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PUBLIC ATTENTION AND *CERTIORARI*: THE IMPACT OF PUBLIC ATTENTION ON SUPREME COURT PETITIONS

by

MATTHEW MONTGOMERY

Under the Direction of Amy Steigerwalt, PhD

ABSTRACT

Research surrounding how much influence the public has on the U.S. Supreme Court offers conflicting results. Some scholars argue that because the Court is politically insulated it does not pay much attention to what the public desires when deciding cases. Others suggest the Court's decisions reflect prevailing public moods. I join in this debate and argue that public opinion indirectly influences the Court by motivating key actors to support cases and file briefs, thereby helping shape the Court's agenda. When powerful attorneys such as the Solicitor General or large D.C. law firms are involved in a petition for *certiorari*, there is a higher likelihood that these petitions will be granted *certiorari*. In addition, I argue public attention spurs action among special interest groups in the form of *Amicus curiae* briefs and gets the attention of powerful

lawyers and government appointees. Once again, these actions increase the likelihood of a case being heard on the merits. I use data from social media to determine how much specific issue areas are being talked about among the American public and build models showing how increased attention leads to discernible effects on the *certiorari* process at the U.S. Supreme Court. I find that the public, albeit indirectly, does have an impact on what petitions are given more attention by the U.S. Supreme Court. Many have argued that the Court is immune from public pressure, and these findings give evidence against that argument.

INDEX WORDS: Public attention, *Certiorari*, Supreme Court, *Amicus curiae*, Agenda setting, Discuss list.

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by

MATTHEW MONTGOMERY

A Dissertation Submitted in Partial Fulfillment of the Requirements for the Degree of

Doctor of Philosophy

in the College of Arts and Sciences

Georgia State University

2019

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2019

PUBLIC ATTENTION AND *CERTIORARI*: THE IMPACT OF PUBLIC ATTENTION ON SUPREME COURT PETITIONS

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DEDICATION

For Linda – second star to the right, and straight on till morning.

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TABLE OF CONTENTS

ACKNOWLEDGEMENTS .... **V**

TABLE OF CONTENTS .... **VIII**

LIST OF TABLES .... **XII**

LIST OF FIGURES .... **XIII**

1 CHAPTER 1: INTRODUCTION **1**

1.1 Introduction **1**

1.2 Theoretical Overview **7**

1.3 Chapter Outlines **9**

2 CHAPTER 2: A THEORY OF PUBLIC ATTENTION & CERTIORARI **13**

2.1 Introduction **13**

2.2 *Writs of Certiorari* **15**

2.3 Amicus curiae **17**

2.4 Lawyers and Litigants **20**

2.5 Discuss List **24**

2.6 Conclusion **27**

3 CHAPTER 3: MEASURING PUBLIC ATTENTION **29**

3.1 Introduction **29**

3.2 Argument for a new Public Attention Measure **31**

3.3 Creating the Measure **33**

3.4 Validating and Exploring the Measure 34

3.4.1 Public Attention to Abortion, Campaign Finance, and Anti-trust.......... 35

3.5 Conclusion 41

4 CHAPTER 4: PUBLIC ATTENTION AND AMICUS BRIEFS 43

4.1 Introduction 43

4.2 Insulated but Still Impacted 44

4.3 *Certiorari* and the Supreme Court 45

4.4 Amicus curiae 46

4.5 Data and Methods 48

4.5.1 Dependent Variable 49

4.5.2 Independent Variables 49

4.6 Results 51

4.7 Conclusion 56

5 CHAPTER 5: IMPACT OF PUBLIC ATTENTION ON INFLUENTIAL ATTORNEYS AND INTEREST GROUPS 57

5.1 Introduction 57

5.2 Federal Attorneys 61

5.3 State Attorneys 63

5.4 Private Attorneys & Interest Groups 64

5.5 Testing when Powerful Lawyers Act 66

5.5.1 Data & Dependent Variables *67*

5.5.2 Independent Variables *68*

5.6 Results **69**

5.7 Conclusion **76**

6 CHAPTER 6: PUBLIC ATTENTION AND THE DISCUSS LIST **78**

6.1 Introduction **78**

6.2 Granting or Denying Cert: Luck or Influence? **79**

6.3 Testing Public and Supreme Court Attention **81**

6.3.1 Capturing Increased Attention to Petitions by the Supreme Court *81*

6.4 Heckman Selection Model **84**

6.4.1 Independent Variables included in Heckman selection model *85*

6.5 Results **86**

6.6 Conclusion **89**

7 CHAPTER 7: CONCLUSION **91**

7.1 Overall Findings and Implications **91**

7.2 Future Work **95**

REFERENCES **97**

APPENDICES **105**

Appendix A **105**

Appendix A.1 .... **105**

Appendix B **106**

Appendix B.1 .... **107**

Appendix C **108**

LIST OF TABLES

Table 4.1: Amicus curiae Before Cert 51

Table 4.2: Certiorari Outcome and Amicus Briefs 52

Table 4.3: Determinants of Amicus curiae before Certiorari 55

Table 5.1: Descriptive Statistics 69

Table 5.2: Public Attention & Government Attorneys 70

Table 5.3: Public Attention & Private Repeat Players.. 72

Table 5.4: Public Attention & Amicus Briefs before Certiorari..................................... 74

Table 6.1: Determinants of Certiorari.. 82

Table 6.2: Indirect Impact of Public Attention on Days Discussed; Amici Briefs....................... 87

Table 6.3: Indirect Impact of Public Attention on Days Discussed; Repeat Players.................... 88

Table B.1: Determinants of Amicus curiae before Certiorari...................................... 107

LIST OF FIGURES

Figure 3.1: Public Attention to Campaign Finance – Twitter 36

Figure 3.2: Most Important Problem - Government 36

Figure 3.3: Public Attention to Abortion – Twitter 38

Figure 3.4: Most Important Problem – Civil Rights 38

Figure 3.5: Public Attention to Abortion, Anti-trust, and Campaign Finance - Twitter 39

Figure 3.6: Most Important Problem - Civil Rights and Government 40

Figure 4.1: Probability of Certiorari being Granted – Amicus Briefs 53

Figure 4.2: Predicted Events – Number of Amici Briefs & Public Attention 56

Figure 5.1: Public Attention to Abortion 59

Figure 6.1: Likelihood of Petition Granted Certiorari 83

Figure A.1: Total Amicus Curiae filings per term 105

1 CHAPTER 1: INTRODUCTION

1.1 Introduction

In January 2010, the Supreme Court made a landmark 5-4 decision in *Citizens United v. FEC* where the Court lifted restrictions on campaign contributions for corporations and other organizations.[1] In November of the same year, the Court accepted a petition for a *writ of certiorari* to another campaign finance case, *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*.[2] In 1998, the Arizona legislature passed a law which gave a flat amount of funding to candidates running for statewide. The act sets spending limits for participating candidates and provides them with additional funds if a nonparticipating opponent spends more than the limit for the office. The act also reduces contribution limits for individuals by 20% to nonparticipating candidates. Candidates could opt in or out, however, if they opted out, the law stipulated that if their opponents opted in, the opponent would receive matching funds based on the amounts spent by private opponents and independent groups against them. Meaning, if one campaign opted out and an outside group raised and spent more money, their challengers would get an equal amount in return from the state. In 2008, the Arizona Free Enterprise Club, along with Republican candidates sued the state. The plaintiffs argued that the law limited the amount of money they could spend on their own campaigns as well as against their opponents, which constituted a violation of their free speech. The U.S. District Court agreed with the plaintiffs and found the 1998 Arizona statute unconstitutional. On appeal, the Ninth Circuit Court of Appeals reversed the district court, finding that the law had a minimal impact on free speech.

[1] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010)
[2] *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011)

On August 17th, 2010, the original plaintiffs of the *Arizona* case petitioned the U.S. Supreme Court for a writ of *certiorari*, hoping the high court would reverse the Ninth Circuit's decision. Likely due to the Court's decision in *Citizens United* earlier in the year, public attention toward campaign finance spiked around the same time.[3] Interestingly, the *Arizona* petition received five *amicus curiae* briefs (highly influential and expensive documents) before the Court made its decision to grant *certiorari*. In contrast, the much more widely known *Citizens United* petition received just one *amici* brief. After the Court granted the *Arizona* petition and placed it on the upcoming docket, the U.S. Solicitor General and many other interest groups also took interest in the case. The Solicitor General filed a motion to argue on the side of the respondents to uphold the Ninth Circuit's ruling, and this motion was granted. In addition, after *certiorari* was granted, the petition would receive 38 additional amicus briefs before a final decision was made. In the end, the Court ruled 5-4 for the petitioners and reversed the Ninth Circuit's ruling.

Why did the *Arizona* petition garner such strong attention from interest groups and government attorneys before the Court placed the petition on its agenda? Why would interest groups spend hundreds of thousands of dollars preparing *amicus curiae* briefs for a relatively less important case when they did not for the much more important *Citizens United* petition filed less than a year earlier? I argue that an increase in public attention to an issue area can motivate important actors who influence the Supreme Court to change their behavior. The more the public pays attention to an issue area, the more likely interest groups who deal with that issue are going to become active to show their membership that they are attempting to influence policy. In addition, I argue the more attention an issue receives, the more likely government attorneys are

[3] The spike of public attention toward Campaign Finance, how I measure it, and how the data was collected, is discussed in Chapter 3.

to get involved in or directly litigate cases related to the issue to show constituents that they are working on issues the public cares about.

Understanding why certain petitions are granted *certiorari* and others are not is of great importance. Justices' rulings establish new precedent, and through these decisions the Supreme Court makes policy. The earliest stage of establishing a new precedent is when the justices decide which cases the Supreme Court will decide on the merits. Understanding what factors impact the Supreme Court's decision to grant *certiorari* is important because of the clear link between this agenda-setting function of the Court and the ultimate decisions of the Court. By deciding which cases to hear – and which not to hear – the Court crafts its policy agenda. These decisions carry with them great weight: placing an issue on the Court's agenda, or leaving it off, can have important ramifications in both the legal and political arenas.

Petitions granted *certiorari* have changed the social and legal landscape of America multiple times in dramatic ways. In the last 60 years, the U.S. Supreme Court has struck down racial segregation in schools, protected the free press, allowed criminal defendants the right to an attorney, removed barriers for mixed race couples to marry, confirmed the right of women to control pregnancies, determined limits of executive privilege, decided presidential elections, and extended marriage rights to same-sex couples.[4] These landmark cases are a small selection of some of the more famous decisions, however, each term includes important and transformative decisions that are made by the Court. Because the Supreme Court has discretion over their agenda, these petitions did not *have* to be granted *certiorari*, but they were. Why? At some point during the agenda setting process, something stood out to the justices which helped convince

[4] In order: *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), *Miranda v. Arizona*, 384 U.S. 436 (1966), *Loving v. Virginia*, 388 U.S. 1 (1967), *Roe v. Wade*, 410 U.S. 113 (1973), *United States v. Nixon*, 418 U.S. 683 (1974), *Bush v. Gore*, 531 U.S. 98 (2000), and *Obergefell v. Hodges*, 14-556 (2015).

them to grant *certiorari* to these specific petitions over thousands of others. I argue that there has been an overlooked variable in researching what impacts the likelihood of a petition being granted *certiorari*: public attention. If the Court has an understudied lever that is used to determine their agenda setting requirements, it stands that greater understanding of that lever would allow a more complete view of the Court's actions and priorities. This not only adds to the academic understanding of American governmental systems but stands to lay the groundwork for predictive models using new data and technologies as they are invented. Understanding new influences and predicting the outcome of that influence with confidence helps maintain transparency in our democracy and reinforces public trust.

This project investigates a new angle on Supreme Court agenda setting and uses a novel measure to determine what impact public attention to specific issue areas has on the agenda setting process. I argue and find that as public attention to an issue area increases, it can prompt legal important players to take specific actions which ultimately affect what is on the Supreme Court's agenda. I argue, therefore, that there is an indirect impact of public attention on the Court's agenda via these outside actors.

While a relatively small, yet rich, literature addresses the cert process, understanding how the public impacts this process is largely unexplored. There are many different aspects of an appeal that have been shown to change the probability that the Supreme Court will grant *certiorari*. The type of appeal (criminal, civil liberties/rights, taxes, etc.), how many amicus briefs are submitted, what considerations the judges may be making, and the types of lawyers and litigants all impact agenda setting on the Court. However, the public is conspicuously missing from the list of known impacts on Supreme Court agenda setting. This project thus

explores how the public can impact the agenda of an institution known for being insulated from public opinion and contributes to the agenda-setting literature in several ways.

First, with how public attention impacts an important Court document: *amicus curiae* briefs. Amici brief filing can occur during both the *certiorari* and merits stages, usually with different goals in mind for the filers. When one files an amicus brief at the *certiorari* stage, they are generally informing the Court of why they believe the petition should be denied or granted. Briefs filed during the merits stage are giving the Court information about their preferred outcome on a case and what potential ramifications may be if the Court decides one way or another. Generally, the more amicus briefs the Court receives for a petition, the more likely they are to grant *certiorari* (Caldeira and Wright 1988, 1990; Perry 1991; Baum and Neal 2009). Further, there is evidence that the arguments found within amicus briefs end up in final Court decisions (Spriggs and Wahlbeck 1997; Kearney and Merill 2000; Corley 2008). Thus, it is important to understand what influences outside actors to file amicus briefs, and this project contributes by adding public attention to the list of potential influences. The first empirical chapter explores the connection between amicus briefs and public opinion.

This project also contributes to our understanding of what prompts powerful attorneys to act and how the public impacts these actions. Many have explored what impact attorneys like the U.S. Solicitor General (S.G.) have on both the agenda and final decisions of the U.S. Supreme Court. Past research has noted how dramatic the impact is when the S.G. or other government attorneys get involved in a petition. When the S.G. petitions the Court for *certiorari*, or when the S.G. informs the Court of their preference on how a case should be decided, the Court goes with the S.G. recommendation a majority of the (Tanenhaus et al. 1963; Provine 1980; Ulmer 1984; Caldeira and Wright 1988; McGuire 1998; Owens 2010). However, relatively few have

investigated *why* the S.G. takes action in the first place. This project explores more deeply the motivation of the country's most powerful attorney, along with his or her colleagues, in why they take action. When public attention increases, the likelihood powerful attorneys will petition the Court or write powerful documents, such as an *Amicus curiae* brief, also increases. This question and ultimate findings are important because little research has explained why they choose to join the cases they choose to join. Further, there is an assumption in the agenda-setting literature that suggests petitions with powerful lawyers appear in front of the justices without much exploration of why they received this attention. This contribution begins the exploration of asking why powerful attorneys attach themselves to some cases and not others, impacting which petitions are ultimately granted cert.

The next contribution brings both S.G. involvement and amicus briefs together with public attention to examine how much attention the Court gives each petition before deciding its fate. I use time spent deliberating each petition as a variable to quantify how much attention the Court gives each petition. I find that in general, the more attention (time spent) the Court gives a petition, the higher the likelihood they will grant *certiorari*. I use a two-stage model to show that as public attention increases, both amicus briefs and government attorney involvement also increase, which then leads to more attention paid by the justices. Thus, there is an indirect impact of public attention on the agenda of the U.S. Supreme Court. Understanding why some petitions receive more attention from the Court is important to more fully understand the agenda setting process. Deeper knowledge of how this process works allows us to better predict which petitions will be granted *certiorari*, and for those looking to change policy, allows for better strategies to get a petition granted.

The final contribution of this research is to help bring light to a new way to measure public engagement to specific issue areas, giving researchers insight that was once not possible. Previous work relied on surveys or newspapers to get an idea of what might be important to the public. Today, advancements in technology and changes in how we communicate have allowed for new ways of measurement. Using data from what the public says online, we can get an idea of what the public cares about at any given moment. As we watch public attention rise and fall, we can determine how it impacts any number of political players and, for this project in particular, how it impacts the Supreme Court. Data gathered in this manner is live, dynamic, and constantly updating, which makes for some fascinating areas of research that can now be explored. As the public can exert more pressure on the Court and that pressure becomes more immediate, unfiltered, and voluminous with technology, we have an imperative to understand how political institutions will respond. Social media potentially gives the keys to the car to that of the public and takes away the agenda setting influences of political elites, or at least begins to equalize the process and priority of the topics considered critical for consideration in a new way.

1.2 Theoretical Overview

The discretionary nature of the Supreme Court's agenda opens the door to investigate what prompts certain petitions to get attention over others. The Supreme Court is insulated from the shifting landscape of public opinion, yet, there is considerable debate regarding how much the Court responds to public preferences. In examining decisions at the merits stage, studies reveal mixed findings as to how much influence the public has on the Supreme Court. Some scholars show evidence of public opinion and elites constraining the justices' decision making (Mishler and Sheehan 1993; McGuire and Stimson 2004; Clark 2009; Casillas, Enns, and Wohlfarth 2011), while others cast doubt on this proposition (Norpoth and Segal 1994; Segal and

Spaeth 2002; Segal, Westerland, and Lindquist 2011). While a wealth of research is devoted to what influences the Court's decision making on the merits, there is less research regarding how the public may influence the Court at the beginning, or the *certiorari* stage, of the process.

Scholars have identified many different aspects of an appeal that increase the probability that the Supreme Court will grant *certiorari*. Civil liberties petitions are more likely to be granted cert than other issues (Caldeira and Wright 1988). The number of amicus briefs holds influence as well: petitions accompanied by more amici briefs are more likely to be granted cert. Lower courts that are more ideologically distant from the Supreme Court are more likely to have their cases reviewed (Tanenhaus et al. 1963; Ulmer, Hintze, and Kirklosky 1972; Caldeira and Wright 1988; Collins 2004). In addition, when certain lawyers and litigants are part of a case or submit a brief, such as the Solicitor General (S.G.) or powerful organizations, there is a dramatic increase in the likelihood of *certiorari* being granted (Nicholson and Collins 2008; Wohlfarth 2009). Finally, studies demonstrate that salient petitions increase the likelihood of special interest groups and government officials filing *amicus curiae* briefs (Solowiej and Collins 2009; Zuber, Sommer, and Parent 2015).

However, no studies to date focus on how amici choose which petitions to join, nor explore how public attention may influence this process. Increasing our understanding of what factors encourage (or discourage) amici briefs is important due to their strong impact on the *certiorari* process. Studies routinely find that the presence of amici briefs increases the likelihood the Court will grant *certiorari*, underscoring why we need to understand what types of petitions are most likely to secure amici (Caldeira and Wright 1988; Collins 2004).

I argue public attention indirectly influences the agenda-setting process of the unelected court sitting at the apex of the American judiciary. However, the unelected nature of the justices

means that this influence is a reflection of the actions taken by other actors in response to public opinion. I argue powerful litigants, such as solicitors general, attorneys general, private repeat players, and interest groups are similarly more likely to submit an amici brief, *and* more likely to appeal their case to the U.S. Supreme Court when the case in question relates to issues of high public salience. When public attention towards an issue area increases, several changes in behavior occur among those surrounding the Supreme Court. More public attention applies pressure to elected government attorneys to address the issue and interest groups wish to show their members they are active in policy and file more amicus briefs. Public attention thus influences powerful actors to engage a problem they may not have otherwise.

I test this theory by estimating the impact public attention has on the likelihood of amicus briefs being filed, government attorneys petitioning the Court, interest group activity, and influential private attorneys. The following section outlines how this dissertation will proceed, chapter by chapter, in giving evidence to support my argument.

1.3 Chapter Outlines

Chapter 2 fully explicates my theory as to why these outside actors would care if the public suddenly gives more attention to an issue area.

Chapter 3 then discusses my measure of public attention and how it was created; this chapter also provides measurement validity checks. The inability to measure what is salient to the public on an array of issues contributes to a dearth of research on how the public influences the *certiorari* process, especially during debate. For the most part, existing measures of salience capture information reflecting the state of the world after *certiorari* has been granted. This project aims to bridge that gap and offers a more direct and accurate measure of what the prevailing topics in public discourse at any given point.

The next three chapters empirically test my theory. Chapter 4 analyzes the impact public attention has on *amicus curiae* filings. I argue that when public interest in a given issue area is high, interest groups and others seeking to capitalize on this public interest are more likely to file amici briefs. Special interest groups desire to show their members they are actively working on their issue of interest and filing amici briefs on related cases is a strong signal of such activity. But what increases the likelihood of an interest group filing a brief on a particular petition? I hypothesize that groups are more likely to take action when public attention to an issue is high, allowing them to capitalize on this increased salience. I first confirm previous findings that petitions receiving more amicus briefs are more likely to be granted cert. I then show that petitions receive more amicus briefs when public attention to the relevant topic area increases.

Chapter 5 explains why and then empirically assesses how public attention impacts the likelihood of interest groups, government attorneys, and private actors to petition the U.S. Supreme Court or file amicus briefs. In this chapter, I argue powerful litigants, such as solicitors general, attorneys general, private repeat players, and interest groups are similarly more likely to submit an amicus brief *and* more likely to appeal their case to the U.S. Supreme Court when the case in question relates to issues of high public salience. The results of this chapter indicate that for government attorneys and private repeat players, an increase in public attention to an issue area significantly increases the probability they will petition the U.S. Supreme Court for *certiorari*. Further, this chapter finds that when an AG/SG is not party to a petition, they are more likely to file an amicus brief if there is more public attention on the issue at hand. In addition, government attorneys and interest groups are more likely to file amicus briefs before a *certiorari* decision is made when public attention increases. Thus, the public has a demonstrable impact on important actors outside of the U.S. Supreme Court. Outside actors such as interest

groups or elected attorneys have an interest in tackling issues the public cares about, and this chapter shows an effect of public attention.

Chapter 6 more directly tests the potential relationship between public attention, the actions of outside groups, and the Supreme Court's *certiorari* decisions. Chapters 4 and 5 reveal that public attention significantly influences the calculations of important outside actors in the *certiorari* process. I argue that the actions of these key actors in turn influence the degree of attention the Supreme Court devotes to evaluating these petitions. Caldeira and Wright (1990) use the docket books from Justice Brennan to examine what aspects of petitions increase the likelihood the Court will place them on the discuss list. Variables such as U.S. being a party, lower court conflict, issue area (Civil Liberties), ideology, and *amicus curiae* participation are tested. The authors find that the U.S. Solicitor General manages to land over 90% of the cases they are a part of placed on the discuss list, and more amicus briefs further increase the likelihood of placement on the list. This chapter explores whether public attention to an issue area indirectly influences how much time the justices of the U.S. Supreme Court spend deliberating a petition.

After demonstrating the positive impact days discussed has on the likelihood of *certiorari* being granted, I then model what impacts a petition to garner more attention from the Court. Utilizing a two-stage model, I find that public attention has a positive and significant impact on the number of amicus briefs filed in relation to a petition before *certiorari*, and those briefs then positively impact the amount of attention the Court devotes to the petition. Further, the more public attention an issue area receives, the more likely a powerful litigant is going to petition the Supreme Court to hear a case related to the issue area, and, subsequently, the more likely the Court will give increased scrutiny to the petition in question. The analysis in this chapter thus

demonstrate that public attention indirectly influences which cases ultimately end up on the Supreme Court's docket.

Chapter 7 concludes the dissertation and gives an overview of the findings, a discussion of broader implications, what some limitations may be, and where future research can build upon this study. Overall the findings of this dissertation are straightforward: the public, through other actors, has a demonstrable influence on the agenda of the U.S. Supreme Court. As past research has demonstrated, it is important to further our understanding of what elements of a petition increase the likelihood of certiorari being granted. However, it is also important to understand how and why outside actors become involved on a petition, and what influences their decisions to do so. My argument and findings show that at least some of their decision-making calculus includes what the public pays attention to.

Further, I argue for more innovative uses of data from social media as a way to gauge what the public is talking about, what the valence of that conversation is, and how it can be applied in other areas of political science. In addition, this dissertation has made extensive use of JavaScript and Python to gather large quantities of data in a relatively short amount of time, and I argue scholars need to familiarize themselves with these tools to expand what areas are possible to research.

2 CHAPTER 2: A THEORY OF PUBLIC ATTENTION & CERTIORARI

The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.
-Supreme Court Justice Benjamin Cardozo 1921, 168

2.1 Introduction

The Supreme Court is, in many ways, structurally insulated from the shifting landscape of public opinion, yet there is considerable debate regarding how much the Court responds to public preferences. In examining decisions at the merits stage, there are mixed results on how much influence the public has on the Supreme Court. The court on one hand appears to follow along with what the general public mood or opinion is on a given issue (Mishler and Sheehan 1993; McGuire and Stimson 2004; Clark 2009; Casillas, Enns, and Wohlfarth 2011), and on the other hand, the Court seems to be immune from public opinion (Norpoth and Segal 1994; Segal and Spaeth 2002; Segal, Westerland, and Lindquist 2011). Much research has been dedicated to deciphering what influences the Court's decision making on the merits, however, less is known regarding how the public may influence the Court at the *certiorari* stage.

When the public is particularly attentive to an issue area, the complexion of petitions to the U.S. Supreme Court may change. Interest groups eager to please their members seize on public interest to file amici briefs and government officials take a policy stand. While the Court is mostly insulated from public backlash, a multitude of constraints and pressures do exist. For its decisions to be carried out, often the other branches need to be involved. If the public disapproves of the Court, the incentive for the executive and Congress to carry out its decisions might wane. The public, then, may have more of an impact on the Court than currently understood.

Knowing more about how the agenda is set at the Supreme Court furthers our understanding of how this institution operates and why some petitions and policies are decided over the others. The policy-making power of this institution makes understanding how and why public opinion matters in the agenda-setting process important.

This project asks whether the public indirectly influences the Supreme Court's agenda-setting behavior. I posit public interest in an issue may spur other actors known to influence the Court into action. When there is high public interest in an issue, powerful litigants such as the Solicitor General or state Attorneys General may be encouraged to write a brief arguing for the Court to accept a petition dealing with the issue. In addition, interest groups seeking to capitalize on public interest and demonstrate their actions to their members may be more likely to file amici briefs. As such actions – such as the SG being a party to a case or interest groups filing amicus briefs – increase the likelihood of the Court granting cert, public attention on an issue area may exert an indirect impact on the petitions the Supreme Court agrees to hear.

What I do not argue is for any direct connection between public attention and *certiorari* decisions. Instead, I argue past research has overlooked the impact the public has on those actors we know are influential in the Court's agenda setting process. Certain attorneys and interest groups have an outsized influence on the Court's *certiorari* decisions. I argue those interest groups and attorneys are influenced by public attention and they, in turn, sway the Court's agenda via the actions they take.

This chapter summarizes my theory and begins by outlining the current literature on the decision to grant or deny *certiorari*. I then explicate my theory of the indirect influence public attention has on the Court's *certiorari* process through its influence on certain key actors in the legal process. I further discuss my specific expectations for how public attention influences the

actions of interest groups and governmental actors, and the effect of their actions on which petitions the Court devotes the most attention.

2.2 *Writs of Certiorari*

In the judicial branch, litigants can appeal a lower court's decision to the Supreme Court. The Supreme Court, however, chooses which cases it will hear; this power is known as discretionary jurisdiction. Losing parties may therefore file a petition for writ of *certiorari* requesting that the Court review their case. These petitions are then reviewed by the Supreme Court, and a small fraction are granted a *Writ of Certiorari*. Roughly 7,000 to 8,000 petitions are filed each term seeking attention from the Court, and about 1% are granted review.[5] When a petition is granted *certiorari*, it means that the Court has agreed to hear the case in full and formally added it to its agenda. Thus, a crucial question arises with how the Court determines which few petitions it will accord a full hearing.

Rule 10 of the Supreme Court provides some guidance as to the types of cases the Court favors for granting a writ of *certiorari*; these include cases with legal conflicts between lower courts, or cases where the lower court "has decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court."[6] A primary motivation of the Court thus is to maintain a uniform body of law throughout the country. However, conflicts among lower courts is not the only metric the justices use when deciding to grant *certiorari*. Not every case appealed to the Supreme Court has equal merit, and many are often found frivolous. Chief Justice Rehnquist and Justice Brennan have commented that many of the petitions are "patently

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[5] Caldeira, Gregory A., and John R. Wright. 1990. "The discuss list: Agenda building in the Supreme Court." *Law and Society Review*: 807-836.
[6] Rules of the Supreme Court no. 10: Considerations Governing Review on *Certiorari*

without merit" and do not require discussion; it is the Court's job to only devote time to cases of real need (McKay 1979; Perry 1991; O'Brien 2008).

A key part of weeding out cases depends on certain aspects of the petition itself. Early work on this topic put forward *cue theory*, which argues that elements of some petitions stand out from others and the justices then take these cues under consideration during the *certiorari* review process. *Cue theory* suggests that justices pay attention to the reputation of the attorneys, the reputation of the lower court judge or circuit, case type (e.g. civil liberties/rights versus tax law), and the parties to the case (e.g. federal government) (Tanenhaus et al. 1963; Ulmer, Hintze, and Kirklosky 1972). More recently, scholars have noted that ideology also matters: for instance, a conservative Supreme Court is more likely to accept cases from a liberal circuit than one from a conservative circuit, and vice versa (Caldeira and Wright 1988; O'Brien 2008).

Strategic and interpersonal calculations also play a role in the *certiorari* process. A justice may be hesitant to grant *certiorari* if he/she feels the Court as a whole would not back his/her preferred policy in ruling on the merits of a case—known as a "defensive denial" of *certiorari*. When a petition comes up for review, a strategic justice who wants to move a policy closer to his/her preferred position will be more likely to grant *certiorari* if he/she feels there will be a majority of justices that support that position (Perry 1991; Boucher and Segal 1995; Segal 1997; Caldeira, Wright, and Zorn 1999).

Scholars have identified many different aspects of an appeal that change the probability of the Supreme Court granting *certiorari*. The type of appeal matters; civil liberties' petitions will generally fare better at getting *certiorari* granted than other issues, more amici briefs increase the likelihood of *certiorari*, as does the ideological distance between the Supreme Court and the lower courts (Tanenhaus et al. 1963; Ulmer, Hintze, and Kirklosky 1972; Caldeira and

Wright 1988; Collins 2004). In addition, certain lawyers and litigants being part of a case or submitting a brief, such as the Solicitor General (S.G.) or powerful organizations, also increase the likelihood of *certiorari* being granted (Nicholson and Collins 2008; Wohlfarth 2009).

I argue that some of the impetus of outside actors attempting to influence the Supreme Court is partially dependent on how much attention that issue has recently received from the public. Interest groups want to show their engagement in a policy, and I argue they are more likely to file an amicus brief when an issue, in their purview, has sufficient attention from the public. Elected officials in both the state and the federal government have a keen interest in tackling issues their constituents are concerned about, which I posit increases their likelihood of formally joining a petition or filing an amicus brief. Also, agents of elected officials, including the S.G. and state Attorney Generals are motivated to act when an issue becomes salient to the public. This response from key actors then encourages the Court to grant *certiorari* to petitions in the salient issue areas. Thus, the public indirectly influences the Supreme Court by placing incentives and pressure on outside actors.

2.3 Amicus curiae

Amicus curiae briefs also provide strong cues for the Supreme Court. Amici briefs are filed by individuals or entities who are not formally a part of the case.[7] Amici briefs can be submitted both at the *certiorari* or the merits stage.[8] These briefs can serve as a cue for justices with regards to what people ideologically similar/distant believe, if other institutions prefer one outcome or cert to be/not be granted, and/or if the legal community has an opinion on *certiorari*.

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[7] Rules of the Supreme Court no. 37: Brief for an *Amicus curiae*

[8] After a petition has been granted, new amici briefs are submitted to persuade the justices to rule one way or another

Amici briefs are effective, particularly at the *certiorari* stage. Generally, as the number of amicus briefs increase (either for or against the petitioner), there is a higher likelihood that the Supreme Court will hear the case (Caldeira and Wright 1988, 1990; Perry 1991; Baum and Neal 2009). In fact, nearly all cases accepted by the Supreme Court have amici briefs filed (Epstein and Knight 1999; Kearney and Merrill 2000). There has been an increase in the number of amicus briefs being filed over time, particularly from special interests and large organizations (Epstein and Knight 1998; Collins 2004). Interestingly, the legal arguments contained within the briefs filed at the merits stage of the process often make their way into the final opinion as well, indicating that they are informative to the justices and can have an impact on the eventual precedent set (Spriggs and Wahlbeck 1997; Kearney and Merrill 2000; Corley 2008). In addition, this effect is similar for amicus briefs filed in the circuit courts of appeal (Martinek 2006).

While expensive, many interest groups find filing an amicus brief to be money well spent. Members of special interest organizations want their organizations to influence a policy change, and these briefs are tangible evidence of such attempts (Solowiej and Collins 2009). Amicus briefs signal to the members of an interest group that the organization is acting and attempting to influence a policy (Wasby 1995; Collins and Martinek 2010; Zuber, Sommer, and Parent 2015). Using amicus briefs as a vehicle, interest groups can inform the justices of the harm or benefits of granting *certiorari* (at the cert stage) or what repercussions may occur at the merits, or decision stage (Collins 2004, 2008).

Some argue that amici participation itself is a proxy for public attention or public salience on a given case. With no direct way to capture salience on a specific case or issue area, scholars argue that increased amici participation signals more public or legal interest. And, studies find

that the Court pays more attention to *certiorari* petitions with high levels of amici participation (Hansford and Damore 2000; Maltzman and Wahlbeck 1996; Maltzman, Spriggs, and Wahlbeck 2000; Collins 2004). Thus, attention paid by the public suggests a connection between public salience and an increase in the likelihood of granted to salient petitions. However, scholars have not yet explored what induces outside amici to join these particular petitions. Put another way, why do some petitions become salient?

I argue that because special interest groups and elected members of government (including state governments) have an interest in affecting policy, an increase in public attention to an issue area may induce these groups / government bodies to file more amici briefs for showing their involvement. Thus, increased attention from the public is likely to produce more amicus briefs related to a salient issue area, which in turn makes it more likely that the Supreme Court will accept petitions related to that issue. Most scholars examine which cases receive amicus briefs, as opposed to why the amici were filed in the first place. Understanding why amicus briefs are filed in the first place, however, is necessary to fully understand what impact they have later.

In the 2014 – 2015 Supreme Court term, there were a record number of amicus briefs filed during both the cert and merits stages;[9] a record-breaking 147 amici were filed for one case—the gay marriage case—*Obergefell v. Hodges*, an extremely salient issue area.[10] In other recent terms, 136 amici were filed in the cases surrounding the Obamacare decision, 156 split between two other gay marriage cases *Perry*[11] and *Windsor*[12], and 47 filed for the recent Texas

[9] The National Law Journal, August 19, 2015.
[10] *Obergefell v. Hodges*, 576 U.S. (2015)
[11] *Hollingsworth v. Perry,* 570 U.S. (2013)
[12] *United States v. Windsor*, 570 U.S. (2013)

abortion case, *Whole Woman's Health v. Hellerstedt*.[13] These cases are easy to identify as ones in which there was intense public interest even before the Court granted *certiorari*, which I argue is a component as to why there were so many amicus briefs filed.

Interest groups are the major players in issuing these briefs as it helps to show their members that they are actively attempting to change policy (Wasby 1995; Hansford 2004; Collins 2004, 2008; Solowiej and Collins 2009; Collins and Martinek 2010; Zuber, Sommer, and Parent 2015). I argue the more salient the issue area, the more likely it is that interest groups, lobbying firms, and others will file an amicus brief on a case addressing that issue in order to satiate their members. Thus, increased public salience indirectly influences the Court by inducing more amici briefs on salient issue petitions versus non-salient ones, which in turn raises the likelihood of these (salient issue) petitions being granted cert.

2.4 Lawyers and Litigants

Certain actors have an outsized influence on the Court, and their motivation for acting may be influenced by public attention to specific issue areas. The Solicitor General may be the most important outside actor. The strength of the S.G. is quite evident; for instance, when the S.G. submits an amicus brief or recommends the Court hear a case, the Court is much more likely to accept that case for review (Tanenhaus et al. 1963; Provine 1980; Ulmer 1984; Caldeira and Wright 1988; McGuire 1998; Owens 2010). Once the Solicitor General has made the government's position clear, the Court sides with the government, majority of the times. When the Court and executive branch are ideologically aligned, the S.G. wins 87% of the time, whereas that number is still as high as 60% if the President and Court are not ideologically aligned (Bailey, Kamoie, and Maltzman 2005; Wolfarth 2009). The president and S.G. may see high

[13] *Whole Woman's Health v. Hellerstedt,* 579 U.S. (2016)

public attention surrounding an issue area which encourages action by the executive branch. Action could include filing an amicus brief stating their position to affect the policy and appease their supporters. The S.G. will not always be told explicitly by the executive to file a brief in a case, but in general, her actions can be viewed as a proxy for what the executive branch prefers (Johnson 2003; Nicholson and Collins 2008; Owens 2010).

This deference to the executive via the S.G. suggests the justices are strategic and do not simply execute their own policy desires, but also consider other actors. When a case is politically salient, the ideology of the individual justices wins out over arguments or positions of other branches of the government (McAtee and McGuire 2007). On the merits, non-salient cases appear to leave the justices open to persuasion from other branches or amici briefs, whereas salient cases rouse the justices, inducing a more ideological behavior (McAtee and McGuire 2007; Black and Owens 2012; Fix 2014). An exact reasoning as to why this is the case is not clear, however, some have speculated that the Justices feel the need to be more ideological in their decision-making when the issue is salient to the public (Segal and Spaeth 2002).

Scholars argue that the S.G. will be more likely to file a brief or become more active in litigation if the case/issue is important to the public (Puro 1971; Salokar 1992). In recent work, Nicholson and Collins (2008) seek to identify when the S.G., arguably the most powerful actor outside of the justices themselves (Caldeira and Wright 1988; Pacelle 2003; Bailey, Kamoie, and Maltzman 2005), would be prompted to file an *amicus curiae* brief. The authors find that when certain legal, political, or administrative conditions are present, the S.G. is more likely to do so. Specifically, they find that when cases are salient, as measured via the NYT salience measure, the S.G. is 15% more likely to file a brief (Nicholson and Collins 2008). Thus, if an issue is

important to the public, it is more likely that the S.G. will become involved, thus increasing the likelihood of *certiorari* being granted

While no other individual lawyer is in front of the Court as often as the S.G., research shows that other high powered, connected, or elite lawyers can also affect the Supreme Court's agenda-setting (McGuire and Caldeira 1993). Litigants with more financial resources are more likely to have their petition granted by the Court and receive a favorable decision on the merits (Galanter 1974; Songer, Sheehan, and Haire 1999). For instance, this "hierarchy of litigants," where some litigants perform at higher rates, illustrates that government entities win more often than businesses, which win more often than interest groups, who win and get their cases granted *certiorari* more so than individuals (Owen 1971; Galanter 1974; Wanner 1975). Across all federal courts, government entities are four times more likely than individuals, and twice as likely than businesses, to have their cases heard and won (Songer and Sheehan 1992). Further, among the individual litigants, those who are well financed and employ lawyers who are repeat players in front of the Supreme Court are the most likely to have their petitions granted (Feldman and Kappner 2016). In all, those with the most resources are able to direct the agenda and have a strong influence on the eventual outcomes of the Court's decisions.

Research also suggests that litigants themselves are strategic. The decision to appeal a judgment comes down primarily to economics; litigants must determine if their perceived payoff will be greater than the costs incurred by mounting an appeal to a higher court (Priest and Klein 1984; Kessler, Meites, and Miller 1996). A part of the calculation for litigants is the ideological makeup of the court the case will be appealed to. There is ample evidence of ideologically strategic litigants. For instance, when deciding to appeal a case, litigants take the ideological temperature of the higher court and use that to determine their eventual success (Zorn 2002;

Baird 2007; Yates and Coggins 2009; Giles, Walker, and Zorn 2006; Black and Owens 2009; Mak, Sidman, and Sommer 2013). I argue that litigants take notice when an issue becomes salient to the public and alter their planning. If the public is generally on their side, they will push forward and file a petition. Further, other actors besides parties on the petition take notice, adding another layer of the public's influence.

In addition to the S.G., an under-explored area of research is if the state Attorneys General or other elite lawyers will seek out or attach themselves to a case in an issue area that is salient among the public. For A.G.s and executive branches of state, getting involved with cases that the wider public is concerned with makes intuitive sense. State executive branches and A.G.s have policy goals, and litigation is the means of pursuing those goals. The State Attorneys General will likely not be compelled to issue a brief or join a case that is nationally salient, unless it is also salient within their state as they too are motivated by policy and electoral goals. Major law firms or elite lawyers who sense an increase in salience for an issue area, or the public opening a window, may more likely represent petitions relating to that issue if it aligns with their clients or lobbying goals. The culmination of these various actors' changing behavior due to public salience can indirectly impact how the Court sets their agenda. In short, if an issue is highly salient to the public in a handful of states, it is likely the A.G.s of those states will join cases or file briefs related to those issue areas, which in turn will increase the likelihood of *certiorari* being granted.

Finally, interest group behavior in the Courts is worth attention due to the large role they play in American politics. Generally, interest groups influence representatives with campaign contributions or by mobilizing their large base of support in the public (Bentley 1908). Interest groups need to push for specific policy goals to show supporters they are active in the issues'

arena and maintain membership (Walker 1983; Collins 2004; Cigler, Loomis, and Nownes 2015). Walker (1983) examines the creation and continued maintenance of interest groups in the 20th century. Walker finds that interest groups who accomplish their goal with no new agenda tend to disappear, and those who maintain strong allegiances with the public, especially in terms of monetary donations, thrive. While most interest groups in Walker's period of study were founded by a wealthy patron, without continued public support, the interest group loses clout in achieving policy goals.

2.5 Discuss List

Before the writs of *certiorari* are decided, some petitions—a short list of petitions the Justices feel are worth the extra attention—are placed on the Discuss List. The Court eventually creates its agenda from the discuss list for the upcoming term, with approximately 7% to 9% of petitions making it to the list. The factors currently known to impact the likelihood of petitions being placed on the discuss list include amicus briefs, S.G. involvement, and the ideological distance between the lower court and the Supreme Court (Caldeira and Wright 1990). However, I argue that there exists another influence on the discuss list—public attention to the petition's issue area. Others have argued similarly, essentially that the justices and clerks are all a part of the society and likely know if an issue is particularly salient when they are reviewing petitions (Giles, Blackstone, and Vining 2008; Baum 2009; Fix 2014).

Understanding which factors influence the decision of placing a petition on the discuss list and granting of *certiorari* is important because of the clear link between the agenda-setting function of the Court and their ultimate decisions. Thus, when controlling for other known influences on the discuss list, I argue that high public salience to an issue will exert its own effect

via the actions of outside actors. These outside actors take notice of the public's attention and file amicus briefs or petitions to the Court in situations they might not have otherwise.

In the Judiciary, there are two ways in which the Court can give attention to an issue; the discuss list and granting of *certiorari*. Litigants need to persuade the Court to give their petition attention, and the first hurdle they need to overcome is making it to the discuss list. The discuss list has origins in the mid-1900s after the Supreme Court was given discretionary jurisdiction with the Judiciary Act of 1925. Immediately following the Judiciary Act, the justices created a "dead list", or cases not to be discussed. Later, the dead list was dropped in favor of a "discuss" list. Justice Stevens describes it: "In the 1975 Term, when I joined the Court, I found that other procedural changes had occurred. The 'dead list' had been replaced by a 'discuss list'; now the chief justice circulates a list of cases he deems worthy of discussion and each of the other members of the Court may add cases to it" (Stevens 1983, 13). Stevens (1983) argues the change from dead list to discuss list was meaningful, as it changed how attention was given to each petition. Originally, every petition was debated unless it was placed on the dead list, and now no petition is discussed unless it is placed on the discuss list. Rarely do the justices browse the full list of petitions; clerks who make up the *certiorari* pool largely analyze the petitions first.

Caldeira and Wright (1990) examine what aspects of petitions increase the likelihood that the Court will place them on the discuss list. Variables such as the U.S. being a party, lower court conflicts, issue areas (Civil Liberties), ideological distance, and *amicus curiae* participation were tested. Some aspects have a strong impact on the likelihood of making it to the discuss list:

> If all of the qualities except the United States as a petitioner, amicus briefs, and real conflict are present in a case, it [petition] has a .39 probability of making the discuss list. The addition of an *amicus curiae* brief increases the probability of discussion to .74. Similarly, on the decision on a writ of *certiorari* absent the United States as a petitioner, an amicus brief, and actual conflict, the addition of an amicus brief more than doubles its

> chances. The message seems clear: organized interests as amici curiae perform an especially central role in both stages of the decision. (Caldeira and Wright 1990, 831).

In addition, the authors find that the S.G. gets over 90% of the cases they are a part of placed on the discuss list, and more amicus briefs further increase the likelihood of placement on the list.

The Court needs legitimacy from the public to operate and cannot enforce decisions alone, meaning opinions of other government institutions and the public are likely considered (Caldeira 1986; Caldeira and Gibson 1992; Gibson and Caldeira 1998; Ignagni and Meernik 1994; Bailey, Kamoie, and Maltzman 2005; Hettinger and Zorn 2005; Curry, Pacelle, and Marshall 2008; Hall 2014; Gibson and Nelson 2015). While the Court does have a reliance on other institutions, generally, their decisions are carried out and executed faithfully (Curry 2007; Chutkow 2008; Carrubba and Zorn 2010). Indeed, some argue that compliance from other government institutions is due to the high amounts of support and legitimacy for the Court, given by the public.

I argue and explore more in depth in chapter 6 about public attention being another yet-to-be-tested impact on the discuss list. I posit that when an issue is highly salient among the public, the Court will spend more time deliberating petitions related to the salient issue area. This is not due to the Justices wishing to appease the public or out of fear of retribution from other branches, but because the outside actors change their behavior (i.e. file more briefs / convince the Court it is worth the time) which influences the Justices to do so.

Either due to concerns about maintaining their legitimacy, replacing the justices, or wanting to tackle issues the public cares about, the Court generally tracks public opinion at the merits stage. Some argue that the Court's mechanism of following public opinion at the merits stage is due to the replacement of justices over time (Norpoth and Segal 1994; Giles, Blackstone

and Vining 2008) or due to constraints perceived from other elected branches (Chutkow 2008; Harvey and Friedman 2009). The public elects the President who selects future justices, as well as the senators who confirm them. Thus, the installation of a new justice would then be reflective of public opinion at that time. Others argue that public opinion produces a real constraint on judicial decision making at the merits stage, regardless of the changes in composition of the justices (Mishler and Sheehan 1993; Stimson, MacKuen, and Erikson 1995; Hurwitz, Mishler, and Sheehan 2004; McGuire and Stimson 2004; Casillas, Enns and Wohlfarth 2011).

I present a detailed argument in Chapter 6 about if the Court decides cases with an eye to public opinion at the merits stage, the justices may also do so during the *certiorari* process. The justices and their clerks are a part of the society and it is a reasonable assumption they are aware of the issues that are salient to the public at any given time (Caldeira and Wright 1990; Giles, Blackstone, and Vining 2008; Baum 2009; Fix 2014). Chapter 6 specifically examines how public attention influences the amount of time the Court spends on each petition.

2.6 Conclusion

Scholars have shown that the Court is responsive to external actors in its decision making in several ways. First, the Court generally tracks public opinion at the merits stage, regardless of the changes in the composition of the justices (Mishler and Sheehan 1993; Stimson, MacKuen, and Erikson 1995; McGuire and Stimson 2004; Casillas, Enns and Wohlfarth 2011). Second, the Court defers to the executive branch at both the merits and *certiorari* stages when their attorneys take part in the case. For example, once the S.G. has made the government's position clear, the Court sides with the government most of the times (Bailey, Kamoie, and Maltzman 2005; Wolfarth 2009), and when the S.G. submits an amicus brief recommending the Court to hear a case, the Court is much more likely to do so (Caldeira and Wright 1988; Provine 1980;

Tanenhaus et al. 1963; Ulmer 1984; Owens 2010). Third, at the *certiorari* stage, the Court takes notice when a petition garners a high amount of *amicus curiae* briefs. Generally, as the number of amicus briefs increase (either for or against the petitioner), there is a higher likelihood that the Supreme Court will hear the case (Caldeira and Wright 1988; Perry 1991; Baum and Neal 2009). In addition, legal arguments contained within briefs filed at the merits stage of the process often make their way into the final opinion as well, indicating that they are informative to the justices and have an impact on the eventual precedent set (Spriggs and Wahlbeck 1997; Kearney and Merrill 2000; Corley 2008).

This project builds on previous research and argues that public interest in an issue area can have an indirect effect on the likelihood of petitions being placed on the discuss list, and ultimately being granted *certiorari*. I argue that when an issue becomes highly salient to the public, formal actors such as the S.G. and interest groups are likely to increase their participation in petitions dealing with these salient issue areas. The justices and clerks notice the actions taken by these key legal actors and alter the discuss list accordingly, thus indirectly increasing the likelihood of the Court granting *certiorari* to petitions dealing with that salient issue area.

In the next chapter I introduce my measure of public attention. I show how it was constructed and compare its results with another measure used to determine what is important to Americans on a national level: Gallup's Most Important Problem survey.

3 CHAPTER 3: MEASURING PUBLIC ATTENTION

3.1 Introduction

When scholars wish to empirically examine a phenomenon, they often create their own data or try and incorporate a measure created by others into their work. In George Bohrnstedt's (2010) presentation of measurement in social sciences, he comments on a trend where our measures are not capturing what we wish them to capture. He argues there are clear and fuzzy measures in social science. Clear measures include age, marital status, race, income, etc., whereas concepts such as attitudes or beliefs often require assumptions to wedge them into our empirical models and theories. Bohrnstedt argues that when measures which do not accurately capture what the researcher is looking to examine are used, theories are bent to accommodate measures, watering down both theories and findings. In response to this presentation, discussants noted that this trend "also leads to the development of 'habitual measurement practices,' that is, relying on the same measures regardless of whether they truly represent the theoretical constructs of interest" (National Research Council 2011, p. 16). Creating measures for specific questions is important, and for this project, a new measure is required. I am concerned with finding out how much the public is talking about an issue.

Since 2006 a paradigm shift has occurred in how people share information and communicate with each other. The public now, more than ever, has multiple platforms to openly discuss topics it finds interesting or outraging. The use of social media has become pervasive, with surveys reliably suggesting that 80% of American adults are online, and a large majority engage with at least one social media platform per day.[14] Social media companies such as

[14] Dr. Nicole Ellison and Dr. Cliff Lampe. Social Media Update 2016. Pew Research Center, Washington, D.C. (November 11th, 2016). http://www.pewinternet.org/2016/11/11/social-media-update-2016
Maeve Duggan. Social Media Update 2015. Pew Research Center, Washington, D.C. (August 19th, 2015). http://www.pewinternet.org/2015/08/19/mobile-messaging-and-social-media-2015

Twitter and Facebook exploded in popularity in 2008 through 2010, with both platforms growing at over 1,000% a year (Golbeck, Grimes, and Rogers 2010). Adoption of social media is particularly strong among younger Americans, with 90% of 18-24-year old's using multiple platforms daily. Among all adult Americans, a stunning 69% regularly communicate on at least one social media platform, with about half using Twitter.[15] Participation in social media generally crosses racial, socioeconomic, gender, and community lines. Minorities use social media at the same rates as whites, as do women and men, those in rural or urban areas, as well as those at various levels of income.[16] These online interactions and conversations are tracked and archived, leaving open the possibility to gauge what topics and issues are given the most attention by the public at any given moment.

Others have used data from social media to help answer an array of important questions such as how social media influences political participation (Gibson, Lusoli, and Ward 2005; Gainous and Wagner 2011; Bond et al. 2012; Boulianne 2015), how news coverage is affected by social media (Wallsten 2011), and how social media is impacting polarization (Howard et al. 2011; Gainous and Wagner 2013). This project is not the first to use data from social media, however, to my knowledge it is the first to use counts of social media activity to capture attention to an issue area.

This chapter proceeds with a brief background on other salience measures widely used in public law, followed by an explanation of how I collected the data for my public attention measure. After explaining the measurement collection process, I validate the measure against one

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Duggan et al. Social Media Update 2015. Pew Research Center, Washington, D.C. (January 9th, 2014). http://www.pewinternet.org/2015/01/09/social-media-update-2014

[15] Aaron Smith and Monica Anderson. Social Media Update 2018. Pew Research Center, Washington, D.C. (March 1st, 2018)

[16] Social Media Fact Sheet. February 5th, 2018. Pew Research Center, Washington, D.C. http://www.pewinternet.org/fact-sheet/social-media/

I feel is trying to get at a similar concept: the Gallup Most Important Problem survey. I demonstrate that while my measure and the Gallup measure are similar, they also have important distinctions that separates the two. I conclude with a summary of findings and introduce chapter 4, the first empirical chapter.

3.2 Argument for a new Public Attention Measure

There are two types of salience as measured in the public law literature: political salience and legal salience (Cook 1993). For an issue to be legally salient it must be "important" insofar as how it affects the law, the people who work with and are close to the law (Maltzman, Spriggs, and Wahlbeck 2000). Political salience by contrast can be described as an issue being highly important to the public or politicians but not necessarily to those of the legal community (Epstein and Segal 2000). Issues such as abortion, gay rights, guns, etc., are typically classified as politically salient cases. A case can be legally salient, politically salient, both, or neither.

The most widespread measure of salience within public law is the Epstein and Segal (2000) *New York Times* salience measure (NYT). To capture which issues are politically salient, the NYT measure reviews the front page of *The New York Times* the day after the Supreme Court decides a case. If the case appears on the front page the day following the decision, it is marked as salient; if not, it is marked as not salient. Others have taken this method and expanded the number of newspapers to produce a more comprehensive assessment of salience (Collins and Cooper 2011; Clark, Lax, and Rice 2015). Within the states, scholars have used the same approach as Epstein and Segal, but instead of using major national papers, they use the largest newspaper in each state by circulation and again look for state supreme court cases on their front pages (Vining and Wilhelm 2009).

To gather data on legal and political salience outside of newspapers, scholars have created an array of other measures. Some use annual polling data such as the Gallup Most Important Problem Survey to gauge what issue is most on top of mind for the public (Fix 2014). There have also been attempts to capture legal salience, arguing that measuring how much the justices speak during oral arguments can be a proxy for how important that issue is for each justice (Black, Sorenson, and Johnson 2013). Other examples include using case citations in constitutional law textbooks as a proxy for salience (Slotnick 1978), or the number of *amicus curiae* briefs submitted (Maltzman and Wahlbeck 1996).

While useful, nearly all existing measures are captured after the case or *certiorari* has been decided or are part of a survey of pre-determined responses, lacking an unfiltered view of what the public is talking about. A more useful measure of salience, particularly when studying the influence of the public, would observe opinion while petitions are being debated. Unlike previous measures of salience, my social media measure overcomes concerns about capturing information *ex post facto*, or at a single instance in time. Rather, this measure provides dynamic, contemporaneous information about what issues the public cares about.

The pervasiveness of social media, along with sophisticated tracking data, enables researchers with the ability to identify what issues are being discussed, how often, and is superior for this type of analysis over traditional methods. Harnessing data available from what is expressed online can help scholars identify what exactly the public is talking about at any given moment. The public's opinion on what is important may change depending on current events. Data from social media is live, constantly updating, and includes the entire universe of people using social media. Due to social media's pervasiveness, the data derived is a true window into what the public is talking about.

3.3 Creating the Measure

Due to access limitations, I selected three issue areas on which to collect data regarding how much the public talked about an issue between 2010 and 2017. The three issues selected were abortion, campaign finance, and anti-trust. I selected these issues for a few reasons. First, I wanted issues that are distinct from one another with no concerns that my capturing of public conversation would be seen as grabbing the same conversation twice. Second, I wanted to vary the levels of salience. Abortion is routinely listed as one of American's top concerns,[17] while campaign finance's salience waxes and wanes; anti-trust is a more technical issue that generally garners little public attention. Finally, I wanted to make sure to collect information on issues that are regularly appealed to the U.S. Supreme Court.

To collect data regarding how much attention the public has paid to the selected three issues over time, I used a service named Sifter. Sifter has a special research relationship with Twitter, and their data company, GNIP, which allows Sifter to request Twitter activity data. After the search parameters are set, GNIP/Sifter takes a sample of all Tweets within the time selected and gives an estimate of Twitter activity. These samples from GNIP/Sifter are highly accurate; GNIP/Sifter will use these estimates to charge customers seeking more data on the tweets in question. In this case, I set parameters for every month from January 2010 through December 2017 for each of the three topic areas, resulting in a count of Twitter activity by month by issue area. Due to Twitter's relatively small public adoption in their earlier years, I use the years 2010 through 2017.[18] As an example, to determine how much attention campaign finance was receiving in September 2013, the following search process was utilized:

[17] Public Opinion on Abortion. Pew Research Center, Washington, D.C. (10/15/2018). http://www.pewforum.org/fact-sheet/public-opinion-on-abortion

[18] Number of monthly active Twitter users worldwide https://www.statista.com/statistics/282087/number-of-monthly-active-twitter-users/

- Boolean search for Campaign Finance would read as follows: ("Citizens United v. FEC" OR "Citizens United" OR "Campaign Finance" OR "Campaign Finance reform" OR "Dark money" OR "Money in politics" OR pac OR pacs OR "Super PAC" OR "Super PACs")[19,20]
- An example date would be specified (e.g., 09/01/2013 through 09/30/2013)
- United States would be set as the geographic area

For example, the above scenario for September 2013 registered 431,000 mentions of Campaign Finance on Twitter. September 2015 registered 476,000 mentions. I repeat this process for every month and every topic area between January 2010 and December 2017.

Because Twitter's popularity increased over time, I normalize my measure of the number of mentions of a topic area per month based on average Twitter usage during that time period. In September 2010, there were approximately 14 million Twitter users. In September 2017, that number increased to 69 million. Thus, 500,000 tweets in 2010 is a larger percent of Twitter activity than it is in 2017. To ensure my measure of public attention can be compared over time, I divide the total number of mentions by topic area/month by the total number of Twitter users during each quarter. (Twitter does not report user base statistics by month – only by quarter.) This procedure provides a standardized measure of public attention for these three topic areas from 2010-2017. Therefore, it serves as a reliable gauge of public attention that is comparable over the years. *Public attention* is thus the average of Twitter activity for that petition's topic area over the previous twelve months.

3.4 Validating and Exploring the Measure

There are no other direct comparisons to validate this new measure; however, past research utilizes methods that are roughly approximate to the data I collected for this project.

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[19] Boolean search refers to a type of search allowing users to combine keywords with operators such as AND, NOT and OR to further produce more relevant results.
[20] Boolean search phrases used are available in Appendix C of the dissertation. Key words were chosen based on words most often used in conjunction with the primary issue area of interest.

One relevant measure of what is important to Americans is data from Gallup's Most Important Problem survey. Gallup's survey asks Americans to select what issues are the most important problem. Researchers affiliated with the Policy Agendas Project (PAP) have recoded Gallup's data according to the PAP content coding by "major topic" to create the Recoded MIP Data Set (Heffington, Park, and Williams 2017). The MIP Data Set contains annual information regarding what respondents deemed the most important problem in the United States from 1947 to 2018. By using this data as a means of comparison, I will show correlations between survey responses and data collected via social media.

I need to be clear that this is not a 1:1 comparison. The data I collected relates to very specific issue areas (abortion, campaign finance, and anti-trust), whereas the MIP Data Set and Gallup's survey lump together issues into broader categories. For example, abortion is coded as "civil rights," and campaign finance falls into the broad category of "government operations." While this is not an exact validation, I believe the topic areas and my issue areas are relatable enough for meaningful comparison. Further, I focus specifically on the campaign finance and abortion issue areas as anti-trust does not show dramatic fluctuation in either my public attention variable or the MIP data set. As a reminder, anti-trust was specifically selected because of its generally low conversation rates.

3.4.1 Public Attention to Abortion, Campaign Finance, and Anti-trust

In Chapter 1, I reviewed the story surrounding *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*.[21] In this case, the Supreme Court sided with the petitioners to strike down a 1998 Arizona law that gave candidates for statewide office funds depending on how much money their opponents spent. I argued in the introduction that the relatively intense attention this

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[21] *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011)

petition received in the form of powerful lawyers and amicus briefs was partly due to the increase in public attention campaign finance received during this period in time. Figure 3.1 illustrates the level of public attention to campaign finance from 2010 through 2017. This data is derived from Twitter and illustrates fluctuations in how much Americans discussed the issue over time.

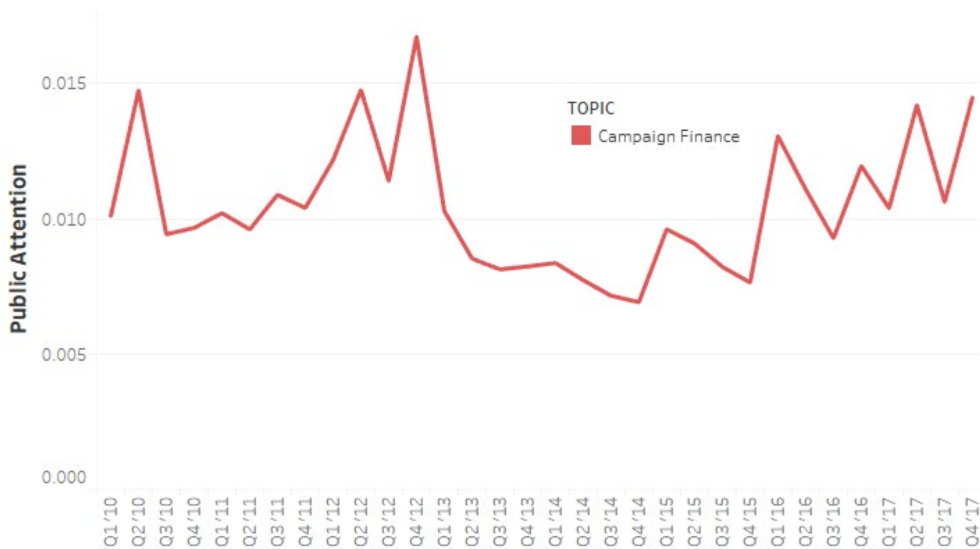

Figure 3.1: Public Attention to Campaign Finance – Twitter

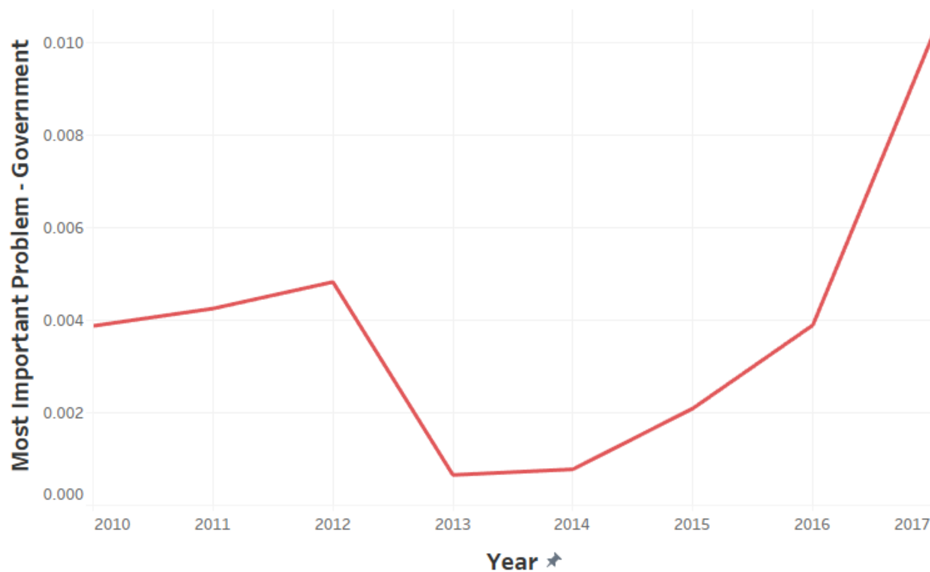

Figure 3.2: Most Important Problem - Government

Figure 3.1 shows in the first and second quarter of 2010, just before the filing of the *Arizona* petition, public attention toward campaign finance reached a near all-time high. If one searches for news articles for any of these issue areas along with the date of each spike, it is generally easy to see what event rallied public interest. Public attention toward campaign finance lowers considerably in later 2010 but reaches its highest levels of public salience in 2012, during the presidential campaign. In 2012, the term "Super PACs" entered the American lexicon, and that same year, John Edwards was on trial for campaign finance violations. The issue falls off most American's radar until Bernie Sanders enters the 2016 presidential race, and the issue has remained salient, with some volatile spikes ever since.

When compared to the Gallup/MIP survey data regarding what issue is the most important, there are similar peaks and valleys. The data from Twitter reports by quarter per year along the X axis, whereas the MIP data reports annually. Figure 3.2 illustrates the same time period, but for the corresponding "major topic" that the Comparative Agendas Project places campaign finance within. The data from these two different-but-similar sources/issue areas both show an increasing slope in early 2010, spiking in 2012 followed by a dip, and then an ever-increasing curve since the 2016 election. Again, I realize this is not an apples-to-apples comparison but given campaign finance is often a major concern of government operations, I believe it is a feasible means to compare measures.

Abortion is the next issue area I compare to the Gallup/PAP MIP data. Abortion is an issue area that never fades from public discourse and is simultaneously salient and not at top of mind. Polling finds that nearly all adult Americans, 95%, have some opinion on abortion and how the government should legislate on the issue.[22] Thus, I expect abortion to be the most talked

[22] Public Opinion on Abortion. Pew Research Center, Washington, D.C. (10/15/2018). http://www.pewforum.org/fact-sheet/public-opinion-on-abortion

about issue among the three topics I selected. Figure 3.3 and 3.4 show how attention has shifted toward abortion/civil rights over the same time 2010-2017 period.

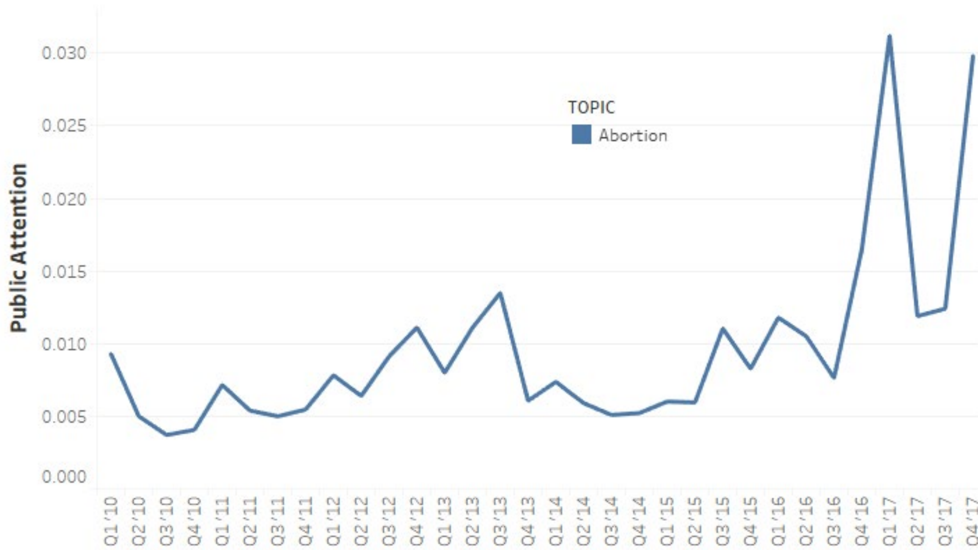

Figure 3.3: Public Attention to Abortion – Twitter

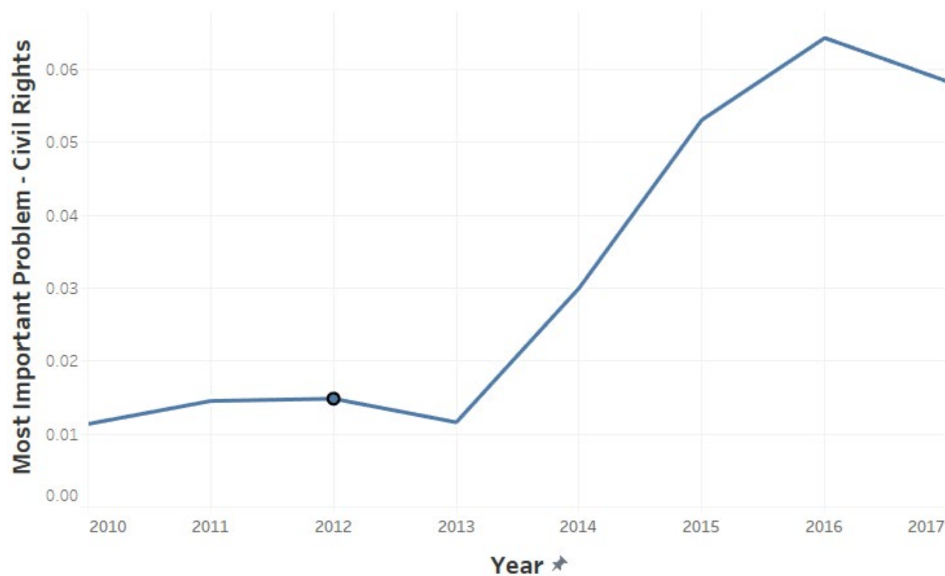

Figure 3.4: Most Important Problem – Civil Rights

The data from both sources, while not measuring the exact same issue area (MIP would also include gay rights, freedom of speech, etc.) have a remarkably similar distribution. Figure 3.3 shows a relatively low amount of public attention to abortion that remains stable until the

final quarter of 2016. The MIP data in 3.4 also shows a steep increase of Americans responding that civil rights are the most important problem over the same period. The end of 2016 coincided with the election of Donald Trump, and in January 2017 he signed an executive order banning federal money to groups that perform or provide information on abortions. Afterwards there have been other developments in this topic area, keeping the issue highly discussed among Americans.

While looking at these two topic areas independently shows a clear comparison between the MIP and Twitter data, I believe there is value in laying these figures on top of one another in order to get an idea of how much more or less each topic is discussed when compared to each other. Figure 3.5 combines all three topics' Twitter data to illustrate how much Americans are talking about abortion versus campaign finance and anti-trust. Figure 3.6 does the same but uses MIP data.

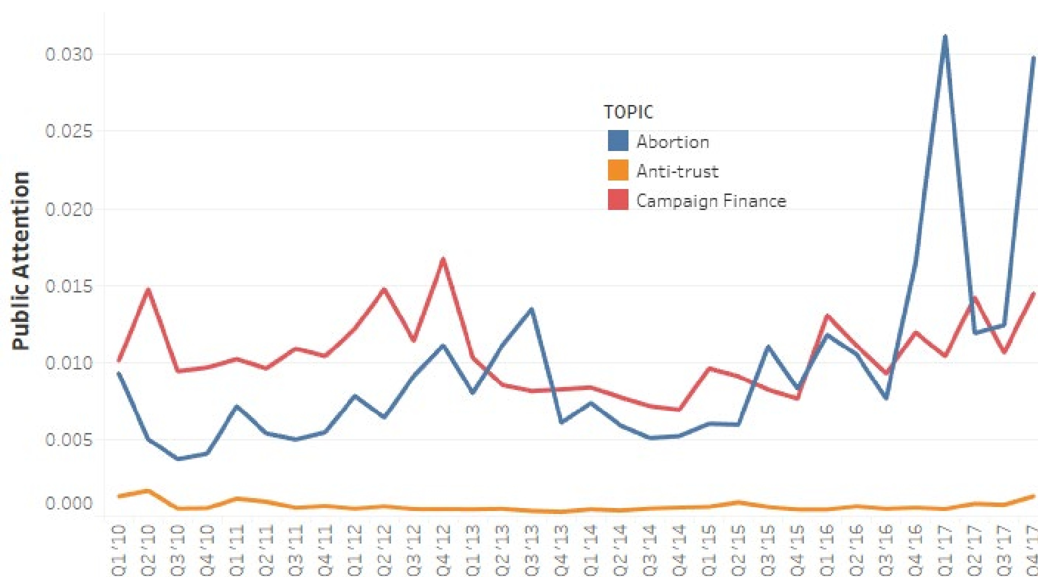

Figure 3.5: Public Attention to Abortion, Anti-trust, and Campaign Finance - Twitter

Figure 3.6: Most Important Problem - Civil Rights and Government

When all issue areas are compared, it is apparent in figure 3.5 that after *Citizens United* was decided, the public paid much more attention to campaign finance than the other two topics. Interestingly in 3.6 the same trend does not occur. Both figures show an increase in respondents identifying the issue as the *most important problem* or talking more about the issue on Twitter at roughly the same time. However, there is a meaningful difference between the two measures that I believe is a strength for using social media. The data gathered from Twitter is capturing what people are saying online as they are talking about it versus the data from Gallup's MIP survey is a survey from a moment in time with pre-determined options. Thus, while respondents may want to tell a survey that they are most concerned with civil rights or another issue, they are talking more about campaign finance, at least in 2010 through 2012. Using data from Gallup over the years of 2010 – 2016 might suggest an over representation of Americans being concerned with civil rights when they are talking and tweeting about different issue areas. The respondents may believe civil rights are a more important issue, however, when interest groups, corporations, elected officials, and the news media see what is trending online, they will see what the public is

talking about instead of what they respond to on a survey. Again, the goal of this measure is to quantify how much Americans are talking about specific issues over time, and I believe it reliably does that.

Returning to figure 3.5, it is worth noting that while anti-trust does not reach public conversation levels near the other two topic areas, there is fluctuation within the topic itself. Further, as empirically shown in subsequent chapters, these relatively minor fluctuations in the public attention given to anti-trust (as well as the other two) causes meaningful responses by outside actors in litigation.

3.5 Conclusion

This chapter began with a discussion about how measures need to be made and used for precise questions in order to help inform precise theories. I then discussed how many Americans now use social media to communicate with one another and voice their opinions. After reviewing other measures used, I discussed how the Gallup/Policy Agendas Project MIP Data set is somewhat comparable to the data I gathered from Twitter. There are similarities between the two, but also important differences. The MIP data is a survey at a moment in time, giving respondents a selection of issues to select. Gathering data from Twitter provides a more direct and truthful representation of what the public is talking about at any given moment. Further, data gathered from social media can be exact versus falling into large and general “major topic” areas such as civil liberties. One can explicitly look at what and how much Americans are saying about an issue if we utilize the data available to us instead of relying on surveys or newspapers.

Data regarding what the public is talking about on social media is the clearest way to capture public attention to an issue. Due to social media’s pervasiveness, use, and widespread adoption in the United States. I argue that this pervasiveness means that conversations online are

not a sample of the public's conversation, but the actual, entire conversation. Thus, capturing what the public is talking about online is capturing what the public is talking about on the whole. Once fully realized, this measure has the possibility of furthering our ability to understand how the public may influence elite agenda-setting and decision-making writ large. This measure provides an important opportunity to create a dynamic measure of public attention/opinion that may aid us in moving beyond some of the issues surrounding traditional methods of collecting public opinion, such as surveys, or other methods of gathering this information.

In this chapter I compared my measure of public attention to the MIP survey data from the Policy Agendas Project. Generally, my measure tracks with what respondents believe to be the most important problem over the same time period. Distinctively, however, the measure derived from social media is more precise in topic versus the wide categories used by the PAP. Further, my measure shows that while respondents on a survey may list one thing as the most important issue, they are talking about something else in their day to day interactions. Thus, this measure is a valid and important way to gauge what the public is talking about at any given point and is superior to other measures attempting to capture a similar metric.

Chapter 4 begins the empirical analysis of this project and asks how public attention impacts the likelihood of special interests, government attorneys, and others to file *amicus curiae* briefs before a petition has been granted/denied *certiorari*. I employ the measure discussed here to find that as public attention toward an issue area increases, so too does the likelihood of these impactful documents being filed.

4 CHAPTER 4: PUBLIC ATTENTION AND AMICUS BRIEFS

4.1 Introduction

Amicus curiae briefs are documents submitted to the U.S. Supreme Court that argue either in favor or opposition to the Court granting *certiorari* to a particular case, or in favor of a particular legal outcome if the case is accepted for a full hearing. These documents are influential and, in general, are intended to let the Court know what the governmental entity, interest group, or concerned citizen who files the brief thinks about the merit or implications of the petition.

Recent terms have seen a dramatic increase in the number of amicus briefs filed. In January 27, 2017, President Donald Trump signed an executive order which for 90 days barred entry of foreign nationals from specific countries as a security risk. The executive order was commonly known as the "travel ban," and it incited nationwide protest, received wide coverage on news media, and generated heated debate on social media; the ban was also immediately challenged in federal district court. On March 29, 2017, the United States District Court for the District of Hawaii granted an injunction to stop the Trump administration from enacting the travel ban from specific countries. On appeal the 9th Circuit Court of Appeals affirmed the lower court and blocked implementation of the ban on May 15th, 2017. On June 1st, 2017, the Trump administration filed a petition for a *writ of certiorari* challenging these decisions. During the four months between filing of the petition and the Court making a *certiorari* decision, the case received a staggering 88 amicus briefs – the most of any petition from 2010 through 2017 by a wide margin.

In reviewing other salient petitions, such as abortion and gay marriage, a clear link emerges between those related to issues with high amounts of public attention receiving the majority of amicus briefs before a *certiorari* decision. In the 2014-2015 Supreme Court term,

there were 147amicus briefs[23] filed during both the *certiorari* (beginning) and merits (end) stage in *Obergefell v. Hodges*.[24] One hundred and thirty-six amici were filed in the cases surrounding the Obamacare decision, 156 split between two other gay marriage cases *Hollingsworth v. Perry*[25] and *United States v. Windsor,*[26] and 47 were filed in the Texas abortion case *Whole Woman's Health v. Hellerstedt*.[27] These issues generated high amounts of public attention, and in turn received a record-breaking number of amicus briefs. While the Court is purposely designed to be insulated from public opinion, there may be other, more nuanced ways the public is helping set the agenda at the highest court in the land.

4.2 Insulated but Still Impacted

The Supreme Court is highly insulated from the shifting landscape of public opinion due to its position at the apex of the federal judiciary and the justices' life tenure. However, there is also considerable debate regarding how much the Court responds to public preferences. Examinations of decisions on the merits produce mixed results. Some scholars show evidence of mass and elite opinions constraining the justices' decision making (Mishler and Sheehan 1993; McGuire and Stimson 2004; Clark 2009; Casillas, Enns, and Wohlfarth 2011), while others cast doubt on public opinion as a causal mechanism (Norpoth and Segal 1994; Segal and Spaeth 2002; Segal, Westerland, and Lindquist 2011). While a wealth of research is devoted to what influences the Court's decision making on the merits, there is relatively little research regarding how the public may influence the Court at the *certiorari* stage of the process.

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[23] The National Law Journal, August 19, 2015.
[24] *Obergefell v. Hodges*, 576 U.S. (2015)
[25] *Hollingsworth v. Perry,* 570 U.S. (2013)
[26] *United States v. Windsor*, 570 U.S. (2013)
[27] *Whole Woman's Health v. Hellerstedt,* 579 U.S. (2016)

This chapter investigates whether the public indirectly influences Supreme Court *certiorari* decisions through *amicus curiae* briefs. Prior research demonstrates that salient petitions increase the likelihood of special interest groups and government officials filing *amicus curiae* briefs (Solowiej and Collins 2009; Zuber, Sommer, and Parent 2015). However, no other studies connect public interest, salience, or attention to amici filings. Increasing our understanding of what factors encourage (or discourage) amici briefs is important due to their strong impact on the *certiorari* process. Studies routinely find that the presence of amici briefs increases the likelihood the Court will grant *certiorari*, underscoring why we need to understand what types of petitions are most likely to secure amici (Caldeira and Wright 1988; Collins 2004). I argue that when public interest in a given issue area is high, interest groups and others seeking to capitalize on public interest are more likely to file amici briefs.

4.3 *Certiorari* and the Supreme Court

As mentioned earlier in the dissertation, there are many different aspects of an appeal that increase the probability that the Supreme Court will grant *certiorari*. Some issues such as civil liberties are more likely to be granted than others, and the number of amicus briefs filed along with solicitor general participation generally increases a petitions chances (Tanenhaus et al. 1963; Ulmer, Hintze, and Kirklosky 1972; Caldeira and Wright 1988; Collins 2004; Nicholson and Collins 2008; Wohlfarth 2009).

While a small yet rich literature addresses the cert process, understanding how the public impacts this process is largely unexplored. As detailed in Chapter 2, when the public is particularly attentive to an issue area, the entire complexion of litigation may change due to actions of outside actors. Interest groups eager to please their members may seize on such cases and file amici briefs or hire powerful attorneys to litigate these issues. Government officials may

take a policy stand, directing their attorneys (i.e. the Solicitor General) to litigate a publicly salient issue. Elected attorneys general in the states may also feel that it is important to act on an issue when the public is paying more attention to it. Thus, I argue that outside actors keep the public in mind, and when the public is paying more attention to an issue area, these outside actors are more likely to file amici briefs, influencing the Court.

4.4 Amicus curiae

Amicus curiae briefs provide strong cues for the Supreme Court. Amici briefs are filed by individuals or entities who are not formally a party to the case.[28] Amici briefs can be submitted both at the *certiorari* or merits stage.[29] These briefs can serve as a cue for justices to understand what people ideologically similar/distant believe, if other institutions prefer one outcome or cert to be/not be granted, and/or if the legal community has an opinion on *certiorari*.

Amici briefs are effective, particularly at the *certiorari* stage. Generally, as the number of amicus briefs increase (either for or against the petitioner), there is a higher likelihood that the Supreme Court will hear the case (Caldeira and Wright 1988, 1990; Perry 1991; Baum and Neal 2009). In fact, nearly all cases accepted by the Supreme Court have amici briefs filed (Epstein and Knight 1999; Kearney and Merrill 2000). While the total number of amicus per term is flat from 2010 through 2017,[30] on larger time periods there has been an increase in the number of amicus briefs filed over time from special interests and large organizations (Epstein and Knight 1998; Collins 2004). Interestingly, the legal arguments contained within briefs filed at the merits stage of the process often make their way into the final opinion as well, indicating that they are informative to the justices and can have an impact on the eventual precedent set (Spriggs and

[28] Rules of the Supreme Court no. 37: Brief for an *Amicus curiae*
[29] After a petition has been granted, new amici briefs are submitted to persuade the justices to rule one way or another.
[30] Appendix Figure A.1 illustrates the number of amicus curiae from 2010 through 2017.

Wahlbeck 1997; Kearney and Merill 2000; Corley 2008). In addition, this effect is similar for amicus briefs filed in the circuit courts of appeal (Martinek 2006).

While expensive, many interest groups find filing an amicus brief to be money well spent. Members of special interest organizations want their organizations to influence policy change, and these briefs are tangible evidence of such attempts (Solowiej and Collins 2009). Interest groups use the creation of an important document such as an amicus brief as a demonstration to its membership of attempting to influence policy (Wasby 1995; Collins and Martinek 2010; Zuber, Sommer, and Parent 2015).

Some argue that amici participation can be a proxy for public attention or public salience on a given case. With no direct way to capture salience on a specific case or issue area, scholars argue that increased amici participation signals more public or legal interest. Studies find that the Court pays more attention to *certiorari* petitions with high levels of amici participation (Hansford and Damore 2000; Maltzman and Wahlbeck 1996; Maltzman, Spriggs, and Wahlbeck 2000; Collins 2004). Thus, attention paid by the public suggests a connection between public salience and an increase in the likelihood of granting *certiorari* to salient petitions.

Most scholars examine which cases receive amicus briefs, as opposed to why organizations file amici in the first place. Cases receiving amici briefs are then used as an *ex post facto* proxy for public salience. However, why are amici attracted to particular cases as opposed to others? My argument is that interested parties are more likely to file a brief on a case related to a specific issue area if it is salient to their relative constituencies. Interest groups and elected members of government (including state governments) have an interest in appealing to their constituencies and/or members, along with influencing policy. I argue that an increase in public attention to an issue area may induce these groups/government bodies to file more amici briefs to

show they are involved, performing the job their supporters expect of them. Thus, increased attention from the public is likely to produce more amicus briefs related to a salient issue area, which in turn leads the Supreme Court to be more likely to accept petitions related to that issue.

Interest groups are major players in issuing these briefs as it helps show their members they are actively attempting to change policy (Wasby 1995; Hansford 2004; Collins 2004, 2008; Solowiej and Collins 2009; Collins and Martinek 2010; Zuber, Sommer, and Parent 2015). I argue the more salient the issue area, the more likely interest groups, lobbying firms, and others will be to file an amicus brief on a case addressing that issue in order to satiate their members. I further argue, and test in Chapter 6, that these actions by key legal actors in turn raise the likelihood of these (salient issue) petitions being granted cert.

4.5 Data and Methods

To examine the effect of public attention on the likelihood of amici brief filings to the U.S. Supreme Court, I gathered every paid petition filed between years 2010 to 2017. *In forma paperatis* (IFP) petitions were not collected because most IFP petitions are criminal appeals which have much less flexibility in their ability to be overturned and are much less likely to be granted *certiorari* (Feldman and Kappner 2016). I used a web text-scraping code to gather all paid petitions to the U.S. Supreme Court from 2010 through 2017. [31] This scraping procedure netted 12,016 paid petitions over the eight terms.

After gathering the petitions filed during my time of interest, I identified all cases that fall into my three topic areas of interest: abortion, anti-trust, or campaign finance. The resulting sub-

[31] Web scrapers are code that can automatically collect data from websites. In this case, a web scraper would input a petition number, collect the data, and move on to the next petition number for each year of interest.

data-set includes 160 petitions related to either abortion, anti-trust, or campaign finance from 2010 through 2017.[32]

4.5.1 Dependent Variable

The dependent variable in this analysis is the total number of amici briefs filed for each petition before a *certiorari* decision. The resulting variable is a count, ranging from zero to 14. Because the dependent variable is a count of amicus briefs, I use a negative binomial regression. Additional reasoning for a negative binomial estimation and a comparison between alternative model specifications are located in Appendix B.1. My expectation is that as public attention increases for a given topic area, there will be more *Amici Before Cert* filed for petitions related to that issue area.

4.5.2 Independent Variables

My primary independent variable of interest is *Public Attention*. As explained in detail in Chapter 3, this variable reflects a standardized measure of the average monthly number of mentions of a topic area in the previous twelve months. Again, due to Twitter's relatively small public adoption in their earlier years, I examine the years 2010 through 2017.[33]

I also account for whether the *U.S. is a party to the case*. The Solicitor General is an important player in the cert process, and if he or she is involved, the likelihood of *certiorari* being granted increases dramatically (Nicholson and Collins 2008; Wohlfarth 2009). The S.G. is successful because she thoughtfully picks which cases to present to the Court, while also representing an important legal player – the executive branch. Thus, if the S.G. argues for the U.S. Supreme Court to hear a case – and does so in specifically selected cases – then the Court is

[32] While the number of cases in the data-set is not large, it is sufficient for my analysis.
[33] Number of monthly active Twitter users worldwide https://www.statista.com/statistics/282087/number-of-monthly-active-twitter-users/

likely to heed that call as a sign that it is a case that needs to be decided. Given the importance of the Solicitor General and the federal government, I created a dichotomous variable to account for if the federal government is party to the case.

Further, ideological distance between the U.S. Supreme Court and lower courts is a well-documented cue for the Supreme Court and also a factor in how litigators decide which cases to appeal. When a lower court is ideologically distant from the U.S. Supreme Court, it is more likely that the Supreme Court will grant *certiorari* in order to "correct" a lower court's decision (Scott 2006; Owens and Simon 2011; Grant, Hendrickson, and Lynch 2012). Given this information, it is important to control for ideological distance as outside actors may understand this relationship and write more or less amicus briefs because of it.

To estimate the ideological distance between the Supreme Court and the lower circuits, I rely on the Judicial Common Space measure from Epstein et al. 2007. The Judicial Common Space (J.C.S.) measure estimates the median ideological score for the Supreme Court and all 11 circuits plus D.C. I take the absolute value of the difference between Supreme Court and lower each court medians per term. This absolute value increases as the distance between the courts grows. For example, in 2011 the median J.C.S. score for the 9th circuit was -0.2585 and the U.S. Supreme Court's median was 0.2107.[34] The resulting difference is a value of 0.4692. A majority of petitions to the Supreme Court are from the Circuit courts. Of the 12,016 petitions, 8,142 are from a circuit court whereas 3,874 are not. Petitions originating from courts where ideology scores are not available (many states and individual district courts) are excluded from the models including this *Ideological Distance* variable.

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[34] Judicial Common Space scores are coded as such that a positive number indicates a more conservative median whereas a negative value indicates a more liberal median.

4.6 Results

An overview of the dependent variable for the first model is displayed in Table 3.1. Over half of all petitions related to my three topic areas of interest received zero amicus briefs before a decision on *certiorari* was made. Generally, if a petition receives an amicus brief, it will receive one to four, with petitions receiving more than four being exceedingly rare.

Table 4.1: Amicus curiae Before Cert

Number of Amici	Frequency	Percent	Cumulative
0	6,938	85.21	85.21
1	582	7.15	92.36
2	264	3.24	95.6
3	132	1.62	97.22
4	89	1.09	98.32
5	46	0.56	98.88
6	30	0.37	99.25
7	21	0.26	99.51
8	12	0.15	99.66
9	8	0.1	99.75
10	6	0.07	99.83
11	3	0.04	99.86
12	2	0.02	99.89
13	2	0.02	99.91
14	3	0.04	99.95
15	1	0.01	99.96
18	1	0.01	99.98
78	1	0.01	99.99
88	1	0.01	100
Total	8,142	100.00	

Before testing the primary hypothesis of this chapter, I first confirm past findings regarding the importance of amici briefs in the *certiorari* process. For this model I use all petitions filed from 2010 through 2017 that appealed a case from a federal circuit court (8,142). I created a dichotomous variable indicating if *certiorari* was granted (1) or denied (0). I then include the *Amici Before Cert* variable, along with an indicator of if a solicitor general (state or federal) was party to the case, *Ideological Distance*, and a variable denoting how many days were taken to arrive at a decision. Table 3.2 displays the estimates of this logit model.

The results show that amici briefs filed before a cert decision have a positive and statistically significant impact on the likelihood of cert being granted for the petition. Further, state or federal solicitors general being party to the petition also increase the likelihood of *certiorari* being granted, supporting previous findings. Additionally, the more days the Court spends discussing a petition has a positive and significant impact on *Certiorari*. This impact of discussion-time is more thoroughly explored in Chapter 6. Finally, contrary to previous research, the *Ideological Distance* between lower circuit courts and the Supreme Court does not have a statistically significant influence, although the coefficient is positively signed.

Table 4.2: Certiorari Outcome and Amicus Briefs

	Granted *Certiorari*	*p*-value
Amici Before Cert	0.348	0.000
	(0.025)	
Ideological Distance	0.49	0.114
	(0.31)	
S.G. Party to Case	0.24	0.038
	(0.116)	
Discussion in days	0.007	0.000
	(0.0005)	
Constant	-3.414	0.000
	(0.117)	
Observations	8,142	

Standard errors in parentheses – Logistic Regression

Using a logit model allows us to estimate significance and directionality of our variables; however, it does not allow for an easy understanding of the substantive impact of variables. To illustrate the impact of amici briefs on the likelihood of *certiorari* being granted, I generate a predictive margins plot for the various amounts of amicus briefs filed before *certiorari*. I hold the other variables at their median (*Ideological distance*, *Discussion in Days*) or mode (*S.G. Party to Case*). Figure 4.1 illustrates these findings.

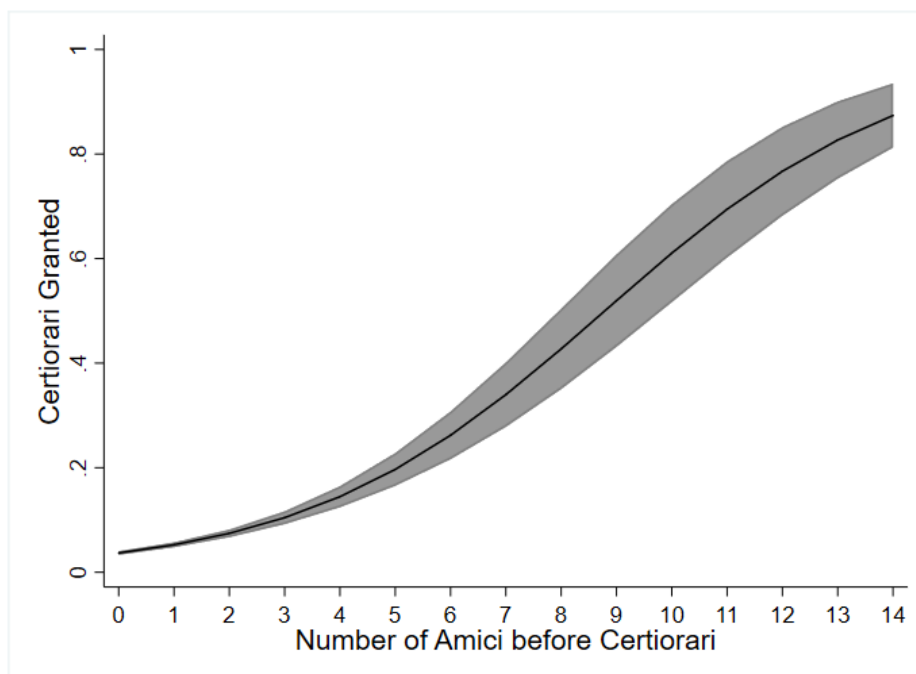

Figure 4.1: Probability of Certiorari being Granted – Amicus Briefs

Before generating predictive margins, I removed some of the extreme outliers. Given 99.9% of all petitions have 16 or less amicus briefs filed before *certiorari*, I cap the analysis at 16.[35] With the other variables held at their modal or median values, there is a 4.4% likelihood of a petition being granted *certiorari* when there are zero amicus briefs filed. The presence of three amici briefs almost doubles the likelihood of *certiorari* being granted to 8.5%. At the maximum number of amicus briefs filed in this subset, 16, the probability of *certiorari* being granted increases to 92.37%. The model predicts that when nine amicus briefs are filed a petition reaches 51% probability of being granted. When examining the entire data-set with no limits to amicus participation, once a petition receives more than 16 amicus briefs it is virtually guaranteed to be granted *certiorari*.

[35] Predictive margins were ran using the entire data-set, however, once a petition receives more than 16 amici briefs the probability of certiorari being granted increases to near 100%. Further, capping at 16 allows for a more focused view at what the majority of petitions receive versus illustrating the outliers.

These results confirm previous studies and demonstrate that cert petitions receiving more amicus curiae briefs are most likely to be granted certiorari. These findings also reveal why studying what impacts amici brief submission is a worthwhile endeavor: If public attention increases the likelihood of amicus briefs being filed, it suggests there is an indirect influence of the public on the *certiorari* process.

I now test my main theoretical contention: increased public attention to an issue area will increase the number of amici briefs petitions related to that issue receive. The dependent variable for this analysis is a count of how many amici briefs each petition received; I use a negative binomial regression to estimate the models. Since I only have public attention data on three topic areas, the number of petitions for this analysis drops to 160. I control for the *Ideological Distance* between the lower court and USSCT, and whether the S.G. is a party to the case. Table 4.3 reports the results for this model.

The results of the negative binomial estimate show a positive and statistically significant relationship between public attention and the number of amicus briefs filed before a cert decision. Thus, as public attention to an issue area increases, the likelihood of an amicus brief being filed on a case in that issue area also increases. This result suggests that key legal actors are responding to cues sent by the public about what issues deserve attention. The only other variable to reach statistical significance is if the S.G. is party to the case. This result builds on previous work and suggests that when the S.G. is a petitioner, others take notice and file amici stating their desired outcome. Interestingly, again, the *Ideological Distance* between the U.S. Supreme Court and lower courts is not statistically significant.

Table 4.3: Determinants of Amicus curiae before Certiorari

	Amici Before Cert	*p*-value
Public Attention	62.37	0.048
	(31.49)	
Ideological Distance	0.0626	0.950
	(1.007)	
S.G. Party to Case	0.584	0.075
	(0.328)	
Constant	-0.158	0.661
	(0.361)	
Observations	160	

Standard errors in parentheses – Negative Binomial Regression

To assess the substantive impact of public attention, I create a predicted number of events margins plot. The two other independent variables are held at their medians. At the lowest amount of public attention, the predicted number of amici briefs is less than 1. At the mean of public attention, the predicted number of amici briefs increases to 1.21. At the maximum amount of public attention, the predicted number of amicus briefs increases to 2.37. Figure 4.2 illustrates the spectrum of results from minimum to maximum public attention. Connecting back to the earlier findings in Figure 4.1, there is a substantively significant impact of public attention on amicus briefs being filed. The margins in Figure 4.1 illustrated that when a petition received roughly three amicus briefs, there was a ten percent increase in the likelihood of *certiorari* being granted over a petition with no amicus briefs. The earlier analysis in figure 4.1 suggested nine petitions as the so-called magic number of amicus needed for a petition to be more than 50% likely to be granted. While the maximum number of amicus filed with maximum public attention is close to four in this estimation, four can have a strong impact on if a petition will be granted cert. Using a larger data-set of issue areas, or different issue areas, might reveal more strength of public attention.

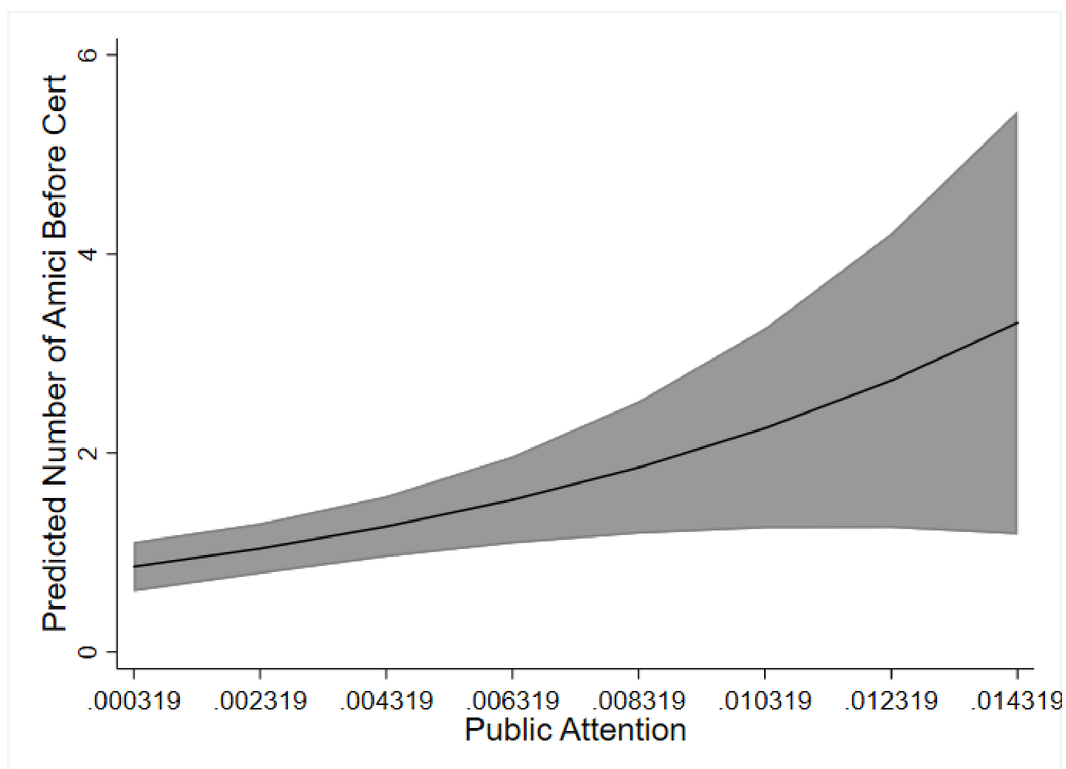

Figure 4.2: Predicted Events – Number of Amici Briefs & Public Attention

4.7 Conclusion

This chapter builds on previous research and finds that public interest in an issue area can have indirect effects on the likelihood of petitions granted *certiorari* via *amicus curiae*. I find that when an issue becomes highly salient to the public, interested parties will be more likely to file *amicus curiae* briefs. I further mirror earlier studies that show petitions receiving more amicus briefs are more likely to be granted certiorari. Thus, this relationship between the public and other interested parties may indirectly increase the likelihood the Court will grant *certiorari* to petitions dealing with that salient issue area.

This chapter examined what impact public attention has on the filing of amici briefs in general. Chapter 5 explores what motivates specific key actors, particularly government attorneys and interest groups, to petition a case to the Supreme Court and file *amicus curiae* briefs.

5 CHAPTER 5: IMPACT OF PUBLIC ATTENTION ON INFLUENTIAL ATTORNEYS AND INTEREST GROUPS

5.1 Introduction

Certain attorneys and interest groups who are well known in legal circles have been shown time and again to have an outsized impact on all levels of courts. These repeat players are more likely to have their petitions granted *certiorari*, and they are more likely to win their cases before the Supreme Court (Galanter 1974; Feldman and Kappner 2016). These powerful groups are motivated to act for several reasons. I argue that one key motivation for both public and private repeat players is the amount of attention the public pays to a specific issue.

On October 9th, 2015, California enacted the Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (the "Act"). A key element of the Act required all licensed pregnancy clinics within California to disclose information to patients about available family planning services offered by the state and private providers, including abortion and contraceptive options. The Act was set to begin enforcement on January 1st, 2016. On October 13th, 2015, the National Institute of Family and Life Advocates (NIFLA) and two other religiously affiliated groups who provided pregnancy services sued, attempting to block implementation of the new law. The plaintiffs argued that the requirement of the law to force all licensed pregnancy assistance entities, including religious ones, to disclose information regarding abortion and contraceptives violated their free speech and free exercise rights.

In February 2016, the U.S. District Court for the Southern District of California denied the plaintiffs request for an injunction, finding they were unable to show a likelihood of success on their free speech or free exercise claims as required by previous precedent. Further, the Court found the Act is a neutral law of general applicability which survived rational basis review. In

short, the Court sided against the plaintiffs. On October 14th, 2016, the Ninth Circuit Court of Appeals unanimously affirmed the District Court's decision. On March 20th, 2017, NIFLA and the other religious groups filed a petition for a writ of certiorari at the U.S. Supreme Court to overturn the earlier decisions. Within one month of filing the petition, seven interest groups submitted *amicus curiae*. It is relatively rare for a petition to receive an amicus brief at all and receiving seven briefs before a cert decision places it in the 96th percentile of all petitions who have received a at least one brief.

The Supreme Court deliberated the petition for 160 days and ultimately granted *certiorari*. The Supreme Court received many amicus briefs, the lower court was ideologically distant, and state A.G.s became involved – all known cues the Court is known to look for. Once the decision to grant cert was made, the petition received 46 additional *amicus curiae* from an array of outside actors including members of congress, state A.G.s, other interest groups, and concerned citizens. In a 5-4 decision the Supreme Court reversed and remanded the case, finding that the California Act violated religious pregnancy centers First Amendment rights.[36] Outside participation in this case was vibrant, and I argue it can partially be explained by public attention.

Reviewing the data regarding public attention over this period reveals that abortion as a topic reached its highest amounts of public discussion in 2016 and 2017. Figure below illustrates the amount of public attention abortion received from 2010 through 2017. Beginning in the final months of 2016 the public began discussing abortion at much higher rates, with a peak occurring in the first quarter of 2017.

[36] *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, (June 26, 2018)

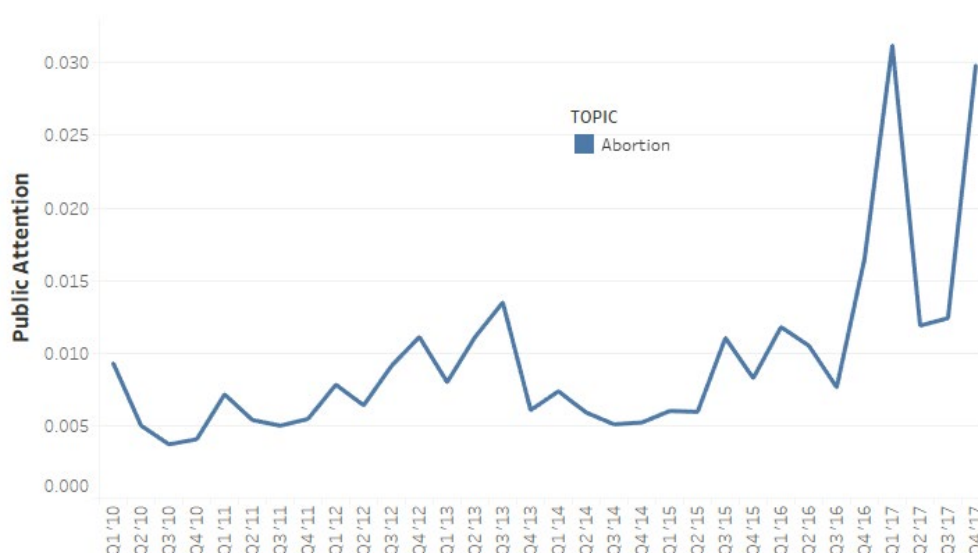

Figure 5.1: Public Attention to Abortion

Public attention to this issue was high, and I argue outside actors were aware of the public discussion. A majority of amicus briefs filed in *Nat'l Inst. of Family & Life Advocates v. Becerra* (2018) discussed above were from other pro-life interest groups or states (Texas) who supported the petitioners. Participation from outside groups was generally high during this period in petitions relating to abortion, with not all petitions being granted cert even with many markers that generally predict a petition will be accepted.

Another abortion related petition during the same time period out of Arkansas. In 2017, Arkansas enacted four laws which aimed to make getting an abortion more difficult, outlawing certain abortion techniques, and restricting certain age groups from seeking an abortion.[37] Not long after passage of these anti-abortion laws, legal challenges arose. In *Planned Parenthood v. Jegley* (2018), a medical doctor alleged the new restrictions were not constitutional and won a stay in the federal district court. The state appealed to the Eighth Circuit, and attorneys general

[37] Arkansas 2017 house bills 1032, 1434, 2024, and 1566.

from 15 (largely liberal) states and Washington, D.C., filed a joint amicus brief in support of the physician challenging the new Arkansas abortion laws.[38] In the amicus brief, the attorneys general argued the new Arkansas laws unconstitutionally created an undue burden to terminate a pregnancy, increased health risks, and increased cost. On appeal, the Circuit reversed and remanded the lower court's decision, and the U.S. Supreme Court denied *certiorari*.

Much like the case discussed earlier out of California, public attention was high, and outside actors likely saw a notable increase in public attention during litigation.[39] Interest groups supported the physician challenging the law, and a strong contingent of 15 state attorneys general became involved. The states represented in the amicus brief include New York, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Oregon, Pennsylvania, Vermont, Virginia, Washington, and the District of Columbia; liberal states in which attorneys general are incentivized to pursue litigation that appeals to their constituents. Further, once the appeal reached the Supreme Court, there were two amicus briefs filed before a *certiorari* decision.[40] While *certiorari* was ultimately not granted, it is important to review petitions such as this. Many state attorneys and outside groups took notice and attempted to change policy through this litigation. While ultimately unsuccessful, the public may have helped spur extra participation that otherwise may not have occurred.

Some Attorneys General advertise their legal pursuits, much like Attorney General Eric T. Schneiderman of New York. In a statement on the Attorney General's website, Schneiderman listed a full-throated defense of why he is directing his office to spend valuable time fighting

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[38] Brief *Amicus curiae* from the Attorneys General of New York, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Oregon, Pennsylvania, Vermont, Virginia, Washington, and the District of Columbia.
https://oag.ca.gov/system/files/attachments/press_releases/States%20Amicus%20Brief%20STAMPED.pdf

[39] From June 2016 (when Arkansas and other states enacted tougher abortion laws) through June 2017, the amount of public attention paid to the abortion issue area more than doubled.

[40] https://www.supremecourt.gov/docket/docketfiles/html/public/17-935.html

against the Arkansas legislation, along with many other challenges to women's reproductive rights across the country. Schneiderman argues in a press release, "[W]e're seeing a proliferation of laws that seek to eliminate safe, medically-accepted accepted methods of abortion. We will not stand by while women's health and constitutional rights are jeopardized by extremist laws."[41] Many government attorneys make public statements such as these, likely to ingratiate themselves with their constituencies.

In the previous chapter, I argue heightened public attention to certain issue areas increases the likelihood of *amicus curiae* briefs being filed alongside petitions related to these salient issues. In this chapter, I argue powerful litigants, such as solicitors general, attorneys general, private repeat players, and interest groups are similarly more likely to submit an amici brief, *and* more likely to appeal their case to the U.S. Supreme Court, when the case in question relates to issues of high public salience. Public attention and outcry can influence powerful actors to engage a problem they may not have otherwise. This chapter proceeds as follows: I first explicate why these repeat players are likely to be influenced by heightened public attention to an issue, and why they may respond to this public interest by joining a petition for *certiorari* on related cases. I also distinguish between the motivations of government attorneys as opposed to private repeat players. I then outline how I test this theory of elite attorney action and report the results of my empirical tests.

5.2 Federal Attorneys

The Solicitor General (S.G.) may be the most important outside actor that appears in front of the U.S. Supreme Court. The strength of the S.G. is clearly established: when the S.G.

[41] A.G. Schneiderman Leads Amicus Brief Defending Women's Access To Constitutionally-Protected Abortion Services
https://ag.ny.gov/press-release/ag-schneiderman-leads-amicus-brief-defending-womens-access-constitutionally-protected

petitions the Court for *certiorari*, the Court is much more likely to accept that case for review (Tanenhaus et al. 1963; Provine 1980; Ulmer 1984; Caldeira and Wright 1988; McGuire 1998; Owens 2010). Once the Solicitor General has made the government's position clear, the Court sides with the government most of the time at the merits stage (McGuire 1998; Owens 2010). The influence of the S.G. crosses ideological boundaries: When the two branches are ideologically aligned, the S.G. wins 87% of the time on the merits, and that number is still as high as 60% even when they are not ideologically close (Bailey, Kamoie, and Maltzman 2005; Wohlfarth 2009). Given that the U.S. Supreme Court accepts less than 1% of all petitions it reviews, the impact of the S.G. getting her petitions granted and decided (most of the time) in her favor cannot be over stated.

The S.G. can generally be viewed as a proxy for the president and executive branch's preferences (Johnson 2003; Nicholson and Collins 2008; Owens 2010; Rogol 2018). Due to the president's electoral and policy goals, the executive branch and S.G. are obviously aware when an issue becomes highly important to the public. The S.G. may be encouraged to file a brief for political reasons stating the position of the executive branch (Supreme Court Rule 37.4). The S.G. is more likely to file a brief or become more active in litigation if the case/issue is important to the public (Puro 1971; Salokar 1992). Nicholson and Collins (2008) investigate what legal, political, and administrative conditions may prompt the S.G. to file an *amicus curiae* brief. Central to this discussion, they find that when cases are salient, as measured via the *New York Times* salience measure (Epstein and Segal 2000), the S.G. is 15% more likely to file a brief (Nicholson and Collins 2008). However, this salience measure, as discussed in Chapter 3, captures a *post hoc* determination of case salience. Their findings do not therefore distinguish between whether the case was salient at the time the S.G. decided to file the brief, or,

alternatively, whether the S.G. filing the brief contributed to its increased salience at the time the decision was handed down. Thus, I similarly hypothesize that the S.G. is more likely to submit an amicus brief or join a petition when the issue garners more attention from the public, and these actions have an outsized impact in increasing the likelihood of *certiorari* being granted for that petition. I expand on their analysis, however, by exploring whether public attention to an issue at the time the S.G. is deciding whether to get involved influences the S.G.'s decision making. Previous work has demonstrated the impact of the S.G. on Supreme Court agenda setting and decision making. My expansion further fills in what prompts the S.G. to take action on certain cases.

5.3 State Attorneys

Like other elected officials in the states, State Attorneys General or Solicitors General also have a keen interest in litigating cases the public cares about and is paying attention to (Brace et al. 2002; Erikson, Wright, and Mclver 1993; Jacoby and Schneider 2001; Provost 2010). For example, on the "role of the Solicitor General" page of the Florida S.G.'s website, one key part of the responsibilities of the job include pursuing "matter[s] of great public interest."[42] And, beyond the general belief in supporting the public interest, state A.G.s are also influenced by personal electoral concerns: In 43 of the fifty states, state Attorneys General are elected, giving an electoral incentive to attending to issues of public import. Catering to public opinion within their states is a high priority for state A.G.s as the position has often been used as a stepping stone for higher elected positions, including governor and U.S. Senator (Clayton 1994; Mahtesian 1996; Provost 2003). Provost (2010, 4) argues "state AGs are driven by

[42] Homepage of the Florida Attorney General:
http://myfloridalegal.com/pages.nsf/main/a0cb91c5c403a0f385256cc6007a3808!opendocument

normative concerns of what policies are best for the state, but also by pragmatic concerns such as reelection and, for the more ambitious, reaching higher offices, such as governor." In short, the leap from A.G. to Governor or Senator would not be possible if the public did not approve of the A.G.'s record. State attorneys general thus have a clear incentive to pursue cases the public cares about.

Other research provides additional evidence suggesting that state A.G.s pay close attention to issues the public cares about. Spill, Licari, and Ray (2001) find that in states with higher amounts of smoking related disease and a relatively small tobacco farming industry, state A.G.s were more likely to file tobacco litigation early and often. If the state was a major producer of tobacco, however, state A.G.s took their time in joining this litigation, if they joined at all. Thus, I hypothesize that as public attention to issue areas increases, the likelihood of powerful state attorneys filing *certiorari* petitions, as well as amicus briefs, related to those salient issue areas also increases. To my knowledge, no one has expressly studied the link between state A.G. behavior, petitions for *certiorari*, and amici briefs to the U.S. Supreme Court. This dissertation explores that link and demonstrates that increased public attention prompts state actors to become more involved in cases, both in terms of bringing cases and filing amici briefs, to show the public they are taking action.

5.4 Private Attorneys & Interest Groups

While no other individual lawyer is in front of the Court as often as the S.G., other high powered, elite lawyers can also influence Supreme Court agenda setting (McGuire & Caldeira 1993). Litigants with more financial resources are more likely to have their petitions granted by the Court and are more likely to receive a favorable decision on the merits (Galanter 1974; Songer, Sheehan, and Haire 1999). These extra resources allow for litigants to hire counsel who

are influential on their own. These elite attorneys include former U.S. Solicitors General, state A.G.s, or other repeat players who are often in front of high courts. For example, elite private attorneys such as David Boies and Theodore Olson, former executive branch lawyers, have no shortage of clients who wish to retain them. Boies and Olson were on opposite sides during the *Bush v. Gore* case, and in 2009, Boies and Olson joined forces to overturn California's Proposition 8. More recently, Mr. Olson served as counsel for CNN in their press credential argument with the Trump administration.[43] These elite lawyers have their pick of what cases and issues they want to litigate, and I argue when public attention to an issue increases, they are more likely to join litigation efforts related to that issue area.

Interest groups also carefully choose which legal cases they join. Generally, interest groups influence representatives with campaign contributions or by mobilizing their large base of support in the public (Bentley 1908). However, many interest groups also pursue legal and litigation strategies, including sponsoring legal cases (Cigler, Loomis, and Nownes 2015) and filing amicus briefs in cases of interest (Collins 2004). Interest groups need to push for specific policy goals to show supporters they are active in the issues' arena and maintain membership (Walker 1983). Walker (1983) examines the creation and continued maintenance of interest groups in the 20th century. Walker finds that interest groups need a constant issue to fight for or against to survive. Interest groups which maintain strong allegiances with the public, especially in terms of monetary donations, thrive. While most interest groups in Walker's period of study were founded by a wealthy patron, without continued public support, the interest group loses clout in achieving policy goals. Further, Walker notes that "[w]ithout the influence of the patrons

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[43]Who is Ted Olson, the former Bush lawyer representing CNN and Acosta against the White House? https://www.washingtonexaminer.com/news/who-is-ted-olson-the-former-bush-lawyer-representing-cnn-and-acosta-against-the-white-house

of political action, the flourishing system of interest groups in the United States would be much smaller" (Walker 1983, p. 404).

When a petition related to an issue area an interest group is concerned with is appealed to the Supreme Court, the group often takes notice and decides if filing a brief is worth the cost (Collins 2004; Cigler, Loomis, and Nownes 2015). Filing an amicus brief is a way of signaling to the members of an interest group, and the public at large, that the organization is acting and attempting to influence policy (Wasby 1995; Collins and Martinek 2010; Zuber, Sommer, and Parent 2015). Interest groups can inform the justices of the harm or benefits of granting *certiorari* or what repercussions may occur at the decision stage (Collins 2004, 2008). I argue that if the public is paying more attention to the interest group or its issue area, the likelihood of the group filing an amicus brief or petitioning the Court itself also increases.

Interest groups can both employ powerful private attorneys to argue their case and/or use in house counsel. Certain interest groups (*Planned Parenthood*, the ACLU, the NRA, AARP, etc.) are themselves powerful repeat players, even without a former S.G. representing their side. Among non-governmental litigants, previous research finds that those who are well financed and employ lawyers who are repeat players in front of the Supreme Court are the most likely to have their petitions granted (Galanter 1974; Feldman and Kappner 2016).

5.5 Testing when Powerful Lawyers Act

I argue that A.G.s, S.G.s, and private repeat-players will be more likely to be a petitioner or file an amicus brief if that petition relates to a publicly salient issue area than those that are less salient. State A.G.s are motivated by a desire to please their constituents, and they also hold aspirations of reaching higher elected office. Federal S.G.s are motivated by similar goals. Federal S.G.s are part of the executive branch, and this branch wishes to be seen as active on

publicly important issues. Additionally, I argue interest groups are likely to be part of salient petitions out of a desire to tackle issues important to their members and maintain their reputation of being active in important litigation.

5.5.1 Data & Dependent Variables

I utilize the same dataset as detailed in Chapter 4 with a new dependent variable. To explore whether repeat players are influenced by public attention, I utilize a series of distinct dependent variables. I first examine how public attention impacts the likelihood of a State or Federal A.G./S.G. being the petitioner. My expectation is that an A.G./S.G. will be more likely to petition the U.S. Supreme Court if public attention increases. The first dependent variable, *Government Attorney-Petitioner,* is coded as 1 if a state A.G./S.G. or federal S.G. is the petitioner of the petition and 0 otherwise.

The next model examines the link between public attention and the actions of powerful private lawyers in appealing cases to the Supreme Court. *Repeat Player-Petitioner* is coded as 1 if a private attorney is the petitioner, and 0 otherwise. For each attorney, I count how many petitions they have been a party to. If an attorney has been part of 20 petitions or more over the 2010-2017 time period, I deem them a repeat player. This scheme is similar to how Feldman and Kappner (2016) determine repeat players in their work on the subject.

The final set of models investigates how public attention impacts the probability that an A.G./S.G. or interest group will file an amicus brief before final *certiorari* decisions. It is well documented that an increase in amicus briefs dramatically increases the likelihood the U.S. Supreme Court will grant *certiorari* (Caldeira and Wright 1988; Provine 1980; Tanenhaus et al. 1963; Ulmer 1984). Further, amicus briefs from these government lawyers is known to influence the Court at the merits stage of the process as well (Owens 2010). The dependent variables in

this analysis capture the number of *A.G.S.G. Amici* and *Interest Group Amici* briefs filed prior to *certiorari* for each petition. For, for the A.G./S.G. model, I removed instances where the U.S. Supreme Court issued a Call for the Views of the Solicitor General (CVSG), a motion that compels the U.S. Solicitor General to file an amicus brief, in addition to petitions where the government was party to the case.

To perform this analysis, I again used the data collected on all petitions related to the three issue areas chosen from 2010 through 2017. This data-set contains 160 petitions, including the name of attorneys for both parties of all the petitions.

5.5.2 Independent Variables

I return to the public attention variable captured via Twitter, with the same three topic areas of abortion, campaign finance, and anti-trust. Again, this measure captures how much the public is talking about these issues on Twitter, each month, from 2010 through 2017, standardized by the number of Twitter users.

As ideological distance between the U.S. Supreme Court and lower courts increases, the likelihood the Supreme Court will grant *certiorari* to petitions originating from the ideologically distant lower court also increases (Cameron, Segal, and Songer 2000; Black and Owens 2009; Grant, Hendrickson, and Lynch 2012). While this project is examining how the public influences actors known to influence the agenda, and not cert decisions, it is important to control for ideological distance. In the introduction to this Chapter I outlined two similar abortion cases with similar elements that should stand out to the justices. One, however, came from an ideologically distant court, whereas the other did not.

To estimate the *Ideological Distance* between the Supreme Court and the lower circuits, I rely on the Judicial Common Space measure from Epstein et al. 2007. The Judicial Common

Space (J.C.S.) measure estimates the median ideological score for the Supreme Court and all 11 circuits plus D.C. I take the absolute value of the difference between these two medians per term, and the resulting number is higher if the distance is farther and lower if the distance is not. This ideological measure is the same as the one outlined in Chapter 4, which has more information on its construction and range.

5.6 Results

The primary goal of this chapter is to examine the impact of public attention to issue areas on powerful lawyers' decisions to appeal a case or file amici briefs alongside petitions related to those issues. Descriptive statistics of petitions related to abortion, campaign finance, and anti-trust are displayed in Table 5.1.

Table 5.1: Descriptive Statistics

Topic	N
Abortion	20
Campaign Finance	26
Anti-Trust	114
Government Attorney	59
Government Attorney-Petitioner	15
Repeat Player	25
Repeat Player-Petitioner	12
Neither Repeat Player or AG/SG	76

Overall, anti-trust is the most petitioned issue area followed by campaign finance and finally abortion. The amount per topic area is expected given how active corporations are in anti-trust litigation, especially when compared to a major social issue like abortion or a relatively new issue area of public concern, campaign finance. A Solicitor General or Attorney General was a party in 59 of the 160 petitions, and the petitioner in 15 of these petitions. Repeat private attorneys were a party to a petition in 25 instances, and the petitioner in 12 of these cases. Public attention to these three issues ranged from hardly mentioned (0.003) to highly mentioned (0.0149). A decimal representation of public attention may not be intuitive, but the difference

between the low and high end is an order of magnitude. On the lower end of public attention there is relatively little conversation (less than 10,000 Tweets on the topic) whereas on the upper end there are millions of Tweets for that month.

First, I estimate how public attention impacts the likelihood of Attorneys General and Solicitors General deciding to appeal a case to the U.S. Supreme Court. Table 5.2 provides estimates of the logit model. Because the dependent variable is dichotomous, logit models are appropriate.[44] The results for the model indicate a positive and significant influence of my key independent variable of *Public Attention*. The more the public pays attention to an issue, the more likely an A.G./S.G. will be the petitioner on a case related to this issue. Thus, when an issue grows in attention among the public, it is more likely that an A.G./S.G. will be part of appeals to the U.S. Supreme Court.

This result demonstrates a higher likelihood of participation from these powerful government attorneys when an issue is important to the public.

Table 5.2: Public Attention & Government Attorneys

	Government Attorney-Petitioner	*p*-value
Public Attention	173.0	0.021
	(75.09)	
Ideological Distance	-0.327	0.895
	(2.471)	
Constant	-3.361	0.000
	(0.932)	
Observations	160	

Standard errors in parentheses

Logit models determine positive and negative directions; however, the coefficients do not

[44] For the second estimate, due to the low number of occurrences within the data, a range of estimates were used to determine best fit. Estimates using a Firth logistic regression with rare events, a Rare-Events model (King and Zeng 2001), and Exact logistic regression (Leitgöb 2013) produce nearly identical results to a standard logistic model. For ease of interpretation, a standard logit model is used.

demonstrate substantive significance. To more fully explore the impact of public attention on A.G./S.G. involvement, I generated adjusted predictions for the independent variable of interest, *Public Attention*. Adjusted predictions specify values for each of the independent variables and compute the probability of the event occurring for those instances. Therefore, I calculated the probability of an A.G./S.G. being the petitioner at various values of the independent variables.

To observe the impact of *Public Attention*, I calculated adjusted predictions with Public Attention at its minimum value. Ideological distance is held at its median. Figure 5.2 illustrates the results. The x-axis displays various levels of public attention with 0. 000387 being the minimum observed value, 0. 00585 the mean, and 0.014729 the maximum. Descriptively, the mean demonstrates that when an A.G./S.G. is the petitioner there is more attention to the issue given by the public.

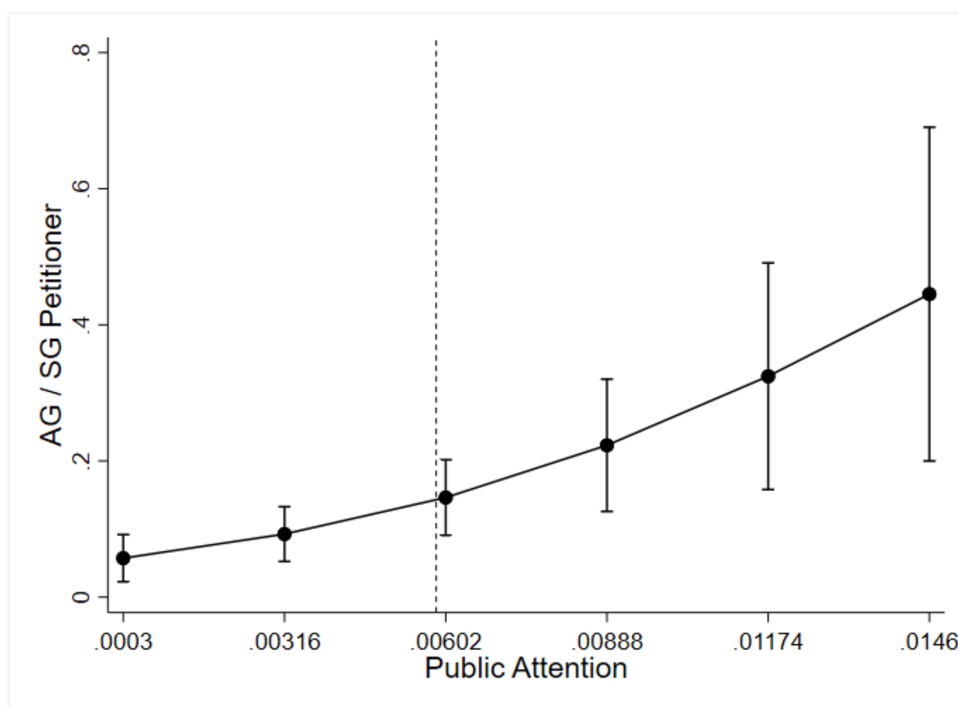

Figure 5.2: Adjusted Predictions for Public Attention – A.G./S.G. as Petitioner
95% two-tailed confidence intervals for the adjusted prediction is reported in brackets.

Figure 5.2 demonstrates that as public attention to an issue area increases, the more likely an A.G./S.G. is the petitioner in *certiorari* petition. When public attention is at its lowest value,

there is a 0.058 probability of an A.G./S.G. being a petitioner for *certiorari*. At the mean, the likelihood increases to 0.148. At the maximum value of public attention, this likelihood increases to 0.44. Thus, when moving from the minimum to maximum value of public attention, there is a 74.1% increase in the likelihood of an A.G./S.G. being the petitioning lawyer.

This result shows a strong impact of public attention on the behavior of powerful government attorneys. They are much more likely to be involved in a petition, arguing the executive's position (for the U.S. Solicitor General) or that of their state, if the public is widely discussing the issue. Further, when public attention is high, and the A.G./S.G. lose in lower courts, they are more likely to petition the U.S. Supreme Court for *certiorari*, versus when they lose in the lower court and public attention to the issue is low.

Next, I examine how public attention impacts the likelihood of private attorneys who are repeat players in front of the U.S. Supreme Court to be party to a petition for *certiorari*. Table 5.3 provides estimates of this logit model.

Table 5.3: Public Attention & Private Repeat Players

	Repeat Player Petitioner	*p*-value
Public Attention	201.3	0.003
	(68.01)	
Ideological Distance	-1.011	0.643
	(2.185)	
Constant	-2.971	0.000
	(0.808)	
Observations	160	

Standard errors in parentheses

Estimating the impact of public attention on private repeat players who are petitioners again demonstrates a statistically significant and positively signed result. Like the earlier A.G./S.G. estimates, the more attention the public pays to an issue area, the more likely a repeat player will petition the U.S. Supreme Court for *certiorari*.

To illustrate the substantive impact of the second model's analysis, I again calculate adjusted predictions with *Public Attention* at its minimum value (0.000387) to its maximum values (0.012059). Supreme Court ideological distance is held at its median. Figure 5.3 displays the results of the adjusted predictions. When public attention to an issue area is low, the probability a repeat player will petition the Court for *certiorari* is 3.6%. At the mean, or dashed line in figure 2, the probability increases to 12.3%. At maximum public attention paid to an issue area, the probability jumps to 30.6%.

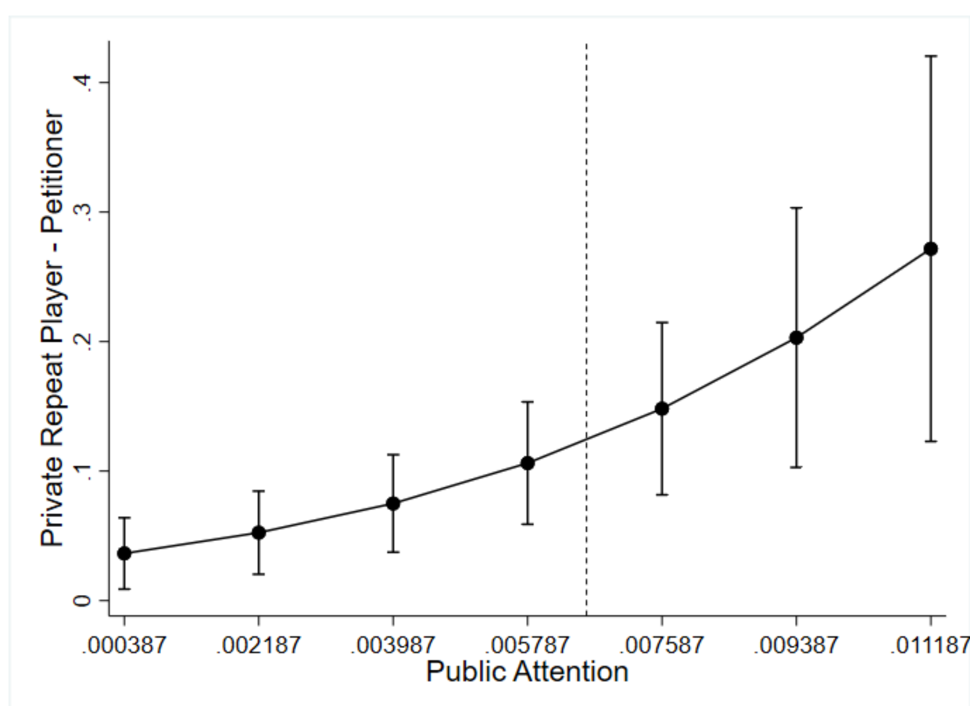

Figure 5.3: Adjusted Probability for Public Attention – Repeat Player as Petitioner
95% two-tailed confidence intervals for the adjusted prediction is reported in brackets.

Finally, I examine how public attention impacts the likelihood of attorneys general/solicitors general and interest groups filing an amicus brief before a *certiorari* decision. For the first analysis examining A.G./S.G. amici filings, I exclude any petition where the government is a party. This exclusion reduces the number of petitions in the model to 141. The dependent variable is a count of the number of amicus filings made by a government attorney, with some petitions receiving amicus briefs from more than one A.G./S.G.

In the second model, the dependent variable notes if an interest group filed *amicus curiae* before *certiorari* is decided. The variable is also a count, ranging from 0 to 11 amicus briefs filed before cert. Due to the count nature of these dependent variables, a negative binomial regression is used.[45] Table 5.4 provides results for both of these analyses.

The first model examines if public attention and ideological distance impact the likelihood of an A.G./S.G. to file an amicus brief alongside a petition before *certiorari* is decided. The estimate reveals a statistically significant and positive relationship between these variables, with *ideological distance* not reaching significance. In other words, the more attention an issue receives from the public, the more likely an A.G./S.G. will file an amicus brief. These results, especially in combination with those reported in Table 5.2, suggest that the actions of S.G.s and A.G.s are influenced by public attention to certain issues, as opposed to other influences.

Table 5.4: Public Attention & Amicus Briefs before Certiorari

	A.G./S.G. Amici	*p*-value	Interest Group Amici	*p*-value
Public Attention	122.4	0.089	89.78	0.005
	(71.92)		(31.85)	
Ideological Distance	2.490	0.244	-0.296	0.773
	(2.135)		(1.026)	
Constant	-2.562	0.001	-0.308	0.395
	(0.792)		(0.362)	
Observations	141		160	

Standard errors in parentheses

For substantive effects of the first model I generate adjusted predictions of the component terms. At the minimum amount of public attention, the probability an A.G./S.G. will file a brief

[45] A poisson goodness of fit test revealed that a poisson estimation would not be proper, and instead a negative binomial is appropriate.

is 0.19. At the mean amount of public attention, this probability increases to 0.25, and at the maximum value there exists an 0.89 probability.

The second model in table 5.4 examines the same question, but the dependent variable changes to interest group amicus brief filings. The results reveal that this relationship echoes earlier findings: the more public attention an issue area receives, the more likely an interest group will file an amicus brief. This finding increases our understanding of interest group behavior and adds to existing literature which argues interest groups are interested in engaging with salient issues to show activity to their members (Walker 1983).

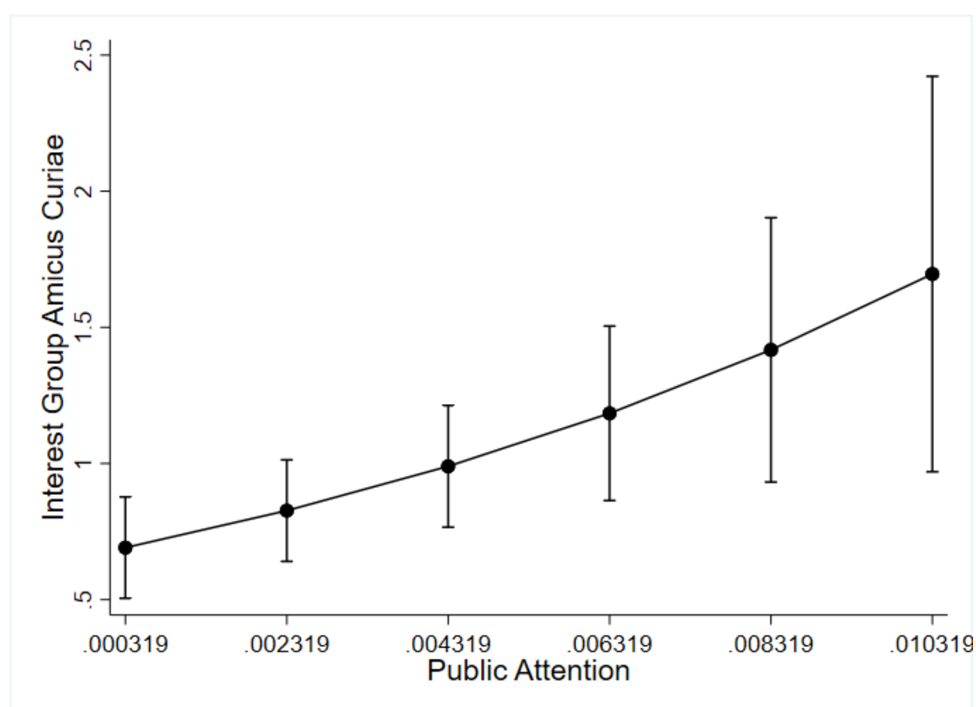

Figure 5.4: Predicted Number of Amicus Briefs by Interest Groups

Substantively, the interest group model's predicted number of briefs illustrated in Figure 5.4 highlights the potent effects of public attention. When public attention to an issue is low, less than one amicus brief is predicted to be filed by an interest group. At the issue area's average amount, the predicted amount of amicus briefs increases to 0.989, almost reaching 1. At one standard deviation higher than the mean amount of public attention, the predicted number of

amicus briefs increases to 1.378. At the maximum amount of public attention, the predicted number of amicus briefs filed before *certiorari* is decided increases to 1.972. Thus, as public attention increases, the number of amicus briefs distinct interest groups will file in conjunction with a petition also increases.

5.7 Conclusion

The results of this chapter indicate that for government attorneys and private repeat players, an increase in public attention to an issue area significantly increases the probability they will petition the U.S. Supreme Court for *certiorari*. This chapter further finds that when an A.G./S.G. is not party to a petition, they are more likely to file an amicus brief if there is more public attention on the issue at hand. In addition, government attorneys and interest groups are more likely to file amicus briefs on related cases before a *certiorari* decision is made when public attention to an issue increases. Thus, the public has a demonstrable impact on important actors outside of the U.S. Supreme Court. Outside actors such as interest groups or elected attorneys have an incentive to tackle issues the public cares about, and this chapter shows that they do so with respect to appeals decisions at the U.S. Supreme Court.

Previous work has argued interest groups must perform maintenance with their members in order to survive and be effective. I believe these findings empirically demonstrate maintenance in action from interest groups. Further, these findings show that, at least in some way, powerful government attorneys attend to their constituents in deciding which cases to be a part. This behavior makes intuitive sense from interest group and government actors' point of view, in addition to supporting previous findings in various literatures.

The ramifications of these findings indicate that there may be a measurable indirect relationship between public attention to issue areas and the agenda of the U.S. Supreme Court. In

the next and final empirical chapter, I bring together amici briefs, powerful actors, and public attention to determine how all of it can influence the ultimate agenda of the U.S. Supreme Court. I argue and find that public attention influences the decisions of key legal actors, and their actions in turn shape the agenda of the U.S. Supreme Court.

6 CHAPTER 6: PUBLIC ATTENTION AND THE DISCUSS LIST

6.1 Introduction

Each year, the U.S. Supreme Court must whittle over 8,000 petitions for *certiorari* down to approximately 100 that will be granted a hearing on the merits. A crucial step in this winnowing process is the creation of the so-called "Discuss List." Researchers do not know definitively what is or is not on the discuss list. The reason for the difficulty in positively identifying which petitions make the discuss list is due to no official reporting of this list from the U.S. Supreme Court. Over time there have been few studies which can expressly identify which petitions made the discuss list. Scholars have looked to docket books or papers from retired justices to determine which petitions made the list (Ulmer et al. 1972; Provine 1980; Caldeira and Wright 1990). For instance, Caldeira and Wright (1990) examine the 1982 term and identify which petitions made the discuss list through notes from the docket books of Justice William J. Brennan Jr. Outside of docket books or notes from past justices, there is no reliable way to determine what exactly is on the discuss list.

Caldeira and Wright (1990) use the docket books from Justice Brennan to examine what aspects of petitions increase the likelihood the Court will place them on the discuss list. Variables such as U.S. being a party, lower court conflict, issue area (Civil Liberties), ideology, and *amicus curiae* participation are tested. In short, the authors find that the U.S. Solicitor General manages to land over 90% of the cases they are a part of placed on the discuss list, and more amicus briefs further increase the likelihood of placement on the list.

Notably missing from earlier work on Supreme Court agenda setting is any real measure of public opinion or public salience. Many scholars have attempted to account for salience and how it impacts decision making on the merits. However, due to the difficulty in convincingly

ascertaining what the public thinks about an issue at any given moment, its influence on *certiorari* has largely been unstudied.

6.2 Granting or Denying Cert: Luck or Influence?

Given the small proportion of petitions granted *certiorari* in a term, it can appear that one's petition being granted is based on luck, which is how one former Supreme Court clerk described the agenda setting process (Perry 1991). The clerks of the Supreme Court are involved in the *certiorari* process, exerting their own influence on the justices they write memorandum for. Generally, one clerk in the pool drafts a memo for each petition, then, that memo is distributed to the other justices who participate in the pool. Some justices ask their personal clerks to review these memos, others skip this step, but generally the justices themselves focus on the memos instead of reading each petition (Perry 1991). Scholars have identified many aspects of a petition that "stick out" and gain the attention of the justices. Petitions that attract interest group support, receive *amicus curiae* briefs, cite a conflict among lower courts, and have powerful attorneys as a party are more likely to gain the attention of the Court (Caldeira and Wright 1988; Provine 1980; Tanenhaus et al. 1963; Ulmer 1984; Bailey, Kamoie, and Maltzman 2005; Wolfarth 2009; Owens 2010)..

I argue increased public attention can also cause external actors to change their behavior, filing amici briefs or petitioning the Court for *certiorari* when they otherwise would not. The justices and clerks at the U.S. Supreme Court are likely not considering what is currently popular on social media while writing memos or deciding which petitions to grant cert. However, the Court needs legitimacy from the public to operate and cannot enforce decisions alone, meaning opinions of other government institutions and the public are likely considered (Caldeira 1986; Caldeira and Gibson 1992; Gibson and Caldeira 1998; Ignagni and Meernik 1994; Bailey,

Kamoie, and Maltzman 2005; Hettinger and Zorn 2005; Curry, Pacelle, and Marshall 2008; Hall 2014; Gibson and Nelson 2015). I posit that when an issue is highly salient among the public, this salience influences others surrounding the Court, indirectly increasing the likelihood of petitions related to salient issue areas being discussed longer/placed on the discuss list. With high public attention surrounding an issue area, government attorneys take notice and file amicus briefs or become counsel themselves to the petition. In addition, interest groups sponsor litigation or file amicus briefs to push forward their policy preference and engage in maintenance of their membership base.

Either due to concerns about maintaining their legitimacy, replacement of justices, or wanting to tackle issues the public cares about, the Court generally tracks with public opinion at the merits stage. Some argue the mechanism for why the Court tends to follow public opinion at the merits stage is due to replacement of justices over time (Norpoth and Segal 1994; Giles, Blackstone and Vining 2008), or due to constraints perceived from other elected branches (Chutkow 2008; Harvey and Friedman 2009). The public elects the president who selects future justices, as well as the senators who confirm them. Thus, the installation of a new justice would then be reflective of public opinion at that time. Others argue public opinion produces a real constraint on judicial decision making at the merits stage, regardless of changes in composition of the justices (Mishler and Sheehan 1993; Stimson, MacKuen, and Erikson 1995; Hurwitz, Mishler, and Sheehan 2004; McGuire and Stimson 2004; Casillas, Enns and Wohlfarth 2011).

While I argue the Court spends more time on petitions regarding a salient issue area because of outside actor’s influence, the Justices and their clerks are part of society. It is a reasonable assumption they are aware what issues are salient to the public at any given time, too (Caldeira and Wright 1990; Giles, Blackstone, and Vining 2008; Baum 2009; Fix 2014). Thus,

the combination of more amicus briefs, participation from powerful attorneys, and their own sense of what the public is attentive to, I argue and expect the Court will spend more time on petitions when the issue is salient.

6.3 Testing Public and Supreme Court Attention

Like other chapters in this dissertation, I rely on petition data gathered between the 2010 through 2017 terms to test how public attention impacts the attention, or time, given to each petition by the U.S. Supreme Court. After gathering the petitions during my time of interest, I identify all cases that fall into my three topic areas of interest: abortion, anti-trust, or campaign finance. In total, 12,016 paid petitions are gathered with 160 petitions specifically related to the selected three issue areas.

6.3.1 Capturing Increased Attention to Petitions by the Supreme Court

Given the difficulty in knowing exactly which petitions make the discuss list, I determine how much *time* the Court spent deliberating on a petition as a proxy for attention given to a petition by the U.S. Supreme Court. I must first demonstrate the relationship between discussion time and the likelihood of *certiorari* being granted. To calculate the time devoted to each petition, I count the number of days from the date of first distribution to conference to the date when the petition receives a final decision. The date of first distribution marks the day in which the petition has cleared procedural hurdles and is given to the justices for consideration.[46] On conclusion day, the justices announce whether the petition has been granted *certiorari* or denied. Descriptive analyses reveal that denied petitions are discussed for an average of 49 days. When the Court grants *certiorari*, however, the average number of discussion days jumps to 109 days.

[46] Another potential starting date could be the date of filing for each petition. However, the Court will at times take a recess, and those petitions stagnate during this break. Thus, using the date of distribution gives a more reliable measure of how long each petition was being discussed.

To more systematically establish that *Days Discussed* provides a reasonable proxy for petitions that received increased attention from the Court during the certiorari process, I estimate the factors that influence the likelihood of a petition being granted certiorari. I control for other variables known to influence *certiorari* outcomes, such as the ideological distance between the USSCT and the lower court, the number of amicus briefs, and Solicitor General involvement; these variables are all measured in the same manner as explained in previous chapters.

The dependent variable in this initial analysis, *Certiorari Granted,* is dichotomous, coded as one (1) if the petition was granted *certiorari*, and zero (0) if denied. Due to the dichotomous nature of the dependent variable, a logistic estimation is appropriate. I expect all independent variables to be positive and significant, reinforcing past work. *Days Discussed* should also be positive and significant, indicating more attention from the Court results in a higher likelihood of a petition being granted. The results are reported in Table 6.1.

Table 6.1: Determinants of Certiorari

VARIABLES	*Certiorari* Granted	*p*-value
Ideological Distance	0.482	0.109
	(0.311)	
Amicus curiae	0.347	0.000
	(0.025)	
Days Discussed	0.007	0.000
	(0.0005)	
A.G./S.G. Petitioner	1.556	0.000
	(0.193)	
Constant	-3.409	0.000
	(0.116)	
Observations	8,142	

Standard errors in parentheses

The results from this estimation has some interesting findings. First, past findings noting the impact of amicus briefs and powerful government attorneys holds, with both variables showing a positive and statistically significant influence on the outcome of a petition.

Surprisingly, the ideological distance between the U.S. Supreme Court and the lower court is not significant.

Days Discussed is positive and significant, however, indicating that the more time the justices spend deliberating a petition, the more likely they are to ultimately grant *certiorari*. To demonstrate the substantive impact of the *Days Discussed* variable, I generate predictive margins at a number of points with the other variables held at their mean or median when appropriate. Figure 1 illustrates the results.

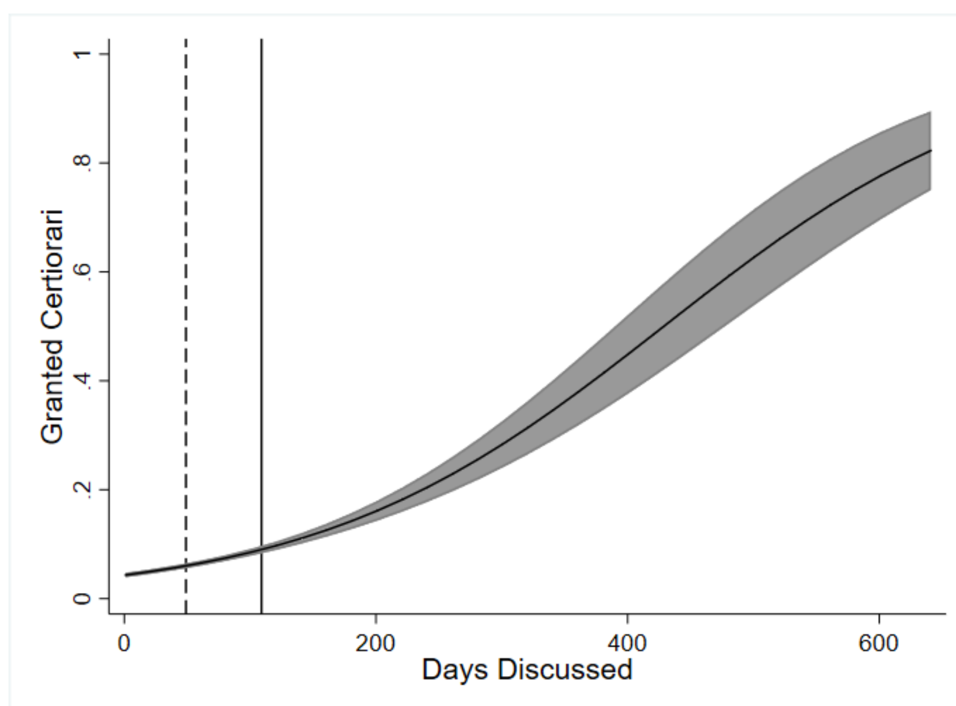

Figure 6.1: Likelihood of Petition Granted Certiorari

When a petition is discussed for the minimum amount of days (one), the probability of *certiorari* being granted is 4.3%. At the mean amount for denied petitions, 49 days (the dashed line), the probability is 5.2%. When discussed for the average amount of days of granted petitions, or 109 days (the solid line), the probability rises to 9.8% - a near 100% increase in probability. At the maximum amount of days discussed, the likelihood of *certiorari* being granted jumps to 82%. It should be noted, however, that it is exceedingly rare for a petition to be

discussed less than 18 days or more than 150 days, as 95% of all petitions are discussed within an 18 to 150-day window.

These results suggest that *Days Discussed* provides a reasonable proxy for which cases receive more attention from the Court; further, those petitions receiving more attention are significantly more likely to be granted certiorari. Given how few cases are ultimately granted *certiorari*, distinguishing how long a petition was under advisement provides some signals as to the "cert-worthiness" of the petition. Those that are discussed for a greater period of time have a greater likelihood of being granted; those that are considered for only a short period of time are much more likely to have not even made it on to the discuss list and instead been routinely dismissed. With this connection between discussion days and *certiorari* established, we now move to the main analysis of this chapter: investigating whether and to what degree public attention indirectly influences the Court's certiorari process.

6.4 Heckman Selection Model

To test my argument that public attention indirectly influences the agenda of the U.S. Supreme Court, I use a two-stage Heckman (1979) selection model. A Heckman selection model captures my theoretical arguments appropriately, and is an excellent estimator given the truncated nature of my data (petitions related to the three topic areas) in the first stage. Here, previous studies, as well as results presented in Chapter 4 and 5, show that more amici briefs and the presence of powerful attorneys increase the likelihood of *certiorari* being granted. However, most analyses of *certiorari* decision-making skip over the question of what distinguishes petitions that receive more amici filings or garner powerful attorneys. I argue – and show in previous chapters – that public attention influences whether actors appeal certain petitions, and whether they choose to file amici briefs. I further posit that these strategic litigation decisions

subsequently influence which cases receive increased attention from the Court during the *certiorari* process, thereby highlighting an indirect mechanism through which public attention helps crafts the Court's agenda. Thus, a Heckman two-stage model captures the dual phases this theory proposes: it first takes into account the public's influence on amici filings, interest groups, and powerful lawyers, and then accounts for how those variables influence the length of time the Court spends deliberating each petition.

When running a Heckman selection model, there are two dependent variables, one for each stage. To account for the impact public attention has on powerful actors both in petitioning the Court and filing amicus briefs, I run two separate Heckman models; one for each variable shown to have an impact on the length of time the Court deliberates a petition. The first stage of both models estimates the impact public attention has on the two dependent variables in question. One estimates the number of amici briefs filed before *certiorari* is decided and the other estimates if a state or federal A.G./S.G. or repeat player is the petitioner. I combine government lawyers and private repeat players due to a low number of petitions with a government lawyer as petitioner *and* high public attention. The second dependent variable for all three models is *Days Discussed*.

6.4.1 Independent Variables included in Heckman selection model

The primary independent variable of interest is my measure of *public attention* to abortion, campaign finance, and anti-trust. I argue this is a latent variable which influences outside actors to file an amicus brief or petition the Court for *certiorari*. I do not expect, nor do I find, public attention to directly influence how long the justices spend deliberating a petition. However, I do expect and find that public attention increases the likelihood of others taking action, which in turn affects the discussion-time dependent variable. Thus, *public attention*

illuminates how public mediates the actions of important actors surrounding the Court, and how those actions in turn help craft the Court's agenda.

The remaining variables include the ideological distance between the Supreme Court and circuit courts, if an A.G./S.G. was the petitioner, and if the U.S. Solicitor General or state A.G. file an amicus brief before *certiorari*. I include ideological distance and in both stages of the model. The variables for U.S. Solicitor General filing an amicus brief and state A.G./S.G. amici briefs are included in only the second stage for empirical and theoretical reasons. There must be differentiation between the independent variables in both stages, and, using an independent variable such as USSG amici filings before *certiorari* to then predict amici filings before cert is inappropriate as it would be predicting the same thing.

6.5 Results

Table 6.2 reports the results of the first Heckman selection model testing the impact of public attention on amicus filings before *certiorari* is decided. Overall, the model performs well with a significant result for both the chi squared and likelihood ratio tests. The results support my argument of an indirect impact of public attention on discussion days. When the amount of *Public Attention* an issue area receives increases, outside actors are more likely to file amicus briefs on petitions related to that issue before *certiorari*, and the Court is then subsequently likely to spend more days discussing those petitions. Similar to Scott's (2006) findings, and mirroring the results shown in Table 6.1, ideological distance between the Supreme Court and lower Courts is insignificant. In the second stage, only amicus briefs filed by state or federal attorneys general or solicitors general have an impact on the amount of time the Court spends deliberating a petition.

Table 6.2: Indirect Impact of Public Attention on Days Discussed; Amici Briefs

	2nd Stage Days Discussed	*p*-value	1st Stage # Amici before Cert	*p*-value
Ideological Distance	13.68	0.817	-0.066	0.928
	(59.22)		(0.726)	
A.G./S.G. Petitioner	33.21	0.211	0.568	0.267
	(26.56)		(0.511)	
USSG Amici	156.3	0.000		
	(32.98)			
State A.G./S.G. Amici	-19.54	0.008		
	(7.375)			
Public Attention			82.34	0.004
			(28.43)	
Constant	69.25	0.015	-0.235	
	(28.51)		(0.262)	
Observations	160		160	
Prob > χ_2 = 0.0001				

Heckman Two-Stage Selection model - Standard errors in parentheses

The next estimation is similar to the above, but instead of selecting on amicus briefs and public attention, I select on if an influential repeat player (both government attorney and/or a private repeat player) are the petitioner. Table 6.3 reports the results of this estimation; however, the overall model statistics are not as positive as the amicus brief model as the chi squared estimation is 0.4025. Even with a low *p*-value, likely due to the small sample size, there is likely connection between public attention, powerful lawyers, and discussion days if the N increased. The results in Table 6.3 are again in line with expectations and show a demonstrable influence of public attention on powerful litigants, if not a strongly significant one. The more public attention an issue area receives, the more likely a state or federal A.G./S.G. or private repeat player will petition the Supreme Court with a case related to that salient issue area.

Table 6.3: Indirect Impact of Public Attention on Days Discussed; Repeat Players

	2nd Stage Days Discussed	*p*-value	1st Stage Repeat-Player Petitioner	*p*-value
Ideological Distance	127.8	0.219	-1.216	0.2
	(104.0)		(0.949)	
# Amici Before Cert	-3.953	0.522		
	(6.168)			
Public Attention			180.1	0.000
			(31.18)	
Constant	14.79	0.769	-1.149	0.000
	(50.31)		(0.326)	
Observations	160		160	
Prob > χ_2 = 0. 4025				

Heckman Two-Stage Selection model - Standard errors in parentheses

Taken together, these results demonstrate that public attention is a latent variable influencing the decisions of powerful actors outside of the Court. The more the public talks about an issue area, the more likely the Court will receive amicus briefs alongside petitions related to that issue area. And, the powerful litigants (such as the A.G./S.G.) that we know have an outsized impact are more likely to be the petitioner of a case pertaining to issue areas attracting public attention.

The reason outside actors are likely to take action is clear: government attorneys have an electoral incentive, either through their own election (in the states) or due to a desire to tackle popular issues from the executive branch (federal). Further, interest groups who wish to see policy implemented in a specific manner, and must also engage in essential group maintenance, are incentivized to prepare amicus briefs or retain a well-known private attorney to litigate a case when the public is paying more attention to an issue area within their arena. This activity from interest groups shows its members that the interest group is taking action, and because of the influence of amici briefs and well-known attorneys at both the *certiorari* and merits stages, it is a meaningful way to influence policy at the national level.

6.6 Conclusion

Public attention is a latent variable affecting which petitions receive more attention from the Court because of the actions taken by outside actors. The number of amici briefs filed before cert and the presence of a government attorney as a petitioner both increase the likelihood of a petition being granted. Further, the number of days spent discussing a petition also positively increases the likelihood of *certiorari* being granted, suggesting the Court spends more time on these petitions, perhaps even placing them on the discuss list. The number of days a petition is discussed is an important variable and given results here, it could be useful for future research in this topic area. While the final cert decision is not a focus here, others who are studying what goes into the Court's cert decisions could find *Days Discussed* of value.

The data demonstrates the relationship between days discussed and the likelihood of *certiorari* being granted, including which variables affect a petition's ability to garner more attention, or days, from the Court. Two two-stage models uncover a potential latent influence of public attention on the important days discussed variable. I find that public attention has a positive and significant influence on the number of amicus briefs filed before *certiorari*, and those briefs then positively influence the number of days discussed. I find that the same holds for powerful actors such as state or federal attorneys general or solicitors general. The impact of the public on repeat players also exits, although I was not able to achieve significance in this estimation. The more public attention an issue area receives, the more likely one of these powerful litigants will petition the Supreme Court to hear a case related to the issue area. The reason for outside actors to act relies largely on their electoral or membership incentives to do so. Government attorneys want to handle cases related to issues the public is widely discussing, and interest groups wish to show their members they are working to influence policy.

In the next and final chapter, I review the work done throughout this dissertation and note potential expansions of this line of research along with some limitations. The concluding chapter summarizes my findings and discusses their broader implications.

7 CHAPTER 7: CONCLUSION

7.1 Overall Findings and Implications

This project began by asking a simple question: does the public influence the U.S. Supreme Court's agenda? In answering this question, I created new measures, scraped thousands of petitions, and put forward new theories to explain why I thought the public had an impact. This project is expanding on decades of research demonstrating the positive impact amicus briefs and powerful litigants have on the likelihood of a petition receiving more attention from the Court or being granted *certiorari*. By using a new measure of public attention, I show that these powerful outside actors are themselves influenced by the public, and thus, indirectly, the public has an impact on the agenda of the U.S. Supreme Court. Understanding the relationship between the public and the courts outside actors, a view of American democracy becomes clearer, and with the increasing ubiquity of social media, the new mechanism by which the public can make their concerns known, understanding this important relationship becomes paramount.

In this concluding chapter I first highlight how the data gathered for this project was collected. I hope that in explaining my methods, it might encourage others to try their hand at coding and looking outside what they are comfortable with to tackle new research ideas. I then review my theory, findings, and outline future work.

Throughout this dissertation, I argue increased public attention to an issue can alter the behavior of influential actors surrounding the U.S. Supreme Court. In Chapter 2, I detailed my theory. I argued that powerful litigants and interest groups have a vested interest in tackling issues the public cares about. Powerful government attorneys often have electoral reasons for engaging in litigation their constituents care about, and interest groups must maintain themselves by being active in policy formation. Thus, powerful litigants such as the solicitor general,

attorneys general, private repeat players, and interest groups are more likely to submit an amici brief, *and* more likely to appeal their case to the U.S. Supreme Court public attention for a petitions issue is high. Public attention influences powerful actors to engage a problem they may have otherwise not.

In Chapter 3 I argued that a new measure to is needed to accurately gauge what the public is talking about. In the past, surveys or newspaper data-sets were used in an attempt to get at what is important to the public. In the last ten years there has been a technological renaissance, dramatically altering how people communicate. Every technological advancement changes how the public debates with itself. From town squares to the written word and most recently radio and television, we constantly invent new, faster ways to communicate. With social media being the prominent method of discussion today, I argue it is the most appropriate place to harvest information about the public conversation. This chapter argued that the pervasiveness of social media means that conversations online are not a sample of the public's conversation, but the actual, entire conversation. Thus, capturing what the public is talking about online is capturing what the public is talking about overall.

In chapter 4, I explicitly tested how public attention influences the likelihood of outside actors to file amicus briefs. I find that when public attention surrounding an issue increases, more *amicus curiae* briefs are filed before a *certiorari* decision is decided. In addition, influential attorneys and interest groups are more likely to file a brief or be party to the petition when public attention is high. Specifically, when public attention is low, there is a low probability that a petition related to that issue will receive an amicus brief. However, when public attention increases, the probability also increases. Overall, I find that a petition dealing with a highly

talked about issue area can expect to receive four or more amicus briefs – a healthy and substantial amount.

This project also contributes to our understanding of what prompts powerful attorneys and interest groups to act. Chapter 5 empirically tested how public attention influences these organizations and individuals. When public attention increases, the likelihood powerful attorneys or interest groups will petition the Court or write amicus briefs increases. The public has a demonstrable effect on important actors outside of the U.S. Supreme Court. Outside actors such as interest groups or elected attorneys have an interest in tackling issues the public cares about, and this chapter shows there is an effect of public attention.

The final empirical chapter brought together both S.G. involvement and amicus briefs with public attention to examine how much attention the Court gives each petition before deciding its fate. I use time spent deliberating each petition as a variable to quantify how much attention the Court gives each petition. I find that in general, the more attention (time spent) the Court gives a petition, the higher the likelihood they will grant *certiorari*. This chapter uses a two-stage model to show that as public attention increases, both amicus briefs and government attorney involvement also increase, which then leads to more attention paid by the justices. Thus, there is an indirect influence of public attention on the agenda of the U.S. Supreme Court.

For decades scholars have known that amicus briefs and government attorney participation positively influence the likelihood a petition will be granted *certiorari*. However, few have explicitly studied what influences the actors to act. Overall, this project finds that another influence exists that can encourage powerful entities and offices in the legal world to take action: public attention. The findings throughout this dissertation have shown an indirect influence from what the public is talking about and how important actors surrounding the Court

behave. If the public is particularly attentive to an issue, we should expect petitions related to that issue to receive more amicus briefs, more engagement from top lawyers, and more time in deliberation in conference. If public law scholars care to understand how interest groups and attorneys such as the Solicitor General are influenced to take action, this project should be a helpful entry into the literature.

Less specifically, this dissertation shows that there are new ways to tackle old questions to produce new research. Knowing that public attention influences some of the most elite, most powerful actors in our government is an interesting finding. While it makes intuitive sense that the public should, of course, impact people that they elect or donate money to, that has been historically difficult to show empirically. Many argue that the powerful in the halls of government are relatively immune from public undulation, but this research should give pause to that line of thinking. There is now strong theoretical and empirical reason to expect the public's attention to drive political and judicial action.

While I was not able to gather more than three topic areas for this project, collecting more, similar data and applying it to new questions will open a large area of research. I believe if one were to obtain more data about what the public is talking about in specific issue area categories, the methods used here can greatly expand our understanding in many different areas of political science or any discipline that has an interest in what the public is concerned with. Potentially even create predictive models well ahead of the decision of the Court to grant cert. Where past research has always been post-facto, future research and data with predictive capability has nearly limitless potential to increase our understanding.

7.2 Future Work

Future projects related to *certiorari* can build on this work by expanding the number of issue areas with public conversation amounts. Given the universe of petitions is readily available via web scraping, gathering as many issue areas as possible would give a better picture of how influential the public is to outside actors, and ultimately the Court

Scholars from many different disciplines can use the methods outlined here to help test new theories. While this project focuses on the actors surrounding the agenda-setting process of the U.S. Supreme Court, the same data can be put toward a multitude of other areas. Knowing how much the public is paying attention to an issue area can be used to examine how the public impacts the other institutions of government. Does public attention have an impact on when and what type of legislation is introduced, in executive order creation, or in voting patterns of members of Congress? Additionally, exporting the methods used here and applying them to the states or to other countries would produce a treasure of interesting research. Finding if these results hold up in the states where judges are elected or in countries with entirely different institutional designs. Data from social media can be tagged to specific locations and doing so would even enable researchers to determine how public attention impacts local institutions, politics, and elections.

In closing, the findings presented here are more than changes in probability of an amicus brief being filed or predicting if the S.G. will become involved in a petition. Much of public law, and political science in general teaches that the Court is a special institution, insulated from public opinion. This insulation allows the Court, in theory, to make decisions that are right and not necessarily popular. Indeed, our undergraduate textbooks read “Because Judges are unelected and serve for life, they are not accountable to the people in the same way that presidents and

members of Congress are" (Geer, Schiller, Segal, and Glencross 2013, p. 514) and "The powerful role of the courts in a democracy will always be vexing for a simple reason: the courts are designed to serve as a check, ultimately, on 'We, the People'" (Morone and Kersh 2013, p. 605). Yes, the Court is relatively insulated, but the public may have more of an impact than we previously thought on the judicial branch, and, on many different facets of our republic.

With social media as a method of communication beginning to mature and the accessibility of powerful programing techniques, there are new and exciting tools available to scholars. Previously it would have been near impossible to gauge what the public was talking about in real time, or, being able to gather the universe of Supreme Court petitions in a reasonable amount of time. It is my hope that future work will continue this type of outside the box data collection and using it to help all of us more fully understand how our world works, and how it is changing. I believe this dissertation is an important step in showcasing how new methods can illuminate old questions.

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APPENDICES

Appendix A

Figure A.1 illustrates the total number of *amicus curiae* filings per term from 2010 through 2017. Note that 2017 is lower than average due to a number of petitions not yet decided when data was collected.

Appendix A.1

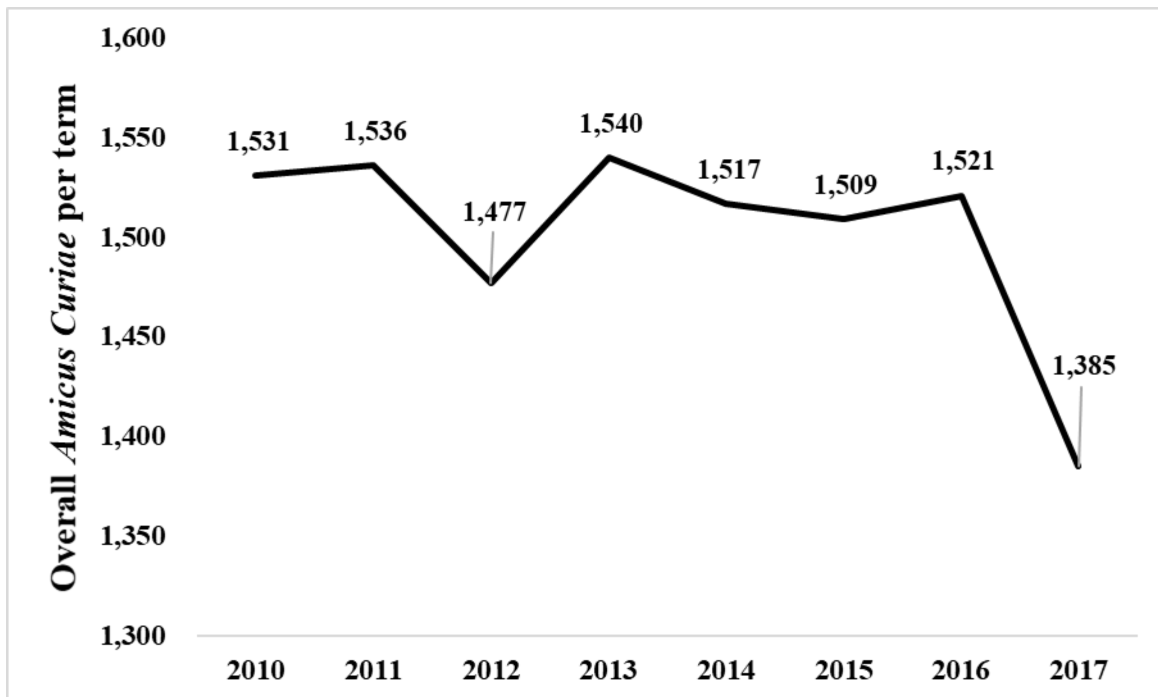

Figure A.1: Total Amicus Curiae filings per term

Appendix B

When estimating a model using a count dependent variable, one must first determine which estimator is appropriate. If the variable is normally disbursed, a Poisson model can be an appropriate estimator. However, when the count variable contains an excessive number of zeros, a determination must be made between a negative binomial or zero-inflated estimation. Both a negative binomial and zero-inflated handle over-dispersion of zeros in different ways. A negative binomial is similar to Poisson regression since it contains the same mean structure as Poisson regression, but it has an extra parameter to model the over-dispersion.

A zero-inflated regression attempts to account for the extra zeros by determining which are zeros because they cannot be anything else, and which ones are “true” zeros. For example, say a researcher is interested in alcohol consumption. The researcher may collect data from patrons leaving a restaurant, asking each person how many drinks they consumed. In addition, the researcher askes each respondent how many friends they went with, their age, how many children were in the party, and if they drove. The count variable, number of drinks, may have an inflated number of zeros due to other circumstances. If the respondent was the designated driver or children were present, he or she might have never intended to drink alcohol. Therefore, there would be an over-dispersion of zeros in the data. A zero-inflated model essentially runs a negative binomial model, and then a logit model. The logit model is attempting to predict when the zeros would always be zero. Zero inflated estimations are helpful if ones data-set contains a variable believed to predict a zero in their count.

In this particular situation where I am concerned with estimating the number of amicus briefs a petition may receive, I do not have a variable which I believe would predict a zero. Further, negative binomial models generally perform better when using smaller data-sets. Given

these considerations, and that the zero-inflated and negative binomial report similar findings, I selected the negative binomial. The results of the zero-inflated negative binomial with robust standard errors are presented in Table B.1.

With no variable I thought could predict when a petition would receive an amicus brief, I inflated the constant. I did model multiple iterations with several other variables inflated, and *Public Attention* never dropped below standard levels of statistical significance.

Appendix B.1

Table B.1: Determinants of Amicus curiae before Certiorari

	Amici Before Cert	*p*-value
Public Attention	91.507	0.001
	(26.673)	
Ideological Distance	-0.07	0.932
	(.819)	
SG Party to Case	0.548	0.298
	(0.527)	
Constant	-0.093	0.758
	(0.302)	
Inflate		
Constant	-14.4	0.000
	(1.78)	
Alpha Log	0.307	0.181
	(0.231)	
Observations	160	
Prob > χ_2 = 0.002		

Robust Standard errors in parentheses – Zero-Inflated Negative Binomial
Prob > χ_2 = 0.002

Appendix C

Below are the Boolean phrases I used to collect data on the three chosen topic areas. The terms used are intentionally narrow as I wanted to be certain I was collecting data on these specific issue areas and not others.

- Abortion: (abortion OR "pro life" OR "pro choice") place_country:us
- Campaign Finance: ("Citizens United v. FEC" OR "Citizens United" OR "Campaign Finance" OR "Campaign Finance reform" OR "Dark money" OR "Money in politics" OR pac OR pacs OR "Super PAC" OR "Super PACs") place_country:us
- Anti-trust: ("corporate monopolies" OR "antitrust" OR "anti-trust" OR "anti trust" OR "corporate monopoly" OR "business monopolies" OR "business monopoly") place_country:us