

No. 20-74

IN THE
Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

IMAGE PROCESSING TECHNOLOGIES LLC ET AL.,

Respondent.

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

**MICRON TECHNOLOGY, INC.'S
BRIEF IN SUPPORT OF PETITION**

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QUESTIONS PRESENTED

1. Whether, for purposes of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, administrative patent judges of the U.S. Patent and Trademark Office are principal officers who must be appointed by the President with the Senate’s advice and consent, or “inferior Officers” whose appointment Congress has permissibly vested in a department head.

2. Whether the court of appeals erred by adjudicating Appointments Clause challenges brought by litigants that had not presented such a challenge to the agency.

CORPORATE DISCLOSURE STATEMENT

Respondent Micron Technology, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

Pursuant to this Court's Rule 12.6, respondent Micron Technology, Inc., respectfully files this responsive brief in support of the petition for a writ of certiorari filed by Andrei Iancu, Under Secretary of Commerce for Intellectual Property and Director, U.S. Patent and Trademark Office, as it regards the cases in which Micron was a party in the court of appeals: *North Star Innovations, Inc. v. Micron Technology, Inc.*, Nos. 2020-1295, 2020-1296, 2020-1297, 2020-1298, and 2020-1299 (Fed. Cir.).

STATEMENT OF THE CASE

The government's petition encompasses 39 orders in which the Federal Circuit vacated and remanded decisions by the Patent Trial and Appeal Board in the wake of the court of appeals' ruling in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019). *See* Pet. 20. The Board is an administrative tribunal within the United States Patent and Trademark Office (PTO) that conducts several types of patent-related adjudicative proceedings, including, as relevant here, inter partes review proceedings under 35 U.S.C. § 311. *See* 35 U.S.C. § 6(b)(4). By statute, the Board consists of certain specified PTO officials as well as a number of administrative patent judges who are appointed by the Secretary of Commerce in consultation with the PTO Director. *See id.* § 6(a).

The court of appeals in *Arthrex* held that these administrative patent judges were appointed in violation of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2. 941 F.3d at 1327-35. The court found the

judges to be principal officers who must be appointed by the President with the advice and consent of the Senate. *Id.* In order to cure the purported constitutional defect, the court of appeals severed the provisions of 5 U.S.C. § 7513(a) as applied to the administrative patent judges, prospectively rendering them inferior officers. 941 F.3d at 1335-38. Finally, as a remedy for *Arthrex* and similarly situated patent owners whose cases had been decided by the formerly unconstitutional judges, the court of appeals vacated the decision of the Board in that case and remanded for rehearing before a new panel of now-constitutional judges. *Id.* at 1338-40.

The Federal Circuit has proceeded to apply that vacate-and-remand remedy in a number of other appeals, including many where (as in *Arthrex* itself) the patent owner had forfeited a constitutional challenge by failing to raise it before the PTO. This includes the orders that are the subject of the government's petition. *See* Pet. 23-25.

One of those orders concerns *Micron*. *See* Pet. App. 53a-55a. It affects three related appeals from a total of five decisions in which the Board, based on petitions for inter partes review filed by *Micron*, held unpatentable all challenged claims of three patents owned by North Star Innovations, Inc. North Star did not challenge the appointment of the administrative patent judges while the inter partes review proceedings were pending before the PTO—even after the *Arthrex* ruling issued, when the time for seeking reconsideration by the Board remained open. North Star belatedly raised this challenge only on appeal to the Federal Circuit. Over the objections of *Micron* and

Director Iancu, who intervened in the appeals, the Federal Circuit vacated the Board's five decisions and remanded for new hearings in light of *Arthrex*. Pet. App. 55a. Micron sought en banc rehearing, which the court of appeals denied on June 16, 2020. Pet. App. 129a-134a.

Shortly thereafter, the government filed a petition for certiorari seeking this Court's review of the *Arthrex* decision as well as a related decision by the court of appeals in *Polaris Innovations Limited v. Kingston Technology Co.*, 792 F. App'x 820 (Fed. Cir. 2020). See Pet. 2, *United States v. Arthrex, Inc.*, No. 19-1434 (filed June 25, 2020). The private parties in the *Arthrex* and *Polaris* cases have petitioned this Court for review as well. See Pet., *Smith & Nephew, Inc. v. Arthrex, Inc.*, No. 19-1452 (filed June 29, 2020); Pet., *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 19-1458 (filed June 30, 2020); Pet., *Polaris Innovations Ltd. v. Kingston Tech. Co.*, No. 19-1459 (filed June 30, 2020).

On July 23, 2020, the United States and Director Iancu filed an omnibus petition for certiorari seeking review of the order remanding North Star's appeals, as well as 38 similar Federal Circuit orders.

REASONS FOR GRANTING THE PETITION

Micron agrees with the government's bottom line: The Court should hold the present petition pending its disposition of the government's other pending petition challenging the Federal Circuit's rulings regarding the constitutional status of the PTO's administrative patent judges. See Pet. 26.

Micron further agrees with the government's reasoning for that request. As the government has explained, the Federal Circuit's *Arthrex* ruling was in error, in two critical respects. First, the court of appeals erred in holding that the PTO's administrative patent judges are principal officers for whom the Constitution requires appointment by the President with the advice and consent of the Senate. *See* 19-1434 Pet. 16-26. Second, the court of appeals erred in excusing the failure of patent owner Arthrex, Inc., to present its constitutional challenge to the Patent Trial and Appeal Board and its corresponding forfeiture of that challenge. *See* 19-1434 Pet. 28-33.

The Federal Circuit committed the same errors with respect to the North Star appeals that are the subject of the government's present petition. The court applied its erroneous constitutional holding to vacate the Board's final written decisions regarding the patentability of North Star's patent claims. Pet. App. 55a. And, just as it had for Arthrex, the court of appeals excused North Star's forfeiture of its constitutional argument, contrary to this Court's and the Federal Circuit's own precedent and in violation of sound administrative procedure. *See* 19-1434 Pet. 28-30. Indeed, North Star's forfeiture is even less excusable than Arthrex's was. At the time the Federal Circuit issued its *Arthrex* decision, North Star was well within the time for seeking rehearing of the Board's final written decisions. It could have requested the precise remedy specified by the *Arthrex* ruling—rehearing by a new panel of now-constitutional judges—but it chose not to do so. And even on appeal, North Star raised its constitutional objection only as to the unfavorable portions of the Board's rulings. In a

separate proceeding, where the exact same panel of administrative patent judges had upheld some of North Star's patent claims, North Star did not challenge the appointment of those judges but filed a cross-appeal addressing only the merits of the decision.¹

The government is correct that, if the Court grants its petition in *Arthrex* and ultimately reverses the Federal Circuit's judgment either on constitutional or forfeiture grounds, such a decision would undermine the Federal Circuit's ruling in the North Star appeals that are subject to the present petition. Pet. 26. In that event, it will be appropriate for the Court to vacate the Federal Circuit's decision and remand for further proceedings. Accordingly, Micron supports the government's request that this Court hold the government's present petition pending the disposition of the petition in *Arthrex* (No. 19-1434) and any further proceedings in this Court.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of the petition for a writ of certiorari in *United States v. Arthrex, Inc.*, No. 19-1434 (filed June 25, 2020), and any further

¹ Micron intends to file its own petition for certiorari, within the time provided by this Court's rules, addressing North Star's forfeitures in more detail.

proceedings in this Court, and then disposed of as appropriate in light of the Court's decision in that case.

Respectfully submitted,

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