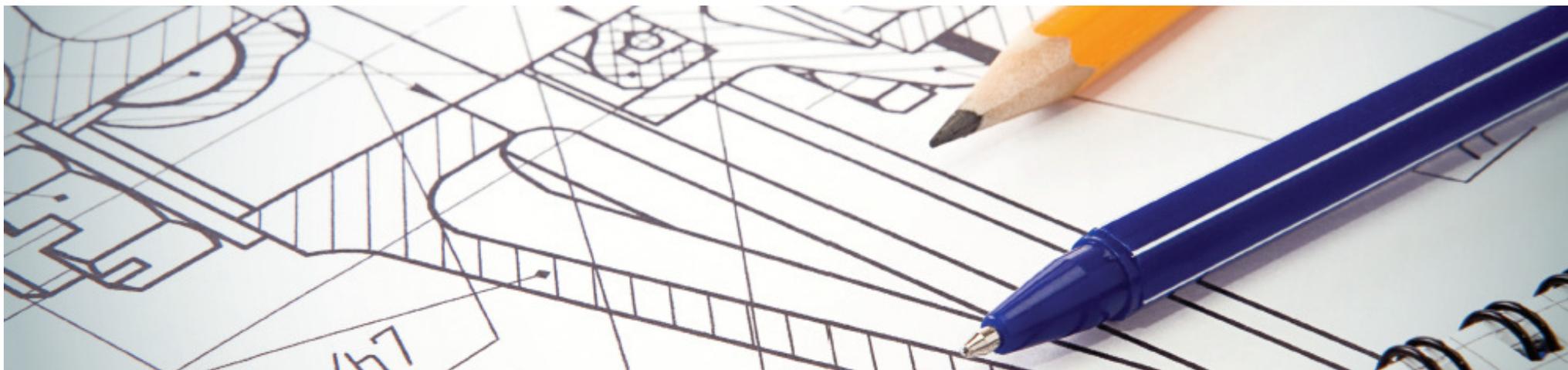


2020 Analysis on PTAB Contested Proceedings

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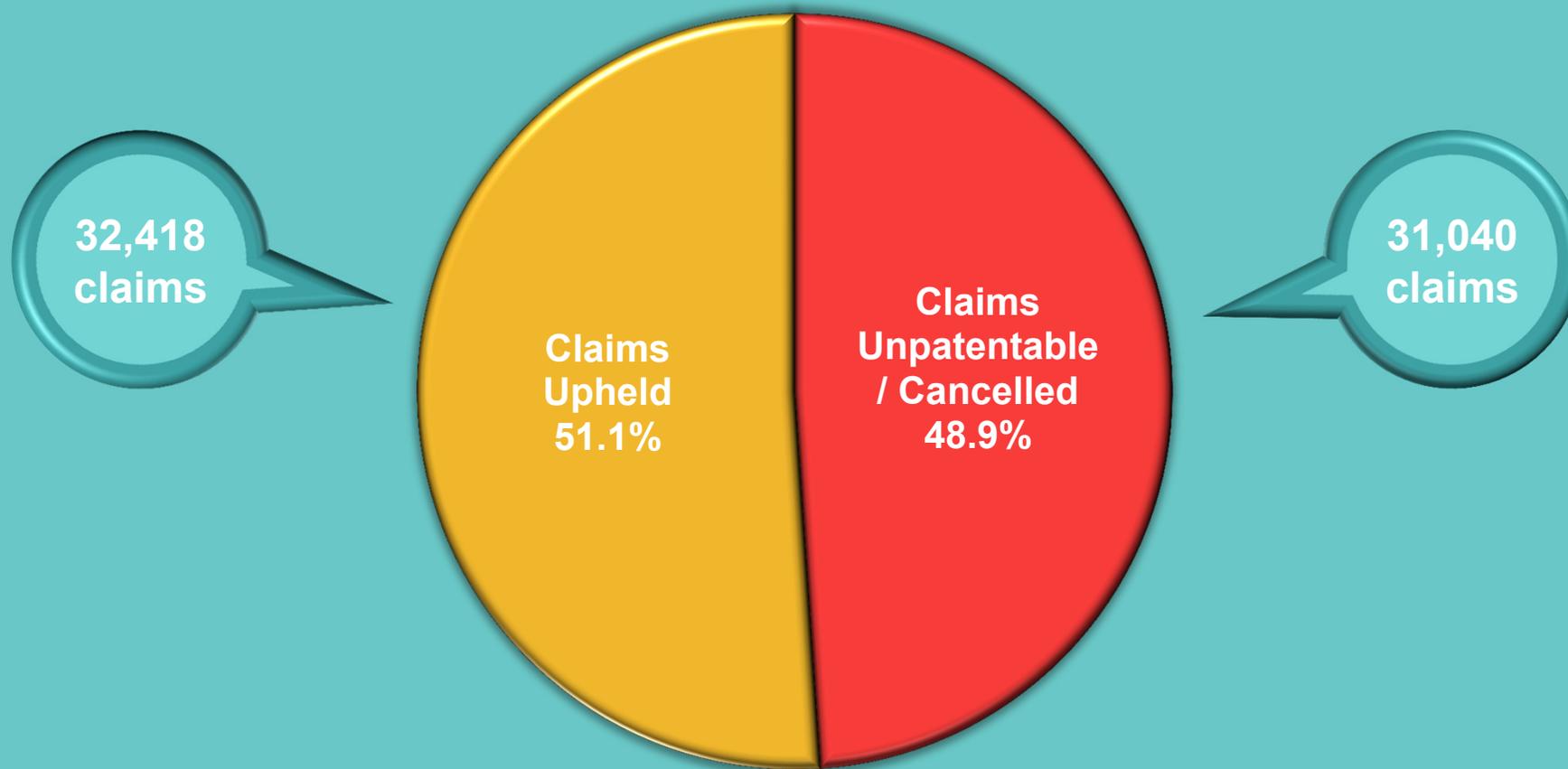
INTRODUCTION

Venable Fitzpatrick has annually undertaken this Report on Patent Trial and Appeal Board (PTAB) AIA trials to provide objective information on the general results of such trials, the types of arguments that have had the most traction, and trends that have emerged over time. The analysis is based on a review of all final written decisions issued through June 2020 and all decisions denying institution issued through June 2019. Because final written decisions issue about one year after institution decisions, we did not include decisions denying institution after June 2019 in order to

avoid improper skewing.

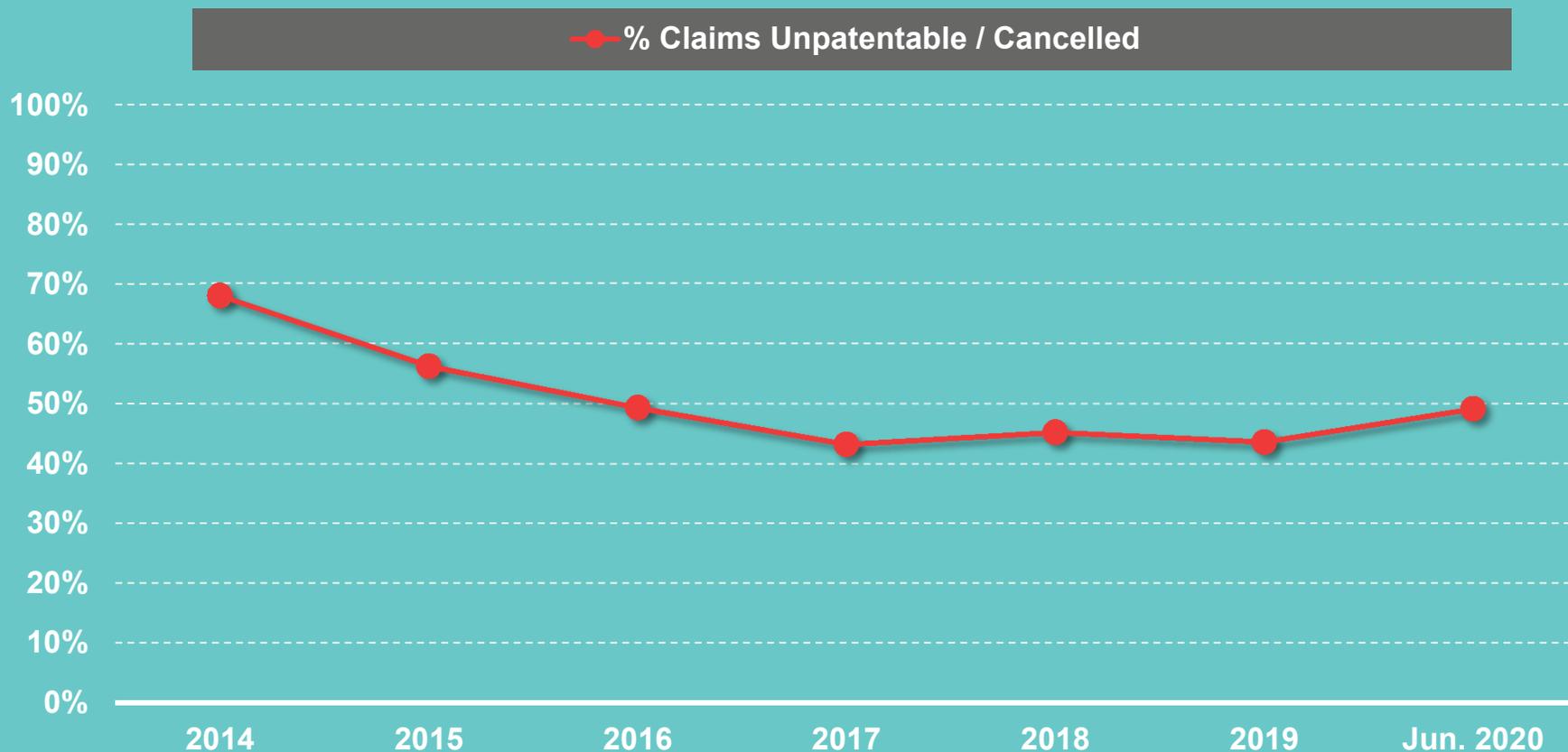
This report provides perspective on the outcomes of review proceedings based on a large pool of decisions and a rigorous methodology that accounts for duplicate petitions and other factors that could paint an incorrect picture. The report provides valuable insights regarding both the usefulness of these proceedings to challengers and effective lines of defense for patent owners.

IPR: Survival Rate of Challenged Claims



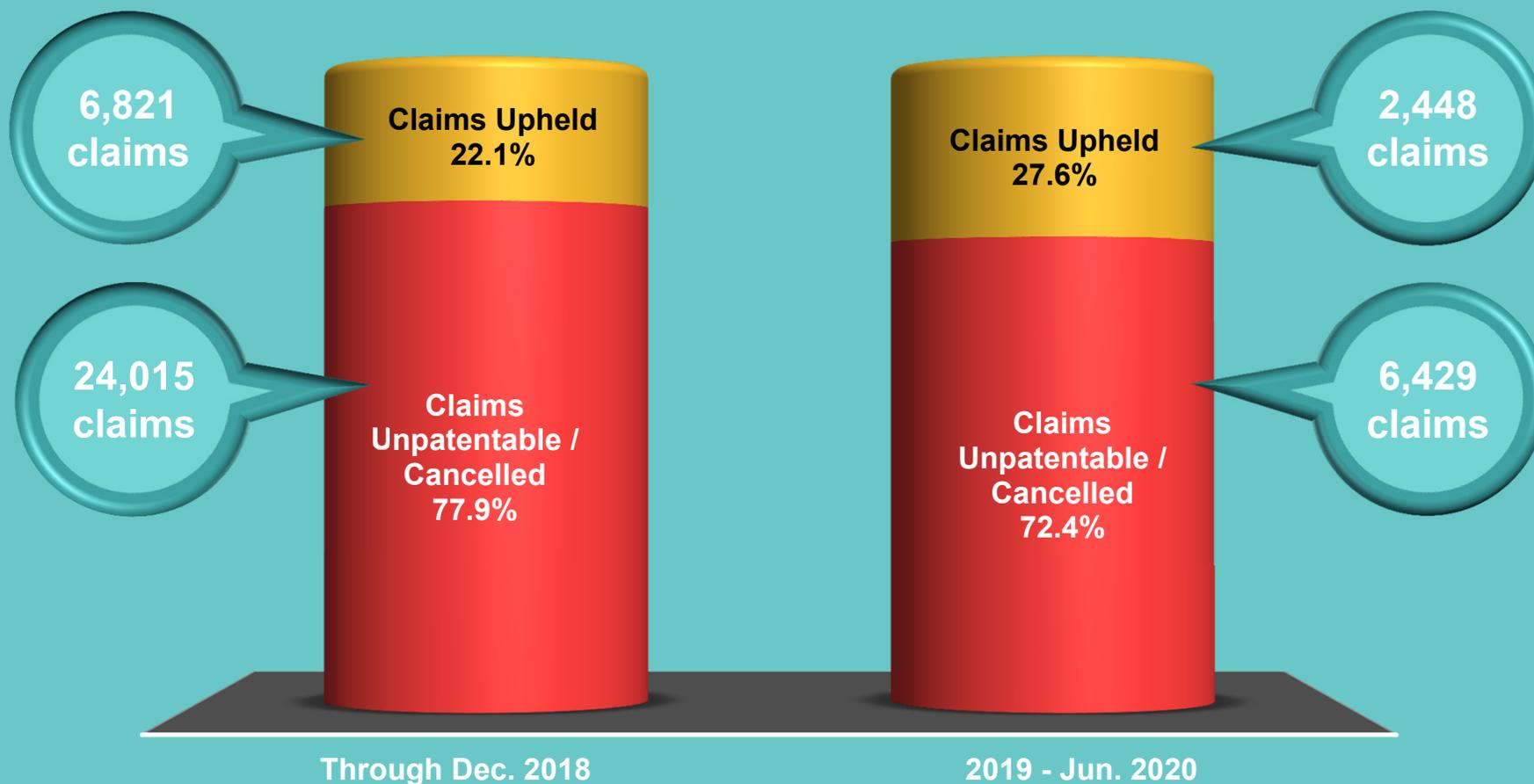
Key Finding: In cases that reached final written decisions or were substantively denied institution, a little less than half of the originally *challenged* claims were cancelled / unpatentable. Claims denied institution due to procedural reasons (e.g., time-barred) were excluded. The analysis includes decisions not to institute through June 2019, and final decisions through June 2020, because final decisions typically issue about one year after the institution decisions. This avoids skewing to one type of decision.

IPR: Percentage of Challenged Claims Found Unpatentable or Cancelled in Final Decisions



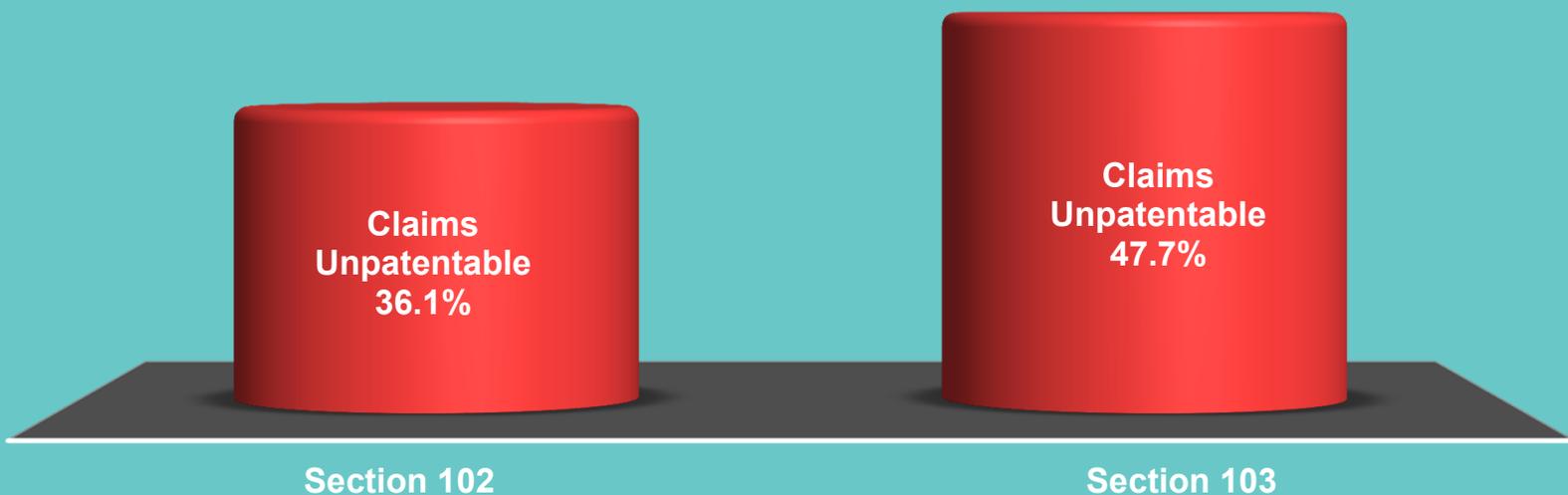
Key Finding: Analyzing originally *challenged* claims that reached final written decisions or were denied institution on substantive grounds, the data show a drop in unpatentability findings over the years, with a leveling off in 2017-2019 and a slight increase in the first half of 2020. The trend over time may stem from adjustments by the PTAB, the quality of patents challenged by petitioners, the quality of petitions/defenses, or some combination thereof. The listed periods are for final written decisions. The analyzed decisions not to institute are from one year earlier.

IPR: Survival Rate of Instituted Claims



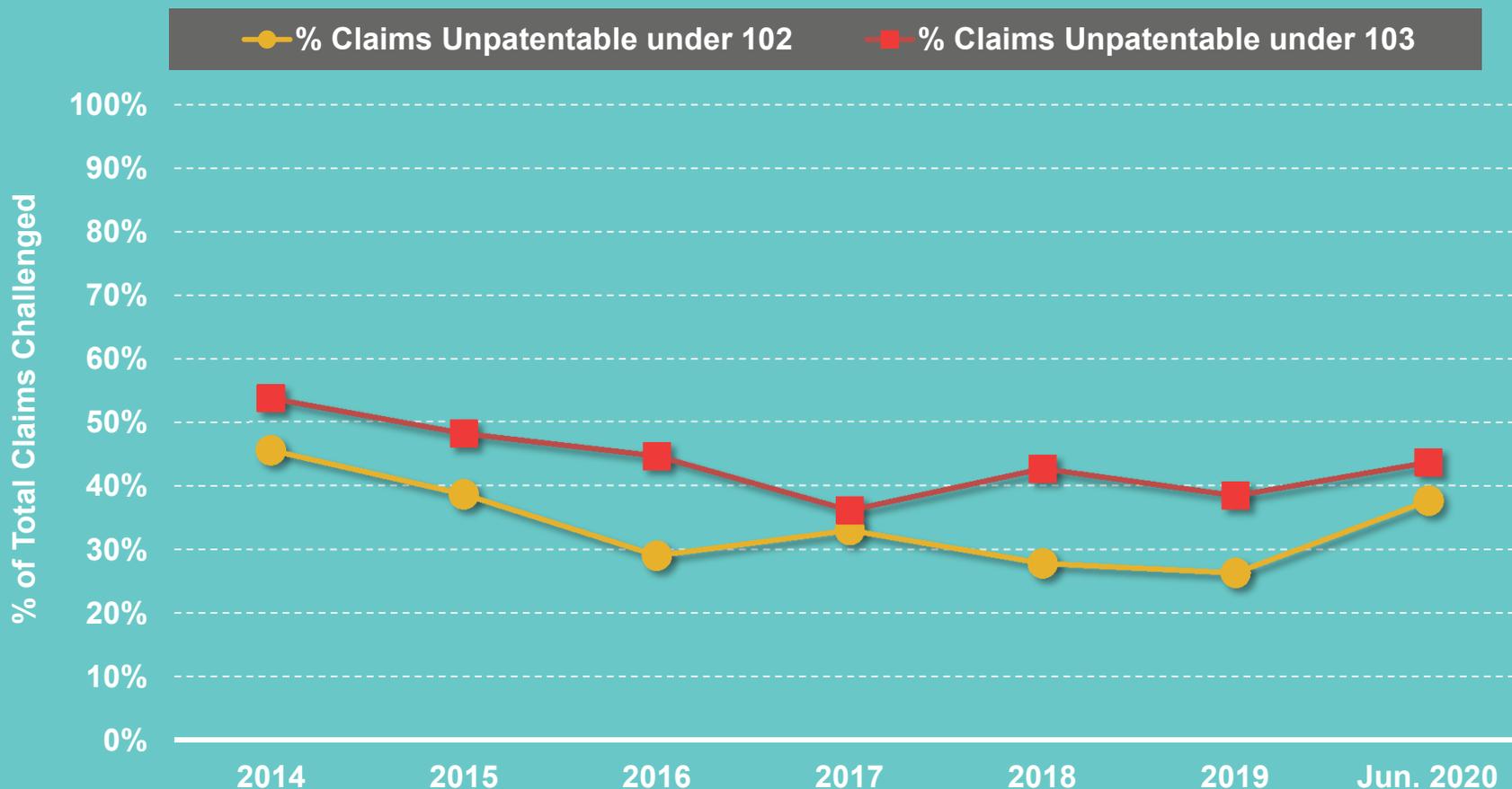
Key Finding: The survival rate of *instituted* claims in IPR proceedings that reached a final written decision trails the survival rate of originally *challenged* claims. Prior to the Supreme Court’s decision in *SAS Institute v. Iancu*, institution could be based on a subset of claims challenged, causing institution to be a significant predictor of the ultimate outcome. It is possible that *SAS* has started to impact this statistic, as the PTAB now institutes trial on all claims even if only some of the claims meet the threshold, i.e., if “it is more likely than not” that at least one claim is unpatentable. In 2019-2020, some claims that were upheld in a final written decision may have been denied institution prior to *SAS*, causing the rate of unpatentability in final written decisions to fall.

IPR: Unpatentability Findings in Final Decisions Relative to Claims Challenged



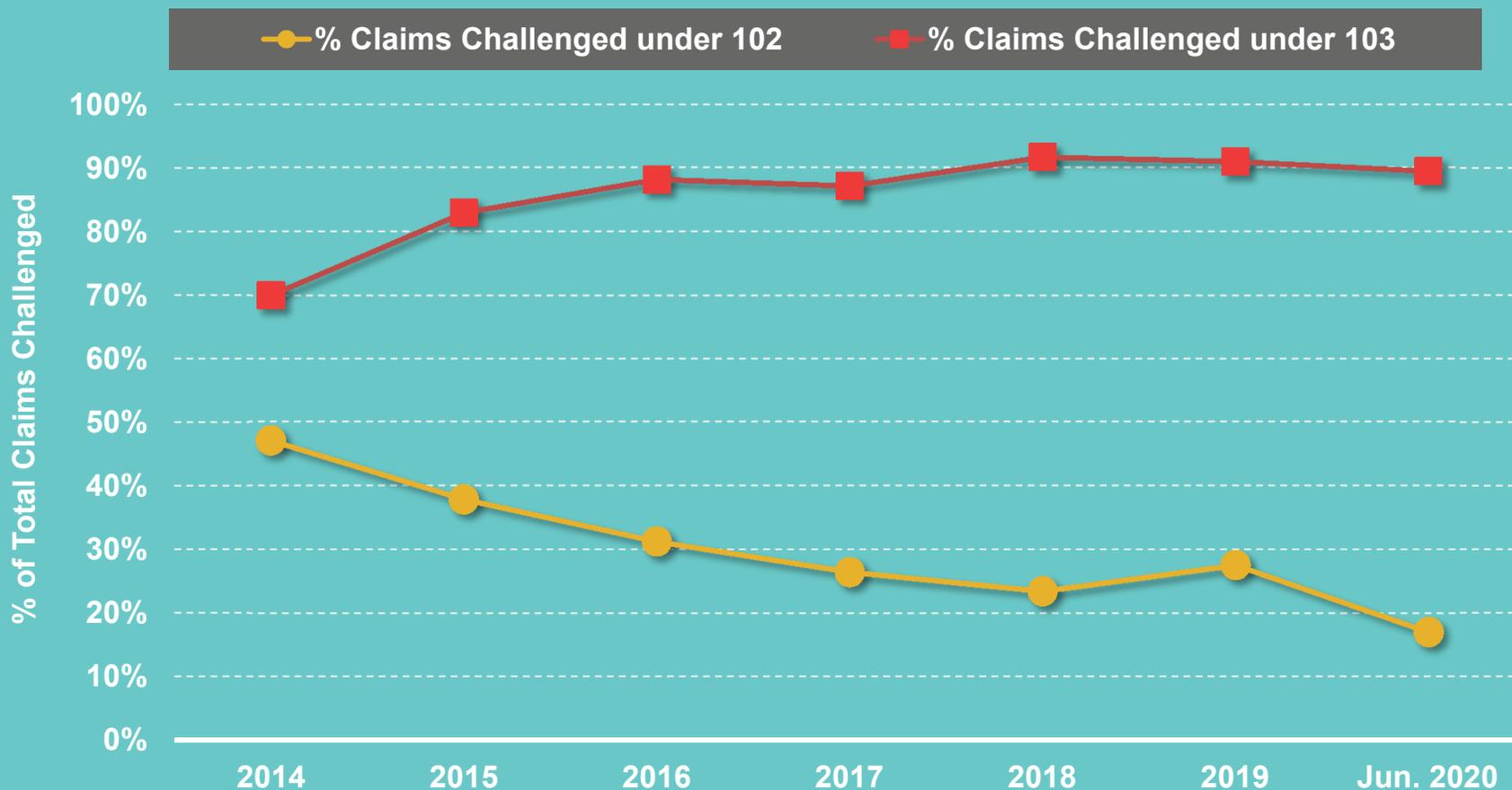
Key Finding: Section 103 grounds continue to outperform Section 102 grounds. The Section 102 success rate is similar to the corresponding rate in district court litigations (about 31-35%), while the success rate for Section 103 is much higher in IPR proceedings than in district courts (about 28-33%). This analysis excludes claims cancelled by the patent owner for which the PTAB could not issue a ruling under a specific section.

IPR: Unpatentability Findings in Final Decisions Relative to Claims Challenged by Year



Key Finding: Over time, unpatentability rates for challenges under both Section 102 and Section 103 have trended downward. In 2019, the unpatentability rate for claims challenged under Section 102 was the lowest it has been, at 26.4% of challenged claims, but it raised sharply to 37.7% in the first half of 2020. This may be attributable to the drop in section 102 challenges. Some claims were invalidated under both sections. This analysis excludes claims cancelled by the patent owner.

IPR: Percentage of Claims Challenged Under 102 and 103 by Year



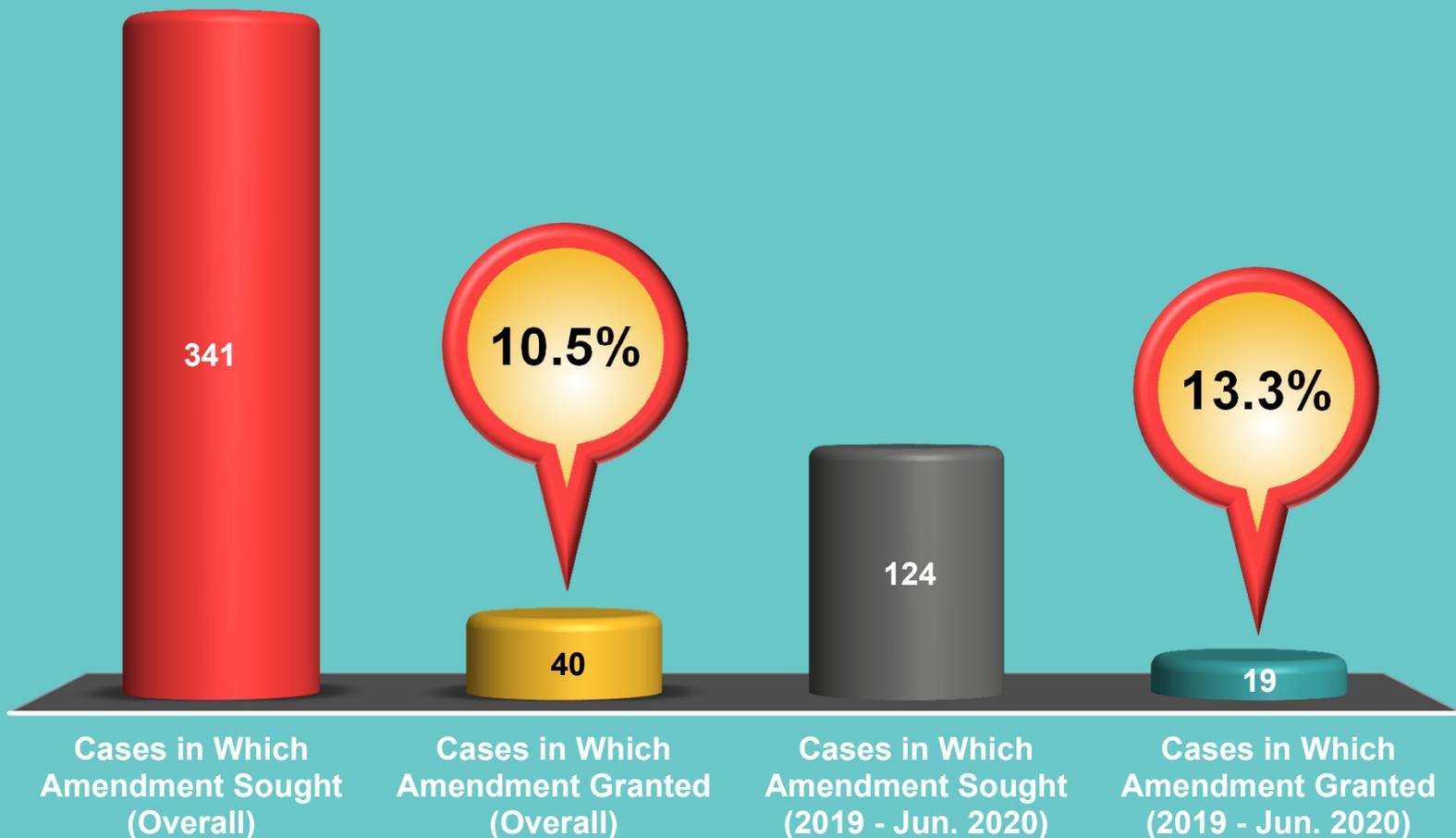
Key Finding: The percentage of claims challenged under Section 102 has declined over time, while the percentage challenged under Section 103 has increased, with approximately 90% of claims now facing Section 103 challenges. This trend is likely because data have continually shown that Section 103 challenges provide a better chance of success. Of note, the increase in the percentage of Section 103 challenges has coincided with a drop in the success rates. This year, the drop in Section 102 challenges has been accompanied by an increase in the rate of success. The percentages shown do not equal 100% because many claims are challenged under both sections.

IPR: Unpatentability Findings in Final Decisions Relative to Claims Instituted



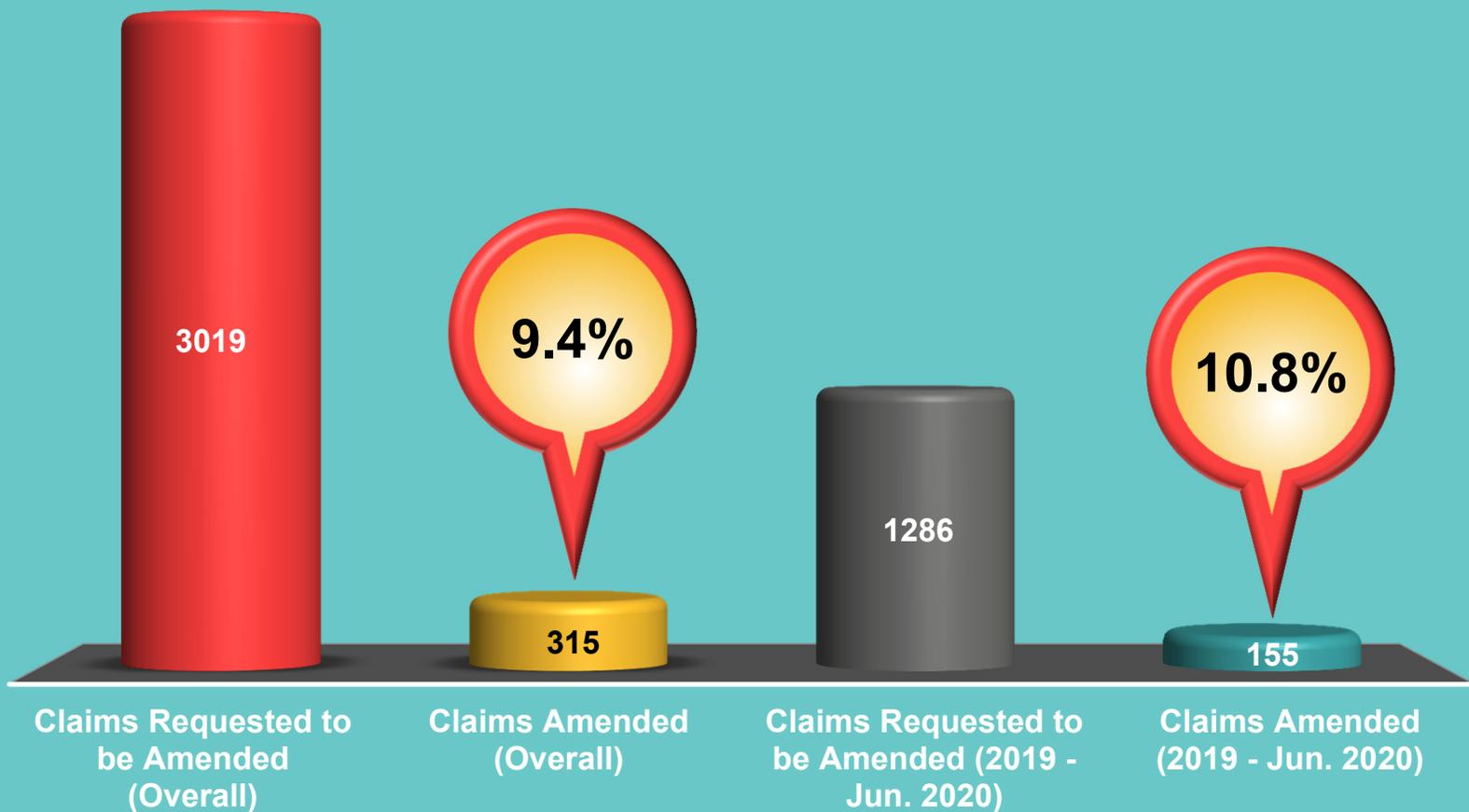
Key Finding: The higher rates show that the likelihood of a successful challenge jumps significantly upon institution. However, these statistics have shifted due to the effects of SAS. For instance, the unpatentability rate for Section 103 claims went from 73.6% in 2018 to 66.3% in 2019. In the first half of 2020, the rate was 68.0%. It is possible that this is due to claims that previously would have been denied institution being found not unpatentable in final written decisions. The rate of unpatentability has remained relatively steady for Section 102 claims (51.7% in 2018, 54.6% in 2019, and 52.3% in the first half of 2020). Some claims were invalidated under both sections. We excluded cancelled claims for which the PTAB could not issue a ruling under a specific section.

IPR: Requests to Amend the Claims



Key Finding: A common complaint of patent owners has been that the PTAB has granted motions to amend claims sparingly. More recently, the news has been better for patent owners. Our 2017 analysis showed a success rate of 6.1%, which rose to 8.8% with the addition of the 2018 data, and rose again to 10.5% with the addition of the 2019 and 2020 data. Notably in 2019 and 2020, there was a significant increase in the overall number of motions to amend filed, from 48 in 2018 to 77 in 2019, and 47 in the first half of 2020. It will be interesting to see how the numbers change in 2020 as patent owners take advantage of the new pilot program (initiated in March 2019) that provides preliminary guidance from the Board on motions to amend.

IPR: Number of Claims Amended / Denied Amendment



Key Finding: As with the statistics for the success rate for overall motions, the success rate on a claim-by-claim basis has increased overall from 2017’s analysis (3.5% overall). Indeed, through 2017, only 42 claims had been successfully amended, as compared to 160 claims by the end of 2018, 258 by the end of 2019, and 315 by mid-2020. While the 2018 statistics showed a success rate on a claim-by-claim basis of over 18%, there was a significant drop in 2019 with the success rate on a claim-by-claim basis being about half that of 2018 at 9.4%. In 2020, the success rate rose again to 14.2%. In most instances, the PTAB denied motions to amend for substantive reasons; however, in a few instances, a contingent motion to amend was not granted because the original claims were upheld.

IPR: Remand Decisions



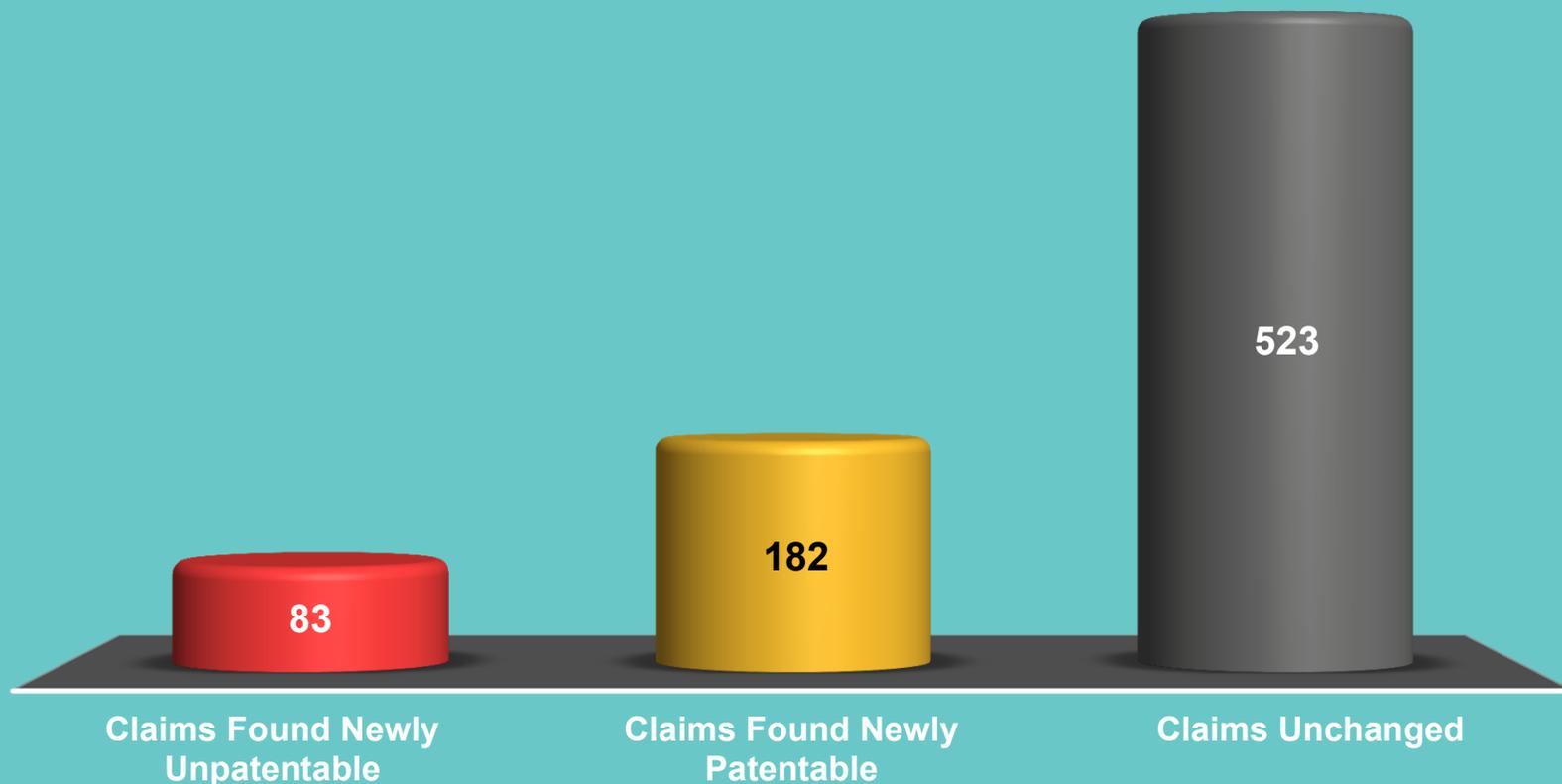
IPRs with Remand
Decisions



Average Time to
Decision on Remand
from Initial Decision

Key Finding: As measured from the initial final written decisions, the average time for such a remand decision is a little over 2.5 years, which includes the time it takes for the case to go through an appeal at the Federal Circuit. The time for the appeal to the Federal Circuit accounts for the bulk of this period. The PTAB has a goal of handling remanded cases within 6 months of the Federal Circuit mandate. The time to decision was much higher for remand decisions rendered in 2019-2020, with an average of 1066 days, compared to the previous average of 789.5 days.

IPR: Statistics on Remand Decisions



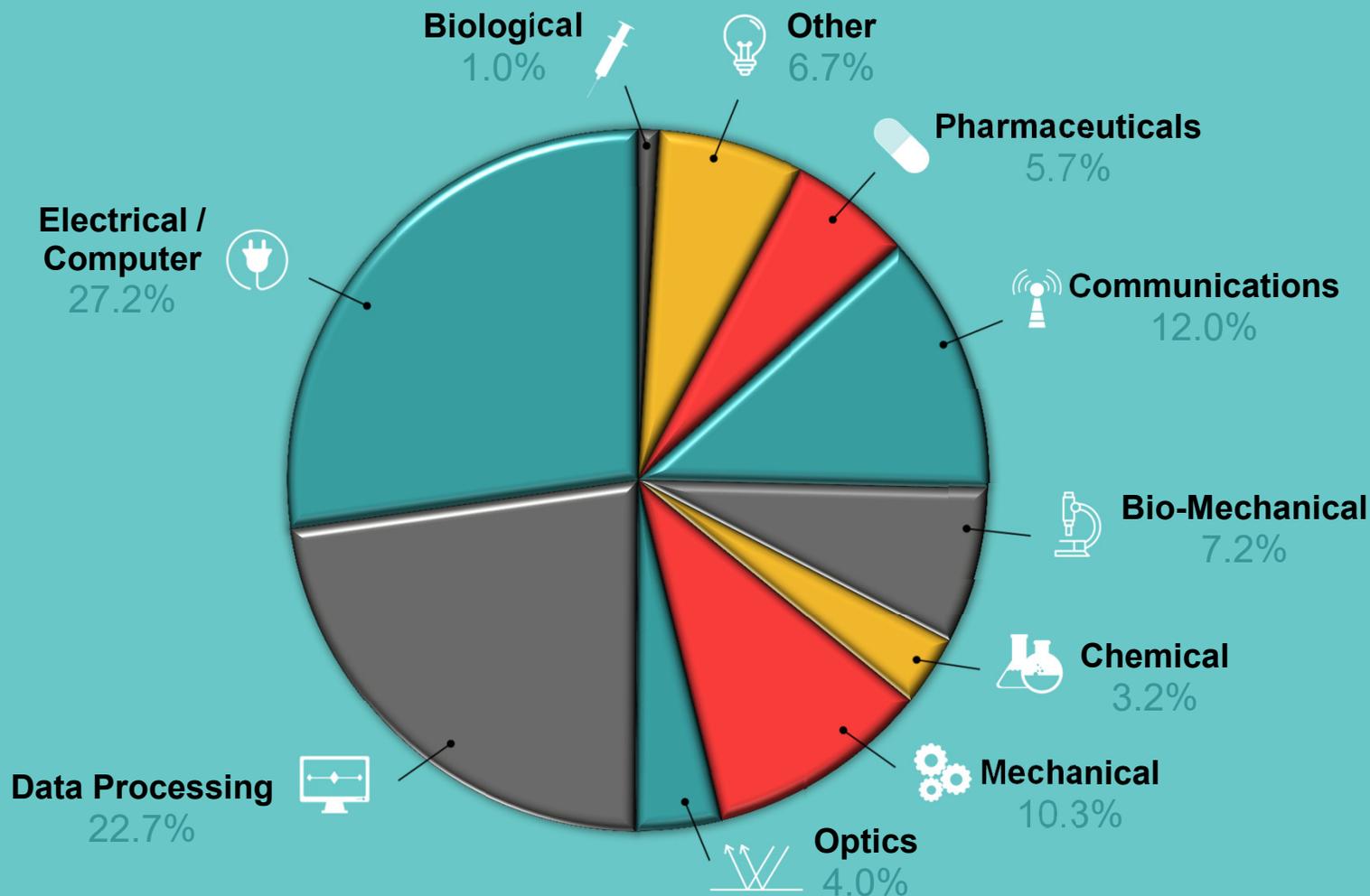
Key Finding: Through 2018, the PTAB’s rulings had gone largely unchanged following remands in which the Federal Circuit instructed the PTAB to reconsider original decisions (e.g., to use a different claim construction). This trend began to change in 2019, when almost half of the patentability outcomes were changed on remand. More remands occurred in 2019 (44 compared to 27 in all previous years combined) due in part to SAS remands requiring the PTAB to consider claims not previously instituted. This analysis does not account for cases in which the Federal Circuit simply reversed the PTAB’s decision, leaving no further analysis for the PTAB to undertake.

Percentage of IPRs with a Concurrent Litigation



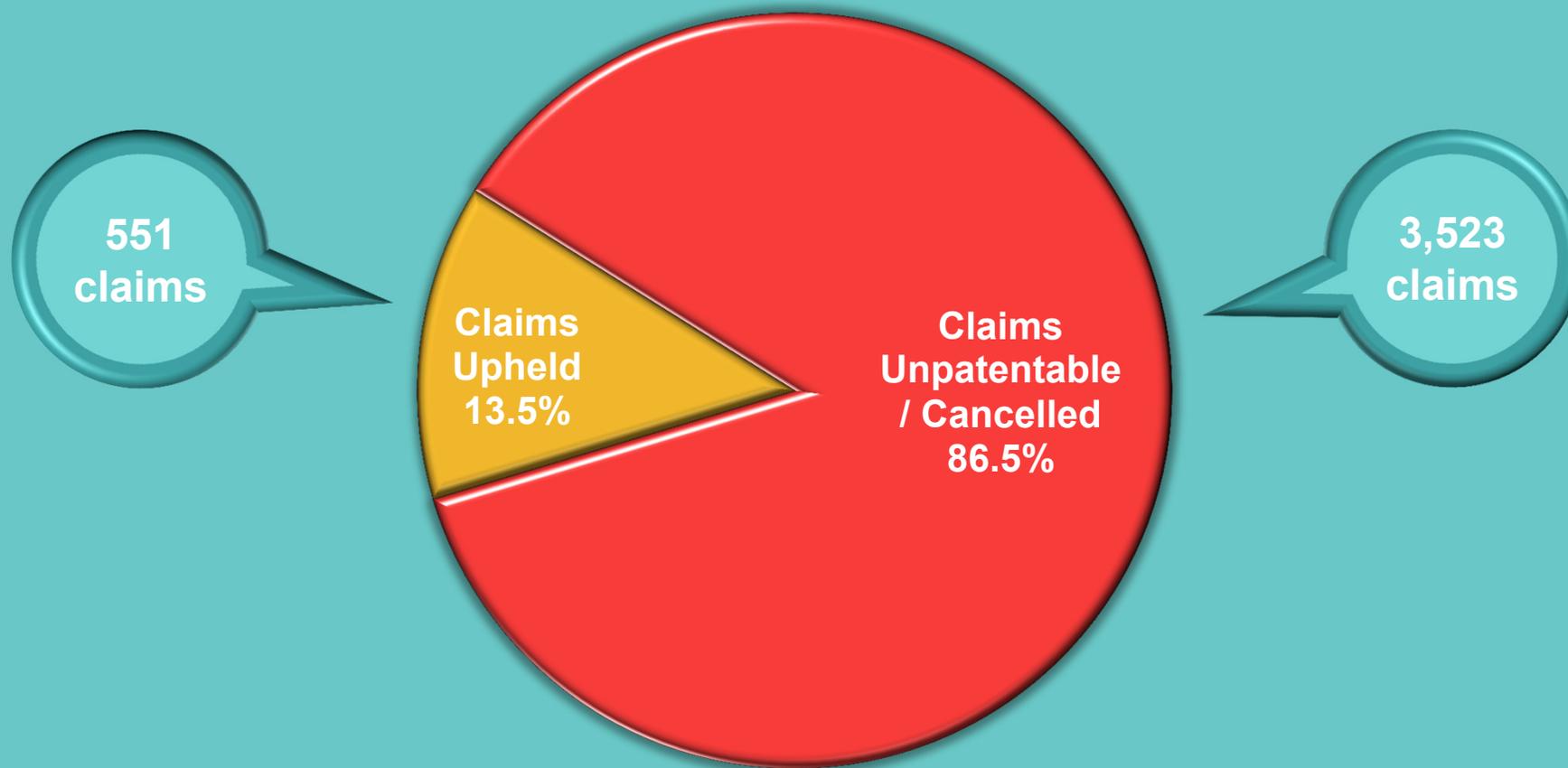
Key Finding: The majority of IPR proceedings involved patents embroiled in concurrent district court litigations. This finding supports the notion that defendants in patent infringement suits are driving the filing of IPR petitions.

IPR and CBM: Final Decisions by Technology



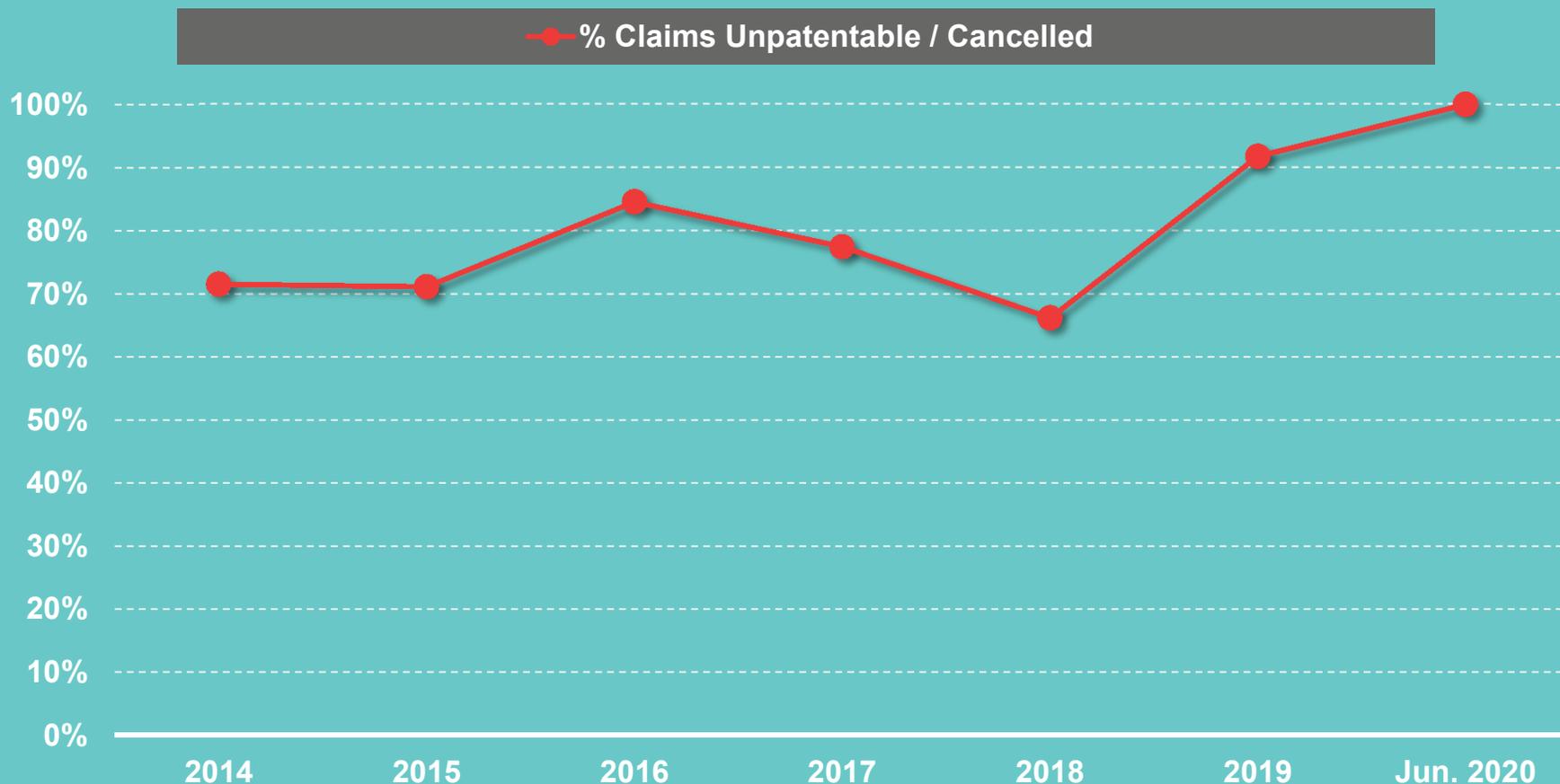
Key Finding: This chart shows the technology areas for the patents for which the PTAB issued final decisions. Two technology categories—electrical/computer and data processing—have been at issue in about 50% of all final decisions issued in IPR and CBM proceedings through June 2020. From the inception of AIA trials in late 2013 through 2015, those two categories had a combined share of about 60%. Pharmaceutical cases accounted for about 5.7% of final decisions, but that share is up from about 4% through 2015.

CBM: Survival Rate of Challenged Claims



Key Finding: As compared to IPR proceedings, CBM proceedings allowed for additional statutory grounds of unpatentability and relate only to qualifying business method patents (which opened the door to Section 101 challenges). The availability of Section 101 challenges largely accounted for the higher rate of unpatentability as compared to IPRs. We did not include cases denied institution for failure to identify a qualifying business method claim, which is the reason for the vast majority of denials of institution. The CBM program expired in September of this year.

CBM: Percentage of Challenged Claims Found Unpatentable or Cancelled in Final Decisions



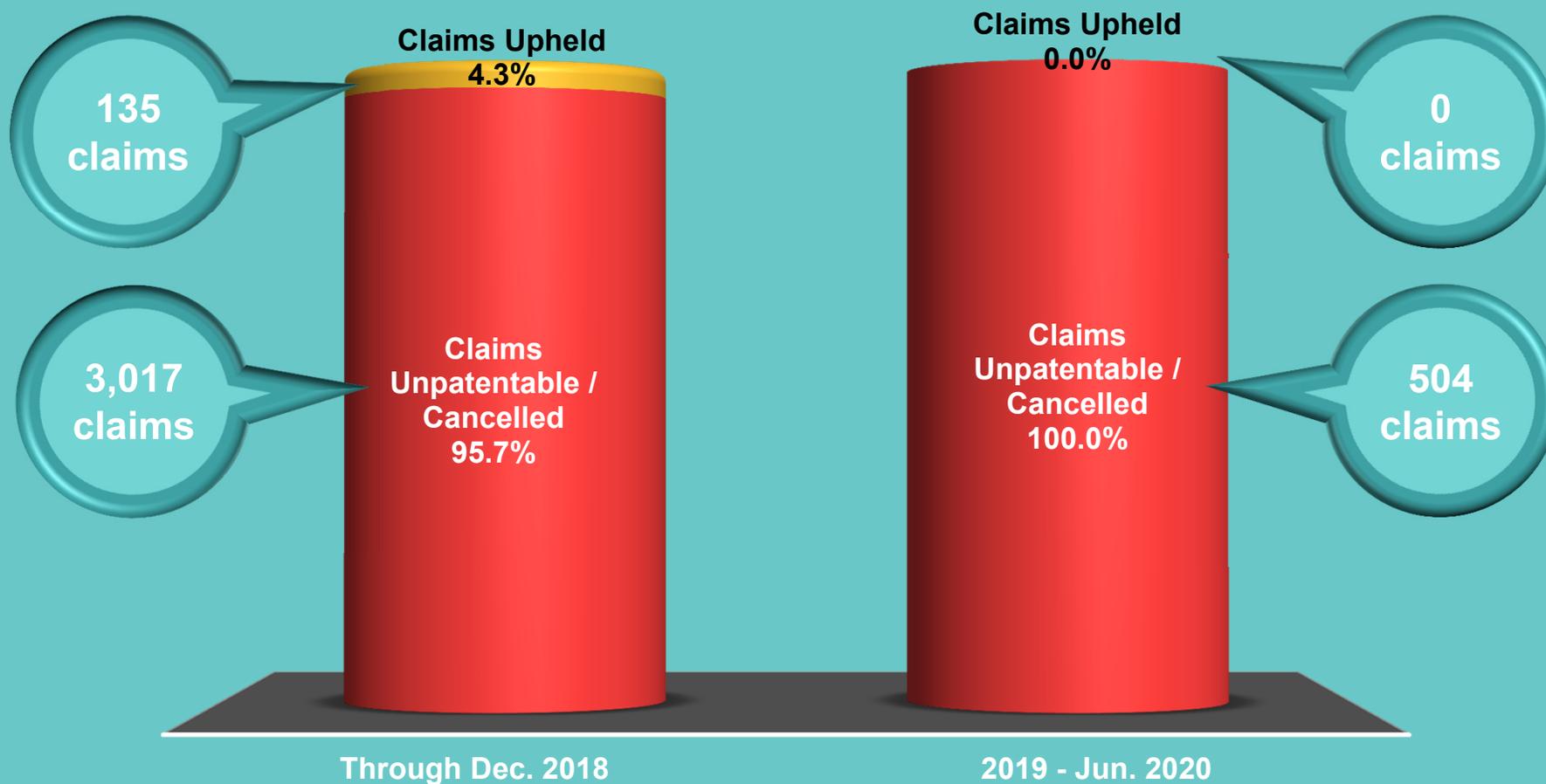
Key Finding: These statistics do not account for overall redundancies in patents challenged, as it examines each year's challenges independently from each other year. The listed periods correspond to the year of the final written decisions. The analyzed decisions not to institute are from one year earlier. As can be seen, the CBM rate of unpatentability has fluctuated within a range, without the discernible trend associated with IPRs. While there is an apparent trend upwards since 2018, it should be noted that, in 2020, the sample size was very small, making it difficult to draw any conclusions from the data. The small sample size may be due to the expiration of the CBM program in September, which may have caused some patent owners to wait until after the expiration to enforce vulnerable patents.

CBM: Unpatentability Findings in Final Decisions Relative to Claims Challenged



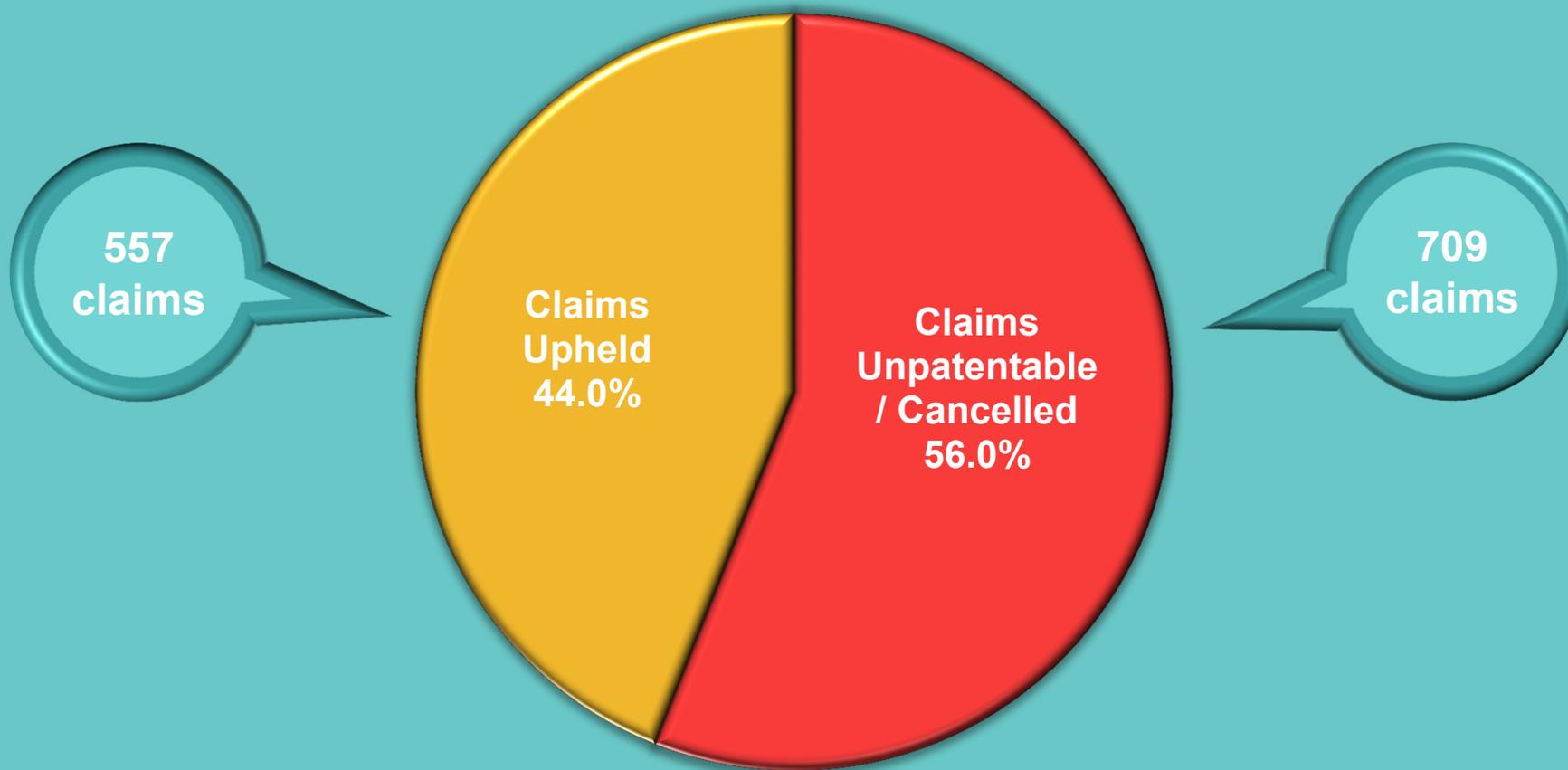
Key Finding: The rate of unpatentability of claims challenged under Section 101 is higher than the corresponding rate under Sections 102, 103, and 112, and is higher than any success rate achieved in IPR proceedings. Note that some claims were found unpatentable on multiple bases. Claims cancelled by the patent owner and cases denied institution for failing to identify a qualifying business method were excluded from the analysis.

CBM: Survival Rate of Instituted Claims



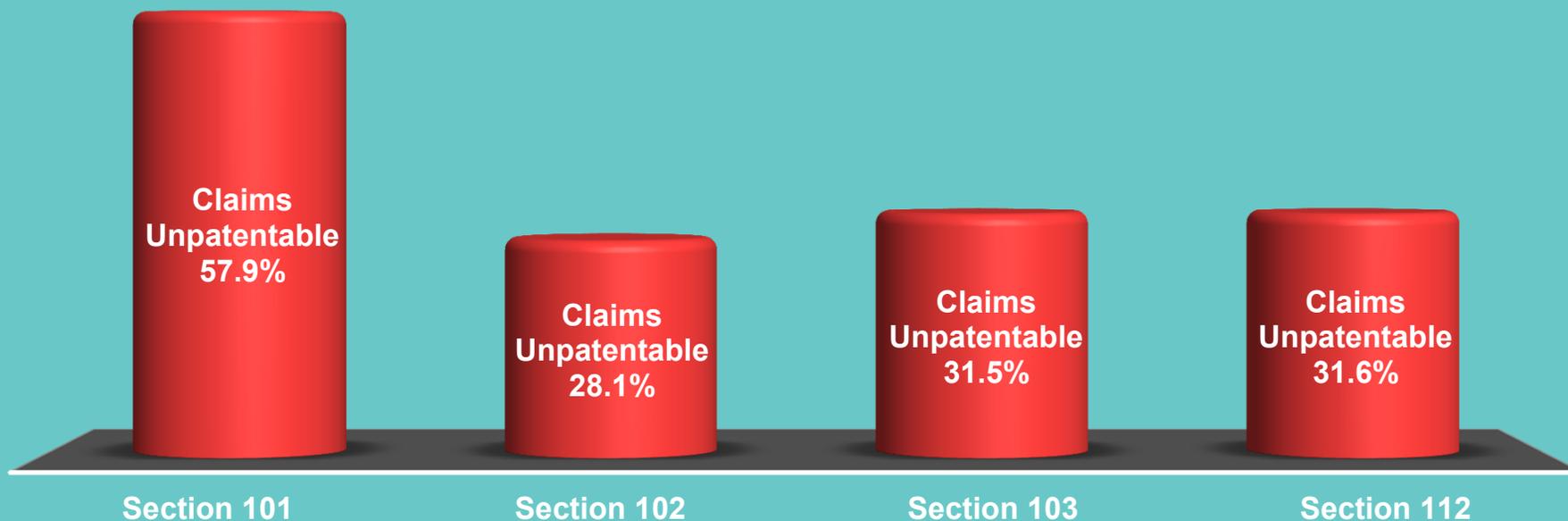
Key Finding: The high rate of unpatentability stems largely from the requirements for institution of a CBM proceeding. Specifically, institution requires that there be a qualifying business method patent claim, which requirement puts the claim in danger of being found unpatentable in view of *Alice*.

PGR: Survival Rate of Challenged Claims



Key Finding: Unlike IPR and CBM proceedings, PGR proceedings can only be initiated for patents having a claim with an effective filing date that is on or after March 16, 2013. The overall percentage of claims cancelled or found unpatentable has been increasing over time, from 38% at the end of 2017, to 50.1% at the end of 2018, and to 53.5% at the end of 2019. In 2019 alone, the rate of unpatentability was 58%, and in the first half of 2020 it was 63%. However, the variance derives in part from the small sample sizes (186 new claims in 2018 and only 339 claims from inception through the end of 2017). There were much larger sample sizes in 2019 and 2020 compared to past years (407 claims in 2019 and 334 claims in the first half of 2020), but the overall sample size still remains small.

PGR: Unpatentability Findings in Final Decisions Relative to Claims Challenged



Key Finding: While the sample size remains small, the numbers indicate that challenges under Section 101 are the most successful. For the remaining bases for challenge, the rates of unpatentability lag those of IPR and CBM proceedings. Of note, unlike CBM proceedings, which also allow for Section 101 challenges, but are limited to business method patents, the top targets for PGR petitions in the cases analyzed were patents on games (e.g., video games), followed by pharmaceutical patents.

ABOUT US

Venable Fitzpatrick has more than 140 attorneys practicing intellectual property law. We have one of the premier patent litigation practices in the nation.

Our offices across the country serve a diverse national and international clientele from Fortune 500 companies to Internet start-ups. We have continually kept pace with the complex world of new technologies and the strategies required for protecting knowledge, vision and ideas.

The quality and experience of our attorneys is among the best. In addition to robust legal qualifications, the vast majority of our attorneys hold scientific degrees, including advanced degrees. Our attorneys also include those with substantial industry experience and experience serving as USPTO examiners.

Our clients do business in a wide range of industries including pharmaceuticals, chemicals, energy, biotechnology, computers, information technology, electronics, medical devices, optics, medical imaging, transportation, telecommunications, finance, food and e-Commerce. As new technologies emerge, we work closely with our clients in developing strategies for protecting and enforcing their intellectual property.



OUR METHODOLOGY

Our analysis for this report considers all of the final written decisions issued by the PTAB for IPR, CBM, and PGR proceedings through June 2020 and all decisions denying institution through June 2019. A few things to note:

1. For situations in which multiple petitions were filed against one patent, we consolidated those petitions into one for purposes of collecting data to avoid skewing from redundant petitions.
2. In gathering statistics, we evaluated only the original claims in the patents at issue. We did not account for amended claims that were subsequently allowed by the PTAB. The number of cases in which motions to amend were granted is quite small.
3. For cases in which the patent owner requested adverse judgment against itself, we considered the claims to be cancelled.
4. For the charts that show the percentage of claims found unpatentable under different sections (e.g., Sections 102 and 103), please note that, in some instances, the PTAB found claims unpatentable under multiple grounds.
5. We did not include in our analysis petitions that did not reach either a final written decision or decision denying institution (e.g., settlements).
6. We analyzed substantive decisions not to institute. We did not include in our analysis denials that were procedural in nature (e.g., time barred petitions, lack of standing in CBMs, etc.).

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FOR MORE INFORMATION CONTACT

JUSTIN OLIVER
PARTNER

T 202.721.5423
JOLIVER@VENABLE.COM