

No. 20-74

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

IMAGE PROCESSING TECHNOLOGIES LLC, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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Additional Captions Listed Inside

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v.

BOLORO GLOBAL LTD.

QUESTIONS PRESENTED

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 the court of appeals erred by adjudicating Appointments Clause challenges brought by litigants that had not presented such a challenge to the agency.

PARTIES TO THE PROCEEDING

Petitioners in this Court are the United States of America, which intervened in the court of appeals in Nos. 2018-2156, 2019-1408, 2019-1485, 2018-1768, 2019-1215, 2019-1216, 2019-1218, 2019-1293, 2019-1294, and 2019-1295, pursuant to 28 U.S.C. 2403(a); and Andrei Iancu, Under Secretary of Commerce for Intellectual Property and Director, U.S. Patent and Trademark Office, who intervened in the court of appeals in Nos. 2019-2315, 2019-1871, 2019-1873, 2019-1875, 2019-1876, 2019-2224, 2019-1994, 2019-2238, 2019-2057, 2019-2231, 2019-2290, 2019-2337, 2020-1030, 2019-2339, 2019-2281, 2019-1671, 2019-2011, 2019-2243, 2019-1202, 2019-2430, 2020-1154, 2020-1155, 2017-2593, 2017-2594, 2019-2210, 2019-2223, 2019-2276, 2019-2318, 2019-2368, 2019-2369, 2019-2388, 2020-1024, 2020-1183, 2020-1253, 2019-1484, 2019-2171, 2020-1082, 2020-1083, 2020-1295, 2020-1296, 2020-1297, 2020-1298, 2020-1299, 2019-1483, 2020-1291, 2020-1164, 2020-1045, 2020-1141, 2020-1142, 2020-1143, 2020-1149, 2020-1150, 2020-1151, 2020-1147, 2020-1069, 2020-1162, 2019-2447, 2020-1197, 2020-1198, and 2020-1319, pursuant to 35 U.S.C. 143, and was the appellee in Nos. 2019-2330, 19-2349, 19-2351, and 19-2353.

Respondents in this Court are AgroFresh, Inc., which was the appellant in the court of appeals in No. 2019-2243; Alan Stuart, Trustee for the Cecil G. Stuart and Donna M. Stuart Revocable Living Trust Agreement, and CDS Development LLC, which were the appellants in the court of appeals in Nos. 2019-1994 and 2019-2238; American Express Co. and American Express Travel Related Services Co., Inc., which were the appellees in the court of appeals in No. 2020-1319; Amgen Inc. and Amgen Manufacturing Ltd., which were the appellants in the court of appeals in No. 2019-2171;

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Apple Inc., which was the appellee in the court of appeals in Nos. 2020-1197 and 2020-1198; Bestway (USA), Inc., which was an appellee in the court of appeals in Nos. 2020-1141, 2020-1142, 2020-1143, 2020-1147, 2020-1149, 2020-1150, and 2020-1151; Boloro Global Ltd., which was the appellant in the court of appeals in Nos. 19-2349, 19-2351, and 19-2353; Cisco Systems, Inc., which was the appellant in the court of appeals in No. 2019-1671; Comcast Cable Communications, LLC, which was the appellee in the court of appeals in Nos. 2019-1215, 2019-1216, 2019-1218, 2019-1293, 2019-1294, 2019-1295, 2019-2368, 2019-2369, and 2020-1253; Comm-Scope Technologies LLC, which was the appellee in the court of appeals in No. 2020-1045; Concert Pharmaceuticals, Inc., which was the appellant in the court of appeals in No. 2019-2011; Cree, Inc., which was an appellee in the court of appeals in No. 2019-2281; Dali Wireless Inc., which was the appellant in the court of appeals in No. 2020-1045; Document Security Systems, Inc., which was the appellant in the court of appeals in Nos. 2019-2281 and 2019-2430; Dr. Reddy's Laboratories, Inc., which was the appellee in the court of appeals in No. 2020-1164; Drone-Control, LLC, which was the appellant in the court of appeals in Nos. 2019-2210, 2019-2223, 2019-2276, and 2019-2318; Eugene H. Luoma, who was the appellant in the court of appeals in No. 2019-2315; Gree, Inc., which was the appellant in the court of appeals in Nos. 2020-1069 and 2020-1162; GT Water Products, Inc., which was the appellee in the court of appeals in No. 2019-2315; High 5 Games, LLC, which was the appellant in the court of appeals in No. 2020-1024; Horizon Pharma USA, Inc. and Nuvo Pharmaceuticals (Ireland) Designated Activity Co., which were the appellants in the court of appeals in

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No. 2020-1164; Hulu, LLC, which was the appellee in the court of appeals in No. 2020-1155; Image Processing Technologies LLC, which was the appellant in the court of appeals in Nos. 2018-2156, 2019-1408, and 2019-1485; Incyte Corp., which was the appellee in the court of appeals in No. 2019-2011; Intex Recreation Corp., which was the appellant in the court of appeals in Nos. 2020-1141, 2020-1142, 2020-1143, 2020-1149, 2020-1150, and 2020-1151, and an appellee in No. 2020-1147; Iron Oak Technologies, LLC, which was the appellant in the court of appeals in No. 2019-2388; JHO Intellectual Property Holdings, LLC, which was the appellant in the court of appeals in No. 2019-2330; Kingston Technology Co., Inc., which was the appellee in the court of appeals in Nos. 2018-1768 and 2019-1202; Koninklijke KPN N.V., which was the appellant in the court of appeals in No. 2019-2447; LG Electronics, Inc., HTC America, Inc., and Lenovo (United States) Inc., which were the appellees in the court of appeals in No. 2019-2447; Micron Technology, Inc., which was the appellee in the court of appeals in Nos. 2020-1295, 2020-1296, 2020-1297, 2020-1298, and 2020-1299; Merck Sharp & Dohme Corp., Sanofi Pasteur Inc., and SK Chemicals Co., Ltd., which were the appellees in the court of appeals in Nos. 2019-1871, 2019-1873, 2019-1875, 2019-1876, and 2019-2224; Moderna Therapeutics, Inc., which was the appellee in the court of appeals in No. 2020-1183; Nestle USA, Inc., which was the appellee in the court of appeals in Nos. 2020-1082 and 2020-1083; Next Caller, Inc., which was the appellant in the court of appeals in No. 2020-1291; North Star Innovations, Inc., which was the appellant in the court of appeals in Nos. 2020-1295, 2020-1296, 2020-1297, 2020-1298, and 2020-1299; Person-

alized Media Communications, LLC, which was the appellant in the court of appeals in Nos. 2020-1197 and 2020-1198; Pfizer Inc., which was the appellant in the court of appeals in Nos. 2019-1871, 2019-1873, 2019-1875, 2019-1876, and 2019-2224; Polaris Innovations Ltd., which was the appellant in the court of appeals in Nos. 2018-1768, 2019-1202, 2019-1483, and 2019-1484; Promptu Systems Corp., which was the appellant in the court of appeals in Nos. 2019-2368, 2019-2369, and 2020-1253; Protiva Biotherapeutics, Inc., which was the appellant in the court of appeals in No. 2020-1183; Rovi Guides, Inc., which was the appellant in the court of appeals in Nos. 2019-1215, 2019-1216, 2019-1218, 2019-1293, 2019-1294, and 2019-1295; RPM International, Inc., and Rust-Oleum Corp., which were the cross-appellants in the court of appeals in Nos. 2019-1994 and 2019-2238; Samsung Electronics Co., Ltd., and Samsung Electronics America, Inc., which were the appellees in the court of appeals in No. 2018-2156, and the cross-appellants in Nos. 2019-1408 and 2019-1485; Seoul Semiconductor Co., Ltd. and Seoul Semiconductor, Inc., which were appellees in the court of appeals in Nos. 2019-2281 and 2019-2430; Signature Systems, LLC, which was the appellant in the court of appeals in No. 2020-1319; Snap Inc., which was the appellee in the court of appeals in Nos. 2019-2231, 2019-2290, 2019-2337, 2019-2339, and 2020-1030; Sound View Innovations, LLC, which was the appellant in the court of appeals in Nos. 2020-1154 and 2020-1155; Steuben Foods, Inc., which was the appellant in the court of appeals in Nos. 2020-1082 and 2020-1083; Supercell Oy, which was the appellee in the court of appeals in Nos. 2020-1069 and 2020-1162; SZ DJI Technology Co., Ltd., which was the appellee in the court of appeals in Nos. 2019-2210, 2019-2223, 2019-2276, and

2019-2318; Team Worldwide Corp., which was the appellant in the court of appeals in No. 2020-1147, and the cross-appellant in Nos. 2020-1141, 2020-1142, 2020-1143, 2020-1149, 2020-1150, and 2020-1151; TRUSTID, Inc., which was the appellee in the court of appeals in No. 2020-1291; Unified Patents Inc., which was the appellee in the court of appeals in Nos. 2019-2057 and 2019-2388; Unified Patents, LLC, which was the appellee in the court of appeals in No. 2020-1154; UPL Ltd., which was the appellee in the court of appeals in No. 2019-2243; Vaporstream, Inc., which was the appellant in the court of appeals in Nos. 2019-2231, 2019-2290, 2019-2337, 2019-2339, and 2020-1030; Vilox Technologies, LLC, which was the appellant in the court of appeals in No. 2019-2057; and VirnetX Inc., which was the appellant in the court of appeals in Nos. 2017-2593, 2017-2594, and 2019-1671.

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ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

VAPORSTREAM, INC., ET AL.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

DOCUMENT SECURITY SYSTEMS, INC., ET AL.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

VIRNETX INC., ET AL.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

CONCERT PHARMACEUTICALS, INC., ET AL.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

AGROFRESH, INC., ET AL.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

POLARIS INNOVATIONS LTD., ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

POLARIS INNOVATIONS LTD., ET AL.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

DOCUMENT SECURITY SYSTEMS, INC., ET AL.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

SOUND VIEW INNOVATIONS, LLC, ET AL.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

SOUND VIEW INNOVATIONS, LLC, ET AL.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

VIRNETX INC., ET AL.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

DRONE-CONTROL, LLC, ET AL.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

PROMPTU SYSTEMS CORP., ET AL.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

IRON OAK TECHNOLOGIES, LLC, ET AL.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

HIGH 5 GAMES, LLC

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

PROTIVA BIOTHERAPEUTICS, INC., ET AL.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

PROMPTU SYSTEMS CORP., ET AL.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

POLARIS INNOVATIONS LTD.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

AMGEN INC., ET AL.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

STEUBEN FOODS, INC., ET AL.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

NORTH STAR INNOVATIONS, INC., ET AL.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

POLARIS INNOVATIONS LTD.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

NEXT CALLER, INC., ET AL.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

HORIZON PHARMA USA, INC., ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

ROVI GUIDES, INC., ET AL.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

DALI WIRELESS INC., ET AL.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

INTEX RECREATION CORP., ET AL.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

TEAM WORLDWIDE CORP., ET AL.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

GREE, INC., ET AL.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

KONINKLIJKE KPN N.V., ET AL.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

PERSONALIZED MEDIA COMMUNICATIONS, LLC, ET AL.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

JHO INTELLECTUAL PROPERTY HOLDINGS, LLC

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

SIGNATURE SYSTEMS, LLC, ET AL.

ANDREI IANCU, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

BOLORO GLOBAL LTD.

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

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States and the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, respectfully petitions for a writ of certiorari to review the judgments of the United

States Court of Appeals for the Federal Circuit in these cases. Pursuant to this Court's Rule 12.4, the United States 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.

OPINIONS BELOW

The order of the court of appeals in *Image Processing Technologies LLC v. Samsung Electronics Co.*, Nos. 2018-2156, 2019-1408, and 2019-1485 (App. 1a-2a), is unreported.

The order of the court of appeals in *Luoma v. GT Water Products, Inc.*, No. 2019-2315 (App. 3a-4a), is unreported.

The order of the court of appeals in *Pfizer Inc. v. Merck Sharp & Dohme Corp.*, Nos. 2019-1871, 2019-1873, 2019-1875, 2019-1876, and 2019-2224 (App. 5a-6a), is unreported.

The order of the court of appeals in *Stuart v. RPM International, Inc.*, Nos. 2019-1994 and 2019-2238 (App. 7a-8a), is unreported.

The order of the court of appeals in *Vilox Technologies, LLC v. Unified Patents Inc.*, No. 2019-2057 (App. 9a-10a), is unreported.

The order of the court of appeals in *Vaporstream, Inc. v. Snap Inc.*, Nos. 2019-2231, 2019-2290, 2019-2337, 2019-2339, and 2020-1030 (App. 11a-13a), is unreported.

The order of the court of appeals in *Document Security Systems, Inc. v. Seoul Semiconductor Co.*, No. 2019-2281 (App. 14a-15a) is unreported.

The order of the court of appeals in *VirnetX Inc. v. Cisco Systems, Inc.*, No. 2019-1671 (App. 16a-17a), is not published in the Federal Reporter but is available at 2020 WL 2511116.

The order of the court of appeals in *Concert Pharmaceuticals, Inc. v. Incyte Corp.*, No. 2019-2011 (App. 18a-19a), is unreported.

The order of the court of appeals in *AgroFresh, Inc. v. UPL Ltd.*, No. 2019-2243 (App. 20a-21a), is unreported.

The order of the court of appeals in *Polaris Innovations Ltd. v. Kingston Technology Co.*, No. 2019-1202 (App. 22a-23a), is unreported.

The order of the court of appeals in *Polaris Innovations Ltd. v. Kingston Technology Co.*, No. 2018-1768 (App. 24a-25a), is not published in the Federal Reporter but is reprinted at 792 Fed. Appx. 819.

The order of the court of appeals in *Document Security Systems, Inc. v. Seoul Semiconductor Co.*, No. 2019-2430 (App. 26a-27a), is unreported.

The order of the court of appeals in *Sound View Innovations, LLC v. Unified Patents, LLC*, No. 2020-1154 (App. 28a-29a), is unreported.

The order of the court of appeals in *Sound View Innovations, LLC v. Hulu, LLC*, No. 2020-1155 (App. 30a-31a), is unreported.

The order of the court of appeals in *VirnetX Inc. v. Iancu*, Nos. 2017-2593 and 2017-2594 (App. 32a-33a), is unreported.

The order of the court of appeals in *Drone-Control, LLC v. SZ DJI Technology Co.*, Nos. 2019-2210, 2019-2223, 2019-2276, and 2019-2318 (App. 34a-35a), is unreported.

The order of the court of appeals in *Promptu Systems Corp. v. Comcast Cable Communications, LLC*, Nos. 2019-2368 and 2019-2369 (App. 36a-37a), is unreported.

The order of the court of appeals in *Iron Oak Technologies, LLC v. Unified Patents Inc.*, No. 2019-2388 (App. 38a-39a), is unreported.

The order of the court of appeals in *High 5 Games, LLC v. Iancu*, No. 2020-1024 (App. 40a-41a), is unreported.

The order of the court of appeals in *Protiva Biotherapeutics, Inc. v. Moderna Therapeutics, Inc.*, No. 2020-1183 (App. 42a-43a), is unreported.

The order of the court of appeals in *Promptu Systems Corp. v. Comcast Cable Communications, LLC*, No. 2020-1253 (App. 44a-45a), is unreported.

The order of the court of appeals in *Polaris Innovations Ltd. v. Iancu*, No. 2019-1484 (App. 46a-47a), is unreported.

The order of the court of appeals in *Amgen Inc. v. Iancu*, No. 2019-2171 (App. 48a-49a), is unreported.

The order of the court of appeals in *Steuben Foods, Inc. v. Nestle USA, Inc.*, Nos. 2020-1082 and 2020-1083 (App. 50a-52a), is unreported.

The order of the court of appeals in *North Star Innovations, Inc. v. Micron Technology, Inc.*, Nos. 2020-1295, 2020-1296, 2020-1297, 2020-1298, and 2020-1299 (App. 53a-55a), is unreported.

The order of the court of appeals in *Polaris Innovations Ltd. v. Iancu*, No. 2019-1483 (App. 56a-57a), is unreported.

The order of the court of appeals in *Next Caller, Inc. v. TRUSTID, Inc.*, No. 2020-1291 (App. 58a-59a), is unreported.

The order of the court of appeals in *Horizon Pharma USA, Inc. v. Dr. Reddy's Laboratories, Inc.*, No. 2020-1164 (App. 60a-61a), is unreported.

The order of the court of appeals in *Rovi Guides, Inc. v. Comcast Cable Communications, LLC*, Nos. 2019-1215, 2019-1216, 2019-1218, 2019-1293, 2019-1294, and 2019-1295 (App. 62a-63a), is unreported.

The order of the court of appeals in *Dali Wireless Inc. v. CommScope Technologies LLC*, No. 2020-1045 (App. 64a-65a), is unreported.

The order of the court of appeals in *Intex Recreation Corp. v. Team Worldwide Corp.*, Nos. 2020-1141, 2020-1142, 2020-1143, 2020-1149, 2020-1150, and 2020-1151 (App. 66a-67a), is unreported.

The order of the court of appeals in *Team Worldwide Corp. v. Intex Recreation Corp.*, No. 2020-1147 (App. 68a-69a), is unreported.

The order of the court of appeals in *Gree, Inc. v. Supercell Oy*, Nos. 2020-1069 and 2020-1162 (App. 70a-71a), is unreported.

The order of the court of appeals in *Koninklijke KPN N.V. v. LG Electronics, Inc.*, No. 2019-2447 (App. 72a-73a), is unreported.

The order of the court of appeals in *Personalized Media Communications, LLC v. Apple Inc.*, Nos. 2020-1197 and 2020-1198 (App. 74a-76a), is unreported.

The order of the court of appeals in *In re JHO Intellectual Property Holdings, LLC*, No. 2019-2330 (App. 77a-78a), is unreported.

The order of the court of appeals in *Signature Systems, LLC v. American Express Co.*, No. 2020-1319 (App. 79a-81a), is unreported.

The order of the court of appeals in *In re Boloro Global Ltd.*, Nos. 19-2349, 19-2351, and 19-2353 (App. 82a-84a), is not yet published in the Federal Reporter but is available at 2020 WL 3781201.

JURISDICTION

The judgment of the court of appeals in *Image Processing Technologies LLC v. Samsung Electronics Co.*, Nos. 2018-2156, 2019-1408, and 2019-1485, was entered on December 5, 2019. Petitions for rehearing in that case were denied on February 24, 2020 (App. 85a-88a).

The judgment of the court of appeals in *Luoma v. GT Water Products, Inc.*, No. 2019-2315, was entered on January 17, 2020. A petition for rehearing in that case was denied on May 15, 2020 (App. 125a-128a).

The judgment of the court of appeals in *Pfizer Inc. v. Merck Sharp & Dohme Corp.*, Nos. 2019-1871, 2019-1873, 2019-1875, 2019-1876, and 2019-2224, was entered on January 21, 2020. Petitions for rehearing in that case were denied on April 8, 2020 (App. 93a-94a).

The judgment of the court of appeals in *Stuart v. RPM International, Inc.*, Nos. 2019-1994 and 2019-2238, was entered on January 21, 2020. Petitions for rehearing in that case were denied on April 8, 2020 (App. 95a-96a).

The judgment of the court of appeals in *Vilox Technologies, LLC. v. Unified Patents Inc.*, No. 2019-2057, was entered on January 21, 2020. A petition for rehearing in that case was denied on April 7, 2020 (App. 91a-92a).

The judgment of the court of appeals in *Vaporstream, Inc. v. Snap Inc.*, Nos. 2019-2231, 2019-2290, 2019-2337, 2019-2339, and 2020-1030, was entered on January 23, 2020. Petitions for rehearing in that case were denied on April 8, 2020 (App. 97a-100a).

The judgment of the court of appeals in *Document Security Systems, Inc. v. Seoul Semiconductor Co.*,

No. 2019-2281, was entered on January 23, 2020. A petition for rehearing in that case was denied on April 9, 2020 (App. 105a-106a).

The judgment of the court of appeals in *VirnetX Inc. v. Cisco Systems, Inc.*, No. 2019-1671, was entered on January 24, 2020. Petitions for rehearing in that case were denied on May 13, 2020 (App. 115a-124a).

The judgment of the court of appeals in *Concert Pharmaceuticals, Inc. v. Incyte Corp.*, No. 2019-2011, was entered on January 24, 2020. Petitions for rehearing in that case were denied on April 9, 2020 (App. 101a-102a).

The judgment of the court of appeals in *AgroFresh, Inc. v. UPL Ltd.*, No. 2019-2243, was entered on January 24, 2020. A petition for rehearing in that case was denied on April 9, 2020 (App. 103a-104a).

The judgment of the court of appeals in *Polaris Innovations Ltd. v. Kingston Technology Co.*, No. 2019-1202, was entered on January 27, 2020. Petitions for rehearing in that case were denied on April 14, 2020 (App. 107a-108a).

The judgment of the court of appeals in *Polaris Innovations Ltd. v. Kingston Technology Co.*, No. 2018-1768, was entered on January 31, 2020. Petitions for rehearing in that case were denied on April 2, 2020 (App. 89a-90a).

The judgment of the court of appeals in *Document Security Systems, Inc. v. Seoul Semiconductor Co.*, No. 2019-2430, was entered on February 3, 2020. A petition for rehearing in that case was denied on April 20, 2020 (App. 109a-110a).

The judgment of the court of appeals in *Sound View Innovations, LLC v. Unified Patents, LLC*, No. 2020-1154,

was entered on February 3, 2020. A petition for rehearing in that case was denied on April 20, 2020 (App. 111a-112a).

The judgment of the court of appeals in *Sound View Innovations, LLC v. Hulu, LLC*, No. 2020-1155, was entered on February 3, 2020. Petitions for rehearing in that case were denied on April 21, 2020 (App. 113a-114a).

The judgment of the court of appeals in *VirnetX Inc. v. Iancu*, Nos. 2017-2593 and 2017-2594, was entered on February 27, 2020.

The judgment of the court of appeals in *Drone-Control, LLC v. SZ DJI Technology Co.*, Nos. 2019-2210, 2019-2223, 2019-2276, and 2019-2318, was entered on February 27, 2020.

The judgment of the court of appeals in *Promptu Systems Corp. v. Comcast Cable Communications, LLC*, Nos. 2019-2368 and 2019-2369, was entered on February 27, 2020.

The judgment of the court of appeals in *Iron Oak Technologies, LLC v. Unified Patents Inc.*, No. 2019-2388, was entered on February 27, 2020.

The judgment of the court of appeals in *High 5 Games, LLC v. Iancu*, No. 2020-1024, was entered on February 27, 2020.

The judgment of the court of appeals in *Protiva Biotherapeutics, Inc. v. Moderna Therapeutics, Inc.*, No. 2020-1183, was entered on February 27, 2020.

The judgment of the court of appeals in *Promptu Systems Corp. v. Comcast Cable Communications, LLC*, No. 2020-1253, was entered on February 27, 2020.

The judgment of the court of appeals in *Polaris Innovations Ltd. v. Iancu*, No. 2019-1484, was entered on March 24, 2020.

The judgment of the court of appeals in *Amgen Inc. v. Iancu*, No. 2019-2171, was entered on March 24, 2020.

The judgment of the court of appeals in *Steuben Foods, Inc. v. Nestle USA, Inc.*, Nos. 2020-1082 and 2020-1083, was entered on March 30, 2020.

The judgment of the court of appeals in *North Star Innovations, Inc. v. Micron Technology, Inc.*, Nos. 2020-1295, 2020-1296, 2020-1297, 2020-1298, and 2020-1299, was entered on March 30, 2020. Petitions for rehearing in that case were denied on June 16, 2020 (App. 129a-134a).

The judgment of the court of appeals in *Polaris Innovations Ltd. v. Iancu*, No. 2019-1483, was entered on April 9, 2020.

The judgment of the court of appeals in *Next Caller, Inc. v. TRUSTID, Inc.*, No. 2020-1291, was entered on April 16, 2020.

The judgment of the court of appeals in *Horizon Pharma USA, Inc. v. Dr. Reddy's Laboratories, Inc.*, No. 2020-1164, was entered on April 17, 2020.

The judgment of the court of appeals in *Rovi Guides, Inc. v. Comcast Cable Communications, LLC*, Nos. 2019-1215, 2019-1216, 2019-1218, 2019-1293, 2019-1294, and 2019-1295, was entered on April 22, 2020.

The judgment of the court of appeals in *Dali Wireless Inc. v. CommScope Technologies LLC*, No. 2020-1045, was entered on April 29, 2020.

The judgment of the court of appeals in *Intex Recreation Corp. v. Team Worldwide Corp.*, Nos. 2020-1141, 2020-1142, 2020-1143, 2020-1149, 2020-1150, and 2020-1151, was entered on April 29, 2020.

The judgment of the court of appeals in *Team Worldwide Corp. v. Intex Recreation Corp.*, No. 2020-1147, was entered on April 29, 2020.

The judgment of the court of appeals in *Gree, Inc. v. Supercell Oy*, Nos. 2020-1069 and 2020-1162, was entered on May 19, 2020.

The judgment of the court of appeals in *Koninklijke KPN N.V. v. LG Electronics, Inc.*, No. 2019-2447, was entered on May 20, 2020.

The judgment of the court of appeals in *Personalized Media Communications, LLC v. Apple Inc.*, Nos. 2020-1197 and 2020-1198, was entered on May 21, 2020.

The judgment of the court of appeals in *In re JHO Intellectual Property Holdings, LLC*, No. 2019-2330, was entered on June 18, 2020.

The judgment of the court of appeals in *Signature Systems, LLC v. American Express Co.*, No. 2020-1319, was entered on June 22, 2020.

The judgment of the court of appeals in *In re Boloro Global Ltd.*, Nos. 19-2349, 19-2351, and 19-2353, was entered on July 7, 2020.

On March 19, 2020, the Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The effect of that order was to extend the deadline for filing a petition for a writ of certiorari seeking review of the judgment in *Image Processing Technologies LLC v. Samsung Electronics Co.*, Nos. 2018-2156, 2019-1408, and 2019-1485, to July 23, 2020, and to extend to a later date the deadline for filing in each of the other cases encompassed by this petition.

In each case, the jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

These cases concern whether, under the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, administrative patent judges of the United States Patent and Trademark Office (USPTO) are principal officers who must be appointed by the President with the advice and consent of the Senate, or “inferior Officers” whose appointment Congress may vest in a department head. In *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (2019), petitions for cert. pending, Nos. 19-1434 (filed June 25, 2020), 19-1452 (filed June 29, 2020), and 19-1458 (filed June 30, 2020), the Federal Circuit held that administrative patent judges are principal officers and that the statutorily prescribed method of appointing administrative patent judges—by the Secretary of Commerce acting alone, see 35 U.S.C. 6(a)—violates the Appointments Clause. 941 F.3d at 1327-1335. In each of the judgments encompassed by this consolidated petition, the court of appeals vacated one or more decisions of the Patent Trial and Appeal Board (Board) based on *Arthrex* and remanded for further proceedings.

1. The Patent Act of 1952 (Patent Act), 35 U.S.C. 1 *et seq.*, establishes the USPTO as an executive agency within the United States Department of Commerce “responsible for the granting and issuing of patents and the registration of trademarks.” 35 U.S.C. 2(a)(1); see 35 U.S.C. 1(a). The Board is an administrative tribunal within the USPTO that conducts several kinds of patent-related administrative adjudications, including appeals from adverse decisions of patent examiners on patent applications and in patent reexaminations; derivation proceedings; and inter partes and post-grant reviews. 35 U.S.C. 6(a) and (b). Its final decisions may be appealed to the Federal Circuit. 35 U.S.C. 141(c), 144, 319.

The Board consists of the Director, the Deputy Director, the Commissioners for Patents and Trademarks, and “administrative patent judges.” 35 U.S.C. 6(a). Administrative patent judges, of whom there are currently more than 200, are “persons of competent legal knowledge and scientific ability who are appointed by the Secretary [of Commerce], in consultation with the Director.” *Ibid.* Like other “[o]fficers and employees” of the USPTO, administrative patent judges are “subject to the provisions of title 5, relating to Federal employees,” 35 U.S.C. 3(c), under which civil servants may be removed “only for such cause as will promote the efficiency of the service,” 5 U.S.C. 7513(a). Because the Secretary appoints the judges, that removal authority belongs to the Secretary. See *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010).

2. a. In *Arthrex*, the court of appeals held that administrative patent judges are principal officers for purposes of the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, and therefore must be appointed by the President with the advice and consent of the Senate. 941 F.3d at 1327-1335. The court therefore held that the statutorily prescribed method of appointing administrative patent judges—by the Secretary of Commerce acting alone—violates the Appointments Clause. *Ibid.*; see 35 U.S.C. 6(a). The Federal Circuit reached and resolved that issue despite the undisputed failure of the party that had appealed the Board’s decision (*Arthrex, Inc.*) to present its Appointments Clause challenge during the Board proceedings. *Arthrex*, 941 F.3d at 1326-1327.

To cure the putative constitutional defect that it identified, the *Arthrex* court held that certain statutory restrictions on the removal of federal officials, 5 U.S.C.

7513(a), cannot validly be applied to administrative patent judges. 941 F.3d at 1335-1338. “Because the Board’s decision in [*Arthrex*] was made by a panel of [administrative patent judges] that were not constitutionally appointed at the time the decision was rendered,” the court vacated the Board’s decision, remanded for “a new hearing” before the Board, and directed “that a new panel of [administrative patent judges] must be designated to hear the [proceeding] anew on remand.” *Id.* at 1338, 1340; see *id.* at 1338-1340. The *Arthrex* court announced that its ruling and remedy would extend to all cases “where final written decisions were issued [by the Board] and where litigants present an Appointments Clause challenge on appeal,” regardless of whether such a challenge had been asserted during the agency proceedings. *Id.* at 1340.

The Federal Circuit denied petitions for rehearing in *Arthrex*. 953 F.3d 760, 761 (2020) (per curiam). Members of the court issued five separate opinions, joined by a total of eight judges, concurring in or dissenting from the court’s order. *Id.* at 761-789.

b. The government has filed a petition for a writ of certiorari seeking review of the Federal Circuit’s judgments in *Arthrex* and in *Polaris Innovations Ltd. v. Kingston Technology Co.*, 792 Fed. Appx. 820 (2020) (per curiam), petitions for cert. pending, No. 19-1434 (filed June 30, 2020) and 19-1459 (filed June 30, 2020), a case in which the court of appeals applied its holding in *Arthrex* but in which an Appointments Clause challenge had been presented to the Board. Pet. 1-34, *United States v. Arthrex, Inc.*, No. 19-1434 (filed June 25, 2020); see *Polaris*, 792 Fed. Appx. at 820; *id.* at 820 n.1 (Hughes, J., concurring). The government’s petition seeks review of

both the Federal Circuit's Appointments Clause holding (which is implicated in both cases) and its decision to excuse the forfeiture of the Appointments Clause challenge in *Arthrex*. See 19-1434 Pet. I, 13-33; see also *id.* at 33-34.

Since the government filed its petition in No. 19-1434, private entities that were parties in *Arthrex* or *Polaris* have filed three additional petitions for writs of certiorari. The appellees in *Arthrex* have sought review of the Federal Circuit's Appointments Clause holding. See Pet. 12-27, *Smith & Nephew, Inc. v. Arthrex, Inc.*, No. 19-1452 (filed June 29, 2020). The appellants in both *Arthrex* and *Polaris* have sought review of the court of appeals' severability holding. See Pet. i, 16-37, *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 19-1458 (filed June 30, 2020); Pet. i, 15-30, *Polaris Innovations Ltd. v. Kingston Tech. Co.*, No. 19-1459 (filed June 30, 2020). All of those petitions are currently pending before the Court.

3. Since resolving *Arthrex*, the Federal Circuit has decided dozens of other appeals in which, based on its *Arthrex* decision, it has vacated Board decisions and remanded for new hearings. See 19-1434 Pet. 14, 27; 19-1434 Pet. App. 223a. In the vast majority of those cases, as in *Arthrex* itself, the parties appealing the Board's decisions had not raised Appointments Clause challenges before the Board. See 19-1434 Pet. 27. In a handful of cases, however, including *Polaris*, an Appointments Clause challenge was preserved during the administrative proceedings. *Id.* at 12; see 792 Fed. Appx. at 820; *id.* at 820 n.1 (Hughes, J., concurring).

The Board has issued a blanket order staying further administrative proceedings in those and any subsequent cases remanded by the Federal Circuit pending

this Court’s disposition of a petition for a writ of certiorari to review the Federal Circuit’s holding in *Arthrex. General Order in Cases Remanded Under Arthrex, Inc. v. Smith & Nephew, Inc.* 941 F.3d 1320 (Fed. Cir. 2019) 1-2 (PTAB May 1, 2020). In issuing that stay, the Board observed that the Federal Circuit “ha[d] already vacated more than 100 decisions by the [Board] and more such Orders are expected.” *Id.* at 1; see *id.* at 2-6 (listing proceedings that had been remanded as of May 1, 2020).¹ In the months since then, the court of appeals has remanded additional cases based on *Arthrex*. *E.g.*, App. 70a-84a.

The 39 orders of the Federal Circuit encompassed by this consolidated petition—which concern nearly twice that number of Board proceedings and Federal Circuit appeals—are among those in which the court has vacated Board decisions based on *Arthrex* and has remanded for further proceedings before a different Board panel. App. 1a-84a. In all of these cases, patent owners challenged final decisions issued by the Board in inter partes reviews or other Board proceedings. *Ibid.* In all of these cases, the government defended against challenges to the constitutionality of the statutory scheme. *Ibid.* And in all of these cases, the Federal Circuit vacated the Board’s final

¹ In one set of 18 Board proceedings that involve the same parties and were covered by the Board’s blanket order, the court of appeals initially vacated and remanded based on *Arthrex*, but the court subsequently granted the request of the party that had raised an Appointments Clause challenge in the court of appeals “to withdraw and permanently waive its Appointments Clause challenge.” Order at 4, *Intel Corp. v. Alacrittech, Inc.*, No. 2019-1443 (Fed. Cir. Apr. 30, 2020). The Board has also determined that two proceedings were mistakenly included in its blanket order and has since lifted the order in those proceedings.

decisions based on *Arthrex*, and remanded the case to be reheard by a different panel of the Board. *Ibid.* In many of these cases, the court denied petitions for rehearing. App. 85a-134a.²

ARGUMENT

In *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (2019), petitions for cert. pending, Nos. 19-1434 (filed June 25, 2020), 19-1452 (filed June 29, 2020), and 19-1458 (filed June 30, 2020), the Federal Circuit held that the administrative patent judges who sit on Board panels are principal officers who must be, but by statute are not, appointed by the President with the advice and consent of the Senate. *Id.* at 1327-1335. The *Arthrex* court resolved that Appointments Clause challenge even though the appellant had not presented it to the agency, and the court excused that forfeiture based on reasons that would apply to nearly all separation-of-powers challenges. *Id.* at 1326-1327. To eliminate that putative constitutional infirmity going forward, the court severed the application to administrative patent judges of certain statutory protections against removal. *Id.* at 1335-1338. But because the Board's decision under review in *Arthrex* had been issued before the court's decision rendering those removal protections inapplicable, the court vacated that Board decision and remanded for a new administrative proceeding before a differently

² The cases encompassed by this petition do not include those in which the Federal Circuit vacated and remanded a Board decision based on *Arthrex* but in which either the government was not a party in the court of appeals at the time of the court's ruling, the party raising an Appointments Clause challenge has since withdrawn it, see p. 24 n.1, *supra*, or the Board has terminated the administrative proceeding following a settlement by the parties.

constituted Board panel. *Id.* at 1338-1340. For the reasons set forth in the government's petition for a writ of certiorari in *United States v. Arthrex, Inc.*, No. 19-1434 (filed June 25, 2020), the court's Appointments Clause and forfeiture holdings are erroneous and warrant this Court's review. See 19-1434 Pet. 13-34.

Since its decision in *Arthrex*, the Federal Circuit has followed the same course in scores of additional appeals from Board rulings, including in the cases encompassed by this petition. In each of the 39 orders at issue here, the court vacated one or more Board decisions based on *Arthrex* and remanded for further proceedings before a different Board panel.

If the Court grants the government's petition in No. 19-1434 and ultimately reverses the Federal Circuit's judgment in *Arthrex* and/or *Polaris Innovations Ltd. v. Kingston Technology Co.*, 792 Fed. Appx. 820 (2020) (*per curiam*), petitions for cert. pending, Nos. 19-1434 (filed June 25, 2020) and 19-1459 (filed June 30, 2020), its decision will undermine the court of appeals' subsequent rulings in these dozens of other cases in which it applied *Arthrex's* holdings to reach the same result. In that event, it will be appropriate for the Court to vacate the Federal Circuit's decisions in these cases and remand for further proceedings. Accordingly, because this Court's disposition of the government's petition in *Arthrex* may affect the proper disposition of these cases, this petition should be held pending the disposition of that petition and any further proceedings in this Court.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of the petition for a writ of certiorari in *United States v. Arthrex, Inc.*, No. 19-1434 (filed June 25, 2020), and any further proceedings in this Court, and then disposed of as appropriate in light of the Court's decision in that case.

Respectfully submitted.

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