2018-2082, -2083, -2084

United States Court of Appeals for the Federal Circuit

BEDGEAR, LLC,

Appellant,

– v. –

FREDMAN BROS. FURNITURE COMPANY, INC.,

Appellee.

Appeals from the United States Patent and Trademark Office, Patent Trial and Appeal Board in Nos. IPR2017-00350, IPR2017-00351 and IPR2017-00352

APPELLANT'S RESPONSE TO APPELLEE'S COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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JANUARY 23, 2020

CERTIFICATE OF INTEREST

Counsel for Appellant Bedgear, LLC certifies the following:

1. The full name of every party or amicus represented by me is:

   Bedgear, LLC

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

   Not applicable

3. All parent corporations and any publicly held companies that own 10 percent of the stock of the party or amicus curiae represented by me are:

   None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

   BRYAN CAVE LEIGHTON PAISNER LLP: Joseph J. Richetti, K. Lee Marshall, Alexander D. Walden, Frank Fabiani, Kevin Paganini

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal:

   Bedgear, LLC v. Fredman Bros. Furniture Company d/b/a Glideaway Sleep Products, Case No. 1:15-cv-6759-KAM-AKT (E.D.N.Y.)

January 23, 2020 */s/ Joseph J. Richetti*

Joseph J. Richetti

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INTRODUCTION

In both this and its consolidated appeal, No. 18-2170, Bedgear properly raised an argument that the underlying decisions of the Administrative Patent Judges ("APJs") must be vacated because APJs were principal officers who operated under an unconstitutional appointment provision. Because the Court held in *Arthrex* that APJs were unconstitutionality appointed while these appeals were pending, Bedgear is entitled to the benefit of that decision.

In both appeals, Bedgear raised in its opening brief precisely the argument that forms the basis for relief. That argument was sufficient to alert the Court and the Parties to its meaning. Before the Panel, Fredman did not challenge the sufficiency of Bedgear's argument, but rather addressed it on the merits. Only now that *Arthrex* rejected Fredman's arguments does Fredman suggest forfeiture. But that suggestion is itself waived.

Moreover, the arguments Fredman did raise to the Panel fail. Bedgear was not required to argue its Appointments Clause challenge to the PTAB, as the Agency could not have declared the statute unconstitutional and offered Bedgear relief. Moreover, *Arthrex* was correct on the merits—APJs are constitutionally infirm—and that decision requires vacatur and remand here.

The Court should deny the petition and vacate and remand now or, in the alternative, hold this and the related petition pending rehearing en banc in *Arthrex*

and *Polaris*, and then vacate and remand the petitions when it denies those en banc petitions or rules on the merits in those cases.

ARGUMENT

I. Bedgear Properly Raised Its Constitutional Challenge In Its Opening Brief And Fredman Bros. Waived Any Argument To The Contrary.

Rules of appellate waiver and forfeiture are discretionary. The "court has consistently held that a party waives an argument not raised in its opening brief." *Advanced Magnetic Closures, Inc. v. Rome Fastener Corp.*, 607 F.3d 817, 833 (Fed. Cir. 2010) (citing *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006)). To be raised, opening brief references may not be "conclusory and passing," *Milo & Gabby LLC v. Amazon.com, Inc.*, 693 F. App'x 879, 891 (Fed. Cir. 2017), nor is an argument raised if it appears only in a footnote, *see Otsuka Pharm. Co., Ltd. v. Sandoz, Inc.*, 678 F.3d 1280, 1294 (Fed. Cir. 2012).

Here, Bedgear's opening brief raised the Appointments Clause violation as a separately-numbered "independent ground" challenging the Board's decision. *See* Dkt. No. 24 at 66; *id*. at 2 (including within the Statement of the Issues, "whether the Board's administrative procedures and *inter partes* review proceedings were unconstitutional under the Appointments Clause").[1] That argument was neither

[1] With its Opening Brief, Bedgear submitted a "Notice of Constitutional Challenge to Federal Statute," providing notice that Bedgear "is challenging the constitutionality of 35 U.S.C. § 6 with respect to the Constitution's Appointments Clause, Art. I, § 2, cl. 2." *See* Dkt. No. 16.

hidden nor footnoted, but appeared as a stand-alone argument in the body of Bedgear's merits brief. Neither the Court nor Fredman had to guess its meaning. Rather, the argument appeared prominently in the statement of issues and the body of the opening brief on the merits.

Unlike the *Trading Techs.* case on which Fredman heavily relies, the constitutional challenge raised by Bedgear was not a legally amorphous and fact-dependent due process claim. Rather, the Appointments Clause challenge is straightforward, dispositive, and fact-independent, and Bedgear's discussion sufficed to raise the argument on appeal. In short, the issue was plainly presented to the Court as an independent challenge to the Board's decision.

Contrary to Fredman's suggestion, the rules do not prohibit brevity, and Bedgear's legal argument was not forfeited merely because the issue was straightforward and the briefing clear and concise. The Appointments Clause challenge was a clear-cut question of constitutional law that was well-understood, and well-briefed, in other pending cases. The argument required no citation to the record in this case or the decision below to be fully explained on the merits of these appeals— it simply required argument referencing this pure question of law.

Indeed, Fredman does not (and cannot) argue that it or the Court did not understand the argument Bedgear raised, as Fredman responded on the merits in its response brief (and Bedgear responded to those arguments in reply). Fredman's

decision to argue the claim on the merits should be sufficient for the Court to consider it presented. Holding otherwise would encourage needlessly long and repetitive briefing on an issue already well known to the Court.

In any event, Fredman's argument fails because it is waived. For the first time in its petition for rehearing, Fredman argues that Bedgear failed to develop sufficiently the Appointments Clause argument in its opening brief. But—despite raising an argument that the challenge was waived for failure to present it to the Board—Fredman did not argue waiver in its own response brief on the merits. Fredman thus waived its opportunity to argue this, and the Court should not consider this new argument about the sufficiency of the opening brief now, for the first time, on petition for rehearing en banc.

The concept of waiving a waiver applies when a party fails to assert a waiver argument in a timely manner on appeal. *United States v. Goodyear*, No. 18-6222, 2019 WL 5783259, at *2 n.2 (10th Cir. Nov. 6, 2019) ("[T]he Government does not raise Defendant's waiver in its response brief and therefore, waives the waiver."); *OTR Wheel Eng'g, Inc. v. W. Worldwide Servs., Inc.*, 897 F.3d 1008, 1016 (9th Cir. 2018) ("But if a party fails to object to a Rule 50(b) motion on the basis of waiver, then the party waives its waiver defense."); *United States v. Delgado-Perez*, 867 F.3d 244, 250 (1st Cir. 2017) ("[B]y failing to raise an argument that a defendant's failure to take some action below waives that defendant's right to raise an issue on

appeal, the government may waive the waiver argument."); *see also Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 740 (D.C. Cir. 1995) (noting that an appellate court always has discretion to reach an issue otherwise waived by appellant).

That is precisely what has occurred here. Notwithstanding that Fredman plainly understands the importance of raising an argument to avoid waiver, it failed to argue in its response brief that Bedgear forfeited an argument by failing to fully develop it in its opening brief.

II. Bedgear Was Not Required To Raise Its Constitutional Challenge Before The Board.

As to the waiver argument that Fredman did make, it is wrong. Bedgear was not required to raise its Appointments Clause challenge before the PTAB, which could not have offered any relief on the merits of its constitutional claim. *Arthrex* correctly held that "the Board was not capable of providing any meaningful relief to this type of Constitutional challenge and it would therefore have been futile for Arthrex [or Bedgear] to have made the challenge there." *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1339 (Fed. Cir. 2019). The relief the Court actually provided in *Arthrex*—declaring a portion of the enacting statute unconstitutional and severing it—could only be provided by an Article III court, not the PTAB.

This aligns with the long-standing proposition that a litigant need not raise an issue before an administrative agency that would be powerless to offer him relief. The PTAB could not offer relief here because "administrative agencies do not have

jurisdiction to decide the constitutionality of congressional enactments." *Riggin v. Office of Senate Fair Employment Practices*, 61 F.3d 1563, 1569 (Fed. Cir. 1995). In other words, "[t]his administrative agency, like all administrative agencies, has no authority to entertain a facial constitutional challenge to the validity of a law. An administrative agency may not invalidate the statute from which it derives its existence and that it is charged with implementing." *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 673 (6th Cir. 2018).

Thus, the Court should "not fault a petitioner for failing to a raise a facial constitutional challenge in front of an administrative body that could not entertain it." *Id.*; *see also* J. Lubbers, "Fail To Comment At Your Own Risk: Does Issue Exhaustion Have A Place In Judicial Review?" 70 Admin. L. Rev. 109, 152 (2018) ("Because agencies cannot determine constitutional questions, courts normally conclude that they can decide such issues without requiring the petitioner to have presented the issue to the agency first.").

This rule is rooted in separation of powers. Agencies cannot entertain facial constitutional challenges (and litigants before them face "no exhaustion requirement, and thus no forfeiture penalty, with respect to facial constitutional claims," *see Jones Bros.*, 898 F.3d at 674), because "only the Judiciary enjoys the power to invalidate statutes inconsistent with the Constitution." *Id.* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78, 2 L.Ed. 60 (1803)). Agencies (*viz.*, the

Executive) may not invalidate nor sever congressional enactments. Only the federal courts may do that.

For that reason, the D.C. Circuit has correctly and "consistently held . . . that challenges to the composition of an agency can be raised on review even when they are not raised before the agency." *UC Health v. N.L.R.B.*, 803 F.3d 669, 672–73 (D.C. Cir. 2015) (citing *Noel Canning v. N.L.R.B.*, 705 F.3d 490, 497 (D.C. Cir. 2013), *aff'd on other grounds*, 34 S.Ct. 2550, 189 L.Ed.2d 538 (2014); *Mitchell v. Christopher*, 996 F.2d 375, 378–79 (D.C. Cir. 1993); *see Hosp. of Barstow, Inc. v. N.L.R.B.*, 820 F.3d 440, 442–43 (D.C. Cir. 2016) ("We recently made clear that challenges of the specific sort raised by Barstow are not subject to waiver based on any failure to preserve the argument before the Board.").

The category of cases in which the D.C. Circuit allows first-instance challenges on appellate review are those in which "the challenge concerned the very power of the Board to act, that it involved a pure question of statutory interpretation, and that resolution of the issue did not require the development of a factual record, the application of agency expertise, or the exercise of administrative discretion." *Mitchell,* 996 F.2d at 378 (citing *Railroad Yardmasters of America v. Harris*, 721 F.2d 1332, 1338-39 (D.C. Cir. 1983)).

That is the rule the Court should apply here. As in *Noel Canning*, when a litigant seeks to challenge the very structure of an administrative panel—such that a

finding in his favor on the constitutional question would render the structure of the administrative panel constitutionally invalid—that challenge can and should be brought for the first time on appeal to a federal court. In *Noel Canning*, the constitutional claim resulted in the invalidation of three officers appointed in violation of the constitution's Recess Appointments Clause and left the Board of five members without a quorum and unable to exercise its power constitutionally absent Congressional action (outside the Board's control). *See Noel Canning*, 705 F.3d at 499. Success on the merits in *Noel Canning* thus left the Board unable to correct the constitutional error. The Court there did not require that such existential challenges to the agency's authority be brought to it in the first instance.[2]

The same is true in this case. No agency fix could work here—"[t]he only possibility of correction which the government claims the agency could have made

[2] This is consistent with the broader right to federal court review of facial Appointments Clause challenges that the Supreme Court recognized in *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010) ("*PCAOB*"). There, litigants circumvented the administrative review process *entirely* and brought a declaratory judgment action directly in federal court, challenging the Board's composition under the Appointments Clause. Such direct review was permissible notwithstanding that the Sarbanes-Oxley Act under which the Board was constituted allowed for post-enforcement judicial review and required that "[n]o objection . . . may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so." *PCAOB*, 561 U.S. at 489. (citing 15 U.S.C. § 78y(a)(1)). The Court noted that the legal challenge was "to the Board's existence;" "'collateral' to any Commission orders or rules from which review might be sought;" and "outside the Commission's competence and expertise[.]" *Id.* at 490-91. So too here.

is the Director shutting down the IPR regime by refusing to institute." *Arthrex*, 941 F.3d at 1339. And the same rule—excusing a failure to argue the APJs should render themselves a fundamental constitutional infirmity[3]—should apply. The Board does not have the power to render statutory provisions constitutionally invalid, nor to sever them. Rather, APJs and the PTAB are only empowered by statute to "issue a final written decision with respect to *the patentability of any patent claim* challenged by the petitioner." *See* 35 U.S.C. § 318(a) (emphasis added). There is no suggestion in this statute that *facial constitutional challenges*—or, for that matter, as-applied constitutional challenges—can or may (much less *must*) be made before the PTAB.

Such a result is consistent with *Lucia*. There, the Court noted that the constitutional challenge was "timely" because it was raised before the agency. *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2055 (2018). But that is because the SEC could have offered an administrative-level remedy to a timely raised and meritorious Appointments Clause challenge—*viz.*, by constitutionalizing the challenged ALJ's appointment as an inferior officer through a Commissioner or by transferring the case to a constitutionally appointed official. No ultra-agency action was required to correct the constitutional infirmity of the appointment of the particular ALJ in that

[3] Whether the Court adopts this rule as an exception to general waiver principles or a *per se* exceptional circumstance excusing waiver, the result is the same: First-cut review by this Court of these questions is proper and appropriate.

case. Thus, the claim in *Lucia* was akin to an *as-applied* constitutional challenge—the type of claim an agency *may* be empowered by Congress to hear. *See, e.g.*, *Fashion Valley Mall, LLC v. N.L.R.B.*, 524 F.3d 1378, 1380 (D.C. Cir. 2008) ("[W]e have stated we may excuse a failure to exhaust administrative remedies when exhaustion would be futile because a claim involves the constitutionality of a federal statutory provision and would therefore be beyond the agency's competence to decide.") (alterations omitted); *see, e.g.*, *Nebraska v. E.P.A.*, 331 F.3d 995, 997 (D.C. Cir. 2003) (A litigant need not raise his constitutional challenge to a statute before the federal agency, but did need to raise his constitutional challenge to the agency regulation before the agency).

Arthrex was correct that an "Appointments Clause challenge was properly and timely raised before the first body capable of providing it with the relief sought—a determination that the Board judges are not constitutionally appointed." *Id*. at *28; *see also id*. at *29 (This type of "[c]onstitutional challenge is one in which the Board had no authority to provide any meaningful relief and . . . it was thus futile for Arthrex to have raise[d] the challenge before the Board.").

Even if the Court disagrees and holds—contrary to *Arthrex*—that that the constitutional challenge should have been raised to the Board, the Court should excuse Bedgear's failure to do so. Appellate courts always have discretion to excuse appellate waiver and forfeiture. *See SmithKline Beecham,* 439 F.3d at 1320;

In re DBC, 545 F.3d 1373, 1378 (Fed. Cir. 2008). In particular, "the court maintains discretion to address an argument not properly raised in the opening brief if disregarding the argument would result in an unfair procedure." *Advanced Magnetic Closures*, 607 F.3d at 833.

Doing so is appropriate here. The Court exercised such discretion in *Arthrex* to incentivize appellate-level challenges raising structural constitutional claims. And the Supreme Court endorsed such an approach in *Freytag*. *See Freytag v. C.I.R.*, 501 U.S. 868, 878 (1991); *see also Arthrex*, 941 F.3d at 1326-27 ("Like *Freytag*, this case implicates the important structural interests and separation of powers concerns protected by the Appointments Clause. Separation of powers is a fundamental constitutional safeguard and an exceptionally important consideration in the context of inter partes review proceedings[.]")(quotation omitted); *see also Noel Canning*, 705 F.3d at 497 ("[T]he objections before us concerning lack of a quorum raise questions that go to the very power of the Board to act and implicate fundamental separation of powers concerns. We hold that they are governed by the 'extraordinary circumstances[.]'").

Arthrex correctly stated that it should apply to "those cases where final written decisions were issued and where litigants presented an Appointments Clause challenge on appeal." *Arthrex*, 941 F.3d at 1340. Thus, while the Court may choose not to excuse a litigant's failure to make any attempt to raise an

Appointments Clause challenge in an opening brief, it should give those litigants who do raise the issue the benefit of *Arthrex*. *Compare Uniloc 2017 LLC v. Facebook, Inc.*, No. 2018-2251, slip op. at *1 (Fed. Cir. Oct. 31, 2019) (cancelling oral argument and vacating and remanding consistent with *Arthrex*, based on "the fact that Uniloc has raised an Appointments Clause challenge in its opening brief in this case") (per curiam) (non-precedential) *with Customedia Techs., LLC v. Dish Network Corp.,* No. 2019-1001 (Fed. Cir., Nov. 1, 2019) (Customedia's argument was forfeited because it "did not raise *any semblance* of an Appointments Clause challenge in its opening brief.") (per curiam) (emphasis added).

III. Arthrex Correctly Held That APJs Are Principal Officers.

On the merits, Fredman petitions for rehearing on only one aspect of *Arthrex*, arguing that that decision incorrectly found APJs to be principal, rather than inferior, officers on the basis of the Director's removal authority. APJs are "inferior, not principal officers" under the constitution, Fredman argues, based on the Director's authority to remove APJs from judicial decision making. *See* Pet. Reh'g at 15-16. Because, Fredman claims, "the reasoning in *Arthrex* placed undue reliance on assessing the Director's ability to remove APJs from employment," including the Director's ability "to designate the APJs to sit on panels for IPRs" and "to de-designate APJs from an existing panel," the *Arthrex* court incorrectly held APJs to be principal officers. *Id.*

But *Arthrex* got it right: APJs are principal officers. Neither of the two presidential appointees at the PTO—the Secretary and the Director—"exercises sufficient direction and supervision over APJs to render them inferior officers." *Arthrex*, 941 F.3d at 1329. Further, APJs "have substantial power to issue final decisions on behalf of the United States without any review by a presidentially-appointed officer." *Id.* at 1331. The power to remove APJs is "limited" by title 5, not "unfettered." *Id.* at 1333. Unlike other quasi-independent (but constitutionally sound) officials, "APJs do not have limited tenure, limited duties, or limited jurisdiction." *Id.* at 1334. In short, "[t]he lack of any presidentially-appointed officer who can review, vacate, or correct decisions by the APJs combined with the limited removal power lead us to conclude . . . that these are principal officers." *Id.* at 1335.

Because APJs are principal officers not appointed by the President and confirmed by the Senate, their appointment is unconstitutional and the authority they wield risks operating outside the control of politically-accountable executive officials in violation of the constitution.

The petition for rehearing alleges that *Arthrex* failed to give due weight to the de-designation authority it claims the Director possesses which, it claims by implication, amounts to wholesale removal authority (and, by extension, Executive control of APJ decision-making). But *Arthrex* carefully considered the scope of

the Director's removal authority, including any authority to designate (or de-designate) particular APJs . *See Arthrex*, 941 F.3d at 1332. *Arthrex* then reserved the question of the actual scope of the de-designation authority, *see id.* ("we do not today decide whether the Director in fact has such authority") because the question was not outcome-determinative in light of the other factors that elucidated the constitutional stature of APJs, *see id.* at n.3 ("However, we need not decide whether the Director has such authority or whether such authority would run afoul of the Constitution because even if we accept, for purposes of this appeal, that he does possess that authority, it would not change the outcome").

Thus, whether the Director possesses designation (or de-designation) authority would not have changed the outcome in *Arthrex* on its own: In light of the "[t]he lack of any presidentially-appointed officer who can review, vacate, or correct decisions by the APJs," and the other factors the Court considered, APJs are principal officers who the President must appoint and the Senate must confirm. *Id.* at 1335.

IV. Remand Is Appropriate Here And In The Related Case.

The Court should vacate and remand all petitions for review of APJ orders now pending that raised a constitutional challenge to the authority of APJs in accordance with the "well-established" practice that "when the law changes while a case is on appeal, the changed law applies." *Sanofi-Aventis Deutschland GMBH v.*

Mylan Pharm. Inc., No. 2019-1368, 2019 WL 6130471, at *12 (Fed. Cir. Nov. 19, 2019) (citing *Thorpe v. Hous. Auth. of Durham*, 393 U.S. 268, 282 (1969); *see also Women's Equity Action League v. Cavazos*, 906 F.2d 742, 751 (D.C. Cir. 1990) ("When intervening legal authority makes clear that a prior decision bears qualification, that decision must yield. 'Law of the case' cannot be substituted for the law of the land.") (quotation omitted).

A change in law during the pendency of an appeal can suffice to bring an issue before the court and some courts allow supplemental briefing of issues not raised in an opening brief in these circumstances. *See, e.g., U.S. v. Oliver*, 397 F.3d 369, 377 n. 1 (6th Cir. 2005) (a post-argument 28(j) letter was sufficient to raise a new constitutional claim); *DSC Commc'ns Corp. v. Next Level Commc'ns*, 107 F.3d 322, 326 n.2 (5th Cir. 1997) (A party that waived an issue by failing to include it in its opening brief could raise the issue in a supplemental brief based on an intervening change of law); *cf. Bekele v. Lyft, Inc.*, 918 F.3d 181, 186–87 (1st Cir. 2019) (finding waiver of argument not raised in opening brief in part because there was no substantial change in applicable law between opening and supplemental briefs).

That was the outcome that resulted from *Noel Canning*, when "almost every circuit has vacated and remanded" pending appeals in light of that decision. *See Entergy Mississippi, Inc. v. N.L.R.B.*, 576 F. App'x 415, 416 (5th Cir. 2014) (and

collecting cases). The same is warranted here. Indeed, that the APJs lacked Executive oversight (in violation of the Appointments Clause), because of the removal protection the statute afforded them, the decisions may have been tainted by an expectation that they could not be reviewed or reversed—precisely the constitutional harm that merits a new hearing.

In short, the decision below correctly vacates and remands to ensure reconsideration without constitutional flaw. The Court should treat all such pending cases on direct appeal that raised this issue similarly.

CONCLUSION

Bedgear preserved a challenge to the constitutionality of the APJs in these consolidated cases. Because *Arthrex* correctly decided that those appointments were unconstitutional while these consolidated cases were pending, Bedgear is entitled to application of that decision. The Petition should be denied or, in the alternative, this and the related Petition should be held and the appeals jointly vacated and remanded when the Court denies rehearing en banc in the pending cases challenging *Arthrex*, or when the Court issues a decision on the merits of those en banc petitions.

Date: January 23, 2020

Respectfully submitted,

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FORM 30. Certificate of Service

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