Cite and Sway? Attorneys, Briefs, and Persuasion at the U.S. Supreme Court*

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Abstract

Supreme Court justices complete large amounts of work in short periods of time, and they need attorneys' help to get it done. Attorneys provide that help in merits briefs, where they offer preliminary legal research while also trying to persuade the justices toward their side. One persuasive tactic utilized in briefs is showing specific sitting justices how their past decisions lead them to favor one side over the other. Do attorneys do this and does it work? Using new citation data collected from 2,396 cases presented between the 1984 and 2018 terms, we analyze the frequency with which attorneys mention sitting Supreme Court justices' past decisions explicitly and in passing. We then examine if the attorneys' appeals convince the justices to side with them. Our results suggest that attorneys target ideologically-congruent justices and the median justice, and that doing so significantly increases the likelihood of winning that justice's vote.

*Replication files are available in the JOP Data Archive on Dataverse (`https://dataverse.harvard.edu/dataverse/jop`).The empirical analysis has been successfully replicated by the JOP replication analyst. Supplementary material for this article is available in the appendix in the online edition.

After the Supreme Court agreed to review the University of Michigan's use of affirmative action in undergraduate and law school admissions in 2002, all eyes turned to Justice Sandra Day O'Connor. Lawyers on both sides of *Gratz v. Bollinger* and *Grutter v. Bollinger* knew they could secure four votes based on ideology alone – the four liberal justices consistently upheld affirmative action programs and the four conservative justices just as consistently overturned them – but O'Connor's votes on the issue were context-dependent and thus more difficult to predict (Thomas 2019). Finding a way to win O'Connor over became a near-obsession for both parties. Attorneys representing Jennifer Gratz and Barbara Grutter repeatedly referenced two of O'Connor's anti-affirmative action majority opinions in their briefs, hoping to draw her attention and legal sympathies (Perry 2007). The attorneys representing the University of Michigan and its president, Lee Bollinger, also made a point of discussing O'Connor's decisions in their legal arguments, including a little-noticed concurrence in a gender discrimination case (Perry 2007). Clearly, the attorneys believed leaning on O'Connor's legal past was the key to building a winning judicial coalition.

The Constitution tasks Supreme Court justices with definitively addressing the complicated legal questions other judges struggled to answer (Hamilton 2003), but the justices do not complete this task independently. Every case that comes to the Court involves nuance and complexity, and the justices, who are policy generalists, need to study case specifics and relevant law before they can resolve anything in a legally consistent and instructive manner (Hitt 2019). The justices' workplace demands, specifically the need to clear their convoluted docket against an annual deadline, limit their ability to fully immerse themselves in any single case, however, so they need something to help them get started (Black, Owens and Wohlfarth 2024). Attorneys provide this help in written merits briefs, which offer the justices summarized case backgrounds and initial analyses of relevant legal issues (Hazelton and Hinkle 2022). Briefs' formal and informal parameters ensure the justices get the information they need in an easily-digestible manner (Johnson 2004). But attorneys also use briefs to shape the justices' perceptions of a case (Wedeking 2010), ideally in a manner most favorable

to their clients (Garner 2003), and they have a multitude of tools to deploy in pursuit of this goal (Schoenherr and Black 2019). As the *Gratz* and *Grutter* examples show, one such tool is tailoring parts of their arguments toward the justices whose votes they want to win.

While attorneys primarily focus on producing a broad and well-reasoned argument in their briefs (Corley 2008; Wedeking 2010), and the nature of the Court's work makes ideological appeals the most useful diversions from that approach (Epstein and Kobylka 1992), finding space to cite key justices' past decisions should boost the individual persuasiveness of an argument, too. After all, these appeals ease the burdens of the decision-making process by showing a targeted justice how her past decisions lead to the attorney's desired outcome (Barry 2021). So are attorneys systemically making these appeals? And if yes, do they work? To answer these questions, we create and utilize an original dataset of citations in Supreme Court merits briefs filed between the 1984 and 2018 terms, covering three hundred thousand citations in 4,792 briefs across 2,396 cases. We first find that attorneys strategically cite their ideological allies and the median justice. Then, we show that targeted appeals significantly increase the probability a justice votes for a party, particularly when that party is the petitioner. Targeted appeals are no match for ideological agreement, of course, but our results suggest they can still help a party pick up votes.

In conducting this research, we make three major contributions to the literature on institutional capacity and policymaking. First, we incorporate Supreme Court justices into a broader conversation about institutional burdens and their effects on policymakers' approaches to their jobs. Political actors always have more work to do than they have time and attention to dedicate to it, and they consequently develop procedures that ease workplace burdens and increase institutional capacity (Jones 2001). This is why, for example, rank-and-file members of Congress empower their leaders to write legislation for them (Curry 2015). But procedural changes often invite new influences to creep into the policymaking process, such as legislative leaders hoarding information about said legislation to ensure party unity on a vote. At the Supreme Court, the justices' burdens stem from the cognitive complexity

of the work they do (Black, Owens and Wohlfarth 2024), and they ask attorneys to provide relief (Hazelton and Hinkle 2022). This decision, in turn, invites attorneys to influence the justices' decisions in meaningful ways. Our research suggests that understanding workplace burdens and their relief mechanisms is crucial for understanding who affects policy outcomes in any institution, including the Supreme Court.

Second, we show that attorneys' strategic legal decisions influence the justices' behavior. Research demonstrates attorneys are strategic about the decision to appeal to the Court (Zorn 2002), how to frame a case's issues when they get there (Epstein, Segal and Johnson 1996), and when to upset protocol for the sake of political gains (Schoenherr and Waterbury 2022). Analyses of the Court's most experienced advocate, the Solicitor General, also suggest the justices let attorneys' work guide their own (Black and Owens 2012). Attorneys clearly affect judicial decisions, but their arguments and appeals are almost universally absent from discussions of judicial decision making, which instead focus on the justices' ideological preferences (but see Corley 2008; Hazelton and Hinkle 2022; Wedeking 2010). By collecting data on attorney decisions during the brief writing process and using it to show attorneys not only approach the justices strategically but get a response for doing so, we add to a growing literature demonstrating that attorneys affect the decision-making process and emphasize the necessity of including them in future analyses of the Court.

Finally, our work encourages a broader conversation on whether personalized appeals can win over elite decision makers. Given their legitimate need to appear above the political fray, Supreme Court justices publicly separate themselves from popularly-elected decision makers by suggesting their work is different and they follow different rules (Zilis 2015). Consequently, scholars often treat Supreme Court justices as unique political actors. In reality, however, all elite decision makers are similar in their desire to be consistent in approach and outcome, as well as their willingness to accept help in pursuit of that goal (Hitt 2019). Knowing this, our research opens the door to the idea that other political actors could also respond positively to personalized, targeted appeals that allow for consistency, from lower

court judges to members of Congress to the president. Research already suggests political actors gladly accept information provided by external parties, especially when that information is ideologically appealing (see, e.g., Hall and Deardorff 2006). We take this argument a step further by suggesting parties tailoring their pitches toward individual decision makers can reap big benefits, too.

Institutional Capacity, Cognitive Burden, and Efficiency

While political scientists often assume policymakers are maximally rational, both institutional and personal limits hinder their ability to chase their goals. At an institutional level, popular expectations collide with policymakers' ability to complete their work (Hall and Deardorff 2006), and individually, policymakers struggle to coherently work on several disparate issues at once without burning out (Gonzales 2005). In the judiciary, navigating around these limitations is crucial for the fair administration of justice. Given the importance of their work and the precedents it sets, judges are duty-bound to address the cases on their dockets as quickly and consistently as possible (Rossouw and Rothmann 2020). This is not an easy task, because the federal docket spans many issues and the judges are policy generalists who need time to review relevant case law before they can resolve anything (Newman and Levy 2024). On the lower courts, caseloads are large but judges are bound by precedent and thus face easier questions (Bowie, Songer and Szmer 2014); at the Supreme Court, the caseloads are significantly smaller, but the justices answer the more difficult questions that demand more research and rational, effortful thought (Black, Owens and Wohlfarth 2024). Judges are slower to resolve cases and less consistent in their decision making when their workloads are high (Hitt 2019; Schrever, Hulbert and Sourdin 2024), so finding ways to reduce their work is essential for a functioning and legitimate judiciary.

At the Supreme Court, the justices have developed several means of reducing their workloads so they can consistently and efficiently address the questions before them (see broadly Engel and Weinshall 2020). Supreme Court justices can, and have, asked Congress

for more and better resources that open up their time, including increased funding for the clerks who aid their daily tasks (Woodward and Armstrong 1979), and more control over their docket (Lane 2022). More often, however, the justices alter their internal processes to increase efficiency. Sometimes, they pool resources to make processes more efficient (Black, Boyd and Bryan 2014). Alternatively, the justices outsource some of their most time-consuming tasks to experts, including their clerks (Black and Boyd 2012), interest groups (Collins 2008), and attorneys (Garner 2003). Asking experts to condense and synthesize details gets the justices the information they need to make informed decisions without the burden of collecting it, and that information often comes via heuristics that further ease consumption and cognitive burdens (Black and Boyd 2013). By reducing their workloads, the justices can better ensure their work gets done well.

Attorneys, Information Subsidy, and Appeals

One of the barriers to efficient resolution of Supreme Court cases is the mountain of information associated with each case. Given the Court's mandate to resolve legal conflict within the judiciary, every case the justices review arrives with a long and dense paper trail, and case resolution involves considerable time and effort (Hitt 2019). Rather than do all the work themselves, the justices ask the attorneys representing each party to summarize a case's history and then conduct a preliminary legal analysis of the case's issues and their resolutions in a written merits brief (Hazelton and Hinkle 2022). Asking the people who know the case best to explain and resolve it eases burdens on the justices' time, as it focuses their attention on the most important parts of a case and lets them ignore the extraneous pieces. These briefs are highly structured to provide the justices with, as Chief Justice Rehnquist put it, "a coherent presentation of arguments in favor of the writer's client" (Rehnquist 1999, 4), or a place from which to start their work. It also creates something to which the justices can return when they need to refresh their memory of the case after turning to other issues.

Outsourcing legal research to parties interested in case outcomes can be dangerous if

those parties believe lying helps them win, but the Court's structures and incentives ensure attorneys provide good and correct information in their briefs. At a minimum, tasking both parties with addressing the same questions guarantees the justices get a full overview of the legal issues (Hazelton and Hinkle 2022). The justices also invite outside groups to participate in the process by submitting "friend of the Court" briefs that address additional information not covered in the party briefs (Collins 2008), and, beyond that, use oral argument to ask about and resolve any informational discrepancies they observe in the briefs (Johnson 2004). Attorneys who shirk on information provision thus face high odds of bad-information exposure, which can damage attorneys' immediate arguments and their broader careers (McGuire 1993). Consequently, attorneys have good reason to give the justices valid information in their briefs (Biskupic, Roberts and Shiffman 2014), and they typically do.

With that said, briefs are not merely informational; they are persuasive, too. Under Supreme Court Rule 24, each party submits its own brief advocating its position (Shapiro et al. 2019), and the Court expects parties will provide the best possible arguments for their clients (Corley 2008). Attorneys thus provide all the helpful information they can while looking for every possible opportunity to win. Attorneys begin by producing "good" legal arguments that explain how the justices can move from problem to resolution using the law (Garner 2003); if an attorney can frame her argument in way that convinces the justices it is good, she is more likely to win (Wedeking 2010). Good arguments are also tied to good writing, and the justices favor briefs that are concise (Totenberg 2011), professional (Black et al. 2016), informative (Garner 2003), and readable (Feldman 2016). Writing a good, strong, persuasive argument makes it easier for the justices to decide a case a certain way and explain their reasons for doing so, which is the epitome of burden reduction.

Of course, at the Supreme Court, where answers are often ambiguous and the odds of both parties producing good arguments are high, attorneys often find additional ways to curry the justices' favor. One such approach is appealing to the justices using heuristics that further simplify the decision-making process (Black and Boyd 2013). Like all humans, judges

are prone to using shortcuts that simplify complex problems (Black, Owens and Wohlfarth 2024; Guthrie, Rachlinski and Wistrich 2001), and attorneys will gladly provide shortcuts that increase their odds of winning. The most obvious heuristic is appealing to justices' ideological preferences, as the justices can and do use ideology to evaluate arguments that lack clear legal answers (Segal and Spaeth 2002). Another is to coordinate arguments with amici and repeat similar arguments, because repetition emphasizes that an easy answer exists (Hazelton and Hinkle 2022). Alternatively, attorneys can show justices how their own past arguments lead them to a preferred outcome (Niblett, Posner and Shleifer 2010), given familiarity and recycled logical eases cognitive strain, too.

Citations as Tools of Persuasion

Encouraging the justices to follow a certain legal path using their own arguments is a heuristic worthy of study. On a fundamental level, citations to the Court's past precedents are the most important part of a legal argument, because legal writing does not allow baseless claims (Garner 2003); every statement needs support, which attorneys provide by citing relevant legal authorities (Anderson 2022). Constructing a coherent argument that advances a particular legal and policy position thus requires carefully chosen, supportive citations (Fox and Loquasto 2010). To be sure, not all precedents are equal; many citations are obligatory and failure to cite them could hurt the validity of an attorney's argument (Hansford and Spriggs 2006). But outside of those six-to-ten must-cite cases that form the bulk of an argument (Schoenherr and Black 2019), the justices want and need attorneys to fill in the rest of the legal argument. Consequently, attorneys have room to use citations to persuade.

Attorneys are strategic about how they fill in their arguments because they have limited space to do it. But if the first key to a winning brief is producing a convincing legal argument, and a second is finding ways to appeal to the justices, then personalized appeals, which do both, should be ideal for achieving their goals. Personal citations serve as shining beacons of guidance for a justice navigating the legal waters of a brief, because they

make it easy for her to see how to decide the case while remaining doctrinally consistent (Niblett, Posner and Shleifer 2010). Such citations also quickly and reliably signal the attorney is advancing a valid argument with which the cited justice should agree (Posner 2000). Beyond that, Supreme Court justices like being acknowledged for their work (Baum 2006), and citations offer a surefire way of doing that (Szmer et al. 2024). By citing a justice's past work, the attorney eases the justice's cognitive burden by creating a signal that shows a justice why she agrees with the attorney's position and should side with it.

The question then becomes, which justices get targeted? An attorney's primary goal is to win his case for his client, and he accomplishes that by securing a minimum winning coalition of at least five votes. Given ideology is the greatest predictor of votes (Segal and Spaeth 2002), ideological allies are the most sensible group to start with for this coalition. After all, the justices have ideological preferences and want to see those preferences actualized. This is not to say the justices do not care about the law, but rather to suggest the justices care about their ability to move policy within the boundaries of the law (Hansford and Spriggs 2006). Attorneys can start building their coalition by making ideological appeals and providing a legal explanation for getting there (Epstein and Kobylka 1992). Thus, a strategic cite to a party's ideological allies is mutually beneficial — the attorney secures support and the justices continue to advance policy goals articulated in past work.

> ***Hypothesis 1****: Attorneys should be more likely to cite sitting justices who are ideological allies than they are to cite ideological opponents.*

Historically, simply appealing to ideological allies on the bench does not secure a majority, however. Parties have to target the median justice, who is often the kingmaker (Brams, Camilo and Franz 2014). Consequently, strategically targeting the median justice is necessary to succeed at the Court. The median justice is typically more moderate than some of the more ideologically-distant justices, thus making her less susceptible to ideological arguments and more open to persuasion (Thomas 2019). And, importantly, this moderation could mean she sees multiple paths to resolution, which can increase her cognitive load.

Signaling agreement through citations can go a long way toward easing that burden. Notably, both parties should be sending these signals, because both parties understand they need that vote and should relentlessly pursue it.

> ***Hypothesis 2****: Attorneys should be more likely to cite the median justice than they are to cite other sitting justices.*

Attorneys must also decide how to most effectively cite cases. Most of the time, they "passively" cite precedent, meaning they simply list the case name without author attribution, e.g., "*Obergefell v. Hodges*, 576 U.S. 644 (2015)." Brief style guides suggest attorneys should exclusively utilize these citations, as they reduce clutter and help attorneys make their points more clearly (Shapiro et al. 2019). But attorneys occasionally ignore this directive and "actively" cite justices by attaching their names to the citation. So, for example, they say, "As Justice Kennedy wrote in *Obergefell v. Hodges* (2015)..." rather than simply mentioning *Obergefell*, as the style guides suggest. Active citations offer neon-bright signals to pay attention, while passive citations offer gentle nudges. We suspect that citing a sitting justice in any way should increase the probability of that justice siding with the citing party, but active citations should be particularly impactful. Notably, ideology should condition these effects. The justices already predisposed to support an outcome should respond to these targets quickly – they just confirm their preferences align with their legal philosophies – while the justices who might not automatically support the outcome need the evidence to get there.

> ***Hypothesis 3****: Conditional on a justice's ideological agreement with a party, the more a party cites a sitting justice, the more likely that justice is to vote for them.*

> ***Hypothesis 4****: Conditional on a justice's ideological agreement with a party, justices should be more likely to vote for a party that actively cites them than for a party than passively cites them.*

Finally, attorneys can also appeal to the justices using different opinion types. Briefs are built on majority opinions because majority opinions set national precedent, and the justices are most likely to look to them for guidance. But separate opinions – concurrences and dissents – offer valuable insight into the ways authoring justices think about the law, and they can ultimately impact decisions over time (Corley 2010; Corley, Steigerwalt and Ward 2023; Matthews 2022). Thus, when seeking to win over justices whose thoughts on a subject might be nuanced or out-of-step with their other ideological preferences, citing a separate opinion should be particularly useful (Hinkle and Nelson 2018). Moreover, citing separate opinions might flatter justices who did not expect attorneys to notice their deeper thoughts on an issue (Posner 2000). Perhaps most importantly, separate opinions are, by necessity, also active citations – one cannot cite a separate opinion without mentioning its writer, because the Court does not produce a single concurrence or dissent. Citing a sitting justice's separate opinions should thus be a particularly powerful move.

> ***Hypothesis 5****: Conditional on a justice's ideological agreement with the party, the more a party cites a sitting justice's separate opinions, the more likely that justice is to vote for them.*

Data Collection

Our goal is to determine if the strategy of appealing to certain justices actually helps attorneys secure those justices' votes. Before we can answer this question, however, we must first see if attorneys are strategically citing certain justices. Only a resounding "yes" to the first question allows us to move onto the second.

To address both questions, we used merits briefs submitted to the Court between the 1984 and 2018 terms to create a dataset of citations to sitting justices' past decisions. We purposefully restricted our analysis to the cases that had only one petitioner brief and one respondent brief (Black et al. 2016), because the Court requests that parties work together to present a unified brief; the justices' dislike of separate brief writing is so strong that attorneys

abide by the rule about 85% of the time (Shapiro et al. 2019). Focusing on two-brief cases allows us to examine how the argument matters without wading into the complicated topic of which argument is stronger or matters more. We thus examine a total of 4,792 briefs from 2,396 cases heard during our thirty-four year period of analysis.

To create this dataset, we began by using regular expressions in `R` to identify the cases attorneys cited in each brief, along with the sentences from which those citations came. Attorneys cite cases in one of four different ways: by name (e.g., *Terry v. Ohio*); by location in the *U.S. Report* (e.g., 392 U.S. 1); by location in the *Supreme Court Reporter* (e.g., 88 S. Ct. 1868); or by common case name shorthand (e.g., *Terry*). The first mention of a case is *always* a combination of the full case name and the decision's location in either the *U.S. Report* or the *Supreme Court Reporter*, while subsequent mentions use any one of the four options.[1] Across our data, the average brief contains 62 citations to 24 cases. Further analysis shows the modal number of times a case gets cited is once, indicating attorneys discuss a few cases in depth and provide singular citations to most others.

With the citations data in hand, we separated citations into the different types – passive and active, majority and separate. Figure 1 provides examples of what we looked for when identifying each type of citation. We began with identifying "active" citations by looking for the justices' last names in the sentence surrounding a citation, where attorneys would explicitly connect a justice to an opinion. If the attorney did not mention a justice's name, then we identified that citation as being "passive," and we proceeded to use the Supreme Court Database to identify the author of each passively cited opinion (Spaeth

[1]We identified over 90% of the citations mentioned in the briefs. Our method always captured the initial citation of a case. Most attorneys simply cite the case's location in the *U.S. Report* or *Supreme Court Reporter* moving forward, and we captured those citations without incident. We used common name shorthand to capture the rest, though we had to eliminate some names because they were too common (e.g., *Roe*). For a broader explanation of this method, see Schoenherr (2020).

et al. 2023).[2] With passively cited majority opinions identified, we next looked for mentions of concurrences or dissents in the same sentence, which allowed us to separate the active *separate* opinions from the active *majority* ones.[3] Importantly, as Figure 1 shows, we did not identify any passive separate opinions because they do not exist. An attorney *must* actively identify a separate opinion by its author; while majority opinions carry the weight of the Court, the Court does not speak with one voice on separate opinions or issue a singular Court concurring or dissenting opinion, and separate opinions are consequently singularly connected to their individual authors.

	Majority	**Separate**
Active	As **Justice Kennedy** wrote for a unanimous Court in ***Michael Williams v. Taylor***, a petitioner does not fail to develop the factual basis for a claim when the lack of development is not the petitioners fault, **529 U.S. at 432**.	Moreover, the determination whether or not a rule is clearly established at the time a state court renders its final judgment of conviction is a question as to which the "federal courts must make an independent evaluation." ***Wright v. West***, **505 U. S. 277**, 308-309 (1992) (**O'CONNOR, J.**, **concurring** in judgment).
Passive	The difference between cases governed by decisions such as ***Texas v. Johnson***, **491 U.S. 397** (1989) (flag-burning) or ***R.A.V.*** (cross-burning) and cases governed by ***O'Brien*** (draft-card burning) is the difference between content based and content-neutral regulation.	

Figure 1: Examples of passive and active citations and majority and separate opinions. Boldfaced words show identifying terms.

Having classified the citations by type, our next step was to identify citations to the *sitting* justices around whom our analysis revolves. To do this, we used the Supreme Court

[2]When sentences contained multiple citations, we manually checked the data to ensure names were associated with the correct cases.

[3]Specifically, we looked for some version of "concurrence" or "dissent" in the text.

Database to identify the sitting justices who decided each case, and then counted the number of times a brief (1) passively cited a sitting justice's majority opinions, (2) actively cited her majority opinions, or (3) actively cited her separate opinions.[4]

Do Attorneys Strategically Cite Supreme Court Justices?

We begin our analysis by examining the frequency with which a party's brief cites each sitting justice. While anecdotal evidence confirms attorneys in salient cases target certain justices with their arguments (Perry 2007), it is important to understand this strategy's prevalence and targets. After all, if attorneys are just citing every sitting justice and not systemically targeting ideological allies and the median, then our theory falls apart.

To examine citation patterns, we employ three different dependent variables measuring the number of times a brief (1) passively cites a sitting justice's majority opinions; (2) actively cites a sitting justice's majority opinions; and (3) actively cites a sitting justice's separate opinions. We have approximately nine observations for each brief, or one for each sitting justice. We analyze petitioners and respondents separately to compensate for any strategic differences the parties might have, given the sequential nature of brief submission (see Wedeking 2010). Table 1 shows the variable ranges for each citation type per brief. Notably, the modal outcome is to not cite a sitting justice at all in a brief; attorneys tend to depend more on past justices' decisions than they do on the current justices' thoughts when making their arguments. When a brief does mention a sitting justice, it is almost always passively. Active citations are rare, but trend more toward separate than majority opinions. Table 1 also suggests petitioners and respondents cite sitting justices at near-equal rates.

As we suggest in Hypotheses 1 and 2, we expect attorneys will use citations to strate-

[4]We use these separate categories for theoretical reasons, but Table B2 in the appendix shows this is also the empirically stronger approach. Reducing the analysis to passive and active citations or total citations, or splitting separate opinions into concurrences and dissents, does not significantly improve our analysis.

Table 1: Citations to Sitting Justices Per Brief

		Mean	Min	Max
Petitioner	Passive Majority Citations	2.399	0	204
	Active Majority Citations	0.024	0	6
	Active Separate Citations	0.252	0	41
Respondent	Passive Majority Citations	2.610	0	128
	Active Majority Citations	0.027	0	8
	Active Separate Citations	0.248	0	21

gically target their ideological allies and the median justice. To model ideological alignment between the party and each justice, we used the Supreme Court Database to identify the ideological direction of the winning party's argument, from which we found the ideological leaning of the petitioner's (respondent's) argument. With that party's ideological position established, we then employed Martin and Quinn (2002) scores to identify the petitioner's ideological congruence with each justice. Martin and Quinn scores range from -6 (liberal) to +6 (conservative). If the petitioner was conservative, we measured alignment as that justice's Martin and Quinn score, so that increasing values represented increasing ideological alignment between the justice and the petitioner. Conversely, if the petitioner was liberal, we reverse-coded Martin and Quinn scores to ensure larger values meant greater alignment. We went through the same process for the respondent. The second key independent variable is a dichotomous indicator of whether the justice in question was the median.[5]

Looking beyond the key variables, we need to consider the possibility that attorneys *have* to cite a sitting justice, which we do by controlling for the number of majority opinions the sitting justice wrote in that issue area through the previous term. Two things can affect the need to cite a sitting justice: their experience with an issue area and their time on the bench. Regarding the first, justices develop valuable legal niches that make them subject-matter experts on certain areas – consider Justice Harry Blackmun's affinity for tax cases or Chief Justice Warren Burger's proclivity for writing Establishment Clause cases (Woodward

[5]Our results are similar if we control for issue-specific medians, see Tables A1 and A2 in the appendix.

and Armstrong 1979) – and they consequently write many decisions in that area, as they can produce better opinions faster. Regarding the second, justices simply have more precedents to cite the longer they sit on the bench. By including this variable, we are able to control for the possibility that a citation is more obligatory than flattering.

We also include several control variables to compensate for factors that are known to influence attorneys' approaches to the justices. First, because past experience gives attorneys an advantage in front of the Court (McGuire 1993; Nelson and Epstein 2022), we take the log of the number of times the counsel of record previously worked on a merits brief. Briefs are collaborative documents that are, on average, attributed to three or four different attorneys (Lane and Schoenherr 2025), but the counsel of record is the lead attorney on the brief, so we use her experience as a proxy for the team's experience. The modal level of past experience is zero, though it ranges up to 216 previous briefs on which a person worked.[6]

To compensate for the inside knowledge clerks have on their justices (Black and Owens 2021), we control for counsels of record who clerked for the justice being cited. We also control for the party's status, as parties with more resources have advantages that weaker parties do not (Sheehan, Mishler and Songer 1992). Following the procedure originally outlined by Collins (2007), we use the Supreme Court Database's party codes to categorize each party into one of ten groups, from poor individuals (1) to the federal government (10). Finally, we control for overall citations habits by controlling for the total number of the citations in a brief, which we operationalize by taking the natural log the count plus one.[7]

[6]We start counting in 1979 to capture most attorneys' experience and manually correct the rest.

[7]Alternatively, we could control for the total number of citations to anyone but the sitting justice being studied, see Tables A3 and A4 in the appendix. If curious about Solicitor General presence or case salience, see Tables A5 and A6. For a full review of all the variables, see Table A7.

Results

We employ ordinary least squares regression for our analysis,[8] with intercepts that vary by justice, issue area, and term to accommodate the multilevel structure of our data.[9] The results for petitioner citations of a sitting justice are in Table 2, and the results for the model of respondent citations are in Table 3.

Table 2: Petitioner Citations of a Sitting Justice

	(1) Passive Majority	(2) Active Majority	(3) Active Separate
Median Justice	0.866*	0.030*	0.197*
	(0.158)	(0.006)	(0.027)
Ideological Congruence, Justice and Party	0.077*	−0.001	−0.005
	(0.017)	(0.001)	(0.003)
Justice Past Expertise in Issue Area	0.010*	0.0001*	0.001*
	(0.001)	(0.00003)	(0.0002)
Log of Attorney Brief Experience	−0.004	−0.002	−0.004
	(0.026)	(0.001)	(0.005)
Clerked for This Justice	1.156*	0.039*	0.099
	(0.366)	(0.014)	(0.065)
Party Status	−0.016	−0.001*	−0.014*
	(0.014)	(0.001)	(0.003)
Log Total Citations in Brief	1.829*	0.024*	0.249*
	(0.053)	(0.002)	(0.009)
Constant	−5.129*	−0.069*	−0.715*
	(0.543)	(0.009)	(0.060)
Observations	21,493	21,493	21,493
Issue Area Variance (N = 12)	0.142	0.001	0.009
Term Variance (N = 35)	0.705	0.001	0.003
Justice Variance (N = 21)	4.318	0.001	0.020
AIC	133,255.100	-6,562.017	59,241.170
BIC	133,350.800	-6,466.311	59,336.880
Note:			*p<0.05

[8]We conducted another analysis controlling for outliers, and our results remain substantively similar, as we show in Tables A8 and A9 in the appendix. Our results are substantively the same if we utilize negative binomial regression, see Tables A10 and A11.

[9]Our results remain substantively the same if we pool the data and cluster the standard errors by justice, issue area, or term, as we show in Tables A12 through A17 in the appendix.

Table 3: Respondent Citations of a Sitting Justice

	(1) Passive Majority	(2) Active Majority	(3) Active Separate
Median Justice	0.775*	0.035*	0.215*
	(0.162)	(0.007)	(0.025)
Ideological Congruence, Justice and Party	0.029	0.0004	−0.00005
	(0.018)	(0.001)	(0.003)
Justice Past Expertise in Issue Area	0.013*	0.0001*	0.001*
	(0.001)	(0.00004)	(0.0002)
Log of Attorney Brief Experience	−0.008	−0.002	0.002
	(0.028)	(0.001)	(0.004)
Clerked for This Justice	0.722	0.059*	0.237*
	(0.422)	(0.019)	(0.068)
Party Status	0.032*	0.001	−0.0003
	(0.015)	(0.001)	(0.002)
Log Total Citations in Brief	1.969*	0.026*	0.228*
	(0.054)	(0.002)	(0.009)
Constant	−5.953*	−0.090*	−0.755*
	(0.587)	(0.011)	(0.051)
Observations	21,493	21,493	21,493
Issue Area Variance (N = 12)	0.224	0.001	0.004
Term Variance (N = 35)	0.786	0.001	0.002
Justice Variance (N = 21)	5.080	0.001	0.014
AIC	134,160.000	783.170	55,797.510
BIC	134,255.700	878.876	55,893.210
Note:			*p<0.05

Starting first with Hypothesis 1, we find some evidence that attorneys strategically cite their ideological allies in briefs. Specifically, we find that petitioners are significantly more likely to passively cite ideological allies than they are to passively cite their ideological foes.[10] A petitioner tends to passively cite their ideological foes about 2.109 times per brief, while citing their allies about 2.697 times per brief (difference of 0.588, or about half a citation). This is a meaningful difference in a world where attorneys have limited room to make individualized appeals. Interestingly, as Table 3 shows, we do not find evidence that respondents are systemically targeting ideological allies in their briefs. We do not think this is entirely surprising, as respondents are, to an extent, bound by the winning

[10]All discussion of significance or significant differences indicate p<0.05.

arguments they made at the lower court and are thus less able to re-work their arguments in ways that might target sitting justices (Wedeking 2010). Equally as interesting, we do not see any evidence that attorneys actively cite justices based on their ideological affiliations. While we suspected attorneys might use active citations to appeal to justices who were more ideologically skeptical, our results suggest that is not the case.

With that said, our results do suggest attorneys are strategically citing the median justice, as we outlined in Hypothesis 2. Turning first to Table 2, our results indicate that attorneys target the median justice using passive majority, active majority, and active separate opinions, and Table 3 confirms respondents engage in the same behavior. Petitioners passively reference the median's majority opinions just over three times per brief, while they passively cite other justices' majority opinions about twice (3.176 vs. 2.306 times, respectively), and that difference is statistically significant. Respondents have similar passive citation habits (2.529 vs. 3.309). The second and third columns in Tables 2 and 3 also show significant differences in active citations of majority and separate opinions. Active citations might be rare, but our results still suggest attorneys are still using them to appeal to the median justice.

Taken together, the results presented in Tables 2 and 3 offer convincing evidence that attorneys strategically cite the justices whose votes they need to win. While all attorneys discuss opinions written by past justices, petitioning attorneys find ways to passively cite majority opinions by their sitting ideological allies, and they utilize passive citations to majority opinions, active citations to majority opinions, and discussion of separate opinions to appeal to the median justice. Likewise, responding attorneys also use citations to target the median justice. Attorneys are providing potentially sympathetic justices with the personalized cues they need to make an easy-yet-informed decision favoring that party.

Do the Justices Respond to Targeted Appeals?

Having accomplished that attorneys do, in fact, target certain justices with their citations, we turn next to whether or not those appeals work. Are sitting justices more likely to side with parties that cite them in their briefs? As we explain in Hypotheses 3, 4, and 5, we believe sitting justices should be more likely to vote for the party that cites them, but active citations of majority opinions and especially separate opinions should be most effective. Here, we examine the justices' voting behavior, so the dependent variable is a dichotomous indicator of whether each justice sided with the petitioner (1) or the respondent (0) in the case. We analyze 21,665 votes across 2,388 cases.

Because our analysis is vote-centered, we include information for petitioners and respondents rather than analyzing them separately. Our first set of key independent variables is the number of times the petitioner (1) passively cited a sitting justice's majority opinions; (2) actively cited their majority opinions; and (3) actively cited their separate opinions. Our second group of key independent variables is the same three counts for the respondents. These variables were our dependent variables in the first part of the analysis. Rather than use the raw counts, however, we transform these variable by logging them, specifically by taking the natural log of the citation count plus one.[11]

Our other key independent variable is the ideological distance between the petitioner and the voting justice. We follow the same congruence process we used in the first models. We also interact this variable with the two sets of citation count variables to see if, as we hypothesized, there are any ideological differences in response to citations to sitting justices.[12]

There are several other factors that can influence the likelihood a justice votes in favor of the petitioner, so we include several control variables as well. First, we once again

[11]The results are substantively the same using raw counts, see Table B1 in the appendix. Analyses using different approaches to these variables are available in Table B2.

[12]Our results remain the same if we use issue-specific medians, see Table B3 in the appendix.

control for the justice's past expertise in an issue area, which allows us to compensate for "must cite" sitting justices whose citation counts should be disproportionately high. We also control for the total number of citations in the petitioner and respondent briefs, given differences in citation approaches broadly.

Additionally, we control for documented advantages one party might have over the other. To that end, we again control for past brief writing experience, though this time using the experiential difference between the petitioner and the respondent. Given well-documented evidence of the Solicitor General's advantage before the justices (Black and Owens 2012), we also control for the Solicitor General's participation in a case, specifically whether they were the petitioner (1), respondent (-1), or not a party.

We also include variables dealing with external influences on the justices' decisions. The first concern is amicus participation (Collins 2008), and we measure the petitioner's advantage in amicus filings by subtracting the number of amicus briefs filed in favor of the respondent from the number filed in favor of the petitioner (Black and Owens 2021). We also identified cases in which the Solicitor General filed an amicus brief in favor of the petitioner (1) or respondent (-1). Additionally, we again control for party status, though this time we subtract the respondent's status from the petitioner's to create a measure of the petitioner's status advantage Collins (2007). Our third concern is lower-court dissents, which can signal error or strong disagreement in the application of law at the lower court, thus making a reversal more likely (Black et al. 2020). We use the Supreme Court Database to identify these situations (Spaeth et al. 2023).

Finally, we control oral argument performance, which influences the final votes in the case (Johnson, Wahlbeck and Spriggs 2006). To account for this, we control for the difference in the number of questions directed toward the petitioner and respondent, as the party with more questions is less likely to succeed (Black et al. 2020).[13]

[13]Tables B4 and B5 show other control variables, Table B6 provides a variable summary.

Results

For this analysis, we utilize logistic regression with intercepts that vary by justice, issue area, and term. We provide these results in Table 4, and discuss our results using graphical representations of predicted probabilities, which we provide in Figures 2 and 3.[14]

Table 4: Probability a Justice Votes for the Petitioner

	(1)
Log of Petitioner Passive Cites of Majority Opinions	0.200*
	(0.024)
Log of Petitioner Active Cites of Majority Opinions	−0.078
	(0.136)
Log of Petitioner Active Cites of Separate Opinions	0.176*
	(0.046)
Log of Respondent Passive Cites of Majority Opinions	−0.150*
	(0.024)
Log of Respondent Active Cites of Majority Opinions	0.033
	(0.128)
Log of Respondent Active Cites of Separate Opinions	−0.032
	(0.045)
Ideological Congruence, Justice and Petitioner	0.079*
	(0.010)
Justice Past Expertise in Issue Area	0.001
	(0.001)
Log Total Citations in Petitioner Brief	0.036
	(0.026)
Log Total Citations in Respondent Brief	−0.122*
	(0.027)
Petitioner Experience Advantage	0.0005
	(0.0004)
Solicitor General as Party	0.590*
	(0.028)
Lower Court Dissented	0.019
	(0.034)
Petitioner Amicus Advantage	0.047*
	(0.004)
Solicitor General as Amicus	0.674*
	(0.042)
Petitioner Status Advantage	−0.004
	(0.004)
Petitioner Advantage in Oral Argument Questions	−0.016*
	(0.001)
Log of Petitioner Passive Cites of Majority Opinions x Ideological Congruence, Justice and Petitioner	0.024*
	(0.010)
Log of Petitioner Active Cites of Majority Opinions x Ideological Congruence, Justice and Petitioner	−0.120
	(0.064)
Log of Petitioner Active Cites of Separate Opinions x Ideological Congruence, Justice and Petitioner	−0.017
	(0.020)
Log of Respondent Passive Cites of Majority Opinions x Ideological Congruence, Justice and Petitioner	−0.026*
	(0.010)
Log of Respondent Active Cites of Majority Opinions x Ideological Congruence, Justice and Petitioner	0.012
	(0.064)
Log of Respondent Active Cites of Separate Opinions x Ideological Congruence, Justice and Petitioner	0.013
	(0.020)
Constant	0.593*
	(0.124)
Observations	21,665
Term Variance (N = 35)	0.032
Justice Variance (N = 21)	0.030
Issue Area Variance (N = 12)	0.023
AIC	27,122.320
BIC	27,337.880
Note:	*p<0.05

[14]Table B7 shows results remain if we cluster standard errors by justice, issue, or term.

We begin by examining attorneys' citations to passive majority opinion citations in merits briefs. Figure 2 shows the predicted probability that a justice who is ideologically aligned with the respondent (dark grey circles), petitioner (light grey triangles), or sits at the median (grey squares) votes for the petitioner, given the number of times the petitioning brief (left panel) or responding brief (right panel) passively cites that justice's majority opinions.[15] For ease of discussion, we transposed our key independent variables to present results as counts. We examine citation behavior ranging from the modal decision to avoid passively citing a sitting justice's majority opinion to the less-typical decision to passively cite a sitting justice's majority opinions 11 times, covering 90% of the data.

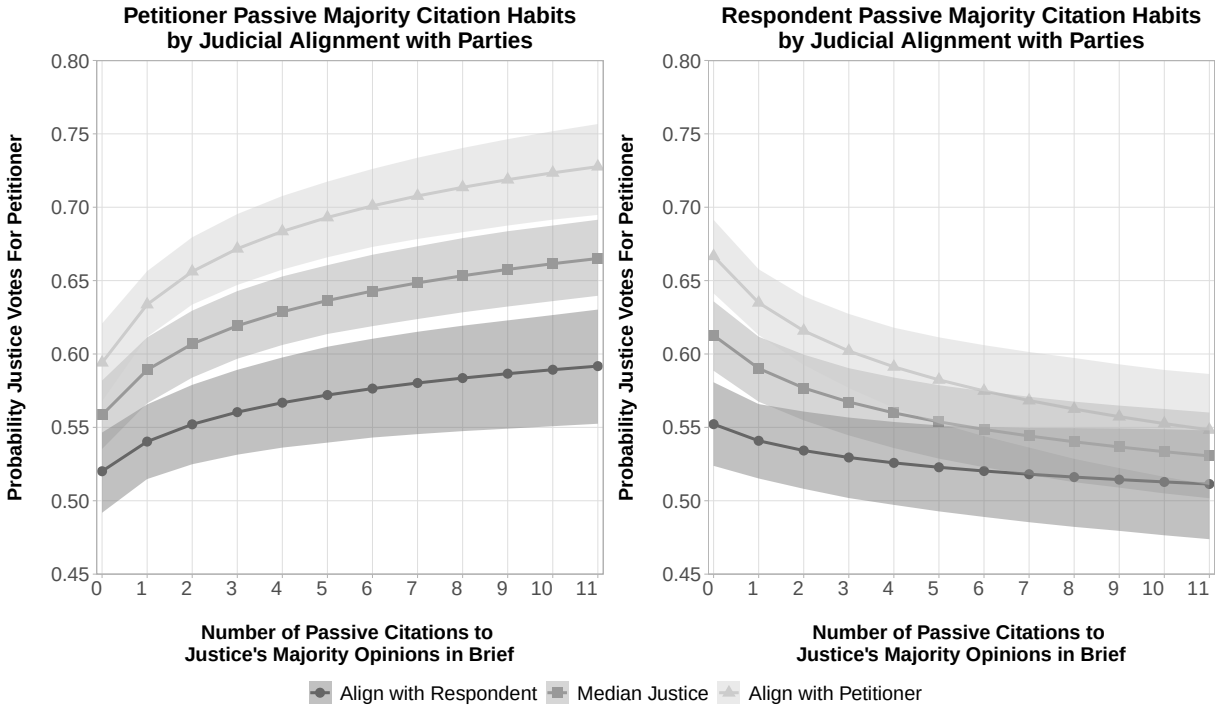

Figure 2: Predicted probability a justice votes in favor of the petitioner as the number of passive citations to her majority opinions increases, given the justice's ideological alignment with the petitioner (light grey triangles), respondent (dark grey circles), or position at the Court's median (grey squares). Left panel shows the petitioner's use of passive majority opinion citations, right shows respondent's. Shaded areas show 95% confidence intervals.

[15]Because the variable is alignment with the petitioner, we take the 10^{th} percentile of the variable to show alignment with the respondent (a value of -2.909), the 90^{th} percentile to show alignment with the petitioner (2.918), and the 50^{th} percentile (0.077) for the median.

Figure 2 supports our suggestion in Hypothesis 3 that, conditional on ideological preferences, a justice is more likely to vote for the party that cites them more.[16] Turning first to the left panel, we see that when the petitioner fails to cite a sitting justice's majority opinions, that justice's ideological preferences drives their vote; a justice aligned with the respondent is the least likely to side with the petitioner (0.52), while the median is significantly more likely to side with the petitioner (0.56), and a justice aligned with the petitioner is most likely to vote for them (0.59). If the petitioner passively cites a justice's majority opinions just once, however, the probability that justice votes for the petitioner increases significantly (to 0.54, 0.59, and 0.63, respectively). Each additional passive majority opinion citation significantly increases the likelihood that justice votes for the petitioner. Importantly, these effects are larger for a justice who already likes the petitioner – passively citing an ideological ally's majority opinion 11 times increases the probability that justice votes for the petitioner by 0.14, while passively citing the median justice's majority opinion increases the probability by 0.11 and passively citing a majority opinion written by someone who prefers the respondent increases the probability by just 0.07. Petitioners who passively cite a sitting justice's majority opinions are significantly more likely to get their vote.

Turning to the right side of Figure 2, we see the justices react similarly to respondents who passively cite their majority opinions. Starting with the decision not to cite a sitting justice, our results again suggest ideological alignment with a party matters most, with the justices showing significantly different voting likelihoods based on their ideological alignment

[16]We do not make a causal argument, though one could ask if a causal relationship exists. Answering this question is difficult because we run into data dimensionality issues when analyzing citation types in a causal framework. Attempting to gain insight, we used coarsened exact matching (Iacus, King and Porro 2011) to address the broader question of whether a justice is more likely to vote for the petitioner if the petitioner cited him at all. As the results and discussion around Table B8 in the appendix show, the answer might be yes, though we present it with caution because they analysis is not directly parallel.

with the petitioner (0.67), median (0.61), and respondent (0.55). Passively citing any of those justices' majority opinions once significantly decreases the probability that justice votes for the petitioner (to 0.63, 0.59, 0.54, respectively), meaning they are significantly more likely to vote for a respondent that passively cites their majority opinions. Each additional passive majority opinion citation by the respondent significantly builds on those differences. Interestingly, respondents who passively cite ideological opponents' and the median's majority opinions have the most to gain. When the respondent passively cites a majority opinion by a justice who does not ideologically agree with them more than 10 times, the probability that justice votes for them is statistically indistinguishable from the probability that an ideological ally votes for them. The same is true for median justices.

Our next objective is to examine Hypothesis 4, in which we suggested the justices would respond most favorably to active citations, and to Hypothesis 5, where we suggested they would respond most positively to separate citations. When it comes to active discussion of majority opinions, we do not find any evidence to support Hypothesis 4. Looking at Table 4, our results suggest that attorneys who connect a justice's name to their majority opinion do not see a corresponding increase in the likelihood that justices votes for them. Given our earlier finding that attorneys are not utilizing this strategy, however, this finding is not entirely surprising; we suspect the justices know which opinions they wrote and do not pay attention to notes reminding them of their work.

But Figure 3 shows that actively citing separate opinions is a useful strategy when the cited justice is not an ideological ally. Turning first to the petitioner's behavior on the left side of Figure 3, we again find see that ideological alignment matters, as the justices who align with the petitioner are significantly more likely to side with the petitioner than are those at the median or ideologically aligned with the respondent. Interestingly, however, we find that only justices at the median or ideologically distant from the petitioner respond to petitioners who actively cite their separate opinions. A median justice's probability of voting with the petitioner increases significantly from 0.58 to 0.61 when cited once, and again to

0.63 when cited twice. The 0.03 increase between not citing and actively citing their separate opinion once is equal to or larger than any one-citation increase in probability for a passive citation to a median justice's work. Similarly, actively citing a separate opinion written by someone predisposed to like the other side significantly increases the probability the cited justice votes for that party (0.53 to 0.57), as does actively citing their separate opinions twice (0.59). These findings offer support for Hypotheses 4 and 5.

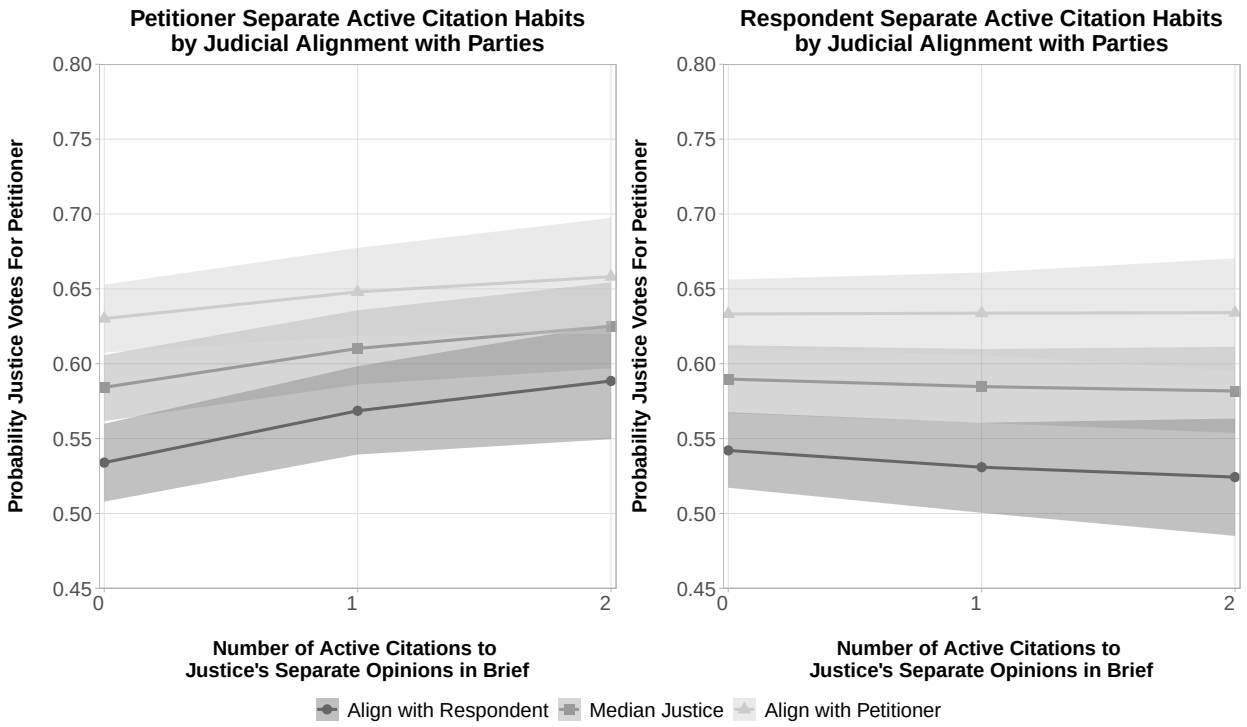

Figure 3: Predicted probability a justice votes in favor of the petitioner as the number of active citations to separate opinions increases, given the justice's ideological alignment with the petitioner (light grey triangles), respondent (dark grey circles), or position at the Court's median (grey squares). Left panel shows the petitioner's use of active citations of separate opinions, right shows respondent's. Shaded areas show 95% confidence intervals.

Looking at the right side of Figure 3, we see that actively citing separate opinions does not help the respondent gain votes. Again, ideology reigns supreme, with statistically-significant differences in the likelihood of voting for the petitioner between justices aligned with the petitioner, justices aligned with the respondent, and justices sitting at the median. Importantly, however, actively citing any justice's separate opinions does not significantly

increase or decrease the probability that justice votes for the petitioner. We again believe this response stems from the more limited world in which respondents operate, where their lower court win constrains their behavior and makes it harder for them to believably appeal to the justices. Taking the results presented in Figure 3 in total, then, we find some support for our hypothesis that justices will respond most positively to active citations of separate opinions. While passive citations of majority opinions are more prevalent, active citations of separate opinions can help win over the median and ideological foes, particularly when the petitioner uses them.

Discussion and Conclusion

Few cases have higher stakes than those that rise to the Supreme Court, and the parties involved put their full effort into winning. Litigants spend astronomical amounts of time and money taking their case from initial injury to the justices' desks (Scott, Lane and Schoenherr 2025), while attorneys devote themselves to identifying and presenting perfect legal arguments (Hazelton and Hinkle 2022). For the justices who ultimately resolve the cases, however, such resources and focused attention are hard to find; the justices face pressure to produce good, consistent, and policy-preferred answers in a timely manner (Hitt 2019), and the multifaceted and dense nature of their work limits their ability to do so (Black, Owens and Wohlfarth 2024). Eliminating some of the work falls to the attorneys, who write merits briefs containing enough information to give the justices a launching pad from which to work. Attorneys take this opportunity to launch a full-scale persuasive attack on the justices' legal and ideological sensibilities (Corley 2008; Wedeking 2010). In this paper, we explore one approach attorneys take when doing this: providing certain justices with targeted guidance on how their past decisions lead to an attorney's preferred outcome.

We created and used a new dataset on attorney citation patterns in merits briefs to show that attorneys strategically cite their allies and the Court median and that such personalized appeals increase the likelihood a justice votes for that attorney's client. Citing a

sitting justice's work should hit all the judicial sweet spots, as the combination of attention to detail, flattery, and ease of decision making should combine to help attorneys secure that justice's vote. Our findings suggest that citing a sitting justice's past work never hurts a party's ability to win a justice over to their side; such citations often increase the likelihood a justice votes for that party. Contrary to our expectations, we find that passive citations of majority opinions pack the most consistent punch, but we also find that petitioners gain a significant advantage if they can work in references to justices' concurrences and dissents, particularly when that justice is not natural ideological ally. Providing justices with specialized guidance on how their past opinions help get to the current answer draws their attention and consideration, and it often gives attorneys a better chance to win, too.

Of course, there are always ways to build on this work and push it in new and interesting directions. Our work shows that attorneys can and do simultaneously ease cognitive loads and appeal to judicial vanity in beneficial ways, but there is ample room for more work of this variety. One big way of expanding this work would be examining the role personalized appeals play on the lower courts, where workloads are substantially higher, oral argument is rare, and briefs are often the only informational source judges have when making decisions (Levy 2013). Looking beyond that, future scholars can examine the role amici play in winning justices' votes. We control for amicus briefs' cuing effects on the decision-making process (Collins 2008), but future work could also examine what, if any, direct influence amici's targeted appeals have on judicial votes (Hazelton and Hinkle 2022). Alternatively, one can also study whether these appeals work more on some justices than others. Scholars can examine if the justices' personalities play a role in acceptance of these appeals (Black et al. 2020), or how justices' time on the bench influences their willingness to accept these shortcuts (Black, Owens and Wohlfarth 2024). There is, as always, more work to be done.

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