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No.

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In the Supreme Court of the United States

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ALBERTO SOLAR-SOMOHANO,

*Petitioner*

v.

UNITED STATES,

*Respondent*

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**ORIGINAL**

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

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**PETITION FOR WRIT OF CERTIORARI**

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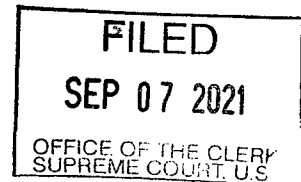
/ALBERTO SOLAR-SOMOHANO/

Petitioner

4741 NW 5<sup>th</sup> Street

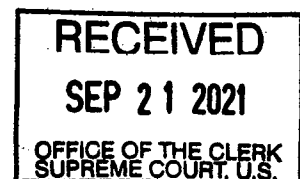
Miami, Fl. 3326

(561) 595-8547



*September 3<sup>rd</sup>, 2021*

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(i)

**QUESTIONS PRESENTED**

**I.**

Whether under *Carr v. Saul* the exhaustion of administrative appeal to the Trial Trademark Board can be bypass directly appealing to the Court of Appeals on a Rule 5.1 appointment clause constitutional challenge.

**II.**

Whether after *US v. Arthrex* final decision on registration and cancellation of Patents & Trademarks certificate be by principle officers President appointee Senate consented appointed

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(ii)

**PARTIES TO THE PROCEEDINGS BELOW**

The Petitioner is the Appellant and Respondent  
is the Appellee in the Federal Circuit Court of  
Appeals case no. 21-1278.

(ii)

**PARTIES TO THE PROCEEDINGS BELOW**

The Petitioner is the Appellant and Respondent  
is the Appellee in the Federal Circuit Court of  
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(iii)

**RELATED PROCEEDING**

There is no related proceeding on the question posed however there is a pending petition with the same Petitioner case no. 20-8464

(iii)

**RELATED PROCEEDING**

There is no related proceeding on the question posed however there is a pending petition with the same Petitioner case no. 20-8464



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CONSTITUTIONAL PROVISION

*Appointment Clause*

Article II, section 2.....1, 5, 8

STATUTORY PROVISION

*United States Code*

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FEDERAL RULES CIVIL PROCEDURAL

*Constitutional Challenge*

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*Action after Responses*

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Court of Appeal denying *petition rehearing* was entered on June 6<sup>th</sup>, 2021 (App, *infra*, 1a-2a); Opinion dismissing appeal entered on April 20<sup>th</sup>, 2021; (3a-4a); Order certifying appointment clause constitutional challenge entered on February 2<sup>nd</sup>, 2021 (5a-6a)

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The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101I.

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*Article II, Section 2, cl. 2*

**STATUTORY PROVISIONS INVOLVED**

*Section 1071 USC 15*

a) PERSONS ENTITLED TO APPEAL; UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT; WAIVER OF CIVIL ACTION; ELECTION OF CIVIL ACTION BY ADVERSE PARTY; PROCEDURE(1) *An applicant for registration of a mark, party to an interference proceeding, party to an opposition proceeding, party to an application to register as a lawful concurrent user, party to a cancellation proceeding, a registrant who has filed an affidavit as provided in section 1058 of this title or section 1141k of this title, or an applicant for renewal, who is dissatisfied with the decision of the Director or Trademark Trial and Appeal Board, may appeal to the United States Court of Appeals for the Federal Circuit.....*

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**FEDERAL RULE CIVIL PROCEDURE**

*Rule 5.1*

**FEDERAL REGULATION**

*37 CFR 2.63(b)(1),(2)*

(b) *Final refusal or requirement.* Upon review of a response, the examining attorney may state that the refusal(s) to register, or the requirement(s), is final.

(1) If the examining attorney issues a final action that maintains any substantive refusal(s) to register, the applicant may respond by timely filing: (i) A request for reconsideration under paragraph (b)(3) of this section that seeks to overcome any substantive refusal(s) to register, and comply with any outstanding requirement(s), maintained in the final action; or (ii) An appeal to the Trademark Trial and Appeal Board under §§ 2.141 and 2.142.

(2) If the examining attorney issues a final action that contains no substantive refusals to register, but maintains any requirement(s), the applicant may respond by timely filing: (i) A request for reconsideration under paragraph (b)(3) of this section that seeks to comply with any outstanding requirement(s) maintained in the final action; (ii) An appeal of the requirement(s) to the Trademark Trial and Appeal Board under §§ 2.141 and 2.142; or (iii) A petition to the Director under § 2.146 to review the requirement(s), if the subject matter of the requirement(s) is procedural, and therefore appropriate for petition.

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(3) Prior to the expiration of the time for filing an appeal or a petition, the applicant may file a request for reconsideration of the final action that seeks to overcome any substantive refusal(s) and/or comply with any outstanding requirement(s). Filing a request for reconsideration does not stay or extend the time for filing an appeal or petition. The Office will enter amendments accompanying requests for reconsideration after final action if the amendments comply with the rules of practice in trademark cases and the Act.

(4) Filing a request for reconsideration that does not result in the withdrawal of all refusals and requirements, without the filing of a timely appeal or petition, will result in abandonment of the application for incomplete response, pursuant to § 2.65(a).

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## STATEMENT OF THE CASE

### I. Proceeding Below

#### A. Office Trademark Application:

On August 23<sup>rd</sup>, 2017 Petitioner filed a trademark application Serial No. 87575740. [1]

On August 4<sup>th</sup>, 2020, the examining attorney (EA) of the United States Trademark Office enter final action letter refusing application. [2]

On September 17, 2020, Petitioner filed reconsideration of refusal requesting review by the Director a principle officer and objecting under Rule 5.1 declaring that ex parte appeal is Unconstitutional Judges not principle officer appointed by the President. [3]

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1

During that time, Petitioner had earlier in other applications in opposition proceedings made the same challenge under *Ryder v. US*, 515 U.S. 177 (1995). (September 24, 2013 #91210647; June 12<sup>th</sup>, 2014 #920574; November 20, 2014 #91210103; November 22 2014 #91211714; November 29<sup>th</sup>, 2014 #91216818/#91210103; January 9<sup>th</sup>, 2015 #91218529; March 2<sup>nd</sup>, 2016 #91224653; March 7<sup>th</sup>, 2016; #91224621; March 9<sup>th</sup>, 2016; #91224670/#91224653; January 24<sup>th</sup>, 2017#91232090)

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Under 15 USC 1070, Petitioner has 6-months to take an *ex parte appeal* to the Trial Trademark Appeal Board (TTAB)

3

*“Reconsideration by the Director a principle officer I object that the EA entertain the Further object the ex parte appeal to the Board is Unconstitutional the Board panel members r not principle officer thus under Rule 5.1. I challenge the constitutionality of the TTAB”*

The reconsideration does not toll the 6-months to timely filed an ex parte appeal to TTAB nor does a petition to the Director under 37 CFR 2.146. The decision of the Director cannot be appeal to the TTAB. *37 CFR 2.63(b)(1)(2)*

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On January 5<sup>th</sup>, 2021 Petitioner filed a notice of appeal on the EA final refusal directly to the Court of Appeals after Petitioner gave notices to the Director and EA for the delay of resolving the reconsideration.

**C. Court of Appeals:**

On January 26<sup>th</sup>, 2021, Petitioner filed a notice challenging the constitution of the appointment clause Trademark Judges not appointed by the President

On February 2<sup>nd</sup>, 2021, the Court of Appeals certified Petitioner's appointment clause challenge giving the US Attorney General 30-days to intervene.[4]

On February 26<sup>th</sup>, 2021, *notwithstanding certifying the appointment clause challenge*, the Court of Appeals issue show cause order to parties why appeal not dismissed for lack of jurisdiction.[5]

On March 29<sup>th</sup>, 2021, Respondent filed response

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On February 3<sup>rd</sup>, 2021, the EA denied Petitioner's reconsideration request pursuant to 5.1 even though not knowing what Rule 5.1 is about. "Applicant's response includes an objection "under Rule 5.1" as to the constitutionality of the Trademark Trial and Appeal Board (TTAB) and the implementation of the U.S. Counsel Rule. It is unclear what Applicant is referring to in citing "Rule 5.1"

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ORDER: The parties are directed to show cause, within 30 days of the date of filing of this order, why this appeal should not be dismissed.

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*“Petitioner is impermissibly attempting to bypass the statutory scheme and to appeal the examining attorney decision directly to this court.”*

On April 22<sup>nd</sup>, 2021, this Court decided *Carr v. Saul*, 19-1442 (April 22<sup>nd</sup>, 2021)

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On June 8<sup>th</sup>, 2021, the Court of Appeals denied rehearing. (App 1(a)-2(a))

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**REASON FOR GRANTING THE WRIT****II. Appointment Clause Challenge****D. Rule 5.1**

Petitioner did it all waited and waited on the Director a principle officer to make the final decision of trademark application be approved for publication, but nothing.

In fact, there is nothing at all if the Director would have made the final decision for the decision is only for publication which means if an opposition is filed it will be the TTAB with the final decision while not being principal officers.

So, final decision by not principle officers is absurd in law and outrageous in fact.

**E. *Carr v. Saul*, 19-1442 (April 22<sup>nd</sup>, 2021)**

This Court held that constitutional challenge to the appointment clause can be raise for the first time on judicial review it wasn't necessary to have been exhaustion nor preserve under *Ryder v. US*, 515 U.S. 177 (1995) on administrative appeal.

This Court rationale was focused on two considerations:

First, the Court noted that agency adjudicative proceedings generally make a poor forum for bringing a structural constitutional challenge, since such a challenge usually falls outside the adjudicator's area of technical expertise.

Second, the Court noted that it has consistently recognized a futility exception to exhaustion requirements, observing that it makes little sense to require litigants to present claims to

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**F. *United States v. Arthrex* 594 US\_\_ (2021)**

This Court entertained an appointment clause, *not decided*, raised for first time at Court of Appeals holding that:

*§6(c) cannot constitutionally be enforced to the extent that its requirements prevent the Director from reviewing final decisions rendered by APJs. The Director accordingly may review final PTAB decisions and, upon review, may issue decisions himself on behalf of the Board. Section 6(c) otherwise remains operative as to the other members of the PTAB. When reviewing such a decision by the Director, a court must decide the case “conformably to the constitution, disregarding the law” placing restrictions on his review authority in violation of Article II. Marbury v. Madison, 1 Cranch 137, 178. The appropriate remedy is a remand to the Acting Director to decide whether to rehear the petition filed by Smith & Nephew. A limited remand provides an adequate opportunity for review by a principal officer. Because the source of the constitutional violation is the restraint on the review authority of the Director, rather than the appointment of APJs by the Secretary, Arthrex is not entitled to a hearing before a new panel of APJs*

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The President of the United States does not supervise the USPTO, the Director is just a puppet the People need to know about it that this Court got to fix it.

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**CONCLUSION**

The Court of Appeals erred by dismissing the appeal for lack of jurisdiction while having jurisdiction to consider the Appointment clause constitutional challenge that final decision from the USPTO must be render by Principle Officer.

Dated: September 3<sup>rd</sup>, 2021

/ASUS/  
ALBERTO SOLAR-SOMOHANO/  
Petitioner

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**CONCLUSION**

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Dated: September 3<sup>rd</sup>, 2021

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A handwritten signature in black ink, consisting of several overlapping loops, is written over the printed name and title. The signature is slanted upwards to the right.