



**U.S. Department of Justice**  
Civil Division

Washington, D.C. 20530

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November 2, 2019

Peter R. Marksteiner  
Clerk of Court  
U.S. Court of Appeals for the Federal Circuit  
717 Madison Place, N.W.  
Washington, D.C. 20439

RE: *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 18-1584 (Fed. Cir.)

Dear Mr. Marksteiner:

Pursuant to Federal Rule of Appellate Procedure 28(j) and Circuit Rule 28(i), the government writes in response to appellant's Rule 28(j) citation of supplemental authorities.

In the new decision cited by appellant, *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 18-2140 (Fed. Cir. Oct. 31, 2019), the Court identified a constitutional defect in the statutes governing the judges of the Patent Trial and Appeal Board. The Court undertook to cure that defect by severing certain removal protections for those officers, vacating the Board's decision, and remanding to the agency. The Court entertained the Appointments Clause challenge in No. 18-2140 because it found that the challenge "was properly and timely raised" before the panel, which the Court deemed "the first body capable of providing it with the relief sought." Op. 28.

Appellant in this case is the same party that raised the Appointments Clause challenge in No. 18-2140. But here, in contrast to that case, appellant did not "properly and timely raise" an Appointments Clause challenge. It never raised any Appointments Clause challenge in its appellate briefs, and the panel therefore did not address the issue. Nor did appellant include such a challenge in its pending rehearing petition. Appellant waived the issue by failing to raise it in its appellate briefs, *see, e.g., Haas v. Peake*, 544 F.3d 1306, 1308 (Fed. Cir. 2008), and its omission of the issue from its rehearing petition compounds that waiver.

Sincerely,

/s/ Dennis Fan  
DENNIS FAN  
Attorney for Intervenor

**CERTIFICATE OF SERVICE**

I hereby certify that on November 2, 2019, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Dennis Fan

DENNIS FAN

Attorney for Intervenor