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Forcing Supreme Court Review by the Federal Circuit

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Forcing Supreme Court Review by the Federal Circuit

JEREMY W. BOCK†

From time to time, a federal court of appeals may want the Supreme Court to take a case because it is stuck: there is an unresolved issue that is important to the day-to-day administration of justice, but an en banc sitting would be futile. The Supreme Court, however, has a haystack problem: it receives several thousand certiorari petitions each year, of which approximately 1% receive plenary review. The literature suggests that the selection of the certworthy needles in this petition haystack is a black-box process affected by discretion and situational factors that make timely review unpredictable and difficult to obtain.

Among the federal appellate courts, the difficulty of securing timely Supreme Court review may be the most

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problematic for the U.S. Court of Appeals for the Federal Circuit, which was established to create and maintain a uniform, coherent body of patent law precedents. Because of its exclusive appellate jurisdiction in patent cases, if the Federal Circuit gets stuck, its impact is felt nationwide. Compared to the other circuits, the Federal Circuit might be more dependent on the Supreme Court in some ways, because there is no intercircuit percolation of patent law. Ironically, the Federal Circuit may have more difficulty signaling when review is necessary because there are no circuit splits in patent law.

Accordingly, using the Federal Circuit as a case study, this Article proposes the creation of a mechanism for bypassing the Supreme Court's certiorari haystack to secure timely review of cases that are important to the day-to-day administration of justice. Specifically, Congress should give the judges of the Federal Circuit the power to periodically invoke (e.g., once a year)—through a majority vote of its regular active judges—either mandatory appellate jurisdiction or mandatory certified question jurisdiction at the Supreme Court to secure review of a case or a discrete issue. By providing a supplemental pathway to Supreme Court review that can be invoked directly by the Federal Circuit judges themselves, the proposal effectively sets up a "hotline" between the two courts and reserves a slot on the high court's plenary docket for a case that was selected with the benefit of the Federal Circuit's expertise. As a result, a tighter, more robust feedback loop is created between the generalist Supreme Court that makes broad pronouncements and the specialist appellate court that is charged with operationalizing those pronouncements for day-to-day adjudication.

Because all appellate courts (not just the Federal Circuit) have an interest in obtaining timely Supreme Court intervention when necessary, this Article might also be of interest to audiences beyond patent law who are seeking ideas for reforming the Supreme Court.

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INTRODUCTION

The United States Court of Appeals for the Federal Circuit has exclusive nationwide jurisdiction in appeals from patent cases.¹ In creating² this specialized circuit court,³ Congress assumed that a single appellate court would produce a coherent, uniform body of precedents that would bring certainty and predictability to patent law.⁴ From time to time, however, the Federal Circuit can experience difficulty in executing this mandate, and it may need the Supreme Court to intervene. Specifically, when “hand-tying” and/or “deadlock” situations arise, they can leave the circuit court stuck due to the futility of en banc review. “Hand-tying” occurs when the Circuit judges believe that their hands are tied by Supreme Court caselaw, such that the en banc court is powerless to fix or avoid issuing a problematic decision. By contrast, “deadlocks” refer to situations where the circuit court is internally split on an issue in a way that a clear majority or consensus position does not exist. This increases the likelihood that an en banc sitting would yield a fractured decision with no majority opinion. On some issues, both hand-tying and deadlocks may exist. A notable example, which will be used throughout this Article, is the current state of the Supreme Court’s caselaw on the “patent eligibility” doctrine, which prevents the patenting of laws of

1. 28 U.S.C. § 1295(a)(1).

2. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

3. Some commentators consider the Federal Circuit to be “semi-specialized” because its limited subject matter jurisdiction also includes several discrete non-patent areas of the law. See William M. Landes & Richard A. Posner, *An Empirical Analysis of the Patent Court*, 71 U. CHI. L. REV. 111, 112 (2004). To streamline the discussion, this Article will use the term “specialized” rather than “semi-specialized” in describing the Federal Circuit.

4. Remarks of Rep. Robert W. Kastenmeier, *The Ninth Annual Judicial Conference of the United States Court of Customs and Patent Appeals*, 94 F.R.D. 347, 358 (1982).

nature, natural products/phenomena, and abstract ideas.⁵

Until the Supreme Court intervenes and resets the debate among the Circuit judges by either clarifying or revisiting its caselaw⁶ (assuming that Congress has not abrogated it), one might expect a hand-tied or deadlocked Federal Circuit to issue decisions in the interim that could further entrench problematic precedents and/or deepen intra-circuit splits. In maintaining a coherent body of caselaw, the timeliness by which precedents are reconsidered may be as consequential as the substance of the opinions themselves. This is especially true in patent law where, by virtue of the Federal Circuit's exclusive jurisdiction, doctrines experience a limited form of percolation at an accelerated pace, thereby reaching a steady-state condition much sooner than in some other areas of the law, where percolation occurs at a slower pace because the cases are distributed among the regional circuits.⁷ Regarding the impact of timely doctrinal fixes, the state of patent decisional law affects not just litigation but also the operations of the U.S. Patent & Trademark Office (PTO)—which receives over 600,000 patent applications and grants almost 400,000 patents annually⁸—as well as, potentially, the business operations, product development plans, commercialization strategies, and licensing activities of a wide variety of

5. See 35 U.S.C. § 101; *Mayo Collaborative Servs. v. Prometheus Lab'ys, Inc.*, 566 U.S. 66 (2012); *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014).

6. See John M. Golden, *The Supreme Court as "Prime Percolator": A Prescription for Appellate Review of Questions in Patent Law*, 56 UCLA L. REV. 657, 657 (2009) ("Supreme Court activity is best justified and conceived not as directed toward final law saying, but instead as involving limited interventions to stimulate new or renewed judicial examination of important legal questions.").

7. See *infra* Section II.C.1.

8. *U.S. Patent Statistics Chart Calendar Years 1963–2020*, U.S. PAT. AND TRADEMARK OFF., https://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.htm (Feb. 20, 2023, 10:21 AM).

stakeholders in the patent system across different industries, whose non-litigation activities involving patents remain largely out of public view.

Because the Supreme Court's plenary docket is almost completely discretionary, it makes the availability of high court review unreliable and unpredictable in light of various situational and behavioral factors that may affect the high court's ability to pick out the "right" needles in the certiorari haystack. Accordingly, when the Federal Circuit's stewardship of decisional patent law goes awry, there is no guarantee that Supreme Court review will be forthcoming in a timely manner—even when a highly fractured Federal Circuit gets stuck and implores the high court for review.

A vivid example of this is provided by *Athena Diagnostics, Inc. v. Mayo Collaborative Services, LLC*,⁹ where the Federal Circuit issued an order denying en banc review that was accompanied by eight separate opinions—four concurrences and four dissents totaling almost forty pages in the Federal Reporter¹⁰—which, to varying degrees, criticized the Supreme Court's caselaw on patent eligibility, and essentially called on the high court to revisit its precedents and provide better guidance. This cry for help from the Federal Circuit went unheeded, as the Supreme Court unceremoniously denied the ensuing petition for certiorari¹¹ without even calling for the views of the Solicitor General (CVSG).¹² The same fate awaited a certiorari petition in a subsequent patent eligibility case, *American Axle & Manufacturing, Inc. v. Neapco Holdings LLC*,¹³ in which the Federal Circuit had (again) denied en banc review

9. 915 F.3d 743 (Fed. Cir. 2019), *cert. denied*, 140 S. Ct. 855 (2020).

10. *Athena Diagnostics, Inc. v. Mayo Collaborative Servs., LLC*, 927 F.3d 1333, 1334 (Fed. Cir. 2019) (listing opinions).

11. *Athena*, 140 S. Ct. at 855.

12. The CVSG procedure is discussed in greater detail in Section I.B.3, *infra*.

13. 967 F.3d 1285 (Fed. Cir. 2020), *cert. denied*, 142 S. Ct. 2902 (2022).

in an order that was (again) accompanied by multiple separate opinions—this time, exposing a 6-6 split among its judges.¹⁴ Notably, the Supreme Court denied review in *American Axle* even though the Solicitor General, in response to a CVSG,¹⁵ had recommended granting review.¹⁶

Athena and *American Axle* illustrate the two types of situations for which the Federal Circuit might want Supreme Court review because an en banc sitting would be futile. In *Athena*, the Federal Circuit was largely faced with a hand-tying situation, in which a majority of judges believed that they were bound by the Supreme Court’s patent eligibility framework set forth in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*¹⁷ (the “*Mayo* framework”) to uphold a problematic result, and many expressed a need for further action by the Supreme Court or Congress.¹⁸ By

14. *Am. Axle & Mfg., Inc. v. Neapco Holdings LLC*, 966 F.3d 1347 (Fed. Cir. 2020). A 6-6 split exists because the Federal Circuit has twelve active judges, six of whom dissented from the denial of the petition for rehearing en banc, while the remaining judges either concurred or acquiesced in the denial.

15. *See infra* note 109.

16. Brief for the United States as Amicus Curiae at 1, *Am. Axle & Mfg., Inc. v. Neapco Holdings LLC*, No. 20-891 (U.S. May 24, 2022), 2022 WL 1670811.

17. 566 U.S. 66 (2012).

18. *Athena Diagnostics, Inc. v. Mayo Collaborative Servs., LLC*, 927 F.3d 1333, 1335 (Fed. Cir. 2019) (Lourie, J., concurring in the denial of the petition for rehearing en banc) (“I concur in the court’s decision not to rehear this case en banc. In my view, we can accomplish little in doing so, as we are bound by the Supreme Court’s decision in *Mayo*.”); *id.* at 1337 (Hughes, J., concurring in the denial of the petition for rehearing en banc) (“[T]his is not a problem that we can solve . . . [W]e are bound by the Supreme Court. I, for one, would welcome further explication of eligibility standards in the area of diagnostics patents Such an explication might come from the Supreme Court. Or it might come from Congress”); *id.* at 1352 (Moore, J., dissenting from the denial of the petition for rehearing en banc) (“The majority of my colleagues believe that our hands are tied and that *Mayo* requires this outcome. I believe *Mayo* does not.”).

contrast, *American Axle* was primarily a deadlock situation: there was no consensus among the Circuit judges over whether a panel decision was consistent with the *Mayo* framework and what to do about it.¹⁹

If an appeals court gets stuck because of hand-tying or deadlocks, there is currently no recourse other than to wait indefinitely for an event that can break the impasse—such as congressional action, the grant of certiorari, personnel changes (at the circuit court or at the Supreme Court), or a judge changing their mind—during which time suboptimal precedents may become entrenched and intra-circuit splits may deepen, which, for the Federal Circuit, could impair the execution of its mandate to maintain uniformity, stability, and coherence in patent law precedents. Also, the nationwide reach of the Federal Circuit’s decisions resulting from its exclusive jurisdiction amplifies the impact of delays in Supreme Court review.

To complicate matters, the Federal Circuit might also be more vulnerable to getting stuck than the regional circuit courts. Because of the Federal Circuit’s exclusive jurisdiction, there is no intercircuit percolation of patent law, so it cannot look to the other circuits for new ideas and alternative approaches. Accordingly, the Federal Circuit may be more reliant on the Supreme Court for help. At the same time, the absence of circuit splits in patent law deprives the Federal Circuit of a key objective signal of certworthiness that the Supreme Court relies on heavily when considering

19. *Am. Axle & Mfg., Inc. v. Neapco Holdings LLC*, 966 F.3d 1347, 1348 (Fed. Cir. 2020) (Dyk, J., concurring in the denial of the petition for rehearing en banc) (“We agree that en banc review was not warranted. The panel opinion is both consistent with precedent and narrow in its scope.”); *id.* at 1361 (Stoll, J., dissenting from the denial of the petition for rehearing en banc) (“[T]he majority’s decision extends § 101 to place in doubt the patent eligibility of historically eligible mechanical inventions The majority asserts that its ‘nothing more’ test is not new, and is instead firmly grounded in precedent I disagree.”).

certiorari (or “cert”) petitions.²⁰ As a result, the Supreme Court may have more difficulty recognizing when review is necessary in patent cases, thereby rendering high court review of patent law issues highly uncertain and unpredictable. This sets up a paradoxical situation: among the federal courts of appeals, the Federal Circuit may be more reliant on the Supreme Court to get unstuck, but may have a harder time getting the high court’s attention because it cannot use the primary mechanism for signaling certworthiness that is available to the other circuits.

If the vagaries of the Supreme Court’s certiorari procedure seem to be more problematic for the Federal Circuit than for the other circuits, some might view the “real” problem to be the Federal Circuit’s exclusive jurisdiction over patent appeals.²¹ However, this jurisdictional quirk may have the effect of revealing more vividly the limitations and weaknesses of the certiorari process, for which various reforms have been proposed over the past several decades.²² Assuming that Congress will not change the Federal Circuit (or get rid of it) anytime soon, it is worth exploring how the high court’s agenda-setting process could be made more robust in light of the Federal Circuit’s experience. Indeed, an improved mechanism for obtaining Supreme Court review of Federal Circuit cases might also provide clues to analogous

20. See *infra* note 61 and accompanying text.

21. Several commentators, including a federal appellate judge, have proposed eliminating the Federal Circuit’s exclusive jurisdiction over patent appeals. See, e.g., Craig Allen Nard & John F. Duffy, *Rethinking Patent Law’s Uniformity Principle*, 101 NW. U. L. REV. 1619, 1625 (2007) (“We propose that, in addition to the Federal Circuit, at least one extant circuit court should be allowed to hear district court appeals relating to patent law.”); Hon. Diane P. Wood, *Keynote Address: Is It Time to Abolish the Federal Circuit’s Exclusive Jurisdiction in Patent Cases?*, 13 CHI.-KENT J. INTEL. PROP. 1, 9 (2013) (“Under the alternative regime I envision, parties . . . could take their appeals to the Federal Circuit . . . or they could file in the regional circuit in which their claim was first filed.”).

22. See *infra* Section I.C.

solutions for the regional circuits.

Accordingly, this Article proposes the creation of a mechanism that would allow the Federal Circuit to bypass the Supreme Court's certiorari haystack in order to secure timely review of those issues that are important to the day-to-day administration of justice. Specifically, Congress should give the judges of the Federal Circuit the power to periodically invoke (e.g., once a year)—through a majority vote of its regular active judges—the Supreme Court's mandatory jurisdiction, in order to secure review of a case or issue. The invocation of mandatory jurisdiction would occur through either of two routes: mandatory appellate jurisdiction or mandatory certified question jurisdiction.

Under the proposal, *mandatory appellate jurisdiction* would be invoked as follows: When entering judgment or an order denying rehearing in a case, the Federal Circuit would issue alongside it a notice certifying that a majority of its judges in regular active service believe that Supreme Court review of particular questions is warranted. This notice would then permit a dissatisfied party to file an *appeal as of right* (rather than a petition for a writ of certiorari) to secure Supreme Court review on the specific questions identified in the Federal Circuit's notice. (Any other questions in the case would be considered by the high court only on a discretionary basis.) Relatedly, the invocation of *mandatory certified question jurisdiction* would take the following form: prior to the entry of judgment or during the consideration of a petition for rehearing, the vote of a majority of Federal Circuit judges in regular active service can be used to trigger Supreme Court review of particular questions.

In essence, this proposal creates an additional pathway for Supreme Court review that can be invoked directly by the Federal Circuit judges themselves. It provides a mechanism for the Federal Circuit to directly hand the Supreme Court a needle that would likely be added to—and get buried in—the certiorari haystack otherwise. In doing so, it allows the Federal Circuit judges to obtain timely review of a case

posing issues that can have a substantial impact on the day-to-day administration of justice, but which the Federal Circuit cannot resolve itself because the judges are deadlocked or believe that their hands are tied by Supreme Court precedent. Although a majority of Federal Circuit judges might refuse to sit en banc in hand-tying or deadlock situations due to futility, there could be occasions (such as *Athena* and *American Axle*) when a majority might find it more productive to invoke high court review instead.

By empowering an inferior tribunal to force a superior one to review a matter, the proposal strengthens the feedback loop between them to enhance cross-hierarchical accountability in precedent management. Given that the impact of the Supreme Court's interventions in patent cases has been decidedly mixed,²³ there needs to be a stronger feedback loop between the Federal Circuit and the high court that allows the circuit court to seek clarification or course-correction when necessary.

The idea of having one court directly ask another court to review a legal issue exists in a variety of forms and court systems, such as the certification of questions of state law to state supreme courts by a federal court²⁴ and the practice of national courts in the European Union to refer questions to the Court of Justice.²⁵ Within the federal court hierarchy, a

23. See Golden, *supra* note 6, at 686 (“[Supreme] Court review of any particular question in patent law has typically been rare in occurrence and spotty in performance.”).

24. See Bennet Cooper, *Certification of Questions of Law to State Supreme Courts*, REUTERS (June 22, 2021, 2:46 PM CDT), <https://www.reuters.com/legal/legalindustry/certification-questions-law-state-supreme-courts-2021-06-22/>.

25. *Presentation*, COURT OF JUSTICE OF THE EUROPEAN UNION, https://curia.europa.eu/jcms/jcms/Jo2_7024/en/ (last visited Aug. 15, 2021) (“[T]he national courts may, and sometimes must, refer to the Court of Justice and ask it to clarify a point concerning the interpretation of EU law, so that they may ascertain, for example, whether their national legislation complies with that law.”).

certification procedure does exist by which the federal appellate courts can seek guidance from the Supreme Court on a question of law.²⁶ However, it is rarely, if ever, used because the high court routinely declines to consider certified questions.²⁷ This, when combined with the near elimination of its mandatory appellate jurisdiction, gives the Supreme Court practically unfettered discretion over its docket. For this reason, this Article proposes empowering the Federal Circuit to directly invoke mandatory review by the Supreme Court, in order to secure timely review of important issues without relying on the exercise of discretion by the high court or the efforts of litigants, who have their own agendas.

Allowing the Federal Circuit to force Supreme Court review—even if it is just one case a year—would have a salutary effect on the development of patent law precedents. First, the possibility of forced reviews (and the forced reviews themselves), may prompt the high court to become more attuned to the workability of its precedents, their practical implications, and the realities at the Federal Circuit, which bears the burden of operationalizing Supreme Court caselaw in furtherance of its mandate to create and maintain a uniform, coherent body of patent decisional law.²⁸ Second, by giving Federal Circuit judges the ability to force review, it may lessen the need for them to engage in signaling behavior, such as dissenting and writing separate opinions, in order to attract the attention of the Supreme Court. Excessive signaling efforts can aggravate not only intra-

26. 28 U.S.C. § 1254(2).

27. *See* *United States v. Seale*, 558 U.S. 985, 986 (2009) (mem) (Stevens, J., dissenting from dismissal of certified question) (“The certification process has all but disappeared in recent decades. The Court has accepted only a handful of certified cases since the 1940s and none since 1981; it is a newsworthy event these days when a lower court even tries for certification.”).

28. *See* *Golden*, *supra* note 6, at 663 (“The [Supreme] Court’s limited competence can render it blind to problems that apparently innocuous aspects of its opinions will create.”).

circuit disagreements but also provide fodder for en banc and certiorari petitioning activity by the litigants, which, in turn, feeds the en banc and certiorari haystacks. Third, the proposal allows the Federal Circuit's expertise to better inform the high court's agenda in an area of law where the Justices' incursions are sporadic.²⁹ Fourth, the proposal sets up, in essence, a "hotline" between the Circuit judges and the Supreme Court Justices that bypasses the certiorari haystack. Although the literature contains a wealth of commentary about the relationship between the Federal Circuit and the Supreme Court, and its implications for patent law, more attention should be directed to exploring potential mechanisms that can help facilitate (or even force) cooperation between the two courts.

To streamline the discussion of the proposal, much of the analysis will focus on patent decisional law, as it provides a salient example for illustrating the dynamics between the Federal Circuit and the Supreme Court. It should be understood, however, that the proposal is intended to be usable by the Federal Circuit for all types of cases under its jurisdiction, including its non-patent docket.³⁰

More broadly, the proposal addresses a problem encountered by all federal appellate courts: the inability to obtain timely, updated guidance from the high court due to the vagaries of its certiorari process. Because the courts of appeals perform the hard work of converting the Supreme Court's lofty pronouncements into precedents that are usable on a day-to-day basis,³¹ deadlocks and hand-tying can leave

29. See *infra* Section II.C.

30. See 28 U.S.C. § 1295.

31. Rochelle C. Dreyfuss, *Percolation, Uniformity, and Coherent Adjudication: The Federal Circuit Experience*, 66 SMU L. REV. 505, 526 (2013) [hereinafter Dreyfuss, *Percolation*] ("The Supreme Court is very good at articulating norms and identifying policy considerations that the lower courts did not consider or properly weigh. However, it often leaves the hard work of implementing its approach to further development below.").

precedents stuck in a suboptimal state. Greater attention should be paid to ensuring that there are robust mechanisms for making timely corrections or modifications to the precedents applied by the federal courts of appeals because they are effectively the courts of last resort in the vast majority of cases, given the limited opportunities for Supreme Court review.³²

This Article proceeds in three parts. Part I highlights the limitations and weaknesses of the Supreme Court's certiorari practice, with a focus on the behavioral and situational factors that may result in the denial of an otherwise certworthy petition that raises issues important to the Federal Circuit's stewardship of decisional patent law.

Part II proposes a mechanism that would allow the Federal Circuit, by a vote of a majority of its judges in regular active service, to invoke the Supreme Court's mandatory jurisdiction to obtain timely review of important cases and issues. This Part sets forth the details of the mechanism's implementation, operational considerations, and expected benefits.

Part III addresses caveats of the proposal, objections, and other considerations, including the suitability of extending this proposal to the regional circuits in the rest of the federal court system. A brief Conclusion follows.

I. OVERVIEW OF THE PROBLEM

A. *Limitations of En Banc Proceedings*

Before considering any changes to the relationship between the Federal Circuit and the Supreme Court, some may wonder if the existence of a deadlock at the Federal Circuit, or the insistence of its judges that their hands are

32. See *Textile Mills Sec. Corp. v. Comm'r*, 314 U.S. 326, 335 (1941) (“[I]n our federal judicial system [circuit] courts are the courts of last resort in the run of ordinary cases.”).

tied, are primarily artifacts that arise out of the difficulty of sitting en banc, which is generally disfavored by the federal appellate courts,³³ including the Federal Circuit.³⁴ Appellate courts try to avoid sitting en banc too often because it is perceived to be a labor-intensive endeavor³⁵ that undermines collegiality,³⁶ with no guarantee that the state of the law will be improved.³⁷ This raises the question: if the en banc process were reformed, would the proposal in this Article for

33. FED. R. APP. P. 35(a) (“An en banc hearing or rehearing is not favored and ordinarily will not be ordered . . .”).

34. See Perry Cooper, *Full Court Patent Review Bids Often ‘Waste of Time,’ Judge Says*, BLOOMBERG L. (Feb. 23, 2021, 4:55 AM), <https://news.bloomberglaw.com/ip-law/full-court-patent-review-bids-often-waste-of-time-judge-says> [hereinafter Cooper, *Full Court*] (“The losing party seeks en banc rehearing in a majority of patent cases . . . [at] the Federal Circuit Few are granted Most petitions for rehearing are ‘a waste of time and a waste of money,’ [Judge Todd Hughes] said.”).

35. See Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981-1990*, 59 GEO. WASH. L. REV. 1008, 1020 (1991) (estimating that, at the District of Columbia Circuit, “one case reheard en banc consumes as much of the court’s resources as five or six cases heard by a panel”).

36. See William C. Rooklidge & Matthew F. Weil, *En Banc Review, Horror Pleni, and the Resolution of Patent Law Conflicts*, 40 SANTA CLARA L. REV. 787, 795 (2000) (“Judges being human, en banc cases can cause friction between the judges on the Federal Circuit.”); Patricia M. Wald, *Changing Course: The Use of Precedent in the District of Columbia Circuit*, 34 CLEV. ST. L. REV. 477, 488 (1986) (“No judge likes to have her opinions en banc, and although she may expect it from those with whom she frequently disagrees, she may resent it from usual allies. Some judges do indeed regard a vote in favor of en bancing *their* cases as tantamount to betrayal.”); see also Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 218 n.23 (1999) (collecting sources). The extent to which collegiality may be a factor that militates against en banc sittings can differ among the circuits due to variations in the level collegiality. See Marcia Coyle, *When Rulings, Respectfully, Offer Peek Behind Curtains at Court Collegiality*, LAW.COM (Mar. 11, 2021, 3:11 PM), <https://www.law.com/nationallawjournal/2021/03/11/when-rulings-respectfully-offer-peek-behind-curtains-at-court-collegiality/>.

37. See Ginsburg & Falk, *supra* note 35, at 1019–20.

forcing Supreme Court review still be necessary? The short answer is “yes.”

As of this writing in early 2023, the last time the en banc Federal Circuit reviewed a patent case was in 2018, when it decided a couple of procedural issues related to litigation involving the PTO and the agency’s internal tribunal, the Patent Trial and Appeal Board (PTAB).³⁸ The circuit court’s most recent en banc opinions pertain to federal employment and veterans matters.³⁹ To some, this data might suggest that the Federal Circuit is not sitting en banc often enough on patent issues. Another interpretation could be that certain issues warranting attention by the full court have evolved to a stage where en banc proceedings—including repeat sittings⁴⁰—might be futile. For additional context, a study by Peter Menell and Ryan Vacca reveals that the Federal Circuit’s average en banc rate for patent cases from 1988 to 2017 was 0.29%, which is similar to the combined average en banc rate of the regional circuits (0.26%).⁴¹ On a year-to-year basis, however, there is considerable variance in the rate at which the Federal Circuit decides patent cases en

38. *Click-To-Call Techs., LP v. Ingenio, Inc.*, 899 F.3d 1321, 1328 n.3 (Fed. Cir. 2018) (footnote 3 decided en banc), *vacated and remanded sub nom. Thryv, Inc v. Click-To-Call Techs., LP*, 140 S. Ct. 1367 (2020); *Wi-Fi One, LLC v. Broadcom Corp.*, 878 F.3d 1364 (Fed. Cir. 2018) (en banc), *abrogated by Thryv, Inc v. Click-To-Call Techs., LP*, 140 S. Ct. 1367 (2020); *Nantkwest, Inc. v. Iancu*, 898 F.3d 1177 (Fed. Cir. 2018) (en banc), *aff’d sub nom. Peter v. Nantkwest, Inc.*, 140 S. Ct. 365 (2019).

39. *E.g.*, *Adams v. United States*, 59 F.4th 1349 (Fed. Cir. 2023) (en banc); *Rudisill v. McDonough*, 55 F.4th 879 (Fed. Cir. 2022) (en banc).

40. *See* Rochelle Cooper Dreyfuss, *The Federal Circuit: A Continuing Experiment in Specialization*, 54 CASE W. RES. L. REV. 769, 775–76 (2004) [hereinafter Dreyfuss, *Continuing Experiment*] (noting “the [Federal Circuit’s] failure to agree on core policy, even after a period of experimentation, and even when cases have been the subject of en banc review”).

41. Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity “Crisis”: Charting A Path for Federal Judiciary Reform*, 108 CALIF. L. REV. 789, 862 (2020).

banc—from 0% to 0.8%⁴²—which illustrates the episodic nature of en banc sittings. As such, the recent lull in en banc patent cases might not be out of the ordinary for the Federal Circuit.

That being said, various proposals exist in the literature for reforming different aspects of the en banc process, such as: the criteria for en banc-worthiness (e.g., allowing en banc suggestions to be raised only by the judges *sua sponte*⁴³ or adopting “objective” criteria⁴⁴); the voting threshold for en banc review;⁴⁵ and the staffing of en banc panels (e.g., relying on visiting judges from different circuits⁴⁶). To the extent some of these proposals would decrease the number of en banc sittings, it could aggravate the problem of suboptimal precedents remaining entrenched. On the flip side, it is unclear whether increasing the number of sittings—such as by lowering the en banc voting threshold⁴⁷ to some level below a majority—would appreciably improve the situation. The danger of lowering the voting threshold—such as adopting a version of the Supreme Court’s “rule of four” for

42. *Id.* at 862 fig.23.

43. Alexandra Sadinsky, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 *FORDHAM L. REV.* 2001, 2034 (2014).

44. Michael E. Solimine, *Ideology and En Banc Review*, 67 *N.C. L. REV.* 29, 29 (1988).

45. Sadinsky, *supra* note 43, at 2034 (less than a majority of judges in regular active service); Note, *The Politics of En Banc Review*, 102 *HARV. L. REV.* 864, 883 (1989) (supermajority). Notably, when Congress was considering proposals to reform the Ninth Circuit in the late 1990s, Senator Dianne Feinstein introduced a bill to lower the en banc threshold to 40% for the Ninth Circuit. *See Ninth Circuit Court of Appeals En Banc Procedures Act of 1999*, S. 1403, 106th Cong. (1999).

46. Michael Abramowicz, *En Banc Revisited*, 100 *COLUM. L. REV.* 1600, 1600 (2000).

47. 28 U.S.C. § 46(c) (specifying that the voting threshold for an en banc sitting is a “majority of the circuit judges of the circuit who are in regular active service”); *see also* FED. R. APP. P 35(a).

granting cert⁴⁸—is that en banc review might occur so often that it adversely affects the stability of precedents or leads to a proliferation of fractured en banc opinions.⁴⁹

Finally, changing the make-up of the en banc panel, such as using visiting judges, is unlikely to eliminate the problem of hand-tying and deadlocks, which may occur eventually when a multimember court needs to make a decision as a group. Different groups of twelve⁵⁰ judges may deadlock over different issues at different frequencies.⁵¹ Similarly, one group of twelve judges might believe that their hands are tied by a particular Supreme Court decision, while a second group might read the same decision less restrictively, and vice versa for a different case. In essence, the occurrence of deadlocks and hand-tying may be a matter of *when*, not if, so long as the en banc process involves deliberation by a group of judges.

48. See *Donnelly v. DeChristoforo*, 416 U.S. 637, 648 (1974) (Stewart, J., concurring) (“[The ‘rule of four’] ordains that the votes of four Justices are enough to grant certiorari and bring a case before the Court for decision on the merits.”).

49. See Cooper, *Full Court*, *supra* note 34 (“[Federal Circuit Judge] Hughes pointed to the court’s 2017 en banc decision in *Aqua Products Inc. v. Matal* . . . The court’s judges wrote five opinions spanning 148 pages, and no single opinion had enough votes to be controlling. ‘That case almost broke me,’ Hughes said. ‘It didn’t really decide anything’”); see also Jon O. Newman, *In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 BROOK. L. REV. 365, 383 (1984) (“[A]n in banc rehearing . . . frequently produces either a single majority opinion that is deliberately vague at key points in order to gain broad support within a court, or several opinions that express the differing views of groups of judges unable to join a definitive majority opinion.”).

50. This is the number of active judges authorized for the Federal Circuit. See 28 U.S.C. § 44(a).

51. Deadlocks occur even at the Supreme Court—a well-known example being the “stream of commerce” theory in personal jurisdiction, regarding which the Court has deadlocked repeatedly, such that no clear, majority position exists on the issue. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011) (4-2-3 deadlock); *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102 (1987) (4-4-1 deadlock).

Accordingly, the proposal in this Article for facilitating Supreme Court review will very likely still be needed even if the en banc process were to be reformed. The proposal will thus complement, rather than replace, the en banc process in the management of Federal Circuit precedents. Whether and how the Federal Circuit's en banc process should be changed are issues beyond the scope of this Article, which focuses on improving the composition of the Supreme Court's plenary docket.

B. *Current State of Supreme Court Agenda-Setting in Patent Cases*

1. No Circuit Splits in Patent Law

When the Federal Circuit is unable or unwilling to sit en banc because of concerns about futility arising from deadlocked judges and/or hand-tying, Supreme Court review might be a way to get the circuit court (and its precedents) unstuck. According to John Golden, the Supreme Court may be envisioned as the “prime percolator” of patent law, whereby the high court's periodic forays into patent law “can help initiate escapes from suboptimal legal equilibria”⁵² by acting as a “catalyst for new or renewed judicial examination of issues” by the Federal Circuit.⁵³

At present, timely Supreme Court review is difficult to obtain because its docket is almost completely discretionary.⁵⁴ The guidelines for exercising that discretion are provided in Supreme Court Rule 10, entitled “Considerations Governing Review on Certiorari,” which lists three considerations that are “neither controlling nor fully measuring the Court's discretion.”⁵⁵ The first two

52. Golden, *supra* note 6, at 657.

53. *Id.* at 663.

54. *See infra* note 121 and accompanying text.

55. SUP. CT. R. 10.

considerations relate to inter-court conflicts, such as circuit splits and conflicts involving state courts of last resort on federal questions.⁵⁶ The third consideration focuses on whether there is an “important question of federal law.”⁵⁷ Because there are no circuit splits for issues falling under the Federal Circuit’s exclusive jurisdiction—such as substantive patent law—the certworthiness of patent cases will likely turn on whether they raise an “important question.” But the “important question” standard is rather vague, if not “tautological[],”⁵⁸ as “[t]here is no formula that reveals the precise amount of importance that will move the Court to grant certiorari.”⁵⁹

The rarity and unpredictability of Supreme Court review may be more troublesome for the Federal Circuit than the regional circuits, as intra-circuit conflicts are more problematic in the former, given its mandate to keep patent law uniform and coherent. While regional circuit courts can look to the other circuits for ideas on how to proceed in the absence of Supreme Court review, the Federal Circuit is on its own: because it is the exclusive forum for patent appeals, it cannot look to the other circuits for ideas on resolving doctrinal difficulties in substantive patent law.⁶⁰ For this

56. *Id.* at R. 10(a)–(b).

57. *Id.* at R. 10(c).

58. H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 34 (1991) (“With the exception of specifying certain types of conflicts, [the Justices] have essentially defined certworthiness tautologically; that is, that which makes a case important enough to be certworthy is a case that we consider to be important enough to be certworthy.”).

59. STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, *SUPREME COURT PRACTICE* § 4.11 (11th ed. 2019).

60. For this reason, some scholars have suggested that at least one additional circuit be allowed to hear patent appeals to enhance percolation. *See* Nard & Duffy, *supra* note 21, at 1625. The proposal suggested in the present Article may also be useful in the event Nard and

reason, compared to the other circuits, the Federal Circuit may be more dependent on the Supreme Court for help when it gets stuck. Paradoxically, however, it may be more difficult for the Federal Circuit to signal to the Supreme Court when help is needed. This is because the Supreme Court relies heavily on the presence of a circuit split as an objective signal of certworthiness⁶¹—which cannot exist on an issue of patent law because of the Federal Circuit’s exclusive jurisdiction. While dissenting opinions at the Federal Circuit may indicate an internal “split,” they may not carry the signaling weight of a circuit split.⁶² Indeed, given the history of decisional disagreement at the Federal Circuit,⁶³ the signal-to-noise ratio may be too low for dissents to be a reliable indicator of when high court review is warranted.⁶⁴

Duffy’s suggestion is adopted, as all appellate courts are susceptible to getting stuck from time to time, not just the Federal Circuit.

61. See Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705, 715 (2018) (noting that “the paramount factor [of certworthiness] is the presence of a ‘split’”); David R. Stras, *The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 981–82 (2007) [hereinafter Stras, *Gatekeepers*] (reporting results of study finding that during the 2003–2005 Terms, nearly 70% of plenary cases involved a split).

62. See Christa J. Laser, *Certiorari in Patent Cases*, 48 AIPLA Q.J. 569, 573, 583–84 (2020) (synthesizing “interviews with former Supreme Court clerks and others involved in the certiorari process” and reporting that “[a]lthough dissents from denial of en banc review or divided decisions en banc provide some indication to the Supreme Court of the contentiousness of an issue, the author understands from the interviewees . . . that they are not considered equivalent to a circuit split”). By contrast, former Federal Circuit Chief Judge Helen Nies was of the view that, in some cases, “I have no doubt that the dissents provided an impetus for Supreme Court review.” Helen Wilson Nies, *Dissents at the Federal Circuit and Supreme Court Review*, 45 AM. U. L. REV. 1519, 1520 (1996).

63. See *infra* note 266 and accompanying text.

64. See Mark D. Janis, *Patent Law in the Age of the Invisible Supreme Court*, 2001 U. ILL. L. REV. 387, 407 (2001) (“Supreme Court attention to Federal Circuit dissents could be counterproductive; it may set the review threshold too low, allowing the views of a single Federal Circuit

Although the Supreme Court has been paying greater attention to the Federal Circuit over the past decade,⁶⁵ there is no guarantee that an issue critical to the latter's competent stewardship of patent law will be reviewed in a timely manner by the former, if ever. More generally, the Supreme Court has been criticized for its shrinking docket⁶⁶ and for not having the "right" mix of cases,⁶⁷ with commentators calling for the high court to pay greater attention to cases that can resolve conflicts in the lower courts and provide guidance on matters important to the fair and orderly administration of justice,⁶⁸ rather than acting as a "superlegislature" that sits chiefly to proclaim new law to govern future transactions and relations."⁶⁹

To select the eighty or so cases for plenary review from the thousands of certiorari petitions filed each year,⁷⁰ the Supreme Court relies on an imperfect process that may result in important cases being deprioritized or overlooked

judge to trigger Supreme Court intervention.”).

65. See Laser, *supra* note 62, at 571 (“In the decade from 2010 to 2019, the Supreme Court has decided more patent law cases than in the prior three decades combined and nearly twice that of any prior decade since the 1952 Patent Act.”).

66. See, e.g., Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403 (1996).

67. See, e.g., Epps & Ortman, *supra* note 61, at 706–08.

68. See, e.g., Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 622 (2009) (“[T]he Supreme Court has in recent decades left many, many questions unresolved, despite conflicts in circuit court opinions.”); Amanda L. Tyler, *Setting the Supreme Court's Agenda: Is There A Place for Certification?*, 78 GEO. WASH. L. REV. 1310, 1313 (2010).

69. Carrington & Cramton, *supra* note 68, at 590.

70. *The Supreme Court at Work*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/courtatwork.aspx> (last visited Aug. 4, 2021) (“Each Term, approximately 5,000-7,000 new cases are filed in the Supreme Court Plenary review, with oral arguments by attorneys, is currently granted in about 80 . . . cases each Term”).

due to a variety of situational and behavioral factors. To the extent that certain aspects of the Supreme Court's case selection process may be susceptible to bias, manipulation, or error, they could potentially be worse in patent cases because of the absence of circuit splits as an objective signal of certworthiness. To see why, the Sections that follow highlight and synthesize some of the more common theories and understandings in the literature regarding how the high court's docket may be shaped by the Supreme Court bar, amicus briefs, the cert pool, the Solicitor General, and the Justices' preferences—in the context of patent cases.

2. The Supreme Court Bar, Amicus Briefs, and the Cert Pool

In the literature on the high court's agenda-setting process, the Supreme Court bar and the cert pool often take a starring role; in patent cases, the literature suggests that their influence might be heightened. This is because, in highly complex or technical areas of the law (such as patent law), the Supreme Court, as a generalist tribunal, may have difficulty assessing the significance of an issue without being “schooled in the relevant law and facts by parties and amici,” who have their own agendas.⁷¹ As John Golden observes, “it should not be surprising if the Supreme Court's lack of expertise makes it particularly prone to manipulation or error.”⁷² Some commentators, such as Richard Lazarus, suggest that the Supreme Court might be especially dependent on—and thus susceptible to being influenced by—the members of the elite Supreme Court bar when deciding whether to grant review in complex and technical areas of the law.⁷³ According to Lazarus, the Supreme Court bar is

71. Golden, *supra* note 6, at 689; *see also* Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1549 (2008).

72. Golden, *supra* note 6, at 689.

73. *See* Lazarus, *supra* note 71, at 1548–49.

“disproportionately successful at the jurisdictional stage.”⁷⁴ Although only about 1% of certiorari petitions are granted, the petitions filed by “the leading private law firms” are granted at “a far higher rate than 1% and as high as almost 25% for some years.”⁷⁵ Similarly, in patent cases, Paul Gugliuzza found that “a cert petition filed by an elite advocate is three times more likely to be granted than a petition filed by a lawyer outside that group.”⁷⁶

The skill of the elite Supreme Court advocates lies in “their ability to respond to signals from the Justices concerning what legal issues and cases most interest them and then go out and find those cases and properly present them before the Court.”⁷⁷ The elite advocates are also highly skilled in lining up amicus support,⁷⁸ which, in patent cases, is “positively correlated with the grant of certiorari.”⁷⁹ Such efforts, in turn, could potentially skew the high court’s docket to include a disproportionate number of cases that focus on the concerns of the parties (usually businesses) that can afford to hire them.⁸⁰ Lazarus points to the business-oriented

74. *Id.* at 1515.

75. *Id.*

76. Paul R. Gugliuzza, *The Supreme Court Bar at the Bar of Patents*, 95 NOTRE DAME L. REV. 1233, 1236 (2020).

77. Lazarus, *supra* note 71, at 1530.

78. See Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1903 (2016) (“Today, elite, top-notch lawyers help shape the Court’s docket by asking other elite lawyers to file amicus briefs requesting that the Court hear their case.”).

79. Colleen V. Chien, *Patent Amicus Briefs: What the Courts’ Friends Can Teach Us About the Patent System*, 1 UC IRVINE L. REV. 395, 422 (2011).

80. See Lazarus, *supra* note 71, at 1530 (“The expert Supreme Court advocates do not merely discern the existing priorities of the Justices. They deliberately and systematically educate the Justices concerning what the priorities should be.”); see also *id.* at 1561 (“It is at the certiorari stage that many well-represented petitioners persuade the Court to grant review in cases that may not be particularly certworthy and also

shift in the Supreme Court's docket as indicative of this phenomenon.⁸¹ In patent cases, Gugliuzza notes that "elite [Supreme Court] lawyers disproportionately seek review on behalf of accused infringers (as opposed to patentees), who would stand to benefit from caselaw that makes it easier to challenge patent validity and to defeat a claim of infringement."⁸²

With the goal of securing a grant of certiorari, advocates may emphasize certain narratives in their cert petitions and amicus briefs. For patent cases, the Federal Circuit's reputation for patent exceptionalism and preference for rigid, bright-line rules⁸³ are items which the "present Supreme Court advocates have learned to highlight when their case fits within this preexisting narrative."⁸⁴ This strategy is understandable, given that a variety of Supreme Court patent cases involving patent litigation procedure, substantive patent law, and remedies arguably fit this narrative.⁸⁵ However, this may leave certworthy Federal

bolster the chances of winning before the Court through the strategic selection of especially favorable factual contexts.”).

81. See Lazarus, *supra* note 71, at 1531–32.

82. Gugliuzza, *supra* note 76, at 1269.

83. Laser, *supra* note 62, at 602 (summarizing interviews with former Supreme Court law clerks and others involved in the certiorari process); see also Peter Lee, *The Supreme Assimilation of Patent Law*, 114 MICH. L. REV. 1413, 1416 (2016); Tejas N. Narechania, *Certiorari, Universality, and a Patent Puzzle*, 116 MICH. L. REV. 1345, 1388–90 (2018) [hereinafter Narechania, *Universality*].

84. Laser, *supra* note 62, at 603 (summarizing interviews with former Supreme Court clerks and others involved in the certiorari process).

85. Examples of cases where the Supreme Court rejected the Federal Circuit's rigid rule or patent exceptionalism (or both), include: *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545 (2014) (attorney fee awards); *Bilski v. Kappos*, 561 U.S. 593 (2010) (patent eligibility); *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007) (obviousness); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007) (declaratory judgment jurisdiction); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) (permanent injunctions); *Festo Corp. v. Shoketsu*

Circuit cases that do not fit the patent exceptionalism/formalism narrative vulnerable to being deprioritized—such as a case seeking to revisit a flexible, context-dependent rule (e.g., the *Mayo* framework for patent eligibility) created by the Supreme Court itself.⁸⁶

Seasoned Supreme Court advocates are also acutely aware of the dynamics of the “cert pool,” which is an oft-cited factor in the Court’s shrinking plenary docket.⁸⁷ The “cert pool” is an internal procedure the Supreme Court adopted to handle the high volume of petitions it receives, whereby “[i]nstead of having nine clerks, one from every chambers, each write a memorandum on a petition for certiorari, one clerk prepares a memorandum that is then circulated to all of the Justices participating in the pool” to inform their decisions on whether to grant review.⁸⁸ Many of the law clerks who author these “cert pool” memos are recent graduates with only a year or two of experience; as such, they may be risk-averse and thus prone to recommending that review be denied.⁸⁹ The sheer number of petitions requires law clerks to make quick judgments, which may leave them susceptible to relying on heuristics and other practices that may bias the consideration of petitions (unconsciously or otherwise), such as avoiding cases involving complicated technologies⁹⁰ or paying closer attention to petitions filed by

Kinzoku Kogyo Kabushiki Co., 535 U.S. 722 (2002) (prosecution history estoppel).

86. For a discussion of how the Supreme Court’s interventions could have potentially increased the level of decisional disagreement at the Federal Circuit, see *infra* notes 266–270 and accompanying text.

87. Lazarus, *supra* note 71, at 1509 n.100 (collecting and synthesizing sources).

88. Stras, *Gatekeepers*, *supra* note 61, at 972.

89. See Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1376–77 (2006) (noting the existence of “a hydraulic pressure to say no” for Supreme Court law clerks).

90. Laser, *supra* note 62, at 605 (“[I]nterviewees indicated that in

elite Supreme Court advocates.⁹¹

Because some Justices may rely solely on the law clerks' memos in deciding whether to grant review,⁹² certworthy cases that might have been selected by those with more experience with the subject matter and time for review may get overlooked.⁹³ This is a particular concern for petitions directed to highly complex, technical areas of the law, such as patent law, as well as those originating from specialized (or relatively obscure) tribunals, such as the Federal Circuit. Related to this latter point, Christa Laser's interviews with former Supreme Court law clerks and others involved in the certiorari process reveal that: "On the issue of certainty, the interviewees . . . stated that the effect of a Supreme Court decision on the certainty and stability of patent law was not a factor that clerks frequently considered or wrote about in their certiorari memos."⁹⁴

3. The Solicitor General and the CVSG Procedure

Of the parties and amici to appear before the Supreme Court, the Solicitor General's influence at the certiorari stage is unmatched. This influence is exercised when the Supreme Court issues a "Call for the Views of the Solicitor General" (CVSG) to get the Solicitor General's recommendation on whether to grant review. The CVSG procedure allows the Justices to get the input of someone whom they consider an

patent cases, clerks pay attention to the technical complexity of a case, avoiding cases with particularly complicated technology even if as a legal matter they present a fairly clean question to the Court.").

91. Lazarus, *supra* note 71, at 1524–26; *see also* Laser, *supra* note 62, at 604–05 ("One interviewee stated . . . that clerks do recognize the names of leading advocates as a signal that the petition will be well-written and at least non-frivolous . . .").

92. Starr, *supra* note 89, at 1377; *see also* Lazarus, *supra* note 71, at 1523–24.

93. *See* Stras, *Gatekeepers*, *supra* note 61, at 975–76.

94. Laser, *supra* note 62, at 606.

“honest broker” or a “straight shooter.”⁹⁵ In general, the Solicitor General’s views are perceived to “hold particular sway with the Court” in patent cases, given the absence of a circuit split as a signal for review, and the complex legal and technological issues presented.⁹⁶ As John Duffy has observed, the Solicitor General has been put in a position to “wield enormous influence in the long-term development of [patent law].”⁹⁷ Indeed, from 2002 to 2016, the Supreme Court followed the Solicitor General’s recommendation at the certiorari stage in patent cases over 90% of the time.⁹⁸

However, the CVSG procedure provides only a limited safeguard against the Supreme Court overlooking or otherwise failing to take important cases. First, it is invoked sparingly on a discretionary basis.⁹⁹ Recall that the Supreme Court denied cert *without* a CVSG in *Athena*, even though the Federal Circuit’s en banc denial order was accompanied by eight separate opinions expressing the need to revisit the *Mayo* framework,¹⁰⁰ and nearly a dozen amicus briefs were filed in support of the cert petition, including one from a former Chief Judge of the Federal Circuit.¹⁰¹ Notably, the high court denied certiorari in *Athena* even after the Solicitor

95. Thomas W. Merrill, *High-Level, “Tenured” Lawyers*, 61 LAW & CONTEMP. PROBS. 83, 97 (1998).

96. Laser, *supra* note 62, at 600 (reporting views of former Supreme Court law clerks).

97. John F. Duffy, *The Federal Circuit in the Shadow of the Solicitor General*, 78 GEO. WASH. L. REV. 518, 520 (2010).

98. Gugliuzza, *supra* note 76, at 1254–55.

99. From the 2002 to the 2016 Terms, the Solicitor General replied to CVSGs in thirty patent cases. *Id.* This averages out to two CVSGs per Term in recent years when the Supreme Court’s interest in patent cases has been high.

100. See *supra* notes 9–11 and accompanying text.

101. U.S. Supreme Court Docket, *Athena Diagnostics, Inc. v. Mayo Collaborative Servs., LLC* (No. 19-430), available at <https://www.supremecourt.gov/docket/docketfiles/html/public/19-430.html> (last visited Mar. 10, 2023).

General, in its response to a CVSG in a *different* case, provided an unsolicited recommendation for granting review in *Athena*.¹⁰² Second, even when a CVSG is issued and the Solicitor General recommends granting certiorari, there is no guarantee that the high court will follow the recommendation. This happened with the cert petition for *American Axle*.¹⁰³ We can only speculate as to the reasons for the Supreme Court's denial of certiorari despite receiving a recommendation to grant review—perhaps a vehicle problem was discovered or some other reason emerged that is difficult for outside observers to discern.¹⁰⁴

Third, despite its reputation among the Supreme Court Justices as an “honest broker,” the Solicitor General is, at bottom, an entity subject to political influence, whose positions can change with the administration.¹⁰⁵ In preparing a response to a CVSG in a patent case, the Solicitor General usually collaborates with the PTO,¹⁰⁶ whose input may reflect the policy preferences of the incumbent PTO Director.¹⁰⁷ Indeed, the delay in the

102. See Brief for the United States as Amicus Curiae at 22–23, *Hikma Pharms. USA Inc. v. Vanda Pharms. Inc.*, No. 18-817 (U.S. Dec. 6, 2019), 2019 WL 6699397.

103. See *supra* notes 13–16 and accompanying text.

104. See, e.g., Dani Kass, *Justices Seem Less Receptive to SG's Take on IP Cases*, LAW360 (Nov. 10, 2022, 9:09 PM), <https://www.law360.com/articles/1548148/justices-seem-less-receptive-to-sg-s-take-on-ip-cases>.

105. See Duffy, *supra* note 97, at 549–50 (“In evaluating the weight to be given to the Solicitor General's position, the Court should be especially attentive to the *durability* of the position through different administrations and should, in crafting judicial doctrine, try to avoid relying excessively on positions adopted by a particular Solicitor General's Office.”).

106. See Arti K. Rai, *Who's Afraid of the Federal Circuit?*, 121 YALE L.J. ONLINE 335, 341 (2011) (“[T]he PTO co-authored the government brief in fifteen of the sixteen cases involving Solicitor General participation.”).

107. Perry Cooper & Kimberly Strawbridge Robinson, *Government's Delay Pushes Patent Eligibility Out of SCOTUS Term*, BLOOMBERG L.

appointment of Kathi Vidal as the new PTO Director by the Biden Administration¹⁰⁸ was deemed by some observers as a likely contributing factor to the delay in the Solicitor General's response to the CVSG in *American Axle* by over a year.¹⁰⁹ While rare, the Solicitor General and the PTO may not always take the same position on issues of patent law, which raises questions about the extent to which the high court should give weight to the Solicitor General's views, given that the Solicitor General is a generalist while the PTO is an agency with expertise in patent law.¹¹⁰

Finally, due to the U.S. government's multi-faceted interactions with the patent system (e.g., operating the PTO, owning patents,¹¹¹ getting sued for infringement¹¹²), along with the fact that patent cases sometimes raise issues that have effects beyond substantive patent law (such as administrative law), the Solicitor General should not be

(Jan. 7, 2022, 2:35 PM), <https://news.bloomberglaw.com/ip-law/governments-delay-pushes-patent-eligibility-out-of-scotus-term>.

108. U.S. PAT. & TRADEMARK OFF., *USPTO Welcomes New Director Kathi Vidal* (Apr. 13, 2022), <https://www.uspto.gov/about-us/news-updates/uspto-welcomes-new-director-kathi-vidal>.

109. Cooper & Robinson, *supra* note 107. The Supreme Court had requested the CVSG on May 3, 2021, and the Solicitor General responded more than a year later on May 24, 2022, according to the Supreme Court's docket for *American Axle*. See U.S. Supreme Court Docket, *Am. Axle & Mfg., Inc. v. Neapco Holdings LLC* (No. 20-891), available at <https://www.supremecourt.gov/docket/docketfiles/html/public/20-891.html> (last visited Mar. 30, 2023).

110. See Tejas N. Narechania, *Defective Patent Deference*, 95 WASH. L. REV. 869, 873 (2020) ("*Myriad* highlights OSG's practice of sometimes advancing arguments inconsistent with the Patent Office's practices or rationales It is, to be sure, somewhat unusual for the Solicitor General to directly contravene the views advanced by an agency with primary authority over a policy matter.>").

111. See U.S. PAT. & TRADEMARK OFF., *U.S. Government Patents, 2008*, https://www.uspto.gov/web/offices/ac/ido/oeip/taf/govt/govt_toc.htm (last visited Mar. 10, 2023).

112. See 28 U.S.C. § 1498(a).

considered a wholly disinterested party when it weighs in on a patent case, but instead a party who represents competing, sometimes conflicting, interests.¹¹³ Indeed, because the Solicitor General is a repeat player at the Supreme Court, considerations related to preserving the office's credibility or its litigation strategy in future cases might affect how it responds to a CVSG.¹¹⁴

4. Court Membership and the Preferences of Individual Justices

Some commentators are skeptical of the ability of Supreme Court advocates to manipulate the dynamics of the cert pool, at least with respect to patent cases.¹¹⁵ Tejas Narechania argues that the focus on the cert pool and related theories of docket capture “unduly minimizes the role of the justices themselves.”¹¹⁶

Accordingly, an important “meta” consideration that can shape the Supreme Court's certiorari docket may well be its membership. The preferences of individual members of the Court could have substantial effects on the composition of its docket for the simple reason that the Justices exercise “unfettered discretion” in the consideration of certiorari

113. See Drew S. Days, III, *The Solicitor General and the American Legal Ideal*, 49 SMU L. REV. 73, 82 (1995) (observing that the Solicitor General must contend with conflicting considerations such as “who is one's client, how does one separate policy and law, what are long-range as opposed to short-range interests of the United States, and [drawing the line between] one's duty as an advocate for the Executive Branch and one's responsibilities as an officer of the Court.”); Margaret H. Lemos, *The Solicitor General as Mediator Between Court and Agency*, 2009 MICH. ST. L. REV. 185, 194 (2009) (“[C]onflict can develop between the SG and the agencies he represents because the SG simply disagrees—on policy or legal grounds—with the position advanced by the agency.”).

114. See Lazarus, *supra* note 71, at 1495–96.

115. See, e.g., Narechania, *Universality*, *supra* note 83, at 1384–86.

116. *Id.* at 1385.

petitions.¹¹⁷ As noted by Samuel Estreicher and John Sexton, “[w]hen the governing norm of case selection is merely the ‘importance’ of the case . . . the search for certworthy cases is predestined to generate a plenary docket reflecting the particular agenda of shifting coalitions of four or more Justices.”¹¹⁸ The subjective nature of case selection has also been acknowledged by the Justices themselves.¹¹⁹

Notably, an empirical study by Narechania¹²⁰ reveals that after Congress all but eliminated the Supreme Court’s mandatory appellate jurisdiction in the 1980s so as to give the Justices near-total control over their docket,¹²¹ “the Court’s important-questions docket . . . seemed to change substantially whenever the Court’s personnel change[d].”¹²² Along these lines, John Duffy suggests that the arrival of Justice Stephen Breyer in 1994 likely played a part in

117. Margaret Meriwether Cordray & Richard Cordray, *Setting the Social Agenda: Deciding to Review High-Profile Cases at the Supreme Court*, 57 U. KAN. L. REV. 313, 318 (2009) (“[T]he Justices are free to select cases on any basis, constrained ‘solely by their individual subjective notions of what is important or appropriate for review by the Court.’” (quoting Eugene Gressman, *The National Court of Appeals: A Dissent*, 59 A.B.A. J. 253, 255 (1973))).

118. Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court’s Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 791 (1984).

119. See, e.g., WILLIAM O. DOUGLAS, *THE COURT YEARS 1939–1975*, at 175–76 (1980) (opposing the “pooling of law clerks to pass on all petitions on certiorari” on the basis that the “job here is so highly personal, depending on the judgment, discretion, and experience and point of view of each of the nine of us”); WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 265 (1987) (“Whether or not to vote to grant certiorari strikes me as a rather subjective decision, made up in part of intuition and in part of legal judgment.”).

120. Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923 (2022) [hereinafter Narechania, *Important Cases*].

121. See Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, 102 Stat. 662.

122. Narechania, *Important Cases*, *supra* note 120, at 983.

reviving the high court’s interest in patent cases.¹²³ In the ensuing decades, this interest seemingly intensified after the appointment of Chief Justice John Roberts and Justice Samuel Alito in 2005, both of whom Narechania suggests “may have particular preferences favoring legal universality” that could make them especially attentive to concerns about patent exceptionalism.¹²⁴ In recent years, two Justices known for their interest in intellectual property issues have departed the Court: the late Justice Ruth Bader Ginsburg in 2020¹²⁵ and Justice Breyer in 2022.¹²⁶ As of this writing, the full impact of their departures on the frequency of grants and the nature of the questions selected for review in patent cases remains to be seen. Part of the difficulty with assessing a Justice’s impact on an area of the law is that the Court’s published decisions and orders tell only part of the story: we don’t know the extent to which a Justice might have been influential in blocking or derailing the grant of review in potentially significant cases, either by withholding the fourth vote or by discouraging their colleagues from granting cert.

Given the variegated backgrounds of the Justices,¹²⁷ a

123. Duffy, *supra* note 97, at 525 (“Justice Breyer’s appointment in 1994 appears to be at least partly responsible for the Court’s increased number of certiorari grants in patent cases.”). Duffy notes that “[p]atent law, which combines intellectual property with issues of antitrust, regulatory theory, and administrative law, seems like a natural area for Justice Breyer, and his subsequent record . . . in patent cases suggests a strong level of interest in the area.” *Id.* at 524–25.

124. Narechania, *Universality*, *supra* note 83, at 1392.

125. See Ryan Davis, *Ginsburg Remembered as Steadfast Pro-Copyright Voice*, LAW360 (Sept. 21, 2020, 11:26 PM EDT), <https://www.law360.com/articles/1312244/>.

126. See Ryan Davis, *Breyer’s Rulings Shaped by Wariness of Intellectual Property*, LAW360 (Jan. 27, 2022, 8:31 PM EST), <https://www.law360.com/articles/1458997>.

127. *Current Members*, U.S. SUPREME COURT, <https://www.supremecourt.gov/about/biographies.aspx> (last visited Jan. 9, 2023).

patent case might appeal to different Justices for different reasons.¹²⁸ Some Justices might be interested in patent cases primarily due to their intellectual property aspect, while others may see in patent cases a suitable vehicle to address problems in a broader context, such as administrative law, civil litigation, or remedies. This may partly explain the spotty and uneven attention paid to different substantive patent doctrines.¹²⁹ In addition, it is possible that the Justices' decision to grant cert in a patent case may also be influenced by current events and trends. This is suggested by, for example, the spate of patent eligibility cases relating to software and life sciences that were decided from 2010 to 2014¹³⁰—a period of time during which concerns about patent trolls,¹³¹ the high cost of health care,¹³² and patent

128. See generally Timothy R. Holbrook, *Explaining the Supreme Court's Interest in Patent Law*, 3 IP THEORY 62 (2013).

129. For example, one area of the law that appears to be of particular interest to the Justices is the extraterritorial application of U.S. law. From 2007 to 2018, the high court took several cases pertaining to patent infringement issues arising in the context of international supply chains. *E.g.*, *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129 (2018); *Impression Prod., Inc. v. Lexmark Int'l, Inc.*, 137 S. Ct. 1523 (2017); *Life Techs. Corp. v. Promega Corp.*, 580 U.S. 140 (2017); *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007).

130. *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013); *Mayo Collaborative Servs. v. Prometheus Lab'ys, Inc.*, 566 U.S. 66 (2012); *Bilski v. Kappos*, 561 U.S. 593 (2010).

131. In 2011, the Federal Trade Commission issued a report with recommendations for improving patent notice and remedies. FED. TRADE COMM'N, *THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION* 116 (2011), <https://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf>.

132. In 2010, Obamacare was enacted. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

reform¹³³ were particularly salient in the public discourse.

Finally, we cannot discount the possibility that the desire for personal consistency,¹³⁴ to save face,¹³⁵ and to avoid potentially difficult, tedious work¹³⁶ may unconsciously affect how the Justices who authored or joined the original majority opinion evaluate cert petitions that seek to revisit that decision—especially if the petitioners are asking the high court to basically rework its precedents in a highly technical area, such as substantive patent law involving complex technologies. In a 2005 study, Michael Gerhardt observed that “[i]t has been extremely rare for Justices to join in overruling a prior decision that they wrote or joined.”¹³⁷ He reports that “[i]n only four cases has a Court

133. In 2011, a major revision to the Patent Act was enacted, namely, the Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified in scattered sections of 35 U.S.C.).

134. See Stephen Breyer, *Judicial Review: A Practicing Judge’s Perspective*, 78 TEX. L. REV. 761, 769 (2000) (“[C]onstraints arise out of the judge’s own need for personal consistency over time. Justice O’Connor has described a judge’s initial decisions as creating footprints that later decisions will follow.”); Craig S. Lerner & Nelson Lund, *Judicial Duty and the Supreme Court’s Cult of Celebrity*, 78 GEO. WASH. L. REV. 1255, 1271–72 (2010) (“[T]he Justices have become noticeably concerned with remaining *personally* consistent over time [I]t is striking how frequently one sees members of the Court adhering to their own personal ‘precedents’ rather than deferring to the Court’s actual precedents.”).

135. Cf. Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 629 (2000) (“It is widely recognized that reputation or esteem provides a powerful money-independent incentive for many people.”).

136. See Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 2 (1993) (observing that “judicial utility is a function mainly of income, leisure, and judicial voting”); Jeremy W. Bock, *Restructuring the Federal Circuit*, 3 NYU J. INTELL. PROP. & ENT. L. 197, 221 (2014) [hereinafter Bock, *Restructuring*] (“[I]t may take less work for a judge to default to his or her prior position, because crafting an opinion that justifies a change of position on principled grounds may be labor-intensive.”).

137. Michael J. Gerhardt, *The Limited Path Dependency of Precedent*,

with no change in membership overruled itself,”¹³⁸ whereas “[i]n every other case . . . the composition of the Court has been different from what it had been in the precedent being overruled.”¹³⁹ This suggests that cert petitions that call for dramatic changes to precedents created by unanimous rulings—such as the current patent eligibility framework anchored by *Mayo* and its progeny, *Alice Corp. v. CLS Bank International*¹⁴⁰—might face longer odds of being granted review without a change in a sufficient number of Justices.

As of this writing in early 2023, four new Justices have joined the Court since *Alice* was decided in 2014, and the author of *Mayo*, Justice Breyer, retired in June 2022.¹⁴¹ The impact of these personnel changes on the timing (and, if review were granted, the nature and extent) of the Court’s re-engagement with its patent eligibility caselaw remains to be seen.

C. Existing Proposals for Reform

As outlined in the previous Sections, a confluence of circumstances, factors, interests, and participants may interact in a manner that can lead to important cases being deprioritized or overlooked for the high court’s plenary docket. The concern that the Supreme Court has been providing insufficient guidance to the lower courts due to weaknesses in its case selection process has yielded various proposals for reform over the past several decades. In the 1970s, for example, a study group chaired by Paul Freund proposed establishing a “National Court of Appeals” consisting of a group of seven circuit judges to screen all

7 U. PA. J. CONST. L. 903, 952 (2005).

138. *Id.*

139. *Id.*

140. 573 U.S. 208 (2014).

141. Letter from Justice Stephen Breyer to the President (June 29, 2022) https://www.supremecourt.gov/publicinfo/press/2022-06-29_SGB_Letter.pdf.

certiorari petitions, decide some petitions on the merits, and refer the more important ones to the Supreme Court for further screening.¹⁴² In recent decades, Paul Carrington and Roger Cramton have suggested setting up a “Certiorari Division” of the Supreme Court that would be staffed by a group of thirteen circuit judges who would select “as many as 120 cases a term that the Court would be obliged to decide.”¹⁴³ Taking a completely different approach, Daniel Epps and William Ortman have proposed a “Lottery Docket,” in which the Supreme Court’s docket would include a small number of cases drawn randomly from the final judgments of the circuit courts to “expose the justices to a more representative range of cases and issues that confront federal courts.”¹⁴⁴

Among the various proposals, a particularly notable one is from Amanda Tyler, who proposes that federal appellate courts “dust off” the certification provision under 28 U.S.C. § 1254(2) and use it “to place before the Supreme Court those issues that they believe warrant the Court’s timely attention.”¹⁴⁵ That is, “certification allows lower court judges themselves to inform the Court—directly and formally—that an issue is important, recurring, and in need of its resolution.”¹⁴⁶ The only wrinkle with certification is that it is “practically a dead letter.”¹⁴⁷ The Supreme Court handles certified questions on a discretionary basis, and, like certiorari, rarely grants review.¹⁴⁸ In fact, certified questions

142. Federal Judicial Center, *Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573, 590–91 (1972).

143. Carrington & Cramton, *supra* note 68, at 632.

144. Epps & Ortman, *supra* note 61, at 708.

145. Tyler, *supra* note 68, at 1319.

146. *Id.* at 1326.

147. Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1712 (2000) (footnote omitted).

148. See Tyler, *supra* note 68, at 1319–21.

are so rarely accepted that, as Justice John Paul Stevens observed in 2009, “it is a newsworthy event these days when a lower court even tries for certification.”¹⁴⁹ For now, Tyler hesitates to propose making certification mandatory, and instead calls for the high court to “relax[] its longstanding hostility to the practice.”¹⁵⁰ This leaves certification susceptible to the same basic problem as the certiorari procedure: being subject to the vagaries of the high court’s exercise of discretion.

To overcome such dynamics, it may be useful to provide the Federal Circuit with a mechanism that allows it to secure timely review of key issues without being dependent on the Supreme Court’s exercise of discretion. A proposal for doing so is detailed in the next Part.

II. PROPOSAL: FORCING SUPREME COURT REVIEW BY THE FEDERAL CIRCUIT

Because the courts of appeals are the de facto courts of last resort in the vast majority of cases filed in federal court, the effective management of precedents requires coordination between the Supreme Court and the circuit courts. But the certiorari docket introduces considerable uncertainty as to when, if ever, the high court would review issues important to the day-to-day administration of justice by the courts of appeals. As discussed in Part I, petitions for certiorari that raise such issues can be deprioritized, overlooked, or otherwise passed over due to a confluence of behavioral, situational, and discretionary considerations involving a variety of participants and practices—such as the Supreme Court bar, amici, the cert pool, the Solicitor General, and the Justices themselves, among other factors. Commentators may disagree over which factors are the most dominant or salient, but the relative weighting of the factors

149. *United States v. Seale*, 558 U.S. 985, 986 (2009) (mem.) (Stevens, J., dissenting from dismissal of certified question).

150. Tyler, *supra* note 68, at 1328.

is not as important for the purposes of this Article than the fact that their existence, in the aggregate, likely introduces blind spots and distortions in the Court's agenda-setting process.

And, as noted previously, the highly technical nature of patent cases and the absence of circuit splits can aggravate the imperfections in the system that contribute to the denial of an otherwise meritorious cert petition. At the same time, the lack of timely review of patent law issues on which the Federal Circuit is stuck or at an impasse can be particularly problematic in light of its stewardship of patent law and the nationwide impact of its precedents. Accordingly, this Article proposes that Congress give the judges of the Federal Circuit some mechanism to force the Supreme Court to review issues that are critical to their day-to-day work.

This Part lays out the major components and features of one possible mechanism.

A. *Mechanism*

To ensure the timely review of cases that can help break deadlocks and address hand-tying at the Federal Circuit, this Article proposes giving its judges the power to invoke the Supreme Court's mandatory jurisdiction to secure review of a case or a certified question by a majority vote of the Federal Circuit judges in regular active service. The proposed mechanism for forcing review may be especially useful when the Federal Circuit believes that the Supreme Court's precedents need to be reconsidered and/or when its judges are hopelessly split on the meaning of the high court's precedents and require clearer instructions or a tiebreaker. In such circumstances where hand-tying and/or deadlocks exist, a majority of Federal Circuit judges are unlikely to vote for an en banc sitting probably because it might be futile. However, perhaps they might be willing to vote for Supreme Court review instead. The need for this option was made clear by the Federal Circuit's orders denying rehearing en banc in *Athena* and *American Axle*, which were accompanied

by multiple separate concurring and dissenting opinions that effectively called on the Supreme Court to step in.¹⁵¹

The proposed mechanism is intended to serve as a supplemental pathway for high court review that would operate separately from, and in parallel with, the existing certiorari process. To avoid possible distortionary effects on the respective roles of the Supreme Court and the Federal Circuit in the federal court system, the frequency with which this mechanism may be exercised by the latter would be limited—e.g., one case per year—as explained in greater detail in Section II.B. At a high level, the proposal would require Congress to slightly expand the Supreme Court’s mandatory jurisdiction so as to provide two supplemental pathways that may be invoked by a majority vote of the Federal Circuit judges: (1) mandatory appellate jurisdiction for cases; and (2) mandatory certified question jurisdiction¹⁵² for discrete issues of law.

Mandatory Appellate Jurisdiction. To invoke mandatory appellate jurisdiction under the proposal, the Federal Circuit would issue a formal notice certifying that a majority of its judges in regular active service believe that a particular case raises issues that warrant Supreme Court review. This certification notice, which would be issued sua sponte when entering judgment or an order denying rehearing, would identify the issues to be addressed. The issuance of this certification notice would allow a party dissatisfied with a final order or judgment of the Federal Circuit to seek Supreme Court review as to those identified issues as an *appellant* rather than as a petitioner seeking certiorari. (Any other questions in the case would be considered by the high

151. See *supra* notes 9–19 and accompanying text.

152. The proposal would require an amendment to the certification statute, 28 U.S.C. § 1254(2), because of the Supreme Court’s practice of treating certified question jurisdiction as discretionary, even though “[i]n form and history, this certified question jurisdiction is mandatory.” 17 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4038 (3d ed. 1998).

court only on a discretionary basis.) The idea of allowing a subordinate court's certification to create a path for mandatory appellate jurisdiction—when only a discretionary path might otherwise exist (if at all)—is by no means unprecedented in the federal court system. For example, under Federal Rule of Civil Procedure 54(b), a district court's certification that there is “no just reason for delay” allows for the entry of final judgment for a subset of the claims in a case that have been finally decided,¹⁵³ which would allow for an appeal as of right for those claims under 28 U.S.C. § 1291.¹⁵⁴

Mandatory Certified Question Jurisdiction. The proposal would also provide a route for mandatory certified question jurisdiction. Presently, certified questions posed by the courts of appeals under 28 U.S.C. § 1254(2) are reviewed on a discretionary basis by the Supreme Court.¹⁵⁵ As mentioned previously, the high court hardly ever grants review of certified questions,¹⁵⁶ such that commentators have concluded that “certification is practically a dead letter.”¹⁵⁷ Under the proposal, Section 1254(2) would be amended to allow the Federal Circuit—by a vote of a majority of its judges in regular active service—to secure mandatory consideration by the high court of an important question necessary to decide a pending case or a petition for rehearing. The Federal Circuit would invoke mandatory certified

153. FED. R. CIV. P. 54(b).

154. Without a Rule 54(b) certification, an appeal from a case where only a subset of the claims has been decided would be deemed interlocutory in nature. The pathways by which interlocutory decisions may be reviewed by an appellate court are typically discretionary in the absence of a specific statutory provision or rule that authorizes an immediate appeal. *See, e.g.*, 28 U.S.C. § 1292.

155. *See supra* note 152 and accompanying text.

156. *See supra* notes 148–149 and accompanying text.

157. Hartnett, *supra* note 147, at 1712; *see also* Aaron Nielson, *The Death of the Supreme Court's Certified Question Jurisdiction*, 59 CATH. U. L. REV. 483, 492 (2010) (“Lamentably, certification jurisdiction is dead at the hands of the Supreme Court and . . . it is not coming back.”).

question jurisdiction in a given case by transmitting its question to the high court with a formal notice certifying that a majority of its judges in regular active service believe that the question warrants Supreme Court review. The certified question route may be particularly useful when “instructions are desired”¹⁵⁸ by the lower court—that is, the Federal Circuit is seeking guidance because it is “in doubt as to the question certified.”¹⁵⁹ Compared to the mandatory appellate jurisdiction route, the mandatory certified question route may be preferred if it can mitigate vehicle problems that might make it difficult for the high court to decide the issue cleanly.¹⁶⁰ That being said, the proposal would include a current feature of Section 1254(2) that allows the Supreme Court to “require the entire record to be sent up for decision of the entire matter in controversy.”¹⁶¹

In the notice that certifies the majority vote and identifies the issues or questions for review—either through the mandatory appellate route or the mandatory certified question route—the Federal Circuit would ideally include a detailed written statement for the purpose of assisting the Supreme Court in its decision-making.¹⁶² A non-exhaustive list of points to be addressed in such a statement may include: (1) a clear identification of the issue(s) to be

158. 28 U.S.C. § 1254(2).

159. *See* Shapiro et al., *supra* note 59, § 9.2 (footnote omitted).

160. *See* 17 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4038 (3d ed. 1998) (“Certification, if wisely used, would have several advantages Incidental issues that might encumber a [cert] petition would be omitted.”).

161. 28 U.S.C. § 1254(2).

162. Ideally, the written statement prepared in conjunction with forcing review would be more detailed than what is presently required by the Supreme Court Rules for certified questions, which states: “The certificate shall contain a statement of the nature of the case and the facts on which the question or proposition of law arises. Only questions or propositions of law may be certified, and they shall be stated separately and with precision.” SUP. CT. R. 19(1).

addressed; (2) the importance or significance of the issue(s); (3) the need for review right now and why (further) percolation is unnecessary or futile; (4) the appropriateness of the case (for which review is being forced) as a vehicle for addressing the issue(s); (5) whether the Circuit judges are split on the issue(s), and, if so, a summary of the areas of disagreement; (6) suggested actions to be taken (e.g., providing clarification or modifying/overruling precedent); and (7) any other considerations that may be relevant to the high court's review of the case or issue(s), including possible options for resolution. By providing a detailed explanation of the issues that the Federal Circuit wants the Supreme Court to consider, it may help the generalist Supreme Court engage with subject matter that it encounters infrequently, and, in doing so, increase the likelihood that the high court would issue a ruling that could materially improve the situation, or, at the very least, decrease the likelihood of making it worse.

B. *Operational Considerations*

This Section highlights several operational considerations for implementing the proposal for invoking mandatory high court review.

1. Frequency of Invocation

The proposal contemplates limiting the rate at which the Federal Circuit may invoke mandatory jurisdiction at the Supreme Court in order to mitigate the likelihood of shirking¹⁶³ by the circuit court. One option would be to limit the frequency within a defined time period (e.g., one invocation per year). Another option would be to set the voting threshold at an appropriate level (e.g., a majority of Federal Circuit judges in regular active service). If there is a concern that the Federal Circuit might invoke high court review prematurely without giving new Supreme Court caselaw an adequate opportunity to percolate, an additional

163. *See infra* Section III.B.

option might be to impose a waiting period (e.g., a minimum number of years or a minimum number of decisions applying it) before allowing the Circuit judges to force the Supreme Court to reconsider that caselaw.

If one or more of the above-mentioned limitations were adopted, the proposed mechanism for forcing high court review could still have a substantial impact even if it were invoked only once a year or once every few years, especially if the issue for which mandatory review is being invoked tends to appear in a substantial number of cases, such as patent eligibility¹⁶⁴ or claim construction.¹⁶⁵ To some, the notion of allowing an appellate court to force the Supreme Court to review a case might be medicine that is too strong, but the poison is in the dose¹⁶⁶: so long as the invocations are controlled through sensible limitations, the proposal is likely to improve matters without materially distorting the hierarchical relationship between the Supreme Court and the Federal Circuit.

2. Impact on Workload

For the Supreme Court Justices, the workload impact from the Federal Circuit's invocation of mandatory jurisdiction may be as low as one (or even fewer) additional plenary cases per year, depending on the limits placed on the

164. See Brandon Rash, Andrew Schreiber & Brooks Kenyon, *Overlooked Patent Cases: Lessons on Section 101 Motions*, LAW360 (Sept. 22, 2020, 1:48 PM EDT) <https://www.law360.com/articles/1310545>, (“In the five years since *Alice*, there has been a spike in these motions to over 75 in 2019, as district courts have been increasingly willing to resolve eligibility at the pleadings stage.”).

165. See *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 659 F.3d 1369, 1370 (Fed. Cir. 2011) (Moore, J., dissenting) (“Claim construction is the single most important event in the course of a patent litigation. It defines the scope of the property right being enforced, and is often the difference between infringement and non-infringement, or validity and invalidity.”).

166. The observation that “the dose makes the poison” is attributed to Paracelsus, a Renaissance-era physician-chemist.

frequency of invocation.

For the Federal Circuit judges, the amount of additional work involved in monitoring and selecting cases for forced review is expected to be largely an extension of their current activities. Indeed, the Circuit judges' practice of circulating all precedential opinions prior to issuance,¹⁶⁷ their detailed knowledge of their own caselaw, and their exclusive jurisdiction over all patent appeals, render it unlikely that the Federal Circuit would need to set up an elaborate procedure for monitoring cases. Rather, any additional work required of the Federal Circuit judges when forcing Supreme Court review would lie primarily in the selection of a suitable case—namely, internal deliberations on whether a particular case is “the one” for which Supreme Court review should be invoked. Once a case is selected, the effort required to prepare a detailed memo to the Supreme Court that lays out the issues is unlikely to materially increase the total amount of work for the Federal Circuit, as such a memo would essentially take the place of the various concurrences and dissents from the denial of en banc review that would have likely been written if the option to invoke mandatory Supreme Court review were not available.

It is also worth considering whether the mere existence of a mechanism to force Supreme Court review might affect the volume of en banc petitions. Specifically, would a greater proportion of dissatisfied litigants file en banc petitions in an attempt to lobby the Federal Circuit to exercise its power to invoke the high court's mandatory jurisdiction for their cases? It is not clear whether the mere existence of this power would materially increase the rate of en banc petitioning, given the apparently high volume of en banc petitions

167. U.S. COURT OF APPEALS FOR THE FED. CIR., INTERNAL OPERATING PROCEDURES, IOP #10, ¶5 (Mar. 1, 2022), <https://cafc.uscourts.gov/wp-content/uploads/RulesProceduresAndForms/InternalOperatingProcedures/InternalOperatingProcedures.pdf>.

already being filed in patent cases.¹⁶⁸ Also, if the Federal Circuit were to force Supreme Court review in a case pertaining to an issue that appears frequently across many cases (e.g., patent eligibility), it is possible that this may cause some parties to refrain from engaging in essentially duplicative petitioning.

3. Form of Dispositions by the Supreme Court

If the Federal Circuit were to invoke mandatory review, there is no guarantee that the Supreme Court will issue a detailed, substantive decision. That is, the high court might decide the matter summarily (e.g., summary affirmance or reversal without an opinion)¹⁶⁹ or with a terse opinion of a few sentences.¹⁷⁰ The extent to which Congress can dictate the form of Supreme Court decisions without raising separation-of-powers issues remains a murky area.¹⁷¹ Nevertheless, there could still be value in forcing high court review, even if it might yield a minimalist decision with little to no explanation.

As an initial matter, a minimalist decision from the Supreme Court can break a tie at the Federal Circuit, which, in some cases, might help reset the debate among the Circuit judges. But more importantly, the minimalist decisions may serve as discrete datapoints that can guide the Federal

168. See Ryan Davis, *Fed. Circ. Judges Say Cool It With The Rehearing Petitions*, LAW360 (Mar. 17, 2022, 8:08 PM EDT), <https://www.law360.com/articles/1475014/fed-circ-judges-say-cool-it-with-the-rehearing-petitions> (reporting Federal Circuit judges' frustration with high volume of en banc petitions).

169. See Shapiro et al., *supra* note 59, § 5.12(a) ("A merits disposition may be a simple order granting certiorari and then affirming or reversing the judgment below. There may or may not be a sentence or a citation or two added to the order in explanation of the result.").

170. See, e.g., *Iran Nat'l Airlines Corp. v. Marschalk Co. Inc.*, 453 U.S. 919 (1981) (terse response to a certified question).

171. See Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 IOWA L. REV. 181, 207–15 (2020).

Circuit's efforts to operationalize Supreme Court precedents. The Supreme Court's precedents on substantive patent law often set out broad principles or high-level standards with the expectation that the Federal Circuit—as the expert tribunal—will develop workable standards for day-to-day adjudication.¹⁷² For the Supreme Court's patent eligibility decisions, the Federal Circuit has struggled to do this. In such situations, a minimalist decision from the high court may help the Federal Circuit better discern the contours of the Supreme Court's broad pronouncements that are easy to state but difficult to apply.¹⁷³ That is, minimalist decisions can serve as guideposts that can help the Federal Circuit judges—who may have a variety of attitudes toward the patent system—self-calibrate and converge on an understanding of which types of analyses comport with the Supreme Court's precedents and which do not. At times, the generalist Supreme Court may have difficulty articulating new rules in patent law with a degree of clarity that satisfies the specialist Federal Circuit. So, to the extent that the high court has a sense of what the result should be if its rules were applied correctly, it can aid the Federal Circuit merely by saying “yes” or “no”, which may give the circuit court enough clues to develop a body of precedents that tries to bring coherence to the “yeses” and “nos”. In essence, the minimalist decisions from the Supreme Court can be the stars that anchor a doctrinal constellation drawn by the Federal Circuit.

4. Vehicle Issues

If the proposal for forcing high court review were adopted, the Supreme Court and the Federal Circuit may, from time to time, have different views on whether a case for

172. See *infra* notes 264–265 and accompanying text.

173. See Richard C. Chen, *Summary Dispositions as Precedent*, 61 WM. & MARY L. REV. 691, 719 (2020) (proposing that “the Supreme Court use summary dispositions as a means of developing the meaning of high-level legal standards”).

which review is being forced is a suitable vehicle for addressing the issue of interest.

Under current practice, the presence of a “vehicle problem” can doom a cert petition at the Supreme Court.¹⁷⁴ Examples of vehicle problems may include: lack of standing;¹⁷⁵ failure to properly raise or preserve the issue in the court below;¹⁷⁶ alternative grounds to support the judgment;¹⁷⁷ and other wrinkles that may prevent the Supreme Court from cleanly deciding the merits.¹⁷⁸ In addition, the quality of the briefing is an important consideration for the Supreme Court, which may deny cert if there are doubts that the case would be ably argued at the merits stage.¹⁷⁹ Although the Supreme Court can hear some cases with vehicle problems (assuming that the problem is not jurisdictional),¹⁸⁰ it will often decide to wait until the

174. See Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 713 (1995) [hereinafter Hellman, *Precedent Unbound*] (“[F]or most of the Justices, most of the time, the presence of a ‘vehicle’ problem will be a sufficient reason to deny review.”).

175. See David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 281 n.188 (2009).

176. See Hellman, *Precedent Unbound*, *supra* note 174, at 712–13.

177. See *id.* at 713.

178. See Thompson & Wachtell, *supra* note 175, at 281 n.188 (“A vehicle problem exists where a case raises an important question of law, but for some reason the Court would not be able to decide cleanly the important issue.”).

179. See David R. Stras, *Secret Agents: Using Law Clerks Effectively*, 98 MARQ. L. REV. 151, 160 (2014) (noting that “whether there is good lawyering so that the Court can get quality briefs and argument in the case” is “something that various sources identify as an important criterion that the Court considers at the cert stage”).

180. See Hellman, *Precedent Unbound*, *supra* note 174, at 713 (“[F]ew of the [vehicle] problems are jurisdictional; thus the Court generally could hear these cases if it wished to.”).

“right” case comes along.¹⁸¹

There are a couple of ways to mitigate the likelihood that the Federal Circuit would force review of cases with vehicle problems. First, the proposal provides a path for the mandatory consideration of certified questions, which can secure review of a discrete issue instead of having the entire case (and its potential vehicle problems) sent up to the Supreme Court.¹⁸² Second, an opportunity for the Supreme Court to raise concerns about vehicle problems can be included in the process for invoking mandatory jurisdiction. For example, after the Federal Circuit provides notice to the Supreme Court that it is invoking mandatory review of a particular case or certified question, the Supreme Court would have a window of time (e.g., thirty days) to notify the Federal Circuit of any considerations that may make the case¹⁸³ a less-than-optimal vehicle, and ask the circuit court if it would be willing to reconsider forcing review. If the Federal Circuit declines to withdraw its invocation of mandatory review, the Supreme Court would then proceed to consider the case, so long as there are no jurisdictional defects. It is worth noting that the Federal Circuit itself has an interest in avoiding vehicle problems, lest the high court issues a terse ruling or a summary disposition that completely avoids the issue of interest or creates ambiguity. For example, if an issue is not cleanly presented by the facts, or if there are alternative bases for deciding the case, a summary affirmance or a summary reversal could give rise to interpretive uncertainty.

Having the Supreme Court directly explain to the

181. See Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 286 (2006) (“[A] sense exists among Justices and law clerks alike that if an issue is really important, it will ‘come back.’” (footnote omitted)).

182. See *supra* note 160 and accompanying text.

183. For certified questions, the “case” refers to the underlying case.

Federal Circuit why a case may not be a suitable vehicle would enhance the latter's ability to select appropriate cases for forcing review in the future. But there would be another major beneficiary of such explanations: the public (assuming that the communications between the Federal Circuit and the Supreme Court are published). This is because the selection of cases for the high court's certiorari docket is currently shrouded in mystery. Tejas Narechania has argued that the Supreme Court should do more to explain its decisions to grant review and develop a "common law doctrine of certiorari" that would "perhaps inspire confidence that the Court's certiorari decisions are more legal than political" and "improve predictability for litigants who are considering whether to undertake the costly process of filing a petition for certiorari."¹⁸⁴ Presently, there is nothing that compels the high court to provide anyone any explanation of its decisions to grant or deny certiorari. The proposal to allow a subordinate court to force review, however, could supply the high court with the necessary motivation to reveal *some* information, at least with respect to vehicle issues.

C. *Expected Benefits*

1. Shaping the Supreme Court's Patent Docket with the Federal Circuit's Perspective and Expertise

When the Federal Circuit invokes mandatory review as proposed, it would be filling a slot on the high court's plenary docket with a case whose selection reflects the circuit court's expertise. By contrast, the current manner by which the Supreme Court's agenda is set may not be fully informed by this perspective, which may not be adequately represented at the certiorari stage by the litigants and amici. The proposal for forcing review remedies this deficiency, which is one of its key benefits.

Having the Federal Circuit's perspective inform the

184. Narechania, *Important Cases*, *supra* note 120, at 991.

composition of the Supreme Court's plenary docket is valuable because judges at different levels of the federal court hierarchy work with different sets of information.¹⁸⁵ The number, type, and relative frequency of cases and issues that are handled by court of appeals judges and the Supreme Court Justices differ due to the filtering and selection that occurs at successive levels of the judicial hierarchy. Only a subset of the cases that are filed in the district courts are appealed, and a further subset of those cases yield cert petitions. Accordingly, the cases for which cert petitions get filed may not necessarily be representative of the universe of cases handled on a day-to-day basis by a court of appeals. This difference in information sets can give rise to a disparity in perception between a circuit court and the high court regarding the impact, urgency, or the importance of an issue. In the case of patent law, any disparities in perception between the Federal Circuit and the Supreme Court are further heightened due to the former's expertise resulting from the centralization of appeals from patent cases.

As such, differences in information sets can lead courts at different levels of the judicial hierarchy to reach different conclusions about the necessity of Supreme Court review. The information set that a court works with can affect its perception of whether a rule is (un)workable, whether there has been adequate percolation, or even whether percolation is necessary to begin with.¹⁸⁶ For example, it is possible that the Supreme Court's failure to promptly revisit its patent eligibility precedents after its 2014 decision in *Alice Corp. v.*

185. See generally Jeffrey A. Lefstin, *Claim Construction, Appeal, and the Predictability of Interpretive Regimes*, 61 U. MIA. L. REV. 1033, 1050–54 (2007) (discussing the impact of different information sets on claim construction).

186. See generally Michael Coenen & Seth Davis, *Percolation's Value*, 73 STAN. L. REV. 363, 369 (2021) (“[P]ercolation’s value is simply too contingent and context-specific to support any generalized presumption in its favor.”).

*CLS Bank International*¹⁸⁷ might have been due, in part, to the high court's difficulty (or inaccuracy) in gauging whether adequate percolation has occurred at the Federal Circuit. This is because the latter's exclusive jurisdiction over patent appeals not only removes circuit splits as a signal of certworthiness but also allows percolation on issues of patent law to occur in a concentrated, accelerated fashion, such that a steady-state condition (percolation-wise) may be reached on a shorter timescale than if patent appeals were distributed among multiple circuit courts.¹⁸⁸ As of this writing, a steady state has likely been reached at the Federal Circuit on patent eligibility issues in the sense that further percolation is unlikely to materially change things due to the deadlock among the Circuit judges on certain issues and their perception that their hands are tied by Supreme Court caselaw.¹⁸⁹

In addition, with the increasing use of data analytics in litigation, it is likely that any disparities in the sense of urgency between the Supreme Court and the Federal Circuit on whether an issue warrants high court review may widen over time. As litigants increasingly turn to data analytics to inform their litigation strategies, the convergence to a steady-state configuration may occur much faster, thereby shortening the period of meaningful percolation during which varying approaches to a legal issue are explored before the "optimal" strategy is discovered and adopted by the litigants en masse. Compared to just a decade ago, it has now become much easier for litigants to stay on top of trends in district court patent litigation and Federal Circuit decisions in light of the relentless coverage, analysis, and tracking of

187. 573 U.S. 208 (2014).

188. See Randall R. Rader, *The United States Court of Appeals for the Federal Circuit: The Promise and Perils of a Court of Limited Jurisdiction*, 5 MARQ. INTELL. PROP. L. REV. 1, 4 (2001) ("The nature of the Court of Appeals for the Federal Circuit has dramatically accelerated the pace of common law development.").

189. See *supra* notes 9–19 and accompanying text.

patent cases by multiple legal news outlets (e.g., Law360,¹⁹⁰ Bloomberg Law¹⁹¹), academics and practitioner blogs (e.g., Patently-O,¹⁹² IPWatchdog¹⁹³), and legal analytics databases (e.g., Lex Machina,¹⁹⁴ Docket Navigator¹⁹⁵). The faster the litigants evolve their tactics and reach a steady state regarding case strategy, the sooner the Federal Circuit will reach a doctrinal steady state, which, in turn, may give rise to a need for high court guidance sooner than the Supreme Court might expect.

Not only does the difference in information sets between the two courts create a disparity in the perception of *when* review may be needed, it may also affect the perception of *what* needs to be reviewed, i.e., the types of cases. As Rebecca Eisenberg has observed: “The greatest challenge for the Supreme Court is to focus its limited attention to patent law in ways that will do the most good for the patent system.”¹⁹⁶ To this end, the Supreme Court should take particular heed when a majority of Federal Circuit judges expresses the need for review of a particular case. The circuit court’s direct oversight over patent appeals from all federal trial courts and several agencies (including the PTO) has allowed it to develop specialized expertise that informs its views on the impact that certain unresolved issues have on the day-to-day adjudication of patent disputes. This expertise may not be

190. LAW360, <https://www.law360.com/ip> (last visited Jan. 25, 2022).

191. BLOOMBERG LAW, <https://news.bloomberglaw.com/ip-law> (last visited Jan. 25, 2022).

192. PATENTLY-O, <https://patentlyo.com> (last visited Jan. 25, 2022).

193. IPWATCHDOG, <https://www.ipwatchdog.com> (last visited Jan. 25, 2022).

194. LEX MACHINA, <https://lexmachina.com> (last visited Jan. 25, 2022).

195. DOCKET NAVIGATOR, <https://www.docketnavigator.com> (last visited Jan. 25, 2022).

196. Rebecca S. Eisenberg, *The Supreme Court and the Federal Circuit: Visitation and Custody of Patent Law*, 106 MICH. L. REV. FIRST IMPRESSIONS 28, 31 (2007) [hereinafter Eisenberg, *Supreme Court*].

adequately or reliably provided by the litigants, amici, and the government (through the Solicitor General), who have their own agendas and may (de)emphasize certain issues in their cert petitions and amicus briefs, whether out of inadvertence or as a matter of strategy (especially by repeat players¹⁹⁷). Furthermore, selection effects can impact the frequency with which certain types of cases and issues are presented in cert petitions, as some litigants may discontinue their fight before reaching the Supreme Court in light of various constraints imposed by time, money, business objectives, strategy, and other considerations.

In recent decades, a substantial portion of the Supreme Court's patent docket has focused on issues related to the transsubstantivity of doctrines across different fields,¹⁹⁸ especially in the context of procedural rules¹⁹⁹ and remedies.²⁰⁰ The Court has also gravitated toward cases where the core issue is statutory construction,²⁰¹ which, in

197. See Rochelle Cooper Dreyfuss, *What the Federal Circuit Can Learn from the Supreme Court-and Vice Versa*, 59 AM. U. L. REV. 787, 805–06 (2010) [hereinafter Dreyfuss, *Vice Versa*].

198. See Narechania, *Universality*, *supra* note 83, at 1380 (“In total, twenty-one petitions for certiorari (out of the fifty-three granted since the creation of the Federal Circuit) allege some form of a field split. By contrast, only six petitions out of a random sample of fifty-three denied petitions in patent cases alleged a field split.”).

199. See, e.g., *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318 (2015) (“clear error” review under Fed. R. Civ. P. 52(a)); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007) (declaratory judgment jurisdiction).

200. See, e.g., *Octane Fitness, L.L.C. v. ICON Health & Fitness, Inc.*, 572 U.S. 545 (2014) (attorney fee awards); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) (injunctions).

201. See, e.g., *WesternGeco L.L.C. v. ION Geophysical Corp.*, 138 S. Ct. 2129 (2018) (interpreting § 271(f)); *TC Heartland L.L.C. v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017) (interpreting 28 U.S.C. § 1400(b)); *Life Techs. Corp. v. Promega Corp.*, 580 U.S. 140 (2017) (interpreting § 271(f)); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93 (2016) (interpreting § 284); *Samsung Elecs. Co. v. Apple Inc.*, 580 U.S. 53

recent years, has increasingly focused on the 2011 America Invents Act,²⁰² whose interpretive issues are currently working their way through the legal system.²⁰³ Looking at the high court's coverage of substantive patent law, its case selection has been eclectic but uneven. For example, from 2002 to 2022, the Supreme Court reviewed multiple cases relating to inducement of infringement,²⁰⁴ extraterritorial infringement,²⁰⁵ and patent eligibility.²⁰⁶ However, it took only one case on the novelty requirement,²⁰⁷ one on nonobviousness,²⁰⁸ and one on the enablement requirement²⁰⁹ during this time. Some of the unevenness among the types of substantive patent issues considered by the high court might be attributable to selection effects as cases make their way up to the Supreme Court. For example, at the trial court, accused infringers may focus more on proving noninfringement rather than invalidity²¹⁰ because of

(2016) (interpreting § 289).

202. Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified in scattered sections of 35 U.S.C.).

203. *See, e.g.*, *Thryv, Inc. v. Click-To-Call Techs., L.P.*, 140 S. Ct. 1367 (2020); *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853 (2019); *Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, 139 S. Ct. 628 (2019); *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348 (2018); *Cuozzo Speed Techs., L.L.C. v. Lee*, 579 U.S. 261 (2016).

204. *E.g.*, *Commil USA, L.L.C. v. Cisco Sys., Inc.*, 575 U.S. 632 (2015); *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 572 U.S. 915 (2014); *Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754 (2011).

205. *See supra* note 129.

206. *See supra* note 130.

207. *Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, 139 S. Ct. 628 (2019).

208. *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007).

209. *Amgen Inc. v. Sanofi*, 987 F.3d 1080 (Fed. Cir. 2021), *cert. granted*, 143 S. Ct. 399 (U.S. Nov. 4, 2022) (No. 21-757).

210. For an in-depth discussion of the “trade-offs and asymmetries that lead many patent defendants to focus on noninfringement instead of invalidity,” see Roger Allan Ford, *Patent Invalidity Versus Noninfringement*, 99 CORNELL L. REV. 71, 71 (2013).

the lower standard of proof (i.e., preponderance for noninfringement, clear and convincing evidence for invalidity)²¹¹ and the primacy of claim construction,²¹² wherein noninfringement can be proven if only a single claim element is not satisfied.

More generally, the state of the high court's patent docket suggests that it could benefit from the Federal Circuit's input through the periodic invocation of mandatory jurisdiction to ensure that high-impact cases secure timely review. This is illustrated by the difficulty of getting the Supreme Court to revisit the *Mayo* framework during a time when the high court seemed unusually attentive to patent cases. For example, in the Supreme Court's 2015 Term, it granted cert in five patent cases,²¹³ but denied review in *Sequenom, Inc. v. Ariosa Diagnostics, Inc.*,²¹⁴ which concerned the patent eligibility of medical diagnostics—an area where the Federal Circuit has long expressed serious reservations about the workability of the *Mayo*

211. Invalidity must be proven by clear and convincing evidence. *N. Telecom, Inc. v. Datapoint Corp.*, 908 F.2d 931, 935 (Fed. Cir. 1990). Noninfringement need only be proven by a preponderance. *See id.* at 943–44.

212. Proof of infringement turns on claim construction—so much so that the two inquiries are effectively merged. *See generally* Jason R. Mudd, *To Construe or Not to Construe: At the Interface Between Claim Construction and Infringement in Patent Cases*, 76 MO. L. REV. 709 (2011).

213. *Life Techs. Corp. v. Promega Corp.*, 579 U.S. 927 (2016) (mem.) (granting cert on June 27, 2016); *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 578 U.S. 959 (2016) (mem.) (granting cert on May 2, 2016); *Samsung Elecs. Co. v. Apple Inc.*, 577 U.S. 1215 (2016) (mem.) (granting cert on Mar. 21, 2016); *Cuozzo Speed Techs., LLC v. Lee*, 577 U.S. 1098 (2016) (mem.) (granting cert on Jan. 15, 2016); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 577 U.S. 938 (2015) (mem.) (granting cert on Oct. 19, 2015).

214. 579 U.S. 928 (2016) (mem.) (denying cert on June 27, 2016); *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371 (Fed. Cir. 2015) (Federal Circuit's decision on the merits in the case below).

framework.²¹⁵ Although *Sequenom*'s cert petition had attracted nearly two dozen amicus briefs, the Court denied review—without even seeking the Solicitor General's views—just three months after the cert petition was filed.²¹⁶ On the same day (June 27, 2016) that the Supreme Court denied review in *Sequenom*, it granted review in *Life Technologies Corp. v. Promega Corp.*,²¹⁷ which presented an issue of statutory interpretation involving 35 U.S.C. § 271(f) regarding the supply of infringing components abroad. *Life Technologies*, which attracted only a couple of amicus briefs at the petition stage,²¹⁸ was criticized by practitioners for having facts that were “incredibly simplistic and not representative of a typical patent infringement case involving complex technologies.”²¹⁹ However, unlike its treatment of *Sequenom*, the Supreme Court had issued a CVSG in *Life Technologies*, regarding which the Solicitor General recommended granting review.²²⁰ The high court's

215. Several years before *Athena*, *Sequenom* was the case where the Federal Circuit's discomfort with the *Mayo* framework as applied to diagnostics was becoming apparent. See, e.g., *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1380–81 (Fed. Cir. 2015) (Linn, J., concurring) (expressing reservations about result dictated by *Mayo* decision), *reh'g en banc denied*, 809 F.3d 1282, 1286–87 (Fed. Cir. 2015) (Lourie, J., concurring in the denial of the petition for rehearing en banc) (same).

216. U.S. Supreme Court Docket, *Sequenom, Inc. v. Ariosa Diagnostics, Inc.* (No. 15-1182), available at <https://www.supremecourt.gov/docketfiles/15-1182.htm> (last visited Apr. 3, 2023).

217. 580 U.S. 140 (2017) (decision on the merits).

218. U.S. Supreme Court Docket, *Life Techs. Corp. v. Promega Corp.* (No. 14-1538), <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/14-1538.htm> (last visited Apr. 3, 2023).

219. Wayne Stacy & Elise Edlin, *Supreme Court Decision in Life Technologies v. Promega Does Not Relieve Manufacturers from the Risk*, IPWATCHDOG (Mar. 9, 2017, 5:15 AM), <https://www.ipwatchdog.com/2017/03/09/supreme-court-life-technologies-v-promega/id=79088/#>.

220. Brief for the United States as Amicus Curiae at 1, *Life Techs. Corp. v. Promega Corp.*, 580 U.S. 140 (2017) (No. 14-1538).

disparate treatment of the petitions in *Sequenom* and *Life Technologies* raises questions about its ability to reliably assess the relative importance of patent cases and properly allocate the limited space on its plenary docket.

The Supreme Court's failure to grant review in *Sequenom* was a missed opportunity to clarify the reach of the *Mayo* framework, and it may have contributed to the subsequent, worsened situation at the Federal Circuit that yielded *Athena* and *American Axle*. Given that issues of substantive patent law are likely to require the type of difficult, tedious attention to technological details that "generalist courts have never relished,"²²¹ the proposal in this Article provides a mechanism that forces the high court to confront such matters when necessary in the expert view of the Federal Circuit. Otherwise, the high court could put off hearing such issues indefinitely or choose a less-than-ideal vehicle to do so.

Although patent law is facially transsubstantive, the reality is that some patent law doctrines have technology- or industry-dependent effects that require a particular set of facts in order to fully and meaningfully explore the issues.²²² Patent eligibility is one such doctrine. For example, the medical diagnostic invention in *Athena* presents issues that can be difficult to properly explore in a case focused on a purely mechanical device or software (which may raise different issues). As noted by Rebecca Eisenberg, the problem with the *Mayo* framework—as applied to diagnostic methods—is that "the [Supreme] Court's broad understanding of what belongs in the category of 'natural laws' prevents the Court from recognizing diagnosis as a form of applied technology at all."²²³ That is, the Supreme

221. Eisenberg, *Supreme Court*, *supra* note 196, at 32.

222. See generally Dan L. Burk & Mark A. Lemley, *Is Patent Law Technology-Specific?*, 17 BERKELEY TECH. L.J. 1155 (2002).

223. Rebecca S. Eisenberg, *Diagnostics Need Not Apply*, 21 B.U. J. SCI. & TECH. L. 256, 267 (2015).

Court's framework effectively disqualifies from the realm of patent eligibility "diagnostic characterizations [that] represent human technological judgments rather than mere observations of nature."²²⁴ As such, patent eligibility cases are not technologically fungible. Differentiating among a plethora of cases involving a variety of technologies that apply a particular doctrine of substantive patent law and figuring out which one would be a high-impact case ripe for high court review is a task where the utility of the expert judgment of the Federal Circuit is at its apex.

It is worth noting that, during the writing of this Article, after the cert denial in *American Axle* in June 2022, the Supreme Court issued CVSG orders in October 2022 in two cases involving patent eligibility.²²⁵ Notably, neither case was decided by a detailed opinion from the Federal Circuit: one case²²⁶ was a summary affirmance without opinion,²²⁷ and the other was a unanimous affirmance in a short, non-precedential decision.²²⁸ If review were granted, the extent to which these two cases would help resolve the current controversies over the doctrine of patent eligibility is uncertain, given that neither case concerns medical diagnostics nor provides a detailed analysis from the Federal Circuit judges on the issues that bedevil them.

224. *Id.* at 266.

225. *Interactive Wearables, LLC v. Polar Electro Oy*, No. 21-1281, 143 S. Ct. 78 (U.S. Oct. 3, 2022) (mem.) (inviting Solicitor General to file brief); *Tropp v. Travel Sentry, Inc.*, No. 22-22, 143 S. Ct. 361 (U.S. Oct. 17, 2022) (mem.) (same); Ryan Davis, *Justices Seek SG's Views On Another Patent Eligibility Case*, LAW360 (Oct. 17, 2022, 11:46 AM EDT), <https://www.law360.com/articles/1540435/justices-seek-sg-s-views-on-another-patent-eligibility-case>.

226. *Interactive Wearables, LLC v. Polar Electro Oy*, No. 2021-1491, 2021 WL 4783803 (Fed. Cir. Oct. 14, 2021).

227. Fed. Cir. R. 36.

228. *Travel Sentry, Inc. v. Tropp*, No. 2021-1908, 2022 WL 443202 (Fed. Cir. Feb. 14, 2022).

2. Improved Dynamics Between the Federal Circuit and the Supreme Court

The proposal to empower the Federal Circuit to periodically invoke the Supreme Court's mandatory jurisdiction can also improve the dynamics between the two courts in several ways.

A notable feature of the proposal is that it would strengthen the feedback loop between the Federal Circuit and the Supreme Court. It would introduce greater cross-hierarchical accountability in precedent management by allowing the subordinate tribunal to force the reviewing tribunal to occasionally revisit its caselaw on the former's timetable rather than always on the latter's. Placing the Supreme Court under a credible threat of forced reviews (and actually forcing review from time to time) by the Federal Circuit may have a salutary effect on the development of decisional patent law, as the high court may become more attuned to the perspectives (and realities) of the circuit court, which is responsible for operationalizing the high court's precedents for day-to-day adjudication.

In effect, the proposal opens up a direct line of communication between the Federal Circuit and the Supreme Court. In some respects, it may act as a "hotline" that could temper certain unproductive tendencies at both levels, such as the Supreme Court's (un)intentional issuance of vague rules and the Federal Circuit's (un)intentional misapplication of them. More generally, increased dialogue between the Federal Circuit and the Supreme Court would be mutually beneficial. As Rochelle Dreyfuss has observed, the Supreme Court "could help the Federal Circuit find the 'sweet spot' between rigid rules and standards[,]” whereas “[t]aking lessons from the Federal Circuit might also help the Supreme Court improve adjudication of technical issues in other complex cases, such as antitrust and environmental law.”²²⁹

229. Dreyfuss, *Vice Versa*, *supra* note 197, at 799.

To the extent that the high court might be (un)intentionally deprioritizing certain cases because they are technologically complex and/or require substantial amounts of tedious doctrinal cleanup, the proposal would make it less daunting for the high court to handle them so long as the Federal Circuit (out of its own self-interest)²³⁰ were to provide detailed explanations regarding the issues to be addressed and possible avenues for resolution when invoking mandatory review. Currently, the Supreme Court might look to a dissent or a concurrence by a Federal Circuit judge in order to glean alternative adjudicatory perspectives when evaluating a cert petition in a patent case, but many cases may not necessarily have them.²³¹ In addition, dissents and concurrences play several roles, and may have been written in a way to primarily attract attention, either from other Federal Circuit judges or the Supreme Court, rather than to aid the latter's adjudication of the merits. By contrast, the certification notice (and any accompanying explanatory memo) for invoking mandatory review would be prepared by the Federal Circuit judges for the specific purpose of speaking directly to the Supreme Court to facilitate its analysis when revisiting caselaw.

Conversely, to the extent that the proposal gives the Federal Circuit a reliable way to engage with the Supreme Court and receive feedback and guidance in a timely manner, it might alleviate some of the circuit court's skepticism or reluctance when it tries to apply the high court's precedents.²³² In addition, because Supreme Court activity

230. See *supra* Section II.A (last paragraph).

231. See Timothy B. Dyk, *Thoughts on the Relationship Between the Supreme Court and the Federal Circuit*, 16 CHI.-KENT J. INTELL. PROP. 67, 78–79 (2016) (“[O]ver the last ten terms, the vast majority—74%—of our patent cases reviewed by the Supreme Court were precedential panel decisions, only 17% were en banc decisions where the majority and dissent often speak directly to the Supreme Court, and nearly 9% were non-precedential decisions” (footnotes omitted)).

232. See *infra* notes 258–262 and accompanying text.

can reset the debate among the Circuit judges,²³³ the receipt of further guidance from the high court in a timely manner may yield more productive attempts within the Federal Circuit to work with the high court's precedents. This is particularly important where the Supreme Court has replaced a rule developed by the Federal Circuit with one that requires substantial further development.

For example, in *Bilski v. Kappos*,²³⁴ the Supreme Court rejected the Federal Circuit's designation of the "machine-or-transformation test" as the exclusive test to determine patent eligibility.²³⁵ In doing so, the high court set aside a test that had been blessed by the en banc Federal Circuit by a 9-to-3 vote,²³⁶ and proceeded to tell the circuit court to develop other criteria.²³⁷ In the ensuing decade after *Bilski*, the Supreme Court crafted its own tests in *Mayo* and *Alice*, which the Federal Circuit has struggled to apply consistently. In a way, the problems with patent eligibility caselaw in the past decade is partly a problem of the Supreme Court's own making that began after it overruled the Federal Circuit's consensus position in *Bilski* and declined to provide further guidance after *Alice* in a timely manner. Perhaps it would be fair then, to force the Supreme Court to work with the Federal Circuit to develop a workable rule; the proposal to empower the circuit court to invoke mandatory review is one option for facilitating such collaboration.

By design, the proposal ensures that the timing of this

233. See Golden, *supra* note 6, at 657.

234. 561 U.S. 593 (2010).

235. *Id.* at 612–13.

236. See *In re Bilski*, 545 F.3d 943, 949, 956 (Fed. Cir. 2008) (en banc).

237. *Bilski*, 561 U.S. at 612–13. *Bilski* has been heavily criticized. See, e.g., Peter S. Menell, *Forty Years of Wondering in the Wilderness and No Closer to the Promised Land: Bilski's Superficial Textualism and the Missed Opportunity to Return Patent Law to Its Technology Mooring*, 63 STAN. L. REV. 1289 (2011).

collaboration is not left solely to the Supreme Court's discretion; otherwise, if review of a suitable case were unduly delayed, it is possible that intra-circuit splits could deepen, further splinter, or otherwise worsen at an accelerated rate for issues that appear frequently on appeal. Consider, for example, the Supreme Court's denial of certiorari in *Athena* on January 13, 2020.²³⁸ If, instead, certiorari had been granted on that date, the high court could have heard argument in *Athena* that Term,²³⁹ such that it could have issued a decision before its summer recess in late June/early July.²⁴⁰ That is, we could have had a Supreme Court opinion in *Athena* by June 30, 2020 or thereabouts. To get a sense of the potential doctrinal footprint of the cert denial, consider the following: from July 1, 2020 to December 31, 2021, the Federal Circuit issued seventy decisions (opinions and Rule 36 judgments) in appeals from the district court and the PTO where patent eligibility was at issue.²⁴¹ In addition, the Federal Circuit's subordinate tribunals (district courts,

238. *Athena Diagnostics, Inc. v. Mayo Collaborative Servs., LLC*, 140 S. Ct. 855 (2020).

239. See U.S. Supreme Court, *A Reporter's Guide to Applications Pending Before the Supreme Court of the United States* 1, 15 <https://www.supremecourt.gov/publicinfo/reportersguide.pdf> (last visited Apr. 4, 2023) ("Cases granted after mid-January are typically carried over until the next term begins the following October, unless the case is expedited by the Court.").

240. U.S. COURTS, *Supreme Court Procedures*, <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> (last visited May 28, 2022).

241. This figure was derived from data downloaded from THE COMPENDIUM OF FEDERAL CIRCUIT DECISIONS, <https://fedcircuit.shinyapps.io/federalcompendium> (last visited June 2, 2022) [hereinafter "the Compendium"]. For discussion of the methodology and contents of the Compendium, see *The Compendium of Federal Circuit Decisions*, U. IOWA, <https://empirical.law.uiowa.edu/compendium-federal-circuit-decisions> (last visited June 2, 2022) and Jason Rantanen, *The Landscape of Modern Patent Appeals*, 67 AM. U. L. REV. 985 (2018).

PTAB, ITC) issued rulings relating to patent eligibility in 153 cases during this period.²⁴²

It is worth emphasizing that this proposal is not meant to replace the current process for seeking Supreme Court review. Rather, it provides an additional path to review that can be invoked by the Federal Circuit judges themselves. By contrast, the current discretionary path to obtaining Supreme Court review requires the Federal Circuit judges to rely on the coordination of multiple actors—namely, the parties, their attorneys, amici, the Solicitor General, the Supreme Court law clerks, and the Justices themselves—all of whom have their own agendas and are susceptible to situational and behavioral elements. The proposal in this Article provides another pathway to get important cases and issues reviewed that bypasses such hurdles. If there is a concern about the long-term effectiveness of this proposal, it may be useful to enact it as a pilot program that sunsets after a few years unless Congress periodically renews it or makes it permanent.

III. CAVEATS AND OTHER CONSIDERATIONS

A. *Not a Panacea*

It is important to bear in mind that the proposal to allow the Federal Circuit to invoke mandatory review is not a cure-all and leaves intact much of the current mechanism by which the Supreme Court sets its agenda. Rather, the proposal is a supplement to existing practices: it provides a limited pathway by which Federal Circuit judges can add a case to the Supreme Court's plenary docket. This pathway is intended to secure timely review of particular cases, which, from the perspective of the Federal Circuit, raise important unresolved issues that cannot be fixed through an en banc

242. This figure was derived through a search on DOCKET NAVIGATOR, <https://docketnavigator.com> (last visited June 2, 2022).

sitting due to hand-tying or deadlocks. This perspective—which is grounded not only in the Circuit judges’ patent law expertise but also in the realities of day-to-day adjudication—is not something that would be necessarily (or adequately) represented in the certiorari petitions and related briefing filed by the litigants and amici. If we were to limit the number of times that mandatory review can be invoked to once per year, this proposal effectively reserves a single slot on the Supreme Court’s docket each Term for the consideration of an issue important to the Federal Circuit that might otherwise get deprioritized or overlooked. (If this proposal were to be extended to the rest of the federal court system, there may be thirteen slots reserved, one for each circuit. This is explored in greater detail *infra*.)

At the same time, many suboptimal precedents will evade high court review—not only because of the frequency limitation on the invocation of mandatory review but also because the Federal Circuit is unlikely to select some of them for forced review, such that they will have to take the certiorari route to the Supreme Court. Take, for example, the conflicting precedents that emerge over time as a byproduct of repeated adjudication by different panels.²⁴³ If a majority of Federal Circuit judges do not believe that a conflict is ripe for resolution (either by the en banc court or the high court), a dissatisfied litigant who believes otherwise would need to file a cert petition if they wanted to further pursue the issue. As for long-standing conflicts, such as the methodological split in claim construction, they may persist so long as there are not enough votes (for whatever reason) for the Federal

243. This would also include conflicts that arise inadvertently from the sheer number of precedents. *See Hart v. Massanari*, 266 F.3d 1155, 1179 (9th Cir. 2001) (“[P]ublishing redundant opinions will multiply significantly the number of inadvertent and unnecessary conflicts, because different opinion writers may use slightly different language to express the same idea [E]ven small differences in language can have significantly different implications when read in light of future fact patterns”).

Circuit to take action.²⁴⁴ In addition, given the Federal Circuit's perceived tendency to favor formalistic, bright-line rules,²⁴⁵ it is possible that its judges may be less inclined to find a rule to be suboptimal if it is capable of being applied relatively consistently by different panels and by district judges,²⁴⁶ or if it is otherwise perceived to increase the stability and coherence of patent law.²⁴⁷ Examples of the Federal Circuit's bright-line rules that were subsequently overruled by the Supreme Court include: the near-automatic injunction rule;²⁴⁸ the teaching-suggestion-motivation test

244. See, e.g., *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 659 F.3d 1369, 1370 (Fed. Cir. 2011) (Moore, J., dissenting from the denial of the petition for rehearing en banc) (“Despite the crucial role that claim construction plays in patent litigation, our rules are still ill-defined and inconsistently applied, even by us.”).

245. See, e.g., David O. Taylor, *Formalism and Antiformalism in Patent Law Adjudication: Rules and Standards*, 46 CONN. L. REV. 415, 420 n.16 (2013) (collecting sources criticizing the Federal Circuit's “overly formalistic rule-based adjudication”); see also Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1670 (2003) (“We think it unwise for courts to set bright-line rules in areas where their effect on innovation may be uncertain.”); John R. Thomas, *Formalism at the Federal Circuit*, 52 AM. U. L. REV. 771, 796 (2003) (“Innovation policy incorporates other values that present an uneasy fit with the Federal Circuit's chosen rules.”).

246. See Peter Lee, *Patent Law and the Two Cultures*, 120 YALE L.J. 2, 29 (2010) (“[Federal Circuit formalism] helps reduce information costs associated with lay engagement with technology. In general, formalism truncates and circumscribes legal inquiries, thus decreasing the extent to which lay judges must engage technologically challenging subject matter.” (footnote omitted)).

247. See Rochelle Cooper Dreyfuss, *Giving the Federal Circuit a Run for Its Money: Challenging Patents in the PTAB*, 91 NOTRE DAME L. REV. 235, 266 (2015) (“[O]ne reason why the Federal Circuit tends to create rules that the Supreme Court regards as overly ‘rigid’ may be that it is drawing bright lines that nontechnical trial judges can apply with ease, thereby effectuating its perceived mandate to ensure the uniform application of patent law.”).

248. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

for obviousness;²⁴⁹ and the complete bar to the application of the doctrine of equivalents based on prosecution history estoppel.²⁵⁰

That being said, having the Supreme Court decide just one case per year that is chosen by the Federal Circuit judges could be quite impactful on the body of decisional patent law, especially if the case involves a recurring issue. There are some issues that arise in a substantial number of patent cases—such as claim construction and, in recent years, patent eligibility—that also happen to be the key issues over which the Federal Circuit’s internal splits have been the deepest.²⁵¹ However, there is no guarantee that Supreme Court review will yield an answer that will provide a definitive resolution. Indeed, the high court’s decision could muddy the issue further, be highly fractured with no clear holding, and/or be extremely short on details (e.g., a terse opinion or a summary disposition). Nevertheless, as John Golden has argued, the chief benefit of periodic Supreme Court involvement in patent law may lie not in its “final law sayer” function but rather in prompting the Federal Circuit to reexamine its own precedents in the process of trying to make sense of those of the high court.²⁵² As mentioned previously, even minimalist Supreme Court decisions could help break ties, provide clues, and reset the debate among the Federal Circuit judges, which may increase the likelihood of resolving a deadlock and/or getting past a hand-tying situation.²⁵³ And when concerns about hand-tying and deadlocks recur on the same issue, the Federal Circuit may force review again. Indeed, the possibility of iteration under this proposal might prompt the Supreme Court to be more

249. *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007).

250. *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722 (2002).

251. *See supra* notes 9–19 and 244 and accompanying text.

252. Golden, *supra* note 6, at 657.

253. *See supra* Section II.B.3.

mindful of the workability of its rules. This is in contrast to the present situation where, once the Supreme Court issues an unhelpful decision, there is no recourse other than to wait for certiorari to be granted again.

Although the Federal Circuit was established with a specific mandate to create and maintain a uniform body of patent law precedents for nationwide application, Congress did not give that court any special procedural tools for fixing its precedents²⁵⁴ beyond those available to the other regional courts of appeal, such as rehearing cases en banc and (patiently) awaiting Supreme Court review. The proposal in this Article seeks to provide an additional tool that can help the Federal Circuit in this regard.

B. *Shirking*

If the Federal Circuit could invoke mandatory review by the Supreme Court, to what extent should we be concerned about shirking by the circuit court? Some may argue that the Federal Circuit, as the expert tribunal, bears the primary responsibility for reaching consensus and figuring out the workable parameters of patent law, rather than the Supreme Court. That is, would empowering the Federal Circuit to force Supreme Court review encourage the former to abdicate its responsibilities as the steward of decisional patent law? There are several considerations that may mitigate the likelihood that the Federal Circuit might shirk.

As an initial matter, setting appropriate operational parameters such as voting thresholds and caps on the

254. Although Congress did not give the Federal Circuit any special procedural tools for managing its caselaw, it did provide authorization for certain special personnel, namely the Senior Technical Assistant (STA), *see* 28 U.S.C. § 715(c) & (d), who, upon request from a Federal Circuit judge, would review a draft opinion and prepare a memo flagging potential conflicts with existing precedent. *See* Bock, *Restructuring*, *supra* note 136, at 206–07.

frequency of invocation²⁵⁵ would be prudent if this proposal were to be adopted. However, there are also inherent limitations that can further temper the tendency of the circuit court to force review or become unduly dependent on the high court. For example, the additional work involved in monitoring, selecting, and teeing-up suitable cases or issues for high court review²⁵⁶ would make it difficult for the Federal Circuit to force review too often. Shirking may also be mitigated if the Supreme Court were to issue a summary disposition or a terse opinion in response to a forced review, as a minimalist ruling would simply serve as a guidepost for the Federal Circuit's work rather than a substitute.

Another inherent limitation lies in the Federal Circuit's perception of the Supreme Court's ability to resolve an issue. The likelihood that the former would shirk may be tempered by any uncertainty over whether the latter's involvement would actually improve matters, given the substantial disparity in their familiarity with the patent system, as well as the Supreme Court's track record of setting aside what it may perceive as the circuit court's formalistic, patent-exceptionalist rules and doctrines.²⁵⁷ Indeed, as the specialist tribunal, the Federal Circuit has, at times, exhibited resistance and skepticism toward the generalist Supreme Court's supervision.²⁵⁸ For example, Federal Circuit judges have criticized the high court's caselaw by

255. *See supra* Section II.B.1.

256. *See supra* Section II.B.2.

257. *See supra* note 85 and accompanying text.

258. *See* Steven Seidenberg, *Patent Tension: The Federal Circuit and the Supreme Court Continue Their Tug-of-War over Interpretations of Patent Law*, A.B.A. J., Jan. 2016, at 17, 17 (noting that the Federal Circuit "often appl[ied] the high court's rulings narrowly and, apparently, rather reluctantly"); *see also* Laura G. Pedraza-Fariña, *Understanding the Federal Circuit: An Expert Community Approach*, 30 BERKELEY TECH. L.J. 89, 124 (2015) ("An analysis of Federal Circuit case law reveals a pattern of resistance to implementing Supreme Court decisions overruling Federal Circuit precedent . . .").

noting that a suboptimal outcome in a case was dictated by the “sweeping language”²⁵⁹ of “unsound”²⁶⁰ Supreme Court precedent. In another instance, a Federal Circuit panel responded somewhat sarcastically to the high court’s replacement of a Federal Circuit rule.²⁶¹ The circuit court has also been accused of attempting to “write around” Supreme Court caselaw or revert to a prior version of a Federal Circuit rule that the high court had rejected.²⁶² It seems unlikely, then, that a majority of Federal Circuit judges would vote to compel Supreme Court involvement in a patent case unless they felt it was absolutely necessary.

If there is a concern that the proposal might decrease the Federal Circuit’s willingness to engage with the high court’s precedents by making it easier for the Circuit judges to “bug” the Supreme Court about them, this concern should be evaluated in light of the benefits of facilitating

259. *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1380 (Fed. Cir. 2015) (Linn, J., concurring) (“I join the court’s opinion invalidating the claims . . . only because I am bound by the sweeping language of the test set out in *Mayo* This case represents the consequence—perhaps unintended—of that broad language . . .”).

260. *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 809 F.3d 1282, 1287 (Fed. Cir. 2015) (Lourie, J., concurring in the denial of the petition for rehearing en banc) (characterizing the Supreme Court’s rule as “unsound” but acknowledging that “the panel did not err in its conclusion that under Supreme Court precedent it had no option other than to affirm the district court”).

261. *See, e.g., Biosig Instruments, Inc. v. Nautilus, Inc.*, 783 F.3d 1374, 1379 (Fed. Cir. 2015) (“The [Supreme] Court has accordingly modified the standard by which lower courts examine allegedly ambiguous claims; we may now steer by the bright star of ‘reasonable certainty,’ rather than the unreliable compass of ‘insoluble ambiguity.’”).

262. *See, e.g., Apple Inc. v. Samsung Elecs. Co.*, 809 F.3d 633, 662–63 (Fed. Cir. 2015) (Prost, C.J., dissenting) (accusing majority of essentially relying on an approach that was “unanimously rejected” by the Supreme Court in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006)); *see also* Seidenberg, *supra* note 258, at 18 (reporting that commentators view the Federal Circuit’s 2015 decision in *Apple Inc. v. Samsung Elecs. Co.* and Judge Reyna’s concurrence as challenging *eBay*).

communication between the two courts. As discussed earlier, allowing the Federal Circuit to force review might actually enhance its ability to engage with the high court's precedents by effectively opening up a "hotline" between the two courts.²⁶³ This is important because the generalist Supreme Court views its cases largely as "guideposts,"²⁶⁴ thereby leaving the further development and refinement of precedents to the Federal Circuit.²⁶⁵ By providing the Federal Circuit a guaranteed pathway to obtain clarification—or even reconsideration—of precedents, the proposal may enhance the circuit court's ability (and willingness) to engage with the high court's precedents in a manner that can lead to more productive outcomes. Otherwise, the absence of a mechanism for obtaining timely Supreme Court review basically leaves the Federal Circuit to its own devices, which might lead the appellate court to (un)intentionally misapply or "write around" Supreme Court precedents that it has difficulty applying.

A related concern is whether the Circuit judges might devote less effort to reach a consensus if they could simply force review when things get difficult. As of now, it is not entirely clear that intra-circuit splits would materially worsen if the proposal were adopted, given the history of

263. *See supra* Section II.C.2.

264. *Bilski v. Kappos*, 561 U.S. 593, 612 (2010) ("The Court . . . need not define further what constitutes a patentable 'process,' beyond pointing to the definition of that term provided in § 100(b) and looking to the guideposts in *Benson*, *Flook*, and *Diehr*.").

265. *See, e.g., id.* at 613 (expressing expectation that the Federal Circuit would develop "other limiting criteria" relating to patent eligibility); *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 40 (1997) ("We expect that the Federal Circuit will refine the formulation of the test for equivalence in the orderly course of case-by-case determinations, and we leave such refinement to that court's sound judgment in this area of its special expertise."); *see also* Dreyfuss, *Vice Versa, supra* note 197, at 802 (observing that "even when the Supreme Court reverses the Federal Circuit's decisions, the Court rather significantly leaves implementation questions to the Federal Circuit's discretion").

decisional disagreement at the Federal Circuit.²⁶⁶ According to Jason Rantanen and Lee Petherbridge, the Supreme Court's increased involvement in patent law in recent decades might be playing a role "in encouraging disagreement between Federal Circuit judges about the content of the law."²⁶⁷ They explain that the Supreme Court's replacement of the Federal Circuit's bright-line rules with more flexible standards has provided greater "decisional space" for the Federal Circuit judges.²⁶⁸ In addition, given that the "[Supreme] Court has, by many accounts, been authoring decisions in patent cases that might be either incoherent or reflect conflicting rules of decision[,] . . . one might expect Federal Circuit judges to more often come into conflict . . ."²⁶⁹ Rantanen and Petherbridge also note that the Supreme Court's increased willingness to take patent cases might have raised the potential reputational payoff for dissenting.²⁷⁰

It appears, then, that a material component of the decisional disagreement that currently exists may be related to the Federal Circuit's efforts to cope with (or, in some cases, bring about) the Supreme Court's interventions. Rather than

266. See Jason Rantanen & Lee Petherbridge, *Disuniformity*, 66 FLA. L. REV. 2007, 2007 (2014) (observing "remarkable increase in decisional disagreement—indicative of a decline in doctrinal uniformity—among Federal Circuit judges over the past several years"); see also Christopher A. Cotropia, *Determining Uniformity Within the Federal Circuit by Measuring Dissent and En Banc Review*, 43 LOY. L.A. L. REV. 801, 818 (2010) (presenting data showing that "the Federal Circuit exhibits a statistically higher percentage of dissents than four of the other five courts of appeals studied").

267. Rantanen & Petherbridge, *supra* note 266, at 2031.

268. *Id.* at 2026.

269. *Id.* at 2027.

270. See *id.* at 2030–31 ("[T]he presence of an active Supreme Court might encourage a positive feedback loop between dissents and reputational rewards that was simply absent when the Supreme Court rarely considered patent law.").

aggravating this situation, the proposal to allow the Federal Circuit to force review could potentially help mitigate the severity and duration of some of the circuit court's internal divisions by allowing the Circuit judges to get clarification or guidance from the high court much sooner, which, in turn, might help them coalesce around a single approach more quickly. Furthermore, if there were a way to reliably obtain Supreme Court review, the Circuit judges may not feel that they have to dissent as often or engage in other signaling behavior to get the high court's attention. It is worth noting that a high frequency of dissents may ultimately dilute the signaling power of any given dissent as an indicator of certworthiness.²⁷¹

That being said, a majority of Federal Circuit judges would likely seek Supreme Court review only as a last resort because, as discussed above, high court intervention might yield binding precedent that the circuit court may perceive as suboptimal (for whatever reason). That is, by forcing review, the Federal Circuit would be asking the Supreme Court for help at the risk of being saddled with precedent that it may not want. Indeed, the very existence of the option to force review might, in certain cases, prompt some Circuit judges to work harder to reach a consensus in order to keep their colleagues from voting to invoke Supreme Court review. This possibility is suggested by the reaction of the Federal Circuit when the Supreme Court granted certiorari in *KSR International Co. v. Teleflex Inc.*²⁷² While that case was pending at the high court, the Federal Circuit attempted to soften the edges of its teaching-suggestion-motivation (TSM) test for obviousness, presumably to convince the Supreme Court that it was not a rigid rule but a flexible one that was not in need of fixing.²⁷³ While it may be possible that giving

271. See *supra* note 64 and accompanying text.

272. 550 U.S. 398 (2007).

273. See Eisenberg, *Supreme Court*, *supra* note 196, at 31 (2007) ("While *KSR* was pending before the Supreme Court, the Federal Circuit

the Federal Circuit the ability to force Supreme Court review could disincentivize consensus in some cases, it may have the opposite effect in others, such that the overall level of decisional disagreement may not necessarily worsen but might even improve.

Finally, it should be noted that shirking goes both ways. Presently, in the absence of forced review, the Supreme Court itself may shirk by denying discretionary review to avoid grappling with difficult issues or tedious doctrinal cleanup. As such, shirking by either the Federal Circuit or the Supreme Court will occur, depending on whether the proposal for forcing review is adopted or not. Because the potential for shirking by *some* court is an ever-present reality, the analysis of shirking in the context of forcing review should focus not merely on whether shirking will occur, but also on the extent to which it may be exacerbated, as well as potentially mitigated.

C. *Extension to Regional Circuits*

Some observers might view the proposal for invoking mandatory Supreme Court review as being appropriate, if at all, only for the Federal Circuit due to the somewhat idiosyncratic circumstances arising from its stewardship of patent law—such as its highly technical subject matter, its uniformity mandate, and the lack of circuit splits in substantive patent law. However, another way to look at the situation is that the current rules and practices for obtaining Supreme Court review have limits and weaknesses that are revealed more clearly and vividly by the Federal Circuit. At bottom, the fundamental problem that the proposal seeks to address is one that is experienced by all federal appellate courts: the Supreme Court pays insufficient attention to

seemed to moderate its rhetoric in nonobviousness cases, going out of its way to show its flexibility. For example, the Federal Circuit reiterated in *Alza Corp. v. Mylan Labs, Inc.* that the TSM standard . . . is not a rigid formula . . .”).

cases that are important to the day-to-day administration of justice by the courts of appeals.²⁷⁴ Because the other federal appellate courts (besides the Federal Circuit) can also experience deadlocks and hand-tying by Supreme Court precedents, it is worth considering whether this proposal could be extended to each of the regional circuits.

If, within each circuit, the circuit judges could vote to invoke mandatory review for one of their cases each year in order to resolve a critical issue affecting their circuit, it would add only thirteen cases per year to the Supreme Court's plenary docket. This is unlikely to substantially burden the high court, as it currently hears around seventy cases per year, which is less than half of its caseload in the 1980s, when it heard around 150 cases.²⁷⁵ While those thirteen cases may not appreciably affect the Supreme Court's workload, the potential beneficial impact on the administration of justice nationwide could be substantial—especially if some of those thirteen cases involve circuit splits.²⁷⁶ According to one estimate, two-thirds of circuit splits remain unresolved.²⁷⁷

To the extent that this proposal may provide particular benefits to the Federal Circuit because of its specialization and exclusive jurisdiction, there are instances of de facto specialization in some regional circuits that may make this proposal useful to them for similar reasons arising from the

274. *See supra* Section I.C.

275. *See* Oliver Roeder, *The Supreme Court's Caseload is on Track to be the Lightest in 70 Years*, FIVETHIRTYEIGHT (May 17, 2016, 9:00 AM), <https://fivethirtyeight.com/features/the-supreme-courts-caseload-is-on-track-to-be-the-lightest-in-70-years/>.

276. *See* Jonathan M. Cohen & Daniel S. Cohen, *Iron-Ing Out Circuit Splits: A Proposal for the Use of the Irons Procedure to Prevent and Resolve Circuit Splits Among United States Courts of Appeals*, 108 CALIF. L. REV. 989, 996–98 (2020) (summarizing impact of unresolved circuit splits on the administration of justice).

277. Deborah Beim & Kelly Rader, *Legal Uniformity in American Courts*, 16 J. EMPIRICAL LEGAL STUD. 448, 448 (2019).

concentration of particular types of cases in certain circuits. Examples of such regional circuits include: the District of Columbia Circuit in the area of administrative law;²⁷⁸ the Second and Ninth Circuits in the area of copyright law;²⁷⁹ and the Fifth Circuit in the area of admiralty and maritime law.²⁸⁰

The details of implementing the proposal for the regional circuits are left to future research, but it is worth noting here a few big-picture considerations when adapting the proposal to courts beyond the Federal Circuit. One consideration is that coordination issues may arise when two or more circuits attempt to invoke mandatory Supreme Court review in different cases that raise the same or similar issues. In such instances, there may need to be a process for selecting, prioritizing, and/or consolidating different candidate vehicles. Another consideration is that, because the regional circuits are far more likely than the Federal Circuit to hear cases involving hot-button social issues and political controversies, there may be a greater possibility of forced reviews becoming politically weaponized²⁸¹ by the coordinated voting of a group of judges in a particular circuit.²⁸² Accordingly, if the proposal in this Article were to

278. See Michael E. Solimine, *Judicial Stratification and the Reputations of the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 1331, 1354–55 (2005).

279. See *id.*

280. See *id.* at 1355.

281. The author thanks Jonas Anderson for this insight.

282. This is not merely a theoretical concern. For example, an empirical study by Neal Devins and Allison Orr Larsen suggests the possibility of “weaponized” en banc reviews, which may occur when “judges vote in blocs aligned with the party of the President who appointed them and use en banc review to reverse panels composed of members from the other team.” Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373, 1373 (2021). Although en banc reviews have historically been largely resistant to partisanship, Devins and Larsen found that “[f]rom 2018–2020 [during the Trump administration,] there

be extended to the regional circuits, a protocol for intercircuit coordination would need to be developed, along with safeguards against the potential weaponization of forced reviews for partisan or political ends.

Given the greater complexity associated with implementing the proposal in the regional circuits, it would be advisable to implement the proposal initially only at the Federal Circuit as a pilot program, whereby the interactions between the Federal Circuit and the Supreme Court can inform a decision on whether an extension to the regional circuits may be advisable and, if so, how it may be accomplished. That is, the Federal Circuit, by virtue of its relative jurisdictional isolation from the other appellate courts, can serve as an experimental sandbox²⁸³ for testing a mechanism that would slightly expand the Supreme Court's mandatory jurisdiction.

D. *In the Interim*

In the absence of Congressional action that would give the Federal Circuit the power to periodically invoke mandatory Supreme Court review, what can be done in the interim? If it cannot force review, the Federal Circuit could instead suggest the need for review in the clearest possible terms. For example, the Circuit judges can try to certify a question through the current discretionary route, as suggested by Amanda Tyler.²⁸⁴ In addition, when the Federal Circuit takes an en banc poll that ultimately fails, it might

was a dramatic and strongly statistically significant spike in both partisan splits and partisan reversals of en banc decisions" *Id.* at 1380. However, they note that it is too soon to tell if the Trump-era spike in partisan en banc decision-making reflects a new normal. *See id.* at 1437.

283. For a discussion of how specialized courts could be used to test new rules and practices, see Jeremy W. Bock, *Deconfounding and Sandboxing Patent Litigation with a Specialized Patent Trial Court*, 80 MD. L. REV. 1137, 1141 (2021).

284. *See supra* notes 145–150 and accompanying text.

consider conducting a follow-up poll on whether the case presents an issue that warrants high court review. If a majority of judges in regular active service support high court review, the Federal Circuit might consider mentioning this fact either in an order denying rehearing en banc, in a footnote in an opinion, or in some other publicly accessible document.

Reporting whether a majority of Federal Circuit judges desires Supreme Court review would be useful because the separate opinions that accompany an en banc denial order may not always clearly lay out the judges' preferences on this point. By providing the Supreme Court with a clear, unmistakable suggestion for review that is signed by a majority of Federal Circuit judges, perhaps the Federal Circuit could be deemed to have supplied a meaningful signal of certworthiness (which is presently lacking in patent law due to the absence of circuit splits). If high court review were consistently denied despite such suggestions, then the case for Congressional action to set up a mechanism for invoking mandatory review would be strengthened.

CONCLUSION

To the extent that the vagaries of the Supreme Court's certiorari docket allow problems to fester in the federal appellate courts, such effects are aggravated at the Federal Circuit because its exclusive jurisdiction gives its decisions nationwide impact, and suboptimal precedents impair its ability to carry out its mandate to maintain a uniform, stable, and coherent body of patent decisional law. At the same time, its exclusive jurisdiction over patent cases makes it more difficult for the Federal Circuit to signal the Supreme Court for help because there are no circuit splits in patent law. Accordingly, this Article proposes that Congress create a supplemental review pathway that allows the Federal Circuit to force mandatory Supreme Court review of a case or certified question. Even if invoked just once a year, the proposal could provide substantial benefits to the

development of decisional law by forcing greater coordination between the two courts.