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## A P P E L L A T E L A W

### The 3rd Circuit's Reversal Rate: A Success Story

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*Special to the Legal*

**D**uring the first six terms of the Roberts Court (2005-10), the U.S. Supreme Court heard more than 460 cases, 16 of which were on review from the 3rd U.S. Circuit Court of Appeals. Importantly, however, when one takes into account cases presenting circuit splits, the Supreme Court in fact reviewed 68 decisions from the 3rd Circuit.

This article examines the Roberts Court's affirmances and reversals of all of these 3rd Circuit decisions, and concludes that the 3rd Circuit has an outstanding "success" rate — i.e., lower reversal rate — significantly better than previously recognized.

The traditional method for calculating a court of appeals' "track record" is a simple score card measure: For any given year, divide the ratio of the number of cases in which the Supreme Court reversed the circuit by the total number of cases decided by the Supreme Court from that circuit. This method is outcome driven, focusing on affirmances and reversals rather than the substance of the justices' reasoning. It also only accounts for those cases on direct review from the circuit court below.

We think that this traditional measure is incomplete and can be misleading. A better measure — the "full" reversal rate — examines a broader category of cases and focuses on a slightly different metric. In any given term, the Supreme Court considers not just a circuit court's cases on direct review, but also "shadow decisions," i.e., those circuit decisions identified by the Supreme Court as part of a circuit split. Including shadow decisions into a circuit court's reversal rate uses more information than the traditional one and in that way more accurately assesses the frequency with which the Supreme Court agrees with that circuit's approach.

Moreover, because the full approach generates more observations about each court of appeals, this approach also means that



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a court of appeals' track record in any one year is more robust. With only 70 to 90 merits cases a year on its docket, the Supreme Court will likely hear only a handful of cases from any given circuit. For example, in 2010, the Supreme Court only reviewed five cases appealed from the 3rd Circuit. This number triples to 15 when shadow decisions are included.

Including how a court of appeals' approach fares in shadow decisions therefore creates a larger and more reliable dataset. Further, unlike the traditional approach, which measures just the outcome of case, the full approach focuses on the Supreme Court's reasoning and that of the courts of appeals.

To be clear, for the purposes of this article, we characterize "success" as the Supreme Court's acceptance of a 3rd Circuit decision, whether on direct review or through review of a circuit split case from a sister circuit. In that way, the court of appeals is correct (or successful) only in the sense that it accurately predicted the way the Supreme Court would rule on the case or an issue, not whether in some other sense the court of appeals was correct in its interpretation and the Supreme Court was not.

A full description of our methodology and more detailed data tables are available on our website, [www.hangley.com/Supreme\\_Court\\_Project](http://www.hangley.com/Supreme_Court_Project). We conclude the following from our analysis of the 3rd Circuit's success before the Roberts Court to date.

#### THE 3RD CIRCUIT'S REVERSAL RATE FAR LOWER THAN PREVIOUSLY UNDERSTOOD

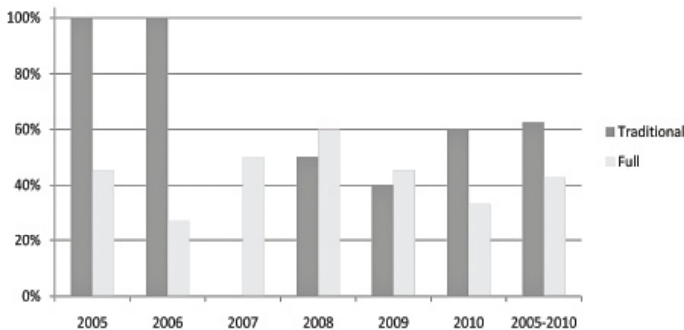
Using the traditional method, assessing the 3rd Circuit on a term-by-term basis creates an incomplete, and skewed, picture of the circuit court's success. Table One below shows the 3rd Circuit's traditional and full reversal rate, by year and for the period 2005 to 2010. Take a look at three of the six years of the Roberts Court: In the 2005 and 2006 terms, the Supreme Court reviewed only one case from the 3rd Circuit and reversed the

court in each case. On that basis, the 3rd Circuit would score a traditional reversal rate of 100 percent for those terms. No determination could be made for the 2007 term as the Supreme Court did not review a single case from the 3rd Circuit.

If you aggregate the Supreme Court’s direct review of the 16 decisions the justices heard during the entire period, you would conclude that the Supreme Court reversed the 3rd Circuit 10 times for a traditional reversal rate of 62.5 percent. This rate was better than many other circuit courts’; only the 10th Circuit (57.1 percent) and the 1st Circuit (46.2 percent) had lower reversal rates under this traditional method.

The full methodology — which includes valuable information from the shadow decisions considered in circuit split cases — presents a broader and different picture. Instead of just 16 reviewed decisions, the Supreme Court actually considered 68 3rd Circuit decisions between 2005 and 2010 — a dataset more than four times larger than the traditional method. Of these, the Supreme Court rejected the 3rd Circuit’s standard only 29 times, for a reversal rate of 42.6 percent. Strikingly, this reversal rate is lower than every other circuit’s. In other words, since 2005, the 3rd Circuit has been the most “successful” circuit court in the United States. The 10th Circuit (44.4 percent) and the 7th Circuit (47 percent) follow behind as among the least reversed.

**TABLE 1: TRADITIONAL, FULL REVERSAL RATES — 3RD CIRCUIT (2005-10)**



## THE 3RD CIRCUIT’S CLOSEST ‘SISTER CIRCUITS’

Our full method is also helpful in illuminating the extent to which the 3rd Circuit is aligned with other circuits on the issues on which the Supreme Court has granted cert. Much as Supreme Court watchers create concordance tables identifying the frequencies with which each justice votes with every other justice, we have created an analogous table showing the degree to which the circuits agreed with each other on the cases heard by the Roberts Court.

Specifically, the agreement percentages are calculated as the number of agreements (both circuits affirmed or both reversed) divided by the sum of agreements and disagreements between the two circuits.

## PERCENTAGE OF AGREEMENTS IN CIRCUIT COURT RULINGS (2005-10)

	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	DC
1st	73.5%	71.0%	64.1%	67.7%	60.0%	71.8%	65.6%	52.8%	61.3%	46.9%	52.9%
2d		53.8%	54.8%	55.8%	48.7%	62.7%	51.6%	57.1%	70.0%	57.1%	60.0%
3d			58.1%	69.7%	50.0%	55.6%	51.5%	57.6%	57.7%	56.3%	61.5%
4th				73.0%	55.6%	70.5%	61.1%	39.0%	57.1%	50.0%	50.0%
5th					64.1%	56.5%	70.3%	54.5%	80.6%	64.7%	52.6%
6th						53.1%	58.8%	63.8%	58.1%	58.1%	60.0%
7th							58.5%	39.2%	52.6%	61.1%	72.2%
8th								59.1%	71.4%	60.5%	61.1%
9th									54.1%	50.0%	61.9%
10th										55.6%	57.1%
11th											47.1%

These data show that the 3rd Circuit has the greatest level of concordance with the 1st Circuit (71 percent) and the 5th Circuit (69.7 percent). In contrast, the 3rd Circuit is least aligned with the 6th Circuit (50 percent) and the 8th Circuit (51.5 percent).

*This article is part of a broader project analyzing the Supreme Court and its relationship to the circuit courts. More information can be found on the Hangley Aronchick Segal Pudlin & Schiller website, [www.hangley.com/Supreme\\_Court\\_Project](http://www.hangley.com/Supreme_Court_Project).*