

No. 20-679

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IN THE  
**Supreme Court of the United States**

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MICRON TECHNOLOGY, INC.,  
*Petitioner,*

*v.*

NORTH STAR INNOVATIONS, INC.,  
*Respondent.*

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

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**REPLY BRIEF FOR PETITIONER**

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**REPLY**

This petition involves three cases that were remanded to the Patent Trial and Appeal Board for rehearing after the Federal Circuit held the Board's judges unconstitutionally appointed. This Court is reviewing that constitutional holding in *United States v. Arthrex, Inc.*, No. 19-1434. Therefore, Micron asked this Court to hold this petition and resolve it based on the outcome of *Arthrex*. Despite asking for the petition to be denied, Respondent North Star acknowledges that these cases will be governed by *Arthrex* and provides no basis for the Federal Circuit's underlying holdings to stand if the constitutional ruling is reversed. For that reason alone, the Court should hold the petition. Furthermore, this petition presents an important forfeiture question that the Court should address even if it upholds the constitutional ruling in *Arthrex*, and North Star fails to justify its forfeiture.

1. North Star effectively concedes that this petition should be held pending the Court's resolution of *Arthrex*, No. 19-1434. As Micron explained, the court of appeals remanded these cases to the Patent Trial and Appeal Board based solely on its ruling in the *Arthrex* case. Pet. 9-10. If this Court overturns the Federal Circuit's ruling regarding the constitutionality of the Board's judges, then these rulings should be vacated and remanded so that North Star's appeals may proceed on the merits. Pet. 10. North Star does not disagree. On the contrary, North Star confirms that the primary question presented by this petition "is already under review by this Court" in the *Arthrex* case. BIO 7. North Star offers no basis to uphold the Federal Circuit's rulings in these cases if the

constitutional holding of *Arthrex* is reversed. And it certainly offers no reason why this Court should refuse Micron's requested relief—to hold the present petition and dispose of it as appropriate based on the outcome of *Arthrex*. The Court should do just that.

2. North Star's brief in opposition is directed entirely to Micron's alternative request that, if the Court affirms the Federal Circuit's constitutional holding in *Arthrex*, it should grant certiorari in these cases to address whether a party may pursue an Appointments Clause challenge on appeal when it has forfeited that challenge before the agency. Pet. 10-13. North Star fails to show why this Court should excuse the type of forfeiture at issue here.

North Star principally relies on the fact that this Court denied certiorari on the forfeiture question presented in *Arthrex*. BIO 7-9. But the critical difference between this case and *Arthrex* is that these proceedings were still pending before the Board when the Federal Circuit issued its constitutional ruling and its statutory remedy. Pet. 11-12. North Star could have asked the Board for rehearing before a new, now-constitutional panel of judges. It chose not to do so.

In an attempt to excuse that forfeiture, North Star suggests that the Board (or the Director) would have had discretion to deny such a request, such that North Star would not have been assured a remedy. BIO 8-9. North Star neglects to address the Director's statement in this very case that rehearing was an available remedy. C.A. PTO Opp'n at 5. But even if North Star had no guarantee of a remedy, it was still incumbent upon North Star to ask. *See In re DBC*, 545

F.3d 1373, 1379 (Fed. Cir. 2008) (“Of course, the Board may not have corrected the problem, or even acknowledged that the problem existed. But in that case, DBC would have preserved its right to appeal the issue.”).

North Star similarly fails to justify its selective assertion of the Constitution, challenging the appointment of the judges in the proceedings it lost but not the appointment of *the very same judges* in the proceeding it partially won. Pet. 12. North Star notes only that it was not the party that initiated these inter partes review proceedings before the Board. BIO 10-11. That is no answer. North Star’s acquiescence in the constitutionality of the tribunal is an independent basis for forfeiture or, at the very least, a reason not to excuse its failure to raise a constitutional objection before the agency.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the Court should hold the petition and dispose of it as appropriate in light of any decision in *Arthrex*, No. 19-1434.

Respectfully submitted,

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