No. 19-1458

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

The government, Smith & Nephew, and Arthrex all agree that this Court should address the court of appeals' attempt to remedy the Appointments Clause violation by severing APJ tenure protections, together with the underlying constitutional question. There is no dispute among the parties that Arthrex's case is the best vehicle in which to do so. The parties thus agree that Arthrex's petition should be granted. Arthrex, moreover, agrees that the Court should frame a common set of questions presented, and that the government's first two proposed questions are appropriate.

Smith & Nephew's merits arguments on severability, by contrast, are premature and without merit. Smith & Nephew's timeliness arguments are similarly unfounded. Smith & Nephew recognizes, however, that those issues are no impediment to review of the important remedy questions that Arthrex's petition presents. Arthrex's petition should accordingly be granted.

I. All Parties Agree That The Court Should Grant Arthrex's Petition

There is no dispute among the parties that the Court should grant Arthrex's petition. The government, Smith & Nephew, and Arthrex all agree that the Court should review, not just the court of appeals' finding of a constitutional violation, but also its purported remedy of severing APJ tenure protections. Gov't Resp. 5; S&N Resp. 10. Whether that remedy is consistent with congressional intent, and whether it suffices to cure the violation, are important questions that independently warrant review.

The only qualification comes from Polaris, the petitioner in a separate case. Advocating for its own petition, Polaris contends that there is "some disagreement" over whether Arthrex preserved its remedy arguments in the court of appeals. Pet. in No. 19-1459, at 15. But there is no disagreement among the parties to *this* case. Arthrex clearly preserved its remedy arguments. Pet. 13 n.2 (quoting briefing). Smith & Nephew agrees that Arthrex preserved the arguments. S&N Resp. 10. That agreement eliminates any preservation concerns from this case. See S. Ct. R. 15.2; *Franchise Tax Bd.* v. *Hyatt*, 139 S. Ct. 1485, 1491 n.1 (2019) (nonjurisdictional objections waived if not raised in response to petition). The court of appeals, moreover, discussed the issues at length, so they are preserved for review regardless. See Pet. App. 22a-28a; *Va. Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8

(1991) ("It suffices for our purposes that the court below passed on the issue presented * * * .").

Arthrex's case is clearly the superior vehicle for addressing the proper remedy. This is the case in which the court of appeals decided the remedy issues in a reasoned opinion. Pet. App. 22a-28a. This is the case in which judges dissented from denial of rehearing en banc on those issues. *Id.* at 97a-104a, 133a-134a. In *Polaris*, by contrast, the court issued summary orders that merely cited this case. Pet. App. in No. 19-1459, at 2a, 4a, 30a-31a. Arthrex's case is thus "a better vehicle than *Polaris*—or any other case—for deciding * * * questions about the Federal Circuit's 'fix.'" S&N Resp. 10.

As Smith & Nephew explains, *if* this Court considers the government's timeliness question worthy of review, it should grant review in both this case and *Polaris* to ensure it can reach all relevant issues. S&N Resp. 8-10. But that is the *only* scenario in which the Court should grant review in *Polaris* as well.

II. SMITH & NEPHEW'S MERITS ARGUMENTS FAIL

Because Smith & Nephew agrees the Court should grant review, its merits arguments about the court of appeals' severance remedy are premature. Arthrex will respond fully if and when this Court grants review. But Smith & Nephew's arguments are unavailing regardless.

A. Smith & Nephew invokes this Court's severability rulings in *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020), and *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477 (2010). But those cases differ in a critical respect: They involved agency heads with broad policymaking and enforcement authority. 140 S. Ct. at 2193; 561 U.S. at 485. Congress has no settled tradition of

granting tenure protections to officers like those. To the contrary, such officers are usually removable at will to ensure their political accountability. See *Seila Law*, 140 S. Ct. at 2201-2204; Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 786 (2013). Stripping tenure protections from the CFPB's Director or the PCAOB's board members thus was no innovation. It merely brought those agencies in line with how Congress normally structures executive agencies—a result eminently consistent with congressional intent.

By contrast, this case involves administrative judges charged solely with impartial adjudication. Congress has long considered tenure protections essential to secure the independence and impartiality of administrative judges. Pet. 16-19. Those protections play a particularly important role under the America Invents Act, which Congress enacted to create a new *adjudicative* mechanism for reviewing patents. *Id.* at 19-20. Whether or not due process requires tenure protections for administrative judges, there is no doubt that *Congress* has long considered those protections essential for administrative judges—a tradition Smith & Nephew ignores. There was no similar showing of Congress's intent in *Seila Law* or *Free Enterprise Fund*. But that longstanding tradition is dispositive here.

Eliminating APJs' tenure protections would be a radical departure from that historical practice. In *Free Enterprise Fund*, this Court expressly distinguished PCAOB members from "administrative law judges [who] * * * perform adjudicative rather than enforcement or policymaking functions." 561 U.S. at 507 n.10. That passage encapsulates why Smith & Nephew's reliance on *Seila Law* and *Free Enterprise Fund* is misplaced.

Smith & Nephew urges that "the 'critical question' is whether Congress would have passed the rest of the statute without the removal protections." S&N Resp. 13. The answer is "no." Congress was trying to *improve* patent review, not eliminate patents by any means necessary. Measured by the yardstick of what Congress traditionally considers essential to fair adjudication, the Federal Circuit's severance remedy is a giant step backward. Congress could not have envisioned a regime in which political subordinates revoke valuable property rights while trying to please their superiors and preserve their jobs.

B. Smith & Nephew fares no better defending the sufficiency of the court's remedy. Even without tenure protections, APJs are still principal officers because no superior executive officer has authority to review their decisions. Deciding cases is what administrative judges do. Supervision that does not include review of those decisions is necessarily "not complete." *Edmond* v. *United States*, 520 U.S. 651, 664 (1997).

Smith & Nephew asserts that "this Court has deemed as *inferior* Officers administrative adjudicators who could enter unreviewable decisions on behalf of their agency." S&N Resp. 15. That assertion is mistaken; it rests on an erroneous account of the statutory regimes in the cases Smith & Nephew cites. Arthrex Resp. in No. 19-1434, at 14-16. This Court has *never* deemed an administrative judge to be an inferior officer where the administrative judge's decisions were totally unreviewable by any superior executive officer. In fact, this Court has never even *considered* a case where administrative judges had that sort of unreviewable authority—a fact that underscores how far the America Invents Act strays from traditional agency structure. In cases like *Edmond*, where the administrative judges' decisions *were* subject to review by

superior officers, that review played a critical role in this Court's analysis. Pet. 25-28.

C. Smith & Nephew finally argues that there are a number of other ways the Court could sever the statute to remedy any defect. S&N Resp. 15-18. It never explains why this Court, rather than Congress, should make those policy-laden decisions. To grant relief on Arthrex's claim, the Court need do no more than order *this* case dismissed. See *Seila Law*, 140 S. Ct. at 2219-2220 (Thomas, J., joined by Gorsuch, J., concurring in part). In any event, Smith & Nephew's catalogue of potential *alternative* remedies underscores the need for review of the *improper* remedy the court of appeals imposed.

III. SMITH & NEPHEW FAILS TO SHOW ANY ERROR ON THE TIMELINESS RULING

Smith & Nephew also argues in support of the government's contention that Arthrex forfeited its Appointments Clause challenge by not timely raising the claim. S&N Resp. 3-8. It acknowledges that those arguments are no impediment to review of the remedy questions in Arthrex's petition. *Id.* at 9. And it fails to show any error regardless.

A. Smith & Nephew argues that raising the Appointments Clause challenge at the Patent Office would not have been futile, because "the Director could have assigned himself and the two Commissioners—who are all effectively removable at will—to preside over Arthrex's case." S&N Resp. 6 (citation omitted). The Commissioners, however, are *not* "effectively removable at will." They are removable only for "misconduct or nonsatisfactory performance." 35 U.S.C. §3(b)(2)(C). That is the *opposite* of at-will removal. See, *e.g.*, *Seila Law*, 140 S. Ct. at 2206 (removal for "malfeasance in office" a restric-

tive standard); 5 U.S.C. §4303(a) (removal of civil service employees for "unacceptable performance").[1]

Even if the Commissioners were removable at will, that would not have obviated Arthrex's constitutional challenge. Arthrex's complaint is not that the APJs who heard its case were removable only for cause. Its complaint is that they were principal officers not appointed in the manner the Constitution requires. The Commissioners, no less than APJs, are appointed by the Secretary. 35 U.S.C. §3(b)(2)(A). And the Commissioners, no less than APJs, render decisions that are not reviewable by any superior executive officer. *Id.* §§6(c), 141. Assigning to the panel Commissioners who are *themselves* improperly appointed principal officers would not have addressed Arthrex's objection in the slightest.[2]

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[1] The Commissioners may be removed "without regard to the provisions of title 5." 35 U.S.C. §3(b)(2)(C). While that qualification confirms that the civil service standards applicable to APJs are *even more* restrictive, it does not change the unambiguously *for-cause* nature of the standard that 35 U.S.C. §3(b)(2)(C) specifies for removal of the Commissioners.

[2] Smith & Nephew's amicus Comcast argues that the Board "can and does consider constitutional questions," pointing to a statement in Standard Operating Procedure 2 that precedential opinion panels may "address constitutional questions." Comcast Br. in No. 19-1452, at 12. But agencies are *expected* to consider constitutional challenges to their *own actions*. See *Cont'l Air Lines, Inc.* v. *Dep't of Transp.*, 843 F.2d 1444, 1455-1456 (D.C. Cir. 1988). The issue here is whether an agency can decide the constitutionality of a *federal statute*—something SOP2 says nothing about, and something agencies presumptively cannot do. Arthrex Resp. in No. 19-1434, at 24. Comcast also cites *St. Jude Medical, LLC* v. *Snyders Heart Valve LLC*, No. IPR2018-00107, 2018 WL 2086454, at *4 (P.T.A.B. May 3, 2018), as a case where the Board considered an Appointments Clause challenge. Comcast Br. in No. 19-1452, at 12-13. But Arthrex already

B. Even apart from futility principles, the court of appeals had discretion to reach Arthrex's claim. Smith & Nephew and the government both expressly told the court that it had discretion to consider the claim—precisely the course of action they now fault the court for taking. Arthrex Resp. in No. 19-1434, at 31. And every factor this Court relied on to excuse the waiver in *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), is equally present here. Arthrex Resp. in No. 19-1434, at 30-32. Smith & Nephew disavows any request to overrule *Freytag*. S&N Resp. 5. But it nowhere identifies any plausible basis for distinguishing the case.

Smith & Nephew suggests that Arthrex somehow waived its Appointments Clause challenge by petitioning for inter partes review in *unrelated* cases. S&N Resp. 5-6. No authority supports that theory. A "waiver [from conduct in one lawsuit] generally does not extend to a separate lawsuit." *Biomedical Patent Mgmt. Corp.* v. *Cal. Dep't of Health Servs.*, 505 F.3d 1328, 1341 (Fed. Cir. 2007), cert. denied, 555 U.S. 1097 (2009); see also *Wagoner Cnty. Rural Water Dist. No. 2* v. *Grand River Dam Auth.*, 577 F.3d 1255, 1259 (10th Cir. 2009). In its briefs below, Smith & Nephew admitted that "Arthrex's repeated reliance on IPRs * * * does not legally bar Arthrex from

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cited that case as the solitary aberration from nearly a dozen cases where the Board expressly refused to consider Appointments Clause challenges. Arthrex Resp. in No. 19-1434, at 24-25 & n.6. Even in *St. Jude*, the Board rejected the claim essentially because *no court* had accepted it yet. 2018 WL 2086454, at *4. Moreover, both authorities Comcast cites post-date the Board's decision in this case. Pet. App. 33a. They are thus irrelevant to whether Arthrex should have pressed its challenge before the Board despite the settled precedent holding that agencies may not declare their own enabling statutes unconstitutional. Arthrex Resp. in No. 19-1434, at 24.

raising an Appointments Clause challenge." S&N C.A. Supp. Br. 7. Finding a waiver here would be unjust: The Patent Office did not give Arthrex the option of pursuing inter partes review before a properly constituted panel. Arthrex was not required to abstain from inter partes review *entirely*, upon pain of waiving every conceivable objection in unrelated cases.

Even if Arthrex's conduct could somehow be characterized as a waiver—and it cannot—it still would not distinguish *Freytag*. In that case, the petitioners consented to the special trial judge's authority to hear *that very case*. 501 U.S. at 871, 878. If this Court had discretion to overlook that unambiguous waiver, the court of appeals certainly was not required to find a waiver from Arthrex's conduct in *unrelated* disputes.

IV. The Court Should Formulate A Common Set Of Questions Presented

Because the government, Smith & Nephew, and Arthrex all seek review of the same judgment and present overlapping issues, Arthrex agrees with the government's proposal that the Court formulate a common set of questions to focus the issues for merits briefing. Gov't Resp. 6-7.

The government's first two questions address the underlying constitutional question and the appropriateness of the severance remedy. Gov't Resp. 6-7. All parties agree that the Court should review those questions. Arthrex further agrees that the government's proposed formulation of those two questions is appropriate.

The government's third question concerns whether the court of appeals erred by adjudicating Arthrex's Appointments Clause challenge despite Arthrex's not having raised the claim before the agency. Gov't Resp. 7. The

government and Smith & Nephew fail to show any abuse of discretion or other error on that issue. Arthrex Resp. in No. 19-1434, at 23-33; pp. 6-9, *supra*. Moreover, the government and Smith & Nephew both told the court of appeals it had discretion to address Arthrex's claim—an admission that would seem to make reversal on the merits a rather remote possibility. Arthrex Resp. in No. 19-1434, at 31. If the Court considers the issue worthy of consideration nonetheless, Arthrex does not oppose review, and it has no objection to the government's formulation of the third question.

Smith & Nephew also invites the Court to review whether, under *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), Arthrex is entitled to a new hearing before a different panel of APJs on remand as a remedy for any Appointments Clause violation. S&N Resp. 7-8. Smith & Nephew does not contend that the government's third question encompasses that issue. But it asserts that the issue is "subsumed" within the government's *first* question. *Id.* at 4. That is incorrect.

The government's first question addresses *only* whether APJs are principal or inferior officers, not the separate question whether Arthrex is entitled to a new hearing before a different panel as a remedy. Gov't Pet. in No. 19-1434, at i; Gov't Resp. 6. The government does not say a word about the *Lucia* new-hearing issue in either its petition or its response. And while Smith & Nephew mentioned the issue in the body of its petition, its question presented omits any reference to the issue, even though the court of appeals ruled against it below. S&N Pet. in No. 19-1452, at i, 32-33.

This Court, of course, could add a question addressing that issue if it wishes. See, *e.g.*, *Seila Law LLC* v. *Consumer Fin. Prot. Bureau*, 140 S. Ct. 427 (2019) (adding

severability question). But Arthrex questions whether Smith & Nephew has shown any good reason to do so, particularly in light of the number of important questions already proposed. The court of appeals persuasively explained why Arthrex's constitutional challenge was timely and why Arthrex was therefore entitled to the new hearing *Lucia* requires. Pet. App. 28a-32a.[3]

If the Court nonetheless considers the *Lucia* new-hearing issue worthy of review, it should formulate an additional, fourth question directed to that specific issue. Adding a fourth question would avoid any disputes over the scope of the issues under review.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[3] Smith & Nephew claims that Arthrex's challenge was not timely under *Lucia* because Arthrex did not press it before the agency. S&N Resp. 7. But *Lucia* did not hold that a petitioner must raise a claim before the agency *even when it would be futile to do so*. The SEC had multiple means to obviate the challenge in that case: The Commission could have heard the case itself, or it could have appointed the ALJ itself. See *Lucia*, 138 S. Ct. at 2055 & nn.5-6; 17 C.F.R. § 201.110; 5 U.S.C. § 3105. Here, by contrast, the Director had no authority to hear Arthrex's case by himself, no ability to configure a panel to avoid the problem, and no authority to decline institution based on his own unreviewable assessment of the statute's constitutionality. Arthrex Resp. in No. 19-1434, at 23-28. The court of appeals thus correctly rejected Smith & Nephew's argument.

Respectfully submitted.

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