No. 2018-1768

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

POLARIS INNOVATIONS LIMITED,

Appellant,

v.

KINGSTON TECHNOLOGY COMPANY, INC.,

Appellee,

UNITED STATES,

Intervenor.

Appeal from the United States Patent and Trademark Office
Patent Trial and Appeal Board No. IPR2016-01621

BRIEF FOR THE UNITED STATES

Of Counsel:

THOMAS W. KRAUSE
Solicitor

FARHEENA Y. RASHEED
Senior Counsel for Patent Law & Litigation

U.S. Patent and Trademark Office
Office of the Solicitor
Mail Stop 8, P.O. Box 1450
Alexandra, VA 22313
(571) 272-9035

JOSEPH H. HUNT
Assistant Attorney General

SCOTT R. MCINTOSH
MELISSA N. PATTERSON
COURTNEY L. DIXON
Attorneys, Appellate Staff
Civil Division, Room 7243
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 353-8189

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STATEMENT OF RELATED CASES

This Court deemed *Polaris Innovations Ltd. v. Kingston Technology Co.*, No. 18-1831 (Fed. Cir.), a companion case to this appeal. Parties in the following pending cases have raised Appointments Clause challenges to the statute governing the Patent Trial and Appeal Board: *Trading Technologies International, Inc. v. IBG LLC*, Nos. 18-1063, 18-1489 (Fed. Cir.); *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 18-2140 (Fed. Cir.); *Affinity Labs of Texas, LLC v. Netflix, Inc.*, No. 2018-1920 (Fed. Cir.); *Koninklijke Philips N.V. v. Google LLC*, No. 19-1177 (Fed. Cir.); *Koninklijke Philips N.V. v. Microsoft Corp.*, No. 19-1178 (Fed. Cir.).

The United States is not aware of any other appeal filed in connection with this inter partes review proceeding, nor of any other related cases within the meaning of Federal Circuit Rule 47.5(b).

STATEMENT OF JURISDICTION

This appeal arises from a final written decision of the Patent Trial and Appeal Board (Board) in an inter partes review proceeding. The Board entered its final written decision on January 29, 2018. Appx1. Polaris Innovations Limited filed a notice of appeal on April 2, 2018, within the time limits specified by 37 C.F.R. § 90.3(a)(1). The Court has appellate jurisdiction over the Board's final written decision under 28 U.S.C. § 1295(a)(4)(A) and 35 U.S.C. § 141(c).

STATEMENT OF THE ISSUES

Whether the administrative patent judges of the Patent Trial and Appeal Board are "inferior" officers of the United States under the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, such that Congress permissibly vested their appointments in a department head, rather than principal officers of the United States who must be nominated by the President and confirmed by the Senate.

STATEMENT OF THE CASE

A. Statutory Background

1. The United States Patent and Trademark Office (USPTO) is an executive agency within the United States Department of Commerce. *See* 35 U.S.C. § 1(a). Congress has vested "[t]he powers and duties of the" USPTO in the Director of the USPTO, who is "appointed by the President" with advice and consent of the Senate, and is subject to at-will removal by the President. *Id.* § 3(a)(1), (4). Among the "[p]owers" of the Office vested in the Director is the authority to establish regulations

to "govern the conduct of proceedings" in the Office. *Id.* §§ 2(b)(2)(A), 3(a)(1). In addition to this authority regarding the USPTO's proceedings, the statute specifically makes the Director responsible for providing substantive "policy direction and management supervision for the Office and for the issuance of patents." *Id.* § 3(a)(2)(A).

The Patent Trial and Appeal Board is an administrative tribunal within the USPTO. *See* 35 U.S.C. § 6. The Board is composed of the Director, the Deputy Director, the Commissioner for Patents, the Commissioner for Trademarks, and "administrative patent judges." *Id.* § 6(a). The Commissioners and Deputy Director are appointed by the Secretary of Commerce. *Id.* § 3(b). Administrative patent judges are also "appointed by the Secretary [of Commerce], in consultation with the Director." *Id.* § 6(a). There are currently more than two hundred administrative patent judges serving on the Board. The statute provides that PTO "[o]fficers and employees … shall be subject to the provisions of title 5, relating to Federal employees," *id.* § 3(c)—which include the basic civil-service protections afforded most federal employees, *see* 5 U.S.C. § 7513(a)—but has no position-specific restrictions regarding removal of administrative patent judges.

The Board is responsible for reviewing appeals from adverse decisions of patent examiners on patent applications; reviewing appeals from the rejection of claims in patent reexaminations; conducting derivation proceedings; and conducting inter partes reviews and post-grant reviews. *See* 35 U.S.C. § 6(b); *see also id.* §§ 311-319,

321-329. The statute requires "at least 3 members" of the Board to hear each "appeal, derivation proceeding, post-grant review, and inter partes review," and provides that the Director "shall" designate Board members for such a hearing. *Id.* § 6(c). The statute does not limit the Director's ability to choose, on his own initiative and at any time, to alter a panel's composition or expand any given panel to more than 3 members. *Id.*; *see also* Patent Trial and Appeal Board Standard Operating Procedure 1 (SOP1) at 1-2, 15, https://www.uspto.gov/sites/default/files/documents/SOP%201%20R15%20FINAL.pdf (last visited Mar. 4, 2019).

The Board may grant rehearing of any panel decision. 35 U.S.C. § 6(c). The current operating procedures established by the Director provide for a standing Precedential Opinion Panel to choose cases to rehear. Patent Trial and Appeal Board Standard Operating Procedure 2 (SOP2) at 1-2, 15, https://www.uspto.gov/sites/default/files/documents/SOP2%20R10%20FINAL.pdf (last visited Mar. 4, 2019). By default, the Director has selected himself, the Chief Administrative Patent Judge, and the Commissioner for Patents to constitute the Precedential Opinion Panel. *Id.* at 4. However, consistent with the Director's authority to designate which Board members will sit on any given panel, the Director may change the members of the Precedential Opinion Panel at any time, either by substituting existing members or by adding members. *Id.* The Director may on his own initiative convene a Precedential Opinion Panel to review any decision of the Board to determine whether

to order rehearing; a party may also request that the Precedential Opinion Panel review a Board decision to determine whether to order rehearing. *Id.* at 5.

The Director has instructed that, by default, any decision issued by the Precedential Opinion Panel is precedential for all future Board decisions. SOP2 at 8. However, "[n]o decision may be designated as precedential without the Director's approval," and the Director may, consistent with the Director's responsibility to provide policy direction to the Board, designate any decision by any panel as precedential and thus binding on all future Board decisions. *Id.*; *see* 35 U.S.C. § 3(a)(2)(A). The Director may also, on his own initiative and at any time, including during the pendency of any particular case, issue policy directives to govern the Board's implementation of various statutory provisions, including directions regarding how those statutory provisions should be applied to sample fact patterns. *See id.* § 3(a)(2)(A); SOP2 at 1-2.

2. The instant appeals arise out of an inter partes review hearing conducted by the Board. Inter partes review allows third parties to "ask the [USPTO] to reexamine the claims in an already-issued patent and to cancel any claim that the agency finds to be unpatentable." *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2136 (2016). Congress vested the Director with unreviewable discretion to deny a petition requesting institution of inter partes review. *See* 35 U.S.C. § 314(a), (d).[1] The Director

[1] The Director has delegated his institution authority to the Board. *See* 37 C.F.R. §§ 42.4(a), 42.108.

also has the authority to promulgate regulations for the conduct of inter partes reviews. *Id.* § 316(a).

If the Director chooses to institute inter partes review, the Board issues a written decision addressing the patentability of the challenged claims. 35 U.S.C. § 318(a). All such decisions are subject to rehearing by the Board. *Id.* § 6(c). The Board's "final written decision" may be appealed to the Federal Circuit. *Id.* §§ 141(c), 318(a), 319.

Congress gave the Director "the right to intervene in an appeal from a decision entered by" the Board, 35 U.S.C. § 143, and the Director routinely does so, including intervening to take a position in court that is contrary to the underlying Board decision, and to seek a remand for the Board to reconsider a decision with which the Director disagrees. *See, e.g.*, *In re Mouttet*, 716 F. App'x 984, 986 (Fed. Cir. 2017) (per curiam) (noting that "[o]n appeal, the PTO's Director concedes that the Board erred … and is not defending" the Board's decision). The statute specifies that the Board's decision does not take effect until after "the time for appeal has expired or any appeal has terminated," after the Director has had an opportunity to intervene in any appeal. 35 U.S.C. § 318(b). After that point, the statute provides that "the Director shall issue and publish a certificate canceling any claim of the patent finally determined to be unpatentable, confirming any claim of the patent determined to be patentable, and incorporating in the patent by operation of the certificate any new or amended claim determined to be patentable." *Id.*

B. Factual Background And Prior Proceedings

Appellee Kingston Technology Company petitioned for inter partes reviews of certain claims of patents owned by Appellant Polaris Innovations Ltd. (Polaris), and the Board instituted review. Appx179. Polaris did not raise an Appointments Clause challenge at any point in the proceedings before the Board. The Board issued a final written decision finding that the challenged claims were unpatentable. Appx1.

In its opening brief, Polaris urges for the first time in these proceedings that the administrative patent judges' appointments violated the Constitution and that the Board's decision should therefore be set aside. This Court certified Polaris's constitutional challenge to the Attorney General under Federal Rule of Appellate Procedure 44(a), asking the Attorney General to inform the Court whether the United States intended to intervene. On September 4, 2018, the United States filed a notice of intervention.

SUMMARY OF ARGUMENT

As an initial matter, Polaris forfeited its Appointments Clause challenge by failing to raise it at any point in Board proceedings. This Court has already held that it will consider an Appointments Clause challenge to the statutory method of administrative patent judges' appointment raised for the first time on appeal only in "exceptional cases." *In re DBC*, 545 F.3d 1373, 1389–80 (Fed. Cir. 2008). Polaris does not even attempt to argue that any exceptional circumstances exist here. As in *DBC*, the issue "could have been raised" before the Board, and Polaris simply failed

to do so. *Id.* at 1380. This Court should thus decline to reach Polaris's Appointments Clause challenge in this case.

That challenge is in any event meritless. Article II of the Constitution provides that "Congress may by Law vest the appointment in such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const., art. II, cl. 2. The USPTO's administrative patent judges are inferior officers whose appointment Congress was free to vest in the Secretary of Commerce, a department head.

The Supreme Court has never "set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes," but has explained that in general, "'inferior officers' are officers 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." *Edmond v. United States*, 520 U.S. 651, 661–63 (1997). Here, administrative patent judges' work is directed and supervised by the Director of the USPTO and the Secretary of Commerce, both Presidentially-nominated and Senate-confirmed officials. Polaris's assertions to the contrary rest on a profound misunderstanding of the Board and the relevant statutes.

The Supreme Court has emphasized that the ability to remove an official is a powerful method of control and supervision, and here, administrative patent judges are subject to two different types of removal authority. The Director has

unconstrained statutory authority to remove a judge from any or all Board panels, a type of removal authority that the Supreme Court has identified as a key feature of adjudicative officers Congress may treat as inferior. Independently, the Secretary of Commerce has the authority to remove judges from federal employment entirely, subject only to the general civil-service tenure protections that almost all federal employees enjoy—a removal standard far less limiting than the type of "good cause" removal restriction this Court has previously found to be consistent with inferior-officer statutes. *See Masias v. Secretary of Health & Human Servs.*, 634 F.3d 1283, 1294 (Fed. Cir. 2011).

In addition to these removal authorities, the Director has myriad other ways of controlling both the process and the substance of the administrative patent judges' work. He may: issue regulations governing the conduct of the Board's proceedings; issue binding policy directions regarding the relevant laws and how they apply to various factual situations, which may be issued in connection with pending cases and which the judges are required to apply; and designate himself as a member of the panel that decides whether to rehear—consistent with his policy direction—any aspect of any Board decision. And if, notwithstanding these many means of supervision, a Board decision with which the Director disagrees does leave the agency, the statute provides that the Board decision has no real-world effect until after the opportunity for an appeal to this Court, in which the Director has a statutory right to intervene and seek a remand.

Taken together, these many forms of control and supervision by Senate-confirmed officials are sufficient to make clear that administrative patent judges are inferior officers. If it reaches the issue, this Court should accordingly reject Polaris's challenge to the statute vesting the judges' appointment in the Secretary of Commerce.

STANDARD OF REVIEW

This Court reviews de novo a constitutional challenge to an Act of Congress. *See Demko v. United States*, 216 F.3d 1049, 1052 (Fed. Cir. 2000).

ARGUMENT

I. Polaris Forfeited Its Appointments Clause Challenge.

As an initial matter, this Court should hold Polaris's Appointments Clause challenge forfeited, since Polaris did not raise this issue before the Board in the first instance. "[A]s a general rule … courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952) (holding that parties may not wait until they are in court to raise a statutory "defect in the … appointment" of the official who issued the agency's initial decision). The Supreme Court has recognized that Appointments Clause challenges, no less than other arguments, must be timely raised to the relevant agency, and are subject to forfeiture if not properly preserved. "[O]ne who makes a *timely* challenge to the constitutional validity of the appointment of an

officer who adjudicates his case is entitled to … relief." *Ryder v. United States*, 515 U.S. 177, 182-83 (1995) (emphasis added) (finding petitioner entitled to relief on Appointments Clause claim because he, unlike other litigants, had "raised his objection to the judges' titles before those very judges and prior to their action on his case"). As with other "nonjurisdictional claims that ha[ve] not been raised below," courts retain their discretion to determine whether to excuse forfeiture and entertain a belated Appointments Clause challenge, but only "rare cases" warrant such an exercise of discretion. *Freytag v. Commissioner*, 501 U.S. 868, 878-79 (1991); *see also Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009) (per curiam) (declining to address Appointments Clause challenge to the Copyright Royalty Board members raised in supplemental briefing because it was "untimely" and there was no reason "to depart from [the Court's] normal forfeiture rule").

Applying these principles, this Court has made clear that Appointments Clause challenges are presumptively forfeited if not presented to the USPTO in the first instance. In *In re DBC*, 545 F.3d 1373 (Fed. Cir. 2008), this Court refused to consider an Appointments Clause challenge to the statutory method of administrative patent judges' appointment—which at the time provided for appointment by the Director, not the Secretary of Commerce—because the petitioner raised the challenge for the first time on appeal. *Id.* at 1378. The Court recognized that it "retain[ed] discretion to reach issues raised for the first time on appeal" in "exceptional cases." *Id.* at 1379-

80. But it concluded no such circumstances existed there; the issue "could have been raised" before the agency, the petitioner had simply failed to do so. *Id.* at 1380.

There are good reasons for requiring a party to raise an Appointments Clause challenge to the agency. As this Court explained, such a rule "'gives [the] agency an opportunity to correct its own mistakes … before it is haled into federal court,'" and "it promotes judicial efficiency, as '[c]laims generally can be resolved much more quickly and economically in proceedings before [the] agency than in litigation in federal court.'" *DBC*, 545 F.3d at 1378-79 (alterations in original) (quoting *Woodford v. Ngo*, 548 U.S. 81, 89 (2006)). Even where an agency "lacks authority" to address or "refused to pass upon the constitutionality of legislation," a constitutional challenge may involve "many threshold questions … to which the [agency] can apply its expertise." *Elgin v. Department of Treasury*, 567 U.S. 1, 16, 22-23 (2012). This is particularly true where "the challenged statute" is "one that the [agency] regularly construes," in which case "its statutory interpretation could alleviate constitutional concerns" or otherwise shed light on a constitutional question eventually brought to this Court. *Id.*

Here, for example, the Board's "expertise" in its own procedures and the statutes it regularly applies can "be 'brought to bear'" on even constitutional challenges to those statutes. *Elgin*, 567 U.S. at 23 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214-15 (1994)). Polaris argues that the structure and duties of the Board render administrative patent judges principal, not inferior, officers. Br. 56–68.

Had Polaris raised its challenge below, the Board would have had an opportunity to address the role of administrative patent judges within the statutory scheme. Even if the Board chose not to "even acknowledge[] that the [asserted] problem existed," Polaris would have "preserved its right to appeal the issue." *DBC*, 545 F.3d at 1379.

Polaris offers no excuse for its failure to raise this issue before the Board in this case, nor does it even attempt to argue that this is "one of those exceptional cases that warrants consideration of the Appointments Clause issue despite its tardy presentation." *DBC*, 545 F.3d at 1379. Polaris's argument is not based on "an intervening change in law or facts," nor "on any legal or factual propositions that were not knowable … when [Polaris] was proceeding before the Board." *Id.* at 1380. Indeed, Polaris undoubtedly could have raised its Appointments Clause challenge, as evidenced by the fact that Polaris raised such a challenge in the agency proceedings underlying a companion case to this appeal, *Polaris Innovations Limited v. Kingston Technology Co.*, No. 18-1831 (Fed. Cir.). Permitting litigants like Polaris to raise Appointments Clause issues "for the first time on appeal would encourage what Justice Scalia has referred to as sandbagging, *i.e.*, 'suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later—if the outcome is unfavorable—claiming that the course followed was reversible error.'" *Id.* (quoting *Freytag*, 501 U.S. at 895 (Scalia, J., concurring in part and concurring in the judgment)). The Court should not "overlook [Polaris's] lack of diligence to present an

issue of which it was, or should have been, aware," and should thus refuse to consider the Appointments Clause challenge in this case. *Id.*

II. Administrative Patent Judges Are Inferior Officers Whose Appointment Congress Permissibly Vested In The Secretary Of Commerce.

Polaris's Appointments Clause challenge is in any event meritless. The Appointments Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint … Officers of the United States." U.S. Const. art. II, § 2, cl. 2. Congress may, however, "vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.* Administrative patent judges are "inferior Officers," and Congress therefore permissibly vested their appointment in the Secretary of Commerce, a "Head[] of Department[]."

A. Inferior Officers Are "Directed And Supervised At Some Level" By Senate-Confirmed Superior Officers.

An "officer" of the United States is a federal official who holds a continuing position established by law and who exercises "significant authority pursuant to the laws of the United States." *Buckley v. Valeo*, 424 U.S. 1, 125–26 (1976) (per curiam). The Appointments Clause divides officers into two categories: principal and inferior. *See* U.S. Const. art. II, § 2, cl. 2. The Constitution specifies that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices." *Id.*

art. II, § 2, cl. 1. By default, all officers are appointed by the President with the advice and consent of the Senate. *See id.* art. II, § 2, cl. 2. Principal officers must be appointed in that manner, but the Clause permits Congress to "vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.*

The Supreme Court has "not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes." *Edmond v. United States*, 520 U.S. 651, 661 (1997). However, it has explained that "[g]enerally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior." *Id.* at 662. The Court has focused not only on whether a potentially inferior officer has a "superior" who "formally maintain[s] a higher rank," but on whether the officer is one "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id.* at 662-63.

Edmond and its progeny illustrate the different ways in which an inferior officer's work may be "directed and supervised at some level" by superior officers. In *Edmond* itself, the Supreme Court held that the military judges of the Coast Guard Court of Criminal Appeals were inferior officers. 520 U.S. at 664. The Court acknowledged "the importance of the responsibilities that Court of Criminal Appeals judges bear," noting that they resolve constitutional challenges, review death

sentences, and could independently weigh all evidence to arrive at a legally and factually correct finding of guilt and sentence. *Id.* at 662. But the "exercise of significant authority pursuant to the laws of the United States," the Court explained, is the hallmark of *any* "officer," and does not represent "the line between principal and inferior officer for Appointments Clause purposes." *Id.* (quotation marks omitted).

Despite the significance of the military judges' duties, the Supreme Court determined the judges were not principal officers. *Edmond*, 520 U.S. at 661. The Court rested its conclusion on the degree of supervision the judges received from Senate-confirmed officers, which was effectuated through two forms: the power to direct and review the judges' work, and the power to remove the judges from their role. *Id.* at 664-65. Those supervisory powers were "divided between the Judge Advocate General (who in the Coast Guard is subordinate to the Secretary of Transportation) and the Court of Appeals for the Armed Forces." *Id.* at 664.

The Judge Advocate General, the Court detailed, "exercises administrative oversight over" the judges, including the ability to "prescribe uniform rules of procedure" and "formulate policies and procedure." *Edmond*, 520 U.S. at 664. The Judge Advocate General could also "remove a Court of Criminal Appeals judge from his judicial assignment without cause," which the Court described as "a powerful tool for control." *Id.* Notably, the Court did not find the relevant control to depend on any authority to remove a judge from government employment entirely, only the power to remove a judge "from his judicial assignment." *Id.*

The Court also pointed to the supervision of "another Executive Branch entity," the Court of Appeals for the Armed Forces. *Edmond*, 520 U.S. at 664-65. That court did not have general jurisdiction to sua sponte review all the military judges' decisions, but did review cases in which a death sentence is imposed, cases ordered reviewed by the Judge Advocate General, and cases in which it granted an accused's petition for review. *Id.*; 10 U.S.C. § 867(a). Nor was the Court of Appeals' review plenary; "so long as there is some competent evidence in the record to establish each element of the offense beyond a reasonable doubt, the Court of Appeals for the Armed Forces will not reevaluate the facts." *Edmond*, 520 U.S. at 665; 10 U.S.C. § 867(c). Despite these limitations on the Court of Appeals' power to review the military judges' decisions, the Supreme Court cited the military judges' lack of power to "render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Edmond*, 520 U.S. at 665. Thus, while neither the Judge Advocate General nor the Court of Appeals for the Armed Forces had "complete" control over the military judges and their decisions, the Supreme Court concluded that other officers could collectively exercise a sufficient "level" of supervision to render the military judges "inferior," not principal, officers. *Id.* at 663-65.

The Supreme Court again addressed the line between principal and inferior officers in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010). There, the Court had "no hesitation in concluding that under *Edmond* the

[Public Company Accounting Oversight] Board members are inferior officers" in light of two considerations: the ability of the Security and Exchange Commission to remove the members at will and the Commission's general oversight authority over Board activities. *Id.* at 510.[2] The Court emphasized the importance of the first consideration, noting "[i]n particular" *Edmond*'s invocation of removal as a relevant and "'powerful'" form of control for the Appointments Clause's purposes. *Id.* (quoting *Edmond*, 520 U.S. at 664). And it pointed to the Commission's "oversight authority" over Board activities, even though the Court had specifically concluded that such authority was not "plenary." *Id.* at 504, 510. "[T]he Board is empowered to take significant enforcement actions, and does so largely independently of the Commission," which was without any statutory authority "to start, stop, or alter individual Board investigations, executive activities typically carried out by officials within the Executive Branch." *Id.* at 504; *see also id.* at 505 (noting that Board members "ha[d] significant independence" to "interven[e] in the affairs of regulated firms (and the lives of their associated persons)").

This Court applied these principles in *Masias v. Secretary of Health & Human Services*, 634 F.3d 1283 (Fed. Cir. 2011), holding that special masters appointed under

[2] The Court in *Free Enterprise Fund* had already invalidated a statutory provision that imposed "an unusually high standard" for the Commission to remove Board members, concluding that separation-of-powers principles precluded that removal restriction in light of the Commissioners' own tenure protections, leaving Board members subject to at-will removal. 561 U.S. at 484, 492-508.

the National Childhood Vaccine Injury Act are inferior officers. *See id.* at 1293-95. The special masters "issue decisions with respect to 'whether compensation is to be provided under the [Vaccine] Program and the amount of such compensation.'" *Id.* at 1284 (alteration in original) (quoting 42 U.S.C. § 300aa-12(d)(3)(A)). This Court rejected the argument that the special masters are principal officers, despite the fact that the Court of Federal Claims was empowered to review and set aside the special masters' decisions only under a deferential standard of review. *See id.* at 1293 & n.12 (citing 42 U.S.C. § 300aa-12(e)(2)(B)). This feature, this Court observed, was similar to the review scheme in *Edmond*, and the Supreme Court nonetheless concluded that "the limitation upon review did not render the judges 'principal officers.'" *Id.* at 1294. Moreover, this Court concluded that "the special masters are administratively supervised by the judges of the Court of Federal Claims in a manner similar to the way in which the Judge Advocate General of the Coast Guard was found to exercise administrative oversight in *Edmond*," pointing to the Court of Federal Claims' ability to "remove special masters 'for incompetency, misconduct, or neglect of duty or for physical or mental disability or for other good cause shown.'" *Id.* (quoting 42 U.S.C. § 300aa–12(c)(2)). Thus, even absent de novo review or at-will removal authority by other Executive officers, this Court has concluded that officials may be inferior officers where they are "directed and supervised" by Presidentially-nominated and Senate-confirmed officers.

Similarly, the D.C. Circuit has concluded that under *Edmond* and *Free Enterprise*, copyright royalty judges are inferior officers, even though their decisions are not "directly reversible" by any other Executive Branch officer, so long as they have no statutory restrictions on removal. *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1340-41 (D.C. Cir. 2012). The D.C. Circuit explained that although the judges "are supervised in some respects by the Librarian [of Congress] and by the Register of Copyrights," that supervision nonetheless left them "broad discretion." *Id.* at 1338. The Librarian approved procedural aspects of the judges' duties, but could not "play an influential role in the [judges'] substantive decisions." *Id.* The Register—himself an inferior officer appointed by the Librarian—was empowered to "provide written opinions to the [judges] on novel material questions of law," which the judges were required to abide by, as well as "review[] and correct[] any legal errors in the [judges'] determinations," but could not otherwise constrain the judges' "vast discretion over the rates and terms" they were charged with determining. *Id.* at 1338-39 (alteration and quotation marks omitted). The D.C. Circuit concluded these types of supervision "fall[s] short of the kind that would render the [judges] inferior officers," absent some other means of control. *Id.* at 1339. In those circumstances, the D.C. Circuit decided, the necessary means of control could be achieved by striking the statutory provision precluding the Librarian from removing the CRJs absent misconduct or neglect of duty. *Id.* at 1341. "With unfettered removal power, the Librarian will have the direct ability to 'direct,' 'supervise,' and exert some 'control'

over the Judges' decisions"—even though "individual CRJ decisions will still not be directly reversible." *Id.* (quoting *Edmond*, 520 U.S. at 662-64).

B. Administrative Patent Judges Are Subject To Robust Supervision And Control By Senate-Confirmed Officers.

The Director of the USPTO and the Secretary of Commerce—both of whom "were appointed by Presidential nomination with the advice and consent of the Senate," *Edmond*, 520 U.S. at 663—exercise control over administrative patent judges in the ways found constitutionally significant by this Court and the Supreme Court. Taken together, the means that the Director and Secretary have to remove and to direct administrative patent judges create a sufficient level of supervision to render these judges inferior officers under the Constitution and make lawful Congress's decision to vest their appointment in the Secretary.

1. The Director and the Secretary of Commerce each independently exercises a form of removal power over the administrative patent judges, which the Supreme Court has recognized is a particularly significant control mechanism for purposes of distinguishing inferior from principal officers. *See Edmond*, 520 U.S. at 664.

First, the Director has the unfettered statutory authority to designate which members of the Board will compose any given panel. *See* 35 U.S.C. § 6(c). As a result, the Director has the power to decide which matters any particular administrative patent judge will be allowed to handle. The Director is free to exclude a judge from any panel on any basis, including expectations about how the judge

might approach a particular matter or issue. Indeed, the Director could, at his discretion, choose to *never* assign a particular judge to any panel, effectively removing that judge from Board service—and short of that step, could choose never to assign a judge to any case or class of cases presenting particular issues. The Director may thus relieve an administrative patent judge of *all* of the official powers and duties of office that, Polaris contends, may only be exercised by a 'principal Officer.'

In this regard, the Director's authority over administrative patent judges mirrors the Judge Advocate General's authority in *Edmond* to remove the military judges. There, the Court relied on the fact that the Judge Advocate General could remove a judge "from *his judicial assignment* without cause." *Edmond*, 520 U.S. at 664 (emphasis added). The Court did not suggest that a supervising officer need be able to remove an inferior officer from his government employment entirely in order for the removal power to be relevant for Appointments Clause purposes. *See* Pet'rs' Reply Br. at 4, *Edmond v. United States*, 520 U.S. 651 (1997) (No. 96-262), 1997 WL 63403 (conceding that "the General Counsel [acting as the Judge Advocate General] removes [military judges] from their positions," but reserving the possibility that "the Secretary [of Transportation] may be the only one who can actually discharge them"). Instead, the Court deemed the more limited power of stopping the judge from exercising the powers of his office to be a "powerful tool for control." *Edmond*, 520 U.S. at 664.

Second, the Secretary may also remove administrative patent judges from government service entirely, under a less protective standard than that which applied to the special masters whom this Court found to be inferior officers in *Masias*. There, this Court pointed to the Court of Federal Claims' ability to remove the officials in question upon a finding of "incompetency, misconduct, or neglect of duty or for physical or mental disability or for other good cause shown." *Masias*, 634 F.3d at 1294 (quoting 42 U.S.C. § 300aa-12(c)(2)). Administrative patent judges have no similar "for cause" removal protection. And contrary to Polaris's suggestion (Br. 56), they do not have the removal protection enjoyed by "administrative law judges appointed under [5 U.S.C. §] 3105" per 5 U.S.C. § 7521(a). By definition, "administrative patent judges" appointed per the authority set out in 35 U.S.C. § 6 do not qualify for such protections. Rather, USPTO "[o]fficers and employees" are subject at most "to the provisions of title 5, relating to Federal employees." 35 U.S.C. § 3(c). The Secretary of Commerce, as the appointing authority, is thus free to remove administrative patent judges under the generalized civil-service standards applicable to federal employees: to "promote the efficiency of the service," 5 U.S.C. § 7513(a), which generally permits removal for any legitimate reason provided that there is a nexus between that reason "and the work of the agency." *See Brown v. Department of the Navy*, 229 F.3d 1356, 1358 (Fed. Cir. 2000); *see also Free Enterprise Fund*, 561 U.S. at 509 ("Under the traditional default rule, removal is incident to the power of appointment."). That the Secretary may remove administrative patent judges from

the federal workforce under the same standard that applies to any other federal employees underscores the degree to which these judges are subject to supervision and control by Senate-confirmed officers.

Finally, even if the modest removal protections that the administrative patent judges have under Title 5's general civil-service standards were inconsistent with the degree of supervision required for inferior officers—notwithstanding *Masias*'s allowance of a more stringent removal standard, the ability to remove the judges from their adjudicative assignments as emphasized in *Edmond*, and the other means of supervision discussed below—it would not follow that the Court must invalidate the statutory appointment mechanism chosen by Congress in 35 U.S.C. § 6(a). Instead, this Court could avoid any constitutional infirmity simply by construing Title 5's "efficiency of the service" standard to permit removal in whatever circumstances the Constitution requires. *See, e.g.*, *National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 563 (2012) (explaining that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality," and that "[t]he question is not whether that is the most natural interpretation of the mandate, but only whether it is a fairly possible one") (quotation marks omitted). Alternatively, this Court could hold that 35 U.S.C. § 3(c)'s provision that USPTO officers and employees are subject to Title 5 cannot constitutionally be applied to Board members with respect to that Title's removal restrictions, and thus must be severed to that extent. In instances where removal restrictions caused constitutional defects in a statute, the Supreme Court and the D.C.

Circuit have invalidated and severed the removal provision from the rest of the statute rather than broadly invalidating Congress's appointment scheme. *See Free Enterprise Fund*, 561 U.S. at 508-09 (rejecting contention that a separation-of-powers defect in Board's structure "rendered it and all power and authority exercised by it in violation of the Constitution," and instead severing "the unconstitutional tenure provisions" "from the remainder of the statute") (quotation marks omitted); *Intercollegiate Broad.*, 684 F.3d at 1336-37, 1340-41 (invalidating statutory removal protections to "provide a remedy that cures the [Appointments Clause] defect with as little disruption as possible"). Although neither of these alternatives is necessary for the reasons discussed, either one would be available if the Court otherwise regarded the existing removal protections as inconsistent with inferior-officer status.

2. In addition to the powerful tool for control provided by these removal powers, the Director exercises a robust level of supervision over the work of the administrative patent judges by other means the Supreme Court has identified as relevant to the inferior-officer analysis. *See Edmond*, 520 U.S. at 664-65. All of the "powers and duties" of the USPTO are "vested in" the Director, who is "responsible for providing policy direction and management supervision" for the agency. 35 U.S.C. § 3(a)(1), (2)(A). The Director exercises this policy-direction and supervisory responsibility in a variety of ways.

Like the Judge Advocate General in *Edmond*, the Director is authorized to promulgate regulations governing inter partes review. 35 U.S.C. §§ 2(b), 316(a)(4);

Edmond, 520 U.S. at 664 (detailing the Judge Advocate General's ability to "prescribe uniform rules of procedure" and "formulate policies and procedure" for military judges). Beyond this regulatory authority, the Director can control the substance of the Board's decisions by exercising his statutory authority to provide policy direction for the USPTO, including the Board. 35 U.S.C. §§ 3(a), 6. Thus, the Director can issue policy directives interpreting and applying the patent and trademark laws, which the Board must follow in its decisions. If he wishes to do so, the Director may even give instructions regarding how the law should be applied to various fact patterns, and may do so in connection with pending cases that present such fact patterns. Similarly, the Director can, on his own initiative, designate any Board decision as precedential, and thereby bind all future panels of the Board. SOP2 at 1. Board members, like all officers and employees of the USPTO, must follow the Director's policy directions, and failure to do so could lead to exclusion from the Board's panels or even removal from office.

The Director's policy-direction authority is an extremely powerful tool for supervising and controlling the Board's work. But it is by no means his only such tool. As explained above, the Director has used his statutory authority over the composition of Board panels to form a standing Precedential Opinion Panel of at least three Board members that can rehear and reverse any Board decision. The Precedential Opinion Panel's rehearing decision itself becomes a precedential decision binding on all future panels of the Board, but only with the Director's agreement.

SOP2 at 8. The Director can choose the Board members who sit on the Precedential Opinion Panel, and by default the Director serves as a member of the Panel himself. *Id.* at 4; *see also Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Comp. Programs*, 519 U.S. 248, 268-69 (1997) (recognizing, outside of the Appointments Clause context, that a principal officer's power to select members of a tribunal and establish rules of procedure are "substantial" means of supervision and control). Through the Precedential Opinion Panel, therefore, the Director plays a unique and central role in rehearing individual Board decisions before they become the final agency action reviewable in this Court.[3]

Nor is the Director without means to superintend Board decisions once issued. If—notwithstanding his power over the composition of panels, his policy-direction authority, and his role in the rehearing process—a decision is issued with which the Director disagrees, the statute gives him the right to intervene and become a party in any subsequent appeal taken from the decision. *See* 35 U.S.C. § 143. Having done so,

[3] The Director revised the Board's Standard Operating Procedures to provide for the Precedential Opinion Panel after the Board issued its decision in this case. *See* Patent Trial and Appeal Board Standard Operating Procedures (Sept. 20, 2018), https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/resources. The current procedures are nonetheless relevant because the Director's most recent revision of the rehearing procedures confirms the statutory authority he has always possessed with respect to the members of the Patent Trial and Appeal Board. In other words, the question here is whether Senate-appointed officers have legally sufficient authority under the statute to supervise the administrative patent judges, not the extent to which those officers factually exercise that authority. *See, e.g.*, *Edmond*, 520 U.S. at 664-65 (analyzing the extent of officers' statutory authority, not the exercise thereof).

the Director can explain the ways in which the Board has erred, and seek a remand from this Court for the Board to reconsider the case consistent with the Director's view of the law and facts. *See, e.g.*, *In re Mouttet*, 716 F. App'x 984, 986 (Fed. Cir. 2017) (per curiam) (noting that "[o]n appeal, the PTO's Director concedes that the Board erred … and is not defending" the Board's decision). Upon remand in such a case, the Director could issue policy directives governing the issues in, or constitute a panel of his choosing to rehear, the remanded case. Notably, the statute specifies that the Board's decision has no effect on the patentee's rights until after an opportunity for an appeal, in which the Director would have an opportunity to intervene. *See* 35 U.S.C. § 318(b) (instructing the Director to "issue and publish a certificate" canceling, confirming, or amending claims in accordance with a Board decision only after "the time for appeal has expired or any appeal has terminated").

These powers of supervising and controlling administrative patent judges and their work render those judges "inferior" to the Director. Here, as in *Edmond* and *Masias*, Senate-confirmed officers have means of supervising the substance as well as the process of the agency's final decisions. *See Edmond*, 520 U.S. at 664-66; *Masias*, 634 F.3d at 1294-95. Indeed, the Director's supervisory power is in some respects even greater than the ones that the Supreme Court and this Court relied on in those cases. The Director need not await a Board decision that he disagrees with to set out a new interpretation of the law that the Board is required to apply in its decisions, as was the case with the supervisory officers in *Edmond* and *Masias*. *See Edmond*, 520 U.S.

at 664 (noting that the Court of Appeals for the Armed Forces could reverse certain categories of decisions made by the military judges at issue); *Masias*, 634 F.3d at 1294-95 (invoking the Court of Federal Claims' authority to reverse special masters' decisions). Even before any such decision is issued, the Director may prospectively bind all administrative patent judges to decide cases in conformity with his understanding of the law by issuing binding policy guidance.

Nor is the Director's authority in this respect diminished by any distinctions between factual and legal determinations, or between de novo and deferential review. *See Edmond*, 520 U.S. at 664-65 (noting that the Court of Appeals for the Armed Forces' "scope of review is narrower" than that of the military judges, since they would "not reevaluate the facts" if the record contained "competent" evidence); *Masias*, 634 F.3d at 1294 (noting similar standard of review); *cf. Intercollegiate Broad.*, 684 F.3d at 1339 (noting that the Register of Copyright had the power to "control the [copyright judges'] resolution of pure issues of law," not factual issues). Although the Director does not hear appeals from the Board's decisions directly, as was the case with the supervising officers in *Edmond* and *Masias*, the Director-mediated rehearing process has no limitations on the scope of review and may result in any aspect of a decision, whether factual or legal, being altered. Moreover, the Director here has the unconstrained ability to issue policy directions to the Board, encompassing the ability to instruct administrative patent judges how to apply the Director's view of the law to various fact patterns, a control mechanism not present in *Edmond* or *Masias*.

Similarly, the "oversight authority" exercised by the Director is in some regards more direct than that invoked by the Court in *Free Enterprise Fund*. 561 U.S. at 510. The Court noted that the SEC has various means of control over the "agency as a whole," but concluded these authorities represented "a problematic way to control an inferior officer" individually, reasoning that "[t]he Commission cannot wield a free hand to supervise individual members if it must destroy the Board in order to fix it." *Id.* at 504 (finding insufficient means of control over individual Board members due to multiple levels of for-cause removal restrictions members even though the Commission could control the Board's budget and relieve the Board of authority). Nonetheless, the Court had "no hesitation" in deeming the Board members inferior officers in light of the Commission's imperfect "oversight authority" over the Board "as a whole," and the Commission's restored removal authority. *Id.* at 510.

Here, the Director has various forms of regulatory and policy-discretion authority over the Board that were not present in *Free Enterprise Fund* and that allow him to exert control over individual administrative patent judges without having to disempower the Board as a whole. The statute gives the Director the authority to issue binding instructions to all of the USPTO, including the administrative patent judges, regarding how to interpret and apply the law. Moreover, there is no statutory barrier to the Director reassigning an individual judge from a particular panel mid-case if he deems the judge noncompliant with his policy directions. *See* 35 U.S.C. § 6(c). The Director's control over the work of individual patent judges is in this regard less

attenuated than the Commission's "oversight authority" over the individual members of the Public Company Accounting Oversight Board. *Cf. Free Enterprise Fund*, 561 U.S. at 504.

Finally, again, if the above-described scope of the Director's authority over the Board were constitutionally insufficient, even in conjunction with the earlier-discussed removal authority, the appropriate judicial remedy would not be to invalidate the administrative patent judges' appointments. Rather, under the canon of constitutional avoidance, this Court could construe the statute to give the Director the authority to unilaterally revise a Board decision before it becomes final. Although the statute provides that an "inter partes review shall be heard by at least 3 members of the Patent Trial and Appeal Board, who shall be designated by the Director," 35 U.S.C. § 6(c), it also provides that "[t]he powers and duties of the United States Patent and Trademark Office"—which includes the Board, *see id.* § 6(a)—"shall be vested in" the Director, *id.* § 3(a). This vesting clause could plausibly be understood to endow the Director alone with all powers of the Board, including its authority to issue final written decisions. Even if not "the most natural interpretation of the [statute]," it is certainly a "'fairly possible one'" if necessary to avoid invalidating the statute on constitutional grounds. *National Fed'n of Indep. Bus.*, 567 U.S. at 563. Indeed, if necessary, the Court could sever section 6(c)'s three-member clause that creates the purported problem. If section 6(c) were narrowed to say merely that "inter partes review shall be heard by the Patent Trial and Appeal Board," it would undoubtedly

permit the Director the discretion to decide cases himself as a member of the Board, especially when read in conjunction with section 3(a)'s vesting clause. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) ("[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid," "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.") (first alteration in original). As with the statutory restrictions on removal of administrative patent judges, such savings measures not necessary here for the reasons discussed, but they are available if the Court otherwise regarded the existing methods of supervision as inconsistent with inferior-officer status.

3. Polaris's arguments that administrative patent judges are principal officers rest on mischaracterizations of the Board and its governing statutes. Polaris asserts that administrative patent judges have "good-cause removal protections." Br. 56. But as discussed above, administrative patent judges have only the basic civil-service protections afforded federal employees. *See supra* p. 22. Similarly, Polaris's assertions that the judges "make final decisions on the agency's behalf, subject to minimal or no oversight," and that "[n]o one in the agency directly supervised PTAB judges' decisions" are also incorrect. Br. 56, 58. As explained, the Director has multiple means of controlling both the process and the substance of the Board's decision in all cases, both before and after a panel issues a decision. And Polaris's assertion that

"the power to grant rehearing of the Board's decisions . . . rests with the Board itself," Br. 58, ignores the Director's statutory authority to designate himself and any other Board members he selects to serve as any panel, including the panel that will decide whether rehearing is warranted and if so, rehear a case and issue a new decision that would necessarily comply with any policy directives the Director chose to issue in the interim.

Polaris seeks to rely on *Intercollegiate Broadcasting*, Br. 58, but the D.C. Circuit's analysis there only confirms that administrative patent judges are inferior officers. The court recognized that copyright royalty judges had "vast discretion" to set royalty rates that could not be "directly revers[ed]" by any other Executive Branch official. 684 F.3d at 1338–41. The court nonetheless concluded the judges would "become validly appointed inferior officers" if the court invalidated a statutory provision prohibiting the Librarian of Congress from removing the judges except for misconduct or neglect of duty. *Id.* at 1341. As set forth above, the Director has no statutory constraints on his authority to remove judges from any panel, and the Secretary may remove the judges from their employment for efficiency of the service, a significantly lower standard than the "misconduct or neglect of duty" removal standard invalidated in *Intercollegiate*. The D.C. Circuit's analysis thus suggests that even if the Director could not influence some aspects of the administrative patent judges' final decisions, those judges would nonetheless be properly appointed inferior

officers. But as explained, the Director in fact has myriad was to control all aspects of the Board's final determinations, both before and after a panel renders a decision.

Nor does *Association of American Railroads v. United States Department of Transportation*, 821 F.3d 19 (D.C. Cir. 2016), aid Polaris. *See* Br. 57. There, the D.C. Circuit examined the status of an arbitrator appointed by the Surface Transportation Board to resolve disputes between the Federal Railroad Administration and Amtrak regarding railroad "metrics and standards," and to "render a final decision" on the dispute, which would be published "in the Federal Register." *American Railroads*, 821 F.3d at 23-24, 37-39. The court concluded that this arbitrator—who could effectively bind two different governmental entities headed by presidential appointees—was a principal officer. *Id.* at 37-39; *see* 49 U.S.C. 103(d) (providing for presidential appointment and Senate confirmation of the head of the Federal Railroad Administration); *Department of Transp. v. Association of American Railroads*, 135 S. Ct. 1225, 1231 (2015) (describing Amtrak's Board of Directors). The court reasoned that the statute providing for the arbitrator's appointment—which involved "anomaly on top of anomaly"—"[n]owhere … suggest[ed] the arbitrator 'is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.'" *American Railroads*, 821 F.3d at 23, 39. The statute permitted the arbitrator to develop the binding metrics in question through an arbitration process in which Senate-confirmed officials had no apparent role and without "provid[ing] any procedure by which the arbitrator's decision" could be

reviewed by the Surface Transportation Board. *Id.* at 39; *see also Department of Transp. v. Association of American Railroads*, 135 S. Ct. at 1238-39 (Alito, J., concurring) (noting lack of supervision over arbitrator). That regime bears no resemblance to the statutory scheme here, which gives the Director and Secretary numerous mechanisms to control and direct the administrative patent judges and their decisions, all of which collectively amounts to much more than a sufficient level of supervision.

CONCLUSION

For the foregoing reasons, the Court should affirm the Board's decision.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

SCOTT R. MCINTOSH
MELISSA N. PATTERSON
/s/ Courtney L. Dixon
COURTNEY L. DIXON
Attorneys, Appellate Staff
Civil Division, Room 7243
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 353-8189
Courtney.l.dixon@usdoj.gov

Of Counsel:

THOMAS W. KRAUSE
Solicitor

FARHEENA Y. RASHEED
Senior Counsel for Patent Law & Litigation

U.S. Patent and Trademark Office
Office of the Solicitor
Mail Stop 8, P.O. Box 1450
Alexandra, VA 22313
(571) 272-9035

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Courtney L. Dixon
COURTNEY L. DIXON

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Circuit Rule 32(a) because it contains 8,756 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ Courtney L. Dixon
COURTNEY L. DIXON