19-1452 SMITH & NEPHEW, INC. V. ARTHREX, INC.

DECISION BELOW: 941 F.3d 1320

LOWER COURT CASE NUMBER: 2018-2140

QUESTION PRESENTED:

This Court has consistently held that first-line administrative adjudicators are Officers of the United States under the Appointments Clause. See *Lucia v. SEC*, 138 S. Ct. 2044, 2053 (2018); *Freytag v. Comm'r*, 501 U.S. 868, 881-82 (1991). With equal consistency, this Court has held that such adjudicators are "inferior" Officers, whose appointments may be vested in a Head of Department, rather than "principal" Officers, who must be nominated by the President and confirmed by the Senate. *Edmond v. United States*, 520 U.S. 651, 666 (1997). In this case, however, the Federal Circuit ruled that administrative patent judges of the Patent Trial and Appeal Board-whose functions are analogous to the adjudicators in *Edmond, Freytag, and Lucia*-are "principal" Officers whose statutory mode of appointment is unconstitutional. The question presented by this petition is:

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

CONSOLIDATED WITH 19-1934 AND 19-1958 FOR ONE HOUR ORAL ARGUMENT. LIMITED TO QUESTIONS 1 AND 2 AS SET FORTH IN THE JULY 22, 2020 MEMORANDUM FOR THE UNITED STATES.

1. 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.

2. Whether, if administrative patent judges are principal officers, the court of appeals properly cured any Appointments Clause defect in the current statutory scheme prospectively by severing the application of 5 U.S.C. 7513(a) to those judges.

CERT. GRANTED 10/13/2020