No. 20-414

In the Supreme Court of the United States

ROVI GUIDES, INC.,

Petitioner,

v.

COMCAST CABLE COMMUNICATIONS, LLC,
AND UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR COMCAST CABLE COMMUNICATIONS, LLC IN OPPOSITION

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RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, respondent states that Comcast Cable Communications, LLC is a wholly owned, indirect subsidiary of Comcast Corporation and no other publicly held corporation owns 10% or more of the stock of respondent.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Rovi Guides, Inc.* v. *Comcast Cable Commc'ns, LLC*, Nos. 2019-1215, 2019-1216, and 2019-1218 (consolidated) (Fed. Cir.), judgment entered on April 22, 2020;
- *Rovi Guides, Inc.* v. *Comcast Cable Commc'ns, LLC*, Nos. 2019-1293, 2019-1294, and 2019-1295 (consolidated) (Fed. Cir.), judgment entered on April 22, 2020.

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ARGUMENT

In its petition in No. 20-273, Comcast Cable Communications LLC presents the question that this Court will decide in *United States* v. *Arthrex*, Nos. 19-1434, 19-1452, and 19-1458: whether administrative patent judges' appointments conform to the Appointments Clause. In this cross-petition, Rovi Guides, Inc. (Rovi) raises remedial questions that are encompassed within the remedial question presented in *Arthrex*: whether, if administrative patent judges 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. Rovi asks this Court to hold its cross-petition pending the Court's decision in *Arthrex*. Regardless of how the Court rules in *Arthrex*, however, this cross-petition should be denied.

1. Rovi forfeited any argument about the proper cure for any Appointments Clause defect by failing to address that issue in its principal briefing before the Federal Circuit. Although Rovi contended for the first time in its opening brief on appeal that the PTAB judges' appointments violated the Appointments Clause, Rovi did not address severability at all: it did not so much as hint that, in its view, the court could not achieve a properly appointed panel by severing the application of 5 U.S.C. 7513(a). See *Advanced Magnetic Closures, Inc.* v. *Rome Fastener Corp.*, 607 F.3d 817, 833 (Fed. Cir. 2010) ("This court has consistently held that a party waives an argument not raised in its opening brief."). Even after the government's brief proposed severing Section 7513(a), Rovi's reply brief failed to meaningfully advance a severability argument, let alone the particular arguments in its cross-petition. See Rovi C.A. Reply Br. 11 ("It is far from

clear that the Government's proposed severances are permissible."); *id*. at 12 (making APJs removable at will "likely violates the APA"). Such passing statements were insufficient to preserve the arguments under Federal Circuit precedent.[1] *SmithKline Beecham Corp.* v. *Apotex Corp*., 439 F.3d 1312, 1320 (Fed. Cir. 2006).

Because Rovi has forfeited the severability arguments that it raises in its cross-petition, it is not entitled to raise them for the first time before this Court. Should the Court hold that the PTAB judges' appointments are unconstitutional and that the defect should be remedied in a manner other than severing the application of Section 7513(a), Rovi would not be entitled to a new hearing under whatever framework results from the Court's remedial holding.

2. Moreover, even if the Court finds an Appointments Clause violation and affirms the Federal Circuit's choice of remedy, Rovi should not be given a new hearing. As Comcast has explained in its petition in No. 20-273, Rovi is not entitled to any relief in this case because it forfeited its Appointments Clause challenge to the PTAB judges' appointment by failing to raise it before the PTAB. The Federal Circuit erred in vacating the PTAB's final determinations in this case in light of that court's holding in *Arthrex*.

a. Although this Court did not grant review of the forfeiture question presented in *Arthrex*, the Court's decision in *Arthrex* may nonetheless shed light on the

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[1] Perhaps realizing that it had forfeited any severability arguments, Rovi belatedly sought to raise them in an untimely petition for initial hearing en banc. No. 19-1215, -1216, -1218 Dkt. No. 67. The Federal Circuit denied the petition. No. 19-1215, -1216, -1218 Dkt. No. 71.

effect of a patent holder's forfeiture on its entitlement to any remedy that the Court announces in *Arthrex*. In *Arthrex*, Smith & Nephew argues that even if this Court holds that the administrative patent judges were invalidly appointed, Arthrex is not entitled to the remedy of a new hearing because "a party who does not raise a 'timely challenge'" to an adjudicator's appointment should receive only declaratory relief. 19-1452 Pet. 32-33 (citing *Lucia* v. *SEC*, 138 S. Ct. 2044, 2055 (2018), and *Ryder* v. *United States*, 515 U.S. 177, 183 (1995)). If the Court accepts that argument, its denial of a new hearing to Arthrex would establish that patent owners like Rovi, who similarly failed to raise their Appointments Clause challenge before the PTAB, also would not be entitled to a new hearing.

b. In addition, even if this Court holds that Arthrex itself should receive a new hearing, the Court should conclude that parties raising forfeited follow-on challenges are not automatically entitled to the same relief. The Court could reach that conclusion whether it views entitlement to a new hearing as a forfeiture issue or a remedial issue.

From a forfeiture standpoint, the Federal Circuit's refusal to enforce forfeiture rules in *this* case rests on a distinct error that goes beyond the Federal Circuit's excusal of forfeiture in *Arthrex* itself. After the Federal Circuit decided *Arthrex*, it adopted a categorical rule that all patentholders who subsequently raised an Appointments Clause challenge for the first time in their principal brief on appeal would be entitled to new hearings. *Customedia Techs., LLC* v. *Dish Network Corp.*, 941 F.3d 1174, 1175 (Fed. Cir. 2019). That across-the-board approach to excusing forfeiture is irreconcilable with basic forfeiture doctrine. This Court

has emphasized that a court should exercise its discretion to excuse forfeiture only in exceptional cases. See *Freytag* v. *Comm'r*, 501 U.S. 868, 879 (1991); *id*. at 894 (Scalia, J.) ("appellate courts may, in truly exceptional circumstances, exercise discretion to hear forfeited claims"). A court cannot conclude that a case is sufficiently exceptional to warrant excusing forfeiture without conducting a case-specific analysis of the equities. This Court therefore may wish to instruct the Federal Circuit to undertake the forfeiture analysis on a case-specific basis.

Considering the failure to timely raise the Appointments Clause issue from a remedial perspective, the Court also may conclude that parties in Rovi's position are not entitled to a new hearing. Even if this Court holds that discretionary remedial considerations justify granting Arthrex a new hearing notwithstanding its failure to timely raise its challenge, those considerations likely would not warrant granting the same relief to Rovi here. For instance, while granting a new trial to Arthrex might be justified by the need to avoid creating a "disincentive" to raising Appointments Clause challenges, *Ryder*, 515 U.S. at 183, that rationale would not apply to follow-on challengers like Rovi.

Moreover, leaving in place the Federal Circuit's categorical vacatur of over one hundred PTAB decisions holding patents invalid will have significant adverse consequences for litigants and the patent system as a whole. Scores of patents that have been found unpatentable in reasoned decisions by the PTAB will be permitted to remain in force until newly constituted PTAB panels can re-examine each case. That is true even where (as here) the patentee has never contended that the alleged Appointments Clause violation had

any bearing on the PTAB's invalidity analysis, and even where (as here) there is no reasonable likelihood of a different result on remand. That substantial burden on the patent system is a weighty reason not to grant new hearings to numerous follow-on challengers who failed to timely raise their Appointments Clause challenges.

In sum, Rovi's cross-petition should be denied because Rovi forfeited both the severability arguments it now seeks to raise in this Court, and its underlying Appointments Clause challenge. Comcast acknowledges that the Court may wish to hold the petition in an abundance of caution. Should the Court do so, Comcast respectfully submits that the proper ultimate disposition will be to deny certiorari, regardless of how the Court rules in *Arthrex*. Comcast's petition in No. 20-273 should be held pending this Court's decision in *Arthrex* (Nos. 19-1434, 19-1452, and 19-1458), and for the reasons explained in Comcast's petition and reply brief, this Court should ultimately grant certiorari, vacate the judgment of the court of appeals, and remand for further proceedings in the Federal Circuit.

CONCLUSION

The cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 30, 2020