No. 22-671

IN THE
Supreme Court of the United States

NOVARTIS PHARMACEUTICALS CORPORATION,
Petitioner,
v.

HEC PHARM CO., LTD., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF RETIRED UNITED STATES CIRCUIT JUDGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici are retired United States Circuit Judges and thus have substantial experience in appellate procedures and the internal operations of the courts of appeals.[1]

William W. Wilkins served on the United States Court of Appeals for the Fourth Circuit from 1986 to 2008, including as Chief Judge from 2003 to 2007. Prior to his service on the Fourth Circuit, Judge Wilkins was a United States District Judge for the District of South Carolina from 1981 to 1986 and was the first Chair of the United States Sentencing Commission from 1985 to 1994.

John D. Tinder served on the United States Court of Appeals for the Seventh Circuit from 2007 to 2015. Prior to his service on the Seventh Circuit, Judge Tinder was a United States District Judge for the Southern District of Indiana from 1987 to 2007.

Andre M. Davis served on the United States Court of Appeals for the Fourth Circuit from 2009 to 2017. Prior to his service on the Fourth Circuit, Judge Davis was a United States District Judge for the District of Maryland from 1995 to 2009. Before his federal judicial service, Judge Davis served as a judge on both the Circuit and District Courts for the City of Baltimore. Following his retirement from the bench, Judge Davis served as Baltimore City Solicitor until 2020.

Thomas I. Vanaskie served on the United States Court of Appeals for the Third Circuit from 2010 to 2019. Prior to his service on the Third Circuit, Judge Vanaskie was a

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[1] No counsel for any party authored this brief in whole or in part, nor did any person or entity other than *amici* or their counsel make a monetary contribution to the preparation or submission of this brief. All counsel of record were given timely notice of *amici*'s intent to file.

United States District Judge for the Middle District of Pennsylvania from 1994 to 2010.

Bernice B. Donald served on the United States Court of Appeals for the Sixth Circuit from 2011 to 2023. Prior to her service on the Sixth Circuit, Judge Donald was a United States District Judge for the Western District of Tennessee from 1995 to 2011 and, before that, a United States Bankruptcy Judge for the Western District of Tennessee from 1988 to 1995. Before her federal judicial service, Judge Donald served as a judge on the General Sessions Criminal Court for Shelby County, Tennessee. Judge Donald currently serves as a neutral with Resolute Systems, LLC.

Reflecting their experiences as judges, *amici* have an interest in the uniform application of rules regarding rehearing in the courts of appeals. *Amici* speak only for themselves personally and not for any entity or other person.

INTRODUCTION AND SUMMARY OF ARGUMENT

Experience teaches that there is life after life tenure. Federal judges have left the bench to enjoy retirement, but also to return to private practice, teach in law schools, become ambassadors, or join the Executive Branch.

Of course, this Court's observation that "federal judges are appointed for life, not for eternity" is no less applicable to jurists who step down from the bench than those who serve out their lifetime terms. *Yovino v. Rizo*, 139 S. Ct. 706, 710 (2019). But the decisions they rendered as judges before they departed the bench are entitled to the same respect and rules as those penned by their remaining colleagues.

This case exemplifies an approach that is out of step with these important principles and thus requires the Court's intervention.

The Federal Circuit, like the Ninth Circuit, has adopted a practice that when a divided three-judge panel decides a case, and one of the judges in the majority leaves the bench *after* the decision issues but *before* a petition for rehearing is disposed of, then that judge must be replaced by a new judge and (as in the case below) can be reversed under the guise of a "panel rehearing" by the newly constituted panel. This turnabout comes with no notice to the parties, no explanation, and no citation to an applicable federal law or rule. What was once a two-to-one decision can become a one-to-two decision in the other direction, notwithstanding the fact that the four judges split evenly.

The Federal Circuit's approach cannot be squared with the law or sound judicial practice. Section 46(c) of Title 28

gives adjudicatory power over appeals to three-judge panels. When a panel decides an appeal, the opinion can be revisited only if the same panel or the en banc court orders rehearing. And a panel may rehear its issued decision only when two members agree—meaning at least one judge who concurred in the majority must agree to rehearing. Otherwise the panel decision must stand, and any rehearing must be ordered by the court of appeals sitting en banc. That rule should not change when a member of the panel majority is no longer on the bench.

The decision below countenances the replacement of a departed colleague whose vote was necessary for the original determination. Adding a new judge after the case has been once decided is akin to creating a new panel for a new review, not a rehearing before the original panel. Courts of appeals make decisions in panels of three, not through rotating combinations of judges who revise and reissue each other's opinions. The better approach, and the one that comports with § 46(c), is to deny panel rehearing unless the remaining quorum of two agrees to it.

Allowing judges to swap out under the pretense of panel rehearing to change already-published decisions undermines public confidence in the judiciary. This issue cries out for uniformity that only this Court can provide. The Court should grant the petition, vacate the grant of panel rehearing, and reinstate the original panel decision.

ARGUMENT

I. The Federal Circuit's practice of appointing a replacement judge solely to vote for panel rehearing is wrong.

A. The courts of appeals issue decisions through three-judge panels.

The structure of the federal judicial system has changed over time, from its establishment under the Judiciary Act of 1789 through the creation of the modern courts of appeals under the Evarts Act of 1891 and the various expansions and divisions since. But throughout the Nation's history, federal appeals have been decided primarily by judges sitting in groups of three. *See* A. Lamar Alexander, Jr., *En Banc Hearings and the Federal Courts of Appeals: Accommodating Institutional Responsibilities*, 40 N.Y.U. L. REV. 563, 571 (1965) (noting that "[t]hree-judge tribunals had decided appeals since the circuit courts were created in 1789"); *see also W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 256 (1953) (interpreting revisions to the Judicial Code to be consistent with "the 'tradition' of three-judge courts").

The three-judge-court tradition has a democratizing effect on the adjudication of disputes, "because any group of three (whatever their partisan affiliation) is seen as able to render justice in any case and therefore the equal of any other group of three." Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373, 1377–78 (2021). Three-judge panels also provide swifter resolution of appeals, as a group of three "is generally conceded to be the most efficient number for hearing appellate cases"; those jurists, "in an intimate conference, will more quickly find the heart of a case than will seven or nine in a necessarily more formal conference." Alexander, *supra*, at 576.

Federal law reflects the three-judge tradition by declaring that "[c]ases and controversies shall be heard and determined by a court or panel of not more than three judges," unless the majority of active judges call for en banc consideration. 28 U.S.C. § 46(c). Upon issuance, a panel's decision stands as "the decision of the court." Revision Notes to 28 U.S.C. § 46. When a three-judge panel renders a decision, it thus speaks for the court as a whole.

The federal rules likewise highlight the panel's written decision as the determination of an appeal. Under Rule 36, "[t]he clerk *must* prepare, sign, and enter the judgment" upon receipt of "the court's opinion" or, "if a judgment is rendered without an opinion, as the court instructs." Fed. R. App. P. 36(a) (emphasis added). The entry of judgment starts the clock for seeking rehearing, whether by the panel or the en banc court. *See* Fed. R. App. P. 35(c) (en banc); Fed. R. App. P. 40(a)(1) (panel). The mandate then follows the expiration of the time to seek rehearing. *See* Fed. R. App. P. 41(b).

In light of these commands, the Court has sensibly explained that "[a] case or controversy is 'determined' when it is decided," *United States v. Am.-Foreign S.S. Corp.*, 363 U.S. 685, 688 (1960), and a case is decided when the court issues its written opinion. *See Yovino*, 139 S. Ct. at 709 (holding judge's vote could not be counted because he died before decision was filed); *Am.-Foreign S.S. Corp.*, 363 U.S. at 691 (holding judge was ineligible to participate in en banc proceeding because he retired from active service before court issued its decision).

Both litigants and the public can therefore be assured that the panel's opinion, absent rehearing by the panel or the en banc court, stands as the decision of the court.

B. Panel rehearing is reserved for the panel that issued the original decision.

Panel rehearing is not supposed to be a do-over for the losing side. Instead, it "is designed to bring to the panel's attention points of law or fact it may have overlooked." *Missouri v. Jenkins*, 495 U.S. 33, 46 n.14 (1990). Rule 40 thus requires the petitioner to "state with particularity each point of law or fact that the petitioner believes the court has o*verlooked or misapprehended* and must argue in support of the petition." Fed. R. App. P. 40(a)(2) (emphasis added). In other words, the petitioner seeking panel rehearing must identify the errors of fact or law apparent from the panel's own decision. *See, e.g.*, *Grubb v. W.A. Foote Mem'l Hosp., Inc.*, 759 F.2d 546, 547 (6th Cir. 1985) (granting panel rehearing and issuing revised decision after concurring judge reversed course and sided with original dissenting judge).

These procedures rest on an obvious premise, but one that apparently bears emphasis: the panel that is asked to *rehear* a case under Rule 40 is the same panel that *heard* the case in the first instance. *See* BLACK'S LAW DICTIONARY 1287 (6th ed. 1990) (defining rehearing as "[r]econsideration of a case by the same court in which the original determination was made").[2] If a court of appeals adopted a procedure that randomly assigned every Rule 40 petition to a new panel of judges, it would make little sense to call that a "rehearing." To the contrary, that practice would resemble a "horizonal appeal" that would "thrust unwarranted

[2] The Federal Circuit's own procedures recognize that rehearing petitions must be distributed "to the merits panel members." Fed. Cir. I.O.P. 12.1(b); *see also* 6th Cir. I.O.P. 40(b) ("Only the original panel members will review petitions for rehearing that are unaccompanied by a petition for rehearing en banc.").

extra burdens on the court." *W. Pac. R.R. Corp.*, 345 U.S. at 258.

When the panel sees no need for rehearing, the petitioner's next recourse at the court of appeals is to seek rehearing en banc. An en banc proceeding "is not favored" and generally should be ordered only when "necessary to secure or maintain uniformity of the court's decisions" or the matter "involves a question of exceptional importance." Fed. R. App. P. 35(a). The mine run of cases do not implicate these considerations, and so the panel, more often than not, gives the last word.

C. The Federal Circuit's practice, like the Ninth Circuit's, is impermissible.

The approach taken by the Federal and Ninth Circuits undermines the core premise of "panel rehearing"—that the *original* panel ought to rethink its own decision. Rather than allowing the original panelists to determine the propriety of panel rehearing under Rule 40, those two courts add a new judge to the mix if an original panelist who joined the decision has left the bench.

This practice brings to mind Justice Byron White's adage: "Every time a new justice comes to the Supreme Court, it's a different court." Dennis J. Hutchinson, THE MAN WHO ONCE WAS WHIZZER WHITE 467 (1998). In the same manner, the addition of a new judge to an existing panel does not reconstitute the panel; it creates a new one. And, of course, on a three-judge panel, one judge can make all the difference.

The Federal Circuit did not explain why it replaced a retired judge and reversed the original panel's published decision, so litigants can only speculate. But the Ninth Circuit has for many years taken the same approach. *See*

Carver v. Lehman, 558 F.3d 869, 878 (9th Cir. 2009).[3] That practice is not based on § 46 or the Rules of Appellate Procedure. Instead, the Ninth Circuit's practice is premised on the court's authority to withdraw or amend its opinion at any time before the issuance of the mandate. But that formalistic approach overstates the meaning of the period between the judgment and the mandate. Litigants (and the general public) would not say, as the Ninth Circuit has suggested, that the published opinion of a court of appeals is "only part way through its finalization process." *Id.* Courts do not publish draft opinions. Yet that is the Ninth Circuit's basis for allowing a post-decision, pre-mandate panel vacancy to be filled by a new judge who can then vote to rehear the case. *See id.* at 878–89 & n.16; *e.g.*, *Perez v. City of Roseville*, 926 F.3d 511, 524–26 (9th Cir. 2019) (flipping outcome on panel rehearing by substituting new judge after post-publication death of original decision's author).

To be sure, a new panelist can be added before the court issues its opinion in the first instance. Under § 46(d) a quorum of two judges can "decide an appeal—provided, of course, that they agree." *Yovino*, 139 S. Ct. at 709. If the quorum of two cannot decide the case, then a replacement judge may be necessary to decide the appeal. Indeed, the appointment of a replacement judge to a panel *before* it renders its decision is memorialized in the internal operating procedures of many of the courts of appeals.[4]

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[3] *See* W.S. Simkins, FEDERAL PRACTICE 1268–70 (1923) (noting that every federal appeals court except the Ninth Circuit limited rehearing to cases in which "a judge who concurred in the judgment desire[d] it and a majority of the court so determine[d]").

[4] *See, e.g.*, 2d Cir. I.O.P. E(b) (allowing two remaining judges in disagreement to "request the clerk designate a third judge by random selection" and requiring the clerk to so advise the parties); 3d Cir. I.O.P. 12.1(b) (requiring two remaining judges to notify the chief judge,

Once a three-judge panel decides an appeal, the subsequent loss of a panelist does not warrant a replacement unless the remaining two agree they need one. In that circumstance, the quorum of two could vote to rehear the case, including by "restor[ing] the case to the calendar for reargument or resubmission." Fed. R. App. P. 40(a)(4)(B). The appointment of a third judge to form a new panel *after* the quorum grants panel rehearing does not target a retired judge's vote for nullification. Instead, it adds the new judge only after the original panelists have reconsidered their own votes and decided to take the case back under advisement. Critically, this process hinges on the agreement of both remaining judges. A one-to-one vote for panel rehearing would not suffice.

That does not mean nonpanelists lack the power to influence a panel's decision. Most obviously, any active-ser-

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who may then "decide whether to reconstitute the panel by naming a substitute"); 4th Cir. I.O.P. 36.2 ("If a panel is reduced to two and the two cannot agree … the case will be reargued before a new three-judge panel which may or may not include prior panel members."); 5th Cir. I.O.P. Recusal or Disqualification of Judges (C) ("If a judge recuses, or is disqualified, he or she immediately notifies the other members of the panel, and arrangements are made for a substitute judge."); 6th Cir. I.O.P. 34(b)(2) ("Where it is necessary to bring in a new judge to complete a panel, the clerk will randomly draw a name from among the active and senior judges not already on the panel."); 8th Cir. R. 47E ("If either judge requests a designation or if the two judges do not agree on the matter, the clerk will randomly designate another circuit judge to sit in place of the judge who no longer serves on the panel" and "will advise the parties of the designation[.]"); 11th Cir. R. 34-2 ("If a judge of a panel that has taken an appeal or matter under submission is not able to participate in a decision, the two remaining judges … may decide the appeal or may request the chief judge or delegate of the chief judge to designate another judge to sit in place of the judge unable to participate.").

vice judge can invoke en banc consideration in the first instance or on rehearing, even if no litigant requests it. *See, e.g.*, *Lexmark Int'l, Inc. v. Impression Prods., Inc.*, 785 F.3d 565 (Fed. Cir. 2015) (ordering sua sponte hearing en banc). And when en banc consideration is denied, "judges are entitled to explain their reasons for that vote." *Doe v. Fairfax Cnty. Sch. Bd.*, 10 F.4th 406, 414 (4th Cir. 2021) (Wilkinson, J., dissenting from denial of rehearing en banc); *see, e.g.*, *Athena Diagnostics, Inc. v. Mayo Collaborative Servs., LLC*, 927 F.3d 1333, 1352 (Fed. Cir. 2019) (Moore, J., dissenting from denial of rehearing en banc).

Many of the courts of appeals also provide for the prepublication circulation of draft opinions to give nonpanelists a chance to reflect and provide feedback on a decision that, left to stand, will bind future panels. *See Cobert v. Miller*, 800 F.3d 1340, 1349 (Fed. Cir. 2015) (acknowledging that a panel opinion becomes "law of the circuit" unless and until overruled by the Supreme Court or en banc court). In the Federal Circuit, for example, for proposed precedential decisions, "the opinion and any concurring or dissenting opinions" must be circulated "to the full court," after which "nonpanel members of the court will have ten working days to review all circulated opinions and orders." Fed. Cir. I.O.P. 10.5. Nonpanelists "may send comments to the authoring judge, to the panel, or to all judges" and even may have the case held "pending a request for an en banc poll." *Id.* The input of nonpanelists in these circumstances is appropriate because, in the end, the final decision will be made by either the original panel or the en banc court in accordance with applicable laws, rules, and procedures.

The judge-replacement practice applied by the Federal and Ninth Circuits needlessly short-circuits the use of these tools and undermines confidence in the judiciary. *See infra*, at II.

D. Other courts of appeals properly recognize that disposition of a panel-rehearing petition when a panelist becomes unavailable belongs to the remaining two-judge quorum.

Only the original panel that decided an appeal can order panel rehearing. So if one of the original judges is no longer available to participate, the remaining two are left to consider the Rule 40 petition. When those remaining judges were on opposite sides of the decision, panel rehearing is only possible if the judge who concurred in the original result changes his or her mind. *Cf.* Sup. Ct. R. 44.1 (allowing rehearing only when agreed to "by a majority of the Court, at the instance of a Justice who concurred in the judgement or decision").

The Third Circuit expressly adheres to that rule. *See United States v. Safehouse*, 991 F.3d 503, 505 (3d Cir. 2021) (declining panel rehearing with "no judge who concurred in the decision having asked for rehearing"). For example, in a decision issued during the last week of his tenure on the Third Circuit, then-Judge Alito joined a majority opinion over the dissent of Judge Ambro. *See Ranke v. Sanofi-Synthelabo Inc.*, 436 F.3d 197 (3d Cir. 2006). By the time the court considered panel rehearing, Judge Alito had departed the court. Even so, the losing party's petition for panel rehearing was denied because "no judge who concurred in the decision" requested rehearing. No. 04-4514 (Feb. 28, 2006). Unlike in the Federal and Ninth Circuits, the Third Circuit did not add a new panelist to decide whether Judge Alito's original vote should be left to stand.[5]

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[5] *See also Delgado v. U.S. Dep't of Justice*, 977 F.3d 1295 (7th Cir. 2020) (disposing of rehearing request by a quorum acting under 28 U.S.C. § 46(d) after Justice Barrett's elevation to the Court).

The Eleventh Circuit's procedures likewise demonstrate the right approach for when to add a replacement judge. Under that court's rules, when a panelist is no longer able to participate in a pending case, the two remaining judges may request a replacement while the matter remains under submission—that is, *before* the case has been decided. *See* 11th Cir. R. 34-2. But if the third panelist becomes unavailable *after* the panel decides the case, there is no provision that allows the remaining judges to request a replacement. *See id.* In that circumstance, the disposition of a panel-rehearing petition is left to the quorum of two. *See, e.g.*, *Fluor Intercontinental, Inc. v. IAP Worldwide Servs., Inc.*, 533 F. App'x 912 (11th Cir. 2013) (2-1 panel decision with Judge Barkett in majority), *reh'g denied*, No. 12-10793 (Nov. 18, 2013) (denying panel rehearing by quorum after Judge Barkett's retirement).

The Tenth Circuit provides another apt example of the proper practice. Shortly before Judge McConnell resigned from the bench, he joined a two-judge majority over the dissent of then-Judge Gorsuch. *See Williams v. Jones*, 571 F.3d 1086 (10th Cir. 2009). By the time the court disposed of the appellee's petition for panel or en banc rehearing, Judge McConnell had left the court. In his dissent from the denial of en banc rehearing, Judge Gorsuch noted he declined to seek panel rehearing not only because he could not say the majority "'overlooked or misconstrued' any argument or evidence presented to them," but also because "a vote among the remaining two panel members would likely result in a tie." *Williams v. Jones*, 583 F.3d 1254, 1256 n.1 (10th Cir. 2009) (Gorsuch, J., dissenting from denial of rehearing en banc).

II. The Court should resolve this issue to ensure uniformity and bolster confidence in the judiciary.

The problem of judge-replacement for panel rehearing is too important to leave uncorrected. When it comes to the Judicial Code under Title 28, "the responsibility lies with this Court to define these requirements and insure their observance." *W. Pac. R.R. Corp.*, 345 U.S. at 258. The Court should impose a uniform rule regarding panel rehearing for cases where an original panelist is unavailable. This is not a problem that ought to be left to percolate.

Importantly, the facts giving rise to this case are likely to increase in frequency in the coming years. More than one-third of all the Article III judges who have ever retired from the federal bench have done so since 2000.[6] Those numbers continue to grow as judges consider life after life tenure.[7] And each time a judge leaves the bench, he or she may leave behind several already-published decisions vulnerable to panel rehearing.[8]

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[6] *See* Fed. Jud. Ctr., *Biographical Directory of Article III Federal Judges, 1789–Present*, https://www.fjc.gov/history/judges/search/advanced-search (last visited Feb. 20, 2023) (select "Resignation" and "Retirement" under "Termination Type" and filter by "Termination Date").

[7] *See, e.g.*, Tiana Headley, "Joseph Greenway to Retire from Third Circuit Appeals Court," *Bloomberg Law* (Feb. 7, 2023), https://news.bloomberglaw.com/us-law-week/joseph-greenaway-to-retire-from-third-circuit-us-appeals-court.

[8] For example, on the day before Judge Costa resigned from the Fifth Circuit, the court issued three decisions that he authored or joined over the dissent over a colleague. *See NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306 (5th Cir. 2022); *Environment Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 47 F.4th 408 (5th Cir. 2022); *In re Silver State Holdings*, No. 21-10212, 2022 WL 3755778 (5th Cir.

The approach taken by the Federal and Ninth Circuits risks undermining public faith in the judicial decisionmaking process. Dissenting judges in the Ninth Circuit have adroitly identified "the problematic concern" raised by that court's practice of allowing "the substitution of a different judge" after the publication of the original panel's decision, *Perez*, 926 F.3d at 526 (Molloy, J., dissenting), and observed that "increasing the extent to which judicial decisions depend on chance and subjectivity is not a wise alternative," *Carver*, 558 F.3d at 881 (Reinhardt, J., concurring in judgment). The appointment of a new judge who changes the result after the decision has already been published raises the concern that a court's decisions "depend upon the personal opinions of those who, from time to time, may make up its membership," making the court "a theater of political strife" whose "action will be without coherence or consistency." *Pollock v. Farmers' Loan & Tr. Co.*, 157 U.S. 429, 651 (1895) (White, J., dissenting).

The need for confidence in our courts of appeals is especially important, because they "are the courts of last resort in the run of ordinary cases." *Textile Mills Sec. Corp. v. Comm'r*, 314 U.S. 326, 335 (1941). Justice Brewer accurately captured the gravity of that responsibility at the first sitting of the Eighth Circuit in 1891: "This is no intermediate court. It is not a halfway house between the trial and the final determination of a cause…. In other words, for that variety of cases which by the statute is committed to this court this is the Supreme Court of the United States." *Proceedings at the Organization of the U.S. Court of Appeals for the Eighth Circuit*, 4 U.S. App. 697, 699 (1891).

Aug. 30, 2022). If the Fifth Circuit adopted the Federal and Ninth Circuits' approach, each of those decisions could be rewritten on panel rehearing as though Judge Costa had never participated in the cases.

To bolster faith in our courts, respect for judicial institutions must come from both inside and out.

CONCLUSION

The Court should grant the petition for a writ of certiorari, vacate the grant of panel rehearing, and reinstate the original panel decision.

Respectfully submitted,

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