

IN THE
Supreme Court of the United States

STEVE MORSA,
Petitioner

v.

ANDRE IANCU, Director,
U.S. PATENT AND TRADEMARK OFFICE,
Respondent

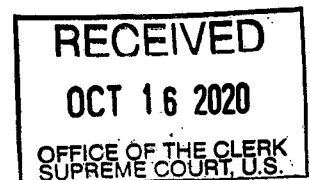
*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT*

PETITION FOR REHEARING

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Pro Se

OCTOBER 2020



PETITION FOR REHEARING

Pursuant to Rule 44.2 of the Rules of the United States Supreme Court, Petitioner respectfully petitions for rehearing of this Court's October 5, 2020 Order denying the petition for a writ of certiorari.

REASON FOR GRANTING THE PETITION FOR REHEARING

Constitutional Challenge to Administrative Patent Judges

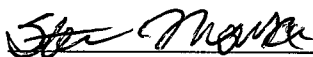
Rule 44.2 of the Rules of the Supreme Court of the United States allows petitioners to file petitions for rehearing of the denial of a petition for writ of certiorari and permits rehearing on the basis of "*intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.*"

Here, a substantial ground not previously presented warrants a rehearing. Briefly and distinctly, on this date this Court granted certiorari in three cases involving critically important questions concerning the constitutional status of Administrative Patent Judges (APJs): *United States v. Arthrex, Inc.*, No. 19-1434; *Smith & Nephew, Inc. v. Arthrex, Inc.*, No. 19-1452; and *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 19-1458.

As the Federal Circuit record below reflects, though instant Petitioner timely and correctly raised this very same constitutional challenge with the Federal Circuit (Appendix One), Petitioner was nevertheless incorrectly and unjustly denied relief (Appendix Two).

Rehearing is accordingly warranted.

Which rehearing is respectfully requested this 13th day of October, 2020.



Steve Morsa

No. 20-32

**IN THE
SUPREME COURT OF THE UNITED STATES**

Steve Morsa,
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v.

Andreu Iancu, Director,
U.S. Patent and Trademark Office
Respondent.

RULE 44.2 CERTIFICATE

Pursuant to Rule 44.2, the undersigned hereby certifies that the attached petition for rehearing of an order denying writ of certiorari is restricted to the grounds specified in Rule 44.2: it is limited to *intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented*. Petitioner further certifies that the attached petition is presented in good faith and not for delay.

By: Steve Morsa

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App. One

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

In re: STEVE MORSA,
Appellant

2019-1757

**APPELLANT’S MOTION TO VACATE AND REMAND
DUE TO NEW AUTHORITY**

A. RELIEF SOUGHT

Appellant moves the Court Pursuant to Federal Rule of Appellate Procedure 27 and Federal Circuit Rule 27(f) for an order vacating and remanding the case to the Board.

B. GROUNDS FOR THE REQUESTED RELIEF

On October 31, 2019, this Court issued its opinion in *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 2018-2140, 2019 U.S. App. LEXIS 32613. *Arthrex* addressed the constitutionality of the appointment of the Board’s Administrative Patent Judges (“APJs”). This Court held:

[T]hat APJs are principal officers under Title 35 as currently constituted. As such, they must be appointed by the President and confirmed by the Senate; because they are not, the current structure of the Board violates the Appointments Clause.

Id. at *27. In addressing this infirmity, the Court applied a narrow remedy and severed the statutory removal provisions as applied to APJs, thereby rendering APJs inferior rather than principal officers of the United States. *Id.* at *34. Next, “[b]ecause the Board’s [final written] decision was made by a panel of APJs that were not constitutionally appointed at the time of the decision was rendered, [the Court] vacate[d] and remand[ed] the Board’s decision without reaching the merits.” *Id.* at *36. The Court further explained that for cases in which “the final decision was rendered by a panel of APJs who were not constitutionally appointed and where the parties presented an Appointments Clause challenge on appeal, [the case] must be vacated and remanded.” *Id.* at *39. This Court determined that a new PTAB panel of APJs must be assigned to such cases. *Id.* at *40.

Appellant hereby raises a challenge to the constitutionality of the Appointments Clause for the APJs assigned to *Ex parte Steve Morsa* (Appeal 2018-004483, App. No. 13/694,192). At the time of the final decision in this case, these APJs were principal officers of the United States who were not appointed by the President and confirmed by the Senate.

Because these APJs were not properly appointed and confirmed, the APJs lacked the constitutional authority to issue a final decision in this case.

C. PRO SE APPELLANT'S ARGUMENT IS TIMELY

While it is true that Federal Appellate Courts do not generally consider issues not passed upon below or entertain arguments not presented to a lower tribunal (Mr. Morsa has already filed his opening brief); in the precedential *Hylete LLC, v. Hybrid Athletics, LLC* (Case 17-2057, p.7), the Court recently again confirmed that exceptions are made in cases where, as here, an Appellant is *pro se*:

We have articulated limited circumstances in which considering arguments made for the first time on appeal is appropriate: (1) “[w]hen new legislation is passed while an appeal is pending, courts have an obligation to apply the new law if Congress intended retroactive application even though the issue was not decided or raised below”; (2) “when there is a change in the jurisprudence of the reviewing court or the Supreme Court after consideration of the case by the lower court”; (3) “appellate courts may apply the correct law even if the parties did not argue it below and the court below did not decide it, but only if an issue is properly before the court”; and (4) **“where a party appeared pro se before the lower court, a court of appeals may appropriately be less stringent in requiring that the issue have been raised explicitly below.”** *Golden Bridge*, 527 F.3d at 1322–23 (quoting *Forshey v. Principi*, 284 F.3d 1335, 1353–57 (Fed. Cir. 2002)). [emphasis provided]

D. CONCLUSION

For the reasons stated herein; and though Appellee surprisingly opposes this constitutional authority restoring motion; it is accordingly respectfully requested that this Court vacate and remand this case to the PTAB with an order to empanel a new Board of APJs in accordance with its decision in *Arthrex*.

Because this motion “if granted, would terminate the appeal,” Appellant respectfully requests that the time for Appellee to serve and file Appellee’s response brief (currently due November 12th, 2019; given that the 40th day from October 1st, 2019 falls on a Saturday) and Appellant’s reply brief (currently due 14 days after service of Appellee’s response brief) both be suspended. *See* Fed. Cir. R. 31(c).

November 5th, 2019

Respectfully submitted,

/s/ Steve Morsa

Steve Morsa,

Appellant / Inventor

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App: TWO

NOTE: This order is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

In re: STEVE MORSA,
Appellant

2019-1757

Appeal from the United States Patent and Trademark
Office, Patent Trial and Appeal Board in No. 13/694,192.

ON MOTION

PER CURIAM.

O R D E R

Steve Morsa moves this court for an order vacating and remanding this appeal to the Patent Trial and Appeal Board in view of this court's recently issued opinion in *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 2018-2140, 2019 WL 5616010 (Fed. Cir. Oct. 31, 2019).³ The Director of the United States Patent and Trademark Office opposes. Mr. Morsa replies.

The court concludes that the Appointments Clause challenge in this case was forfeited. See *Customedia Techs., LLC v. Dish Network Corp.*, No. 2018-2239 et al., 2019 WL 5677703 (Fed. Cir. Nov. 1, 2019). Mr. Morsa's motion is therefore denied.

Accordingly,

IT IS ORDERED THAT:

- (1) The stay of the briefing schedule is lifted.
- (2) Mr. Morsa's motion is denied.
- (3) The Director's response brief is due within 30 days of the date of filing of this order.

FOR THE COURT

November 25, 2019
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court