

No. 20-1400

IN THE
United States Court of Appeals
for the Federal Circuit

NEW VISION GAMING & DEVELOPMENT, INC.,

Appellant

v.

SG GAMING, INC., FKA BALLY GAMING, INC.,

Appellee

KATHERINE K. VIDAL, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL
PROPERTY AND DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE,

Intervenor

APPEAL FROM THE U.S. PATENT & TRADEMARK OFFICE,
PATENT TRIAL AND APPEAL BOARD, IN No. CBM2018-00006

**CORRECTED BRIEF OF *AMICUS CURIAE* RON D. KATZNELSON IN
SUPPORT OF APPELLANT AND REVERSAL**

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**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number 20-1400

Short Case Caption New Vision Gaming & Development, Inc. v. SG Gaming, Inc.

Filing Party/Entity Ron D. Katznelson, Ph.D., Amicus Curiae

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 10/03/2022

Signature: /Ron Katznelson/

Name: Ron D. Katznelson, Ph.D.

<p>1. Represented Entities. Fed. Cir. R. 47.4(a)(1).</p>	<p>2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).</p>	<p>3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).</p>
<p>Provide the full names of all entities represented by undersigned counsel in this case.</p>	<p>Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.</p> <p><input checked="" type="checkbox"/> None/Not Applicable</p>	<p>Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.</p> <p><input checked="" type="checkbox"/> None/Not Applicable</p>
<p>Ron D. Katznelson, Ph.D., Amicus Curiae</p>		

Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

None/Not Applicable Additional pages attached

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

None/Not Applicable Additional pages attached

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None/Not Applicable Additional pages attached

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INTEREST OF *AMICUS CURIAE*

For reasons more fully described in the accompanying Motion for Leave to file this *Amicus* brief, Ron D. Katznelson, Ph.D. is particularly qualified to aid this Court on the first Question Presented, having thoroughly researched and reported on directly relevant matters in his article entitled “*The Pecuniary Interests of PTAB Judges—Empirical Analysis Relating Bonus Awards to Decisions in AIA Trials*,” (July 5, 2021) at <https://ssrn.com/abstract=3871108> (hereinafter, the “Bonus Study.”) The Bonus Study was introduced and entered into the House Judiciary Committee hearing record during the recent hearings on the PTAB.¹ As the author of this brief, Dr. Katznelson adds in Section 2 additional factual information collected for the first time from Patent Office expenses report that is relevant to the Question Presented. This *Amicus* Brief does not address the second Question Presented related to the contractual obligation that precluded an AIA post grant challenge.

This *amicus* brief is filed pursuant to Fed. Cir. Rule 29(a), as electronic submission of unrepresented person provided in Fed. Cir. Rule 25(a)(1)(B). Pursuant to Federal Rules of Appellate Procedure 29(a)(4)(E), the undersigned states that this brief was authored by *amicus curiae* Ron D. Katznelson, and that no counsel for a party authored this brief in whole or in part, and no counsel or party other than *amicus curiae* contributed money intended to fund preparing or submitting the brief.

¹ See <https://docs.house.gov/meetings/JU/JU03/20220721/115027/HHRG-117-JU03-20220721-SD004.pdf>

SUMMARY OF THE ARGUMENT

This case presents a precedent-setting Question of exceptional importance: Whether the structure for instituting and funding AIA trial reviews violates the Due Process Clause in view of *Tumey v. Ohio*, 273 U.S. 510 (1927), and its progeny, which establish “structural bias” as a violation of due process.

The focus of this *Amicus* brief is on the financial incentives and the performance measures of any Administrative Patent Judge (APJ) serving on the Patent Trial and Appeal Board (PTAB) at the US Patent & Trademark Office (PTO). Specifically, APJs are awarded Decisional Unit (DU) credits for the work done on decisions they make in adjudicating any *ex parte* appeal, Inter Partes Review (IPR), Post Grant Review (PGR), or Covered Business Method Reviews (CBM), the latter three are also called AIA Trials. The larger the number of DU credits APJs receive, the easier it is for them to obtain larger bonus awards and improve their opportunity for a salary increase.

This brief is directed only to the “structural bias” as it exists with the APJs themselves—whether their pecuniary interest in obtaining more DUs constitutes bias in their decision to institute more AIA trials, thereby ensuring more work for them and thereby increasing the DUs they earn. The PTO has argued elsewhere that APJs’ DU credits are fungible—that the PTAB has a significant backlog of ex

parte appeals and that APJs can work on such appeals to earn more DU credits without having to grant petitions to institute AIA trials.

This Brief shows that this PTO proposition is false and that APJs do not only have the capability and substantial incentives to earn the same number of DUs by working *significantly fewer* hours through institution and work on AIA trials, but that they are also subject to other organizational impediments and may be forbidden from taking on additional ex parte appeal work. As such, APJ's are manifestly subject to "structural bias" to institute more AIA trials, in violation of the Due Process Clause.

FACTUAL MATTER

1 APJs earn more Decisional Unit credits in AIA Trials than in Ex Parte Appeals

The Court generally recognized that APJs are compensated with Decisional Unit (DU) credits for work they do in adjudicating matters in both ex parte appeals and in AIA trials and that such credits affect APJ's bonus awards and salary increases. However, the PTO never disclosed how it determined *the level* of DU credits it allocates per APJ activity in such proceedings, and concealed it from the public for years. The Performance Appraisal Plan (PAP) Support Documents produced by PTO under FOIA Request F-21-00111 on May 27, 2021, and included in Appendix

C of this author's Bonus Study, provides a table of the DU credits by APJ activity.

Bonus Study, Appendix C at C42-43.

Average Decisional Unit credit earned by APJs							
Proceeding Kind	Institution	Trial FWD		Motion to Amend	Rehearing Decision	Other Motions & Orders	Total DU
			Unit DU	1	1		
			Frequency	0.1	0.37		
			Source	(a)	(b)	(c)	
Ex Parte Appeal	1.1						1.1
AIA IPR	5.5	6.5		0.1	0.37	0.1	12.6
AIA PGR/CBM	6	7.5		0.1	0.37	0.1	14.1

Table 1. Average number of DU credits earned by APJs in deciding ex parte Appeals and AIA trials that have been instituted. *Frequency sources*: (a) PTO MTA Study;² (b) PTO submission to OMB under the Paperwork Reduction Act, and PTAB statistics;³ (c) author's estimate.⁴

² Patent owners have filed a Motion to Amend (MTA) in about 10% of cases. See *PTAB Motion to Amend Study, Installment 5: Update through September 30, 2018*, at 2 (MTA filed in 416 out of 4269 cases in the study). Available at www.uspto.gov/sites/default/files/documents/ptab_%20mta_study_%28installment_5_-_%20update_through_fy2018%29.pdf.

³ PTO's *Supporting Statement in Patent Review and Derivation Proceedings*, OMB Control No. 0651-0069 (November 2018) available at www.reginfo.gov/public/do/DownloadDocument?objectID=94752601, (hereinafter "Supporting Statement"). This statement based on FY 2018 data provides the number of Requests for Rehearing under 37 CFR 42.70 in Item 6, Table 3 as 322. That is 37% of the 859 AIA trials instituted in FY 2018. See *PTAB Trial Statistics* (September 2018). at www.uspto.gov/sites/default/files/documents/trial_statistics_20180930a.pdf

⁴ Based on the number of various motions and orders including Motions to Exclude, Motions to Strike, etc. which the author found in the PTO's *PTAB Decisions Database* at <https://developer.uspto.gov/ptab-web/#/search/decisions>, the author estimates that AIA trials afforded an additional average of 0.1 DU for these additional decisions.

Based on this information, Table 1 provides the relevant DU credits for ex parte appeals and instituted AIA trials. In addition to DU credits for institution and trials on the merit, additional DU credits are shown as an average over all AIA trials, taking into account the frequencies of occurrence of such orders or decisions. This data is also depicted in Figure 1.

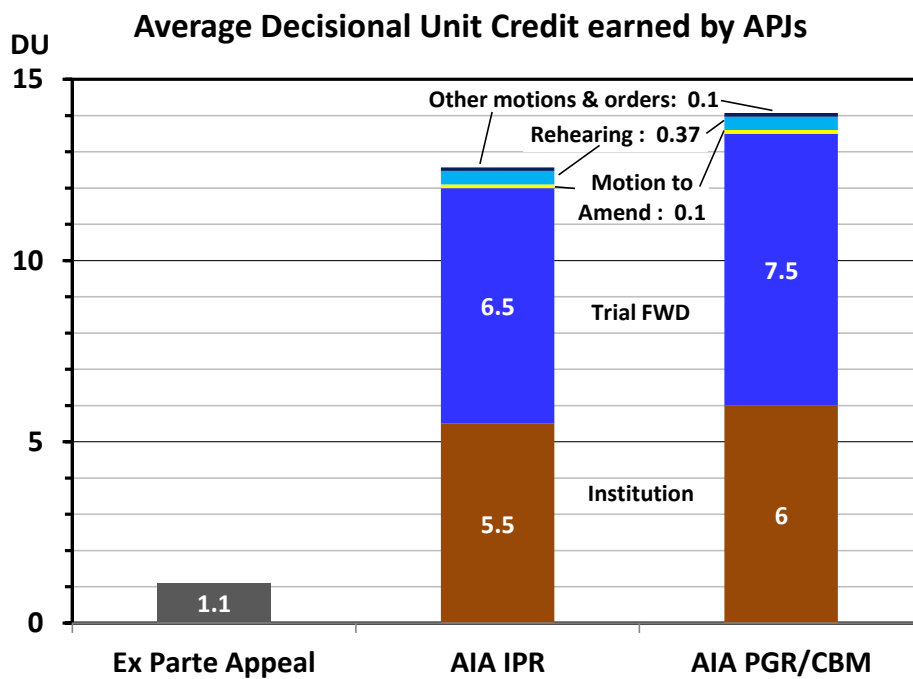


Figure 1. The Average number of DU credits earned by APJs in deciding ex parte Appeals and AIA trials that have been instituted. See Table 1.

Both Table 1 and Figure 1 show a substantial disparity in the total DU credits APJs receive by working on AIA trials compared to ex parte appeals. While differing workload on the different kinds of proceedings may explain some of this disparity, further investigation of PTO's own report of its expenses (and thereby APJ hours

spent) on those kinds of proceedings reveal a substantial remaining disparity, constituting PTO's systemic bias in more richly rewarding APJs for instituting and adjudicating AIA trials compared to DU awards on ex parte appeals.

2 PTO's expense data shows that APJs must work substantially more hours on Ex Parte Appeals than on AIA Trials to earn the same DU credits

Periodically, in setting or adjusting fees, the PTO publishes detailed support for its "aggregate costs" to justify its changes of user fees.⁵ In particular, it published its actual expenses based on a detailed Activity Based Information (ABI) program (managerial cost accounting), broken down by activity based on employees use of work-breakdown codes and the like, and particularly including PTAB activities.⁶

⁵ See the most recent compilation in *Fee Setting and Adjusting*, (FY 2020) www.uspto.gov/about-us/performance-and-planning/fee-setting-and-adjusting.

⁶ PTO, *Setting and Adjusting Patent Fees during Fiscal Year 2020—Activity Based Information and Patent Fee Unit Expense Methodology*, (Hereinafter "Expenses Report"), Table 2, at 24. Available at www.uspto.gov/sites/default/files/documents/Activity%20Based%20Information%20and%20Patent%20Fee%20Unit%20Expense%20Methodology.docx .

(a)	Fee Code	Fee Description	Fee Unit Expense	
			FY 2018	FY 2019
Patent Trial and Appeal Fees			<i>E</i>	
	1401/2401/3401	Notice of Appeal (<i>Ex Parte</i> Appeal)	\$23	\$21
	1413/2413/3413	Forwarding an Appeal in an Application or <i>Ex Parte</i> Reexamination Proceeding to the Board (<i>Ex Parte</i> Appeal)	\$5,879	\$7,285
	1406	<i>Inter Partes</i> Review Request Fee	\$15,016	\$17,887
	1414	<i>Inter Partes</i> Review Post-Institution Fee	\$25,490	\$27,376
	1408	Post-Grant or Covered Business Method Review Request Fee	\$21,465	\$26,296
	1416	Post-Grant or Covered Business Method Review Post-Institution Fee	\$29,842	\$40,791

Source: Note (i) **Share of Direct APJ Costs** **0.83** ***S***

Source: Note (ii) **APJ Hourly Rate** **\$258.32** ***R***

(b)	Fee Code	Fee Description	APJ Unit Hours	
			FY 2018	FY 2019
			$T = E * S / R$	
	1401/2401/3401	<i>T1</i> : Notice of Appeal (<i>Ex Parte</i> Appeal)	0	0
	1413/2413/3413	<i>T3</i> : Forwarding an Appeal in an Application or <i>Ex Parte</i> Reexamination Proceeding to the Board (<i>Ex Parte</i> Appeal)	18.9	23.4
	1406	<i>T4</i> : <i>Inter Partes</i> Review Request Fee	48.2	57.5
	1414	<i>T5</i> : <i>Inter Partes</i> Review Post-Institution Fee	81.9	88.0
	1408	<i>T6</i> : Post-Grant or Covered Business Method Review Request Fee	69.0	84.5
	1416	<i>T7</i> : Post-Grant or Covered Business Method Review Post-Institution Fee	95.9	131.1

Table 2. (a) Shows the unit expenses the PTO provided in the Expenses Report; (b) converts the fully-burdened unit expense to direct costs in APJ hours⁷ based on APJ's hourly rate.⁸

⁷ Note (i): Share of Direct APJ costs in the fully-burdened expense was 83% on average. See Expenses Report at 13 ("on average, direct expenses accounted for 83 percent of the Patents business line operating expenses while the remaining 17

Table 2 provides the PTO's unit expenses of the relevant APJ activities as translated to APJ work hours per each task, and normalized by the respective DU credits earned by APJs for that task.

(c) Combination	Task Description	APJ Hours	
		FY 2018	FY 2019
$T8 = T1+T3$	$T8$: Ex Parte Appeal	18.9	23.4
$T9 = T4+T5$	$T9$: IPR (Institution & Trial)	130.1	145.4
$T10 = T6+T7$	$T10$: PGR or CBM (Institution & Trial)	164.9	215.6

(d) DU Credit	APJ work hours required to earn one DU credit	APJ Hours/DU	
		FY 2018	FY 2019
1.1	Ex Parte Appeal	17.2	21.3
12.6	IPR (Institution & Trial)	10.3	11.5
14.1	PGR or CBM (Institution & Trial)	11.7	15.3

Table 2. (c) combines the hourly activity components for each task and in (d), the total number of APJ hours are normalized by the respective DU credits on the left column, showing the results in APJ hours required to earn one DU.

The information in Table 2(d) is depicted in Figure 2. This information, including for FY 2018 and FY 2019, shows a consistent trend, wherein APJs worked fewer hours on AIA trials to earn the same amount of DU credits they would earn from working on ex parte appeals.

percent were indirect expenses. The direct expenses for an activity plus the indirect expenses constitute the 'fully burdened' expense for that activity.”)

⁸ Note (ii): APJ's average hourly rate in FY 2018 was \$258.32. See Supporting Statement, at 10.

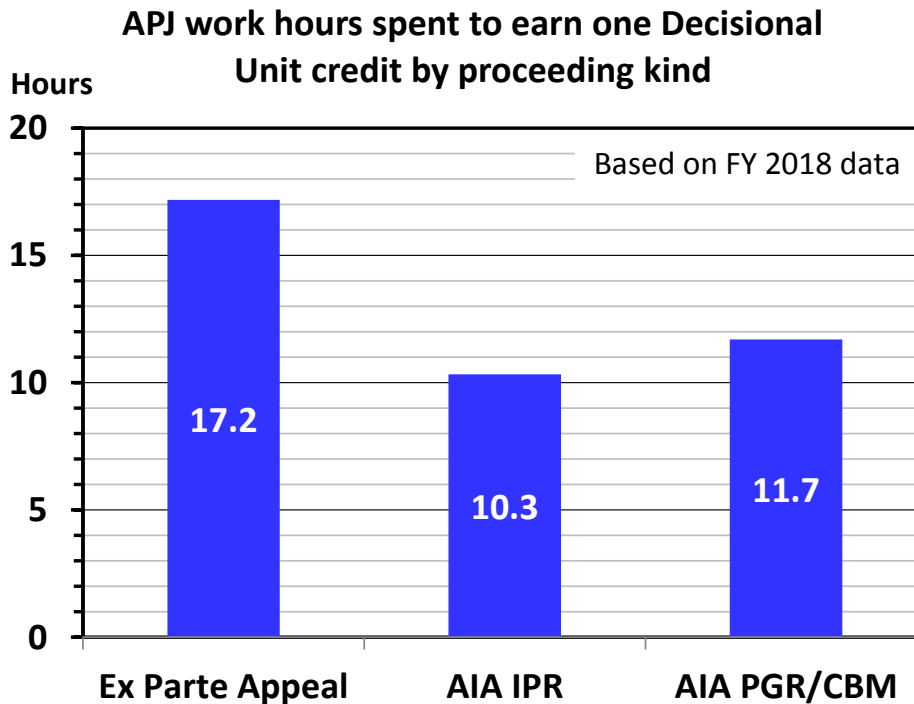


Figure 2. The average number of hours APJs worked on each proceeding kind to earn one DU credit. See derivation from PTO expenses data in Table 2.

For example, as Table 2(d) and Figure 2 show, an APJ working on ex parte appeals must spend an average of 17.2 hours, 66% more time than the average 10.3 hours the APJ would spend on IPRs, to earn the same one DU credit. The year 2018, on which Figure 2 is based, is the very year during which the APJs in this case at issue worked on the petition and decided to institute.

ARGUMENT

In *Mobility Workx, LLC v. Unified Patents, LLC*, 15 F.4th 1146 (Fed. Cir. 2021), this Court had an occasion, to consider the argument that APJ's are incentivized to

institute AIA trials so that they may earn more DU credits to increase their bonus awards and also improve their opportunity for a salary increase. The PTO contended that APJs' DU credits are fungible—that the Board “has a significant backlog of over 7,500 appeals, ... [and there] is no need for APJs to grant petitions and institute AIA trials in order to ensure that they have sufficient work.”⁹ The PTO, however, neglected to inform the Court of the facts presented above in Section 2. Subsequently, the Court held that, as the Court put it, APJs can earn more DUs by working on ex parte appeals. It reasoned:

Even though an APJ will earn decisional units for a follow-on merits decision if he or she issues a decision instituting an AIA proceeding, there has been no showing that APJs institute AIA proceedings to earn sufficient decisional units to qualify for a bonus. Decisional units can be earned by participation in non-AIA proceedings, and there is a significant backlog of ex parte appeals. While APJs are generally assigned to specific jurisdictions of the Board (e.g., AIA proceedings or ex parte appeals), APJs are free to “request ex parte appeals to be added to his or her docket.” J.A. 4355. Mobility does not dispute that APJs have access to non-AIA work or that there is sufficient non-AIA work for APJs to meet the 84 decisional unit threshold for additional compensation. Thus, even if there were an incentive to institute AIA proceedings to earn decisional units, any interest APJs have in instituting AIA proceedings to earn decisional units would be too remote to constitute a due process violation.”

Mobility Workx, 15 F.4th at 1156. However, substantial evidence the author

⁹ Brief of the U.S. ECF. 54 at 39, *Mobility Workx, LLC v. Unified Patents, LLC*, No. 20 1441 (Fed. Cir. November 9, 2020).

presented in the Bonus Study and now in Section 2, clearly shows that APJs had, and continue to have, substantive pecuniary incentives and compelling reasons to *more easily* obtain DU credits through instituting and adjudicating AIA trials rather than through working many more hours on ex parte appeals. This evidence, of which this Court was unaware, shows that an APJ assigned to the jurisdiction of the Board on AIA proceedings would be ill-advised, and indeed *unlikely* to “request ex parte appeals to be added to his or her docket” to earn more DUs. Doing so, instead of securing more AIA trial work through institution decisions, would actually *reduce* the APJ’s ability to earn more DUs in the same time period. Other empirical evidence discussed below substantiates this simple reality.

3 Empirical evidence shows that APJs with large share of work on AIA trials earn higher bonus awards than those with large share of appeal work

The disparities shown in Table 2(d) and Figure 2 above have real and tangible consequences. Substantial incentive effects are manifested in the preferences of APJs, in their financial compensation, and in operation of the PTAB. Section 4.4 of the author’s Bonus Study shows that of all APJs doing any work on AIA trials, the top 20 APJ bonus earners were predominantly engaged in AIA trials, with the median of only 5.1% work share of decisions in ex parte appeals. In contrast, the

bottom 20 bonus earners were predominantly engaged in ex parte appeal decisions, with a median of 54.2% share of decisions being ex parte appeal decisions.

The reasons for this finding are that through incentives and restrictions, APJs working on AIA trials have tangible disincentives, are discouraged or otherwise prevented from taking-on a greater fraction of their workload in ex parte appeals. The Bonus Study (at Section 4.4.1) establishes that APJs working in the AIA trial jurisdiction of the PTAB cannot be automatically paneled on ex parte appeals and must request permission of the APJ's supervisor.

Moreover, the APJ's supervisors and PTAB officials from whom permission must be obtained have presumptive pecuniary interest in *denying permission*. As shown in the Bonus Study, Section 4.4.1, senior PTAB official's PAPs contain critical element goals that require maintaining AIA trial completion within 12 months and issuance of institution decision within a statutory period of 3 months, and further requiring them to "[e]nsure PTAB employees are efficiently working on mission-critical tasks." Accordingly, these officials' interests are to ensure that APJs assigned to AIA proceedings are not distracted by extraneous appeals work that could undermine their ability to meet the statutory deadlines on AIA trial work already in progress.

It becomes manifestly clear that the disparity in obtaining DU credits more easily in AIA trial work as shown in Table 2(d) and Figure 2, thereby securing APJ's incentives to focus on such work, is *designed to effectively protect* those senior officials' *own* performance measures and bonuses. It better aligns the APJ's incentives with their own. While those senior PTAB officials do have countervailing interests in reducing ex parte appeals backlog, the Bonus Study (Section 4.4.1) shows that their PAP critical element IV calls "for reducing ex parte appeals inventory *within limits imposed by AIA trial inventory and deadlines.*"

In a world in which ex parte appeals take second seat to AIA trials, PTAB senior officials protect the resources required to institute and adjudicate AIA trials at the expense of delaying ex parte appeal decisions if necessary, which have no statutory completion deadline.

In conclusion, the PTO cannot control or increase the number of ex parte appeals which are driven by patent applicants and thus those proceedings have no use in increasing PTAB revenues and workload. In contrast, AIA trials do, and the PTO constructed the elaborate machinery not only to incentivize the revenue-generating institution, but also to secure the resources necessary for timely completion of

those trials once instituted through a biased DU award system.

It is not surprising to find that when it comes to additional DU credit, APJs would prefer to earn them more easily in AIA trial work, where they require no special permission for such cases to be placed on their docket. That is why APJs working predominantly on AIA trials earn larger bonus awards than those working predominantly on ex parte appeals.

CONCLUSION

It is shown that the proposition that DU credits are fungible and can be earned through work on ex parte appeals is false. It is shown that APJs do not only have the capability and substantial incentives to earn the same number of DUs by working *significantly fewer* hours through institution and work on AIA trials, but that they are also subject to other organizational impediments and may be forbidden from taking on additional ex parte appeal work. As such, APJ's are manifestly subject to "structural bias" to institute more AIA trials, in violation of the Due Process Clause.

For the foregoing reasons, the Director's decision should be reversed, and the Board's decision should be vacated.

Respectfully submitted,

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October 3, 2022

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

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