

No. 20-853

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**In the Supreme Court of the United States**

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ANDREI IANCU, UNDER SECRETARY OF COMMERCE FOR  
INTELLECTUAL PROPERTY AND DIRECTOR, UNITED STATES  
PATENT AND TRADEMARK OFFICE, PETITIONER

v.

FALL LINE PATENTS, LLC, *et al.*

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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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**BRIEF FOR RESPONDENT HEMOSONICS LLC**

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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.

**RULE 29.6 STATEMENT**

Pursuant to this Court's Rule 29.6, respondent states that HemoSonics LLC is a wholly-owned subsidiary of Stago International. No publicly held company owns 10% or more of Stago International's stock.

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**RESPONDENT HEMOSONICS LLC'S  
RESPONSE IN SUPPORT OF THE  
PETITION FOR WRIT OF CERTIORARI**

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Respondent HemoSonics, LLC agrees with the federal government that this case should be held pending this Court's decision in *United States v. Arthrex, Inc.*, No. 19-1434 (argued Mar. 1, 2021), and then disposed of as appropriate in light of that decision. See Pet. 11.

**OPINIONS BELOW**

The order of the court of appeals (Pet. App. 20a-21a) is unreported.

**JURISDICTION**

The order of the court of appeals was entered on October 27, 2020. Pet. App. 21a. The petition for a writ of certiorari was filed on December 23, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. HemoSonics filed a petition for *inter partes* review with the Patent Trial and Appeal Board, challenging the patentability of all claims of U.S. Patent No. 9,915,671 (the '671 patent). C.A. J.A. 16; see 35 U.S.C. 319. The '671 patent claims a cartridge for testing blood during clotting. C.A. J.A. 17. The Board instituted review, and after a full trial, it found all claims of the '671 patent unpatentable. *Id.* at 61. The Board explained that the claims of the '671 patent are obvious in light of the prior art. *Id.* at 30-60.

2. C.A. Casyso GmbH, the owner of the '671 patent, appealed to the Federal Circuit. Its principal arguments on appeal were that the Board wrongly found that a person of ordinary skill in the art would have had a motivation to combine the prior art references, and that the Board incorrectly discounted certain evidence. Casyso C.A. Br. 20-35. Casyso also argued that the administrative patent judges who heard the case had been appointed in violation of the Appointments Clause. *Id.* at 35-36. Casyso relied (*id.* at 35) on *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), cert. granted, 141 S. Ct. 551 (2020) (argued Mar. 1, 2021). Casyso had not presented that Appointments Clause argument to the Board. See HemoSonics C.A. Br. 40.

In *Arthrex*, the court of appeals held that administrative patent judges are principal officers who must be appointed by the President with the consent of the Senate, and that severing administrative patent judges' statutory removal protections cures the Appointments Clause violation. 941 F.3d at 1338. It remanded the case so it could be reheard by a reconstituted Board, even though the patent owner had not presented its Appointments Clause challenge to the Board. *Id.* at 1338-1339.

3. In a brief, unpublished *per curiam* order, the court of appeals vacated the Board's decision in this case based on *Arthrex* and remanded for further proceedings. Pet. App. 21a.

#### ARGUMENT

The federal government has filed a petition for a writ of certiorari in this case (and many others), asking this Court to hold the case pending its disposition of *Arthrex*, and then dispose of the case as appropriate in light of that decision. Pet. 9-10. HemoSonics agrees with that recommendation for disposition of this case.

The court of appeals decided this case solely based on *Arthrex*. Pet. App. 21a. If this Court reverses the court of appeals' decision in *Arthrex*, it will undermine the only basis for the court of appeals' decision in this case. And for the reasons explained in the government's brief in *Arthrex* (at 16-45), the Court should reverse the court of appeals' decision, because *Arthrex* was wrongly decided.

The Court therefore should hold this petition pending its resolution of *Arthrex*, and then dispose of the petition as appropriate in light of its decision in that case.

**CONCLUSION**

The petition for a writ of certiorari should be held pending this Court's resolution of *United States v. Arthrex, Inc.*, No. 19-1434, and then disposed of as appropriate in light of the Court's decision in that case.

Respectfully submitted.

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