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# Finding Certainty in Cert: An Empirical Analysis of the Factors Involved in Supreme Court Certiorari Decisions from 2001-2015

## Cover Page Footnote

Law; Supreme Court of the United States

2016]

FINDING CERTAINTY IN CERT: AN EMPIRICAL ANALYSIS OF THE  
FACTORS INVOLVED IN SUPREME COURT CERTIORARI  
DECISIONS FROM 2001–2015

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I. INTRODUCTION

**I**N what has become a common recent trope, each June the Supreme Court announces its most anticipated decisions.<sup>1</sup> These decisions deal with controversial topics ranging from abortion and contraception to universal healthcare and marriage equality.<sup>2</sup> For the casual observer, it would appear that the bulk of the Court's work is in deciding these cases. Based on numbers alone, however, this could not be further from the truth. During the 2013 Supreme Court term, for instance, 7,376 writs of certiorari (cert) were filed with the Supreme Court.<sup>3</sup> The Court granted plenary review in only seventy-six or approximately 1% of these cases.<sup>4</sup>

The Supreme Court typically does not hear cases on first impression. It does so only through its power of original jurisdiction in limited instances, predominately dealing with disputes between two states.<sup>5</sup> The Court lacks discretion on whether to take cases on appeal, but this too is limited to a particularly small class of cases that are authorized by specific statutes.<sup>6</sup>

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1. See Lee Epstein, William M. Landes & Richard A. Posner, *The Best for Last: The Timing of U.S. Supreme Court Decisions*, 64 DUKE L.J. 991, 993 (2015).

2. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566 (2012).

3. See Journal of the Supreme Court of the United States, October Term 2013, SUPREME COURT OF THE U.S. II (2013), <http://www.supremecourt.gov/orders/journal/jnl13.pdf> [<https://perma.cc/QCV7-JEQX>].

4. See *id.*

5. The Supreme Court's original jurisdiction is limited by Article III, Section 2 of the Constitution to "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party." See U.S. CONST. art. III, § 2, cl. 2. In the 2014 Term, the two cases on the Court's docket under original jurisdiction were *Kansas v. Nebraska*, 126 Orig. (2014), and *United States v. California*, 5 Orig. (2014). In 2013, there were no cases on the Court's docket under original jurisdiction.

6. The Court is seldom presented with cases on direct appeal. These appeals are limited by statute to specific situations under 28 U.S.C. § 1253, which states:

The Supreme Court hears cases on certiorari (cert), the most common method of bringing cases to the Court, only after all other sources of appeal to lower courts are exhausted. After a decision is rendered by the lower court, a party has ninety days “after entry of [a] judgment” to file a petition for cert with the Supreme Court.<sup>7</sup> There are no cut-and-dry rules that bind the Court to grant cert, as these writs are purely discretionary. The Supreme Court does provide some guidance in its rules for what types of issues are more relevant for Supreme Court review, but the Court is not bound by them.<sup>8</sup> With the number of petitions the Court receives, the clerks and Justices need heuristics to efficiently locate petitions for cases that the Court might hear and that are at least worthy of additional review.

Of the petitions the Court receives, the vast majority currently are *in forma pauperis* (IFP).<sup>9</sup> Litigants without sufficient funds to bring lawsuits to the Supreme Court may be granted IFP status, where filing fees and associated costs are waived.<sup>10</sup> Most of these filings come from incarcerated pris-

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Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 1253 (2012). In practice, the types of cases that come to the Supreme Court on direct appeal from this act are limited to suits under three statutes:

(1) 28 USCS § 2281, suits to enjoin enforcement of state statutes or administrative orders on grounds of unconstitutionality; (2) 28 USCS § 2282, suits to enjoin enforcement of federal statutes on grounds of unconstitutionality; and (3) 28 USCS § 2325, suits to enjoin enforcement of certain orders of the Interstate Commerce Commission.

Jerald J. Director, *Annotation, Construction and Application of 28 USCS § 1253 Permitting Direct Appeal to Supreme Court from Order of Three-Judge District Court Granting or Denying Injunction*, 26 L. ED. 2D 947 (2012). As a practical matter, the Supreme Court hears fewer than one direct appeal annually.

7. See SUP. CT. R. 13.1.

8. These factors, listed in SUP. CT. R. 10, include:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power; (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

SUP. CT. R. 10.

9. See David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 249 (2009) (describing that almost four times as many IFP petitions were filed compared to paid petitions for years of study).

10. See 28 U.S.C. § 1915 (2012).

oners.<sup>11</sup> Although IFP filings make up the bulk of petitions for cert to the Court, these petitions are granted much less frequently than paid petitions.<sup>12</sup>

After the petitions for cert are filed each year, the Supreme Court Justices and, more importantly, their clerks, must wade through thousands of petitions and accompanying briefs. The clerks often draft memoranda about the merits of the various petitions, which play large roles in shaping the Justices' decisions on cert.<sup>13</sup> Due to the high volume of filings each year, the Justices and clerks need shorthand methods to decide which cases to accept on cert. Several pieces of information may be particularly helpful in these decisions. Previous empirical studies support the proposition that, while a very low percentage of petitions for cert are granted in the aggregate, the chance of success substantially increases when lawyers and law firms with extensive Supreme Court experience file these petitions.<sup>14</sup> Secondly, the Court may consider the lower court where the case was previously heard and the Court's perceived alignment of views with that court, as well as amicus curiae briefs filed at the cert stage, to assist in gauging whether to grant cert.<sup>15</sup> Based on the number of factors that may influence the Justices' cert decisions and the limited time the Justices and clerks have to make these decisions, the Court needs effective cues to help process this heap of information.

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11. See Wendy L. Watson, *The US Supreme Court's in Forma Pauperis Docket: A Descriptive Analysis*, 27 JUST. SYS. J. 47 (2006) (noting IFP docket is primarily composed of criminal cases and civil rights cases involving prisoners).

12. See, e.g., Cristina Lane, Comment, *Pay Up or Shut Up: The Supreme Court's Prospective Denial of in Forma Pauperis Petitions*, 98 NW. U. L. REV. 335, 344 (2003) (noting Rehnquist Court granted only 0.2% of IFP petitions in 2000 Term, as compared to "4% of paid cases" in same Term (citing ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 8.1 (8th ed. 2002))).

13. See William D. Blake, Hans J. Hacker & Shon R. Hopwood, *Seasonal Affective Disorder: Clerk Training and the Success of Supreme Court Certiorari Petitions*, 49 LAW & SOC'Y REV. 973, 987-93 (2015) (discussing "Long Conference" and clerks' influence on Justices' decisions to grant cert).

14. See H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 127 (1991) ("When certain clerks or justices see certain people or groups as litigants, they pay closer attention."); Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1115 (1988) (noting Court is "more likely to grant cert[ ]" when petition is filed by U.S. Solicitor General); Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1512-13, 1526, 1544, 1550 (2008) (describing importance of "experienced Supreme Court advocates" placing their names on petitions for cert); Kevin T. McGuire & Gregory A. Caldeira, *Lawyers, Organized Interests, and the Law of Obscenity: Agenda Setting in the Supreme Court*, 87 AM. POL. SCI. REV. 717, 719 (1993) ("The mere presence of a repeat player as counsel goes a long way toward demonstrating the seriousness of the petitioners.").

15. See Charles M. Cameron, Jeffrey A. Segal & Donald Songer, *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 AM. POL. SCI. REV. 101, 101, 108 (2000).

More than any Supreme Court preceding it, the Roberts Court has to deal with an ever-increasing number of petitions for cert.<sup>16</sup> It does so while at the same time decreasing the overall number of cases it hears on average per term.<sup>17</sup> This reinforces the importance that the Court makes the right decisions regarding which cases to hear. The importance of the cases for which the Court grants review is further underscored by the perception that the current Chief Justice makes “strategic” decisions in order to manage his own reputation and that of the current Court.<sup>18</sup> If the Chief Justice is truly legacy-oriented, then many cert decisions will be affected by this interest because the Chief Justice leads the conferences among the Justices, and conferences are where the Court decides the list of cases for the term. By choosing to hear certain cases with specific facts, the Court decides which issues it will tackle and which to avoid. In doing so the Court must decide between issues that are more or less controversial and more or less salient to the general public.

This paper confronts the issue of how the recent Supreme Court sets its agenda by analyzing docket reports and the 93,000 petitions that the Court decided between the 2001 Term and the start of the 2015 Term. It uses an original dataset that combines information about attorneys, law firms, lower courts, amicus curiae briefs, and parties. This dataset allows us to test some of the prevalent hypotheses for the agenda setting stage empirically, including the relationship between each of these factors and the likelihood of cert success.

This paper not only shows the relative advantages (or disadvantages) that these factors provide but also looks to the micro-level to distinguish the individual actors that are most successful in the cert stage. By comparing the relative success of individual attorneys, law firms, and parties, this paper sets out to determine the players that assist the Court in setting its agenda.

The paper proceeds as follows: in the following section, the paper discusses the importance of attorneys, parties, lower courts, and amicus curiae in setting the Court’s agenda. These factors align with the hypotheses that we test with our dataset. The paper then goes through our methodology and describes the data gathering in greater detail, as well as how we work with such an extensive dataset. The third section contains analyses of the components of interest in order to assess the main factors that come to bear on cert and the individual actors behind these factors. The concluding section discusses the implications of this study on our understanding of the cert process, and for the relationship between the Court

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16. See Lazarus, *supra* note 14, at 1512 (noting that there are “more petitions for writs of certiorari than ever”).

17. See *id.* (noting “paradox” of growing Supreme Court bar while “plenary docket is shrinking”).

18. See James L. Gibson & Michael J. Nelson, *Change in Institutional Support for the U.S. Supreme Court: Is the Court’s Legitimacy Imperiled by the Decisions It Makes?* (July 15, 2014), <http://ssrn.com/abstract=2466422> [<https://perma.cc/WA79-QKS2>].

and its decision stimuli at perhaps the most significant phase in the Court's annual calendar.

## II. FACTORS AS CUES

Although there are no hard and fast rules that Justices follow when deciding whether to grant cert, Supreme Court Rule 10 provides clues as to what the Court is looking for in cert petitions. The main point in this rule is that the Court is looking for cases with decision conflicts between lower courts.<sup>19</sup> Other factors, such as Justices' personal policy preferences as well as Justices' views on the role of the Court, may also affect the Justices' votes on cert.<sup>20</sup>

The Justices rely on clerks to provide memos that outline the key points of cert petitions and recommend whether the Justices should grant them. Clerks have exerted influence on the Justices' cert decisions since at least the mid-twentieth century, yet the extent of this influence is not wholly clear. To avoid redundancy in the clerks' work, a "cert pool" was established wherein one memorandum is drafted by a clerk for each case and presented to all Justices, rather than clerks in each chamber individually reviewing each petition.<sup>21</sup> The Justices who participate in the cert pool may put less emphasis on the clerks' conclusions if they have less faith in the clerks from other chambers.<sup>22</sup> Still, some scholars see the cert pool as affording the clerks too great a power because they are independently delegated petitions to present to all Justices in the pool, and some Justices make decisions, especially regarding which petitions to deny, partially or entirely based on these memos.<sup>23</sup>

In terms of the cert vote, petitions must convince a minority of justices—four of nine to vote—in favor of granting the petition. This is

19. See SUP. CT. R. 10.

20. See generally Margaret Meriwether Cordray & Richard Cordray, *Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 410–51 (2004) (explaining factors that affect Justices' case selections).

21. See Barbara Palmer, *The "Bermuda Triangle?" The Cert Pool and Its Influence over the Supreme Court's Agenda*, 18 CONST. COMMENT. 105, 107–08 (2001).

22. See generally DAVID L. WEIDEN & ARTEMUS WARD, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 126–47 (2006) (describing clerks' function of reviewing petitions and clerks' views that their influence on cert process has declined with rise of cert pool). During the years covered in this paper, Justice Stevens' chambers did not participate in the cert pool, and Justice Alito withdrew from the cert pool in 2008. See David R. Stras, *Secret Agents: Using Law Clerks Effectively*, 98 MARQ. L. REV. 151, 158 (2014) ("With the exception of Justice Alito now, it used to be Justice Stevens, everybody participates in the cert pool . . . ." (citing WEIDEN & WARD, *supra*, at 126; Adam Liptak, *A Second Justice opts out of a Longtime Custom: The 'Cert Pool'*, N.Y. TIMES, Sept. 26, 2008, at A21)).

23. See Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1377 (2006) (citing David M. O'Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court's Shrinking Plenary Docket*, 13 J.L. & POL. 779, 801 (1997)) (discussing how Justices Stevens and Scalia rely almost entirely on clerks' memoranda in their cert decisions).

known as the “Rule of 4.”<sup>24</sup> Many attorneys who submit petitions to the Supreme Court strategize based on these procedures, and some have developed specific tactics based on them.<sup>25</sup>

The view that certain case characteristics independently enhance the likelihood of the Justices granting cert is known as “cue theory.”<sup>26</sup> Many different permutations of cue theory have been asserted over the years. An important development in this theory helped to link the cues designed to influence the Justices’ and clerks’ behaviors.<sup>27</sup> By linking the behavior of the clerks to that of the Justices, the existence of specific cues influencing the Justices’ votes can be inferred. Other studies relay that certain factors, such as the attorney on the cert petition, work as a strong cue for the Justices’ decisions.<sup>28</sup>

This paper empirically examines these factors on a large scale. The factors explored in this paper are treated as potential cues for the Justices, and, if they have the hypothesized effect, they should lead to systematic, statistically-significant differences in the Justices’ decisions at the cert stage.

#### A. Attorneys and Law Firms

Some attorneys and law firms are anecdotally noted for their success at the cert stage. What do these actors possess that others lack? We posit multiple rationales for such differential success. Unlike experience trying cases before the Supreme Court, experience drafting cert petitions does not necessarily increase the likelihood of drafting successful petitions.<sup>29</sup>

24. See SAUL BRENNER & JOSEPH M. WHITMEYER, STRATEGY ON THE UNITED STATES SUPREME COURT 140–41 (2009) (describing potential justifications for cert voting norm).

25. See Lazarus, *supra* note 14, at 1512–13 (describing increasing number of petitions for cert coming from “expert” Supreme Court attorneys); see also Susan Brodie Haire, Stefanie A. Lindquist & Roger Hartley, *Attorney Expertise, Litigant Success, and Judicial Decisionmaking in the U.S. Courts of Appeals*, 33 LAW & SOC’Y REV. 667, 667, 671–72 (1999) (describing benefits of attorney “experience and specialization” for success before Court).

26. See Joseph Tanenhaus et al., *The Supreme Court’s Certiorari Jurisdiction: Cue Theory*, in JUDICIAL DECISION-MAKING 111, 118 (Glendon Schubert ed., 1963) (setting foundation for cue theory); Donald R. Songer, *Concern for Policy Outputs as a Cue for Supreme Court Decisions on Certiorari*, 41 J. POL. 1185, 1187 (1979) (examining importance of potential merits decision as cue for Justices’ cert votes); S. Sidney Ulmer, William Hintze & Louise Kirklosky, *The Decision to Grant or Deny Certiorari: Further Consideration of Cue Theory*, 6 LAW & SOC’Y REV. 637, 638–40 (1972) (looking more expansively at variables that are cues for Justices).

27. See PERRY, *supra* note 14, at 127 (providing interviews with Supreme Court clerks that describe interactions within their chambers and how their perceptions of Justices influenced their assessments at cert stage).

28. See VANESSA A. BAIRD, ANSWERING THE CALL OF THE COURT: HOW JUSTICES AND LITIGANTS SET THE SUPREME COURT AGENDA 24–27 (2007).

29. Rather than examine experience in the cert process, several studies note the importance of Supreme Court litigators’ aggregate “Supreme Court experience” for their success on the merits. See, e.g., KEVIN T. MCGUIRE, THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY 87–94 (1993) [herein-



Without a good vehicle for the Supreme Court, parties or lawyers may draft petition after petition that is denied. If experience is not the key differentiating factor, then what is?

Perhaps not experience in the practice of law generally, but experience in the cert process specifically leads to greater success. For one thing, success likely breeds success, as clients seek out those attorneys who were successful with cert petitions in the past. This allows specific attorneys to become more selective in which cases to take, and thus to pick more potential winners.<sup>30</sup>

Attorneys who have attained a track record for success on cert almost entirely work in firms or practice groups that specialize in practice at the Supreme Court level.<sup>31</sup> Many of these attorneys worked in the Office of the Solicitor General (OSG), and several worked as Solicitor General (SG) prior to returning to the private sector.<sup>32</sup> As the number of attorneys with a high level of Supreme Court experience began to rise in the 1980s, the phrase “Supreme Court Bar” was coined to refer to this group of high-caliber attorneys.<sup>33</sup> The general success of the Supreme Court Bar is documented at both the cert and merits levels.<sup>34</sup> Past studies do not disaggregate down to the firm or attorney level, nor do they examine such an extensive dataset. With data broken down to the individual level, we are able to assess the extent of the Supreme Court Bar’s success at cert with greater precision.

These attorneys also often represent clients who are repeat players in the Supreme Court. These repeat players often have an advantage over opposing parties that stems from their ability to bear greater costs, focus on gains in the aggregate through repeat litigation, and shift the course of

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after THE SUPREME COURT BAR]; Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187, 188–90 (1995) [hereinafter *Repeat Players*]; Adam Feldman, *Who Wins in the Supreme Court? An Examination of Attorney and Law Firm Influence* 2–30, <http://ssrn.com/abstract=2643826> [<https://perma.cc/SKX4-VK68>] (last updated Jan. 22, 2016); see also David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability*, 74 U. CHI. L. REV. 1145, 1145, 1168 (2007) (discussing factors in attorney success more generally).

30. See Leonard R. Mellon, Joan E. Jacoby & Marion A. Brewer, *The Prosecutor Constrained by His Environment: A New Look at Discretionary Justice in the United States*, 72 J. CRIM. L. & CRIMINOLOGY 52, 80–81 (1981) (discussing importance of case selectivity in attorney’s likelihood of success).

31. See Joseph W. Swanson, *Experience Matters: The Rise of a Supreme Court Bar and Its Effect on Certiorari*, 9 J. APP. PRAC. & PROCESS 175, 181–82 (2007) (noting “impression that experienced representation makes a difference at the certiorari stage”).

32. See MCGUIRE, THE SUPREME COURT BAR, *supra* note 29, at 160–61.

33. See, e.g., John G. Roberts, *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 68 (2005) (“Over the past generation, roughly the period since 1980, there has been a discernible professionalization among the advocates before the Supreme Court . . .”).

34. See MCGUIRE, THE SUPREME COURT BAR, *supra* note 29, at 89 tbl.5.4; Lazarus, *supra* note 14, at 1514–15, 1540.

the law over time.<sup>35</sup> Members of the Supreme Court Bar may derive an advantage from their institutional standing and developed skill in the unique area of bringing cases to the Supreme Court. An attorney's credibility that derives from cumulative experience in the Supreme Court also goes a long way in establishing credibility before the Justices.<sup>36</sup>

Accumulated practice before the Supreme Court allows attorneys to develop specialized knowledge of the Justices and their specific predilections, as well as relationships with the Justices that other attorneys lack. Exposure to the Court also provides attorneys with insight into what to include and exclude from their petitions.<sup>37</sup> This includes what the Court might find useful and, consequently, the type of material that will draw attention on cert.<sup>38</sup> Many experienced Supreme Court attorneys also clerked for Supreme Court Justices, an experience that provides them with intimate knowledge of Justices that others lack.<sup>39</sup>

Previous work experience in the OSG provides attorneys with both unparalleled Supreme Court litigation experience and greater knowledge of the Justices. The Justices hold the OSG in such high esteem that they often invite the SG to file amicus briefs in cases in which the government is not directly involved to get the OSG's assessment or the government's position on an issue.<sup>40</sup> In cases where the Justices need a better explanation of the facts, issues, or arguments, they often turn to the SG's brief to provide these insights and hope that the assessment will be as objective as possible, notwithstanding the SG's role as an advocate.<sup>41</sup>

The Supreme Court Bar may somewhat diminish the strength and influence of the OSG due to its practitioners' extensive litigation experi-

35. See Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 124-28 (1974).

36. See RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 160 (rev. 1st ed. 1996) (discussing common mistakes in briefs written by lawyers without Supreme Court experience).

37. See Carter G. Phillips, *Advocacy Before the United States Supreme Court*, 15 T.M. COOLEY L. REV. 177, 189-90 (1998) (explaining attorneys with little experience may present information not sought by Justices).

38. See Richard A. Posner, *Convincing a Federal Court of Appeals*, 25 LITIG. 3, 4 (1999) (discussing importance of highlighting relevant material).

39. See TODD C. PEPPERS & ARTEMUS WARD, IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES 383-84 (2012) (discussing former clerks' relationships with Justices); see also Matthew L. Sundquist, *Learned in Litigation: Former Solicitors General in the Supreme Court Bar*, 5 CHARLESTON L. REV. 59, 81-84 (2010) (discussing additional litigation advantage of having prior experience as SG).

40. See REBECCA MAE SALOKAR, THE SOLICITOR GENERAL: THE POLITICS OF LAW 145 (1992).

41. See RICHARD L. PACELLE, JR., BETWEEN LAW AND POLITICS: THE SOLICITOR GENERAL AND THE STRUCTURING OF RACE, GENDER, AND REPRODUCTIVE RIGHTS LITIGATION 20-27 (2003) (explaining Justices often turn to SG's brief to learn about confusing issues or facts).

ence.<sup>42</sup> For many years OSG attorneys were the predominant repeat players in the Court, yet, with the presence of Supreme Court Bar attorneys, equally or more experienced attorneys are now regularly involved in litigating Supreme Court cases.<sup>43</sup> These attorneys have the resources to research and prepare briefs extensively in a variety of case areas.<sup>44</sup>

Law firms focused on Supreme Court litigation attempt to accumulate top attorneys. Even the Justices see a potential advantage to employing the service of these firms.<sup>45</sup> Still, Supreme Court attorneys in specialized practices do not necessarily have the same insight at the ground level as local attorneys.<sup>46</sup> Such local insight may not, however, play a great role in the Court's initial process of weeding out petitions for cert if the clerks and Justices predominately pay attention to the names of the lawyers and law firms on the petitions.

#### B. Lower Courts

The lower court in which a case originates conveys subtle information that may affect the Justices' cert decisions. There are a limited number of courts that try cases before a case makes its way to the Supreme Court. While cases can come to the Supreme Court from federal and state courts, the bulk of the Supreme Court's docket tends to be filled with cases from the U.S. Circuit Courts of Appeal.

Sitting atop the judicial hierarchy, the Supreme Court ensures the binding effect of its rulings by reversing rulings that conflict with Supreme

42. See Lazarus, *supra* note 14, at 1546 (noting SG's "monopoly on advocacy expertise" has vanished due to rise of Supreme Court Bar). *But see* SALOKAR, *supra* note 40, at 25 (describing how SG historically performs more successfully than other litigators both in opposing petitions and in bringing petitions to Court); *see also* RYAN C. BLACK & RYAN J. OWENS, *THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT: EXECUTIVE BRANCH INFLUENCE AND JUDICIAL DECISIONS* 23–24 (2012) (citing variety of statistics relating to OSG's success at cert stage).

43. See MCGUIRE, *THE SUPREME COURT BAR*, *supra* note 29, at 128 (documenting rise of experienced Supreme Court practitioners in private practice); *see also* Roberts, *supra* note 33, at 77 ("[T]he rise of Supreme Court and appellate practice departments in major law firms . . . is largely a phenomenon of the past twenty-five years . . .").

44. See Lazarus, *supra* note 14, at 1549 (describing how Justices rely on expertise of members of Supreme Court Bar in "[c]ases involving complex and technical areas of law").

45. See Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 *FORDHAM L. REV.* 227, 231 (1973) ("[W]e see that clients who can afford such lawyers—in the big firms or in the many excellent medium-size firms or indeed among this country's skilled sole practitioners—are well served by lawyers."). *But see* William H. Rehnquist, *The Legal Profession Today*, 62 *IND. L.J.* 151, 152–54 (1986) (questioning whether contemporary billing requirements at large law firms affect quality of work and life for associates).

46. See Christine M. Macey, *Referral Is Not Required: How Inexperienced Supreme Court Advocates Can Fulfill Their Ethical Obligations*, 22 *GEO. J. LEGAL ETHICS* 979, 995 (2009) (discussing how Justices may occasionally prefer informational expertise of local attorneys to that of experienced Supreme Court practitioners).

Court precedent.<sup>47</sup> This view has several theoretical roots. First, under the principal-agent model, the Supreme Court maintains its supremacy and keeps the lower courts in check with its rulings as the principal in the judicial hierarchy.<sup>48</sup> There is also a more nuanced strategic theory of judicial behavior that not only presumes the Court wants to maintain compliance with its rulings, but also that the Justices are further motivated by a desire to see their preferences effectuated through lower court compliance.<sup>49</sup>

Strategic- and preference-based theories of judging extend this argument further, noting the possibility that the Supreme Court places extra scrutiny on petitions coming from lower courts deemed more ideologically distant.<sup>50</sup>

With our data we can test how the rate of cert grants varies depending on which lower court previously ruled on the case. We can do this with state courts as well as with federal courts of appeal. Looking beyond the number of petitions per circuit at the percentage of cert grants per circuit provides additional insight into the level of accord between the court levels, as well as evidence of whether the Supreme Court takes this principal-agent relationship seriously.

### C. Parties

The Justices and clerks on the Supreme Court can make quick assessments of the likely merits of a cert petition based on the attorney on the petition. The parties on the petition have the potential to supplement the Justices' and clerks' initial assessments of a case further. Some repeat parties might cue the Court's attention in a similar way to the attorneys on the petitions.

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47. See, e.g., Charles M. Cameron, Jeffrey A. Segal & Donald Songer, *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 AM. POL. SCI. REV. 101, 102 (2000) (suggesting that Supreme Court is more likely to grant certiorari from courts when that court makes greater deviations from Supreme Court precedent).

48. See *id.* (“[C]onflict with precedent galvanizes the Court into granting certiorari . . .”).

49. See *id.* at 104–05; see also UDI SOMMER, SUPREME COURT AGENDA SETTING: STRATEGIC BEHAVIOR DURING CASE SELECTION 29–30 (1st ed. 2014); Jeffrey R. Lax, *Certiorari and Compliance in the Judicial Hierarchy: Discretion, Reputation and the Rule of Four*, 15 J. THEORETICAL POL. 61, 63–67 (2003) (setting forth “formal model” of relationship between court levels based on different utility functions); Donald R. Songer, Jeffrey A. Segal & Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court–Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 676–77 (1994) (noting lower courts may have conflicting preferences and relative strength of each court's preferences affects each court's incentive structure).

50. One way to do this is by comparing the median ideological scores for the Supreme Court and the lower court of interest. See Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303, 306–23 (2007) (placing “ideal points” across separate institutions on same scale so that scores of Supreme Court, Congress, and courts of appeals are comparable).

According to our theory, the party on the petition for cert should also weigh on the Court's decision. One way that it may do so is based on the party type. Courts at all levels, including the Supreme Court, show preferences towards litigants with greater resources.<sup>51</sup> Similar to the theory of lawyer-based cues, Justices and clerks may form opinions about repeat-player parties that affect their decisions on cert. For instance, if certain parties historically bring cases worthy of cert or are often listed as opposing parties on favorable cert petitions, the Court may develop preconceptions of the relevance of petitions that list these parties.

On one hand, the Court may have preferences for certain party types during certain time periods.<sup>52</sup> If the Court is concerned with policy in certain areas, then it may disproportionately grant cert to certain party types in order to rule on such cases. The Justices' favoritism towards certain party types has the potential to lead to, or at least appear as, preferences for certain parties' petitions. This is most evident with parties that have filed multiple successful cert petitions in the Supreme Court.

Along these lines the most common and successful repeat player, both on cert and merits, is the U.S. Government. This dovetails with the success of the SG, the lawyer who represents the U.S. Government before the Supreme Court.<sup>53</sup>

Just as the U.S. Government is at an advantage in filing petitions for cert, IFP litigants or those without sufficient funds to pay for a petition are at a disadvantage.<sup>54</sup> As the number of IFP petitions, which are generally filed by incarcerated prisoners, far exceeds that of paid petitions, and because IFP petitions predominately name the United States as the opposing party, the SG has to decide whether to respond to these petitions.<sup>55</sup> The low response rate corresponds to the findings of studies that show the Justices themselves spend only a modicum of time reviewing individual IFP

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51. See generally Galanter, *supra* note 35, at 98–104 (setting forth theory of litigation advantages due to disparity of resources between “haves” and “have nots”); see also Ryan C. Black & Christina L. Boyd, *US Supreme Court Agenda Setting and the Role of Litigant Status*, 28 J.L. ECON. & ORG. 286, 305–07 (2012) (explaining parties with greater resources are more successful in petitions and in oppositions to petitions).

52. The Roberts Court, for example, is known for its interest in business-related cases. See Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1472 (2013) (“The Court is taking more cases in which the business litigant lost in the lower court and reversing more of these — giving rise to the paradox that a decision in which certiorari is granted when the lower court decision was anti-business is more likely to be reversed . . .”).

53. See SALOKAR, *supra* note 40, at 25 (describing U.S. Government's inherent advantage based on number of cases brought by SG that meet cert criteria).

54. Litigants without sufficient funds to pay for a petition may have the associated fees waived. See SUP. CT. R. 39.4.

55. See Thompson & Wachtell, *supra* note 9, at 158 (presenting information that SG voluntarily responded to “only 10.3% of [IFP petitions]” in 1999 compared to 32% response rate in paid cases).

petitions.<sup>56</sup> Just as IFP petitions constitute the bulk of the filings on an annual basis and are generally unsuccessful, paid petitions are more successful relative to IFP petitions, even though the vast majority of paid petitions are denied as well.<sup>57</sup>

#### D. *Salience, Certiorari, and Strategy*

What makes a case “cert worthy”? With so many petitions at the Court’s disposal, the individuals directly involved in the case cannot provide sufficient information about the value of hearing a case in every instance. Additional cues parlay the likelihood that the case involves an issue of significant substance to the clerks and Justices. One such cue is when non-parties take the time and energy to file amicus curiae briefs at the cert stage. These briefs are a consequential cue because they are voluntary, and, because cert is not guaranteed, the Court may not deem the case relevant for other reasons in their absence. Amicus briefs at the cert stage can, and often do, signal the importance of a case to the Court for the exact reason that non-parties engage in them without any guaranteed reward.<sup>58</sup>

Aside from the amicus briefs filed at this stage of the case, the parties’ institutional ties may signal the importance of the case. When government actors are involved in cases, the strategic stakes are raised for the Justices.<sup>59</sup> The types of cases that the Court takes on cert may also vary depending on the involvement of other governmental actors.<sup>60</sup> When these governmental actors are present, policy-minded Justices are likely to

56. See Songer, *supra* note 26, at 1186 (citing GERHARD CASPER & RICHARD A. POSNER, *THE WORKLOAD OF THE SUPREME COURT* 65–66 (1967)).

57. See Thompson & Wachtell, *supra* note 9, at 241 (citing *Journal of the Supreme Court of the United States*, October Term 2005, *SUPREME COURT OF THE U.S. II* (2006), <https://www.supremecourt.gov/orders/journal/jnl05.pdf> [<https://perma.cc/PQN6-FV4R>]) (stating Court granted cert in only approximately 1% of all petitions but granted cert and oral argument “in 3.5% of [paid] petitions” in 2005–2006 Term).

58. See Caldeira & Wright, *supra* note 14, at 1118 (presenting findings that increasing number of amicus briefs filed at cert stage increases likelihood of Court granting cert, even if briefs are filed in support of party opposing cert); see also BAIRD, *supra* note 28, at 122–28 (describing how politically salient decisions may lead to increase in amicus filings in subsequent terms); PERRY, *supra* note 14, at 120, 133 (citing Caldeira & Wright, *supra*, note 12, at 1109–27); Ryan C. Black & Ryan J. Owens, *Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence*, 71 *J. POL.* 1062, 1072 (2009) (“[J]ustices who could be expected to [g]rant on policy grounds are even more likely to [g]rant when amicus curiae briefs are present.”).

59. See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 82–88 (1998) (discussing influence of other governmental actors on Justices’ decisions).

60. See Lee Epstein, Jeffrey A. Segal & Jennifer Nicoll Victor, *Dynamic Agenda-Setting on the United States Supreme Court: An Empirical Assessment*, 39 *HARV. J. ON LEGIS.* 395, 428 (2002) (providing evidence that Court is more likely to take “statutory cases” when it confronts more favorable Congress and vice-versa with taking constitutional cases).

consider the potential institutional repercussions of their decision to grant cert.<sup>61</sup>

The presence of the SG also directly signals the government's position on an issue. Not only is there an inherent assumption that the SG will become engaged only in important cases, but the SG's position as petitioner or respondent on cert should specifically affect the likelihood that institutionally-minded Justices will vote for or against cert.<sup>62</sup>

Case salience may combine with other factors to influence the Court's cert decisions. While experienced attorneys may be retained to oppose cert in certain circumstances, their reputation need not necessarily benefit the party retaining them:<sup>63</sup> studies show that amicus briefs filed for the parties opposing cert enhance the likelihood of the Court granting cert because they indicate the importance of cases to others beyond the parties involved.<sup>64</sup> Based on this evidence, those opposing cert are likely working against their interests by acting in any way to highlight a case's salience.

Ironically, the same actor who often signals the salience of a case, the SG, may also have a blunting effect on the Court's desire to grant cert. While the SG's presence in a case is generally one of the strongest indicators of a case's importance, the Justices also pay close attention to the points conveyed by the SG.<sup>65</sup> The SG, through direct participation or as an amici, is uniquely situated to provide the Court with jurisprudential reasons to deny cert. Even though the SG's presence may indicate the relevance of a case to the Court, a persuasive argument by the SG can influence the Justices in the other direction.

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61. See Black & Owens, *supra* note 58, at 1072 (finding Justices more likely to grant cert when policy preferences aligned with direction policy would move if petitioning party succeeded on merits).

62. See Michael A. Bailey, Brian Kamoie & Forrest Maltzman, *Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making*, 49 AM. J. POL. SCI. 72, 81 (2005) (presenting evidence that Justices are more likely to grant cert when ideologically aligned with President who appointed SG than when they are not ideologically aligned).

63. See Andrea McAtee & Kevin T. McGuire, *Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme Court?*, 41 LAW & SOC'Y REV. 259, 273 (2007) ("Experienced appellate advocacy, therefore, makes a significant contribution to the Court's consideration of the legal questions that, though they may merit the Court's attention, are not ones in which the justices themselves are heavily invested."); see also Stephen M. Shapiro, *Certiorari Practice: The Supreme Court's Shrinking Docket*, LITIG., Spring 1998, at 25, 30 ("[T]he Court prefers to grant review in cases involving experienced counsel who can brief and argue the issues in a sophisticated manner. Pool memoranda often refer to 'good lawyering' . . . in their certworthiness evaluations, and they list the counsel named in the petition and brief in opposition.").

64. See Caldeira & Wright, *supra* note 14, at 1119 ("[T]he more briefs filed in favor of certiorari on any given case, the better the chances for plenary review."); see also Timothy S. Bishop, *Opposing Certiorari in the U.S. Supreme Court*, 20 LITIG. 31, 33 (1994) ("Amicus support . . . has been shown actually to increase the likelihood of a grant.").

65. See generally LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987).

Based on available evidence, Table 1 provides several expectations for the factors we expect to have the greatest impact on the likelihood of the Court granting cert.

TABLE 1: SIGNIFICANT CERTIORARI FACTORS

Factor	Petitioner	Respondent
Supreme Court Specialized Practitioner/Firm	Large Increase	Increase
Solicitor General (merits attorney)	Large Increase	Decrease
Amicus Briefs (generally)	Increase	Increase
Amicus Briefs (Solicitor General)	Large Increase	Decrease

While we expect that success breeds success in the Supreme Court, so that experienced attorneys from specialized practices should have a much higher than average cert grant rate, we also predict that these attorneys will not fare as successfully in opposing cert. If the presence of these attorneys and firms signals the salience of a case, then their presence opposing cert should have a similar, albeit somewhat more tempered, effect.

The presence of the SG, however, is expected to have a different effect. When the SG files an amicus brief in support of the respondent, the Court should be cognizant of the reasons the SG provides for denying cert, and the signal given off by the SG's presence should be moderated by the SG's arguments. Also, the SG's arguments and presence, either as an attorney for the cert petitioner or as amicus curiae, should make a grant of cert significantly more likely.

### III. METHODS

This paper looks at the Court's cert decisions from the 2001 through the 2015 Supreme Court Terms. To do this, we examine the 93,000 Supreme Court docket reports. While large-scale analyses of cert decisions are not inherently novel, this paper looks at a much larger dataset than was used in past efforts and the individual actors involved with more empirical precision and particularity.<sup>66</sup>

66. There have been various attempts to examine cert decisions empirically. See, e.g., Cordray & Cordray, *supra* note 20; Margaret Meriwether Cordray & Richard Cordray, *Strategy in Supreme Court Case Selection: The Relationship Between Certiorari and the Merits*, 69 OHIO ST. L.J. 1 (2008); Emily Grant, Scott A. Hendrickson & Michael S. Lynch, *The Ideological Divide: Conflict and the Supreme Court's Certiorari Decision*, 60 CLEV. ST. L. REV. 559 (2012) (focusing on random sample of cases between 1986 and 1994 Terms where petition for cert presented conflict between federal courts of appeal); Robert M. Lawless & Dylan Lager Murray, *An Empirical Analysis of Bankruptcy Certiorari*, 62 MO. L. REV. 101 (1997) (analyzing 611 cert petitions involving issues of federal bankruptcy law from 1980 through 1995 Terms); Lazarus, *supra* note 14; Kevin H. Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 OKLA. L. REV. 727 (2001) (examining "318 [ ] randomly drawn" paid petitions for statutory cert raising equal protection arguments between 1981 and 1987 Terms); Thompson & Wachtell, *supra* note 9 (examining approximately 31,000 petitions for cert between 2001 and 2004 Supreme Court Terms and focusing on when Court "calls for [ ] response or calls for [ ] views of



The goal of this paper is equally expansive. With this vast dataset, we set out to show what features lead to success or failure on cert. The data allow us to pinpoint the relevance of these factors and the individual actors during the Roberts Court's years and the few years preceding.

Supreme Court docket reports contain various pieces of information relevant to our inquiry. Docket reports include the names of the petitioner and respondent parties, the lawyers and the law firms for both parties, as well as their contact information, all joined parties and their representation, the most recent lower court to hear the case, the case number, the date of any Supreme Court dispositions, the dispositions themselves, and all orders and proceedings, including all briefs filed in the case.

The following example from our dataset will illustrate the information collected for each case. In the 2010–2011 Term, the Court denied cert in the case *Alaska Airlines, Inc. v. Eid*.<sup>67</sup> The lawyer on the petition for Alaska Airlines was Deane E. Maynard from Morrison & Foerster's Washington, D.C. office, and the lawyer for Azza Eid was Gilbert Gaynor, a solo practitioner from Santa Barbara, California. Three briefs for amicus curiae were from the Air Line Pilots Association, the Air Transport Association of America, and Professors Paul Dempsey and Pablo Mendes de Leon prior to the Court's ruling on cert.<sup>68</sup> The most recent lower court was the Court of Appeals for the Ninth Circuit, which came to a decision on July 30, 2010, and denied a rehearing on October 26, 2010. The Supreme Court docketed the case on January 27, 2011, and denied certiorari on May 2, 2011.<sup>69</sup>

We compiled this information for all cases docketed between the 2001 and the 2015 Terms. With this information, we are able to gauge the importance of these factors in our large N-analysis and the most influential components of each variable on the individual level. We are also able to determine trends over time, as well as locate shifts in the importance of these factors over the course of the period we analyze.

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[SG]"). Several studies narrow the data by focusing on petitions where the Justices' individual votes are available through Justices' papers that later were made public. See, e.g., Black & Boyd, *supra* note 51; Ryan C. Black, Christina L. Boyd & Amanda C. Bryan, *Revisiting the Influence of Law Clerks on the U.S. Supreme Court's Agenda-Setting Process*, 98 MARQ. L. REV. 75 (2014); Black & Owens, *supra* note 58; Ryan J. Owens, *The Separation of Powers and Supreme Court Agenda Setting*, 54 AM. J. POL. SCI. 412 (2010); Nancy C. Staudt, *Agenda Setting in Supreme Court Tax Cases: Lessons from the Blackmun Papers*, 52 BUFF. L. REV. 889 (2004).

67. 563 U.S. 974 (2011).

68. To view the docket in *Alaska Airlines v. Eid*, see Docket for *Alaska Airlines v. Eid*, SUPREME COURT OF THE U.S., <https://www.supremecourt.gov/search.aspx?file name=/docketfiles/10-962.htm> [<https://perma.cc/JS9E-BB3E>] (last visited Nov. 19, 2016).

69. See *id.*

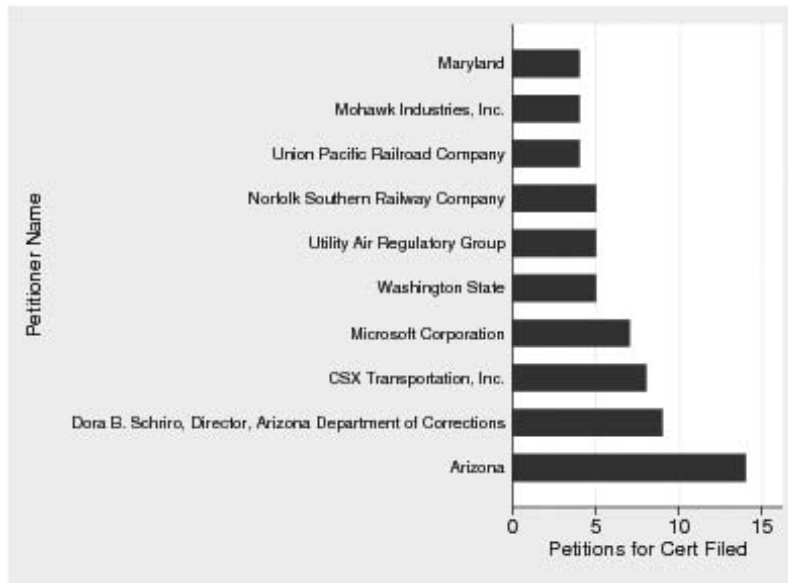
## IV. CERT FACTORS

The factors that affect the likelihood that the Court will grant cert in a particular case are mainly elements of the case itself. Again, we distinguish between elements intrinsic and extrinsic to the case by separating them into those that relate directly to representation and those that do not. Doing so, we focus on the non-representational factors first. These include the petitioning party, lower court, and the extent of amicus curiae involvement.<sup>70</sup> We then examine factors directly related to representation. These include the attorneys and law firms, broken into various segments such as petitioning and responding parties, as well as the SG's performance.<sup>71</sup> Parsing the cert-related attributes in these ways allows us to test how these factors affect the likelihood that the Court will grant cert. To illustrate the influence of these factors, we grouped and sorted the dataset by each factor and showed the top entries.

A. *Non-Representation Related Factors That Count*

We begin by examining the most frequent petitioners in the Supreme Court. In Figure 1, we show "repeat players," defined as parties with at least four petitions and with greater than 25% success at cert. These repeat players and their number of petitions are displayed in Figure 1.

FIGURE 1: "REPEAT PLAYER" PETITIONERS BY NUMBER OF CERT PETITIONS



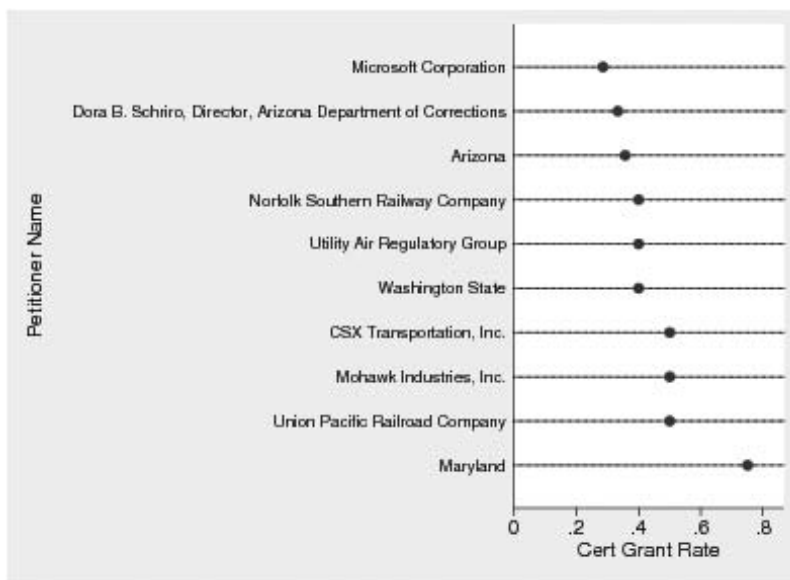
70. In line with the stated purpose of this paper, we looked only at amicus briefs filed prior to the Court's cert decision in a case.

71. In our analyses, we focus on the principal petitioning and respondent attorneys and law firms who are listed first in the Supreme Court's docket in a particular case.

These repeat players tend to cluster into different party types. The range of the number of petitions from these petitioners is from four to fourteen, with the State of Arizona filing the most.

Along with Arizona, the other states in this figure include Washington and Maryland. The entity with the second most petitions in this figure is associated with the first. The second most petitions were filed in the name of Dora Schiuro, who was Director of Arizona's Department of Corrections. The remainder of these repeat players are corporations or interest groups. The types of cases brought by these companies vary substantially from Microsoft's focus on patent and technology issues to CSX Transportation's focus on torts and liability. To explore the success of these petitioners, Figure 2 shows the rates of successful petitions filed by the repeat players identified in Figure 1.

FIGURE 2: MOST FREQUENT PETITIONERS' SUCCESS ON CERT



Starting with the most successful petitioner in the group, Maryland had a 75.0% success rate at cert.<sup>72</sup> The next three petitioners on the list—

72. We do not include petitions summarily disposed of, whether based on other cert decisions or by parties' stipulations, when calculating success counts for attorneys and law firms unless otherwise noted. If we had, Bank of America would have both filed the most petitions in Figure 2 and topped the list of most successful petitioners in Figure 2 with a 91% success rate. Bank of America's success is mainly due to the Supreme Court's cert grant in *Bank of America v. Caulkett* and the cases linked to it. See 135 S. Ct. 1995 (2015). Twenty of Bank of America's successful petitions were granted and summarily disposed of based on the Court's decision in *Caulkett*.

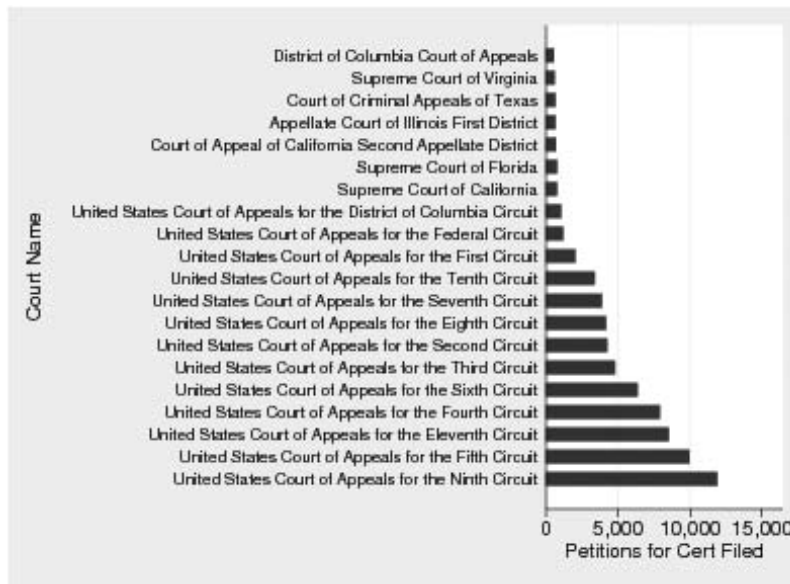
Union Pacific Railroad, Mohawk Industries, and CSX Transportation—each had a 50.0% cert success rate.

The next set of petitioners—Norfolk Southern Railway, Utility Air Regulatory Group, and Washington State—each were successful with 40.0% of their cert petitions. The last three petitioners to make this list—Arizona, Dora Schriro, and Microsoft—had cert grant rates of 35.7%, 33.3%, and 28.6%, respectively. The stark contrast between those rates and the average rate of cert grant for paid petitions, 5.0%, illustrates the significant differential between these repeat players’ grant rates and the grant rate for the average petitioner.<sup>73</sup>

While certain parties’ Supreme Court experience may lead to improved petition grant rates, there are a slew of other important factors to consider and, as will be apparent, the absence of states’ attorneys is quite apparent.

Another consequential aspect in the likelihood of a cert petition’s success is the lower court that most recently ruled on the case. The Court has varying levels of experience handling petitions from the large number of courts below. The Supreme Court traditionally grants the most cert petitions from the U.S. Circuit Courts of Appeals. Figure 3 shows the number of petitions from the lower courts where the greatest number of petitions to the Supreme Court originated.

FIGURE 3: MOST FREQUENT LOWER COURTS



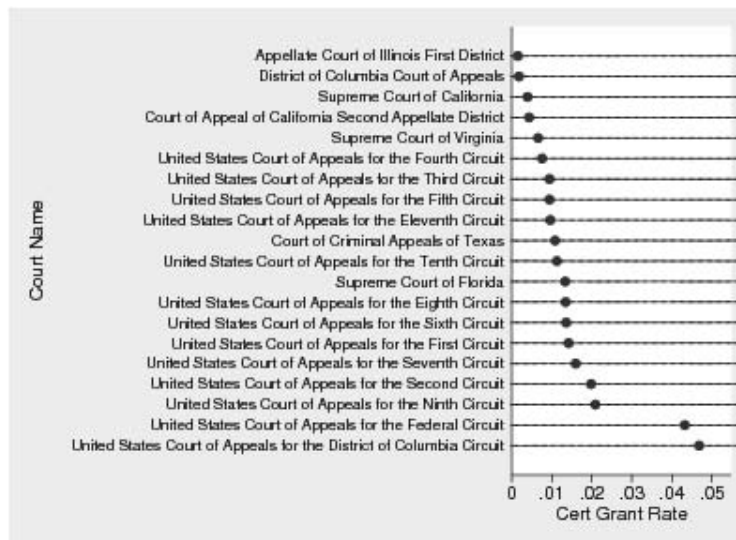
73. Summary cert grants and denials based on the decisions in other cases were removed from this calculation.

The figure shows all courts where more than 500 petitions originated. Thus, while twenty courts appear in Figure 3, the total number is pared down from the 482 courts where petitions originated during the time-frame of this paper.

Along with the federal courts of appeal, several state supreme courts appear in this mix. The presence of courts of appeal from Texas and California, which handle mostly criminal cases, provides evidence of the high rate of petitions from state court criminal decisions. This is especially true in cases dealing with capital crimes. California also has two courts listed, the California Supreme Court and the California Court of Appeal for the Second Appellate District, along with the Ninth Circuit Court of Appeal, which encompasses California along with several other western states.

The population served by a given court largely explains the courts with the most filings. The Ninth Circuit covers appeals from the largest portion of the population of the Courts of Appeal and has the largest number of petitions with 12,027. The Fifth Circuit is the only other court that heard over 10,000 petitions with 10,308. State courts with the most petitions include the California Court of Appeal for the Second Appellate District with 795, the Supreme Court of California with 766, and the Supreme Court of Florida with 752. The other states with state courts represented in the figure include Illinois, Texas, and Virginia as well as the District of Columbia. Figure 4 examines the cert grant rates from the courts shown in Figure 3.<sup>74</sup>

FIGURE 4: CERT GRANT PERCENTAGE FOR LOWER COURTS WITH MOST CERT PETITIONS



74. We created an Appendix with Figures 3 and 4 replicated, but split between IFP and paid cases.

Looking at the results for cert grants, there are three clusters of grant rates.<sup>75</sup>

Another aspect of this figure that might stick out is the relatively high rate of grants for petitions from the D.C. and Federal Circuits (the courts that compose the second cluster), especially when compared to that of the Ninth Circuit.<sup>76</sup> Past studies show the high rate at which the Supreme Court reverses Ninth-Circuit decisions relative to the other courts of appeal.<sup>77</sup> As an initial matter then, it is important to distinguish between what leads to cert grants and what leads to reversals on the merits. The Supreme Court may monitor decisions from the Ninth Circuit more closely than those from other lower courts.<sup>78</sup> By contrast, the high rate of cert grants to cases from the D.C. Circuit may have more to do with the importance of these cases because the D.C. Circuit deals with highly politicized issues more geared to Supreme Court adjudication than those from other circuit courts.<sup>79</sup>

The rate of cert grants to petitions from the U.S. Circuit Courts of Appeals are generally higher than the rates for petitions from state courts. Additionally, state courts with high grant rates, including the Supreme Court of Florida and the Texas Court of Criminal Appeals, handle many death penalty cases that are eventually petitioned to the U.S. Supreme Court.<sup>80</sup>

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75. There is a fourth cluster when cases are not removed and cert was granted but summarily decided based on another decision. The additional subset is composed solely of cases from the California Court of Appeal for the Second Appellate District. Of the 795 cases petitioned from this California court, over three-quarters were IFP filings. These not only highlight the greater overall percentage of paid docket grants, but in the case of the California Court of Appeal for the Second Appellate District, they also show the large number of IFP relative to paid cert grants. The large criminal docket in California leads to the high rate of filings from this court. When we included these summary decisions, the Supreme Court granted 13.1% of petitions from this court over the period of this paper. The additional cases were granted and summarily decided based upon the Supreme Court's decision in *Cunningham v. California*, 549 U.S. 270 (2007).

76. The cert grant rates for cases petitioned from the D.C. and Federal Circuits are 6.5% and 5.8%, respectively, while the rate from the Ninth Circuit is 3.2%.

77. See generally Kevin M. Scott, *Supreme Court Reversals of the Ninth Circuit*, 48 ARIZ. L. REV. 341 (2006) (examining Ninth Circuit's "reversal rate" at Supreme Court).

78. See *id.* at 341–42 (providing "possible explanations" for why Ninth Circuit is reversed at higher rate); see also Cameron, Songer & Segal, *supra* note 47, at 108 (providing "ideological distance" explanation as rationale for Supreme Court's differential monitoring of various courts of appeal).

79. See generally Richard L. Revesz, *Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit*, 76 N.Y.U. L. REV. 1100 (2001) (discussing seriousness of issues considered by D.C. Circuit); John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375 (2006) (examining D.C. Circuit's history and jurisdiction over administrative matters).

80. See John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 472 (1999) (cit-

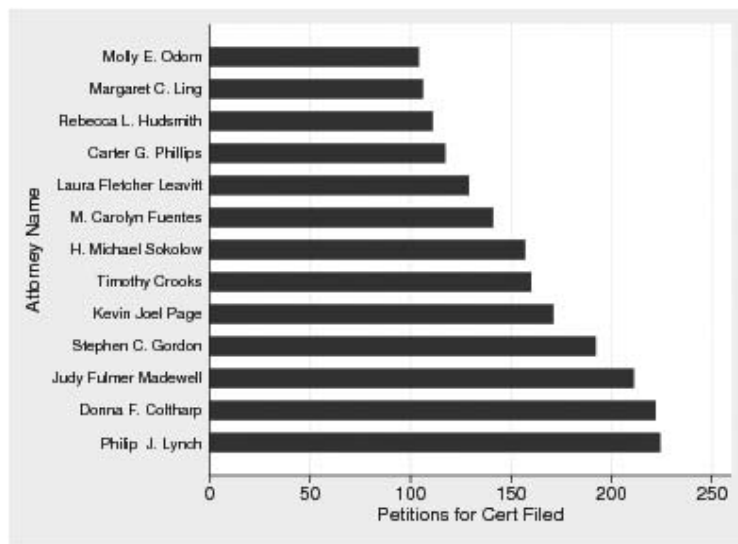
Sitting below the middle cluster of values that spans from the Eighth Circuit to the Supreme Court of California are the Appellate Court of Illinois for the First District and the D.C. Court of Appeals. Petitions from these two courts are granted at lower rates than those arising from any of the other courts in the figure. The grant rate for cases arising in the D.C. Court of Appeals is 0.2%, and the grant rate is 0.3% for cases from the Illinois court.

### B. Representation-Based Factors: Attorneys

Representation at the cert stage can be analyzed based on each of the three principal actors: attorneys, law firms, and amicus curiae. We look at how all three forms of support affect the chances of cert success and the likelihood of defending against cert. There is also an institutional element to cert decisions. Many of the petitions involve state and federal government entities. In some of the analyses in this paper, we look at government cert filings alongside the petitions filed by all other entities. In other situations, we look specifically at non-governmental or at government-only filings.

To begin our assessment of attorneys, Figure 5 shows the attorneys with the most cert filings during the years covered in this paper, starting at 100 cert petitions. This figure excludes only attorneys working in the OSG.

FIGURE 5: ATTORNEYS WITH THE MOST CERT PETITIONS

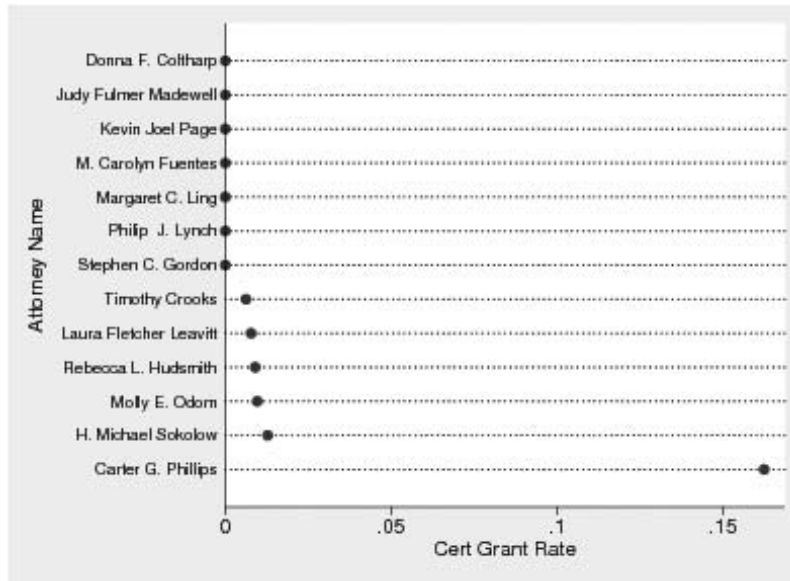


ing John Williams, *Election '94: GOP Gains Majority in State Supreme Court*, HOUS. CHRON., Nov. 10, 1994, at A29); see also Michael L. Radelet & Margaret Vandiver, *The Florida Supreme Court and Death Penalty Appeals*, 74 J. CRIM. L. & CRIMINOLOGY 913 (1983).

From this figure, it is clear that the most active attorneys at the cert stage are state government attorneys. The attorneys with the top three most filings—Philip Lynch, Donna Coltharp, and Judy Madewell—all worked for the Office of the Federal Public Defender in the Western District of Texas. Lynch filed the most petitions with 224 followed by Coltharp and Madewell with 222 and 211 petitions, respectively. The attorney with the fourth most petitions, Stephen Gordon, was an Assistant Federal Public Defender in North Carolina.<sup>81</sup> With the number of IFP petitions soaring ahead of those for paid petitions, these public defense attorneys have petitions constantly moving through their offices.

There is one unique attorney in the figure, Carter Phillips, who once worked in the OSG at the federal level and subsequently returned to private practice. Phillips filed 117 cert petitions. Aside from Phillips, in fact, the remainder of the attorneys in the figure worked or work in an Office of the Federal Public Defender with the majority of attorneys in Figure 5 based in Texas. Although this figure paints a picture of where many cert filings originate, it does not provide information regarding these attorneys' successes with their cert petitions. Figure 6 looks at their relative success rates.

FIGURE 6: SUCCESS RATE OF ATTORNEYS WITH MOST CERT PETITIONS



There is a significant gap between Phillips's 16.2% success rate and the success of the rest of the attorneys in the figure whose values all fall

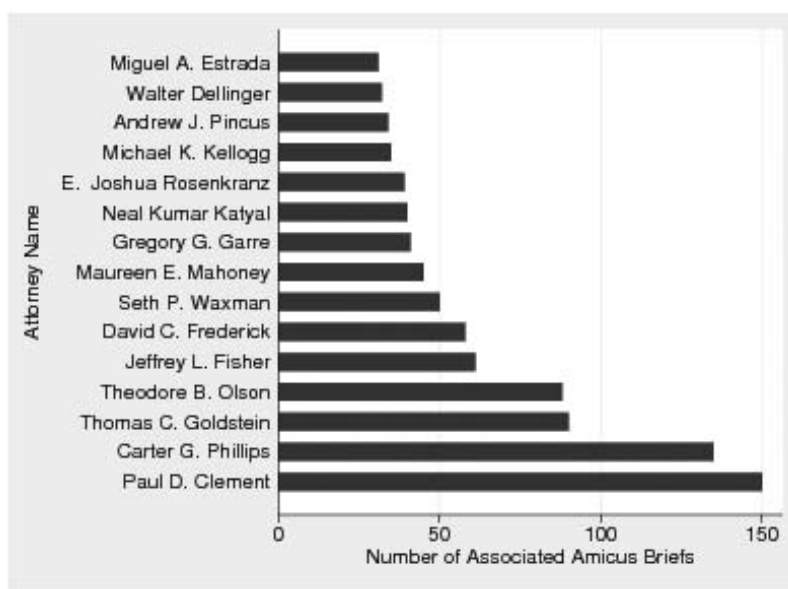
81. See Staff Directory, FED. PUB. DEFENDER: E. DISTRICT OF N.C., <http://nce.fd.org/content/staff-directory> [<https://perma.cc/2UVN-H98L>] (last visited Nov. 11, 2016).



below 2%.<sup>82</sup> What explains this large differential? Perhaps the biggest reason is that of the attorneys in the figure, only Phillips worked in the OSG and has strong institutional support as well as a lengthy record of Supreme Court success.

Phillips remains one of the most powerful attorneys outside of the OSG. One metric to gauge this is by the number of amicus curiae briefs filed in cases he tries. This metric that we generated for this paper helps to gauge an attorney's ability to recruit additional resources to support his or her party's position. We are interested in both supporting and opposing amicus briefs because the literature suggests both types lead to higher cert grant rates.<sup>83</sup> Figure 7 below shows the non-OSG attorneys with the greatest overall number of amicus briefs filed in their cases. The minimum number of amicus briefs for an attorney in this figure is 30.

FIGURE 7: PETITIONING ATTORNEYS WITH MOST ASSOCIATED AMICUS BRIEFS (NON-OSG)



In private practice, Paul Clement is the petitioning attorney with the most amicus briefs filed in his cases with 150 briefs. Phillips is second on this list with 135 amicus briefs.

82. The next most successful attorney in this figure is H. Michael Sokolow with a 1.3% cert grant rate.

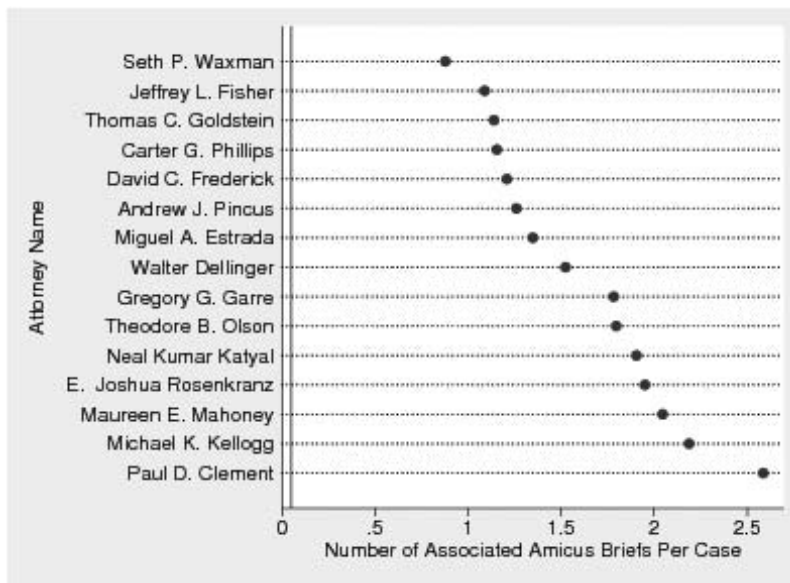
83. See e.g., Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the US Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1112 (1988) (“[T]he mere presence or absence of a brief amicus curiae may weigh in more heavily than the substantive arguments presented.”).

The practitioners on this list are among the elite attorneys in Supreme Court practice. Prior-SGs in this figure include Clement, Theodore Olson, Seth Waxman, Gregory Garre, Neal Katyal, and Walter Dellinger. Each has extensive experience both at the cert and merits phases of Supreme Court cases. The high level of amicus involvement is related to the salience of their cases and to the cases' broad policy implications.

Though amicus involvement does not guarantee cert success, it is an indicator of a strongly supported interest. The relationship between successful attorneys in specialized Supreme Court practice groups and amicus briefs is evident from this figure. All of the attorneys in Figure 7 work in specialized practices. The level of amicus support underscores that these attorneys often handle the most high profile cases. The figure also highlights links between amicus support and attorneys who formerly worked in the OSG because two of the top attorneys, Clement and Olson, both worked as SG during the period of this paper.

Though examining the total of amicus briefs in cases an attorney takes on conveys the general, overall salience of an attorney's cases, a second metric, amicus support on a per-case basis, presents a way to better control for attorneys that take on heavier caseloads. Figure 8 shows the per-case amicus involvement for the attorneys in Figure 7.

FIGURE 8: ASSOCIATED AMICUS BRIEFS PER-CASE FOR PETITIONING ATTORNEYS (NON-OSG)



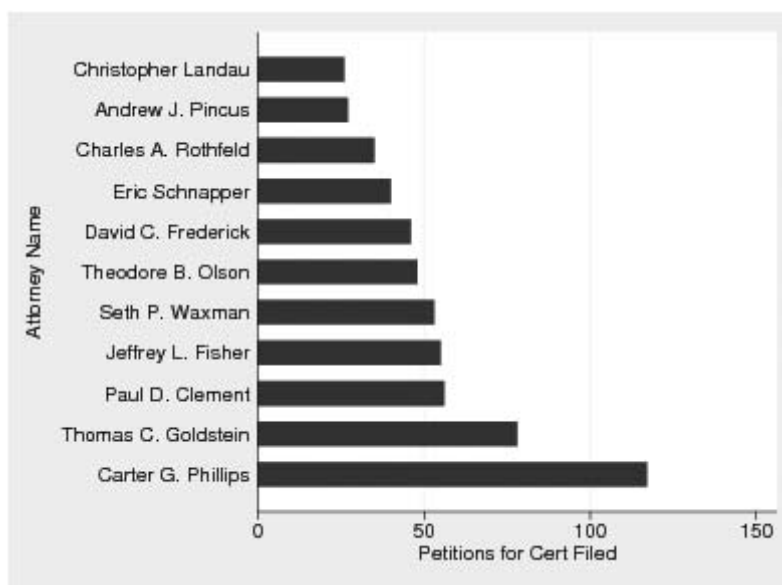
Note: Reference line at .05, which is the mean number of amicus briefs per case for all attorneys in the dataset.

Although there are consistencies between Figures 7 and 8, there is also noticeable variation. Paul Clement has the most amicus briefs on a per-case basis with 2.6, which is consistent with his position on the list of attorneys with the most overall amicus involvement. In this figure, even with Carter Phillips's association with a large number of amicus briefs, his caseload pulls him lower on the list of per-case support because he has 1.2 briefs associated per-case. In contrast, the large number of amicus briefs filed in Michael Kellogg's cases raises him to the second highest on a per-case basis with 2.2 briefs per-case. The next attorney on the list is Maureen Mahoney with 2.1 amicus briefs per-case, followed by E. Joshua Rosenkranz with 2.0 amicus briefs per-case. The attorney with the fewest amicus briefs per-case in this figure is Seth Waxman with 0.9.

The amicus briefs per-case metric gives an initial sense of the attorneys that bring the most salient cases to the Supreme Court. This size of this measure is primarily driven by the perceptions of interest groups seeking to convey certain policy positions and to reach specific outcomes. This provides a sense of the importance of these attorneys' cases to external actors.

There is a strong, and possibly not so surprising, similarity between this group of attorneys and the most successful attorneys in the Supreme Court at the cert stage. To begin analyzing the most successful Supreme Court attorneys, we look at the attorneys with the most successful cert petitions. Figure 9 shows the number of petitions filed by these attorneys.

FIGURE 9: MOST SUCCESSFUL CERT ATTORNEYS: NUMBER OF PETITIONS (NON-OSG)

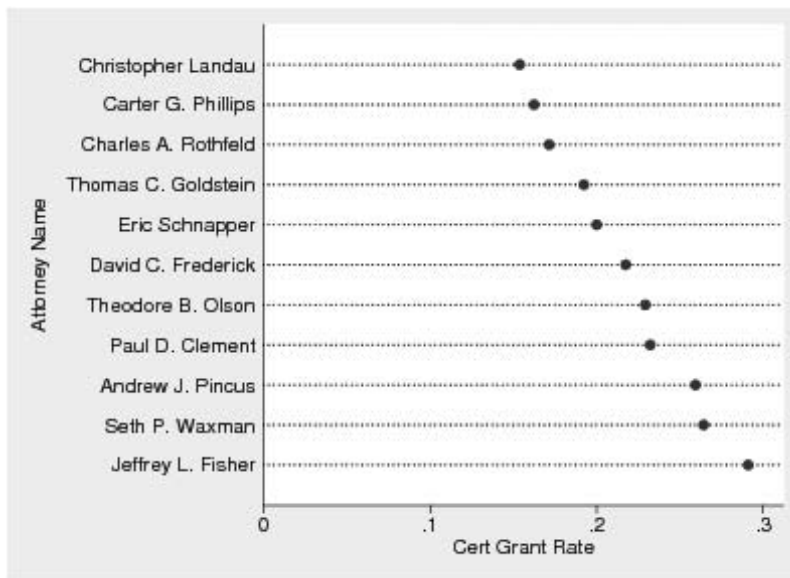


The limits we set on attorneys in Figure 9 are that they filed more than twenty-five petitions for cert with minimally a 15% cert grant rate. Perhaps not surprisingly, Carter Phillips tops the list for number of filings at 117. Phillips was the only attorney from a large, private law firm with a specialized Supreme Court practice group on the list of attorneys with the most petitions. He also was associated with the second most amicus briefs filed in cases where he was the petitioner.

After Phillips, there is a precipitous drop off to the next attorney in Figure 9. The attorney with the next most cert filings in this figure is Thomas Goldstein with 78.

To assess these attorneys' true success, we next focus on their success rates in terms of cert grants per petition they file. Figure 10 presents these rates.

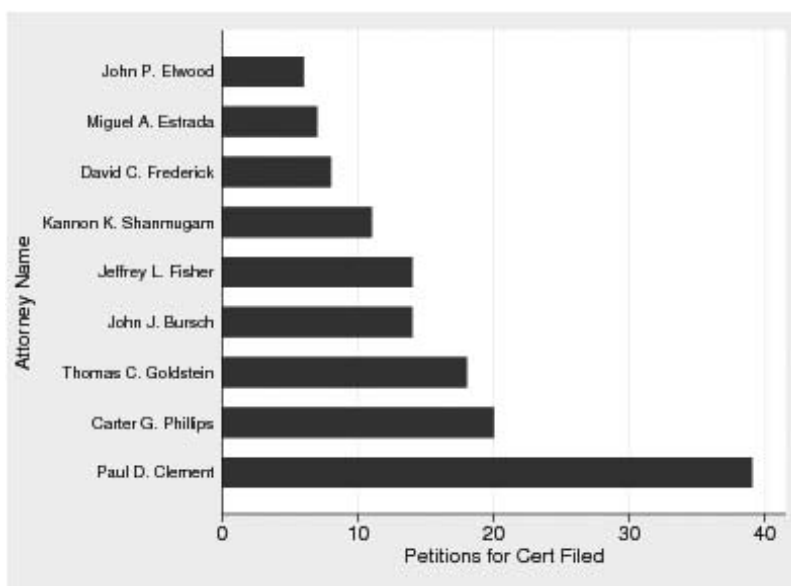
FIGURE 10: MOST SUCCESSFUL ATTORNEYS: CERT SUCCESS RATE (NON-OSG)



The top-performing attorney at the cert level is Jeffrey Fisher from Stanford Law School's Supreme Court Litigation Clinic. Fisher's cert grant rate is 29.1%. Fisher filed the fourth most petitions of these successful attorneys with fifty-five. Seth Waxman and Andrew Pincus are next in the figure and fare similarly to one another with 26.4% and 25.9% success at the cert phase, respectively. Paul Clement was the next best-performing attorney after Waxman with 23.2% success. Carter Phillips, who filed the most petitions of this group, had a 16.2% rate of cert grants for this period.

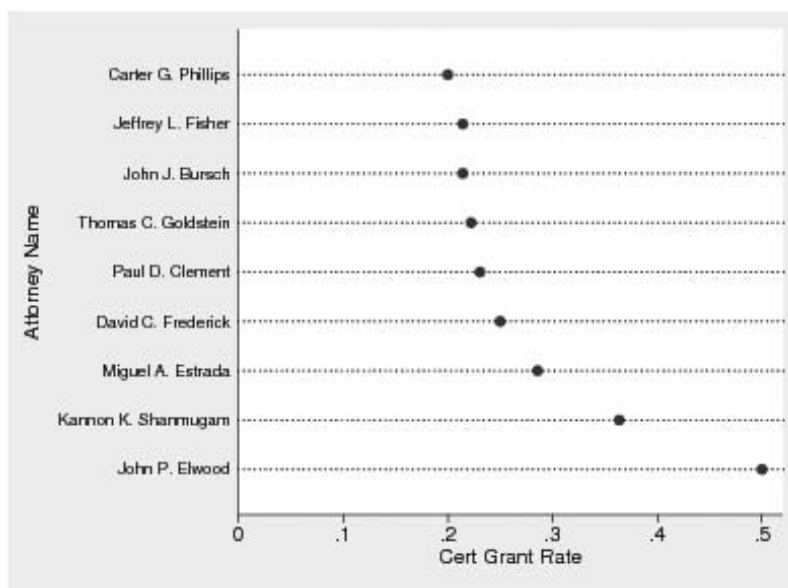
This measure for attorney success focuses on attorneys with strong records across the years of this paper. This time frame, however, may not convey the successful attorneys who have established themselves more recently as cert experts. To examine if there are “rising star” cert attorneys, or those who are successful over the most recent years, we created figures similar to Figures 9 and 10 with data for the 2012–2015 Terms. Figure 11 shows the petition counts for attorneys who filed more than five cert petitions with greater than 20% success for the 2012–2015 Terms.

FIGURE 11: MOST SUCCESSFUL CERT ATTORNEYS 2012–2015:  
NUMBER OF PETITIONS (NON-OSG)



The three successful attorneys with the most filings are the same for the period of 2012–2015 as they are for the entirety of 2001–2015. The main difference in the more recent years is that Paul Clement far exceeds all other petitioners with the most cert filings. Clement filed thirty-nine cert petitions between 2012 and 2015 while the attorney with the next most filings is Carter Phillips with twenty. Attorneys who meet the parameters of this figure but were not included in prior attorney figures for successful attorneys include John Bursch, Kannon Shanmugam, and John Elwood. We present their success rates for the 2012 through 2015 Terms in Figure 12.

FIGURE 12: MOST SUCCESSFUL ATTORNEYS 2012–2015: CERT SUCCESS RATE (NON-OSG)



Two attorneys who stand out in terms of success rates for these years are two of the attorneys who did not meet the requirements for the earlier figures: John Elwood and Kannon Shanmugam. Elwood works in the Washington, D.C. office of Vinson & Elkins.<sup>84</sup> Although he was not one of the most active cert attorneys in this group, his success rate was far higher than any of the other attorneys at 50.0%—three of his six cert petitions for this period were granted. Shanmugam has a history of government work, working in the OSG prior to joining his current firm, Williams & Connolly.<sup>85</sup> While not as successful as Elwood on a per-petition basis, Shanmugam filed more petitions with eleven of which four—or more than 36.4%—were granted.

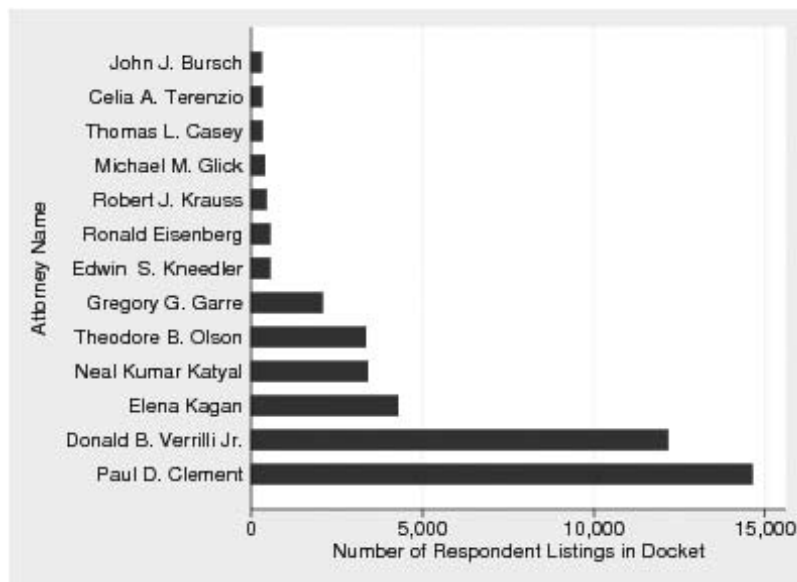
Along with attempting to convince the Court to grant cert in cases, the other main, and diametrically opposite, role of attorneys at this stage is opposing cert. An attorney may succeed at the cert phase by convincing the Court to grant cert as well as by convincing the Court not to grant cert in cases where they represent the opposing party. With this in mind, we are interested both in petitioning and in responding attorneys. Figure 13 looks at the attorneys who were listed as respondents the most times at the

84. See John P. Elwood, VINSON & ELKINS, <http://www.velaw.com/lawyers/johnelwood.aspx> [<https://perma.cc/87NZ-RCUG>] (last visited Nov. 11, 2016).

85. See Kannon K. Shanmugam, WILLIAMS & CONNOLLY, <https://www.wc.com/Profiles/Kannon-K-Shanmugam> [<https://perma.cc/3FA7-KA57>] (last visited Nov. 11, 2016).

cert stage. The lower bound for the number of times an attorney was listed as a respondent in this figure is 300.

FIGURE 13: RESPONDENT ATTORNEYS LISTED MOST



We intentionally did not exclude SGs from this figure in order to convey the magnitude of difference in the number of dockets in which they are listed as respondent attorneys compared with all other attorneys practicing before the Supreme Court. Two of the SGs, Paul Clement and Donald Verrilli, were listed on over 10,000 dockets as the respondent attorney. Clement was listed on 14,626 and Verrilli on 12,170. The number of IFP filings leads to this large differential between the number of responses SGs make compared with those of all other attorneys. These cases compose the majority of the cases where the SG is listed as the respondent.

After Clement and Verrilli, three more Solicitors General—Elena Kagan, Neal Katyal, and Gregory Garre—were each listed as the respondent in more than 2,000 cases. Next is prior Acting Solicitor General Edwin Kneedler, who was also listed as a cert respondent 560 times. Kneedler worked in the OSG and was Acting Solicitor General of the United States from January until March 2009 between the appointments of Gregory Garre and Elena Kagan. The first non-OSG attorney on this list is Ronald Eisenberg, who works in the Philadelphia District Attorney's Office. Eisenberg was listed as the respondent in 555 cases.

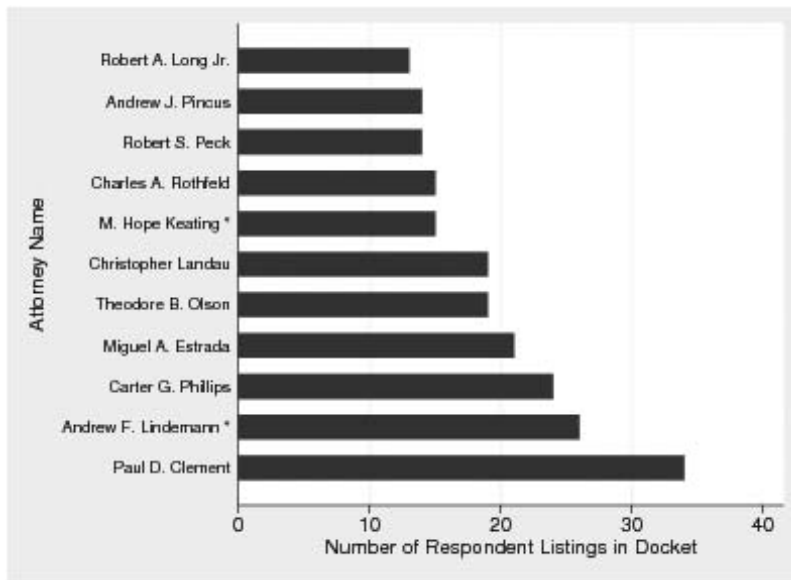
The remaining attorneys in Figure 13 worked for state governments. Robert Krauss and Celia Terenzio both worked in Florida's Office of the Attorney General. Krauss was the respondent on 457 petitions while Terenzio was listed as the respondent on 326. Michael Glick was in the Illi-

nois Office of the Attorney General and Thomas Casey as well as John Bursch both worked as Michigan’s SG. Glick was the respondent on 403 petitions, and Casey was listed on 333 petitions.

Based on the numbers in Figure 13, the attorneys most often listed as respondents are in federal and state governments. Each of these attorneys’ success rate as a respondent is well over 90%. This is due, at least in part, to the high level of IFP petitions filed against the federal and state governments and the Court’s propensity to deny such petitions. In turn, this leaves little variation between governmental attorneys in their success at responding to cert petitions. To gauge success at responding to petitions better, we examine non-governmental attorneys who focus on paid petitions.

Figure 14 presents the most successful attorneys in responding to cert petitions excluding attorneys representing the federal and state governments.<sup>86</sup> The figure looks at the number of responses to cert filed by these attorneys. To generate this figure, we limit our results to non-governmental attorneys who were successful in defending against more than twelve cert petitions with a success rate of over 50%.

FIGURE 14: MOST SUCCESSFUL RESPONDENT ATTORNEYS: NUMBER OF RESPONSES (NON-GOVERNMENTAL)



Note: \* = Non-governmental attorney with primarily or all state-related clients.

86. The possibility exists that these estimates are low due to ghostwriting of opposition briefs in order not to ascribe additional importance to certain cases. While this has been anecdotally suggested, there is little empirical evidence to support this proposition.



There is a relatively narrow range to the number of responses these attorneys filed, as is evident from Figure 14. Paul Clement responded to the most cert petitions with thirty-four responses, while Robert Long had the fewest responses in Figure 14 with thirteen. These attorneys are predominately lawyers from well-known, specialized practices. Many overlap with the most successful petitioning attorneys. These attorneys include Carter Phillips, Paul Clement, Andrew Pincus, Theodore Olson, Charles Rothfeld, and Christopher Landau.

There is one notable caveat in this figure. M. Hope Keating and Andrew Lindemann both work in private practice, yet their clients are those traditionally handled by state attorneys. Keating practices in Greenberg Traurig's Florida office. All of her cert responses involve cases where the Florida Bar, or a related entity, is the respondent.<sup>87</sup> Similarly, Andrew Lindemann works at Davidson & Lindemann, a civil trial practice in Columbia, South Carolina. Lindemann's cert responses were written for clients including and related to the South Carolina Department of Corrections, the Town of Hollywood, the County of Richland, South Carolina, the South Carolina Department of Mental Health, the South Carolina Department of Social Services, and the Camden Police Department.<sup>88</sup> While we do not remove Keating and Lindemann from this figure because they technically do not fall outside of the figure's limitations, we also think their responses to cert are more in line with those from state government attorneys than with those filed by the remainder of the attorneys represented in Figures 14 and 15.

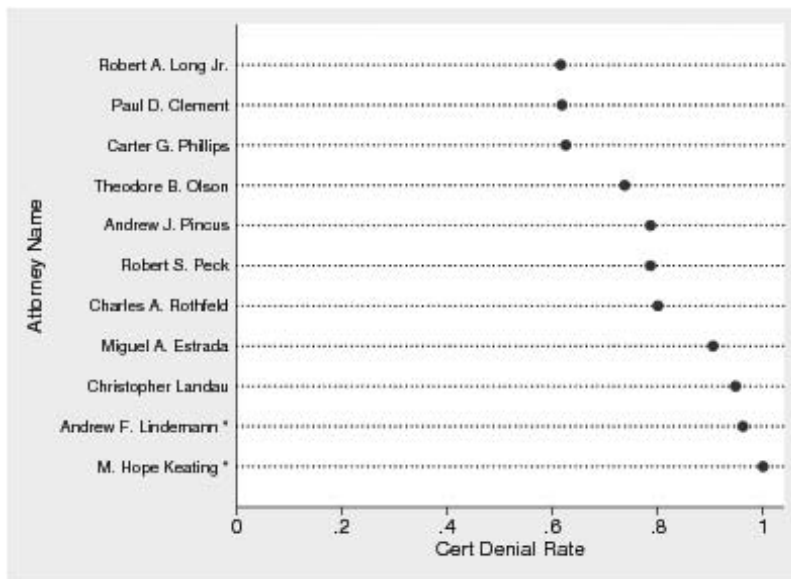
Figure 15 below shows the success rates in terms of cert denials for the attorneys listed in Figure 14.

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87. To view the docket in *Scott v. Frankel*, see Docket for *Scott v. Frankel*, SUPREME COURT OF THE U.S., <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/14-121.htm> [<https://perma.cc/69BP-TQGL>] (last visited Nov. 19, 2016). To view the docket in *Garcia v. Fla. Bar*, see Docket for *Garcia v. Fla. Bar*, SUPREME COURT OF THE U.S., <https://www.supremecourt.gov/docketfiles/09-1490.htm> [<https://perma.cc/8WYM-X3LU>] (last visited Nov. 19, 2016).

88. To view the docket in *Carolina Chloride, Inc. v. Richland Cnty.*, see Docket for *Carolina Chloride, Inc. v. Richland Cnty.*, SUPREME COURT OF THE U.S., <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/11-1440.htm> [<https://perma.cc/26VR-7EUR>] (last visited Nov. 19, 2016). To view the docket in *Smart v. Wilson*, see Docket for *Smart v. Wilson*, SUPREME COURT OF THE U.S., <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/12-5245.htm> [<https://perma.cc/4WGJ-A2X9>] (last visited Nov. 19, 2016).

FIGURE 15: MOST SUCCESSFUL RESPONDENT ATTORNEYS: CERT DENIAL RATE (NON-GOVERNMENTAL)



Note: \* = Non-governmental attorney with primarily or all state-related clients.

Based on our caveat for respondent attorneys, there are two ways to view Figure 15. The first is that, based on the figure's express limits, M. Hope Keating and Andrew Lindemann are the two top non-governmental attorneys for cert responses. The Court denied cert in all fourteen cases where Keating responded to petitions, and Lindemann had a 96.2% cert denial rate in the twenty-five cases where he was the respondent attorney.

Focusing on similar representation, however, leads to the second view of Figure 15. When we look at the most successful attorneys in terms of cert responses and eliminate the two attorneys with mainly state clients, Christopher Landau is the top-performing attorney. Landau is a Supreme Court specialist who works in Kirkland & Ellis's Washington, D.C. office.<sup>89</sup> Landau's cert denial rate is 94.7% in the eighteen cases in which he was listed as the respondent attorney. Unlike the previously discussed attorneys, who mainly represent state clients, Landau's Supreme Court clients include private entities such as National Geographic, ConAgra Foods, and Allstate Insurance.<sup>90</sup>

89. See Christopher Landau, KIRKLAND & ELLIS, <https://www.kirkland.com/sitecontent.cfm?contentID=220&itemID=8991> [https://perma.cc/ZNP7-NDT8] (last visited Nov. 11, 2016).

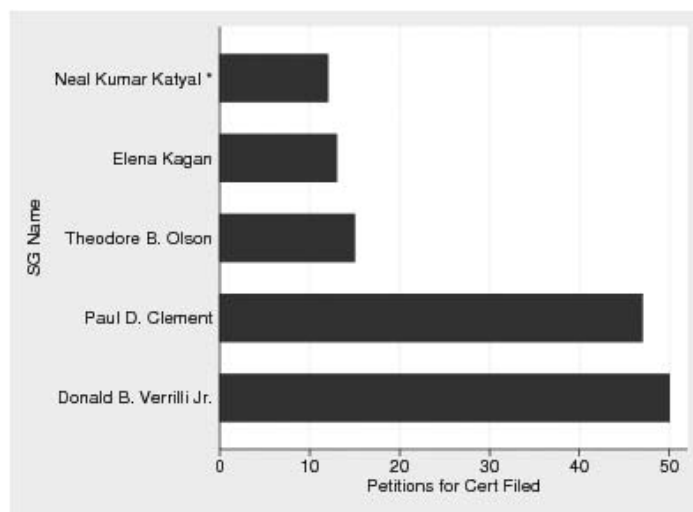
90. See e.g., *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393 (2010). To view the docket in *Becker v. ConAgra Foods, Inc.*, see Docket for *Becker v. ConAgra Foods, Inc.*, SUPREME COURT OF THE U.S., <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/14-899.htm> [https://perma.cc/T5PK-H5JS] (last visited Nov. 19, 2016). To view the docket in *Greenberg v. Nat'l Geographic*, see

After Landau, the next most successful attorneys are Charles Rothfeld and Miguel Estrada. Rothfeld filed fifteen cert responses, while Estrada responded to twenty-one. Their respective rates of cert denial are 80.0% and 90.5%.

Finally, the two most active cert petitioners in this figure were also two of the three most active cert respondent attorneys—Paul Clement and Carter Phillips. Although both had cert denial rates well above the 50% threshold, their success rates were towards the bottom of the attorneys in the figure. Clement had the second lowest denial rate at 61.8%, and Phillips recorded the third-lowest rate with 62.5%.

The final way we examine cert success is by focusing on petitions filed by U.S. SGs. We generally removed SGs from prior figures because, as attorneys serving in the Executive Branch, they tend not to be regarded as similarly situated to attorneys in private practice. This distinction is apparent in SGs' success over time, as documented in previous studies.<sup>91</sup> Therefore, we analyze SGs' success separately from that of other attorneys. To create a lower limit for attorneys on OSG filings, we set the minimum number of cert petitions for an OSG cert petitioner to fifteen. The number of cert petitions filed by the SGs during the years of our paper are shown in Figure 16.

FIGURE 16: NUMBER OF CERT PETITIONS FILED BY SOLICITORS GENERAL



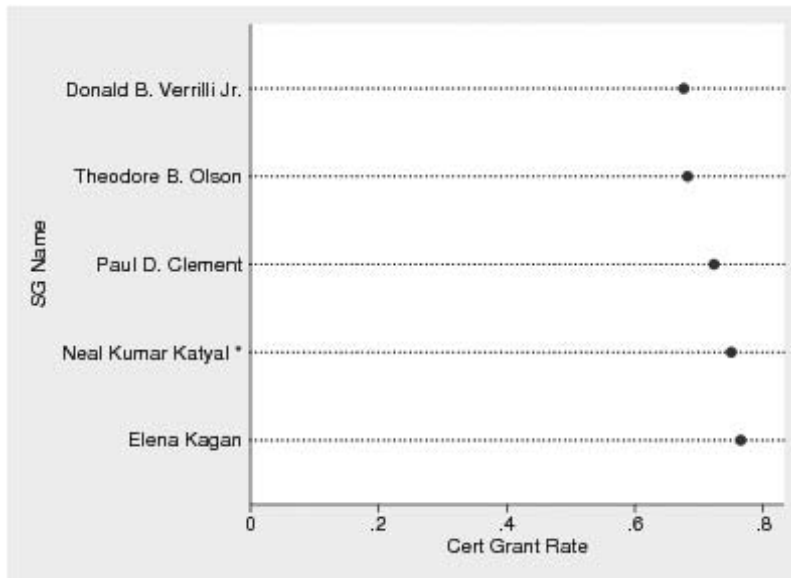
Note: \* = Acting Solicitor General. Excludes these attorneys' non-OSG petitions for cert.

Docket for *Greenberg v. Nat'l Geographic*, SUPREME COURT OF THE U.S., <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/08-428.htm> [<https://perma.cc/8TC5-Z3MF>] (last visited Nov. 19, 2016).

91. See Lazarus, *supra* note 14, at 1515, 1540; see also McGuire, THE SUPREME COURT BAR, *supra* note 29, at 160–61 (noting former members of OSG are highly-sought by private law firms).

The number of petitions these SGs file obviously correlates with the length of their tenures as SG. Because Paul Clement and Donald Verrilli served in this post the longest of the attorneys included in the figure, they filed the most petitions as SGs at sixty-five and seventy-four, respectively. Theodore Olson, who was SG at the beginning of the first Supreme Court Term covered in this Article, filed twenty-three petitions as SG that we included in our analyses. Elena Kagan filed seventeen cert petitions, and Neal Katyal filed sixteen. The success rates for their cert filings as SG are covered in Figure 17.

FIGURE 17: SOLICITOR GENERAL SUCCESS RATES FOR CERT PETITIONS



*Note:* \* = Acting Solicitor General. Excludes these attorneys' non-OSG petitions for cert. Due to the number of petitions, we cannot say that the difference in these rates is statistically significant.

The SGs' success rates, as predicted, far exceed even the top performing attorneys in private practice. Each SG studied had a rate of cert grants greater than 65%. The most successful SG during this period was Elena Kagan. Based on her seventeen cert petitions during the period of this Article, her success rate was 76.5%. Next is Neal Katyal. Katyal was granted cert in 75.0% of the sixteen petitions he filed. After Katyal is Paul Clement, who was successful in 72.3% of his cert petitions. Theodore Olson had a 68.2% cert success rate. Finally, the most recent SG in this paper, Donald Verrilli, had a 67.6% success cert grant rate for petitions that he filed.

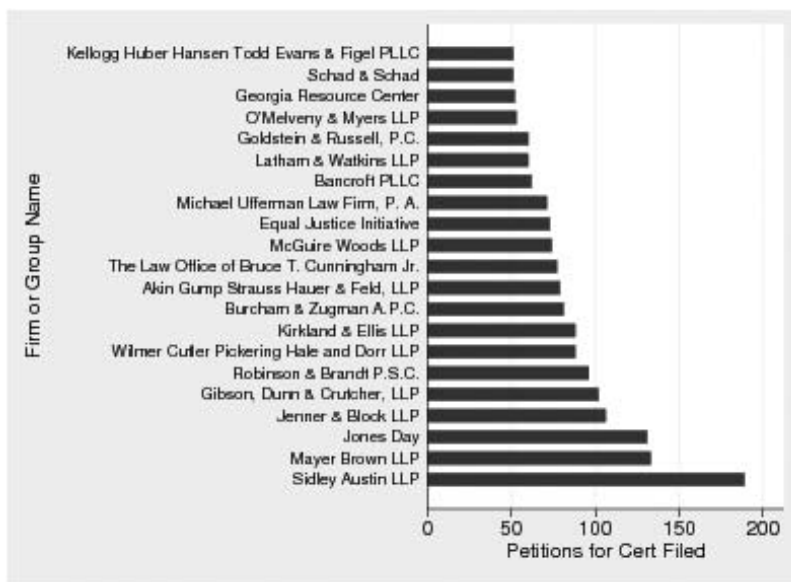
C. *Representation-Based Factors: Law Firms*

These profiles of attorney success at cert provide an analysis of one dimension of representation. A related but different dimension is given by comparing law firms' success at the cert stage. Law firms are the organizations that employ the attorneys who ultimately file the petitions for cert. Their goal is not only individual success, but also the aggregate success of their attorneys. One necessary aspect for a successful firm, therefore, is to attract top-level attorneys. Currently, many of these top-level Supreme Court attorneys once worked in the OSG.

For a firm to be successful in the Supreme Court, there is a requisite organizational component that attracts clients. Clients may be allured by the quality of attorneys at a firm and a firm's notoriety for creating a successful Supreme Court practice. In the analyses below, we look at similar cert success metrics applied to law firms.

We begin by looking at the law firms with the most Supreme Court cert experience. Figure 18 contains these law firms. In this figure, we examine all non-state or federal governmental practices with more than fifty cert filings.

FIGURE 18: NUMBER OF FILED PETITIONS FOR LAW FIRMS WITH MOST CERT PETITIONS (NON-GOVERNMENTAL)



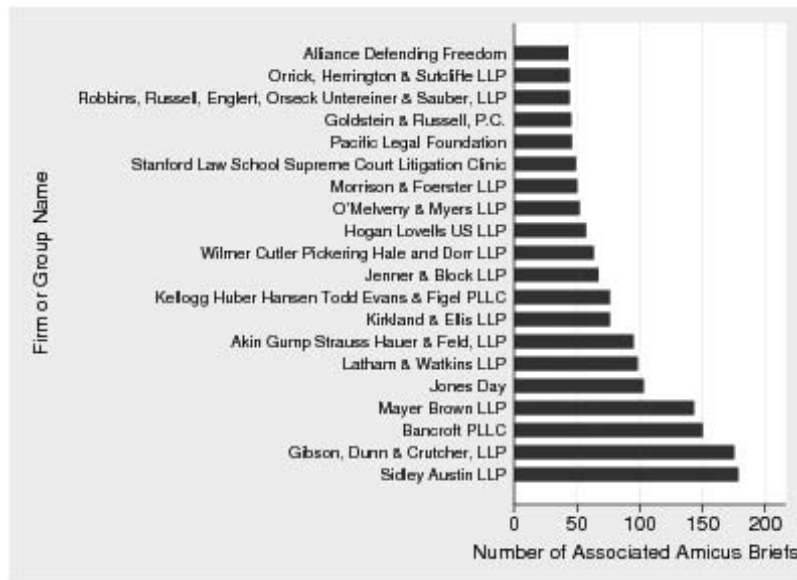
The firms with the most cert filings are strongly driven by a few experienced Supreme Court attorneys. This is most visible with Sidley Austin, the firm with the most cert filings. Carter Phillips, who filed the most non-OSG cert petitions of the successful attorneys, works in Sidley Austin's

Washington, D.C. office. Of Sidley’s 189 cert petitions, 117 were filed by Phillips.

Among the remaining firms, even when the majority of the petitions are not driven by a single attorney, there is often an attorney or several attorneys noted for their Supreme Court expertise. Mayer Brown has the second most cert petitions with 133. Andrew Pincus alone filed about one in five of all of Mayer Brown’s petitions. Wilmer Hale has Seth Waxman. Gibson, Dunn & Crutcher has both Theodore Olson and Miguel Estrada. This pattern continues on for many of the other firms with a high number of cert petitions.

High petition counts tell us which firms are most active at the cert stage of Supreme Court litigation, but aside from potentially adding to a firm’s name recognition in this arena, they do not inform us of a firm’s likelihood of success. As was shown with attorneys, amicus involvement in cases points to cases’ generalized importance beyond the immediate parties and, in the aggregate, can serve as an indicator of an attorney or firm’s prominence. Similar to our examination of attorneys, we look to overall counts of amicus briefs in specific law firms’ cases as a means to show the salience of their cases. Figure 19 presents these results.

FIGURE 19: PETITIONING FIRMS WITH MOST ASSOCIATED AMICUS BRIEFS (NON-GOVERNMENTAL)



In Figure 19, we set the threshold for the minimum number of amicus curiae briefs to forty. As with Figure 18, the majority of these are large private law firms with specialized Supreme Court practices. Here, how-

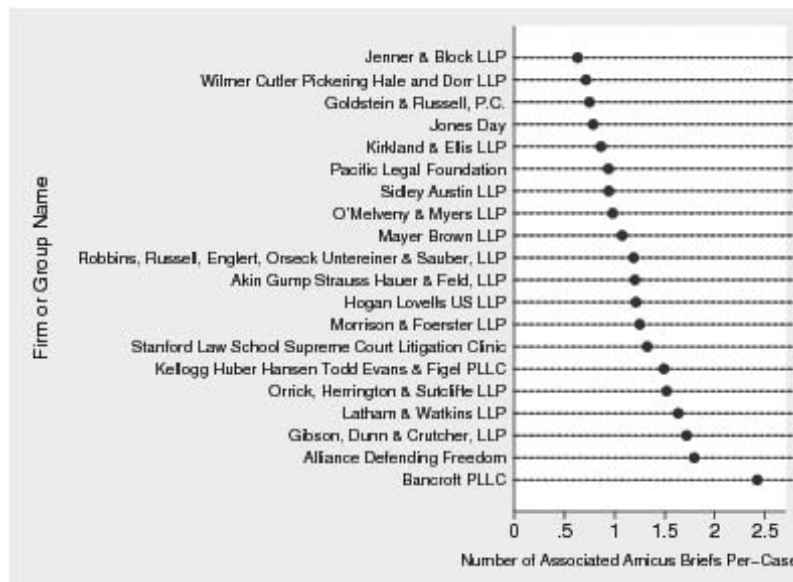
ever, there are also a few outliers from this norm that are still highly touted for their Supreme Court litigation expertise.

To begin, many of the firms with the most cert filings are also retained in cases with amicus filings. Gibson Dunn and Sidley Austin are at the top of both metrics, indicating that they not only file many petitions, but also that they file petitions in important cases as determined by amici involvement. Along with these two firms, Bancroft PLLC, Mayer Brown, Jones Day, and Latham & Watkins are next on the list of firms.

Other noted firms and groups in this figure are not part of the coterie of private firms with specialized Supreme Court practice groups. All but one case—in which Stanford's Supreme Court Law Clinic represented the petitioner—had four or more amicus filings. Lastly, rights-advocating groups with strong Supreme Court presences—the Pacific Legal Foundation and the Alliance Defending Freedom—make the cut for petitioning firms with the most overall amicus involvement.

As with attorneys, we also control for the number of petitions filed by these firms by examining the amicus filings on a per case basis. This information is provided in Figure 20.

FIGURE 20: PETITIONING FIRMS' ASSOCIATED AMICUS BRIEFS PER CASE (NON-GOVERNMENTAL)

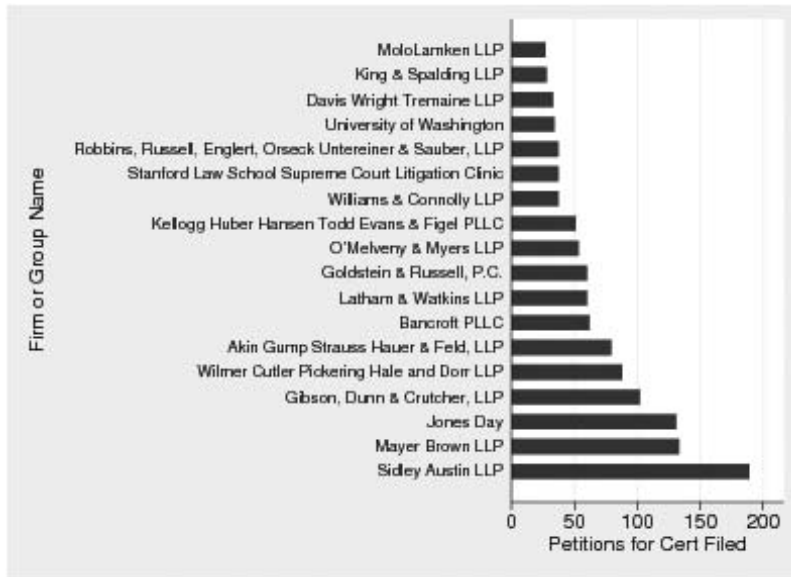


Paul Clement's firm, Bancroft PLLC, tops the list for petitioning firms with the most amicus involvement on a per case basis with 2.4. There is a large margin between the amicus involvement in Bancroft's cases and the next group in the figure, Alliance Defending Freedom, which averages 1.8

amicus briefs in cases where it is the petitioning firm. The next firm in the figure is Gibson Dunn with a per case amicus brief average of 1.7.

We next look to the most successful law firms at the Supreme Court’s cert stage. We first examine the number of aggregate, successful cert filings by these firms. The parameters we set for these firms is that they filed more than twenty-five cert petitions and had a success rate of greater than 15% of their filings. Our theory suggests an association between factors such as amicus filings and cert success, as well as between successful Supreme Court attorneys and the firms where they house their practices. Both of these relationships are discernible in the petition counts for the most successful law firms as depicted in Figure 21.

FIGURE 21: LAW FIRMS WITH MOST SUCCESSFUL CERT PETITIONS  
(NON-GOVERNMENTAL)



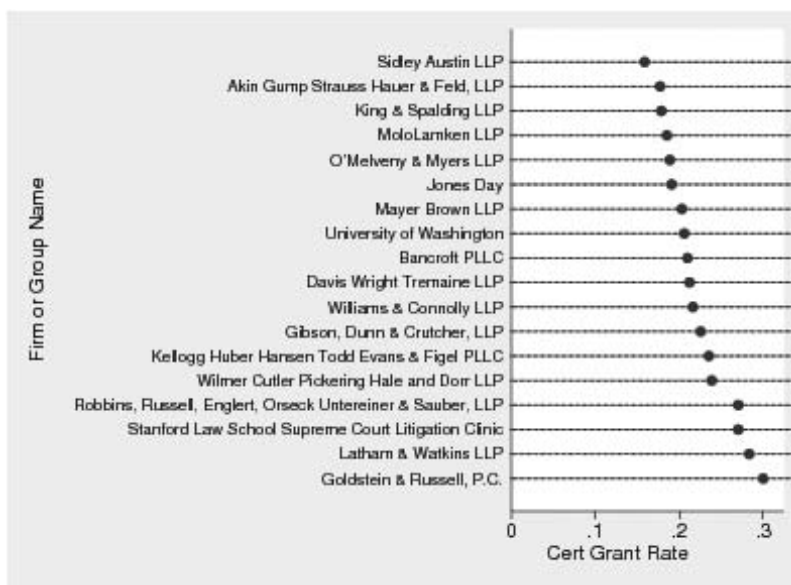
Firms that filed the most cert petitions in Figure 21 align with our results for the most successful attorneys. Carter Phillips, who works in Sidley Austin’s Washington, D.C. office, had the most attorney filings of the successful attorney grouping. Next, Mayer Brown has experienced Supreme Court litigator Andrew Pincus. The twenty-seven petitions Pincus filed during the period of this paper constitute a significant fraction of Mayer Brown’s 133 cert petitions. This is similarly the case with Gibson, Dunn & Crutcher and its arsenal of top Supreme Court litigators, including Theodore Olson.

Similar to the findings for attorneys, law firms’ success with their aggregate cert filings does not guarantee success on a per-case basis. In Fig-



ure 22, we examine the most successful law firms by looking at cert grant rates for their petitions.

FIGURE 22: SUCCESS RATE OF LAW FIRMS WITH MOST SUCCESSFUL CERT PETITIONS (NON-GOVERNMENTAL)

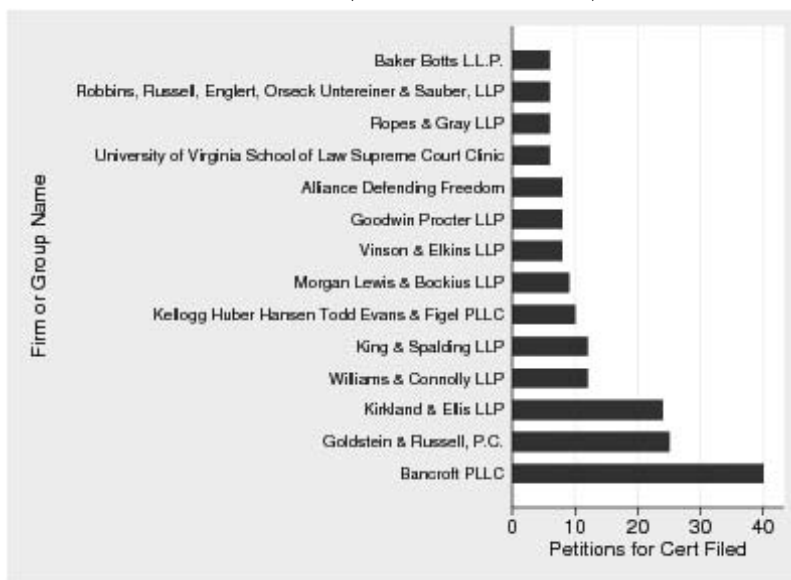


Thomas Goldstein's firm, Goldstein & Russell, is the most successful firm, winning grants with 30.0% of its sixty petitions. Latham & Watkins is close behind with cert grants in 28.3% of its sixty cert petitions. Other firms with 25% or greater success rates at cert include Stanford Law School's Supreme Court Litigation Clinic and Robbins, Russell, Englert, both with 27.0% success at cert. The last firm to meet the parameters for these top firms is the highest filer, Sidley Austin, with 15.9% cert grant success.

The large difference in the overall number of cert filings from these successful firms is also notable. The number of petitions ranges from 189 from Sidley Austin to twenty-seven from MoloLamken. This range in the overall number of cert filings may well play into a firm's cert success because large increases in this number may have an adverse effect on a firm's overall cert success rate.

To convey the law firms that were successful in recent years, we created Figures 23 and 24. These figures look at the most successful law firms for the 2012–2015 Terms. The limits we set for these figures are that the firm or group is non-governmental, filed more than five cert petitions, and had greater than a 20% success rate for the 2012–2015 Terms.

FIGURE 23: LAW FIRMS WITH MOST SUCCESSFUL CERT PETITIONS  
2012–2015 (NON-GOVERNMENTAL)



Several of the most successful firms for 2012 to 2015 were also successful for the earlier Terms covered in this paper. Bancroft PLLC moved up in terms of its relative number of cert petitions filed, and this is predominately attributable to Paul Clement's cert filings. Goldstein & Russell also moved higher in terms of its number of cert filings relative to the other most successful firms for this period. The firms or groups that fit the parameters for this figure but were not examined in previous figures tended to file fewer petitions during this period than the repeat firms that carry over from the other figures. These firms or groups not previously examined include Vinson & Elkins, Goodwin Procter, the University of Virginia's Supreme Court Clinic, Ropes & Gray, and Baker Botts. Figure 24 shows the success rates for these firms or groups.

FIGURE 24: SUCCESS RATE OF LAW FIRMS WITH MOST SUCCESSFUL CERT PETITIONS 2012–2015 (NON-GOVERNMENTAL)

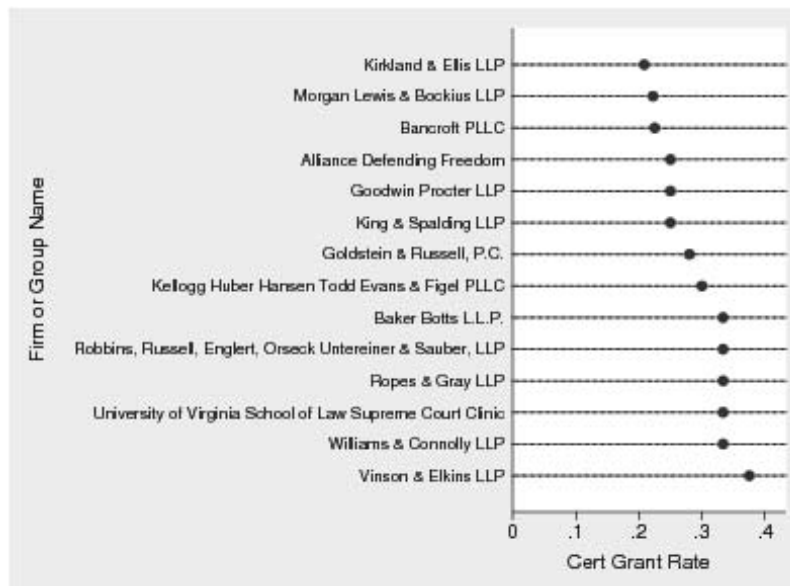
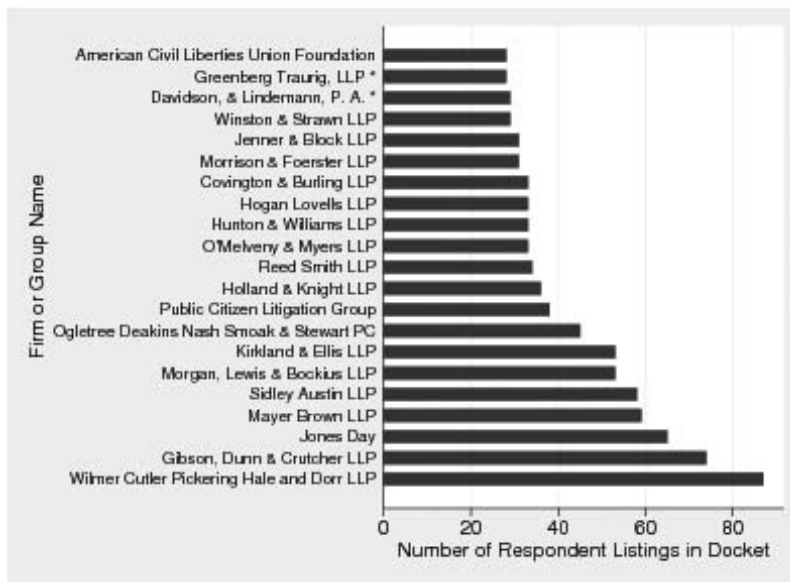


Figure 24 presents parallels with Figure 12, which looks at cert grant rates for the most successful petitioning attorneys from 2012 to 2015. Notably, Vinson & Elkins is the most successful firm for this period. It won cert grants in three of eight, or 37.5%, of its petitions. The attorney on all three petitions was John Elwood.

The next set of firms all had 33.3% cert success during this period. Three out of five of these firms were not in Figure 22—examining the most successful firms across all terms covered in this paper—including Ropes & Gray, University of Virginia’s Supreme Court Clinic, and Baker Botts. The two firms that were mentioned in Figure 22 are Williams & Connolly and Robbins Russell. The rise in Williams & Connolly’s success coincides with Kanon Shanmugam’s individual success filing cert petitions during these years. Taken together, Vinson & Elkins’s and Williams & Connolly’s high cert grant rates for 2012 to 2015 show that one effective cert attorney may drive a top firm’s cert success for these limited years.

Looking at the other side of cert litigation, we also focus on the firms that are most successful at defending against cert in Figures 25 and 26. For these firms we examine only non-governmental firms that defended against more than twenty-five cert petitions, with more than 70% of those petitions denied.

FIGURE 25: COUNT OF CERT RESPONSES FOR MOST SUCCESSFUL LAW FIRMS DEFENDING AGAINST CERT (NON-GOVERNMENTAL)



Note: \* = Non-governmental firms with primarily or all state-related clients.

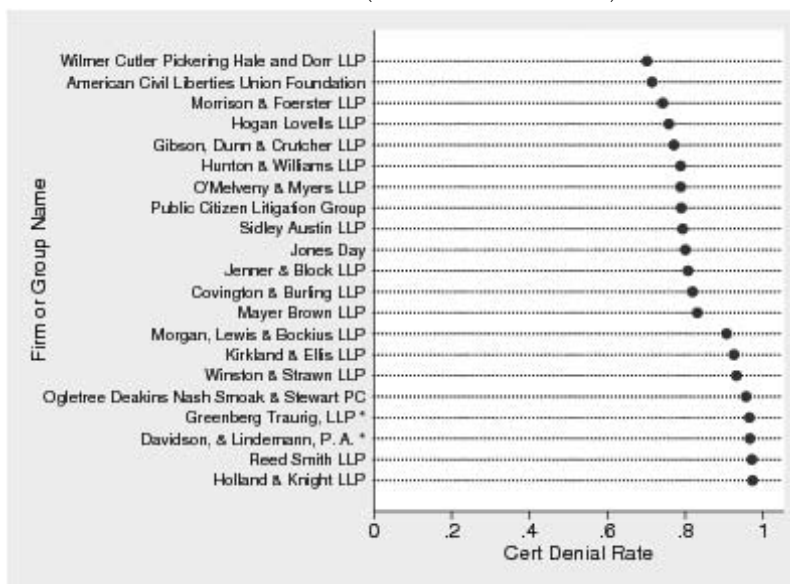
Many of the most successful petitioning law firms carry over into our findings for the most successful cert respondent firms. Those with high counts of cert petitions, such as WilmerHale, Gibson Dunn, Jones Day, and Mayer Brown, were also involved in large numbers of cert responses with eighty-seven, seventy-four, sixty-five, and fifty-nine cert responses, respectively. There are also a handful of large private firms in this figure that we have not examined in other analyses, including Reed Smith and Holland & Knight.

This figure shows that there are at least two clusters of firms in terms of the number of cert responses. The break point between these two groups is between Kirkland & Ellis, with fifty-three cert responses, and Public Citizen Litigation, with thirty-nine cert responses, with Ogletree Deakins’s forty-five responses fitting in between the two clusters. This difference in number of cert responses indicates that there is a tiered system at the top of the successful firms, with a group of seven of the most successful law firms in this area handling the bulk of cert responses for the overall group.

The firms of the two attorneys who handled primarily state-government responses to cert are also present in this figure. Greenberg Traurig and Davidson & Lindemann both meet the criteria for top law firms by cert responses, but as with their attorneys, this statistic needs to be scrutinized with an understanding that these firms’ clients are mostly state ac-

tors. With this in mind, we next look to the cert denial rates for these top cert response law firms.

FIGURE 26: SUCCESS RATE OF MOST SUCCESSFUL LAW FIRMS DEFENDING AGAINST CERT (NON-GOVERNMENTAL)



Note: \* = Non-governmental firms with primarily or all state-related clients.

With a 97.2% cert denial rate, Holland & Knight is the most successful firm in defending against cert. Holland & Knight handled thirty-six cert responses, of which thirty-five cert petitions were denied. Reed Smith falls just behind Holland & Knight with a 97.1% cert denial rate based on denials in thirty-three of thirty-four petitions. After Reed Smith, we have the two law firms handling mainly state responses: Davidson & Lindemann and Greenberg Traurig. In terms of raw percentages, both had cert denial rates very close to that of Reed Smith with 96.6% and 96.4%, respectively. After these firms, Ogletree Deakins and Winston & Strawn have cert denial rates of 95.6% and 93.1%, respectively. The last two firms with greater than 90% cert denial rates are Kirkland & Ellis and Morgan, Lewis & Bockius with 92.5% and 90.6% cert denial rates, respectively.

## V. DISCUSSION AND CONCLUSION

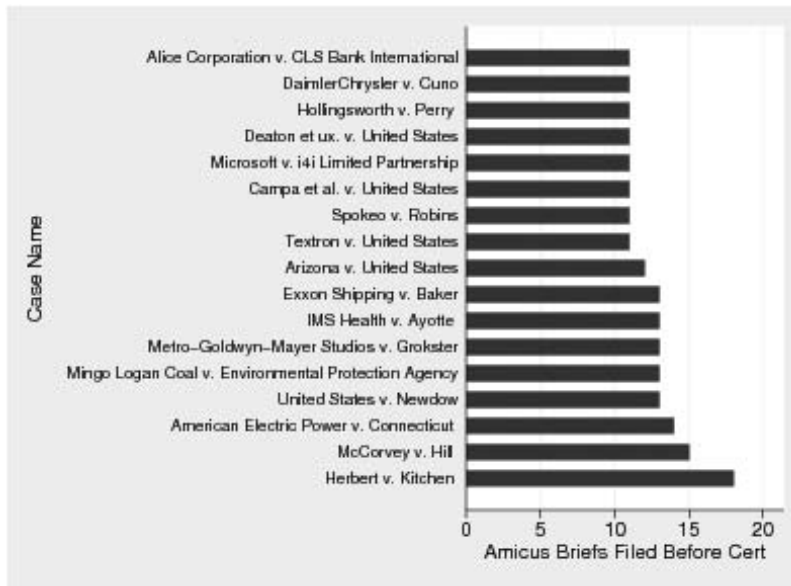
Even though we look at many different factors that impact the likelihood of cert success in this paper, these factors tend to pinpoint similar players. Top attorneys are often, and understandably, related to top law firms. Successful cert-petitioning attorneys and firms are often present in our findings for successful respondent attorneys and firms. Groups tend to file more amicus briefs supporting and opposing cert when these attor-

neys and firms have a stake in the litigation. Also, many of the same lower courts were the last courts to hear cases constituting the most salient petitions.

There are notable differences when the federal or state governments are involved. Case salience is immediately apparent when the SG files cert petitions. The majority of state petitions for cert are filed by public defenders on behalf of indigent petitioners.<sup>92</sup> Both types of government must respond to a glut of petitions against them, which are mainly from IFP petitioners. The influx of IFP petitions against government respondents likely augments the governments' high rates of success defending against cert.

Although our analyses disaggregate the various components that affect the likelihood of the Court granting cert and the similarities between the entities in the analyses show that there are successful repeat players often involved in these petitions, these analyses are nonetheless separate. We want, however, to be able to see how these various moving parts function simultaneously. To do so, we examine the cases between the 2001 and 2015 Supreme Court Terms with the greatest number of amicus briefs filed at the cert stage. These cases are shown in Figure 27.

FIGURE 27: CASES WITH MOST AMICUS BRIEFS FILED AT CERT PHASE



These cases tended to generate much press even as the Supreme Court was deciding whether to grant them cert. They dealt with issues

92. See Thompson & Wachtell, *supra* note 9, at 262–63 (discussing thousands of petitions against states and state prison officials in dataset as well as high number of IFP petitioners that compose group).

salient to large portions of the population.<sup>93</sup> The federal government was involved at some level in most of these cases. The SG represented the respondent in *Deaton v. United States*,<sup>94</sup> *Campa v. United States*,<sup>95</sup> *Textron Inc. & Subsidiaries v. United States*,<sup>96</sup> *Arizona v. United States*,<sup>97</sup> and *Mingo Logan Coal Co. v. EPA*.<sup>98</sup> The SG also represented the petitioner in *Newdow v. U.S. Congress*.<sup>99</sup> The SG filed amicus curiae briefs in *Hollingsworth v. Perry*,<sup>100</sup> *Spokeo, Inc. v. Robins*,<sup>101</sup> *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*,<sup>102</sup> *Alice Corp. Pty. Ltd. v. CLS Bank International*,<sup>103</sup> and in *Microsoft Corp. v. i4i Ltd. Partnership*.<sup>104</sup> Additionally, the U.S. Chamber of Commerce filed amicus briefs in *DaimlerChrysler Corp. v. Cuno*,<sup>105</sup> *Exxon Shipping Co. v. Baker*,<sup>106</sup> and *American Electric Power Co. v. Connecticut*.<sup>107</sup>

All of these petitions were on the paid docket. All of the lower courts for these cases were U.S. Circuit Courts of Appeal, with six cases coming from the Ninth Circuit.

Examining the petitioners' representation, we noted many of the attorneys and firms in our previous analyses. Attorneys for the petitioners included Thomas Goldstein (twice), Andrew Pincus, Carter Phillips, Kannon Shanmugam, Paul Clement, Walter Dellinger, Theodore Olson, and Donald Verrilli as SG. Petitioners' law firms included Akin Gump (twice), Mayer Brown, Sidley Austin (twice), Williams & Connolly, Bancroft PLLC, Gibson Dunn (twice), O'Melveny & Myers, and Jenner & Block.

The respondents' representation in these cases included Theodore Olson and Neal Katyal in private practice, as well as SGs Theodore Olson, Elena Kagan, and Donald Verrilli. Along with the OSG, the firms representing respondents included Gibson Dunn, Davis, Wright, Tremaine, and Hogan Lovells.

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93. See, e.g., Adam Liptak, *Blocking Parts of Arizona Law, Justices Allow Its Centerpiece*, N.Y. TIMES (June 25, 2012), <http://www.nytimes.com/2012/06/26/us/supreme-court-rejects-part-of-arizona-immigration-law.html> [https://perma.cc/Y3JT-ARXG]; Greg Stohr, *How Historic Supreme Court Gay-Marriage Case Will Unfold: Q&A*, SCOTUSBLOG (Mar. 25, 2013, 11:09 PM), <http://www.scotusblog.com/2013/03/how-historic-supreme-court-gay-marriage-case-will-unfold-qa/> [https://perma.cc/S M47-HBM3].

94. 541 U.S. 972 (2004).

95. 557 U.S. 904 (2009).

96. 560 U.S. 924 (2010).

97. 132 S. Ct. 845 (2011).

98. 134 S. Ct. 1540 (2014).

99. 540 U.S. 962 (2003).

100. 133 S. Ct. 2652 (2013).

101. 135 S. Ct. 1892 (2015).

102. 545 U.S. 913 (2005).

103. 134 S. Ct. 2347 (2014).

104. 564 U.S. 91 (2011).

105. 547 U.S. 332 (2006).

106. 554 U.S. 471 (2008).

107. 564 U.S. 410 (2011).

The Court granted nine out of seventeen of these petitions for cert. The SG wrote the response briefs for four of the eight cases where cert was denied. Both of these factors accord with our theory that the Court is likely to pay close attention to the SG's arguments on cert. If this is correct, when the federal government is the respondent, the Court is going to take a close look at the SG's points. This helps to explain why the Court might deny cert in these cases even when there is apparent salience based on the number of amicus briefs.

What does the information from this figure tell us? The results in Figure 23 help to confirm our assumptions about the factors involved in cert and their relationship to one another. The federal government is often directly or indirectly involved in the most salient cases, as are the top cert attorneys and law firms. The lower courts that previously heard these cases are the U.S. Circuit Courts of Appeal. Finally, the outcomes are primarily cert grants, especially when the SG does not argue for cert denial.

This is not to say that our findings help us predict cert outcomes, only that they help us make more informed predictions about the likelihood of cert grants. Like most Supreme Court practices, the actual cert voting process is generally kept secret from public scrutiny.<sup>108</sup> Without a more direct means to observe the Justices' decisions on cert, we mainly have to base our analyses and assumptions on the available data. This data is at the heart of this paper's analyses and drives our findings regarding cert success.

## VI. APPENDIX

### A. Dataset Methodology

The dataset was created by programmatically accessing the official electronic docket of the Supreme Court available on <http://www.supremecourt.gov/>. The Supreme Court states that all cases since the beginning of the 2001 Term are entirely accessible.

First, the journal files were downloaded from <http://www.supremecourt.gov/orders/journal.aspx> for all terms. These files were then processed to extract all case numbers. Then, the docket entries were downloaded from <http://www.supremecourt.gov/search.aspx?filename=/docketfiles/docketnumber.html>. Unfortunately, because no machine-format access is available, these documents were then processed with a series of pattern-matching regular expressions to classify their petition type, attorney name, and other parameters investigated in this study.

To prevent firm name changes or minor variations in spellings from causing differences in the outcome of our analyses, the attorney names

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108. *But see* Timothy R. Johnson, Ryan C. Black & Eve M. Ringsmuth, *Hear Me Roar: What Provokes Supreme Court Justices to Dissent from the Bench?*, 93 MINN. L. REV. 1560, 1569 (2009) (describing strategic utility of public dissents from denial of cert).

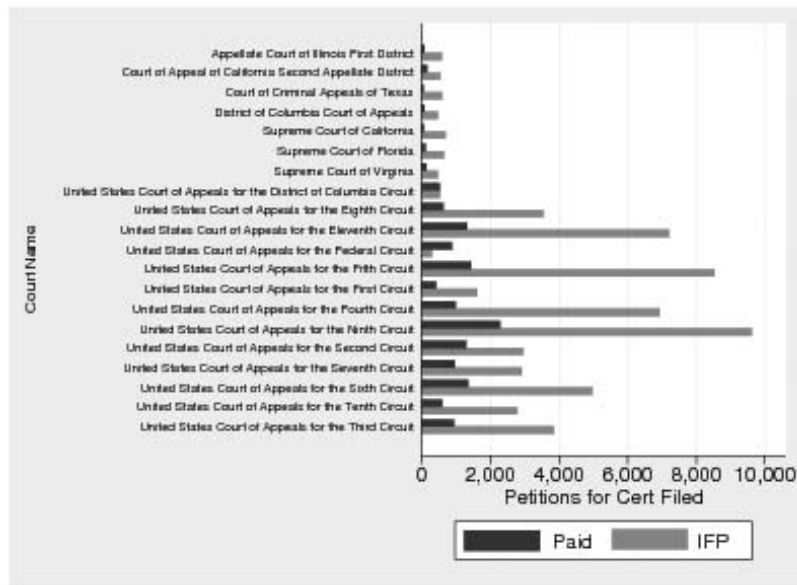


were then divided into similarity groups by using a locality-based “hash function.”<sup>109</sup>

Finally, in some instances, the Supreme Court remands large numbers of cases upon deciding a substantially similar case. To prevent these “sweeping remands” from inflating the cert numbers, cases that were remanded “in light of” another decision were excluded from the majority of our analyses.

### B. Lower Courts Statistics by Case Type

FIGURE 28: LOWER COURT COUNTS BY CASE TYPE



109. See generally Ernesto Damiani et al., *An Open Digest-Based Technique for Spam Detection* (2004), <https://pdfs.semanticscholar.org/7a5f/dc6e9250428a636be20643191eaf9faa1434.pdf> [<https://perma.cc/H4HB-N2ZN>].

FIGURE 29: CERT GRANT PERCENTAGE FOR LOWER COURTS WITH MOST CERT PETITIONS BY CASE TYPE

