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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 case law 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 the 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 cert.-worthiness. 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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INTRODUCTION

On May 28, 2002, the Supreme Court decided a case with the inimitable caption of *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.* 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”—concepts the Court had tackled only five Terms earlier in *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.* 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.”

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\(^4\)) through 2004, the Court has decided 40 patent cases since 2005—an average of over three per Term.\(^5\)

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 semi-specialized 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.\(^6\) 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”\(^7\)—rulings (usually by the Federal Circuit) that exempt patent law from transsubstantive principles of jurisdiction, procedure, remedies, and extraterritoriality that govern in other areas of federal litigation.\(^8\) 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.\(^9\) More simply, the Court’s large docket of patent cases could reflect the

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5 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; see also infra fig. 1.


8 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, 1603 (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.”). For a more general analysis of inter-field 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”).

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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. 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, 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, has provided the impetus for several recent Supreme Court decisions in patent cases, and disputes involving the AIA will likely populate the Court’s docket for the foreseeable future.

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

14 See, e.g., Return Mail, Inc. v. U.S. Postal Serv., 139 S. Ct. 397 (2018) (granting cert. on the question of whether the federal government is a “person” who may challenge patent validity in the new administrative proceedings created by the AIA).
16 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, Friends of the Court: Evaluating the Supreme Court’s Amicus Invitations, 101 CORNELL L. REV. 1533, 1541 (2016) (noting that “the expertise 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).
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\(^{17}\)—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 past seven Terms, a small group of lawyers—no more than 30 strong and headed by well-known generalist appellate litigators such as Carter Phillips, Paul Clement, Seth Waxman, and Tom Goldstein—have 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 though 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 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 the article by discussing some limitations of the data that is currently available and sketching a roadmap for

\(^{17}\) For a more detailed discussion of my definition of the Supreme Court elite, see infra Part I.
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. DATABASES, 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, 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. 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 lawyer had presented oral argument in at least five cases in the Term under review and the preceding ten Terms, combined.

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.

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18 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 Supreme Court of the United States, Journal, https://www.supremecourt.gov/orders/journal.aspx. 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 45. I occasionally obtained affiliation information from other sources, such as the transcript of oral argument, which often lists organizational affiliation for government lawyers.

19 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.
Indeed, in assessing the factors that influence the Court to grant or deny certiorari, it is difficult to overstate the importance of law clerks. The Court receives over six thousand cert. petitions every year, 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. (In a given Term, the Court grants between seventy and eighty petitions.) 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 cert.-worthiness for all of the Justices participating the pool (currently seven). Petitions identified as possibly worth granting are put on a list for further discussion and vote at the Justices’ weekly conference.

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. 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 . . . . Most justices never read more than the clerk’s memo if the recommendation is to deny.” 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.”

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

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20 See H.W. Perry, Jr., Deciding to Decide 69 (1991) (“[O]ne cannot talk about the agenda-setting process without talking about the law clerks.”).


23 See, e.g., Supreme Court, supra note 21, at ii (reporting 77 granted petitions in the 2017 Term).


25 Any chambers can request that a case be added to the so-called discuss list. Perry, supra note 20, at 43.

26 See Shapiro et al., supra note 22, at 321 (“[C]ases that do not appear on the [discuss] list by the day before the conference are automatically denied . . . .”).

27 Perry, supra note 20, at 70.

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. 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.

Circuit splits, however, rarely happen in patent cases because of the centralization of appeals in the Federal Circuit. 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. The rich, emerging literature on the new Supreme Court bar suggests that lawyer identity matters at the cert. stage in all types of cases. In patent cases, lawyer identity may play an outsized role because of the lack of other objective indicators of cert.-worthiness, such as a circuit split.

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

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29 See Perry, supra note 20, at 63; see also Kenneth W. Starr, 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)).

30 See David R. Stras, The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process, 85 TEX. L. REV. 947, 980 (2007); 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”).

31 See Narechania, supra note 8, at 1347.

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

33 See, e.g., Lazarus, supra note 16, 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.”).

34 Cf. Narechania, supra note 8, 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”).

Electronic copy available at: https://ssrn.com/abstract=3347935
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 non-elite 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. 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 co-authors defined as a “top oral advocate” anyone who argued at least five cases during the past decade. 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.

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. In Part III of the article, I present some background data on the number of lawyers who met my definition of elite.

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. To create that dataset, I

35 See Shaw, supra note 16, at 1556-57 (discussing the importance of a prior Supreme Court clerkship in obtaining an appointment from the Court to argue as an amicus).
36 Biskupic et al., supra note 15.
37 Lazarus, supra note 16, at 1502.
38 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), 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 Institute, Inc. v. Lee, 138 S. Ct. 1348 (2018), 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 LLC, 137 S. Ct. 1514 (2017), 2016 WL 4983136 (James Dabney of Hughes Hubbard, who at the time had argued three cases before the Court).
39 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
used the Supreme Court’s journal\textsuperscript{40} 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;\textsuperscript{41} I excluded petitions filed in forma pauperis because those petitions are rarely granted\textsuperscript{42}—and certainly not in any patent case since 1982.\textsuperscript{43} 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.\textsuperscript{44} For every other case, I personally reviewed the 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.\textsuperscript{45} The vast majority of petitions could easily be classified as patent or non-patent 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

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\textsuperscript{40} See supra note 18.

\textsuperscript{41} See Sup. Ct. R. 38(a).

\textsuperscript{42} Shapiro et al., supra note 22, at 557-58.

\textsuperscript{43} 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). If you are still reading this footnote, kudos to you for your enthusiasm about the minutiae of Supreme Court administration!

\textsuperscript{44} For instance, cases in which the respondent was the Merit Systems Protection Board or the Secretary of Veterans Affairs could readily be coded as non-patent cases. Non-patent 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 non-patent cert. petitions gradually declined during the period covered by my study. In nearly every Term from 2002 through 2011, non-patent petitions accounted for over half of all paid petitions. From 2012 through 2016, however, the average proportion of non-patent 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 Federal Circuit, Appeals Filed in Major Origins, http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/Hist_Caseld_by_Major_Origin_10-year.pdf. For additional data on the proportion of cert. petitions in patent and non-patent cases, see infra app’x A.

about patentability, infringement, 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), (3) a question of procedural law, jurisdictional law, or remedies in a case involving a live claim arising under patent law, or (4) a question of non-patent 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 or a contract claim involving a patent license. By contrast, I coded a petition as a non-patent petition if it presented (1) only substantive issues of non-patent law 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. It bears emphasizing that the number of close cases was extremely small—no more than 15 or 20 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

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50 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 Entm’t, LLC, 135 S. Ct. 2401, 2405 (2015) (holding unenforceable contracts charging royalties after a patent expires).
51 A paradigmatic example is Oracle Am., Inc. v. Google, Inc., 750 F.3d 1339 (Fed. Cir. 2014), cert. denied, 135 S. Ct. 2887 (2015), 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.
52 Examples include: Petition for a Writ of Certiorari, Wayne-Dalton Corp. v. Amarr Co., No. 09-260, 2009 WL 2864356 (U.S. filed Aug. 31, 2009) (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 Petition for a Writ of Certiorari, Designing Health, Inc. v. Erasmus, No. 07-34, 2007 WL 1974208 (U.S. filed July 2, 2007) (raising issues about post-trial motions and the Seventh Amendment in a case where the live claims were for fraud and breach of fiduciary duty).
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.\textsuperscript{53} Less commonly, the Court will GVR if the case becomes moot (usually due to settlement) while the cert. petition is pending.\textsuperscript{54} Because a GVR usually indicates little about the petition’s merits I exclude GVR’d petitions from the analysis below unless otherwise indicated.\textsuperscript{55}

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.\textsuperscript{56} 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 petition pending a decision in another case).\textsuperscript{57} Most of the SG’s briefs were available on Westlaw; those that were not were available on the SG’s website.\textsuperscript{58} I then used Westlaw or the Supreme

\textsuperscript{53} See, e.g., Medinol Ltd. v. Cordis Corp., 137 S. Ct. 1372, 1372 (2017) (GVR’ing in light of SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 137 S. Ct. 954 (2017), which held that laches cannot be asserted as a defense to a claim for damages for patent infringement).

\textsuperscript{54} See, e.g., LG Elecs., Inc. v. InterDigital Commc’ns, LLC, 134 S. Ct. 1876 (2014).

\textsuperscript{55} Including GVR’d petitions, my dataset contains 617 petitions.

\textsuperscript{56} See infra Part II.C.

\textsuperscript{57} 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., 572 U.S. 1131 (2014). In that circumstance, there is simply no SG recommendation to include in the dataset.

Court’s docket to determine the Court’s action on the petition and to code for whether the Court 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 1,500 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 pre-dates 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.59

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.60 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. 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 eight Terms (2010 through 2017), the Court has decided at least two patent cases, averaging 3.75 patent decisions per Term over that time period. Figure 1 below graphically illustrates of the number of patent cases decided by the Supreme Court, per Term, from 1982 through 2017.61

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


61 Though Figure 1 indicates that the Supreme Court has decided a patent case in only fourteen consecutive Terms, the Court has already decided a patent case in the not-yet-concluded 2018 Term, Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc., 139 S. Ct. 628 (2019), and another patent case is currently under submission after oral argument, Return Mail, Inc. v. U.S. Postal Serv., 139 S. Ct.
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 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,}


62 The primary source of the data reported in Figure 1 is Supreme Court Patent Cases, supra note 5. Note that Figure 1 includes three patent-related Supreme Court cases that did not arise from the Federal Circuit: Kimble v. Marvel Entm’t, LLC, 135 S. Ct. 2401 (2015) (Ninth Circuit), Gunn v. Minton, 568 U.S. 251 (2013) (Texas Supreme Court), and FTC v. Actavis, Inc., 570 U.S. 136 (2013) (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 Sys., Inc. v. Swift-Eckrich, Inc., 546 U.S. 394 (2006), and Nelson v. Adams USA, Inc., 529 U.S. 460 (2000), in accordance with this article’s definition of “patent case,” discussed above. See supra Part 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?, 16 CHI.-KENT J. INTELL. PROP. 313, 314 n.8 (2017) (describing the occasional difficulties in categorizing and counting Supreme Court patent cases).
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.63 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. Since 2002, the Supreme Court has 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 ($p = .009$).64 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.


64 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.
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%—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 (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).

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65 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 18, appears to treat GVR’d cases as, essentially, denials. See id. at 410 n.f (including only cases granted plenary review as “grants” for the purpose of calculating the overall grant rate).
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 ($p = .793$).

**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.**66**

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**66 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 22, at 515 (“[A] nonparty whose interest favors the denial of certiorari ordinarily...”)**
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 accompanied by amicus briefs in, respectively, 8.5%, 11.6%, and 15.9% of cases.67

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

<table>
<thead>
<tr>
<th></th>
<th>Fed. Cir. patent cases</th>
<th>All petitions</th>
<th>All petitions</th>
<th>All petitions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Petitions OT2002-16</td>
<td>%</td>
<td>%</td>
<td>%</td>
<td>%</td>
</tr>
<tr>
<td>With amicus</td>
<td>118</td>
<td>20.0%</td>
<td>8.5%</td>
<td>11.6%</td>
</tr>
<tr>
<td>Without amicus</td>
<td>471</td>
<td>80.0%</td>
<td>91.5%</td>
<td>88.4%</td>
</tr>
</tbody>
</table>

Indeed, in each of those individual Terms, the proportion of patent petitions supported by at least one amicus brief exceed 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,68 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.69

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

67 For other points of reference about the quantity of cert.-stage amicus briefs filed overall, see Lazarus, supra note 16, at 1530-31 (reporting that 9.5% of cert. petitions were supported by amicus briefs in the 2005 Term); Allison Orr Larsen & Neal Devins, The Amicus Machine, 102 VA. L. REV. 1901, 1939 (2016) (reporting that 14.2% of cert. petitions were supported by amicus briefs in the 2014 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.

68 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.

69 See infra Part III.B.2.
Elite lawyers are well aware that eliciting support from sympathetic amici vastly increases the chance of review.\textsuperscript{70} One early study concluded that a petition supported by at least one amicus brief was three to four times more likely to be granted than a petition filed without amicus support.\textsuperscript{71} 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.\textsuperscript{72} The presence of a cert.-stage amicus brief in a patent case similarly makes the probability of grant about eight times more likely.\textsuperscript{73}

| Table 2. Amicus Briefs and Cert. Grants/Denials, Federal Circuit Patent Cases Versus Overall |
|----------------------------------|----------------------------------|----------------|----------------|----------------|----------------|
|                                  | Fed. Cir. patent cases OT2002-16 | 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.\textsuperscript{74} By comparison, in 2002, only

\textsuperscript{70} See infra notes 111-115 and accompanying text.

\textsuperscript{71} See Perry, supra note 20, at 137-38.

\textsuperscript{72} 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, 8.3 times more likely (17.6% versus 2.2%). For studies reporting similar figures, see Larsen & Devins, supra note 67, at 1939 (reporting that, in the 2014 Term, a supporting amicus brief made a cert. grant six times more likely); Lazarus, supra note 16, at 1528 (2005 Term, nearly 10 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 app’x B-D.

\textsuperscript{73} 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 UC Irvine L. Rev. 397, 424 (2011).

\textsuperscript{74} One of the 13 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 Perry, supra note 20, 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.
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 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. Indeed, in more recent years, the proportion of granted patent petitions accompanied by amicus briefs has grown. From 2002 through 2009, seven 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. 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.

The data for patent cases look 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.

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75 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 64.

76 For more details about the number of amicus briefs filed in all cases in the 2002, 2010, and 2016 Terms, see infra app’x B-D.

77 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: 14.8% for petitions supported by one amicus brief versus a grant rate of 3.8% overall. Lazarus, supra note 16, at 1529.
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.78 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.79

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

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<th>Amicus briefs filed</th>
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<td>22</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0.0%</td>
</tr>
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</table>

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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

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78 Again, for more detailed data about amicus brief filings in all cases in the 2002, 2010, and 2016 Terms, see infra app’x B-D.

79 None of these differences are statistically significant. Even for the large spread in 2002, p = 0.155.
above. 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 13 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 13 petitions accompanied by five or more amicus briefs, the court granted 10 (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 three of seven 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%).

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 (SG) 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.

A call for the views of the Solicitor General is a strong indication that the Court is interested in a case. 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%, 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

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80 This difference is statistically significant ($p = .012$).
81 Lazarus’s study of the 2005 Term reported that six out of 10 petitions supported by five or more amicus briefs were granted. See Lazarus, supra note 16, at 1529.
82 See infra Part III.C.
84 See supra fig. 3.
discussed in more detail below, the Court follows the SG’s recommendation to grant or deny cert. more than three-quarters of the time.\textsuperscript{85}

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.\textsuperscript{86} As Duffy reported, before the 2000 Term, the Court had issued a CVSG in only one patent case ever.\textsuperscript{87} In 2000, however, the Court issued CVSGs in three patent cases,\textsuperscript{88} and that trend has continued to this day, right alongside the growing number of patent cases decided on the merits. Since 2000, the Court has issued an average of 2.18 CVSGs in Federal Circuit patent cases per Term. And, since 2004, the Court has issued at least one CVSG in a patent case in every Term except one, as Figure 4 below indicates.\textsuperscript{89}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{85} See infra fig. 6.
\item \textsuperscript{87} Id. at 525-27. The case was Barr Labs. v. Burroughs Wellcome Co., 515 U.S. 1130 (1995).
\item \textsuperscript{88} Duffy, supra note 86, at 529-30.
\item \textsuperscript{89} 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 Enters., Inc., 134 S. Ct. 2719 (2014). 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., 572 U.S. 1131 (2014), because voluntary dismissals are excluded from my dataset of Federal Circuit cert. petitions. See supra note 39. 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) (denying cert. after the respondent filed a suggestion of mootness, over the opposition of the petitioner).
\end{itemize}
\end{footnotesize}
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 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.⁹⁰

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 1, Commil USA, LLC v. Cisco Sys., Inc., Nos. 13-896, 13-1044 (U.S. filed Oct. 16, 2014), 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 1-8, Chadbourne & Parke LLP v. Troice, Nos. 12-79, 12-86, 12-88 (U.S. filed Dec. 14, 2012) 2012 WL 6591478 (non-patent 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 20, Am. Trucking Ass’ns, Inc. v. Mich. Pub. Serv. Comm’n, Nos. 03-1230, 03-1234, 03-1250 (U.S. filed Dec. 17, 2004), 2004 WL 2985237 (non-patent 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
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. 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 ($p = .008$).

Circuit, mentioned above, see supra notes 62, 89, 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 fig. 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 Samsung Elecs. Co. v. Apple Inc., 138 S. Ct. 420 (2017) (denying cert.); WesternGeco LLC v. ION Geophysical Corp., 138 S. Ct. 734 (2018) (granting cert.). Including those two cases would push the Court-SG agreement rate in patent cases even higher.

91 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, 276 (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.
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 and another in 2012. Yet, looking at all cases 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.


93 Bowman v. Monsanto Co., 568 U.S. 936 (2012) (granting cert. over the SG’s recommendation to deny); see also supra notes 62, 89 (discussing Kimble v. Marvel Enters, Inc., 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).
It is worth noting that the increase in disagreement rate beginning in 2009 coincides with 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, 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. Instead, my findings are consistent with recent empirical literature demonstrating the decline of Supreme Court deference to the President.

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

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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%).97 In addition, the Court granted every single patent petition the SG recommended granting.98 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.99 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. 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 century, the Supreme Court bar lost its cohesiveness. 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.100

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97 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.

98 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.


100 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 16, 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...
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.\(^1\)

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.\(^2\) 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 Supreme Court merits decisions 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 53 lawyers in 2003 to a high of 81 lawyers in 2016—an increase of 52.8% .\(^3\)

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). \(^4\) at 1499-1500.

\(^1\) 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.

\(^2\) \(^{\text{Id. at 1490-91; accord Biskupic et al., supra note 15.}}\)

\(^3\) For another empirical analysis presenting evidence of increased specialization among Supreme Court advocates, see Tonja Jacobi & Matthew Sag, \textit{The New Oral Argument: Justices as Advocates}, 94 \textit{Notre Dame L. Rev.} (forthcoming 2019) (manuscript at 40), \textit{available at} https://ssrn.com/abstract=3125357 (showing a decline in the number of different advocates presenting oral argument at the Supreme Court starting in the mid-1980s).
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 22 in 2002, 2003, and 2004 to 39 in 2016—an increase of 77.3%, as depicted in Figure 9 below.
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. 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.

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104 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.

105 A linear regression of the data underlying Figure 10 shows statistical significance ($p < .001$) and a positive slope ($\beta = .020$).
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 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 indicate 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 2016.106 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 29 (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).

106 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).
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 grant cert. in patent cases is statistically significant at the 1% level ($p = .009$).\footnote{See supra fig. 2 and accompanying text for more detailed discussion of the data underlying Table 4.}


<table>
<thead>
<tr>
<th>Year Range</th>
<th>% Filed By Elites</th>
<th>% Granted</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002-09</td>
<td>10.2%</td>
<td>3.9%</td>
</tr>
<tr>
<td>2010-16</td>
<td>22.0%</td>
<td>9.2%</td>
</tr>
</tbody>
</table>

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 non-elites in Federal Circuit patent cases, another difference that is statistically significant at the 1% level \((p = .005)\).\(^{108}\) 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 non-elite.\(^{109}\)

**Table 5. Grant Rates on Cert. Petitions in Federal Circuit Patent Cases, OT2002 through OT2016**

<table>
<thead>
<tr>
<th></th>
<th>Elite</th>
<th>Non-elite</th>
</tr>
</thead>
<tbody>
<tr>
<td>Granted</td>
<td>15</td>
<td>23</td>
</tr>
<tr>
<td>Denied</td>
<td>81</td>
<td>469</td>
</tr>
<tr>
<td>% Granted</td>
<td>15.6%</td>
<td>4.7%</td>
</tr>
</tbody>
</table>

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

\(^{108}\) The overall grant rate for Federal Circuit patent cases was 6.6%, as discussed above. See supra fig. 3.

\(^{109}\) Excluding the 43 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 non-elites (15.6% versus 5.1%), and the difference between elites and non-elites remains statistically significant at the 1% level \((p = .008)\).
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 \textit{granted} patent cases from the very beginning of the Supreme Court’s recent surge of interest in the field. Of the 11 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 four 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%). 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 three 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 newfound 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—
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. Rather, Larsen and Devins explain, sophisticated, expert Supreme
Court counsel actively recruit amici and coordinate their message to the Court.
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.” 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.

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.\textsuperscript{116}) 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.\textsuperscript{117}

Though elite counsel are significantly more likely to elicit (or, better, solicit) amicus briefs and to have their petitions granted, my data also indicate 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 non-elite 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 non-elite 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 non-elites), 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 non-elites and accompanied by two or more amicus briefs.

\textsuperscript{116} Specificaly, 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.

\textsuperscript{117} Both of these differences are statistically significant ($p < .001$).
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 non-elite advocates: cert. petitions filed by elite advocates in Federal Circuit patent cases are far more likely to elicit a CVSG than petitions filed by non-elites. 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 non-elites (3.5%), a difference that is statistically significant at the 1% level ($p = .003$).\footnote{Though my dataset includes only petitions the Court disposed of from the 2002 through 2016 Terms, it is worth noting that in both of the Federal Circuit patent cases in which the Court issued a CVSG order in the 2016 Term but that the Court did not dispose of until the 2017 Term featured elite advocates representing the petitioner. See Samsung Elecs. Co. v. Apple Inc., 137 S. Ct. 2320 (2017); WesternGeco LLC v. ION Geophysical Corp., 137 S. Ct. 2206 (2017).}

\begin{table}
\centering
\caption{CERT. Petitions in Federal Circuit Patent Cases, OT2002 through OT2016: Elites, Non-Elites, and Amici}
\begin{tabularx}{\textwidth}{|l|c|c|c|}
\hline
\multicolumn{4}{|c|}{Petitions Filed by Elite Advocates} \\
\hline
 & Total & With at least one & With two or more \\
 & & amicus brief & amicus briefs \\
\hline
Filed & 96 & 49 & 32 \\
\hline
Granted & 15 & 13 & 11 \\
\hline
% Granted & 15.6% & 26.5% & 34.4% \\
\hline
\multicolumn{4}{|c|}{Petitions Filed by Non-Elite Advocates} \\
\hline
 & Total & With at least one & With two or more \\
 & & amicus brief & amicus briefs \\
\hline
Filed & 492 & 69 & 37 \\
\hline
Granted & 23 & 13 & 12 & \\
\hline
% Granted & 4.7% & 18.8% & 32.4% \\
\hline
\end{tabularx}
\end{table}
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.\(^{\text{119}}\)

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 non-elite petitions. On petitions filed by elite advocates, the Solicitor General recommended granting cert. in six of its 14 briefs; on petitions filed by non-elites, the Solicitor General recommended granting cert. in six of 16 briefs. (One non-elite petition in my dataset of Federal Circuit cert. petitions that obtained a CVSG was denied before the SG filed its brief.\(^{\text{120}}\)

**Figure 14. CVSG Orders and Solicitor General Recommendations on Cert. Petitions in Federal Circuit Patent Cases, OT2002 through OT2016**

![Diagram showing CVSG orders and Solicitor General recommendations on cert. petitions](https://ssrn.com/abstract=3347935)

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


\(^{\text{120}}\) Apotex Inc. v. Pfizer, Inc., 549 U.S. 970 (2006) (denying cert. after the respondent filed a suggestion of mootness, over the opposition of the petitioner).
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 suggest, 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.\textsuperscript{121} A second possibility is that, despite the disparity in the frequency of CVSGs in cases filed by elites versus non-elites, the Court is doing a relatively good job at identifying cases that are at least plausibly worthy of review. Hence, the Solicitor General recommends a grant in roughly the same proportion of CVSG cases regardless of whether the petition is filed by an elite or non-elite.

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

By many accounts, Supreme Court patent law has taken a decidedly “anti-patent” turn over the past two decades.\textsuperscript{122} 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 case law 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. Non-elite 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

\textsuperscript{121} See, e.g., Rex E. Lee, \textit{Lawyering for the Government: Politics, Polemics & Principle}, 47 \textit{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.”).

\textsuperscript{122} See, e.g., Gregory N. Mandel, \textit{Institutional Fracture in Intellectual Property Law: The Supreme Court Versus Congress}, 102 \textit{Minn. L. Rev.} 803, 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 measureable direction” and that 18 of those 23 decisions “weakened patent protection”). \textit{But cf.} Timothy R. Holbrook, \textit{The Supreme Court’s Quiet Revolution in Induced Patent Infringement}, 91 \textit{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”).

Electronic copy available at: https://ssrn.com/abstract=3347935
were orally argued from 2002 through 2017\textsuperscript{123} (31.7\%) featured elite advocates on both sides—either conducting oral argument, as counsel of record on the primary merits brief, or both.\textsuperscript{124} Another 10 cases (24.4\%) featured non-elite advocates on both sides. Five cases featured non-elite 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 non-elite. Non-elite advocates actually enjoyed a slight edge in those cases, prevailing seven out of 13 times.

TABLE 7. ELITE AND NON-ELITE ADVOCATES IN SUPREME COURT PATENT CASES HEARD ON THE MERITS, OT2002 THROUGH OT2017

<table>
<thead>
<tr>
<th></th>
<th>Cases</th>
<th>Wins</th>
</tr>
</thead>
<tbody>
<tr>
<td>Elite v. Elite</td>
<td>13</td>
<td>--</td>
</tr>
<tr>
<td>Non-elite v. Non-elite</td>
<td>10</td>
<td>--</td>
</tr>
<tr>
<td>Elite v. Non-elite</td>
<td>13</td>
<td>Elite 6, Non-elite 7</td>
</tr>
<tr>
<td>Non-elite v. SG</td>
<td>5</td>
<td>Non-elite 2, SG 3</td>
</tr>
</tbody>
</table>

Prior studies examining whether experience as a Supreme Court litigator translates into favorable results on the merits have reached mixed results.\textsuperscript{125} My findings are consistent with that ambiguity.

\textsuperscript{123} The total number of orally argued cases in this portion of the article is different than the number of Federal Circuit cert. petitions granted (discussed elsewhere in the paper) for several reasons. First, I include the case in which the cert. petition was filed by the Solicitor General, see supra note 106, 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 Elecs., Inc. v. Pulse Elecs., 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 part of the article. 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 62. 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).

\textsuperscript{124} For this portion of the article, I treat elite advocates in private practice separately from elite advocates in the Office of the Solicitor General.

\textsuperscript{125} 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...
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. 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.

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, the term during which Congress passed the America Invents Act—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. Yet the Act was itself a response to the increasing quantity and prominence of patent litigation, as reflected in the increasing quantity and prominence of patent litigation, as reflected in the fourteen Supreme Court patent decisions in the decade preceding the Act—many of which were handled by elite lawyers.

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

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126 See supra notes 6-14.
127 See supra fig. 1.
128 See supra notes 13-14.
129 See H.R. REP. NO. 112-98, at 39 (2011) (House Report on the America Invents Act: “[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.”).
130 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 fig. 13.
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, 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. Relatedly, an elite lawyer might be more willing to take a case (perhaps even without a fee) 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 illustrate 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 examine only petitions accompanied by amicus briefs 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 non-elites 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. 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. 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, which the Federal Circuit had long held

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133 See Lazarus, supra note 16, 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”).

134 See supra tbl. 6.


137 35 U.S.C. § 282(a) (“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.”).
required a patent challenger to prove invalidity by clear and convincing evidence.\textsuperscript{138} 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.\textsuperscript{139} Despite that decision at the cert. stage in favor of an elite lawyer, the Court ultimately affirmed the Federal Circuit’s precedent\textsuperscript{140} (a somewhat unusual outcome).\textsuperscript{141} 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.\textsuperscript{142} 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 raise an eligibility argument\textsuperscript{143} and over the Solicitor General’s recommendation to deny.\textsuperscript{144} (The SG was ultimately vindicated when the Court dismissed the petition as improvidently granted.\textsuperscript{145})

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, over the past two years, the Court has 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.\textsuperscript{146} Petitioner’s counsel of record in both cases qualified as elite.\textsuperscript{147}

\textsuperscript{139} See Petition for a Writ of Certiorari at i, Microsoft Corp. v. i4i Ltd. P’ship, 564 U.S. 91 (2011), 2010 WL 3413088 (Tom Hungar).
\textsuperscript{140} i4i, 564 U.S. at 95.
\textsuperscript{141} Timothy B. Dyk, Thoughts on the Relationship Between the Supreme Court and the Federal Circuit, 16 CHI.-KENT. J. INT’L. L., INT’L. BUS., & INT’L. POL’Y 67, 72 (2016) (reporting that the Supreme Court reversed or vacated 70% of Federal Circuit decisions reviewed on the merits from OT2006 through OT2015).
\textsuperscript{142} See, e.g., Petition for a Writ of Certiorari at i, Excel Commc’n’s, Inc. v. AT&T Corp., No. 99-95 (U.S. filed July 13, 1999), 1999 WL 33640012.
\textsuperscript{144} See Brief for the United States as Amicus Curiae, Lab. Corp., 548 U.S. 124, 2005 WL 2072283.
\textsuperscript{145} Lab. Corp., 548 U.S. at 125.
\textsuperscript{147} See Petition for a Writ of Certiorari, WesternGeco, 138 S. Ct. 2129, 2017 WL 678358 (Paul Clement); Petition for a Writ of Certiorari, Life Techs., 137 S. Ct. 734, 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 (2007); see \textit{also}
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 post-issuance review proceedings created by the America Invents Act— and that was after denying a petition presenting the same issue filed by a lawyer who plainly qualifies as elite and who wrangled significant amicus support. Similarly, in 2005, the Court granted certiorari in KSR International Co. v. Teleflex, Inc., on a petition filed by a lawyer who did not qualify as elite, to review the “teaching, suggestion, motivation” requirement adopted by the Federal Circuit for proving obviousness—an issue that had been presented in cert. petitions several times previously (though not, as far as I can tell, by an elite lawyer).

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. Both petitions also featured former Supreme Court clerks on their covers. Moreover, the petition in KSR enjoyed significant amicus

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148 Petition for a Writ of Certiorari, Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC, 138 S. Ct. 1365 (2018), 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).


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


154 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.
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.\textsuperscript{155}

In future work, I plan to at least partially untangle these causal threads by coding the roughly 600 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),\textsuperscript{156} whether there were separate opinions (concurrences or dissents) at the Federal Circuit,\textsuperscript{157} and the date of the conference at which the Supreme Court considered the petition.\textsuperscript{158} Finally, I intend to create a more granular metric of 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.

\textsuperscript{155} See supra tbl. 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).

\textsuperscript{156} See Paul R. Gugliuzza & Mark A. Lemley, \textit{Can a Court Change the Law By Saying Nothing?}, 71 \textit{VAND. L. REV.} 765, 767-68 (observing that the Federal Circuit could use Rule 36 to detract attention from particular decisions).

\textsuperscript{157} See, e.g., Duffy, supra note 3, at 318-19 (suggesting that the Federal Circuit’s divided en banc vote in \textit{Warner-Jenkinson} and the accompanying opinions “signaled the importance of the case to the [Supreme] Court” and “also provided a menu of alternative positions”).

\textsuperscript{158} See Margaret Meriwether Cordray & Richard Cordray, \textit{The Calendar of the Justices: How the Supreme Court’s Timing Affects Its Decisionmaking}, 36 \textit{AZ. ST. L.J.} 183, 204 (2004) (finding that the Court grants a higher percentage of cert. petitions in October (after the Court disposes of the large number of petitions that have accumulated during the summer recess), November, January, and June).
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.159 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 requirements.160 Yet the Court has heard more cases on eligibility in the past decade (four)161 than it has on all of those other patentability requirements combined (two).162 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.163

159 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 20, 113-39.

160 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).


163 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
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.\(^1\) 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.\(^2\) Moreover, because Supreme Court patent cases often involve elite lawyers on both sides,\(^3\) 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 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.\(^4\)

**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.\(^5\) And so the Supreme Court

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2. *See generally* Paul R. Gugliuzza, *Saving the Federal Circuit*, 13 CHI.-KENT J. INTELL. PROP. 350, 373 (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).

3. *See supra* tbl. 7.

4. 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*, 104 IOWA L. REV. (forthcoming 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.*

5. *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 nine different law firms argued three or more Supreme Court cases in the 2017 Term).
has, in all likelihood, not only returned to the bar of patents—it has pulled up a chair.
## APPENDIX A. PAID CERT. PETITIONS IN FEDERAL CIRCUIT CASES, PATENT VERSUS NON-PATENT, OT2002 THROUGH OT2016 (INCLUDING GVR’d CASES)

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Electronic copy available at: https://ssrn.com/abstract=3347935
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| 0 or 1              | 1405  | 1361   | 44      | 3.1%      |
| 2 to 4              | 106   | 88     | 18      | 17.0%     |
| 5 or more           | 23    | 14     | 9       | 39.1%     |

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