No. 22-671

In the Supreme Court of the United States

NOVARTIS PHARMACEUTICALS CORPORATION,
PETITIONER,

v.

HEC PHARM CO., LTD., HEC PHARM USA INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICI CURIAE* LAW PROFESSORS AND CIVIL PROCEDURE SCHOLARS SUPPORTING PETITIONER

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STATEMENT OF INTEREST[1]

Amici curiae are law professors and other scholars whose focus includes civil procedure, federal courts, judicial administration, and legal ethics.[2] *Amici* have a particular interest in the unique appellate jurisdiction of the Federal Circuit and in procedural statutes and rules that promote consistency and uniformity in federal law. *Amici* also are interested in ensuring transparency and confidence in the judicial process. The Federal Circuit's formation of a second panel that issued a second opinion reaching a conclusion directly opposite to that of the panel that had decided the case implicates these important concerns.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves remarkable procedural circumstances. After a three-judge panel issued a 2-1 decision affirming the district court, a second panel apparently was formed without notice to the parties—with one new judge replacing a recently retired member of the first panel—to address the already-pending petition for panel rehearing. Neither of the original panel members changed their views of the case. Instead, solely because the new judge sided with what had been the

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[1] Pursuant to Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] *Amici* are David Hricik, Mercer University School of Law; Jeffrey W. Stempel, William S. Boyd School of Law, University of Nevada Las Vegas; Roger M. Baron, University of South Dakota School of Law; Lonny Hoffman, University of Houston Law Center; Christa Laser, Cleveland State University College of Law; Emil J. Ali, McCabe Ali LLP; Paul Gugliuzza, Temple University School of Law. Institutional affiliations are listed for identification purposes only.

dissent, the second panel reached a result opposite from the first. As a result of assigning the case to a new panel, the majority opinion became the dissent, and the dissent the majority.

The addition of a new judge to form a second panel was legally unnecessary. Under 28 U.S.C. § 46(d), the two judges remaining on the first panel constituted a quorum with full authority to decide the petition for panel rehearing. But more than that, the formation of a new panel—through the addition of a new judge whose vote changed the outcome of the appeal—exceeded the court of appeals' authority.

The Federal Circuit's procedure was anomalous. Numerous decisions from other circuits around the country show that granting a petition for rehearing is authorized only when an original panel member changes his or her vote on the outcome. Accordingly, where the departure of one original panel member leaves a 1-1 split and neither judge changes his or her vote, a quorum is present and the tie vote requires denying any petition for rehearing. The majority rule also recognizes that panel rehearing is authorized solely to correct points of law or fact that the panel "overlooked or misapprehended." Fed. R. App. P. 40(a)(2). The procedure below circumvented that rule and undermined the finality of panel opinions.

The Federal Circuit's *ad hoc* and unannounced approach also undermines principles of uniformity, fairness, and transparency that should inform all court procedures. The procedure followed here is inconsistent with principles reflected in the law-of-the-circuit doctrine, which ensures uniformity in circuit law by holding that one three-judge panel must abide by prior panel decisions, absent en banc or Supreme Court rulings. By implementing its procedure without explanation or notice, the Federal Circuit also undermined the transparency

that allows for public discussion and debate over important questions of civil procedure.

What is more, the Federal Circuit's procedure is inherently one-sided: if there are no grounds for an original panel member to change his or her vote, then the appointment of a new judge can assist only the losing party. The prevailing party can only lose ground, creating a troubling, one-sided procedure that decreases confidence in the courts. Further, this procedure allows a panel decision to be reversed by the vote of a single judge, without a majority vote of the original panel to reach a different outcome, and without a majority vote of the court to rehear a case en banc.

Appropriate appellate procedure is critical to maintaining confidence in the judiciary. A change in the composition of a panel ideally would not affect how the law applies to a given set of facts. But Congress and the courts have developed procedures for our imperfect world, including to avoid conflicting panel decisions. That is why 28 U.S.C. § 46 authorizes a panel to speak for the entire court; and it is why the law-of-the-circuit doctrine insulates panel decisions from intra-circuit review outside the en banc process. In the Federal and Ninth Circuits, however, the selection of a new judge for panel rehearing can directly change the outcome of a case.

The startling outcome here is not only unauthorized and one-sided; it also will encourage more losing parties to bring the most inefficient, vexing, and unproductive type of rehearing petition: one that merely rehashes arguments the panel has already rejected.

ARGUMENT

I. The Federal Circuit Was Not Authorized to Create a New Panel for Purposes of "Panel" Rehearing

Once a duly authorized three-judge panel has "heard and determined" the outcome of an appeal, no federal

statute permits rehearing before a *different* three-judge panel. See 28 U.S.C. § 46(c). The Federal Circuit exceeded its authority when it created an *ad hoc* second panel in response to a petition for panel rehearing when the initial panel quorum of two judges retained statutory authority to resolve the petition for rehearing. See *id.* § 46(d); see *United States* v. *Desimone*, 140 F.3d 457, 458-59 (2d Cir. 1998) ("Section 46(d) provides that a majority of judges of an authorized three-judge panel or court in banc shall constitute a quorum.").

A. The federal courts of appeals decide the vast majority of appeals in three-judge panels. See 28 U.S.C. § 46(c) ("Cases and controversies shall be heard and determined by a court or panel of not more than three judges."). Under Section 46, each "separate panel[]," *id.* § 46(b), opinion represents the judgment of the entire court, and that decision is final unless "hearing or rehearing before the court in banc is ordered by a majority of the circuit judges," *id.* § 46(c).

Under federal law, once a panel has "heard" an appeal and "determined" its outcome, a dissatisfied party has three options. First, the party may file a "petition for panel rehearing," which "is *addressed to the original panel*." 16AA Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3981.2 (5th ed. 2022 update) (emphasis added). Second, the party may file "a petition for rehearing en banc," which "is addressed to all judges in regular active service." *Ibid.* Third, the party may file a petition for certiorari, which is addressed to this Court. See 28 U.S.C. § 1254.

Given this framework, panel rehearings are narrowly circumscribed by the appellate rules. A "petition for panel rehearing" is "[a] request that a *particular judicial panel that has issued a decision* should reconsider its decision on grounds that it has overlooked or misapprehended a fact or the law." *Petition for Panel Rehearing*, *Black's*

Law Dictionary 1384 (11th ed. 2019) ("*Black's Law*") (emphasis added).

Here, the panel that "issued a decision" was comprised of Chief Judge Moore, Judge O'Malley, and Senior Judge Linn. Accordingly, the petition for panel rehearing was directed to that "particular judicial panel." *Ibid.* Judge O'Malley's retirement did not dissolve the panel that "heard and determined" the case, 28 U.S.C. § 46(c), and that "*issued a decision*" in the appeal, *Black's Law*, *supra*, at 1384 (emphasis added). The panel's remaining two members constituted a quorum and so retained the statutory authority—and sole responsibility—to decide the petition for panel rehearing pursuant to Section 46(d), under which "[a] majority of the number of judges authorized to constitute a court or panel thereof … shall constitute a quorum." 28 U.S.C. § 46(d). There was no need to add a judge and form a new panel to address the petition. And as petitioner explains (at 22-27), every circuit outside of the Ninth (and now Federal) Circuits rejects that approach.

B. The Federal Circuit's appointment of another panel—with two of the original three members and a third in place of Judge O'Malley—was not only unnecessary, it was also unauthorized. Indeed, the Federal Circuit's procedure exceeded any accepted meaning of the term "rehearing."

The process for panel rehearing is not statutorily authorized; it is instead a feature of the court's inherent authority to correct manifest errors in its initial opinion. See, *e.g.*, *Davis* v. *Kia Motors Am., Inc.*, 408 F. App'x 731, 732 n.* (4th Cir. 2011) (per curiam) ("excercis[ing] … inherent authority to sua sponte grant rehearing and recall the mandate"); *Spanish Int'l Broad. Co.* v. *FCC*, 385 F.2d 615, 621 (D.C. Cir. 1967) ("The power to reconsider is inherent in the power to decide … ." (citation omitted)). The procedural rules defining the court's authority thus

consistently recognize that panel *re*hearing should be directed to the panel that "heard and determined" the appeal in the first place. 28 U.S.C. § 46(c).[3]

As the Federal Rules of Appellate Procedure explain, the purpose of a petition for panel rehearing is limited to identifying points of law or fact that the panel "overlooked or misapprehended." Fed. R. App. P. 40(a)(2); see *Easley* v. *Reuss*, 532 F.3d 592, 594 (7th Cir. 2008) ("Panel rehearings are designed as a mechanism for the panel to correct *its own* errors in the reading of the factual record or the law." (emphasis added)). The power to reconsider issues previously presented is specific to the panel that decided the case in the first instance.

The Federal Circuit's own rules reflect the same understanding that the panel that decided a case should consider whether to rehear it. The practice note to Federal Circuit Rule 40 states that "[w]hen a petition for panel rehearing is filed, the clerk of court will transmit copies to *the panel that decided the case*." Fed. Cir. R. 40, practice note (emphasis added). Similarly, the Federal Circuit's Internal Operating Procedures direct that, "[p]romptly on receipt, the clerk will distribute the petition for rehearing to *the merits panel members* with a petition for panel rehearing vote sheet." CAFC IOP No.

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[3] The standard for panel rehearing at the appellate level mirrors the standard for reconsideration in district courts. See Fed. R. Civ. P. 59(e), 60(b). "A motion for reconsideration serves a very limited purpose in federal civil litigation; it should be used only 'to correct manifest errors of law or fact or to present newly discovered evidence.'" *Franks* v. *Saul*, No. 19-CV-1299, 2020 WL 8571774, at *1 (E.D. Wis. Nov. 30, 2020) (quoting *Rothwell Cotton Co.* v. *Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir. 1987)). Like a petition for panel rehearing on appeal, "[r]econsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly." *Templet* v. *HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004); see *Dempster* v. *Lamorak Ins. Co.*, 457 F. Supp. 3d 547, 554 (E.D. La. 2020).

12.1(b) (Mar. 1, 2022). "[U]nless a majority *of the panel* agrees to rehear the case," the clerk is to deny the petition. Fed. Cir. R. 40, practice note (emphasis added). Even when panel rehearing is granted, moreover, rehearing is "before the panel." *Ibid.* These rules do not contemplate that a new panel will be formed for the purpose of considering a rehearing petition.[4]

What happened in this case was thus not "rehearing," as that term is understood by the Federal Circuit's own rules, or by the rules of most other courts of appeals. 28 U.S.C. § 46(d) (a quorum is a majority of the panel). Absent a vote by the remaining judge from the first panel majority in favor of rehearing, the petition for panel rehearing could not have been granted by a majority of the panel and should have been denied.

C. The Federal Circuit's *ad hoc* procedure, by contrast, undermines the purpose of rehearing: to allow judges to correct mistakes of fact or law in their initial

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[4] The rules of other courts of appeals are in accord. See, *e.g.*, CA3 IOP No. 8.1 (Jan. 6, 2023) ("A petition for panel rehearing is sent to the members of the panel … ."); *id.* No. 8.3.1 ("The author, if an active or senior judge of this court, enters an order granting panel rehearing if two members of the panel vote for panel rehearing, and vacates the panel's opinion and the judgment entered thereon. Otherwise, the author enters the order denying panel rehearing."); CA4 IOP No. 40.2 (July 15, 2022) ("The panel of judges who heard and decided the appeal will rule on the petition for rehearing. … If a petition for rehearing is granted, the original judgment and opinion of the Court are vacated and the case will be reheard before the original panel."); 5th Cir. R. 40.2 ("Petitions for rehearing of panel decisions are reviewed by panel members only."); *Practitioner's Guide to the United States Court of Appeals for the Tenth Circuit* 59 (13th ed. Jan. 2023) ("If the petition does not request en banc consideration, it is circulated only to the panel of judges that decided the appeal, who then vote on the petition."); 11th Cir. R. 34-2 ("Following the issuance of an opinion by a panel of three judges, if a judge of the panel recuses or is disqualified, the two remaining judges, whether or not they are both judges of this court, may proceed by quorum to take such further actions as are deemed appropriate.").

opinions. See *Rehearing*, *Black's Law*, *supra*, at 1539 ("A court's *second or subsequent* hearing of a case, a motion, or an appeal, usu. to consider an alleged error or omission in the court's judgment or opinion … ." (emphasis added)). Confirming this understanding, the Federal Circuit's website explains that "[p]etitions for rehearing should not be used to reargue issues previously presented that were not accepted by the merits panel during initial consideration of the appeal." *Petitions for Rehearing & Rehearing En Banc*, U.S. Court of Appeals for the Fed. Circuit, http://bit.ly/3IAlDUi; see also Hon. Richard S. Arnold, *Why Judges Don't Like Petitions for Rehearing*, 3 J. App. Prac. & Process 29, 36 (2001) ("Petitions for rehearing are generally denied unless something of unusual importance … is at stake, or a real and significant error was made by the original panel or there is a conflict within the circuit on a point of law. In the usual course of things, cases receive all the consideration they need the first time through.").

In this case, the new panel member—Judge Hughes—was not "rehearing" anything. He was hearing the case for the first time, meaning he had made no initial legal or factual error that possibly could have required correction. And there was nothing he conceivably "overlooked or misapprehended" in arriving at the first panel decision, since he did not participate in that decision. Fed. R. App. P. 40(a)(2). His assignment created a *new* panel that, as a panel, was considering the case for the first time.

As the Federal Circuit itself noted when reviewing a decision by the Armed Services Board of Contract Appeals in *Universal Restoration, Inc.* v. *United States*, "no reconsideration" occurs when "[a] different panel simply disagree[s] with the first decision." 798 F.2d 1400, 1406 n.9 (Fed. Cir. 1986). Such a "re-do" is not an appropriate function of the rehearing procedure. It allows

a panel decision to be reversed without a vote of a majority of the panel to rehear the case, or by a majority of the court to rehear a case en banc. Instead, it effectively allows reversal by the vote of a single judge.

II. The Second Opinion Undermines the Public Policy Interests of Uniformity, Confidence in the Judiciary, Fairness, and Transparency

Established practice in this Court—and in every circuit except the Ninth Circuit (and now the Federal Circuit)—confirms that a new panel may not be formed for rehearing, and panel rehearing may not be granted, unless a judge in the original majority changes his or her vote. Novartis's Petition for Certiorari surveys (at 22-27) that circuit split exhaustively, and *Amici* do not repeat it here. Instead, *Amici* explain that the Federal Circuit's *ad hoc* panel rehearing procedure implicates important systemic concerns that merit this Court's attention.[5]

A. Permitting a newly constituted panel to overturn a prior panel's opinion is inconsistent with principles of sound adjudication that are reflected in the law-of-the-circuit doctrine. Under this doctrine, every three-judge panel is bound by prior panel decisions until or unless those decisions are "overruled by the court *en banc* or by other controlling authority such as [an] intervening …

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[5] This Court routinely reviews cases involving questions of appellate procedure that implicate concerns of fairness and consistency. See, *e.g.*, *Cameron* v. *EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1010-11 (2022) (reviewing and reversing court of appeals' denial of intervention on appeal); *Smith* v. *Barry*, 502 U.S. 244, 245 (1992) (reviewing and reversing court of appeals' holding that a document intended to serve as an appellate brief may not constitute a notice of appeal under Fed. R. App. P. 3); *Acosta* v. *La. Dep't of Health & Hum. Res.*, 478 U.S. 251, 253 (1986) ("Because such a direct conflict over the interpretation of the Rules of Appellate Procedure calls for resolution in this Court, we grant the petition for a writ of certiorari.").

Supreme Court decision." *Tex. Am. Oil Corp.* v. *U.S. Dep't of Energy*, 44 F.3d 1557, 1561 (Fed. Cir. 1995) (en banc); see also *Metzinger* v. *Dep't of Veterans Affs.*, 20 F.4th 778, 781 (Fed. Cir. 2021); *Robert Bosch, LLC* v. *Pylon Mfg. Corp.*, 719 F.3d 1305, 1316 (Fed. Cir. 2013) ("Panel opinions are of course opinions of the court and may only be changed by the court sitting en banc.").[6]

The law-of-the-circuit doctrine exists to ensure that the court—acting through its three-judge panels—speaks with a single voice, and that decisions of the court are not overturned lightly or without special justification. The doctrine instills confidence in the Judiciary: it "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2422 (2019) (quoting *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991)).

All circuits follow the law-of-the-circuit approach. See, *e.g.*, *Payne* v. *Taslimi*, 998 F.3d 648, 654 (4th Cir. 2021) ("[W]hen a panel of [the court of appeals] looks horizontally to our own precedents, we must apply their commands as a mechanical mandate."), *cert. denied*, 142 S. Ct. 716 (2021); *Scott* v. *United States*, 890 F.3d 1239,

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[6] The procedure here was also in tension with the law-of-the-case doctrine, which similarly promotes uniformity but, unlike *stare decisis*, does so within a single case rather than in the legal system more broadly. "Law of the case is a discretionary, common law doctrine that counsels the court to follow its prior decision on a particular issue in all subsequent proceedings in the same case unless, among other things, the decision was clearly erroneous and continued adherence would be a manifest injustice." Paul R. Gugliuzza, *(In)valid Patents*, 92 Notre Dame L. Rev. 271, 275 (2016). "[T]o serve the interests of judicial economy, finality, and avoidance of 'panel-shopping,' the [law-of-the-case] doctrine strongly discourages reconsideration of issues that a previous panel has addressed, fully considered, and decided." *Toro Co.* v. *White Consol. Indus., Inc.*, 383 F.3d 1326, 1335 (Fed. Cir. 2004) (citation omitted).

1257 (11th Cir. 2018) ("The prior-panel-precedent rule requires subsequent panels of the court to follow the precedent of the first panel to address the relevant issue 'unless and until the first panel's holding is overruled by the Court sitting en banc or by the Supreme Court.'" (quoting *Smith* v. *GTE Corp.*, 236 F.3d 1292, 1300 n.8 (11th Cir. 2001)); see also Phillip M. Kannan, *The Precedential Force of Panel Law*, 76 Marquette L. Rev. 755, 755-56 (1993). Although the specifics of their approach may vary somewhat, each circuit recognizes that a panel opinion cannot be overturned absent special circumstances—either recognition by the panel of a serious error or omission in its judgment or a determination by the court of appeals sitting en banc.

What happened in this case is inconsistent with principles underlying the law-of-the-circuit doctrine. The original panel opinion, *Novartis Pharmaceuticals Corp.* v. *Accord Healthcare, Inc.*, 21 F.4th 1362 (Fed. Cir. 2022), was precedential upon issuance; it was therefore binding on the new panel that issued the second opinion. The mere fact that a panel member left the bench *after the decision issued* does not justify reversing a precedential decision. Nor is "mere" disagreement between two panels sufficient to justify uprooting circuit precedent, as the Federal Circuit itself has recognized. See, *e.g.*, *Bedgear, LLC* v. *Fredman Bros. Furniture Co.*, 783 F. App'x 1029, 1030 (Fed. Cir. 2019) (applying *Arthrex, Inc.* v. *Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), as binding precedent before mandate issued). In *Bedgear*, for instance, the panel recognized that it was "bound to follow" *Arthrex* even though a majority of the *Bedgear* panel disagreed with the *Arthrex* decision. *Id.* at 1030 (Dyk & Newman, JJ., concurring in judgment). Instead, absent a changed panel vote—or special circumstances justifying en banc review—the law-of-the-circuit doctrine should have kept the first panel decision in place. The same interests in fairness, reliance, and integrity of the

judicial process manifested by the law-of-the-circuit doctrine should have led the Federal Circuit to allow the original panel to decide the petition for rehearing here.

B. "Inconsistency is the antithesis of the rule of law." *LaShawn A.* v. *Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996). Conversely, maintaining the same panel through the rehearing process promotes confidence in the Judiciary. In a perfect world, a change in the composition of a panel would not affect how the law applies to a given set of facts. See *Carver* v. *Lehman*, 558 F.3d 869, 880 (9th Cir. 2009) (Reinhardt, J., concurring in the judgment). The "fortuity" of changes in panel composition should not impact outcome. *Ibid.*

In the Federal and Ninth Circuits, however, the selection of a new judge for panel rehearing can tip the scales. In such a case, the result changes based on the extra-legal circumstances of the panel's members, *not* based on some legal or factual issue that was "overlooked or misapprehended" in the initial hearing. Fed. R. App. P. 40(a)(2). This case illustrates the point. "[T]he law did not change … between the time of the original panel's decision and the time of the new majority's opinion." *Carver*, 558 F.3d at 880 (Reinhardt, J., concurring in the judgment). The outcome in this appeal turned on the panel's composition.

A procedure that encourages varying outcomes on identical facts is particularly incongruous in the Federal Circuit, given that court's foundational purpose of creating a unified national body of patent law. See Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. Rev. 1, 2 (1989). The unusual procedure here could bolster the notion advanced by some commentators that the Federal Circuit's patent decisions are too panel-dependent. See, *e.g.*, Paul M. Janicke, *On the Causes of Unpredictability*

of Federal Circuit Decisions in Patent Cases, 3 Nw. J. Tech. & Intellectual Prop. 93, 93 (2005).

C. Creating a new panel to resolve a petition for panel rehearing is also inherently one-sided. In every circuit besides the Federal and Ninth Circuits, panel rehearing is allowed only in the narrow circumstance where a judge in the original panel majority changes his or her vote. See *Carver*, 558 F.3d at 878-79. Appointing a new judge to form a new panel can benefit only the original losing party, allowing that party a chance—as here—of flipping the result even if no member of the original panel changes his or her mind, and with no corresponding benefit to the prevailing party. Fundamental due process principles counsel against such a one-sided rule. See *Offutt* v. *United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice.").

D. The Federal Circuit's procedure was all the more concerning because it was not public. The Ninth Circuit explained its novel panel rehearing procedure in a written opinion in response to criticisms raised by the concurrence. See *Carver*, 558 F.3d at 878-79. The Federal Circuit, by contrast, did not explain its panel rehearing process at all—let alone identify any issue of law or fact that the first panel had "overlooked or misapprehended" to warrant panel rehearing under Fed. R. App. P. 40(a)(2)—despite its previous recognition of the value in transparency as an aid to appropriate judicial review in other circumstances. See *Universal Restoration*, 798 F.2d at 1406 n.9 ("Why the first decision warranted reconsideration at all is a mystery.").

Circuit splits are disfavored in any form. See Sup. Ct. R. 10(a). But when the basis for the court of appeals' decision is not public, it thwarts the open discussion of ideas and the "percolation" of issues through which the law develops. *California* v. *Carney*, 471 U.S. 386, 400 n.11 (1985) (Stevens, J., dissenting) (quoting Samuel

Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 716, 719 (1984)). It also undermines judicial legitimacy by conveying the impression that courts make outcome-determinative decisions without notice or opportunity to be heard, and in secret. This Court's intervention is necessary, at a minimum, to enable public deliberation about the appropriate process for panel rehearing moving forward.

E. The Federal Circuit's departure from the traditional standards for rehearing, see Fed. R. App. P. 40(a)(2), also encourages parties to rehash their same arguments in petitions for rehearing in the hopes of a different outcome (or potentially, a different panel). At a minimum, the Federal Circuit's rule ensures that a well-counseled litigant will file a petition for rehearing any time a judge on the Federal Circuit leaves the bench after joining a 2-1 majority. But except in unusual circumstances, such petitions only waste judicial (and party) resources. They should not be encouraged. See Arnold, *supra*, at 33.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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