

No.

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

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COMCAST CABLE COMMUNICATIONS, LLC,  
*Petitioner,*

v.

PROMPTU SYSTEMS CORPORATION,  
AND ANDREI IANCU, DIRECTOR,  
UNITED STATES PATENT AND TRADEMARK OFFICE,  
*Respondents.*

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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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**PETITION FOR A WRIT OF CERTIORARI**

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### **QUESTION PRESENTED**

Whether administrative patent judges are “principal” or “inferior” Officers of the United States within the meaning of the Appointments Clause.

**PARTIES TO THE PROCEEDING BELOW**

Petitioner Comcast Cable Communications, LLC, was the petitioner in proceedings before the Patent Trial and Appeal Board and the appellee in the court of appeals in Nos. 2019-2368 & 2019-2369 (consolidated), and 2020-1253.

Respondent Promptu Systems Corporation was the patent owner in proceedings before the Patent Trial and Appeal Board and the appellant in the court of appeals in Nos. 2019-2368 & 2019-2369 (consolidated), and 2020-1253.

Respondent Andrei Iancu, Director, United States Patent and Trademark Office was an intervenor in the court of appeals in Nos. 2019-2368 & 2019-2369 (consolidated), and 2020-1253.

**RULE 29.6 STATEMENT**

Pursuant to this Court's Rule 29.6, petitioner states that Comcast Cable Communications, LLC, is a wholly owned, indirect subsidiary of Comcast Corporation and no other publicly held corporation owns 10% or more of the stock of petitioner.

### **RELATED PROCEEDINGS**

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Promptu Sys. Corp. v. Comcast Cable Commc'ns, LLC*, Nos. 2019-2368 and 2019-2369 (consolidated) (Fed. Cir.), judgment entered on February 27, 2020;
- *Promptu Sys. Corp. v. Comcast Cable Commc'ns, LLC*, No. 2020-1253 (Fed. Cir.), judgment entered on February 27, 2020;
- *Comcast Cable Commc'ns, LLC v. Promptu Sys. Corp.*, Case IPR2018-00342 (P.T.A.B), final written decision entered on July 18, 2019;
- *Comcast Cable Commc'ns, LLC v. Promptu Sys. Corp.*, Case IPR2018-00343 (P.T.A.B), final written decision entered on July 18, 2019; and
- *Comcast Cable Commc'ns, LLC v. Promptu Sys. Corp.*, Case CBM2018-00034 (P.T.A.B), final written decision entered on October 7, 2019.

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## PETITION FOR A WRIT OF CERTIORARI

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Comcast Cable Communications, LLC, respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Federal Circuit in these two cases. Pursuant to this Court's Rule 12.4, Comcast is filing a "single petition for a writ of certiorari" because the judgments "sought to be reviewed" are from "the same court and involve identical or closely related questions." Sup. Ct. R. 12.4. As explained further below, Comcast respectfully submits that this petition should be held pending the disposition of the petitions for writs of certiorari in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019). See Nos. 19-1434, 19-1452, and 19-1458. The government has separately filed a petition for a writ of certiorari in these two cases (along with 37 others) asking that its petition also be held pending the disposition of the petitions for writs of certiorari in *Arthrex*. Pet. for Cert. 27, *United States v. Image Processing Tech. LLC*, No. 19-\_\_ (U.S. filed July 23, 2020).

### OPINIONS BELOW

The order of the court of appeals in Nos. 2019-2368 & 2019-2369 (consolidated) (Pet. App. 1a), and the final written decisions of the Patent Trial and Appeal Board in those inter partes review cases (Pet. App. 5a & 82a), are unreported.

The order of the court of appeals in No. 2020-1253 (Pet. App. 3a), and the final written decision of the Patent Trial and Appeal Board in that covered business method review case (Pet. App. 167a), are unreported.

## **JURISDICTION**

The court of appeals entered its judgments on February 27, 2020. Pet. App. 1a & 3a. The Court's March 19, 2020 order extended the deadline for filing a petition for a writ of certiorari in these cases to July 26, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL PROVISION INVOLVED**

The Appointments Clause is reproduced in the Appendix at 267a.

## **STATEMENT**

The Patent Trial and Appeal Board (Board) entered final written decisions that claims 1–21 of U.S. Patent No. RE44,326 are unpatentable. By summary orders, the Federal Circuit vacated and remanded those decisions in light of *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), which held that administrative patent judges (APJs) who serve as Board members are principal Officers who had not been appointed in accordance with the Appointments Clause.

1. Petitioner Comcast Cable Communications, LLC, is a leading cable television service provider in the United States. Comcast offers, among many other things, a voice recognition feature through its television cable service. The '326 patent, which is owned by respondent Promptu Systems Corporation, claims certain methods of performing voice recognition. *See, e.g.*, Pet. App. 11a–12a.

In December 2016, Promptu sued Comcast in the U.S. District Court for the Eastern District of Pennsylvania. *See Promptu Sys. Corp. v. Comcast Corp.*, No. 16-cv-6516 (E.D. Pa. filed Dec. 19, 2016). In December 2017 and April 2018, Comcast timely sought inter partes review (IPR) and covered business method (CBM) review of claims 1–21 of the ’326 patent. Pet. App. 6a; *id.* at 83a; *id.* at 168a. The Director of the United States Patent and Trademark Office (USPTO) instituted review of the challenged claims and designated different panels of three APJs to preside over each of the review proceedings. *See ibid.* One panel issued final written decisions in favor of Comcast in the two IPR proceedings, while a different panel issued a final written decision in favor of Comcast in the CBM review proceeding. Pet. App. 80a; *id.* at 165a; *id.* at 265a. The Board thus found all challenged claims of the ’326 patent unpatentable for a variety of reasons.

In separate proceedings, the same panel of APJs that presided over the IPRs of the ’326 patent also presided over IPRs of two other related patents asserted by Promptu in the Pennsylvania litigation (U.S. Pat. Nos. 7,047,196 and 7,260,538). In those separate proceedings, however, the panel issued decisions favorable to Promptu. *See Comcast Cable Commc’ns, LLC v. Promptu Sys. Corp.*, Case IPR2018-00340, Paper 58 (P.T.A.B. Mar. 29, 2019) (final written decision); *Comcast Cable Commc’ns, LLC v. Promptu Sys. Corp.*, Case IPR2018-00341, Paper 58 (P.T.A.B. Mar. 29, 2019) (final written decision); *Comcast Cable Commc’ns, LLC v. Promptu Sys. Corp.*, Case IPR2018-00344, Paper 59 (P.T.A.B. June 28, 2019) (final written decision); *Comcast Cable Commc’ns, LLC v. Promptu Sys. Corp.*, Case IPR2018-00345, Paper 59 (P.T.A.B. June 28, 2019) (final written decision).

At no time during any of the IPR or CBM review proceedings did Promptu assert a constitutional challenge to the appointment of the designated APJs or the Board as a whole.

2. Promptu timely appealed the Board’s IPR and CBM review decisions regarding the ’326 patent, and the Federal Circuit consolidated the two IPR appeals. C.A. Dkt. 2 (No. 2019-2368). The CBM appeal proceeded separately.

While Promptu’s appeals were pending, the Federal Circuit held in *Arthrex* that APJs are principal Officers and, therefore, their appointment by the Secretary of Commerce pursuant to congressional directive violates the Appointments Clause. 941 F.3d at 1335. Like Promptu here, the patent owner in that case had not raised its constitutional challenge before the Board. The *Arthrex* panel nevertheless elected to excuse this forfeiture, *ibid.*, and—as a remedy—vacated the Board’s final written decision and remanded for a “new hearing” before a newly designated panel of APJs, *id.* at 1338–40 (citing *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018)). The panel concluded that this relief was “appropriate” because “[t]he Board was not capable of correcting the constitutional infirmity,” *id.* at 1339–40, but “limited” its holding to cases “where litigants present an Appointments Clause challenge on appeal,” *id.* at 1340. The court of appeals subsequently explained that litigants must present such challenges in their opening briefs or in motions filed prior to their opening briefs. See *Customedia Techs., LLC v. Dish Network Corp.*, 941 F.3d 1174, 1175 (Fed. Cir. 2019).

Before filing its opening briefs in the ’326 IPR and CBM appeals, Promptu filed motions to summarily vacate the Board’s final written decisions and remand

in light of *Arthrex*. Pet. App. 1a–2a; *id.* at 3a–4a. Both Comcast and the USPTO (as intervenor) opposed Promptu’s motions. *Ibid.* The court of appeals granted Promptu’s motions on February 27, 2020, vacating the Board’s decisions on the ’326 patent and remanding to the Board for proceedings consistent with *Arthrex*. *Ibid.*

**3.** Like Promptu in the ’326 appeals, Comcast timely appealed the Board’s separate decisions on the ’196 and ’538 patents. Like Promptu, Comcast presented an identical Appointments Clause challenge in its merits briefing in those appeals. C.A. Dkt. 26 (No. 2019-1947); C.A. Dkt. 18 (No. 2019-2287). The Federal Circuit has since ruled, however, that the remedy of a new hearing under *Arthrex* is available only to patent owners like Promptu, not IPR petitioners like Comcast. *Ciena Corp. v. Oyster Optics, LLC*, 958 F.3d 1157, 1162 (Fed. Cir. 2020). Comcast’s appeals related to the ’196 and ’538 patents are still pending in the Federal Circuit.

**4.** In *Arthrex* itself, the Federal Circuit denied rehearing over the dissents of several judges. *Arthrex, Inc. v. Smith & Nephew, Inc.*, 953 F.3d 760, 761 (Fed. Cir. 2020). All three parties in *Arthrex*—the United States, Smith & Nephew, and Arthrex—have filed petitions for writs of certiorari seeking this Court’s review of the panel decision. *See* Pet. for Cert., *United States v. Arthrex, Inc.*, No. 19-1434 (U.S. filed June 25, 2020) (“U.S. Pet.”); Pet. for Cert., *Smith & Nephew, Inc. v. Arthrex, Inc.*, No. 19-1452 (U.S. filed June 29, 2020) (“Smith & Nephew Pet.”); Pet. for Cert., *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 19-1458 (U.S. filed June 30, 2020) (“Arthrex Pet.”). Several other petitions raising similar issues have already been filed in this Court, and more can be expected to follow. *See*,

*e.g.*, Pet. for Cert., *Sanofi-Aventis Deutschland GMBH v. Mylan Pharm. Inc.*, No. 19-1451 (U.S. filed June 26, 2020); Pet. for Cert., *Polaris Innovations Ltd. v. Kingston Tech. Co.*, No. 19-1459 (U.S. filed June 30, 2020); Pet. for Cert., *Duke Univ. v. Biomarin Pharm. Inc.*, No. 19-1475 (U.S. filed July 2, 2020); Pet. for Cert., *United States v. Image Processing Tech. LLC*, No. 19-\_\_ (U.S. filed July 23, 2020).

In light of *Arthrex*, the Federal Circuit has now “vacated more than 100 decisions” by the Board—and as the panel did below—and has “instruct[ed] the Board to conduct further proceedings on remand before newly-designated Board panels.” General Order, 2020 WL 2119932, at \*1 (P.T.A.B. May 1, 2020). The Board is currently holding all such cases, including those at issue in this petition, “in administrative abeyance until [this] Court acts on a petition for certiorari” presenting the Appointments Clause issue. *Ibid.*

### **REASONS FOR GRANTING THE PETITION**

The question presented by this petition—whether APJs are principal or inferior Officers—is directly presented in the petitions for writs of certiorari filed in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019). *See* Nos. 19-1434, 19-1452, and 19-1458. Both the United States and Smith & Nephew have asked the Court to decide whether APJs are principal or inferior Officers, and *Arthrex* has presented a closely related question. *See* U.S. Pet. I (question 1); Smith & Nephew Pet. i; *Arthrex* Pet. i (question 2). Accordingly, this petition should be held pending final disposition of the three *Arthrex* petitions, and then disposed of as appropriate. In the alternative, this petition should be granted.

1. If the Court grants any or all of the petitions in *Arthrex* (or any other case presenting the question whether APJs are principal or inferior Officers), then this petition should be held and disposed of in light of the Court's ultimate disposition of that case.

If, for example, the Court were to hold that APJs are inferior Officers, the judgments in these cases would have to be vacated and the cases remanded to the Federal Circuit for consideration on the merits. Even if the Court were to conclude that APJs are principal Officers, that could alter the remedial aspects of the decision below. If, for example, the Court were to hold that the remedy of a new hearing is only available if an Appointments Clause challenge was presented to the Board, the judgments in these cases would have to be vacated and the cases remanded to the Federal Circuit for consideration on the merits. And if the Court were to affirm the *Arthrex* decision across-the-board, it should also make clear that IPR petitioners have the same rights and remedies as patent owners.

The PTAB is already holding these cases in abeyance along with all others remanded from the Federal Circuit in light of *Arthrex*, pending this Court's decision on the petitions. General Order, 2020 WL 2119932, at \*1 (P.T.A.B. May 1, 2020). Thus, holding this petition will cause no prejudice to Promptu, the Board, or the USPTO. Therefore, this petition should be held pending the ultimate disposition of *Arthrex*, and then disposed of accordingly. *See, e.g., Emerson Elec. Co. v. Sipco, LLC*, No. 19-966, 2020 WL 3146672, at \*1 (U.S. June 15, 2020) (petition held pending the Court's disposition of *Thryv, Inc. v. Click-To-Call Techs., LP*, 140 S. Ct. 1367 (2020)).

2. Although Comcast seeks a hold for *Arthrex* (or another case presenting the Appointments Clause issue) rather than plenary review, Comcast submits that the summary orders in this case reflect two core errors—both of which are presented in the petitions for writs of certiorari in *Arthrex*.

*First*, the Federal Circuit in this case followed *Arthrex*'s erroneous holding that APJs are principal Officers. The Appointments Clause “divides all its officers into two classes,” *United States v. Germaine*, 99 U.S. 508, 509 (1879): “Officers” (i.e., “principal (non-inferior) officers,” *Edmond v. United States*, 520 U.S. 651, 659 (1997)), who the President must appoint with the advice and consent of the Senate; and “inferior Officers,” whose appointment Congress may vest “in the President alone, in the Courts of Law, or in the Heads of Departments.” U.S. Const. art. II, § 2, cl. 2. Whether an Officer is inferior “depends on whether he has a superior.” *Edmond*, 520 U.S. at 662–63; *see also Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2199 n.3 (2020). Even if an Officer otherwise exercises significant authority “largely independently” from a superior, that Officer is an inferior Officer so long as the superior “direct[s] and supervise[s]” the Officer’s work “at some level.” *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 504, 510 (2010) (quoting *Edmond*, 520 U.S. at 663).

APJs are inferior Officers within the meaning of the Appointments Clause because they are “directed and supervised” by the Director of USPTO, a principal Officer who is removable at will by the President. *Edmond*, 520 U.S. at 663. This point has been explained at length in two of the *Arthrex* petitions (U.S. Pet. 16–26; Smith & Nephew Pet. 14–27), and Comcast will not repeat those arguments here; rather, Comcast

adopts those arguments by reference. The short of it is that because APJs are inferior Officers, their appointments by the Secretary of Commerce (a Head of Department) is entirely consonant with the Constitution. The Federal Circuit therefore erred in concluding that APJs are principal Officers and that the governing statutory scheme “violate[d] the Appointments Clause.” *Arthrex*, 941 F.3d at 1335.

*Second*, the Federal Circuit relied on and applied *Arthrex* to grant new hearings even though Promptu had not presented its constitutional challenge to the Board. The court of appeals erred in *Arthrex* itself by excusing the patent owner’s administrative forfeiture. *See* U.S. Pet. 26–33. The Federal Circuit compounded that error in this case because, whatever the circumstances in *Arthrex* itself, there are no exceptional circumstances in *this* case that warrant excusing Promptu’s administrative forfeiture. Nevertheless, the Federal Circuit has adopted, and applied in this case, a blanket rule awarding patent owners (but not challengers) a new hearing whenever they raise an Appointments Clause challenge on appeal, regardless of whether it was presented to the Board. *Customedia Techs., LLC v. Dish Network Corp.*, 941 F.3d 1174, 1175 (Fed. Cir. 2019); *Ciena Corp. v. Oyster Optics, LLC*, 958 F.3d 1157, 1162 (Fed. Cir. 2020). Such an approach has no basis in the Court’s precedents allowing courts to overlook administrative forfeitures only in “rare cases.” *Freytag v. Comm’r*, 501 U.S. 868, 879 (1991). The Federal Circuit’s refusal to conduct a case-by-case inquiry itself warrants review and reversal.

Moreover, the remedy of a new hearing is limited to those who “timely” present constitutional challenges, *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018)

(quoting *Ryder v. United States*, 515 U.S. 177, 182–83 (1995)); an administrative forfeiture means, at minimum, that the challenger is limited to declaratory relief. See *Smith & Nephew Pet.* 32–33. Again, Comcast adopts the arguments previously made by reference and will not repeat them here. The bottom line is that Promptu’s failure to preserve its Appointments Clause challenge before the Board could well require vacatur of the summary orders in this case even if APJs are principal Officers.

\* \* \*

Because *Arthrex* was wrongly decided in both its substantive and remedial aspects, the panel in this case erred in vacating the Board’s decisions and remanding to the Board based on that decision. This Court should therefore hold this petition pending ultimate disposition of *Arthrex* (or another case addressing an Appointments Clause challenge to APJs), and then dispose of this petition in light of the Court’s decision in that case.

**CONCLUSION**

The petition for a writ of certiorari should be held pending disposition of the *Arthrex* petitions (Nos. 19-1434, 19-1452, and 19-1458) and then disposed of accordingly. In the alternative, this petition should be granted.

Respectfully submitted.

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