

# THE SUPREME COURT BAR AT THE BAR OF PATENTS

*Paul R. Gugliuzza\**

*Over the past two decades, a few dozen lawyers have come to dominate practice before the U.S. Supreme Court. By many accounts, these elite lawyers—whose clients are often among the largest corporations in the world—have spurred the Court to hear more cases that businesses care about and to decide those cases in favor of their clients. The Supreme Court’s recent caselaw on antitrust, arbitration, punitive damages, class actions, and more provides copious examples.*

*Though it is often overlooked in discussions of the emergent Supreme Court bar, patent law is another area in which the Court’s agenda has changed significantly in the past twenty years. After rarely hearing patent cases for several decades, the Court now decides three or more patent cases nearly every Term. This Article presents an empirical analysis linking the Supreme Court’s increasing interest in patent law to the elite bar’s growing involvement in patent litigation. Though correlation does not prove causation, the Article relies on a novel dataset of cert petitions in Federal Circuit patent cases to suggest that the elite bar has, in fact, contributed to the growth of the Supreme Court’s patent docket. Among this Article’s key findings is that, in patent cases, a cert petition filed by an elite lawyer is three times more likely to be granted than a petition filed by a lawyer outside that group. And although elite lawyers account for only 16% of cert petitions filed in patent cases, their petitions account for a remarkable 40% of the petitions granted.*

*Because patent appeals are centralized in the Federal Circuit, patent law lacks the circuit splits that the law clerks who sift through cert petitions would normally look for in recommending that the Court grant review. But the presence of elite lawyers may not be an ideal proxy for certworthiness. In fact, the increasing participation of those lawyers in patent litigation could help explain why the Court’s recent patent cases, though substantial in number, mainly involve issues of jurisdiction, procedure, and statutory interpretation—not the core areas of patent law where the Court’s input would be most useful.*

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\* Professor of Law, Boston University School of Law. For comments and helpful discussions, thanks to Jonas Anderson, Bob Bone, Stacey Dogan, John Duffy, John Golden, Tim Holbrook, Mark Lemley, Mike Meurer, Lisa Ouellette, Rachel Rebouché, Greg Reilly, and Ted Sichelman, as well as participants at the Law and Society Association Annual Meeting in Toronto, the Junior IP Scholars Association Summer Workshop at Northwestern University Pritzker School of Law, the IP Scholars Conference at UC Berkeley School of Law, the IP, Science, and Technology Workshop at the University of Texas School of Law, and the Midwestern Law and Economics Association Annual Meeting at Villanova University School of Law. Thanks also to Ally Faustin, Kris Hansen, Hillary Leffue, and Allison McSorley for superb research assistance. Finally, special thanks to David Schwartz and Kathy Zeiler for guidance on the quantitative aspects of this Article.

## INTRODUCTION

On May 28, 2002, the Supreme Court decided a case with the inimitable caption of *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*<sup>1</sup> As the Court explained, its opinion “address[ed] once again the relation between two patent law concepts, the doctrine of equivalents and the rule of prosecution history estoppel”<sup>2</sup>—concepts the Court had tackled only five Terms earlier in *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*<sup>3</sup> Later in 2002, in an article titled *The Festo Decision and the Return of the Supreme Court to the Bar of Patents*, John Duffy contended that, although the Supreme Court had decided very few patent cases during the second half of the twentieth century, decisions such as *Festo* and *Warner-Jenkinson* reflected a Court that was “increasingly comfortable in reviewing patent decisions and increasingly interested in directing the development of law in the field.”<sup>4</sup>

Since Duffy wrote that article, the Supreme Court’s engagement with patent law has grown tremendously. After deciding less than one patent case per Term from 1982 (the year the Federal Circuit assumed exclusive jurisdiction over patent appeals)<sup>5</sup> through 2004, the Court has since decided more than forty patent cases—an average of over three per Term.<sup>6</sup>

Scholars have proposed several explanations for the modern Supreme Court’s close attention to patent law, and most of them likely contain a grain of truth. One common sentiment is that the Federal Circuit, the semispecialized court created to achieve uniformity in patent law, has failed, undone by the tunnel vision and interest group capture thought to be endemic to specialized tribunals.<sup>7</sup> In a similar vein, the Supreme Court’s recent patent decisions read like a campaign to eliminate what is often referred to as “patent exceptionalism”<sup>8</sup>—rulings (usually by the Federal Circuit) that exempt pat-

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1 535 U.S. 722 (2002).

2 *Id.* at 726.

3 520 U.S. 17, 21, 30 (1997).

4 John F. Duffy, *The Festo Decision and the Return of the Supreme Court to the Bar of Patents*, 2002 SUP. CT. REV. 273, 283. I am indebted to Duffy and his article for inspiring the title of this piece.

5 See generally Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 GEO. L.J. 1437, 1453–64 (2012) (summarizing the Federal Circuit’s history and jurisdiction).

6 See *infra* Figure 1. For a frequently updated list of Supreme Court patent decisions, see *Supreme Court Patent Cases*, WRITTEN DESCRIPTION, <https://writtendescription.blogspot.com/p/patents-scotus.html> (last visited Nov. 11, 2019).

7 For discussions of the problems commonly associated with specialized courts and analyses of whether those problems exist in the Federal Circuit, see Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 3 (1989); Craig Allen Nard & John F. Duffy, *Rethinking Patent Law’s Uniformity Principle*, 101 NW. U. L. REV. 1619, 1628–29 (2007); and Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035, 1110 (2003). For a more general analysis of courts—both specialized and not—as potential targets of interest group capture, see J. Jonas Anderson, *Court Capture*, 59 B.C. L. REV. 1543, 1574 (2018).

8 See Peter Lee, *The Supreme Assimilation of Patent Law*, 114 MICH. L. REV. 1413, 1416 (2016).

ent law from transsubstantive principles of jurisdiction, procedure, and remedies that govern in other areas of federal litigation.<sup>9</sup> More benignly, the Supreme Court, in deciding an increasing number of patent cases, might be playing the role of “percolator” of patent doctrine—a necessary function in a field where, because of the Federal Circuit’s exclusive jurisdiction, inter-circuit dialogue about the content of the law does not exist.<sup>10</sup> More simply, the Court’s large docket of patent cases could reflect the notion that, in a digitized and networked world, intellectual property rights are of greater social and economic importance than they were a few decades ago.<sup>11</sup> Indeed, the amount of patent litigation in the federal courts has increased in the past twenty years and, though the magnitude of that increase is a matter of dispute,<sup>12</sup> more patent litigation offers the Supreme Court more patent cases to choose from and raises more issues of patent law to be resolved. Not only are the lower courts creating more patent law, Congress is, too. The America Invents Act (AIA), passed in 2011,<sup>13</sup> has provided the impetus for several recent Supreme Court decisions in patent cases,<sup>14</sup> and disputes involving the AIA will likely populate the Court’s docket for the foreseeable future.<sup>15</sup>

In this Article, I seek to introduce an additional consideration into the ongoing endeavor to understand the Supreme Court’s newfound interest in patent law: the changing characteristics of the lawyers litigating patent cases

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9 See Paul R. Gugliuzza & Megan M. La Belle, *The Patently Unexceptional Venue Statute*, 66 AM. U. L. REV. 1027, 1028–29 (2017) (providing case examples); see also J. Jonas Anderson, *Reining in a “Renegade” Court: TC Heartland and the Eastern District of Texas*, 39 CARDOZO L. REV. 1569, 1604 (2018) (“[A]n overlooked aspect of the Supreme Court’s recent patent jurisprudence is how little guidance the Court has provided on patent law doctrine. The Court appears to be more interested in the procedural aspects of patent litigation than the substance of patent doctrine.” (footnote omitted)). For a more general analysis of interfield consistency as a motivator for granting certiorari, see Tejas N. Narechania, *Certiorari, Universality, and a Patent Puzzle*, 116 MICH. L. REV. 1345, 1348 (2018) (suggesting that, in deciding whether to grant certiorari, “the Supreme Court appears to consider . . . whether two fields of law apply the same transsubstantive doctrine differently”).

10 See John M. Golden, *The Supreme Court as “Prime Percolator”: A Prescription for Appellate Review of Questions in Patent Law*, 56 UCLA L. REV. 657, 662 (2009).

11 See Timothy R. Holbrook, *Explaining the Supreme Court’s Interest in Patent Law*, 3 IP THEORY 62, 77 (2013).

12 See Matthew Sag, *IP Litigation in U.S. District Courts: 1994–2014*, 101 IOWA L. REV. 1065, 1078–85 (2016).

13 Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified as amended in scattered sections of 35 U.S.C.).

14 See *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853, 1858–59 (2019); *Helsinn Healthcare S.A. v. Teva Pharm. USA, Inc.*, 139 S. Ct. 628, 630 (2019); *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1370 (2018); *SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1352–53 (2018); *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2136 (2016); see also *Sandoz Inc. v. Amgen Inc.*, 137 S. Ct. 1664, 1669 (2017) (involving the Biologics Price Competition and Innovation Act, which was passed in 2010 as part of the Patient Protection and Affordable Care Act).

15 See, e.g., *Dex Media, Inc. v. Click-to-Call Techs., LP*, 139 S. Ct. 2742 (2019) (mem.) (granting cert on the question of whether a party may appeal the Patent Office’s decision about whether a postissuance patent challenge is time barred).

on appeal. The past few decades have seen the emergence of a small, elite group of lawyers specializing not in any substantive area of law but in litigation at the Supreme Court.<sup>16</sup> The academic literature on this new Supreme Court bar suggests that the Court is highly sympathetic to the arguments pressed by those elite lawyers, who often represent the world's largest corporations in matters of significant interest to the business community.<sup>17</sup> This Article extends those insights to the field of patent law, presenting the results of a novel empirical study showing that the elite Supreme Court bar has, indeed, arrived at the bar of patents.

As recently as a decade ago, elite Supreme Court advocates—which I generally define as lawyers who have presented oral argument in five or more Supreme Court cases in the preceding ten years<sup>18</sup>—filed barely 10% of cert petitions in patent cases arising out of the Federal Circuit. Since 2010, however, that percentage has more than doubled: over the seven Terms from 2010 through 2016, a small group of lawyers—no more than thirty strong and headed by well-known generalist appellate litigators such as Carter Phillips, Paul Clement, Seth Waxman, and Tom Goldstein—served as counsel of record on nearly a quarter of cert petitions filed in Federal Circuit patent cases.

This correlation between the increased presence of elite advocates in Supreme Court patent litigation and the Court's growing docket of patent cases of course does not prove causation. The data I have gathered, however, suggests that elite lawyers have helped shape the Court's agenda at the behest of their often well-heeled clients. Specifically, I find that, in patent cases, a cert petition filed by an elite advocate is three times more likely to be granted than a petition filed by a lawyer outside that group. Moreover, although elite lawyers accounted for only 16% of cert petitions filed in patent cases from 2002 through 2016, they accounted for 40% of the petitions granted review. Both of these findings are statistically significant at the 1% level. In short, though many different factors have surely influenced the Supreme Court to take a greater interest in patent law, the presence of elite advocates seeking certiorari deserves, at minimum, a spot on the list.

The remainder of this Article proceeds as follows. Part I describes the datasets I built for this project, including a novel collection of every cert petition filed in a Federal Circuit patent case from 2002 through 2016. Drawing on those datasets, Part II provides original empirical evidence illustrating

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16 See Joan Biskupic et al., *The Echo Chamber: At America's Court of Last Resort, a Handful of Lawyers Now Dominates the Docket*, REUTERS (Dec. 8, 2014), <https://www.reuters.com/investigates/special-report/scotus>.

17 See Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1490–91 (2008); see also Katherine Shaw, Essay, *Friends of the Court: Evaluating the Supreme Court's Amicus Invitations*, 101 CORNELL L. REV. 1533, 1541 (2016) (noting that “the experience and talents” of elite Supreme Court lawyers “are disproportionately deployed in the service of business interests,” and discussing the “troubling distributional consequences” of that dynamic).

18 For a more detailed discussion of my definition of the Supreme Court elite, see *infra* Section I.A.

that, over the past few decades, the Supreme Court's interest in patent law has increased not only in terms of the raw number of cases decided but, more importantly, in a relative sense: cert petitions in patent cases, my data indicates, are two to three times more likely to be granted today than they were a decade ago. And cert petitions in patent cases are now nearly twice as likely to be granted as the average petition, unlike in the recent past, when cert petitions in patent cases were *less* likely to be granted than the average petition. Part III then presents evidence linking the elite Supreme Court bar's involvement in patent litigation to the Court's growing docket of patent cases. It also shows how cases involving elite lawyers are more likely to have other characteristics widely acknowledged to make a cert grant more likely, such as an order from the Court calling for the views of the Solicitor General, a large number of cert-stage amicus briefs, or both. Part IV concludes this Article by discussing some limitations of the data that is currently available and sketching a roadmap for future research to better understand how the elite bar shapes both the Supreme Court's agenda in patent cases and the substance of patent law.

## I. DATASETS, DEFINITIONS, AND METHODOLOGY

This Part describes the four novel datasets I built to prepare this Article. It begins by summarizing the data I used to identify the lawyers who qualify as members of the elite Supreme Court bar and by explaining the definition of "elite" that I chose to employ. It then describes a unique dataset I constructed containing all cert petitions in Federal Circuit patent cases over the past fifteen years, as well as two datasets of amicus briefs and calls for the view of the Solicitor General (SG), both of which provide useful points of comparison for the patent-specific data I have gathered.

### A. *The Elite Supreme Court Bar: Data and Definition*

The first of the four datasets I built for this project contains, among other information, the identity and organizational affiliation (law firm, government entity, etc.) of every lawyer who conducted oral argument in every case (not just patent cases) heard by the Supreme Court from October Terms (OTs) 1992 through 2016.<sup>19</sup> This dataset allowed me to determine which lawyers, exactly, comprise the elite Supreme Court bar. For the purpose of this Article, I considered a lawyer to be a member of that group if the

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19 I obtained the identity of the lawyers conducting oral argument from the Supreme Court's journal, which contains the official minutes of the Court from each day the Court is in session. See *Journal*, SUP. CT. U.S., <https://www.supremecourt.gov/orders/journal.aspx> (last visited Nov. 11, 2019). In most circumstances, I obtained information about each lawyer's organizational affiliation from the briefs in the case, which were usually available on Westlaw or ProQuest Supreme Court Insight. See *infra* note 46. I occasionally obtained affiliation information from other sources, such as the transcript of oral argument, which often lists organizational affiliation for government lawyers.

lawyer had presented oral argument in at least five cases in the Term under review and the preceding ten Terms, combined.<sup>20</sup>

I adopted this definition of elite (to the exclusion over other possible metrics, such as number of cert petitions filed or affiliation with a law firm that has a significant Supreme Court practice) because I view the repeated, individual presentation of oral argument before the Justices to be the *best* indicator that a lawyer is a member of the elite. Those individual presentations allow the Justices to become familiar with the lawyer and his or her work. Even more importantly, the individual delivery of oral argument creates the news coverage and notoriety that allows lawyers to be known, by name, to the Justices' law clerks.

In assessing the factors that influence the Court to grant or deny certiorari, it is difficult to overstate the importance of law clerks.<sup>21</sup> The Court receives over six thousand cert petitions every year,<sup>22</sup> and it is the law clerks—not the Justices—who sift through those petitions and identify the small number that are plausibly worthy of review.<sup>23</sup> (In a given Term, the Court grants between seventy and eighty petitions.)<sup>24</sup> To lighten the law clerks' workload, most chambers participate in the "cert pool"—an arrangement under which one law clerk prepares a memo analyzing the petition's certworthiness for *all* of the Justices participating in the pool (currently seven).<sup>25</sup> Petitions identified as possibly worth granting are put on a list for further discussion and a vote at the Justices' weekly conference.<sup>26</sup>

Importantly, when a law clerk's memo recommends that a petition be *denied*, that is typically the end of the road—odds are no Justice will ever even see that petition.<sup>27</sup> As H.W. Perry put it in his definitive study of the cert process: "Clerks are probably more influential in cert. than in opinion writing because often the justice defers to their analysis of the issues in a cert. petition . . . . [M]ost justices never read more than the clerk's memo if the

20 So, for example, a lawyer filing a cert petition in a patent case in the 2016 Term met my definition of elite if he or she had presented argument in at least five cases from the 2006 Term through the 2016 Term, inclusive.

21 See H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 69 (1991) ("[O]ne cannot talk about the agenda-setting process without talking about the law clerks.").

22 See, e.g., *Statistics as of June 29, 2018*, J. SUP. CT. U.S., Oct. Term 2017, at II, <https://www.supremecourt.gov/orders/journal/Jnl17.pdf> (reporting 6315 new cases docketed during the 2017 Term).

23 For a summary of the law clerks' responsibilities in processing cert petitions, see STEPHEN M. SHAPIRO ET AL., *SUPREME COURT PRACTICE* 40–42, 318–21 (10th ed. 2013).

24 See, e.g., *Statistics as of June 29, 2018*, *supra* note 22, at II (reporting seventy-seven granted petitions in the 2017 Term).

25 Tony Mauro, *Unlike Gorsuch, Kavanaugh Jumps into SCOTUS Cert Pool*, NAT'L L.J. (Oct. 11, 2018), <https://www.law.com/nationallawjournal/2018/10/11/unlike-gorsuch-kavanaugh-jumps-into-scotus-cert-pool>. Justices Alito and Gorsuch do not participate. *Id.*

26 Any chambers can request that a case be added to the so-called discuss list. PERRY, *supra* note 21, at 43.

27 See SHAPIRO ET AL., *supra* note 23, at 321 ("[C]ases that do not appear on the [discuss] list by the day before the conference are automatically denied . . . .").

recommendation is to deny.”<sup>28</sup> Chief Justice Rehnquist, in his historical monograph about the Court, confirmed the great—if not dispositive—weight given to the clerk’s recommendation on cert, writing: “As soon as I am confident that my new law clerks are reliable, I take their word and that of the pool memo writer . . . and with a large majority of the petitions it is not necessary to go any further than the pool memo.”<sup>29</sup>

Thus, at the cert stage, the Justices’ law clerks play a crucially important screening function. How do the clerks wield their power? From a clerk’s perspective, it is risky to recommend that the Court grant review. Grant recommendations are subjected to rigorous scrutiny, both for whether review should, in fact, be granted, as well as for procedural infirmities that might prove the law clerk’s recommendation to have been mistaken.<sup>30</sup> By contrast, denial recommendations are rarely second guessed, as the discussion above suggests. Thus, law clerks, by most accounts, will search for “objectively identifiable grounds” to justify a grant recommendation—most commonly, a split of authority among the courts below.<sup>31</sup>

Circuit splits, however, rarely happen in patent cases because of the centralization of appeals in the Federal Circuit.<sup>32</sup> In the absence of circuit splits, another “objective” factor that might drive law clerk decisionmaking at the cert stage—and which this Article focuses on—is the identity (and accompanying expertise) of the petitioner’s counsel of record, as indicated on the cover of the cert petition.<sup>33</sup> The rich, emerging literature on the new Supreme Court bar suggests that lawyer identity matters at the cert stage in all types of cases.<sup>34</sup> In patent cases, lawyer identity may play an outsized role

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28 PERRY, *supra* note 21, at 70.

29 WILLIAM H. REHNQUIST, *THE SUPREME COURT* 233–34 (Alfred A. Knopf new ed. 2004) (1987).

30 See PERRY, *supra* note 21, at 63; see also Kenneth W. Starr, Essay, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1376–77 (2006) (“The prevailing ethos is that no harm can flow from ‘just saying no.’ Self-confident law clerks can rest assured that few, if any, recriminations will attend their providing guidance to the Court to deny certiorari. Harm can, and indeed does, flow when a hapless clerk recommends a grant of certiorari, and the merits are eventually seen as not all they were cracked up to be.” (footnotes omitted)).

31 David R. Stras, *The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 980 (2007) (book review); see also SUP. CT. R. 10(a)–(b) (listing conflicting decisions between the federal courts of appeals, state courts, or both, as “Considerations Governing Review on Certiorari”).

32 See Narechania, *supra* note 9, at 1347.

33 SUP. CT. R. 34(1)(f) (requiring the name of petitioner’s counsel to appear on the petition’s cover).

34 See, e.g., Lazarus, *supra* note 17, at 1526 (“When [the law clerks] see the name of an attorney whose work before the Court they know, at least by reputation, that attorney’s involvement in the case, by itself, conveys an important message about the significance of the legal issues being presented and the credibility of the assertions being made.”).

because of the lack of other objective indicators of certworthiness, such as a circuit split.<sup>35</sup>

In developing the definition of “elite” Supreme Court lawyer for this Article, the significant influence of law clerks at the cert stage is what led me to require a lawyer’s appearances before the Supreme Court to be within the past decade. Law clerks, relatively fresh out of law school, may not as readily recognize the name of a lawyer who argued, say, ten Supreme Court cases two decades ago as they will the name of a lawyer who has argued at least one case every other Term in the past decade.

This definition, no doubt, ultimately classifies as nonelite some petitions filed by lawyers with whom the Justices and their law clerks are surely familiar, either through prior arguments or the advocates’ own Supreme Court clerkships.<sup>36</sup> But other recent studies documenting the emergence of a specialized Supreme Court bar have similarly used five arguments as the line that must necessarily be drawn to provide a definition of the elite. For instance, in their exhaustive story on the existence and impact of the expert Supreme Court bar, journalist Joan Biskupic and her coauthors defined as a “top oral advocate” anyone who argued at least five cases during the past decade.<sup>37</sup> Richard Lazarus, in his pathmarking law review article on the emergence of the modern Supreme Court bar, adopted a slightly more capacious definition, identifying a lawyer as an expert in Supreme Court advocacy if the lawyer had presented at least five oral arguments in his or her career or was affiliated with a firm whose attorneys had collectively argued at least ten cases.<sup>38</sup>

Though my definition of elite is relatively narrow, it should be noted that a broader definition (for example, requiring only one prior argument or considering firm affiliation) would likely only strengthen my results showing elite lawyers’ increasing domination of Supreme Court patent litigation. In recent years, the Court has granted several patent petitions filed by lawyers from firms with significant Supreme Court practices and who have previously argued before the Court—just not quite frequently enough to qualify as elite, as I have defined that term.<sup>39</sup> In Part III of the Article, I present some background data on the number of lawyers who met my definition of elite.

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35 Cf. Narechania, *supra* note 9, at 1348 (arguing that the Supreme Court’s cert decisions in patent cases are influenced by the existence of “field splits”—situations in which “two fields of law apply the same transsubstantive doctrine differently”).

36 See Shaw, *supra* note 17, at 1556–57 (discussing the importance of a prior Supreme Court clerkship in obtaining an appointment from the Court to argue as an amicus).

37 Biskupic et al., *supra* note 16.

38 Lazarus, *supra* note 17, at 1502.

39 See, e.g., Petition for a Writ of Certiorari, *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365 (2018) (No. 16-712), 2016 WL 6995217 (Allyson Ho, then of Morgan Lewis, who at the time had argued three cases before the Court); Petition for a Writ of Certiorari, *SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348 (2018) (No. 16-969), 2017 WL 491052 (Greg Castanias of Jones Day, who at the time had argued four cases before the Court); Petition for a Writ of Certiorari, *TC Heartland, LLC v. Kraft Foods Grp. Brands*



### B. *Cert Petitions in Patent Cases, Amicus Briefs, and CVSGs*

The second dataset I created for this Article contains every cert petition filed in a patent case arising out of the Federal Circuit that the Supreme Court either granted or denied from the 2002 Term through the 2016 Term.<sup>40</sup> To create that dataset, I used the Supreme Court's journal<sup>41</sup> to compile a list of every cert petition arising from a Federal Circuit case during those Terms. I included only petitions for which the petitioner paid the \$300 filing fee;<sup>42</sup> I excluded petitions filed in forma pauperis because those petitions are rarely granted<sup>43</sup>—and certainly not in any patent case since 1982.<sup>44</sup> The next step was to winnow that list of paid cert petitions to patent cases only. Many cases could be easily identified as having nothing to do with patents by reviewing the Federal Circuit's decision or, in some circumstances, by merely reading the caption.<sup>45</sup> For every other case, I personally reviewed the

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LLC, 137 S. Ct. 1514 (2017) (No. 16-341), 2016 WL 4983136 (James Dabney of Hughes Hubbard, who at the time had argued three cases before the Court).

40 The dataset does not include petitions that were voluntarily dismissed by the parties—due to settlement, for instance. See, e.g., *Maersk Drilling USA, Inc. v. Transocean Offshore Deepwater Drilling, Inc.*, 134 S. Ct. 2333 (2014) (mem.). See generally SUP. CT. R. 46(1) (“At any stage of the proceedings, whenever all parties file with the Clerk an agreement in writing that a case be dismissed, . . . the Clerk, without further reference to the Court, will enter an order of dismissal.”).

41 See *supra* note 19.

42 See SUP. CT. R. 38(a).

43 SHAPIRO ET AL., *supra* note 23, at 557–58.

44 Separating paid petitions from in forma pauperis petitions is made easier by the Court's docket numbering system, which assigns paid petitions docket numbers between YY-1 and YY-4999 (where YY is the last two digits of the Term in which the petition was filed) and in forma pauperis petitions docket numbers of YY-5000 and above. See Kevin Russell, *Mystery of the Premature Docket Number*, SCOTUSBLOG (Sept. 28, 2009), <http://www.scotusblog.com/2009/09/mystery-of-the-premature-docket-number> (explaining also that the Court begins to assign docket numbers for the subsequent Term in June, after the Court has handed down the current Term's final opinions but before the subsequent Term technically begins on the first Monday of October, see 28 U.S.C. § 2 (2012)). If you are still reading this footnote, kudos to you for your enthusiasm about the minutiae of Supreme Court administration!

45 For instance, cases in which the respondent was the Merit Systems Protection Board or the Secretary of Veterans Affairs could readily be coded as nonpatent cases. Nonpatent cases account for 47.2% (551 of 1168) of the paid cert petitions seeking review of Federal Circuit decisions from 2002 through 2016. The proportion of nonpatent cert petitions gradually declined during the period covered by my study. In nearly every Term from 2002 through 2011, nonpatent petitions accounted for over half of all paid petitions. From 2012 through 2016, however, the average proportion of nonpatent petitions declined to 37.2%. Similar changes have occurred at the Federal Circuit, where the court's docket is increasingly populated by patent cases, due largely to the growing number of appeals from the new post-issuance proceedings created by the America Invents Act. See U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, APPEALS FILED IN MAJOR ORIGINS (n.d.), [http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/02\\_Hist\\_Caseld\\_by-Origin\\_through\\_FY18\\_-\\_Final.pdf](http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/02_Hist_Caseld_by-Origin_through_FY18_-_Final.pdf). For additional data on the proportion of cert petitions in patent and nonpatent cases, see *infra* Appendix, Table A1.

cert petition to determine whether the underlying case was, in fact, a patent case. The full text of most petitions was available on Westlaw; for the petitions that were not on Westlaw I used ProQuest Supreme Court Insight.<sup>46</sup>

The vast majority of petitions could easily be classified as patent or nonpatent based on the question presented, but a small number of petitions, perhaps one or two per Term, presented close calls. Ultimately, I coded a petition as a patent petition if it presented (1) a substantive question of patent law (such as a question about patentability, infringement,<sup>47</sup> or claim construction); (2) a question about the interpretation or application of the Patent Act (such as a question about attorneys' fees or enhanced damages);<sup>48</sup> (3) a question of procedural law, jurisdictional law, or remedies in a case involving a live claim arising under patent law;<sup>49</sup> or (4) a question of nonpatent law in a case in which the existence of a patent provided the basis for the dispute, such as an antitrust claim based on patent-related conduct<sup>50</sup> or a contract claim involving a patent license.<sup>51</sup> By contrast, I coded a petition as a nonpatent petition if it presented (1) only substantive issues of nonpatent law<sup>52</sup> or (2) a question of procedural law in a case in which the patent claims were entirely out of the dispute by the time it reached the cert stage.<sup>53</sup> It

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46 See *Supreme Court Insight (1975–Present)*, PROQUEST, <https://www.proquest.com/products-services/Supreme-Court-Insight.html> (last visited Oct. 31, 2019).

47 Including exhaustion of patent rights. *E.g.*, *Impression Prods., Inc. v. Lexmark Int'l, Inc.*, 137 S. Ct. 1523, 1529 (2017).

48 *E.g.*, *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1928 (2016) (considering the standard for awarding enhanced damages under § 284 of the Patent Act); *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1749 (2014) (considering the standard for granting attorneys' fees to a prevailing party under § 285 of the Patent Act).

49 Examples of patent cases raising procedural, jurisdictional, or remedial issues include *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 396–97 (2006) (holding, in a patent infringement dispute, that a party's failure to move for a new trial or for judgment as a matter of law after a jury verdict forecloses that party from seeking a new trial on appeal based on insufficiency of the evidence); *International Rectifier Corp. v. IXYS Corp.*, 555 U.S. 882 (2008) (mem.) (denying cert on a question about notice of appeal deadlines in a patent infringement dispute); and *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 390 (2006) (considering the standard for granting injunctive relief after a finding of patent infringement).

50 *E.g.*, *Petition for a Writ of Certiorari at 2, Ark. Carpenters Health & Welfare Fund v. Bayer AG*, 557 U.S. 920 (2009) (mem.) (No. 08-1194), 2009 WL 797579 (antitrust challenge to "reverse payment" settlements of pharmaceutical patent litigation).

51 Though it did not originate in the Federal Circuit and hence is not included in my dataset, a good example would be *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2405 (2015) (holding unenforceable contracts charging royalties after a patent expires).

52 A paradigmatic example is *Oracle America, Inc. v. Google Inc.*, 750 F.3d 1339 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 2887 (2015) (mem.), which was appealed to the Federal Circuit because the original complaint included patent infringement claims. Those patent claims were entirely out of the case by the time Google filed its cert petition. See *id.* at 1347.

53 Examples include *Wayne-Dalton Corp. v. Amarr Co.*, 558 U.S. 991 (2009) (mem.) (denying cert on a question about the Federal Circuit's use of no-opinion affirmances in a case where the live claim was for false advertising under the Lanham Act); and *Designing*

bears emphasizing that the number of close cases was extremely small—no more than fifteen or twenty in the entire dataset—so slightly different coding practices would not significantly affect the overall results.

My dataset of paid cert petitions in Federal Circuit patent cases, which covers fifteen Terms (2002 through 2016), contains 589 petitions, excluding petitions that the Supreme Court granted, vacated, and remanded (“GVR’d”). The most common reason for a GVR is that the Court has issued a plenary ruling that is potentially relevant to the question presented.<sup>54</sup> Less commonly, the Court will GVR if the case becomes moot (usually due to settlement) while the cert petition is pending.<sup>55</sup> Because a GVR usually indicates little about the petition’s merits, I exclude GVR’d petitions from the analysis below unless otherwise indicated.<sup>56</sup>

I then coded each patent petition for, among other things, the petitioner’s counsel of record (as it appeared on the cover of the petition); the counsel of record’s organizational affiliation; whether the respondent waived the right to respond (and, if it did, whether the Court subsequently requested a response); whether any amicus briefs were filed at the cert stage (and, if they were, how many); whether the Court issued an order calling for the views of the Solicitor General (and, if it did, what the Solicitor General recommended); the Court’s disposition of the petition (granted, denied, or GVR’d); and, for petitions that were granted, whether the petitioner was a patentee, accused infringer, or neither (such as the Solicitor General seeking review on behalf of the Patent Office).

In addition to my datasets of Supreme Court oral arguments and patent case cert petitions, I created two other datasets to provide reference points for my patent-specific data. First, I created a dataset of *all* cert petitions (not just petitions in patent cases) on which the Court issued a call for the views of the Solicitor General (a “CVSG,” colloquially) from 2002 through 2016. As I explain in more detail below, a CVSG often foreshadows the grant of cert.<sup>57</sup> My objective in creating a dataset of CVSGs was to explore the extent to which the Court’s CVSG practice might differ in patent cases as compared to other types of cases.

To create the dataset of CVSG cases, I used the Supreme Court’s journal to identify petitions on which the Court issued a CVSG. I then personally reviewed the Solicitor General’s brief to determine its recommendation (grant, deny, GVR, or more a nuanced recommendation, such as to hold the

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*Health, Inc. v. Erasmus*, 552 U.S. 887 (2007) (mem.) (denying cert on issues about posttrial motions and the Seventh Amendment in a case where the live claims were for fraud and breach of fiduciary duty).

54 See, e.g., *Medinol Ltd. v. Cordis Corp.*, 137 S. Ct. 1372 (2017) (mem.) (GVR’ing in light of *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 137 S. Ct. 954, 959 (2017), which held that laches cannot be asserted as a defense to a claim for damages for patent infringement).

55 See, e.g., *LG Elecs., Inc. v. InterDigital Commc’ns, LLC*, 134 S. Ct. 1876 (2014) (mem.).

56 Including GVR’d petitions, my dataset contains 617 petitions.

57 See *infra* Section II.C.

petition pending a decision in another case).<sup>58</sup> Most of the SG's briefs were available on Westlaw; those that were not were available on the SG's website.<sup>59</sup> I then used Westlaw or the Supreme Court's docket to determine the Court's action on the petition and to code for whether it agreed or disagreed with the SG's recommendation. Finally, for each case in which the Court issued a CVSG, I used Westlaw or ProQuest Supreme Court Insight to determine the identity of the petitioner's counsel of record as indicated on the cert petition itself.

As a second and final point of comparison, I created a dataset of amicus briefs filed at the cert stage in all paid cases in three Supreme Court Terms: 2002, 2010, and 2016. To create this dataset, I, with the help of research assistants, reviewed the docket for every case in which the Supreme Court either granted or denied certiorari in the 2002, 2010, and 2016 Terms. We again used the Supreme Court's journal to identify the relevant grants and denials, and we excluded petitions that were dismissed, GVR'd, or on which the Court issued a summary reversal. We also excluded amicus briefs filed by the federal government in response to a CVSG. Because this process required reviewing the individual docket for over 1500 cases per Term, we limited the dataset to the three Terms mentioned above. I chose those Terms in particular because of their significance to the Court's growing docket of patent cases. As discussed below, 2002 predates the dramatic growth of Supreme Court patent decisions, 2010 marks the beginning of the most substantial period of growth, and 2016 was the most recently concluded Term when I was collecting the data for this Article.<sup>60</sup>

## II. THE SUPREME COURT'S INCREASING INTEREST IN PATENT LAW

Not long ago, the Supreme Court was, as Mark Janis put it, "well nigh invisible" in matters of patent law.<sup>61</sup> For the first fifteen years of the Federal Circuit's existence, 1982 through 1997, the Supreme Court decided, at most, one patent case per Term.<sup>62</sup> Though the Court decided three patent cases in both the 1998 and 2001 Terms, the average number of patent cases decided per Term since the Federal Circuit's creation remained below one until 2011—the eighth of a now fifteen-consecutive-Term streak of the Supreme Court deciding at least one patent case. In fact, in each of the past nine Terms (2010 through 2018), the Court has decided at least two patent

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58 Occasionally, a case settles after the Court issues its CVSG but before the SG files its brief. See, e.g., *Maersk Drilling USA, Inc. v. Transocean Offshore Deepwater Drilling, Inc.*, 134 S. Ct. 2333 (2014) (mem.). In that circumstance, there is simply no SG recommendation to include in the dataset.

59 *Supreme Court Briefs*, U.S. DEP'T JUST., <https://www.justice.gov/osg/supreme-court-briefs> (last visited Nov. 1, 2019).

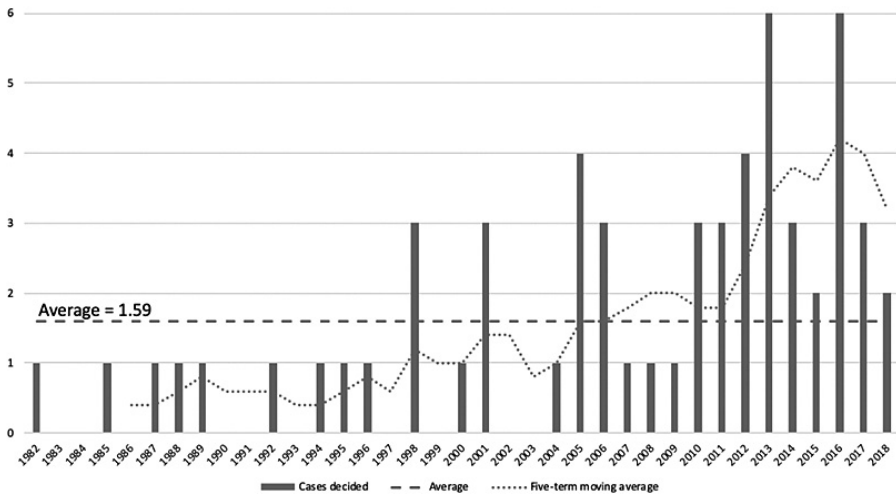
60 Supreme Court Terms begin and end on the first Monday of October. 28 U.S.C. § 2 (2012). Thus, the 2016 Term ended in October 2017.

61 Mark D. Janis, *Patent Law in the Age of the Invisible Supreme Court*, 2001 U. ILL. L. REV. 387, 387.

62 See *infra* Figure 1.

cases, averaging 3.44 patent decisions per Term over that time period. Figure 1 below graphically illustrates the number of patent cases decided by the Supreme Court, per Term, from 1982 through 2018.<sup>63</sup>

FIGURE 1: PATENT CASES DECIDED BY THE SUPREME COURT, OT1982 THROUGH OT2018<sup>64</sup>



As mentioned in the Introduction, the main objective of this Article is to highlight an explanation for the growth of the Supreme Court's patent docket that is rarely mentioned in the literature: the increasing involvement

<sup>63</sup> Though Figure 1 indicates that the Supreme Court has decided a patent case in only fifteen consecutive Terms, the Court has already granted cert on two cases to be heard in the current 2019 Term, *Dex Media, Inc. v. Click-to-Call Technologies, LP*, 139 S. Ct. 2742 (2019) (mem.); and *Iancu v. NantKwest, Inc.*, 139 S. Ct. 1292 (2019) (mem.), making it almost certain that the streak will extend to sixteen Terms.

<sup>64</sup> The primary source of the data reported in Figure 1 is *Supreme Court Patent Cases*, *supra* note 6. Note that Figure 1 includes three patent-related Supreme Court cases that did not arise from the Federal Circuit: *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401 (2015) (arising from the Ninth Circuit); *Gunn v. Minton*, 568 U.S. 251 (2013) (arising from the Texas Supreme Court); and *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013) (arising from the Eleventh Circuit). Because of the unusual origins of those cases, I exclude them from the remainder of this study unless otherwise indicated. Figure 1 also includes two cases that raised a purely procedural issue in the context of a patent infringement dispute: *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 396–97 (2006); and *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 463 (2000), in accordance with this Article's definition of "patent case," discussed above. See *supra* Section I.B. Lastly, Figure 1 counts *Halo Electronics, Inc. v. Pulse Electronics, Inc.* and *Stryker Corp. v. Zimmer, Inc.* as a single case because the cases were argued and decided in a consolidated fashion. See *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1931 (2016). See generally Timothy R. Holbrook, *Is the Supreme Court Concerned with Patent Law, the Federal Circuit, or Both: A Response to Judge Timothy B. Dyk*, 16 CHI-KENT J. INTELL. PROP. 313, 314 n.8 (2016) (describing the occasional difficulties in categorizing and counting Supreme Court patent cases).

of the elite, specialized Supreme Court bar in appellate patent litigation. To set the stage for that analysis, this Part of the Article provides empirical evidence about how much, exactly, the Supreme Court's interest in patent law has grown, and it suggests that two factors strongly correlated with a cert grant in all types of cases—the presence of amicus briefs at the cert stage and the involvement of the Solicitor General—may play an outsized role in patent cases.

*A. A Relative View of the Supreme Court's Growing Patent Docket*

Observers—including elite Supreme Court advocates themselves—often cite the growing raw number of Supreme Court decisions in patent cases (as reflected on Figure 1 above) as evidence of the Court's "increased interest" in patent law.<sup>65</sup> Yet that is ultimately a relative claim. It could be that the Court is simply receiving a greater number of cert petitions in patent cases and is granting them at the same rate it always has. Or grant rates could be increasing in all types of cases, not just patent cases. The data I have collected, however, indicates that patent law has, in fact, become a more important topic at the Supreme Court relative to other areas of law. I make this claim based on two observations.

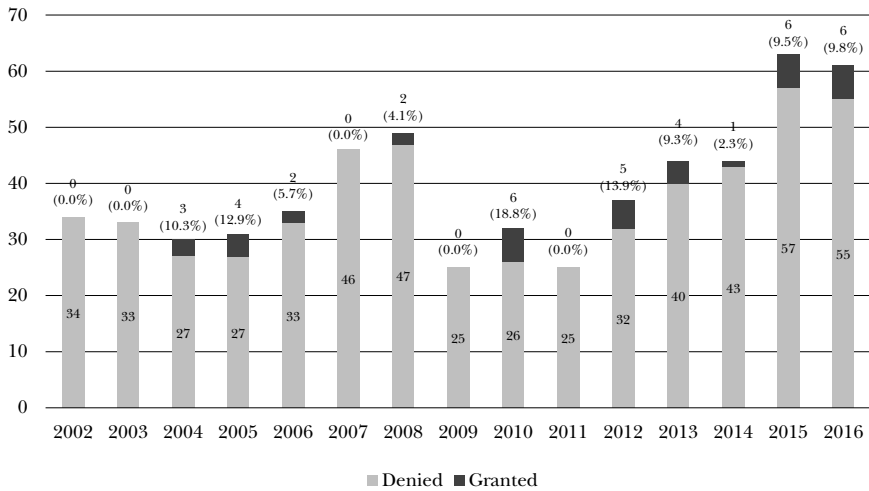
First, cert petitions in patent cases are more likely to be granted today than they were a decade ago. From 2002 through 2016, the Supreme Court granted 6.6% of paid cert petitions in Federal Circuit patent cases (39 of 589). Yet, from 2002 through 2009, the grant rate was only 3.9% (11 of 283). From 2010 through 2016, however, the grant rate more than doubled to 9.2% (28 of 306), a change that is statistically significant at the 1% level ( $p = .009$ ).<sup>66</sup> Figure 2 below indicates the number and percentage of patent petitions granted and denied on a Term-by-Term basis, showing that the grant rate has varied between a low of 0.0% (five times, but not since 2011) and a high of 18.8% (6 of 32) in 2010.

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65 *E.g.*, Seth P. Waxman, *May You Live in Interesting Times: Patent Law in the Supreme Court*, 17 CHI.-KENT J. INTELL. PROP. 214, 216 (2017).

66 Because the data presented throughout this Article includes the entire population of relevant cases during the time periods of interest, the results are arguably statistically significant by definition. Nevertheless, to provide a sense of the importance of observed differences, I report  $p$ -values at several points, based on the assumption that my data is a sample of a larger population. Unless otherwise indicated, to calculate  $p$ -values, I used Microsoft Excel to perform a two-tail  $t$ -test.

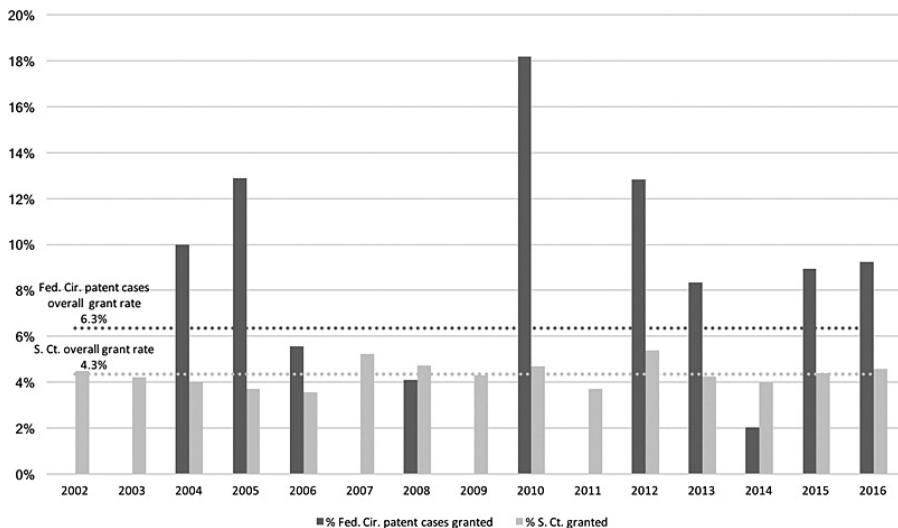
FIGURE 2: PAID CERT PETITIONS GRANTED OR DENIED IN FEDERAL CIRCUIT PATENT CASES, OT2002 THROUGH OT2016



A second indicator of the increased importance of patent cases at the Supreme Court is that cert petitions in patent cases today are more likely to be granted than the average cert petition whereas, not long ago, patent petitions were *less* likely than average to be granted. To make an accurate comparison to the data the Supreme Court publishes about its overall grant rate, we must treat GVR'd petitions as being denied plenary review, which lowers the grant rate in Federal Circuit patent cases slightly, from 6.6% to 6.3% (39 of 617). As Figure 3 below illustrates, the Supreme Court's overall grant rate in paid cases is 4.3%<sup>67</sup>—32% lower than the grant rate in patent cases and a difference that is statistically significant at the 5% level ( $p = .045$ ). In five of the seven most recent Terms captured in my data (2010 through 2016), the grant rate in patent cases exceeded the overall grant rate, often substantially. Over those seven Terms, the grant rate in Federal Circuit patent cases was 8.0% (28 of 350, including GVR'd cases as denials). The overall grant rate for that period, by contrast, was 4.4%. That difference is also statistically significant ( $p = .015$ ). Looking back to an earlier period, the grant rate in Federal Circuit patent cases from 2002 through 2009, including GVR'd cases as denials, was only 4.0% (11 of 278). The overall grant rate for that period, by contrast, was 4.3%. That small difference in grant rates during this earlier time period is not statistically significant ( $p = .793$ ).

67 I obtained the Supreme Court's overall grant rate from the statistics entry in the *Harvard Law Review's* annual Supreme Court review. See, e.g., *The Supreme Court, 2016 Term—The Statistics*, 131 HARV. L. REV. 403, 410 tbl.II(B) (2017). The grant rate reported by the *Harvard Law Review*, which is, in turn, based on statistics reported in the Supreme Court's journals, see *supra* note 19, appears to treat GVR'd cases as, essentially, denials. See *The Supreme Court, 2016 Term—The Statistics*, *supra*, at 410 n.f (including only cases granted plenary review as “grants” for the purpose of calculating the overall grant rate).

FIGURE 3: PAID CERT PETITION GRANT RATES, FEDERAL CIRCUIT PATENT CASES VERSUS ALL CASES, OT2002 THROUGH OT2016



To put it simply: today, cert petitions in patent cases are more than twice as likely to be granted than they were a decade or two ago, and petitions in patent cases are roughly twice as likely to be granted as the average cert petition.

Having established that cert petitions in patent cases are increasingly likely to be granted, the next question—and the question that occupies much of the rest of this Article—is whether there is a way to tell *which* patent petitions are most likely to be granted. To help answer that question, I have collected data on two factors identified in the literature as correlated with the Supreme Court’s decision to grant or deny certiorari in all types of cases: the presence of amicus briefs at the cert stage and the issuance of a call for the views of the Solicitor General. Those factors, it turns out, may be even more salient in patent cases than in other areas of law.

### B. Amicus Briefs

As Table 1 below illustrates, cert-stage amicus briefs were filed alongside 20.0% (118 of 589) of paid cert petitions in patent cases from 2002 through 2016.<sup>68</sup> This level of amicus activity is noticeably higher than the comparable data for *all* paid cert petitions filed in 2002, 2010, and 2016, which were

68 In counting amicus briefs for the purpose of this Article, I have included both briefs filed in support of and in opposition to the petition because of the conventional wisdom that *any* cert-stage amicus brief calls attention to the case and therefore makes a grant more likely. See SHAPIRO ET AL., *supra* note 23, at 515 (“[A] nonparty whose interest favors the denial of certiorari ordinarily does not wish . . . to accentuate the importance of the case by filing a brief revealing that importance and concern; thus it is generally advisable . . . to forgo an amicus brief until after review is granted, if it is.”). In any event—



accompanied by amicus briefs in, respectively, 8.5%, 11.6%, and 15.9% of cases.<sup>69</sup>

TABLE 1: CERT-STAGE AMICUS BRIEFS, FEDERAL CIRCUIT PATENT CASES  
VERSUS OVERALL

	Federal Circuit Patent Cases OT2002–2016		All Petitions OT2002	All Petitions OT2010	All Petitions OT2016
	Petitions	%	%	%	%
With Amicus	118	20.0%	8.5%	11.6%	15.9%
Without Amicus	471	80.0%	91.5%	88.4%	84.1%

Indeed, in each of those individual Terms, the proportion of patent petitions supported by at least one amicus brief exceeds the overall numbers: In the 2002 Term, 11.8% of patent petitions (4 of 34) were accompanied by at least one amicus brief, as compared to 8.5% of petitions overall. In the 2010 Term, 29.0% of patent petitions (9 of 31) were accompanied by at least one amicus brief, as compared to 11.6% overall. And in 2016, 31.1% of patent petitions (19 of 61) were accompanied by at least one amicus brief, as compared to 15.9% overall. Though these numbers indicate an upward trend in the number of cert-stage amicus briefs filed in *both* patent cases and overall, the difference between the number of amicus briefs filed in patent cases as compared to the overall numbers is statistically significant for both the 2010 and 2016 Terms,<sup>70</sup> meaning that, in general, recent patent cases have involved an unusually high level of amicus activity at the cert stage. As I explain in more detail below, this increase in amicus activity in patent cases neatly corresponds to the increased involvement of elite Supreme Court lawyers in patent disputes.<sup>71</sup>

Elite lawyers are well aware that eliciting support from sympathetic amici vastly increases the chance of review.<sup>72</sup> One early study concluded that a petition supported by at least one amicus brief was four to five times more

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probably because of this conventional wisdom—the number of amicus briefs filed in opposition to review is vanishingly small.

69 For other points of reference about the quantity of cert-stage amicus briefs filed overall, see Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1939 tbl.2 (2016) (reporting that 14.2% of cert petitions were supported by amicus briefs in the 2014 Term); Lazarus, *supra* note 17, at 1529 tbl.4 (reporting that 9.5% of cert petitions were supported by amicus briefs in the 2005 Term). Those figures (and the increase from 2005 to 2014) are consistent with my data, though it should be noted that those prior studies included only briefs filed in support of the petition, not the small number filed against review. See Larsen & Devins, *supra*, at 1939 n.217; Lazarus, *supra* note 17, at 1529.

70 For 2010,  $p = .045$  and for 2016,  $p = .014$ . For 2002, when the spread between patent cases and the overall numbers was smaller,  $p = .566$ .

71 See *infra* subsection III.B.2.

72 See *infra* notes 116–20 and accompanying text.

likely to be granted than a petition filed without amicus support.<sup>73</sup> The more recent data I have collected, reported on Table 2 below, indicates that filing an amicus brief makes a grant eight to nine times more likely.<sup>74</sup> The presence of a cert-stage amicus brief in a patent case similarly makes the probability of grant about eight times more likely.<sup>75</sup>

TABLE 2: AMICUS BRIEFS AND CERT GRANTS/DENIALS, FEDERAL CIRCUIT PATENT CASES VERSUS OVERALL

	Federal Circuit Patent Cases OT2002–2016			All Petitions OT2002	All Petitions OT2010	All Petitions OT2016
	Denied	Granted	% Granted	% Granted	% Granted	% Granted
With Amicus	92	26	22.0%	22.3	18.6%	17.6%
Without Amicus	458	13	2.8%	2.6%	2.1%	2.2%

There is, of course, an endogeneity concern with this data: larger, more sophisticated litigants—who are more likely to attract the Court’s attention in the first place—are more likely to be able to obtain amicus support. Yet two observations drawn from my data suggest that amicus briefs play a unique role in patent cases in particular. First, as Table 2 above indicates, from 2002 through 2016, two-thirds of the granted cert petitions in Federal Circuit patent cases (26 of 39) were accompanied by at least one amicus brief.<sup>76</sup> By comparison, in 2002, only 44.6% of granted cert petitions overall (33 of 74) were accompanied by at least one amicus brief. In 2010, that figure was 53.3% (32 of 60). Though the proportion of granted petitions accompanied

<sup>73</sup> See PERRY, *supra* note 21, at 137.

<sup>74</sup> Specifically, for the 2002 Term, a paid petition accompanied by at least one amicus brief was 8.6 times more likely to be granted (22.3% versus 2.6%); for the 2010 Term, 8.9 times more likely (18.6% versus 2.1%); and for the 2016 Term, eight times more likely (17.6% versus 2.2%). For studies reporting similar figures, see Larsen & Devins, *supra* note 69, at 1939 (reporting that, in the 2014 Term, a supporting amicus brief made a cert grant six times more likely); and Lazarus, *supra* note 17, at 1528–29 (2005 Term, nearly ten times more likely). For more detailed data about of the number of cert-stage amicus brief filings in the 2002, 2010, and 2016 Terms and corresponding grant rates, see *infra* Appendix, Tables A2–A4.

<sup>75</sup> Specifically, 7.9 times more likely (22.0% versus 2.8%). In a study covering 2000 through 2009, Colleen Chien similarly reported that “the Supreme Court was seven times more likely to grant certiorari [in a patent case] . . . if a third party filed a brief urging the court to do so.” Colleen V. Chien, *Patent Amicus Briefs: What the Courts’ Friends Can Teach Us About the Patent System*, 1 U.C. IRVINE L. REV. 395, 422 & n.161 (2011).

<sup>76</sup> One of the thirteen granted cert petitions without any accompanying amicus briefs was filed by the Solicitor General, who, many studies have noted, enjoys an enormous advantage in seeking certiorari on behalf of the federal government. See, e.g., PERRY, *supra* note 21, at 129. Excluding that petition from the figures reported in the text, 68.4% of granted cert petitions in patent cases (26 of 38) were accompanied by at least one amicus brief.

by amicus briefs has steadily grown, reaching 60.6% in 2016 (43 of 71), that figure is still smaller than the comparable figure for patent cases over the past fifteen Terms.<sup>77</sup> Indeed, in more recent years, the proportion of granted patent petitions accompanied by amicus briefs has grown. From 2002 through 2009, 7 of 11 granted cert petitions in patent cases (63.6%) were accompanied by amicus briefs. From 2010 through 2016, that figure increased to 19 of 28 (67.9%).

Second, the *quantity* of amicus briefs filed appears to have a unique relationship to the likelihood of a cert grant in patent cases as compared to Supreme Court cases more generally. Across all types of cases (not just patent cases), the presence of even a single amicus brief at the cert stage corresponds to a substantial increase in the likelihood of the Court granting review. In 2002, for instance, a petition accompanied by just one amicus brief was over 3.5 times more likely to be granted than the average petition: the grant rate was 15.1% for petitions accompanied by one amicus brief versus a grant rate of 4.2% overall.<sup>78</sup> In 2010, the presence of a single amicus brief made a cert grant over four times more likely: 17.2% for petitions accompanied by one amicus brief versus a grant rate of 4.1% overall. And, in 2016, the presence of a single amicus brief made a cert grant just over three times more likely: 13.9% for petitions accompanied by one amicus brief versus a grant rate of 4.6% overall.<sup>79</sup>

The data for patent cases looks much different. As Table 3 below illustrates, a patent petition in which only one cert-stage amicus brief is filed is actually *less* likely than the average patent petition to be granted: the grant rate was 6.1% for patent petitions accompanied by one amicus brief as compared to the overall patent-case grant rate of 6.6% reported above.<sup>80</sup>

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77 The difference between the proportion of Federal Circuit patent cases with amicus briefs and the overall numbers for OT2002 is statistically significant ( $p = .024$ ). The smaller differences between the patent case numbers and the overall numbers for OT2010 and OT2016 are not statistically significant ( $p = .187$  and  $p = .528$ , respectively). But recall my data represents the entire population of relevant cases during the chosen time periods, meaning that *any* difference could arguably be considered significant. See *supra* note 66.

78 For more details about the number of amicus briefs filed in all cases in the 2002, 2010, and 2016 Terms, see *infra* Appendix, Tables A2–A4.

79 All of the differences reported in this paragraph are statistically significant ( $p < .001$ ). Studying the 2005 Term, Lazarus similarly found that the presence of a single amicus brief made a cert grant nearly four times more likely: 14.77% for petitions supported by one amicus brief versus a grant rate of 3.75% overall. Lazarus, *supra* note 17, at 1529 tbl.4.

80 See *infra* p. 1247.

TABLE 3: CERT-STAGE AMICUS BRIEFS FILED IN FEDERAL CIRCUIT PATENT CASES, OT2002 THROUGH OT2016

Amicus Briefs Filed	Total	Denied	Granted	% Granted
0	471	458	13	2.8%
1	49	46	3	6.1%
2	32	26	6	18.8%
3	17	12	5	29.4%
4	7	5	2	28.6%
5	2	1	1	50.0%
6	2	0	2	100.0%
7	2	0	2	100.0%
8	2	1	1	50.0%
9	2	0	2	100.0%
11	2	0	2	100.0%
22	1	1	0	0.0%
0 or 1	520	504	16	3.1%
2 to 4	56	43	13	23.2%
5 or more	13	3	10	76.9%

The filing of two to four amicus briefs increases the grant rate across all cases, but the magnitude of the increase is far more pronounced in patent cases specifically. In 2002, across all cases, 33.3% of petitions accompanied by two to four amicus briefs were granted—about double the grant rate of 15.1% for petitions accompanied by a single amicus brief.<sup>81</sup> By 2010, however, the grant rates had become almost identical: 17.4% of petitions accompanied by two to four amicus briefs were granted versus a grant rate of 17.2% for petitions accompanied by a single amicus brief. In 2016, the percentages spread apart slightly, but not by much: 17.0% of petitions accompanied by two to four amicus briefs were granted versus 13.9% of petitions accompanied by a single amicus brief.<sup>82</sup>

In patent cases, by contrast, the grant rate increases nearly fourfold when two to four amicus briefs are filed at the cert stage, from 6.1% for cases with one amicus brief to 23.2% in cases with two to four amicus briefs, as illustrated on Table 3 above.<sup>83</sup> And this is not a function of the granted patent cases with two to four amicus briefs occurring in an earlier era, when there was a larger spread in the overall numbers. Rather, nine of the thir-

81 Again, for more detailed data about amicus brief filings in all cases in the 2002, 2010, and 2016 Terms, see *infra* Appendix, Tables A2–A4.

82 None of these differences are statistically significant. Even for the large spread in 2002,  $p = .155$ .

83 This difference is statistically significant ( $p = .012$ ).

teen granted cases with two to four amicus briefs were granted in the 2010 Term or later.

Patent cases in which five or more amicus briefs are filed at the cert stage are extremely likely to be granted. Out of thirteen petitions accompanied by five or more amicus briefs, the court granted ten (76.9%). Though we are dealing with relatively small numbers, that grant rate for patent cases is roughly double the grant rate across all types of cases (not just patent cases) with a similarly large number of amicus briefs: in the 2002 Term, the Court granted 3 of 7 petitions accompanied by five or more amicus briefs (42.9%); in 2010, 5 of 16 (31.3%); and in 2016, 9 of 23 (39.1%).<sup>84</sup>

In short, my data confirms the overall correlation between the presence of amicus briefs at the cert stage and the likelihood of a cert grant. Most intriguingly, it suggests that the correlation between the *number* of amicus briefs and the likelihood of a cert grant is more important in patent cases than in other areas of law.

### C. *The Solicitor General*

The Solicitor General is a uniquely influential litigant at the Supreme Court, both at the cert stage and on the merits. In patent cases, the Solicitor General commonly becomes involved when the Court invites the SG to file a brief expressing the views of the United States. This happened on 31 of the 589 patent petitions in my dataset, as I discuss in more detail below.<sup>85</sup>

A call for the views of the Solicitor General is a strong indication that the Court is interested in a case.<sup>86</sup> According to my data, across all types of cases (not just patent cases), the mere issuance of a CVSG makes it over ten times more likely that the Court will grant cert. Though the Court's overall grant rate is about 4%,<sup>87</sup> from 2002 through 2016, the Court granted 139 of the 308 petitions on which it issued a CVSG, or 45.1%. (That figure excludes petitions that were GVR'd or dismissed due to settlement.) Though the mere issuance of a CVSG order dramatically increases the likelihood of a cert grant, the SG's recommendation does matter: as discussed in more detail below, the Court follows the SG's recommendation to grant or deny cert more than three-quarters of the time.<sup>88</sup>

In an article published roughly a decade ago, John Duffy highlighted the Solicitor General's role in shaping the Supreme Court's then-nascent docket of patent cases.<sup>89</sup> As Duffy reported, before the 2000 Term, the Court had

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84 Lazarus's study of the 2005 Term reported that 6 out of 10 petitions supported by five or more amicus briefs were granted. See Lazarus, *supra* note 17, at 1529.

85 See *infra* subsection III.A.3.

86 See Stefanie A. Lepore, *The Development of the Supreme Court Practice of Calling for the Views of the Solicitor General*, 35 J. SUP. CT. HIST. 35, 38 (2010).

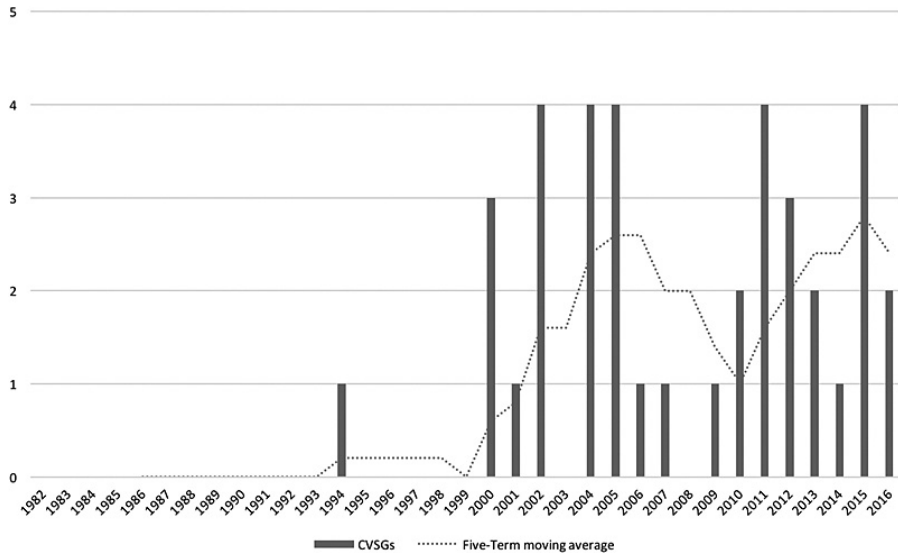
87 See *supra* Figure 3.

88 See *infra* Figure 6.

89 See John F. Duffy, *The Federal Circuit in the Shadow of the Solicitor General*, 78 GEO. WASH. L. REV. 518, 519–20 (2010).

issued a CVSG in only one patent case ever.<sup>90</sup> In 2000, however, the Court issued CVSGs in three patent cases,<sup>91</sup> and that trend has continued to this day, right alongside the growing number of patent cases decided on the merits. From 2000 through 2016, the Court issued an average of 2.18 CVSGs in Federal Circuit patent cases per Term. And, from 2004 through 2016, the Court issued at least one CVSG in a patent case in every Term except one, as Figure 4 below indicates.<sup>92</sup>

FIGURE 4: CVSGs IN FEDERAL CIRCUIT PATENT CASES, BY TERM ORDER WAS ISSUED



The data I have collected neatly illustrates the unusually high degree of influence the Solicitor General enjoys at the cert stage in patent cases. As Figure 5 below shows, on cert petitions in Federal Circuit patent cases that the Court acted on from the 2002 through the 2016 Terms, the Supreme Court agreed with the Solicitor General's recommendation to grant or deny

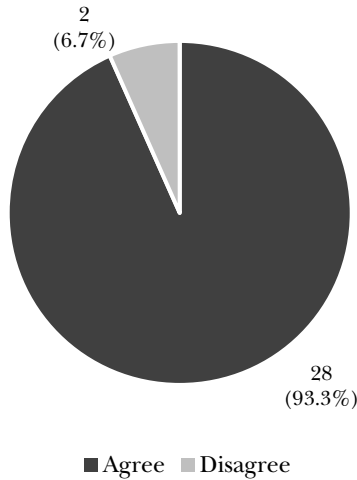
90 *Id.* at 525–27. The case was *Barr Laboratories, Inc. v. Burroughs Wellcome Co.*, 515 U.S. 1130 (1995) (mem.). Duffy, *supra* note 89, at 527.

91 Duffy, *supra* note 89, at 529–30.

92 The analysis that follows, which focuses on patent cases arising out of the Federal Circuit, excludes one patent-related case arising out of the Ninth Circuit in which the Court issued a CVSG, *Kimble v. Marvel Enterprises, Inc.*, 134 S. Ct. 2719 (2014) (mem.). Note also that Figure 4 excludes a Federal Circuit case in which the Court issued a CVSG but that the parties voluntarily dismissed before the SG filed its brief, *Maersk Drilling USA, Inc. v. Transocean Offshore Deepwater Drilling, Inc.*, 134 S. Ct. 2333 (2014) (mem.), because voluntary dismissals are excluded from my dataset of Federal Circuit cert petitions. *See supra* note 40. Figure 4 does include, however, one case in which the Court issued a CVSG but then *denied* certiorari before the SG filed its brief, *Apotex Inc. v. Pfizer, Inc.*, 549 U.S. 970 (2006) (mem.) (denying cert after the respondent filed a suggestion of mootness, over the opposition of the petitioner).

cert over 90% of the time—in 28 of the 30 cases in which the Solicitor General filed a brief in response to a CVSG.<sup>93</sup>

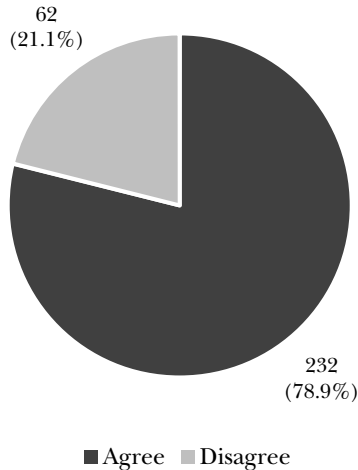
FIGURE 5: SUPREME COURT AGREEMENT WITH SOLICITOR GENERAL RECOMMENDATION ON CERT IN FEDERAL CIRCUIT PATENT CASES WITH A CVSG, OT2002 THROUGH OT2016



93 Figures 5 and 6 treat each cert petition as a separate case (that is, as a separate instance of agreement or disagreement), even if the Solicitor General filed a single brief containing recommendations for multiple petitions. *See, e.g.*, Brief for the United States as Amicus Curiae at 1, *Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920 (2015) (Nos. 13-896, 13-1044), 2014 WL 5299431 (patent case, recommending partial grant of the petition in No. 13-896 and denial of the cross-petition in No. 13-1044). Though this methodology causes some petitions presenting similar or identical questions to be counted multiple times, *see, e.g.*, Brief for the United States as Amicus Curiae at 1–8, *Chadbourn & Parke LLP v. Troice*, 134 S.Ct. 1058 (2014) (Nos. 12-79, 12-86, 12-88) 2012 WL 6591478 (nonpatent case, recommending denial of three petitions presenting the same question), the Solicitor General often recommends different actions on different petitions in a single brief, even if those petitions present the same question, *see, e.g.*, Brief for the United States as Amicus Curiae at 20, *Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429 (2005) (Nos. 03-1230, 03-1234, 03-1250) 2004 WL 2985237 (nonpatent case, recommending different actions on each of three petitions challenging a single decision of the Michigan Court of Appeals), so counting each petition as a separate case provides, in my view, the most accurate assessment of the frequency with which the Court agrees or disagrees with the Solicitor General's recommendation. It also bears noting that, in the patent-related *Kimble* case arising out of the Ninth Circuit, mentioned above, *see supra* notes 64, 92, the SG recommended denying certiorari, but the Court granted it. Including that instance of disagreement would drop the agreement rate reported on Figure 5 from 93.3% to 90.3%—still notably higher than the overall agreement rate indicated below. *See infra* Figure 6. Lastly, it is worth noting that the Supreme Court issued two CVSG orders in Federal Circuit patent cases in the 2016 Term that the Court did not dispose of until the 2017 Term. In both of those cases, the Court agreed with the SG's recommendation. *See WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 734 (2018) (mem.) (granting cert); *Samsung Elecs. Co. v. Apple Inc.*, 138 S. Ct. 420 (2017) (mem.) (denying cert).

By contrast, the data I have collected for *all* cases indicates that the Court agrees with the Solicitor General's recommendation slightly less than 80% of the time, as shown on Figure 6 below.<sup>94</sup> This difference in the agreement rate between patent cases with a CVSG and all cases with a CVSG is statistically significant at the 1% level ( $p = .008$ ).

FIGURE 6: SUPREME COURT AGREEMENT WITH SOLICITOR GENERAL  
RECOMMENDATION ON CERT IN ALL CASES WITH A CVSG,  
OT2002 THROUGH OT2016



Interestingly, the Solicitor General's sway in patent cases has held steady over time, even as the SG's influence overall appears to have decreased. The Court has disagreed with the SG's recommendation on cert in only two Federal Circuit patent cases ever, one in which the Court acted on the cert petition in the 2005 Term<sup>95</sup> and another in 2012.<sup>96</sup> Yet, looking at *all* cases

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Including those two cases would push the Court-SG agreement rate in patent cases even higher.

94 A prior study using data from 1998 through 2004 reported a similar agreement rate of 78.5%. David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 275–76 (2009). Like that study, the results reported on Figures 5 and 6 are limited to cases in which the Solicitor General recommended a straight grant or denial and not, say, a recommendation to GVR or to hold the petition pending resolution of another case.

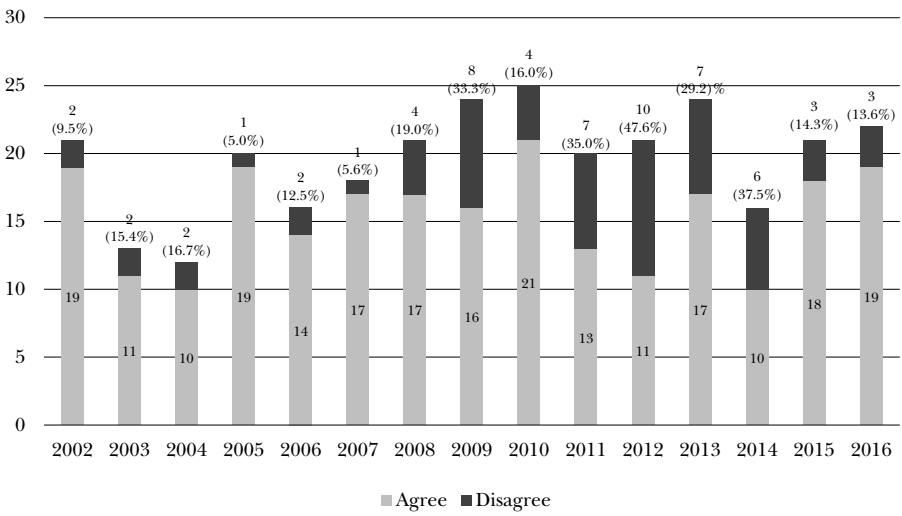
95 *Lab. Corp. of Am. Holdings v. Metabolite Labs., Inc.*, 546 U.S. 999 (2005) (mem.) (granting cert over the SG's recommendation to deny). Ironically, the Court ultimately dismissed the writ of certiorari in that case as improvidently granted. *Lab. Corp. of Am. Holdings v. Metabolite Labs., Inc.*, 548 U.S. 124, 125 (2006) (mem.) (per curiam).

96 *Bowman v. Monsanto Co.*, 568 U.S. 936 (2012) (mem.) (granting cert over the SG's recommendation to deny); see also *supra* notes 64, 92 (discussing *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401 (2015), a patent-related case arising from the Ninth Circuit in which the Supreme Court granted cert over the SG's recommendation to deny).



involving a CVSG order during the time period of my study, the Court has become far more likely to disagree with the SG’s recommendation. As Figure 7 below indicates, in not a single Term from 2002 through 2008 did the Court disagree with the SG’s recommendation in more than 20% of cases overall, and the disagreement rate was often below 10%. From 2009 through 2016, however, the disagreement rate grew markedly: the Court disagreed with the SG’s recommendation over 25% of the time in five of the eight Terms during that time period.

FIGURE 7: SUPREME COURT AGREEMENT WITH SOLICITOR GENERAL RECOMMENDATION ON CERT IN ALL CASES WITH A CVSG, TERM BY TERM



It is worth noting that the increase in disagreement rate beginning in 2009 coincides with a switch from a Republican presidential administration (and a Republican-appointed Solicitor General) to a Democratic one. Ignoring the Terms during which control of the White House changed political parties (2008 and 2016), the disagreement rate from 2002 through 2007 was a mere 10.0% (10 of 100), but from 2009 through 2015 it was nearly three times higher—29.8% (45 of 151). This difference is statistically significant at the 1% level ( $p < .001$ ). As I explain in greater detail in a companion essay to this Article,<sup>97</sup> this development challenges the conventional wisdom that the Justices are strongly inclined to follow the SG’s cert recommendation even if they disagree with the SG ideologically.<sup>98</sup> Instead, my findings are consistent

97 Paul R. Gugliuzza, Supreme Court Ideology and Deference to the Solicitor General (Jan. 14, 2019) (unpublished manuscript) (on file with author).

98 See, e.g., RYAN C. BLACK & RYAN J. OWENS, THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT 58, 66 (2012) (relying on data from 1970 through 1993).

with recent empirical literature demonstrating the decline of Supreme Court deference to the President.<sup>99</sup>

Returning to patent cases—and in view of the Supreme Court’s growing docket of patent disputes—it bears mention that the SG recommends the Court grant certiorari in a greater percentage of patent cases than overall. Specifically, the SG recommended a grant in 13 of the 30 Federal Circuit patent cases (43.3%) in which it filed a brief in response to a CVSG from 2002 through 2016, versus 80 of 294 cases overall (27.2%).<sup>100</sup> In addition, the Court granted every single patent petition the SG recommended granting.<sup>101</sup> Thus, even if the SG’s influence is declining overall, the SG’s influence at the cert stage in patent cases seems alive and well.

\* \* \*

This Part of the Article has made three primary points. First, the Supreme Court’s interest in patent cases has grown in the past two decades, both in terms of the raw number of cases on the docket and the likelihood of a cert petition in a patent case being granted. Second, the presence of amicus briefs—and in particular the number of them—appears to be an important indicator of the likelihood of cert being granted in a patent case, perhaps more important than in other areas of law. And third, the Solicitor General’s recommendation seems to play a vital role in the Supreme Court’s decision whether to grant cert in a patent case—again possibly even more than in other areas of law. In the next Part of the Article, I introduce an additional development that corresponds to the Court’s increasing tendency to grant cert in patent cases: the more frequent presence of elite Supreme Court litigators in patent disputes.

### III. THE SUPREME COURT BAR AT THE BAR OF PATENTS

To begin, some background on the Supreme Court bar.<sup>102</sup> During the nineteenth century, a small group of lawyers, including Daniel Webster, Francis Scott Key, and Luther Martin, dominated oral argument at the Supreme Court.<sup>103</sup> This was mostly a function of geography. At the time, it was simply too difficult for leading lawyers in New York or Boston to travel to Washington, D.C. As travel became easier in the late nineteenth and early twentieth

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99 See Lee Epstein & Eric A. Posner, *The Decline of Supreme Court Deference to the President*, 166 U. PA. L. REV. 829, 846–47, 847 n.75 (2018) (finding that, in cases decided on the merits, the executive branch’s win rate steadily declined from 77% in 1980 to 48% in 2015).

100 Because of the relatively small numbers, this difference is not statistically significant ( $p = .101$ ), but, again, the figures reported in the text represent the entire population of relevant cases, not a sample.

101 In the overall dataset, the Supreme Court disregarded the SG’s grant recommendation in 4 of 294 cases (1.4%). A small fraction, to be sure, but not zero.

102 For a detailed recounting of this story, see KEVIN T. MCGUIRE, *THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY* 12–27 (1993).

103 See *id.* at 13–15.

century, the Supreme Court bar lost its cohesiveness.<sup>104</sup> For most of the twentieth century, there were few if any private lawyers who had a significant, sustained Supreme Court practice. That began to change in the 1980s as veterans of the Solicitor General's office began to form their own private practices specializing in appellate and Supreme Court litigation.<sup>105</sup> Those specialized practices were, and mostly still are, housed within large law firms, though there are some small firms (and, increasingly, law school clinics) dedicated entirely to appellate and Supreme Court practice.<sup>106</sup>

By many accounts, this specialized private bar has reformed the Supreme Court's agenda by encouraging the Court to hear more cases of interest to the business community, and it has reshaped the law by obtaining numerous rulings in favor of its clients, which are often the largest corporations in the world.<sup>107</sup> As I show below, the elite bar also appears to have been successful at enticing the Supreme Court to hear more patent cases. Those lawyers' ultimate impact on the substance of patent law is, however, less clear, in part because decisions on the merits in patent cases often involve elite lawyers on both sides of the dispute.

#### A. *The Growth of the Elite Supreme Court Bar*

Figure 8 below presents empirical evidence showing how a small number of lawyers are increasingly dominating Supreme Court litigation generally. As that figure illustrates, the number of advocates who qualify as elite under this Article's definition (five or more arguments in the Term under review and the ten preceding Terms, combined) has steadily grown from 2002 through the present, from a low of fifty-three lawyers in 2003 to a high of eighty-one lawyers in 2016—an increase of 52.8%.<sup>108</sup>

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104 See *id.* at 19.

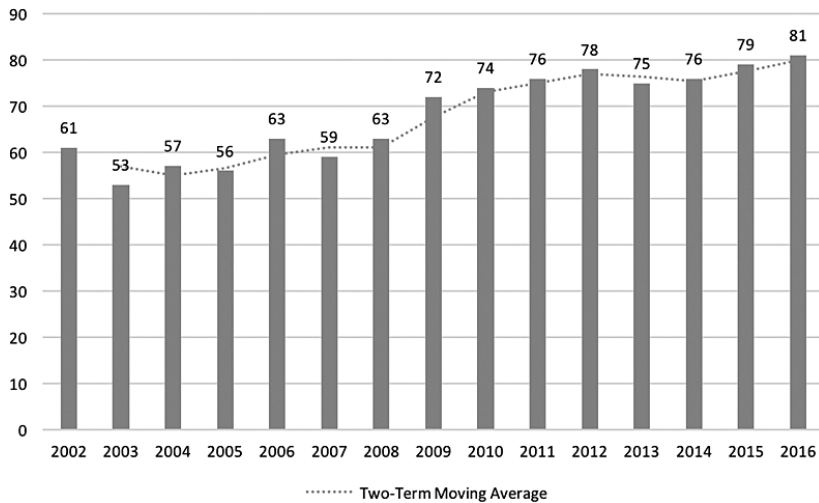
105 As Lazarus reports, this trend began in 1985 when Sidley Austin hired Rex Lee, President Reagan's first Solicitor General, to create a Supreme Court and appellate practice in the firm's D.C. office. Lazarus, *supra* note 17, at 1498. After Lee presented oral argument in a remarkable six cases in the 1986 Term, other firms quickly followed suit by hiring former Solicitors General Ken Starr (Kirkland & Ellis), Seth Waxman (Wilmer Cutler), Ted Olson (Gibson Dunn), and Drew Days (Morrison & Foerster), as well as Starr's Principal Deputy Solicitor General, John Roberts (Hogan & Hartson). *Id.* at 1498–500.

106 Well-known small firms dedicated to appellate and Supreme Court practice and staffed by elite Supreme Court lawyers include Kellogg, Hansen, Todd, Figel & Frederick (David Frederick, among others) and Goldstein & Russell (Tom Goldstein, among others). The most successful law school clinic focused on Supreme Court advocacy is at Stanford Law School and is directed by elite Supreme Court lawyers Jeff Fisher and Pam Karlan.

107 Lazarus, *supra* note 17, at 1490–91; accord Biskupic et al., *supra* note 16.

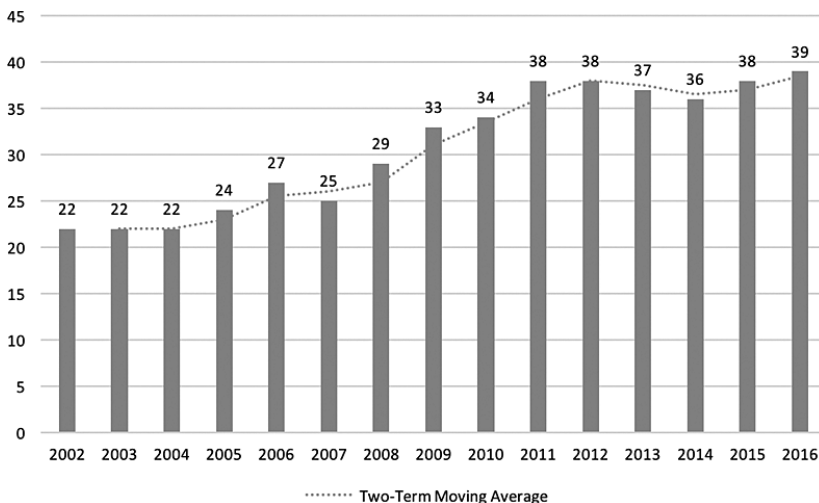
108 For another empirical analysis presenting evidence of increased specialization among Supreme Court advocates, see Tonja Jacobi & Matthew Sag, *The New Oral Argument: Justices as Advocates*, 94 NOTRE DAME L. REV. 1161, 1201 (2019) (showing a decline in the number of different advocates presenting oral argument at the Supreme Court starting in the mid-1980s).

FIGURE 8: NUMBER OF LAWYERS WITH FIVE OR MORE ORAL ARGUMENTS IN CURRENT AND TEN PRECEDING TERMS, OT2002 THROUGH OT2016



Of course, the Office of the Solicitor General has always provided a group of lawyers specializing in Supreme Court litigation, and many of those lawyers are captured on Figure 8. The growth of a dominating, elite *private* bar is more apparent if we amend the definition of elite and exclude arguments that a lawyer conducted while employed by the government. Under that definition, the number of advocates who qualify as elite has grown from twenty-two in 2002, 2003, and 2004 to thirty-nine in 2016—an increase of 77.3%, as depicted in Figure 9 below.

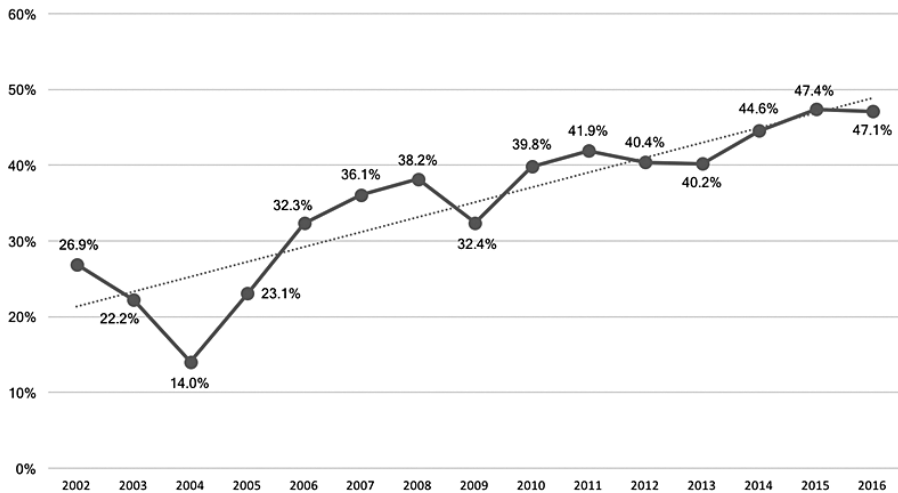
FIGURE 9: NUMBER OF LAWYERS WITH FIVE OR MORE ORAL ARGUMENTS IN CURRENT AND TEN PRECEDING TERMS, EXCLUDING CASES ARGUED AS A GOVERNMENT EMPLOYEE, OT2002 THROUGH OT2016



In the analysis that follows, I include *all* oral arguments in determining whether a lawyer qualifies as elite, on the rationale that a Supreme Court argument in *any* capacity helps the lawyer develop expertise and the reputation among the Justices and their law clerks that could influence the Court's decisionmaking.

Perhaps most revealing about the emergence of an elite private sector Supreme Court bar is Figure 10 below. It shows the percentage of all Supreme Court oral arguments that were delivered by elite advocates on a Term-by-Term basis, excluding arguments presented by attorneys employed by the government.<sup>109</sup> As that figure illustrates, as recently as 2005, less than a quarter of the private sector lawyers presenting oral argument at the Supreme Court met my definition of elite. A decade later, that proportion had doubled: in both the 2015 and 2016 Terms, 47% of all private sector lawyers presenting oral argument at the Supreme Court qualified as elite.<sup>110</sup>

FIGURE 10: PERCENTAGE OF NONGOVERNMENT LAWYERS PRESENTING ORAL ARGUMENT WHO QUALIFIED AS ELITE, OT2002 THROUGH OT2016



### B. The Supreme Court Bar in Patent Cases: At the Cert Stage

#### 1. Elites and the Growing Supreme Court Patent Docket

The transformation of the Supreme Court bar and the Court's docket raises the question of central relevance to this Article: Has the elite Supreme Court bar spurred the Court to hear more patent cases, too? Patent law

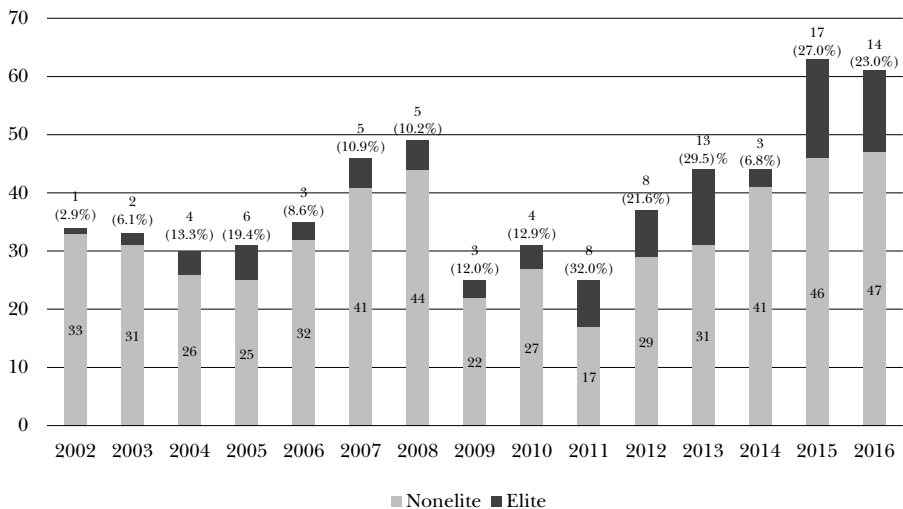
109 For example, lawyers in the Office of the Solicitor General, lawyers working in a state attorney general's office, city and county prosecutors, and state and federal public defenders.

110 A linear regression of the data underlying Figure 10 shows statistical significance ( $p < .001$ ) and a positive slope ( $\beta = .020$ ).

would certainly qualify as a topic of interest to the large corporations often represented by elite Supreme Court lawyers—at least more than other staples of the Supreme Court’s docket, such as criminal law, criminal procedure, habeas corpus, and civil rights litigation.

My data indicates that the elite Supreme Court bar has become increasingly involved in patent cases in recent years, most importantly, at the cert stage. Figure 11 below shows the proportion of cert petitions in Federal Circuit patent cases filed by elite advocates from 2002 through 2016.<sup>111</sup> As that figure illustrates, as recently as a decade ago, the number of patent petitions filed by elite advocates was small—rarely much more than 10% in any given Term. Of the 283 cert petitions filed in Federal Circuit patent cases from 2002 through 2009, only twenty-nine (10.2%) were filed by elite advocates. Since then, however, the elite bar’s involvement in patent cases has become more than twice as frequent. From 2010 through 2016, elite lawyers filed 67 of the 305 cert petitions in Federal Circuit patent cases (22.0%). This difference is statistically significant at the 1% level ( $p < .001$ ).

FIGURE 11: CERT PETITIONS IN FEDERAL CIRCUIT PATENT CASES FILED BY ELITE/NONELITE ADVOCATES, OT2002 THROUGH OT2016



The increase in the proportion of cert petitions filed by elite advocates neatly corresponds to the Supreme Court’s increased tendency to grant cert in patent cases, as discussed above and summarized on Table 4 below, which compares the percentage of cert petitions in Federal Circuit patent cases filed by elite lawyers with the Court’s grant rate in patent cases. Like the increased participation of elite lawyers, the Court’s increased proclivity to

<sup>111</sup> The analysis in this part of the Article excludes the one cert petition in my dataset that was filed by the Solicitor General (which the Court granted), *Kappos v. Hyatt*, 566 U.S. 431 (2012).

grant cert in patent cases is statistically significant at the 1% level ( $p = .009$ ).<sup>112</sup>

TABLE 4: CERT PETITIONS IN FEDERAL CIRCUIT PATENT CASES, OT2002 THROUGH OT2016

	% Filed by Elites	% Granted
2002–2009	10.2%	3.9%
2010–2016	22.0%	9.2%

The correlation between the increasing involvement of elite lawyers and the growth of the Supreme Court’s patent docket does not, of course, prove causation. Yet aspects of my data suggest that elite advocates have influenced the Court to hear more patent cases. As Table 5 below shows, from 2002 through 2016, the Supreme Court granted 15.6% of cert petitions filed by elite advocates in Federal Circuit patent cases as compared to only 4.7% of petitions filed by nonelites in Federal Circuit patent cases, another difference that is statistically significant at the 1% level ( $p = .005$ ).<sup>113</sup> Put slightly differently: the Supreme Court is 3.3 times more likely to grant cert when a petition in a Federal Circuit patent case is filed by an elite advocate as compared to a nonelite.<sup>114</sup>

TABLE 5: GRANT RATES ON CERT PETITIONS IN FEDERAL CIRCUIT PATENT CASES, OT2002 THROUGH OT2016

	Elite	Nonelite
Granted	15	23
Denied	81	469
% Granted	15.6%	4.7%

Another way of quantifying the success that elite lawyers have had in shaping the Supreme Court patent docket: From 2002 through 2016, cert petitions filed by elite lawyers accounted for 16.3% of the petitions filed in Federal Circuit patent cases, as one can calculate from Table 5 above and as illustrated on Figure 12 below. Yet, as Figure 13 indicates, petitions filed by elite lawyers accounted for nearly 40% of the petitions granted by the

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See *supra* Figure 2 and accompanying text for more detailed discussion of the data underlying Table 4.

113

The overall grant rate for Federal Circuit patent cases was 6.6%, as discussed above. See *supra* p. 1247.

114

Excluding the forty-three petitions in my dataset (all denied) that were filed pro se (even though some of those litigants appear to be lawyers themselves), elite lawyers still enjoy a grant rate over three times as large as nonelites (15.6% versus 5.1%), and the difference between elites and nonelites remains statistically significant at the 1% level ( $p = .008$ ).

Supreme Court in Federal Circuit patent cases (15 of 38). That difference is, again, statistically significant at the 1% level ( $p = .007$ ).

FIGURE 12: CERT PETITIONS *FILED* IN FEDERAL CIRCUIT PATENT CASES, OT2002 THROUGH OT2016

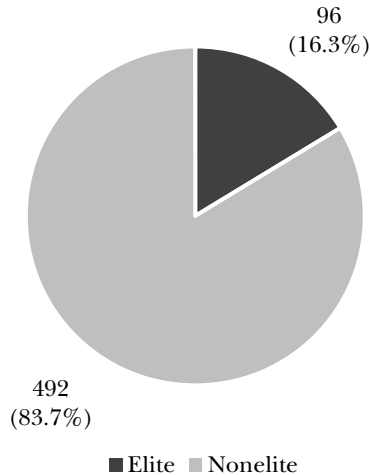
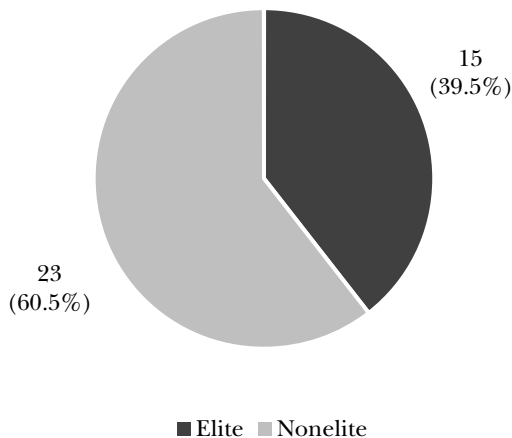


FIGURE 13: CERT PETITIONS *GRANTED* IN FEDERAL CIRCUIT PATENT CASES, OT2002 THROUGH OT2016



Of course, it is possible that causation may run the opposite direction from what I have suggested: that is, the Supreme Court may not be interested in patent cases because of elite lawyers; rather, elite lawyers may have gravitated toward patent cases because the Supreme Court became interested in patent law. But elite lawyers have been disproportionately involved in *granted* patent cases from the very beginning of the Supreme Court's recent surge of interest in the field. Of the eleven patent cases the Court granted



from 2002 through 2009, elite lawyers served as counsel of record on four, or 36.4%—roughly in line with the 39.5% figure reported on Figure 13 for the entire time period of my study. And although elite lawyers have become modestly more successful at obtaining cert over the years, the difference is slight and not statistically significant. From 2002 through 2009, the Court granted 4 of the 29 cert petitions in patent cases filed by elite lawyers (13.8%). From 2010 to 2016, the Court granted 11 of 67 (16.4%).<sup>115</sup> Moreover, in the 2002 and 2003 Terms—the two earliest Terms in my dataset and two of the five Terms in which the Court granted cert in zero patent cases—elite lawyers were noticeably absent from patent cases, filing only 3 of the 67 cert petitions in those Terms, or 4.5%—far below 16.3% rate of elite participation for the entire period of my study, as reported on Figure 12. In short, even if the Court’s increased interest in patent law has driven the elite bar to patent cases *in recent years*, this data suggests that the Court’s initial interest in patent law—particularly from 2004 through 2009—was linked to the new-found presence of elite lawyers in patent cases.

## 2. Elites and Amicus Briefs

As discussed above, cert petitions accompanied by amicus briefs are about eight times more likely to be granted than petitions filed without amicus briefs, and that general observation holds true for patent cases. Moreover, in patent cases, the sheer number of amicus briefs filed appears to have unusual importance. Thus, the ability to “wrangle” amicus briefs out of sympathetic parties—important in all types of Supreme Court litigation<sup>116</sup>—appears to have an even greater importance in patent cases.

The ability to recruit amici is, in fact, a key benefit of hiring elite Supreme Court counsel. As Allison Orr Larsen and Neal Devins note in their exploration of what they term the “amicus machine,” the notion that amicus briefs in Supreme Court cases are “organically developed by concerned interest groups” is outdated and incomplete.<sup>117</sup> Rather, Larsen and Devins explain, sophisticated, expert Supreme Court counsel actively recruit amici and coordinate their message to the Court.<sup>118</sup> Larsen and Devins highlight the role of the person they call the “amicus wrangler”: a lawyer who solicits supportive amicus briefs from sympathetic businesses or organizations—“much like a trial lawyer . . . selecting a roster of expert witnesses for trial.”<sup>119</sup> The amicus wrangler is sometimes the counsel of record, sometimes another lawyer on the team, but always a seasoned Supreme Court advocate in his or her own right.<sup>120</sup>

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115  $p = .743$ .

116 See Larsen & Devins, *supra* note 69, at 1919–20.

117 *Id.* at 1905–06.

118 *Id.* at 1906.

119 *Id.* at 1922.

120 See *id.* at 1922–24.

Perhaps not surprisingly, my data indicates that elite advocates' success at wrangling amicus briefs carries over to patent cases. As Table 6 below indicates, at least one cert-stage amicus brief was filed in 51.0% (49 of 96) of Federal Circuit patent cases in which the petitioner's counsel of record was an elite advocate, and two or more briefs were filed nearly a third of the time (in 31 of 96 cases, or 32.3%). (As Table 3 above indicated, the presence of two or more amicus briefs makes a cert petition in a patent case over five times more likely than average to be granted.)<sup>121</sup> By comparison, at least one amicus brief was filed in only 14.0% (69 of 492) of Federal Circuit patent cases in which the petitioner was not represented by elite counsel, and in only 7.5% of those cases (37 of 492) were more than two amicus briefs filed.<sup>122</sup>

Though elite counsel are significantly more likely to elicit (or, better, *solicit*) amicus briefs and to have their petitions granted, my data also indicates that a large number of amicus briefs can negate the advantage enjoyed by elite lawyers. Even the presence of one cert-stage amicus brief closes the gap between elite and nonelite grant rates substantially. As Table 6 below shows, of the 49 elite petitions accompanied by at least one amicus brief, the Court granted 13, or 26.5%. By contrast, of the 69 nonelite petitions accompanied by at least one amicus brief, the Court also granted 13, or 18.8%. That gap is much smaller than it is across all patent cases (a 15.6% grant rate for elites versus a 4.7% grant rate for nonelites), and it is not statistically significant ( $p = .335$ ).

Focusing on petitions accompanied by two or more amicus briefs, the elite bar's advantage almost entirely disappears (though the numbers begin to get small). From 2002 through 2016, the Court granted 34.4% (11 of 32) of petitions filed by elite advocates and accompanied by two or more amicus briefs. By comparison, the Court granted 32.4% (12 of 37) petitions filed by nonelites and accompanied by two or more amicus briefs.

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121 Specifically, the Court granted 33.3% of patent cert petitions accompanied by two or more amicus briefs (23 of 69) versus an overall grant rate of 6.6% in patent cases.

122 Both of these differences are statistically significant ( $p < .001$ ).

TABLE 6: CERT PETITIONS IN FEDERAL CIRCUIT PATENT CASES, OT2002 THROUGH OT2016: ELITES, NONELITES, AND AMICI

Petitions Filed by Elite Advocates			
	Total	With at Least One Amicus Brief	With Two or More Amicus Briefs
Filed	96	49	32
Granted	15	13	11
% Granted	15.6%	26.5%	34.4%

Petitions Filed by Nonelite Advocates			
	Total	With at Least One Amicus Brief	With Two or More Amicus Briefs
Filed	492	69	37
Granted	23	13	12
% Granted	4.7%	18.8%	32.4%

3. Elites and CVSGs

As discussed above, a CVSG order makes it over ten times more likely that the Supreme Court will grant cert across all types of cases. In Federal Circuit patent cases specifically, the effect of a CVSG is less pronounced, but still significant. From 2002 through 2016, the Court granted 46.7% (14 of 30) of Federal Circuit patent cases in which it issued a CVSG and the SG filed a brief—a little more than seven times higher than the overall patent-case grant rate of 6.6%.

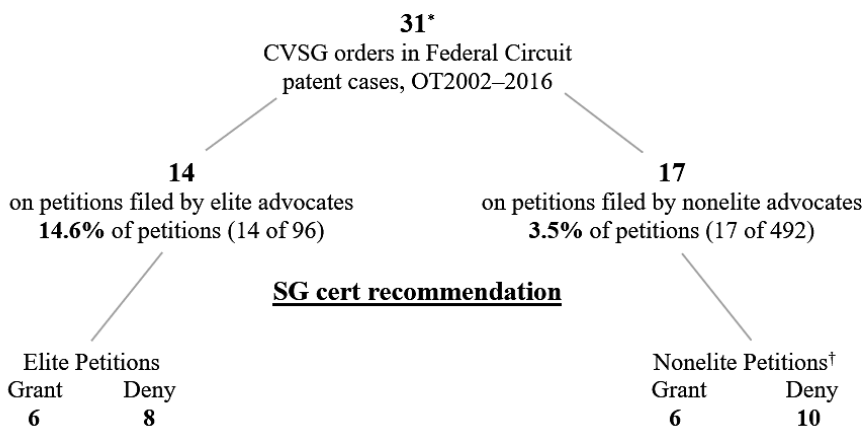
That leads to more potentially bad news for nonelite advocates: cert petitions filed by elite advocates in Federal Circuit patent cases are far more likely to elicit a CVSG than petitions filed by nonelites. As shown on Figure 14 below, the Court issued a CVSG on 14 of the 96 cert petitions filed by elite advocates in my dataset (14.6%) as compared to 17 of the 492 cert petitions filed by nonelites (3.5%), a difference that is statistically significant at the 1% level ( $p = .003$ ). (Elites’ advantage would be even higher if I included a fifteenth petition that obtained a CVSG but was voluntarily dismissed by the parties before the SG filed its brief.)<sup>123</sup>

Interestingly, though petitions filed by elite advocates are four times more likely to *elicit* a CVSG, the Solicitor General’s proclivity to recommend granting or denying cert is not significantly different for elite versus nonelite petitions. On petitions filed by elite advocates, the Solicitor General recommended granting cert in 6 of its 14 briefs; on petitions filed by nonelites, the Solicitor General recommended granting cert in 6 of 16 briefs. (One none-

123 *Maersk Drilling USA, Inc. v. Transocean Offshore Deepwater Drilling, Inc.*, 134 S. Ct. 2333 (2014) (mem.). As explained above, however, I exclude voluntary dismissals from my dataset of cert petitions in Federal Circuit cases. See *supra* note 40.

lite petition in my dataset of Federal Circuit cert petitions that obtained a CVSG was denied before the SG filed its brief.)<sup>124</sup>

FIGURE 14: CVSG ORDERS AND SOLICITOR GENERAL RECOMMENDATIONS ON CERT PETITIONS IN FEDERAL CIRCUIT PATENT CASES, OT2002 THROUGH OT2016



\* Excludes (an elite) petition voluntarily dismissed before the SG filed its brief

† The Court denied one (nonelite) petition before the SG filed its brief

Though these are small numbers, they have at least two possible implications. First, they suggest that the Solicitor General's recommendation is unaffected by the identity of the lawyer on the cert petition. This is important because many members of the elite Supreme Court bar formerly worked in the Office of the Solicitor General. It would therefore not have been surprising to find that lawyers in that office are more inclined to recommend a grant when a petition is filed by a former colleague than when it is filed by an unfamiliar lawyer. My data suggests, however, that any concern about a revolving door or capture is trumped by other considerations—perhaps most notably the office's oft-stated desire to preserve its reputation with the Justices as a neutral voice about the desirability of review.<sup>125</sup> A second possibility is that, despite the disparity in the frequency of CVSGs in cases filed by elites versus nonelites, the Court is doing a relatively good job at identifying cases that are at least plausibly worthy of review. Hence, the Solicitor Gen-

124 *Apotex Inc. v. Pfizer, Inc.*, 549 U.S. 970 (2006) (mem.) (denying cert after the respondent filed a suggestion of mootness, over the opposition of the petitioner).

125 See, e.g., Rex E. Lee, *Lawyer for the Government: Politics, Polemics & Principle*, 47 OHIO ST. L.J. 595, 597 (1986) ("[T]here is a widely held, and I believe substantially accurate, impression that the Solicitor General's office provides the Court from one administration to another—and largely without regard to either the political party or the personality of the particular Solicitor General—with advocacy which is more objective, more dispassionate, more competent, and more respectful of the Court as an institution than it gets from any other lawyer or group of lawyers.").

eral recommends a grant in roughly the same proportion of CVSG cases regardless of whether the petition is filed by an elite or nonelite.

*C. The Supreme Court Bar in Patent Cases: On the Merits, Briefly*

By many accounts, Supreme Court patent law has taken a decidedly “antipatent” turn over the past two decades.<sup>126</sup> On first blush, it is tempting to attribute that development to the elite Supreme Court bar. My data indicates that elite lawyers disproportionately seek review on behalf of accused infringers (as opposed to patentees), who would stand to benefit from caselaw that makes it easier to challenge patent validity and to defeat a claim of infringement. Of the 38 cert petitions in my dataset that were filed by private parties and that the Court granted, 26 (68.4%) were filed by an accused infringer, as compared to only 12 that were filed by a patentee or patent applicant. But 80% of the granted petitions filed by elite lawyers (12 of 15) were on behalf of accused infringers. Nonelite lawyers, by contrast, represented accused infringers only 60.9% of the time (in 14 of 23 cases). That difference, however, is not statistically significant ( $p = .208$ ).

Moreover, elite lawyers’ disproportionate success at obtaining review does not translate to disproportionate success on the merits. Part of the reason is that the merits stage of Supreme Court patent cases not infrequently involves elite lawyers on both sides. As Table 7 below indicates, 13 of the 41 patent-related cases that were orally argued from 2002 through 2017<sup>127</sup> (31.7%) featured elite advocates on both sides—either conducting oral argument, as counsel of record on the primary merits brief, or both.<sup>128</sup> Another

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126 See, e.g., Gregory N. Mandel, *Institutional Fracture in Intellectual Property Law: The Supreme Court Versus Congress*, 102 MINN. L. REV. 803, 808, 811–12 (2017) (finding that 23 of the 29 Supreme Court patent decisions from the 2002 Term through the 2015 Term “substantively affected patentee rights in a measurable direction” and that 18 of those 23 decisions “weakened patent protection”). But cf. Timothy R. Holbrook, *The Supreme Court’s Quiet Revolution in Induced Patent Infringement*, 91 NOTRE DAME L. REV. 1007, 1009 & n.8 (2016) (noting that several recent Supreme Court decisions on induced infringement “have favored the patent owner for the most part” and citing additional examples of “pro-patent rulings”).

127 The total number of orally argued cases in this Section is different than the number of Federal Circuit cert petitions granted (discussed elsewhere in this Article) for several reasons. First, I include the case in which the cert petition was filed by the Solicitor General, see *supra* note 111, when discussing merits cases. Second, two pairs of Federal Circuit cases in my dataset were argued in tandem at the Supreme Court by the same lawyers, and each pair was decided in a single opinion: *Sandoz Inc. v. Amgen Inc.*, 137 S. Ct. 1664 (2017) (consolidated with *Amgen Inc. v. Sandoz Inc.*, No. 15-1195); and *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 136 S. Ct. 1923 (2016) (consolidated with *Stryker Corp. v. Zimmer, Inc.*, No. 14-1520). I treat each pair as a single case in this Section. Third, I include in my discussion of merits cases the three patent-related cases that the Court decided from 2002 through 2017 that originated outside of the Federal Circuit. See *supra* note 64. Finally, I include a case in which the cert petition was granted and the case was decided in the 2017 Term. *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129 (2018).

128 For this Section, I treat elite advocates in private practice separately from elite advocates in the Office of the Solicitor General.

10 cases (24.4%) featured nonelite advocates on both sides. Five cases featured nonelite advocates squaring off against lawyers from the Office of the Solicitor General, with the SG’s lawyers winning three times, and the private advocate winning twice. In only 13 of 41 cases (31.7%) did an elite advocate square off against a nonelite. Nonelite advocates actually enjoyed a slight edge in those cases, prevailing 7 out of 13 times.

TABLE 7: ELITE AND NONELITE ADVOCATES IN SUPREME COURT PATENT CASES  
HEARD ON THE MERITS, OT2002 THROUGH OT2017

	Cases	Wins
Elite v. Elite	13	–
Nonelite v. Nonelite	10	–
Elite v. Nonelite	13	Elite 6, Nonelite 7
Nonelite v. Solicitor General	5	Nonelite 2, SG 3

Prior studies examining whether experience as a Supreme Court litigator translates into favorable results on the merits have reached mixed results.<sup>129</sup> My findings are consistent with that ambiguity.

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The Supreme Court bar has arrived at the bar of patents. The increasing proportion of cert petitions in patent cases filed by elite advocates neatly corresponds with the growing number of patent cases being decided by the Supreme Court on the merits. Though elite advocates seem to have helped reshape the Court’s agenda in patent law, it is not clear that they are responsible for changing the substance of patent law in any consistent way.

IV. LIMITATIONS, IMPLICATIONS, AND NEXT STEPS

It bears repeating that the correlation between elite lawyers’ increasing participation in Supreme Court patent cases and the Supreme Court’s growing patent docket suggests but does not prove causation. As noted in the Introduction, many factors have likely played a role in spurring the Court to hear more patent cases.<sup>130</sup> The main objective of this Article has been to inject an *additional* consideration into the discussion: the identity of the lawyers seeking Supreme Court review.

129 Compare Andrea McAtee & Kevin T. McGuire, *Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme Court?*, 41 LAW & SOC’Y REV. 259, 275 (2007) (finding that experienced Supreme Court litigators win more frequently than novices in cases without strong ideological valence), with Ryan C. Black & Ryan J. Owens, *The Success of Former Solicitors General in Private Practice: Costly and Unnecessary?*, 2016 MICH. ST. L. REV. 325, 327 (finding that the Court is no more likely to rule in favor of an attorney who formerly worked in the Office of the Solicitor General than an attorney with a similar level of experience who did not work in that office).

130 See *supra* notes 7–15 and accompanying text.

The elite bar's involvement in patent cases may, in fact, be inextricably intertwined with the other factors causing the Court's patent docket to grow, creating a sort of "chicken or egg" problem. For instance, the major spike in Supreme Court patent decisions began in the 2010 Term,<sup>131</sup> the Term during which Congress passed the America Invents Act<sup>132</sup>—the most significant revision to the patent laws in over half a century. The Act, as noted, has provided the basis for several recent Supreme Court decisions and numerous cert petitions.<sup>133</sup> Yet the Act was itself a response to the increasing quantity and prominence of patent litigation,<sup>134</sup> as reflected in the fourteen Supreme Court patent decisions in the decade preceding the Act—many of which were handled by elite lawyers.<sup>135</sup>

There is also an endogeneity concern in trying to draw a causal link between the presence of elite advocates and the Supreme Court's increased tendency to grant cert in patent cases. Parties who think they have a good chance of obtaining cert might be more willing to pay the high fees of an elite lawyer,<sup>136</sup> and the parties who can afford to hire an elite lawyer (mostly large corporations) might be those most likely to attract the Court's attention in the first place.<sup>137</sup> Relatedly, an elite lawyer might be more willing to take a case (perhaps even without a fee)<sup>138</sup> if the lawyer thinks the case has a strong chance of obtaining cert. In short, it could be that the substance of the cases is dispositive; elite lawyers just end up being associated with the cases that are most cert worthy.

Yet there remain good reasons to think that having an elite lawyer makes a difference to the Court's decisionmaking at the cert stage, even if it is not the only factor. For starters, the data above illustrates that elite lawyers are remarkably able at obtaining amicus support for their cert petitions. The fact that elite lawyers' advantage in obtaining cert largely disappears when we

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131 See *supra* Figure 1.

132 Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified as amended in scattered sections of 35 U.S.C.).

133 See *supra* notes 14–15 and accompanying text.

134 See H.R. REP. NO. 112-98, at 39 (2011) ("[T]he need to modernize our patent laws has found expression in the courts, as well. The Supreme Court has reversed the Federal Circuit in six of the patent-related cases that it has heard since the beginning of the 109th Congress.").

135 Specifically, five of the fourteen granted petitions in patent cases from 2004 through 2010, or 35.7%, featured elite advocates as counsel of record, only slightly below the 39.5% rate of elite representation on all granted patent petitions in my study. See *supra* Figure 13.

136 See David Lat, *Top Supreme Court Advocates Charge How Much Per Hour?*, ABOVE L. (Aug. 10, 2015), <https://abovethelaw.com/2015/08/top-supreme-court-advocates-charge-how-much-per-hour>.

137 See Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAG. (Mar. 16, 2008), <https://www.nytimes.com/2008/03/16/magazine/16supreme-t.html>.

138 See Lazarus, *supra* note 17, at 1557 (noting that Supreme Court advocates often take cases pro bono or for reduced fees because "they bolster the attorney's overall credentials as a Supreme Court practitioner for those cases that *do* have the potential for generating significant fees").

examine only petitions accompanied by amicus briefs<sup>139</sup> suggests that elite lawyers' exceptional ability to wrangle amicus support may be the most important explanation for their disproportionate success in obtaining cert in patent cases.

Moreover, there have been several situations in which the Court has passed on issues when presented by nonelites but then granted the same issue when presented by an elite. For example, over the course of more than a decade, the Court received numerous petitions seeking review of Federal Circuit precedent holding that patent claim construction is a pure question of law subject to de novo review on appeal.<sup>140</sup> The Court finally granted review on that issue (and overturned the Federal Circuit's precedent) in a case in which petitioner's counsel of record was a member of the elite.<sup>141</sup> Similarly, over roughly the same time period, the Court received many petitions involving the scope and applicability of the statutory presumption of patent validity found in 35 U.S.C. § 282,<sup>142</sup> which the Federal Circuit had long held required a patent challenger to prove invalidity by clear and convincing evidence.<sup>143</sup> The Court denied all of those petitions, but, in 2010, it granted a petition—filed by an elite lawyer—that broadly presented the question of whether § 282 carries with it a clear and convincing standard of proof.<sup>144</sup> Despite that decision at the cert stage in favor of an elite lawyer, the Court ultimately affirmed the Federal Circuit's precedent<sup>145</sup> (a somewhat unusual outcome).<sup>146</sup> And during the late 1990s and early 2000s the Court received several petitions challenging Federal Circuit case law that had rendered the patent-eligible subject matter requirement effectively a dead letter.<sup>147</sup> But the Court refrained from granting cert on that issue until 2005, when it granted a petition filed by an elite lawyer that did not even explicitly

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139 See *supra* Table 6.

140 See, e.g., *Petition for Writ of Certiorari, Memorex Prods. Inc. v. SanDisk Corp.*, 546 U.S. 1076 (2005) (mem.) (No. 05-546), 2005 WL 2508049.

141 *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 835 (2015); see also *Petition for a Writ of Certiorari, Teva*, 135 S. Ct. 831 (No. 13-854), 2014 WL 230926 (William Jay).

142 35 U.S.C. § 282(a) (2012) ("A patent shall be presumed valid. . . . The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.").

143 See, e.g., *Petition for a Writ of Certiorari at i, Ga.-Pac. Corp. v. U.S. Gypsum Co.*, 531 U.S. 816 (2000) (mem.) (No. 99-1882), 2000 WL 34013891 (presenting the question of whether the clear and convincing evidence standard applied to the defense of obviousness-type double patenting).

144 See *Petition for a Writ of Certiorari at i, Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91 (2011) (No. 10-290), 2010 WL 3413088 (Tom Hungar).

145 *i4i*, 564 U.S. at 95.

146 Timothy B. Dyk, *Thoughts on the Relationship Between the Supreme Court and the Federal Circuit*, 16 CHL-KENT. J. INTELL. PROP. 67, 72 (2016) (reporting that the Supreme Court reversed or vacated seventy percent of Federal Circuit decisions reviewed on the merits from OT2006 through OT2015).

147 See, e.g., *Petition for a Writ of Certiorari at i, 16, Excel Commc'ns, Inc. v. AT&T Corp.*, 528 U.S. 946 (1999) (mem.) (No. 99-95), 1999 WL 33640012.



raise an eligibility argument<sup>148</sup> and over the Solicitor General's recommendation to deny.<sup>149</sup> (The SG was ultimately vindicated when the Court dismissed the petition as improvidently granted.)<sup>150</sup>

In addition, although the Court has frequently passed on issues that it ultimately reviewed at the urging of an elite lawyer, the Court has in other circumstances quickly granted somewhat esoteric issues pressed by elite lawyers in the first instance. For example, in a span of eighteen months from 2016 to 2018, the Court granted cert in two cases involving patent infringement under 35 U.S.C. § 271(f)—a relatively obscure provision making it illegal to sell components of patented inventions to be assembled outside the United States.<sup>151</sup> Petitioner's counsel of record in both cases qualified as elite.<sup>152</sup>

There are, to be sure, other case examples suggesting that elite lawyering is not as important as my analysis indicates. For instance, in the 2016 Term, the Court in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC* granted a cert petition, filed by a lawyer who did not qualify as elite, challenging the constitutionality of the new postissuance review proceedings created by the America Invents Act<sup>153</sup>—and that was after denying a petition presenting the same issue filed by a lawyer who plainly qualifies as elite<sup>154</sup> and who wrangled significant amicus support.<sup>155</sup> Similarly, in 2005, the Court granted certiorari in *KSR International Co. v. Teleflex, Inc.*, on a petition filed by a law-

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148 See Petition for a Writ of Certiorari, *Lab. Corp. of Am. Holdings v. Metabolite Labs., Inc.*, 548 U.S. 124 (2006) (mem.) (per curiam) (No. 04-607), 2004 WL 2505526 (Jonathan Franklin).

149 See Brief for the United States as Amicus Curiae at 1, *Lab. Corp.*, 548 U.S. 124 (No. 04-607), 2005 WL 2072283.

150 *Lab. Corp.*, 548 U.S. at 125.

151 *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2136 (2018); *Life Techs. Corp. v. Promega Corp.*, 137 S. Ct. 734, 737 (2017).

152 See Petition for a Writ of Certiorari, *WesternGeco*, 138 S. Ct. 2129 (No. 16-1011), 2017 WL 678358 (Paul Clement); Petition for a Writ of Certiorari, *Life Techs.*, 137 S. Ct. 734 (No. 14-1538), 2015 WL 3941490 (Carter Phillips). For another relatively recent Supreme Court case on § 271(f) in which the petition was, again, filed by an elite lawyer, see *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 441 (2007); and see also Petition for a Writ of Certiorari, *AT&T*, 550 U.S. 437 (No. 05-1056), 2006 WL 403897 (Ted Olson). Cases arising under § 271(f), it should be noted, almost inevitably involve the potential for extra-territorial application of a federal statute—an issue that might capture the Court's attention regardless of the underlying area of substantive law. Cf. Narechania, *supra* note 9, at 1376–80 (documenting the Supreme Court's proclivity to grant cert when “a patent-specific rule stands at odds with the approach employed in nearly every other substantive field,” citing *AT&T* as an example).

153 Petition for a Writ of Certiorari at i, *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365 (2018) (No. 16-712), 2016 WL 6995217 (Allyson Ho); see also *Oil States*, 138 S. Ct. at 1370 (holding that the proceedings violate neither Article III nor the Seventh Amendment).

154 See *MCM Portfolio LLC v. Hewlett-Packard Co.*, 137 S. Ct. 292 (2016) (mem.) (denying cert); Petition for a Writ of Certiorari at i, *MCM Portfolio* 137 S. Ct. 292 (No. 15-1330), 2016 WL 1729988 (Tom Goldstein).

155 Eight cert-stage amicus briefs were filed in the *MCM Portfolio* case.

yer who did not qualify as elite, to review the “teaching, suggestion, or motivation” requirement adopted by the Federal Circuit for proving obviousness<sup>156</sup>—an issue that had been presented in cert petitions several times previously (though not, as far as I can tell, by an elite lawyer).<sup>157</sup>

That said, even in cases such as *Oil States* and *KSR*, traces of elite lawyer effects can be found. Most notably, the counsel of record in both cases had previously argued before the Court—just not frequently enough to qualify as elite under the definition I use in this Article.<sup>158</sup> Both petitions also featured former Supreme Court clerks on their covers.<sup>159</sup> Moreover, the petition in *KSR* enjoyed significant amicus support: three amicus briefs were filed at the cert stage—a fact that, as discussed above, correlates with a grant rate that is four to five times greater than average.<sup>160</sup>

In future work, I plan to at least partially untangle these causal threads by coding the roughly six hundred Federal Circuit cert petitions in my dataset for the substantive question presented. This will allow for more systematic examination of the various questions presented to the Supreme Court and help in isolating the impact of elite lawyers. I also intend to code the petitions for other information that is potentially relevant to the Supreme Court’s decision to grant or deny cert, such as the mode of disposition in the Federal Circuit (precedential opinion, nonprecedential opinion, or affirmance without opinion under Federal Circuit Rule 36),<sup>161</sup> whether there were separate opinions (concurrences or dissents) at the Federal Circuit,<sup>162</sup> and the date of the conference at which the Supreme Court considered the petition.<sup>163</sup> Finally, I intend to create a more granular metric of

156 Petition for a Writ of Certiorari at i, *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007) (No. 04-1350), 2005 WL 835463 (James Dabney); see also *KSR*, 550 U.S. at 407 (rejecting the Federal Circuit’s caselaw).

157 See, e.g., Petition for a Writ of Certiorari at i, 13, *Medinol Ltd. v. Johnson & Johnson*, 543 U.S. 814 (2004) (mem.) (No. 03-1590), 2004 WL 1174638; Petition for a Writ of Certiorari at i, 2, *S. Cal. Edison Co. v. Ecolochem, Inc.*, 532 U.S. 974 (2001) (mem.) (No. 00-1426), 2001 WL 34124948.

158 See *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1202 (2015) (Ho); *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 930 (2015) (Ho); *Holmes Grp., Inc. v. Vornado Air Circulation Sys.*, 535 U.S. 826, 827 (2002) (Dabney).

159 Allyson Ho, counsel of record in *Oil States*, was a clerk to Justice O’Connor. And the petition in *KSR* included as counsel John Duffy, a former clerk to Justice Scalia.

160 See *supra* Table 3 (reporting a 29.4% grant rate for patent cases in which three amicus briefs were filed at the cert stage, as compared to a 6.6% grant rate in patent cases overall).

161 See Paul R. Gugliuzza & Mark A. Lemley, *Can a Court Change the Law by Saying Nothing?*, 71 VAND. L. REV. 765, 767–68 (2018) (observing that the Federal Circuit could use Rule 36 to detract attention from particular decisions).

162 See, e.g., Duffy, *supra* note 4, at 318–19 (suggesting that the Federal Circuit’s divided en banc vote in *Warner-Jenkinson* and the accompanying opinions “signaled the importance of the case to the [Supreme] Court” and “also provided a menu of alternative positions”).

163 See Margaret Meriwether Cordray & Richard Cordray, *The Calendar of the Justices: How the Supreme Court’s Timing Affects Its Decisionmaking*, 36 ARIZ. ST. L.J. 183, 204 (2004) (finding that the Court grants a higher percentage of cert petitions in October (after the

each lawyer's experience before the Supreme Court, taking into account factors such as the number of arguments the lawyer has presented before the Court (as the discussion of *Oil States* and *KSR* indicates, even one prior argument probably has a positive effect on the lawyer's ability to obtain cert), whether the lawyer is a former Supreme Court clerk, and whether the lawyer formerly worked in the Solicitor General's office. All of those data points will shed light on the question of whether it is particular lawyers who are driving the Supreme Court's interest in patent law, turning relatively mundane cases into Supreme Court blockbusters, or whether seasoned Supreme Court advocates are simply ending up on cases that are already strong candidates for cert.

Despite the work that remains to be done, this Article's analysis still significantly advances our understanding of the agenda-setting process in Supreme Court patent cases. To recap, its main findings are as follows: First, the Supreme Court is increasingly inclined to grant cert in patent cases as compared to all types of cases and as compared to the Court's historical practice in patent cases. Second, at the same time the Court has become more inclined to grant cert in patent cases, elite advocates have become more involved in patent litigation at the cert stage. Third, in patent cases, the Court is far more likely to grant a cert petition filed by an elite advocate as compared to the average petition. Finally, factors strongly correlated with the likelihood of a cert grant in all types of cases, such as orders calling for the views of the Solicitor General and a large number of cert-stage amicus briefs, appear to play an outsized role in patent cases.

The elite bar's remarkable success at obtaining cert in patent cases, coupled with the seeming importance of the Solicitor General's views and the number of amicus briefs, suggests that the Court relies heavily on heuristics in deciding whether to grant cert in a patent dispute.<sup>164</sup> This is perhaps to be expected given that patent law can be complex and unfamiliar to the law clerks who sift through cert petitions, particularly when coupled with the lack of circuit splits. But the reliance on heuristics raises the risk that the patent cases decided by the Supreme Court—though substantial in number—will not involve the issues of legal doctrine on which Supreme Court input would be most useful. I noted above the two decisions in two years on § 271(f)—a statutory provision implicated in only a fraction of patent infringement cases. Likewise, numerous commentators have criticized the Court's recent decisions on patent-eligible subject matter under § 101 of the Patent Act, arguing that the Court has improperly imported into that doctrine considerations of inventiveness and patent scope that are already addressed by § 102's novelty requirement, § 103's nonobviousness requirement, and § 112's disclosure

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Court disposes of the large number of petitions that have accumulated during the summer recess), November, January, and June).

164 For a more in-depth discussion of the indices, signals, and cues the Court uses to cope with its enormous cert-stage workload, see PERRY, *supra* note 21, 113–39.

requirements.<sup>165</sup> Yet the Court has heard more cases on eligibility in the past decade (four)<sup>166</sup> than it has on all of those other patentability requirements combined (two).<sup>167</sup> Why the fixation on eligibility? One possibility is that eligibility disputes are magnets for amicus briefs: eligibility cases represent four of the nine patent cases with the most cert-stage amicus briefs filed in my dataset.<sup>168</sup>

All that said, the increasing involvement of the elite Supreme Court bar in patent litigation is not necessarily a bad thing. In recent decades, a large amount of patent scholarship has criticized the work of the Federal Circuit, contending that the court has succumbed to pathologies, such as capture and tunnel vision, often associated with specialized courts.<sup>169</sup> Because the lawyers who comprise the elite Supreme Court bar are not patent law specialists, they could counteract any tendency by the Federal Circuit to favor patentees and to encourage patent litigation.<sup>170</sup> Moreover, because Supreme Court patent cases often involve elite lawyers on both sides,<sup>171</sup> the quality of advocacy should be high and enable the Court to make well-informed decisions in what can sometimes be a complex and arcane area of law. In the

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165 For a summary of those critiques, see John M. Golden, *Redundancy: When Law Repeats Itself*, 94 TEX. L. REV. 629, 703 (2016). For the record, in prior work, I have challenged the notion that the Supreme Court's reinvigoration of the eligibility requirement is a negative development. See Paul R. Gugliuzza, *Quick Decisions in Patent Cases*, 106 GEO. L.J. 619, 655 (2018).

166 *Alice Corp. v. CLS Bank Int'l*, 134 S. Ct. 2347, 2352 (2014); *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 580 (2013); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 72 (2012); *Bilski v. Kappos*, 561 U.S. 593, 599–601 (2010).

167 *Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, 139 S. Ct. 628, 630 (2019) (§ 102); *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120 (2014) (§ 112). The Court's last § 103 decision was in 2007, see *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398, 407 (2007), despite numerous intervening Federal Circuit decisions that appear to be in tension with Supreme Court caselaw. See Paul R. Gugliuzza, *How Much Has the Supreme Court Changed Patent Law?*, 16 CHI.-KENT J. INTELL. PROP. 330, 346–47 (2017) (citing examples).

168 Specifically, seven cert-stage amicus briefs were filed in *Myriad*, nine in *Bilski*, and eleven in *Alice*. This Article's analysis of the importance of amicus briefs makes it all the more remarkable that the Court denied cert—without even calling for the views of the Solicitor General—in *Sequenom, Inc. v. Ariosa Diagnostics, Inc.*, 136 S. Ct. 2511 (2016) (mem.), a case in which twenty-two cert-stage amicus briefs were filed—the most of any patent case in my dataset by far. See *supra* Table 3.

169 See, e.g., J. Jonas Anderson, *Patent Dialogue*, 92 N.C. L. REV. 1049, 1097 (2014); Michael J. Burstein, *Rules for Patents*, 52 WM. & MARY L. REV. 1747, 1797 (2011); Nard & Duffy, *supra* note 7, at 1622; Rai, *supra* note 7, at 1099.

170 See generally Paul R. Gugliuzza, *Saving the Federal Circuit*, 13 CHI.-KENT J. INTELL. PROP. 350, 373–74 (2014) (discussing the possibility of interest group capture of the Federal Circuit and contending that the court is not necessarily “pro-patent,” as critics often suggest, but “pro-patent lawyer” because it shapes patent doctrine to encourage companies to actively obtain patents and to encourage both plaintiffs and defendants to vigorously litigate infringement disputes).

171 See *supra* Table 7.

end, because the elite bar's involvement in patent litigation is a relatively recent development, it may be too early to decide whether it is to be lamented or praised.<sup>172</sup>

### CONCLUSION

The Supreme Court's return to the bar of patents is one of the most significant events in intellectual property law in the past two decades. This Article has linked that development to the activity of a small group of lawyers working at the country's most prestigious law firms. At present, the elite bar's dominance of Supreme Court litigation shows no sign of abating.<sup>173</sup> And so the Supreme Court has, in all likelihood, not only returned to the bar of patents—it has pulled up a chair.

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172 In a companion piece to this Article, prepared for a law review symposium on *Administering Patent Law*, I explore in more detail the normative implications of having a small, relatively homogeneous group of lawyers play such a large role in shaping patent doctrine. See Paul R. Gugliuzza, *Elite Patent Law*, Essay, 104 IOWA L. REV. 2481, 2497–2507 (2019). I also present the results of an empirical study showing that elite Supreme Court lawyers are increasingly involved in patent cases at the Federal Circuit level, too, casting doubt on the conventional wisdom that the practice of patent law is limited to specialized lawyers with backgrounds in the hard sciences. See *id.* at 2491–97.

173 See Jacqueline Bell, *The Firms That Won Big at the Supreme Court*, LAW360 (July 1, 2018), <https://www.law360.com/articles/1057730/the-firms-that-won-big-at-the-supreme-court> (noting that lawyers from eight different law firms argued three or more Supreme Court cases in the 2017 Term).

APPENDIX  
TABLE A1: PAID CERT PETITIONS IN FEDERAL CIRCUIT CASES,  
PATENT VERSUS NONPATENT, OT2002 THROUGH  
OT2016 (INCLUDING GVR'D CASES)

Term	Patent	Nonpatent	Total	% Patent	% Nonpatent
2002	37	40	77	48.1%	51.9%
2003	33	46	79	41.8%	58.2%
2004	30	44	74	40.5%	59.5%
2005	31	36	67	46.3%	53.7%
2006	36	46	82	43.9%	56.1%
2007	46	39	85	54.1%	45.9%
2008	49	33	82	59.8%	40.2%
2009	27	42	69	39.1%	60.9%
2010	33	34	67	49.3%	50.7%
2011	27	32	59	45.8%	54.2%
2012	39	25	64	60.9%	39.1%
2013	48	33	81	59.3%	40.7%
2014	49	40	89	55.1%	44.9%
2015	67	28	95	70.5%	29.5%
2016	65	33	98	66.3%	33.7%
<b>Total</b>	<b>617</b>	<b>551</b>	<b>1168</b>	<b>52.8%</b>	<b>47.2%</b>

TABLE A2: CERT-STAGE AMICUS BRIEFS FILED IN ALL SUPREME COURT CASES  
(PAID PETITIONS ONLY), OT2002

Amicus Briefs Filed	Total	Denied	Granted	% Granted
0	1595	1554	41	2.6%
1	93	79	14	15.1%
2	24	17	7	29.2%
3	14	10	4	28.6%
4	10	5	5	50.0%
5	4	2	2	50.0%
6	1	1	0	0.0%
8	1	1	0	0.0%
9	1	0	1	100.0%
0 or 1	1718	1663	55	3.2%
2 to 4	48	32	16	33.3%
5 or more	7	4	3	42.9%

TABLE A3: CERT-STAGE AMICUS BRIEFS FILED IN ALL SUPREME COURT CASES  
(PAID PETITIONS ONLY), OT2010

Amicus Briefs Filed	Total	Denied	Granted	% Granted
0	1305	1277	28	2.1%
1	87	72	15	17.2%
2	34	29	5	14.7%
3	28	23	5	17.9%
4	7	5	2	28.6%
5	7	5	2	28.6%
6	2	2	0	0.0%
7	3	3	0	0.0%
9	1	0	1	100.0%
10	1	1	0	0.0%
11	1	0	1	100.0%
14	1	0	1	100.0%
0 or 1	1392	1349	43	3.1%
2 to 4	69	57	12	17.4%
5 or more	16	11	5	31.3%

TABLE A4: CERT-STAGE AMICUS BRIEFS FILED IN ALL SUPREME COURT CASES  
(PAID PETITIONS ONLY), OT2016

Amicus Briefs Filed	Total	Denied	Granted	% Granted
0	1290	1262	28	2.2%
1	115	99	16	13.9%
2	54	45	9	16.7%
3	31	28	3	9.7%
4	21	15	6	28.6%
5	7	4	3	42.9%
6	3	3	0	0.0%
7	6	4	2	33.3%
8	4	2	2	50.0%
9	1	1	0	0.0%
10	1	0	1	100.0%
14	1	0	1	100.0%
0 or 1	1405	1361	44	3.1%
2 to 4	106	88	18	17.1%
5 or more	23	14	9	39.1%

