeal." *Id.* (quoting *Polaris Indus. Inc. v. Arctic Cat, Inc.*, 724 F. App'x 948, 949 (Fed. Cir. 2018)).

adidas itself thus moved for remand of this matter after filing its opening brief following the *SAS* decision. The Federal Circuit granted that motion. Yet in *Customedia Techs., LLC v. Dish Network Corp.*, 941 F.3d 1173, 1174 (Fed. Cir. 2019), the Federal Circuit issued a precedential order precluding reliance on *Arthrex* in a pending appeal where the challenger had failed to anticipate the change of law and raise the issue in its opening brief or a pre-filing motion. That reversal of course was inappropriate. *See also Spiegla v. Hull*, 481 F.3d 961, 964 (7th Cir. 2007) ("A party cannot . . . waive an argument that did not exist when he submitted his brief."). But, in view of the announced rule in *Customedia,* any assertion of the *Arthrex* issue by adidas would have been entirely futile and forfeiture is simply inequitable in these circumstances.

Respondent pretends the lower court never imposed that rule below, but it did and the consequence is that the equities here do not support forfeiture. Nor do Respondent's arguments that multiple other parties unsuccessfully petitioned this

Court to address the Federal Circuit's forfeiture rule matter. Those petitions largely asked this Court to clarify the law on forfeiture standards, and they largely did so before the Court had granted certiorari in *Arthrex*. What adidas seeks is materially different: To be treated exactly as other parties will be under this Court's pronounced judgment in *Arthrex* once it resolves the issues it granted certiorari to address.

Finally, Respondent urges that, as the petitioner seeking the *inter partes* review, adidas somehow forfeited the Appointments Clause challenge simply by initiating. That is incorrect for all of the same reasons described. Indeed, to assert that a party who takes advantage of apparently otherwise lawful procedures set out by Congress forfeits constitutional challenges to such procedures would foreclose this Court's review of such questions. *Cf. Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850–51 (1986) ("To the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty . . . .").

CONCLUSION

The petition for a writ of certiorari should be held pending disposition of *Arthrex* (Nos. 19-1434, 19-1452, and 19-1458), and any further proceedings in this Court, and then disposed of as appropriate in light of the Court's decision in that case.

Respectfully submitted.

MITCHELL G. STOCKWELL
KILPATRICK TOWNSEND & STOCKTON LLP
1100 Peachtree Street
Suite 2800
Atlanta, GA 30309
(404) 815-6500
mstockwell@kilpatricktownsend.com

Counsel for Petitioner

ADAM H. CHARNES
Counsel of Record
KILPATRICK TOWNSEND & STOCKTON LLP
2001 Ross Avenue
Suite 4400
Dallas, TX 75201
(214) 922-7106
acharnes@kilpatricktownsend.com