

No. 20-74

In the
Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

IMAGE PROCESSING TECHNOLOGIES LLC, ET AL.,

Respondents.

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

**BRIEF FOR RESPONDENT
COMCAST CABLE COMMUNICATIONS, LLC**

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QUESTIONS PRESENTED

1. Whether, for purposes of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, administrative patent judges of the United States 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.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, respondent states that Comcast Cable Communications, LLC is a wholly owned, indirect subsidiary of Comcast Corporation and no other publicly held corporation owns 10% or more of the stock of respondent.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION.....	1
DISCUSSION	2
CONCLUSION	4

TABLE OF AUTHORITIES

	Page(s)
FEDERAL CASES	
<i>Arthrex, Inc. v. Smith & Nephew, Inc.</i> , 941 F.3d 1320 (Fed. Cir. 2019).....	2, 3, 4
FEDERAL STATUTES	
28 U.S.C. 1254(1)	1
ADMINISTRATIVE MATERIALS	
General Order, 2020 WL 2119932 (P.T.A.B. May 1, 2020)	2

OPINIONS BELOW

The order of the court of appeals in *Rovi Guides, Inc. v. Comcast Cable Commc'ns, LLC*, Nos. 2019-1215, 2019-1216, and 2019-1218 (consolidated) and in *Rovi Guides, Inc. v. Comcast Cable Commc'ns, LLC*, Nos. 2019-1293, 2019-1294, and 2019-1295 (consolidated) (Pet. App. 62a-63a) is unreported.

The order of the court of appeals in *Promptu Sys. Corp. v. Comcast Cable Commc'ns, LLC*, Nos. 2019-2368 and 2019-2369 (consolidated) (Pet. App. 36a-37a) is unreported.

The order of the court of appeals in *Promptu Sys. Corp. v. Comcast Cable Commc'ns, LLC*, No. 2020-1253 (Pet. App. 44a-45a) is unreported.

JURISDICTION

The judgments of the court of appeals in *Promptu Sys. Corp. v. Comcast Cable Commc'ns, LLC*, Nos. 2019-2368 and 2019-2369 (consolidated), and in *Promptu Sys. Corp. v. Comcast Cable Commc'ns, LLC*, No. 2020-1253, were entered on February 27, 2020.

The judgments of the court of appeals in *Rovi Guides, Inc. v. Comcast Cable Commc'ns, LLC*, Nos. 2019-1215, 2019-1216, and 2019-1218 (consolidated) and in *Rovi Guides, Inc. v. Comcast Cable Commc'ns, LLC*, Nos. 2019-1293, 2019-1294, and 2019-1295 (consolidated), were entered on April 22, 2020.

The petition for a writ of certiorari was filed on July 23, 2020, pursuant to this Court's March 19, 2020 order extending the time within which to file a petition for a writ of certiorari to 150 days after the date of the court of appeals' judgment. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

DISCUSSION

In *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), the Federal Circuit held that administrative patent judges who sit on the Patent Trial and Appeal Board (Board) are principal rather than inferior Officers of the United States; that severing administrative patent judges' statutory removal protections was sufficient to cure the Appointments Clause violation; and that the patent owner was entitled to re-adjudication before a reconstituted Board panel despite not having raised its Appointments Clause challenge before the Board. The United States has filed a petition for a writ of certiorari in *Arthrex*, seeking review of the Federal Circuit's Appointments Clause and remedial rulings. See Pet. for Cert., *United States v. Arthrex, Inc.*, No. 19-1434 (filed June 25, 2020). The private parties have filed petitions as well. Pet. for Cert., *Smith & Nephew, Inc. v. Arthrex, Inc.*, No. 19-1452 (filed June 29, 2020); Pet. for Cert., *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 19-1458 (filed June 30, 2020).

Since its decision in *Arthrex*, the Federal Circuit has "vacated more than 100 decisions" by the Board and has "instruct[ed] the Board to conduct further proceedings on remand before newly-designated Board panels." General Order, 2020 WL 2119932, at *1 (P.T.A.B. May 1, 2020). Among those more than 100 decisions are nine decisions in which Comcast Cable Communications, LLC prevailed before the Board, but the Federal Circuit vacated the Board's decisions in reliance on *Arthrex*. Three of the Board decisions concern a patent owned by Promptu Systems Corp. See Pet. App. 36a-37a (Nos. 2019-2368 & 2019-2369 (consolidated)); *id.* at 44a-45a (No. 2020-1253). Six of the decisions concern patents owned by Rovi Guides, Inc. See *id.* at 62a-63a (Nos. 2019-1215, 2019-1216, and

2019-1218 (consolidated) and Nos. 2019-1293, 2019-1294, and 2019-1295 (consolidated)).

The United States' omnibus petition in this case encompasses the Federal Circuit's judgments in the cases involving Comcast and seeks a hold for these and other cases pending this Court's decision on the *Arthrex* petitions. Pet. 25-26. The Federal Circuit vacated the Board's final written decisions in these cases based on its conclusion in *Arthrex* that the administrative patent judges were invalidly appointed. As in *Arthrex*, the Federal Circuit did so despite the patent owners' failure to raise any Appointments Clause challenge to the Board's constitution before the Board itself. The United States' omnibus petition therefore presents the same questions that are presented in the petitions for writs of certiorari filed in *Arthrex*.

In addition, Comcast has separately filed a certiorari petition with respect to the *Promptu* cases, in which Comcast also urges this Court to hold the petition pending its disposition of *Arthrex* and then dispose of it accordingly. Pet. for Cert., *Comcast Cable Commc'ns, LLC v. Promptu Sys. Corp.*, No. 20-92 (filed July 24, 2020). Comcast intends to file a certiorari petition with respect to the *Rovi* cases, seeking the same relief.

For the reasons summarized in the United States' omnibus petition (at 25-26), *Arthrex* was wrongly decided in both its substantive and remedial aspects. See also Br. for Amicus Curiae Comcast Cable Communications, LLC in Supp. of Pet'rs, *Smith & Nephew, Inc. v. Arthrex, Inc.*, No. 19-1452 (filed Aug. 3, 2020). Accordingly, Comcast respectfully submits that the Court should hold the United States' petition for a writ of certiorari involving the Comcast cases (No. 20-74) pending disposition of the *Arthrex* petitions (Nos. 19-

1434, 19-1452, and 19-1458) and then dispose of it accordingly. Comcast requests the same relief with respect to its *Promptu* petition (No. 20-92), and will request the same relief in its *Rovi* petition. In the alternative, the petitions involving the Comcast cases should be granted.

CONCLUSION

The petition for a writ of certiorari should be held pending disposition of the *Arthrex* petitions (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. In the alternative, the petitions involving the Comcast cases should be granted.

Respectfully submitted,

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