Arising Under: A Review of Notable Jurisdictional Disputes of the Federal Circuit

Elizabeth C. Elrod*

Abstract

Since its establishment in 1982, the Federal Circuit's jurisdiction has been the subject of substantial litigation. In Christianson v. Colt Industries*, the Supreme Court intervened in a jurisdictional dispute that arose a mere six years after the establishment of the Federal Circuit, ruling that cases falling under the Federal Circuit's jurisdiction must require resolution of patent law issues to be considered "arising under" patent law. This decision ushered in a wave of cases involving underlying patent law issues that, technically, required resolution in order for the case to be properly decided. These cases, however, involved underlying patent law issues—and the Supreme Court's guidance in* Christianson *did not help the Federal Circuit or other circuit courts create a uniform rule. Consequently, cases with a patent law "case-within-a-case" bounced between the Federal Circuit and regional circuit courts.*

The Supreme Court and Congress have not clarified the Federal Circuit's muddied jurisdiction jurisprudence—leaving the problem to be addressed by the Federal Circuit reviewing the issue through a new lens. This Note presents potential solutions to this problem, solutions that encourage the Federal Circuit to become the gap-filler originally envisioned by legislators when they drafted the Federal Courts Improvement Act of 1982.

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* Elizabeth Elrod is a student at the University of Texas School of Law, expected to graduate in May 2024.

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I. Introduction

The Federal Circuit is the newest of the appellate circuits in the United States and is unique in its jurisdiction, which is not based on geographic location but purely on subject matter. Notably, almost sixty percent of the Federal Circuit's cases involve matters unrelated to patent law: "veterans benefits, government-employment disputes, and government contracts."[1] However, this paper focuses on the other forty percent of cases: those relating to patents. 28 U.S.C. § 1295(a)(1) grants the Federal Circuit exclusive jurisdiction over actions that arise under the patent laws.

The presence of a subject-matter-specific circuit court alongside exclusively geographic circuit courts has created difficulties for practitioners and judges alike. When deciding whether a case should go to the First Circuit or Fifth Circuit, for example, the answer is easy. When deciding whether a case should go to the Fifth Circuit or Federal Circuit, however, the answer is much more difficult. If the courts disagree on whether the case arises under patent law, jurisdictional ping-pong ensues.[2] Such disputes have clogged judicial dockets since the inception of the Federal Circuit and are frequently the subject of inter-circuit transfers. This paper considers what "arising under the patent laws" actually means, how disagreement about that meaning has resulted in "jurisdictional ping-pong," and potential paths forward.[3]

II. Establishment of the Federal Circuit

The Federal Circuit was established by the Federal Courts Improvement Act (FCIA) of 1982, which "essentially merged the United States Court of Claims and the United States Court of Customs and Patent Appeals."[4] The legislative history and text of the FCIA inform the scope of the Federal Circuit's jurisdiction, as courts endeavor to align their decisions with both legislative intent and the statutory text.

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1 Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 GEO. L. J. 1437, 1439 (2012).
2 *See, e.g.*, Xitronix Corp. v. KLA-Tencor Corp., 882 F.3d 1075, 1077 (Fed. Cir. 2018).
3 Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 818, 823 (1988).
4 Jack C. Goldstein, *The Federal Circuit's Appellate Jurisdiction over Federal District Court Patent Cases: The First Three Years*, 13 AIPLA Q. J. 271, 271 (1985).

A. Legislative History

The Federal Circuit's subject-matter-defined jurisdiction resulted from a "congressional determination that there was a particular need for nationwide subject matter jurisdiction over appeals in patent cases—where the circuit courts had been inconsistently applying the law."[5] Congress first began discussions of establishing the Federal Circuit in 1979, and the bill was reintroduced in 1981.[6]

Both the House and Senate reports on the FCIA emphasized the "malfunctioning" and "crisis"-ridden appellate system sought to be remedied by the new Federal Circuit.[7] The legislators' main focuses were improving uniformity among appellate courts and alleviating docket pressures on existing regional circuits.[8] The House Report described the public support for this system:

> The establishment of a single court to hear patent appeals was repeatedly singled out by the witnesses who appeared before the Committee as one of the most far-reaching reforms that could be made to strengthen the United States patent system in such a way as to foster technological growth and industrial innovation.[9]

The goal of improving uniformity among appellate courts was grounded in the perceived issue of "appellate courts reach[ing] inconsistent decisions on the same issue, or in which . . . courts apply the law unevenly when faced with the facts of individual cases."[10] Various regional circuits were developing reputations for being pro- or anti-patent, and forum shopping abounded.[11] The House noted that "the validity of a patent is too dependent upon geography."[12] This issue was thought to be resolvable by taking the decision out of the hands of the litigants and placing it into the hands of the legislators. Specifically, the House stated that the Federal Circuit would "eliminate the expensive, time-consuming and unseemly forum-shopping that characterizes litigation in the field."[13] This improved uniformity was designed to "increase doctrinal stability in the field of patent law," as a survey of patent practitioners "indicated that uncertainty created by the lack of national law precedent was a significant problem."[14]

The goal of alleviating docket pressures on existing regional circuits was broader—beyond just standardizing the application of appellate patent law, the

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5 Joseph R. Re, *Brief Overview of the Jurisdiction of the U.S. Court of Appeals for the Federal Circuit Under § 1295(a)(1)*, 11 FED. CIR. BAR J. 651, 652 (2001).

6 *Landmark Legislation: Federal Circuit*, FED. JUD. CTR., https://www.fjc.gov/history/legislation/landmark-legislation-federal-circuit (last visited Dec. 24, 2022).

7 S. REP. NO. 97–275, at 3 (1981); H.R. REP. NO. 96–1300, at 15 (1980).

8 S. REP. NO. 97–275, at 3; H.R. REP. NO. 96–1300, at 16.

9 H.R. REP. NO. 96–1300, at 18.

10 S. REP. NO. 97–275, at 3.

11 H.R. REP. NO. 96–1300, at 18.

12 *Id.* at 19.

13 *Id.* at 18. Notably, this vision for the impact of the Federal Circuit proved incorrect. Forum shopping just shifted to the importance of the district court itself, with various district courts developing reputations for being pro- or anti-patent.

14 S. REP. NO. 97–275, at 5.

Federal Circuit provided an opportunity to lessen the work of *all* the regional circuits in one fell swoop.[15] The court was "designed to promote efficiency because the judges of the new court would, over time, acquire expertise in specialized areas of the law, enabling them to reach faster and better-reasoned decisions."[16] Having the Federal Circuit handle patent appeals was projected to "have the beneficial effect of removing . . . unusually complex, technically difficult, and time-consuming cases from the dockets of the regional courts of appeals."[17] With patent cases off the dockets of the regional circuits, the regional circuit's time could be spent on cases in which jurisdiction was geographic.

The Federal Circuit was designed to "help alleviate the docket pressures on the regional courts of appeals by reallocating and realigning existing judicial resources, not by adding new ones."[18] Although "[n]o new judgeships [were] created[] and the number of federal courts within the system [was] not increased," the Federal Circuit was still designed to alleviate docket pressure because of its "breadth of jurisdiction."[19] However, the House report clarified that "case management [was] not the primary goal of the legislation; rather, the central purpose is to reduce the widespread lack of uniformity and uncertainty of legal doctrine that exist in the administration of patent law."[20] Thus, the effect on the regional circuits was more of a beneficial externality than a primary motivation behind the Federal Courts Improvement Act.

Despite the apparent goal that the Federal Circuit specialize in patent law, the Senate made it clear that "the Federal Circuit will not be a 'specialized court,' as the term is normally used" because its jurisdiction was not "limited to one type of case."[21] The court would not *only* do patent appeals, but it would "handle *all* patent appeals."[22] In other words, all cases that were patent cases would be handled by the Federal Circuit, but not all of the cases that the Federal Circuit heard would be patent cases.

The FCIA established the Federal Circuit in order to increase uniformity in the field of patent law and to alleviate docket pressures on the regional circuits with its new subject-matter-specific jurisdiction. Congress envisioned a streamlined judicial system in which the Federal Circuit was uniquely equipped to handle patent cases, and the jurisdiction of the Federal Circuit was designed to achieve that purpose.

B. 28 U.S.C. § 1295

The FCIA gave the newly established Federal Circuit jurisdiction as follows:

> The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction . . . of an appeal from a final decision of a district court . . . if the jurisdiction of

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15 *See* H.R. REP. NO. 96–1300, at 15–16.
16 Re, *supra* note 5, at 652.
17 H.R. REP. NO. 96–1300, at 20.
18 *Id.* at 16.
19 *Id.*
20 *Id.* at 20.
21 S. REP. NO. 97–275, at 6.
22 *Id.* (emphasis added).

> that court was based, in whole or in part, on section 1338 of this title, except . . . a case involving a claim arising under any Act of Congress relating to copyrights or trademarks . . . .[23]

Section 1338, referenced within § 1295, recites the following:

> The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks.[24]

To paraphrase the statutes, in effect, the Federal Circuit has exclusive jurisdiction over appeals of any civil action arising under patent law. This jurisdiction was designed to "produce uniformity in the area of federal patent law" by having all patent cases appear before a single circuit court.[25]

In 2011, the jurisdictional statute was amended to replace the references to § 1338 with "any Act of Congress relating to patents."[26] This revision is functionally equivalent to the prior language but has implications for the statutory interpretation. Previously, interpretations of § 1338 obviously impacted interpretations of § 1295 due to the explicit reference within the statute. With the revision, however, § 1338 is not explicitly referenced, and a court might reasonably decline to follow an interpretation of "arising under any Act of Congress relating to patents" that comes from § 1338 rather than § 1295.

The Federal Circuit's jurisdiction, like subject matter jurisdiction for all federal courts, must be examined in every case, even if the parties agree that the Federal Circuit should have jurisdiction. This examination may include *sua sponte* evaluation of the trial court's jurisdiction.[27] A key question remains: what is the boundary for when a case begins to "arise under patent laws"? Jack Goldstein correctly predicted in 1985, three years after the Federal Circuit's creation, that "only time will tell."[28] The Federal Circuit and the Supreme Court have made efforts to answer this question in the decades since the Federal Circuit's establishment.

III. Notable Jurisdictional Disputes

In evaluating the jurisdictional question, only one court's jurisdictional analysis can be truly correct. The controlling inquiry is whether the district court's jurisdiction arose in part under patent laws—if it did, then *only* the Federal Circuit has jurisdiction over the appeal.[29] A case arising under patent laws could not be properly decided by any other court.[30]

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[23] 28 U.S.C. § 1295 (1982) (amended 2011).
[24] 28 U.S.C. § 1338.
[25] Goldstein, *supra* note 4, at 298.
[26] 28 U.S.C. § 1295 (1982) (amended 2011).
[27] Re, *supra* note 5, at 655 (citing RHI Holdings, Inc. v. United States, 142 F.3d 1459 (Fed. Cir. 1998)).
[28] Goldstein, *supra* note 4, at 299.
[29] Re, *supra* note 5, at 657 (citing Atari, Inc. v. JS&A Group, Inc., 747 F.2d 1422 (Fed. Cir. 1984)).
[30] *Id.* ("Based on this landmark ruling [in *Atari*], the Federal Circuit has eliminated any possibility that appeals from the same action could properly be decided by two different courts of appeal.").

However, the question of whether the action arises under patent law is up to interpretation. Courts of appeals evaluate jurisdiction based on their own law, so where the Federal Circuit's interpretation of "arising under" differs from that of a sister circuit court, each court might be "correct" in denying jurisdiction.[31] Below is a review of notable jurisdictional disputes resulting from the varying interpretations of the "arising under" requirement of the Federal Circuit's jurisdiction.

A. Malpractice Claims

Attorney malpractice, on its face, is an issue governed by state law because there is generally no federal question, let alone a patent law question. However, several cases have raised the issue of "whether a state law claim alleging legal malpractice *in the handling of a patent case* must be brought in federal court," and, if so, whether the appeal should go to the Federal Circuit or a regional circuit.[32]

1. *Air Measurement Technologies, Inc. v. Akin Gump Strauss Hauer & Feld, L.L.P.*

Before the Supreme Court's intervention, the Federal Circuit had a pattern of extending its jurisdiction to state law malpractice claims that contained any underlying patent issue.[33] The court's decision in *Air Measurement Technologies* is representative of this pattern.

Patentee Air Measurement Technologies (AMT) had engaged a patent attorney working with Akin Gump Strauss Hauer & Feld, L.L.P. (Akin Gump) to secure patent protection for their invention.[34] After obtaining several patents on the subject matter, AMT filed six patent infringement suits against manufacturers.[35] While the six suits settled without judicial determinations of infringement, invalidity, or enforceability of AMT's patents, AMT discovered several errors made by the Akin Gump attorney during prosecution.[36] AMT sued for legal malpractice, alleging "that Akin Gump's errors forced [AMT] to settle the prior litigation far below the fair market value of the patents" because of how the attorney's errors during prosecution affected the

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[31] *See* Paul R. Gugliuzza, *Rising Confusion About 'Arising Under' Jurisdiction in Patent Cases*, 69 EMORY L. J. 459, 465 (2019) ("[T]he Federal Circuit's decisions adopting a narrow conception of arising under jurisdiction create clear intracircuit splits that leave state courts, federal district courts, and the regional circuits—all of whom must decide questions of patent jurisdiction in the first instance—with no helpful guidance from a court whose primary reason for existence is to provide uniformity in patent law.").

[32] Gunn v. Minton, 568 U.S. 251, 253 (2013) (emphasis added).

[33] Gugliuzza, *supra* note 31, at 475 ("[The Federal Circuit] held for many years that state law claims (or claims created by bodies of federal law besides patent law, such as antitrust law) arose under patent law—and therefore fell within the federal courts' and the Federal Circuit's exclusive jurisdiction—if the claims implicated issues about the scope or validity of any particular patent.").

[34] Air Measurement Techs., Inc. v. Akin Gump Strauss Hauer & Feld, L.L.P., 504 F.3d 1262, 1265 (Fed. Cir. 2007).

[35] *Id.* at 1266.

[36] *Id.* These violations include the attorney's failure to file the initial patent application within the one year "on-sale bar" and failure to disclose information to the USPTO during prosecution.

patents' enforceability.[37] All of AMT's claims against Akin Gump were state law claims.[38]

Akin Gump removed the case to federal court, arguing that the case required "resolution of a substantial question of federal patent law."[39] The district court certified the jurisdictional issue for interlocutory appeal, which was granted by the Federal Circuit.[40] The Federal Circuit applied the two-part jurisdictional test established in *Christianson*—the relevant inquiry for this case was "whether patent law is a necessary element of AMT's malpractice claim."[41]

The malpractice claim required analysis of both the attorney's duty and breach as well as the underlying "case within a case."[42] In order for a plaintiff to win a legal malpractice claim, the plaintiff must show that the attorney's actions were the proximate cause of the plaintiff's loss—but-for the attorney's negligence, the plaintiff would have won.[43] This underlying "case within a case" was the basis for the Federal Circuit's jurisdiction. The court reasoned that it would be "illogical" for the federal district court to have jurisdiction over the underlying infringement suit and not over "the same substantial patent question in the 'case within a case' context of a state malpractice claim."[44] The benefits of having judges "experience[d] in claim construction and infringement matters" were also cited by the court, particularly in light of Congress's intent when drafting § 1338.[45] The Federal Circuit affirmed the case's removal to federal court.[46]

2. *Immunocept LLC v. Fulbright and Jaworski*

Immunocept, decided the same year as *Air Measurement Technologies*, came to the same conclusion: the Federal Circuit has jurisdiction over malpractice claims relating to patents.[47] The most substantial difference between *Immunocept* and *Air Measurement Technologies* is the nature of the "case within a case."[48] While *Air*

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[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.* at 1267. The specific issue certified for interlocutory appeal was "[w]hether a Texas state-law legal malpractice claim arising out of underlying patent prosecution and patent litigation necessarily raises a question of federal patent law, actually disputed and substantial, that a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Id*.
[41] *Id.* at 1267–68. *See infra* Section III.B for a discussion of *Christianson*.
[42] *Id.* at 1268–69.
[43] *Id.* at 1269.
[44] *Id.*
[45] *Id.* at 1272.
[46] *Id.* at 1273. The court pointed to several factors: that "establishing patent infringement is a necessary element of a malpractice claim stemming from alleged mishandling of patent prosecution and earlier patent litigation, the issue is substantial and contested, and federal resolution of the issue was intended by Congress." *Id*.
[47] Immunocept, LLC v. Fulbright & Jaworski, LLP, 504 F.3d 1281, 1289 (Fed. Cir. 2007).
[48] *Id.* at 1283; *Air Measurement Technologies*, 504 F.3d at 1265.

Measurement Technologies involved the effects of malpractice on settlement negotiations, *Immunocept* involved the effects of malpractice on investment negotiations.[49]

Immunocept had hired a Fulbright attorney to secure patent protection, and a "fatal flaw" of the patent was later discovered during Immunocept's preliminary investment negotiations with another company.[50] After learning of the "fatal flaw," the potential investor terminated negotiations.[51] Immunocept sued Fulbright in federal district court for state law legal malpractice, attributing federal jurisdiction to § 1338.[52]

After summary judgment was granted to Fulbright, Immunocept appealed to the Federal Circuit, which ordered briefing on the jurisdictional issue.[53] The Federal Circuit found that the "fatal flaw" (a claim drafting error) was "a necessary element of the malpractice cause of action" such that "Immunocept [could not] prevail without addressing claim scope."[54] The court reiterated that "claim scope [is] . . . a substantial question of patent law . . . that can be complex."[55] Because of these complexities, the court found that these cases are best handled by "federal judges who are used to handling these complicated rules."[56] This decision aligns with the analysis in *Air Measurement Technologies*, which found that if a question of claim scope is necessary to resolve the case as a whole, the Federal Circuit has jurisdiction.[57]

3. *Gunn v. Minton*

In *Gunn v. Minton*,[58] the Supreme Court steered the Federal Circuit from its broad jurisdictional approach taken in *Air Measurement Technologies* and *Immunocept*.

The cause of action was state law attorney malpractice for the conduct of the attorney, Gunn, in a patent infringement suit.[59] In that suit, the district court found Minton's patent invalid due to violations of the "on-sale bar."[60] After losing his patent infringement case, Minton sued Gunn for legal malpractice, alleging that "his attorneys' failure to raise the experimental-use argument earlier had cost him the lawsuit and led to invalidation of his patent."[61]

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[49] *Immunocept*, 504 F.3d at 1283; *Air Measurement Technologies*, 504 F.3d at 1265.
[50] *Immunocept*, 504 F.3d at 1283.
[51] *Id.*
[52] *Id.* at 1283–84.
[53] *Id.* at 1284.
[54] *Id.* at 1285.
[55] *Id.*
[56] *Id.*
[57] *See* Air Measurement Techs., Inc. v. Akin Gump Strauss Hauer & Feld, L.L.P., 504 F.3d 1262, 1267–68 (Fed. Cir. 2007).
[58] 568 U.S. 251 (2013).
[59] *Id.* at 253–54.
[60] *Id.* at 254.
[61] *Id.* at 255.

After losing on the merits in his malpractice case, Minton argued for the first time that the district court's jurisdiction was improper, alleging that "[b]ecause his legal malpractice claim was based on an alleged error in a patent case," the federal courts had jurisdiction.[62] When the dispute ended up before the Supreme Court of Texas, the court removed the case to federal court "because the success of [the] malpractice claim [was] reliant upon the viability of the experimental use exception as a defense to the on-sale bar."[63] This language mirrored the Federal Circuit's decisions in *Air Measurement Technologies* and *Immunocept*, requiring the mere existence of a patent issue to be resolved in the "case within a case."[64]

The U.S. Supreme Court had a different interpretation of "arising under" jurisdiction than the Supreme Court of Texas and the Federal Circuit.[65] The inquiry is not whether there is *any* underlying patent issue but instead whether "the state-law claim necessarily raise[s] a stated federal issue, actually disputed *and substantial*, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities."[66] When these factors are met, the federal court can assert jurisdiction "without disrupting Congress's intended division of labor between state and federal courts."[67]

Although *Gunn* required resolution of an "actually disputed" federal patent question, the federal issue was "not substantial in the relevant sense."[68] This was because substantiality relates "to the importance of the issue to the federal system as a whole," not just the importance of the issue to the plaintiff's case.[69] The Court found "no such significance" to the underlying patent issue in Minton's case, as "[n]o matter how the state courts resolve [the hypothetical patent issue], it will not change the real-world result of the prior federal patent litigation [and] Minton's patent will remain invalid."[70] A state court ruling on this issue would not affect the uniformity of patent law, as "federal courts are of course not bound by state court case-within-a-case patent rulings."[71] Thus, leaving a "case within a case" patent law issue would have no larger impact and would not justify the federal courts stepping in to rule on what is otherwise an issue of state law.[72] Furthermore, the proposed intervention of federal

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[62] *Id.*

[63] Gunn v. Minton, 355 S.W.3d 634, 644 (Tex. 2011).

[64] Air Measurement Techs., Inc. v. Akin Gump Strauss Hauer & Feld, L.L.P. , 504 F.3d 1262, 1265 (Fed. Cir. 2007); *see also* Immunocept, LLC. v. Fulbright & Jaworski, LLP, 504 F.3d 1281, 1285 (Fed. Cir. 2007) ("Because the claim scope determination involved in the malpractice claim presents a substantial question of patent law, we conclude that jurisdiction is proper under § 1338.").

[65] *See* Gunn v. Minton, 568 U.S. 251, 264–65 (2013) (holding that federal courts do not have jurisdiction "of all questions in which a patent may be the subject-matter of the controversy").

[66] *Id.* at 258 (emphasis added).

[67] *Id.*

[68] *Id.* at 259–60.

[69] *Id.* at 260.

[70] *Id.* at 261.

[71] *Id.* at 262.

[72] *See id.* at 261–64 ("There is no doubt that resolution of a patent issue in the context of a state legal malpractice action can be vitally important to the particular parties in that case. But something more,

courts would be on an issue of state law of particular interest to the state: maintaining standards among lawyers.[73] The Supreme Court remanded the case to state court for further proceedings and established the "*Gunn* factors" for approaching state law legal malpractice claims relating to patent cases or issues.[74]

4. Conclusions

The Federal Circuit's body of decisions regarding legal malpractice claims was remarkably expansive until the Supreme Court intervened in *Gunn v. Minton*.[75] The court justified this expansive approach "by emphasizing both the unique experience of federal judges in deciding patent cases and the overarching importance of uniformity in patent law."[76] After *Gunn*, however, the Federal Circuit changed its tune in order to comply with the Supreme Court's decision. The *Gunn* factors state that there is federal jurisdiction over a state law claim if a federal issue is (1) reasonably raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.[77] The addition of the substantiality requirement raised the bar that the Federal Circuit had established in *Air Measurement Technologies* and *Immunocept*—a bar that had only required that a claim "implicate[] issues about the scope of validity of *any* particular patent."[78]

While *Gunn* relates to the jurisdiction of *all* federal courts over state law claims, the factors and the Supreme Court's interpretation of § 1338 inform analysis for determining the jurisdiction of the Federal Circuit in particular.

B. Sherman Act

The Sherman Act has presented significant jurisdictional difficulties for the Federal Circuit. The statute prohibits monopolies, and holding a valid patent is a natural defense to an alleged Sherman Act violation. Sections 1 and 2 of the Sherman Act prohibit:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several States, or with foreign nations . . . .[79]
>
> Every person who shall monopolize, or attempt to monopolize, or combine and conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . . [80]

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demonstrating that the question is significant to the federal system as a whole, is needed. That is missing here.").

[73] *Id.* at 264.

[74] *Id.* at 265.

[75] Gugliuzza, *supra* note 31, at 475.

[76] *Id.*

[77] *Gunn v. Minton*, 568 U.S. at 258.

[78] Gugliuzza, *supra* note 1, at 475 (emphasis added).

[79] 15 U.S.C. § 1.

[80] 15 U.S.C. § 2.

Because the Sherman Act itself is not a patent law, the Federal Circuit's jurisdiction is not automatic, even when the validity of a patent becomes a focus of the case as it develops. The Federal Circuit's jurisdiction is even more complicated when the case under the Sherman Act involves a *Walker Process* claim—one expressly asserting the invalidity of a patent while alleging an illegal monopoly.[81]

1. *Christianson v. Colt Industries Operating Corp.*

Christianson v. Colt was an early test of the Federal Circuit's jurisdiction that garnered Supreme Court intervention. This case arose almost immediately after the establishment of the Federal Circuit in 1985.[82] Christianson sued Colt in federal district court for violating §§ 1 and 2 of the Sherman Act and for tortious interference under state law.[83] The complaint alleged that Colt's conduct illegally drove Christianson out of business.[84] The only mention of patents was in a single paragraph of Christianson's complaint:

> The validity of the Colt patents had been assumed throughout the life of the Colt patents through 1980. *Unless such patents were invalid through the wrongful retention of proprietary information in contravention of United States Patent Law (35 U.S.C. § 112)*, in 1980, when such patents expired, anyone who has ordinary skill in the rifle-making art is able to use the technology of such expired patents for which Colt earlier had a monopoly position for 17 years.[85]

Christianson's claim was based entirely in the Sherman Act; there was no mention of patent validity beyond the single reference discussed above.[86] However, after Colt counterclaimed for Christianson's "alleged misappropriation of M-16 specifications," Christianson filed a motion for summary judgment explicitly relating to patent law.[87] The motion alleged the invalidity of Colt's patents, arguing that because enabling disclosure was improperly withheld from the patent applications, Colt's alleged trade secrets were not protected by state law.[88] The district court granted the motion for summary judgment, and, consequently, invalidated Colt's patents and declared all trade secrets relating to the M-16 "unenforceable."[89]

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[81] *See* Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 176–77 (1965) (holding that enforcement of a patent procured by fraud on the PTO may be a federal antitrust violation under the Sherman Act).

[82] Christianson v. Colt Indus. Operating Corp., 486 U.S. 800 (1988).

[83] *Id.* at 800.

[84] *Id.* at 805.

[85] *Id.* (emphasis added).

[86] *Id.* Christianson's claim stands in contrast with *Walker Process* claims, which assert invalidity of patents in the original complaint.

[87] *Id.* at 806.

[88] *Id.*

[89] Christianson v. Colt Indus. Operating Corp., 613 F.Supp. 330, 331–32 (C.D. Ill. 1985).

Colt appealed to the Federal Circuit, which heard oral arguments and full briefs on the merits.[90] The Federal Circuit, in an unpublished order, transferred the appeal to the Seventh Circuit.[91] The order recited as follows:

> Having reviewed the submissions of the parties, as well as the pleadings filed in the district court, the court can discern no basis for jurisdiction in the Court of Appeals for the Federal Circuit.[92]

The Seventh Circuit did not accept the Federal Circuit's transfer and instead concluded that the Federal Circuit's order was "clearly wrong."[93] The Seventh Circuit emphasized its "power to reconsider the jurisdictional rulings of another circuit court," noting that "[t]here is certainly no basis in law for the proposition that the Federal Circuit has greater latitude than the regional circuits in defining the boundary between its and the regional circuits' jurisdiction."[94] It used this power to outline two types of cases that may "arise under" patent law: first, those in which patent law creates the cause of action and, second, those in which "the vindication of a right under a non-patent law calls for a determination of the meaning or application of a patent law."[95]

The Seventh Circuit categorized *Christianson* under the latter category given how the district court's decision extinguished a patent right. While acknowledging the need to adhere to the "well-pleaded complaint" doctrine, the Seventh Circuit "consider[ed] arguments made outside the pleadings to determine the substance of the action," allowing subsequent arguments to provide context for the interpretation of the complaint.[96] In particular, the Seventh Circuit looked to Christianson's motion for summary judgment in finding that "Christianson was necessarily seeking to vindicate a right or interest that would be defeated by one or sustained by the opposite construction of the patent laws."[97] The Seventh Circuit acknowledged that patent law did not create the cause of action here, but it found that this case was the second type described above because "the plaintiff must establish that his interpretation of the patent laws is correct in order to prevail."[98] Accordingly, the Seventh Circuit transferred the case back to the Federal Circuit, relying on the arguments made in Christianson's motion for summary judgment to do so.[99]

After the transfer back from the Seventh Circuit, the Federal Circuit began its decision with a request for "Congress to make its intention even more clear to those willing to look for it in the statute and legislative history," as the Federal Circuit's jurisdiction was already "less than crystal clear" a mere five years after its

90 *Christianson*, 486 U.S. at 806.
91 *Id.*
92 Christianson v. Colt Indus. Operating Corp., 798 F.2d 1051, 1058 n.7 (7th Cir. 1986).
93 *Id.* at 1056–57.
94 *Id.* at 1057.
95 *Id.* at 1059.
96 *Id.* at 1060.
97 *Id.* at 1060–62.
98 *Id.* at 1061.
99 *Id.* at 1062.

establishment.[100] The Federal Circuit found "no basis on which to posit a congressional intent to deprive the regional circuits of jurisdiction over *every* appeal that remotely involves a patent issue."[101] Rather, the court remarked that "a careful examination of the FCIA and the legislative history establishes the absurdity of supposing that Congress intended [the Federal Circuit's] jurisdiction . . . to turn on whether a patent question is raised in an *argument* against a *defense* on cross-motions for summary judgment in an antitrust suit."[102]

The Federal Circuit soundly rejected the Seventh Circuit's determination that the existence of a patent issue in the well-pleaded case granted jurisdiction to the Federal Circuit.[103] Instead, the Federal Circuit pointed to the lack of allegations of patent invalidity in the complaint itself, as only the complaint may be considered for subject matter jurisdictional disputes.[104] "The Seventh Circuit's mistaken belief that Christianson said it anticipated Colt's defense of *patent validity*, when, as Christianson correctly argued, the complaint anticipated Colt's defense of *trade secrets*, may account in great part for its view that this court has jurisdiction over this appeal."[105]

The Federal Circuit's misstep was ruling on the merits of the appeal while denying its jurisdiction. The court did so to avoid the "risk [of] leaving the parties with no avenue of appellate review of the district court's judgment,"[106] but it left its decision open to being vacated by the Supreme Court.

The framework for the Supreme Court's analysis was that in order for the Federal Circuit to have jurisdiction, "the plaintiff must set up some right, title or interest under the patent laws, or at least make it appear that some right of privilege will be defeated by one construction, or sustained by the opposite construction of these laws."[107] Finding that "patent law did not in any sense create petitioners' antitrust or intentional-interference claims," the Court focused its analysis on "whether patent law [was] a necessary element of one of the well-pleaded antitrust claims."[108] The Supreme Court found that it was not.[109]

In order for a claim to "arise under" patent law, evidence of such must appear "in the plaintiff's statement of his own claim in the bill or declaration, unaided by

[100] Christianson v. Colt Indus. Operating Corp., 822 F.2d 1544, 1550 (Fed. Cir. 1987).
[101] *Id.* at 1550.
[102] *Id.* at 1551.
[103] *Id.* at 1557.
[104] *Id.* The well-pleaded complaint rule originated in *Louisville & Nashville Railroad v. Mottley*, 211 U.S. 149 (1908), and requires that the federal question necessarily appear on the face of the plaintiff's well-pleaded complaint in order for the federal courts to have jurisdiction.
[105] *Id.*at 1558–59.
[106] *Id.* at 1560.
[107] Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 807–808 (1988).
[108] *Id.* at 809.
[109] *Id.* at 810 ("The patent-law issue, while arguably necessary to at least one theory under each claim, is not necessary to the overall success of either claim.").

anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose."[110] This portion mandates that jurisdictional analysis exclude statements by the plaintiff that set up counterarguments to what the defense might bring up in their response. Jurisdiction cannot be based merely on one of these counter-argument set-ups, "even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case."[111]

Even if patent law supports one theory explicitly articulated in the complaint, that alone may be insufficient. The Supreme Court held that "[a] claim supported by alternative theories in the complaint may not form the basis for § 1338(a) jurisdiction unless patent law is essential to *each* of those theories."[112] Patent law cannot be merely one potential resolution of one issue identified in the complaint. There must be no way of resolving that issue *without* dealing with substantial questions of patent law.[113]

Here, the Supreme Court assumed Colt's argument that the validity of their patents was "an essential element of the foregoing monopolization theory" but reasoned that "just because an element that is essential to a particular theory might be governed by federal patent law does not mean that the entire monopolization claim 'arises under' patent law."[114] The Supreme Court agreed with Colt and found that Christianson's monopolization theory, which contained the element governed by federal patent law, was "only one of several" theories, and "the only one for which the patent-law issues is even arguably essential."[115] The conduct alleged in Christianson's complaint, including that unrelated to the validity of Colt's patents, "could be deemed wrongful quite apart from the truth or falsity" of the patent-law issue.[116]

Ultimately, the Supreme Court found that, because there were "reasons completely unrelated to the provisions and purposes of federal law [establishing] why petitioners may or may not be entitled to the relief they sought under their monopolization claim, . . . the claim does not arise under federal patent law."[117]

In addition to relying on jurisprudence interpreting § 1338, the Court also turned to the legislative history of the Federal Courts Improvement Act.[118] Colt had argued that "Congress' goals would be better served" if the Federal Circuit's jurisdiction was determined "by reference to the case actually litigated" rather than merely the complaint filed.[119] However, the Court found that the text of 28 U.S.C. § 1295(a)(1)

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[110] *Id*. at 809.
[111] *Id*.
[112] *Id.* at 810 (emphasis added).
[113] *See id*.
[114] *Id.* at 811.
[115] *Id*.
[116] *Id.* at 812.
[117] *Id.* at 801–802 (citation omitted).
[118] *Id.* at 813.
[119] *Id.*

mandated that the reference be "the well-pleaded complaint," as the complaint rather than the case actually litigated determines the district court's jurisdiction.[120]

While agreeing with the Federal Circuit's conclusion that it lacked jurisdiction, the Supreme Court nonetheless "disapprove[d] of its decision to reach the merits anyway 'in the interest of justice'" because a court may not "extend its jurisdiction where none exists."[121] The Court found that even the interest of justice was insufficient to justify the Federal Circuit's exercise of jurisdiction, especially given that the Federal Circuit had just determined it had none.[122]

The Supreme Court cautioned that this "perpetual game of jurisdictional ping-pong" had negative national consequences for the perception and efficiency of the judiciary.[123] The Court pointed the blame to the Seventh Circuit's failure to "adher[e] strictly to the principles of law of the case."[124] The transferee court should only raise jurisdictional issues if the transfer is "clearly erroneous," as "if the transferee court can find the transfer decision plausible, its jurisdictional inquiry is at an end."[125] Because the Federal Circuit decided the jurisdictional issue first, the "law-of-the-case" was that the Seventh Circuit had jurisdiction.[126] The Seventh Circuit had the power to revisit the Federal Circuit's initial jurisdictional determination, but it "should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice."[127]

This "law-of-the-case" principle does not deprive co-equal circuit courts of appeals from reviewing each other's transfer decisions but rather establishes the level of deference that the second court should apply to the first court's decision.[128] The Supreme Court adhered to this principle in the hopes that "it will obviate the necessity for [the Court] to resolve every marginal jurisdictional dispute."[129] The Court then remanded to the Seventh Circuit for proceeding on the merits.[130]

It appeared clear that the Supreme Court thought *Christianson* was an outlier—that this would be the only case of "jurisdictional ping-pong" and a dispute unique to the early years of the Federal Circuit.[131] In actuality, *Christianson* represents a common conundrum of federal subject matter jurisdiction in general: what to do when

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[120] *Id.* at 813–14.
[121] *Id.* at 818.
[122] *Id.*
[123] *Id.* at 818–19.
[124] *Id.* at 819.
[125] *Id.*
[126] *Id.* at 817.
[127] *Id.*
[128] *Id.*
[129] *Id.* at 819.
[130] *Id.*
[131] *See id.* at 818.

an issue comes to fruition after the initial pleading stage and how to determine whether any "hints" given in the pleadings were sufficient to establish jurisdiction.

The Supreme Court did not intervene in subsequent jurisdictional disputes of Sherman Act or *Walker Process* claims, instead leaving that dispute up to the circuit courts of appeals. Two of such notable disputes have emerged between the Fifth Circuit and the Federal Circuit in *Xitronix* and *Chandler*.

2. *Xitronix Corp. v. KLA-Tencor Corp.*

Xitronix contained a *Walker Process* claim—a Sherman Act claim alleging that the defendant fraudulently obtained a patent.[132] The plaintiff's complaint alleged that the defendant "engaged in exclusionary conduct by fraudulently prosecuting to issuance the '260 patent" and by undertaking conduct "specifically intended to monopolize and destroy competition in the market."[133] The question before the Federal Circuit in light of the Supreme Court's decisions in *Christianson* and *Gunn* was "whether the monopolization allegation necessarily depend[ed] on resolution of a substantial question of federal law, in that patent law is a necessary element of one of the well-pleaded claims."[134]

The Federal Circuit found that although "a determination of the alleged misrepresentations to the PTO will almost certainly require some application of patent law," something more is required to invoke the Federal Circuit's jurisdiction.[135] Specifically, the court relied on the fact that "[p]atent claims will not be invalidated or revived based on the result of this case" and that "the fact that at least some *Walker Process* claims may be appealed to the regional circuits will not undermine [the court's] uniform body of patent law."[136] The court relied heavily on the Supreme Court's decision in *Gunn*, which emphasized that "consistency with the federal question jurisdiction statute requires more than mere resolution of a patent issue in a 'case within a case.'"[137] Accordingly, the Federal Circuit transferred the case to the Fifth Circuit.[138]

The Fifth Circuit, however, did not agree, stating that the transfer was "implausible."[139] The Fifth Circuit construed the Federal Circuit's opinion as "[t]he Federal Circuit transferr[ing] the case because it understood *Gunn v. Minton* to change the law governing the allocation between it and the regional circuits," despite "compelling reasons to think that *Gunn* did not."[140] The Fifth Circuit noted that the Federal Circuit "regularly exercised jurisdiction over *Walker Process* claims"

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[132] *See supra* note 81.
[133] Xitronix Corp. v. KLA-Tencor Corp., 882 F.3d 1075, 1077 (Fed. Cir. 2018). Notably, at the time of this dispute, the '260 patent was still valid.
[134] *Id.*
[135] *Id.* at 1078.
[136] *Id.*
[137] *Id.*
[138] *Id.* at 1080.
[139] Xitronix Corp. v. KLA-Tencor Corp., 916 F.3d 429, 431 (5th Cir. 2019).
[140] *Id.* at 435.

because "the determination of fraud before the PTO necessarily involves a substantial question of patent law."[141] Notably, the statement of the Federal Circuit about *Walker Process* claims cited here by the Fifth Circuit predates the Supreme Court's decision in *Gunn*.[142] The Fifth Circuit stated that "*Gunn* gave no indication that it meant to alter *Christianson* or the allocation of cases among the circuit courts."[143]

Thus, the Fifth Circuit found that the key issue was whether a finding that the defendant had fraudulently obtained the patent-in-suit would render the patent "effectively unenforceable in future cases."[144] This is the standard previously applied by the Federal Circuit in cases such as *Air Measurement Technologies* and *Immunocept*, wherein any determination regarding claim scope granted the Federal Circuit jurisdiction.[145]

The court accepted that *Gunn* intended to change the Federal Circuit's jurisdiction but found that *Gunn* did not apply to the case at hand because the patent-in-suit was valid.[146] The Fifth Circuit relied on the ability of "[t]his litigation . . . to render that patent effectively unenforceable."[147] The court also pointed to implications that this case would have on "the interaction between the PTO and Article III courts."[148] The Fifth Circuit went on to articulate the reasons why it did *not* think *Gunn* changed the Federal Circuit's jurisdiction, stating that "*Gunn* concerned the district courts' jurisdictional statute, § 1338, not the Federal Circuit's jurisdictional statute, § 1295."[149]

Regardless of dicta on the impact of *Gunn*, the Fifth Circuit found that "this case presents a standalone *Walker Process* claim" with no non-patent theories that would give the Fifth Circuit jurisdiction.[150] The Fifth Circuit transferred the case back to the Federal Circuit.[151]

Once this case was back in the Federal Circuit, the court did not make the same mistake it had in *Christianson* of denying jurisdiction while ruling on the merits, a decision that had led the Supreme Court to vacate the Federal Circuit's decision.[152] The Federal Circuit did, however, rule on the merits in an unpublished, non-

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[141] *Id.* at 436 (quoting *In re* Ciprofloxacin Hydrochloride Antitrust Litig., 544 F.3d 1323, 1330 n.8 (Fed. Cir. 2008)).

[142] *Compare In re* Ciprofloxacin Hydrochloride Antitrust Litig., 544 F.3d 1323, 1330 n.8 (Fed. Cir. 2008), *with* Gunn v. Minton, 568 U.S. 251, 253 (2013).

[143] *Xitronix*, 916 F.3d at 438.

[144] *Id.* at 439.

[145] *See* Air Measurement Tech., Inc. v. Akin Gump Strauss Hauer & Feld, L.L.P., 504 F.3d 1262, 1265 (Fed. Cir. 2007); Immunocept, LLC v. Fulbright & Jaworski, LLP, 504 F.3d 1281, 1283 (Fed. Cir. 2007).

[146] Xitronix, 916 F.3d at 441.

[147] *Id.*

[148] *Id.*

[149] *Id.* at 442.

[150] *Id.* at 443–444.

[151] *Id.*

[152] Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 818 (1988).

precedential decision.[153] Although the court pointed out "flaws" in the Fifth Circuit's transfer order, the Federal Circuit conceded that it was "not implausible."[154] It stated:

> While it is not implausible to reach this conclusion, we reject the theory that our jurisdiction turns on whether a patent can still be asserted. Under this logic, cases involving *Walker Process* claims based on expired patents would go to the regional circuits while those with unexpired patents would come to [the Federal Circuit], despite raising the same legal questions. . . . [T]he fact that any decision could have effects on enforceability is a plausible reason for us to accept jurisdiction.[155]

The Supreme Court declined to grant certiorari for *Xitronix*.[156]

3. *Chandler v. Phoenix Services, LLC*

Chandler, like *Xitronix*, involved a *Walker Process* claim.[157] The case differed from *Xitronix*, however, in that the underlying patent-in-suit had already been invalidated at the time of the *Walker Process* claim.[158]

Chandler brought a *Walker Process* claim against Phoenix Services, the patent owner, in the U.S. District Court for the Northern District of Texas.[159] The complaint alleged two anti-competitive actions taken by Phoenix Services: (1) sending a cease and desist letter in 2013 that allegedly contributed to the recipient losing customers and going out of business and (2) asserting the now-invalidated '993 patent in a 2014 lawsuit against two of the plaintiff companies in this litigation.[160] The district court granted the defendant's motion for summary judgment, finding that the plaintiff's claim was time-barred under the four-year statute of limitations.[161]

Chandler appealed the district court's decision to the Federal Circuit, which held that it lacked jurisdiction over the appeal and transferred to the Fifth Circuit.[162] The Federal Circuit relied on its own precedent from *Xitronix*, which established that *Walker Process* claims do not inherently present a substantial issue of patent law.[163] While acknowledging that it found the Fifth Circuit's interpretation of *Walker Process* claim jurisdiction in *Xitronix* "not implausible," the Federal Circuit emphasized that said decision was made in a non-precedential opinion.[164] The court reiterated that it disagreed with the Fifth Circuit's interpretations of *Christianson* and

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153 Xitronix Corp. v. KLA-Tencor Corp., 757 Fed. App'x 1008, 1010 (Fed. Cir. 2019).
154 *Id.*
155 *Id.*
156 Xitronix Corp. v. KLA-Tencor Corp., 140 S.Ct. 110 (2019) (mem).
157 Chandler v. Phoenix Services LLC, 1 F.4th 1013, 1014 (Fed. Cir. 2021).
158 *Id.* at 1014–1015. The '993 Patent in *Chandler* was invalidated by a district court for failure to disclose numerous non-experimental sales and public uses of the invention prior to the critical date, i.e., violations of the "on sale bar." *See* Energy Heating, LLC v. Heat On-The-Fly, LLC, No. 4:13-cv-10, 2016 WL 10837799, at *3–4 (D.N.D. Jan. 14, 2016).
159 Chandler v. Phoenix Services LLC, No. 7:19-CV-00014-O, 2020 WL 1848047, at *3 (N.D. Tex., Apr. 13, 2020).
160 *Id.*
161 *Id.* at *16.
162 *Chandler*, 1 F.4th at 1018–19.
163 *Id.* at 1015–18.
164 *Id.* at 1018.

Gunn that it used when transferring *Xitronix* to the Federal Circuit.[165] Additionally, the court emphasized the distinguishable facts of *Xitronix*, which involved a valid patent-in-suit.[166] Contrastingly, the patent-in-suit in *Chandler* had already been invalidated—there was no possibility of this litigation validating or extinguishing a patent right.[167]

The Fifth Circuit found that the Federal Circuit's jurisdictional analysis was plausible and accepted the transfer.[168] However, the court highlighted its disagreement with the Federal Circuit's precedent, i.e., with *Xitronix*, regarding *Walker Process* claim jurisdiction.[169] The Fifth Circuit did not mince words, stating that although it could not find the Federal Circuit's decision implausible, "that does not mean that it is correct."[170] Nonetheless, the Fifth Circuit took a conservative approach to jurisdiction, accepting the Federal Circuit's transfer because of how the Supreme Court had "admonished" circuits in *Christianson* to express restraint in rejecting circuit-to-circuit transfer cases.[171] The Fifth Circuit ruled on the merits, stating that it "will engage in no unseemly jurisdictional ping-pong here."[172]

4. *Conclusions*

The Fifth Circuit and the Federal Circuit ardently disagree on who has jurisdiction over *Walker Process* claims. Both courts have valid, well-reasoned precedent supporting their jurisdictional analysis—precedent that depends on the courts' understandings of how *Christianson* and *Gunn* impacted the Federal Circuit's jurisdiction.

The root of this issue is the lack of uniformity of law applied by the circuit courts when deciding whether they have jurisdiction over a case. Circuit courts, each relying on their own understanding of what the jurisdictional statute means, can come to two different results. Moreover, each circuit court has the right to do so—all circuit courts are "on the same judicial tier," and the Federal Circuit's opinion about its jurisdiction holds no more power than the Fifth Circuit's opinion of the Federal Circuit's jurisdiction.[173] The best way to solve this problem would be for the Supreme Court to take up a case on this matter and provide an increased level of uniformity.

IV. Potential Solutions

The Federal Circuit's opinion that "[u]nfortunately, the [precedential] canvas looks like one that Jackson Pollock got to first" rings true.[174] Scholars note that the

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[165] *Id.* at 1015–19.
[166] *Id.* at 1016.
[167] *Id.*
[168] Chandler v. Phoenix Services LLC, 45 F.4th 807, 810 (5th Cir. 2022).
[169] *Id.* at 812–13.
[170] *Id.* at 813.
[171] *Id.*
[172] *Id.*
[173] *See* Joseph R. Re, *supra* note 5, at 652.
[174] Gunn v. Minton, 568 U.S. 251, 258 (2013).

"multifaceted, malleable, factor-driven jurisdictional test [like that from *Gunn*] has not proven easy for the courts to apply."[175] The multi-factor jurisdictional tests allow the circuit courts of appeals to reach such different conclusions regarding jurisdictional issues.

Some scholars point to the complexity of the jurisdictional test as the source of the Federal Circuit's jurisdictional disputes, as Gugliuzza proposed a simpler rule under which "the mere need to *apply* federal law is never sufficient to create arising under jurisdiction."[176] This rule mirrors that of federal question jurisdiction, which is "confined" to claims that "really and substantially involve a dispute or controversy respecting the validity, construction, or effect of federal law."[177]

This paper proposes an alternate rule—that the Federal Circuit has jurisdiction when a question of claim scope is necessary to resolve the case as a whole. This alternate rule errs on the side of allowing the Federal Circuit jurisdiction over *any* case involving a patent issue, which is more in line with legislative intent of the FCIA. Congress's intent for the Federal Circuit was to create a uniform body of law, and such a body of law is best created by the Federal Circuit.[178] Legislators envisioned that the Federal Circuit would "increase doctrinal stability in the field of patent law" by being the *only* court to rule on cases involving patent laws.[179] Under the current rules, the Federal Circuit is not the only court ruling on cases involving patent laws, especially with the Federal Circuit's repeated denial of jurisdiction over *Walker Process* claims. Rather, if a party appeals a *Walker Process* claim to the Federal Circuit, the underlying issue of patent validity will most likely be heard by the regional circuit instead.[180]

This rule would look more like the jurisdictional analysis applied by the Federal Circuit in *Air Measurement Technologies* and *Immunocept* than that applied in *Xitronix*.[181] However, given the Supreme Court's intervention in *Christianson* and *Gunn*, such a rule would require the Supreme Court to overrule the conflicting portions of that precedent. This overruling seems unlikely given that the Supreme Court has not intervened in such jurisdictional disputes since *Gunn* in 2013. Alternatively, Congress could intervene. By codifying whichever jurisdictional approach aligns best with legislative intent, Congress could save litigants the time and money that would be required to request that the Supreme Court hear this issue.

Regardless of the solution, it is clear that the Federal Circuit has a jurisdiction problem. The current framework most unfairly impacts *Walker Process* litigants, who must engage in a peculiar form of forum shopping. If litigants choose to appeal to the Federal Circuit, the court will likely transfer the case to the regional circuit. If litigants

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175 Gugliuzza, *supra* note 1, at 501.
176 *Id.*
177 Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 313 (2005) (citing Shulthis v. McDougal, 225 U.S. 561, 569 (1912)) (cleaned up).
178 S. REP. NO. 97–275, at 3; H. R. REP. NO. 96–1300, at 16.
179 S. REP. NO. 97–275, at 5.
180 *See* Chandler v. Phoenix Services, 45 F.4th 807, 810 (5th Cir. 2022).
181 *See supra* Section III.A for discussion of *Air Measurement Technologies* and *Immunocept*.

choose to appeal to the regional circuit, the court will likely transfer the case to the Federal Circuit. A long-term legislative or judicial solution is necessary to avoid these inefficiencies.