

No. 20-74

In The
Supreme Court of the United States

UNITED STATES OF AMERICA, et al.,

Petitioners,

v.

IMAGE PROCESSING TECHNOLOGIES LLC, et al.,

Respondents.

**On Petition For Writ Of Certiorari
To The Court Of Appeals
For The Federal Circuit**

**BRIEF IN OPPOSITION FOR RESPONDENTS
VILOX TECHNOLOGIES, LLC AND
EUGENE H. LUOMA**

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QUESTIONS PRESENTED

The Government's petition presents the following questions:

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 appointments Clause challenges brought by litigants that had not presented such a challenge to the agency.

The Named Respondents present a third question:

3. Whether the Government as intervenor at the court of appeals may seek relief in this Court that differs from that sought by any party.

CORPORATE DISCLOSURE STATEMENT

Under this Court's Rule 29.6, respondents ViloX Technologies, LLC and Eugene H. Luoma state that they respectively have no parent corporation and that no publicly held company owns 10% or more of their stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT	1
ARGUMENT	3
I. The Director as Intervenor Lacks Standing Against the Particular Respondents Named in this Brief in Opposition, Making This Petition Jurisdictionally Defective as to Them	3
II. In the Alternative, Named Respondents Consent to a Hold to Permit Application of All Decisions in the Lead <i>Arthrex</i> Cases to The Named Respondents' Cases.....	8
CONCLUSION.....	12

TABLE OF AUTHORITIES

	Page
CASES	
<i>Arthrex, Inc. v. Smith & Nephew, Inc.</i> , 941 F.3d 1320 (Fed. Cir. 2019)	<i>passim</i>
<i>Arthrex, Inc. v. Smith & Nephew, Inc.</i> , 953 F.3d 760 (Fed. Cir. 2020)	1, 9, 10
<i>Cleveland Bd. of Educ. v. Loudermill</i> , 470 U.S. 532 (1985)	11
<i>Edmond v. United States</i> , 520 U.S. 651 (1997)	10
<i>King v. Alston</i> , 75 F.3d 657 (Fed. Cir. 1996)	11
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	6
<i>Steel Co. v. Citizens for Better Env't</i> , 523 U.S. 83 (1998)	7
<i>Town of Chester v. Laroe Estates, Inc.</i> , 137 S. Ct. 1645 (2017)	4
<i>Virginia House of Delegates v. Bethune-Hill</i> , 139 S. Ct. 1945 (2019)	7
CONSTITUTIONAL PROVISIONS	
Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2	1, 8, 9, 10, 11
U.S. Const. Article III	3, 4, 5, 6, 7
STATUTES AND RULES	
1946 Administrative Procedures Act	9
1975 Patent Act	9

TABLE OF AUTHORITIES—Continued

	Page
35 U.S.C. § 143	5
U.S. Sup. Ct. R. 12.4.....	2

**BRIEF IN OPPOSITION FOR
RESPONDENTS VILOX TECHNOLOGIES, LLC
AND EUGENE H. LUOMA
STATEMENT**

Research has not located any prior case in which the Government acted adversely in this Court against so many innovators at one time in a single petition.

The Government (either as the United States of America, or through Andrei Iancu, Under Secretary of Commerce for Intellectual Property and Director, U.S. Patent and Trademark Office) brought this extraordinary petition for a writ of certiorari against respondents (or sets of respondents) in thirty-nine (39) different proceedings. Each proceeding involved the Court of Appeals for the Federal Circuit granting remand to the United States Patent and Trademark Office (“USPTO”), instructing that a new set of administrative patent judges (APJs) reconvene to conduct agency proceedings. In most of the named court of appeals proceedings, particularly those arising from America Invents Act patentability trials, the Government was not a party. Instead, the Government had intervened prior to action by the court of appeals.

The Government seeks review of the holding of the court of appeals that the appointment of APJs violated the Constitution’s Appointments Clause. The Government’s lead case in this Court (No. 19-1434) involves a petition seeking direct review of this holding in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), reh’g denied, 953 F.3d 760 (Fed. Cir. 2020).

The present petition is a “hold” petition brought in joint fashion under this Court’s Rule 12.4 against a wide swath of innovators, including large and small companies, and individual inventors.

Vilox Technologies, LLC and individual inventor Eugene H. Luoma (hereafter, “Named Respondents”) join in this Brief in Opposition to oppose the Government’s petition.¹ The Named Respondents fall into a subcategory of respondents in the 39 proceedings that the Government should have left alone. With respect to the Named Respondents (and a handful of others), the parties had consented to the relief granted by the court of appeals. That is, the actual parties to the proceeding either all consented to an *Arthrex* remand, or expressly did not object to a motion for remand (which amounts to the same thing).

Appendix page 10a is the Federal Circuit Order stating that “Vilox Technologies, LLC moves **unopposed** to vacate the decision of the Patent Trial and Appeal Board and remand for further proceedings in light of [*Arthrex*].” (Emphasis added). Appendix pages 3a-4a is the Federal Circuit Order stating that “Eugene H. Luoma moves to vacate the decision of the Patent Trial and Appeal Board and remand for further proceedings in light of [*Arthrex*]. Mr. Luoma states that GT Water Products, Inc. [the other party] ‘neither consents **nor objects**’ to the motion and ‘takes the

¹ Vilox Technologies was appellant in the court of appeals, Case No. 2019-2057. Mr. Luoma was appellant in the court of appeals, Case No. 2019-2315.

position that the patent should remain invalid.’” (Emphasis added). Both Orders indicate that the Government had intervened to oppose remand. In both cases, the court of appeals granted the requested remand over the Government’s objection.

◆

ARGUMENT

I. The Director as Intervenor Lacks Standing Against the Particular Respondents Named in this Brief in Opposition, Making This Petition Jurisdictionally Defective as to Them

Although a “hold” petition should ordinarily be held, not this one. The Court should deny the Government’s unusual petition without holding it. With regard to respondents joining in this brief in opposition (the “Named Respondents”), the Government lacks standing as an intervenor to seek different relief from what was otherwise consented relief at the court of appeals. That makes the present petition defective, at least as to the Named Respondents.

Adopting the Government’s own argument, this Court recently confirmed how certain intervenors lack standing to ask for certain kinds of relief. This is so even when the intervenor has an absolute right to intervene:

[A]n intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff

requests. This result follows ineluctably from our Article III case law, so it is not surprising that both parties accept it (as does the United States as *amicus curiae*). See Brief for Petitioner 13 (arguing that an intervenor must always demonstrate standing); Brief for Respondent 28 (“[A]n intervenor who . . . seeks relief beyond that requested by a party with standing must satisfy Article III”); Brief for United States as *Amicus Curiae* 16 (An intervenor must demonstrate its own standing if it “seek[s] damages” or “injunctive relief that is broader than or different from the relief sought by the original plaintiff(s)”).

In sum, **an intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing.** That includes cases in which both the plaintiff and the intervenor seek separate money judgments in their own names. Cf. *General Building Contractors Assn., Inc. v. Pennsylvania*, 458 U. S. 375, 402, n. 22, 102 S. Ct. 3141, 73 L. Ed. 2d 835 (1982) (declining to address the State’s standing “until [it] obtains relief different from that sought by plaintiffs whose standing has not been questioned”).

Town of Chester v. Laroe Estates, Inc., 137 S. Ct. 1645, 1651 (2017) (emphasis added).

The present cert petition violates the *Town of Chester* rule, and hence is jurisdictionally defective. Here, the Government must show that it has Article III standing in order to pursue relief that is different

from that which the parties to Patent Office proceedings sought. There is no question that the Government's current requested relief is different. There is equally no question that the Government (through the USPTO Director or otherwise) lacks independent Article III standing. The Court should therefore dismiss or deny this petition immediately as to the Named Respondents.

In each of the joined proceedings addressed by this Brief in Opposition, the Government was not a "party" as such. Rather, the Government (through the Director) intervened at the court of appeals under 35 U.S.C. § 143. After intervention, the Director argued against the same constitutional remedy that the court of appeals had already devised in the previously-decided *Arthrex* case. Namely, *Arthrex* entitles an appellant in certain circumstances to a remand to the Patent Trial and Appeal Board for re-adjudication before a different set of APJs. The Director did not want that for the Named Respondents. The Director instead argued against remand, explaining that it expected further review (in the *en banc* court of appeals or in this Court) of the soundness of the *Arthrex* panel's determinations.

The Government's decision to chart its own course was self-defeating, within any proceeding where no actual party sought what the Government sought. In the proceedings addressed by this brief in opposition, the remand was consented and/or not opposed among the parties. Unsurprisingly, the court of appeals granted the *Arthrex* remand in each case over the Government's objection. In other words, the Government at

the court of appeals went against every party's wish, then got rebuffed by the court of appeals itself, and now comes to this Court without legal standing with respect to the Named Respondents.

The Government's actions in asking for distinct relief would only have been jurisdictionally proper if the Director had independent Article III standing. He did not. Article III standing hinges on the three part test of *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). To establish standing under *Lujan*, an entity must show that it has a genuine stake in the relief sought because it has personally suffered (or will suffer) (1) a concrete and particularized and actual or imminent injury-in-fact, (2) that is traceable to the allegedly unlawful actions of the opposing party and (3) that is redressable by a favorable judicial decision. *Id.*

At least the first two prongs of *Lujan* standing are absent.

The Director entered the fray to argue for the interests of an adjudicative body inside a federal agency—the PTAB and its APJs. No property or monetary claim for or against the agency or its Director is at stake. Hence, the Director cannot show any injury-in-fact. Re-adjudication may draw upon the time and talents of qualified agency employees that would otherwise go toward other tasks, but the need for agency employees to do their jobs does not present a concrete and particularized “injury-in-fact” to the agency or to the Director. When the court of appeals remands for an

agency to do what it exists to do, the agency does not experience an “injury” to any of its legally protectible interests. *Cf. Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950-55 (2019) (finding intervenor lower house of the Virginia Legislature lacked Article III standing in redistricting case, in part because a legislative chamber as an institution has no cognizable interest in the identity of its members).

Nor is any “injury” of any sort “traceable” to the actions of either the original petitioner or original respondent in the agency proceedings. If the Director is “injured” by a ruling that his roster of 260 APJs lacked constitutionally valid appointments, this injury is traceable either to the Congress who crafted how APJs got hired, or to the court who issued the adverse ruling. The parties to the PTAB proceeding did not cause the Director’s problem.

In short, the Director, as a government institutional party, cannot assert a generalized, nonparticularized interest in the proper application, interpretation or enforcement of the law. The “psychic satisfaction” of knowing “that the Nation’s laws are faithfully enforced” is “not an acceptable Article III remedy because it does not redress a cognizable Article III injury.” *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83, 107 (1998). Without “injury-in-fact” and “traceability,” the Director lacks independent Article III standing to bring the current petition against the Named Respondents. Without independent Article III standing, the Director as intervenor cannot seek a different remedy from that agreed by the parties. Therefore, the Court

should deny the petition by the Government (through the Director) on jurisdictional standing grounds, at least as to the Named Respondents here.

II. In the Alternative, Named Respondents Consent to a Hold to Permit Application of All Decisions in the Lead *Arthrex* Cases to The Named Respondents' Cases

If not denied, Named Respondents agree that the Government's petition should be held in view of *Arthrex*. Yet any such hold should be for the purpose of allowing application to all cases within the instant proceedings (No. 20-74) of all rulings in all of the *Arthrex* proceedings, including those rulings sought by the *Arthrex* patentee itself (No. 19-1458). The Government's petition overlooked requesting such relief should this Court take up No. 19-1458 (the patentee's petition). In other words, if this Court determines that the remedy at the court of appeals did not go far enough, did not retrospectively cure an Appointments Clause violation, or that the Appointments Clause violation was not remediable by the judiciary, the Named Respondents seek application of whatever new remedy or holding that this Court issues.

In *Arthrex*, the court of appeals correctly concluded that APJs are unconstitutionally appointed.

That decision nevertheless devised a remedy that is no remedy at all. The Federal Circuit remedy declares abolition of APJ tenure protection. The panel deemed that, for all future PTAB decisions, APJs are

inferior officers, thus making their decisions constitutionally sound from that day forward.

Two Federal Circuit Judges later commented on the haste and carelessness of their colleagues' remedy analysis. They observed that "*Arthrex* disposed of the [remedy] question in a few sentences," without a "fulsome severance analysis." *Arthrex, Inc. v. Smith & Nephew, Inc.*, 953 F.3d 760, 787 (Fed. Cir. 2020) (Hughes, J. and Wallach, J., dissenting from denial of reh'g *en banc*). Their concern was well-founded. Converting APJs to at-will employees conflicts with the goals and policy behind the Framers' placement of the Appointments Clause into our Constitution. As Judge Dyk observed (with concurrence from three other Federal Circuit judges): "By eliminating Title 5 removal protections for APJs, the panel is performing major surgery to the statute that Congress could not possibly have foreseen or intended." *Arthrex*, 953 F.3d 769 (Dyk, J., dissenting from denial of reh'g *en banc*).

Making APJs politically accountable by dint of removing their Title 5 tenure protection conflicts with Congressional purpose concerning job security, as first established in the 1946 Administrative Procedures Act for ALJs, and 1975 Patent Act amendments for APJs. *Id.* at 769-71. Since 1975, despite numerous modifications of the Patent Act both big and small, Congress preserved APJ tenure protection for the precise reason that personnel who conduct adjudication within Executive agencies should not be "mere tools of the agency and subservient to the agency heads in making their proposed findings of fact and recommendations." *Id.* at

770. Judge Dyk (with three other Judges) pointed out, without rebuttal from their fellow Judges, that “ALJs in general and APJs in particular have been afforded longstanding and continuous protection from removal” by Congress. *Id.* at 771. And they additionally noted that after the *Arthrex* panel decision, Congress convened a subcommittee hearing at which one Member stated that eliminating tenure protection was “inconsistent with the idea of creating an adjudicatory body [capable of] providing independent impartial justice.” *Id.* at 772.

Nor can this outcome advance the Appointments Clause policy of structuring the most important governmental hires “to curb Executive abuses of the appointment power” and “to assure a higher quality of appointments.” *Edmond v. United States*, 520 U.S. 651, 659 (1997). For instance, the decision never explains how taking away job security for a class of federal employees can possibly curb, as opposed to enable, abuse of Executive appointment and removal power by political appointees. And the panel decision never explains how emplacing a structure that promotes kowtowing to the President’s appointees, as opposed to independence from them, will lead to “higher quality” personnel filling APJ jobs, or doing those jobs more accurately. The *Arthrex* remedy is facially irrational, in the context of an adjudicatory body whose job is to reach the right answer on a single issue, and in the context of the policy behind the Appointments Clause.

The *Arthrex* remedy also appears to replace one type of unconstitutionality with another. It thus cannot

be correct. Federal employees possess a property right in their employment. *King v. Alston*, 75 F.3d 657, 661 (Fed. Cir. 1996) (identifying property right intrinsic to the same Section 7513 employment provision applicable to APJs) (*citing Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985)). The *Arthrex* remedy extinguishes those property rights. No APJ or APJ interest group filed any appearance or had any say. Even so, the remedy took away APJ property rights in federal employment from hundreds of people. Such an action by a court without due process of law to those affected means that the tenure-removal remedy is itself likely unconstitutional.

In short, the Named Respondents support holding this petition (No. 20-74), as an alternative to denying it. Holding this petition means that any future ruling favorable to the Named Respondents should apply (*e.g.*, in No. 19-1458), allowing them further relief from the Appointments Clause violation found by the court of appeals.²



² Even if the Court grants the primary request of this Brief in Opposition to deny the Director's petition now, the Named Respondents will benefit from any changes to the remedy in the lead case. This is because the Director is holding all *Arthrex* remands in abeyance pending this Court's action in *Arthrex*. To be clear, Named Respondents expressly reserve their rights to seek all additional relief for the Appointments Clause violation once this Court issues its future merits decision.

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

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