

Nos. 19-1434, 19-1452, 19-1458

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In The  
**Supreme Court of the United States**

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UNITED STATES OF AMERICA,

*Petitioner,*

v.

ARTHREX, INC., ET AL.,

*Respondents.*

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**On Writs Of Certiorari To The  
United States Court Of Appeals  
For The Federal Circuit**

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**BRIEF OF *AMICI CURIAE* THE COMPUTER &  
COMMUNICATIONS INDUSTRY ASSOCIATION  
AND U.S. MANUFACTURER'S ASSOCIATION FOR  
DEVELOPMENT AND ENTERPRISE IN SUPPORT  
OF UNITED STATES AND SMITH & NEPHEW**

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[Additional Captions On Inside Cover]

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SMITH & NEPHEW, INC., ET AL.,

*Petitioners,*

v.

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**INTERESTS OF *AMICI CURIAE***<sup>1</sup>

The Computer & Communications Industry Association (CCIA) is an international, nonprofit association representing a broad cross-section of communications and technology firms. For nearly fifty years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy.<sup>2</sup> CCIA regularly files *amicus* briefs in this and other courts to promote balanced patent policies that reward, rather than stifle, innovation.

U.S. Manufacturers' Association for Development and Enterprise (US MADE) is a nonprofit association representing companies manufacturing diverse goods in the United States. US MADE members range from some of the largest U.S. manufacturers to the smallest father and son business. While US MADE members have collectively received hundreds of thousands of patents to undergird their innovative enterprises, they have also been the targets of abusive patent litigation. Thus, US MADE was specifically created to preserve and strengthen efficient and cost-effective mechanisms

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<sup>1</sup> Pursuant to Supreme Court Rule 37.3, all parties have given consent to the filing of this brief. Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or part; no party or counsel made a monetary contribution intended to fund its preparation or submission; and no person other than *amici* made such a contribution.

<sup>2</sup> CCIA's members are listed at <http://www.ccianet.org/members>.

to cancel improvidently granted patents that can be used to threaten U.S. manufacturing.<sup>3</sup>

The *inter partes* review (IPR) proceeding, created to provide the United States Patent and Trademark Office (USPTO) with the ability to review the patentability of patents after they were issued, has had a significant positive impact on the innovation ecosystem. Litigation costs and patent litigation frequency have come down from their peak, and the quality of patents asserted in litigation has increased.

*Amici's* members regularly file petitions for IPR. They rely on an effective and consistent IPR system as part of their innovative activities, in particular to manage risk and cost from patent assertions by non-practicing entities. The *Arthrex* decision threatens not just the efficient operation of the IPR system, but the benefits that IPR has brought to the patent ecosystem as a whole.

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## SUMMARY OF ARGUMENT

Administrative Patent Judges (APJs) of the Patent Trial and Appeal Board (PTAB) unquestionably exercise significant authority on behalf of the United States. This renders them officers.

However, the Director maintains the sole ability to formulate policy for the PTAB. APJs have no ability to

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<sup>3</sup> US MADE's members are listed at: <https://us-made.org/members/>.

formulate policy that binds the United States; to the extent any decision may become binding policy, that occurs only with the Director's approval. This lack of policy-making authority is a signal that APJs are inferior officers, not principals.

Further, the authority APJs exercise is fundamentally subordinated to the direction and authority of the Director of the USPTO. They are bound to abide by the policy directives he creates, exercise authority only with his permission, may have their exercise of authority in a case terminated by his sole decision, and their decisions are subject to re-hearing at his discretion. These tools of control and supervision are fundamentally the type of tools applied by a principal officer to direct an inferior officer.

Finally, the Director has created policies that lie outside those authorized by the PTAB's organic statute. These policies have led to challenges under the Administrative Procedure Act. Despite this, there have been no instances in which a PTAB judge failed to adhere to them. This uniform adherence to questionable policy guidance illustrates the effective control that the Director exerts over APJs.

For each of these reasons, this Court should find that APJs are inferior officers and reverse the underlying decision on that basis alone.

By providing additional review of patent validity, IPR and PGR have helped mitigate flaws in the patent system. The advent of the *inter partes* review (IPR) and post-grant review (PGR) proceedings has led to

reduced patent litigation rates and reduced patent litigation costs. While *amici* argue that severance of civil service protections is unnecessary, Congress would not have wished to have such an effective program terminated when it could be saved by a minor change. If this Court finds that APJs are principal officers, it should bless the curing action taken by the *Arthrex* court and uphold severance of APJs civil service protections.

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## ARGUMENT

### I. THE DIRECTOR ALONE HAS THE ABILITY TO FORMULATE POLICY

The America Invents Act (AIA), as codified in 35 U.S.C. § 311 *et seq.*, gave the Director of the USPTO the authority to prescribe regulations “establishing and governing *inter partes* review under this chapter.” 35 U.S.C. § 316(a)(4). The Director has also promulgated rules establishing that he and he alone is the final authority on what decisions of the PTAB will become precedential.

In contrast, the authority of an APJ “does not include any authority to formulate policy for the Government or the Executive Branch, nor does it give appellant any administrative duties outside of those necessary to operate her office.” *Morrison v. Olson*, 487 U.S. 654, 671-72 (1988).

The Director, not any APJ, has complete authority over how IPR will be conducted, subject only to the

limits imposed in the statutory text, and thus complete authority to direct APJs in the conduct of their work. *See Edmond v. United States*, 520 U.S. 651, 663 (1997). This policy control alone illustrates that APJs are inferior officers whose superior principal officer is the Director.

**A. The Director Formulates Policy Via Rule-making; APJs Implement That Policy**

The Director's rulemaking authority extends broadly across those regulations that establish and govern *inter partes* review. 35 U.S.C. § 316(a)(4). In the past two years alone, the Director has employed this authority to: make changes to the substantive standard employed by APJs when interpreting claims, 83 Fed. Reg. 51340 (Oct. 11, 2018); create new factors not found in statute to be evaluated by APJs during the institution process, 83 Fed. Reg. 39989 (Aug. 13, 2018); re-interpret how 35 U.S.C. § 101 is to be applied by Office personnel, including APJs conducting post-grant reviews, 84 Fed. Reg. 50 (Jan. 7, 2019); create pilot programs making it easier to amend patents during an IPR, 84 Fed. Reg. 9497 (Mar. 15, 2019); and discourage institution of more than one proceeding on the same patent, 84 Fed. Reg. 33925 (July 16, 2019). And as described in Section III, *infra*, no APJ has ignored or contradicted those policies.

No individual APJ has authority to formulate policy via rules and guidance, and all must follow the rules and guidance established by the Director. By

setting out the policy that APJs apply, the Director effectively directs the fashion in which APJs conduct their work. This is quintessentially supervision of an inferior officer.

**B. The Director Formulates Policy Via Designation of Opinions as Precedential; APJs Are Bound to Follow That Precedent**

Beyond the Director's authority to promulgate rules and guidance for APJs to obey, the Director also retains final authority over all determinations of precedent at the PTAB. In fact, "no decision will be designated or de-designated as precedential or informative without the approval of the Director." USPTO, PTAB Standard Operating Procedure 2 (Revision 10), <https://www.uspto.gov/sites/default/files/documents/SOP2%20R10%20FINAL.pdf> ("SOP2").

This requirement ensures that the Director controls both the formal rulemaking apparatus for setting policy and the precedential caselaw that controls policy and procedure of the Board. By choosing to designate as precedential only those decisions that implement the Director's desired policy, the Director exercises a second layer of direction and control over the work of APJs.

Again, this type of supervision via setting the policy to be applied is the type of supervision found throughout the federal government, permitting

principal officers to set policy and allowing inferior officers to carry out the execution of that policy.

The policy-based control of APJs by the Director, and the lack of policy control for APJs, is a strong signal that APJs are in fact inferior officers. But in addition to the policy control the Director exerts over APJs, the Director also retains significant ability to directly affect the decisions and work of the APJs.

## **II. THE DIRECTOR HAS THE ABILITY TO EFFECTIVELY DIRECT AND CONTROL ADMINISTRATIVE PATENT JUDGES, RENDERING THEM INFERIOR OFFICERS**

Another fundamental distinction that marks an officer as an inferior officer, rather than a principal officer, is that inferior officers are “officers whose work is directed and supervised at some level by” a principal officer. *Edmond v. United States*, 520 U.S. 651, 663 (1997).

The Director of the USPTO is a principal officer. 35 U.S.C. § 3(a)(1). In that role, he exhibits significant direction and supervision of the work conducted by the APJs of the Board. This direction includes binding APJs to policy guidance the Director devises and single-handedly designating opinions as having precedential status, determining which IPRs APJs will hear, determining if there will be an instituted IPR for an APJ to hear, and even rehearing and revising APJ’s opinions through a panel convened at the Director’s

sole discretion and composed of the Director and his hand-picked subordinates.

These tools, all available to the Director, allow the Director to completely control the exercise of authority by a judge of the Patent Trial and Appeal Board. No APJ may issue an effective decision that implements a policy contrary to the Director's desired policy; if one tries, they would be subject to reversal at the Director's initiative and, if necessary, to removal from their role. All of these practices are hallmarks of the direction and supervision of an inferior officer by a principal officer.

**A. The Director Bears Sole Authority to Set the Policies the APJs Must Follow, Directing Their Actions**

As discussed in Section I, *supra*, the Director bears sole responsibility for policy-making for the policies APJs must implement. 35 U.S.C. § 3(a)(2)(A); 35 U.S.C. § 316(a). And APJs are bound to follow that direction. A failure to follow the Director's policy guidance may lead to removal from an IPR, removal from hearing any IPRs, or even removal from the Board altogether.

**B. The Director Controls Whether an APJ Will Hear Any Particular Case, or Even Whether the APJ Will Hear Any Cases at All**

Beyond general policy-setting authority, the Director also is given the sole statutory authority to

designate which APJs will hear each *inter partes* review. 35 U.S.C. § 6(c). And while the Director has permitted the Chief Judge of the PTAB to assign panel members in general, the Director explicitly “retains his or her own statutory authority to designate panels.” USPTO, PTAB Standard Operating Procedure 1 (Revision 15), <https://www.uspto.gov/sites/default/files/documents/SOP%201%20R15%20FINAL.pdf> (“SOP1”). In addition to authority to determine which proceedings an APJ may participate in, the Director is also the sole party authorized to determine if a proceeding should be instituted at all. 35 U.S.C. § 314(a).

The net result of these twin authorities is that the Director may determine whether any given APJ will hear any cases at all, and determines for any given case which APJs will be permitted to hear it. This type of control via assignment is a quintessential form of supervision, rendering the Director the principal officer who is the superior of the inferior officer APJ. *Edmond*, 520 U.S. at 662. It is also strongly analogous to the independent counsel of *Morrison*. *Morrison v. Olson*, 487 U.S. 654 (1988).

### **1. The independent counsel in *Morrison* was sufficiently subject to control by the Attorney General**

In *Morrison*, the Attorney General—a principal officer—could, based on information received, preliminarily investigate whether there are “reasonable grounds to believe that further investigation or

prosecution is warranted.” 28 U.S.C. § 592(b)(1). In the event that such grounds exist, the Attorney General, in conjunction with the Special Division, would select an independent counsel and define the jurisdiction of the independent counsel. *Morrison*, 487 U.S. at 661. The independent counsel would then pursue the proposed investigation, independent of any direct supervision by the Attorney General or Special Division. While not directly supervised by the Attorney General, the independent counsel was still obliged to follow the established policies of the Department of Justice in their investigation. 28 U.S.C. § 594(f). The Attorney General could remove the independent counsel, but only “for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel’s duties.” 28 U.S.C. § 596(a)(1).

## **2. APJs are subject to analogous, but greater, control by the Director**

Similarly, the Director of the USPTO receives a petition for *inter partes* review. 35 U.S.C. § 312. If the Director determines that there is “a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition,” he may choose to authorize an *inter partes* review. 35 U.S.C. § 314(a). And if the Director chooses to institute a proceeding, he selects the APJs who will be assigned to that proceeding. 35 U.S.C. § 6(c). The Director is permitted to remove APJs from any case at any time, for any reason. 35 U.S.C. § 6(c); *see also* SOP1 (“authority

of the Director to designate, de-designate, or otherwise alter in any way at any time, panels in his or her sole discretion”). APJs are bound to follow the guidance of the Director. *See* Section I, *supra*. The Director can also remove APJs from employment entirely “for such cause as will promote the efficiency of the service.” 5 U.S.C. § 7513(a).

**3. If the independent counsel of *Morrison* is an inferior officer, then APJs—subject to greater control and less insulated from removal—must also be**

Both the independent counsel of *Morrison* and APJs are selected by a principal officer to serve a specific purpose within a limited jurisdiction, whether a specific investigation of crimes or a specific investigation of a patent. Each only receives that grant of authority if the principal officer issues a preliminary decision that the assignment is reasonably likely to bear fruit. Both are bound to the general policy set forth by their principal officer. And while APJs maintain their membership in the Board when not hearing a proceeding, that membership itself comes with no specific authority to exercise the authority of the United States; their sole authority stems from their assignment to specific proceedings by the Director. They are, in practice if not in Human Resources files, temporary appointees to each proceeding, with their offices being created and terminated as they are assigned to and removed from proceedings.

Further, the Director has significantly greater powers of removal than the Attorney General in *Morrison*. The Attorney General could remove the counsel only with cause; the Director can remove an APJ from a proceeding without any cause whatsoever, and can terminate an APJ's employment entirely based on a determination that their conduct harms the efficiency of the service. One such cause, as expressed by the dissent from denial of rehearing *en banc*, would be “[f]ailing or refusing to follow the Director’s policy or legal guidance.” *Arthrex, Inc. v. Smith & Nephew, Inc.*, 953 F.3d 760, 787 (Fed. Cir. 2020) (Hughes, J., dissenting).

Given the significant similarities between APJs and the independent counsel of *Morrison*, ranging from the way in which they are assigned to proceedings to their obligation to abide by the policy guidance of their principal officer, the *Morrison* holding leads to the conclusion that APJs are inferior officers.

### **C. The Director Can Unilaterally Determine to Rehear an APJ’s Decision, and Can Do So Accompanied by Hand-Picked Subordinates to Ensure the Desired Outcome**

If an APJ were to reach a disfavored outcome not yet subject to guidance or even to ignore the Director’s policy guidance, then the Director retains the ability to unilaterally determine that that decision should be reheard and retains the ability to have it reheard by the Director’s chosen panel. This process was previously

discussed by this Court in the *Oil States* argument, where Chief Justice Roberts described the situation where the Director “can change [the] panels if she doesn’t agree with the direction they’re going, that she can add new judges to the panel . . . and I think constitutionally this may be fine, [is] a tool of the executive activity.” Transcript of Argument in *Oil States v. Greene’s Energy* at 33:2-8 (Nov. 27, 2017).

SOP2 sets out the process by which the Director achieves this panel stacking. Per SOP2, the “Director may convene a Precedential Opinion Panel to review a decision in a case and determine whether to order sua sponte rehearing, in his or her sole discretion.” SOP2 at 5. Having convened such a panel, “Precedential Opinion Panel members are selected by the Director.” SOP2 at 4. The members of the PTAB include the Director, the Deputy Director, the Commissioner for Patents, and the Commission for Trademarks, as well as more than 200 APJs. 35 U.S.C. § 6(a); USPTO Performance and Accountability Report, FY2020 (Nov. 2020). The Deputy Director is nominated by the Director and appointed by the Secretary of Commerce. 35 U.S.C. § 3(b)(1).

Faced with a decision the Director objects to, it is within the Director’s power and authority to *sua sponte* convene a Precedential Opinion Panel, removing the original APJ from the matter and placing the Director himself onto the panel. He may also select the Deputy Director, who owes her position to the Director’s selection and nomination, as well as the Director’s choice of any APJ from among more than 200 APJs. The ability

to select the officials charged with hearing or rehearing the proceeding is effectively the ability to select the outcome, particularly when each of the members of the Board is obligated to follow the policy guidance of the Director at the potential cost of losing their position.

While one or two APJs might theoretically disagree with that guidance, the ability to express to a selected APJ what the Director believes to be the correct interpretation of the statute and policy is a strong tool to ensure that the selected APJ will abide by the Director's interpretation. In practice, the ability to select and stack precedential panels is equivalent to a power to directly and individually review a decision.

The ability to panel-stack to achieve the desired outcome is another mechanism by which the Director controls and supervises APJs, further cementing their status as inferior officers. Panel-stacking might or might not create a due process concern or result in a policy that exceeds the Director's authorized role, but such "shenanigans" are properly the subject of the Administrative Procedure Act or constitutional challenges to particular decisions. *Cf. Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2131, 2142 (2016).

### III. UNIFORM ADHERENCE BY ADMINISTRATIVE PATENT JUDGES TO THE DIRECTOR'S EXTRASTATUTORY POLICIES SIGNALS THE DIRECTOR'S EFFECTIVE CONTROL

Concerns regarding these shenanigans are not hypothetical. Several of the policies set by the Director in recent years are currently subject to challenge under the Administrative Procedure Act as exceeding his statutory authority. *See Apple et al. v. Iancu*, Case No. 5:20-CV-6128 (N.D. Cal., filed Aug. 31, 2020). And these policies have led at least one APJ to file a lengthy dissent from the way in which his panel applied that policy, a rare event at the PTAB. *See Cisco Systems, Inc. v. Ramot At Tel Aviv University, Ltd.*, IPR2020-00123, Paper No. 14 (May 15, 2020) (Crumbley, APJ, dissenting). But even in disagreeing with the application of the precedent, the APJ did not ignore the Director's extrastatutory policy.

While *amici* agree with the challengers in that case that the policy in question is not one the Director is authorized to create, *amici* are unaware of, and Arthrex has not identified, any instance in which an APJ has ignored policy set by the Director in favor of his or her own preferred policy. The uniform adherence of more than 200 APJs to the Director's preferred policy is itself evidence of the Director's *de facto* control and direction of the APJs, made all the more salient when at least some of those policies may be without statutory backing.

**IV. *INTER PARTES* REVIEW HAS SIGNIFICANTLY IMPROVED THE FUNCTION OF THE PATENT SYSTEM AND CONGRESS WOULD NOT WISH TO DISTURB THAT IMPROVEMENT**

Since the creation of the *inter partes* review process, the amount and cost of patent litigation has fallen significantly. From a peak of 6,114 patent lawsuits filed in 2013, disputes have fallen to 3,347 in 2019. Unified Patents, *2019 Patent Dispute Report—Year in Review*, Fig. 1 (Jan. 1, 2020), <https://www.unifiedpatents.com/insights/2019/12/30/q4-2019-patent-dispute-report>. And the cost of those lawsuits has fallen as well, from a median of \$5,500,000 for a single patent lawsuit in 2013 to a median of \$4,000,000 in 2019. AIPLA, *Report of the Economic Survey 2019* at 50 (2019). Much of this decline appears attributable to the impacts of IPR. Landau, *IPR and Alice Appear Responsible for Reduced Patent Litigation Costs*, Patent Progress (Oct. 18, 2018), <https://www.patentprogress.org/2018/10/18/ipr-and-alice-appear-responsible-for-reduced-patent-litigation-costs/>.

*Amici*'s members have benefited from these positive changes to the patent system. Rather than devote financial and employee resources to legal disputes over intellectual property—especially disputes over the kind of invalid patents IPR was designed to eliminate—they have instead been able to devote those resources to creating new innovation. This is precisely what Congress envisioned in creating the *inter partes*

review process—the creation of “quick and cost effective alternatives to litigation.” H.R. Rep. No. 112-98, at 48 (2011).

Further, while this case focuses on the role of APJs in hearing *inter partes* reviews, that is not their only function. They also hear *ex parte* appeals from patent applications under examination, hear appeals of *ex parte* reexaminations, and conduct interference and derivation proceedings to determine which of two applicants for the same invention is entitled to a patent right. Finding their appointment to be unconstitutional throws into question those other proceedings as well. The work of similar employees in roles across the federal government would also be questioned if the Board’s APJs were determined to be unconstitutionally appointed principal officers.

While *amici* believe no fix is necessary, as the APJs are inferior officers operating under the direction, control, and supervision of the Director, *amici* submit that the severance of removal protections would have been preferred by Congress to striking down the appointments of all PTAB judges. In determining whether a provision is severable, a court must ask whether “the legislature [would] have preferred what is left of its statute to no statute at all.” *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006). The remainder of the statute is presumptively severable unless it is evident that its continued enforcement would produce “a scheme sharply different

from what Congress contemplated.” *Murphy v. NCAA*, 138 S. Ct. 1461, 1482 (2018).

Striking down PTAB appointments entirely would disrupt patent examination, with applicants unable to appeal to the Board adverse decisions from examiners. It would block the other long-standing reexamination process, *ex parte* reexamination. And it would block derivation proceedings, which are used to determine ownership of some of the most valuable technologies today. See, e.g., *Broad Institute v. Regents of the University of California*, Interference No. 106,115 (CRISPR gene-editing technology).

Rather than see the USPTO’s operations grind to a halt, Congress would have preferred to remove civil service protections from the APJs and leave intact the critical operations of the Board.



## CONCLUSION

The decision below incorrectly finds that Administrative Patent Judges are principal officers, despite being under the *de jure* and *de facto* control of the Director of the USPTO. For the foregoing reasons, this Court should determine that the judges of the Board

are inferior officers and overturn the underlying decision.

Respectfully submitted,

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