

NOTE: This order is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

VIRNETX INC.,
Appellant

v.

CISCO SYSTEMS, INC.,
Appellee

2019-1725

Appeal from the United States Patent and Trademark
Office, Patent Trial and Appeal Board in No. 95/001,792.

ON MOTION

ORDER

VirnetX Inc. submits a motion to vacate the final written decision of the Patent Trial and Appeal Board and remand this case in light of this court's recent decision in *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 2018-2140, 2019 WL 5616010 (Fed. Cir. Oct. 31, 2019). The court also construes the motion as a notice that VirnetX is challenging the Board's decision as rendered by a panel of administrative patent judges who were appointed in violation of the Appointments Clause of the Constitution.

Upon notice of the fact that “a party questions the constitutionality of an Act of Congress in a proceeding in which the United States . . . is not a party,” the clerk of this court must “certify that fact to the Attorney General.” Fed. R. App. P. 44(a); *see also* 28 U.S.C. § 2403(a) (“In any action . . . in a court of the United States to which the United States . . . is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene . . . for argument on the question of constitutionality.”).

Upon consideration thereof,

IT IS ORDERED THAT:

(1) Notice of VirnetX’s constitutional challenge is hereby certified to the Attorney General.

(2) The United States’ request to intervene and any response by the United States to the motion is due no later than December 27, 2019. Any reply in support of the motion is due no later than January 2, 2020.

(3) The briefing stay remains in place.

FOR THE COURT

November 26, 2019
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

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cc: United States Attorney General