21-5728

No.

In the Supreme Court of the United States

ALBERTO SOLAR-SOMOHANO,

Petitioner

v.

UNITED STATES,

Respondent

ORIGINAL

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

PETITION FOR WRIT OF CERTIORARI

/ALBERTO SOLAR-SOMOHANO/
Petitioner
4741 NW 5th Street
Miami, Fl. 3326
(561) 595-8547

September 3rd, 2021

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QUESTIONS PRESENTED

I.

Whether under *Carr v. Saul* the exhaustion of administrative appeal to the Trial Trademark Board can be bypass directly appealing to the Court of Appeals on a Rule 5.1 appointment clause constitutional challenge.

II.

Whether after *US v. Arthrex* final decision on registration and cancellation of Patents & Trademarks certificate be by principle officers President appointee Senate consented appointed

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PARTIES TO THE PROCEEDINGS BELOW

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RELATED PROCEEDING

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JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101I.

CONSTITUTIONAL PROVISION

Article II, Section 2, cl. 2

STATUTORY PROVISIONS INVOLVED

Section 1071 USC 15

a) PERSONS ENTITLED TO APPEAL; UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT; WAIVER OF CIVIL ACTION; ELECTION OF CIVIL ACTION BY ADVERSE PARTY; PROCEDURE(1) *An applicant for registration of a mark,* party to an interference proceeding, party to an opposition proceeding, party to an application to register as a lawful concurrent user, party to a cancellation proceeding, a registrant who has filed an affidavit as provided in section 1058 of this title or section 1141k of this title, or an applicant for renewal, *who is dissatisfied with the decision of the Director* or Trademark Trial and Appeal Board, *may appeal to the United States Court of Appeals for the Federal Circuit*.....

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FEDERAL RULE CIVIL PROCEDURE

Rule 5.1

FEDERAL REGULATION

37 CFR 2.63(b)(1),(2)

(b) *Final refusal or requirement.* Upon review of a response, the examining attorney may state that the refusal(s) to register, or the requirement(s), is final.

(1) If the examining attorney issues a final action that maintains any substantive refusal(s) to register, the applicant may respond by timely filing: (i) A request for reconsideration under paragraph (b)(3) of this section that seeks to overcome any substantive refusal(s) to register, and comply with any outstanding requirement(s), maintained in the final action; or (ii) An appeal to the Trademark Trial and Appeal Board under §§ 2.141 and 2.142.

(2) If the examining attorney issues a final action that contains no substantive refusals to register, but maintains any requirement(s), the applicant may respond by timely filing: (i) A request for reconsideration under paragraph (b)(3) of this section that seeks to comply with any outstanding requirement(s) maintained in the final action;(ii) An appeal of the requirement(s) to the Trademark Trial and Appeal Board under §§ 2.141 and 2.142; or (iii) A petition to the Director under § 2.146 to review the requirement(s), if the subject matter of the requirement(s) is procedural, and therefore appropriate for petition.

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(3) Prior to the expiration of the time for filing an appeal or a petition, the applicant may file a request for reconsideration of the final action that seeks to overcome any substantive refusal(s) and/or comply with any outstanding requirement(s). Filing a request for reconsideration does not stay or extend the time for filing an appeal or petition. The Office will enter amendments accompanying requests for reconsideration after final action if the amendments comply with the rules of practice in trademark cases and the Act.

(4) Filing a request for reconsideration that does not result in the withdrawal of all refusals and requirements, without the filing of a timely appeal or petition, will result in abandonment of the application for incomplete response, pursuant to § 2.65(a).

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STATEMENT OF THE CASE

I. Proceeding Below

A. **Office Trademark Application:**

On August 23rd, 2017 Petitioner filed a trademark application Serial No. 87575740. [1]

On August 4th, 2020, the examining attorney (EA) of the United States Trademark Office enter final action letter refusing application. [2]

On September 17, 2020, Petitioner filed reconsideration of refusal requesting review by the Director a principle officer and objecting under Rule 5.1 declaring that ex parte appeal is Unconstitutional Judges not principle officer appointed by the President. [3]

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During that time, Petitioner had earlier in other applications in opposition proceedings made the same challenge under *Ryder v. US*, 515 U.S. 177 (1995).(September 24, 2013 #91210647; June 12th, 2014 #920574; November 20, 2014 #91210103; November 22· 2014 #91211714; November 29th, 2014 #91216818/#91210103; January 9th, 2015 #91218529; March 2nd, 2016 #91224653; March 7th, 2016; #91224621; March 9th, 2016; #91224670/#91224653; January 24th, 2017#91232090)

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Under 15 USC 1070, Petitioner has 6-months to take an *ex-parte appeal* to the Trial Trademark Appeal Board (TTAB)

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"Reconsideration by the Director a principle officer I object that the EA entertain the Further object the ex parte appeal to the Board is Unconstitutional the Board panel members r not principle officer thus under Rule 5.1. I challenge the constitutionality of the TTAB"

The reconsideration does not toll the 6-months to timely filed an ex parte appeal to TTAB nor does a petition to the Director under 37 CFR 2.146. The decision of the Director cannot be appeal to the TTAB. *37 CFR 2.63(b)(1)(2)*

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B. Ex parte Appeal

On January 5th, 2021 Petitioner filed a notice of appeal on the EA final refusal directly to the Court of Appeals after Petitioner gave notices to the Director and EA for the delay of resolving the reconsideration.

C. Court of Appeals:

On January 26th, 2021, Petitioner filed a notice challenging the constitution of the appointment clause Trademark Judges not appointed by the President

On February 2nd, 2021, the Court of Appeals certified Petitioner's appointment clause challenge giving the US Attorney General 30-days to intervene.[4]

On February 26th, 2021, *notwithstanding certifying the appointment clause challenge,* the Court of Appeals issue show cause order to parties why appeal not dismissed for lack of jurisdiction.[5]

On March 29th, 2021, Respondent filed response

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5 ORDER: The parties are directed to show cause, within 30 days of the date of filing of this order, why this appeal should not be dismissed.

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"Petitioner is impermissibly attempting to bypass the statutory scheme and to appeal the examining attorney decision directly to this court."

On April 22nd, 2021, this Court decided *Carr v. Saul,* 19-1442 (April 22nd, 2021)

On May 3rd, 2021, 2021, Petitioner filed rehearing on account of *Carr v. Saul, supra*

On June 8th, 2021, tye Court of Appeals denied rehearing. (App 1(a)-2(a)

On June 21st, 2021, this Court decided *United* States v. *Arthrex, Inc.*, 594 U.S. ___ (2021)

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An applicant may not skip administrative review by the Board under 15U.S.C. § 1070 and proceed directly in this Court under 15 U.S.C. § 1071(a). An applicant's failure to exhaust the administrative remedy provided by Congress—appealing to the Board—means that this Court lacks appellate jurisdiction.

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REASON FOR GRANTING THE WRIT

II. Appointment Clause Challenge

D. Rule 5.1

Petitioner did it all waited and waited on the Director a principle officer to make the final decision of trademark application be approved for publication, but nothing.

In fact, there is nothing at all if the Director would have made the final decision for the decision is only for publication which means if an opposition is filed it will be the TTAB with the final decision while not being principal officers.

So, final decision by not principle officers is absurd in law and outrageous in fact.

E. *Carr v. Saul*, 19-1442 (April 22nd, 2021)

This Court held that constitutional challenge to the appointment clause can be raise for the first time on judicial review it wasn't necessary to have been exhaustion nor preserve under *Ryder v. US*, 515 U.S. 177 (1995) on administrative appeal.

This Court rationale was focused on two considerations:

First, the Court noted that agency adjudicative proceedings generally make a poor forum for bringing a structural constitutional challenge, since such a challenge usually falls outside the adjudicator's area of technical expertise.

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adjudicators who are powerless to grant the relief requested.

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This Court entertained an appointment clause, *not decided*, raised for first time at Court of Appeals holding that:

§6(c) cannot constitutionally be enforced to the extent that its requirements prevent the Director from reviewing final decisions rendered by APJs. The Director accordingly may review final PTAB decisions and, upon review, may issue decisions himself on behalf of the Board. Section 6(c) otherwise remains operative as to the other members of the PTAB. When reviewing such a decision by the Director, a court must decide the case "conformably to the constitution, disregarding the law" placing restrictions on his review authority in violation of Article II. Marbury v. Madison, 1 Cranch 137, 178. The appropriate remedy is a remand to the Acting Director to decide whether to rehear the petition filed by Smith & Nephew. A limited remand provides an adequate opportunity for review by a principal officer. Because the source of the constitutional violation is the restraint on the review authority of the Director, rather than the appointment of APJs by the Secretary, Arthrex is not entitled to a hearing before a new panel of APJs

At the United States Patent Trademark Office the *final decision for trademark registration* is not made by a principle officer.

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CONCLUSION

The Court of Appeals erred by dismissing the appeal for lack of jurisdiction while having jurisdiction to consider the Appointment clause constitutional challenge that final decision from the USPTO must be render by Principle Officer.

Dated: September 3rd, 2021

/ASUS/
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CONCLUSION

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