No. 21-691

IN THE

Supreme Court of the United States

FG SRC LLC,

Petitioner,

v.

MICROSOFT CORPORATION,

Respondent.

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

REPLY BRIEF

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioner FG SRC LLC submits this reply to Respondents' Brief In Opposition ("Opposition") to Petitioner's Petition for Writ of Certiorari ("Petition") to review the judgment of the United States Court of Appeals for the Federal Circuit.

Respondent argues that this Court should not grant, vacate, and remand in light of *United States v. Arthrex, Inc.*¸ 141 S. Ct. 1970 (2021) because "petitioner forfeited any Appointments Clause challenge by failing to raise it in its briefs before the court of appeals." Opposition at i (Question Presented). Petitioner's assertion is not well founded, because the Federal Circuit had already—albeit wrongly—held that severance of the restrictions on removal of APJs cured any constitutional infirmity. *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (2019). Thus, at the time the appeal was filed, there was no legal basis to challenge the PTAB's finding that there was no constitutional violation. However, immediately after this Court's *Arthrex* decision issued, Petitioner explicitly brought the issue before the Federal Circuit which summarily rejected it. As demonstrated in detail by the below timeline, a grant, vacate, remand order is the appropriate remedy in this case. A decision to the contrary would mean that parties must indefinitely and exhaustively appeal all issues to the Federal Circuit just in case the controlling law may change after the Federal Circuit issues a decision but before a party's right to seek this Court's review is exhausted.

A. Petitioner Timely Raised Its Constitutional Challenge When Appropriate

First, it is undisputed that Petitioner raised its constitutional challenge before each of the final written decisions were issued by the PTAB in IPR2018-01601 (joined with IPR2018-01602 and IPR2018-01603), IPR2018-01604, and IPR2018-01605 (joined with IPR2018-01606 and IPR2018-01607). Pet. App. C, D, and E. Each of these was entered prior to this Court's decision in *Arthrex* (*id.*), and in each, the PTAB improperly rejected FG SRC's constitutional argument that the APJs who decided the matter were unconstitutionally appointed in violation of the Appointments Clause. Pet. App. 61a, 189a, 309a.

Second, prior to these final written decisions, the Federal Circuit had issued its decision in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (2019), holding that severance of the restrictions on removal of APJs cured any constitutional infirmity. *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (2019). Thus, at the time this appeal was originally filed, the Federal Circuit had already—albeit wrongly—decided this issue. *Id.*

Third, on May 6, 2021, the Federal Circuit summarily affirmed all three final written decisions of the PTAB under Rule 36. Pet. App. A and B. In both appeals, the Federal Circuit's original summary affirmance of the PTAB decisions was issued 45 days *before* this Court's opinion in *Arthrex*, which issued on June 21, 2021. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021). Nine days after *Arthrex* issued, on June 30, 2021, FG SRC expediently asked the Federal Circuit to reconsider its

summary affirmance in light of the *Arthrex* decision. The Federal Circuit, however, once again, summarily rejected FG SRC's challenge to the constitutionality of the PTAB's actions under the *Arthrex* decision. Pet. App. F and G. The Federal Circuit's holding improperly ignored this Court's holding in *Arthrex*.

B. Violation Of The Appointments Clause Cannot Be Forfeited Or Waived.

A constitutional challenge alleging a violation of the Appointments Clause cannot be forfeited or waived. *Freytag v. Comm'r*, 501 U.S. 868, 878 (1991) (a party cannot waive or forfeit the right to raise a violation of the Appointments Clause, even when failing to raise a timely objection to the assignment below, or even when consenting to the assignment below).

Respondent disputes this understanding of *Freytag*, but merely glosses over the analysis therein in its Opposition:

> In reply, Petitioner simply asserted, incorrectly, that *Freytag* had held that an Appointments Clause challenge could not be waived, . . . and made no attempt to show why the Federal Circuit should, as this Court had in *Freytag*, 'exercise [its] discretion' to excuse the waiver. 501 U.S. at 879.

Opposition at 7. Respondent's interpretation of *Freytag* misconstrues this Court's holding regarding waiver of an appointments clause challenge. In *Freytag*, the petitioner had not only failed to raise a timely objection to the

assignment of their cases to a special trial judge, but also *specifically consented to the assignment*, and thus, had arguably *intentionally waived* its right to challenge the appointment of the special trial judge. Even so, this Court found:

> [W]e are faced with a constitutional challenge that is neither frivolous nor disingenuous. The alleged defect in the appointment of the Special Trial Judge goes to the validity of the Tax Court proceeding that is the basis for this litigation. It is true that, as a general matter, a litigant must raise all issues and objections at trial. *But the disruption to sound appellate process entailed by entertaining objections not raised below does not always overcome what Justice Harlan called "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers."*

Id. at 879 (emphasis added). Violations of the Appointments Clause in particular must be rectified because it implicates the structural concerns regarding the separation of powers mandated by the Constitution:

> The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint. Because it articulates a limiting principle, the Appointments Clause does not always serve the Executive's interests. For example, the Clause forbids Congress to grant the appointment power to inappropriate members of the Executive Branch. Neither

> Congress nor the Executive can agree to waive this structural protection. . . . The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic.

Id. at 880. *Freytag* therefore does not require that the party alleging a violation of the Appointments Clause to first prove that the court should "'exercise [its] discretion' to excuse the waiver." Opposition at 7. Instead, *Freytag* clearly holds that—even in the face of an intentional consent to an appointment below—a violation of the appointments clause is itself an extraordinary reason that must be addressed. *Freytag v. Comm'r*, 501 U.S. 868, 878-880 (1991).

Respondent's citation to *Customedia Techs. LLC v. Dish Network Corp.*, 941 F.3d 1173, 1174 (Fed. Cir. 2019) (*per curiam*) is inapposite because (1) that decision predates the Supreme Court's decision in *Arthrex* (issued June 21, 2021); and (2) it does not cite to *Freytag* at all and indeed contradicts *Freytag.* Respondent appears to suggest that the Federal Circuit has a bright line rule that no issue not raised in an opening appeal brief can be later considered even in the face of a change in law affecting a constitutional right. Such a Federal Circuit rule does not exist, and, in any event, would not control in this Court and be flatly contradicted by controlling precedent, including *Freytag.* Had the parties brought that binding precedent to the Court's attention, *Customedia* would have been decided differently.

Respondent further cites to *Arthrex, Inc. v. Smith & Nephew, Inc.*, 141 S. Ct. 236 (2020) (denying writ

of certiorari). However, the issue below considered "Appointments Clause objections to officers as a challenge which could be considered on appeal even if not raised below." *Arthrex, Inc. v. Smith & Nephew*, Inc., 941 F.3d 1320, 1326 (2019). Here, it is not disputed that the issue was raised in the PTAB below. Opposition at 2 ("the Board rejected that [appointments clause] challenge"). Petitioner also raised the issue at the appellate stage. Pet. App. at 313a, 315a. Finally, the underlying *Arthrex* decision actually found that an appointments clause violation "is an issue of exceptional importance, and we conclude it is an appropriate use of our discretion to decide the issue over a challenge of waiver." *Arthrex, Inc. v. Smith & Nephew*, Inc., 941 F.3d 1320, 1327 (2019).

Respondent further cites *Essity Hygiene & Health AB v. Cascades Canada ULC*, 141 S. Ct. 555 (2020) (No. 20-131). However, the underlying Federal Circuit decision being appealed, *Essity Hygiene & Health AB v. Cascades Canada ULC*, 811 F. App'x 638, 641 (Fed. Cir.), cert. denied, 141 S. Ct. 555 (2020) does not address the appointments clause. The same is true for Respondent's citations to *IYM Techs. LLC v. RPX Corp.*, 796 F. App'x 752 (Fed. Cir.), cert. denied, 141 S. Ct. 850 (2020) ; *Wi-LAN Inc. v. Iancu*, 825 F. App'x 922 (Fed. Cir. 2020), cert. denied sub nom ; *Wi-LAN, Inc. v. Hirshfeld*, 141 S. Ct. 2799 (2021) ; *ThermoLife Int'l LLC*, 796 F. App'x 726 (Fed. Cir. 2020), cert. denied sub nom. *ThermoLife Int'l LLC v. Iancu*, 141 S. Ct. 1049 (2021) ; and *Adidas AG v. Nike, Inc.*, 963 F.3d 1355, 1360 (Fed. Cir. 2020), cert. denied, 141 S. Ct. 1376 (2021). Moreover, one of the inapposite cases, *ThermoLife*, involved an *ex parte* reexamination which is a different proceeding involving a different statute. *See* 796 F. App'x 726 at 727.

Further cited are *States v. Olano*, 507 U.S. 725 (1993) and *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967), neither of which relate to the appointments clause. Moreover, *Curtis* actually supports Petitioner's position. Respondent appears to argue that Petitioner should have "seen the handwriting on the wall" when it submitted its opening appeal brief, but that position has been expressly rejected by this Court in *Curtis*. In that case, the Court made clear that a petitioner has not surrendered a right to appeal unless there has been a waiver of a known right or privilege, and that threshold is not met when the petitioner relies on the current state of the law at the time of the appeal. 388 U.S. 130 at 143. That is precisely Petitioner's position here.

Respondent further cites to *Sanofi-Aventis Deutschland, GMBH v. Mylan Pharms., Inc.*, 141 S. Ct. 266 (2020). This case cites to the erroneous *Customedia* decision discussed *supra*, and, like *Customedia*, does not address *Freytag*. Further, as noted in Judge Newman's dissent, that case, like *Customedia*, is of questionable validity. *Sanofi-Aventis Deutschland GMBH v. Mylan Pharms. Inc.*, 791 F. App'x 916, 931 (Fed. Cir. 2019), cert. denied, 141 S. Ct. 266, 208 L. Ed. 2d 33 (2020), Newman, dissenting ("My colleagues deny the motion, ruling that our recent *Customedia* rulings establish that the *Arthrex* ruling cannot be applied to pending appeals. . . . The majority errs in denying [the] motion.").

Similarly, Respondent's cite to *Immunex Corp. v. Sanofi-Aventis U.S. LLC*, 141 S. Ct. 2799 (2021) concerns an underlying case which summarily dismissed an appointments clause challenge in a footnote with reference to *Customedia*. *Immunex Corp. v. Sanofi-Aventis U.S.*

LLC, 977 F.3d 1212, 1223 (Fed. Cir. 2020), cert. denied, 141 S. Ct. 2799 (2021). Respondent also cites *Hanwha Soln's Corp. v. Longi Green Energy Tech. Co.*, No. 21-1629, Dkt. 35 at 3–4 (Fed. Cir. Oct. 4, 2021) but that case is inapplicable for the same reason. However, it is precisely such reasoning that underscores the importance of granting GVR by this Court. As noted above, to the extent these decisions represent a bright line rule of the Federal Circuit, they are not controlling here and are inconsistent with this Court's precedent. This Court should correct the Federal Circuit's intermittent viewpoint that an appointments clause violation can be waived in violation of this Court's binding precedent set in *Freytag*.

CONCLUSION

In summary, the constitutional violation regarding the improper appointment of APJ's in this matter is no longer merely alleged, nor frivolous or disingenuous. This Court has confirmed with finality that the procedures employed by the Board violate the United States Constitution, and this Court must honor "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers" which are not merely "those of any one branch of Government but of the entire Republic." *Freytag*, 501 U.S. at 879-880. Therefore, a GVR order to proceed consistent with *Arthrex* is the proper remedy.

Date: December 17, 2021 Respectfully submitted,

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