
YALE LAW & POLICY REVIEW

INTER ALIA

Resolving Circuit Splits

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INTRODUCTION

The Supreme Court has emphasized that the existence of a circuit split influences its decision to grant certiorari,¹ and Supreme Court Rule 10 formalizes this consideration.² The existence of a circuit split is probably

* J.D., 2026, Yale Law School. Thank you to Dean Cristina Rodríguez and Professor Ian Ayres for supporting me in my research and writing since I was a 1L. I am so grateful for your guidance and support throughout law school. Thank you as well to Rebecca Araten, Natalie Kelly, Danielle Hopkins, and Grant Bianco of *Inter Alia* for everything they have done to improve this Essay.

1. See, e.g., Tejas N. Narechania, *Certiorari, Universality, and a Patent Puzzle*, 116 MICH. L. REV. 1345, 1359 (2018) (evaluating the Court’s search for splits in patent cases when deciding to grant certiorari).

2. SUP. CT. R. 10; see also *Rule 10. Considerations Governing Review on Writ of Certiorari*, LEGAL INFO. INST., CORNELL L. SCH., https://www.law.cornell.edu/rules/supct/rule_10

one of the most, if not *the* most important factor for the Justices.³ Chief Justice John Roberts has “emphasized that ‘circuit splits are far and away

[<https://perma.cc/WW3L-A5ES>]. The first set of Supreme Court rules that were promulgated in 1803 did not include this provision. WILLIAM CRANCH, REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES, IN AUGUST AND DECEMBER TERMS 1801, AND FEBRUARY TERM 1803 (1803), https://www.supremecourt.gov/pdfs/rules/rules_1803.pdf [<https://perma.cc/B2LU-CXB4>]. A rule addressing the Court’s consideration of circuit-court splits when granting appellate review did not appear until 1925 in the Supreme Court’s rules, and when it did, it was listed as Rule 35. SUP. CT. OF THE U.S., RULES OF THE SUPREME COURT OF THE UNITED STATES (1911), https://www.supremecourt.gov/pdfs/rules/rules_1919.pdf [<https://perma.cc/J4ZT-U7VS>]; SUP. CT. OF THE U.S., REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES 29-31 (1925), https://www.supremecourt.gov/pdfs/rules/rules_1925.pdf [<https://perma.cc/7GD3-P6MT>] (adopting these revised rules on June 8, 1925 which became effective on July 1, 1925). The 1928 rules moved this provision to Rule 38, and in 1954, it became part of Rule 19. SUP. CT. OF THE U.S., REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES 29-32 (1928), https://www.supremecourt.gov/pdfs/rules/rules_1928.pdf [<https://perma.cc/H4TJ-Q3CA>] (adopting these revised rules on June 5, 1928 which became effective on July 1, 1928); SUP. CT. OF THE U.S., REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES 17-18 (1954), https://www.supremecourt.gov/pdfs/rules/rules_1954.pdf [<https://perma.cc/5HBE-2XFF>] (adopting these rules on April 12, 1954 which became effective on July 1, 1954). The 1980 rules listed this provision as part of Rule 17 and the 1989 rules (adopted in 1989 and effective in 1990) for the first time listed the provision under Rule 10. SUP. CT. OF THE U.S., RULES OF THE SUPREME COURT OF THE UNITED STATES 17 (1980), https://www.supremecourt.gov/pdfs/rules/rules_1980.pdf [<https://perma.cc/NH7Q-WBHY>] (adopting these revised rules on April 14, 1980 which became effective on June 30, 1980); SUP. CT. OF THE U.S., RULES OF THE SUPREME COURT OF THE UNITED STATES 6 (1989), https://www.supremecourt.gov/pdfs/rules/rules_1989.pdf [<https://perma.cc/3KF5-KHQZ>] (adopting these revised rules on December 5, 1989 which became effective on January 1, 1990). *See also generally Historical Rules of the Supreme Court*, SUPREME CT. U.S., <https://www.supremecourt.gov/ctrules/scannedrules.aspx> [<https://perma.cc/N27P-SRNP>].

3. Jeffrey S. Sutton & Brittany Jones, *The Certiorari Process and State Court Decisions*, 131 HARV. L. REV. 167, 169 (2018) (arguing that there is a “material underrepresentation of state court decisions at the nation’s High Court”). *See generally* Deborah Beim & Kelly Rader, *Evolution of Conflict in the Federal Circuit Courts* 1 (June 25, 2015) (unpublished manuscript) (on file with

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the most important consideration in deciding whether to grant cert petitions.”⁴ Circuit splits have been referred to as “the best predictor of certiorari.”⁵ “Because it is so widely known that the Court is more likely to grant review to cases that implicate splits . . . allegation of conflict is common in cert petitions.”⁶

The Court likely selects cases involving circuit splits because of its desire to promote legal “uniformity” and reduce “confusion.”⁷ “[I]ntercircuit

author) (evaluating the “life cycle” of a circuit split and how many (and how quickly) splits are “resolved”); Narechania, *supra* note 1, at 1359; 9.5 *Info Brief: How Does a Case Get to the Supreme Court*, NAT’L CONST. CTR, <https://constitutioncenter.org/education/classroom-resource-library/classroom/9.5-info-brief-how-does-a-case-get-to-scotus> [<https://perma.cc/YX99-UNR6>].

4. Sutton & Jones, *supra* note 3, at n.20 (quoting Evan Bernick, *Federalism & Separation of Powers: The Circuit Splits Are Out There—And the Court Should Resolve Them*, 16 FEDERALIST SOC’Y REV. 36, 36 (2015)).
5. Deborah Beim & Kelly Rader, *Legal Uniformity in American Courts*, 16 J. EMPIRICAL LEGAL STUD. 448, 449, 450 (2019) (revealing that the Supreme Court resolves one-third of circuit splits but that most remain unresolved). For more information on the prevalence of circuit splits, see generally MICHAEL JOHN GARCIA, CRAIG W. CANETTI, ALEXANDER H. PEPPER & JIMMY BALSER, CONG. RSCH. SERV., R47899, *THE UNITED STATES COURTS OF APPEALS: BACKGROUND AND CIRCUIT SPLITS FROM 2023* (2024) (listing circuit splits “recognized” in 2024).
6. Beim & Rader, *supra* note 5, at 452 n.5. There is inherent subjectivity in ascertaining whether or not there is a circuit conflict despite assertion of one in a petition for certiorari:

Much of a law clerk’s task is distinguishing genuine from alleged conflict. In a sample of all petitions filed in the 1986-1993 terms, Epstein et al. (2012) find that over half alleged conflict but only 14 percent of those were genuine according to clerks. Even among those that had genuine conflict, only about 16 percent were granted

Id. (internal citation omitted).
7. Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1568, 1582 (2008); 9.5 *Info Brief: How Does a Case Get to the Supreme Court*, *supra* note 3; see also Beim & Rader, *supra* note 5, at 449 (describing the Supreme Court’s ability to “ensure nationwide uniformity in federal law”). Justice Brandeis has “quip[ped] that ‘it is more important that the applicable rule of law be settled than that it be settled right.’” Narechania, *supra* note 1, at 1359 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)). Chief Justice Roberts argued that the “Court’s ‘main job’ is to ensure that ‘federal law is uniform across the country.’” *Id.* at 1360 n.76 (quoting *Supreme Court Chief Justice Roberts*, at 18:05–18:25 (C-SPAN

splits harm businesses, make judging difficult for district courts, and undermine uniformity in federal law.”⁸ Circuit splits make “it difficult for businesses to operate in multiple jurisdictions” and “on criminal issues, circuit splits can make it hard for the government to treat all violators equally.”⁹ To that end, circuits splits may “cast doubt on the legitimacy of the legal system itself.”¹⁰

television broadcast June 19, 2009), available at <https://www.c-span.org/video/?286078-1/supreme-court-chief-justice-roberts&start=1077> [<https://perma.cc/J3G3-4HB2>]]. In addition, Justice Elena Kagan “said that the Court ‘think[s] that . . . [citizens] are entitled to the same body of federal law as somebody who lives in another state.’” *Id.* (quoting Chi.-Kent Sch. of L. at Ill. Tech., *A Conversation with Justice Elena Kagan*, Oct. 16, 2017, Chicago-Kent College of Law, at 23:50–24:05 (Youtube, Oct. 19, 2017), https://www.youtube.com/watch?time_continue=4&v=MWKA79-3vHA [<https://perma.cc/2TM8-TTEF>]); see also Kelsey Dallas, *The Art of the Circuit Split: An Explainer*, SCOTUSBLOG (Feb. 17, 2026), <https://www.scotusblog.com/2026/02/the-art-of-the-circuit-split-an-explainer> [<https://perma.cc/55PG-LXEN>] (explaining why circuit splits “matter”).

8. Beim & Rader, *supra* note 5, at 449.
9. Beim & Rader, *supra* note 5, at 451. Jonathan M. Cohen and Daniel S. Cohen have identified additional ways in which circuit-court splits pose issues for the federal judicial system:

First, circuit splits create uncertain and disparate applications of federal legal rights Second, circuit splits cause the same federal law to impose different burdens or limitations on government actors based on those actors’ location Third, circuit splits often endure well beyond the cases immediately at issue Fourth, circuit splits raise questions of fundamental fairness because they impair the bedrock American principle that federal law should be uniform Fifth, because circuit splits raise questions of fundamental fairness, they may undermine the federal judiciary’s legitimacy.

Jonathan M. Cohen & Daniel S. Cohen, *Iron-ing Out Circuit Splits: A Proposal for the Use of the Irons Procedure to Prevent and Resolve Circuit Splits Among United States Courts of Appeals*, 108 CAL. L. REV. 989, 996-97 (2020) (proposing a new method to resolve circuit splits beyond Court review). “Justice White famously wrote a dissent from denial of certiorari every time the Supreme Court refused to resolve an intercircuit split.” Beim & Rader, *supra* note 5, at 449.

10. Beim & Rader, *supra* note 5, at 451. The Court is likely always concerned with its legitimacy. For example, in *Marbury v. Madison*, had Chief Justice “Marshall decided to grant the remedy and order delivery of the commissions, he risked

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The prevalence of circuit-court splits provides no shortage of cases for the Court to adjudicate should it seek to resolve different applications of federal law.¹¹ And the number of them may be growing.¹² Larger caseloads could “result in more significant and enduring circuit splits.”¹³ This is because the increase in cases being heard by federal courts of appeals presents additional opportunities for those courts to disagree on how to interpret federal statutes.¹⁴ And differences among circuit courts could also exacerbate disagreement among them.¹⁵

simply being ignored by his rivals, thereby exposing the young Supreme Court as powerless to enforce its decisions, and damaging its future legitimacy.” Nicholas Mosvick, *Marbury v. Madison and the Independent Supreme Court*, NAT’L CONST. CTR. (Feb. 24, 2022), <https://constitutioncenter.org/blog/marbury-v-madison-and-the-independent-supreme-court> [<https://perma.cc/JAT6-VDNB>].

11. See generally Beim & Rader, *supra* note 5 (discussing circuit splits); Cohen & Cohen, *supra* note 9, at 992.
12. Cohen & Cohen, *supra* note 9, at 992.
13. Cohen & Cohen, *supra* note 9, at 990. The *2023 Year End Report on the Federal Judiciary* does note that the number of “filings” in the courts of appeals has declined; however, the sheer volume of total filings still supports the point that the amount of federal appellate work presents the opportunity for many instances of disagreement between the circuits. *2023 Year-End Report on the Federal Judiciary*, SUP. CT., <https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf> [<https://perma.cc/Q26E-LB7H>].
14. Cohen & Cohen, *supra* note 9, at 990, 992.
15. Emma Platoff, *Trump-Appointed Judges Are Shifting the Country’s Most Politically Conservative Circuit Court Further to the Right*, TEX. TRIB. (Aug. 30, 2018), <https://www.texastribune.org/2018/08/30/under-trump-5th-circuit-becoming-even-more-conservative> [<https://perma.cc/GEP8-32LF>]; Dylan Matthews, *How the 9th Circuit Became Conservatives’ Least Favorite Court*, VOX (Jan. 10, 2018), <https://www.vox.com/policy-and-politics/2018/1/10/16873718/ninth-circuit-court-appeals-liberal-conservative-trump-tweet> [<https://perma.cc/2CCL-N2GV>]; Ben Feuer, *Thanks to Trump, the Liberal 9th Circuit Is No Longer Liberal*, WASH. POST (Feb. 28, 2019), <https://www.washingtonpost.com/outlook/2019/02/28/thanks-trump-liberal-ninth-circuit-is-no-longer-liberal/>; Arthur D. Hellman, *Liberalism Triumphant? Ideology and the En Banc Process in the Ninth Circuit Court of Appeals*, 31 WM. & MARY BILL RTS J. 22, 33 (2022); Andreas Broscheid, *Is the 9th Circuit More Liberal Than Other Circuits?*, (Sept. 1, 2008) (unpublished manuscript) (on file with author).

Because of the volume of cases implicating splits, the Court cannot review all circuit splits, even if the Justices sought to and the docket could accommodate the cases.¹⁶ In fact, few splits may actually be resolved by the Supreme Court.¹⁷ Relying on certain datasets, researchers found that “only about one-third of intercircuit splits are resolved by the Supreme Court.”¹⁸ At least part of the reason is that litigants must decide to appeal the lower court decision and file a petition for certiorari; not all unresolved splits lead to petitions for certiorari (despite a potential court of appeals opinion recognizing a split).¹⁹ The existence of a circuit split is thus an “external mechanism over which the Court cannot exercise control.”²⁰ The Court is at the mercy of litigants who decide to appeal lower court decisions and bring certain circuit splits to the forefront. Moreover, the prevalence of circuit splits is only “compounded by the Supreme Court’s shrinking docket and amplified by the Court’s recent trend of declining to resolve circuit splits.”²¹ The Court is accepting fewer petitions and thus hearing fewer cases implicating splits.²²

Each of the three branches of government should take greater steps to bring awareness to the existence of circuit splits, which will aid in their resolution. This awareness may afford greater legitimacy to the Court since it will highlight the Court’s role as an adjudicator of cases that resolve

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16. See Nicolas J. Madan, *The Development and Resolution of Conflict Among Federal Appellate Courts iv-v*, 2 (2022) (Ph.D. dissertation, Duke University) (on file with author) (studying whether “the Court is more likely to resolve splits when it has more ideological allies among the lower courts involved in the conflict,” “justices make policy sacrifices at the merits stage,” and “position-taking in a conflict is independent of the prior history of decisions in the split”).
 17. Beim & Rader, *supra* note 5, at 449.
 18. Beim & Rader, *supra* note 5, at 448. The Court is more likely to accept a case implicating a split for resolution “when it has more ideological allies among the lower courts involved in the conflict.” Madan, *supra* note 16, at iv.
 19. See generally Beim & Rader, *supra* note 5 (describing their research method in studying circuit splits).
 20. Ryan J. Owens & David A. Simon, *Explaining the Supreme Court’s Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1234 n.34 (2012).
 21. Cohen & Cohen, *supra* note 9, at 993; see Adam Feldman, *The Supreme Court’s Vanishing Fall Docket*, SCOTUSBLOG (Feb. 3, 2026), <https://www.scotusblog.com/2026/02/the-supreme-courts-vanishing-fall-docket> [<https://perma.cc/9PAL-VFQY>].
 22. Cohen & Cohen, *supra* note 9, at 994.

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different applications of federal law throughout the United States. The Solicitor General's Office may be a reliable actor that can highlight the existence of a circuit split and weigh in on how it should be resolved. Furthermore, Congress may be able to play an increased role in assisting the Court in resolving circuit splits. This Essay lays out what the Court can do to bring attention to the existence of circuit splits, as well as efforts that the Solicitor General's Office and Congress can undertake to resolve such splits.

I. THE SUPREME COURT

The Court can improve its legitimacy by adjudicating circuit splits, but that is contingent on others knowing that it is *actually adjudicating a circuit split*. Therefore, the Court should take steps to notify the public as to when it is resolving a circuit split. Clearly stating that the Court is doing so would be one discrete, concrete, and small way to (1) clarify what the Court is doing, and (2) provide greater insight into the prevalence of circuit splits, which could support the Court's legitimacy.

The Court is the best positioned to highlight the existence of a split.²³ This is because petitioners and respondents may try to emphasize or downplay the existence of a circuit split to affect the Court's grant of certiorari. Meanwhile, lower circuit courts may or may not be aware of the existence of all other circuit decisions that conflict with their decisions. And finally, most third-party sources probably cannot be consistently relied upon to provide this information; moreover, third-party sources may often bring their own bias to this analysis. It is certainly true that the Court itself is making a judgment about the existence of a circuit split. However, the Court's judgment about the existence of a split is *the* relevant judgment.

In publicizing the existence of a split, the Court would not risk revealing all insights into the Justices' decision-making. In *Maryland v. Baltimore Radio Show, Inc.*, the Court indicated that in the context of "reasons for denying petitions for certiorari . . . Congress has placed the control of the Court's business, in effect, within the Court's discretion."²⁴ There may be various judgments or analyses that the Court makes to which the public cannot or should not be privy. However, the existence of a circuit split is oftentimes asserted in the petitioner and/or respondent's brief, sometimes mentioned by the lower courts, and is highlighted as an important consideration by Supreme Court Rule 10. Therefore, in asserting that there is (or is not) a circuit split at stake in the case, the Court is only clarifying

23. In contrast to, for example, petitioners, respondents, or other actors.

24. *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950).

information that is already publicly available, rather than revealing proprietary or sensitive analysis of the Court. Additionally, it is not information that is likely to provoke backlash if revealed. Thus, the Court should highlight the cases in which it is resolving a circuit split.

II. SOLICITOR GENERAL

A third party that may be a consistently reliable source to highlight the existence of circuit splits—and advocate for a way to resolve them—is the Solicitor General’s Office. The Solicitor General has been termed “the Tenth Justice” because of their “special relationship to the Court.”²⁵ “[T]he Court’s rules and traditions both formally and informally privilege the Solicitor General as the de facto head of the Court’s bar—and show special solicitude to the Solicitor General across a constellation of considerations.”²⁶ For example, in 2019, the Office of the Solicitor General was:

fil[ing] an unprecedented number of requests for emergency or extraordinary relief from the Justices, asking the Court (1) to hear certain appeals before the lower courts have finished ruling; (2) to halt the effect of lower court rulings pending the Supreme Court’s review; or (3) to jump over the courts of appeals and directly issue writs of mandamus to rein in perceived abuses by different district courts.²⁷

And as Professor Stephen I. Vladek has indicated, the overall result of these requests has been favorable to the Solicitor General—with the Court granting the Solicitor General “most of what he has asked for.”²⁸

The Solicitor General is attributed this special status because they are not just an attorney advocating for their client. They have a special client (the United States) and so the Court “assumes that the Solicitor General . . . will aid the Court in finding the solution most conducive to the

25. Seth P. Waxman, *Presenting the Case of the United States as It Should Be: The Solicitor General in Historical Context*, OFF. SOLIC. GEN., <https://www.justice.gov/osg/solicitor-general-historical-context> [<https://perma.cc/2GGA-Q2VK>] (quoting LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 3 (1987)).

26. Stephen I. Vladek, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 123 (2019).

27. *Id.* at 124.

28. *Id.* at 126.

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public interest.”²⁹ For example, the Solicitor General has been “willing” to acknowledge when the Court does not have jurisdiction to hear a case, or that a case does not meet “usual criteria for granting *certiorari*, even when the government’s litigating interests would be advanced by a contrary argument.”³⁰

Given the Solicitor General’s status before the Court, the office could be an important partner to the Court in clarifying the role and prevalence of circuit splits. Solicitors General have, in fact, intervened when they deemed it necessary to do so.³¹ Scholars have noted that the Office of the Solicitor General had participated, either as an amicus or as a party, in roughly 80% of the Court’s cases.³² And amicus oral argument is considered “one of the rare signals the Court sends about whose opinions it values.”³³ This suggests that the office could provide greater clarity regarding circuit splits implicating the United States, directly or indirectly.

III. CONGRESS

Congress may also have a greater role to play in helping the Court “adjudicate” circuit splits. The Congressional Research Service already issues reports on circuit splits.³⁴ And, courts “include language” to “flag[]

29. Note, *Government Litigation in the Supreme Court: The Roles of the Solicitor General*, 78 YALE L.J. 1442, 1443 (1969).

30. David A. Strauss, *The Solicitor General and the Interests of the United States*, 61 L. & CONTEMP. PROBS. 165, 169 (1998).

31. Waxman, *supra* note 25.

32. Darcy Covert & Annie J. Wang, *The Loudest Voice at the Supreme Court: The Solicitor General’s Dominance of Amicus Oral Argument*, 74 VAND. L. REV. 681, 684 (2021).

33. Covert & Wang, *supra* note 32, at 685.

34. GARCIA, CANETTI, PEPPER & BALSER, *supra* note 5; DAVE S. SIDHU & MADELINE W. DONLEY, CONG. RSCH. SERV., LSB10944, CONGRESSIONAL COURT WATCHER: RECENT APPELLATE DECISIONS OF INTEREST TO LAWMAKERS (MARCH 27-MARCH 31, 2023) (2023); MICHAEL JOHN GARCIA & HANNAH SOLOMON-STAUS, CONG. RSCH. SERV., LSB11389, CONGRESSIONAL COURT WATCHER: CIRCUIT SPLITS FROM DECEMBER 2025 (2026); MICHAEL JOHN GARCIA, CONG. RSCH. SERV., LSB11399, CONGRESSIONAL COURT WATCHER: CIRCUIT SPLITS FROM JANUARY 2026 (2026); MICHAEL JOHN GARCIA & HANNAH SOLOMON-STAUS, CONG. RSCH. SERV., LSB11384, CONGRESSIONAL COURT WATCHER: CIRCUIT SPLITS FROM NOVEMBER 2025 (2025); MICHAEL JOHN GARCIA & TAMSIN G. HARRINGTON, CONG. RSCH. SERV., LSB11348, CONGRESSIONAL COURT WATCHER: CIRCUIT SPLITS FROM JULY 2025 (2025); MICHAEL JOHN GARCIA, TAMSIN G.

potential issues for Congress to consider.”³⁵ However, Congress may be able to do more. During an eight-year time period, Congress “responded” to only a small fraction of circuit-court decisions, even though most circuit-court decisions concern federal statutes.³⁶

This Essay’s prescriptions are premised on a more flexible notion of the separation of powers. Legislators, not just judges, can be involved in statutory interpretation.³⁷ Thus, when the Court itself adjudicates a split, Congress can try to play a greater role in clarifying its original intent.³⁸ When the Court does not adjudicate a split, Congress can issue guidance regarding the statute’s meaning to minimize and maybe eliminate the split among circuit courts interpreting the statute. This will ensure that regardless of whether the Court actually intervenes to resolve a split, Congress can speak for itself and ensure that all courts—including *the* Court—follow Congress’s guidance and intention.

The Court’s efforts to ascertain Congress’s intent when resolving cases concerning federal statutes—and its reference to congressional intent in cases implicating circuit splits—highlight that there is space for Congress to be more involved.³⁹ Different Justices have different approaches toward

HARRINGTON & CRAIG W. CANETTI, CONG. RSCH. SERV., R48846, THE U.S. COURTS OF APPEALS: BACKGROUND AND CIRCUIT SPLITS FROM 2025 (2026).

35. GARCIA, CANETTI, PEPPER & BALSER, *supra* note 5, at 9 (quoting *Goethel v. U.S. Dep’t of Com.*, 854 F.3d 106, 117 (1st Cir. 2017)).
36. *Id.*
37. Alexander Zhang argues that expository legislation “purports to interpret or construe what a law means and had always meant” and that the history of such legislation “upends the idea that there is a clear constitutional and historical foundation for strict separation of powers when it comes to statutory interpretation.” Alexander Zhang, *Legislative Statutory Interpretation*, 99 N.Y.U. L. REV. 950, 955, 1023 (2024). In other words, legislatures and lawmakers are also “expected . . . to interpret statutes through expository legislation.” *Id.*
38. Alternatively, if Congress cannot say for sure what its original intent was, it may seek to legislate anew.
39. *See, e.g.*, *Abitron Austria GmbH v. Hetronic Int’l, Inc.*, 600 U.S. 412, 417 (2023) (referring to Congress’s intent in discussing the presumption against extraterritoriality); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 385 (2023) (“[W]e will not find an abrogation of tribal sovereign immunity unless Congress has conveyed its intent to abrogate in unequivocal terms.”); *see also* *Barrett v. United States*, 607 U.S. 128, 142-44 (2026) (discussing congressional intent and the *Blockburger* doctrine).

statutory interpretation, but despite the general trend toward textualism, references to congressional intent have not entirely vanished from Court cases.⁴⁰ Whether the Court successfully “discovers” congressional intent, is another question.

It is true that Congress itself—even if it is the enacting Congress—may struggle to articulate what Congress meant in enacting a specific statutory provision. “Laws are the product of compromise, and no law pursues its . . . purpose[s] at all costs.”⁴¹ However, amicus briefs and legislative responses to a Supreme Court or lower court decision present at least two avenues through which Congress could attempt to clarify the meaning of a statutory provision. These may be imperfect mechanisms, but it is possible that they are at least comparable, if not better, than post hoc judicial interpretation.

First, Congress could be more active in filing amicus briefs,⁴² as there is at least some evidence suggesting that congressional amicus briefs are valued by courts (notably the Supreme Court).⁴³ Since at least 2016, the House has sought to play a more active role in filing amicus briefs with proper approval.⁴⁴ The Senate has “more routinely authorize[d] its Legal Counsel to serve as amicus on behalf of the Senate and even has a statutory provision contemplating such resolutions.”⁴⁵ Furthermore, former members of Congress could file amicus briefs. Depending on who ultimately

40. See Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 272, 279 (2020).

41. *Perez v. Sturgis Pub. Schs.*, 598 U.S. 142 (2023) (internal quotations omitted).

42. See Brief of Members of Congress as Amici Curiae in Support of the Employees, *Bostock v. Clayton County*, 590 U.S. 644 (2019) (Nos. 17-1618, 17-1623, 18-107). The Court may even invite Congress to do so. In *Jones v. Hendrix*, the “Court invited Morgan L. Ratner to brief and argue this case as *amicus curiae* in support of the judgment below.” Brief for Court-Appointed *Amicus Curiae* in Support of Judgment Below at 1, *Jones v. Hendrix*, 599 U.S. 465 (2022) (No. 21-857).

43. Paul M. Collins Jr., Pamela C. Corley & Jesse Hammer, *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 L. & SOC’Y REV. 917, 938 (2015).

44. CONG. RSCH. SERV., *THE HOUSE MAY VOTE TO FILE AN AMICUS BRIEF: IS THIS UNPRECEDENTED?* (2016).

45. *Id.*

writes the brief, the amicus brief may help guide the Court even if it is not necessarily dispositive.⁴⁶

In a recent, salient example, members of Congress filed an amicus brief in *Dobbs v. Jackson Women's Health*.⁴⁷ In 2024, members of Congress also filed an amicus brief seeking reversal of a Fifth Circuit ruling that could “dramatically curtail access to mifepristone nationwide.”⁴⁸ Congresspersons do not necessarily sign onto amicus curiae to clarify statutory questions, but rather “as a means of ‘taking stances,’ akin to cosponsoring a bill.”⁴⁹ Nevertheless, members of Congress can use amicus briefs more intentionally as a means of supporting the judiciary in resolving circuit splits. Congresspersons’ views may carry more weight in statutory cases, given that legislation falls within their constitutional purview, while the Court (and lower courts) may view other constitutional issues as within the exclusive purview of the judicial branch.⁵⁰

Beyond amicus briefs, Congress has three other potential tools to promote resolution of circuit splits. First, Congress could pass ex ante legislation prior to the Court’s resolution of a circuit split, or pass ex post legislation to affirm one side of a circuit split. If the Court never adjudicates

46. An amicus brief by a nonenacting, subsequent Congress may not be dispositive since the membership has likely changed and the new membership may not be familiar with the enacting Congress’s original intent.

47. Brief of 228 Members of Congress as Amici Curiae in Support of Petitioners, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2021) (No. 19-1392).

48. *Congressional Democrats File Amicus Brief Urging Supreme Court to Reverse Dangerous Ruling That Would Restrict Access to Mifepristone Nationwide & Upend FDA Approval Process*, U.S. SENATE COMM. ON JUDICIARY (Jan. 30, 2024), <https://www.judiciary.senate.gov/press/releases/congressional-democrats-file-amicus-brief-urging-supreme-court-to-reverse-dangerous-ruling-that-would-restrict-access-to-mifepristone-nationwide-and-upend-fda-approval-process> [<https://perma.cc/4NLH-SEVA>].

49. Rorie L. Spill Solberg & Eric S. Heberlig, *Communicating to the Courts and Beyond: Why Members of Congress Participate as Amici Curiae*, 29 LEGIS. STUDS. Q. 591, 591 (2004).

50. *Cf. Marbury v. Madison*, 5 U.S. 137, 173 (1803) (“The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish.”).

the circuit split, then Congress could pass (or revise) a law as a direct way to resolve a circuit split consistent with original congressional intent.⁵¹

Second, members of Congress could try to intervene in a court case to actively advocate for Congress's understanding of a particular statute.⁵² There are likely unique logistical challenges to intervening to articulate the same message that Congress could advance through another method, such as an amicus brief or legislation. For example, if members of Congress decide to intervene, they may have to meet legislative standing requirements.⁵³

Third, Congress could pass legislation requiring courts to certify issues of statutory interpretation to Congress.⁵⁴ Some have argued that federal courts should be able to certify questions of statutory interpretation to Congress, similar to how federal courts are able to certify questions of law to state courts.⁵⁵ Professor Amanda Frost makes a broader claim that,

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51. Congressional legislation of this form is useful not just in circuit-split cases regarding the interpretation of federal law, but in any statutory-interpretation case.
 52. To ameliorate the problem that a new Congress may not understand what the original intent of the enacting Congress was, perhaps Congress could call on former members (or members present at the time of the statute's passage) to represent it in litigation. This may be unprecedented, but former members of the House and Senate are still "afforded certain courtesies and privileges." R. ERIC PETERSEN, CONG. RSCH. SERV., R41121, SELECTED PRIVILEGES AND COURTESIES EXTENDED TO FORMER MEMBERS OF CONGRESS 1 (2020); WILSON C. FREEMAN & KEVIN M. LEWIS, CONG. RSCH. SERV., R45636, CONGRESSIONAL PARTICIPATION IN LITIGATION: ARTICLE III AND LEGISLATIVE STANDING (2019).
 53. See Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539, 1561-62 (2012); see also *Raines v. Byrd*, 521 U.S. 811, 829-30 (1997) (finding that members of Congress did not have standing to challenge the Line Item Veto Act, because they did not have a "sufficient 'personal stake' in this dispute," and because the court's refusal to hear the case did not "deprive[]" congresspersons "of an adequate remedy").
 54. There are likely questions about the constitutionality of such a statute. Since Congress has the authority to create lower federal courts, perhaps it at least has the authority to require lower federal courts to certify questions about federal law to Congress in the case of circuit splits. See U.S. CONST. art. III, § 1. Perhaps Congress could use permissive rather than mandatory language regarding whether the Supreme Court should certify questions of statutory interpretation to Congress in the case of circuit splits.
 55. Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1, 3 (2007). Some have also argued that state courts should be able to certify questions of federal law to federal courts. John Macy, *Give and Take: State Courts Should Be*

irrespective of the existence of a circuit split, “[w]hen a federal court must construe a statute that leaves important issues about its application unclear, the court should have the option to stay the case and refer the question to Congress.”⁵⁶ This would ameliorate the need for Congress to spend time “overrid[ing] numerous Supreme Court decisions construing federal statutes.”⁵⁷

A primary argument against a greater role for Congress in helping courts to adjudicate statutory circuit splits is that Congress is not willing nor realistically able to do so in the aforementioned ways. However, there are a few reasons why Congress may be willing and able to assist. First, many of these issues are not hyperpolarized and thus it could be less challenging for Congress to form a bipartisan or substantial group of congresspersons willing and able to act. Secondly, when Congress wants to act, even in a politicized environment, it has demonstrated that it can.⁵⁸ Third, perhaps Congress could legislate in one omnibus bill regarding a series of circuit splits, which would reduce the need to organize bipartisan coalitions multiple times over.⁵⁹ Finally, to the extent that Congress is intentional when it initially passes legislation, then it should arguably be concerned about the actual implementation of such legislation.

CONCLUSION

The existence of circuit splits concerning the interpretation of federal law means that federal law is applied differently in different parts of the country. Identifying when this is occurring is a matter of primary importance, and one in which the Court, Solicitor General’s Office, and Congress can be more active. This Essay has identified specific ways in which Congress, in particular, may have a greater role to play in actually resolving differing interpretations and applications of federal law.

Able to Certify Questions of Federal Law to Federal Courts, 71 DUKE L.J. 907, 907, 910 (2021).

56. Frost, *supra* note 55.

57. William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 332 (1991).

58. See, e.g., Stephen Groves & Lisa Mascaro, *The House Passes Billions in Aid for Ukraine and Israel After Months of Struggle. Next is the Senate*, ASSOCIATED PRESS (Apr. 21, 2024), <https://apnews.com/article/ukraine-aid-israel-tiktok-congress-a8910452e623413bf1da1e491d1d94ba> [<https://perma.cc/4YFD-56QQ>].

59. Perhaps it could do so every fiscal year, for example.