No. 21-691

IN THE

Supreme Court of the United States

FG SRC LLC,

Petitioner,

v.

MICROSOFT CORPORATION,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should grant, vacate, and remand in light of *United States* v. *Arthrex, Inc.*, 141 S. Ct. 1970 (2021), in a case in which the petitioner forfeited any Appointments Clause challenge by failing to raise it in its briefs before the court of appeals?

RULE 29.6 STATEMENT

Respondent Microsoft Corporation is a publicly-held corporation. Microsoft has no parent corporation, and no publicly-held corporation owns ten percent or more of Microsoft's stock.

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INTRODUCTION

In *United States* v. *Arthrex, Inc.*, 141 S. Ct. 1970, 594 U.S. ___ (2021), the Court held that the unreviewable authority wielded by the Administrative Patent Judges (APJs) of the Patent Trial and Appeal Board (Board) during inter partes review was incompatible with their appointment by the Secretary of Commerce to an inferior office. 141 S. Ct. at 1978-85. As a remedy, the Court directed a remand to the Acting Director of the United States Patent & Trademark Office to decide whether to review the APJs' final written decision. 141 S. Ct. at 1987-88.

All challenged claims of three patents owned by Petitioner FG SRC LLC were held unpatentable in inter partes review proceedings before the Board. Petitioner appealed the Board's decisions to the Federal Circuit, and the Federal Circuit affirmed. Petitioner now asks the Court to grant certiorari, vacate, and remand for reconsideration in light of *Arthrex*. Petitioner fails to mention, however, that it was well aware of the Appointments Clause issue addressed in *Arthrex*, and chose not to raise that issue in the court of appeals until *after* that court affirmed the Board's decisions on the merits.

Petitioner forfeited the issue it seeks to present to this Court. It is well settled, both in the courts of appeals and in this Court, that a party who seeks to raise an Appointments Clause challenge to agency action must properly present that challenge on appeal. The Federal Circuit has consistently applied that principle to *Arthrex*-related arguments, and this Court's disposition of petitions for certiorari challenging those Federal Circuit rulings reflects the same principle, with the Court consistently denying petitions where the petitioners had failed properly to

present an Appointments Clause challenge in the court of appeals.

Denial is equally appropriate here. Petitioner failed to present any Appointments Clause issue in its briefs on appeal, making it indistinguishable from the many other petitioners in the same position whose petitions have been denied. Moreover, Petitioner's forfeiture was not the result of an inadvertent oversight, but rather reflects a calculated, tactical choice. Petitioner does not even suggest a reason why its forfeiture should be excused, and there is none. The petition should be denied.

STATEMENT OF THE CASE

Petitioner is the current owner[1] of U.S. Patent Nos. 7,421,524 B2 ("the '524 patent"), 7,225,324 B2, ("the '324 patent"), and 7,620,800 B2 ("the '800 patent"). In 2019, the Board granted Microsoft's requests for inter partes reviews of the '524, '324, and '800 patents. Pet. App. 6a, 66a, 195a.

The proceedings before the Board were well underway when the Federal Circuit issued its decision in *Arthrex, Inc.* v. *Smith & Nephew, Inc.*, 941 F.3d 1320 (2019). Following that decision, Petitioner raised an Appointments Clause challenge in sur-replies filed before the Board. Pet. App. 61a, 188a–189a, 309a. In its subsequent final written decisions in each of the cases, the Board rejected that challenge because, under the Federal Circuit's decision, severance of the restrictions on removal of APJs cured any constitutional infirmity. The Board also found the

[1] At earlier stages in these proceedings, the patents were owned by the Saint Regis Mohawk Tribe, and by DirectStream, LLC. Pet. 1; Pet. App. 6a.

challenged claims of all three patents unpatentable on the merits. Pet. App. 62a, 190a–191a, 310a–311a.

Petitioner appealed from all three final written decisions, and the Federal Circuit consolidated the proceedings into Appeal No. 2020-1993 (concerning the '524 patent) and Appeal Nos. 2020-1925 and 2020-1926 (concerning the '324 and '800 patents). Pet. 1–2.

Petitioner did not raise an Appointments Clause challenge in its opening briefs before the Federal Circuit, which were filed in October 2020, nearly a year after that court's *Arthrex* decision. Instead, in each of its appeals, Petitioner urged reversal based on claim construction arguments Petitioner had failed to raise before the Board. See *FG SRC, LLC* v. *Microsoft Corp*., No. 2020-1993, Dkt. 21 at 60–62; *FG SRC, LLC* v. *Microsoft Corp*., No. 2020-1925, Dkt. 26 at 31–34. Petitioner's appeal concerning the '524 patent also challenged the prior art status of the lead invalidating reference on which the Board had relied (*FG SRC, LLC* v. *Microsoft Corp*., No. 2020-1993, Dkt. 14 at 4), a challenge Petitioner had expressly waived before the Board, while its appeal concerning the '324 and '800 patents raised a total of nine issues, including multiple substantial evidence challenges (*FG SRC, LLC* v. *Microsoft Corp*., No. 2020-1925, Dkt. 18 at 5–6). Like its opening briefs, Petitioner's reply briefs in each appeal failed to mention *Arthrex* or any Appointments Clause issue. *FG SRC, LLC* v. *Microsoft Corp*., No. 2020-1993, Dkt. 24; *FG SRC, LLC* v. *Microsoft Corp*., No. 2020-1925, Dkt. 27.

On May 6, 2021, the Federal Circuit affirmed the Board's final written decisions. Pet. App. 1a–4a. Petitioner filed petitions for panel rehearing and rehearing en banc in both appeals on June 7, 2021, but again did not raise any Appointments Clause challenge. *FG SRC, LLC* v. *Microsoft Corp*., No. 2020-

1993, Dkt. 38; *FG SRC, LLC* v. *Microsoft Corp.*, No. 2020-1925, Dkt. 41.

Petitioner raised the Appointments Clause issue for the first time before the Federal Circuit on June 30, 2021, nearly two months after that court affirmed the Board's final written decisions. Petitioner moved to dismiss each of its own appeals and remand the cases to the Board, invoking this Court's decision in *Arthrex*. Pet. 2–3. Microsoft opposed the motions, pointing out that Petitioner had forfeited its Appointments Clause arguments by failing to raise them in its opening (or reply) briefs before the Federal Circuit. *FG SRC, LLC* v. *Microsoft Corp.*, No. 2020-1993, Dkt. 40; *FG SRC, LLC* v. *Microsoft Corp.*, No. 2020-1925, Dkt. 43. On August 6, 2021, the Federal Circuit denied rehearing and rehearing en banc, and denied Petitioner's motions to dismiss the appeals and remand to the Board. Pet. App. 313a–316a.

REASONS FOR DENYING THE PETITION

I. PETITIONER FAILED PROPERLY TO PRESENT ITS APPOINTMENTS CLAUSE CHALLENGE IN THE COURT OF APPEALS AND THEREFORE HAS FORFEITED THAT CHALLENGE.

Petitioner asks the Court to vacate the Federal Circuit's decisions and remand these cases "to cure the constitutional violation in accordance with this Court's decision in *Arthrex*." Pet. *i*. But Petitioner forfeited its Appointments Clause challenges by failing to raise them in its opening briefs before the court of appeals. As a result, this Court's decision in *Arthrex* provides no basis for disturbing the court of appeals' judgments in these cases. See, *e.g.*, *Customedia Techs. LLC* v. *Dish Network Corp.*, 941 F.3d 1173, 1174 (Fed. Cir. 2019) (per curiam) (holding that patentee "forfeited its

Appointments Clause challenges" because it "did not raise any semblance of an Appointments Clause challenge in its opening briefs or raise this challenge in a motion filed prior to its opening briefs," and noting that the Federal Circuit had granted relief in *Arthrex* itself only because "the party had properly raised the challenge on appeal").

This Court denied the petition for certiorari seeking review of the Federal Circuit's decision in *Customedia*, see *Customedia Techs., LLC* v. *Dish Network Corp.*, 141 S. Ct. 555 (2020) (No. 20-135), and has consistently denied petitions in other cases asserting similar Appointments Clause challenges where, as here, the petitioner first raised the issue *after* its opening brief in the Federal Circuit. See, *e.g., Arthrex, Inc.* v. *Smith & Nephew*, Inc., 141 S. Ct. 236 (2020) (No. 19-1204) (Appointments Clause challenge initially raised after petition for rehearing in the Federal Circuit); *Essity Hygiene & Health AB* v. *Cascades Canada ULC*, 141 S. Ct. 555 (2020) (No. 20-131) (same); *IYM Techs., LLC* v. *RPX Corp.*, 141 S. Ct. 850 (2020) (No. 20-424) (Appointments Clause challenge initially raised in petition for rehearing in the Federal Circuit); *Sanofi-Aventis Deutschland, GMBH* v. *Mylan Pharms., Inc.*, 141 S. Ct. 266 (2020) (No. 19-1451) (Appointments Clause challenge initially raised in post-argument letter); *Immunex Corp.* v. *Sanofi-Aventis U.S. LLC*, 141 S. Ct. 2799 (2021) (No. 20-1285) (Appointments Clause challenge initially raised in reply brief in the Federal Circuit). See also *Wi-LAN, Inc.* v. *Hirshfeld*, 141 S. Ct. 2799 (2021) (No. 20-1261) (Appointments Clause challenge raised for the first time in the petition for certiorari); *ThermoLife Int'l, LLC* v. *Iancu*, 141 S. Ct. 1049 (2021) (No. 20-150) (same); *adidas AG* v. *Nike, Inc.*, 141 S. Ct. 1376 (2021) (No. 20-728) (same).

The same result is warranted here. See *United States* v. *Olano*, 507 U.S. 725, 731 (1993) ("No procedural principle is more familiar to this Court than that a constitutional right . . . may be forfeited . . . by the failure to make timely assertion of the right.") (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)); *Curtis Publ'g Co.* v. *Butts*, 388 U.S. 130, 143 (1967) ("Of course, it is equally clear that even constitutional objections may be waived by a failure to raise them at a proper time.").

Petitioner is in the same position as the petitioners in these prior cases. As in those cases, this petition should be denied.

II. NOTHING ABOUT THIS CASE CALLS FOR A DIFFERENT RESULT THAN OTHER CASES IN WHICH A PETITIONER FAILED PROPERLY TO PRESENT AN APPOINTMENTS CLAUSE CHALLENGE ON APPEAL.

Petitioner fails even to acknowledge its failure to raise a timely Appointments Clause challenge before the Federal Circuit. Nor does Petitioner mention this Court's denials of similar petitions for certiorari, much less explain why it should be treated any differently than other petitioners who failed to timely raise an Appointments Clause argument in the court of appeals. Indeed, if Petitioner's situation can be distinguished from that of the many other litigants who failed to raise the issue on appeal, Petitioner has an even weaker claim for relief because Petitioner raised an Appointments Clause challenge before the Board, yet made the conscious, tactical decision to forego the issue on appeal to the Federal Circuit.

Worse, the Petition misleadingly tries to create the impression that the Appointments Clause issue in fact

may have been properly raised before the Federal Circuit. For example, Petitioner argues that in denying its post-ruling motions to dismiss, "[t]he Federal Circuit, *once again*, summarily rejected FG SRC's challenge to the constitutionality of the PTAB's actions under the *Arthrex* decision." Pet. 3 (emphasis added). That is false. The Federal Circuit could not have rejected Petitioner's challenge "once again" because Petitioner declined to raise any Appointments Clause challenge in that court.

Petitioner's failure to address forfeiture in its Petition to this Court is particularly telling given that Respondent Microsoft identified the forfeiture in the course of opposing Petitioner's motions to dismiss in the Federal Circuit. *FG SRC, LLC* v. *Microsoft Corp.*, No. 2020-1993, Dkt. 40 at 1–2; *FG SRC, LLC* v. *Microsoft Corp.*, No. 2020-1925, Dkt. 43 at 1–2. As Respondent explained, although "courts of appeals may forgive waiver or forfeiture of claims that implicate structural constitutional concerns," this is not one of those "rare" circumstances in which a court should do so. *Ciena Corp.* v. *Oyster Optics, LLC*, 958 F.3d 1157, 1160–61 (Fed. Cir. 2020) (quoting *Freytag* v. *Comm'r*, 501 U.S. 868, 879 (1991)). In reply, Petitioner simply asserted, incorrectly, that *Freytag* had held that an Appointments Clause challenge could not be waived, *FG SRC, LLC* v. *Microsoft Corp.*, No. 2020-1993, Dkt. 41 at 2; *FG SRC, LLC* v. *Microsoft Corp.*, No. 2020-1925, Dkt. 44 at 2, and made no attempt to show why the Federal Circuit should, as this Court had in *Freytag*, "exercise [its] discretion" to excuse the waiver. 501 U.S. at 879.

Nor does it matter, as Petitioner argued in its replies in support of its motions in the Federal Circuit, that this Court's decision in *Arthrex* had not yet issued when Petitioner submitted its briefs on appeal. The

same was true in the cases referenced above (*supra* at p. 5). The Federal Circuit had identified the Appointments Clause issue in *Arthrex* itself on October 31, 2019. When Petitioner filed its opening briefs in these appeals in October 2020, it could have included an Appointments Clause argument based on the issue the Federal Circuit had identified and addressed nearly a year earlier. It did not, thereby forfeiting that argument.

III. PETITIONER'S REMAINING ARGUMENTS ARE UNFOUNDED AND IRRELEVANT.

The Petition's remaining arguments likewise fail to establish a basis for the relief Petitioner seeks or to excuse the forfeiture Petitioner fails to mention.

It is irrelevant that this Court's decision in *Arthrex* established a remedy for the constitutional violation different from the remedy fashioned in the Federal Circuit's *Arthrex* decision. See Pet. 6–7. Again, the same was true in the cases referenced above. Like the patentees in those cases, Petitioner was unquestionably on notice that the Federal Circuit had found an Appointments Clause violation and that its decision might be altered on review by this Court. Indeed, similarly-situated parties continued to preserve Appointments Clause challenges by making them in their opening briefs. See *Hanwha Soln's Corp.* v. *Longi Green Energy Tech. Co.*, No. 21-1629, Dkt. 35 at 3–4 (Fed. Cir. Oct. 4, 2021) (denying motion to remand for Appointments Clause violation where patentee failed to raise the issue in its opening brief, and collecting cases where other appellants had preserved the issue).

Moreover, there is no basis for the Petition's speculation that "the Federal Circuit may well have relied on a prior standard that has been altered by this

Court's *Arthrex* decision, which would have affected the outcome." Pet. 9. First, the Federal Circuit denied Petitioner's motions two months after this Court decided *Arthrex*, with the parties having addressed the decision in their briefing on the motions. And, in the wake of this Court's decision, the court of appeals had ordered parties in dozens of other appeals in which Appointments Clause issues had been properly presented to file briefs explaining how their cases should proceed. See Order, No. 2018-2093, et al. (Fed. Cir. June 23, 2021). The Federal Circuit was plainly aware of this Court's decision and its impact on pending cases. Second, this Court's *Arthrex* decision does not address forfeiture or otherwise alter the settled requirement that parties raise issues in their opening briefs on appeal. Third, the Appointments Clause challenge Petitioner raised in its belated motions below did not turn on any differences between this Court's *Arthrex* decision and that of the Federal Circuit (namely, the precise nature of the constitutional violation or the remedy sought).

Further, the Court's standard of review for GVR orders (see Pet. 8) weighs against that relief here. There are no "intervening developments, or recent developments that [the Court] ha[s] reason to believe the court below did not fully consider" that might "reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam). To the contrary, the Federal Circuit's denial of Petitioner's motions to dismiss is consistent with that court's treatment of the issue across multiple cases: parties forfeit an Appointments Clause challenge by failing to raise it in their opening brief. See *Hanwha Sol'ns*, Dkt. 35 at 3; *Customedia*,

941 F.3d at 1174; *Sanofi-Aventis Deutschland, GMBH* v. *Mylan Pharms, Inc.*, 791 F. App'x 916, 928 n.4 (Fed. Cir. 2019).

Nor does it appear "that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence*, 516 U.S. at 167. The Petition simply declares, without explanation, that GVR "is appropriate if there is a 'reasonable probability' of a different outcome" and that these cases "clearly meet[] this standard." Pet. 9. The Board issued well-reasoned decisions totaling over 300 pages holding all challenged claims unpatentable. Pet. App. 6a–312a. As noted above, Petitioner's appeals of those decisions largely turned on arguments it failed to make before the Board and on challenges to the Board's determinations of credibility and the weight to be given to evidence. The Petition makes no effort to show that potential discretionary review by the Director presents any reasonable likelihood of changing that outcome.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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