

IN THE SUPREME COURT OF THE UNITED STATES

No. 19-1434

UNITED STATES, PETITIONER

v.

ARTHREX, INC., ET AL.

No. 19-1452

SMITH & NEPHEW, INC., ET AL., PETITIONERS

v.

ARTHREX, INC., ET AL.

No. 19-1458

ARTHREX, INC., PETITIONER

v.

SMITH & NEPHEW, INC., ET AL.

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

MOTION OF THE UNITED STATES FOR DIVIDED ARGUMENT

Pursuant to Rule 28.4 of the Rules of this Court, the Acting Solicitor General, on behalf of the United States, respectfully moves for divided argument in these cases. The Court has consolidated these three cases and allocated a total of one hour for oral argument. The United States moves to allocate oral

argument time as follows: 15 minutes for the United States, petitioner in No. 19-1434; 15 minutes for petitioners in No. 19-1452; and 30 minutes for petitioner in No. 19-1458. Counsel for the other parties have authorized us to state that they agree with that allocation of argument time. Granting this motion would not require the Court to enlarge the overall time for argument.

1. The Patent Act of 1952, 35 U.S.C. 1 et seq., establishes the United States Patent and Trademark Office (USPTO) as an executive agency within the United States Department of Commerce "responsible for the granting and issuing of patents and the registration of trademarks." 35 U.S.C. 2(a)(1); see 35 U.S.C. 1(a). The Patent Trial and Appeal Board (Board) is an administrative tribunal within the USPTO that conducts several kinds of patent-related administrative adjudications, including appeals from adverse decisions of patent examiners on patent applications and in patent reexaminations; derivation proceedings; and inter partes and post-grant reviews. 35 U.S.C. 6(a) and (b). Its final decisions may be appealed to the Federal Circuit. 35 U.S.C. 141(c), 144, 319.

The Board consists of the USPTO's Director, the Deputy Director, the Commissioners for Patents and Trademarks, and "administrative patent judges." 35 U.S.C. 6(a). Administrative patent judges, of whom there are currently more than 250, are "persons of competent legal knowledge and scientific ability who

are appointed by the Secretary [of Commerce], in consultation with the Director.” Ibid. Like other “[o]fficers and employees” of the USPTO, most administrative patent judges are “subject to the provisions of title 5, relating to Federal employees.” 35 U.S.C. 3(c). Under those provisions, members of the civil service may be removed “only for such cause as will promote the efficiency of the service.” 5 U.S.C. 7513(a).

2. In the decision below, the Federal Circuit held that administrative patent judges are principal officers for purposes of the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, and therefore must be appointed by the President with the advice and consent of the Senate. Pet. App. 6a-22a. The court of appeals therefore held that the statutorily prescribed method of appointing administrative patent judges -- by the Secretary of Commerce acting alone -- violates the Appointments Clause. Id. at 22a; see 35 U.S.C. 6(a).

To cure the putative constitutional defect that it identified, the court of appeals held that the restrictions on removal imposed by 5 U.S.C. 7513(a) cannot validly be applied to administrative patent judges, and that the application of those restrictions should be severed so that the judges are removable at will. Pet. App. 22a-29a. “Because the Board’s decision in this case was made by a panel of [administrative patent judges] that were not constitutionally appointed at the time the decision was

rendered," however, the court vacated the Board's decision, remanded for "a new hearing" before the Board, and directed "that a new panel of [administrative patent judges] must be designated to hear the [proceeding] anew on remand." Id. at 29a, 33a.

3. On October 13, 2020, this Court granted the government's petition for a writ of certiorari to review the Federal Circuit's decision, as well as two additional petitions filed by the private parties in the case. See United States v. Arthrex, Inc., No. 19-1434; Smith & Nephew, Inc. v. Arthrex, Inc., No. 19-1452; Arthrex, Inc. v. Smith & Nephew, Inc., No. 19-1458. The Court has agreed to consider: (1) whether administrative patent judges are principal or inferior officers for purposes of the Appointments Clause; and (2) whether, if administrative patent judges are principal officers, the Federal Circuit properly cured any Appointments Clause defect by severing the application of 5 U.S.C. 7513(a) to those judges. On October 21, 2020, the Court established a briefing schedule under which petitioners in Nos. 19-1434 and 19-1452 each filed opening briefs, addressing the first question presented, on November 25, 2020; petitioner in No. 19-1458 shall file a consolidated opening brief and response brief, addressing both questions, on December 23, 2020; petitioners in Nos. 19-1434 and 19-1452 shall each file a consolidated response and reply brief on January 22, 2021; and petitioner in No. 19-1458 shall file a reply brief, pursuant to Rule 25.3 of this Court.

The allotment of oral argument time proposed by this motion accords with the Court's briefing schedule by evenly dividing the default 30 minutes of argument time allotted to one side of a case between petitioners in Nos. 19-1434 and 19-1452 and allotting the full 30 minutes of argument time for the other side to petitioner in No. 19-1458. We believe that dividing the argument time for one side between the United States and the petitioners in No. 19-1452 would be of material assistance to the Court. The United States has a substantial interest in this case, because it concerns the constitutionality of an Act of Congress, the internal operations of the Executive Branch, and the validity of the Board's decision in this case, as well as dozens of other Board decisions that the Federal Circuit has vacated on the basis of the decision below. See, e.g., Pet. at 1-27, Iancu v. Luoma, No. 20-74 (filed July 23, 2020). Petitioners in No. 19-1452 also have a substantial interest in this case because they prevailed in the Board proceeding that was subject to the Federal Circuit's decision in this case, and can offer the Court a distinct perspective as the petitioners in those administrative proceedings. The government accordingly requests that the Court grant the motion for divided argument.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

DECEMBER 2020