

No. _____

IN THE
Supreme Court of the United States

IYM TECHNOLOGIES LLC,

Petitioner,

v.

RPX CORPORATION AND ADVANCED MICRO DEVICES,
INC.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

IYM Technologies LLC's ("IYM's") appeals below arose from two decisions by the Patent Trial and Appeal Board ("PTAB" or "Board") to revoke IYM's patent claims during an inter partes review ("IPR") proceeding. While IYM's appeals were pending, the Federal Circuit held in another case, *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *reh'g denied*, 953 F.3d 760 (2020), that the administrative patent judges who conduct inter partes review proceedings had been appointed in violation of the Appointments Clause. The Federal Circuit, however, has repeatedly refused to apply its *Arthrex* ruling to cases like here, in which the appellant did not raise an Appointments Clause challenge in its opening brief on appeal.

The question presented is:

Whether a court of appeals can invoke forfeiture to refuse to address a constitutional claim in a pending appeal despite an intervening change in law.

PARTIES TO THE PROCEEDING

Petitioner IYM Technologies LLC was the patent owner in proceedings before the Board and the appellant in the court of appeals.

Respondents RPX Corporation and Advanced Micro Devices, Inc. (collectively, “RPX” or “Respondents”) were petitioners in proceedings before the Board and appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court’s Rule 29.6, petitioner IYM Technologies LLC states that General Patent Corporation owns a 50% membership interest in IYM Technologies LLC. No publicly traded corporation owns 10% or more of IYM Technologies LLC’s stock.

RELATED PROCEEDINGS

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

RPX Corporation and Advanced Micro Devices, Inc. v. IYM Technologies LLC, No. IPR2017-01886 (P.T.A.B.), final written decision entered March 6, 2019.

RPX Corporation and Advanced Micro Devices, Inc. v. IYM Technologies LLC, No. IPR2017-01888 (P.T.A.B.), final written decision entered March 6, 2019.

IYM Technologies LLC v. RPX Corporation and Advanced Micro Devices, Inc., No. 19-1761 (Fed. Cir.), judgment entered on March 9, 2020.

IYM Technologies LLC v. RPX Corporation and Advanced Micro Devices, Inc., No. 19-1762 (Fed. Cir.), judgment entered on March 13, 2020.

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PETITION FOR A WRIT OF CERTIORARI

IYM Technologies LLC (“IYM”) respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Federal Circuit in these cases. Pursuant to this Court’s Rule 12.4, IYM is filing a “single petition for a writ of certiorari” because the “judgments * * * sought to be reviewed” are from “the same court and involve identical or closely related questions.” Sup. Ct. R. 12.4.

OPINIONS BELOW

The court of appeals’ opinion in *IYM Technologies LLC v. RPX Corporation and Advanced Micro Devices, Inc.*, No. 19-1761 [hereinafter *IYM* 1761] (App. A) is not published in the Federal Reporter but is reprinted at 796 F. App’x 752 (Fed. Cir. Mar. 9, 2020). The court of appeals’ order denying panel rehearing and rehearing en banc is unreported but is reproduced at Appendix E. The final written decision of the PTAB in that case (App. C) is not reported but is available at 2019 WL 1085309.

The court of appeals’ opinion in *IYM Technologies LLC v. RPX Corporation and Advanced Micro Devices, Inc.*, No. 19-1762 [hereinafter *IYM* 1762] (App. B) is not published in the Federal Reporter but is reprinted at 798 F. App’x 642 (Fed. Cir. Mar. 13, 2020). The court of appeals’ judgment is unreported but is reproduced at Appendix G. The court of appeals’ order denying panel rehearing is unreported but is reproduced at Appendix F. The final written decision of the PTAB in that case (App. D) is not reported but is available at 2019 WL 1085313.

JURISDICTION

The Federal Circuit entered judgment in *IYM* 1761 on March 9, 2020. *IYM* filed a petition for panel rehearing and rehearing en banc, which the court denied on May 8, 2020.

The Federal Circuit entered judgment in *IYM* 1762 on March 13, 2020. *IYM* filed a petition for panel rehearing, which the court denied on May 8, 2020.

This Court has extended the deadline to file a petition for a writ of certiorari due on or after March 19, 2020, to 150 days. This Court has jurisdiction under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

The Appointments Clause, U.S. Const. art. II, § 2, cl. 2, provides as follows:

[The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

STATEMENT OF THE CASE

IYM is the owner of U.S. Patent No. 7,448,012 (“’012 Patent”). The ’012 Patent is at issue in both *IYM* 1761 and *IYM*1762.

I. IYM’S PATENTED INVENTION

The ’012 Patent is directed to a process for optimizing an integrated circuit layout by operating on constraints between layout objects. The invention improves the manufacturing yield of an integrated circuit’s layout generated from traditional so-called “design rules” which dictate, for example, limits or constraints on how far apart two layout objects must be spaced from each other in a circuit layout. The claimed method achieves yield improvement by modifying the layout constraints, for example, in areas where compliance with the design rules would result in chip failure. Instead of globally increasing the minimum spacing, or directly moving shapes in a circuit layout, the invention of the ’012 Patent changes constraint distances only at specified locations, e.g., locations where faults are likely to occur, using what the inventor referred to as “local process modifications” resulting in new localized constraint distances. These new localized constraint distances are in turn enforced on the layout, removing the hotspots caused, for example, by conductors being spaced too close together. Claim 1 is exemplary of the claimed invention:¹

1. A method for generating design layout artwork implemented in a computer, comprising:

¹ Bracketed letters have been added for ease of reference.

[A] receiving a design layout comprising a plurality of layout objects residing on a plurality of layers;

[B] receiving descriptions of manufacturing process;

[C] constructing a system of initial constraints among said layout objects;

[D] computing local process modifications to change said initial constraints using said descriptions of manufacturing process;

[E] constructing new local constraint distances by combining said local process modifications with constraint distances in said system of initial constraints;

[F] enforcing said new local constraint distances; and

[G] updating the coordinate variables of layout objects according to the solutions obtained from enforcing said new local constraint distances;

whereby a new layout is produced that has increased yield and performance.

'012 Patent at 8:16–35.

II. PROCEEDINGS BEFORE THE BOARD

A. The *IYM1761* IPR

On July 28, 2017, RPX filed an inter partes review petition (“Côté Petition”), alleging that claims 1–14 of the '012 Patent were unpatentable as obvious. Pet. for Inter Partes Review at 1, *RPX Corp. et al. v. IYM Techs. LLC*, No. IPR2017-01886 (filed P.T.A.B. Jul. 28, 2017). RPX set forth four grounds of invalidity, each

relying on U.S. Patent No. 6,745,372 to Côté (“Côté”) as a primary prior art reference. *Ibid.*

On March 8, 2018 the Board instituted trial on all grounds of invalidity alleged in the petition. Decision Granting Institution at 31, *RPX Corp. et al. v. IYM Techs. LLC*, No. IPR2017-01886 (filed P.T.A.B. Mar. 8, 2018).

In its Response to the Côté Petition, IYM provided documentary and expert evidence to rebut all instituted grounds. IYM disputed that Côté’s “local layout requirements” and “additional constraints” respectively met the claimed “local process modifications” and “new local constraint distances” in limitations [D] and [E]. Patent Owner’s Resp. 31–43, 53–57, *RPX Corp. et al. v. IYM Techs. LLC*, No. IPR2017-01886 (filed P.T.A.B. Jun. 11, 2018). Additionally, IYM argued that Côté did not render claim 14 obvious, because RPX’s argument was based on the disclosure of the ’012 Patent itself. *Id.* at 57–62.

After trial, the Board issued a final written decision, finding claims 1–14 of the ’012 Patent unpatentable as obvious. Final Written Decision at 74, *RPX Corp. et al. v. IYM Techs. LLC*, No. IPR2017-01886 (filed P.T.A.B. Mar. 6, 2019).

B. The *IYM1762* IPR

Also on July 28, 2017, RPX filed a second inter partes review petition (“Allan Petition”), alleging that claims 1–11 and 13–14 of the ’012 Patent were unpatentable as obvious. Pet. for Inter Partes Review at 7, *RPX Corp. et al. v. IYM Techs. LLC*, No. IPR2017-01888 (filed P.T.A.B. Jul. 28, 2017). RPX set forth two grounds of invalidity, each relying on an article by Allan et al., “An [sic] Yield Improvement Technique for IC

Layout Using Local Design Rules,” *IEEE Transactions On Computer-Aided Design*, Vol. 11, No. 11, November 1992 (“Allan”) as a primary prior art reference. *Ibid.*

On March 8, 2018 the Board instituted trial on both grounds of invalidity alleged in the petition. Decision Granting Institution at 31, *RPX Corp. et al. v. IYM Techs. LLC*, No. IPR2017-01888 (filed P.T.A.B. Mar. 8, 2018).

In its Response to the Allan Petition, IYM provided documentary and expert evidence to rebut all instituted grounds. IYM argued that Allan does not disclose the claimed step of “enforcing said new local constraint distances” under any reasonable construction of that term. In particular, IYM proposed that the broadest reasonable construction of the claimed “enforcing” limitation in view of the intrinsic record is “finding solutions (i.e., adjustments to the layout) that remove violations of the new local constraint distances.” Patent Owner’s Resp. at 17, *RPX Corp. et al. v. IYM Techs. LLC*, No. IPR2017-01888 (filed P.T.A.B. Jun. 11, 2018). IYM further demonstrated that under the proper construction, Allan cannot render the challenged claims unpatentable, because Allan’s optimization technique makes no attempt to remove violations of what RPX alleged in Allan represents “new local constraint distances.” *Id.* at 28–35.

After trial, the Board issued a final written decision, finding that RPX had shown by a preponderance of the evidence that claims 1–9, 11, 13, and 14 of the ’012 Patent are unpatentable, and that RPX had not shown by a preponderance of the evidence that claim 10 of the ’012 Patent is unpatentable. Final Written Decision at 2, *RPX Corp. et al. v. IYM Techs. LLC*, No. IPR2017-01888 (filed P.T.A.B. Mar. 6, 2019).

III. APPEAL TO THE FEDERAL CIRCUIT

IYM timely filed appeals in both *IYM* 1761 and *IYM* 1762. In *IYM* 1761, IYM argued on appeal that there was no substantial evidence for the Board’s findings that Côté teaches limitations [D] “computing local process modifications to change said initial constraints using said descriptions of manufacturing process” and [E] “constructing new local constraint distances by combining said local process modifications with constraint distances in said system of initial constraints.” Brief for Appellant in No. 19-1761 (CAFC) at 28–43. IYM further argued that the Board’s conclusion that claim 14 is obvious over Côté was erroneous for the additional reason that the Board’s obviousness finding was based on no record evidence other than the specification of the ’012 Patent itself. *Id.* at 45–53.

In *IYM* 1762, IYM argued on appeal that the Board erred in construing the claimed “enforcing” limitation in a manner that improperly reads-out of the claims any concept of compelling the positions of the layout objects to comply with the new local constraint distances or, in other words, removing violations of the new local constraint distances. Brief for Appellant in No. 19-1762 (CAFC) at 24–37. IYM further argued that under any reasonable construction of the enforcing limitation, the Allan prior art reference does not “enforce” new local constraint distances, and that even under the Board’s erroneous construction, there was not substantial evidence that Allan meets such construction. *Id.* at 37–44.

The Federal Circuit held oral argument on both appeals on March 4, 2020. On March 9, 2020, the Federal Circuit issued a summary order in *IYM* 1761,

affirming the Board's final written decision without opinion. (App. A). On March 13, 2020, the Federal Circuit issued an order in *IYM* 1762 dismissing that appeal. (App. B). The Federal Circuit did not decide the merits of IYM's appeal, but rather stated that the appeal in *IYM* 1762 was moot in view of its decision in *IYM* 1761 affirming the Board's finding that claims 1–14 of the '012 Patent are unpatentable. *Ibid.*

IV. THE *ARTHREX* DECISION

On October 31, 2019, after briefing had closed in both *IYM* 1761 and *IYM* 1762, the Federal Circuit issued its decision in *Arthrex*. In *Arthrex*, the Federal Circuit held that the appointment of the PTAB's administrative patent judges ("APJs") violated the Appointments Clause, and that any PTAB decisions prior to *Arthrex* were invalid. *See Arthrex*, 941 F.3d at 1335. The *Arthrex* panel attempted to prospectively remedy the constitutional violation by severing the removal protections for APJs. *Id.* at 1337. However, because the panel of APJs in that case had been unconstitutionally appointed, the Federal Circuit remanded the case for a new hearing before a different panel of APJs. *Id.* at 1340.

The *Arthrex* opinion limited itself to "cases where final written decisions were issued and where litigants present an Appointments Clause challenge on appeal." 941 F.3d at 1340. And, in a decision issued the day after *Arthrex*, a panel of the Federal Circuit went further and held that a party who did not raise an Appointments Clause challenge in its opening brief had forfeited its *Arthrex* argument. *Customedia Techs., LLC v. Dish Network Corp.*, 941 F.3d 1173 (Fed. Cir. 2019). Because the Federal Circuit had not yet issued its *Arthrex* decision declaring APJs unconstitutionally appointed

until after briefing was completed in this appeal, IYM did not raise the issue in its opening brief.

In a timely filed petition for panel rehearing and rehearing en banc in *IYM* 1761, IYM argued that *Arthrex* represented an intervening change of law and that IYM's patent rights were abrogated by an unconstitutionally appointed panel of APJs. Appellant's Combined Petition for Panel Rehearing and Rehearing En Banc in No. 19-1761 (CAFC) at 7–11. IYM further argued that because APJs operate as “principal officers” rather than the Director's subordinates, the Director's delegation of his authority to institute inter partes review to APJs violates 35 U.S.C. § 314. *Id.* at 11–12. IYM also requested rehearing for the panel to reconsider whether it can affirm (without opinion) the Board's findings concerning limitation [D], when it is undisputed that substantial evidence does not support the Board's finding that Côté teaches “changes to initial design rules 505.” *Id.* at 4–7.

In a timely filed petition for panel rehearing in *IYM* 1762, IYM explained that based on its concurrently filed petition for panel rehearing and rehearing en banc in *IYM* 1761, the appeal in *IYM* 1762 was not moot. Appellant's Petition for Panel Rehearing in No. 17-1762 (CAFC) at 1. IYM therefore requested panel rehearing for the panel to consider the merits of the *IYM* 1762 appeal. *Ibid.*

On May 8, 2020, the court of appeals denied rehearing in both *IYM* 1761 and *IYM* 1762.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE *ARTHREX* DECISION APPLIES TO ALL APPEALS THAT WERE PENDING WHEN IT ISSUED

While IYM's appeals were pending, the Federal Circuit issued its decision in *Arthrex*, holding that the appointment of the PTAB's APJs violated the Appointments Clause, and that any PTAB decisions prior to *Arthrex*—like the underlying decision here—were invalid. *See Arthrex*, 941 F.3d at 1335. The Federal Circuit also determined that, where a party raised an Appointments Clause challenge in its opening brief on appeal, the remedy is to vacate and remand the cases to be reconsidered by a new panel of APJs. Here, in a timely-filed petition for rehearing, IYM raised an Appointments Clause challenge in view of *Arthrex*. The court, however, denied IYM's petition, and did not apply *Arthrex* to this case. Because *Arthrex* represented a significant change in the law concerning the constitutionality of the appointment of APJs, the Federal Circuit should have applied its holding to this case. Its failure to do so warrants review.

A. As the Federal Circuit Found in *Arthrex*, Administrative Patent Judges Were Appointed in Violation of the Appointments Clause of the Constitution

The Appointments Clause requires that principal officers be nominated by the President and confirmed by the Senate. U.S. Const. art. II, § 2. Inferior officers, however, may be appointed by a head of department. *Ibid.* APJs are appointed by the secretary of Commerce, a head of department. 35 U.S.C. § 6(a).

Thus, appointments of APJs in this manner are permissible only if they are inferior officers.

In *Arthrex*, the Federal Circuit correctly determined that the PTAB's APJs are not inferior officers. This Court has explained that "inferior officers are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate," i.e., principal officers. *Edmond v. United States*, 520 U.S. 651, 663 (1997). There is no such direction or supervision of APJs. The director of the United States Patent and Trademark Office does not review final written decision of APJs. Rather, final written decisions are appealable only to Article III courts. *Arthrex*, 941 F.3d at 1329–31. After a patent holder has exhausted their appeals, the statute provides that "the Director shall issue and publish a certificate canceling any claim of the patent finally determined to be unpatentable." 35 U.S.C. § 318(b). Nor does the statute permit APJs to be removed from their position without cause by principal officers. *Arthrex*, 941 F.3d at 1332–34.

Accordingly, as the Federal Circuit correctly determined, because the APJs are principal officers that were not appointed by the President and confirmed by the Senate, "the current structure of the Board violates the Appointments Clause." *Id.* at 1335.

To prospectively remedy the Appointments Clause defect, the Federal Circuit severed the portion of the Patent Act protecting APJs from removal without cause. *Id.* at 1337. However, because the APJs were not constitutionally appointed when they issued the final written decision below in *Arthrex*, the Federal Circuit vacated the PTAB's decision and ordered that a new

panel of constitutionally appointed APJs consider the matter on remand. *Id.* at 1340.

Here too, unconstitutionally appointed APJs adjudicated IYM's patent rights, and the remedy should be the same as in *Arthrex*—the Board's final written decision should be vacated, and the case remanded for a constitutionally valid proceeding. The Board issued the decision which IYM is appealing on March 6, 2019, before the Federal Circuit's decision in *Arthrex* sought to remedy the prospective constitutional defects in the appointment of the APJs. Thus, like in *Arthrex*, the final written decision on appeal here was issued by APJs who were unconstitutionally appointed.

B. Whether *Arthrex* Applies to Pending Appeals is an Important and Recurring Issue

To prospectively remedy the Appointments Clause defect, the Federal Circuit in *Arthrex* severed the portion of the Patent Act protecting APJs from removal without cause. *Arthrex*, 941 F.3d at 1337. However, because the APJs were not constitutionally appointed when they issued the final written decision at issue in *Arthrex*, the Federal Circuit vacated the PTAB's decision and ordered that a new panel of constitutionally appointed APJs consider the matter on remand. *Id.* at 1340. Here too, unconstitutionally appointed APJs adjudicated IYM's patent rights, and the remedy should have been the same as in *Arthrex*—the PTAB's final written decisions should have been vacated, and the case remanded for a constitutionally valid proceeding.

Arthrex, however, unnecessarily limited its stated remedy to “cases where final written decisions were issued and where litigants present an Appointments

Clause challenge on appeal.” *Arthrex*, 941 F.3d at 1340. In a decision issued the day after *Arthrex*, a panel of the Federal Circuit went further, and held that a party who did not raise an Appointments Clause challenge in its *opening* brief had forfeited its *Arthrex* argument. *Customedia Techs.*, 941 F.3d at 1173. Since then, the Federal Circuit has applied its forfeiture rule numerous times to deny the *Arthrex* remedy to parties whose patents were revoked by unconstitutionally-appointed APJs before *Arthrex* purported to remedy the violation of the Appointments Clause. See, e.g., *Sanofi-Aventis Deutschland GmbH v. Mylan Pharms. Inc.*, 791 F. App’x 916, 928 n.4 (Fed. Cir. 2019); *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 18-1584, Dkt. 72 (Fed. Cir. Nov. 1, 2019) (raising change in law regarding Appointments Clause); *id.*, Dkt. 75 (Fed. Cir. Nov. 8, 2019) (denying reconsideration en banc); *Duke University v. BioMarin Pharm. Inc.*, No. 18-1696, Dkt. 54 (Fed. Cir. Dec. 11, 2019) (raising change in law regarding Appointments Clause); *id.*, Dkt. 63 (Fed. Cir. Feb. 3, 2020) (denying reconsideration en banc).

This is a recurring issue, as the Appointments Clause defect impacts every appeal from a final written decision that was still pending when the Federal Circuit decided *Arthrex*. Several recently filed petitions to this Court raise the same question of whether courts of appeal may refuse to consider arguments based on the change in law reflected in *Arthrex*. See Pet. for Writ of Cert. in *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 19-1204 (Apr. 6, 2020); Pet. for Writ of Cert. in *Duke University v. Biomarin Pharm. Inc.*, No. 19-1475 (Jul. 2, 2020); Pet. for Writ of Cert. in *Customedia Techs., LLC v. Dish Network Corp., et al.*, No. 20-135 (Aug. 1, 2020); Pet. for Writ of Cert. in *Sanofi-Aventis Deutschland*

GmbH v. Mylan Pharms. Inc., No 19-1451 (Jun. 26, 2020).

This issue is also one of great constitutional importance. As the *Arthrex* court itself recognized, the Appointments Clause implicates “important structural interests and separation of powers concerns” and is “a fundamental constitutional safeguard’ and an ‘exceptionally important’ consideration in the context of inter partes review proceedings.” *Arthrex*, 941 F.3d at 1326–27 (citation omitted).

C. The Federal Circuit’s Application of Forfeiture is Wrong

IYM did not waive its right to the remedy provided under *Arthrex*. Because the Federal Circuit had not yet issued its *Arthrex* decision declaring APJs unconstitutionally appointed until after briefing was completed in IYM’s appeals, IYM did not raise the Appointments Clause issue in its opening briefs. Despite IYM raising the issue in its timely-filed petition for rehearing, the Federal Circuit refused to grant IYM the remedy set forth in *Arthrex*.

This Court has long recognized an exception to the rule of forfeiture of arguments not raised in an opening brief. Forfeiture does not apply in cases where “there have been judicial interpretations of existing law after decision below and pending appeal—interpretations which if applied might have materially altered the result.” *Hormel v. Helvering*, 312 U.S. 552, 558–59 (1941); *see also Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 143 (1967) (“[T]he mere failure to interpose [a constitutional] defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground.”). Thus, when the

law changes while a case is pending on appeal, the “rigid and undeviating judicially declared practice” to enforce forfeiture of unpreserved issues must yield. *Hormel*, 312 U.S. at 557. Under such circumstances, the “failure to raise the claim in an opening brief reflects not a lack of diligence, but merely a want of clairvoyance.” *Joseph v. United States*, 574 U.S. 1038, 1039 (2014) (Kagan, J., dissenting from denial of certiorari).

Arthrex represented a significant change in the law regarding the Appointments Clause that occurred while IYM’s appeal was pending. Before the *Arthrex* decision, the Federal Circuit had at least twice summarily rejected the same Appointments Clause challenge raised in *Arthrex*. See *Trading Techs. Int’l, Inc. v. IBG LLC*, 771 F. App’x 493 (Fed. Cir. 2019); *Bedgear, LLC v. Fredman Bros. Furniture Co., Inc.*, 779 F. App’x 748 (Fed. Cir. 2019). This Court also denied certiorari in a case presenting the same Appointments Clause question prior to *Arthrex*. *Smartflash LLC v. Samsung Elecs. Am., Inc.*, 139 S. Ct. 276 (2018); Petition for Writ of Certiorari in *Smartflash LLC*, No. 18-189, 2018 WL 3913634, at *18 (2018).

This Court has acknowledged that, regardless of when raised during the course of a case, courts should consider structural constitutional challenges, like those posed by the Appointments Clause, as they implicate important separation of powers concerns that excuse waiver. *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 879 (1991) (finding that the Court may exercise discretion to “hear petitioners’ challenge to the constitutional authority” of tax judges over claims of waiver); cf. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 850–51 (1986) (“To the extent that this structural principle is implicated in a given case, the

parties cannot by consent cure the constitutional difficulty . . .”). Indeed, “the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers” overcomes the usual rule of entertaining only preserved issues on appeal. *Freytag*, 501 U.S. at 879 (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962)). The concern over whether officers exercising executive power are constitutionally appointed is so important that in *Freytag*, for example, the Court disregarded waiver arguments and allowed an Appointments Clause challenge. This Court has even allowed an Appointments Clause challenge where the party first raised the issue in “a supplemental brief upon a second request for review.” *Glidden*, 370 U.S. at 536 (citing *Lamar v. United States*, 241 U.S. 103, 117 (1916)) (finding that an Appointments Clause challenge may be raised for the first time before the Supreme Court). That IYM did not raise an Appointments Clause challenge in its opening appeal brief does not change the fact that its patent rights were revoked in violation of core constitutional protections.

II. THE COURT SHOULD EITHER GRANT THE PETITION OR HOLD THE CASE PENDING OTHER PETITIONS RAISING THE FORFEITURE ISSUE OR *ARTHREX* ITSELF

The Court should grant review in this case to address the Federal Circuit’s erroneous application of forfeiture. Alternatively, the Court should hold this case while it considers other petitions raising similar forfeiture issues, see *supra*, or the petition in *Arthrex* (No. 19-1458) itself. The *Arthrex* petition raises the underlying question of whether the Federal Circuit correctly held that APJs are unconstitutionally-appointed principal officers, as well as whether the

Federal Circuit’s statutory adjustment—severing of removal protections—successfully remedied the structural flaw. If this Court grants certiorari in *Arthrex* (No. 19-1458), its decision may have significant implications for the question presented here, including as to the proper forfeiture analysis in other Appointments Clause cases.

III. THE COURT SHOULD VACATE THE FEDERAL CIRCUIT’S DISMISSAL OF THE *IYM*1762 APPEAL ON MOOTNESS GROUNDS

In *IYM* 1761, the court of appeals affirmed the Board’s decision finding claims 1–14 of the ’012 Patent invalid. Because the appeal in *IYM* 1762 involved only a subset of the claims of the ’012 Patent found invalid in *IYM* 1761, the court of appeals dismissed the *IYM* 1762 appeal “as moot in light of [its] affirmance in *IYM Techs. LLC v. RPX Corp.*, No. 19-1761 (Fed. Cir. March 9, 2020), which invalidated all of the claims at issue in this appeal.” (App. B). The court of appeals declined to address the *IYM* 1762 appeal on the merits.

Accordingly, if this Court determines that *IYM*’s appeal in *IYM* 1761 was wrongly decided, then *IYM*’s appeal in *IYM* 1762 is not moot. In that case, *IYM* respectfully requests that this Court remand *IYM*’s appeal in *IYM* 1762 to the court of appeals for further appropriate consideration.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

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