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# EXPERIENCE MATTERS: THE RISE OF A SUPREME COURT BAR AND ITS EFFECT ON CERTIORARI

Joseph W. Swanson\*

## I. INTRODUCTION

During Maureen Mahoney's oral argument in the Michigan affirmative action cases, then-Chief Justice Rehnquist addressed his former clerk as "Maureen."<sup>1</sup> In that same case, Justices Stevens and Souter called one of the amicus briefs the "Carter Phillips brief" and the "Phillips brief," apparently referring to the well-known advocate whose name appeared on its cover.<sup>2</sup> These rare personal references illustrate the growing familiarity between the Justices and the lawyers who appear before them frequently, particularly those attorneys who have devoted their practices to mastering Supreme Court advocacy.

The rise of a dedicated Supreme Court bar has attracted considerable attention from the press<sup>3</sup> as well as comment from

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1. Tony Mauro, *Getting Personal*, XXV Am. Law 33 (May 2003).

2. *Id.*

3. See e.g. Joan Biskupic, *Lawyers Emerge as Supreme Court Specialists*, USA Today 6A (May 16, 2003) ("[I]n the past several years, an elite group of repeat performers that specializes in Supreme Court arguments has emerged."); Tony Mauro, *Building a Better Advocate*, XXIV Am. Law. 73 (Oct. 2002) ("[T]he advocates who appear before [the Justices] seem more and more familiar—a confrerie of lawyers who argue more frequently at the Court than was common among their predecessors."); Marcia Coyle, *High Court Bar's "Inner Circle"*, Natl. L.J. A1, A16 (Mar. 3, 1997) (reporting on the "select cadre of high court stars . . . to whom parties are increasingly turning because of their familiarity with the ways of the court and their track records").

current and former members of the bar itself.<sup>4</sup> This commentary has generally focused exclusively on the role that the specialized bar plays at oral argument and its effect on the merits of each case,<sup>5</sup> but this paper examines a relatively underappreciated issue: whether these elite Supreme Court practitioners enjoy disproportionate success at the critical certiorari stage.<sup>6</sup>

The article begins by documenting the historical development of the Supreme Court bar and profiling a few of its elite members. Then, using earlier studies and anecdotal and statistical evidence, this paper shows that these specialists play a particularly influential role in shaping the Court's agenda. After a discussion of certiorari practice in general, the paper concludes with a qualitative analysis of three successful petitions. These petitions, each written by a leading Supreme Court practitioner, prove that the unique skills that come with specialization distinguish these advocates from their peers<sup>7</sup> and likely account for their greater success at obtaining certiorari.

## II. THE MODERN SUPREME COURT BAR

### *A. Overview*

By the mid-1990s, several Washington firms began developing Supreme Court practice groups.<sup>8</sup> That trend continues today, with an increasing number of firms focused on

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4. See John G. Roberts, Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 J. S. Ct. History 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, to the extent that one can speak of the emergence of a real Supreme Court bar."); Thomas Goldstein, *The Expansion of the "Supreme Court Bar,"* SCOTUSblog, [http://www.scotusblog.com/movabletype/archives/2006/03/the\\_expansion\\_o.html](http://www.scotusblog.com/movabletype/archives/2006/03/the_expansion_o.html) (Mar. 2, 2006, 11:32 a.m. EST) (commenting on expansion of specialized Supreme Court bar).

5. See e.g. Biskupic, *supra* n. 3, at 6A.

6. Cf. Thomas Goldstein, *One Plugged, Thousands to Go*, 25 Leg. Times 68 (Nov. 18, 2002) ("With the exception of a few high-profile matters, the [J]ustices' agenda-setting role is regarded as too complicated or too trivial to merit much discussion, even in the academic literature.").

7. See *infra* n. 152.

8. Coyle, *supra* n. 3, at A16 (discussing several firms that had Supreme Court practices in 1996).

Supreme Court work. One informal survey found that between late 1999 and early 2006, the number of firms offering established Supreme Court practices grew from nine to twenty-four, a remarkable increase of fifteen firms in just six years.<sup>9</sup> This proliferation of Supreme Court specialization has led to a dramatic rise in the number of repeat appearances at oral argument by lawyers who can be characterized as Supreme Court elites.<sup>10</sup>

With seventeen oral arguments to his credit, Thomas C. Goldstein of Akin Gump exemplifies the trend toward Supreme Court specialization.<sup>11</sup> In fact, Goldstein's former law firm touted itself as "the nation's only Supreme Court litigation boutique."<sup>12</sup> In 1999, when he launched that firm, Goldstein believed that "there were many opportunities to bring cases to the Supreme Court that no one was taking there."<sup>13</sup> With that in mind, Goldstein aimed, not only to win cases on the merits, but also to develop an expertise at certiorari practice.<sup>14</sup> According to Goldstein, understanding what motivates the Justices to accept a case is critical to building a successful Supreme Court practice and helps distinguish him as a leading appellate advocate.<sup>15</sup>

While Goldstein's founding of his own boutique presents one successful approach to Supreme Court specialization, Mayer

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9. Goldstein, *supra* n. 4.

10. *See id.*

11. *See Thomas C. Goldstein*, [http://www.akingump.com/attorney.cfm?attorney\\_id=2662](http://www.akingump.com/attorney.cfm?attorney_id=2662) (law-firm biography noting Goldstein's prior association with Goldstein & Howe, and summarizing his Supreme Court experience).

12. *See e.g.* Jason Boog, *Thomas C. Goldstein*, in *40 Under 40: Young Lawyers Chalk up Impressive Achievements and Exert Influence*, 27 Natl. L. J. S8 (May 9, 2005) (noting Goldstein's "unusual dream" of restricting his practice to arguing before the Supreme Court).

13. Jonathan Groner, *Thomas Goldstein—Goldstein & Howe*, in *12 Winning Arguments: D.C.-area Lawyers Who Make Their Mark in Appellate Litigation*, 27 Leg. Times 32 (July 19, 2004).

14. *Id.* He succeeded in developing that expertise, of course, and he has since wound up the business of Goldstein & Howe and joined the Washington office of Akin Gump. *See* n. 11, *supra*.

15. *See id.* Goldstein explained, "The reasons that the Court takes cases have nothing to do with the reasons that lawyers want them to take cases. The Court cares about circuit conflicts, and I built my practice around circuit conflicts." *Id.* For a more detailed discussion of the factors influencing the Court's decision to accept a case for review, see *infra* pp. 183-86.

Brown offers another, and on a larger scale. This international law firm boasts one of the country's leading appellate litigation departments and views Supreme Court work as "its signature dish."<sup>16</sup> Founded in the mid-1980s, the firm's appellate section includes a "dream team" among whose members are Andrew J. Pincus and several other former members of the Solicitor General's office who, over the course of their careers, have argued almost 200 cases before the Supreme Court.<sup>17</sup> Reflecting the importance firms now place on specialization, Mayer Brown maintains a website devoted exclusively to appellate practice that offers resources ranging from Supreme Court docket reports to recent briefs filed with the Court.<sup>18</sup>

Finally, Sidley Austin's Carter G. Phillips, one of the earliest to focus his career on Supreme Court work, now stands out as one of the elite circle's most successful members. Phillips's widely known accomplishments<sup>19</sup> underscore his professional success, and confirm the degree to which Supreme Court practice has become dominated by a handful of repeat players.

### *B. The Supreme Court Bar and Certiorari Practice*

One significant consequence of the growing specialization in Supreme Court advocacy is, as a study by Kevin McGuire indicates,<sup>20</sup> the fact that certain practitioners seem able to routinely persuade the famously skeptical Justices to accept their clients' cases. Given the overwhelming odds against obtaining

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16. Nathan Koppel, *Mayer, Brown: A Private SG's Office*, 23 Leg. Times 16 (Oct. 30, 2000).

17. See *Oral Arguments by Mayer, Brown Attorneys*, <http://www.appellate.net/sctoral.args>.

18. See *Appellate.Net*, <http://www.appellate.net> (noting that, in addition to information about Mayer Brown's attorneys and their cases, the site contains "information and links relevant to Supreme Court and appellate practice").

19. See *Carter G. Phillips*, [http://www.sidley.com/lawyers/bio\\_print.asp?id=3913](http://www.sidley.com/lawyers/bio_print.asp?id=3913) (law-firm biography indicating that Phillips clerked for Chief Justice Burger and worked in the Solicitor General's office before entering private practice, and that he has argued more than fifty cases in the Supreme Court).

20. See Kevin T. McGuire, *The Supreme Court Bar: Legal Elites in the Washington Community* 197-98 (U. Press of Va. 1993) (concluding that, in general, the Justices are more disposed to grant review for petitions written by elite Supreme Court practitioners).

certiorari, this may be the most important skill that these advocates possess.<sup>21</sup> Indeed, the McGuire study, which examines data from the late 1970s and early 1980s, found that the presence of experienced counsel at the petition stage played an influential role even then in determining whether the Justices voted to hear a case.<sup>22</sup>

In explaining his findings, McGuire cites with approval the conviction of experienced Supreme Court advocates that their higher success rates can be attributed to a pair of reasons: the quality and credibility of their petitions.<sup>23</sup> As to the first factor, McGuire posits that experienced Supreme Court litigators generally craft persuasive and well-organized petitions for certiorari, which enjoy improved prospects for success.<sup>24</sup> Moreover, a petition filed by an elite Supreme Court practitioner carries with it a certain aura of credibility, which stems from the advocate's carefully guarded reputation for good judgment.<sup>25</sup> As one veteran attorney explained, "We don't want to put a silly petition up there."<sup>26</sup> Thus, when an expert Supreme Court litigator actually seeks review, the Justices can assume that the issues presented merit their attention.<sup>27</sup>

In a more recent study, McGuire considers the role that former law clerks play in subsequent private practice before the Court.<sup>28</sup> He maintains that former clerks argue before the Justices more often than other attorneys, and that they influence the outcomes in a relatively high percentage of Supreme Court

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21. *See id.* at 198 ("On balance, specialized representation, while important at [the merits stage], appears to be more significant at the petition stage. These expert lawyers . . . are engaged as a means of gaining access.").

22. *Id.* at 181-82. According to McGuire's study, twenty-two percent of the cases brought by experienced Court litigators gained review, while only six percent of the cases brought by non-expert practitioners succeeded at the petition stage. *Id.* at 181. Even after controlling for other variables, McGuire concluded that "experienced Supreme Court representation stands out as an important predictor." *Id.* at 182.

23. *Id.* at 172.

24. *Id.* at 173 (noting that experienced Supreme Court counsel "have developed the skills necessary to make petitions attractive to the Court").

25. *Id.* at 175.

26. *Id.*

27. *Id.*

28. Kevin T. McGuire, *Lobbyists, Revolving Doors and the U.S. Supreme Court*, 16 J.L. & Pol. 113 (2000).

cases.<sup>29</sup> Apparently, the clerks' earlier behind-the-scenes experience gives them a distinct advantage in later practice before the Court.<sup>30</sup> Although McGuire's study omits consideration of the former clerks' influence at the certiorari stage,<sup>31</sup> it would seem that the same insight that leads to success on the merits in private practice likewise confers advantages when petitioning the Court for review.

An article examining the effect of *amicus curiae* briefs at the Supreme Court also offers circumstantial support for the proposition that experience matters when seeking plenary review.<sup>32</sup> The article, which relies on seventy interviews with former Supreme Court clerks,<sup>33</sup> probes whether the identity of an *amicus* brief's author influences the level of consideration given to it.<sup>34</sup> Notably, eighty-eight percent of the clerks interviewed admitted that they paid more careful attention to *amicus* briefs written by renowned attorneys.<sup>35</sup> The clerks generally identified about two dozen lawyers, including Carter Phillips, who, by virtue of their reputation, commanded a close read.<sup>36</sup> Like McGuire's findings, these results imply that experienced Supreme Court advocates probably fare better at the certiorari stage than do their less experienced counterparts.

The practitioners themselves certainly believe that they make a difference. According to one advocate, "Hiring a lawyer at the cert stage who has a reputation at the Supreme Court for playing by the Court's rules is one of the most important things

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29. *Id.* at 114 (noting the movement of former clerks into Washington law firms), 130 (citing statistics to support the claim that "the side with the greater number of [former clerks] preparing and arguing its case is more likely to win").

30. *See id.* at 120-21. As one former clerk said, "[Our] sense of what sorts of legal arguments will fly and which ones will draw hoots is almost always more acute than that of [the lawyer] lacking such exposure." *Id.*

31. *Id.* at 136-37. McGuire acknowledges that his article leaves "some fairly interesting questions unanswered," including whether former Supreme Court law clerks' experience with the Justices enables them to later enjoy greater success at the case-selection stage. *Id.*

32. *See* Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & Pol. 33 (2004).

33. *Id.* at 33.

34. *Id.* at 52-56.

35. *Id.* at 54-56. One clerk explained, "A famous name creates a certain level of expectation; it is a natural human quality to look at the source." *Id.* at 55.

36. *See id.* at 53-55.

a client can do in terms of getting attention paid to his cert petition.”<sup>37</sup> Similarly, a Mayer Brown partner attributes his firm’s thriving appellate practice to the “perception that when you are heading to the Supreme Court, you need someone who knows his or her way around.”<sup>38</sup> Finally, Phillips notes that he is likely to share a “reasonably similar perspective on a case” with the Justices.<sup>39</sup> His clients concur, with one in particular calling Phillips an “important filter through which we pass all the cases in which there is a potential Supreme Court petition.”<sup>40</sup>

These practitioners’ remarkable success confirms the impression that experienced representation makes a difference at the certiorari stage. For instance, the Stanford Law School Supreme Court Litigation Clinic, founded and taught by Goldstein and Stanford professor Pamela Karlan, herself an experienced Supreme Court advocate and former Blackmun clerk,<sup>41</sup> had each of its first four cases granted review by the Court.<sup>42</sup> A partner at Mayer Brown once filed five consecutive successful certiorari petitions.<sup>43</sup> And among the more than fifty cases that Phillips has argued in the Supreme Court are at least

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37. McGuire, *supra* n. 20, at 183-84.

38. Tony Mauro, *Highly Specialized*, XXV Am. Law. 77 (Sept. 2003) (quoting Kenneth Geller, who had argued three cases during what was then the most recent Term); *see also Appellate.Net—Nature of Practice* (describing the character of Mayer Brown’s Supreme Court practice, and indicating that its members “frequently work as co-counsel with litigators at other law firms who seek assistance in handling cases in the Supreme Court, ranging from help in drafting petitions and briefs to preparation for oral argument”).

39. Tony Mauro, *Carter Phillips’ Powers of Persuasion*, 23 Leg. Times 13 (Oct. 16, 2000).

40. *Id.* That client added, “If [Phillips] says we don’t have a prayer that the Supreme Court will accept a case, we take his advice and don’t file. He saves us a lot of money.” *Id.*

41. *See Pamela S. Karlan*, <http://www.law.stanford.edu/directory/profile/32/Pamela%20S.%20Karlan> (faculty biography indicating that Karlan clerked for both Judge Abraham D. Sofaer of the Southern District of New York and Justice Blackmun).

42. *Law Students Enjoy Supreme Success*, Stanford Magazine (Jan./Feb. 2005) (available at <http://www.stanfordalumni.org/news/magazine/2005/janfeb/farm/news/law.html>); *see also* Pamela S. Karlan, Thomas C. Goldstein & Amy Howe, *Go East Young Lawyers: The Stanford Law School Supreme Court Litigation Clinic*, 7 J. App. Prac. & Process 207 (2005) (describing history of Stanford clinic and including table that shows its early results).

43. Mauro, *supra* n. 38, at 77.



seventeen in which he was also responsible for drafting the petitions.<sup>44</sup>

The cases in which review was granted during the Term studied for this article show continuing success for these elite advocates. Indeed, Mayer Brown attorneys persuaded the Justices to accept several of the firm's cases during the studied Term.<sup>45</sup> Likewise, the Court once granted three of Phillips's petitions within the span of just two weeks.<sup>46</sup> These success rates are especially striking when one considers that in recent Terms, the Supreme Court has granted review in only about four percent of all paid cases filed.<sup>47</sup> Evidently, experienced Supreme Court advocates play a pivotal role at the certiorari stage.

### III. BACKGROUND AND CONTEXT: OBTAINING CERTIORARI

The material in this section provides a brief summary of the certiorari process and some of the recommended methods for achieving success at the petition stage. Although this information is in some sense peripheral to the material addressed in the rest of the article, the general reader may find that it provides useful context for the sections that follow.

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44. Carter G. Phillips, *Providing Strategies for Success: Petitioning the Supreme Court for Certiorari*, 46 *For the Defense* 22 (Apr. 2004) (noting that Phillips had by the spring of 2004 argued seventeen cases in which he was also responsible for the petitions).

45. *See Cases Handled by Mayer Brown Rowe & Maw LLP during the 2005 U.S. Supreme Court Term* (July 13, 2006), <http://www.appellate.net/about/sc2005cases.PDF> (accessed Oct. 17, 2007; copy on file with Journal of Appellate Practice and Process).

46. *See* Supreme Court of the United States, *Docket*, <http://www.supremecourtus.gov/docket/docket.html> (accessed September 13, 2007; copy on file with Journal of Appellate Practice and Process). Searching "Carter G. Phillips" on this page yields a list of cases in which Phillips appeared as counsel of record, including *eBay, Inc. v. MercExchange L.L.C.*, No. 05-130, in which certiorari was granted on November 28, 2005; *Burlington N. & Santa Fe Rwy. Co. v. White*, No. 05-259, in which certiorari was granted on December 5, 2005; and *Mohawk Ind., Inc. v. Williams*, No. 05-465, in which certiorari was granted on December 12, 2005. It also shows that Phillips was counsel of record in two additional cases, *Norfolk S. Rwy. Co. v. Sorrell*, No. 05-746, and *Environmental Defense v. Duke Energy Corp.*, No. 05-848, in which certiorari was granted on the same day later in the Term.

47. *See e.g.* Timothy S. Bishop, Jeffrey W. Sarles & Stephen J. Kane, *Tips on Petitioning for Certiorari in the U.S. Supreme Court*, Circuit Rider 28, 28 (May 2007) (noting that approximately four percent of petitions are granted). In accord with convention, I use "paid cases" here to distinguish the cases to which this article refers from the *in forma pauperis* cases filed at the Supreme Court by prisoners.

### *A. Factors Leading to Review on the Merits*

The four percent success rate for paid petitions in recent Terms confirms the difficulty of persuading the Supreme Court to hear a case on the merits. As the Court's own rules make clear, review on certiorari "is not a matter of right, but of judicial discretion."<sup>48</sup> In exercising this discretion, the Justices and their clerks approach each petition with a "presumption against a grant."<sup>49</sup> The petitioner must somehow overcome this powerful bias by making a compelling—yet concise—argument for certiorari.<sup>50</sup>

Supreme Court Rule 10 lists the factors that the Justices consider in deciding whether to grant a cert petition. They include, among other things, conflicting opinions regarding an important issue among the federal circuits, a circuit's significant departure from the "accepted and usual course of judicial proceedings," a circuit's decision on an unsettled—yet important—question of federal law, or a circuit's ruling that conflicts with Supreme Court precedent.<sup>51</sup>

According to a now-classic behind-the-scenes look at the Supreme Court's screening process, a combination of these factors must exist to make a case certworthy.<sup>52</sup> Among these factors, a circuit conflict stands out as the most important.<sup>53</sup>

48. Sup. Ct. R. 10 (available at <http://uscode.house.gov>). The rule also says, "A petition for a writ of certiorari will be granted only for compelling reasons." *Id.*

49. H.W. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* 218 (Harv. U. Press 1991). In describing the presumption, one clerk remarked, "We saw our role as clerks to find every reason possible to deny cert. petitions." *Id.* Another added, "There is enormous pressure not to take a case . . . there is an institutionalized inertia not to grant cert." *Id.*

50. One report estimates that the Justices spend five minutes or less on each petition for certiorari. Stephen M. Shapiro, *Certiorari Practice: The Supreme Court's Shrinking Docket*, <http://www.appellate.net/articles/certpractice.asp> (accessed Sept. 15, 2007; copy on file with Journal of Appellate Practice and Process).

51. Sup. Ct. R. 10. The Rule also warns, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

52. Perry, *supra* n. 49, at 245.

53. See e.g. *id.* at 246. As research for his study into how the Court sets its agenda, Perry interviewed several Justices and many of their former clerks. In discussing the importance of circuit conflicts, one clerk told Perry that such "splits" were the "driving force" behind the rare grant of review on certiorari. *Id.*

Goldstein agrees, observing that “circuit conflicts so dominate the cert docket that the [J]ustices appear to regard them as a violation of a norm of federal law.”<sup>54</sup> As a result, most petitions allege a conflict among the lower courts, particularly where the split involves an outcome-determinative issue.<sup>55</sup>

After circuit conflicts, the second key factor bearing on certworthiness is whether the petition presents an important issue.<sup>56</sup> In assessing an issue’s importance, the Court considers its breadth of effect as opposed to its depth.<sup>57</sup> Specifically, an issue affecting a great number of people is more important to the Court than an issue likely to have a significant effect on only one entity or individual.<sup>58</sup>

A petition may demonstrate importance in a variety of ways. For example, the petition might refer to a dissenting opinion in the court of appeals or a judge’s dissent from a denial of rehearing en banc.<sup>59</sup> In addition, amicus briefs in support of a petition for certiorari can prove invaluable.<sup>60</sup> Although difficult to obtain, an amicus brief submitted by the Solicitor General on behalf of the United States dramatically increases one’s chances of receiving plenary review.<sup>61</sup> Should the federal government refrain from filing on a petitioner’s behalf, however, the next best sources of amicus support include the states and certain trade associations.<sup>62</sup>

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54. Goldstein, *supra* n. 6, at 68.

55. Phillips, *supra* n. 44, at 22-23. As one commentator writes, the experienced Supreme Court practitioner will “[s]acrifice everything necessary to make the point [in the petition] that [the] case is an ideal vehicle to resolve an indisputable circuit split.” Tony Mauro, *Apprentice Appellants*, XXVI Am. Law. 75 (June 2004).

56. Perry, *supra* n. 49, at 253.

57. *Id.* at 254.

58. *Id.*

59. Phillips, *supra* n. 44, at 23.

60. *Id.* Phillips points out that amicus briefs serve two purposes. First, they help a case stand out visually by making the bundle of briefs delivered to each chambers for that case appear more substantial than those petitions lacking amicus support. Second, from a practical standpoint, an argument that a particular issue carries important implications for the entire nation sounds more convincing in the presence of amicus briefs echoing that sentiment. *Id.* at 24.

61. *See id.* at 23-24.

62. *Id.* at 24.

In addition, and notwithstanding Rule 10's warning against petitioning to correct erroneous factual findings or misapplied law,<sup>63</sup> the Court's tendency to reverse cases on the merits suggests that lower court error does improve a petition's chances.<sup>64</sup> Thus, an effective merits argument may spark the Justices' interest.<sup>65</sup> As Phillips writes, "[I]t is worth a few pages to make it clear that your client should win."<sup>66</sup>

Despite the foregoing general guidance on certworthiness, however, the process remains highly subjective and unpredictable.<sup>67</sup> In fact, while a circuit conflict, important issue, or erroneous lower court decision may make a case a stronger candidate for review, any one of a list of factors can just as easily lead to a denial of certiorari. For instance, some petitions are deemed "clear denials," because the Court is simply not interested in the issue presented.<sup>68</sup> Examples of traditional "clear denials" include tax or patent cases.<sup>69</sup>

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63. See *supra* n. 51.

64. See Phillips, *supra* n. 44, at 26; Shapiro, *supra* n. 50.

65. See Shapiro, *supra* n. 50 (noting that Justice Brennan considered "apparent error" a factor contributing to certworthiness).

66. Phillips, *supra* n. 44, at 26.

67. See William H. Rehnquist, *The Supreme Court: How It Was, How It Is* 265 (William Morrow & Co. 1987) ("Whether or not to vote to grant certiorari strikes me as a rather subjective decision, made up in part of intuition and in part of legal judgment."); see also Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View From the Supreme Court*, 8 J. App. Prac. & Process 91, 96 (2006) ("I am uncertain precisely what accounts for the reduced number of cases in recent years. When we go into Conference, however, the Justices approach the petitions with an eye toward taking the cases, not with an eye toward keeping the workload down."); Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 Wash. U. L.Q. 389, 452 (2004) (quoting Justice Jackson as saying that in many instances, no one understands exactly why the Court denied certiorari).

68. Perry, *supra* n. 49, at 226-30.

69. *Id.* at 229-30. Note, however, that the Court may in coming years be more inclined to grant review in patent cases. See e.g. Peter O. Huang, *eBay v. MercExchange as a Sign of Things to Come: Is the Supreme Court Still Reluctant to Hear Patent Cases?* 8 J. App. Prac. & Process 373, 374 n. 5 (2006) (listing then-recent patent cases heard in the Supreme Court). Indeed, the Court granted certiorari in a patent-royalty case as this article was being prepared for publication. See *Quanta Computer, Inc. v. LG Elec., Inc.*, No. 06-937 (Sept. 26, 2007) (granting certiorari).

Meanwhile, inadequate “percolation” among the lower courts also spells doom for many petitions.<sup>70</sup> Likewise, a petition filed in a case with “bad facts”—those that might hinder resolution of the question presented—or one filed in a case that suffers from procedural defects will usually be denied, particularly where other cases raising the same legal issue are still being litigated in the lower courts.<sup>71</sup> Finally, the Court refuses many petitions that pose “intractable” issues<sup>72</sup> for which the Court cannot perceive adequate solutions.<sup>73</sup>

### *B. Drafting an Effective Petition for Certiorari*

The Court’s rules mandate that petitions “be stated briefly and in plain terms.”<sup>74</sup> Given that an overworked law clerk will read the petition first, common sense dictates that the petition should avoid rhetoric and must remain concise and readable.<sup>75</sup> Although Court rules impose a thirty-page limit for petitions, most successful submissions probably stay well below that ceiling.<sup>76</sup>

Aside from these general suggestions, the leading Supreme Court advocates offer the following specific tips for each of the major sections in a petition for certiorari.

#### *1. The Question Presented*

Mayer Brown’s Stephen Shapiro calls the first page of any petition the “most important page in the entire document,”

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70. Perry, *supra* n. 49, at 230-34. The Court would generally prefer to postpone consideration of an issue until other judges and legal scholars have rendered their analysis. *Id.* at 231.

71. *Id.* at 234-37. Where various lower court cases are addressing the same legal question as that presented in a pending petition for certiorari, the issue is said to be “in the pipeline.” *Id.* at 236.

72. *Id.* at 239-44.

73. *Id.* at 240-41.

74. Sup. Ct. R. 14(3).

75. See Timothy S. Bishop & Jeffrey W. Sarles, *Petitioning the United States Supreme Court for Certiorari: A Primer*, <http://www.appellate.net/articles/petit799.asp> (accessed Sept. 15, 2007; copy on file with Journal of Appellate Practice and Process).

76. See Phillips, *supra* n. 44, at 24.

because it contains the question presented.<sup>77</sup> He recommends that the question presented “be the colorful fly that irresistibly leads to a strike,”<sup>78</sup> but Carter Phillips suggests using a “pithy and largely neutral” tone.<sup>79</sup> If necessary to convey the context surrounding the question presented, a brief introductory paragraph may be included.<sup>80</sup> Finally, if a conflict exists among the lower courts, the question presented ought to acknowledge it.<sup>81</sup>

## 2. *The Statement of the Case*

After the question presented, a petition for certiorari must contain a “concise statement of the case setting out the facts material to consideration of the questions presented.”<sup>82</sup> This portion of the petition should remain “simple and lean,” because any statement exceeding five or six pages conveys the impression that the case is overly complex and “fact-bound.”<sup>83</sup> As in the question presented, any circuit conflict should be mentioned here so as to “whet the reader’s appetite.”<sup>84</sup> In some instances, it may make sense to begin the statement of the case with a summary of the argument, rather than a mere restatement of the facts.<sup>85</sup> The statement usually ends with a description of the holdings below. It is useful there to highlight any provocative language from the lower court’s opinion, including whether the court recognized the existence of a circuit split or felt constrained by ill-advised Supreme Court precedent.<sup>86</sup>

## 3. *The Argument*

The statement leads to the petition’s argument section,

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77. Shapiro, *supra* n. 50.

78. *Id.*

79. Phillips, *supra* n. 44, at 25.

80. Shapiro, *supra* n. 50.

81. Phillips, *supra* n. 44, at 25.

82. Sup. Ct. R. 14(1)(g).

83. Shapiro, *supra* n. 50.

84. *Id.*

85. Phillips, *supra* n. 44, at 25.

86. *See id.* at 26.

which sets forth the reasons for review.<sup>87</sup> Typically, this section includes a more formal summary at the outset before describing any conflict among the lower courts.<sup>88</sup> To facilitate the Justices' understanding of the issues, a lower court conflict must be adequately described; merely citing the cases and providing parentheticals does not suffice.<sup>89</sup> After presenting a lower court conflict, the petition must convince the Justices of the issue's importance.<sup>90</sup> Proving importance demands an imaginative approach and may require reference to an issue's financial consequences, the possibility of increased litigation, and the practical difficulties presented when an area of the law is in disarray.<sup>91</sup> The argument section should also explain why the decision below is wrong, combining in that explanation both legal reasoning and an analysis of the relevant public policy.<sup>92</sup> Lastly, in the event that the respondent submits an opposition brief, the petitioner should file a reply brief. This allows the petitioner to respond to the opposition, get in a last word, and bolster the arguments advanced in the petition.<sup>93</sup>

#### IV. THREE ELITE ADVOCATES, THREE SUCCESSFUL PETITIONS

##### *A. Introduction*

The following analysis of three petitions filed during a recent Term illustrates the role of an elite Supreme Court bar at

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87. Sup. Ct. R. 14(1)(h).

88. Phillips, *supra* n. 44, at 26. Note that although Phillips advocates focusing the argument on lower court conflicts, he maintains that an argument should not emphasize as its leading point that the holding below conflicts with Supreme Court precedent. *Id.* at 23. He bases this advice on the fact that "the Court ordinarily does not view its role as involving mere error correction." *Id.*

89. *Id.*; see also Shapiro, *supra* n. 50 ("[I]t is not enough to allege the existence of a conflict. The conflict must be proven. Describe the decisions asserted to be in 'conflict' in sufficient detail, and with sufficient quotations, to make your conflict argument unmistakable.").

90. Shapiro, *supra* n. 50.

91. See *id.*

92. *Id.*

93. Bishop & Sarles, *supra* n. 75.

the certiorari stage. Their authors are all prominent members of that bar: As of this writing, Goldstein has argued seventeen cases before the Court,<sup>94</sup> Pincus has argued sixteen,<sup>95</sup> and as noted above, Phillips has argued more than fifty.<sup>96</sup> Further, all three advocates and their firms have enjoyed disproportionate success in obtaining certiorari.<sup>97</sup> And it appears that each was hired, at least in part, for his expertise in drafting petitions for certiorari, as none was counsel below in the cases analyzed here.<sup>98</sup>

Each of these petitions illustrates a different strategy for proving certworthiness, highlighting the expertise and creativity of elite Supreme Court advocates. In the first petition, Goldstein demonstrates how to use a circuit conflict as the leading argument for certiorari. Next, Pincus's petition boldly asks the Court to revisit existing precedent. In the final petition, Phillips extracts a certworthy issue from an otherwise fact-bound lower court opinion. All three illustrate the lessons for certiorari practice discussed above in Section III(B), and underscore the important role that experienced counsel can play in setting the Court's agenda.<sup>99</sup>

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94. See n. 11, *supra*.

95. See *Andrew J. Pincus*, [http://www.mayerbrown.com/lawyers/profile.asp?hubbardid=P139278592&lawyer\\_name=Pincus%2C+Andrew+J%2E](http://www.mayerbrown.com/lawyers/profile.asp?hubbardid=P139278592&lawyer_name=Pincus%2C+Andrew+J%2E) (law-firm biography describing Pincus's work in the Supreme Court).

96. See n. 19, *supra*.

97. See text accompanying nn. 42-47, *supra*.

98. See *In Re Rousey*, 347 F.3d 689 (8th Cir. 2003) (indicating that counsel below did not include Goldstein); *Independent Ink, Inc. v. Illinois Tool Works, Inc.*, 396 F.3d 1342 (Fed. Cir. 2005) (indicating that counsel below did not include Pincus); *MercExchange, L.L.C. v. eBay Inc.*, 401 F.3d 1323 (Fed. Cir. 2005) (indicating that counsel below did not include Phillips).

99. In addition, comparing the Pincus petition with the opposition brief filed in the same case further demonstrates that veteran Supreme Court advocates probably understand the objectives at the certiorari stage better than do most other attorneys. See *infra* n. 152.



### *B. The Goldstein Petition: Rousey v. Jacoway*

#### *1. The Issue as Stated*

Working with the assistance of students in Stanford's Supreme Court Clinic, Goldstein asks the Court in this petition to settle a "three-way circuit conflict" regarding "whether and to what extent Individual Retirement Accounts (IRAs) are exempt from a bankruptcy estate under 11 U.S.C. [§] 522(d)(10)(E)."<sup>100</sup>

#### *2. The Case Below*

This issue arose because the trustee objected when the Rouseys sought to exempt from their bankruptcy estate the portion of their assets held in two IRAs containing funds rolled over from a previous employer's pension plan.<sup>101</sup> Noting that it was required by its own precedents to find for the trustee, the Eighth Circuit held that the Rouseys' IRAs were not exempt.<sup>102</sup> Even so, the Eighth Circuit recognized that four other circuits had held otherwise, and conceded that this alternate rule might be "more consistent" with the purposes of the Bankruptcy Code.<sup>103</sup>

#### *3. Analysis of the Petition*

The Eighth Circuit's acknowledgement of the obvious circuit conflict makes the argument for review here much easier than is typical. Indeed, that discord, so crucial to certworthiness,<sup>104</sup> may explain the *Rousey* petition's brevity and its lack of amicus support.<sup>105</sup> Nevertheless, the *Rousey* petition illustrates the way in which a skilled Supreme Court practitioner

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100. Pet. for Writ of Cert., *Rousey v. Jacoway*, 544 U.S. 320, 2004 WL 763798 (Apr. 6, 2004), at i.

101. *In re Rousey*, 347 F.3d 689, 691 (8th Cir. 2003).

102. *Id.* at 693.

103. *Id.*

104. See *supra* nn. 53-55 and accompanying text.

105. The *Rousey* petition runs a mere eighteen pages, while the other two petitions discussed here each span twenty-eight pages, and both enjoy considerable amicus support. (The *Rousey* petition has none.)

can make the most of a conflict.

From the outset of the petition, Goldstein establishes that this case implicates a deep division among the circuits.<sup>106</sup> The question presented asks whether the Court should resolve the “three-way circuit conflict,” and the statement of the case mentions the “entrenched three-way split among the courts of appeals,”<sup>107</sup> using key quotes from the Eighth Circuit’s opinion to reinforce that point.<sup>108</sup> Thus, even before the reader reaches the petition’s argument section, the circuit split is apparent.

The argument maintains this focus. Not only does the first heading label the courts of appeals “intractably divided,” but the argument’s carefully chosen language also supports the proposition that a conflict exists.<sup>109</sup> To foreclose any suggestion that the issue has not undergone sufficient percolation in the lower courts, the petition notes that the Eighth Circuit had already denied rehearing on the ground that its long-established precedent barred the grant of an exemption.<sup>110</sup> In addition, the petition describes the Third Circuit’s twenty-one-year-old rule as “similarly entrenched.”<sup>111</sup>

One criticism that might be leveled against this petition is that the cases from circuits that exempt IRAs are not given much explanation beyond citation.<sup>112</sup> The straightforward nature of the issue in this case makes such criticism unwarranted, however, for a court either exempts IRAs or it does not. Furthermore,

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106. As this petition makes clear, the lower courts fell into “three camps” regarding whether to exempt IRAs from a bankruptcy estate. *Rousey* Petition, *supra* n. 100, at 5. While the Eighth Circuit denied exempt status, the Second, Fifth, Sixth, and Ninth Circuits permitted exemption. *Id.* at 6-8. The Third Circuit, meanwhile, refused to exempt future IRA payments to debtors younger than the statutory threshold for withdrawal, but exempted “present payments” to debtors who had reached that age. *Id.* at 9.

107. *Id.* at i, 2.

108. For example, the petition quotes the language in which the Eighth Circuit recognized that several of its sister circuits disagreed with its holding. *Id.* at 5.

109. *Id.* at 6-10. Examples of this effective language include calling the Eighth Circuit’s position “unique,” explaining the Third Circuit’s stance as “yet another rule,” and referring to these circuits together as “outliers.” *Id.*

110. *Id.* at 10. Given the denial of a rehearing, the petition argues, “This three-way circuit split will not resolve itself without this Court’s intervention.” *Id.*

111. *Id.* One might contend that the age of the Third Circuit’s rule renders any conflict stale, but Goldstein uses the passage of time to his advantage, explaining that it underscores the Third Circuit’s recalcitrance.

112. *See id.* at 7.

using only citations and parenthetical explanations for the other circuits' decisions offers the added benefit of keeping the petition short and readable.

The petition's streamlined discussion of the exempting circuits also enables Goldstein to devote greater detail to the Third Circuit's rule. For example, the question presented challenges both the Eighth Circuit's decision in this case and the Third Circuit's rule from prior cases.<sup>113</sup> Later, the petition spends two pages discussing Third Circuit case law.<sup>114</sup> Although challenging both the Eighth and Third Circuits as "intractable outliers" may appear overly ambitious, it permits Goldstein to argue later that this case "provides an ideal vehicle to resolve the three-way circuit split."<sup>115</sup> Because Goldstein attacks both circuits, he also keeps the Court from passing over his petition in favor of a later Third Circuit case.

Aside from its adept handling of the circuit split, the petition also answers any concerns about the importance of the question presented, which might initially seem mundane and unworthy of the Court's review. Goldstein effectively illustrates the importance of this issue by addressing both its breadth and its depth.<sup>116</sup> To show the number of people affected by this issue, the petition cites the staggering number of bankruptcies filed each year, as well as the widespread use of IRAs.<sup>117</sup> To highlight the issue's depth, the petition explains the dire financial consequences for individuals whose attempted exemptions are denied.<sup>118</sup> The use of these powerful statistics transforms what might initially appear to be hyperbole<sup>119</sup> into a

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113. *See id.* at i. By asking both "whether" and "to what extent" IRAs are protected, the question presented seems to address both the Eighth Circuit's categorical denial and the Third Circuit's practice of granting an exemption only to debtors of a certain age.

114. *Id.* at 9-10.

115. *See id.* at 11. The petition explains how, in light of the petitioners' ages when they filed for bankruptcy and then filed their appeal, the Third Circuit's rule would dictate the same result reached by the Eighth Circuit. *Id.*

116. *See id.* at 12-14; *see also* text accompanying nn. 56-58, *supra*.

117. *Rousey* Petition, *supra* n. 100, at 12.

118. *Id.* at 12-13 (discussing the significant amount of money saved in most IRAs, as well as the fact that such accounts offer important retirement savings opportunities to self-employed people and small-business employees).

119. *Id.* at 12 (stating baldly that "[t]ens or even hundreds of thousands of people every year are likely affected by the resolution of this issue").

convincing argument for a uniform rule. It also demonstrates, particularly in light of Goldstein's effective treatment of the circuit conflict and his prudent decision to challenge the rules applied in both the Eighth and Third Circuits, the advantage that experienced Supreme Court advocates provide at the certiorari stage.

*C. The Pincus Petition: Illinois Tool Works Inc.  
v. Independent Ink, Inc.*

*1. The Issue as Stated*

Mayer Brown's Pincus asks in this petition whether, in a lawsuit alleging unlawful tying under the Sherman Act, the plaintiff must show that the defendant possessed actual market power, or whether market power can be presumed from the existence of the defendant's patent on the tying product.<sup>120</sup>

*2. The Case Below*

The underlying litigation began when Independent accused Trident, an Illinois Tool subsidiary, of illegal tying by requiring its patent licensees to use only unpatented Trident ink with the patented printhead technology that was the subject of the licenses.<sup>121</sup>

The district court rejected Independent's claim that this arrangement violated the Sherman Act, holding that for patent tying to be illegal, the plaintiff had to show that the defendant possessed market power in the market for the tying product.<sup>122</sup> Because Independent failed to prove Trident's economic power in the printhead market, the district court denied its claims.<sup>123</sup>

The Federal Circuit reversed, finding that two Supreme

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120. Pet. for Writ of Cert., *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 2005 WL 779574 (Apr. 4, 2005), at i.

121. *Independent Ink, Inc. v. Illinois Tool Works, Inc.*, 396 F.3d 1342, 1345 (Fed. Cir. 2005).

122. *Id.*

123. *Id.*

Court cases “squarely establish that patent and copyright tying . . . do not require an affirmative demonstration of market power.”<sup>124</sup> Instead, the market power required to prove a Sherman Act violation could be presumed from the existence of the patent.<sup>125</sup> Although the Federal Circuit felt bound by this precedent, it acknowledged that the market-power presumption had faced considerable criticism from both members of the Court and academic writers, and concluded that “[t]he time may have come to abandon the [market-power presumption].”<sup>126</sup> Nevertheless, the court said, “[I]t is up to the Congress or the Supreme Court to make this judgment.”<sup>127</sup>

### 3. *Analysis of the Petition*

Armed with the strong language in the Federal Circuit’s decision, the petition for certiorari urges the Court to revisit its patent-tying precedent.<sup>128</sup> Despite the Federal Circuit’s open invitation for the Justices to reconsider the market-power presumption, however, Pincus faces a daunting challenge in making the case for certiorari.<sup>129</sup> To persuade the Court to accept the case, Pincus assembles a creative argument that is noteworthy for both its length<sup>130</sup> and its lack of emphasis on circuit conflict.<sup>131</sup> Unlike Goldstein, who relies heavily on a

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124. *Id.* at 1348 (citing *U.S. v. Loew’s, Inc.*, 371 U.S. 38 (1962), and *Intl. Salt Co. v. U.S.*, 332 U.S. 392 (1947)).

125. *Id.* at 1348-49. But the court also held that this presumption was rebuttable. *Id.* at 1352.

126. *Id.* at 1351.

127. *Id.*

128. See *Illinois Tool* Petition, *supra* n. 120, at 7-9 (quoting Federal Circuit decision, summarizing scholarly critique, and noting, among other things, that several members of the Court had questioned the presumption’s continuing vitality).

129. The petition acknowledges the gravity of its request by conceding that “[t]his Court approaches reconsideration of its decisions ‘with the utmost caution.’” *Id.* at 8 (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)).

130. At twenty-eight pages, the petition easily exceeds Goldstein’s eighteen-page petition in *Rousey*, and of course it ignores the conventional wisdom that successful petitions generally do not run beyond twenty pages. See *supra* text accompanying n. 76.

131. The petition eventually addresses the “disarray among the lower courts” over the market-power presumption, but its discussion of the split appears relatively late in the argument and accounts for just three pages of text. See *Illinois Tool* Petition, *supra* n. 120, at 21-24. Given the importance the Court attaches to circuit conflicts, the decision to

three-way circuit split,<sup>132</sup> Pincus employs a handful of other effective techniques, including a more frequent use of exaggerated rhetoric, to demonstrate the certworthiness of his case. And his skill in deploying them demonstrates that elite representation makes a difference at the certiorari stage.

One way in which Pincus persuades the Court to reconsider its precedents is by emphasizing the district court opinion. In fact, the statement of the case devotes three full pages to the proceedings in the district court.<sup>133</sup> A critic might question this use of resources, particularly given the general advice to keep the statement of the case “simple and lean.”<sup>134</sup> However, the extended focus on the proceedings in the district court proves effective, because it indicates that petitioners would prevail on the merits absent the market-power presumption.<sup>135</sup>

The petition’s other tactics further demonstrate the need for the Court to reexamine the presumption. In one example, the petition asserts that “on two separate occasions Justices have questioned the *International Salt-Loew’s* standard.”<sup>136</sup> This approach works particularly well, because it reminds the Justices—the petition’s ultimate audience—that two of them had already urged reconsideration of the doctrine.<sup>137</sup> If, as one practitioner notes, a petition makes a convincing argument for certiorari by citing a dissenting opinion from the panel below,<sup>138</sup> then referring to the Justices’ own prior opinions seems likely to be even more effective.

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deemphasize this confusion among the lower courts is curious. It might, however, reflect Pincus’s judgment that persuading the Court to reconsider established precedent requires a different approach.

132. See *supra* pp. 190-92.

133. *Illinois Tool* Petition, *supra* n. 120, at 4-6.

134. See *supra* text accompanying n. 83.

135. See *Illinois Tool* Petition, *supra* n. 120, at 5-6 (noting that the district court insisted on “real proof” of Trident’s market power, rather than simply presuming that such power existed by virtue of the printhead patent, and that when Independent failed to “proffer any evidence that [Trident possessed] market power,” the district court granted summary judgment).

136. See *id.* at 20-21.

137. The two were then-Chief Justice Rehnquist and then-Justice O’Connor, both of whom were members of the Court in April 2005, when the *Illinois Tool* petitioners sought review.

138. See Phillips, *supra* n. 44, at 23.

The petition also argues that the policies of the federal agencies charged with enforcing the Sherman Act—the Department of Justice and the FTC—mandate a reconsideration of the market-power presumption.<sup>139</sup> To make this point, the petition quotes both the agencies’ antitrust guidelines<sup>140</sup> and public speeches by leaders of the DOJ’s Antitrust Division.<sup>141</sup> In addition, after filing the petition, Pincus submitted a supplemental brief highlighting a more recent speech by an antitrust official calling for a grant of certiorari in the case and reiterating the government’s belief that intellectual property rights do not necessarily confer market power.<sup>142</sup> Thus, even though the Solicitor General did not file an amicus brief at the certiorari stage of this case, the petition and supplemental brief effectively indicate the federal government’s interest in the litigation, and once again demonstrate the importance of retaining experienced counsel who can show the Court that a case is certworthy.<sup>143</sup>

Whether describing the district court opinion, the Justices’ own criticisms, or the enforcement policies of the relevant federal agencies, the petition leverages a broad range of authoritative sources to make a convincing case for certiorari, even citing to supportive scholarly authority.<sup>144</sup> It supplements these third-party arguments, however, with its own bold attacks on the market-power presumption. For instance, the petition points out that the presumption “simply makes no sense in the context of the Court’s present-day tying jurisprudence” and characterizes it as embodying “formalism over economic

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139. *Illinois Tool* Petition, *supra* n. 120, at 17-19.

140. *Id.* at 17 (quoting the guidelines as providing that, “[t]he federal antitrust enforcement agencies ‘will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner,’ even in tying cases”).

141. *Id.* at 18-19. As the petition states, one antitrust official said that “[b]ecause patents do not necessarily confer market power, there is no presumption that tying arrangements involving patented products necessarily are illegal.” *Id.* at 18.

142. Supp. Br. of Petr., *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 2005 WL 1387955 (June 9, 2005), at 1 (citing speech by Assistant Attorney General R. Hewitt Pate on June 3, 2005).

143. As expert Supreme Court advocates maintain, indicating that there is strong federal government interest in the case usually increases the odds of obtaining review. See discussion *supra* p. 184.

144. *Illinois Tool* Petition, *supra* n. 120, at 19-20.

substance.”<sup>145</sup> Perhaps Pincus turns to this sort of forceful rhetoric, which is largely absent from Goldstein’s *Rousey* petition, because he fears that a more subtle tone might fail to persuade the Court to revisit its precedent. In any event, this strong language, which might seem out of place in another petition, sounds credible here and proves highly effective when read in conjunction with the similar statements made by the district court, the Justices who raised the issue in other cases, and the federal government.

The *Illinois Tool* petition must go to great lengths to demonstrate the importance of the matter at issue because persuading the Court to accept a patent case had been difficult in what was then the recent past.<sup>146</sup> Faced with this challenge, Pincus employs a handful of techniques to outline the issue’s significance. Like Goldstein in the *Rousey* petition,<sup>147</sup> he uses key quotes from the appellate court’s opinion to convince the Court of the need to intervene.<sup>148</sup> Using a time-honored technique, Pincus also explains how, with plaintiffs more likely to withstand motions to dismiss and summary judgment, the market-power presumption will engender an increase in meritless lawsuits.<sup>149</sup> His reply brief further underscores the importance of this issue by devoting its entire first paragraph to a summary of the amicus briefs submitted in support of certiorari.<sup>150</sup> Because amicus briefs can play such an important role in demonstrating an issue’s importance, Pincus wisely ensures that they do not go unnoticed here.

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145. *Id.* at 10. The petition adds that in light of the Supreme Court’s more recent tying cases, it is “inconceivable” that the Court would adopt this market-power presumption today. *Id.* at 14.

146. See Perry, *supra* n. 49, at 229-30. Although the Justices for years expressed little interest in patent cases, that may be changing. See Huang, *supra* n. 69; see also Marcia Coyle, *Justices Ponder Printer Ink Case*, 28 Natl. L.J. P1 (Dec. 5, 2005) (reporting that the then-current Term contained the Court’s “heaviest patent docket in 40 years”).

147. See *supra* n. 108 and accompanying text.

148. See *Illinois Tool* Petition, *supra* n. 120, at 7 (quoting the Federal Circuit as recognizing the criticism leveled against the market-power presumption, but leaving it to the Supreme Court to overrule its own precedent).

149. *Id.* at 26.

150. Reply Br. of Petr., *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 2005 WL 1182268 (May 17, 2005) at 1.



With so much of the petition making a strong case for certiorari, the phrasing of the question presented leaves the reader disappointed.<sup>151</sup> Rather than conveying the urgent need for Supreme Court review, the overly long and dry question presented suggests the exact opposite: that this case presents a dull and complicated patent issue. In fact, the question presented is couched in terms so neutral that the respondent's brief leaves it virtually unchanged.<sup>152</sup>

The relative weakness of the question presented does not, however, detract from what is otherwise a highly persuasive petition. Through effective references to the district court decision, the Justices' earlier opinions, and the federal government's enforcement policies, the petition explains why the Court must revisit its market-power presumption. In addition, the petition's judicious use of forceful rhetoric and policy arguments further solidifies the reader's impression that the issue raised in it is of significant importance. The ability to weave all of these techniques into a single petition confirms the value added by expert Supreme Court advocates, and it helps to explain their remarkable success in shaping the Court's agenda.

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151. See *Illinois Tool* Petition, *supra* n. 120, at i.

152. See Respt. Br. in Opposition, *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 2005 WL 1079177 (May 4, 2005), at i. Although he wisely leaves petitioners' question presented intact, respondent's counsel fails to explain why the Court should not accept the case. This appears to have been a mistake, for "[r]espondent's job is to show that none of the traditional criteria for Supreme Court review have been satisfied. . . . The opposition builds on and reinforces the general presumption of unworthiness that characterizes the Supreme Court's entire screening process." Shapiro, *supra* n. 50. In this case, respondent's counsel, rather than rebut petitioners' argument regarding the importance of the issue or otherwise explain its unworthiness, relies almost entirely on a merits argument in support of the market-power presumption. For instance, he writes, "The presumption of market power in patents is not only solid law, it is solid economics, and is a presumption which has conferred a substantial benefit on consumers throughout the years." Br. in Opposition, *supra* this note, at 14. Later, respondent's counsel accuses petitioners of engaging in an "illegal scheme" and asserts, "Most legitimate businesses do not engage in patent tying." *Id.* at 23. These merits arguments illustrate a fundamental misunderstanding of the objectives in certiorari practice and, when contrasted with Pincus's effective petition, underscore the difference that skilled Supreme Court advocates can make at the Court's agenda-setting stage.

*D. The Phillips Petition: eBay Inc. v. MercExchange, L.L.C.*

*1. The Issue as Stated*

In this petition, Phillips seeks review of a Federal Circuit decision mandating that in patent cases, absent exceptional circumstances, a permanent injunction will issue upon a finding of infringement.<sup>153</sup>

*2. The Case Below*

The Federal Circuit articulated this general rule after hearing an infringement appeal in which MercExchange alleged that the fixed-price purchasing component of eBay's website infringed its patents.<sup>154</sup> Although a jury found for MercExchange, the district court had refused to enjoin eBay.<sup>155</sup>

On appeal, the Federal Circuit affirmed the finding of infringement, but reversed the denial of a permanent injunction.<sup>156</sup> In its lengthy opinion, the court focused largely on the sufficiency of the evidence and other factual matters, providing little analysis of whether a permanent injunction should issue automatically upon a finding of infringement.<sup>157</sup> Yet in its brief discussion of injunctive relief, the Federal Circuit relied on what it termed the "general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances."<sup>158</sup> Concluding that no such circumstances existed in this case, it reversed the district court's denial of MercExchange's request for equitable relief.<sup>159</sup>

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153. Pet. for Writ of Cert., *eBay Inc. v. MercExchange, L.L.C.*, \_\_\_ U.S. \_\_\_, 126 S. Ct. 1837, 2005 WL 1801263 (July 25, 2005) at i.

154. *MercExchange, L.L.C. v. eBay Inc.*, 401 F.3d 1323, 1325 (Fed. Cir. 2005). Readers interested in additional analysis of this case, its procedural history, and its importance, can refer to Huang, *supra* n. 69.

155. *MercExchange*, 401 F.3d at 1326.

156. *Id.*

157. *See id.* at 1327-38.

158. *Id.* at 1339. The court repeatedly emphasized the fact that issuance of an injunction should be the norm in these cases. For example, it characterized the denial of injunctive relief as "rare" and an "unusual step." *Id.* at 1338-39 (citation omitted).

159. *Id.* at 1339.

### 3. Analysis of the Petition

Unlike the appellate courts in *Rousey*<sup>160</sup> and *Illinois Tool*,<sup>161</sup> the Federal Circuit in this case did not offer any particularly provocative language suggesting the need for Supreme Court review.<sup>162</sup> Unable to exploit a lower court's recognition of a circuit conflict or a suggestion that the Court's precedent ought to be reexamined, Phillips turns to alternative techniques to make the case for certiorari. For example, although he generally advises against using as a lead argument the fact that the lower court has deviated from Supreme Court precedent, Phillips resorts to that strategy here.<sup>163</sup> In addition, he relies heavily on the presence of amicus briefs—both in support of certiorari and against it—to make the argument for Supreme Court review.<sup>164</sup>

Although both the unorthodox lead argument and the effective use of amicus briefs demonstrate the flexibility and creativity that experienced Supreme Court counsel provide at the certiorari stage, it is Phillips's distillation of the Federal Circuit's fact-bound opinion to a single certworthy issue that makes the *eBay* petition remarkable. As a veteran Supreme Court advocate, Phillips knows not to contest the underlying finding of patent infringement.<sup>165</sup> Instead, he challenges the

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160. See *supra* text accompanying n. 108.

161. See *supra* text accompanying n. 148.

162. Indeed, the Federal Circuit expressed no reservations about its decision. It said, "We therefore see no reason to depart from the general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances." *MercExchange*, 401 F.3d at 1339.

163. Compare Phillips, *supra* n. 44, at 23 (noting that to begin by arguing that the case presents a conflict with a Supreme Court decision "will be read as a sign of weakness") with *eBay* Petition, *supra* n. 153, at 13 (containing a first heading in the argument section that characterizes the Federal Circuit's per se rule as "fundamentally inconsistent with . . . this Court's rulings").

164. See Reply Br. of Petr., *eBay Inc. v. MercExchange, L.L.C.*, \_\_\_, U.S. \_\_\_, 126 S. Ct. 1837, 2005 WL 2600844 (Oct. 11, 2005) at 1-2. Here, Phillips highlights the presence of numerous amici filing in support of eBay, asserting that "[t]hose submissions alone warrant this Court's review of the important holding below in this case." *Id.* at 1. He also notes the presence of respondent's amici, which provides further evidence of the issue's importance. *Id.* at 2.

165. A re-examination of that finding would involve the Court in a technical, fact-intensive analysis, and would almost certainly lead to the denial of certiorari. See S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of

Federal Circuit's holding on the issue of whether a permanent injunction must issue upon a finding of patent infringement.<sup>166</sup>

Phillips's decision to seek review of this single straightforward issue must have pleased the weary clerks who struggled through the Federal Circuit's cumbersome opinion before reading the petition. The question presented here—more so than the other two petitions analyzed in this article—succinctly conveys the issue to be reviewed.<sup>167</sup> At the same time, it foreshadows the petition's major themes by asking whether the Federal Circuit “erred” in establishing its “general rule” that a permanent injunction “must” issue.<sup>168</sup> Respondent's significant revision in the opposition brief of Phillips's question presented attests to the effectiveness of Phillips's work.<sup>169</sup>

Another significant feature of Phillips's *eBay* petition is its speculation that a circuit conflict would exist absent the Federal Circuit's exclusive jurisdiction over patent appeals.<sup>170</sup> Looking to cases involving trademark and copyright law—and even including in his analysis a few cases construing statutes much farther removed from patent law—Phillips cites other lower court decisions recognizing the importance of equitable discretion in considering whether to issue permanent injunctions.<sup>171</sup> According to Phillips, these cases show that other circuits would resist adopting the Federal Circuit's more rigid doctrine in patent infringement cases.<sup>172</sup>

The use of this analogy underscores the importance experienced practitioners place on circuit conflicts when petitioning for Supreme Court review. In this case, however,

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erroneous factual findings.”).

166. See *eBay* Petition, *supra* n. 153, at i.

167. *Id.*

168. *Id.*

169. See Resp't. Brief in Opp., *eBay Inc. v. MercExchange, L.L.C.*, \_\_\_ U.S. \_\_\_, 126 S. Ct. 1837, 2005 WL 2396812 (Sept. 26, 2005), at i (characterizing the issue as “[w]hether the Federal Circuit correctly determined that the district court abused its discretion in denying a permanent injunction under the case-specific facts presented here once infringement was found”).

170. See *eBay* Petition, *supra* n. 153, at 21 (“Although not directly in conflict because only the Federal Circuit hears patent appeals, it is clear that other courts of appeals would have rejected the Federal Circuit's wooden approach to injunctive relief.”).

171. *Id.* at 20-22.

172. *Id.* at 21.

although the hypothetical circuit split is inventive, it is not particularly compelling. Unlike the direct three-way circuit conflict in *Rousey*, the dispute here is inherently speculative, given that only the Federal Circuit entertains patent appeals.<sup>173</sup> Furthermore, by citing only Second Circuit cases,<sup>174</sup> Phillips fails to explain how this issue could have undergone sufficient “percolation” among the lower courts to merit Supreme Court review.<sup>175</sup>

At twenty-eight pages, the petition also seems long, especially given Phillips’s suggestion elsewhere that most successful petitions do not approach the thirty-page limit.<sup>176</sup> In particular, the twelve-page statement of the case ignores the general principle that this segment of the petition ought to remain “simple and lean” and consist of no more than five or six pages.<sup>177</sup> But rather than limit himself here to restating the facts, Phillips uses the statement much as he uses the argument: to make the case for certiorari. For example, the statement of the case begins with a four-page summary of the argument,<sup>178</sup> which provides context for the question presented<sup>179</sup> and illustrates the issue’s importance.<sup>180</sup> Thus, although it lengthens the petition, Phillips’s decision to include an argument for certiorari at this early stage of the petition is understandable, especially given the absence of a genuine circuit conflict in this case and the Court’s traditional disdain for patent cases.<sup>181</sup>

The statement of the case also makes good use of the district court opinion.<sup>182</sup> Phillips quotes from it extensively, highlighting in particular the portion of the opinion in which the

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173. *See id.*

174. *See id.* at 22.

175. *See supra* n. 70 and accompanying text.

176. *See supra* n. 76 and accompanying text.

177. *See supra* n. 83 and accompanying text.

178. *See eBay* Petition, *supra* n. 153, at 1-4. Phillips has recommended this approach elsewhere. *See supra* n. 85 and accompanying text.

179. *See eBay* Petition, *supra* n. 153, at 2 (explaining that the Federal Circuit’s rule on permanent injunctions disregards both a federal statutory scheme and Supreme Court precedent).

180. *See id.* at 3-4 (arguing that the Federal Circuit’s rule unduly burdens innovating companies and will spawn massive amounts of litigation).

181. *See supra* n. 69 and accompanying text.

182. *See eBay* Petition, *supra* n. 153, at 8-10.

court characterized the decision regarding injunctive relief as “within [the] discretion of the trial judge.”<sup>183</sup> Like the *Illinois Tool* petition’s reliance on the district court opinion in that case, the *eBay* petition’s focus on the trial court’s judgment here shows the reader that, absent the Federal Circuit’s misguided rule, the petitioners would win on the merits. Thus, by providing a summary of the argument and a helpful recap of the district court’s opinion, this unusually long statement of the case accomplishes its objective.

Phillips’s petition in *eBay* once again illustrates the importance of using veteran Supreme Court counsel at the certiorari stage. His experience manifests itself in a number of ways, including his choice to petition the Court solely on the permanent injunction issue, as opposed to the fact-intensive finding of patent infringement. His articulation of a hypothetical circuit split, if not entirely convincing, nevertheless shows the premium placed on creativity in Supreme Court advocacy. Finally, the persuasive statement of the case reflects Phillips’s awareness that, with the odds of gaining review so small, every page of a petition must advance the goal of persuading the Justices to grant certiorari.

## V. CONCLUSION

A growing number of attorneys have devoted their careers to mastering Supreme Court advocacy. Although the demands of this practice require a range of skills, perhaps the greatest challenge arises at the certiorari stage, where the odds of obtaining review are miniscule. Although the Court’s certiorari decisions remain highly subjective, certain experienced practitioners enjoy disproportionate success in crossing the Court’s threshold. Whether making the most out of a circuit court conflict, urging reconsideration of the Court’s precedent, or reducing a dense lower court opinion to one certworthy issue, the three illustrative petitions discussed here reflect their authors’ understanding of the nuanced process by which the Supreme Court sets its agenda. One can only conclude that

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183. *Id.* at 8.

hiring experienced Supreme Court counsel to petition the Justices for review may improve one's chances considerably.