

No. 19-1204

IN THE
Supreme Court of the United States

ARTHREX, INC.,
Petitioner,

v.

SMITH & NEPHEW, INC.; ARTHROCARE CORP.;
AND UNITED STATES OF AMERICA,
Respondents.

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

REPLY FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner Arthrex, Inc., states that the corporate disclosure statement included in the petition remains accurate.

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REPLY FOR PETITIONER

Respondents nowhere deny that whether Congress can apply inter partes review retroactively to patents that predate the America Invents Act is an important and recurring issue. This Court is currently considering three other petitions raising the question. Gov't Br. in Opp. 9 n.1. Respondents urge that Arthrex's case is different because, although Arthrex applied for its patent and disclosed its invention before the AIA, the Patent Office granted the patent afterward. But that difference only underscores why this case should be included in any grant of review.

Arthrex disclosed its invention to the public in reliance on the government's promise of certain protections. Only after Arthrex made that irrevocable disclosure did the government alter the deal. Arthrex is not alone: Roughly *one in seven* patents falls into this same category. The Court should not address the weighty retroactivity issues currently before it while leaving the status of this important category uncertain.

The Court should also review the court of appeals' refusal to apply its intervening Appointments Clause decision to this case. This Court made clear in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), that forfeiture rules do not apply when there is an intervening change of law. Respondents ignore that decision. While the court below is not the only court to depart from that principle, many others adhere to it. That disarray confirms the need for review.

I. THE COURT SHOULD RESOLVE WHETHER THE RETROACTIVE APPLICATION OF INTER PARTES REVIEW VIOLATES THE FIFTH AMENDMENT

A. The Question Is Important

1. Respondents do not dispute the importance of the retroactivity issue. The Court is already considering three other petitions raising the question. Gov't Br. in Opp. 9 n.1. This Court would not have flagged the issue in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 138 S. Ct. 1365, 1379 (2018), if it were unworthy of attention.

More than 10,400 petitions for inter partes review have been filed. Pet. 15. More than 60% of them challenge pre-AIA patents. *Ibid.* Inter partes review has been roughly *twice as lethal* as its predecessors. *Id.* at 8, 18. Respondents dispute none of those statistics.

2. Nor can respondents refute the importance of cases like Arthrex's, where inventors applied for a patent before the AIA but received it after. Roughly *one in seven* patents falls into this category—another statistic respondents do not dispute. Pet. 16 & n.1.

Respondents insist that applying the AIA to Arthrex's patent is not retroactive. Gov't Br. in Opp. 9-10; S&N Br. in Opp. 11-16. But that is respondents' position on the merits—it does not address *importance*. Arthrex disclosed its invention in reliance on promises of certain protections—the “carefully crafted bargain” on which patent law rests. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150-151 (1989). Even petitioners like Celgene emphasize the *disclosure* of their inventions in arguing against retroactivity. See, e.g., *Celgene* Pet. 31 (“Before the AIA was enacted, patent owners weighed the cost and the value * * * of disclosing their inventions to the public * * *.”); *Enzo* Pet. 3 (“[T]he AIA upended the settled expectations that Enzo had in its intellectual property long after Enzo had disclosed its inventions for the benefit of society * * *.”).

Applying the AIA to patents like Arthrex's clearly raises substantial questions. See Biotechnology Innovation Org. Br. in *Oil States*, No. 16-712, at 31 n.27 (filed Aug. 31, 2017) (explaining retroactivity concerns posed by this category of patents). That Arthrex's petition is the only one of the four to present this fact pattern (S&N Br. in Opp. 12) is reason to grant the petition, not ignore it. The Court should not address these important retroactivity questions while leaving this major category of cases unresolved.

B. This Case Is an Appropriate Vehicle

Smith & Nephew urges that *Celgene* involves a takings claim, while this case involves a due process claim. S&N Br. in Opp. 17-18. But that difference *favours* review. The due process claim is important: *Oil States* expressly reserved judgment on a “due process challenge.” 138 S. Ct. at 1379. By granting both this case and *Celgene*, the Court could address both legal theories (takings and due process) on both fact patterns (issuance date and application date). Smith & Nephew’s argument only underscores that the cases are complementary.

Smith & Nephew faults Arthrex for not raising its claim before the Board. S&N Br. in Opp. 7. But Smith & Nephew did not preserve that objection in the court of appeals, and the government affirmatively invited the court to reach the issue. Gov’t C.A. Br. 16-17. Any such objection is thus forfeited. Objecting before the Board would have been futile regardless because agencies lack jurisdiction to determine the constitutionality of a statute. See *Weinberger v. Salfi*, 422 U.S. 749, 751 (1975). The Board has thus repeatedly refused to consider the retroactivity question. See, e.g., *Tomtom, Inc. v. Blackbird Tech, LLC*, No. IPR2017-02023, 2018 WL 7585605, at *28 (PTAB Mar. 11, 2018).

Smith & Nephew finally urges that Arthrex added the two ’541 patent claims at issue after the AIA. S&N Br. in Opp. 18. The court of appeals did not rely on that theory, and for good reason: The argument misunderstands the relationship between disclosures and claims. “No amendment shall introduce new matter into the disclosure of the invention.” 35 U.S.C. §132(a). Thus, “claims added during prosecution must find support * * * in the written description of the original priority application.” *Novozymes A/S v. Dupont Nutrition Biosciences APS*, 723

F.3d 1336, 1344 (Fed. Cir. 2013). The Patent Office therefore would not have permitted Arthrex to add the claims *unless* the original application disclosed the invention those claims covered—which it did. Compare Pet. App. 28a-32a (figures 5 and 7a illustrating claims) with Pet. 9 (same figures from original application).

C. Respondents’ Merits Arguments Fail

1. Respondents urge that there is no retroactivity here because Arthrex’s patent issued after Congress changed the law. Gov’t Br. in Opp. 9-10; S&N Br. in Opp. 13-15. But respondents do not contest that Arthrex relied on the government’s promises when it applied for a patent and disclosed its invention—promises that gave Arthrex a statutory *right* to certain protections. 35 U.S.C. §§ 101, 131; *Bonito Boats*, 489 U.S. at 150-151. Changing the law to substitute less valuable protections is a classic bait and switch. Pet. 23; *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994).¹

Arthrex need not show the process was “completed” before Congress changed the law. S&N Br. in Opp. 12-13. An application of a statute may be retroactive even if some conduct post-dates the change. See, e.g., *Vartelas v. Holder*, 566 U.S. 257, 269-272 (2012). Besides, Arthrex completed *its* side of the bargain before the AIA, even if the Patent Office took eight years to issue the patent. If a contractor performed services, but the government then changed the law before paying, the retroactive

¹ The government urges that *Landgraf* addresses the interpretive presumption against retroactivity rather than constitutional limitations. Gov’t Br. in Opp. 10. But *whether* a particular application of a statute is retroactive is a question common to both contexts.

effect would be obvious. See *Martin v. Hadix*, 527 U.S. 343, 358 (1999). This case is no different.²

The government deprived Arthrex of property by canceling its patent. But patents are not the only property at issue. The Patent Act recognizes that *applications* are property too: It grants applicants “just compensation” if a secrecy order prevents a patent from issuing. 35 U.S.C. § 183; see also *Regents of Univ. of N.M. v. Knight*, 321 F.3d 1111, 1121 (Fed. Cir. 2003) (“legal ownership rights in patent applications”). And by disclosing its invention, Arthrex surrendered valuable property rights in trade secrets. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984). Respondents have no answer.

2. Respondents dismiss inter partes review as a mere procedural change. Gov’t Br. in Opp. 11-15; S&N Br. in Opp. 15-16. But the AIA did far more than alter procedure. For one thing, “the burden of proof is a substantive aspect of a claim.” *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191, 199 (2014) (quotation marks omitted). The AIA alters burdens of proof in multiple respects.

Before the AIA, a party seeking to challenge a patent through adversarial proceedings could do so only in court

² The government points to statements in the Patent Act and *Oil States* that patents issue “[s]ubject to the provisions” of the statute. Gov’t Br. in Opp. 9-10. That vague language does not address the timing issue. Nor did *Oil States* “focus[] on the legal regime in place ‘when [the] patent issued.’” S&N Br. in Opp. 12. It merely noted that the petitioner had made no retroactivity argument *even though* inter partes review did not exist “when its patent issued.” 138 S. Ct. at 1379. Finally, *McClurg v. Kingsland*, 42 U.S. (1 How.) 202 (1843), addressed statutes that *expand* patent rights—not changes that restrict them. Pet. 23-24.

under a clear and convincing evidence standard. See *Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. 91, 95 (2011). Under the AIA, a party can prove invalidity at the Patent Office by a mere preponderance of the evidence. 35 U.S.C. §316(e). Before the AIA, a petitioner had to show a “substantial *new* question of patentability.” 35 U.S.C. §303(a) (emphasis added); 35 U.S.C. §312(a) (2006). There is no such limit in inter partes review. 35 U.S.C. §§314(a), 325(d).

The vastly different rules for amendment (Pet. 8, 18) also amount to a substantive change because they dramatically alter what a petitioner must show to invalidate a patent in a way that cannot be cured by amendment. Before the AIA, if a petitioner identified prior art, the patent owner could respond simply by narrowing the claims to avoid it. See *In re Yamamoto*, 740 F.2d 1569, 1571-1572 (Fed. Cir. 1984). To invalidate a patent entirely in a way that could not be cured by amendment, a petitioner would have to show that the patent disclosed *no* new content that could support *any* claims. Under the AIA, by contrast, a petitioner can invalidate a patent merely by showing that the claims, as drafted, sweep in *some* prior art. The patent owner typically can no longer save the patent by amendment.³

Rules can also be substantive if they have a sufficiently important impact on outcomes. See *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427-428 (1996) (rules that “have [an] important * * * effect upon the for-

³ That distinction is not unlike the difference between the *Salerno* standard for most facial challenges and the overbreadth standard for First Amendment claims. See *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1585 (2020) (Thomas, J., concurring). The two are miles apart.

tunes of one or both of the litigants”); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 420 (2010) (Stevens, J., concurring in part). That is the situation here. Inter partes review exposes patents to repeated assaults by infringers highly motivated to attack them. It has *doubled* the cancellation rate. Pet. 8, 18. That is no mere change of procedure. It is a brand new, potent mechanism for revoking patents.

3. The government argues that, even if the AIA retroactively impairs Arthrex’s rights, it need only show a “rational legislative purpose.” Gov’t Br. in Opp. 11-15. But cases such as *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984), involved only economic regulations that imposed future obligations—not deprivations of vested property rights. See *Eastern Enters. v. Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring in judgment) (contrasting law that “simply imposes an obligation to perform an act, the payment of benefits,” with one that “appropriate[s] * * * a valuable interest in an intangible (e.g., intellectual property)”).

This Court has not applied rational basis review to laws appropriating vested rights, particularly when the government reneges on its own promises. The Court did not apply rational basis review in *Perry v. United States*, 294 U.S. 330, 350-353 (1935), or *Lynch v. United States*, 292 U.S. 571, 576-579 (1934), cases it continues to cite as good law, see, e.g., *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 646 (2005).

Rational basis review makes no sense for laws that appropriate vested property rights. The government can always claim a “rational basis” for such laws—they procure valuable property for the public, for free. To be a meaningful constraint, the Fifth Amendment must require more. See *District of Columbia v. Heller*, 554

U.S. 570, 628 n.27 (2008) (rational basis test inappropriate for “specific, enumerated right”).

In any case, the impact of inter partes review is so far-reaching that it exceeds even the bounds for retroactive economic regulations. See *Eastern Enters.*, 524 U.S. at 547-549 (Kennedy, J., concurring in judgment). Applying the AIA to previously issued patents violates due process under any meaningful standard.

D. At a Minimum, the Court Should Hold the Petition

At the very least, if the Court grants review in *Celgene*, *Collabo*, or *Enzo*, it should hold this case pending review. Whatever differences may exist among the cases, a ruling for one of the other petitioners could clearly call into question the court of appeals’ rationale here. See Stephen M. Shapiro *et al.*, *Supreme Court Practice* §5.9, at 340 (10th ed. 2013) (hold appropriate where “a pending case raising * * * similar issues” could “aid * * * determination of the matter”).

This Court’s rationale in one of the other cases could easily support Arthrex’s claim, even though Arthrex received its patent after the AIA. The other petitioners expressly invoke their *disclosure* of their inventions as a reason why the statute’s application is retroactive. See p. 3, *supra*. And although *Celgene* involves a takings claim while this case involves a due process claim, the two are closely related. See *Joy Techs., Inc. v. Manbeck*, 959 F.2d 226, 228-229 (Fed. Cir. 1992) (due process ruling “controlling authority” on takings claim). A ruling for one of the other petitioners could thoroughly undermine the court of appeals’ reasoning here. At a minimum, therefore, the Court should hold the petition.

**II. THE COURT SHOULD ADDRESS WHETHER THE AR-
THREX APPOINTMENTS CLAUSE DECISION APPLIES
TO ALL CASES PENDING ON APPEAL**

The court of appeals’ refusal to apply its intervening Appointments Clause decision in this case similarly warrants review—or at a minimum, a hold for the other petitions raising that issue.

Respondents urge that there is no exception to forfeiture rules for Appointments Clause claims. Gov’t Br. in Opp. 16; S&N Br. in Opp. 20-21. But there *is* an exception for intervening changes of law: “[T]he mere failure to interpose [a constitutional] defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground.” *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 143 (1967); see also *Hormel v. Helvering*, 312 U.S. 552, 558-559 (1941).

Respondents ignore those decisions. Smith & Nephew cites two reported court of appeals cases that refused to consider constitutional claims despite intervening changes of law. S&N Br. in Opp. 23. But other court of appeals cases go the other way. See, e.g., *Holzsgager v. Valley Hosp.*, 646 F.2d 792, 796 (2d Cir. 1981); *United States v. Chittenden*, 896 F.3d 633, 639-640 (4th Cir. 2018); *Big Horn Cty. Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 953-954 (9th Cir. 2000); *Gray v. Phillips Petrol. Co.*, 971 F.2d 591, 592 n.3 (10th Cir. 1992). Even within the Federal Circuit, judges disagree. Pet. 29-30. That diversity of opinion confirms the need for review.

Respondents assert that the court of appeals merely exercised its discretion not to review the claim. S&N Br. in Opp. 20; Gov’t Br. in Opp. 16-17. But when the court ruled in this case, it had already held, in a precedential order, that it “*must* treat th[ese] argument[s] as forfeited.” *Customedia Techs., LLC v. Dish Network Corp.*,

941 F.3d 1173, 1174 (Fed. Cir. 2019) (emphasis added). In any case, *Curtis* holds that failure to raise a claim “cannot prevent a litigant from later invoking” an intervening change of law. 388 U.S. at 143 (emphasis added). The court thus had no discretion to refuse to consider Arthrex’s challenge.

Smith & Nephew’s assertion that Arthrex omitted this claim from its opening brief for unidentified “strategic and tactical reasons” is baseless. S&N Br. in Opp. 24. Arthrex filed its opening brief in June 2018. C.A. Dkt. 20. Although one law professor had uploaded an unpublished manuscript to SSRN describing the argument by that date, Smith & Nephew does not cite a single Federal Circuit brief raising the claim. S&N Br. in Opp. 24. By contrast, Arthrex filed its opening brief in the ’907 appeal four months later in October 2018. No. 18-2140, Dkt. 18 (Fed. Cir. filed Oct. 19, 2018). By then, multiple appellants had raised these claims, and several articles had reported on them. See *Polaris Innovations Ltd. v. Kingston Tech. Co.*, No. 18-1768, Dkt. 22 at 59 (Fed. Cir. filed July 10, 2018); *Trading Techs. Int’l, Inc. v. IBG LLC*, No. 18-1489, Dkt. 36 at 79-80 (Fed. Cir. filed Aug. 14, 2018); S&N Br. in Opp. 25 (citing articles). The argument was simply much better known by then.

Nor does it matter that Arthrex omitted the argument from its reply brief and petition for rehearing. S&N Br. in Opp. 20. Absent a change of law, raising the argument at those stages would have been futile, because the argument was not made in the opening brief. See *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006). The claim became viable only when the intervening change of law occurred upon the Federal Circuit’s Appointments Clause decision. What matters is whether Arthrex acted promptly after *that* decision. See

Curtis, 388 U.S. at 145. Clearly it did: Arthrex raised the claim the very next day. C.A. Dkt. 72.

CONCLUSION

The Court should grant the petition or, in the alternative, hold the case pending disposition of the related matters cited in the petition.

Respectfully submitted.

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