

No. 20-728

IN THE
Supreme Court of the United States

ADIDAS AG,

Petitioner,

v.

NIKE, INC.,

Respondent.

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

BRIEF IN OPPOSITION

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RULE 29.6 DISCLOSURE STATEMENT

Respondent NIKE, Inc. has no parent or publicly held company owning 10% or more of its stock.

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INTRODUCTION

adidas's petition for certiorari should be denied because it forfeited any Appointments Clause challenge at every stage of the proceedings below. This Court already has denied multiple cert petitions presenting less extreme forfeitures of the *Arthrex* issue. Here, the forfeiture is even more thorough than it was in those cases. Despite being the petitioner in the *inter partes* review (IPR) proceedings and the appellant in two Federal Circuit appeals, adidas never breathed a word of an Appointments Clause challenge until its cert petition to this Court. adidas cannot belatedly piggy-back on *Arthrex* simply because certiorari has been granted in that case.

Though it had every opportunity to raise an Appointments Clause challenge, adidas decided to take its chances at the Federal Circuit solely on the merits. adidas lost that gamble. It is far too late to choose a different strategy now. It does not matter how *Arthrex* turns out: adidas already has forfeited any opportunity for relief. It is not even necessary to hold the petition until a decision in *Arthrex*. The petition for certiorari should be denied.

REASONS WHY THE PETITION SHOULD BE DENIED

A. adidas Forfeited Any Appointments Clause Challenge

“No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, ‘may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.’” *United States v. Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus v. United States*, 321 U.S.

414, 444 (1944)). This principle requires the denial of adidas's petition regardless of *Arthrex's* outcome. adidas forfeited any Appointments Clause challenge at every conceivable stage of the proceedings below.

Recognizing its predicament, adidas conveniently omits from its petition many important details of the timeline of proceedings. This timeline underscores the completeness of adidas's forfeiture of any Appointments Clause challenge:

- October 19, 2017 – Patent Trial and Appeal Board (PTAB) issues final written decisions in the IPRs that adidas filed in 2016
- November 13, 2017 – adidas files first appeal
- February 26, 2018 – adidas files opening brief in first appeal
- May 1, 2018 – adidas files reply brief in first appeal
- May 24, 2018 – adidas files motion to remand first appeal to PTAB based on this Court's decision in *SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348 (2018)
- July 2, 2018 – Federal Circuit grants adidas's motion and remands to PTAB

At no point in these proceedings did adidas make an Appointments Clause challenge in either the PTAB or the Federal Circuit. The same is true of the post-remand proceedings:

- February 19, 2019 – PTAB issues post-remand final written decisions in IPRs
- April 19, 2019 – adidas files second appeal

- August 30, 2019 – adidas files opening brief in second appeal
- October 31, 2019 – Federal Circuit decides *Arthrex*
- December 23, 2019 – adidas files reply brief in second appeal (no mention of *Arthrex* or Appointments Clause)
- May 15, 2020 – adidas files notice of supplemental authority in second appeal (no mention of *Arthrex* or Appointments Clause)
- June 25, 2020 – Federal Circuit issues judgment and opinion in second appeal
- July 27, 2020 – Time to file rehearing petition expires (no rehearing petition is filed)

adidas made no mention of *Arthrex* or the Appointments Clause at all, before either the PTAB or the Federal Circuit, at any stage of these proceedings. Nor did adidas ever file the required notice under Federal Rule of Appellate Procedure 44 indicating that it planned to challenge the constitutionality of a federal statute on appeal. Whether by design, neglect, or some combination of the two, adidas’s utter failure to make any Appointments Clause challenge was an outright forfeiture of the issue on which it now seeks this Court’s review. See *Olano*, 507 U.S. at 731; *Yakus*, 321 U.S. at 444; see also *Stern v. Marshall*, 564 U.S. 462, 482 (2011) (“If Pierce believed that the Bankruptcy Court lacked the authority to decide his claim for defamation, then he should have said so—and said so promptly.”). This forfeiture is fatal to adidas’s cert petition. No “hold” for *Arthrex* is needed.

adidas's failure to raise the Appointments Clause issue at the Federal Circuit in its second appeal is especially glaring. By the time adidas filed its opening brief in the second appeal, this Court's decision in *Lucia v. SEC*, 138 S. Ct. 2044 (June 21, 2018), was more than a year old. In *Lucia*, this Court held that administrative law judges (ALJs) of the Securities and Exchange Commission qualify as inferior "Officers of the United States" under the Appointments Clause and hence must be appointed by the President or a delegated Officer of the United States. *Id.* at 2053-55. *Lucia* itself relied on a long line of this Court's Appointment Clause precedents, especially *Freytag v. Commissioner*, 501 U.S. 868 (1991).

Starting even before *Lucia*, IPR litigants had been challenging the constitutional validity of the appointments of the PTAB's ALJs under the Appointments Clause. *E.g.*, *Coalition for Affordable Drugs VIII, LLC v. The Trustees of the Univ. of Penn.*, IPR2015-01836, IPR2015-01835; *Mylan Pharms. Inc. v. Yeda Res. & Dev. Co. Ltd.*, PGR2016-00010; *Hulu, LLC v. Sound View Innovations, LLC*, IPR2018-00017, IPR2018-00366; *St. Jude Med., LLC v. Snyders Heart Valve, LLC*, IPR2018-00105, IPR2018-00106, IPR2018-00107, IPR2018-00109; *ZTE (USA) Inc. v. Fundamental Innovation Sys. Int'l LLC*, IPR2018-00425; *Investors Exchange LLC v. NASDAQ, Inc.*, CBM2018-00041, CBM2018-00042; *Unified Patents Inc. v. Bradium Techs. LLC*, IPR2018-00952; *Apple, Inc. v. Uniloc Luxembourg, S.A.*, IPR2018-00424, IPR2018-00282; *Intel Corp. v. VLSI Tech. LLC*, IPR2018-01105, IPR2018-01035, IPR2018-01144, IPR2018-01033, IPR2018-01040, IPR2018-01312, IPR2018-01107; *Samsung Elecs. Am., Inc. v. Uniloc Luxembourg, S.A.*, IPR2018-01653; *Quest USA Corp. v. PopSockets LLC*, IPR2018-00497, IPR2018-01294; *General Elec. Co. v. Vestas Wind Sys.*

A/S, IPR2018-00928, IPR2018-00895, IPR2018-00896; *Unified Patents, Inc. v. Uniloc 2017 LLC*, IPR2019-00453; *Starbucks Corp. et al. v. Fall Line Patents, LLC*, IPR2019-00610; *Unified Patents Inc. v. MOAEC Techs., LLC*, IPR2018-01758; *Flywheel Sports, Inc. v. Peloton Interactive, Inc.*, IPR2019-00564, IPR2019-00295, IPR2019-00294. These challenges extended at least as far back as 2016—the same year adidas filed the IPR petitions at issue here.

The Appointments Clause challenges to the PTAB’s ALJs accelerated after *Lucia*, and many reached the Federal Circuit. For example, the appellant in *Polaris Innovations Ltd. v. Kingston Technology Co.* (whose cert petition remains pending) raised the Appointments Clause challenge in the PTAB before *Lucia*, and again in its opening Federal Circuit appeal brief less than three weeks after *Lucia*: “The cancellation of Polaris’s claims violated the Appointments Clause . . . as a final agency decision requiring the Board to act as ‘principal Officers’ without having been appointed by the President and confirmed by the Senate.” Opening Brief of Appellant at 1-2 (Dkt. 22), No. 2018-1768 (Fed. Cir. July 10, 2018); *id.* at 52-60. Arthrex itself raised the issue in its opening appeal brief in the Federal Circuit in October 2018. Opening Brief of Appellant at 2, 5-6, 31, 59-66 (Dkt. 18), No. 2018-2140 (Fed. Cir. Oct. 19, 2018). Other appellants raised the issue in their Federal Circuit opening appeal briefs as well. *E.g.*, *Bedgear, LLC v. Fredman Bros. Furniture Co.*, 779 F. App’x 748 (Fed. Cir. 2019), reh’g granted and judgment vacated, 803 F. App’x 407 (Fed. Cir. 2020); Opening Brief of Appellant at 63-64 (Dkt. 18), No. 2018-2170 (Fed. Cir. Nov. 13, 2018); see also General Order in Cases Remanded Under *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), Patent Trial and Appeal Board (May 1, 2020)

(noting that Federal Circuit had already vacated and remanded more than 100 PTAB decisions under *Arthrex*).

The Federal Circuit had not yet decided *Arthrex* when appellants like Polaris, Arthrex, and Bedgear raised the Appointments Clause issue in their opening briefs. adidas could have raised the issue too. But it did not. As noted in the timeline above, adidas filed its opening brief in the second Federal Circuit appeal on August 30, 2019. By this time, numerous appellants already had raised the issue in their opening briefs, and the question whether the Appointments Clause might affect the constitutionality of PTAB decisions had been the subject of extensive public commentary in the wake of *Lucia*. *E.g.*, R. Davis, Are PTAB Appointments Unconstitutional? A Closer Look, *Law360* (Sept. 5, 2018); D. Crouch, Appointments and Illegal Adjudication: A Second Patent Judge Appointments Crisis, *Patently-O* (Jan. 29, 2018); G. Lawson, Appointments and Illegal Adjudication: The America Invents Act Through a Constitutional Lens, *26 Geo. Mason U. L. Rev.* 26 (Jan. 2018). adidas had no excuse for failing to raise the issue then, and it has no justification for attempting to raise it for the first time now.

This Court, in fact, already has denied multiple cert petitions where the petitioner failed to raise the Appointments Clause issue in its opening appeal brief in the Federal Circuit. In none of these cases did the cert petitioner exhibit the dereliction that adidas has shown here. Unlike adidas, each of them at least had lodged an Appointments Clause challenge at *some* point during the Federal Circuit proceedings, yet this Court still denied cert.

For example, in *Sanofi-Aventis Deutschland GMBH v. Mylan Pharmaceuticals Inc.* (No. 19-1451), the cert

petitioner first raised the Appointments Clause issue on November 5, 2019—less than a week after *Arthrex* and two months after the Federal Circuit oral argument—in a Federal Rule of Appellate Procedure 28(j) letter asking to file a supplemental brief on the issue. The *Sanofi-Aventis* cert petition was distributed for the same September 29, 2020 Court conference for which the *Arthrex* petitions were initially distributed. This Court nonetheless denied cert on October 5, 2020.

Similarly, in *IYM Technologies LLC v. RPX Corporation and Advanced Micro Devices, Inc.* (No. 20-424), the cert petitioner first raised the Appointments Clause issue in timely-filed rehearing petitions at the Federal Circuit—after the Federal Circuit had decided *Arthrex*, which in turn had come after briefing in IYM’s appeals had closed. The *IYM* cert petition was distributed for the November 13, 2020 Court conference, a month *after* this Court had granted certiorari in *Arthrex*. This Court denied cert on November 16, 2020.

The Court likewise has denied petitions for certiorari in multiple other cases where the appellant had raised the Appointments Clause issue after filing its opening brief in the Federal Circuit but before arriving on this Court’s doorstep. *E.g.*, *Essity Hygiene & Health AB, et al. v. Cascades Canada ULC, et al.*, No. 20-131, cert. denied Oct. 13, 2020 (cert petitioner first raised Appointments Clause issue in Federal Circuit motion to remand on November 13, 2019, about two weeks after *Arthrex* decision and before response and reply briefs had been filed in appeal); *Customedia Techs., LLC v. Dish Network Corp., et al.*, No. 20-135, cert. denied Oct. 13, 2020 (cert petitioner first raised Appointments Clause issue in Federal Circuit after briefing had closed by filing Rule 28(j) supplemental

authority letter, motion to remand, and motion for leave to file a supplemental brief one day after the Federal Circuit had decided *Arthrex*). The Court considered the *Essity* and *Customedia* petitions at the same conference (October 9, 2020) that produced the cert grant in *Arthrex*. Yet those petitions were not held; they were instead denied outright. The same outcome is warranted here.

Finally, the cases cited by adidas do not support its “anything goes” approach to forfeiture here. adidas quotes *Curtis Publishing Co. v. Butts* for the proposition that “the 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.” 388 U.S. 130, 143 (1967) (quoted in Pet. 10). But adidas omits the very next sentence that this Court wrote in that case: “Of course, it is equally clear that even constitutional objections may be waived by a failure to raise them at a proper time, [citation omitted], but an effective waiver must, as was said in [citation omitted], be one of a ‘known right or privilege.’” *Id.* Further, the Court acknowledged that the new constitutional defense—*New York Times Co. v. Sullivan*, 376 U. S. 254 (1964)—had reversed “strong precedent indicating that civil libel actions were immune from general constitutional scrutiny,” and the petitioner had “immediately brought [the new decision] to the attention of the trial court by a motion for new trial.” *Curtis*, 388 U.S. at 138, 143-44. adidas’s failure to raise this foreseeable issue at all below, even after *Arthrex* was decided, stands in stark contrast.

Freytag also does not help adidas’s cause. See *Freytag v. Commissioner*, 501 U.S. 868 (1991) (cited in Pet. 10). The Court described *Freytag* as “one of those

rare cases in which we should exercise our discretion to hear petitioners' challenge" notwithstanding a potential waiver. *Id.* at 879. adidas's petition, by contrast, is a run-of-the-mill case of forfeiture of an argument. adidas in fact failed to do *anything* below, even after the Federal Circuit had decided *Arthrex* in the midst of briefing in adidas's appeal. The petitioner in *Freytag* at least had raised the Appointments Clause challenge before the Fifth Circuit. *Id.* at 893 (Scalia, J., concurring in part and concurring in the judgment). Further, adidas's petition does not implicate the "strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers" that was invoked in *Freytag*, 501 U.S. at 879, because this Court already has decided to hear a case (*Arthrex* itself) that presents the issue. So there is no risk that the issue may evade review if adidas's petition is denied. And as described above, the Court has denied tag-along petitions for certiorari involving less significant delays in raising the *Arthrex* issue than adidas has perpetrated here.

This Court's grant of certiorari in *Arthrex* does not excuse adidas's forfeiture either. As adidas acknowledges (Pet. 10-11), *Arthrex* raised its Appointments Clause challenge in the Federal Circuit despite not having raised it in the PTAB. Specifically, *Arthrex* raised the issue in its opening brief along with a Rule 44 notice of its constitutional challenge. Dkt. 15 & 18, No. 2018-2140 (Fed. Cir. Oct. 19, 2018). adidas, by contrast, did nothing. adidas instead sat on its hands despite having access to the arguments that *Arthrex* and other appellants already had briefed and, later, to the *Arthrex* decision itself. The two situations are not remotely comparable.

Nor is adidas's citation to the D.C. Circuit's panel opinion in *PHH Corp. v. Consumer Financial Protection Bureau* of any avail. 839 F.3d 1 (D.C. Cir. 2016), rev'd en banc, 881 F.3d 75 (D.C. Cir. 2018) (cited in Pet. 10). Unlike adidas, the challenger in *PHH* raised the issue before the Court of Appeals, and the panel's decision did not involve any of this Court's considerations governing the disposition of a petition for certiorari.

B. adidas's Status as the IPR Petitioner Is an Additional and Independent Ground for Denying Review

The forfeiture described above justifies denial of adidas's cert petition all by itself. Yet adidas's status as the IPR petitioner in the PTAB proceedings is a further independent reason to deny the cert petition. In *Ciena Corp. v. Oyster Optics, LLC*, the Federal Circuit held that an IPR petitioner had forfeited its Appointments Clause challenge because, by filing its IPR petition, it "affirmatively sought a ruling from the [PTAB] members, regardless of how they were appointed." 958 F.3d 1157, 1159 (Fed. Cir. 2020) (converting January 28, 2020 non-precedential order into precedential order on May 5, 2020—all before the Federal Circuit decided adidas's second appeal). The Federal Circuit also held, in the alternative, that the IPR petitioner's *consent* to the PTAB's jurisdiction "would most certainly doom" its challenge even if the *forfeiture* were disregarded. *Id.* at 1161.

These holdings apply squarely to adidas's situation as the IPR petitioner here. But in its cert petition, adidas does not even acknowledge these additional barriers to relief, much less tee them up as questions presented. adidas's forfeiture of *any* Appointments Clause challenge below is therefore compounded by its

further waiver of these threshold issues. Even if it had not forfeited the underlying Appointments Clause challenge, adidas would need a favorable decision on these issues before it could obtain any relief from this Court. Accordingly, adidas's failure to raise the issues—not here, not below, not anywhere—is an additional independent reason why its cert petition should be denied.

CONCLUSION

It is both troubling and telling that adidas did not even inform this Court of crucial procedural facts giving rise to its forfeiture of the questions presented by its petition. adidas is like a ticketless passenger trying to board a train unnoticed by hiding in a crowd of embarking travelers. Its ploy should be sniffed out and rejected. adidas happily took its chances before the PTAB and Federal Circuit without ever raising an Appointments Clause challenge. Regardless of how *Arthrex* turns out, adidas cannot obtain relief from this Court “now that [it] is sad.” *Stern*, 564 U.S. at 482. By failing to raise and preserve below the issues it now urges, adidas has forfeited any access to review. The petition for certiorari therefore should be denied.

Respectfully submitted,

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