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## Quantifying the Significance of Circuit Splits in Petitions for *Certiorari*: The Case of Securities Fraud Litigation

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**Abstract:** A substantial literature establishes that circuit splits significantly increase the probability that the Supreme Court grants a petition for *certiorari*. But not all splits are created equal. Splits among circuits governing a smaller fraction of controversies affected by the question presented are less consequential than splits implicating a larger share of the same controversies. This article introduces a novel set of metrics that quantify the significance of circuit splits. It applies those metrics to federal securities fraud litigation to generate practical examples of the metrics' operation. An immediate implication of the analysis is that the Second and Ninth Circuits dominate class action securities fraud litigation, together resolving approximately 60% of all class action securities fraud claims. Splits implicating those circuits are therefore particularly significant and, all other factors equal, more worthy of *certiorari* than splits between any other two circuits. The analysis also documents a strong correlation among measures of economic significance, which can be difficult to quantify, and semantic measures that are easier to extract from legal databases. The proposed metrics promote precision and consistency in assessing a split's significance and can be useful to the Supreme Court in allocating the scarce and valuable opportunity to be heard. This article's analysis is preliminary, and the proposed metrics are designed to be suggestive, and far from dispositive. Significant additional research is appropriate before these novel metrics are broadly applied.

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\* The William A. Franke Professor of Law and Business (emeritus) at Stanford Law School; Commissioner, United States Securities and Exchange Commission (1985-1990). The research support provided by the team at Cornerstone Research, particularly Duarte Mascarenhas, and by my able assistant, Justin Fu, was essential to the preparation of this article. My thanks to them all.

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## I. Introduction

The grant of a petition for *certiorari* is discretionary with the Supreme Court and requires the affirmative vote of four Justices.<sup>1</sup> A substantial literature suggests that circuit splits are the most important factor in persuading the Court to grant a petition.<sup>2</sup> The ability to be heard by the Supreme Court is valuable for two distinct reasons. First, as an empirical matter, the Court's decision to grant a petition is a credible signal that the opinion below will be vacated or reversed. Second, the number of cases heard each term has declined precipitously from a peak of about 200 to its current level of approximately 70.<sup>3</sup>

Circuit splits play an outsized role in the *certiorari* process for many reasons.<sup>4</sup> Resolving a split promotes uniformity among the federal courts and uniformity can, in and of itself, be sufficient cause to grant a petition. Promoting uniformity is also consistent with error correction as an incentive for review. After all, if circuits express conflicting interpretations of the law, they can't all be right. Splits can also signal an intellectually significant debate that presents precisely the sort of challenge that appeals to the Supreme Court. Splits can also have ideological salience. If four Justices perceive a meaningful ideological divergence from their preferred outcome, and if those Justices view the case as a promising vehicle by which to shape lower court jurisprudence, then the odds increase that the petition will be granted.

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<sup>1</sup> SUP. CT. R. 10; STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE § 5.4 (11th ed. 2019) (ebook). Although the Supreme Court's docket primarily consists of its discretionary *certiorari* jurisdiction, the Court has mandatory appellate jurisdiction over injunctions issued by three-judge district courts, 28 U.S.C. § 1253. See *Abbott v. Perez*, 585 U.S. 579, 624 (2018) (Sotomayor, J., dissenting). The Court also has original jurisdiction over a limited category of cases, but its exercise of this original jurisdiction is discretionary. 17 VIKRAM DAVID AMAR, FEDERAL PRACTICE AND PROCEDURE (WRIGHT & MILLER) § 4053 (3d ed. updated Apr. 2023).

<sup>2</sup> See *infra* Section III.A and sources cited in note 50.

<sup>3</sup> See *infra* Section II.

<sup>4</sup> See *infra* Section III.

But not all splits are created equal. Splits differ in doctrinal significance, intellectual complexity, and ideological salience, among other dimensions. Splits can also be unequal for far more pragmatic reasons. Simply put, splits can arise in circuits with different “market shares.” Splits between circuits in which a question of law rarely arises, or has little practical consequence, are less worthy of the Supreme Court’s attention than precisely the same split involving circuits in which the question is more common or has greater economic effect. Splits created by a single outlier circuit, particularly if that circuit has a small “market share,” are also less worthy of review than splits created by a more equal divisions among circuits that frequently address the question presented in a petition.

The current state of the art in advocating for *certiorari* generally fails to measure an alleged split’s quantitative significance. Petitioners and respondents most commonly “count noses” and implicitly assume that all circuits are equally important with respect to a split’s significance.<sup>5</sup> A petition might thus allege that the First and Second Circuits split with the Third and Fourth Circuits, but not answer a more fundamental question: “Who cares if these circuits split?” Are these circuits trivially involved in the questions presented, or is there a more substantial reason to be concerned because the split circuits frequently address the question presented by the petition?

Consider a simple example. Assume a petition alleges a split involving four circuits with two circuits on each side of the split. If each of the four split circuits hears only 1% of all cases that raise the question presented, then the alleged split implicates an aggregate of only 4% of all potentially affected controversies. Alternatively, if each split circuit hears 20% of all cases that raise the question presented, then the split implicates a total of 80% of potentially affected controversies. The latter scenario obviously presents a stronger argument for granting a petition. This concept is not especially complicated. To use an election-year illustration, no presidential candidate would consider a split between California (with 54 electoral votes) and Delaware (with 3 electoral votes) as a mere one-to-one split. In contrast, a split between Minnesota and Missouri, each with 10 electoral votes, is more naturally viewed as an even split. The point is that counting all states in the Electoral College as equal, like counting all circuits when petitioning the Supreme Court as equal, provides a relatively superficial level of information, and can mask much more informative data.

But more contextualized statistics of the kind discussed here are usually not presented to the Court either by petitioners or by respondents. Simple “nose counting” instead rules the day.

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<sup>5</sup> See, e.g., Petition for Writ of Certiorari at 14, *Bittner v. United States*, 598 U.S. 85 (2023) (No. 21-1195) (describing a circuit split between the Fifth and Ninth Circuits as “undeniable and entrenched”); Petition for Writ of Certiorari at 21, *Reed v. Goertz*, 598 U.S. 230 (2023) (No. 21-442) (describing a split between the Fifth, Seventh, and Eleventh Circuits as “entrenched”); cf. Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705, 724–25 (2018) (noting that splits often arise due to poorly worded statutes or technical or complex areas of law, not because the split is particularly important or impacts a large number of people). However, some petitions provide further explanation for why the at-issue split is particularly important. See Petition for Writ of Certiorari at 5, *NVIDIA Corp. v. E. Ohman J:or Fonder AB* (No. 23-970) (explaining that the Ninth Circuit’s decision below diverged from the Second Circuit on the two questions presented, and these circuits “account for a significant majority of securities litigation nationwide”).

The Court is usually left to assess a split's significance based on criteria unrelated to a quantification of the extent to which the split circuits are important, in a frequentist sense, to the question presented.

This article addresses this challenge by introducing a pair of novel yet relatively simple statistics that quantify the significance of an alleged split. To be sure, this form of quantification might be more persuasive to some observers than others. But, given the small number of cases for which petitions are granted, and the small number of Justices required to vote in favor of a grant, this innovation can have a material impact on Supreme Court practice even if it only influences the vote of a single Justice in a small fraction of petitions. In other words, this form of analysis need not be broadly adopted for it to be consequential.

The first of the two proposed metrics is the “aggregate circuit split share” (ACSS). This metric estimates the aggregate economic (or other form of) significance of the allegedly split circuits. In the preceding example, the ACSS is either 4% or 80%. The higher the ACSS, the more consequential the split, and the stronger the argument favoring grant of the petition.

Significant complexities can, however, arise when operationalizing this simple insight. These challenges should not be minimized. The examples developed in this article rely on class action securities fraud litigation, a field of study that has generated detailed publicly available databases that have no analogues in many other areas of the law.<sup>6</sup> These securities fraud data document that, regardless of the measure employed, the Second and Ninth Circuits strongly dominate the market for class action securities fraud litigation. The Second Circuit's “circuit share” is, as explained below, approximately 37% and the Ninth Circuit's share is approximately 23%. Together, these two circuits represent approximately 60% of the market for securities fraud litigation.

Thus, splits involving these two circuits are, all other factors equal, more worthy of the Court's attention than other splits. The uniformity of this result arises because of strong, consistent correlations across multiple measures of economic significance. The same high degree of correlation cannot be assumed to exist in other areas of inquiry, and if no such correlations exist, then meaningful debate can arise as to which circuits are most important for the resolution of a question presented. This article recognizes and expands on these potential challenges.

This article's analysis of class action securities fraud litigation also documents a strong correlation between economic metrics (such as settlement values, number of complaints filed, and potential damage claims) and semantic metrics (such as the number of citations to Rule 10b-5 or to Section 11 of the Securities Act of 1933 in circuit court opinions). This correlation is potentially very meaningful because, if confirmed across other fields of inquiry, it could support the use of simple Lexis or Westlaw database searches to generate circuit share data that could serve as inputs

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<sup>6</sup> This article relies on data collected and curated at the Stanford Securities Class Action Clearinghouse (securities.stanford.edu) and analyzed by Cornerstone Research. The Clearinghouse collects information describing every securities fraud class action filed in federal court since January 1, 1996, the effective date of the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737. I am the principal investigator for that site.

for the calculation of ACSS and other metrics. That approach could greatly simplify application of the methodology described in this article, but additional research is necessary before a semantic approach can be broadly accepted.

The second metric, the “split ratio” (SR), measures the market shares on either side of the split. Intuitively, a split that can be described as 50-50, because the courts are evenly split on the question, should present a more compelling case for granting a petition than a 90-10 split, where a small number of circuits who rarely hear cases implicated by the split have a minority view as to the interpretation of the law.

While this intuition is simple, operationalizing the concept is a bit complex. Consider a split between two circuits in which the opinion giving rise to the petition is issued by a circuit that has 10% of the relevant market and the circuit with an opposing view has 40% of the market. The SR for that scenario can be expressed either as 10-40, following a convention that the petitioner’s split share is expressed first, or as 20-80 where 20 is the percentage of the total market of split cases represented by the opinion giving rise to the petition ( $10/(10+40) = .20$ ) and 80 is the percentage of the market of split cases represented by the circuit with the prior opposing view ( $40/(10+40)=.80$ ), again following a convention that the petitioner’s share is expressed first.

In the first expression of this metric, the two values sum to the aggregate circuit split share (here 50%), the ACSS. In the second expression, the values always sum to 100%. To normalize across all values of ACSS, this article’s analysis prefers the second expression, but this is a matter of taste, not substance. Either expression conveys the same information.

Viewed together, intuition suggests that, all other factors equal, which is never the case, the Court should be more inclined to grant petitions that present splits with higher ACSS values and with split ratios, SRs, closer to 50-50. Those cases present questions of broader national significance as to which circuits are most evenly split. Splits with lower ACSS scores and SR’s farther from 50-50 implicate fewer cases and suggest splits among outlier circuit(s) rather than more pervasive disagreements.

This article proceeds in six parts. Part II reviews the literature suggesting that the grant of a petition is valuable both because it is rare and because it signals that the Supreme Court is predisposed to reversing or vacating the opinion below. Part III reviews the literature indicating that the existence of a circuit split is an important factor influencing the decision to grant petitions for *certiorari*. Part IV develops this article’s methodology with precision and illustrates its application to petitions raising questions related to class action securities fraud litigation. Part V describes multiple potential extensions of the analysis. Part VI concludes.

## **II. Competing for *Certiorari*: The Right to be Heard is Valuable and Rare**

The grant of a petition for a writ of *certiorari* is a valuable legal commodity, for at least two distinct reasons. First, successful petitioners are likely to prevail and have the lower court opinion vacated or reversed at least in part. Second, the Court grants a relatively small number of petitions each year, and that number has declined precipitously over time. Obtaining that rare and valuable assent requires the concurrence of at least four Justices. Viewed from that perspective,

the battle for *certiorari* is a contest for the attention of four of the nine Justices in the allocation of a small set of opportunities to be heard.

### A. Petitioners Tend to Prevail More Frequently at the Supreme Court

The Supreme Court sides with petitioners more often than with respondents. Lazarus<sup>7</sup> documents that petitioners prevailed in 61% of cases, while respondents won just 35.4% of cases.<sup>8</sup> This “petitioner effect” holds even for petitions filed by the Solicitor General of the United States, who enjoys particularly privileged access to Supreme Court review.<sup>9</sup> Thus, while the Solicitor General’s petitions are more likely to be granted than petitions filed by others, the Solicitor General’s win rate is far higher when the office enters as a petitioner or in support of a petitioner, than when representing a respondent. In other words, “the successful petitioner will not always win, but the successful petition will more likely than not result in a win.”<sup>10</sup> That trend has been true for decades: the Court affirmed more orally argued cases that it reversed in only three Terms between 1946 and the early 2000s.<sup>11</sup> More recent data describing opinions spanning the 2007 to 2022 terms document an approximate 71% reversal rate.<sup>12</sup>

The primary reason for this trend stems from the *certiorari* process itself. When reviewing a petition, the Court considers, among other matters, the probability that the decision below is in error and recognizes that the opportunity to error-correct is a valuable allocation of the Court’s shrinking docket.<sup>13</sup> Thus, when the Court decides to hear a case, there is a good chance that a significant number of Justices begin the merits review process with a presumption that the decision below is less than perfect.

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<sup>7</sup> Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1494 (2008).

<sup>8</sup> *Id.* Possible explanations for the residual 3.6% of cases where neither respondent nor petitioner win are situations where, after the Supreme Court grants certiorari, the parties settle, *see, e.g., Leidos, Inc. v. Ind. Pub. Ret. Sys.*, 138 S. Ct. 2670 (2018) (Mem.), or the Court dismisses the case as improvidently granted, *see, e.g. Emulex Corp. v. Varjabedian*, 139 S. Ct. 1407 (2019) (Mem.).

<sup>9</sup> *See* Lazarus, *supra* note 7, at 1493–94 (finding that “[t]he Court grants the Solicitor General’s petitions for writ of certiorari at a rate of several orders of magnitude higher than anyone else’s—about 70% of the time compared to less than 3–4% for others,” but that “[l]ike all other parties, [the Solicitor General’s] success rate [on the merits] is much higher as a petitioner or an amicus supporting a petitioner than as a respondent or amicus supporting respondent.”).

<sup>10</sup> *Id.* at 1540.

<sup>11</sup> *Id.*

<sup>12</sup> *SCOTUS case reversal rates (2007 - Present)*, BALLOTPEdia, [https://ballotpedia.org/SCOTUS\\_case\\_reversal\\_rates\\_\(2007\\_-\\_Present\)](https://ballotpedia.org/SCOTUS_case_reversal_rates_(2007_-_Present)) (last visited Mar. 18, 2024).

<sup>13</sup> SHAPIRO, *supra* note 1, § 4.17 (“The fact that there are many more reversals than affirmances following the grant of *certiorari* further indicates that the Court is more likely to grant *certiorari* when it believes that the decision below may be erroneous.”).

## B. Grants of Petitions Are Increasingly Rare

The Court's merits docket has declined since the mid-twentieth century, even as the number of petitions has grown. Between 2005 and 2017, the Court decided, on average, fewer than 78 cases per term, as compared to 200 cases per term in the mid-twentieth century.<sup>14</sup>

The literature offers multiple explanations for this trend. Some scholars argue that the significant decline in the Court's docket in the late 1980s and early 1990s was caused by changes in the Court's composition, as newly appointed Justices voted for *certiorari* less frequently than predecessors.<sup>15</sup> Scholars also debate the influence of the "cert pool," an administrative process instituted in 1972 whereby each petition is assigned to a Justice's law clerk, who recommends grant or denial.<sup>16</sup> Enactment of the Supreme Court Selections Act of 1988,<sup>17</sup> eliminated most of the Court's mandatory jurisdiction and is another cause cited for the decline.<sup>18</sup> The Court's ideological makeup can also contribute to its shrinking docket because "[t]he Court decides more cases when it is ideologically cohesive and fewer cases when it is ideologically fractured."<sup>19</sup>

Whatever the reason for the Court's shrinking docket, the trend continues even as the number of petitions has increased. For example, in each of the 2020 to 2022 terms, between approximately 4,200 to 5,300 cases were filed in the Supreme Court and about 70 cases were disposed of, a grant rate of approximately one and a half percent.<sup>20</sup> For comparison's sake, the

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<sup>14</sup> See Michael Heise et al., *Does Docket Size Matter? Revisiting Empirical Accounts of the Supreme Court's Incredibly Shrinking Docket*, 95 NOTRE DAME L. REV. 1565, 1567 (2020)

<sup>15</sup> See, e.g., David R. Stras, *The Supreme Court's Declining Plenary Docket: A Membership-Based Explanation*, 27 CONST. COMMENT. 151, 161 (2010) ("[E]very Justice appointed between 1986 and 1993 voted to grant plenary review less often than his or her predecessor."); Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 784–90 (2001) (noting, *inter alia*, that Justice White, who famously advocated for resolving circuit splits, retired, and that Chief Justice Rehnquist voted for cert much less often after his elevation to Chief Justice); Arthur D. Hellman, *The Shrunk Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 430 (1996) (arguing that the new Justices had "a substantially different view of the Court's role" than prior Justices).

<sup>16</sup> See, e.g., Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1376–77 (2006) (explaining that these clerks, who are typically inexperienced recent law school graduates, face intense pressure to recommend a denial and prevent the embarrassment of mistakenly recommending a grant); David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 987 (2007) (finding a "surprisingly strong relationship between the number of plenary decisions by the Court ... and the number of grant recommendations made by the cert pool"). *But see* Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1282 (2012) (finding, in an empirical study, that the cert pool "d[id] not appear to have systematically reduced the number of cases the Court decided per Term").

<sup>17</sup> Pub. L. No. 100-352, 102 Stat. 662.

<sup>18</sup> See, e.g., Owens & Simon, *supra* note 16 at 1278–79; Heise et al., *supra* note 14 at 1581.

<sup>19</sup> Owens & Simon, *supra* note 16 at 1276; *accord* Heise et al., *supra* note 14 at 1580.

<sup>20</sup> Specifically, there were 4,159 filings and 68 dispositions in the 2022 term, 4,900 filings and 70 dispositions in the 2021 term, and 5,307 filings and 72 dispositions in the 2020 term. See *Chief Justice's*



odds are far better on gaining admission to Harvard (3% of applicants), or Stanford (4% of applicants).<sup>21</sup>

The combination of the shrinking docket and increasing number of petitions means that the competition for Supreme Court review is fierce. The Justices must sift through a growing pile of petitions to identify those most worthy of review, while petitioners strive to present their case as the one among many that merits the Court's attention.

### III. Circuit Splits Are a Significant Factor in Determining the Probability That a Writ is Granted

Numerous data points, including the academic literature and the Supreme Court's own rules and statements, demonstrate that circuit splits significantly impact whether *certiorari* is granted. But there are numerous conflicts among the lower courts, necessitating guideposts for determining which splits are worthy of review, and motivating this article's proposed metrics for quantifying circuit splits.

#### A. The Academic Literature

A significant academic literature analyzes factors that influence the probability that a petition is granted. Bonica, Chilton, and Sen review the literature and identify four categories of factors likely to influence the probability of a grant.<sup>22</sup> The most cited theory, "cue theory," suggests that "the presence of certain important features signals that a petition is worthy of attention."<sup>23</sup> Circuit splits are the dominant factor,<sup>24</sup> but additional cues include the presence of amicus briefs,<sup>25</sup>

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*Year-End Reports on the Federal Judiciary*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx> (last visited Mar. 18, 2024).

<sup>21</sup> *Harvard University Admissions*, U.S. News and World Report, <https://www.usnews.com/best-colleges/harvard-university-2155/applying> (last visited Mar. 18, 2024); *Stanford University Admissions*, U.S. News and World Report, <https://www.usnews.com/best-colleges/stanford-university-1305/applying> (last visited Mar. 18, 2024).

<sup>22</sup> Adam Bonica, Adam Chilton & Maya Sen, *The "Odd Party Out" Theory of Certiorari* 3–5 (Harv. Kennedy Sch., Working Paper No. 20-020, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3537876](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3537876).

<sup>23</sup> *Id.* at 3 (citing, *inter alia*, H.W. PERRY JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991); Adam Feldman & Alexander Kappner, *Finding Certainty in Cert: An Empirical Analysis of the Factors Involved in Supreme Court Certiorari Decisions from 2001-2015*, 61 VILL. L. REV. 795 (2017); JOSEPH TANENHAUS ET AL., THE SUPREME COURT'S CERTIORARI JURISDICTION: CUE THEORY. IN JUDICIAL DECISION-MAKING 111–132 (1963)).

<sup>24</sup> *Id.* (citing Gregory A Caldeira & John R Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109 (1988); Gregory A Caldeira, John R. Wright & Christopher J. W. Zorn, *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 JJ. OF L., ECON. & ORG. 549 (1999); Ryan C. Black, & Ryan J. Owens, *Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence*, 71 J. OF POL. 1062, 1065, 1070 (2009)).

<sup>25</sup> *Id.* (citing Caldeira & Wright, *supra* note 24).

dissenting opinions,<sup>26</sup> and a lower court’s ideological divergence from the median of the Supreme Court’s views.<sup>27</sup>

Second, the “error correction” hypothesis suggests that Justices “have preferences over case outcomes” and theorizes that granting a petition allows the Court to respond to cases that are inconsistent with the median Justice’s preference.<sup>28</sup> A circuit split is, however, all other factors equal, more likely to challenge the Court’s median preference for the simple reason that when a split exists, the probability that the median view is offended by one side of the split or the other is greater than the equivalent probability in the absence of a split.<sup>29</sup> From this perspective, splits are significant factors in both cue theory and error correction theory.

Third, a “jurisprudential development” theory emphasizes that “the justices’ objective is to make contributions to doctrine”<sup>30</sup> by focusing on cases that “present novel and interesting questions of law.”<sup>31</sup> The existence of a split signals disagreement among sophisticated interpreters of the law. That, in and of itself, signals an opportunity to make a “contribution to doctrine” that is less likely to arise when doctrine is settled. Circuit splits thus also act as an index of an opportunity for jurisprudential development and can also serve as a rational signal of a “case’s potential importance.”<sup>32</sup>

Bonica, Chilton, and Sen contribute an “odd party out” theory of *certiorari* by hypothesizing that grants are more likely when a petitioner “is ideologically opposed to both ... the respondent[] and the lower court panel.”<sup>33</sup> This “odd party out” theory may be correlated with the

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<sup>26</sup> *Id.* (citing Caldeira, Wright & Zorn, *supra* note 24; Jonathan P. Kastellec, *Panel Composition and Judicial Compliance on the United States Courts of Appeals*, 23 J. OF L., ECON. & ORG. 421 (2007); Deborah Beim, Alexander V. Hirsch & Jonathan P. Kastellec, *Whistleblowing and Compliance in the Judicial Hierarchy*, 58 AM. J. OF POL. SCI. 904 (2014)).

<sup>27</sup> *Id.* (citing Charles M. Cameron, Jeffrey A. Segal & Donald Songer, *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court’s Certiorari Decisions*, 94 AM. POL. SCI. REV. 101 (2000); THOMAS H. HAMMOND, CHRIS W. BONNEAU & REGINALD S. SHEEHAN, *STRATEGIC BEHAVIOR AND POLICY CHOICE ON THE U.S. SUPREME COURT* (2005); Matthew Hall, *Experimental Justice: Random Judicial Assignment and the Partisan Process of Supreme Court Review*, 37 AM. POL. RSCH. 195 (2009); Ryan C. Black & Ryan J. Owens, *Consider the Source (and the Message): Supreme Court Justices and Strategic Audits of Lower Court Decisions*, 65 POL. RSCH. Q. 385 (2012)).

<sup>28</sup> *Id.* at 4 (citing, *inter alia*, Saul Brenner, *Error-Correction on the U.S. Supreme Court: A View from the Clerks’ Memos*, 34 SOC. SCI. J. 1 (1997)).

<sup>29</sup> *Cf. id.* (“cert petitions are more likely to be granted when the panel median is ideologically distant from the Court’s median” (citing Black & Owens, *supra* note 27)).

<sup>30</sup> *Id.* (citing PERRY, *supra* note 23; Tom S. Clark & Jonathan P. Kastellec, *The Supreme Court and Percolation in the Lower Courts: An Optimal Stopping Model*, 75 J. OF POL. 150 (2013); Deborah Beim, *Learning in the Judicial Hierarchy*, 79 J. OF POL. 591 (2017)).

<sup>31</sup> *Id.* at 5 (quoting Clark & Kastellec, *supra* note 30, at 150).

<sup>32</sup> *Id.* at 5.

<sup>33</sup> *Id.* at 1.

presence of a circuit split because polarization might be more likely to generate both a circuit split and their “odd man out” pattern that is more worthy of a grant.<sup>34</sup>

Significantly, all four theories incorporate circuit splits either as direct indicators, as in cue theories, or as correlated factors, as in error correlation theories, jurisprudential development theories, or potentially “odd party out” theories. Splits thus operate as significant indicia of cert-worthiness in all major theoretical constructs. It is therefore unsurprising that academic “research has mostly focused on ... circuit splits.”<sup>35</sup> Indeed, circuit splits are such an important factor in the battle for *certiorari* that petitioners claim that splits exist when a closer reading of the case suggests that the alleged split is more illusory than real.<sup>36</sup>

## **B. Rule 10 Considerations**

Not only does the academic literature focus on circuit splits, but so do the Supreme Court’s own rules. Supreme Court Rule 10 provides guidance regarding considerations governing review of petitions for *certiorari*, explaining that “[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion.”<sup>37</sup> While “neither controlling nor fully measuring the Court’s discretion,” Rule 10 identifies three factors that “indicate the character of the reasons the Court considers” when deciding whether to grant review.<sup>38</sup>

The first, and most obvious, consideration is a split in authority among federal courts of appeals. Such a split arises when a federal court of appeals enters “a decision in conflict with the decision of another United States court of appeals on the same important matter.”<sup>39</sup> That type of “division is a traditional ground for certiorari,” and is governed by Rule 10(a).<sup>40</sup>

The presence of important federal questions can be relevant on its own or in combination with splits of authority. Rule 10(b) addresses circumstances where “a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.”<sup>41</sup> Rule 10(c) captures circumstances where either a federal court of appeal or state court “has decided an important question of federal law that has not been, but should be settled by [the Supreme] Court, or has decided an important federal question in a way that conflicts with relevant decisions of [the Supreme] Court.”<sup>42</sup>

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<sup>34</sup> *Cf. id.* at 30 and Appendix A9 (discussing circuit splits and the “odd man out” theory).

<sup>35</sup> *Id.* at 5.

<sup>36</sup> SHAPIRO, *supra* note 1, § 6.37.(I).(1).

<sup>37</sup> SUP. CT. R. 10.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* 10(a).

<sup>40</sup> *Wheaton Coll. v. Burwell*, 573 U.S. 958, 958 (2014).

<sup>41</sup> SUP. CT. R. 10(b).

<sup>42</sup> *Id.* 10(c); *see Duncan v. Tennessee*, 405 U.S. 127, 127 (1972) (dismissing writ as improvidently granted because constitutional questions were “so interrelated with rules of criminal pleading peculiar to the State

Other, less frequently invoked considerations mentioned in Rule 10 includes circumstances where a circuit court “has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of th[e] Court’s supervisory power.”<sup>43</sup> This basis for *certiorari* implicates the Court’s “significant interest in supervising the administration of the judicial system,” particularly where necessary to protect “the integrity of judicial processes.”<sup>44</sup>

### C. The Supreme Court’s Uniformity Concerns

Notwithstanding Rule 10’s other considerations, it is widely agreed that a conflict—particularly a circuit split—is the most significant factor in the Court’s review of petitions for *certiorari*.<sup>45</sup> According to the Justices themselves, this is due, in large part, to their role in ensuring federal uniformity. The Court has stated that its overarching responsibility is to maintain the uniformity of federal law.<sup>46</sup> Because circuit splits almost always entail a conflict on a federal question, they necessarily threaten federal uniformity.

Thus, as Justices have explained, one of the primary purposes of *certiorari* jurisdiction is to resolve conflicts and preserve federal uniformity,<sup>47</sup> making circuit splits one of the most significant factors in determining whether *certiorari* should be granted.<sup>48</sup>

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of Tennessee, the constitutionality of which is not at issue, so as not to warrant the exercise of the certiorari jurisdiction of this Court”).

<sup>43</sup> SUP. CT. R. 10(a).

<sup>44</sup> *Hollingsworth v. Perry*, 558 U.S. 183, 184 (2010) (staying broadcast of a federal trial because “the courts below did not follow the appropriate procedures set forth in federal law before changing their rules to allow such broadcasting”).

<sup>45</sup> See, e.g., Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923, 929 (2022).

<sup>46</sup> See *Arthur v. Dunn*, 580 U.S. 1141 (2017) (Sotomayor, J., dissenting from the denial of *certiorari*) (“[S]ince the very beginning of our Nation, we have emphasized the ‘necessity of uniformity’ in constitutional interpretation ‘throughout the whole United States, upon all subjects within the purview of the constitution.’” (quoting *Martin v. Hunter’s Lessee*, 1 Wheat. 304, 347–348 (1816)); *Danforth v. Minnesota*, 552 U.S. 264, 292 (2008) (Roberts, C.J., dissenting) (describing “the Framers’ decision to vest in ‘one supreme Court’ the responsibility and authority to ensure the uniformity of federal law”); *Kansas v. Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring) (“Our principal responsibility under current practice ... is to ensure the integrity and uniformity of federal law.”).

<sup>47</sup> See *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 610 (2015) (“[C]ertiorari jurisdiction exists to clarify the law....”); *Braxton v. United States*, 500 U.S. 344, 347 (1991) (“A principal purpose for which we use our certiorari jurisdiction ... is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law.”).

<sup>48</sup> See The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 78 (2010) (statement of Elena Kagan) (“[T]here are some pretty settled standards for deciding which cases to take. The first thing always is if there is a circuit split, because ... one of the principal roles of the Supreme Court is to apply uniformity across our country....”); John Shattuck, A Conversation with Justice Stephen Breyer, JOHN F. KENNEDY PRESIDENTIAL LIBRARY AND MUSEUM (Sept. 21, 2003), <https://www.jfklibrary.org/events-and->

Viewed from this perspective, it is unsurprising that much of the Court’s docket addresses circuit splits, or that approximately 68% of cases heard in the 2022 term alleged a circuit split in the petition.<sup>49</sup> This close connection between *certiorari* grants and circuit splits substantially predates the 2022 term.<sup>50</sup>

#### **D. Not All Splits Are Created Equal**

Although ensuring federal uniformity is important, the Court cannot resolve every minor disagreement among lower courts. As an initial matter, the number of circuit splits is simply too high. Data suggest that the federal courts of appeal generate approximately 400 splits per year.<sup>51</sup> With approximately 70 cases now heard each term, the Court would have to roughly quintuple its workload just to address every split arising every year, and that’s without attempting to reduce the existing inventory of splits. This isn’t happening anytime soon. The Court must therefore triage among splits.

Given the glut of *certiorari* petitions alleging a circuit split,<sup>52</sup> there are other criteria for determining whether a conflict is “cert-worthy.” Some factors are prudential, such as whether the particular case is “an imperfect vehicle for considering” the question presented.<sup>53</sup> The Court also considers whether the question has spent sufficient time percolating in the lower courts, as “the experience of our thoughtful colleagues on the district and circuit benches[] could yield insights (or reveal pitfalls) we cannot muster guided only by our own lights.”<sup>54</sup>

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awards/kennedy-library-forums/past-forums/transcripts/a-conversation-with-justice-stephen-breyer-2003 (statement of Stephen Breyer) (“The reason that I’m going to vote to take a case is because I think it is necessary to have a uniform rule of federal law on this topic.”).

<sup>49</sup> See *October Term 2022*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/terms/ot2022/> (last visited Mar. 18, 2024).

<sup>50</sup> See Narechania, *supra* note 45, at 938 n.71, 942–43 (estimating, based on cases from 1925 to 2018 that provided an in-text reason for granting *certiorari*, that about 45% of cases “are decided to resolve a split of some sort”); Black & Owens, *supra* note 24, at 1065, 1070 (analyzing a random sample of paid nondeath penalty petitions from the 1986 to 1993 terms and finding that the existence of a conflict impacted justices’ *certiorari* votes); 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) (a study of all cases from the 2003 to 2005 terms determined that approximately 70% of cases involved a split among the lower courts); Hellman, *supra* note 15 at 415–16 (determining that 45% of cases from 1983 to 1985 and 69% of cases from 1993 to 1995 concerned a circuit split); Arthur D. Hellman, *Case Selection in the Burger Court: A Preliminary Inquiry*, 60 NOTRE DAME LAW REV. 947, 1015 (1985) (“[C]onflicts were present in more than one-third of the 593 cases that received plenary consideration in the first four Terms of the 1980’s.”).

<sup>51</sup> See Cordray & Cordray, *supra* note 15, at 772 (estimating, based on Bloomberg’s “Circuit Split Roundup,” that there are approximately 400 acknowledged circuit splits per year).

<sup>52</sup> See *supra* text accompanying note 49.

<sup>53</sup> *Griffin v. HM Fla.-ORL, LLC*, 144 S. Ct. 1, 2 (2023) (Kavanaugh, J., respecting the denial of the application for stay).

<sup>54</sup> *Maslenjak v. United States*, 582 U.S. 335, 354 (2017) (Gorsuch, J., concurring in part and concurring in the judgment); see, e.g., *Calvert v. Texas*, 141 S. Ct. 1605, 1606 (2021) (Sotomayor, J., respecting the denial

But as Supreme Court Rule 10 makes clear, the most significant criteria is whether a split presents an “important federal question,” and there is no formula for determining this.<sup>55</sup> One potential factor is if the conflict involves a circuit that, based on its docket, will have a particularly significant impact on litigants, interested parties, or the area of law. The D.C. Circuit, for instance, has an outsized influence on administrative law, as it hears a greater percentage of these cases than any other circuit.<sup>56</sup> Similarly, the Second Circuit has long been considered “[t]he ‘Mother Court’ of securities law,” in large part because its jurisdiction encompasses New York, “the Nation’s financial center.”<sup>57</sup> And some federal questions can divide multiple significant circuits, rendering cert particularly necessary. For example, the Court immediately granted cert once a split arose between the Ninth and Fifth Circuits on the federal statute governing offshore lands, because almost all offshore oil and gas operations in the country are subject to those circuits’ law.<sup>58</sup> Other proxies or cues for identifying “important” circuit splits include, among other things, the involvement of the Solicitor General (who may argue that the federal government is significantly impacted by the conflict) or the presence of amicus curie (who may make similar arguments on behalf of other interested parties).<sup>59</sup>

None of these proxies are perfect, however. The Solicitor General represents the federal government’s interests, and may not identify cases that affect other parties. The absence of amicus curie may also not stem from a case’s insignificance as much as from the parties’ inability to pay lawyers to write amicus briefs or identify legal issues that affect them. Nor is it always clear from the circuits involved whether the split will affect an outsized number of persons or economic activity.

#### **IV. Quantifying the Significance of Circuit Splits in Class Action Securities Fraud Litigation**

This article proposes new metrics for identifying whether a circuit split is important, focusing on the split’s economic significance. Class action securities fraud litigation presents a

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of *certiorari*) (“The legal question [petitioner] presents is complex and would benefit from further percolation in the lower courts prior to this Court granting review.”).

<sup>55</sup> SUP. CT. R. 10(a).

<sup>56</sup> See Hon. Douglas H. Ginsburg, *Remarks Upon Receiving the Lifetime Service Award of the Georgetown Federalist Society Chapter*, 10 GEO. J.L. & PUB. POL’Y 1, 2 (2012); see also Hon. Brett M. Kavanaugh, 2013 *Sumner Canary Memorial Lecture: The Courts and the Administrative State*, 64 CASE W. RES. L. REV. 711, 715 (2014) (describing administrative law as “the bread and butter” of the D.C. Circuit).

<sup>57</sup> *Morrison v. Nat’l Austl. Bank*, 561 U.S. 247, 274–76 (2010) (Stevens, J., concurring in the judgment) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting)).

<sup>58</sup> Petition for Writ of *certiorari* at 12, 20, *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881 (2019) (No. 18-389); see *Parker*, 139 S. Ct. at 1886–87 (“Given the disagreement between the Fifth and Ninth Circuits, we granted *certiorari*.”).

<sup>59</sup> See *supra* notes 9, 25 and accompanying text; Epps & Ortman, *supra* note 5 at 715–16 (collecting empirical research that the Court is more likely to grant petitions involving the Solicitor General and amicus briefs).

particularly rich environment for an initial exploration of metrics that quantify the significance of circuit splits. Publicly available databases track this form of litigation with precision and facilitate auditable computation of a range of circuit share statistics. This analysis proceeds in five subsections.

Subsection A reports data describing five different economic measures of class action securities fraud litigation over a recent ten-year period in each of the twelve Circuits. It also presents semantic metrics generated by simple Lexis or Westlaw searches.

This analysis supports two major findings. First, on visual inspection all of the proposed circuit share metrics appear to be highly correlated. The selection of any specific metric makes little or no difference to the analysis. Second, the Second and Ninth Circuits have dominant circuit shares under all metrics. The Third Circuit draws honorable mention with the third largest share, but after that all remaining circuits appear to have de minimis shares. The bottom line is clear: splits involving the Second or Ninth Circuits are most likely to be consequential, all other factors equal.

Part B formally demonstrates the existence of strong, statistically significant correlations among all the metrics. This finding is potentially quite important from a pragmatic perspective. If additional research confirms that semantic metrics are reasonably robust proxies for economic metrics across a broad range of litigated claims, then ACSS and SR calculations can be easily computed and presented in virtually every petition implicating a split. Indeed, the Supreme Court would then be able to generate those data on its own if petitioners or respondents did not voluntarily supply that information. Additional research is, however, necessary to support or reject this underlying hypothesis.

Part C introduces split ratio analysis and discusses its role in quantifying the significance of circuit splits.

Part D integrates ACSS and SR analyses and expands on the intuitive observation that circuit splits implicating larger circuit shares, when circuits are more evenly split, are, all other things equal, more worthy of a slot on the court's docket. Part D also introduces a graphic representation of ACSS and SR data that facilitates a two-factor descriptor consistent with this intuition. This analysis also introduces the possibility of creating three "zones of interest" that might help triage petitions according to both their aggregate circuit split shares and their split ratios. The suggestion of these zones is designed to stimulate discussion about levels of concentration and of splits that are likely sufficient to warrant court review. These are conversation starters, not conclusions recommending cutoffs or mandatory standards designed to govern the grant of a petition.

Part E analyzes the splits asserted in two pending petitions for review and in two recently resolved Supreme Court opinions, all raising questions related to class action securities fraud. The analysis calculates the relevant ACSS and SR data, and observes that splits involving the Second and Ninth Circuits were implicated in all these cases.

## A. Quantifying Circuit Shares

Table 1 presents the raw counts and “circuit shares” for all twelve circuit courts of appeal for seven different metrics. Five of these metrics are economic and two are semantic. The data are calculated over the ten-year period spanning January 1, 2013, to December 31, 2022.

Columns 1 and 2 report the number of federal class action securities fraud cases filed in district courts in the corresponding circuits over that ten-year period, as well as the corresponding percentages of total filings in each circuit.

Columns 3 and 4 report the corresponding number of settlements entered and the circuit shares of these settlement counts.

Columns 5 and 6 report the corresponding aggregate dollar value of settlements entered over the sample’s ten- year period, and each circuit’s share of that total.

“Maximum dollar loss” (MDL) measures the change in aggregate dollar value of the defendant firm’s market capitalization on the trading day that has the highest market capitalization during the alleged class period to the trading day immediately following the last day of the alleged class period. Columns 7 and 8 report aggregate MDL values and circuit shares over the sample period. MDL is typically an aggressive estimate of plaintiff’s potential damages claims.

“Disclosure dollar loss” (DDL) measures the dollar value change in defendant firm’s market capitalization between the trading day immediately preceding the end of the class period and the trading day immediately following the end of the class period. Intuitively, it measures only the one-day unadjusted capitalization change as of the date of the last corrective disclosure alleged by plaintiffs. DDL is a more conservative estimate of plaintiff’s damages claims. Columns 9 and 10 report aggregate DDL values and circuit shares over the sample period.

The final four columns report data of a qualitatively different nature. These data result from semantic analysis of opinions issued by each circuit over the sample period as reported by Westlaw.

Columns 11 and 12 report counts and circuit shares based on the number of reported opinions over the sample period, issued by district courts in each circuit, including “Rule 10b-5”. Columns 13 and 14 report analogous data for mentions of “Section 11” of the Securities Act of 1933.

Column 15 reports the equal weighted average for all circuit shares over all metrics.

Figure 1 displays the data presented in Table 1 in bar chart format. This presentation graphically reinforces the conclusion that the Second and Ninth Circuits hold the dominant “circuit shares” regardless of metric. Again, the Third Circuit draws honorable mention with the third largest average share. A dramatic decline then follows, with little difference among the remaining circuit shares.



## B. Correlation Analyses

Visual inspection suggests a strong correlation among the seven metrics. Table 2 formally tests that hypothesis and confirms that correlations among all seven metrics are strong and statistically significant. Every correlation is significant at the one percent confidence level, or better, and the coefficients range from a maximum of 0.9988 (between the number of cases filed and the number settled) to a minimum of 0.88 (between the number of cases settled and total settlement value). These lower correlations arise in connection with the total settlement value metric. This pattern can be explained by the existence of a small number of high-settlement value cases in circuits that otherwise experience little securities fraud litigation activity.

It is particularly interesting to observe that all correlations with the two semantic metrics (other than with total settlement value) range between 0.93 and 0.99. These findings support cautious preliminary optimism that semantic analysis of generally available legal databases can generate meaningful ACSS and SR data that would assist the court in deciding whether to grant a petition.

## C. Split Ratios

The same data used to generate aggregate split data can also generate “split ratios” (SR) that describe whether a split is caused by outlier circuits with relatively low circuit shares, or whether the split reflects a disagreement among circuits with comparable circuit shares.

While this intuition is simple, operationalizing the concept is a bit complex. Consider a split between two circuits in which the opinion giving rise to the petition is by a circuit with 10% of the relevant market, while the circuit with an opposing view has a 40% share. The corresponding SR can be expressed either as 10-40, following a convention that the petitioner’s split share is expressed first, or as 20-80 where 20 is the percentage of the total market of split cases represented by the opinion giving rise to the petition ( $10 / (10+40) = 0.20$ ) and 80 is the percentage of the total market of split cases represented by the circuit with the opposing view ( $40 / (10+40) = 0.80$ ), again following a convention that the petitioner’s share is expressed first. An alternative convention would have the larger share expressed first, here indicating an 80-20 split.

In the first expression of this metric, the two values sum to the aggregate circuit split share (here 50%), the ACSS. In the second and third expressions, the values always sum to 100%. To normalize across all values of ACSS, this article’s analysis prefers the third expression, and then couples that value with the ACSS. Thus, every split is described by two numbers: the ACSS and the SR, where the SR sums to 100, and the larger share is expressed first.

Viewed together, intuition suggests that, all other factors equal, which is never the case, the Court should be more inclined to grant petitions that present splits with higher ACSS scores and split ratios closer to 50-50. Those cases present questions of broader national significance as to which the circuits are more evenly split. Splits with lower ACSS scores and SR’s farther from 50-50 implicate fewer cases, or less economic activity, and suggest splits among outlier circuit(s) rather than more pervasive splits.

#### **D. Combining Aggregate Circuit Split Data and Split Ratio Data**

Figure 2 is a graphic representation of all possible combinations of ACSS and SR values, where SR values are expressed in ratio form always adding to 100. At one level, it is easy to argue that this analysis over-complicates the situation. From this perspective, ACSS can be considered the dominant, or perhaps even the only relevant value. For even if an outlier circuit has taken a divergent position, the fact that the ACSS is high is sufficient reason to grant the petition. Not even a minor deviation should be allowed to upset the applecart of uniformity.

Alternatively, observers might reasonably conclude that the court should preserve its valuable docket space for petitions that present splits that are important in two distinct senses. The splits implicate a sufficiently large circuit share, and do not reflect the views of a minority of rogue circuits whose views are of little practical consequence.

This article takes no position in that debate and here refines the second perspective in order to advance the discussion, not to advocate a conclusion.

If one concludes that SR data are relevant in combination with ACSS data, then one might contemplate three different “zones of interest” that describe petitions with differing quantitative arguments for or against the grant of a petition. As illustrated in Figure 2, Zone 1 cases present the strongest quantitative argument for granting a petition. Zone 1 cases describe splits that implicate more than 50 percent of the circuit share of all cases, where the split is more uniform than 75-25 (or 25-75). In other words, the split has already captured at least half the relevant market and, of the split cases, at least a quarter of them are in the minority. In the extreme, at the northeast apex of the Zone 1 triangle in Figure 2, all the circuits have addressed the question and are evenly split, 50-50. Cases in which 50% of the circuit share have addressed the question and are split 75-25 (or 25-75), and cases in which 100% of the circuit share has spoken but are split 75-25 (or 25-75) are the other two vertices of the Zone 1 triangle.

The selection of 50% as the cut-off for the ACSS value and 75-25 (or 25-75) as the SR cutoff is entirely arbitrary. Those cutoffs could easily be replaced by other values that would expand or contract Zone 1.

Zone 2 cases have ACSS values exceeding 50% but implicate splits that are more easily described as reflecting the views of outlier circuits that represent no more than 25% of the circuit share that has opined on the question presented.

Zone 3 cases present the weakest quantitative argument for granting a petition. They describe cases in which less than 50% of the circuit share has taken a position on the question presented, and in which the minority view represents 25% or less of the circuit share that has expressed a view. These splits are of the sort where the Court might more reasonably conclude that allowing further development by the lower courts before granting a petition is a more prudent allocation of the Court’s docket space.

Again, the cutoffs proposed for Zones 1, 2, and 3 are entirely arbitrary. It is also wholly reasonable to conclude that split ratios should play little or no role in the analysis, and that the

notion of Zones 1, 2, and 3 introduce unnecessary complexity. These critiques are welcome inasmuch as this analysis strives to begin, not conclude, a longer conversation about the application of quantitative metrics to the *certiorari* process.

### **E. Recently Granted and Pending Petitions for *Certiorari* in Securities Fraud Litigation**

This article's analysis is easily applied to petitions recently granted. In *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*,<sup>60</sup> petitioners alleged that the Second Circuit opinion giving rise to their petition entrenched a split with the Third, Ninth, and Eleventh Circuits.<sup>61</sup> The ACSS for this split, using average circuit share values is 76%, and the corresponding split ratio is 51-49. This is a Zone 1 split in which the two primary circuits, the Second and Ninth, are split, and in which the presence of additional circuits that concur with the Ninth cause an SR that is as close as possible to the maximum value without quite reaching it. Based purely on these quantitative metrics, *Macquarie* would seem strongly to support the docket space it received.

In *Slack Technologies, LLC v. Pirani*,<sup>62</sup> petitioners claimed that the Ninth Circuit had diverged from every other Circuit that had previously considered the question.<sup>63</sup> That would include the First, Second, Third, Fifth, Eighth, Tenth, and Eleventh Circuits, which generate an ACSS, using average share values, of 87%, and a corresponding split ratio of 74-26. This would also be a Zone 1 case again capturing a split between the Second and Ninth Circuits with a pattern suggesting that the Ninth had "gone rogue" against all other circuits.

In *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*,<sup>64</sup> two questions were presented. As to the first, petitioners alleged a split between the Second and Seventh Circuits, and as to the second, petitioners alleged a split between the Second and Seventh Circuits on one side, and the Eighth Circuit on the other.<sup>65</sup> The first split has an ACSS of 44% and an SR of 95-5 which would be a Zone 3 case. The second split suggests an ACSS of 39% and an SR of 95-5 which would also be a Zone 3 case. Here, the split implicates the Second Circuit but the division is, in both cases, with a Circuit that has a minor circuit share: hence the imbalanced SR and lower ACSS.

A petition is also pending in *NVIDIA*, where petitioner alleges two splits. As to the first, petitioners alleged a split with the Ninth and the First on one side of the question, and the Second,

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<sup>60</sup> 144 S. Ct. 479 (2023) (Mem.) (granting *certiorari*).

<sup>61</sup> Petition for Writ of *Certiorari* at 14–17, *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, (No. 22-1165).

<sup>62</sup> 598 U.S. 759 (2023).

<sup>63</sup> Petition for Writ of *Certiorari* at 14–19, *Slack Techs., LLC v. Pirani*, 598 U.S. 759 (2023) (No 22-200).

<sup>64</sup> 594 U.S. 113 (2021).

<sup>65</sup> Petition for Writ of *Certiorari* at 20–24, *Goldman Sachs Grp., Inc. v. Arkansas Tchr. Ret. Sys.*, 594 U.S. 113 (2021) (No 20-222).

Third, Fifth, Seventh, and Tenth on the opposite side.<sup>66</sup> As to the second question presented, petitioners alleged a split between the Ninth Circuit on one side and the Second and Fifth Circuits expressing the opposing view.<sup>67</sup> The first split has an ACSS of 86% and an SR of 71-29 which would be a Zone 1 case. The second split suggests an ACSS of 67% and an SR of 66-34, which would also be a Zone 1 case. Here again, each split pits the Second against the Ninth, implicates more than 50% of the relevant market, and suggests a meaningfully balanced division among the lower courts.

To the extent it is possible to draw weak conclusions from a pattern of only three recent decisions to grant a petition, and the split alleged in a pending petition, the presence of either or both of the Second and Ninth Circuits as participants in the split seems an important factor in the analysis, and landing in Zone 1 also seems to be a common but not mandatory consideration. The preliminary nature of this analysis, and the small size of the sample bear emphasis. An analysis of a larger data set, as described below, could easily refute these very preliminary observations.

## V. Opportunities for Further Research

This article's analysis is preliminary and suggestive and is best understood as providing a foundation for multiple forms of additional research. There is nothing conclusive in this article.

Additional research exploring correlations between semantic indicators (*e.g.*, citation counts) and measures of economic significance in geographies covered by each circuit could validate the proposition that semantic indicators are reasonable proxies for more traditional economic metrics. Positive findings would support substituting relatively inexpensive legal database analytics, such as citation counts, for more laborious economic database analyses.

Market share data can also differ dramatically depending on whether the market is defined from a production or consumption perspective. *National Pork Producers Council v. Ross*<sup>68</sup> is an excellent example of the challenge. There, California adopted allegedly unconstitutional legislation affecting pork production. California has a relatively large share of the consumption market but a much smaller share of the production market. "California imports 99.87% of its pork," or put another way, it produces only 0.13% of the pork it consumes.<sup>69</sup> But California represents 13% of national pork consumption.<sup>70</sup> ACSS and SR data computed based on production metrics would here generate results very different from data based on consumption metrics. Which should dominate? This analysis cannot answer that question, and an excellent case can be presented that the metric that generates the better argument for the grant of *certiorari* should prevail because producers and consumers both have equivalent interests in uniform application of the law.

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<sup>66</sup> See Petition for Writ of Certiorari at 15–23, *NVIDIA Corp. v. E. Ohman J:or Fonder AB* (No. 23-970)

<sup>67</sup> *Id.* at 27–28.

<sup>68</sup> 598 U.S. 356 (2023).

<sup>69</sup> Petition for Writ of Certiorari at 2, *Nat'l Pork Prods. Council v. Ross*, 598 U.S. 356 (2023) (No. 21-468).

<sup>70</sup> *Commodity Fact Sheet Pork*, CALIFORNIA PORK PRODUCERS ASSOCIATION, <https://cdn.agclassroom.org/ca/resources/fact/pork.pdf> (last visited Mar. 18, 2024).

Appellate forum shopping creates additional challenges. Recent commentary suggests that parties aggrieved by the Biden Administration’s executive and administrative action prefer to litigate in the Fifth Circuit.<sup>71</sup> In some situations, parties may form new entities that generate Fifth Circuit standing when none might otherwise exist.<sup>72</sup> If this form of appellate forum-shopping becomes or remains sufficiently strong, it weakens the link between economic and semantic indicators. More precisely, many administrative challenges will be brought in the Fifth Circuit relating to markets and practices that are relatively rare in the states that compose the Fifth Circuit.

The easy response is that appellate forum shopping increases the salience of semantic analysis, and that might well be a superior mode of analysis. After all, reviewing the correctness of opinions reached by circuits that attract forum shoppers, particularly because litigants expect rulings that systematically favor their position, could well be more important than reviewing opinions of circuits that might cover a significant amount of activity affected by the question presented, but rarely get to litigate the question precisely because forum shopping is a successful strategy. Indeed, the simple fact that a circuit attracts forum shoppers might in and of itself constitute a “plus factor” in the decision to grant a petition for *certiorari*.

The potential for appellate forum shopping is also related to the possibility that the Supreme Court abandons or limits *Chevron* deference.<sup>73</sup> Courts would then lose the ability to rely on administrative interpretations of statutory provisions, which, by definition, are singular. They would then generate their own appellate interpretations which could more easily diverge. If that hypothesis is correct, the incidence of splits over the interpretation of administrative actions is likely to increase. That development would not only generate greater workload for the appellate courts but would also increase the number of splits that could support petitions for *certiorari*, while reinforcing incentives to forum shop.

The opportunities for further research in this space are substantial, and questions dominate answers given the current state of the art.

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<sup>71</sup> See, e.g., Pamela King, Niina H. Farah & Lesley Clark, *Red states bet on 5th Circuit to take down Biden agenda*, E&E NEWS BY POLITICO (Feb. 15, 2023, 1:40 PM), <https://www.eenews.net/articles/red-states-bet-on-5th-circuit-to-take-down-biden-agenda/>. Conversely, many challenges to Trump-era administrative actions were brought in the Second and Ninth Circuits. See, e.g., *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (challenge to the termination of DACA, on writ of *certiorari* from the Second, Ninth, and D.C. Circuits); *Dep’t of Com. v. New York*, 139 S. Ct. 2551 (2019) (challenge to the 2020 census’s citizenship question, on writ of *certiorari* from Southern District of New York); *Trump v. Hawaii*, 585 U.S. 667 (2018) (challenge to President Trump’s “travel ban,” on writ of *certiorari* from the Ninth Circuit).

<sup>72</sup> Cf. Howard M. Wasserman, “Nationwide” Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. 335, 363–64 (2018) (discussing how nationwide injunctions against, *inter alia*, administrative action incentive forum shopping); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 457–61 (2017) (same).

<sup>73</sup> See, e.g., Jeff Overley, *Liberal Justices Hint Chevron Deference Hanging By A Thread*, LAW360 (Feb. 21, 2024, 12:04 AM), <https://www.law360.com/articles/1795968/liberal-justices-hint-chevron-deference-hanging-by-a-thread>.

## VI. Conclusion

Not all circuit splits are created equal. The current state of the art in analyzing splits as part of the *certiorari* process often counts noses, and implicitly assumes that all circuits are equally important in split analysis. In reality, however, some circuits are far more important to the resolution of some questions of law than are others. The Second and Ninth Circuits, for example, dominate the market for class action securities fraud litigation. Splits involving those circuits are, all other factors equal, more worthy of the Court's attention than splits involving other circuits.

This paper seeks to advance the art of circuit split analysis by introducing a pair of novel metrics that quantify the significance of circuit splits. The first metric describes the total market share of the circuits that have taken positions implicated by the split. The second describes the extent to which the split reflects a minority, outlier view, or the extent to which courts are more evenly divided as to the question.

The application of these metrics, given the current state of the literature, likely raises at least as many questions as it provides answers. The analysis presented in this article is therefore best viewed as preliminary and suggestive, and as providing an invitation for further research rather than presenting firm conclusions and recommendations.

Table 1: Federal Securities Class Actions Circuit Shares

Circuit	Cases Filed <sup>[2]</sup>		Cases Settled		Total Settlement Value		Total MDL <sup>[3]</sup>		Total DDL <sup>[4]</sup>		"Rule 10b-5" Mentions <sup>[5]</sup>		Section 11 Mentions <sup>[5]</sup>		Average Circuit Shares
	#	%	#	%	\$	%	\$	%	\$	%	#	%	#	%	%
1	17	3%	23	3%	\$345	1%	\$43,028	2%	\$19,467	4%	81	3%	4	1%	2%
2	215	33%	222	30%	\$14,465	44%	\$1,167,821	42%	\$203,588	37%	773	31%	173	41%	37%
3	81	12%	84	11%	\$4,485	14%	\$457,667	16%	\$77,259	14%	235	9%	42	10%	12%
4	16	2%	26	3%	\$1,376	4%	\$78,364	3%	\$8,930	2%	92	4%	14	3%	3%
5	30	5%	43	6%	\$1,241	4%	\$95,707	3%	\$13,774	3%	134	5%	10	2%	4%
6	28	4%	35	5%	\$1,196	4%	\$62,692	2%	\$16,038	3%	106	4%	21	5%	4%
7	31	5%	38	5%	\$2,356	7%	\$106,958	4%	\$39,356	7%	89	4%	15	4%	5%
8	9	1%	14	2%	\$585	2%	\$52,841	2%	\$20,522	4%	33	1%	2	0%	2%
9	187	28%	201	27%	\$4,823	15%	\$538,457	19%	\$109,595	20%	642	26%	110	26%	23%
10	14	2%	19	3%	\$570	2%	\$74,120	3%	\$13,005	2%	103	4%	22	5%	3%
11	28	4%	39	5%	\$885	3%	\$71,503	3%	\$14,532	3%	197	8%	9	2%	4%
DC	2	0%	5	1%	\$272	1%	\$40,895	1%	\$9,548	2%	9	0%	0	0%	1%
<b>Total</b>	<b>658</b>	<b>100%</b>	<b>749</b>	<b>100%</b>	<b>\$32,598</b>	<b>100%</b>	<b>\$2,790,053</b>	<b>100%</b>	<b>\$545,614</b>	<b>100%</b>	<b>2,494</b>	<b>100%</b>	<b>422</b>	<b>100%</b>	<b>8%</b>

Source: Cornerstone Research and Stanford Law School Securities Class Action Clearinghouse; Securities Class Action Services (SCAS)

Note:

[1] Analysis is based on Cornerstone Research's study of over 790 post-Reform Act securities cases filed after 12/22/95 for which settlement hearing dates between 1/1/13 and 12/31/22 were posted on the Securities Class Action Services (SCAS) database and cases alleged Rule 10b-5 claims or Section 11 brought by purchasers of a corporation's common stock/ADR/ADS.

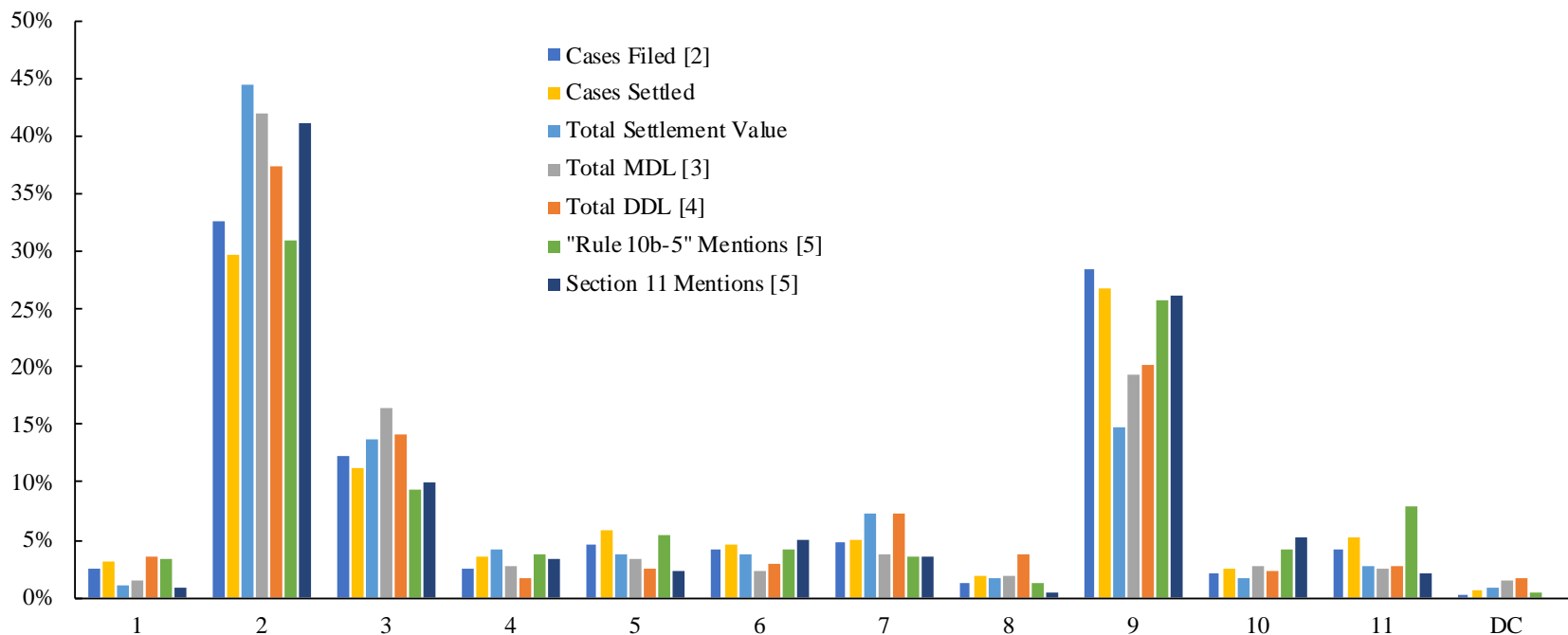
[2] Taken from Cornerstone Research and Stanford Law School Securities Class Action Clearinghouse.

[3] MDL is the dollar-value change in the defendant firm's market capitalization from the trading day with the highest market capitalization during the class period to the trading day immediately following the end of the class period. Taken from Cornerstone Research and Stanford Law School Securities Class Action Clearinghouse.

[4] DDL is the dollar-value change in the defendant firm's market capitalization between the trading day immediately preceding the end of the class period and the trading day immediately following the end of the class period. Taken from Cornerstone Research and Stanford Law School Securities Class Action Clearinghouse.

[5] Search conducted on Westlaw.

**Figure 1**  
**Federal Securities Class Actions**  
**Circuit Shares<sup>[1]</sup>**  
**2013 – 2022**



Source: Cornerstone Research and Stanford Law School Securities Class Action Clearinghouse; Securities Class Action Services (SCAS)

Note:

[1] Analysis is based on Cornerstone Research's study of over 790 post-Reform Act securities cases filed after 12/22/95 for which settlement hearing dates between 1/1/13 and 12/31/22 were posted on the Securities Class Action Services (SCAS) database and cases alleged Rule 10b-5 claims or Section 11 brought by purchasers of a corporation's common stock/ADR/ADS.

[2] Taken from Cornerstone Research and Stanford Law School Securities Class Action Clearinghouse.

[3] MDL is the dollar-value change in the defendant firm's market capitalization from the trading day with the highest market capitalization during the class period to the trading day immediately following the end of the class period. Taken from Cornerstone Research and Stanford Law School Securities Class Action Clearinghouse.

[4] DDL is the dollar-value change in the defendant firm's market capitalization between the trading day immediately preceding the end of the class period and the trading day immediately following the end of the class period. Taken from Cornerstone Research and Stanford Law School Securities Class Action Clearinghouse.

[5] Search conducted on Westlaw.



Table 2: Federal Securities Class Actions Variance Co-Variance Matrix<sup>1</sup> 2013-2022

<b>Metric</b>	<b>Number of Cases Filed</b>	<b>Number of Cases Settled</b>	<b>Total Settlement Value</b>	<b>Total MDL</b>	<b>Total DDL</b>	<b>“Rule 10b-5” Mentions</b>	<b>Section 11 Mentions</b>
Number of Cases Filed	1						
Number of Cases Settled	0.9988***	1					
Total Settlement Value <sup>[2]</sup>	0.89***	0.88***	1				
Total MDL <sup>[3]</sup>	0.94***	0.93***	0.98***	1			
Total DDL <sup>[4]</sup>	0.95***	0.94***	0.97***	0.99***	1		
“Rule 10b-5” Mentions <sup>[5]</sup>	0.99***	0.99***	0.89***	0.93***	0.94***	1	
Section 11 Mentions <sup>[6]</sup>	0.97***	0.97***	0.94***	0.97***	0.97***	0.97***	1

Source: Cornerstone Research and Stanford Law School Securities Class Action Clearinghouse; Securities Class Action Services (SCAS); Westlaw  
 Note:

[1] Correlations are taken with respect to total values per circuit, for each pairwise combination of variables. “\*”, “\*\*”, and “\*\*\*” denote statistical significance at the 10%, 5%, and 1% confidence levels, respectively.

[2] Analysis is on Cornerstone Research’s study of over 790 post-Reform Act securities cases filed after 12/22/95 for which settlement hearing dates between 1/1/13 and 12/31/22 were posted on the Securities Class Action Services (SCAS) database and cases alleged Rule 10b-5 claims or Section 11 brought by purchasers of a corporation’s common stock/ADR/ADS.

[3] MDL is the dollar-value change in the defendant firm’s market capitalization from the trading day with the highest market capitalization during the class period to the trading day immediately following the end of the class period. Taken from Cornerstone Research and Stanford Law School Securities Class Action Clearinghouse.

[4] DDL is the dollar-value change in the defendant firm’s market capitalization between the trading day immediately preceding the end of the class period and the trading day immediately following the end of the class period. Taken from Cornerstone Research and Stanford Law School Securities Class Action Clearinghouse.

[5] Rule 10b-5 Mentions is the number of cases that contain textual references to SEC rule 10(b)5 in the Securities Exchange Act of 1934. References were compiled from Westlaw.

[6] Section 11 Mentions is the number of cases that contain textual references to SEC Section 11 in the Securities Exchange Act of 1934. References were compiled from Westlaw.

**Figure 2**  
**Aggregate Circuit Shares and Split Ratios of Four Pending or Recently Resolved Petitions for**  
***Certiorari* in Federal Securities Cases**

