No. 20-414

In the Supreme Court of the United States

Rovi Guides, Inc.,

Petitioner,

v.

Comcast Cable Communications, LLC;
United States of America,

Respondents.

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

REPLY BRIEF FOR THE PETITIONER

MICHAEL E. JOFFRE
Counsel of Record
JASON D. EISENBERG
WILLIAM H. MILLIKEN
Sterne, Kessler, Goldstein & Fox, PLLC
1100 New York Avenue, N.W.
Washington, D.C. 20005
(202) 772-8856
mjoffre@sternekessler.com

Counsel for Petitioner

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REPLY BRIEF FOR THE PETITIONER

As Comcast admits (at 1), Rovi's cross-petition for certiorari "raises remedial questions that are encompassed within the remedial question" that this Court will decide in *United States v. Arthrex, Inc.*, Nos. 19-1434, 19-1452, and 19-1458 (certiorari granted Oct. 13, 2020). In *Arthrex*, this Court granted review to decide whether administrative patent judges are improperly appointed principal officers under the Appointments Clause, and, if so, whether the Federal Circuit permissibly cured the Appointments Clause violation by severing and invalidating administrative patent judges' tenure protections. Rovi's cross-petition presents the same questions. *See* Pet. i. Accordingly, Rovi's cross-petition should be held pending this Court's disposition of *Arthrex*.

Indeed, Comcast has itself petitioned for certiorari from the same Federal Circuit decision from which Rovi has petitioned, and Comcast, too, has requested that the Court hold the petition pending its decision in *Arthrex*. *See Comcast Cable Commc'ns, LLC v. Rovi Guides, Inc.*, No. 20-273 (petition filed Aug. 28, 2020). Rovi agrees that both petitions should be held. *See* Mem. of Resp. Rovi Guides, Inc. at 3, No. 20-273 (filed Sep. 21, 2020). Comcast, however, urges (at 1) that, while its own petition should be held, Rovi's should be denied.

Neither of Comcast's proffered rationales for this inconsistent treatment withstands scrutiny.

1. Comcast first contends (at 1–2) that Rovi forfeited its arguments about the propriety of the

Federal Circuit's severance remedy by failing to raise them in its opening brief on appeal. This argument is doubly flawed.

As an initial matter, the proposed remedy of severing and invalidating administrative patent judges' tenure protections was first advanced in the Government's responsive brief to the Federal Circuit. *See* Dkt. 38 at 24 (July 17, 2019).[1] (Comcast, for its part, did not make a severability argument in its own briefing.) It hardly makes sense to require a party to rebut in its opening brief a severability proposal that has not even been offered. There are numerous potential severances or saving constructions that a court might adopt to remedy a constitutional flaw in a statute. A party challenging the constitutionality of statutes is not required to anticipate and rebut each one in its opening brief.

In any event, Rovi's opening brief to the Federal Circuit *did* explain why administrative patent judges must enjoy tenure protections. Rovi explained that it "necessarily follows" from the Administrative Procedure Act that administrative patent judges—"like other ALJs that conduct formal administrative adjudications under the APA—enjoy the for-cause removal protections of 5 U.S.C. § 7521." Dkt. 21 at 28–29 (Apr. 2, 2019); *see also id.* at 29 n.5. And Rovi's reply brief argued that the Government's proposal to sever APJs' tenure protections is not consistent with

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[1] References to "Dkt. __" refer to docket entries in *Rovi Guides, Inc. v. Comcast Cable Communications, LLC*, No. 19-1215 (Fed. Cir.).

congressional intent because it "likely violates the APA." Dkt. 42 at 12 (Aug. 21, 2019) (making APJs removable at will would impermissibly "prevent APJs from 'exercising their independent judgment on the evidence before them, free from pressures by the parties or other officials within the agency'") (alterations omitted) (quoting *Butz v. Economou*, 438 U.S. 478, 513 (1978)). This is the same argument presented in Rovi's cross-petition. This argument was not forfeited.

2. Comcast next contends (at 2–3) that Rovi forfeited its Appointments Clause challenge by raising it for the first time to the Federal Circuit. This argument is likewise meritless. The Federal Circuit has consistently and correctly held that parties may properly raise Appointments Clause challenges for the first time in the court of appeals because "the Board was not capable of providing any meaningful relief to this type of [c]onstitutional challenge and it would therefore have been futile for [a litigant] to have made the challenge there." *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1339 (Fed. Cir. 2019). As Comcast concedes (at 2), this Court declined to review the forfeiture question in *Arthrex*. That question thus remains resolved in Rovi's favor.

Comcast argues (at 4) that this case deserves different treatment from *Arthrex* itself because, "while granting a new trial to Arthrex might be justified by the need to avoid creating a disincentive to raising Appointments Clause challenges, that rationale would not apply to follow-on challengers like Rovi" (citation omitted). Setting aside that the Federal Circuit has consistently rejected this

argument as a matter of law, Comcast mischaracterizes Rovi's argument as a "follow-on" one. Rovi raised its Appointments Clause challenge in opening briefs filed in April 2019, *see* Dkt. 21—more than six months before *Arthrex* was decided.

Comcast also asserts (at 2–3) that this Court's ultimate disposition of *Arthrex* "may nonetheless shed light on the effect of a patent holder's forfeiture on its entitlement to any remedy that the Court announces in *Arthrex*." Even if that were true, it would be a reason to *hold* this petition pending decision in *Arthrex*—not a reason to deny it.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Arthrex* and then disposed of as appropriate in light of that decision.

Respectfully submitted,

Michael E. Joffre
Counsel of Record
Jason D. Eisenberg
William H. Milliken
Sterne, Kessler, Goldstein & Fox, PLLC
1100 New York Avenue, N.W.
Washington, D.C. 20005
(202) 772-8856
mjoffre@sternekessler.com

Counsel for Petitioner