

Post-Grant for Practitioners Webinar Series

# Just the Facts: A Mid-Year Review

August 6, 2020



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**FISH.**  
FISH & RICHARDSON

# Agenda

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- *Arthrex*: Where are we? What's Next?
- Recent Happenings in IPR Estoppels
- *Thryv v. Click-to-Call*: Is anything left?
- Standing of Petitioners to Appeal
- Due Process Issues
- Treatment of Indefinite Claims

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# ***Arthrex: Where Are We? What's Next?***

# Arthrex: Congress Over-Delegated to APJs

[Arthrex, Inc. v. Smith & Nephew, Inc.](#),  
941 F.3d 1320 (Fed. Cir. Oct. 31, 2019)

## The Constitutional Issue:

- IPR statute gave APJs power to issue decisions binding the government, but did not **fully subordinate** them to the Secretary of Commerce or PTO Director
- Thus in IPR, APJs act as “Superior Officers of the United States”—but they were not appointed as such
  - Superior officers generally require Presidential appointment, with Senate advice and consent
  - i.e., **Appointments Clause** (art. II, § 2, cl. 2)
- The IPR statute is in this respect **unconstitutional**

United States Court of Appeals  
for the Federal Circuit

ARTHREX, INC.,  
*Appellant*

v.

SMITH & NEPHEW, INC., ARTHROCARE CORP.,  
*Appellees*

UNITED STATES,  
*Intervenor*

2018-2140

Appeal from the United States Patent and Trademark  
Office, Patent Trial and Appeal Board in No. IPR2017-  
00275.

Decided: October 31, 2019

ANTHONY P. CHO, Carlson, Gaskey & Olds, PC, Bir-  
mingham, MI, argued for appellant. Also represented by  
DAVID LOUIS ATALLAH, DAVID J. GASKEY, JESSICAE  
ZILBERBERG.

CHARLES T. STEINBERG, Wolf, Greenfield & Sacks, PC,  
Aurora, IL, argued for appellees. Also represented by  
RICHARD GRANT, JUDITH SARNOFF, MICHAEL N. RALPH,

**Judge Moore** **Judge Reyna** **Judge Chen**



# Arthrex: Determining IPR's Fate

- No dispute that APJs in this IPR (and all others . . . ) were not appointed under Appointment Clause standards
- Opinion turns to whether IPR as a whole can survive
  - Striking IPR in its entirety would be highly disruptive, and against Congress's clear intent
  - Possible to strike just one part, and keep the rest?
- Conclusion: **Yes. Severing Congress's grant of federal employment protections to APJs** [35 U.S.C. § 3(c)] is the narrowest way to preserve the statute
  - Thus APJs are now "at-will" employees

*States v. Grace*, 461 U.S. 171 (1983). All parties and the government agree that this would be an appropriate cure for an Appointments Clause infirmity. This as-applied severance is the narrowest possible modification to the scheme Congress created and cures the constitutional violation in the same manner as *Free Enterprise Fund* and *Intercollegiate*. Title 5's removal protections cannot be constitutionally applied to APJs, so we sever that application of the statute.

Slip op. at 24–25

Judge Moore



Judge Reyna



Judge Chen



# Arthrex: Side Comments

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Judge Moore



Judge Reyna



Judge Chen



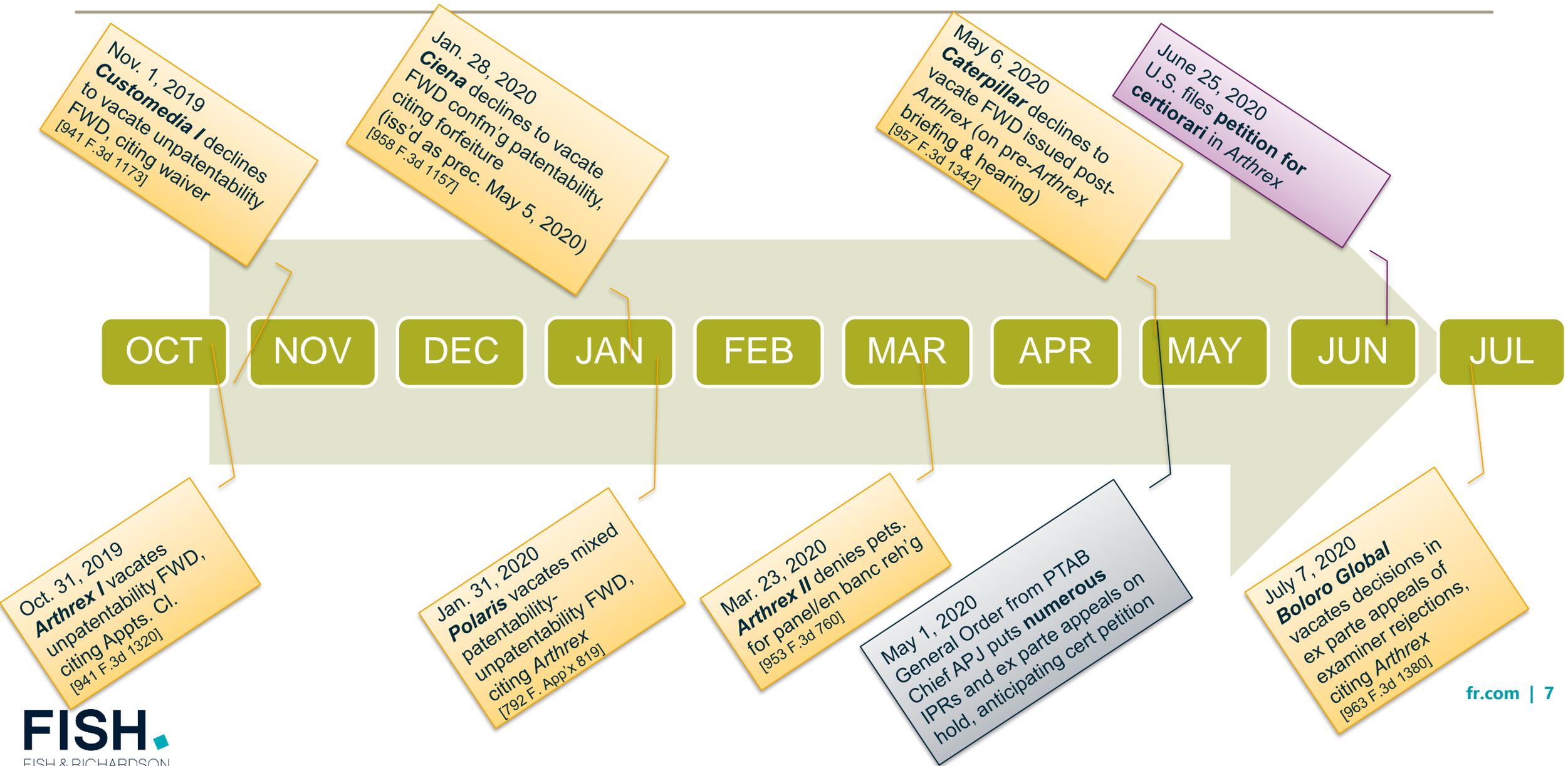
appropriate. We have decided only that this case, where the final decision was rendered by a panel of APJs who were not constitutionally appointed and where the parties presented an Appointments Clause challenge on appeal, must be vacated and remanded. Appointments Clause challenges are “nonjurisdictional structural constitutional objections” that can be waived when not presented. *Freytag*, 501 U.S. at 878–79. Thus, we see the impact of this case as limited to those cases where final written decisions were issued and where litigants present an Appointments Clause challenge on appeal.

Slip op. at 29

To be clear, on remand the decision to institute is not suspect; we see no constitutional infirmity in the institution decision as the statute clearly bestows such authority on the Director pursuant to 35 U.S.C. § 314. Finally, we see

Slip op. at 30

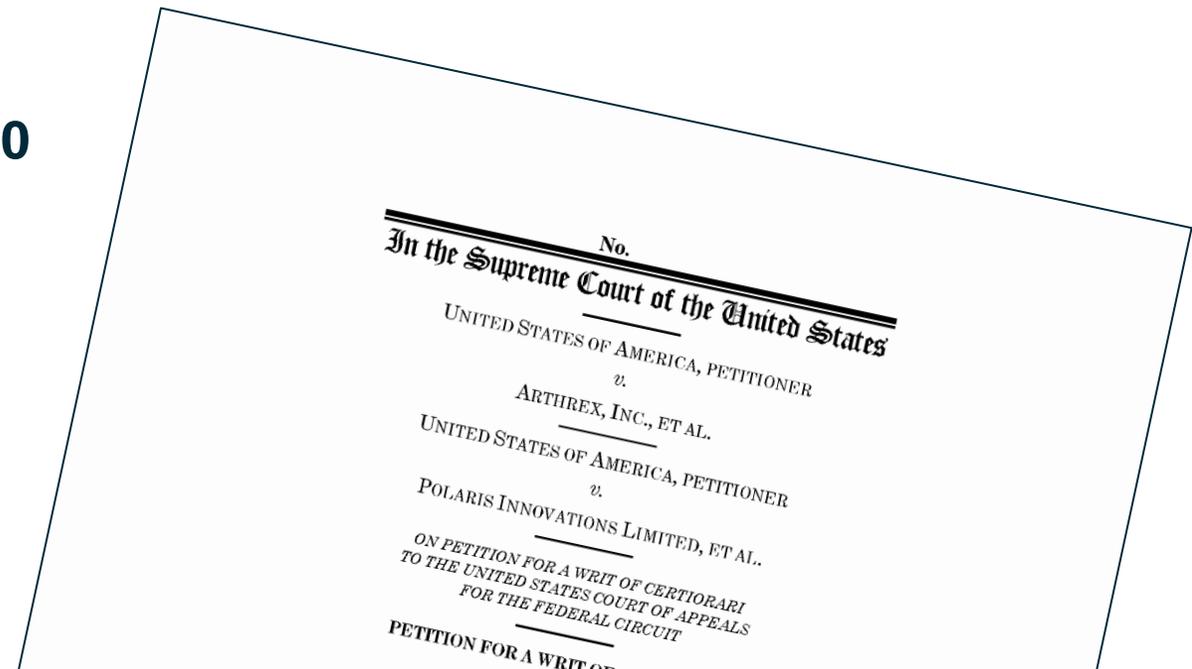
# Arthrex & Appointments Clause Challenges



# The Government's *Arthrex* Cert. Petition

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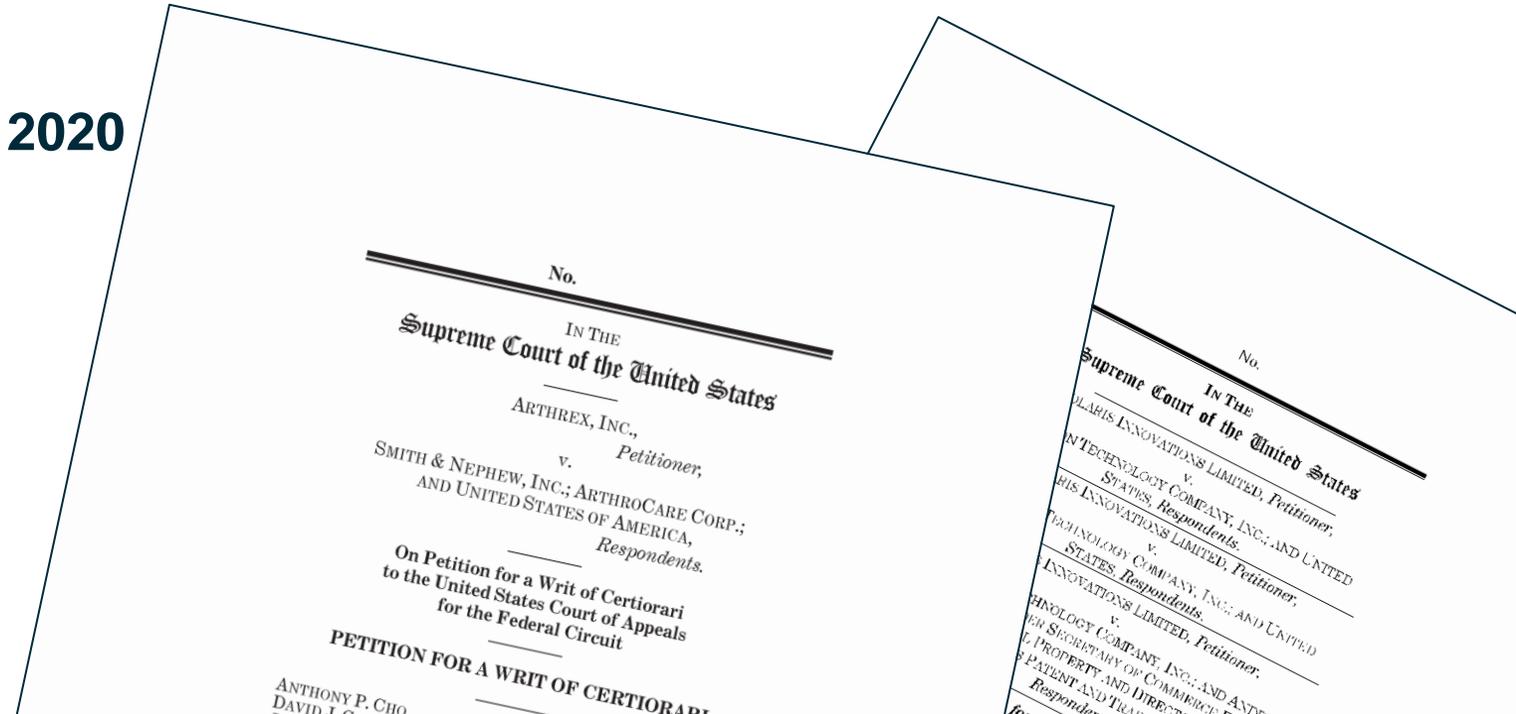
- U.S. filed cert. petition **June 25, 2020** (No. 19-1434), attacking (1) the Fed Cir's **determination that APJs are "principal officers"** and (2) the Fed Cir's decision to take up an argument *Arthrex* had **not advanced before the agency** [2020 WL 3545866]
  - U.S.'s petition addressed both *Arthrex* and the non-precedential *Polaris* decision from January 2020
  - *Arthrex* petitioner Smith & Nephew also petitioned on the first ground on **June 29, 2020** (No. 19-1452)
- Responses were filed **July 23–24, 2020**
- Replies expected by mid-August



# Still More *Arthrex*—Private Petitions

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- Patentee Arthrex filed a petition of its own on **June 30, 2020** (No. 19-1458), attacking the Federal Circuit’s holding that the Constitutional issue could be addressed by severing APJ employment protections [2020 WL 3805820]
- Patentee Kingston Technology filed a similar petition, also on **June 30, 2020** (No. 19-1459) [2020 WL 3805821]
- Response briefs filed **July 22–23, 2020**
- Replies expected by mid-August



# The Supreme Court's Timeline

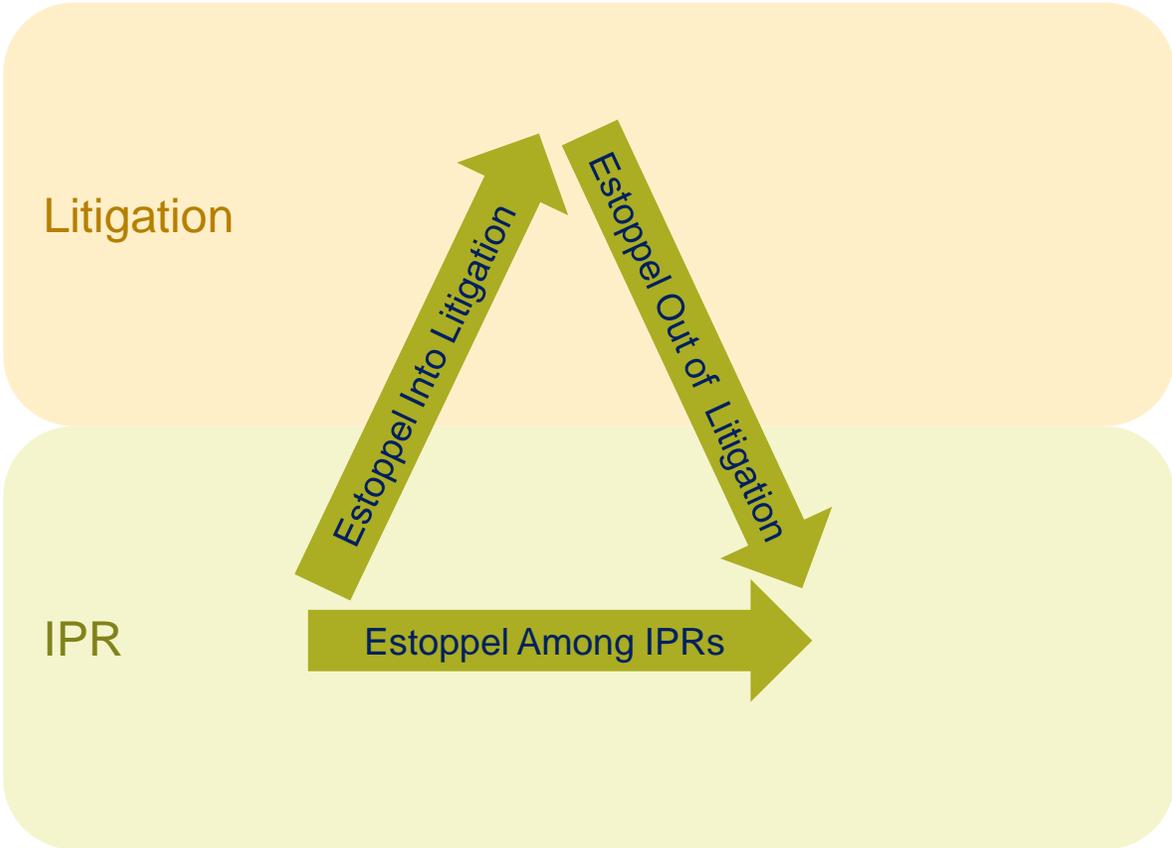
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- The Supreme Court is currently **in recess**.
- U.S.'s petition will be handled as part of the “summer list,” likely addressed at the Court’s first conference of the October 2020–21 term, on **September 29, 2020**
- Were the Court to grant any cert. petition in October, the case would probably be argued near the end of the 2020–21 term—i.e., around **April/May 2021**.
- But argument in the following term (i.e., October/November 2021) is **also possible**.



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# Recent Happenings in IPR Estoppels



# Estoppel – PTAB on District Court

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- **Final PTAB invalidity determinations are binding on district court actions**
  - *Fresenius USA, Inc. v. Baxter Int'l, Inc.*, 721 F.3d 1330, 1346 (Fed. Cir. 2013) (“[T]he statute requires that a final PTO decision affirmed by this court be given effect in pending infringement cases that are not yet final.”)
  - *Chrimar Sys., Inc. v. ALE USA Inc.*, 785 F. App'x 854, 856 (Fed. Cir. 2019) (holding that the district court case was still pending—“not kept alive only on insubstantial grounds”—when CAFC affirmed IPR invalidity decisions such that defendant owed no damages or on-going royalties due the preclusive effect of the IPR decisions)
    - Supreme Court denied cert. on June 29, 2020
    - Patentee Chrimar had challenged CAFC’s finality standard and the ability of an administrative decision to nullify a court final judgment
- **The binding effect of PTAB invalidity determinations stems primarily from a statutory grant of authority**
  - After PTO determines unpatentability, **patent claims are cancelled** when any appeal proceeding has concluded or the time for appeal has expired. 35 U.S.C. §§ 307(a), 318(b), 328(b) (*ex parte* reexamination, *inter partes* review, and post-grant review, respectively).
  - “Congress has expressly delegated reexamination authority to the PTO under a statute requiring the PTO to cancel rejected claims, and cancellation extinguishes the underlying basis for suits based on the patent.” *Fresenius USA, Inc. v. Baxter Int'l, Inc.*, 721 F.3d 1330, 1344 (Fed. Cir. 2013).
  - “[I]n general, when a claim is cancelled, the patentee loses any cause of action based on that claim, and any pending litigation in which the claims are asserted becomes moot.” *Id.* at 1340.

# Estoppel – PTAB on District Court

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- Such decisions are afforded preclusive effect after such unpatentability determinations are affirmed on appeal—or the time to appeal has expired
- *Maxlinear, Inc. v. CF Crespe LLC*, 880 F.3d 1373 (Fed. Cir. 2018)
  - “The TTAB, at issue in *B & B Hardware*, and the Board, in this case are indistinguishable for preclusion purposes.” *Id.* at 1376.
  - “The **preclusive effect** of the prior adjudications, and the subsequent affirmations, has finally resolved the issue of the unpatentability” of certain claims in the IPR on appeal.
  - “The fact that the ’728 IPR became final while this case was pending on appeal is irrelevant, as issue preclusion applies even though the precluding judgment comes into existence **while the case** as to which preclusion is sought (this case) **is on appeal.**” *Id.* at 1377 (internal quotations, citation, alterations omitted).
- *XY, LLC v. Trans Ova Genetics, L.C.*, 890 F.3d 1282, 1394 (Fed. Cir. 2018)
  - Affirmance of a PTAB invalidity determination “renders a final judgment on the invalidity of [the subject patent], and has an **immediate issue-preclusive effect** of any pending or co-pending actions involving the patent.” *Id.* at 1294; *id.* (“[A]n affirmance of an invalidity finding, whether from a district court or the Board, has a collateral estoppel effect on all pending or co-pending actions.”).
  - CAFC affirmed PTAB decision the **same day** as the district court appeal.

# Estoppel – PTAB on District Court

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- **Issue Preclusion/Collateral Estoppel**

- *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 148 (2015) (“[I]ssue preclusion is not limited to those situations in which the same issue is between two **courts**. Rather where a single issue is before a court and an administrative agency, preclusion also often applies.”).
  - *Nestle USA, Inc. v. Steuben Foods, Inc.*, 884 F.3d 1350, (Fed. Cir. 2018) (in IPR appeal, applying collateral estoppel to claim construction issue addressed in previous CAFC IPR decision).
- “The Court, therefore, regularly turns to the Restatement (Second) of Judgments for a statement of the ordinary elements of issue preclusion. **The Restatement explains that subject to certain well-known exceptions**, the general rule is that ‘[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.’” *B & B Hardware*, 575 U.S. at 148 (quoting Restatement (Second) of Judgments § 27, p. 250 (1980) and citing *id.*, § 28, at 273 (listing exceptions)).
- **Restatement § 28**: “[R]elitigation of the issue in a subsequent action between the parties **is not precluded** in the following circumstances: . . .
  - (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or **the adversary has a significantly heavier burden than he had in the first action.**”
  - District Court invalidity burden (**clear and convincing**) vs PTAB unpatentable burden (**preponderance of the evidence**).
  - See 18 Wright & Miller, Federal Practice & Procedure § 4422 (3d ed. 1998) (“[A] party who has carried the burden of establishing an issue by a preponderance of the evidence is not entitled to assert preclusion in a later action that requires proof of the same issue by a higher standard.”).

# Estoppel – PTAB on PTAB Proceedings

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- **Final PTAB invalidity determinations are binding on other PTAB proceedings**
- **Such decisions are afforded issue preclusive effect after such unpatentability determinations are affirmed on appeal—or the time to appeal has expired**
  - *Facebook, Inc. v. Windy City Innovations, LLC*, 953 F.3d 1313, 1336 (Fed. Cir. 2020) (holding that voluntary dismissal of appeal of IPR finding certain claims invalid rendered moot, the challenge to the validity of those claims in a separate IPR)
  - *Papst Licensing GMBH & Co. KG v. Samsung Elecs. Am., Inc.*, 924 F.3d 1243, 1251-52 (Fed. Cir. 2019) (issue preclusion based in IPR whose appeal was voluntarily dismissed, where no exception applied)
- **Appeal is usually not required for collateral estoppel to attach**
  - “[T]he law is well-settled that the pendency of an appeal has no effect of the finality or binding effect of a trial court’s holding.” *SSIH Equipment S.A. v. Int’l Trade Comm’n*, 718 F.2d 365, 370 (Fed. Cir. 1983); see also *In re Kane*, 254 F.3d 325, 328 (1st Cir. 2001) (“The general rule [of issue preclusion] applies—in most jurisdictions—even where the first, or issue preclusive, judgment is still on appeal when the second action occurs.”); Restatement (Second) of Judgments § 13, comments f.
  - *Mobile Tech, Inc. v. Invue Sec. Prod. Inc.*, No. IPR2018-00481, 2019 WL 3208477, at \*13 (P.T.A.B. July 16, 2019) (“The fact that an appeal is pending does not prevent the application of collateral estoppel. Out of an abundance of caution, however, we decline to apply collateral estoppel to this claim and will address Petitioner’s arguments on the merits.”).
- **Issue Preclusion Exceptions**
  - *Power Integrations, Inc. v. Semiconductor Components Indus., LLC*, 926 F.3d 1306, 1312-13 (Fed. Cir. 2019) (applying the lack-of-incentive-to-litigate exception to issue preclusion because “the non-appealed IPR concern[ed] a patent unassociated with any infringement finding or damages award”)
  - “We decline to apply issue preclusion, especially when a recognized exception is satisfied, in a way that would require [the patentee] to have appealed from every adverse IPR decision, even where there is little or no incentive, to preserve the ability to challenge a legal issue like the Board’s interpretation of § 315(b).” *Id.* at 1313 n.7.

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# ***Thryv v. Click-to-Call: Is Anything Left?***

# Framework

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- Section 314(d): “determination whether to institute ... under this section shall be final and nonappealable.”
- Sections 312/315: Set out, respectively, requirements of a petition (e.g., name the real party in interest and ID challenged claims) and one-year time limit to file.
- Sections 318/319: Describe how to take an appeal from an IPR – they focus on appealing from Final Written Decisions

# History

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***St. Jude Med., Cardiology Div., Inc. v. Volcano Corp.***, 749 F.3d 1373 (Fed. Cir. 2014)

- Reasoned that a petitioner could not appeal from a denial of institution because the overall structure of the statute shows an intent to have appeal only from final written decisions

***Cuozzo Speed Technologies, LLC v. Lee***, 579 U. S. \_\_\_ (2016).

- Review blocked for things that “closely tied” to things like 102/103—including whether the petition laid out the grounds sufficiently. Review could be had for PTO “shenanigans.”

***Wi-Fi One, LLC v. Broadcom Corp.***, 878 F. 3d 1364, 1367 (2018) (en banc).

- Holds that a patentee can complain about institution after taking appeal from a final written decision.
- Held that the Section 315 one-year bar was not “closely tied”

***SAS Institute Inc. v. Iancu***, 584 U.S. \_ (2018).

- After holding that IPRs are all-or-nothing, Justice Gorsuch said: “*Cuozzo* concluded that §314(d) precludes judicial review only of the Director’s ‘initial determination’ under §314(a) that ‘there is a “reasonable likelihood” that the claims are unpatentable on the grounds asserted’ and review is therefore justified.”



# What Happened in *Thryv*?

## **Federal Circuit**

- The PTO completed an IPR and refused to block institution under the one-year bar because the old lawsuit had been dismissed.
- The panel found the institution decision unreviewable.
- But reversed on rehearing, in view of the en banc holding in *WiFi One*.

## **Supreme Court**

- Majority ruled that *Cuozzo* controlled and that things “closely tied” to the main institution decision included the one-year bar of Section 315 (and by extension, covers all legitimate decisions made at institution).
- Gorsuch dissent (with Sotomayor): Says only Section 314 determinations (not 312 or 315) are blocked from review.

(Slip Opinion) OCTOBER TERM, 2019 1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337.

**SUPREME COURT OF THE UNITED STATES**

Syllabus

THRYV, INC., FKA DEX MEDIA, INC. v. CLICK-TO-CALL TECHNOLOGIES, LP, ET AL.

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

No. 18–916. Argued December 9, 2019—Decided April 20, 2020

Inter partes review is an administrative process that permits a patent challenger to ask the U. S. Patent and Trademark Office to reconsider the validity of earlier granted patent claims. For inter partes review to proceed, the agency must agree to institute review. See 35 U. S. C. §314. Among other conditions set by statute, if a request comes more than a year after suit against the requesting party for patent infringement, “[a]n inter partes review may not be instituted.” §315(b). The agency’s “determination . . . whether to institute an inter partes review under this section shall be final and nonappealable.” §314(d).

Entities associated with petitioner Thryv, Inc. sought inter partes review of a patent owned by respondent Click-to-Call Technologies, LP. Click-to-Call countered that the petition was untimely under §315(b). The Patent Trial and Appeal Board (Board) disagreed and instituted review. After proceedings on the merits, the Board issued a final written decision reiterating its §315(b) decision and canceling 13 of the patent’s claims as obvious or lacking novelty. Click-to-Call appealed the Board’s §315(b) determination. Treating the Board’s application of §315(b) as judicially reviewable, the Court of Appeals concluded that the petition was timely, vacated the Board’s decision, and remanded with instructions to dismiss.

**Held:** Section 314(d) precludes judicial review of the agency’s application of §315(b)’s time prescription. Pp. 6–14.

(a) A party generally cannot contend on appeal that the agency should have refused “to institute an inter partes review.” §314(d). That follows from §314(d)’s text and *Cuozzo Speed Technologies, LLC v. Lee*, 579 U.S. \_\_\_\_\_. In *Cuozzo*, this Court explained that §314(d) “preclud[es] review of the Patent Office’s institution decisions”—at

# What Institution Mistakes are Happening?

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**Fast-Track Forums:** The PTO can deny institution on the ground that parallel litigation may wrap up before the IPR (*Apple v. Fintiv*)

**Re-Exam Games:** Petitioner kills claims in IPR#1 filed within the 1-year window, Patentee gets new claims in ex parte re-exam, and PTO denies IPR#2 for being outside the window (*Apple v. IXI*)

**Real-Party-in-Interest Problems:** PTO decides that a barred party is really pulling the strings

**Govt as Real-Party-in-Interest:** PTO decides that federal government (that perhaps was sued in a 28 USC 1498 action) is the real-party-in-interest, which is not allowed (*Microsoft v. Science Applications*)

# How to Challenge?

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***Direct Appeal:*** *not really.*

***Mandamus Petition:***

- Argue “shenanigans”
- Enormous burden for mandamus **and** for shenanigans
- USSC gave two examples of shenanigans:
  - PTO applies an invalidity ground (Section 112) that it is clearly not allowed to apply in an IPR;
  - A constitutional violation or other APA violation by the PTO
- Fed Cir has only granted mandamus for things that cannot be undone (privilege) or massive, long-simmering issues (venue)

***APA Lawsuit:***

- Cuozzo referred to the APA standards of review
- Better framing of issues
- Better **practical** standard of review
- Bring a “big picture” action
- *But see Dominion Dealer v. Lee*, 3:13-cv-699, 2014 WL 1572061 (E.D. Va. Apr. 18, 2014)

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# Standing of Petitioners to Appeal

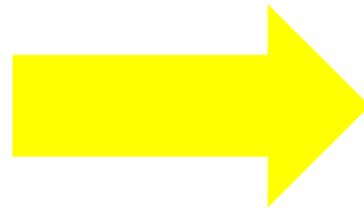
# Article III Standing

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## Framework

Article I Standing

Whatever Congress and/or  
Administration Want -  
“anyone”



Article III Standing

“case or controversy”  
- “imminent” harm

# Article III Standing

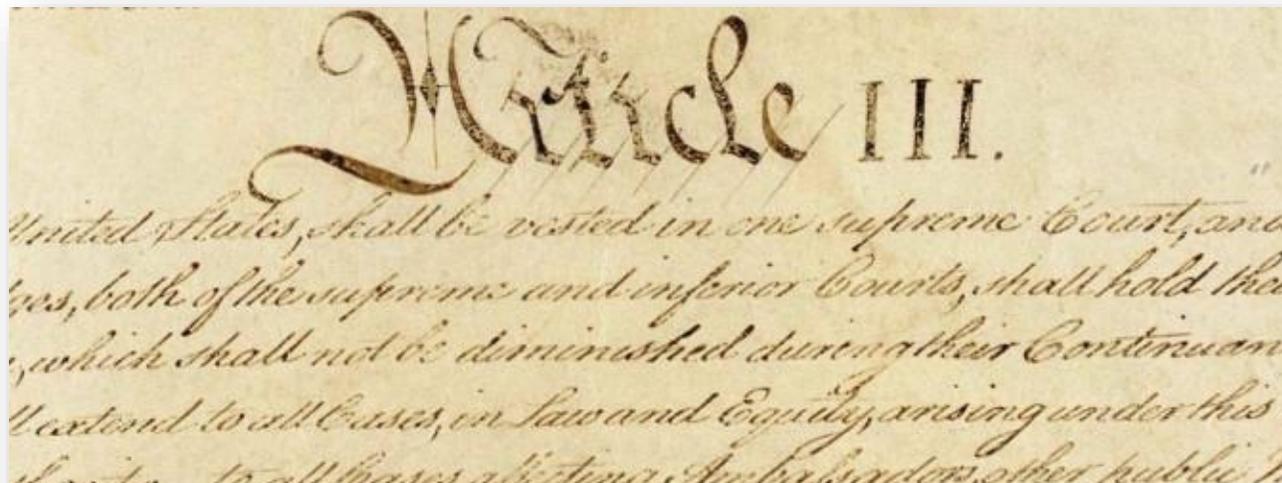
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- In recent years, several Federal Circuit cases have addressed IPR petitioners' **Article III standing** to **have the Federal Circuit hear** appeals from PTAB decisions confirming patentability
- ***Adidas v. Nike*** [963 F.3d 1355]
  - Held that Adidas **could** show injury in fact from PTAB's confirmation of Nike's patent
  - Evidence that ***Nike had asserted the patent against others*** engaged in activity ***similar*** to Adidas
- ***Argentum Pharms. v. Novartis Pharms*** [956 F.3d 1374]
  - Held that Argentum could **not** show injury in fact
  - ***Plans to have a partner file an ANDA*** were insufficient, mostly because Argentum itself would not be the target of a Hatch-Waxman suit
- ***General Electric v. United Techs.*** [928 F.3d 1349]
  - An executive's declaration citing ***competitive injury*** (high costs to design around the patent) was insufficient
  - Supreme Court denied GE's cert petition in May

# Article III Standing—Takeaways

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- IPR petitioners who haven't received a formal allegation of infringement should be ready to submit **concrete evidence** that they are engaged in activity likely to result in a suit
  - E.g., evidence of a “live” **ANDA application** (*Amerigen Pharms.* [913 F.3d 1076])
  - Or of the patentee attacking others based on **similar acts** (*Adidas* [963 F.3d 1374])
  - Or of a “live” **plan to engage in acts** implicating the patent (*DuPont* [904 F.3d 996])
- Declarations about future plans can be effective
- A high level of detail seems to be key



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# Due Process Issues

# Permissible Scope of Argument & Citation During IPR

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- Fed Cir regularly hears IPR appeals alleging that PTAB erred in considering (or not considering) arguments raised in a reply brief (or at the oral hearing)
- General rule is that the IPR petition's **arguments** and **citations** set the scope—no major new positions on reply
  - ***Intelligent Bio-Sys v. Illumina Cambridge*** (affirming exclusion of reply brief) [821 F.3d 1359]
  - ***Dell v. Acceleron*** (affirming PTAB refusal to consider contentions raised only at oral hearing)  
[884 F.3d 1364]

# Permissible Scope of Argument and Citation During IPR

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- Fed Cir has recently emphasized the Board’s discretion in determining what arguments to hear—but with some limits
- ***Apple v. Andrea Elecs.*** [949 F.3d 697]
  - PTAB **abused its discretion** by refusing to consider argument/citation in Apple’s reply
  - Some of Apple’s citations were new, but directed to the same basic argument
  - And (crucially) **responsive to Andrea’s arguments**
  - *See also Chamberlain v. One World Techs.* (affirming exercise of discretion to consider argument) [944 F.3d 919]
- The 2018 Trial Practice Guide’s endorsement of ***sur-replies*** somewhat ameliorates this issue

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# Treatment of Indefinite Claims

# Indefiniteness & Post-Grant

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- Because IPR may not invalidate claims for indefiniteness, should the PTAB find a claim indefinite it generally reasons that comparison to art is **impossible**, and holds the claim “**not proved unpatentable**”
- Recent Fed Cir opinions require the PTAB to **take up** the prior art and **render a decision** on novelty/obviousness for **certain types of indefinite claims**
  - ***Samsung v. Prisua***: Reverse/remand PTAB decision that **IPXL-type claim** (purporting to mix apparatus and method) could not be compared to prior art [948 F.2d 1342]
  - ***Cochlear v. Oticon Medical***: Vacate/remand PTAB decision that claim reciting **alternatives** (some of which were indefinite means-plus-function terms) could not be compared to prior art [958 F.3d 1348]

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# Other Items

# Other Items

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- **Continued focus on the Board’s obligation to show its work**
  - *Alacritech v. Intel* vacated an obviousness FWD because the Board had not taken up and resolved some of the patentee’s arguments for patentability [2020 WL 4377855]
    - “Intel insists that the substantial evidence standard requires us to affirm ‘so long as there is evidentiary support in the record, even if the support was not specifically cited by the Board.’ This is a fundamentally incorrect statement of the law. . . . Our precedent is clear: under the APA, our review of a patentability determination is confined to the grounds upon which the Board actually relied.”
- **Limits on appellate fee-shifting relating to post-grant**
  - *Amneal Pharms. v. Almirall* confirmed that the Fed Cir may not award fees incurred before the PTAB [960 F.3d 1368]
- **“General knowledge” at the PTAB**
  - *Koninklijke Philips v. Google* affirmed PTAB’s reliance on “general knowledge” to supply a missing claim limitation [948 F.3d 1330]
  - *Genentech v. Hospira* affirmed PTAB’s determination that POSITA would have reasonably understood a limitation to be practiced—and so wasn’t “missing” at all [946 F.3d 1333]
- **Time-bar is waivable**
  - *Acoustic Technology v. Itron Networked Solutions* confirmed that if a patentee does not present a time-bar argument to the PTAB, the Fed Cir will not take it up on appeal [949 F.3d 1360]

# Thank you!

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