

No. _____

In the Supreme Court of the United States

NIKE, INC.,

Applicant,

v.

ADIDAS AG, ET AL.

**APPLICATION FOR AN EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI**

To the Honorable John G Roberts, Jr., Chief Justice of the United States and Circuit Justice for the United States Court of Appeals for the Federal Circuit:

1. Pursuant to Supreme Court Rule 13.5, Applicant Nike, Inc. respectfully requests a 30-day extension of time, to and including Tuesday, March 21, 2023, within which to file a petition for a writ of certiorari. The United States Court of Appeals for the Federal Circuit issued opinions on February 11, 2016 (Exhibit A), on April 9, 2020 (Exhibit B), and on September 1, 2022 (Exhibit C). Copies of those opinions are attached. The Federal Circuit denied Applicant's timely rehearing petition in an order issued on November 21, 2022 (Exhibit D). This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

2. Absent an extension, a petition for a writ of certiorari would be due on February 19, 2023. This application is being filed more than 10 days in advance of that date, and no prior application has been made in this case.

3. This case concerns an *inter partes* proceeding held before the Patent Trial and Appeal Board in which the petitioner seeks to cancel an already-issued patent claim and the patentee has presented a substitute claim. The question is whether the Federal Circuit correctly determined that, in such a case, the Board may *sua sponte* identify a patentability issue with regard to the substitute claim and may reject the substitute claim on that basis.

4. In this case, the Federal Circuit held as a matter of first impression “that the Board may *sua sponte* identify a patentability issue for a proposed substitute claim based on the prior art of record.” Exhibit B at 9. The court further held, on the basis of a patentability challenge raised by the Board *sua sponte*, that Applicant’s substitute claim was unpatentable. Exhibit C at 14–19, 21–22.

5. This case raises an important question of law under the Patent Act. The *inter partes* review system, see 35 U.S.C. Ch. 31, authorizes “an adversarial hearing before the Board.” *Oil States Energy v. Green’s Energy Grp.*, 138 S. Ct. 1365, 1378 (2018) (citing 35 U.S.C. § 316(a)). In such a hearing, Congress placed “the burden of proving a proposition of unpatentability,” including with respect to a substitute claim, on the petitioner. 35 U.S.C. § 316(e). By authorizing the Board to raise a patentability issue *sua sponte* and to deem a substitute claim unpatentable on that basis, the Federal Circuit’s ruling contravenes the Patent Act. The ruling also threatens to upend the careful review system that Congress created, which incorporates traditional principles of party presentation.

6. Applicant respectfully requests an extension of time to file a petition for a writ of certiorari. A 30-day extension would allow counsel sufficient time to fully examine

the decision below and lengthy case record, research and analyze the issues presented, and prepare the petition for filing. Additionally, undersigned counsel has a number of other pending matters with proximate due dates that will interfere with counsel's ability to file the petition on or before February 19, 2023.

Wherefore, Applicant respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari to and including Tuesday, March 21, 2023.

January 23, 2023

Respectfully submitted,



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