

# Meet The Supreme Court Heavyweights Arguing Arthrex

By [Dani Kass](#)

Law360 (February 26, 2021, 1:00 PM EST) -- The trio of attorneys trying to win over the [U.S. Supreme Court](#) justices Monday in a dispute over whether Patent Trial and Appeal Board judges are constitutionally appointed are all seasoned veterans of the court and patent law.

Presenting U.S. v. [Arthrex](#) to the Supreme Court will be [MoloLamken](#)'s Jeffrey A. Lamken, [Gibson Dunn & Crutcher LLP's Mark Perry](#) and Deputy Solicitor General Malcolm L. Stewart.

The [justices will first](#) be considering whether administrative patent judges have been acting as "principal" officers of the government, who must be appointed by the president and confirmed by the Senate under the appointments clause, or "inferior" officers, who can be appointed by heads of departments.

The [Federal Circuit found](#) in October 2019 that the judges, who have not gone through the confirmation process, didn't have enough oversight to be considered inferior officers, and supposedly fixed the problem by severing a part of the Patent Act that made the judges hard to fire. The ruling led to a three-way cross appeal, with the government and [Smith & Nephew](#) disputing the appointments clause decision, and Arthrex fighting the removal of job protections.

If the justices agree the judges were wrongly appointed, they will then decide whether the Federal Circuit's remedy solved the problem, and if not, what to do about it.

The underlying dispute in this case is Smith & Nephew's successful challenge to an Arthrex suture patent that has since been vacated and lined up for a do-over based on the appointments clause issue.

Here, Law360 introduces the three attorneys who will present the case to the justices.

## Arthrex: MoloLamken founder Jeffrey A. Lamken



Jeffrey A. Lamken

Who is he?

Lamken is a Supreme Court regular who has argued two dozen cases before the justices over his career.

Among them was a case from 2010 when he represented the Public Company Accounting Oversight Board as it was being challenged under the Constitution's separation of powers and appointments clauses. That dispute in [Free Enterprise Fund et al. v. Public Company Accounting Oversight Board](#) ultimately ended in more oversight for the board.

Lamken has a wealth of patent experience as well and is a [common face](#) at the Federal Circuit. He has repeatedly [petitioned](#) the Supreme Court with patent matters and filed [amicus briefs](#) in top cases.

He formed MoloLamken LLP in 2009, leaving his role as head of [Baker Botts LLP's Supreme Court](#) and appellate practice. Earlier in his career, he had been a partner at [Kellogg Huber Hansen LLP](#) and an assistant to the solicitor general.

He clerked for both retired Justice Sandra Day O'Connor and former Ninth Circuit Judge Alex Kozinski, and earned his law degree from Stanford Law School.

What's his argument?

Lamken [will defend](#) the Federal Circuit's holding that PTAB judges were improperly acting as principal officers, but will say the panel erred by removing tenure protections. Instead, he says the justices should end the current inter partes review system and let Congress decide what happens next.

**Smith & Nephew: Gibson Dunn partner Mark A. Perry**



Mark A. Perry

Who is he?

Taking up the case for Smith & Nephew will be another former clerk of both Justice O'Connor and Judge Kozinski who has made multiple appearances before the Supreme Court.

Perry, the co-chair of Gibson Dunn's nationwide appellate and constitutional law practice group, notably argued for CLS Bank in its landmark case against Alice Corp. There, the Supreme Court held that abstract ideas implemented using a computer aren't patent eligible, and that [2014 ruling](#) in [Alice Corp. v. CLS Bank](#) has been one of the [most influential](#) Supreme Court rulings in patent law.

He also represented former investment adviser Raymond J. Lucia at the Supreme Court in an appointments clause dispute that the Federal Circuit cited in Arthrex. In the [2018 decision](#) in [Lucia v. SEC](#), the justices said [U.S. Securities and Exchange Commission](#) administrative law judges are inferior officers and remanded the case to the SEC with the caveat that the plaintiff's case must be reheard by a "properly appointed official."

The University of Chicago Law School graduate and longtime friend of Justice Brett Kavanaugh has spent more than 20 years at Gibson Dunn.

What's his argument?

Perry will be [arguing](#) that the Federal Circuit got it wrong in *Arthrex* and that administrative patent judges were properly appointed from the start because their work is adequately supervised.

**Government: Deputy Solicitor General Malcolm L. Stewart**



Malcolm L. Stewart

Who is he?

The government will be represented by an attorney who has spent three decades with the Justice Department. Stewart started at the [U.S. Department of Justice](#)'s Civil Division before becoming an assistant to the solicitor general in 1993 and then moving up to deputy in 2008.

Among the dozens of cases Stewart has argued before the Supreme Court are several focused on patents. Those include 2019's [Return Mail v. U.S. Postal Service](#) about whether the government can [challenge patents](#) at the PTAB and 2018's [SAS Institute v. Iancu](#) about whether the [PTAB can institute](#) just part of a petition to review a patent. In both of those instances, the government lost, but he did win when defending the [legality of PTAB reviews](#) in 2017's [Oil States Energy Services LLC v. Greene's Energy Group LLC](#).

The Yale Law School grad had clerked for the late Justice Harry Blackmun and the late D.C. Circuit Judge Patricia M. Wald before joining the DOJ.

What's his argument?

Like Smith & Nephew, Stewart will be [arguing](#) that APJs are properly appointed and supervised, so the Federal Circuit's decision should be overturned.

--Editing by Marygrace Murphy.