Nos. 19-1434, 19-1452 and 19-1458

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

ARTHREX, INC., *et al.*,

Respondents.

SMITH & NEPHEW, INC., *et al.*,

Petitioners,

v.

ARTHREX, INC., *et al.*,

Respondents.

ARTHREX, INC.,

Petitioner,

v.

SMITH & NEPHEW, INC., *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF THE INTELLECTUAL PROPERTY LAW ASSOCIATION OF CHICAGO AS *AMICUS CURIAE* IN SUPPORT OF NO PARTY

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INTEREST OF AMICUS CURIAE[1]

The Intellectual Property Law Association of Chicago ("IPLAC") respectfully requests that this Court reverse the Federal Circuit's decision in *Arthrex, Inc. v. Smith & Nephew, Inc.,* 941 F.3d 1320 (Fed. Cir. 2019).[2]

Founded in 1884 in Chicago, Illinois, a principal forum for U.S. technological innovation and intellectual property litigation, IPLAC is the country's oldest bar association devoted exclusively to intellectual property matters. IPLAC has as its governing objects, *inter alia,* to aid in the development of intellectual property laws, the administration of them, and the procedures of the U.S. Patent and Trademark Office, the U.S. Copyright Office, and the U.S. courts and other officers and tribunals charged with administration. IPLAC's about 1,000 voluntary members include attorneys in private and corporate practices in the areas of copyrights, patents, trademarks, trade secrets, and the legal issues they present before federal courts throughout the United States, as well as before the U.S. Patent and

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the amicus curiae, its members, or its counsel, made such a monetary contribution.

[2] Pursuant to Supreme Court Rule 37.3(a), Petitioner and Respondents have provided blanket consents to the filing of amicus briefs.

Trademark Office and the U.S. Copyright Office.[3] IPLAC's members represent innovators and accused infringers in roughly equal measure and are split roughly equally between plaintiffs and defendants in litigation.

As part of its central objectives, IPLAC is dedicated to aiding in developing intellectual property law, especially in the federal courts.[4]

ISSUES PRESENTED

This case presents two issues. The first is whether, for purposes of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, administrative patent judges ("APJs") of the U.S. Patent and Trademark Office ("USPTO") 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.

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[3] In addition to the statement of footnote 1, after reasonable investigation, IPLAC believes that (a) no member of its Board or Amicus Committee who voted to prepare this brief, or any attorney in the law firm or corporation of such a member, represents a party to this litigation in this matter; (b) no representative of any party to this litigation participated in the authorship of this brief; and (c) no one other than IPLAC, or its members who authored this brief and their law firms or employers, made a monetary contribution to the preparation or submission of this brief.

[4] Although over 30 federal judges are honorary members of IPLAC, none were consulted on, or participated in, this brief.

The second issue is whether, if APJs are principal Officers, the court of appeals properly cured any Appointments Clause defect in the current statutory scheme prospectively by severing the application of 5 U.S.C. § 7513(a) to those judges ("the *Arthrex* remedy").

On these issues, IPLAC respectfully submits that a straightforward approach is warranted: APJs are inferior Officers whose appointment Congress has permissibly vested in a department head, and, as a result, the Court need not address whether the *Arthrex* remedy is a proper cure. To the extent the Court finds that APJs are principal Officers, IPLAC expresses no opinion regarding the propriety of the *Arthrex* remedy. However, should the Court hold that the *Arthrex* remedy is improper, IPLAC notes that the result would have far-reaching implications in the patent system that the Court should consider.

SUMMARY OF ARGUMENT

The Court should reverse the Federal Circuit's holding on the first issue and find that, for purposes of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, APJs are inferior Officers whose appointment Congress has permissibly vested in a department head. The statutory scheme of Title 35 makes clear that Congress considered the Director of the USPTO to be a principal Officer, requiring his appointment by the President, by and with the Advice and Consent of the Senate. Conversely, Congress indicated its belief that APJs are inferior Officers, as they are appointed by the Secretary of Commerce in consultation with the Director. Thus, the only question before the Court

with regard to the first issue is whether, in practice, the work of APJs is directed and supervised at a level that accords with this Congressional intent. While there is no bright line rule for distinguishing principal and inferior Officers, the statutory provisions of Title 35 establish a sufficient level of direction and supervision required to find APJs inferior.

Because IPLAC's position is that APJs are inferior Officers for purposes of the Appointments Clause, IPLAC respectfully submits that the Court need not address the second issue, *i.e.*, whether the Federal Circuit's severance of the application of 5 U.S.C. § 7513(a) to APJs properly cured any alleged defect in the current statutory scheme. However, to the extent the Court finds that APJs are principal Officers and that the *Arthrex* remedy was not proper, IPLAC notes that this result would have far-reaching implications in the patent system.

ARGUMENT

I. The Appointment of Administrative Patent Judges Under Title 35 Does Not Violate the Appointments Clause.

The Court should reverse the Federal Circuit's decision holding that APJs are principal Officers who must be appointed by the President with the Advice and Consent of the Senate and instead hold that their appointment by the Secretary of Commerce, in consultation with the Director of the USPTO, under Title 35 does not violate the Appointments Clause.

Under the Appointments Clause, the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consults, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2.

No party disputes that APJs appointed under Title 35 are Officers of the United States for purposes of the Appointments Clause. *See Arthrex*, 941 F.3d at 1328 ("Neither Appellees nor the government dispute that APJs are officers as opposed to employees"). Rather, the instant dispute is whether APJs at the USPTO are principal Officers, who must be appointed by the President with the Senate's Advice and Consent, or inferior Officers, who may be appointed by a department head.

As the Court recognized decades ago, "[t]he line between 'inferior' and 'principal' officers is one that is far from clear." *Morrison v. Olson*, 487 U.S. 654, 671 (1988); *see also Edmond v. United States*, 520 U.S. 651, 661 (1997) ("Our cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes"). "Whether one is an 'inferior' officer depends on whether he has a superior," such that his "work is directed and supervised *at some level* by others who were appointed by Presidential nomination with the advice and consent of the

Senate." *Edmond*, 520 U.S. at 662-63 (emphasis added). However, nominal supervision and control may be insufficient to render an Officer "inferior." *See id.* at 667 ("It does not follow, however, that if one is subject to some supervision and control, one is an inferior officer. Having a superior officer is necessary for inferior officer status, but not sufficient to establish it") (Souter, J., concurring in part and concurring in the judgment) (citing *Morrison,* 487 U.S. at 722 ("To be sure, it is not a *sufficient* condition for 'inferior' officer status that one be subordinate to a principal officer. Even an officer who is subordinate to a department head can be a principal officer") (Scalia, J., dissenting) (emphasis in original)). Thus, the inquiry may be better defined as whether the Officer's work is directed and supervised at a *sufficient* level by one or more principal Officers.

For the reasons provided below, IPLAC respectfully submits that the USPTO's APJs are directed and supervised at a sufficient level by a principal Officer and, as a result, they are inferior Officers for purposes of the Appointments Clause.

A. The Statutory Scheme of Title 35 Confirms Congress's Intent to Establish Administrative Patent Judges As Inferior Officers

Title 35 expressly establishes that the Director of the USPTO is a principal Officer and that the Secretary of Commerce, another principal Officer, consults with him to appoint APJs at the Patent Trial and Appeal Board ("PTAB"). As 35 U.S.C. § 3 (a) explains, "[t]he powers and duties of the [USPTO]

shall be vested in an Under Secretary of Commerce for Intellectual Property and Director . . . who shall be a citizen of the United States and who shall be *appointed by the President, by and with the advice and consent of the Senate*" (emphasis added). The statute further provides that the Director shall "appoint such officers . . . of the Office as the Director considers necessary to carry out the functions of the Office" and "define the title, authority, and duties of such officers . . . and delegate to them such of the powers vested in the Office as the Director may determine." 35 U.S.C. § 3(b)(3)(A)-(B). Similar to Section 3(b)'s delegation of authority to the Director to appoint officers, 35 U.S.C. § 6(a) provides for the appointment of APJs by the Secretary of Commerce "in consultation" with the Director of the USPTO.

The difference between the latter two sections and Section 3(a) confirms that, unlike the Director of the USPTO, Congress intended for APJs to be inferior Officers. "[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). Had Congress intended for APJs to be principal Officers, Congress could have easily used the same language from § 3(a) (Director of the USPTO) in § 6(a) (APJs). It did not. As a result, the Court should defer to the statutory scheme of Title 35 to presume that APJs are inferior officers, absent sufficient evidence to overcome that presumption.

B. The Federal Circuit Improperly Created a Bright Line Rule from *Edmond*, Despite the Need for a Totality of the Circumstances Analysis

Contrary to the Federal Circuit's analysis, *Edmond* did not establish a bright line rule for distinguishing between principal and inferior Officers for Appointments Clause purposes. In *Edmond*, the Court observed that some factors that *may* apply to the analysis include: (1) whether the Officer is removable by a higher Officer; (2) whether the Officer performed limited duties; (3) the scope of the Officer's jurisdiction; and (4) length of tenure. 520 U.S. at 662 (citing *Morrison*, 487 U.S. at 671-72). But nowhere in *Edmond* did the Court create a "definitive" test for determining "whether an officer is 'inferior' under the Appointments Clause" in all instances. *Id.*; *see also Polaris Innovations Limited v. Kingston Tech. Co.*, 792 Fed. App'x 820, 821 (Fed. Cir. Jan. 31, 2020) ("*Edmond* does not lay out a more exacting test than this, and we should not endeavor to create one in its stead") (Hughes, J., concurring, in which Wallach, J., joins). In fact, given the wide range of Officers that could be implicated by a challenge under the Appointments Clause, a "definitive" test would be impractical given that certain factors may not apply to particular Officers. *See, e.g.*, *Edmond*, 520 U.S. at 661 (finding that, "with regard to the office of military judge at issue," the factors of tenure and jurisdiction did not apply).

This Court has traditionally frowned on adopting similar bright line rules. *See, e.g.*, *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1932-33 (2016)

(rejecting the Federal Circuit's two-part test for willful infringement in favor of an analysis that considers the totality of the circumstances); *Bilski v. Kappos*, 561 U.S. 593, 604 (2010) ("The machine-or-transformation test is not the sole test for deciding whether an invention is a patent-eligible 'process'"); *see also USPTO et al. v. Booking.com B.V.*, 140 S. Ct. 2298, 2301 (2020) (rejecting the "PTO's sweeping rule" that "[t]he combination of a generic word and '.com' is generic" for trademarks); *Kirtsaeng v. John Wiley & Sons*, 136 S. Ct. 1979, 1988 (2016) (finding that "objective reasonableness can be only an important factor in assessing fee applications—not the controlling one" for copyrights).

Against this backdrop, there is no reason for the Court to adopt a bright line rule in this situation, particularly as the Appointments Clause should be interpreted to provide ample room to "preserve political accountability relative to important Government assignments." *Edmond*, 520 U.S. at 663; *see also id.* at 668 (Souter, J., concurring in part and concurring in the judgment) ("What is needed . . . is a detailed look at the powers and duties of these judges to see whether reasons favoring their inferior officer status within the constitutional scheme weigh more heavily than those to the contrary").

Indeed, in the cases following *Edmond*, this Court has adopted flexibility and accounted for other factors when considering whether an Officer is principal or inferior. *See, e.g.*, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2199 n.3 (2020) (observing that the Court has previously "examined factors such as the nature, scope, and duration of an

officer's duties" and, more recently, "focused on whether the officer's work is 'directed and supervised' by a principal officer"); *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 510 (2010) (reiterating the flexible test as "[w]hether one is an 'inferior' officer depends on whether he has a superior").

In the instant case, the Director of the USPTO possesses several supervisory powers, including those that set the metes and bounds within which APJs must conduct their proceedings, which, on balance, weigh in favor of finding that he is a superior and that, for purposes of the Appointments Clause, establish that APJs are inferior to him. By way of illustration, a list of the Director's powers is provided below:

- 35 U.S.C. § 3(a)(2)(A): "The Director shall be responsible for providing policy direction and management supervision for the Office and for the issuance of patents and the registration of trademarks[;]"

- 35 U.S.C. § 3(a)(2)(B): "The Director shall consult with the Patent Public Advisory Committee established in section 5 on a regular basis on matters relating to the patent operations of the Office . . . and shall consult with the respective Public Advisory Committee before submitting budgetary proposals to the Office of Management and Budget[;]"

- 35 U.S.C. § 3(b)(6): "The Director may fix the rate of basic pay for the administrative patent

judges appointed pursuant to [35 U.S.C.] section 6[;]"

- 35 U.S.C. § 6(c)[5]: The Director shall designate members of the PTAB who shall hear each "appeal, derivation proceeding, post-grant review, and inter partes review[;]"

- 35 U.S.C. § 143: "The Director shall have the right to intervene in an appeal from a decision entered by the Patent Trial and Appeal Board in a derivation proceeding under section 135 or in an inter partes or post-grant review under chapter 31 or 32[;]"

- 35 U.S.C. § 316(a): "The Director shall prescribe regulations – (2) setting forth the standards for the showing of sufficient grounds to institute a review under section 314(a); . . . (4) establishing and governing inter partes review under this chapter and the relationship of such review to other proceedings under this title; (5) setting forth standards and procedures for discovery of relevant evidence . . . ; (6) prescribing sanctions for abuse of discovery, abuse of process, or any

[5] According to the PTAB's Standard Operating Procedure 1, "[t]he Director's authority under 35 U.S.C. § 6(c) to designate panels has been delegated to the Chief Judge," however, "[t]he delegated authority is non-exclusive and the Director expressly retains his or her own statutory authority to designate panels." PTAB, Standard Operating Procedure 1 (Revision 15) Assignment of Judges to Panels, https://www.uspto.gov/sites/default/files/documents/SOP%201%20R15%20FINAL.pdf (last visited Dec. 2, 2020).

other improper use of the proceeding . . . ; (9) setting forth standards and procedures for allowing the patent owner to move to amend the patent . . . ; (11) requiring that the final determination in an inter partes review be issued [by the APJs] not later than 1 year after the date on which the Director notices the institution of a review under this chapter, except that the Director may, for good cause shown, extend the 1-year period by not more than 6 months, and may adjust the time periods in this paragraph in the case of joinder under section 315(c);"

- 35 U.S.C. § 326(a): "The Director shall prescribe regulations [that are nearly identical to § 316(a), but with respect to post-grant reviews[;]"[6] and

- PTAB's Standard Operating Procedure 2[7]: "The Director may convene a Precedential Opinion

[6] Although the present case involves inter partes reviews instead of post-grant reviews, the latter also are conducted by APJs. Thus, the Director's ability to direct and/or supervise the work of APJs in those proceedings is relevant to whether the APJs are considered inferior Officers.

[7] PTAB, Standard Operating Procedure 2 (Revision 10) Precedential Opinion Panel to Decide Issues of Exceptional Importance Involving Policy or Procedure; Publication of Decisions and Designation or De-Designation of Decisions as Precedential or Informative, https://www.uspto.gov/sites/default/files/documents/SOP2%20R10%20FINAL.pdf (last visited Dec. 2, 2020).

> Panel to review a decision in a case and determine whether to order sua sponte rehearing, in his or her discretion and without regard to the procedures set forth herein."

As demonstrated above, the Director of the USPTO, *i.e.*, a principal Officer, "direct[s] and supervise[s]" a broad range of the work of APJs. *Edmond*, 520 U.S. at 663; *see also Seila*, 140 S. Ct. at 2199 n.3 (noting that the Court's recent focus has been on this direction and supervision, as compared to a more rigid examination of factors "such as the nature, scope, and duration of an officer's duties"). While it is true that the Director is not able to review the merits of a final written decision or to remove APJs without good cause, those two facts only establish that the Director's direction and supervision over the APJs is not absolute. But this Court has never required *absolute* direction and control by a superior to hold that an Officer is inferior. *See Edmond*, 520 U.S. at 665 (holding that the Court of Criminal Appeal judges were inferior Officers despite their superior's "scope of review [being] narrower than that exercised by the Court of Criminal Appeals"). On balance, these two elements do not undermine the fact that the Director exercises sufficient direction and supervision over the work of APJs to consider the latter inferior Officers, consistent with Congress's intent to that effect.

C. If the Court Believes this is a Close Case, It Should Defer to Congress and Hold that Administrative Patent Judges are Inferior Officers

When "it is ultimately hard to say with any certainty on which side of the line [certain Officers] fall, . . . deference to the political branches' judgment is appropriate." *Weiss v. United States*, 510 U.S. 163, 193-94 (1994) (Souter, J., concurring); *see also In re Sealed Case*, 838 F.2d 476, 532 (D.C. Cir. 1988) (Ginsburg, J., dissenting) ("[J]udicial review must fit the occasion. Where, as in the matter at hand, the label that better fits an officer is fairly debatable, the fully rational congressional determination surely merits more tolerance . . . ."), rev'd sub nom. *Morrison*, 487 U.S. 654.

As explained in section I.A, *supra*, the statutory scheme of Title 35 confirms that Congress did not intend for APJs to be principal Officers for purposes of the Appointments Clause. A finding to the contrary not only renders the appointments of these APJs unconstitutional—despite numerous indications that the Director exhibits direction and supervision over their work in a multitude of ways—but also risks "upsetting Congress' considered judgment on the matter." *In re Sealed Case*, 838 F.2d at 532 (Ginsburg, J., dissenting). As such, should the Court determine that this is a close case, with compelling arguments to be made in both directions, the Court should defer to Congress' judgment and reverse the Federal Circuit's decision holding that APJs are principal Officers.

II. Because Administrative Patent Judges are Inferior Officers For Purposes of the Appointments Clause, The Court Need Not Address Whether the *Arthrex* Remedy Was Proper.

The second question on which the Court granted *certiorari* is premised on a determination that the APJs are principal Officers. Since the APJs are inferior Officers for at least the reasons discussed in section I, *supra*, IPLAC respectfully submits that the Court need not address this question.

III. A Holding that APJs are Principal Officers and that the *Arthrex* Remedy Was Not Proper Has Far-Reaching Implications Beyond the Scope of the Present Cases.

Were the Court to reverse the Federal Circuit with regard to both issues on appeal and not craft a workable solution, the effect on the patent system could be devastating. As of September 30, 2020, the USPTO reports that patent challengers have filed 12,147 petitions for inter partes review (11,299), post grant review (246), and covered business method review (602) in the eight years since those procedures first became available on September 16, 2012. *See* USPTO, *Trial Statistics IPR, PGR, CBM September 2020*, at 3, https://www.uspto.gov/sites/default/files/documents/trial_statistics_20200930.pdf (last visited Dec. 2, 2020). Approximately 1,554 of those petitions were settled by the parties, and 840 of those petitions are still pending, leaving just under 10,000 petitions for which those APJs issued rulings dismissing or

denying review or for which they instituted review, including 3,414 petitions for which the APJs issued final written decisions. *Id*. at 10. Moreover, a decision by the Court to strike down the Federal Circuit's remedial framework would nullify not only all of these previous institution or declination decisions and the 3000+ final written decisions, but the tens, if not hundreds, of thousands of decisions made by the APJs during the course of each review, including, *inter alia*, those related to the scope of discovery[8], the ability to amend, cancel, or substitute claims[9], and the issuance of sanctions in the event of conduct determined by those APJs to have been improper[10].

In addition, the overwhelming majority of these post grant petitions were filed by alleged infringers of the respective patents, such that there was or is concurrent district court litigation involving those patents. In the more than 2,000 cases in which the APJs issued final written decisions finding all challenged claims unpatentable, *see id*. at 11, those decisions effectively ended the patent owner's infringement cases.

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[8] *See, e.g.*, 37 C.F.R. § 42.51 (granting the PTAB authority to specify conditions for discovery).

[9] *See, e.g.*, 37 C.F.R. § 42.121 (providing procedures a patent owner must follow to amend, cancel, or substitute claims, including filing a motion with the PTAB to permit such action).

[10] *See, e.g.*, 37 C.F.R. § 42.12 (empowering the PTAB to impose sanctions against any part for misconduct).

Further compounding the potential effect of the Court's decision, the Federal Circuit also held that the decision on appeal here also affects all *ex parte* appeals of patent applicants attempting to reverse the rejections of their patent claims at the examination phase, since those *ex parte* appeals also are decided by the same APJs at issue here. *In re Boloro Glob. Ltd.*, 963 F.3d 1380, 1380-81 (Fed. Cir. 2020) ("Boloro Global Limited moves to vacate and remand the underlying decisions of the Patent Trial and Appeal Board in these appeals from the Board's decisions in *ex parte* appeals, affirming the examiner's rejection of claims in Boloro's patent applications. . . . But the Director having conceded that the APJ's appointments were unconstitutional, we see no principled reason to depart here from the resulting remedy applied in *Arthrex* and *VirnetX* [*Inc. v. Cisco Sys., Inc.*, 958 F.3d 1333 (Fed. Cir. 2020)]"). The Patent Office does not present statistics for *ex parte* appeals in the same manner as it does for the post grant proceedings discussed above, but in just the fiscal years 2017-2020, it reports having received 34,540 *ex parte* appeals, each of which (as well as the tens of thousands of *ex parte* appeals filed before 2017) could be affected by the Court's decision.[11]

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[11] *Ex parte* appeal totals are calculated as the total number of cases received in each fiscal year, less the cases received in Technology Center 3900, which is devoted to *inter partes* reexamination, *ex parte* reexamination, supplemental examination, and reissue, although the Court should note that its decision also would affect those appeals since they, too, are handled by the same APJs. For the total numbers received in fiscal years 2017 to 2020, see USPTO, *Fiscal Year 2017 Patent Trial & Appeal Board Receipts and Dispositions by Technology*

"[C]ourts must be cautious before adopting changes that disrupt the settled expectations of the inventing community[, because f]undamental alterations in these rules risk destroying the legitimate expectations of inventors in their property. *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 739 (2002). Thus, should the Court affirm the Federal Circuit as to the first question presented and reverse as to the second question presented, IPLAC respectfully submits that any action contemplated by the Court account for this additional impact.

CONCLUSION

For the foregoing reasons, IPLAC respectfully requests that the Court reverse the Federal Circuit's decision and use a straightforward approach to find

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Centers Appeal, at 1, https://www.uspto.gov/sites/default/files/documents/fy2017_sep_e.pdf (last visited Dec. 2, 2020); USPTO, *Fiscal Year 2018 Patent Trial & Appeal Board Receipts and Dispositions by Technology Centers Appeal*, at 1, https://www.uspto.gov/sites/default/files/documents/FY18%20Appeals%20Receipts%20and%20Dispositions%20by%20Tech%20Center.pdf (last visited Dec 2, 2020); USPTO, *Fiscal Year 2019 Patent Trial & Appeal Board Receipts and Dispositions by Technology Centers Appeal*, at 1, https://www.uspto.gov/sites/default/files/documents/FY19%20Appeals%20Receipts%20and%20Dispositions%20by%20TC%20-%20September.pdf (last visited Dec. 2, 2020); USPTO, *Fiscal Year 2020 Patent Trial & Appeal Board Receipts and Dispositions by Technology Centers Appeal*, at 1, https://www.uspto.gov/sites/default/files/documents/fy20_appeal_receipts_and_dispositions_by_tc_sept2020.pdf (last visited Dec. 2, 2020).

that APJs at the USPTO are inferior Officers for purposes of the Appointments Clause and as a result, the Court need not address whether the *Arthrex* remedy is a proper cure.

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