

## **Cantor Colburn Client Alert: Supreme Court Requires More Oversight Over PTAB In *Arthrex* Decision**

### **Summary**

On June 21, 2021, the U.S. Supreme Court issued its opinion in the closely watched *United States v. Arthrex* case, which centered on the issue of whether Administrative Patent Judges (APJs) of the Patent Trial and Appeal Board (PTAB) are constitutionally appointed. In the majority opinion, written by Chief Justice John Roberts, the Court held (1) APJs are unconstitutionally appointed, but (2) the problem is remedied by giving the Director of the U.S. Patent and Trademark Office (Director) final oversight over PTAB Decisions.

### **Case Overview**

APJs—appointed by the Secretary of Commerce—conduct adversarial proceedings, including *inter partes* review (IPR) and post grant review (PGR), for challenging the validity of patents before the PTAB. Patent owner Arthrex appealed an adverse decision in an IPR, arguing that that the structure of the PTAB violated the U.S. Constitution’s Appointments Clause. The Appointments Clause permits “inferior officers” to be appointed by “Heads of Departments” like the Secretary of Commerce, but it requires “principal officers” to be appointed by the President with the advice and consent of the Senate. The Court held that APJs’ authority to render final decisions on patentability is inconsistent with their status as inferior officers, thereby violating the Appointments Clause. As a remedy for the constitutional violation, the Court held that “[d]ecisions by APJs must be subject to review by the Director”, who is a principal officer appointed by the President. This approach, the Court explained, properly renders APJs inferior officers that are validly appointed by the Secretary of Commerce.

The practical effect of *Arthrex* remains to be seen, as it leaves open how the U.S. Patent and Trademark Office (PTO) will procedurally implement Director review of PTAB decisions. It is widely expected that the PTO will issue formal guidance relatively quickly, possibly within a matter of days. Cantor Colburn will issue further client alerts as the PTO’s procedural guidance becomes available.

### **For Further Information and Assistance**

Cantor Colburn’s [Post-Grant Practice Group](#), chaired by partner [Andrew C. Ryan](#), has substantial experience representing clients in post-grant proceedings. Please do not hesitate to contact Andy, at [aryan@cantorcolburn.com](mailto:aryan@cantorcolburn.com) & +1 (860) 286-2929, ext. 1127, or your Cantor Colburn attorney with any questions you may have regarding this matter or your IP in general.

***Please note that each situation has its own unique circumstances and ramifications. This Client Alert is for informational purposes only and is not legal advice.***