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

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ARTHREX, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY AND RESPONSE BRIEF FOR THE UNITED STATES

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(Additional Captions On Inside Cover)

SMITH & NEPHEW, INC., ET AL., PETITIONERS

v.

ARTHREX, INC., ET AL.

ARTHREX, INC., PETITIONER

v.

SMITH & NEPHEW, INC., ET AL.

QUESTIONS PRESENTED

1. Whether, for purposes of the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, administrative patent judges of the U.S. Patent and Trademark Office are principal officers who must be appointed by the President with the Senate's advice and consent, or "inferior Officers" whose appointment Congress has permissibly vested in a department head.

2. Whether, if administrative patent judges are principal officers, the court of appeals properly cured any Appointments Clause defect in the current statutory scheme prospectively by severing the application of 5 U.S.C. 7513(a) to those judges.

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SUMMARY OF ARGUMENT

I. Under the Court's existing analytic framework, this case is straightforward. Administrative patent judges on the United States Patent and Trademark

Office's (USPTO's) Patent Trial and Appeal Board (Board) are inferior officers, because from start to finish their work is "directed and supervised at some level" by the Secretary of Commerce and the USPTO Director, both of whom are presidentially appointed, Senate-confirmed Executive Branch officials. See *Edmond* v. *United States*, 520 U.S. 651, 663 (1997).

A. Arthrex's attempts to discount those officials' oversight powers are unpersuasive. While the Secretary can remove a judge from federal service only for misconduct that is likely to affect an agency's work, failing to follow the Director's binding regulations and binding policy guidance readily qualifies. And although the Director's unfettered removal authority applies only to judicial assignments, not federal service, the *Edmond* Court found precisely that type of removal authority to be a powerful tool for control.

The Director's independent authority to issue binding policy guidance, as well as his unilateral authority to designate or de-designate Board decisions as precedential, fill any gap in his ability to establish the general policies that the judges must apply. And while the Director is not authorized to reverse a final Board decision unilaterally, he can institute or de-institute Board proceedings at any time before the Board renders its decision. That power, combined with the Director's substantial control over any rehearing after a final decision is issued, provides significant control over each of those individual proceedings.

Contrary to Arthrex's contention, the Secretary's and Director's exercise of these statutory oversight authorities—either singly or in combination—is consistent with the overall statutory scheme and with due process requirements. The Patent Act expressly contemplates

that the Director will both establish general USPTO policy and participate in individual Board proceedings. And there is no inherent unfairness in his exercise of those authorities to serve legitimate goals.

B. Arthrex proposes a new categorical rule, under which an administrative judge cannot be an inferior officer unless a Senate-confirmed officer can exercise plenary review over her decisions. Under this Court's precedents, however, there is no exclusive criterion for inferior-officer status, including for administrative judges. Although review authority can provide one significant means for control, it is not the only way—and not always the best way—to ensure effective supervision.

Arthrex's appeal to history and tradition is also unavailing. Since 1793, Congress has frequently granted final decisionmaking authority on patent rights to officials who had not received Senate confirmation. Indeed, throughout the period (since 1980) when the USPTO has been authorized to reconsider the validity of previously issued patents by re-examination, that task has always been entrusted to non-Senate-confirmed agency officials. And since 1870, initial patent examiners (who no one contends are principal officers) have been authorized to issue the Executive Branch's final word in granting patent rights. Far from supporting Arthrex's position, this longstanding congressional practice provides powerful evidence that final authority to determine the validity of a patent is not enough to make the decisionmaker a principal officer of the United States.

II. If the Court concludes that administrative patent judges are principal officers under the current statutory scheme, the Court should affirm the court of appeals' remedial holding, severing the judges' modest tenure protections to render them inferior officers.

A. When it identifies a constitutional flaw in a federal statute, this Court applies a strong presumption in favor of invalidating only particular unconstitutional provisions or applications of the law, while leaving the rest in force, as long as the remainder of the statutory scheme can function independently. Here, the remaining Patent Act provisions will function as Congress intended if administrative patent judges are removable at will. And nothing in the Act's text or history indicates that, if affording tenure protections rendered the statute unconstitutional, Congress would have preferred to forgo inter partes reviews entirely rather than to have such reviews conducted by officials who can be removed at will.

Arthrex's contrary assertions are misguided. Although the Court has sometimes *permitted* tenure protections for certain Executive Branch adjudicators, it has never *required* them. And while Congress has afforded tenure protections for administrative judges in some circumstances, most prominently under the Administrative Procedure Act, it has not uniformly done so. Nothing in the Patent Act suggests that the modest tenure protections afforded to administrative patent judges under that law are critical to its operation. And there is no barrier to the Court's invalidating those removal restrictions only as applied to administrative patent judges.

B. The possibility of other potential cures to any Appointments Clause violation does not counsel against following the court of appeals' approach. If severing administrative patent judges' removal restrictions would not cure any constitutional problem the Court identifies, or if it would introduce a new constitutional infir-

mity, the Court should consider other remedial approaches. But the mere possibility that other potential responses exist does not foreclose the Court from adopting any solution at all.

ARGUMENT

I. ADMINISTRATIVE PATENT JUDGES ARE INFERIOR OFFICERS WHOSE APPOINTMENT CONGRESS VALIDLY VESTED IN THE SECRETARY OF COMMERCE

USPTO administrative patent judges are inferior officers who may be validly appointed under the Appointments Clause by the "Head[]" of their "Department[]," Art. II, § 2, Cl. 2, rather than by the President with the advice and consent of the Senate. The court of appeals reached a different conclusion only by employing a deeply flawed, mechanical application of this Court's decision in *Edmond* v. *United States*, 520 U.S. 651 (1997), and by failing to appreciate the numerous ways in which the Secretary of Commerce and the Director of the USPTO direct and supervise those judges' work.

Except for a passing footnote, Arthrex does not defend that approach. Instead, while disputing various aspects of the government's description of the Secretary's and Director's supervisory authority, Arthrex principally advocates a new test for determining inferior-officer status, at least for officials who perform adjudicatory functions. Arthrex's criticisms of the government's application of *Edmond* are misguided, and its arguments for wholesale replacement of the Court's traditional approach are unpersuasive. The court of appeals' judgment should be reversed.

A. From Start To Finish, The Work Of Administrative Patent Judges Is Subject to Significant Supervision and Direction By Senate-Confirmed Officers

Under *Edmond*, inferior officers are those "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." 520 U.S. at 663. Two Senate-confirmed officers—the Secretary and the Director—possess a variety of mechanisms that operate in both independent and mutually reinforcing ways to provide substantial direction and supervision to administrative patent judges. Arthrex's efforts to dismiss or discount those oversight authorities lack merit.

1. a. The Secretary exercises significant control over administrative patent judges through his authority to appoint all such judges, and his concomitant authority to remove them from federal service under the permissive efficiency-of-the-service standard. U.S. Br. 26-27. Particularly when combined with the Director's authority to set binding policy for the Office, see pp. 10-12, *infra*, the Secretary's appointment and removal authority provides a meaningful tool for oversight and control.[1]

Arthrex emphasizes (Br. 36-38) that the Federal Circuit has interpreted the efficiency-of-the-service standard to require "misconduct * * * likely to have an ad-

[1] As our opening brief explains (at 4 n.1), a somewhat different removal standard applies to a small number of administrative patent judges who are members of the Senior Executive Service. Neither the court of appeals nor Arthrex has suggested that those judges should be classified differently for purposes of the Appointments Clause. See Arthrex Br. 37 n.7. In any event, none of those judges served on the Board panel that ruled in this case. See U.S. Br. 5 n.1.

verse impact on the agency's performance of its functions," *Brown* v. *Department of the Navy*, 229 F.3d 1356, 1358 (Fed. Cir. 2000), cert. denied, 533 U.S. 949 (2001), and characterizes (Br. 38) that standard as a "sharp[] limit[ation]" on the Secretary's authority. But at least in the present statutory context, that interpretation poses no serious impediment to the Secretary's supervision of administrative patent judges' work. A civil servant's failure or refusal to follow a superior's binding instructions or policy *is* misconduct. See U.S. Br. 27 (citing, *e.g.*, *Cobert* v. *Miller*, 800 F.3d 1340, 1351 (Fed. Cir. 2015)). And when an administrative judge engages in such misconduct while carrying out her adjudicative work on behalf of the agency, an adverse impact on agency functions is the likely result. See, *e.g.*, *Exum* v. *Department of Homeland Security*, 446 Fed. Appx. 282, 283-284 (Fed. Cir. 2011) (per curiam) (upholding, under the efficiency-of-the-service standard, the removal of an immigration officer who had failed to follow agency policies when "adjudicat[ing] applications of aliens seeking to become lawful permanent residents").

Arthrex asserts (Br. 37) that the Federal Circuit has held to the contrary, but the single case it cites is inapposite. *Abrams* v. *Social Security Administration*, 703 F.3d 538 (Fed. Cir. 2012), involved the removal of an administrative law judge under the "good cause" removal standard in 5 U.S.C. 7521(a) established by the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, for judges appointed under 5 U.S.C. 3105. 703 F.3d at 543 (quoting 5 U.S.C. 7521(a)); see 5 U.S.C. 7521(a). As the court below held (and Arthrex does not dispute), an administrative patent judge's removal is not governed by Section 7521(a) because administrative patent judges are appointed under 35 U.S.C. 3, not 5 U.S.C. 3105. See

Pet. App. 18a n.4. Thus, as the court below explained, their removal requires "a lower threshold" than under the Federal Circuit's prior construction of Section 7521(a). *Ibid.*; see *Lucia* v. *SEC*, 138 S. Ct. 2044, 2061 (2018) (Breyer, J., concurring in the judgment in part and dissenting in part) (noting the government's disagreement with that interpretation of Section 7521(a)).

This Court's decision in *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183 (2020), is also not to the contrary. In *Seila Law*, the Court held unconstitutional a provision that limited the permissible grounds for removing the CFPB Director—the single head of an independent agency—to "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 2193 (quoting 12 U.S.C. 5491(c)(3)). The Court found that this removal standard, as it had previously been understood, interfered with the President's ability to fulfill his responsibilities under the Take Care Clause and violated the separation of powers in the context of that case. See 140 S. Ct. at 2197. And it declined to adopt a different statutory interpretation to address that constitutional infirmity, noting that the appointed amicus had failed to offer "any workable standard derived from the statutory language." *Id.* at 2206. That reasoning, which concerned the permissible interpretation of different statutory language in response to distinct constitutional concerns, has no bearing on the scope or efficacy of the removal authority that the Secretary possesses under the efficiency-of-the-service standard here.

b. In addition to the Secretary's authority to appoint and remove administrative patent judges from federal service entirely, the Director has independent and

unfettered authority with respect to those officers' "judicial assignment[s]," *Edmond*, 520 U.S. at 664. U.S. Br. 27-29.

Arthrex suggests that a subordinate must "fear and, in the performance of his functions, obey" only a superior with the power to remove the officer from federal service altogether. Br. 38 (quoting *Bowsher* v. *Synar*, 478 U.S. 714, 726 (1986)). But as Arthrex acknowledges (Br. 39), the Judge Advocate General in *Edmond* was authorized to remove his inferior officers only from their judicial assignments, not from federal service. See U.S. Br. 40. The Court nevertheless found, citing the very passage in *Bowsher* on which Arthrex relies, that the ability to remove administrative judges from their judicial assignments provided a "powerful tool for control." *Edmond*, 520 U.S. at 664.

Arthrex also argues (Br. 38) that, although some administrative patent judges would welcome the "paid vacation," divesting a judge of her judicial assignments would constitute a "constructive" removal from federal service. To establish constructive removal, a claimant must actually resign and then show "that the agency effectively imposed the terms of the employee's resignation or retirement, that the employee had no realistic alternative but to resign or retire, and that the employee's resignation or retirement was the result of improper acts by the agency." *Staats* v. *USPS*, 99 F.3d 1120, 1124 (Fed. Cir. 1996); see *Shoaf* v. *Department of Agric.*, 260 F.3d 1336, 1341 (Fed. Cir. 2001) (constructive removal requires "working conditions * * * so intolerable * * * that a reasonable person in the employee's position would have felt compelled to resign"). Arthrex identifies no reason to conclude that relieving an administrative patent judge of her judicial assignments

would meet that "demanding legal standard," *Staats*, 99 F.3d at 1124, particularly since an administrative patent judge can be assigned meaningful non-judicial work, see U.S. Br. 28.

In any event, Arthrex does not (and could not plausibly) suggest that declining to designate a judge to sit on a particular panel (or rehearing panel), or to hear a particular category of cases, would constitute a constructive removal. In light of the other available means for direction and supervision, the Court need not decide whether that unfettered case-specific designation authority would be sufficient standing alone to render administrative patent judges inferior officers. It is enough to recognize that it provides the Director with one effective means, among many, for directing and supervising the judges' work—indeed, one that can be more effective than the more drastic binary authority possessed by the Judge Advocate General in *Edmond*. U.S. Br. 40.

2. The Director also exercises significant control over administrative patent judges' work through the creation of general agency policies, including by promulgating regulations governing the Board's adjudicatory process, issuing binding policy directives, and determining what, if any, precedential weight a final Board decision will receive. U.S. Br. 28-33.

Arthrex contends that the Director possesses "no general rulemaking authority over *substantive patentability standards*." Br. 43 (citing *Cooper Techs. Co.* v. *Dudas*, 536 F.3d 1330, 1336 (Fed. Cir. 2008)). Even if that were correct, the authority to adopt procedural rules governing all Board proceedings would provide an important tool for direction and supervision of the judges who conduct those proceedings. See *Edmond*,

520 U.S. at 664 (relying on the Judge Advocate General's authority to "prescribe uniform rules of procedure" for the Court of Criminal Appeals) (citation omitted); cf. *Mistretta* v. *United States*, 488 U.S. 361, 392 (1989) ("[T]he rules of procedure have important effects on the substantive rights of litigants.").

In any event, *Cooper* is inapposite here because the Federal Circuit decided that case before the Leahy-Smith America Invents Act (AIA), Pub. L. No. 112-29, 125 Stat. 284, granted the Director extensive new regulatory authority. See 35 U.S.C. 316(a), 326(a). *Cooper* and similar decisions thus "interpret a different statute," *Cuozzo Speed Technologies, LLC* v. *Lee*, 136 S. Ct. 2131, 2143 (2016) (citing *Cooper*, 536 F.3d at 1335), and do not control the interpretation of the Director's new "more broadly" worded authority under the AIA, *ibid.* (citing 35 U.S.C. 316(a)(4)); see *ibid.* (noting that, even before the AIA, the statute did not "clearly contain the [Federal] Circuit's claimed limitation").[2]

Moreover, any gap in the Director's authority to direct administrative patent judges through regulations is readily filled by the Director's authority to provide

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[2] The non-binding "[a]dditional views" expressed in *Facebook, Inc.* v. *Windy City Innovations, LLC*, 973 F.3d 1321, 1347 (Fed. Cir. 2020), also do not support Arthrex's narrow conception of the Director's regulatory authority. In their separate opinion in *Facebook*, the judges considered whether certain precedential opinions of the Board warranted *Chevron* deference. *Ibid.* Those judges found *Chevron* to be inapposite, but their rationales for that conclusion support a broad view of the Director's regulatory authority. The judges reasoned that, in light of the AIA's express delegation to the Director (rather than to the Board) of "the ability to adopt legal standards and procedures *by prescribing regulations*," neither the Director nor the Board could exercise the same interpretive authority through adjudication. *Id.* at 1350.

"policy direction" to and "management supervision" of the Board. 35 U.S.C. 3(a)(2)(A); see, *e.g.*, *2019 Revised Patent Subject Matter Eligibility Guidance*, 84 Fed. Reg. 50 (Jan. 7, 2019). Arthrex observes (Br. 43-44) that such policy directives do not have "the force and effect of law" because they do not bind third parties or create any rights or benefits enforceable against the USPTO. 84 Fed. Reg. at 51. For purposes of the Appointments Clause, however, the salient point is that the policy directives are one means by which the Director can supervise and direct *the Board's* performance of its functions. See *ibid.* ("All USPTO personnel are, as a matter of internal agency management, expected to follow the [Director's policy] guidance."); Pet. App. 14a (Federal Circuit holding that Section 3(a)(2)(A) authorizes the Director to "issue policy directives" to the Board, "includ[ing] exemplary applications of patent laws to fact patterns").

The Director's general policymaking authority is further bolstered by his power to designate or de-designate any Board decision as precedential, thus granting it or depriving it of any prospective significance beyond the parties. Citing three pages of argument in other patent owners' pending motion for summary judgment in district court, Arthrex suggests (Br. 44 n.12) that the Director's precedential designation authority is "hotly contested." But that authority has not been contested in this case, and the Federal Circuit rightly took it as a given that the Director possesses such authority and that "all precedential decisions of the Board are binding on future panels." Pet. App. 14a. Arthrex provides no substantive reason to question that important tool for providing clear and transparent direction and supervision here.

3. Finally, the Director has substantial authority to influence the conduct of any individual Board proceeding. The Director possesses sole and unreviewable power to institute and de-institute Board proceedings. He is also authorized to designate a Board panel, which may include himself, to determine whether to rehear any individual decision. U.S. Br. 30-32.

Arthrex contends (Br. 41 n.10) that vacating an institution decision once made would "subvert" the statutory rehearing procedures. But the Director does not claim the right to vacate his institution decision as a means of rescinding a final written decision by the Board resolving disputed patentability issues. If the Director disagrees with a final decision by the Board, he has other mechanisms to revisit that decision or diminish its prospective significance. U.S. Br. 31-32. The statute provides, however, that the Board "shall issue a final written decision" in AIA adjudications only if the proceeding "is instituted *and not dismissed*." 35 U.S.C. 318(a) (inter partes review) (emphasis added); see 35 U.S.C. 328(a) (post-grant review) (same). The AIA thus "contemplates that a proceeding" may be terminated by the Director or his delegee before the Board issues a final decision. See, *e.g.*, *Medtronic, Inc.* v. *Robert Bosch Healthcare Sys., Inc.*, 839 F.3d 1382, 1385-1386 (Fed. Cir. 2016), cert. dismissed, 137 S. Ct. 2113 (2017); *BioDelivery Scis. Int'l, Inc.* v. *Aquestive Therapeutics, Inc.*, 935 F.3d 1362, 1366 (Fed. Cir. 2019), cert. denied, 141 S. Ct. 254 (2020).

4. While each of these powers gives the Secretary or Director meaningful authority to direct and supervise administrative patent judges' work, those powers *in combination* allow particularly effective supervision.

U.S. Br. 35-39. The Director could, for example, promulgate a rule requiring Board opinions to be circulated in advance of issuance (much like many federal circuit courts require pre-circulation of certain panel decisions), thus enabling him either to issue relevant guidance on any unresolved legal or policy issues or to deinstitute review before any final decision is issued. Through that mechanism alone, the Director could deprive administrative patent judges of any "power to render a final decision on behalf of the United States unless permitted to do so" by the Director himself. *Edmond*, 520 U.S. at 665.

a. Arthrex contends (Br. 39) that the government's examples of ways in which the various oversight authorities can reinforce each other would "defy" the statutory scheme. That is incorrect. Congress's delegation of rulemaking authority to the Director and adjudicatory authority to the Board, for example, does not prevent the Director from using his rulemaking and policymaking authority to influence individual Board proceedings. Congress vested the Director with "[t]he powers and duties of the [USPTO]," 35 U.S.C. 3(a)(1), and made him responsible for "providing policy direction and management supervision for the Office," of which the Board is an important part, 35 U.S.C. 3(a)(2)(A). The AIA specifically grants the Director unilateral authority to institute the Board's adjudicative proceedings, 35 U.S.C. 135(a), 314(a), 324(a) and (e), and to issue regulations that "govern" those proceedings, 35 U.S.C. 2(b)(2)(A), 316(a)(4), 326(a)(4).

If Congress had intended to limit the Director's exercise of those powers to oversee the Board's work, it would have said so expressly—as it did with the Security and Exchange Commission's (SEC's) authority to

supervise the work of the independent agency at issue in *Free Enterprise Fund* v. *Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010). See 15 U.S.C. 7217(d)(2) (authorizing the SEC to "impose limitations upon the activities, functions, and operations of the Board" only after making certain findings "on the record, after notice and opportunity for a hearing"). Absent such an express limitation, the Director has ample authority to ensure that the Board complies with his policies and direction in any given proceeding, even if he cannot "simply *tell* the Board how to rule" in a specific case, Arthrex Br. 41.

b. There is likewise no merit to Arthrex's suggestion (Br. 41-42) that the Secretary's and Director's use of their oversight authority to supervise individual proceedings would violate due process. In a variety of circumstances, and often with this Court's blessing, Congress has authorized presidentially appointed, Senate-confirmed agency heads to *personally* conduct administrative adjudications. See, *e.g.*, *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947) (affirming SEC's direct approval of reorganization plan); *United States ex rel. Dunlap* v. *Black*, 128 U.S. 40, 49-51 (1888) (enforcing by mandamus the personal determination of a pension claim by the Secretary of the Interior); see Harold J. Krent, *Presidential Control of Adjudication Within the Executive Branch*, 65 Case W. Res. L. Rev. 1083, 1089-1091 (2015) (collecting examples); cf. *Withrow* v. *Larkin*, 421 U.S. 35, 56 (1975) (rejecting a due process challenge to adjudication by state administrative agencies). And in Arthrex's view, the Constitution *requires* that a Senate-confirmed officer at least have the authority to review and modify any agency decision.

If it does not inherently offend due process for such an official to personally conduct or review every administrative adjudication, there can be no inherent due process problem when the same official selects which inferior officers will comprise an adjudicatory panel, publishes policy directives for those inferiors to follow, or exercises his other legitimate authority to supervise them—particularly where any final decision is subject to judicial review in an Article III court. See *Kalaris* v. *Donovan*, 697 F.2d 376, 401 (D.C. Cir.) (rejecting due process challenge to adjudicative structure of Department of Labor's Benefits Review Board, and refusing to "call into constitutional question the validity of the many quasi-judicial boards whose judgments are subject to the direct or indirect control of the Executive Branch"), cert. denied, 462 U.S. 1119 (1983).

That is particularly true here. AIA proceedings conducted by the Board are designed not simply to resolve private disputes, but to enable the USPTO to take "'a second look at an earlier administrative grant of a patent'" and to correct the agency's prior errors in granting that "public franchise." *Oil States Energy Servs., LLC* v. *Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1374-1375 (2018) (citation omitted); see *Cuozzo*, 136 S. Ct. at 2140 (describing inter partes review as a mechanism by which the USPTO may "revisit and revise earlier patent grants"). The Secretary and Director thus have a substantial interest in ensuring "consistency across [all USPTO] decision makers" who are involved in such patentability determinations. Patent Trial and Appeal Board, *Standard Operating Procedure 2 (Revision 10)* at 2 (Sept. 20, 2018), https://go.usa.gov/xwXem. Those officials' use of various oversight tools to achieve

that end does not create any inherent "risk of unfairness" that might offend due process. *Utica Packing Co.* v. *Block*, 781 F.2d 71, 78 (6th Cir. 1986). Contrary to Arthrex's suggestion (Br. 42), providing the constitutionally mandated supervision of administrative patent judges does not require the Director to act as the judges' "backroom puppetmaster," but rather only as their congressionally designated boss.[3]

Any potential for unfairness in individual Board proceedings should therefore be addressed through the consideration of the facts and circumstances of those cases, see *Cuozzo*, 136 S. Ct. at 2141-2142 (noting the reviewing court's authority to set aside any final decision in inter partes review that is "contrary to constitutional right") (quoting 5 U.S.C. 706(2)(B)), not through the categorical rejection of the Secretary's and the Director's legitimate statutory authorities. That is particularly so if restricting the authority of the Secretary and Director would create a separate constitutional problem.

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[3] Arthrex notes in passing (Br. 8) that, for inter partes review, the "Board has invalidated some or all claims in 80% of cases that reached final written decisions." But taking into account all decisions that terminate the case—denials of institution, settlements, dismissals, etc.—the Board actually finds less than 30% of all challenged claims unpatentable in final written decisions. And the likelihood of a patent owner receiving an invalidity outcome is about the same at the Board as it is in district court litigation. See, *e.g.*, U.S. Patent and Trademark Office, *PTAB Trial Statistics: FY20 End of Year Outcome Roundup, IPR, PGR, CBM*, https://go.usa.gov/xAfPc.

B. The Appointments Clause Does Not Require That Every Decision By An Inferior Officer Must Be Subject To Review And Possible Modification By A Principal Officer

When the supervisory mechanisms available to the Commerce Secretary and USPTO Director are taken together, administrative patent judges are inferior officers with two presidentially appointed, Senate-confirmed superiors who direct and supervise their work at virtually every step. Evidently recognizing that it cannot prevail under that contextual approach, Arthrex proposes a new test. At least with respect to officers who perform adjudicatory functions, Arthrex contends (Br. 20-22) that a federal officer cannot be "inferior" unless a presidentially appointed, Senate-confirmed official can "review and modify" each of his decisions. The Court should reject that approach.

1. The Appointments Clause imposes no exclusive criterion for inferior-officer status

The Appointments Clause does not identify any specific attribute that renders an officer of the United States an "inferior Officer[]," U.S. Const. Art. II, § 2, Cl. 2, beyond the implicit requirement that "he has a superior." *Edmond*, 520 U.S. at 662. In establishing the first offices of the Executive Branch, early Congresses did not identify any further indispensable attributes. For more than 200 years since, in keeping with Congress's substantial authority to structure the Executive Branch and the impracticality of attempting "to foresee[] or to provide for all the combinations of circumstances" that might arise, 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1529, at 385-386 (1833), this Court has not identified any such exclusive criterion. U.S. Br. 17-25.

a. Arthrex's argument principally proceeds in three steps. Arthrex first points (Br. 20) to the *Edmond* Court's observation that the Judge Advocate General's control over the judges of the Coast Guard Court of Criminal Appeals was "not complete" because, among other things, the Judge Advocate General had "no power to reverse decisions of th[at] court." 520 U.S. at 664. Arthrex then notes (Br. 20-21) that the Court found it "significant" that another Executive Branch entity, the Court of Appeals for the Armed Forces (CAAF), *did* possess such review authority, so that the inferior-officer judges "ha[d] no power to render a final decision on behalf of the United States unless permitted to do so by [those] Executive officers." *Id.* at 664-665. From those two premises, Arthrex argues (Br. 21-23) both that (i) review authority is what makes supervision of administrative judges "complete" and (ii) unless presidentially appointed, Senate-confirmed officers possess such "complete" authority over administrative judges, those judges are themselves principal officers.

Arthrex's premises are accurate, but its conclusions do not follow. The *Edmond* Court did not find that the CAAF's review authority, even combined with the Judge Advocate General's powers, provided complete control over the Coast Guard judges. To the contrary, the Court acknowledged the meaningful "limitation[s] upon review" by the CAAF, *Edmond*, 520 U.S. at 665, and it recognized *two* ways in which the Judge Advocate General's authority was incomplete, *id.* at 664. Even assuming that the CAAF's limited review authority made up for the Judge Advocate General's inability to exercise any review function, the Court did not suggest that any executive officer could evade the other limitation on

the Judge Advocate General's authority, *i.e.*, the Uniform Code of Military Justice's (UCMJ's) prohibition on improperly "influenc[ing] (by threat of removal or otherwise) the outcome" of individual court martials. *Ibid.* (citing 10 U.S.C. 837 (1994)).

Edmond therefore cannot reasonably be read to establish that an administrative judge, or any other executive officer, must be subject to "complete" control by one or more Senate-confirmed officials in order to be considered an inferior officer. That was not true of the Coast Guard judges whom the Court found to be inferior officers in that case. *A fortiori*, the decision did not identify any particular mechanism of control, including review authority, as essential to providing "complete" control. Rather, consistent with the Court's precedents before and since, the *Edmond* Court considered the cumulative effect of the available control mechanisms to determine whether presidentially appointed, Senate-confirmed officials exercised *sufficient* direction and supervision to ensure that Coast Guard judges "ha[ve] a superior." 520 U.S. at 662; see *id.* at 664-666.

The *Edmond* Court's discussion of *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), reinforces that conclusion. Cf. Arthrex Br. 21. The Court identified "two significant distinctions between [the] Tax Court judges" whose status was at issue in *Freytag* and the Court of Criminal Appeals judges in *Edmond*: first, "no Executive Branch tribunal comparable to the Court of Appeals for the Armed Forces" reviewed decisions of Tax Court judges; and second, "no officer comparable to a Judge Advocate General * * * supervise[d] the work of the Tax Court, with the power to determine its procedural rules, to remove any judge without cause, and to order any decision submitted for review." 520 U.S. at

665-666. The Court thus focused on the differences between the cumulative supervisory mechanisms to which Tax Court and Court of Criminal Appeals judges respectively were subject. And despite those distinctions, the *Edmond* Court was careful to point out that "*Freytag* d[id] not hold that Tax Court judges are principal officers." *Ibid.*

b. The other precedents on which Arthrex relies likewise do not support its constitutional approach. Arthrex observes (Br. 21) that, in *Free Enterprise Fund*, the Public Company Accounting Oversight Board's (PCAOB's) "issuance of rules" and "imposition of sanctions" were "subject to Commission approval and alteration." 561 U.S. at 486. But the PCAOB was still "empowered to take significant enforcement actions * * * largely independently of the Commission," which lacked authority "to start, stop, or alter individual Board investigations." *Id.* at 504. Accordingly, the Court recognized that the SEC's control over the Board was not "plenary." *Ibid.* The Court nevertheless had "no hesitation in concluding" that the PCAOB members were inferior officers, basing that conclusion not on any particular supervisory power, but on the totality of the Commission's "oversight authority." *Id.* at 510. Indeed, to the extent the Court highlighted any specific authority as particularly salient, it was the Commission's newly recognized "power to remove Board members at will," not the Commission's ability to review the PCAOB's sanctions decisions. *Ibid.*[4]

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[4] Similarly in *Morrison* v. *Olson*, 487 U.S. 654 (1988), the independent counsel decisions to frame indictments, file informations, initiate prosecutions, and dismiss matters were not subject to review within the Executive Branch. *Id.* at 662-664.

Arthrex's reliance (Br. 21) on Justice Alito's separate opinion in *Department of Transportation* v. *Association of American Railroads*, 575 U.S. 43 (2015), is likewise misplaced. That case did not involve an administrative adjudication, but an elaborate process for adopting certain "metrics and standards" governing private railroads. *Id.* at 47 (citation omitted); see *id.* at 46-49. In expressing doubt about the scheme's compliance with the Appointments Clause, Justice Alito recognized that "an officer without a supervisor must be [a] principal" officer. *Id.* at 63-64 (Alito, J., concurring). He also stated that, if the statute there were read to authorize the appointment of a public official for the sole purpose of "making law *without supervision*" by any presidentially appointed, Senate-confirmed officer (or by anyone at all), it would "raise serious questions under the Appointments Clause." *Ibid.* (emphasis added). The circumstances here bear no resemblance to such a scheme.

c. The ability of a superior to review and modify the decisions of an inferior is one significant way to exercise direction and control over that inferior's work. But it is not the only way. And depending on the details of a particular statutory scheme, it may not even be the most effective.

For example, Arthrex observes (Br. 22) that removal authority alone cannot "undo" a previous decision that a judge has made on the agency's behalf, even if the decision is "directly contrary to the agency's policies or views." But the review authority afforded the CAAF in *Edmond* applied only in specified circumstances and permitted the CAAF to "take action only with respect to matters of law," UCMJ, 10 U.S.C. 867(c) (1994). And

as explained above and in our opening brief, even without unilateral review authority, the Secretary and Director have ample means of ensuring that no Board decision establishes any policy with which they disagree.

There is substantial variety across the federal government in how agency adjudicatory bodies are structured, and in the degree of direct review to which their individual decisions are subject. See, *e.g.*, Michael Asimow, Administrative Conference of the U.S., *Federal Administrative Adjudication Outside the Administrative Procedure Act* App. A (2019). Several agencies contain adjudicative bodies composed of officials who may be appointed by the department head, and whose decisions are the final word for the Executive Branch in at least some categories of cases. See, *e.g.*, 33 U.S.C. 921(b) and (c) (Department of Labor Benefits Review Board); 8 U.S.C. 1324b(e) and (i)(1) (Department of Justice Executive Office of Immigration Review); 41 U.S.C. 7105, 7107 (Civilian and Postal Service Boards of Contract Appeals). In other agencies, presidentially appointed and Senate-confirmed officials have only circumscribed review authority over administrative judges' decisions, as was the case in *Edmond*, 520 U.S. at 665—such as review over only particular aspects of the decision, in only certain circumstances, or under a deferential standard of review.

Arthrex acknowledges (Br. 20) that, for most Executive Branch officers, "the nature of the superior's direction and supervision may depend on context." But it argues (Br. 20-21) that, for administrative judges, the power to review and modify decisions is "an indispensable element of supervision" because "that is how they exercise executive power." That is unpersuasive.

To be sure, other Executive Branch officers exercise power in different ways than do administrative judges, *e.g.*, by taking enforcement actions, pursuing investigations, or promulgating regulations. Yet this Court has never required plenary principal-officer review of *those* actions as an indispensable element of inferior-officer status. See, *e.g.*, *Free Enterprise Fund*, 561 U.S. at 504 (noting the PCAOB's ability to "take significant enforcement actions * * * largely independently of the Commission"); *Morrison* v. *Olson*, 487 U.S. 654, 662 (1988) ("With respect to all matters within the independent counsel's jurisdiction, the Act grants the counsel 'full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice.'"). There is no sound reason that the appointment of administrative judges should be subject to a more categorical rule. Indeed, in *Free Enterprise Fund*, the Court reserved the question whether administrative judges may require *less* presidential control because "unlike members of the [PCAOB]," they "perform adjudicative rather than enforcement or policymaking functions." 561 U.S. at 507 n.10; see *Myers* v. *United States*, 272 U.S. 52, 135 (1926) (similar). As with other executive officials, the determination whether an administrative judge is a principal or inferior officer turns on whether all of the available mechanisms of control, taken together, enable presidentially appointed, Senate-confirmed officials to meaningfully "direct[] and supervise[]" the judge's work. *Edmond*, 520 U.S. at 663.

2. History provides no sound basis for treating principal-officer review as an indispensable prerequisite to inferior-officer status

History and tradition do not support Arthrex's proposed rule. Cf. Arthrex Br. 27-35. As a matter of policy, Congress has often authorized principal-officer review of administrative adjudications, including most prominently under the APA. That practice, however, does not imply that the Appointments Clause requires such review. In the patent context in particular, Congress has long authorized Executive Branch officials who were not principal officers to issue final agency decisions regarding patent rights.

a. In 1793, the Second Congress enacted interference procedures to address the resolution of disputes where two applicants sought a patent for the same invention. See Act of Feb. 21, 1793, ch. 11, § 9, 1 Stat. 322-323. Rather than vest such decisions in the Secretary of State, who otherwise had authority to issue patents, see § 1, 1 Stat. 318-321, Congress provided that "interfering applications * * * shall be submitted to the arbitration of three persons" chosen by the parties or the Secretary depending on the circumstances, and that "the decision or award of such arbitrators, delivered to the Secretary of State * * * or any two of them, *shall be final*, as far as respects the granting of the patent." § 9, 1 Stat. 322-323 (emphasis added).

In 1836, when Congress established the first iteration of the Patent Office, headed by the Commissioner of Patents, it again entrusted some final patent decisions to officials appointed by a department head. See Act of July 4, 1836 (1836 Act), ch. 357, 5 Stat. 117. The 1836 Act provided that, when the Commissioner denied

a patent application, the applicant could appeal the denial to "a board of examiners, to be composed of three disinterested persons, who shall be appointed for that purpose by the Secretary of State." § 7, 5 Stat. 119-120. That board of Secretary-appointed officers had the "power * * * to reverse the decision of the Commissioner, either in whole or in part," and the board's opinion "governed [any] further proceedings to be had on [the] application." *Ibid.* In an interference, if either of the competing applicants was "dissatisfied with the decision of the Commissioner on the question of priority of right or invention," the disappointed applicant could appeal to the board of examiners in the same way. § 8, 5 Stat. 120-121.[5]

In 1861, Congress established a permanent appellate board of examiners, consisting of three "examiners-in-chief" (predecessors to administrative patent judges), "for the purpose of securing greater uniformity of action in the grant and refusal" of patents. Act of Mar. 2, 1861 (1861 Act), ch. 88, § 2, 12 Stat. 246-247. Initially, these examiners-in-chief decided appeals from patent-application denials and interferences, and their decisions were appealable to the Commissioner. *Ibid.* In 1927, however, Congress made the Commissioner just one member of the "Board of appeals," composed of the

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[5] As Arthrex notes (Br. 34 n.5), this board of examiners was abolished in 1839. See Act of Mar. 3, 1839, ch. 88, §§ 11-12, 5 Stat. 354-355 (making decisions of the Commissioner appealable to the District Court for the District of Columbia). But that change was due to difficulty in securing examiners to serve on an ad hoc basis and to other sources of delays—not because of any perceived conflict with the Appointments Clause. See P. J. Federico, *Evolution of Patent Office Appeals*, 22 J. Pat. Off. Soc'y 838, 842 (1940).

examiners-in-chief and several other officials, and it authorized any panel of at least three Board members to issue the Executive Branch's final word on patent applications and interferences. Act of Mar. 2, 1927 (1927 Act), ch. 273, §§ 3-6, 8, 11, 44 Stat. 1335-1337.

Arthrex emphasizes (Br. 32-33) that, under the 1861 and 1927 statutes, the examiners-in-chief were presidentially appointed and Senate-confirmed. But because presidential appointment with Senate confirmation is the "default" method for appointment of inferior officers, *Edmond*, 520 U.S. at 660, that fact alone does not indicate that Congress considered the examiners-in-chief to be principal officers. And several other aspects of the laws indicate that Congress considered examiner-in-chiefs to be inferior officers. The 1836 Act made clear that the Commissioner was the "chief officer" in the Patent Office, responsible for "superintend[ing]" all "acts and things touching and respecting the granting and issuing of patents." 1836 Act, § 1, 5 Stat. 117-118; see § 2, 5 Stat. 118 (referring to the Commissioner as the "principal officer"). The 1861 Act amendments, creating the office of examiner-in-chief, did not alter that aspect of the Patent Office's structure. Indeed, they specifically provided that examiners-in-chief were to be "governed in their action by the rules to be prescribed by the Commissioner." § 2, 12 Stat. 246-247. And even after the 1927 Act amendments, the Commissioner continued to be charged with "superintend[ing]" "all duties respecting the granting and issuing of patents directed by law," 35 U.S.C. 6 (1926); had the authority to "establish regulations * * * for the conduct of proceedings in the Patent Office," *ibid.*; and possessed the unfettered ability to designate the members of each three-person

panel of the Board of Appeals, 1927 Act § 3, 44 Stat. 1335-1336.

In 1870, Congress vested initial patent examiners with the authority to issue final decisions granting patents. See Act of July 8, 1870 (1870 Act), ch. 230, §§ 2, 31, 16 Stat. 198-199, 202. The 1870 Act provided for the appointment of 67 initial patent examiners of various ranks "by the Secretary of the Interior, upon nomination of the [C]ommissioner." § 2, 16 Stat. 198-199. Upon the filing of a patent application, the Commission was required to "cause an examination to be made" by one of those examiners, and "if on such examination it shall appear that the claimant is justly entitled to a patent," the Act required the Commissioner to "issue a patent therefor" without the possibility for further review. § 31, 16 Stat. 202. Even today, that authority to issue the agency's final word on any patent *grant*, absent post-issuance review, is still vested in initial patent examiners, who are now appointed by the Director alone. See 35 U.S.C. 3(b)(3)(A), 131.

In the Patent Act of 1952, Congress created an additional way for non-Senate-confirmed federal officials to play a decisive role in determining patent rights. As in the 1927 Act, Congress there provided that a "Board of Appeals" would "review adverse decisions of examiners upon applications for patents," with the Board consisting of the Commissioner, assistant commissioners, and examiners-in-chief, all Senate-confirmed presidential appointees. Act of July 19, 1952, ch. 950, § 7, 66 Stat. 793; see §§ 141, 145, 66 Stat. 802-803 (permitting those dissatisfied with the Board's decision to appeal to the United States Court of Customs and Patent Appeals or

file a civil action against the Commissioner).[6] Congress again required that "[e]ach appeal shall be heard by at least three members of the Board * * * to be designated by the Commissioner." § 7, 66 Stat. 793. But the Commissioner was permitted to "designate any patent examiner of the primary examiner grade or higher * * * to serve as examiner-in-chief" and to "act as a member of the Board" for up to six months, so long as only one such examiner served on a panel hearing a particular appeal. *Ibid.* Thus, such primary examiners—who were appointed by the Secretary of Commerce at the time, see § 3, 66 Stat. 792-793—were permitted to do the work of the Board, potentially casting the deciding vote between two Senate-confirmed Board members.

Finally, as Arthrex acknowledges (Br. 33), since 1975 and throughout the entire history of statutory mechanisms for the USPTO's reconsideration of previously issued patents, officials without Senate confirmation have made final decisions regarding patent rights. See Act of Jan. 2, 1975 (1975 Act), Pub. L. No. 93-601, 88 Stat. 1956. As Arthrex notes (Br. 33), as part of a 1999 appropriations bill, Congress temporarily vested the appointment authority for administrative patent judges in the Director. See Patent and Trademark Office Efficiency Act, Pub. L. No. 106-113, § 4717, 113 Stat. 1501A-580 to 1501A-581. After a law professor raised Appointments Clause concerns about that scheme, Congress passed a stand-alone bill that vested those judges' ap-

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[6] After 1958, when Congress clarified that the Court of Customs and Patent Appeals was an Article III court, it was clear that review by that tribunal did not constitute Executive Branch review. See *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 540-541 (1962) (citing Act of Aug. 25, 1958, Pub. L. No. 85-755, 72 Stat. 848).

pointment in the Secretary of Commerce, where it remains today. See Act of Aug. 12, 2008, Pub. L. No. 110-313, § 1(a)(1), 122 Stat. 3014; *In re DBC*, 545 F.3d 1373, 1377-1378 (Fed. Cir. 2008), cert. denied, 558 U.S. 816 (2009). The current appointment scheme for administrative patent judges thus represents Congress's considered judgment, entitled to the respect that this Court ordinarily affords constitutional determinations of a coordinate Branch, that those judges may be appointed in a manner that the Appointments Clause specifies as appropriate for inferior officers.

b. Contrary to Arthrex's suggestion, there is no "lack of historical precedent" for the current statutory scheme that governs the many thousands of patent decisions the Executive Branch must make each year. Br. 34 (citation omitted). Rather, since "the earliest days of the Republic," *Freytag*, 501 U.S. at 890 (citation omitted), Congress has vested a variety of officials, including officials who have not received Senate confirmation, with authority to issue the final decision of the Executive Branch on patent rights. "Because 'traditional ways of conducting government . . . give meaning' to the Constitution," this longstanding congressional practice "provides evidence" that this authority may be exercised by persons who are not principal officers of the United States. *Ibid.* (citation omitted).

II. IF THE COURT CONCLUDES THAT ADMINISTRATIVE PATENT JUDGES ARE PRINCIPAL OFFICERS UNDER THE CURRENT SCHEME, THE COURT SHOULD AFFIRM THE FEDERAL CIRCUIT'S REMEDIAL HOLDING SEVERING THE STATUTORY REMOVAL RESTRICTIONS

After holding that administrative patent judges are principal officers, and therefore were invalidly appointed under the current statutory scheme, the court of appeals held that it could cure the Appointments Clause violation prospectively by "sever[ing] the application of Title 5's [efficiency-of-the-service] removal restrictions to" administrative patent judges, thus making them removable at will by the Secretary of Commerce. Pet. App. 27a; see *id.* at 29a ("We hold that the application of Title 5's removal protections to [administrative patent judges] is unconstitutional and must be severed."). The court reasoned that severance of those restrictions "render[ed] [administrative patent judges] inferior rather than principal officers" who could validly be appointed by their department head. *Id.* at 28a. If this Court concludes that administrative patent judges are principal officers under the existing statutory scheme, it should affirm the court of appeals' remedial holding curing the Appointments Clause violation.

A. Administrative Patent Judges' Modest Tenure Protections May Be Severed From The Rest Of The Statute

1. "Generally speaking, when confronting a constitutional flaw in a statute,'" this Court seeks "to limit the solution to the problem," either by invalidating "only the unconstitutional applications of a statute while leaving other applications in force," or by severing any "problematic portions while leaving the remainder in-

tact." *Ayotte* v. *Planned Parenthood of N. New England*, 546 U.S. 320, 328-329 (2006). "[E]ven in the absence of a severability clause," the Court applies "a strong presumption of severability." *Barr* v. *American Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2350-2351 (2020) (*AAPC*) (plurality opinion); see *Seila Law*, 140 S. Ct. at 2209. As long as the "remainder of the statute is 'capable of functioning independently' and thus would be 'fully operative' as a law," "[t]he Court's precedents reflect a decisive preference for surgical severance rather than wholesale destruction." *AAPC*, 140 S. Ct. at 2350-2352 (citation omitted).

The Court's decision in *Free Enterprise Fund* is illustrative. When confronted with "a number of statutory provisions that, working together," violated the separation of powers, this Court held invalid only the for-cause removal restrictions that applied to PCAOB members, "leav[ing] the Board removable by the Commission at will," and preserving the rest of the statute. 561 U.S. at 509. The Court explained that, with the "tenure restrictions excised," the statutory scheme "remain[ed] 'fully operative as a law.'" *Ibid.* (citation omitted). The Court found that "nothing in the statute's text or historical context ma[de] it 'evident' that Congress, faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will." *Ibid.* (citation omitted).

In *Intercollegiate Broadcasting System, Inc.* v. *Copyright Royalty Board*, 684 F.3d 1332 (2012), cert. denied, 569 U.S. 1004 (2013), the D.C. Circuit followed a similar approach in resolving an Appointments Clause challenge to the administrative judges of the Copyright Royalty Board (CRB). After concluding that CRB judges were

principal officers—and therefore could not be appointed by the Librarian of Congress—the court of appeals determined that, as in *Free Enterprise Fund*, "invalidating and severing the restrictions on the Librarian's ability to remove the [judges] eliminate[d] the Appointments Clause violation and minimize[d] any collateral damage." *Id.* at 1340. "With unfettered removal power," the court reasoned, the Librarian possessed the level of control needed to render the judges "validly appointed inferior officers." *Id.* at 1341.

In the present case, given the Federal Circuit's conclusion that the statutory scheme could not be sustained in full, the remedy that it chose—invalidating the application to administrative patent judges of the removal restrictions in 5 U.S.C. 7513(a)—represented "the narrowest possible modification to the scheme Congress created and cure[d] [any] constitutional violation in the same manner as [in] *Free Enterprise Fund* and *Intercollegiate*." Pet. App. 27a. The court noted that "[a]ll parties and the government agree[d] that this would be an appropriate cure for an Appointments Clause infirmity." *Ibid.* And the Court found in the statute's text and history no reason to doubt that Congress "would have preferred a Board whose members are removable at will rather than no Board at all." *Ibid.* (quoting *Free Enterprise Fund*, 561 U.S. at 509).

2. Arthrex contends that the court of appeals erred in severing the application of Title 5's removal restrictions to administrative patent judges. Its arguments are unsound.

a. Arthrex principally argues (Br. 45-47) that the court of appeals' severance approach is insufficient to cure the Appointments Clause violation because the Di-

rector and Secretary still lack the authority to unilaterally review administrative patent judges' decisions. That argument fails because direct review of an administrative judge's individual decisions is not a constitutional prerequisite to inferior-officer status under the Appointments Clause. If this Court affirms the Federal Circuit's holding that administrative patent judges are not already subject to constitutionally sufficient direction and supervision under the existing statutory scheme, making those judges removable at will would provide Senate-confirmed officials with constitutionally adequate supervisory authority over their work, even if the judges' decisions "will still not be directly reversible." *Intercollegiate Broad. Sys.*, 684 F.3d at 1341; see *Free Enterprise Fund*, 561 U.S. at 510.

b. Arthrex contends that "Congress would not have enacted the America Invents Act without tenure protections for administrative patent judges." Br. 47 (capitalization altered; emphasis omitted); see Br. 47-56. Arthrex argues (Br. 59) that, rather than sever the application of the Title 5 tenure protections to administrative patent judges, "the Court should hold the current inter partes review regime unconstitutional." That remedial approach is unsound.

i. The crux of Arthrex's remedial approach is that tenure protections are "[e]ssential" for all Executive Branch adjudicators. Arthrex Br. 48 (emphasis omitted). But while this Court has "permitted Congress to give" tenure protections for certain Executive Branch officers in certain circumstances, it has never held that such tenure protections are required. *Seila Law*, 140 S. Ct. at 2197-2200. To the contrary, Congress has long authorized agency *heads* who are removable at will to personally adjudicate cases. See p. 15, *supra*. Indeed,

under the first Patent Act, patent adjudication was vested directly in the Secretary of State, Secretary of War, and the Attorney General, or any two of them. Act of April 10, 1790, ch. 7, § 1, 1 Stat. 109-110. Lower courts have also correctly rejected arguments that tenure protections are necessary to "preserve [officers'] unbiased, independent judgments." See *Kalaris*, 697 F.2d at 394, 396 (rejecting argument that removal restrictions were constitutionally required for members of the Department of Labor's Benefits Review Board, "inferior officers" who perform adjudications).[7]

Arthrex emphasizes (Br. 50-52) the tenure protections that Congress afforded to administrative law judges in the APA, 5 U.S.C. 7521(a). But Arthrex again ignores that Congress did not afford administrative patent judges the "good cause" removal protection that applies to administrative law judges under Section 7521(a). See pp. 7-8, *supra*. And Congress has created other inferior adjudicative bodies without insulating their members from removal at all. See 5 U.S.C. 7511(b)(8) (exempting certain administrative judges from civil-service removal protections); 41 U.S.C. 7105(c) (Tennessee Valley Authority Board of Contract Appeals); 41 U.S.C. 7105(d) (Postal Service Board of Contract Appeals); see also, *e.g.*, *Reagan* v. *United States*, 182 U.S. 419, 426-427 (1901) (commissioners of

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[7] Madison's description of the first Comptroller of the Treasury is not to the contrary. Cf. Arthrex Br. 48. "Madison's actual proposal, consistent with his view of the Constitution, was that the Comptroller hold office for a term of 'years, unless sooner removed by the President'" at will. *Seila Law*, 140 S. Ct. at 2205 (quoting *Free Enterprise Fund*, 561 U.S. at 500 n.6); see 1 Annals of Cong. 612 (1789) (Joseph Gales ed., 1834).

the Indian Territory); *United States* v. *Allred*, 155 U.S. 591, 594 (1895) (circuit court commissioners).

ii. Arthrex's contention (Br. 52-56) that tenure protections for administrative patent judges are "particularly important" under the AIA, Br. 52, is similarly misplaced. The Patent Act does not establish *any* removal restrictions that are specific to administrative patent judges. See 35 U.S.C. 6 (providing for administrative patent judges without addressing their removal). Although the Act includes particular removal provisions for other USPTO offices, see 35 U.S.C. 3(a) (making the Director removable at will by the President); 35 U.S.C. 3(b)(2)(C) (authorizing removal of the Commissioners of Patents and Trademarks by the Secretary of Commerce "for misconduct or nonsatisfactory performance"), the removal of administrative patent judges is subject to Title 5's efficiency-of-the-service standard only by virtue of a catch-all provision making all "[o]fficers and employees" of the USPTO "subject to the provisions of title 5, relating to Federal employees." 35 U.S.C. 3(c). Congress evidently did not view either the patent-law context, or the adjudicative functions that administrative patent judges perform, as warranting a special removal standard.[8]

iii. As compared to severance of administrative patent judges' tenure protections, Arthrex's preferred remedy—invalidation of "the current inter partes review regime," Br. 59—would much more severely disrupt

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[8] Arthrex asserts (Br. 52) that, "[w]hen Congress first granted the Patent Office power to reexamine previously issued patents in 1980, examiners-in-chief were removable only for cause." But the provision on which Arthrex relies did not mention removal, stating only that examiners-in-chief "shall be appointed under the classified civil service." 1975 Act, § 2, 88 Stat. 1956.

Congress's policy choices, by negating a post-issuance review mechanism that was a centerpiece of the AIA. Respondents identify no basis, moreover, for distinguishing inter partes review from other functions that administrative patent judges perform. Both in conducting other types of post-issuance review proceedings, see 35 U.S.C. 306, and in resolving disappointed patent applicants' appeals from examiners' rejections, 35 U.S.C. 134, administrative patent judges perform adjudicatory functions and issue final decisions on behalf of the agency. Arthrex does not explain why, if its Appointments Clause and remedial arguments are accepted, the Board could continue to conduct those proceedings but not inter partes reviews. Arthrex's proposed severance remedy would be especially disruptive if its logical consequence was to preclude administrative patent judges from performing those functions as well.

iv. Arthrex's appeal (Br. 53-54) to the adversarial nature of some Board proceedings is likewise unavailing. To be sure, the proceeding that the Board conducted in this case, inter partes review, resembles civil litigation in certain respects.[9] But like all post-issuance proceedings, it is still fundamentally an Executive Branch process by which the USPTO may "reconsider[]" the agency's own prior decision "to grant a pub-

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[9] In other significant ways, however, inter partes review differs from adjudication in Article III courts. The decision whether to "institute [inter partes] review is made by the Director and committed to his unreviewable discretion," *Oil States*, 138 S. Ct. at 1378 n.5, and the Director can de-institute such a proceeding at any time before a final decision is issued, see p. 13, *supra*. And the Board can continue to reconsider a challenged patent claim "even after [an] adverse party has settled" or dropped out. *Cuozzo*, 136 S. Ct. at 2144; see 35 U.S.C. 317(a).

lic franchise." *Oil States*, 138 S. Ct. at 1373, 1378. Congress established that process to expand the USPTO's existing tools to "protect the public's 'paramount interest in seeing that patent monopolies . . . are kept within their legitimate scope.'" *Cuozzo*, 136 S. Ct. at 2144 (ctiation omitted); see H.R. Rep. No. 98, 112th Cong., 1st Sess. Pt. 1, at 48 (2011). As such, it is designed to ensure that the existence of a United States patent reflects the USPTO's current, informed judgment that the claimed invention satisfies the statute's patentability requirements.

In that context, it is unsurprising that Congress has granted the Secretary and the Director significant authority to direct and supervise the work of administrative patent judges. In light of those control mechanisms, including the Director's authority to remove an administrative patent judge from her judicial assignments, see pp. 8-10, *supra*, affording the Secretary the further authority to remove administrative patent judges from federal service at will would not be "incompatible with [the AIA's] structure," Arthrex Br. 55. Indeed, the President already has the at-will authority to remove the Director—who is himself a member of the Board—from federal service. 35 U.S.C. 3(a)(4).

c. Contrary to Arthrex's assertion (Br. 59), there is nothing problematic about the "'as applied' nature" of the court of appeals' severance holding. "[T]his Court has on several occasions declared a statute invalid as to a particular application without striking the entire provision that appears to encompass it." *United States* v. *National Treasury Emps. Union*, 513 U.S. 454, 487 (1995) (O'Connor, J., concurring in the judgment in part and dissenting in part) (citing cases); see, *e.g.*, *Ayotte*, 546 U.S. at 331 (remanding for consideration of whether

narrower, as-applied remedy was appropriate rather than "invalidat[ing] the law wholesale"); *United States* v. *Grace*, 461 U.S. 171 (1983) (invalidating statute as applied to "sidewalks," even though the statute's text did not distinguish between sidewalks and other applications). Such an approach follows from the "'normal rule'" that "'partial'" rather than wholesale "'invalidation is the required course,'" so as not to "nullify more of a legislature's work than is necessary." *Ayotte*, 546 U.S. at 329 (citation omitted).

d. Arthrex's appeal (Br. 62-64) to principles of constitutional avoidance to avoid a severance remedy is particularly misplaced. To the extent the answer to the Appointments Clause question in this case turns on the resolution of any statutory ambiguities—*e.g.*, whether the Patent Act authorizes the Director to issue rules or other directives that will bind the Board on matters of patentability, or to de-institute an inter partes review based on his disagreement with a proposed Board decision—the Court should interpret the statute so as to avoid any Appointments Clause infirmity. To that extent, principles of constitutional avoidance apply in this case. But it is *Arthrex's* approach of repeatedly construing the Secretary's and Director's authority as narrowly as possible (and sometimes more narrowly still) that is inconsistent with those principles.

If the Court reaches the severability question, constitutional-avoidance principles have no remaining role to play. In that circumstance, the Court by definition will have found an Appointments Clause infirmity in the statutory scheme as enacted. The Court's severance precedents would then call for the invalidation of whatever statutory provisions or applications must be excised to leave in place a fully operative scheme that

satisfies the Appointments Clause's requirements as this Court has construed them. To be sure, the Court could not properly remedy an Appointments Clause violation by severing statutory provisions that are necessary to prevent some *other* constitutional infirmity. But, contrary to Arthrex's contention (Br. 63-64), severing tenure protections for Executive Branch adjudicators does not raise any meaningful due process concern. See pp. 15-17, *supra*.

B. The Existence Of Other Potential Means To Cure Any Appointments Clause Problem Does Not Cast Doubt On The Court Of Appeals' Approach

Finally, there is nothing remarkable about the possibility that Congress, this Court, or various amici could devise alternative approaches to curing any Appointments Clause problem here. The existence of those potential approaches does not call into doubt the court of appeals' severability holding. Cf. Arthrex Br. 56-60.

1. If the Court determines that severing the tenure protections for administrative patent judges would not cure any Appointments Clause problem that the Court identifies, or is unavailable for any other reason, the Court should consider whether an alternative approach that is consistent with this Court's precedents would solve the problem. For example, if the Court agrees with Arthrex that further Executive Branch review of an administrative adjudicator's individual decisions is an essential prerequisite to the adjudicator's inferior-officer status, it could (in lieu of or in combination with the court of appeals' approach, as appropriate) sever 35 U.S.C. 6(c)'s directive that "[o]nly the Patent Trial and Appeal Board may grant rehearings" of the Board's final decisions. In the absence of such an express limi-

tation, and in light of the Patent Act's vesting in the Director of "[t]he powers and duties of the [USPTO]," see 35 U.S.C. 3(a), the statute would fairly be read to permit the Director to review and reverse any Board decisions with which he disagrees. See, *e.g.*, *Strand* v. *United States*, 951 F.3d 1347, 1351-1354 (Fed. Cir. 2020) (interpreting a statute that required the Navy Secretary to correct any service records by "acting through boards of civilians" to permit the Secretary to review those boards' otherwise final decisions), cert. denied, No. 20-111 (Dec. 7, 2020) (citation and emphasis omitted).[10]

2. The mere existence of other potential cures for any Appointments Clause violation, however, does not prevent this Court from adopting the narrowest approach. In *Free Enterprise Fund*, for example, the Court held that "the language providing for good-cause removal" of members of the PCAOB was "only one of a number of statutory provisions that, working together, produce[d] a constitutional violation." 561 U.S. at 509. "In theory," the Court explained, it might address the separation-of-powers violations by invalidating "a sufficient number of the Board's responsibilities so that its members would no longer be 'Officers of the United States.'" *Ibid.* Or, reminiscent of Arthrex's theory here, the Court suggested that it might restrict the Board's powers "so that it would be a purely recommendatory panel." *Ibid.* But the existence of those alternative approaches to fixing the problem did not preclude the Court from taking the much less disruptive

[10] Congress recently granted the Director a similar right to review decisions by the comparable Trademark Trial and Appeal Board in the Trademark Modernization Act of 2020, Pub. L. No. 116-260, Div. Q, Tit. II, Subtit. B, § 228 (Dec. 27, 2020).

approach of invalidating the removal restrictions, leaving Congress "free to pursue" any other approach "going forward." *Id.* at 510.

Similarly in *Seila Law*, the Court observed that, "[a]s in every severability case," there may have been "means of remedying the defect in the CFPB's structure" other than invalidating the restriction on removal of the agency's head. 140 S. Ct. at 2211. For example, the problem could in theory have been resolved by "converting the CFPB into a multimember agency." *Ibid.* While recognizing those potential alternatives, however, the Court instead adopted a narrower remedy that minimized the departure from the scheme that Congress had enacted, while noting that its "severability analysis" would not "foreclose Congress from pursuing alternative responses to the problem." *Ibid.* This Court's severability precedents thus make clear that the Court's "decisive preference for surgical severance rather than wholesale destruction," *AAPC*, 140 S. Ct. at 2350-2351 (plurality opinion), is not confined to circumstances in which there exists just one possible solution to a constitutional problem.

CONCLUSION

The judgment of the court of appeals should be reversed on the ground that the court's resolution of the first question presented was erroneous. In the alternative, if the Court affirms the court of appeals' Appointments Clause holding, it should also affirm that court's resolution of the second question presented.

Respectfully submitted.

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