No.

IN THE
Supreme Court of the United States

SMITH & NEPHEW, INC.
AND ARTHROCARE CORP.,

Petitioners,

v.

ARTHREX, INC.
AND UNITED STATES OF AMERICA,

Respondents.

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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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.

PARTIES TO THE PROCEEDING BELOW

Petitioners Smith & Nephew, Inc. and ArthroCare Corp. were petitioners in proceedings before the Patent Trial and Appeal Board and appellees in the court of appeals.

Respondent Arthrex, Inc. was the patent owner in proceedings before the Patent Trial and Appeal Board and the appellant in the court of appeals.

The United States of America was an intervenor in the court of appeals.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, petitioners Smith & Nephew, Inc. and ArthroCare Corp. state that Smith & Nephew PLC is petitioners' parent corporation and no other publicly held corporation owns 10% or more of the stock of either petitioner.

RELATED PROCEEDINGS

There are no proceedings directly related to this case within the meaning of Rule 14.1(b)(iii). Other proceedings that are not directly related to this case but involve the same parties are:

- *Arthrex, Inc.* v. *Smith & Nephew, Inc.*, No. 19-1204 (U.S.), petition for a writ of certiorari filed on April 6, 2020; and
- *Smith & Nephew, Inc.* v. *Arthrex, Inc.*, Case IPR2016-00918 (P.T.A.B.), final written decision entered on October 16, 2017.

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PETITION FOR A WRIT OF CERTIORARI

Although this Court has repeatedly recognized that first-line administrative adjudicators are "inferior" Officers of the United States, the Federal Circuit held in this case that 200-plus administrative patent judges are *principal* Officers. This aspect of the court of appeals' decision marks a sea change in Appointments Clause jurisprudence, as explained in the government's separate petition. *See* Pet. for Cert. 14–26, *United States* v. *Arthrex, Inc.*, No. 19-__ (U.S. filed June 25, 2020) ("U.S. Pet."). The decision below has already upended more than 100 administrative patent proceedings; and its reasoning, if not corrected, could impact virtually all participants in the patent system. The court of appeals itself recognized that this case presents "an issue of exceptional importance," Pet. App. 6a, and the panel decision drew multiple separate opinions criticizing its conclusions, *id.* at 81a–82a. Accordingly, this petition for a writ of certiorari should be granted.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 941 F.3d 1320. The court of appeals' order denying rehearing en banc, with additional opinions (Pet. App. 80a), is reported at 953 F.3d 760. The Patent Trial and Appeal Board's final written decision (Pet. App. 34a) is unreported.

JURISDICTION

The court of appeals entered its judgment on October 31, 2019, Pet. App. 1a, and denied a timely petition for rehearing on March 23, 2020, *id.* at 82a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appointments Clause as well as pertinent statutory provisions are reproduced in the Appendix at 145a–205a.

STATEMENT

Administrative patent judges (APJs) of the Patent Trial and Appeal Board preside over a variety of proceedings under the direction and supervision of the Director of the United States Patent and Trademark Office. This Court has ruled that administrative adjudicators whose "work is directed and supervised at some level" by other executive Officers are *inferior* Officers within the meaning of the Appointments Clause and therefore may be appointed by a Head of Department—as APJs are. *Edmond* v. *United States*, 520 U.S. 651, 663 (1997). In this case, however, the Federal Circuit ruled that APJs are *principal* Officers who must be appointed by the President with the advice and consent of the Senate. Pet. App. 2a.

1. One of the "significant structural safeguards of the constitutional scheme," the Appointments Clause was "designed to preserve public accountability relative to important Government assignments." *Edmond*, 520 U.S. at 659, 663. By requiring presidential nomination and senatorial confirmation for all Cabinet-level and other principal Officers, *see* U.S. Const. art. II, § 2, cl. 2, the Clause "ensure[s] public accountability for both the making of a bad appointment and the rejection of a good one," *Edmond*, 520 U.S. at 660. With respect to "inferior Officers," however, "administrative convenience . . . was deemed to outweigh the benefits of the more cumbersome procedure." *Ibid.*

The Clause therefore permits Congress to vest the appointment of "inferior Officers" "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2.

The United States Patent and Trademark Office (USPTO) is an executive agency within the Department of Commerce, 35 U.S.C. § 1(a), with responsibility for granting, reviewing, amending, and canceling patent claims. The USPTO's "powers and duties" are vested in a Director, who also serves as Under Secretary of Commerce for Intellectual Property, and is nominated by the President, confirmed by the Senate, and removable by the President at will. *Id.* § 3(a)(1), (4). Among other powers and duties, the Director is "responsible for providing policy direction and management supervision for the Office," *id.* § 3(a)(2)(A), and has the authority to establish regulations "govern[ing] the conduct of proceedings in the Office," *id.* § 2(b)(2).

The Patent Trial and Appeal Board (Board) is "an adjudicatory body within the PTO" that conducts various proceedings for reviewing previously issued patent claims. *Oil States Energy Servs., LLC* v. *Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1370–71 (2018); *see also* 35 U.S.C. § 6(b). The Board is composed of the Director, the Deputy Director, two Commissioners, and more than 200 "administrative patent judges." 35 U.S.C. § 6(a); Pet. App. 10a. The Commissioners and Deputy Director are appointed by the Secretary of Commerce. 35 U.S.C. § 3(b). APJs are also "appointed by the Secretary, in consultation with the Director," *id.* § 6(a), at a pay rate fixed by the Director, *id.* § 3(b)(6). As officials in the civil service, *id.* § 3(c), most APJs may be terminated by the Secretary for cause, *see* 5 U.S.C. § 7513(a), and some—as members

of the Senior Executive Service, *see* 83 Fed. Reg. 29,312, 29,324 (June 22, 2018)—are subject to even "fewer protections" from removal, *Shenwick* v. *Dep't of State*, 92 M.S.P.R. 289, 295 (M.S.P.B. 2002).

"Over the last several decades," Congress has created several "administrative processes" by which the Board now reviews previously issued patent claims. *Oil States*, 138 S. Ct. at 1370. The Board hears appeals from the initial examination of patent and reissue applications, 35 U.S.C. § 134(a), and from "ex parte reexaminations," *id.* § 134(b), which were created in 1980 for third-party challenges to the patentability of issued patent claims, *see* An Act to Amend the Patent and Trademark Laws, Pub. L. No. 96-517, 94 Stat. 3015 (1980) (codified at 35 U.S.C. § 301 *et seq.*). The Board also continues to conduct two procedures phased out by the Leahy-Smith America Invents Act (AIA), Pub. L. No. 112-29, 125 Stat. 284 (2011), *see* AIA §§ 3(n), 7(e), 125 Stat. 293, 315: *viz.*, "interference" proceedings, for resolving conflicts between patent claims covering the same subject matter, 35 U.S.C. § 135 (2010), and appeals of "inter partes reexaminations," which are similar to ex parte reexaminations but with more third-party participation, *see id.* § 314 (2010). And the AIA further authorizes the Board to conduct "post-grant review[s]" for canceling patent claims within nine months of a patent's issuance, *id.* § 321; "covered business method" review, for a particular category of patents, AIA § 18, 125 Stat. 329; "derivation proceedings," for correcting a previous patent that was derived from the applicant's invention, 35 U.S.C. § 135; and "inter partes review" (IPR), which is an updated form of inter partes reexamination with "broader [third-party] participation rights," *Cuozzo Speed Techs., LLC* v. *Lee*, 136 S. Ct. 2131, 2137, 2144 (2016); *see* 35 U.S.C. § 311.

The IPR procedure—currently the most widely used procedure for reviewing previously issued patent claims—begins when any person other than the patent owner files a petition requesting cancellation of patent claims that fail the standards for patent validity. 35 U.S.C. § 311. The Director possesses the sole and unreviewable discretion whether to institute an IPR, *see Thryv, Inc.* v. *Click-To-Call Techs., LP*, 140 S. Ct. 1367, 1370 (2020) (citing 35 U.S.C. § 314(d)), and whether to reconsider and dismiss an IPR after institution, *see Medtronic, Inc.* v. *Robert Bosch Healthcare Sys., Inc.*, 839 F.3d 1382, 1386 (Fed. Cir. 2016).

Once an IPR is instituted, the Director "designate[s]" a panel of "at least 3 members" of the Board to assess whether the challenged claims are patentable. 35 U.S.C. § 6(c). The statute does not limit the Director's authority to alter the panel's composition and size on his own initiative at any time. *See ibid.* For example, the Director can assign himself to a panel, and can assign, *sua sponte* reassign, or add APJs to panels based on the need "to secure and maintain uniformity of the Board's decisions" on "major policy or procedural issues." Patent Trial and Appeal Board Standard Operating Procedure 1 (SOP 1) at 6–12, 15 & n.4, https://www.uspto.gov/sites/default/files/documents/SOP%201%20R15%20FINAL.pdf (all Internet sites last visited June 29, 2020).

The IPR proceedings over which APJs preside "are adjudicatory in nature": the parties "may seek discovery, file affidavits and other written memoranda, and request an oral hearing." *Return Mail, Inc.* v. *U.S. Postal Serv.*, 139 S. Ct. 1853, 1860 (2019); *see generally* 35 U.S.C. § 316. The Director has "prescribe[d] regulations" governing recurring substantive and procedural aspects of these proceedings.

35 U.S.C. § 316(a); *see also Oil States*, 138 S. Ct. at 1371 (listing provisions). The Director can provide further "policy direction and management supervision" to APJs, 35 U.S.C. § 3(a)(2), by "provid[ing] instructions" with "exemplary applications of patent laws to fact patterns," Pet. App. 14a, and by designating (and redesignating) which Board decisions are nonbinding, which are "precedential" and hence binding "in subsequent matters involving similar facts or issues," and which are "informative" and hence to "be followed in most cases, absent justification" for departure. Patent Trial and Appeal Board Standard Operating Procedure 2 (SOP 2) at 11–12, https://www.uspto.gov/sites/default/files/documents/SOP2%20R10%20FINAL.pdf.

After an IPR proceeding has concluded, the panel issues a "final written decision" addressing the patentability of the challenged claims under the controlling legal authorities, including the Director's regulations and designated precedential decisions. 35 U.S.C. § 318(a). That decision, however, is subject to "rehearing[ ]" by the Board. *Id.* § 6(c). Under the current operating procedure established by the Director, a standing Precedential Opinion Panel convened and designated at the Director's sole discretion can *sua sponte* order rehearing. *See* SOP 2 at 4–5. On rehearing, the Director has sole discretion to designate which APJs, and how many, sit on the panel. *See* 35 U.S.C. § 6(c); *Nidec Motor Corp.* v. *Zhongshan Broad Ocean Motor Co.*, 868 F.3d 1013, 1015 (Fed. Cir. 2017) (per curiam) (rehearing by "expanded panel").

"A[ny] party dissatisfied with the final written decision" of the Board "may appeal the decision" to the Federal Circuit, 35 U.S.C. § 319, which "'review[s] the Board's claim construction de novo'" and "'subsidiary

fact findings'" for substantial evidence, *Gen. Hosp. Corp.* v. *Sienna Biopharm., Inc.*, 888 F.3d 1368, 1371 (Fed. Cir. 2018) (citation omitted). Once judicial review concludes, the USPTO will "issue and publish a certificate canceling any claim of the patent finally determined to be unpatentable, confirming any claim of the patent determined to be patentable, and incorporating in the patent by operation of the certificate any new or amended claim determined to be patentable." 35 U.S.C. § 318(b).

2. Petitioner Smith & Nephew, Inc. is a leading portfolio medical technology company and the parent corporation of petitioner ArthroCare Corp. Among many other life-saving and life-enhancing products, petitioners market and sell suture anchors, which are devices that surgeons implant in bone to help secure soft tissue. *See* Pet. App. 37a–38a. Respondent Arthrex, Inc. is the owner of U.S. Patent No. 9,179,907, which claims particular suture anchors. *See id.* at 3a.

a. In November 2015, respondent sued petitioners in the U.S. District Court for the Eastern District of Texas. *See Arthrex, Inc.* v. *Smith & Nephew, Inc.*, No. 15-cv-1756 (E.D. Tex. filed Nov. 10, 2015). The jury found that petitioners infringed four claims of the '907 patent. C.A. JA4713–14. But before the court could rule on post-trial motions, the parties reached a settlement with the express understanding that IPR of the '907 patent could be pursued. C.A. JA532–33 at 52:20–53:3 (acknowledgment by Arthrex's counsel).

In November 2016, petitioners timely sought IPR of thirteen claims of the '907 patent. C.A. JA48, 122; *see* 35 U.S.C. § 315(b). Respondent disclaimed two of the thirteen, and the Director instituted review on the remaining eleven (including the four at issue in the district court litigation) and designated a panel of

three APJs to preside over the IPR. C.A. JA216. The same panel of APJs had presided over previous IPRs instituted by respondent, and had issued decisions favorable to respondent. *See*, *e.g.*, *Arthrex, Inc.* v. *Vite Techs., Inc.*, Case IPR2016-00381, Paper 7 (P.T.A.B. June 23, 2016) (institution decision); *id.*, Paper 15 (Nov. 7, 2016) (final written decision). At no time during the IPR proceedings did respondent assert a constitutional challenge to the appointment of the designated APJs or the Board as a whole. After a trial conducted pursuant to the Director's regulations, precedential decisions, and other guidance, the Board issued a final written decision finding all eleven instituted claims unpatentable. Pet. App. 78a.

b. Respondent timely appealed the Board's decision, and a three-judge panel of the Federal Circuit vacated the Board's decision and remanded for a new hearing. Pet. App. 33a.

The panel did not address respondent's patentability challenge, but instead ruled only on respondent's alternative argument—raised for the first time on appeal—that APJs are principal Officers who were not appointed in the manner required by the Appointments Clause. *See* C.A. Dkt. 18 at 59 (opening brief). The panel acknowledged that respondent had not preserved this argument during the proceedings before the Board, but elected to excuse this forfeiture in light of the "exceptional importance" of the constitutional question and its "wide-ranging effect on property rights and the nation's economy." Pet. App. 4a–6a (citing *Freytag* v. *Comm'r*, 501 U.S. 868, 879 (1991)).

On the merits of the Appointments Clause issue, the panel acknowledged this Court's instruction that "[w]hether one is an 'inferior' officer depends on whether he has a superior." Pet. App. 9a (alteration

in original) (quoting *Edmond*, 520 U.S. at 662–63). But the panel went on to derive a multipart test for inferior-officer status that turns on:

> (1) "the level of supervision and oversight an appointed official has over the officers";
>
> (2) "whether an appointed official" can "review and reverse the officers' decision"; and
>
> (3) whether the appointed official has "power to remove the officers."

Ibid. (citing *Intercollegiate Broad. Sys., Inc.* v. *Copyright Royalty Bd.*, 684 F.3d 1332, 1338 (D.C. Cir. 2012)).

The court of appeals recognized that the first factor—supervision—"weigh[s] in favor of a conclusion that APJs are inferior officers" because APJs are subject to oversight similar to the inferior Officers in *Edmond*. Pet. App. 16a. Specifically, the Director promulgates regulations that "guide APJ-panel decision making," "has administrative authority that can affect the procedure of individual cases"—for example, by deciding whether to institute an IPR and which APJs will sit on a panel—and exercises supervisory "authority over the APJs' pay." *Id.* at 14a–16a.

The court of appeals concluded, however, that the other two factors "support[ed] a conclusion that APJs are principal officers." Pet. App. 13a–14a, 16a. Because the Director could not "single-handedly" reverse a particular final written decision, the panel reasoned, the Director's supervisory powers were "not . . . the type of review[ ]" that counted for Appointments Clause purposes. *Id.* at 10a–12a. The court added that "[t]he Director's authority to assign certain APJs to *certain panels* is not the same as the authority to

remove an APJ *from judicial service* without cause." *Id.* at 17a.

Concluding that the second two factors outweighed the first, the court of appeals held that APJs are principal Officers and, therefore, their appointment by the Secretary violated the Appointments Clause. Pet. App. 22a.

The panel then "sever[ed]" the application of Title 5's for-cause removal restrictions to APJs in 35 U.S.C. § 3(c). Pet. App. 25a–26a. "Although the Director still does not have independent authority to review" APJ decisions, the panel reasoned, stripping APJs of their statutory protections from removal rendered them inferior rather than principal Officers because the Director's "provision of policy and regulation to guide the outcomes of those decisions," coupled with the Secretary's power to remove APJs without cause, "provides significant constraint on issued decisions." *Id.* at 28a. The court surmised that Congress "would have preferred a Board whose members are removable at will rather than no Board at all." *Id.* at 27a.

As a remedy, the court of appeals vacated the Board's final written decision and remanded for a "new hearing" before a newly designated panel of APJs. Pet. App. 31a–32a (citing *Lucia* v. *SEC*, 138 S. Ct. 2044, 2055 (2018)). The panel concluded that this relief was "appropriate," even though respondent had not raised its Appointments Clause challenge before the Board, because "[t]he Board was not capable of correcting the constitutional infirmity" and Appointments Clause "challenges under these circumstances should be incentivized at the appellate level." *Id.* at 31a–32a (citing *Lucia*, 138 S. Ct. at 2055 n.5).

c. Following the decision below, several Federal Circuit judges disagreed in other cases with the

panel's Appointments Clause analysis. Judge Hughes, joined by Judge Wallach, explained in detail his view that APJs are inferior Officers "in light of the Director's significant control over [their] activities." *Polaris Innovations Ltd.* v. *Kingston Tech. Co.*, 792 F. App'x 820, 821 (Fed. Cir. 2020) (concurring op.). And Judge Dyk, joined by Judge Newman, questioned whether APJs are principal Officers and expressed concerns with the remedy imposed by the panel in this case. *Bedgear, LLC* v. *Fredman Bros. Furniture Co.*, 783 F. App'x 1029, 1030 (Fed. Cir. 2019) (concurring op.).

d. Petitioners, respondent, and the United States all filed petitions for rehearing en banc in this case. *See* C.A. Dkts. 77–79. The Federal Circuit denied rehearing in an order accompanied by five separate opinions. Pet. App. 81a–82a.

Two concurring opinions agreed with the panel on the merits. Judge Moore (joined by Judges O'Malley, Reyna, and Chen) wrote that the panel opinion, which she had authored, properly identified and applied "*Edmond*'s broad framework." Pet. App. 85a–86a. Judge O'Malley (joined by Judges Moore and Reyna) agreed that APJs "are principal officers," and wrote separately that the panel decision did not "obviat[e] the need for [Board] rehearings" in cases raising an Appointments Clause challenge on appeal because "judicial severance is not a 'remedy'; it is a forward-looking judicial fix." *Id.* at 93a–96a.

In three separate dissenting opinions, four Federal Circuit judges disagreed with the panel decision on the merits. Judge Dyk (joined by Judges Newman and Wallach and in part by Judge Hughes) questioned the panel's conclusion that APJs are principal Officers because they bear significant commonalities with

other non-policymaking inferior Officers. Pet. App. 123a–125a. Judge Hughes (joined by Judge Wallach) reiterated his view that APJs are inferior Officers because the Director exercises "significant control over [their] activities." *Id.* at 126a. He explained that this "Court has not required that a principal officer be able to single-handedly review and reverse the decisions of inferior officers, or remove them at will, to qualify as inferior." *Id.* at 127a–128a. And Judge Wallach emphasized that the Director's "significant authority over the APJs" appropriately "preserves . . . political accountability" and "strongly supports the contention that APJs are inferior officers." *Id.* at 142a.

e. Applying the decision below, the Federal Circuit has "vacated more than 100 decisions" in IPR proceedings, "instruct[ing] 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, in turn, has ordered all such cases to be held "in administrative abeyance until [this] Court acts on a petition for certiorari." *Ibid.*

In addition to IPRs, the Federal Circuit has since held that the decision below applies to other post-grant review proceedings. *VirnetX Inc.* v. *Cisco Sys., Inc.*, 958 F.3d 1333, 1336–37 (Fed. Cir. 2020) (inter partes reexamination); Order at 2, *In re JHO Intellectual Prop. Holdings, LLC*, No. 19-2330, Dkt. 25 (Fed. Cir. June 18, 2020) (ex parte reexamination).

REASONS FOR GRANTING THE PETITION

To preserve political accountability while allowing the federal government to function efficiently, the Appointments Clause employs a carefully calibrated two-tiered approach to appointing "Officers of the United

States." U.S. Const. art. II, § 2, cl. 2. Cabinet members and other principal Officers must be appointed by the President with the advice and consent of the Senate, whereas Congress may authorize others, including "Heads of Departments," to appoint "inferior" Officers. *Ibid.*

Congress authorized the Secretary of Commerce—a Head of Department—to appoint APJs to serve as first-line adjudicators in IPRs and other proceedings under the Patent Act. In performing those functions, APJs are extensively directed and controlled by the Director of the USPTO—a principal Officer who has unfettered discretion to decide whether to institute proceedings, whether (and if so to what extent) individual APJs actually serve on decisional panels, whether their decisions are binding on other panels, and whether particular cases should be reheard.

This Court has stressed that "[w]hether one is an 'inferior' officer depends on whether he has a superior." *Edmond* v. *United States*, 520 U.S. 651, 662–63 (1997). APJs are inferior Officers under *Edmond* because their "work is directed and supervised at some level" by the Director in myriad ways. *Ibid.* Indeed, this Court has always recognized that first-line administrative adjudicators are *inferior* Officers because they exercise significant federal authority subject to supervision. *See Lucia* v. *SEC*, 138 S. Ct. 2044, 2053 (2018); *Freytag* v. *Comm'r*, 501 U.S. 868, 881–82 (1991).

The court of appeals, however, departed from this Court's long and unbroken line of Appointments Clause jurisprudence. Despite recognizing the Director's extensive "supervisory powers" over APJs, the panel concluded that APJs are nevertheless principal

Officers because they can issue final decisions on behalf of the USPTO and enjoy limited statutory protection from removal. Pet. App. 16a, 21a. Neither attribute, however, is determinative of principal-officer status under this Court's precedents. *See* U.S. Pet. 24–26. Indeed, the inferior Officers in *Freytag* and *Lucia* possessed one or both. *See Lucia*, 138 S. Ct. at 2059–60 (Breyer, J., concurring in the judgment in part and dissenting in part); *Freytag*, 501 U.S. at 882.

The court of appeals also ignored that a "'[l]ong settled and established practice'" of the co-equal branches is entitled to "'great weight'" in the Appointments Clause context. *NLRB* v. *Noel Canning*, 573 U.S. 513, 524 (2014) (alteration in original; citation omitted). The Patent Act, as amended to address Appointments Clause concerns raised in the context of inter partes reexaminations, authorizes the appointment of APJs by a Head of Department—leaving no doubt that Congress and the President understand APJs to be inferior Officers. Yet the court of appeals gave *no* weight to the views of the political branches.

Whether APJs are principal or inferior Officers is "an issue of exceptional importance," as the Federal Circuit itself recognized. Pet. App. 6a. And the ideal vehicle for deciding that question is *this* case—where the issue was amply and ably briefed by all parties and resulted in a decision on the merits as well as multiple separate opinions. The Court should grant this petition for a writ of certiorari.

I. THE FEDERAL CIRCUIT ERRED IN CONCLUDING THAT APJS ARE PRINCIPAL OFFICERS.

APJs are inferior Officers because a principal Officer—the Director—"direct[s] and supervise[s]" their

work. *Edmond*, 520 U.S. at 663. Despite acknowledging the Director's extensive "supervisory powers," the Federal Circuit derived and then applied a multipart test to conclude that APJs are principal Officers because they "issue decisions that are final on behalf of the Executive Branch" and they are "not removable without cause." Pet. App. 16a, 21a (citing *Intercollegiate Broad. Sys., Inc.* v. *Copyright Royalty Bd.*, 684 F.3d 1332, 1338 (D.C. Cir. 2012)). That approach, however, finds no footing in this Court's cases; a straightforward application of *Edmond*'s focus on supervision, as well as due respect for the longstanding judgment of the political branches, establishes that APJs are not principal Officers.

A. This Court's Precedents Establish That APJs Are Inferior Officers.

"While '[this Court's] cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers,' [the Court] ha[s] in the past examined factors such as the nature, scope, and duration of an officer's duties. More recently, [the Court] ha[s] focused on whether the officer's work is 'directed and supervised' by a principal officer." *Seila Law LLC* v. *Consumer Fin. Prot. Bureau*, No. 19-7, slip op. at 15 n.3 (U.S. June 29, 2020) (citation omitted). Under that approach, APJs—like every other first-line administrative adjudicator this Court has encountered—are inferior Officers.

1. This Court's definition of "inferior Officers" is straightforward: "Whether one is an 'inferior' officer depends on whether he has a superior." *Edmond*, 520 U.S. at 662. The superior's oversight need not take any particular form, check any "exclusive criterion," *id.* at 661, or even be "plenary," *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 504

(2010). So long as the superior "'direct[s] and supervise[s]'" the Officer's work "'at some level,'" *id.* at 510 (quoting *Edmond*, 520 U.S. at 663), the Officer is an inferior Officer—even if she otherwise exercises significant authority "largely independently" from a superior, *id.* at 504.

Edmond's construction of "inferior Officer" reflects the Appointments Clause's text and purpose. The term "inferior Officer" connotes merely a "relationship with some higher ranking officer." *Edmond*, 520 U.S. at 662. Founding-era dictionaries, for example, define "inferior" in terms of a relationship of "[s]ubordinat[ion]," irrespective of the precise contours of that subordinate relationship. *E.g.*, Thomas Sheridan, *A Complete Dictionary of the English Language* (2d ed. 1789) (Inferiour); Noah Webster, *An American Dictionary of the English Language* (1828) (Inferior). The first Congress understood this term in precisely the same way. *See* U.S. Pet. 17 (citing *Edmond*, 520 U.S. at 663, 664).

A straightforward construction of "inferior Officer," moreover, is necessary to preserve the balance between "public accountability" and "administrative convenience" struck by the Appointments Clause. *Edmond*, 520 U.S. at 660. By requiring the "joint participation" of the President and the Senate, the Appointments Clause "ensure[s] public accountability for both the making of a bad appointment and the rejection of a good one." *Ibid.* "[F]oreseeing," however, that offices would "bec[o]me numerous" and that it "might be inconvenient" to require presidential nomination and senatorial confirmation for all Officers, the Founders created an exception for inferior Officers. *United States* v. *Germaine*, 99 U.S. 508, 509–10 (1879). A nebulous line between principal and inferior Officers

would constrain Congress's discretion to vest the appointment of "such inferior Officers, as [it] think[s] proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2.

2. In applying these principles, this Court has *always* recognized that a first-line administrative adjudicator is an inferior Officer—even in the absence of complete supervision by a superior in particular instances.

Edmond, for example, held that intermediate appellate military judges were "inferior" Officers because the Judge Advocate General could "exercise[ ] administrative oversight," remove the judges from their "judicial assignment," and "order any decision submitted for review" by the Court of Appeals for the Armed Forces (CAAF). 520 U.S. at 664–66. The Judge Advocate General's supervision was far from "complete"—notably, the superior could "not attempt to influence . . . the outcome of individual proceedings"—and the scope of CAAF's review was itself "limit[ed]." *Id.* at 664–65. Nonetheless, the Court held that the military judges were inferior Officers "by reason of [their] supervision." *Id.* at 666; *see also Weiss* v. *United States*, 510 U.S. 163, 182 (1994) (Souter, J., concurring) (explaining that trial-level military judges were "inferior" Officers).

Similarly, the first-line adjudicators in *Freytag* and *Lucia* unquestionably were inferior Officers, even though their decisions were not always subject to review within the Executive Branch. *Freytag* held that special trial judges of the U.S. Tax Court were inferior Officers—despite their power to "render the decisions of the Tax Court in [certain] cases." 501 U.S. at 882. And *Lucia* recognized that administrative law judges

of the Securities and Exchange Commission were inferior Officers *because of* their "last-word capacity." 138 S. Ct. at 2054. Those judges could not only enter decisions that became final "when the SEC declines review," *ibid.*, but also issue immediately enforceable default orders without any agency review at all, *see In re Alchemy Ventures, Inc.,* Exchange Act Release No. 70,708, 2013 WL 6173809, at *4 (Oct. 17, 2013).

3. APJs are likewise "inferior" Officers because, from soup to nuts, their work is directed and supervised by principal Officers.

a. The Director, a principal Officer who is politically accountable and serves at the President's pleasure, *see* 35 U.S.C. § 3(a)(4), extensively directs and supervises APJs' work. For example, the Director:

- provides "policy direction and management supervision" for APJs, 35 U.S.C. § 3(a)(2)(A);
- controls whether to institute IPRs in the first place, *id.* § 314(a);
- controls how many and which APJs serve on which panels, *id.* § 6(c);
- provides "exemplary applications of patent laws to fact patterns" that are binding on APJs, Pet. App. 14a;
- controls whether a panel's decision will be precedential, SOP 2 at 11–12;
- controls whether a decision will be reheard by a Precedential Opinion Panel, SOP 2 at 4–5;
- controls how many and which APJs rehear a case, 35 U.S.C. § 6(c); and

- decides whether to dismiss an entire IPR proceeding rather than allow a panel's decision to become final, Pet. App. 131a–132a (Hughes, J., dissenting from the denial of rehearing en banc).

The Director controls all facets of initiating and assigning IPR proceedings. He decides whether to institute IPRs, 35 U.S.C. § 314(a), (d), who will preside over them, *id.* § 6(c), and even how they are resolved. Like the Judge Advocate General in *Edmond*, moreover, the Director "exercises administrative oversight," 520 U.S. at 664, by "providing policy direction and management supervision for the Office and for the issuance of patents," 35 U.S.C. § 3(a)(2)(A), and "prescrib[ing] regulations" governing the substantive and procedural conduct of IPR proceedings, *id.* § 316(a). But unlike the Judge Advocate General, the Director *also* may "issue policy directives" that "include exemplary applications of patent laws to fact patterns," which APJs must follow "when presented with factually similar cases." Pet. App. 14a.

The Director additionally controls the review and termination of IPR proceedings. If dissatisfied with the Board's decision, the Director may "single-handedly" decide not to make it precedential; add more members to the panel (including himself) and potentially order the matter reheard; or reconsider the institution decision and terminate the proceedings entirely. Pet. App. 131a (Hughes, J., dissenting from the denial of rehearing en banc); *see also Medtronic, Inc.* v. *Robert Bosch Healthcare Sys., Inc.*, 839 F.3d 1382, 1384 (Fed. Cir. 2016) (reconsideration decisions are unreviewable). The Director could even insist on reviewing draft decisions and terminate those proceed-

ings where he disagrees with the draft. *See BioDelivery Scis. Int'l, Inc.* v. *Aquestive Therapeutics, Inc.*, 935 F.3d 1362, 1366 (Fed. Cir. 2019) (affirming termination of proceedings nearly five years after institution). In no circumstance, therefore, can an APJ "render a final decision on behalf of the United States unless permitted to do so by" the Director. *Edmond*, 520 U.S. at 665.

These supervisory powers mean that "[t]he Director"—a principal Officer who is removable at will—"bears the political responsibility" for the work APJs do. *Saint Regis Mohawk Tribe* v. *Mylan Pharm. Inc.*, 896 F.3d 1322, 1327 (Fed. Cir. 2018). And participants in the patent system regularly take the Director to task for his policy decisions. *See*, *e.g.*, Gene Quinn, *The Honeymoon Is Over: Time for Iancu to Take Action on PTAB Harassment of Patent Owners*, IP Watchdog (Aug. 14, 2019), https://www.ipwatchdog.com/2019/08/14/honeymoon-time-iancu-take-action-ptab-harassment-patent-owners. That is exactly the "political accountability" the Appointments Clause demands. *Edmond*, 520 U.S. at 663.

b. The Secretary of Commerce, another principal Officer who serves at the President's pleasure, *see* 15 U.S.C. § 1501, also exercises supervision and control over APJs. The Secretary appoints APJs in consultation with the Director, 35 U.S.C. § 6(a), and may remove them "for such cause as will promote the efficiency of the service," 5 U.S.C. § 7513(a), which includes a "'failure to follow instructions,'" *Cobert* v. *Miller*, 800 F.3d 1340, 1351 (Fed. Cir. 2015) (alteration and citation omitted). Such limitations on removal are permissible "for inferior officers with limited duties and no policymaking or administrative authority," *Seila Law*, slip op. at 16, like APJs. In addition,

the Secretary, who serves at the President's will, can remove APJs for cause; there is thus only one layer of removal protection between the President and the APJs. *Cf. Free Enter. Fund*, 561 U.S. at 495.

2. The decision below correctly recognized that the Director "exercises a broad policy-direction and supervisory authority over the APJs" that is "similar to the supervisory authority" in *Edmond*. Pet. App. 14a–16a. But rather than "focus[ ] on" those supervisory powers, as precedent requires, *Seila Law*, slip op. at 15 n.3, the court of appeals announced and applied a multipart test that shifted the focus to two particular incidents of supervision. The court held that APJs are principal Officers because the Director lacks (a) "unfettered removal authority" and (b) the "power to single-handedly review, nullify or reverse" APJ decisions in particular cases. *Id.* at 10a, 16a.

Although the court of appeals purported to apply *Edmond*, this Court nowhere suggested in *Edmond* that protection from removal or the ability to issue final decisions was determinative of principal-officer status. As the United States explains, the panel erroneously viewed those attributes "as ends in themselves, rather than as complementary tools of supervision and direction." U.S. Pet. 23. Indeed, this Court has repeatedly held that adjudicators who possess one or both attributes are inferior Officers.

a. *Edmond* noted that military judges could be removed from their "*judicial assignment* without cause." 520 U.S. at 664 (emphasis added). But nothing in that decision suggests that removability from *employment* dictates Officer status.

The Director enjoys the same "powerful tool for control" as did the Judge Advocate General in *Ed-*

mond. 520 U.S. at 664. Like APJs, commissioned officers who served as military judges possess a number of protections against removal from federal employment. *See* 10 U.S.C. §§ 629–632, 804, 1161, 1181–1185. And just as military judges can "be reassigned to other duties" without cause, *United States* v. *Ryder*, 44 M.J. 9, 10–11 (C.A.A.F. 1996); *see also Edmond*, 520 U.S. at 664, the Director has similarly unfettered discretion to remove a particular APJ from judicial assignment entirely by never assigning the APJ to a panel, *see* 35 U.S.C. § 6(c).

The power of removal is merely "incident to"—not determinative of—"the power of appointment." *Myers* v. *United States*, 272 U.S. 52, 110 (1926). It is therefore well established that when Congress "vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest." *Free Enter. Fund*, 561 U.S. at 494 (alteration omitted) (quoting *United States* v. *Perkins*, 116 U.S. 483, 485 (1886)). SEC administrative law judges and trial-level military judges, for example, are inferior Officers who cannot be removed at will. *Lucia*, 138 S. Ct. at 2050–51 & n.1 (SEC administrative law judges); *Weiss*, 510 U.S. at 194 (Souter, J., concurring) (military judges). Accordingly, the Officer must be properly characterized *before* considering the constitutionality of any removal restrictions. *See Seila Law*, slip op. at 17–18.

b. The court of appeals elevated form over substance in asking whether "the Director [has] the power to single-handedly review, nullify or reverse" a Board decision. Pet. App. 10a.

APJs cannot, in any meaningful sense, speak the last word for the Executive Branch "unless permitted

to do so by other Executive officers." *Edmond*, 520 U.S. at 665. *Edmond* emphasized that the Judge Advocate General could "determine . . . procedural rules," "remove any judge [from assignment] without cause," and "order any decision submitted for review." *Id.* at 666. As detailed above, the Director has those same supervisory powers—*and*, unlike the Judge Advocate General, who could "not attempt to influence . . . the outcome of individual proceedings," *id.* at 664, the Director can issue binding "exemplary applications of patent laws to fact patterns," Pet. App. 14a, and prevent any decision from becoming final by terminating the proceedings at any time, *see Medtronic*, 839 F.3d at 1384.

The court of appeals' narrow focus on whether APJ decisions are subject to administrative review in every case ignores that this Court has consistently deemed Officers "inferior" even when they could issue final decisions on behalf of their agencies. The special trial judges in *Freytag*, for instance, were inferior Officers even though they could be "assign[ed] . . . to render the decisions of the Tax Court in [certain] cases." 501 U.S. at 882. And the "near-carbon copies" of those judges in *Lucia* were inferior Officers—despite their "last-word capacity," 138 S. Ct. at 2052, 2054, which included the power to issue immediately enforceable default orders, *Alchemy Ventures*, 2013 WL 6173809, at *4.

In addition, every IPR decision of the Board is subject to judicial review by the Federal Circuit, *see* 35 U.S.C. § 319; *Oil States Energy Servs., LLC* v. *Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1372, 1379 (2018), and the Director has the right to intervene and become a party in any such appeal, 35 U.S.C. § 143. The

USPTO cannot cancel any patent claim until it is "finally determined to be unpatentable" on judicial review, or the time for seeking judicial review has expired. 35 U.S.C. § 318(b). Notably, this scheme differs from traditional APA review of "final agency action," 5 U.S.C. § 704, which occurs *after* an executive agency has taken action; rather, judicial review of the Board's decisions occurs *before* the USPTO can take final action canceling any patent claims.

In short, the Director has sole discretion to assign the panel, prescribe the procedures, set the precedent, supply the exemplary interpretations, convene a rehearing panel, and decide whether a final decision should issue (or the proceedings terminated). The Director's extensive supervision of APJ decisionmaking is more than sufficient to make APJs inferior Officers, even assuming some level of administrative review rather than judicial review is required. Because every facet of APJs' work is "directed and supervised" by principal Officers, APJs are inferior Officers. *Edmond*, 520 U.S. at 662–63.

B. The Co-Equal Branches Agree That APJs Are Inferior Officers.

The decision below conflicts with this Court's teachings in another respect: It failed to afford any weight to the uniform and longstanding view of the political branches that APJs are inferior Officers.

1. The Patent Act vests the appointment of APJs in the Secretary of Commerce, not the President. *See* 35 U.S.C. § 6(a). That "chosen method" of appointment demonstrates "that neither Congress nor the President thought [APJs] were principal officers." *Weiss*, 510 U.S. at 194 (Souter, J., concurring).

Congress has long viewed administrative adjudicators within the USPTO as inferior Officers. Congress unmistakably confirmed this view in 1975 when it vested the appointment of the officials later named APJs in the Secretary, a Head of Department. *See* 35 U.S.C. § 3(a) (1976). More recently, after briefly vesting the appointment of APJs in the Director, *see id.* § 6 (2000), Congress "redelegated the power of appointment to the Secretary," *In re DBC*, 545 F.3d 1373, 1380 (Fed. Cir. 2008) (citing 35 U.S.C. § 6(a), (d)). Congress did so expressly to "eliminat[e] the issue of unconstitutional appointments going forward," after in influential article had noted that the Director is not a Head of Department authorized to appoint inferior Officers. *See ibid.* (discussing John F. Duffy, *Are Administrative Patent Judges Unconstitutional?*, 2007 Patently-O Pat. L.J. 21, 21–22, 26–28 (2007)). At the time, APJs presided over inter partes reexaminations, which were the predecessors of, and had the same "basic purpose[ ]" as, today's inter partes reviews. *Cuozzo Speed Techs., LLC* v. *Lee*, 136 S. Ct. 2131, 2144 (2016); *see* 35 U.S.C. § 314 (2010).

In signing the legislation into law, the President never suggested that APJs were in fact principal Officers. To the contrary, the Executive Branch has long recognized that administrative adjudicators are inferior Officers. *See*, *e.g.*, *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 96 (2007) ("Inferior revenue officers" whose classification decisions "could, without any 'subsequent sanction,' by law 'bind the rights of others'"); *Administrative Procedure Act, Promotion of Hearing Examiners*, 41 Op. Att'y Gen. 74, 79–80 (1951) (predecessors to administrative law judges).

2. The panel remarked only that this longstanding and considered view of the political branches was "[i]nteresting[ ]." Pet. App. 21a. But as this Court has explained, a "'[l]ong settled and established practice'" of the co-equal branches "'is a consideration of great weight'" in the Appointments Clause context. *NLRB* v. *Noel Canning*, 573 U.S. 513, 524 (2014) (alteration in original; citation omitted). Just recently, this Court noted that "Congress' practice of requiring advice and consent" to appoint territorial governors with important federal duties "supports the inference" that they are Officers of the United States. *Fin. Oversight & Mgmt. Bd. for P.R.* v. *Aurelius Inv., LLC*, 140 S. Ct. 1649, 1658 (2020).

Early Appointments Clause cases thus looked to the political branches' chosen method of appointment in determining whether an official was an inferior Officer. *See*, *e.g.*, *Germaine*, 99 U.S. at 510–11 (civil surgeon); *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 393–94 (1868) (treasury clerk); *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 257–58 (1839) (clerk of court). More recent cases have "found . . . significant" the political branches' use of "terms . . . found within the Appointments Clause." *Edmond*, 520 U.S. at 657–58 (use of "appoint" instead of "detail" or "assign"); *Weiss*, 520 U.S. at 172 (same). This Court has even accepted the government's concessions that certain officials "are executive 'Officers,'" *Free Enter. Fund*, 561 U.S. at 506, or are not principal Officers, *see Lucia*, 138 S. Ct. at 2051 n.3. While the Judiciary ultimately has the last word, "a page of history is worth a volume of logic." *N.Y. Tr. Co.* v. *Eisner*, 256 U.S. 345, 349 (1921).

The panel therefore erred in failing to accord *any* weight to the considered and longstanding view of the co-equal branches that APJs are inferior Officers.

This inter-branch conflict heightens the need for the Court to grant review.

II. THIS COURT SHOULD REVIEW THE FEDERAL CIRCUIT'S ERRONEOUS DECISION IN THIS CASE.

Recognizing the central importance of the IPR system—which has been invoked thousands of times since the AIA was enacted—this Court has granted certiorari five times to review statutory or constitutional issues that have arisen in the system's relative infancy. *See Thryv, Inc.* v. *Click-To-Call Techs., LP*, 140 S. Ct. 1367 (2020); *Return Mail, Inc.* v. *U.S. Postal Serv.*, 139 S. Ct. 1853 (2019); *Oil States*, 138 S. Ct. 1365; *SAS Inst., Inc.* v. *Iancu*, 138 S. Ct. 1348 (2018); *Cuozzo*, 136 S. Ct. 2131. This case presents another constitutional issue that, as the Federal Circuit recognized, is "critical to providing certainty" to the essential and efficient functioning of the patent system. Pet. App. 5a. Indeed, *all three* parties to this case—petitioners, respondent, and the United States—agree that this Court's review is warranted, albeit for different reasons.

A. This Case Is The Ideal Vehicle For Deciding Whether APJs Are Principal Or Inferior Officers.

As the Federal Circuit explained in this case, whether APJs are principal or inferior Officers is an "issue of exceptional importance" that has a "wide-ranging effect on property rights and the nation's economy." Pet. App. 5a–6a. This issue warrants review in this case. The United States agrees. U.S. Pet. 14.

1. By holding that APJs must be appointed by the President with the advice and consent of the Senate,

the decision below has usurped Congress's prerogative to vest the appointment of APJs in a "Head[ ] of Department[ ]" "as they think proper." U.S. Const. art. II, § 2, cl. 2. The Court has a "'strong interest . . . in maintaining the constitutional plan of separation of powers.'" *Freytag*, 501 U.S. at 879 (citation omitted). Moreover, the practical consequences of the decision below are significant.

The IPR procedure is a cornerstone of the modern patent system. By 2010, there were over two million U.S. patents in force. *See* World Intellectual Property Organization, Statistical Country Profiles (Mar. 2020), https://www.wipo.int/ipstats/en/statistics/country_profile/profile.jsp?code=US. To ensure the validity of these patents, Congress created the IPR process as a "quick and cost effective alternative[ ] to litigation." H.R. Rep. No. 112-98, at 48 (2011). And parties have increasingly turned to that option, as Congress intended—with over 10,000 IPR petitions filed since 2014, and $2.6 billion saved from reduced litigation. *See* Perryman Group, *An Assessment of the Impact of the America Invents Act and the Patent Trial and Appeal Board on the US Economy* 3–6 (June 2020), https://www.perrymangroup.com/media/uploads/report/perryman-an-assessment-of-the-impact-of-the-american-invents-act-and-patent-trial-and-appeal-board-on-the-us-economy-06-2020.pdf.

The Federal Circuit has "already vacated more than 100 [IPR] decisions" by the Board and "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 decision below could require "hundreds of new proceedings." *Bedgear, LLC* v. *Fredman Bros. Furniture Co.*, 783 F. App'x 1029, 1030 (Fed. Cir.

2019) (Dyk, J., concurring in the judgment). The Board is currently holding "all such cases in administrative abeyance" pending action by this Court. General Order, 2020 WL 2119932, at *1.

The consequences of the Federal Circuit's decision extend far beyond IPR proceedings. Already the Federal Circuit has ruled that the panel's reasoning "compels [the court to] reach the same conclusion in the context of" other Board proceedings created decades ago, including inter partes reexaminations, *VirnetX Inc.* v. *Cisco Sys., Inc.*, 958 F.3d 1333, 1336–37 (Fed. Cir. 2020), and ex parte reexaminations, Order at 2, *In re JHO Intellectual Prop. Holdings, LLC*, No. 19-2330, Dkt. 25 (Fed. Cir. June 18, 2020) ("we see no relevant distinction between the proceedings"). This is significant because, as noted above, Congress authorized the Secretary to appoint APJs at a time when such reexamination proceedings were the principal form of post-grant review.

Moreover, if APJs are principal Officers "for purposes of" some proceedings, such as IPRs, they are principal Officers for all proceedings. *Freytag*, 501 U.S. at 882. The decision below thus extends to *any* proceedings before the Board—including, for example, garden-variety appeals from patent examiners' rejections of pending applications. *See* 35 U.S.C. § 134(a).

The decision below also promises a tidal wave of new Appointments Clause challenges to administrative adjudicators across the federal government. Two examples within the Federal Circuit's exclusive jurisdiction are the Trademark Trial and Appeal Board and the Board of Veterans Appeals. Hundreds if not thousands of other Officers likewise are supervised yet also sometimes enter final decisions for the Executive Branch and/or are not removable at will. Unless

the decision below is corrected, courts will be confronted with countless challenges to virtually every administrative adjudicator based on each agency's particular combination of powers and protections for its first-line adjudicators. This Court should cut off that litigation now and reaffirm its uniform teachings that first-line adjudicators are inferior Officers.

2. This case cleanly presents the important and recurring question whether APJs are principal or inferior Officers of the United States. The question presented by this petition—which is substantively identical to the first question presented by the government's petition—is tightly focused. It is undisputed that APJs are Officers of the United States, not mere employees, Pet. App. 8a, and are appointed by a Head of Department, *see id.* at 2a–3a (citing 35 U.S.C. § 6(a)). There are no additional legal or factual issues to complicate the Court's analysis on the merits. Indeed, this case is the ideal vehicle in which to resolve whether APJs are principal or inferior Officers.

The question presented was pressed in and passed upon by the court of appeals: Each party, including the United States as intervenor, filed principal, supplemental, and multiple rehearing briefs on the constitutional question; and two *amici* filed briefs as well. *See* C.A. Dkt. 18 (Appellant's brief); C.A. Dkt. 33 (Appellees' brief); C.A. Dkt. 37 (Intervenor's brief); C.A. Dkt. 40 (reply brief); C.A. Dkts. 66–68 (supplemental briefs); C.A. Dkts. 77–79 (rehearing petitions); C.A. Dkts. 92, 99 (*amicus* briefs); C.A. Dkts. 105–07 (responses to rehearing petitions). And the Federal Circuit produced five considered opinions exploring all aspects of the issue while dividing sharply on the question presented. Pet. App. 1a (panel opinion); *id.*

at 85a–86a (Moore, J., concurring in the denial of rehearing en banc); *id.* at 123a–125a (Dyk, J., dissenting from the denial of rehearing en banc); *id.* at 126a–138a (Hughes, J., dissenting from the denial of rehearing en banc); *id.* at 141a–144a (Wallach, J., dissenting from the denial of rehearing en banc).

Importantly, this case is the *only* case in which the Federal Circuit actually decided whether APJs are principal or inferior Officers. All other cases on the subject are mere fruit of this case's poisonous tree, and most of them—including *Polaris*—were disposed of by per curiam summary orders. *See* U.S. Pet 12. Because the constitutional error stems from this case, it should be reviewed and resolved in this case before the Court considers any ramifications in and for other cases.

B. Respondent's Forfeiture Is An Additional Reason To Grant Certiorari In This Case.

The government's petition presents as a second question whether the court of appeals erred in excusing respondent's failure to raise its Appointments Clause challenge before the Board. U.S. Pet. 26–33; *see* Pet. App. 4a–6a. Petitioners agree that respondent's forfeiture of the constitutional challenge is an additional reason for the Court to review this case. *Only* this case "presents both the constitutional and forfeiture issues," U.S. Pet. 33, and allows this Court to fully explore all facets of the Federal Circuit's ruling.

1. Respondent's failure to assert a timely constitutional objection while this case was pending before the Board gives rise to two distinct issues at this stage of the case.

The first forfeiture issue is whether the court of appeals should have reached the merits of the constitutional challenge *at all*. *See* U.S. Pet. 29–30. Petitioners will address this issue further in their response brief. For present purposes, however, it is important to note that respondent's administrative forfeiture is no obstacle to *this Court*'s review of the principal/inferior Officer distinction in the event this Court does not review or reverse the Federal Circuit's decision to relieve respondent of one consequence of that forfeiture. Because the court of appeals actually decided the Appointments Clause question, this Court can review that decision. *See*, *e.g.*, *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Our practice 'permit[s] review of an issue not pressed so long as it has been passed upon'" (alteration in original; citation omitted)).

The second (and significantly more wide-ranging) forfeiture issue is whether respondent is entitled to the remedy of a new hearing if its Appointments Clause challenge is successful. To be clear, if the Court holds—as petitioners submit—that APJs are inferior Officers, there is no constitutional violation to remedy. But if the Court were to affirm the Federal Circuit's determination that APJs are principal Officers, then the question of remedy would be presented.

This Court recently held that a party who "'makes a timely challenge'" to the appointment of an administrative adjudicator is entitled to a "new hearing" before a different, properly appointed adjudicator. *Lucia*, 138 S. Ct. at 2055 (citation omitted). One corollary of this rule is that a party who does *not* raise a "timely challenge" is not entitled to a new hearing. Instead, the "appropriate" relief, *Ryder* v. *United States*,

515 U.S. 177, 183 (1995), for such a party is a declaratory judgment. That is because as a "general rule[,] courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). Respondent here failed to present its Appointments Clause challenge to the Board; accordingly, it should not receive a new hearing (or, indeed, anything other than declaratory relief) even if the Court were to agree that APJs are principal Officers.

Respondent will be filing a separate petition for a writ of certiorari that focuses on the remedial aspects of the Appointments Clause challenge in this case. Accordingly, petitioners will address those arguments, as warranted, more fully in their response brief.

2. The government also suggests that the Court should grant certiorari *both* in this case *and* in *Polaris*, in which the Appointments Clause question was presented to the Board. U.S. Pet. 33–34. Petitioners will address that suggestion in their response brief. Petitioners note, however, that this Court has recognized the importance of properly incentivizing raising Appointments Clause challenges at the administrative level. *See Lucia*, 138 S. Ct. at 2055. This case provides the superior vehicle for calibrating those incentives.

* * *

The question presented by this petition (and the first question presented by the government's petition) is whether APJs are principal or inferior Officers. They must be one or the other, and the constitutionality of an Act of Congress depends on the answer. Since

the Federal Circuit exercises exclusive jurisdiction over appeals from the Board, 28 U.S.C. § 1295(a)(4)(A), no other Circuit will weigh in on this question; and the denial of rehearing with multiple separate opinions in this case indicates that the constitutional issue will grow no better developed with time. The Court should grant certiorari now, in *this* case, to decide whether APJs are principal or inferior Officers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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