

No. 20-853

IN THE
Supreme Court of the United States

ANDREW HIRSHFELD, PERFORMING THE FUNCTIONS
AND DUTIES OF THE UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
Petitioner,

v.

FALL LINE PATENTS, LLC, ET AL.,
Respondents.

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

**RESPONDENT APPLE INC.'S RESPONSE
IN SUPPORT OF THE PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

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.

CORPORATE DISCLOSURE STATEMENT

Respondent Apple Inc. has no parent corporation. To the best of Respondent's knowledge and belief, no publicly held corporation owns 10% or more of Apple Inc.'s stock.

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RULE PROVISIONS

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INTRODUCTION

Pursuant to Supreme Court Rule 12.6, Respondent Apple Inc. (“Apple”) files this brief in support of the government’s petition for a writ of certiorari.¹ As the petition explains, Apple was the appellee in two consolidated Federal Circuit appeals that were recently remanded to the Patent Trial and Appeal Board in light of the Federal Circuit’s decision in *United States v. Arthrex, Inc.*, 941 F.3d 1320 (2020). *See* Pet. II; *see also* App. 22a-23a (remand order).

This Court has granted certiorari to review *Arthrex* and, if it ultimately reverses the Federal Circuit’s decision, the ruling will almost certainly require vacatur of the remand order in Apple’s consolidated appeals. Accordingly, Apple respectfully supports the government’s request to hold the petition until this Court has issued its judgment in *United States v. Arthrex, Inc.*, No. 19-1434, and the consolidated cases (Nos. 19-1452 and 19-1458), and then dispose of this case as appropriate in light of this Court’s decision in *Arthrex*.

STATEMENT

In December 2017, Apple filed two related *inter partes* review petitions with the Patent Trial and Appeal Board (“PTAB”) challenging the patentability of several claims of U.S. Patent No. 6,622,018. Following briefing and oral argument, the PTAB declared the challenged claims unpatentable in two related, well-reasoned decisions. *Apple Inc. v. Uniloc Luxembourg*,

¹ Apple complied with Rule 12.6’s requirement of notice to all other parties on January 15, 2021, via an email that was sent to all counsel of record.

S.A., IPR2018-00394, Paper 20 (P.T.A.B. June 17, 2019); *Apple Inc. v. Uniloc Luxembourg, S.A.*, IPR2018-00395, Paper 20 (P.T.A.B. June 18, 2019).

On April 20, 2020, Uniloc 2017 LLC (“Uniloc”) appealed both of the PTAB’s unpatentability rulings to the Federal Circuit, which consolidated the two appeals. *Uniloc 2017 LLC v. Apple Inc.*, Nos. 2020-1729, 2020-1730 (Fed. Cir.). At 11:30pm on the day that Uniloc’s opening merits brief was due—and the same day on which this Court granted certiorari in *Arthrex*—Uniloc moved to remand the consolidated cases in light of the Federal Circuit’s ruling in *Arthrex* because the PTAB’s rulings had been issued by (in Uniloc’s view) an unconstitutionally appointed panel of administrative judges.

Apple and the government (which is an intervenor in the appeals) both opposed Uniloc’s eleventh-hour motion, arguing *inter alia* that the *Arthrex* issue was waived and in any event that the motion should be held until this Court issued its ruling on the merits. *See* Appellee’s Opp’n to Appellant’s Mot. to Vacate, *Uniloc 2017 LLC v. Apple Inc.*, Nos. 2020-1729, 2020-1730 (Fed. Cir. Oct. 16, 2020), ECF No. 27; Intervenor’s Opp’n to Appellant’s Mot. to Vacate, *Uniloc 2017 LLC* (Fed. Cir. Oct. 23, 2020), ECF No. 28. Over six weeks after Uniloc’s motion was filed, a Federal Circuit panel granted the motion in a short order without reasoning. App. 22a-23a; *see also* Pet. 8-9.

On December 23, 2020, the government filed the instant petition for certiorari, which asks this Court to hold this case pending disposition of *Arthrex* and then to dispose of the petition as appropriate in light of the Court’s *Arthrex* ruling. This Court docketed the petition on December 28, 2020.

REASONS FOR GRANTING THE PETITION

Apple adopts Petitioner’s argument section in full. *See* Pet. 9-10. For the reasons stated therein, the petition should be held and disposed of following the issuance of this Court’s judgment in *Arthrex*.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court’s decision in *United States v. Arthrex, Inc.*, No. 19-1434, and the consolidated cases (Nos. 19-1452 and 19-1458), and then disposed of as appropriate in light of the Court’s decision.

Respectfully submitted.

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