

2018-2156

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

IMAGE PROCESSING TECHNOLOGIES, LLC,

APPELLANT,

v.

SAMSUNG ELECTRONICS CO., LTD., SAMSUNG ELECTRONICS AMERICA, INC.,

APPELLEES,

UNITED STATES,

INTERVENOR.

*Appeal from the United States Patent and Trademark Office, Patent Trial and
Appeal Board, Case No. IPR2017-00353.
Administrative Patent Judges Joni Y. Chang, Michael R. Zecher, and
Jessica C. Kaiser*

APPELLEES' PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTEREST

FORM 9. Certificate of Interest

Form 9
Rev. 10/17

<p>UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT</p> <p>Image Processing Technologies, LLC <small>Samsung Electronics Co., Ltd.; Samsung Electronics America, Inc.</small> v. _____</p> <p>Case No. <u>18-2156</u></p> <p>CERTIFICATE OF INTEREST</p>		
<p>Counsel for the:</p> <p><input type="checkbox"/> (petitioner) <input type="checkbox"/> (appellant) <input type="checkbox"/> (respondent) <input checked="" type="checkbox"/> (appellee) <input type="checkbox"/> (amicus) <input type="checkbox"/> (name of party)</p>		
<p>certifies the following (use "None" if applicable; use extra sheets if necessary):</p>		
<p>1. Full Name of Party Represented by me</p>	<p>2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:</p>	<p>3. Parent corporations and publicly held companies that own 10% or more of stock in the party</p>
Samsung Electronics Co., Ltd.	Samsung Electronics Co., Ltd.	N/A
Samsung Electronics America, Inc.	Samsung Electronics America, Inc.	Samsung Electronics Co., Ltd.
<p>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 (and who have not or will not enter an appearance in this case) are:</p> <p>O'Melveny & Myers LLP - Brian M. Cook, Clarence Rowland</p>		

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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. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

Image Processing Technologies, LLC v. Samsung Electronics Co., Ltd., et al., Case No. 2:16-cv-00505 (E.D. Tex.) (filed May 13, 2016)

4/24/2019

Date

/s/ Marc J. Pensabene

Signature of counsel

Please Note: All questions must be answered

Marc J. Pensabene

Printed name of counsel

cc: Counsel of Record

Reset Fields

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FEDERAL CIRCUIT RULE 35(B)(2) STATEMENT OF COUNSEL

Based on my professional judgment, I believe the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedent(s) of this court: *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010); *Edmond v. United States*, 520 U.S. 651 (1997); *Freytag v. Comm’r*, 501 U.S. 868 (1991); and *In re DBC*, 545 F.3d 1373 (Fed. Cir. 2008)

Based on my professional judgment, I believe this appeal requires an answer to one or more precedent-setting questions of exceptional importance:

(1) Whether litigants who failed to raise an Appointments Clause challenge before the Patent Trial and Appeal Board (the “PTAB” or “Board”) should be permitted to raise such a challenge on appeal, where there are other cases properly presenting the issue already before this Court;

(2) Whether Board Administrative Patent Judges (“APJs”) are inferior or principal officers of the United States for purposes of the constitution’s Appointments Clause;

(3) If APJs are principal officers, what remedy is warranted for this and similarly-situated cases.

/s/ Marc J. Pensabene
Marc J. Pensabene
Counsel for Appellees

INTRODUCTION

This case is one of many affected by the panel decision in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (2019), which held that APJs are principal officers of the United States who were not appointed in the manner required by the Constitution’s Appointments Clause. Relying on *Arthrex*, the panel here vacated and remanded the case to the Board with instructions that the matter be reheard by a new panel of APJs, even though, like the appellant in *Arthrex*, appellant Image Processing Technologies (“IPT”) did not raise an Appointments Clause challenge before the Board.

This petition raises three questions of exceptional importance that have been raised by the pending petitions for rehearing *en banc* in *Arthrex*: (1) whether the Court should hear Appointments Clause challenges raised for the first time in this Court; (2) whether APJs are principal or inferior officers for Appointments Clause purposes; and, (3) if APJs are in fact principal officers, the appropriate remedy in a case like this one.

Rehearing is needed for the reasons in this petition and in the petitions filed by the United States and Smith & Nephew, Inc. in *Arthrex*, and, to the extent rehearing petitions are granted in *Arthrex*, this petition should be granted for full consideration alongside *Arthrex*. Granting this petition will allow the Court to consider the full range of options for the hundreds of affected appeals on the

preservation question—as explained below, even if *Arthrex* were correct that the exceptional importance of the Appointments Clause issue warranted a departure from ordinary preservation rules in that case, there was no cause to extend that holding to every other case in which the issue was not properly preserved.

At a minimum, if this Court grants rehearing *en banc* in *Arthrex*, it should either grant this petition as well or defer resolution of this petition so that the mandate does not issue prior to any further guidance from this Court on the Appointments Clause issues. If this Court ultimately determines that there is no Appointments Clause violation, or resolves the preservation or remedy issues differently than the *Arthrex* panel did, then issuing the mandate and instructing the Board to carry out a new hearing in the meantime could lead to an unnecessary and wasteful expenditure of resources for the PTAB and all parties involved.

STATEMENT

IPT filed this appeal to challenge the Board’s determination that claims 1 and 2 of U.S. Patent No. 8,983,134 are invalid on obviousness grounds. As part of that challenge, IPT argued for the first time in its opening brief to this Court that the decision was invalid because the APJs who rendered it were appointed in violation of the Appointments Clause, U.S. Const., art. II, § 2, cl.2.

On October 31, 2019, the *Arthrex* panel endorsed a similar Appointments Clause challenge. That panel determined that (1) Arthrex, Inc. could raise its

Appointments Clause challenge for the first time on appeal even though ordinary preservation rules would deem it forfeited; (2) APJs are “principal officers” who must be appointed by the President and confirmed by the Senate; and (3) the appropriate remedy was to sever the statutory restrictions on removal of APJs by the Director and to remand for a new proceeding before a new panel of APJs.

On December 5, 2019, without the benefit of briefing or argument on why *Arthrex* should not be extended to this case, the panel in this case vacated the Board’s decision and “remanded to the Board for proceedings consistent with the Court’s decision in *Arthrex*.” Order at 2. In the *Arthrex* matter, all three parties—the Appellant Arthrex, Inc. as well as both the United States and the Appellee Smith & Nephew, Inc.—have filed petitions for rehearing *en banc*. The United States and Smith & Nephew together challenge each of the *Arthrex* panel’s three key rulings. On January 3, 2020, the Court invited responses to each of those petitions.

REASONS FOR GRANTING THE PETITION

The preservation, merits, and remedy issues presented by this case and many others are indisputably of exceptional importance and should be resolved by the Court sitting *en banc*. This petition should be granted for consideration alongside *Arthrex*, and at a minimum the petition should not be ruled upon until after the petitions in *Arthrex* have been decided.

I. The Preservation Question As Applied To Both *Arthrex* And Cases Like This One Warrants *En Banc* Review

Both Arthrex, Inc. and IPT failed to raise their Appointments Clause challenges before the Board. *Arthrex* recognized that failure would ordinarily result in a forfeiture of the Appointments Clause challenge, and that this Court had refused to consider a similarly forfeited Appointments Clause challenge in *In re DBC*, 545 F.3d 1373 (Fed. Cir. 2008). The panel nevertheless concluded that *Arthrex* was “one of the ‘rare cases in which we should exercise our discretion to hear petitioners’ challenge.” *Arthrex*, 941 F.3d at 1326 (quoting *Freitag v. Comm’r*, 501 U.S. 868, 879 (1991)). Such discretion was not appropriate, and it was particularly erroneous for the *Arthrex* panel to extend its case-specific holding to *every pending case* in which the appellant had, after losing before the Board, raised an Appointments Clause argument for the first time only on appeal to this Court. *See id.* at 1340.

The *Arthrex* panel’s primary rationale for excusing Arthrex’s forfeiture was that the Appointments Clause issue “has a wide-ranging effect on property rights and the nation’s economy,” such that “[t]imely resolution is critical to providing certainty to rights holders and competitors alike who rely upon the *inter parties* review scheme to resolve concerns over patent rights.” *Arthrex*, 941 F.3d at 1327. That rationale is problematic because there were other already-pending challenges in this Court in which the litigant *had* properly preserved the Appointments Clause

question. As the United States explains in its petition for rehearing, the issue is properly preserved in *Polaris Innovations Ltd. v. Kingston Tech. Co.*, No. 18-1831, which was argued November 4, 2019, and in which the panel has now received supplemental briefing on the Appointments Clause issues. Thus, the *Arthrex* panel's reliance on two Supreme Court cases that addressed Appointments Clause challenges raised for the first time in the courts of appeals was inapt, and the Appointments Clause questions addressed by the *Arthrex* panel would have been timely resolved without the panel creating an exception for Arthrex's waiver. See *Freytag*, 501 U.S. at 879; *Glidden Co. v. Zdanok*, 370 U.S. 530, 535-36 (1962). Indeed, there is no reason to reward litigants like IPT and Arthrex, who took their chances before the Board, and decided only after receiving an unwanted result to argue that the APJs adjudicating their matters had no authority to do so in the first place. Rewarding such tactics risks encouraging similar "sandbagging" in the future. *In re DBC*, 545 F.3d at 1380.

But even if the importance of the issue warranted an exception to ordinary procedure in *Arthrex* so that the issue could be addressed in that case, there was no justification to further extend that rarely-exercised discretion to every single case "where litigants present an Appointments Clause challenge on appeal" in or prior to their opening brief. 941 F.3d at 1340. Whatever interest there might be in treating each such appellant equally to the appellant in *Arthrex* is outweighed by

the costs to the appellees and the Board in every case where the appellant, like IPT, knowingly took its chances before the panel of APJs assigned to hear its dispute, only to shift course on appeal and take issue with the nature of those APJs' appointments. In other words, having decided the issue in *Arthrex*, the exception made in that case need not and should not be broadly extended to other IPRs in which the appellant made a strategic choice not to present an Appointments Clause challenge to the Board, only then to raise the issue for the first time on appeal after receiving an unfavorable result from their IPR panel. *See, e.g., Wood v. Milyard*, 566 U.S. 463, 473 (2012) (“Due regard for the trial court’s processes and time investment is also a consideration appellate courts should not overlook.”).

II. Whether APJs Are Inferior Or Principal Officers Warrants *En Banc* Review

A. APJs Are Inferior Officers Who Are “Directed And Supervised At Some Level” By Senate-Confirmed Superiors

In *Edmond v. United States*, 520 U.S. 651 (1997), the Supreme Court explained that an inferior officer is one whose “work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.” *Id.* at 663. The reason for that approach is that the Appointments Clause is “designed to preserve political accountability relative to important Government assignments,” and for an officer to qualify as “inferior,” there must be “a superior” who herself is accountable to the President. *Id.*

Here, APJs’ “work is directed and supervised” in many ways by the Director, who is a principal officer appointed by the President with the advice and consent of the Senate. APJs serve on 3-member panels and are the front-line adjudicators of IPRs. The Director controls whether to institute an IPR, and has the corresponding power to cancel any institution instead of allowing the matter to proceed to a final decision. 35 U.S.C. §§ 314(a), 318(a); *BioDelivery Sciences Int’l v. Aquestive Therapeutics, Inc.*, 935 F.3d 1362, 1367 (Fed. Cir. 2019). If the Director institutes an IPR, the Director then has unfettered control over the composition of the panel that will resolve the IPR. 35 U.S.C. § 6(c).

The Director also has authority to closely control the process and substance of APJs’ decision-making. The Director can promulgate regulations governing the conduct of IPRs. 35 U.S.C. § 316. He also “has the power to issue policy directives and management supervision,” such as “instructions that include exemplary applications of patent laws to fact patterns,” which apply when APJs confront “factually similar cases.” *Arthrex*, 941 F.3d at 1331 (citing 35 U.S.C. § 3(a)). Such policy directives are “binding on any and all USPTO employees.” Patent Trial and Appeal Board Standard Operating Procedure 2 at 2. The Director similarly controls which (if any) Board decisions are designated precedential and thus binding on future panels. *Arthrex*, 941 F.3d at 1330. The Director similarly controls the procedures for rehearing requests, including the composition of

rehearing panels, under the foregoing statutory authority. Finally, the Director has authority over APJs' pay. 35 U.S.C. § 3(b)(6). This comprehensive authority over APJs readily suffices to establish that APJs are "directed and supervised at some level" by the Director such that they are "inferior" to the Director in the constitutional sense. *Edmond*, 520 U.S. at 663.

B. The *Arthrex* Panel's Contrary Conclusion Did Not Adequately Credit The Extent Of The Director's Authority Over APJs

The *Arthrex* panel acknowledged that the Director exercises significant "policy-direction and supervisory authority over the APJs." *Arthrex*, 941 F.3d at 1331. Rather than focus on the totality of the Director's direction and supervision of APJs as *Edmond* instructs, however, the panel focused on what it saw as two specific distinctions between the authority of APJs here and the Court of Criminal Appeals judges in *Edmond*.

First, the panel emphasized that APJs are able to issue final decisions that are not reviewable by another Executive Branch official. Specifically, the panel asserted that the Director cannot "single-handedly review, nullify or reverse a final written decision issued by a panel of APJs." *Id.* at 1329. That assertion is legally irrelevant—the inferior officer judges in *Freytag* could issue "final" decisions in various circumstances, and yet they were deemed inferior officers. 501 U.S. at 876. The question is not whether the Director can nullify APJs' decisions, but

whether they are “directed and supervised at some level” by the Director. *Edmond*, 520 U.S. at 663. The answer to that question is yes.

In any event, the Director *can* unilaterally reverse the decision of an APJ panel or dictate the result in a particular case. The *Arthex* panel focused on the fact that a decision to rehear, and any rehearing itself, would be made by a panel of at least three Board members. *Arthrex*, 941 F.3d at 1329-30. But that rationale overlooked the Director’s undisputed ability to unilaterally give binding policy guidance regarding how to apply the law to particular sets of facts. As the Government explains in its petition for rehearing in *Arthrex*, the Director plainly has the ability to dictate the outcome of rehearings because he can unilaterally issue binding policy guidance based on or related to the facts of a particular case, which the APJs he chooses to serve on the rehearing panel would be required to follow. *See* U.S. Petn. for Reh’g En Banc 10, No. 18-2140; *Cobert v. Miller*, 800 F.3d 1340, 1351 (Fed. Cir. 2015) (“[I]t is beyond dispute that ‘[f]ailure to follow instructions or abide by requirements affects the agency’s ability to carry out its mission’” and can warrant dismissal under the “efficiency of the service” standard (quoting *Blevins v. Dep’t of the Army*, 26 M.S.P.R. 101, 104 (1985))). In fact, the Director can plainly issue such guidance while cases are pending and prior to a final decision, or exercise his authority to dismiss institution entirely. The latter authority alone would suffice to show that APJs may not “render final decision on

behalf of the United States unless permitted to do so by other Executive officers,” just as was true in *Edmond*. *Edmond*, 520 U.S. at 665.

Second, the panel emphasized its belief that the Director and Secretary of Commerce had only limited removal authority over APJs, because APJs can be terminated from employment “only for such cause as will promote the efficiency of the service.” *Arthrex*, 941 F.3d at 1333 (quoting 5 U.S.C. § 7513(a)). The panel found that limitation significant because the Supreme Court stated in *Edmond* that the Judge Advocate General (“JAG”) could remove a military judge “from his judicial assignment without cause.” *Id.* at 1332 (quoting *Edmond*, 520 U.S. at 664).

But that fact does not distinguish this case from *Edmond*. *Edmond* was referring to the JAG’s ability to reassign judges to other duties, not to terminate them from service entirely.¹ Here, the Director’s unfettered control over the composition of Board panels gives him the exact same authority, because the Director can choose not to assign an APJ to *any future panel*. 35 U.S.C. § 6(b).

¹ In fact, the JAG could not even remove judges from their judicial positions for any reason at all—the JAG could not remove a member from the court based only on his disagreement with the judge’s legal rulings. *Weiss v. United States*, 510 U.S. 163, 181 (1994) (“[I]t would also violate Articles 26 and 37 if a Judge Advocate General decertified or transferred a military judge based on the General's opinion of the appropriateness of the judge’s findings and sentences”).

The *Arthrex* decision ignored that authority when it reasoned that the “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.” 941 F.3d at 1332.

Even if the ability to terminate an APJ from employment entirely based on policy disagreement were relevant,² the Director’s authority over panel composition effectively gives him that authority as well. If the Director were to determine an APJ is unfit to serve on any future Board panels, then dismissing that APJ would plainly promote the “efficiency of the service.” *See Brown v. Dep’t of the Navy*, 229 F.3d 1356, 1360 (Fed. Cir. 2000) (affirming dismissal under efficiency of the service standard where supervisor testified there would “practically be no job” for employee to perform because patrons would not “turn to him”); *see also Einboden v. Dep’t of the Navy*, 802 F.3d 1321, 1325-26 (Fed. Cir. 2015) (“We give wide berth to agency decisions as to what type of adverse action is necessary to ‘promote the efficiency of the service,’ provided that the agency’s decision bears some nexus to the reason for the adverse action.”).

² Not only did *Edmond* not focus on the ability to terminate the judges at issue from employment entirely, but the judges in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), had at least one level of “for cause” removal protections, *see id.* at 2059-60 (Breyer, J., concurring), and so did the special masters deemed inferior officers in *Masias v. Secretary of Health & Human Services*, 634 F.3d 1382, 1295 (Fed. Cir. 2011).

In short, the Director’s ability to control and correct decisions with which he disagrees and his removal power over APJs is robust and takes APJs well outside the ambit of qualifying as principal officers. Indeed, *Edmond* instructed that the proper inquiry is a holistic one into whether the officer is directed and supervised “at some level” by a principal officer. 520 U.S. at 663. As shown in Part I.A, the Director possesses numerous powerful tools to direct and supervise the substance and procedure of APJs’ work. Those tools include power over whether APJs are permitted to serve on panels at all, the procedural rules by which their decisions are made, the substantive body of decisions that bind them, and the pay they receive.³

³ *Arthrex* relied heavily on a comparison of APJs to the Copyright Royalty Judges (“CRJs”) deemed principal officers in *Intercollegiate Broadcast System, Inc. v. Copyright Royalty Board*, 684 F.3d 1332 (D.C. Cir. 2012). *Arthrex* overlooked two crucial distinctions between that case and this one. First, the D.C. Circuit emphasized at length that the supervisory officials there—the Librarian of Congress and the Register of Copyrights—had no authority at all over the fact-specific rate determinations that formed the core of CRJs duties: those officials could provide binding guidance on only “pure issues of law,” leaving the CRJs “vast discretion over the rates and terms.” *Id.* at 1339; *see id.* at 1338-39. In fact, CRJs are statutorily granted “full independence” when setting royalty rates. *Id.* at 1340 (quoting 17 U.S.C. § 802). APJs are given no similar authority. To the contrary, the Director can provide unilateral and binding guidance on how to apply the law to different sets of facts, and the Librarian of Congress also had no authority remotely similar to the Director’s ability to retroactively decide not to institute and therefore dismiss an IPR. Second, in stark contrast to the Director’s unfettered authority to reassign APJs to non-judicial duties, the Librarian of Congress had no authority at all over the cases CRJs would hear—CRJs always sat en banc, 17 U.S.C. § 803(a)(2)—and could remove CRJs from duty “only for misconduct or neglect of duty.” *Intercollegiate*, 684 F.3d at 1340.

Given these supervisory powers, APJs are plainly inferior officers. *See Edmond*, 520 U.S. at 666; *Freytag*, 501 U.S. at 876.

III. The Appropriate Remedy In Cases Where The Issue Was Not Properly Preserved Also Merits *En Banc* Review

The appropriate remedy for any Appointments Clause violation, particularly for cases in which the challenge was not presented to the Board, should also be resolved *en banc*. *Arthrex* ruled that the statutory limitations on removal should be excised and that the Board’s decision had to be vacated and the case remanded for a new hearing before a new panel of APJs. 941 F.3d at 1340.

To begin, Judge Dyk’s concurrence in *Bedgear, LLC v. Fredman Bros. Furniture Co.*, 783 F. App’x 1029 (Fed. Cir. 2019), persuasively explains that no vacatur is required because the judicial construction of the statute is both retrospective and prospective, which means that APJs were in fact removable at will even prior to the issuance of the *Arthrex* decision. *Id.* at 1031-32. As Judge Dyk put it, “the statute here must be read as though the PTAB judges had always been constitutionally appointed.” *Id.* at 1032. For example, when the Supreme Court invalidated the two-level for-cause removal protection for members of the SEC’s Public Company Accountability Oversight Board (“PCAOB”) in *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), it did not invalidate prior actions of the PCAOB. Instead, it held that the PCAOB members had in fact been “validly appointed” because, given the Court’s construction of the statute, they were always

subject to removal at will by their superior, the SEC. *Id.* at 510, 513. The same should follow here.

Moreover, even if the burdens and inequities created by allowing untimely Appointments Clause challenges on appeal do not warrant a conclusion that the issue is not properly presented at all, those considerations surely warrant a narrower remedy in such cases. At the very least, where the Appointments Clause challenge was not raised before the Board, the case should be remanded for a new hearing before the same panel. The existing, broad-brush remedy announced by *Arthrex* will impose “large and unnecessary burdens on the system of *inter partes* review, requiring potentially hundreds of new proceedings.” *Bedgear*, 783 F. App’x at 1030. That remedy should not be allowed to stand, particularly without full consideration by the *en banc* Court.

CONCLUSION

The petition for rehearing *en banc* should be granted. At a minimum, this petition should not be ruled upon until after the petitions in *Arthrex* or any other case in which the Court resolves these important issues have been disposed of.

Dated: January 21, 2020

Respectfully submitted,

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Electronics America, Inc.*

ADDENDUM

NOTE: This order is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

IMAGE PROCESSING TECHNOLOGIES LLC,
Appellant

v.

**SAMSUNG ELECTRONICS CO., LTD., SAMSUNG
ELECTRONICS AMERICA, INC.,**
Appellees

UNITED STATES,
Intervenor

2018-2156

Appeal from the United States Patent and Trademark
Office, Patent Trial and Appeal Board in No. IPR2017-
00353.

IMAGE PROCESSING TECHNOLOGIES LLC,
Appellant

v.

**SAMSUNG ELECTRONICS CO., LTD., SAMSUNG
ELECTRONICS AMERICA, INC.,**
Cross-Appellants

UNITED STATES,
Intervenor

2019-1408, 2019-1485

Appeals from the United States Patent and Trademark Office, Patent Trial and Appeal Board in No. IPR2017-01218.

ORDER

PER CURIAM.

In light of this court's decision in *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 18-2140 (Fed. Cir. Oct. 31, 2019), and the fact that Image Processing Technologies LLC has raised an Appointments Clause challenge in its opening brief in both of the above captioned cases,

IT IS ORDERED THAT:

(1) The oral arguments scheduled for January 6, 2020 are cancelled and the cases are removed from the calendar.

(2) The Patent Trial and Appeal Board's decisions in No. IPR2017-00353 and No. IPR2017-01218 are vacated and the cases are remanded to the Board for proceedings consistent with the court's decision in *Arthrex*.

FOR THE COURT

December 5, 2019
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 35(b)(2). This brief contains 3,720 words, excluding the parts of the brief exempted by Federal Circuit Rule 35(c)(2).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft® Word 2016 in 14-point Times New Roman.

Dated: January 21, 2020

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