The "Odd Party Out" Theory of Certiorari

Adam Bonica* Adam Chilton† Maya Sen‡

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Abstract

Whether and why the Supreme Court agrees to hear cases is among the most important—and well studied—topics in American politics. However, existing theories have overlooked a key player: the advocates. We develop and test a new theory that explicitly incorporates advocates in explaining which cases the Supreme Court is likely to accept. Specifically, we theorize that cert petitions are most likely to be successful when (1) there is great ideological distance between the opposing advocates and (2) the lower-court panel is closest ideologically to the advocate who won at the lower-court level. In these cases, as we explain, the advocate petitioning the Supreme Court to intervene becomes the "Odd Party Out," a cue that conveys important information about the probability of bias as well as the political importance of the case. We test this theory using a new dataset on the identities and ideologies of advocates and judges. We find strong support for our theory: cert petitions are significantly more likely to be granted when the advocate appealing to the Court is an ideological outlier—that is, when the petitioner is in opposition to an ideologically aligned respondent and lower-court panel.

Note to Readers. This is a very early draft. We are still cleaning data to perform many of the robustness checks that we believe are required to fully test our theory, and we plan to do a great deal more work on this project in the near future. So we greatly appreciate any comments or suggestions you may have about directions to take the paper.

*Associate Professor of Political Science, Stanford University.
†Assistant Professor of Law and Walter Mander Research Scholar, University of Chicago.
‡Associate Professor of Public Policy, Harvard University.

1 Introduction

Although U.S. federal courts decide tens of thousands of cases per year, the U.S. Supreme Court's discretionary review means it hears significantly fewer—currently only around 70-80 cases per term. And because the Supreme Court is the final arbiter of many of the country's most important constitutional and legal disputes, this extraordinary discretion has made understanding the Supreme Court's decision to grant *certiorari* one of the most well-studied topics in judicial politics. The topic is important to practitioners as well; understanding and predicting which cases the Court will be most likely to hear structures the behavior of many elite lawyers, determining which cases they prioritize and which arguments they will make.

In trying to explain which cases the Court decides to hear, research in this literature has taken several approaches. A number of papers have identified several key factors that are associated with higher probabilities of cert grants: the involvement of the Solicitor General (e.g., Bailey, Kamoie, and Maltzman, 2005); the number of amicus briefs (e.g., Caldeira and Wright, 1988); dissents issued by lower court judges (e.g., Beim, Hirsch, and Kastellec, 2014); and the presence of circuit splits (e.g., Perry, 1991; Beim, 2017). Other papers in this literature have sought to explain the motivations of the courts. For instance, a line of scholarship argues that the Court decides to grant cert with a eye toward correcting the errors and biases of the appeals courts (e.g., Cameron, Segal, and Songer, 2000; Black and Owens, 2012), while another line of scholarship theorizes that the Court is more interested in developing legal doctrine and answering important questions than in correcting straightforward errors (e.g., Clark and Kastellec, 2013; Beim, 2017).

However, this literature has largely overlooked a key player in the cert process: the advocates hired by the parties to represent their case. Although some papers have examined the influence that experienced Supreme Court lawyers have had on the probability of a cert grant (e.g., McGuire, 1995; Feldman and Kappner, 2016) and several papers have analyzed

how the lower-courts' ideology influences the probability of cert (e.g., Cameron, Segal, and Songer, 2000; Lindquist, Haire, and Songer, 2007; Black and Owens, 2012), we are unaware of any prior theoretical or empirical research that has examined the role of advocates' ideologies or the interplay between the advocates' and lower-court judges' ideologies. This represents an important gap in our understanding of the cert process: the ideology of the advocates, and its relationship to the appeals court judges who decide cases, conveys key information about the probability of bias in the lower courts' decisions as well as about the possible political importance of a case.

In this paper, we develop a theory of how advocates' ideologies could influence cert decisions by building from existing papers arguing that the Supreme Court strategically selects cases based on cues like the ideology of the lower-court (e.g., Cameron, Segal, and Songer, 2000; Black and Owens, 2012). However, our argument takes this one step further by noting that the advocates' ideologies are often associated with the ideological position of their clients (Bonica and Sen, 2017) and are also often well-known to the clerks and Justices considering cert petitions (Lazarus, 2008). As a result, the interaction of advocates' ideologies with each other and with those of the lower-court judges provide important signals for the Court. Substantively, this may be the case for two reasons. First, when a lower-court panel sides against an ideologically opposed party (and in favor of an ideologically aligned party) and then that party appeals, the Justices may be unable to rule out that the panel acted out of ideological bias; however, when a panel sides against an ideological ally and that party appeals, then the Justices have less reason to worry—they may infer that the party had a weaker case and thus they will more readily rule out the possibility that the appeals court decision was ideologically biased. Second, the ideological distance between the advocates is relevant because large distances suggests that the case is likely to be political polarizing and, thus, possibly politically or publicly salient. Ultimately, just as the Supreme Court considers the ideology of the lower-court panel, it is likely that they evaluate the

larger ideological picture by also considering the corresponding ideology of the attorneys representing the various parties.

Based on these arguments, we hypothesize that when the lawyer petitioning the court for review (the petitioner) is ideologically at odds with the lawyer responding (the respondent), the Supreme Court will be more likely to grant cert. But the importance of this signal is mediated by the lower-court panel's ideology. That is, cert is more likely to be granted when the appeals-court panel is ideologically close the attorney who won at the lower court stage and ideologically at odds with the party who lost (and who thus is making the appeal). In other words, when the petitioning attorney is ideologically at odds with the opposing attorney and the lower-court panel—thus making the petitioning attorney what we refer to as the *Odd Party Out*—it should significantly increases the probability of cert. Alternatively, if the respondent is the Odd Party Out, it should *reduce* the probability of cert.

We test our theory using a novel, newly constructed dataset. First, we obtained lawyer names from of all cert petitions filed from 2003 through 2016 (n = 54,89) from the Supreme Court's website, combining it with corresponding advocate ideology scores from Bonica, Chilton, and Sen (2016) and Bonica and Sen (2017), which are based on political contributions from the Database on Ideology, Money, and Election (Bonica, 2014). To construct the universe of possible cases from which parties could appeal, we then collected the lower-court opinions from the same time period from the U.S. Court of Appeals from the Federal Judicial Center's Integrated Database, which we combined with each opinion's raw text from CourtListener. The resulting dataset provides us with the identities of judges and advocates involved in each case and also individual-level estimates of ideology measured on a single common scale. We obtained these measures for every single cert petition as well as every single appeals court case that could have been petitioned for cert.

Using this data, we find that the ideological configuration of the advocates and judges is indeed a important predictor of cert grants. More specifically, we find that the Supreme Court

is more likely to grant cert when (1) the petitioner and respondent attorneys are ideologically distant and when (2) the petitioner is an ideological outlier vis a vis the respondent and lower-court panel ideology. Such circumstances, we argue, show the Court that the petitioner is the Odd Party Out, which signals that this is a case with possibly high political importance as well as an increased likelihood of ideological bias.

This paper proceeds as follows. First, we motivate our inquiry by explaining how our theory expands on important existing research documenting that the Court grants cert when it looks to correct errors (or bias) and when it seeks to rule on important or legally significant cases. Second, we explain our theory of the Odd Party Out. Next, we introduce the data that we use to test this theory, which include new data on the identities and ideologies of the advocates and federal court of appeals court judges. We then present support for the Odd Party Out theory by showing that the ideological distance between the attorneys and the panel median strongly predicts the probability that the Supreme Court will grant cert. Finally, we provide additional analysis testing the framework's underlying assumptions and the robustness of the results. We conclude with preliminary thoughts on how to test the different mechanisms behind the findings. The Appendix includes additional analyses and robustness checks.

2 Previous Literature on Cert Decisions

A body of theoretical and empirical scholarship has explained how and why the Court grants cert (see generally Tanenhaus et al., 1963; Ulmer, 1972; Brenner, 1979; Provine, 1980; Palmer, 1982; Caldeira and Wright, 1988, 1990; Perry, 1991; McGuire and Caldeira, 1993; Boucher and Segal, 1995; Caldeira, Wright, and Zorn, 1999; Cameron, Segal, and Songer, 2000; Owens, 2010; Clark and Kastellec, 2013; Beim, 2017). Much of this literature starts with the straightforward observation that, given its small number of personnel and limited

administrative capacity, the Court must use its resources wisely and strategically.[1] From this observation, a number of papers have argued that the Court relies on important cues about a case's possible importance in order to decide which cert petitions to grant.

Cues Predicting Cert Grants. Several papers have examined the factors associated with higher likelihood of cert petitions being granted (see generally Perry, 1991; Feldman and Kappner, 2016). This line of research argues that the presence of certain factors signals to the Court that the case is in some way worthy of its attention, alerting the Court to the possibility of error or the jurisprudential importance of the case (as we discuss below). The idea that the Court takes advantage of these sorts of heuristics when deciding which cases to grant cert is known as "cue theory" (Tanenhaus et al., 1963).

A number of cues have been shown to be associated with a higher probability of cert (Feldman and Kappner, 2016). For example, one factor that strongly predicts cert is the presence of disagreements among the appeals courts (e.g. Tanenhaus et al., 1963; Ulmer, 1984; Caldeira and Wright, 1988; Perry, 1991; Caldeira, Wright, and Zorn, 1999; Black and Owens, 2009).[2] Another category of cues relates to the procedural history of the case. For instance, cert is more likely when an appeals court has heard the case *en banc* (George and Solimine, 2001), or sitting in its entirety; when a dissenting opinion was filed (Tanenhaus et al., 1963; Perry, 1991; Caldeira, Wright, and Zorn, 1999; Kastellec, 2007; Beim, Hirsch, and Kastellec, 2014); and when the ideological composition of the lower-court panel is in opposition to the ideological composition of the Supreme Court (Cameron, Segal, and Songer, 2000; Hammond and Sheehan, 2005; Hall, 2009; Black and Owens, 2012).[3]

[1] For example, there are 9 Justices on the Supreme Court and around 36 law clerks (4 per Justice) in any term. By contrast, there are around 400 Court of Appeals judges and around 1200 law clerks (again, 4 per judge).

[2] The presence of a circuit split is believed to be such a strong cue that advocates frequently claim a split exists regardless of the state of the law. For practitioner commentary on this, see Russell (2007).

[3] As Perry (1991, p. 257) notes, however, none of these will matter if the facts of the particular case are fundamentally ill-suited for disposition.

The category of cues that concern us here involves the identities of the individuals asking the Court to grant cert. For example, cert is more likely to be granted when the U.S. Solicitor General recommends the case be heard (Tanenhaus et al., 1963; Ulmer, 1984; Bailey, Kamoie, and Maltzman, 2005); when the litigants have higher status (Black and Boyd, 2010); when more amicus briefs are filed on the petitioners' behalf (Caldeira and Wright, 1988); and, most relevant to our study, when the advocates have previously argued before the Supreme Court (Feldman and Kappner, 2016). This last category suggests that the identity of the advocates may convey relevant information to the Justices about the case's quality and legal and political importance. However, no papers to date have evaluated whether the ideology of the petitioning or responding attorneys—as distinct from their Supreme Court litigation experience—influences the Court's decisions.

Error (or Bias) Correction. Another set of papers notes that the Justices have strong ideological preferences about case outcomes and accordingly approach cert granting as a way to change the outcomes of cases that at least four members of the Court would have decided differently (e.g. Ulmer, 1972; Krol and Brenner, 1990; Brenner, 1997). These theories are typically characterized as "error correcting" because the models underlying them "generally privilege error correction as a motivation for discretionary jurisdiction" (Clark and Kastellec, 2013, p. 151).[4]

However, the appeals courts decide tens of thousands of cases each year, so the Court necessarily must orient its resources strategically to the most important errors or biases, again relying on cues and signals. Another line of literature therefore focuses on how the Supreme Court strategically "audits" the lower courts (Cameron, Segal, and Songer, 2000; Lindquist, Haire, and Songer, 2007; Black and Owens, 2012; Bryan and Black, 2017). These

[4]This basic argument has taken several forms. For instance, Cameron, Segal, and Songer (2000) refer to "error correction" as doctrinal enforcement. See also papers modeling how members of the Supreme Court strategically vote to grant cert by making "aggressive grants" and "defensive denials" (Brenner, 1979; Boucher and Segal, 1995; Benesh, Brenner, and Spaeth, 2002; Lax, 2003; Sommer, 2010, 2011).

papers have modeled the Supreme Court's role in the judicial hierarchy as akin to a principal exercising oversight over its agents, the lower courts. Under this framework, the Court monitors the appeals courts and scans the universe of cert petitions for cues that appeals courts ruled "incorrectly" for doctrinal or ideological reasons. For instance, Lindquist, Haire, and Songer (2007) find that more cert petitions are accepted from circuits with judges that are ideologically distant from the Supreme Court, Black and Owens (2012) find that the Court is more likely to grant cert when the median appeals court judge on a panel is ideologically distant from the Supreme Court, and Bryan and Black (2017) find that the Supreme Court crafts its agenda to audit judges in ideologically distant states. This suggests that the Court scans for signs of ideological bias.

These papers underscore that the ideology of the lower-court panel is important predictively and theoretically because the Court is trying to select cases that may have been decided in an ideologically biased way (i.e., different from the Court's own preferences). Looking at advocates, a clear extension to this intuition is that the identities of the lawyers making the appeal to the Court—who themselves often have strong ideological profiles—may also send an important ideological signal. Indeed, just as the Court is likely to look especially closely at cases where judges have dissented, the Justices may be more likely to look closely at a case where the lower-court panel has ruled against a lawyer who is ideologically distant. However, no papers to date have evaluated this possibility.

Learning and Jurisprudential Development. Finally, other papers have argued that the objective of the Supreme Court is not exclusively bias (or error) correction, but instead making contributions to law and refining or expanding doctrine (Provine, 1980; Perry, 1991; Clark and Kastellec, 2013; Beim, 2017). These papers are motivated in part by the reality that the Supreme Court takes an extremely small number of cases each year. Given the unlikely probability with which lower court decisions will be reversed by the Supreme Court,

fear of reversal is unable to fully explain compliance with Supreme Court decisions (Klein and Hume, 2003). Moreover, if the Court were acting purely out of an error-correcting concern, it would take dozens, if not hundreds, more cases where obvious errors have been made. As a result, error correcting may be one motivation, but it is not the only one.

In line with this intuition, these papers have argued that the Justices vote to hear cases that stand out as contributing meaningfully to the Court's status as an interpreter of laws and of the Constitution. As Clark and Kastellec (2013, p. 150) argue, "[b]ecause their docket is so selective, the justices use most of these cases not to engage in simple error correction of lower courts; instead, they can focus on taking cases that present novel and interesting questions of law." Perry (1991, p. 220) similarly writes that "the Court basically sees itself not as a place to right wrongs in individual cases but as a place to clarify the law." In applying this logic, Clark and Kastellec (2013) argue that the judicial hierarchy allows the Court to observe repeated case adjudication at the lower-court level as a way to learn about interesting issues and potential legal doctrines. This is a theme echoed by Beim (2017), which develops a model of how the Supreme Court can leverage the lower-court's role as "laboratories" of law to learn more about possible doctrinal approaches.

In terms of empirical approaches, these papers have mostly examined the key indicator of inter-circuit splits. Circuit splits are not only highly predictive of whether the Court will grant cert from an empirical perspective, but, as Beim (2017, p. 592) notes, "decisions informing the Supreme Court are often in conflict with one another, which the Supreme Court uses to its advantage." In other words, circuit splits represent the kind of wonkish tinkering with doctrine that appeals to the Court's learning sensitivities. Indeed, circuit splits are so important that the Supreme Court's internal rules require petitioners to address them in their legal briefs.[5]

For our purposes, this literature implies that the Supreme Court grants cert when it be-

[5]See Rules of the Supreme Court of the United States, Rule 10.

lieves to be exceptionally important across different criteria, not just doctrinal significance. For example, Perry (1991, p. 253) notes that the Court looks closely at cases that "are important to the polity," including cases involving "issues that are of huge political and societal importance." The presence of a circuit split may obviously indicate this kind of issue, but the identities of the advocates may do so as well. Indeed, members of the Supreme Court bar are highly experienced, many of them with prominent political reputations (McGuire, 1993; Lazarus, 2008). In addition, political or ideological polarization is often a symptom of politically salient issue spaces and so could be particularly prevalent in cases involving challenged election outcomes, reproductive rights, civil rights, redistricting, same-sex marriage, or health care. If the Court is looking specifically for politically or publicly important cases, then examining the ideology of the advocates making the appeal might be particularly effective means to do so.

3 How Advocate Ideology Could Influence Cert Decisions

Ideology plays an important role in many of the existing theories about the cert process specifically (e.g. Cameron, Segal, and Songer, 2000; Lindquist, Haire, and Songer, 2007; Black and Owens, 2012) and Supreme Court decision making more generally (see, e.g., Segal and Spaeth, 2002; Martin et al., 2004; Ruger et al., 2004; Miles and Sunstein, 2007). But to date, prior scholarship has been largely silent about the role that the advocates' ideologies play in cert decisions. However, the ideological leanings of the lawyers involved provides important information to the Court both about the possibility of bias (or error) and the jurisprudential and political importance of the case, as suggested by the prior literature. In this section, we develop this claim and explain our *Odd Party Out* theory of how the interaction of judicial and advocate ideology influences cert decisions.

3.1 The Role of Advocates in Supreme Court Litigation

Advocates are known to play an important role in Supreme Court litigation (McGuire, 1995; McAtee and McGuire, 2007; Feldman, 2016). For instance, McGuire (1995) finds that lawyers that have litigated in the Court more frequently than their opponents were more likely to win, and McAtee and McGuire (2007, p. 259) find that the justices are unlikely to change their views about high salience issues, but on low salience issues the justices are "open to the persuasion of lawyers." Other research examines the specific mechanisms through which the advocates may be able to influence outcomes, including whether advocates influence Justices through either their briefs (Corley, 2008; Wedeking, 2010) or their oral arguments (Johnson, Wahlbeck, and Spriggs, 2006). The importance of advocates extends to the cert process specifically (McGuire and Caldeira, 1993; McGuire, 1995; Songer, Cameron, and Segal, 1995; Lazarus, 2008; Mak, Sidman, and Sommer, 2013; Feldman and Kappner, 2016). For example, cert is more likely to be granted when the advocates are experienced members of the Supreme Court bar (e.g. Feldman and Kappner, 2016) possibly because their presence on a cert petition signals to the Justices that the case has merit and will generate high-quality briefs and oral arguments. Likewise, McGuire (1995, p. 187) argues that the reason that repeat litigators are successful is that the Justices believe that these litigators are able to meet their "informational needs."

A recurring theme in this research is that much of the litigation at America's highest court is conducted by a small group of repeat players (Lazarus, 2008). As early as 1993, McGuire (1993, p. 365) wrote that "that the lawyers in the Court are a discrete collection of representatives, strongly anchored in Washington, DC." The elite group of lawyers that argue in front of the Supreme Court are so well known in elite legal circles that, not only do the Justices know their reputations from repeated litigation, but their reputations are also known to the Justices' clerks. Lazarus (2008, p. 1526) writes that when the clerks reviewing cert petitions "see the name of an attorney whose work before the Court they

know, at least by reputation, that attorney's involvement in the case, by itself, conveys an important message about the significance of the legal issues being presented and the credibility of the assertions being made." This information likely includes information about ideological leanings, especially in light of the fact that many law firms where these lawyers work themselves have prominent ideological leanings (Bonica et al., 2017).

There is also empirical and anecdotal evidence that advocates' ideologies are related to the ideologies of the parties that they represent. Although there might not be a strong a signal at every level of litigation, Supreme Court litigation is sufficiently politicized that parties advancing liberal positions to the Court typically hire liberal advocates and parties advancing conservative positions typically hire conservative advocates. Bonica and Sen (2017) find empirical support for this claim by showing that when the Supreme Court issues a conservative (or liberal) decision, the winning advocate is likely to be conservative (or liberal). Anecdotally, there are also many examples of well-known liberal members of the Supreme Court bar who are repeatedly hired by liberal clients and well-known conservative members of the Supreme Court bar who are hired by conservative clients. Well-known liberal lawyer Paul Smith has represented the liberal side in high profile cases like *Lawrence v. Texas* (2003) and *Gill v. Whitford* (2018), and well-known conservative lawyer Paul Clement represented the conservative position in high profile cases like *McDonald v. Chicago* (2010) and *United States v. Windsor* (2013). Of course, even before the Supreme Court, lawyers may represent causes and clients that they do not agree with. But, in general, advocates' ideologies are related to the ideologies of their clients—especially in the most important cases.[6]

[6]We empirically test the relationship between the ideologies of advocates and the positions they represent in Part 6.1.

3.2 The Odd-Party Out Theory of Certiorari

Our theory relies on three empirically grounded assumptions. The first assumption, based on the literature on the Supreme Court bar (e.g., McGuire, 1993; Lazarus, 2008), is that the ideologies of many advocates are known with some accuracy to the clerks and to the Justices reviewing cert petitions. Knowledge does not have to be perfect for our theory to hold, but, there must be some knowledge of the ideology of some attorneys.[7] The second assumption is that the ideology of advocates is associated with the ideological position of the advocates' clients. That is, clients with liberal causes are more likely to hire liberal advocates and, vice versa, clients with conservative causes are more likely to hire conservative lawyers. There is strong empirical evidence for this at the Supreme Court (Bonica and Sen, 2017), which we revisit in Part 6.1. However, this assumption can be weakened somewhat by a simple re-statement: we assume that the Justices perceive there to be a link between advocate ideology and the cases argued.

Linking these two ideas, the relative ideologies of the advocates conveys valuable information about the merits and importance of the case to the Supreme Court. Specifically, if the advocates representing the petitioner and respondent are in ideological opposition, then it provides a signal that the case is about something politically polarizing. Because politically and publicly salient cases are likely to be those in which there is political disagreement, this polarization in advocate ideology thus conveys to the Court a strong signal about the importance of the case. In addition, because the Justices typically considers cases that they consider important (Perry, 1991), we thus expect that cert is more likely to be granted when the advocates are in ideological opposition.

The third assumption is that the Court will infer that ideology influences decision making such that the probability that a lower court rules in favor of an attorney will be greater when

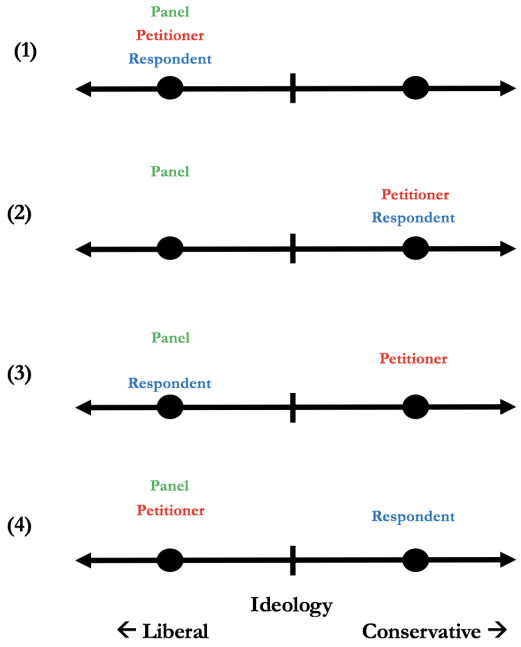
[7] Logically, if the assumption does not hold for all lawyers—which is of course likely—this would introduce random noise into our analyses, biasing our findings toward zero.

the panel and attorney are of the same type. This means that the ideologies of the advocates are not the only ideological cue contained in a cert petition—the ideology of the median member of the lower court panel conveys important information as well. Prior research has shown that cert is more likely to be granted in cases where the median member of the lower court panel is ideologically distant to the Court's median (Cameron, Segal, and Songer, 2000; Lindquist, Haire, and Songer, 2007; Black and Owens, 2012). But previously unexplained is that the relationship between the ideologies of the advocates and the lower court should matter as well. Simply put, the Supreme Court should be more likely to grant cert in cases where a lower court panel has ruled against an ideological opponent (and in favor of an ideological ally), and less likely to grant cert when the lower court panel has ruled in favor of an ideological opponent (and against an ideological ally).

Several stylized examples illustrate the logic. Suppose that a lower-court panel with liberal median judge rules against a liberal advocate in favor of a conservative advocate, and that the liberal advocate then appeals to the Supreme Court. In this case, the Court would be skeptical of the liberal petitioner's claim.[8] After all, the advocate has enjoyed an ideologically favorable panel and still lost, suggesting that, even in the most favorable instance, she represents a losing case. Alternatively, suppose that a lower-court panel with liberal median instead rules against a conservative advocate in favor of a liberal advocate, and that the conservative advocate then appeals to the Supreme Court. Here, there would be more reason for the Supreme Court to look closely at the case, since the configuration of the parties suggests that the conservative advocate (the "Odd Party Out," to use our terminology) faced an unfavorable panel and was maybe the target of error or bias. Indeed, here, it would be difficult to rule out the possibility that the case may have been decided differently had it been assigned to a different, more conservative panel. This reasoning

[8]Again, the petitioner refers to whichever party lost at the lower court and the respondent refers to the party that won in the lower court.

Figure 1: Stylized Illustrations of the Odd Party Out



implies that the relationship between the ideologies of the two advocates and of the panel plays an important role in the decision to grant cert.

To put more structure on the theory, a three-judge panel could be one of two types, $Panel \in Liberal, Conservative$.[9] The petitioner and respondent advocates are also one of the types, so $Petitioner \in Liberal, Conservative$ and $Respondent \in Liberal, Conservative$. Assuming there are only these types, Figure 1 depicts the possible combinations of panels' and advocates' ideologies. (For simplification, Figure 1 only shows the combinations when the lower court panel is the liberal type.)

When both attorneys are of the same type—which occurs when there is no Odd Party Out (top row of Figure 1) or when the panel is the Odd Party Out (second row)—the Court has little reason to suspect that a panel of the opposite type would have ruled differently.

[9]We focus on the panel median, since the median effectively determines which of the parties will win or lose the case. This also makes it more straightforward to operationalize the analysis that follows. However, some scholarship (for example, the scholarship on panel effects) notes differential case outcomes dependent depending on panel configurations—for example, panels composed of three Republicans tend to issue more conservative rulings than panels composed of two Republicans and one Democrat (Sunstein et al., 2006).

But when advocates are of different types (i.e., one is liberal and the other conservative), the panels' type conveys some information about the petitioner's case. When the respondent (the winning party at the lower court level) is the same type of the panel—and the petitioner is thus the Odd Party Out (third row)—the Court may think the petitioner may have won if she had drawn a different panel or the case had proceeded through a different circuit. And when the petitioner (the losing party in the lower court) is the same type of the panel—and the respondent is thus the Odd Party Out (bottom row)—the Court will think the case must have been weak if the petitioner lost despite having an ideologically favorable panel.

The resulting prediction is that *cert will be more likely to be granted when the petitioner is the Odd Party Out.* That is, when a liberal panel sides with a liberal respondent against a conservative petitioner (or vice versa), the Court will be more likely to grant the petition. The logical corollary is that *cert should be less likely to be granted when the respondent is the Odd Party Out.*

4 Data

Testing our theory requires information on the identities and ideologies of Supreme Court advocates, the identities and ideologies of lower-court judges, and cert petition outcomes. Because administrative data does not collect this information, we gathered our own data on the universe of cert petitions filed for over a decade.[10]

Cert Petition Data. We gathered cert petitions from the Supreme Court's website (`http://supremecourt.gov`), which included all petitions made to the Court from 2003 to 2015.

[10] Administrative data do not include the identities of lower court judges. Because of this, other studies examining the cert process have relied on hand-coding. For example, Cameron, Segal, and Songer (2000) use a random sample of 273 search and seizure cases appealed to the Burger court from 1972 to 1986; Black and Owens (2012) use a random sample of 358 paid non-death penalty petitions from 1986 to 1993; and Mak, Sidman, and Sommer (2013) uses a sample of the universe of 578 appellate decisions and 169 cert petitions from free exercise of religion cases decided by the Federal Court of Appeals from 1946 to 2006.

Table 1: Cert Petition Outcomes by Year for Cases Appearing Before the Circuit Courts

Year	Cert Petition	Denied	GVR	Reversed	Affirmed
2003	3,325	3,136	100	53	36
2004	3,685	3,003	584	73	25
2005	4,769	4,097	561	88	23
2006	5,162	4,723	323	87	29
2007	4,495	4,107	287	82	19
2008	4,015	3,646	239	104	26
2009	4,272	4,018	157	74	23
2010	4,280	4,053	124	66	37
2011	4,106	3,834	176	73	23
2012	4,073	3,823	159	62	29
2013	3,885	3,682	107	67	29
2014	3,593	3,391	128	55	19
2015	3,370	3,189	83	46	52

This represented 53,030 total petitions, or approximately 4,080 petitions per year.[11] From each petition, we extract several pieces of information, including the names of the attorneys representing the petitioners and the respondents. Table 1 reports the number of cert petitions filed and their outcomes by year. As Table 1 shows, out of the 53,030 cert petitions filed during this period, only 4,328 of petitions (8.1%) were granted.

Lower-Court Decisions Data. Although the identities of the advocates is available from the Supreme Court petitions, the names of the judges on the panel that heard the appeal is not in the cert data. We thus collected data from two other sources. First, we collected data on all U.S. Court of Appeals cases decided between 2003 and 2015 from the Federal Judicial Center's Integrated Database (`https://www.fjc.gov/research/idb`). This provides detailed data on case characteristics and outcomes but intentionally omits the names of the judges that heard the cases.

[11] This included 13,289 petitions from petitioners proceeding *pro se*, which means that these are petitioners who are representing themselves (many of these are prisoners challenging their detention). We control for *pro se* petitioners in our models.

We thus obtained the names of all lower-court judges from the opinion themselves, which we collected from the CourtListener database (`http://courtlistener.org`). For each case, we parsed the names of the court of appeals judges who were on the opinion. This ranged from three judges for three-judge panels to sixteen for certain cases heard by all of the judges in a circuit sitting *en banc*. We also used the text of the lower court opinions from CourtListener to extract additional information about the attorneys arguing the case before the lower courts, which we analyze in Part 6. We also rely on opinion text from CourtListener to code whether a case generated a dissenting opinion from the lower-court panel and, if so, the identity of the dissenting judge.

Ideology Data. Lastly, testing our theory depends on having fine-grained ideological positioning of both advocates and lower court judges. Although it is possible to leverage the fact that judges have been appointed and confirmed by politicians to measure their ideology, this is obviously not possible for the vast majority of advocates filing cert petitions. We therefore instead rely on the Database on Money, Ideology, and Elections (DIME). DIME uses information from over 20 million individual donors and 250 million donations to generate an estimate of each donor's ideology, which is called the DIME score (or common-space CFscore) (Bonica, 2014).[12] These scores have the advantage of being available for attorneys in private practice who have not previously held elected office. DIME also has the advantage of placing advocates and judges on a common scale.[13]

For the judges, we also use an estimate of their ideology based on their political donations. Although most judicial behavior research has measured judges' ideology using either the party of the appointing president or Judicial Common Space (JCS) scores, both of these

[12]The DIME scores are based on the weighted average of the ideologies of candidates that the donors have contributed to, and it is scaled so that the mean ideology is 0, a score of -1 is one standard deviation more liberal than the average donor, and a score of +1 is one standard deviation more conservative than the average donor.

[13]The scores have been validated using data on policy preferences from the Congressional Campaign Election Study (Bonica, 2017).

Table 2: Summary Statistics

	Proportion / Mean	Grant Rate (var=1)	Grant Rate (var=0)	N obs.
Ideology				
Pet. Atty. DIME Score (x_p)	-0.442			31,563
Resp. Atty. DIME Score (x_r)	-0.133			43,237
CoA Panel Median DIME Score (x_c)	0.226			52,075
Atty. Dist. ($x_p - x_r$)	-0.335			26,974
Panel. Dist. ($x_p - x_c$)	-0.335			26,974
No Odd-Party-Out (Case 1 or 2)	0.785	0.096	0.118	26,547
Respondent is Odd-Party-Out (Case 3)	0.089	0.083	0.102	26,547
Petitioner is Odd-Party-Out (Case 4)	0.126	0.143	0.094	26,547
Case Characteristics				
En Banc (CoA)	0.018	0.182	0.074	52,731
Dissenting Opinion (CoA)	0.079	0.169	0.069	52,731
District Court Reversed (CoA)	0.076	0.186	0.067	52,731
Case Dismissed (CoA)	0.740	0.067	0.106	52,084
Criminal Case	0.466	0.085	0.069	52,731
Civil Case	0.510	0.069	0.085	52,731
Litigant Characteristics				
In Pauperis (Petitioner)	0.709	0.063	0.110	52,731
Solicitor General (Petitioner)	0.006	0.763	0.072	52,731
Solicitor General (Respondent)	0.572	0.075	0.078	52,731
Corporation (Petitioner)	0.053	0.138	0.073	52,731
Corporation (Respondent)	0.075	0.080	0.076	52,731
Attorney Characteristics				
Pro Se (Petitioner)	0.239	0.021	0.094	52,731
Veteran Atty. (Prev. Cert Grants >0)	0.047	0.225	0.069	52,731
Veteran Atty. (Prev. Cert Grants >5)	0.062	0.208	0.068	52,731
Pet. Atty. Donated	0.650	0.095	0.041	52,731
Resp. Atty. Donated	0.828	0.085	0.033	52,731

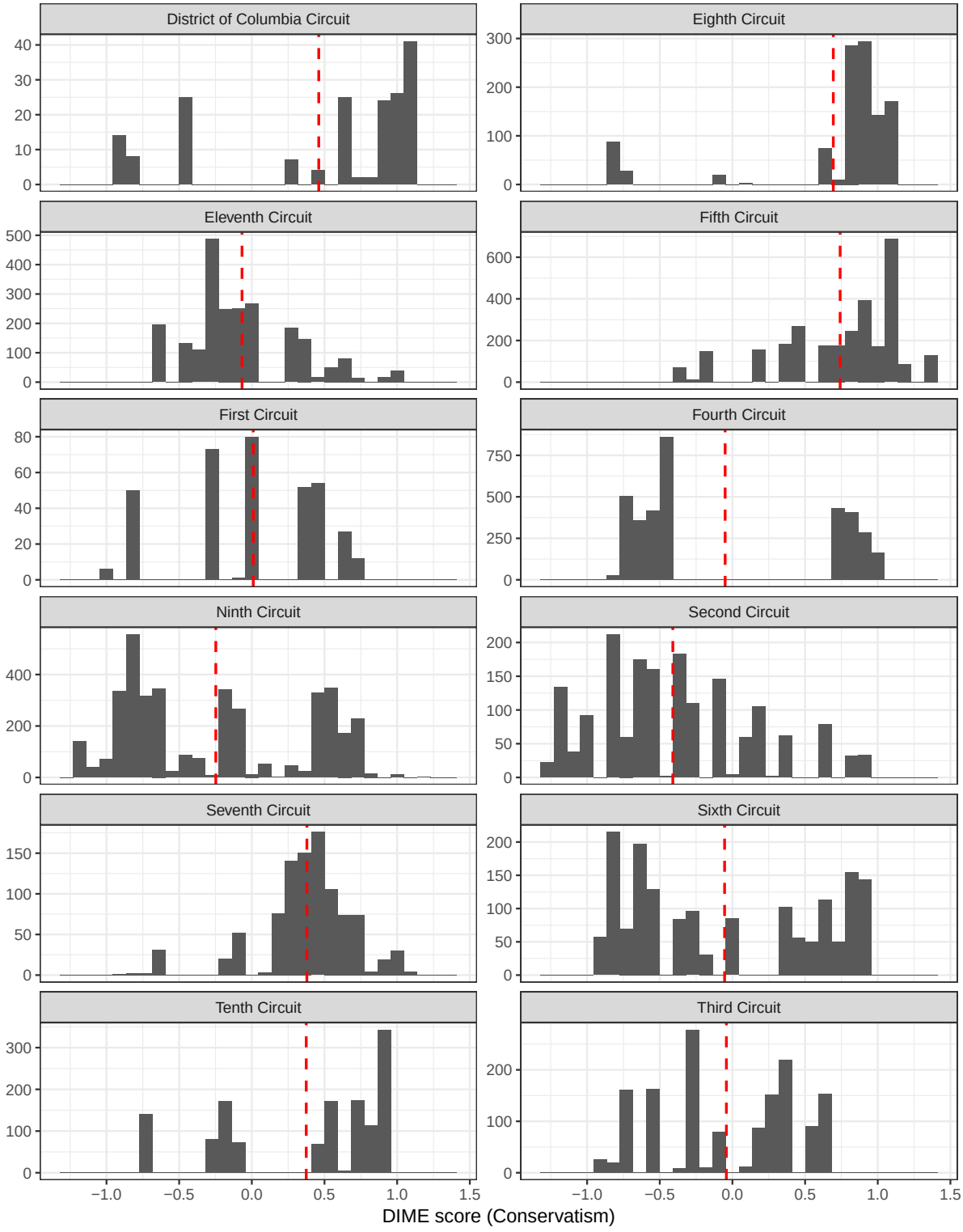
Note: The DIME scores for attorneys are denoted as x_p for the petitioning attorney, x_r for the respondent attorney, and x_c for circuit median.

approaches have the potential to introduce measurement error.[14] We thus rely on ideological estimates constructed by Bonica and Sen (2017) based on political donations made by, and to, the judges. These scores have two key advantages. First, they capture variation within groups of judges in the same jurisdiction appointed by the same presidents (which JCS scores cannot capture). Second, they make it possible to place Supreme Court advocates on the same scale as the lower-court judges.[15]

[14]Party of the appointing President, while usefully employed in several studies, overlooks ideological differences among those appointed by the same president. JCS scores, which use the identity of the appointing President or, if of the same party, the home-state Senator/s, also has the possibility of assigning judges appointed by the same president within the same jurisdiction the same ideological score. For a discussion of the comparative advantages and disadvantages of these measures, see Bonica and Sen (2017).

[15]Additional discussion, including the robustness of the ideological scores to missingness and to strategic giving, can be found in the supplemental appendix of Bonica and Sen (2017).

Figure 2: Within Circuit Variation in Panel Medians



Summary statistics across various subsets of the data are presented in Table 2, which displays the number of observations and mean DIME scores. We also note some interesting geographical patterns by circuit, which could be overlooked by other scores and operationalizations, particularly those that rely on the ideology of the appointing president (or home-state senators) as proxies for judicial ideology. Figure 2 plots the median DIME score for the lower-court panel that heard every court of appeals case in each of the twelve regional circuits from 2003 to 2015. As the figure makes clear, panel medians vary widely in ideology, even compared to the circuit median. In fact, regressing panel medians on circuit medians explains just 28 percent of the overall variation, which suggests that most variation in panel medians is observed *within-circuit* rather than *across-circuit*. Substantively, the figure also makes clear that using the median JCS of the entire circuit as a measure of ideology for every panel in that circuit could be problematic.[16]

5 Results

We now turn to empirically testing our *Odd Party Out* theory of certiorari. We begin by presenting the results from our primary specification and then moving to consider alternative specifications and robustness checks.

[16]Circuit courts can review a panel's ruling on a case *en banc* if the majority of the circuit votes to do so; in practice, however, most cases that generate cert petitions are not reviewed in this manner.

5.1 Primary Results

To estimate the relationship between whether a petitioner or respondent is an *Odd Party Out* and the probability of cert, we use the following regression framework:

$$\begin{aligned} Pr(cert) = \beta_0 &+ \beta_1(cf_P - cf_R) + \beta_2(cf_P - cf_C) \\ &+ \beta_3((cf_P - cf_R) \times (cf_P - cf_C)) \\ &+ \gamma X + \mu_c + \delta_t + \varepsilon_{cjt} \end{aligned} \tag{1}$$

In equation (1), cf denotes the DIME score of the pertinent actor, while P corresponds to the petitioner, R to the respondent, and C to the lower-court panel median. Thus, $cf_P - cf_R$ is the signed ideological distance between the petitioner and the respondent, and $cf_P - cf_C$ is the signed ideological distance between the petitioner and the circuit panel's median. In this specification, β_3 is the main effect of interest. Higher values of β_3 indicate that both the panel and respondent are moving away from the petitioner in the same direction. (For instance, the extreme case would be a very liberal panel ruling for a very liberal respondent against a very conservative petitioner.) In addition, γX denotes a vector of control variables that capture various case characteristics (which we discuss below). To control for the possibilities that there are differences in grant rates across circuits or terms, in all specifications we include circuit fixed effects (μ_c) and Supreme Court term fixed effects (δ_t). Finally, ε_{cjt} denotes the error term. Since the dependent variable is binary, we use a logit model. However, our results are robust to using either a probit or linear probability model.

Table 3 reports the regression results from the regression specified by Equation 1. Column 1 reports the results when including only circuit and term fixed effects (and no other controls). Column 2 adds a series of variables that control for the procedural history of the case, specifically whether there was *en banc* review, a court of appeals dissent, a reversal by the court of appeals of the district court, no hearing by the appeals panel, or the case was

Table 3: Determinants of Cert Grants

	DV: Cert Granted					
	Model 1	**Model 2**	**Model 3**	**Model 4**	**Model 5**	**Model 6**
(Intercept)	-2.300^{***}	-2.566^{***}	-2.956^{***}	-2.261^{***}	-2.399^{***}	-2.531^{***}
	(0.188)	(0.198)	(0.210)	(0.193)	(0.250)	(0.285)
Ideology						
Atty. Dist. $(x_p - x_r)$	-0.051^{**}	-0.107^{***}	-0.101^{***}	-0.110^{***}	-0.082^{***}	-0.153^{***}
	(0.024)	(0.024)	(0.026)	(0.025)	(0.024)	(0.027)
Panel Dist. $(x_p - x_c)$	0.234^{***}	0.258^{***}	0.208^{***}	0.274^{***}	0.240^{***}	0.260^{***}
	(0.027)	(0.027)	(0.028)	(0.028)	(0.027)	(0.029)
Panel Dist. × Atty. Dist.	0.098^{***}	0.097^{***}	0.084^{***}	0.073^{***}	0.101^{***}	0.065^{***}
	(0.012)	(0.012)	(0.012)	(0.012)	(0.012)	(0.013)
Case Characteristics						
En Banc (CoA)		0.372^{***}				0.263^{**}
		(0.114)				(0.120)
Dissenting Opinion (CoA)		0.590^{***}				0.460^{***}
		(0.064)				(0.068)
District Court Reversed (CoA)		0.635^{***}				0.385^{***}
		(0.074)				(0.081)
Case Dismissed (CoA)		-0.241^{***}				-0.201^{***}
		(0.060)				(0.064)
Criminal Case					−0.191	−0.297
					(0.168)	(0.195)
Civil Case					0.098	-0.304^{*}
					(0.167)	(0.178)
Litigant Characteristics						
In Pauperis			-0.234^{***}			-0.137^{**}
			(0.056)			(0.066)
Solicitor General (Petitioner)			3.117^{***}			2.151^{***}
			(0.180)			(0.191)
Solicitor General (Respondent)			-0.515^{***}			-0.339^{***}
			(0.064)			(0.078)
Corporation (Petitioner)			0.445^{***}			0.203^{**}
			(0.076)			(0.081)
Corporation (Respondent)			-0.380^{***}			-0.322^{***}
			(0.085)			(0.090)
U.S. Government (Petitioner)			0.419^{***}			0.337^{***}
			(0.073)			(0.075)
U.S. Government (Respondent)			0.830^{***}			0.328^{***}
			(0.118)			(0.125)
Attorney Characteristics						
Pro Se (Petitioner)				-0.486^{***}		-0.389^{***}
				(0.098)		(0.105)
Veteran Atty. Ln(Prev. Cert Grants + 1)				0.543^{***}		0.457^{***}
				(0.017)		(0.019)
Circuit Fixed Effects	Yes	Yes	Yes	Yes	Yes	Yes
Year Fixed Effects	Yes	Yes	Yes	Yes	Yes	Yes
N	26554	26176	26554	26554	26554	26176
Log Likelihood	−8204.029	−7915.156	−7845.927	−7700.659	−8184.135	−7360.173
AIC	16464.060	15892.310	15761.850	15461.320	16428.270	14804.350

$^{***}p < .01$; $^{**}p < .05$; $^{*}p < .1$

Note: The DIME scores for attorneys are denoted as x_p for the petitioning attorney, x_r for the respondent attorney, and x_c for circuit median.

dismissed by the appeals panel. Column 3 adds a series of variables that control for the parties in the case (if the U.S. was the appellant in the court of appeals, if the U.S. was the

Appellee in court of appeals, if the petitioner is a corporation, and if the petition is proceeding *In forma Pauperis*[17]). Column 4 adds a series of variables that control for the identities of the attorneys in the case (veteran attorney, public defender, or a petitioner proceeding *Pro Se*[18]). Column 5 adds variables to control for whether the case was a criminal case or a civil case. Finally, Column 6 includes all the full battery of control variables simultaneously.

5.2 Alternative Specifications

For ease of interpretation we can also use a simple indicator variable to capture whether a petitioner or respondent is an Odd Party Out. For this approach, we define a party being an Odd Party Out based on a distributional cutoff. We specifically calculate the absolute distance between litigant-panel pairs across all cases. Parties with distances below the 25th percentile (0.4 units) are categorized as *ideologically aligned*. Parties with distances greater than the 75th percentile (1.6 units) are categorized as *ideologically opposed*. A petitioner is an Odd Party Out if she is ideologically opposed to the panel and the respondent is ideologically aligned with the panel median. Likewise, a respondent is an Odd Party Out if he is ideologically opposed to the panel median and the petitioner is ideologically aligned to the panel median. Using these criteria, there are 2,356 cases in our sample (8.8%) where the petitioner is the Odd Party Out and 1,373 cases in our sample (5.2%) where the respondent is the Odd Party Out.[19]

To estimate the relationship between these indicators for whether a petitioner or respondent is an *Odd Party Out* and the probability of cert, we use the following regression,

[17]This designation means that the petitioner is asking for the Supreme Court to waive certain fees.

[18]This designation means that the petitioner is representing himself or herself, most commonly done by prison inmates seeking *habeas corpus* relief from the federal courts.

[19]We can relax these cutoff threshhold by varying the percentiles, which we show in Table A.1. As expected, adjusting the cutoff distances used to classify actors as ideologically aligned/opposed to more extreme values (e.g. the 10th/90th percentiles) results in significantly larger relative estimated effects.

$$Pr(cert) = \beta_0 + \beta_1 * Odd\,Out + \gamma X + \mu_c + \delta_t + \varepsilon_{cjt} \quad (2)$$

where $Odd\,Out$ is a dummy variable that captures the parties' ideological positioning at the lower-court level. Specifically, this variable takes on one of three values: the respondent is the Odd Party Out (Case 1, which is the excluded category), there are no parties who are the Odd Party Out (Cases 2 and 3, which we group together), and the petitioner is the Odd Party Out (Case 4). Our theory predicts that the coefficients associated with Case 4 should be positive and Case 1 should be negative. We again use a logit specification with circuit and Supreme Court term fixed effects.

These results are presented in Table 4. (Again, Case 1, which corresponds to the respondent being the Odd Party Out, is the excluded category.) In all specifications, the coefficients for when there is no Odd Party Out (Cases 2 and 3) and when the petitioner is the Odd Party Out (Cases 4) are in the hypothesized direction, statically significant, and substantively large. To put some additional context, overall, cert is granted about twice as often for cases where the petitioner is the Odd Party Out (15.1% grant rate) compared with cases where the respondent is the Odd Party Out (7.5% grant rate).

For all of these analyses, we note that the size of these effects are comparable to several other variables that have previously been identified as factors—or "cues"—that increase the probability of cert. For instance, the probability of cert is estimated to increase by 3.7% when there was lower court dissenting opinion and by 2.9% in when the circuit court reversed a district court opinion. These results are all consistent with our theory that the relative positions of the advocates and panels are strong predictors of the probability that cert will be granted.

Table 4: Determinants of Cert Grants, Alternative Specification

	DV: Cert Granted					
	Model 1	**Model 2**	**Model 3**	**Model 4**	**Model 5**	**Model 6**
(Intercept)	−2.551***	−2.760***	−2.778***	−2.489***	−2.609***	−2.499***
	(0.212)	(0.221)	(0.224)	(0.215)	(0.268)	(0.298)
Ideology						
No Odd-Party-Out (Case 2 or Case 3)	0.311***	0.301***	0.302***	0.328***	0.289***	0.325***
	(0.107)	(0.109)	(0.110)	(0.109)	(0.107)	(0.114)
Petitioner is Odd-Party-Out (Case 4)	0.582***	0.641***	0.536***	0.502***	0.600***	0.506***
	(0.121)	(0.123)	(0.125)	(0.124)	(0.121)	(0.129)
Case Characteristics						
En Banc (CoA)		0.355***				0.245**
		(0.114)				(0.119)
Dissenting Opinion (CoA)		0.589***				0.467***
		(0.064)				(0.068)
District Court Reversed (CoA)		0.614***				0.372***
		(0.073)				(0.080)
Case Dismissed (CoA)		−0.248***				−0.207***
		(0.060)				(0.064)
Criminal Case					−0.167	−0.302
					(0.168)	(0.195)
Civil Case					0.104	−0.294*
					(0.167)	(0.178)
Litigant Characteristics						
In Pauperis			−0.239***			−0.139**
			(0.055)			(0.065)
Solicitor General (Petitioner)			3.117***			2.151***
			(0.180)			(0.191)
Solicitor General (Respondent)			−0.515***			−0.339***
			(0.064)			(0.078)
Corporation (Petitioner)			0.445***			0.202**
			(0.076)			(0.081)
Corporation (Respondent)			−0.380***			−0.322***
			(0.085)			(0.090)
U.S. Government (Petitioner)			0.419***			0.337***
			(0.073)			(0.075)
U.S. Government (Respondent)			0.830***			0.328***
			(0.118)			(0.125)
Attorney Characteristics						
Pro Se (Petitioner)				−0.486***		−0.388***
				(0.098)		(0.105)
Veteran Atty. Ln(Prev. Cert Grants + 1)				0.543***		0.457***
				(0.017)		(0.019)
Circuit Fixed Effects	Yes	Yes	Yes	Yes	Yes	Yes
Year Fixed Effects	Yes	Yes	Yes	Yes	Yes	Yes
Log Likelihood	−8204.029	−7915.156	−7845.927	−7700.659	−8184.135	−7359.748
AIC	16464.060	15892.310	15761.850	15461.320	16428.270	14803.500
N	26554	26176	26554	26554	26554	26169

***p < .01; **p < .05; *p < .1

Note: The reference category is Respondent is Odd-Party-Out (Case 1).

6 Robustness Checks

The results reported in Part 5 suggest that the relative ideologies of the advocates and lower court judges are an important determinant of whether the Supreme Court will grant a cert petition. We now turn to presenting additional analyses that test these findings.

6.1 Ideology of Attorneys and Case Directionality

An helpful assumption of our framework is that the ideology of the attorneys conveys information about the ideology of the position they are representing—that is, that Justices can look to the ideology of lawyers for meaningful information about the case. This implies that, on average, the ideology of the attorney of record on the cert petition will be related to the ideology of their client's position. Although parties in a dispute may need not necessarily hire lawyers that have ideological views similar to their position in a given case, we believe that this is a reasonable assumption at the Supreme Court level. The ideology of members of the Supreme Court bar are well known, and these lawyers are frequently hired, at least in part, based on their ideology.[20]

We test this reasoning based on case outcomes. Washington University's Supreme Court Database codes the outcomes of Supreme Court cases as conservative or liberal. If our assumption is correct, the winning attorney for a case that is coded as conservative should herself lean in a conservative direction, while the losing attorney (her opposing counsel) should lean in a liberal direction. Following this approach, Table 5 reports the results of a series of regressions where the main independent variable is the DIME score of the winning and losing attorneys and the dependent variable is whether the outcome of the case is

[20]For instance, Paul Clement was the Solicitor General during the George W. Bush administration and in private practice represents conservative clients before the Supreme Court, while Seth Waxman was the Solicitor General during the Clinton Administration and is now known for representing primarily liberal positions before the Supreme Court. Accordingly, we would expect the Court to view update about case quality and importance based on the ideologies of people like Clement and Waxman.

Table 5: Attorney Ideology Predicts the Directionality of Supreme Court Decisions

DV: Directionality of Supreme Court Decisions (Conservative = 1).				
	Model 1	**Model 2**	**Model 3**	**Model 4**
Winning Atty. (DIME)	0.471***	0.454***		
	(0.065)	(0.066)		
Losing Atty. (DIME)	−0.309***	−0.268***		
	(0.065)	(0.067)		
CoA Panel Median (DIME)		−0.499***		−0.489***
		(0.099)		(0.099)
Winning Atty. (DIME) - Losing Atty. (DIME)			0.391***	0.362***
			(0.046)	(0.047)
Constant	0.365	0.360	0.384	0.383
	(0.287)	(0.291)	(0.286)	(0.290)
Term Fixed Effects	Yes	Yes	Yes	Yes
Correct Classification	0.651	0.686	0.646	0.686
Log Likelihood	−768.017	−755.185	−769.578	−757.177
AIC	1570.035	1546.370	1571.157	1548.354
N	1247	1247	1247	1247

***p < .01; **p < .05; *p < .1

conservative. (Conservative outcomes are coded as 1 and liberal outcomes are coded as 0.) As the results in Table 5 show, higher DIME scores—which correspond to more conservative ideologies—are strongly and statistically significantly associated with higher probabilities of conservative decisions. This means, logically, that when the winning attorney is more conservative, the decision eventually returned by the Court is more likely to be conservative as well. This suggests a rough correspondence between attorney ideologies and the sides they represent.

6.2 Repeat Players and the Odd Party Out

Although the results in Table 5 suggest that the ideology of the attorney is a reliable proxy for the legal position that the attorney represents, a concern might be that this may only be true for experienced members of the Supreme Court bar. Parties to disputes may hire high-profile attorneys like Paul Clement or Seth Waxman based on their ideological reputations, but ideology may not be a factor when parties hire attorneys who are not well-known by the Justices. Moreover, since the Justices are less likely to know the ideologies of attorneys who have not previously argued before them, even if these attorneys are hired in part because

Table 6: Cert Grants: Subsetting on Attorney Experience

	DV: Cert Granted		
	(Prev. Cert Grants = 0)	**(Prev. Cert Grants > 0)**	**(Prev. Cert Grants > 0)**
(Intercept)	-2.822^{***}	-0.303	16.495
	(0.362)	(0.724)	(6208.838)
Ideology			
Atty. Dist. $(x_p - x_r)$	-0.119^{***}	-0.224^{***}	-0.308^{***}
	(0.035)	(0.044)	(0.071)
Panel Dist. $(x_p - x_c)$	0.263^{***}	0.241^{***}	0.242^{**}
	(0.036)	(0.049)	(0.098)
Panel Dist. × Atty. Dist.	0.066^{***}	0.045^{**}	0.095^{**}
	(0.016)	(0.023)	(0.039)
Case Characteristics			
En Banc (CoA)	-0.013	0.455^{**}	0.069
	(0.176)	(0.181)	(0.237)
Dissenting Opinion (CoA)	0.392^{***}	0.299^{***}	0.302^{**}
	(0.089)	(0.110)	(0.145)
District Court Reversed (CoA)	0.651^{***}	-0.128	-0.144
	(0.099)	(0.129)	(0.172)
Case Dismissed (CoA)	-0.249^{***}	-0.509^{***}	-0.595^{***}
	(0.076)	(0.107)	(0.150)
Criminal Case	0.155	-0.282	1.194^{**}
	(0.251)	(0.328)	(0.485)
Civil Case	-0.183	-0.032	0.701
	(0.235)	(0.293)	(0.443)
Litigant Characteristics			
In Pauperis	-0.162^{**}	-0.375^{***}	-0.170
	(0.076)	(0.112)	(0.246)
Solicitor General (Petitioner)	3.963^{***}	1.468^{***}	1.838^{***}
	(0.660)	(0.207)	(0.452)
Solicitor General (Respondent)	-0.017	-1.027^{***}	-0.510^{**}
	(0.091)	(0.153)	(0.223)
Corporation (Petitioner)	0.365^{***}	-0.100	0.444^{**}
	(0.106)	(0.126)	(0.187)
Corporation (Respondent)	-0.381^{***}	-0.170	-0.248
	(0.118)	(0.141)	(0.186)
U.S. Government (Petitioner)	0.093	0.529^{***}	0.764^{***}
	(0.096)	(0.132)	(0.188)
U.S. Government (Respondent)	-0.027	0.581^{***}	0.309
	(0.159)	(0.213)	(0.278)
Circuit Fixed Effects	Yes	Yes	Yes
Year Fixed Effects	Yes	Yes	Yes
Atty Fixed Effects	No	No	Yes
Log Likelihood	-5279.336	-2241.796	-1503.805
AIC	10638.670	4563.591	4189.611
N	21019	5359	5359

***p < .01; **p < .05; *p < .1

Note: Model 1 subset on cases where the petitioning attorney has not previously had a cert petition granted. Models 2 and 3 subset on cases where the petitioning attorney has previously had cert petitions granted.

of their ideology, it may convey less information. We thus tested whether our results were consistent when we subset our sample based on whether the attorneys had previously argued a case before the Supreme Court.

Table 6 presents these results. Most tellingly, Column 1 reports the results when both the petitioning and responding attorneys had never previously argued before the Supreme Court—so subsetting to attorneys whose ideology is less likely to be known to the Court. The results in Column 1, however, indicate that that the Odd Party Out theory is predictive of a higher cert probability: when the petitioner is ideologically distant from the panel and from his opposing counsel, the Supreme Court is more likely to take the case. Notably, this basic pattern is also evident among individuals who are repeat players at the Court. Specifically, Column 2 reports the results subsetted to instances where the petitioner attorney argued at least one case before the Court—so individuals with whom the Court had perhaps greater familiarity. Finally, Column 3 includes attorney-specific fixed effects, which captures the fact that certain lawyers—for example, people like Clement, Waxman, and Smith—repeatedly argue before the Court and so could signal in idiosyncratic ways about the case's quality and importance. The findings for Column 3 show that, even with the inclusion of the fixed effects, the basic findings of the Odd Party Out Theory hold.

6.3 Robustness Checks on Using DIME for Lower Court Ideology

Our analyses depend on DIME scores being reasonably good measures of the ideology of circuit court panel medians. Although these measures have been extensively validated in Bonica and Sen (2017), because they are likely to be less familiar than the widely used JCS, we provide two additional tests here.

First, we test whether the judicial DIME scores can predict dissents at the appellate level. Prior research has suggested that greater diversity in the ideology of panels increases the probability that a dissenting opinion will be written (e.g., Hettinger, Lindquist, and Martinek, 2003). If DIME scores are a reliable predictor of the ideology of the panel, then greater spreads between the most liberal and most conservative members of the panel should be associated with higher probabilities of dissenting opinions. Using the data we compiled

Table 7: Dissent on Circuit Panels is Predicted By Within-Panel Ideological Divisions

	DV: Dissenting Opinion by Panel Judge	
	Model 1	**Model 2**
|Panel DIME$_{max}$ − Panel DIME$_{min}$|	0.602***	0.464***
	(0.019)	(0.019)
Criminal		0.098
		(0.077)
Civil		0.530***
		(0.075)
Constant	−3.979***	−2.983***
	(0.027)	(0.112)
Circuit Fixed Effects	No	Yes
Year Fixed Effects	No	Yes
N	261089	261089
Log Likelihood	−41942.460	−39140.990
AIC	83888.910	78337.980

***p < .01; **p < .05; *p < .1

from the Federal Judicial Center's Integrated Database and from CourtListener,[21] we tested this possibility on the entire universe of Court of Appeals decisions filed between 2003 to 2015. The results of these regressions are reported in Table 7, where the dependent variable is whether there is a dissenting opinion (1 of dissent, 0 otherwise). These findings show that greater ideological spreads between the members of the appeals panel are positively associated with higher probabilities that a dissenting opinion will be written. This provides additional evidence that these measures capture ideological variation in lower court panels.

Second, we test whether the appeals court panel median ideology (as estimated by the panel's median DIME score) predicts the eventual directionality of the lower court decision. For this, we rely on the Supreme Court Database's coding of the ideological direction of lower court decisions that were granted cert. Table 8, Column 1, reports the results of regressions where the outcome is the appeals court decision (1 if conservative, 0 if liberal) and the main explanatory variable is the panel's median DIME score. Seeing a positive relationship would imply that more conservative panel medians (as measured by DIME scores) are returning

[21] See Part 4 for a discussion of this data.

Table 8: Predicting the Directionality of Appeals Court Decisions Using Panel Median DIME Scores and Panel Median JCS Scores

	DV: Directionality of Lower Court Decision (Conservative = 1).	
	Model 1	**Model 2**
CoA Panel Median (DIME)	0.131***	
	(0.012)	
CoA Panel Median (JCS)		0.115***
		(0.012)
Constant	0.427***	0.427***
	(0.012)	(0.012)
N	1688	1688
R-squared	0.070	0.054
Residual Std. Error (df = 1686)	0.477	0.481
F Statistic (df = 1; 1686)	126.787***	96.195***

***p < .01; **p < .05; *p < .1

Note: Both measures have been standardized.

more conservative decisions—a finding that would provide good support for the use of DIME scores. This is borne out by the table. In addition, we provide a simple comparison to JCS scores (Table 8, Column 2), for the same analysis. These results are consistent: more conservative panels (as measured by median JCS score) are associated with more conservative decisions. The model using the DIME CFscores, however, has a higher R^2 and so explains more of the variance and better predicts the outcome.

6.4 Petitioner's Decision to File Cert[22]

Our theory suggests that the Supreme Court is more likely to grant cert in cases where the petitioner is the Odd Party Out. If this is true, a clear implication would be that strategic attorneys would understand this dynamic and work backwards, being more likely to file petitions in instances where they find themselves in the Odd Party Out position. Such a strategy would, as we have shown, be entirely rational and would result in a cert petition

[22]Note to Reader: This section presents results that are preliminary. We plan to conduct additional empirical analyses and explore the theoretical implications of the decision to file cert more in the next several months.

that has a higher likelihood of success.

The difficulty with testing this implication of our theory, however, is that it requires data on the universe of cases that could potentially produce cert petitions, especially those decisions from the federal courts of appeals. Unfortunately, to our knowledge, this data is not publicly available. The Federal Judicial Center's Integrated Database does provide information on federal courts of appeals cases, but it does not include attorney information or names of the judges that sat on the panel—both of which are critical to testing the implication of theory on strategic attorney behavior. Although these data limitations make it currently impossible to test whether cert petitions are more likely to be filed in the universe of cases that could theoretically produce a petition, we still wanted to test our theory for at least some cases. To do so, we matched data from the Federal Judicial Center's Integrated Database with data we scraped from CourtListener.[23]

We present the analyses using the data that we were able to match in Table 9, in which we present some preliminary results on whether the Odd Party Out theory predicts whether losing parties at the court of appeals level file for cert. (The dependent variable is coded as 1 if a cert petition was filed in the case and 0 otherwise.) The key independent variables are the appeals panel median CFscore and the petitioner attorney (losing party) CFscore, as well as the distance between these. Here, the results in Table 9 suggest that when the parties are ideologically distant, the petitioner is more likely to file a cert petition (Column 3). Although we do not fully test all of the implications of the Odd Party theory,[24] this is suggestive of the fact that petitioner attorneys are, rationally, considering the implications of the ideological landscape at the appeals court level in deciding whether to file a cert petition with the Supreme Court.

[23]See Part 4 for a discussion of this data.

[24]Note to Reader: as of this draft, we have not compared the distance in between the attorneys and the court of appeals panel. We plan to explore this further in a future draft.

Table 9: Decision to File Cert

	DV: Cert Petition Filed		
Panel CFscore		0.015	
		(0.011)	
Atty. CFscore Distance			0.111***
			(0.034)
Supreme Court Median (MQ Score)		−2.048***	0.076
		(0.063)	(0.196)
Petitioner Atty. CFscore			−0.176***
			(0.047)
Panel CFscore × Supreme Court Median (MQ Score)		−0.080***	
		(0.028)	
Atty. CFscore Distance × Supreme Court Median (MQ Score)			−0.159*
			(0.092)
Supreme Court Median (MQ Score) × Petitioner Atty. CFscore			0.479***
			(0.125)
En Banc	1.139***	1.135***	1.092***
	(0.054)	(0.055)	(0.169)
Dissenting Opinion	0.943***	0.928***	0.514***
	(0.025)	(0.025)	(0.073)
Dissenting Opinion (In Part)	0.465***	0.477***	0.655***
	(0.043)	(0.043)	(0.113)
District Court Reversed	−0.134***	−0.140***	0.072
	(0.023)	(0.023)	(0.093)
Case Dismissed	0.474***	0.475***	0.583***
	(0.015)	(0.015)	(0.084)
Pro Se Petitioner	−0.468***	−0.470***	−0.294
	(0.046)	(0.046)	(0.195)
U.S. Government is Party	−1.715***	−1.717***	−0.860**
	(0.030)	(0.030)	(0.381)
Criminal	0.858***	0.850***	0.986***
	(0.046)	(0.046)	(0.133)
Civil	0.415***	0.409***	0.152
	(0.046)	(0.046)	(0.131)
Constant	−3.482***	−2.970***	−1.889***
	(0.079)	(0.075)	(0.210)
Circuit Fixed Effects	Yes	Yes	Yes
Year Fixed Effects	Yes	Yes	Yes
N	267526	265311	14673
Log Likelihood	−119939.200	−118796.100	−7944.741
AIC	239946.300	237664.200	15963.480

***p < .01; **p < .05; *p < .1

7 What Explains the Odd Party Out Finding?[25]

Our results, particularly those presented in Table 3 suggest that the cert is more likely to be granted when the petitioner is an Odd Party Out (and less likely to be granted when the respondent is an Odd Party Out) but they leave open questions as to why this would be true. As we argued in Part 3, however, we see two plausible likely explanations. The first is that the relative ideologies of the parties conveys important information about the likelihood

[25]Note to Reader: This section is still under construction.

of error (or bias) in the appeals court decision. The second is that an increased distance between the parties naturally signals something about the possible importance—politically or legally—about the case. Both could also be operating together.

In this section, we describe observable implications associated with both of these narratives, although, as of this writing, we have yet to conduct these analyses.

Error (or Bias) Correction. A possible explanation for our findings is that the Court seeks to correct for errors, and that instances of the petitioner being the Odd Party Out represent likely instances of this. Indeed, in line with papers on strategic auditing by the Supreme Court, we would suspect that seeing the petitioner as the Odd Party Out might raise the possibility that the lower federal court is being ideologically biased—that is, it is ruling against an ideological opponent on ideological grounds. This would raise the possibility that the Court would have ruled differently had it (or maybe even a differently situated lower-court panel) heard the case.

An implication of this is that that the Court might be more likely to reverse lower-court rulings in which the petitioner is the Odd Party Out. However, we must consider the fact that the Court's "Rule of Four" means that, for any case granted cert, the petitioner is more likely to win than the respondent, meaning that most lower-court rulings are reversed. (In fact, studies have shown that the petitioner wins roughly two-thirds of the time across all Supreme Court cases.) Even so, examining the reversal rates of cases with an petitioner as the Odd Party Out would still provide some evidence of whether these cases cue the Court to believe there was error or bias.

Legal or Political Importance. Another possible explanation is that the ideological distance between all of the parties—not just between the lawyers, but also between the lawyers and the panel—implies that the case is of particular legal or political importance. Indeed, looking backwards, 5-4 decisions—a good proxy for issue polarization—have risen in

prominence and have characterized highly publicized rulings (including rulings on campaign finance, same-sex marriage, and the death penalty). Given this, we would suspect that increased ideological polarization between the petitioner and respondent lawyers and between lawyers and the appeals panel would be a useful proxy for legal or political importance.

One implication of this is that we might suspect that the strength of this signal might vary according to the reputation of the lawyers involved, with lawyers with longer track records before the Court being able to convey this signal the most strongly. Thus, the Odd Party Out finding should be the strongest when it comes to the elite lawyers—such as Clement, Smith, and Waxman—whose affiliation with a case is also a strong signal of importance. We see some suggestive evidence against this, actually, in Table 6, in which we subset out the relationship between the Odd Party Out status by petitioner attorney experience. The table shows that the Odd Party Out status (for the petitioner) is positively associated with cert being granted even for attorneys who are new to the Court; this suggests that the possible legal or political importance is present even if the signal about the ideological positioning of the attorney is weaker than it would be for a more experienced litigator.

Another implication of the "importance" explanation is that cases that have stronger political or legal importance might be those for whom the signal sent by the Odd Party Out would be particularly strong. Borrowing from existing papers looking at legal and political importance (e.g., Epstein and Segal, 2000; Fowler et al., 2007), a possible test is whether the case appeared on the front page of *The New York Times* or whether it was classified as a "major" case by *Congressional Quarterly*. However, as of this writing, we have not done these analyses, largely due to the fact that these cases comprise an extremely small fraction of overall cert petitions.

8 Conclusion

It is has long been known that the Supreme Court relies on cues when deciding which cases to hear, but one important cue has received little scholarly attention: the ideologies of the advocates. As we have argued, large gaps between the ideologies of the advocates indicates that the case may be politically salient or important, and the Justices are likely to pick up on that cue. Additionally, the interaction between the ideologies of the advocates and the ideology of the lower-court panel also conveys valuable information. When there is a large ideological distance between the advocates, and the lower-court sides with the party who is ideologically opposite to the panel, this suggests the losing party may have a weak case. But when the lower-court sides with its ideological ally and against its ideological opponent, it both suggests that the issue is important and that the outcome may have been influenced by the panel's ideology. Using several novel data sources, we find strong support for this theory.

However, there are several caveats worth noting about our results. First, our claim is not that the petitioner's or respondent's status as an Odd Party Out is the only reason, or even the most important reason, that cert is granted. Instead, our claim is that this is one of the factors, among many, that influences the Court's decision making. Second, it is possible that other factors affect the relative influence of a party being an Odd Party Out. Third, although we have shown that a party's status as the Odd Party Out is strongly associated with changes in the probability of cert being granted, since we are using observational data without any exogenous variation, these results should not and cannot be interpreted causally. Indeed, advocates likely gravitate toward representing certain cases that echo their ideological concerns, suggesting that unobserved case covariates could correlate with attorney ideology.

With these caveats in mind, our results make several contributions to the literature on judicial behavior. Most obviously, they contribute to the large literature on Supreme Court

decisionmaking by documenting previously unidentified factors that are associated with cert petitions being granted. Beyond that, they also emphasize the need to consider the role that advocates play in judicial descionmaking. For instance, the existing literature has largely explored the determinants of whether, conditional on being filed, cert petitions are granted. Little work has been done to explore why, despite the high expense and low probability of success, litigants choose to file cert petitions in the first place. Our results suggest that the views of advocates can, and should, be incorporated into research on the topic going forward. Finally, our results also suggest the need to expanded the way that ideology in the legal system is studied. Although the role that judges' and Justices' ideologies play in case outcomes has been extensively studied, less attention has been paid to the role that other actors' ideologies play in the legal process. But as this paper demonstrates, new data sources are making it possible to incorporate information on the ideologies of a wider range of actors into empirical analysis on judicial behavior.

A Appendix

Figure A.1: Relationship Between Attorney Ideological Distance and Pr(Cert)

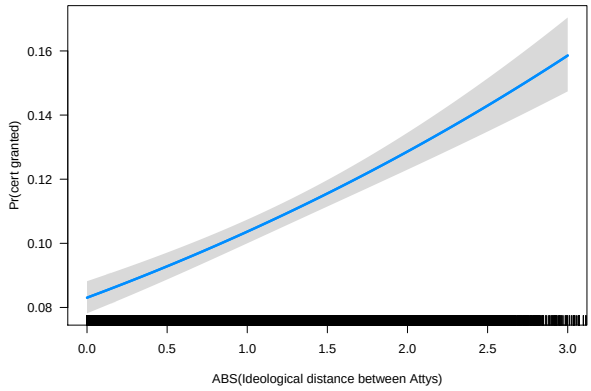


Figure A.2: Relationship Between Petitioner and Circuit Ideological Distance and Pr(Cert)

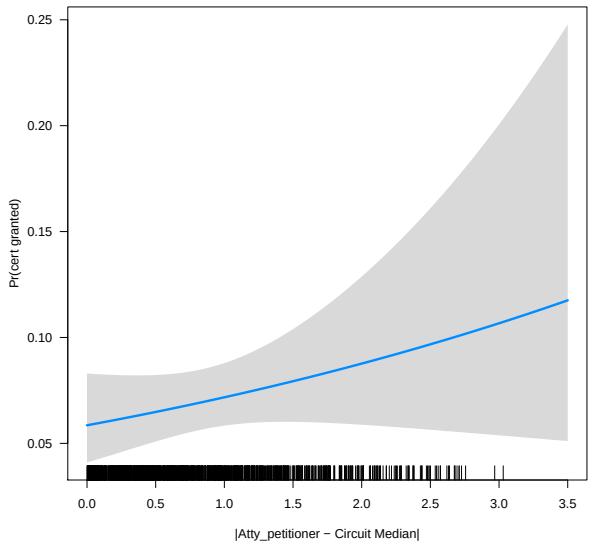


Table A.1: Varying Case Thresholds

	DV: Cert Granted						
	Cutoff Value						
	0.10	**0.15**	**0.20**	**0.25**	**0.3**	**0.35**	**0.40**
(Intercept)	−3.683***	−3.407***	−2.621***	−2.347***	−2.224***	−2.187***	−2.186***
	(0.489)	(0.359)	(0.297)	(0.282)	(0.276)	(0.272)	(0.270)
No Odd-Party-Out (Case 1 or Case 2)	1.651***	1.378***	0.544***	0.240**	0.093	0.056	0.042
	(0.429)	(0.256)	(0.146)	(0.106)	(0.088)	(0.074)	(0.067)
Petitioner is Odd-Party-Out (Case 1)	1.845***	1.433***	0.724***	0.475***	0.346***	0.261***	0.277***
	(0.444)	(0.270)	(0.161)	(0.121)	(0.102)	(0.088)	(0.078)
Circuit *En Banc*	0.281**	0.284**	0.288**	0.289**	0.292**	0.293**	0.292**
	(0.117)	(0.117)	(0.117)	(0.117)	(0.117)	(0.117)	(0.117)
Lower Court Dissent	0.391***	0.389***	0.395***	0.399***	0.398***	0.395***	0.395***
	(0.066)	(0.066)	(0.066)	(0.066)	(0.066)	(0.066)	(0.066)
Reversed District Court Decision	0.385***	0.381***	0.380***	0.378***	0.378***	0.375***	0.373***
	(0.077)	(0.077)	(0.077)	(0.077)	(0.077)	(0.077)	(0.077)
Case Dismissed by CoA Panel	−0.202***	−0.203***	−0.202***	−0.201***	−0.201***	−0.202***	−0.204***
	(0.062)	(0.062)	(0.062)	(0.062)	(0.062)	(0.062)	(0.062)
In Pauperis	−0.406***	−0.403***	−0.405***	−0.401***	−0.399***	−0.399***	−0.397***
	(0.061)	(0.061)	(0.061)	(0.061)	(0.061)	(0.061)	(0.061)
Corporate Petitioner	0.184**	0.183**	0.184**	0.189**	0.189**	0.189**	0.190**
	(0.078)	(0.078)	(0.078)	(0.078)	(0.078)	(0.078)	(0.078)
Corporate Respondent	−0.392***	−0.387***	−0.391***	−0.394***	−0.393***	−0.392***	−0.394***
	(0.086)	(0.086)	(0.086)	(0.086)	(0.086)	(0.086)	(0.086)
Pro Se	−0.311***	−0.315***	−0.313***	−0.311***	−0.313***	−0.315***	−0.317***
	(0.098)	(0.098)	(0.098)	(0.098)	(0.098)	(0.098)	(0.098)
Veteran Atty. Ln(Prev. Cert Grants + 1)	0.432***	0.433***	0.431***	0.430***	0.429***	0.429***	0.430***
	(0.018)	(0.018)	(0.018)	(0.018)	(0.018)	(0.018)	(0.018)
Solicitor General is Petitioner	2.345***	2.340***	2.308***	2.294***	2.292***	2.296***	2.298***
	(0.191)	(0.190)	(0.190)	(0.189)	(0.189)	(0.189)	(0.189)
Solicitor General is Respondent	−0.149**	−0.138*	−0.144**	−0.151**	−0.156**	−0.155**	−0.157**
	(0.071)	(0.071)	(0.071)	(0.071)	(0.071)	(0.071)	(0.071)
Criminal Case	−0.034	−0.035	−0.036	−0.035	−0.037	−0.039	−0.047
	(0.189)	(0.189)	(0.189)	(0.189)	(0.189)	(0.189)	(0.189)
Civil Case	−0.211	−0.207	−0.207	−0.204	−0.204	−0.206	−0.210
	(0.173)	(0.173)	(0.173)	(0.173)	(0.173)	(0.173)	(0.173)
Circuit Fixed Effects	Yes	Yes	Yes	Yes	Yes	Yes	
Year Fixed Effects	Yes	Yes	Yes	Yes	Yes	Yes	
N	26169	26169	26169	26169	26169	26169	26169
Log Likelihood	−7794.286	−7785.655	−7795.915	−7798.065	−7798.254	−7800.536	−7797.235
AIC	15666.570	15649.310	15669.830	15674.130	15674.510	15679.070	15672.470

***p < .01; **p < .05; *p < .1

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