No. 20-74

In the Supreme Court of the United States

UNITED STATES OF AMERICA

v.

IMAGE PROCESSING TECHNOLOGIES LLC, ET AL.

ANDREI IANCU,
UNDER SECRETARY OF COMMERCE FOR
INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE

v.

SOUND VIEW INNOVATIONS, LLC, ET AL.

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

BRIEF FOR RESPONDENT SOUND VIEW INNOVATIONS, LLC IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether administrative patent judges who were not appointed by the President with the Senate's advice and consent, whose decisions were not subject to significant Executive branch review, and who were not removable at will, were acting as Principal Officers in violation of the Appointments Clause.

2. Whether the court of appeals may vacate proceedings conducted before an unconstitutionally appointed panel and remand to a panel of administrative patent judges removable at will, where the agency denied a party's attempt to raise the Appointments Clause issue prior to appeal.

PARTIES TO THE PROCEEDINGS

The petitioner in this Court is Andrei Iancu, Under Secretary of Commerce for Intellectual Property and Director, U.S. Patent and Trademark Office, who intervened in the court of appeals in Nos. 2020-1154 and 2020-1155 pursuant to 35 U.S.C. § 143.

Sound View Innovations, LLC was the appellant in the court of appeals in Nos. 2020-1154 and 2020-1155. Unified Patents, LLC (f/k/a Unified Patents Inc.) was the petitioner in the agency proceedings and the appellee in the court of appeals in No. 2020-1154. Hulu, LLC was the petitioner in the agency proceedings and the appellee in the court of appeals in No. 2020-1155.

The petition combines 39 captions and includes other parties that were not involved in the proceedings below involving Sound View Innovations, LLC.

CORPORATE DISCLOSURE STATEMENT

Sound View Innovations, LLC is wholly owned by Sound View Innovation Holdings, LLC. No publicly held corporation owns 10 percent or more of Sound View Innovation Holdings, LLC.

RELATED PROCEEDINGS

The following federal cases and agency proceedings are directly related:

- *Sound View Innovations, LLC v. Unified Patents, LLC*, No. 2020-1154, United States Court of Appeals for the Federal Circuit. Judgment entered Feb. 3, 2020.
- *Sound View Innovations, LLC v. Hulu, LLC*, No. 2020-1155, United States Court of Appeals for the Federal Circuit. Judgment entered Feb. 3, 2020.
- *Unified Patents Inc. v. Sound View Innovations, LLC*, Case IPR2018-00599, Patent Trial and Appeal Board. Final written decision filed Sept. 9, 2019.
- *Hulu, LLC v. Sound View Innovations, LLC*, Case IPR2018-00864, Patent Trial and Appeal Board. Final written decision filed Sept. 9, 2019.

The petition lists other proceedings for which petitioners seek combined review.

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INTRODUCTION

The petition should be denied as to the first Question Presented because the court of appeals' decisions in *Arthrex, Inc.* v. *Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019)[1] and these cases do not require review. *Arthrex* correctly held that administrative patent judges (APJs) were principal officers whose manner of appointment by the Secretary of Commerce violated the Appointments Clause. The court severed the application of a provision so as to render APJs inferior officers who are removable at will, just as this Court severed in *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477, 508–09 (2010) and *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (June 29, 2020). To give a meaningful remedy to challengers, the court of appeals has vacated decisions rendered by APJs before *Arthrex* and remanded for further proceedings before APJs who are now properly appointed. Those holdings below are fully consistent with this Court's cases.

Further, the cases involving respondent Sound View Innovations, LLC (Sound View) do not implicate the second Question Presented in the Government's petition. Unlike other parties, Sound View *did* raise the Appointments Clause issue *at the agency* before appealing, including a request citing *Arthrex*. The Government's single petition improperly combines cases that do not present the same issues. Because Sound View gave the agency an opportunity to remedy the constitutional infirmity before seeking judicial relief, Sound View did not waive its Appointments Clause challenge. The court of appeals did not find forfeiture—nor should this Court.

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[1] Petitions for certiorari are pending in *Arthrex* and its progeny, in at least Nos. 19-1434, 19-1452, 19-1458, and 19-1459 in this Court.

The judgments below do not require review. The proceedings concerning Sound View's patent should be allowed to move forward at the Patent Trial and Appeal Board pursuant to the Federal Circuit's remand, instead of being held. On remand, a new panel of APJs will evaluate the patentability of the challenged claims of Sound View's patent. A hold unduly prejudices Sound View because it has the same practical consequence as letting the APJs' earlier decisions go into effect without judicial review on the merits of patentability; during the hold, it would be impractical to enforce or license Sound View's patent. Regardless of what ensues for the remainder of the Government's combined petition, the proceedings as to Nos. 2020-1154 and 2020-1155 below should be severed, and the Court should deny the petition at least with respect to these proceedings.

STATEMENT

A. Administrative Patent Judges Under the America Invents Act

"In 2011, Congress overhauled the patent system by enacting the America Invents Act (AIA), which created the Patent Trial and Appeal Board" (Board) as a multimember tribunal within the Patent Office. *Return Mail, Inc.* v. *U.S. Postal Serv.*, 139 S. Ct. 1853, 1860 (2019); Pub. L. No. 112-29, § 7, 125 Stat. 284, 313–15 (2011). The AIA charges the Board with post-issuance review of patents in three new types of adjudicatory proceedings. *Return Mail*, 139 S. Ct. at 1860. *Arthrex* and the cases below arose from *inter partes* reviews at the Board.

The Board comprises the Director of the Patent Office, the Deputy Director, the Commissioner for Patents, the Commissioner for Trademarks, and "the administrative patent judges" (APJs). 35 U.S.C. § 6(a). Of these

members, only the Director is appointed by the President with the advice and consent of the Senate. § 3(a)(1). APJs are appointed by the Secretary of Commerce. § 6(a). APJs do most of the day-to-day work of the Board. According to the Government, there are currently over 200 APJs. Pet. 21.

Inter partes review and other AIA proceedings are conducted by panels of the Board consisting of at least three members. 35 U.S.C. § 6(c). Because only the Director is a presidential appointee, even when the Director is on a three-member panel, officers who were not appointed by the President with the advice and consent of the Senate make up a majority of the panel. In the typical case, APJs make up the entire panel.

The Director cannot unilaterally rescind, modify, or vacate a panel's decision. Final written decisions in these cases are appealable to the Court of Appeals for the Federal Circuit only by parties to the proceedings, §§ 141(c), 319—though the Director may intervene once a party appeals, § 143. If no party appeals, the Director has no choice but to implement the final written decision of the Board: he "*shall* issue and publish a certificate" conforming to the decision. 35 U.S.C. § 318(b) (emphasis added).

Like other "[o]fficers and employees of the [Patent] Office," APJs are "subject to the provisions of title 5," § 3(c), including civil service removal protections. See 5 U.S.C. § 7513. Under those provisions, employees can be removed only "for such cause as will promote the efficiency of the service," § 7513(a), and have procedural rights, including the right to appeal adverse employment actions to the Merit Systems Protection Board, § 7513(b)–(d). So, until *Arthrex*, the Secretary who appoints APJs could not fire them at will.

B. The *Arthrex* Decision Holds That APJs Were Appointed in Violation of the Appointments Clause

The Appointments Clause requires that principal officers be appointed by the President with the advice and consent of the Senate. U.S. Const. art. II, § 2, cl. 2. Congress may vest the appointment of inferior officers in a department head. *Id.* To be an inferior officer, however, the officer's work must be directed and supervised by a principal officer. *Edmond* v. *United States*, 520 U.S. 651, 662–63 (1997).

Under the statutory scheme then in effect, the court of appeals held in *Arthrex, Inc.* v. *Smith & Nephew, Inc.* that APJs are principal officers. 941 F.3d at 1325. No other principal officer can exercise sufficient control over APJs by direct review or by removal. Their decisions, including final written decisions in *inter partes* review, are not reviewable by any principal officer—neither Director Iancu nor the Secretary has the ability to rescind or modify a final written decision by himself. *Id.* at 1329–31. And the Secretary, who appoints APJs, cannot remove them at will, because of the civil service protections applicable to APJs. *Id.* at 1332–34; see 5 U.S.C. § 7513. Consequently, APJs are impermissibly insulated from Executive branch control, while wielding significant Executive power—including the power to revoke prior grants of patent monopolies. See *id.* at 1335. The court of appeals therefore concluded that the prescribed manner of APJs' appointment, without presidential nomination and Senate confirmation, violates the Appointments Clause. *Id.*

The court recognized that the provision insulating APJs from removal is severable. *Id.* at 1335–38. The civil service laws, and 35 U.S.C. § 3(c), which makes civil service laws applicable to APJs, were not part of the scheme for post-issuance review of patents that Congress enacted

in the AIA. (35 U.S.C. § 3(c) applies to all Patent Office employees and officers, and predates the AIA.) The court of appeals reasoned that "Congress intended for the *inter partes* review system to function * * * and * * * would have preferred a Board whose members are removable at will rather than no Board at all." *Arthrex*, 941 F.3d at 1337–38. Rather than disturb the elaborate scheme that Congress crafted, the court of appeals took the minimalist approach endorsed by this Court in *Free Enterprise Fund*: severing the application of civil service removal protections to APJs. *Id.* This remedy rendered APJs sufficiently accountable to the Secretary of Commerce, turning them into inferior officers who do not require presidential appointment. *Id.* at 1338.

Finally, the court recognized that a decision made by unconstitutionally appointed APJs had to be vacated in order to give meaningful relief to this type of constitutional challenge. *Id.* at 1339. Even though Arthrex had not raised its challenge at the Board, the court of appeals agreed that it was futile to raise the issue before the Board, which had no power to invalidate statutes. *Id.* And the agency could not otherwise cure the problem by finding constitutionally appointed officers to staff three-member panels required by the statute, 35 U.S.C. § 6(c), because there were no such officers other than the Director. 941 F.3d at 1339–40. The panel reasoned that its holding would be "limited to those cases where final written decisions were issued and where litigants present an Appointments Clause challenge on appeal." *Id.* at 1340.

The court denied petitions for rehearing and rehearing en banc. *Arthrex, Inc.* v. *Smith & Nephew, Inc.*, 953 F.3d 760, 761 (Fed. Cir. 2020) (per curiam). The Government, and parties in *Arthrex* and related cases, have filed petitions for certiorari. See Pet. 22–23.

C. Proceedings Below

1. Respondent Sound View is the assignee of U.S. Patent No. 9,462,074 (the '074 patent), entitled "Method and System for Caching Streaming Multimedia on the Internet." After Sound View filed suit for infringement against Hulu, LLC (Hulu) in district court, Unified Patents Inc. (Unified) and Hulu petitioned the Board for *inter partes* review. Unified challenged claims 3 and 9 of the '074 patent as unpatentable. IPR2018-00599, Paper 2 (filed Feb. 8, 2018). Hulu challenged claims 3, 5, and 9. IPR2018-00864, Paper 1 (filed Mar. 29, 2018).

The same three-member panel of the Board—consisting of three APJs appointed by the Secretary before *Arthrex*—decided both petitions. In both proceedings, the Board found the challenged claims of the '074 patent unpatentable. *Unified Patents Inc.* v. *Sound View Innovations, LLC*, Case IPR2018-00599, Paper 50 (P.T.A.B. Sept. 9, 2019); *Hulu, LLC* v. *Sound View Innovations, LLC*, Case IPR2018-00864, Paper 35 (P.T.A.B. Sept. 9, 2019). The Board entered its final written decisions on September 9, 2019. *Id.* Notices of appeal were due November 12, 2019.[2]

2. On October 31, 2019, the Federal Circuit issued its decision in *Arthrex*. 941 F.3d 1320. Immediately, other parties began evaluating *Arthrex*'s impact on their cases at the Board.[3] *Arthrex* was a significant appellate

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[2] Pursuant to 35 U.S.C. § 142 and 37 C.F.R. § 90.3(a)(1), a notice of appeal is due 63 days after the date of the Board's decision. Here, because that day fell on a Federal holiday, the deadline was extended to the following day. 37 C.F.R. § 90.3(b)(2).

[3] See, *e.g.*, Matthew Bultman, *Nasdaq Wants PTAB Redo After Constitutionality Ruling*, Law360 (Nov. 1, 2019, 6:47 PM EDT), https://www.law360.com/articles/1216124/nasdaq-wants-ptab-redo-after-constitutionality-ruling.

decision about the structure of the agency that had collateral consequences for pending AIA proceedings. Under the circumstances, Sound View decided to raise the issue at the agency, before appealing the Board's decisions.

On November 8, 2019, Sound View submitted a request to the agency for an extension of time to appeal in view of "the issues raised by the Federal Circuit's recent decision in *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 2018-2140 (Fed. Cir. Oct. 31, 2019)." C.A. No. 20-1154, D.I. 16 Ex. A. At the same time, Sound View requested a conference call with the panel regarding potential rehearings to remedy the Appointments Clause defect prior to appeal, following Board guidance for such circumstances. C.A. No. 20-1154, D.I. 1-2 attachment 3 (correspondence with the Board). Sound View wrote, in pertinent part:

> Pursuant to the guidance provided by the Chief Judge in such circumstances, Patent Owner requests a conference call in cases IPR2018-00599/00864 (US9463074) to ask permission to file an out of time request for rehearing of the September 9, 2019 final written decisions in these cases. *See Chat With The Board On SAS webinar*, Apr. 30, 2018, at Slide 17.

Id. Unified and Hulu did not oppose a conference call with the Board in the aftermath of *Arthrex*. *Id.*

Sound View cited the Board's guidance for implementing a significant appellate decision affecting then-pending proceedings, which the Chief Judge and other leadership published in the aftermath of this Court's ruling in *SAS Institute Inc.* v. *Iancu*, 138 S. Ct. 1348 (2018). See *Chat with the Chief on SAS, April 30, 2018*, U.S. Patent & Trademark Off., https://www.uspto.gov/sites/default/files/documents/chat_with_chief_sas_5.3.18.pdf [https://perma.cc/53L6-KTYQ]. The Board's guidance

instructs parties on protocol at the agency after such a significant ruling: "Either party can file rehearing request to raise *SAS*-issues" or "request a conference call with the panel to discuss additional briefing." *Id.* at 16–17. The Board may "waive [the] rehearing deadline if time has passed" to address the new issues. *Id.*

Even though the Board had procedural mechanisms with which it could have remedied the *Arthrex* issues (*e.g.*, by permitting Sound View to request rehearing and then designating a new properly appointed panel to rehear the case), the Board denied the requests. C.A. No. 20-1154, D.I. 1-2 attachment 3. The Board asserted that the cited guidance was limited to the aftermath of *SAS* and had no bearing on how the Board would regard requests for additional briefing or rehearing in these proceedings. See *id.* Consequently, the Board refused to disturb the final written decisions rendered by the APJs while they were, according to *Arthrex*, unconstitutionally appointed.

3. Sound View timely appealed. In its notices of appeal, Sound View specifically addressed the Appointments Clause issue:

> whether the inter partes review determinations in this case by a panel of members of the Board declaring unpatentable issued claims 3 and 9 of Appellant's '074 Patent are unconstitutional, including because the members of the panel, in rendering determinations in this inter partes review adverse to the vested rights in the '074 Patent, acted as Principal Officers under the Appointments Clause of the United State[s] Constitution, despite having been appointed by the Secretary of the Department of Commerce under 35 U.S.C. § 6(a), rather than nominated by the President by and with the advice and consent of the Senate;

Notice of Appeal, C.A. No. 20-1154, D.I. 1-2 at 4 (citation omitted); Notice of Appeal, C.A. No. 20-1155, D.I. 1-2 at 3–4.

Sound View moved to vacate and remand for a new hearing by a new panel of properly appointed APJs. C.A. No. 20-1154, D.I. 16; C.A. No. 20-1155, D.I. 15. The Director intervened and opposed the motion. Unified and Hulu also opposed.

The court of appeals granted the motion, vacated the Board decisions, and remanded for further proceedings consistent with *Arthrex*. Pet. App. 28a–31a. The court denied petitions for rehearing and rehearing en banc by the Director and by Hulu. Pet. App. 111a–114a.

4. After the Federal Circuit vacated and remanded the cases below, the Board issued a blanket order pausing all remanded proceedings. *General Order in Cases Remanded Under* Arthrex, Inc. v. Smith & Nephew, Inc., *941 F.3d 1320 (Fed. Cir. 2019)* (P.T.A.B. May 1, 2020). The Government then filed the instant petition, requesting that all of the remanded cases be held pending the petitions in *Arthrex*. Pet. 27.

ARGUMENT

Sound View raised the Appointments Clause issue at the agency before appealing, including direct citation to the *Arthrex* case in papers filed with the Board. And Sound View raised the Appointments Clause issue in its notices of appeal and in its first briefs (motions to vacate and remand) at the court of appeals. Thus, Sound View has fully preserved its challenge to the constitutionality of decisions issued by the Board while the panel comprised unconstitutionally appointed principal officers.

The Government's petition is premised on an incorrect generalization about the procedural history that does not apply to all of the cases named in its petition. The petition poses a legal question that does not apply to Sound View's proceedings below—whether the court of appeals erred by "adjudicating Appointments Clause challenges brought by litigants that had not presented such a challenge to the agency" (Question Presented No. 2, Pet. I). And the Government asserts that "[i]n the vast majority of [these] cases * * * the parties appealing the Board's decisions had not raised Appointments Clause challenges before the Board." Pet. 23. Sound View did, and cannot be lumped into that group. The petition should be denied as to Sound View's cases, at least because these cases do not present the same legal questions as the others. See Sup. Ct. R. 12.4.

Further, there is no reason to hold these proceedings pending the petitions in *Arthrex* and its progeny. If the Court denies certiorari or affirms *Arthrex*, there is no effect on these proceedings. If the Court holds that APJs were never principal officers in violation of the Appointments Clause, the parties can resume or restart appeals to the Federal Circuit on the merits of patentability and other arguments. In the unlikely event that the Court applies a broader remedy for an Appointments Clause defect, such as invalidating the Board's existence, such a holding would naturally also terminate any proceedings at the Board and void its decisions below, regardless of whether this petition is held.

Those far-fetched outcomes are also unlikely, because the court of appeals got *Arthrex* exactly right: Absent the Director's ability to review APJs' decisions or the Secretary's power to fire them at will, APJs are principal officers appointed in violation of the Appointments Clause.

Arthrex's immediate outcome—severing the removal provision to make APJs inferior officers—was a minimalist cure for the defect, exactly what this Court has done before and would similarly do here. See 941 F.3d at 1337 (citing *Free Enter. Fund* v. *Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492, 508 (2010)). In these holdings, *Arthrex* is consistent not only with *Free Enterprise Fund*, but also with this Court's recent decision in *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (June 29, 2020) (No. 19-7), which severed a removal protection so as to make the CFPB Director removable at will. *Id.* at 2211 (Roberts, C.J.); *id.* at 2224 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

Arthrex was also correct about the disposition of appeals arising from decisions issued by unconstitutionally appointed APJs. Such decisions have to be vacated and remanded for decision by a properly constituted panel of removable APJs—and, a different body from the first. 941 F.3d at 1340; see *Lucia* v. *S.E.C.*, 138 S. Ct. 2044, 2055 (2018).

The Federal Circuit did not err in applying *Arthrex* to other patent cases that had been conducted by unconstitutionally appointed APJs before *Arthrex*. Inherent in its later rulings is a recognition that *Arthrex* upset the status quo, and that it had been futile for litigants to raise the issue at the Board. (The Board has since confirmed just how futile such a challenge would have been, because the Board has declined to address the Appointments Clause issue after *Arthrex*, even when Sound View brought it to the Board's attention. See *supra* pp. 7–8.) The Federal Circuit correctly applied *Arthrex* to these cases by vacating the Board's decisions in Nos. 2020-1154 and 2020-1155 and remanding for further proceedings.

Finally, holding this petition and pausing the proceedings below would be unduly prejudicial because it has the same effect as affirming the APJs' decisions in the meantime. Sound View (and similarly situated patent owners) is harmed: uncertainty regarding patent validity after the decisions by the first set of APJs makes it impractical to enforce the patent through licensing or litigation.[4] So, the practical consequence of a hold—and the Government's refusal to conduct remanded proceedings (*supra* p. 9)—is the same as if this Court upheld the APJs' decisions of unpatentability, depriving the patent owner of the patent's value even when there has been no judicial ruling affirming the Board's decisions on the merits. That is not an appropriate status quo to "hold," if there is a substantial chance that the eventual disposition will require a remand anyway.

Conversely, should the proceedings resume at the Board on remand from the Federal Circuit, as the mandates require, a properly constituted panel of APJs will determine anew whether or not the challenged claims of the '074 patent are patentable. The burden of re-deciding the *inter partes* review petitions with duly appointed APJs presents no irreparable harm to the Government, even if it later turns out that APJs have always been inferior officers.

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[4] In a normal case, the parties would have already briefed substantive challenges to the Board's decisions at the Federal Circuit, potentially resulting in reversal (upholding the claims' validity) or a remand to the Board for reasons other than the Appointments Clause. Because the appeals below were short-circuited by early motions in light of *Arthrex*, Sound View has not had an opportunity to address other substantive faults with the Board's decisions.

Because Sound View has preserved its Appointments Clause challenge, the Federal Circuit correctly decided *Arthrex*, and substantial prejudice could result from holding the petition, this Court should deny the petition at least as to Sound View's cases, and permit the proceedings below to continue on remand to the Patent Trial and Appeal Board.

CONCLUSION

The petition should be denied as to the proceedings involving Sound View Innovations, LLC.

Respectfully submitted,

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