

IN THE
Supreme Court of the United States

CUSTOMEDIA TECHNOLOGIES, LLC,

Petitioner,

v.

DISH NETWORK CORPORATION;
DISH NETWORK, LLC,

Respondents.

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

PETITION FOR REHEARING

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IN THE
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No. 20-135

CUSTOMEDIA TECHNOLOGIES, LLC,
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DISH NETWORK CORPORATION;
DISH NETWORK, LLC,
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*ON PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR REHEARING

Petitioner Customedia Technologies, LLC (“Customedia”) respectfully petitions the Court for rehearing of the Court’s order denying Customedia’s petition for a writ of certiorari.

GROUNDS FOR REHEARING

On October 13, 2020, the Court granted certiorari in *United States v. Arthrex, Inc.*, No. 19-1434. 2020 WL 6037206, at *1 (U.S. Oct. 13, 2020). The Court will answer the questions of whether the appointment of administrative patent judges of the United States Patent and Trademark Office violates the Constitution, and if so, what is the proper means of curing the constitutional violation. No matter how the Court answers these questions, the Court will create new precedent concerning substantive law. The Court's decision to grant certiorari in *Arthrex* and answer the questions presented in that case is therefore an intervening circumstance of a substantial or controlling effect here where Customedia appealed a final written decision of the PTAB to the Federal Circuit and raised an Appointments Clause challenge through appropriate methods.

The Court granting certiorari in *Arthrex* heralds an intervening decision which the Court cannot disregard here. *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993) ("The Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently."). Further, when the Court applies a rule of federal law to the parties in *Arthrex*, that rule will be "the controlling interpretation of federal law and must be given full

retroactive effect in all cases still open on direct review” *Id.* Failing to apply the Court’s ultimate decision in *Arthrex* here would be “merely a want of clairvoyance[.]” as Customedia could not know that the Court would answer the questions raised in *Arthrex* and create directly applicable precedent. *Joseph v. United States*, 574 U.S. 1038, 1039 (2014) (Kagan, J., respecting denial of certiorari). Because the Court’s decision to grant certiorari is an intervening circumstance of a substantial or controlling effect, the Court should grant Customedia’s petition for rehearing, and hold Customedia’s petition for a writ of certiorari for its ultimate decision in *Arthrex*.

CONCLUSION

The Court’s decision to grant certiorari in *Arthrex* is an intervening circumstance of a substantial or controlling effect. Customedia’s petition for rehearing should be granted.

Respectfully submitted,

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NOVEMBER 6, 2020

CERTIFICATE OF COUNSEL

As required by Supreme Court Rule 44, I certify that the grounds for this petition for rehearing are limited to intervening circumstances of a substantial or controlling effect. I also certify that this petition is presented in good faith and not for delay.

Respectfully submitted,

A handwritten signature in black ink, reading "R. W. Mort III" with a stylized flourish at the end.

Raymond W. Mort, III

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