AMICUS BRIEFS: ANSWERING THE TEN MOST IMPORTANT QUESTIONS ABOUT AMICUS PRACTICE

WHAT IS AN AMICUS BRIEF?

The Original Amicus Curiae

An amicus brief is filed by an "amicus curiae," a term defined as: "A friend of the court. A term applied to a bystander who, without having interest in the cause, of his own knowledge makes a suggestion on a point of law or fact for the information of the presiding judge."[1] The submission of amicus briefs precedes even the common law, having its roots in ancient Rome. The role of the original amicus was to provide a court with legal information that was beyond its notice or expertise.[2] In England, the amicus brief first appears in the 17th century,[3] and its role was principally to assist judges in avoiding errors.[4] For example, a Member of Parliament filed an amicus brief to advise the court of the meaning of a statute based on his personal knowledge of the relevant legislative history.[5]

1. Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy,* 72 Yale L.J. 694 (1963).
2. Allison Lucas, *Friends of the Court? The Ethics of Amicus Brief Writing in First Amendment Litigation*, 26 Fordham Urban L.J. 1605, 1605 (1999); Alexander Wohl, *Friends with Agendas—Amicus Curiae Briefs May be More Popular Than Persuasive*, 46 A.B.A. J., Nov. 1996, at 46–48; Karen O'Connor & Lee Epstein, *Court Rules and Workload: A Case Study of Rules Governing Amicus Curiae Participation*, 8 Just. Sys. J. 35, 36 (1983); Ernest Angell, *The Amicus Curiae: American Development of English Institutions*, 16 Int'l & Comp. L.Q. 1017, 1017 (1967); Fowler v. Harper & Edwin D. Etherington, *Lobbyists Before the Court*, 101 U. PA. L. Rev. 1172, 1176 (1953).
3. Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs,* 72 N.C.L. Rev. 91, 97 (1993) (citing Protector v. Geering, Hardres 85, 145 Eng. Rep. 394 (1656)).
4. Sylvia H. Walbolt & Joseph H. Lang, Jr., *Amicus Briefs: Friend or Foe of Florida Courts,* 32 Stetson L. Rev. 269, 270 (2003).
5. Nancy Bage Sorenson, *The Ethical Implications of Amicus Briefs: A Proposal for Reforming Rule 11 of the Texas Rules of Appellate Procedure*, 30 St. Mary's L.J. 1219, 1225 (1999).

The first amicus brief in the United States was submitted when the Supreme Court requested Henry Clay's assistance in determining the application of the commerce clause to a land agreement between Kentucky and Virginia.[6] To this day, courts may appoint amici curiae to assist them. After Clay's service to the Supreme Court, amicus briefs began to be filed by the United States, state governments, attorneys for client organizations, and lobbyists representing private and trade organizations.[7] Governmental entities filed amicus briefs even in private disputes, when public interests were implicated.[8]

The function of the amicus curiae at common law was to advise the judge of relevant opinions, to prevent any manifest error.[9] The amicus curiae had the further role of informing the judge of a relevant fact, such as a party's death or the collusive or fraudulent nature of a suit.[10] Traditionally, then, the sole objective of the amicus was to prevent an uninformed legal or factual error. Analogous was the status of the original jury—namely, members of the community who were knowledgeable about the parties and the relevant facts.[11] Example 13 is an amicus brief that provides facts relating to the case in a Counter-Statement of Facts section of the brief.

Such traditional participation by an amicus occurs even today. A law professor or an attorney in a specialized field may submit an unsolicited brief or letter to the court suggesting that the court has made a legal error in a recent decision or simply providing "neutral" data that may assist the court in making its decision without advocating whether one side is favored by the data.[12] That type of amicus submission was contemplated by the United States Supreme Court when it promulgated its first written

6. *Id.* (citing Green v. Biddle, 21 U.S. (8 Wheat.) I (1823)).
7. Rustad & Koenig, *supra* n.3, at 96.
8. Walbolt & Lang, *supra* n.4, at 270; *see, e.g.,* Gibbons v. Ogden, 22 U.S. I (1824); Martin v. Hunter's Lessee, 14 U.S. 304 (1816).
9. *Id.* at 694 (quoting ABBOTT'S DICTIONARY OF TERMS & PHRASES); *see also* Edmund R. Beckwith & Rudolph Sobernheim, *Amicus Curiae—Minister of Justice*, 17 FORDHAM L. REV. 38, 38 (1948).
10. Krislov, *supra* n.1, at 695.
11. B. Michael Dann, *Free the Jury,* 23 LITIG., Fall 1996, at 5.
12. EUGENE GRESSMAN, KENNETH S. GELLER, STEPHEN M. SHAPIRO, TIMOTHY S. BISHOP & EDWARD A. HARTNETT, SUPREME COURT PRACTICE 740 (9th ed. 2007) (hereinafter cited as SUPREME COURT PRACTICE). A "no-argument" amicus brief with such data was filed in No. 13-1010, *M&G Polymers USA, LLC v. Tackett*, in the United States Supreme Court.

rule on the subject of amicus briefs in 1937.[13] A variant of the traditional amicus brief is one submitted by a law professor or specialist who advocates a policy choice but does not do so because of any allegiance to a party.[14]

The Modern Friend

The amicus submission has evolved into something very different from its original role. The modem-day amicus is rarely a neutral friend of the court. To the contrary, an interest in the litigation is one of the factors that courts use to decide whether to accept an amicus brief, although that interest cannot be a direct pecuniary one.[15] Thus, a more recent definition of amicus curiae is: "A person with strong interest in or views on the subject matter of an action [who] . . . petition[s] the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views."[16]

In the last several decades, attorneys acting as amici often represent private clients who are either interested in the case or in the manner in which the court will dispose of it.[17] Amici are sometimes disparagingly referred to as "lobbyists of the court."[18] The amicus brief has become a means of advocacy for interest groups, private individuals, and business concerns that are nothing more than extensions of the parties; they are friends of the litigants rather than of the courts.[19] That type of amicus participation began with industry trade groups and later expanded into minority

---

13. Krislov, *supra* n.1, at 694.
14. Ben Glassman, *Representing Law, Representing Truth: Legal Realism and Issues in the Ethics of Representation,* 44 Harvard L. Rev. I, 25–26 (2000);*see, e.g.*, Price v. GMAC, LLC, 562 F.3d 618, 629 (4th Cir. 2009) (discussing amicus brief filed by "Bankruptcy Professors," as well as amicus brief by National Association of Consumer Bankruptcy Attorneys.
15. Ed R. Haden & Kelly Fitzgerald Pate, *The Role of Amicus Briefs,* Alabama Lawyer (Mar. 2009) at 115, 117.
16. Black's Law Dictionary 75 (5th ed. 1979).
17. Robert L. Stern, Appellate Practice in the United States 302 (2d ed. 1989).
18. Wohl, *supra* n.2, at 46; *see also* Daniel A. Farber, *When the Court Has a Party, How Many "Friends Show Up?—A Note on the Statistical Distribution of Amicus Brief Filings*, 24 Const'l Commentary 19, 36 (Spr. 2007) (noting that lobbying by means of amicus briefs is different in two respects—it is more formal, and the lobbyist cannot offer the decision maker any benefits in return for support).
19. *Id*.; Rustad & Koenig, *supra* n.3, at 96 (observing that many amici are now lobbyists for private interests with a direct or indirect stake in the outcome of the litigation).

groups.[20] An example is an amicus brief filed by Michael Crichton, Larry David, Scot Turow, other writers, and the Authors Guild, Inc., in support of the petitioner concerning the right to use a real person's name in a work of fiction.[21] The International Trademark Association regularly files amicus briefs and publishes them in its Trademark Reporter.[22] The expanded nature of amicus briefs reflects Justice Black's observation, that "[m]ost cases before this Court involve matters that affect far more people than the immediate record parties."[23]

Private parties are by no means the only amici. The United States Government has often filed amicus briefs, dating back to 1812 in *Schooner Exchange v. McFadden*.[24] Indeed, the rules of the United States Supreme Court and Courts of Appeals do not require the government to obtain consent from the parties to file amicus briefs, as is the case with private amici.[25]

One commentator has decried the politicization of amicus practice by representatives of the federal government, citing examples of amicus briefs filed by the Solicitor General espousing views of the current presidential administration.[26] "One window into the soul of a presidential administration is the work of the Office of the Solicitor General."[27] Another commentator argues that the Solicitor General should confine its amicus practice to cases directly involving federal interests and that the Solicitor General's amicus briefs should be given deference in cases involving foreign relations and areas of government enforcement or policy that Congress has dedicated to the President.[28] The SEC is another example of a governmental amicus

---

20. Wohl, *supra* n.2, at 46–48; Walbolt & Lang, *supra* n.4, at 273.
21. *Amicus Brief of Michael Crichton et al. in* McFarlane v. Twist, 11 UCLA Enter. L. Rev. 1 (2004).
22. *See, e.g.,* Amicus Brief of International Trademark Association in *Special Effects, Ltd. v. L'Oreal SA et al*., 97 Trademark Rptr. 793 (May–June 2007).
23. Quoted by Mary-Christine Sungaila, *Effective Amicus Practice before the United States Supreme Court: A Case Study,* 8 S. Cal. L. Rev. & Women's Stud. 187, 188 (1999).
24. 11 U.S. (7 Cranch) 116, 118 (1812).
25. S. Ct. R. 37.4; Fed. R. App. P. 29(a); *see* Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?,* Am. Univ. L. Rev. 1243, 1261 (1992) (noting the greater opportunity for the government to file amicus briefs).
26. Sorenson, *supra* n.5, at 1235–38.
27. Karen Swenson, *President Obama's Policy in the Supreme Court: What We Know So Far from the Office of the Solicitor General's Service as Amicus Curiae*, 34 S.I.U.L.J. 359 (2010).
28. Michael E. Solimine, *The Solicitor General Unbound: Amicus Curiae Activism and Deference in the Supreme Court*, 45 Ariz. St. L.J. 1183 (2013).

curiae. From 1981 to 1989, the Supreme Court adopted the SEC's argument as amicus in eight of nine cases.[29] Professional groups, such as the American Association for Justice (*see* Appendix Example 8) and the Defense Research Institute (DRI) (*see* Appendix Example 9), have filed amicus briefs.

Perhaps adopting a view similar to the commentators critical of agency amicus briefs, the First Circuit considered an agency amicus brief in *Lawson v. FMR LLC*,[30] but expressly stated that the court "owed no deference" to the agency's brief.[31] In *Christopher v. SmithKline Beecham Corp.*,[32] the Supreme Court discussed at some length whether and under what circumstances courts should defer to agency interpretations in briefs, noting that the Department of Labor had submitted inconsistent amicus briefs on an issue whose resolution could impose substantial compliance burdens.[33] In a Fair Labor Standards Act case, the Fifth Circuit expressed interest in an issue by asking for briefing on whether to approve a two-step process for collective actions that had been used by a number of district courts, with the first step being a fairly lenient one. The Department of Labor and the EEOC filed an amicus brief endorsing the two-step process for policy reasons, and the court of appeals then denied mandamus relief without oral argument.[34]

More generally, a commentator has identified seven groups within modern amici: (1) special interest groups and trade organizations; (2) parties in other, similar cases; (3) government; (4) non-litigants potentially affected by the case; (5) law professors and practitioners in specialized fields; (6) bar organizations; and (7) quasi-parties that have in some way participated in some phase of the case.[35]

Amicus participation is especially valuable to non-parties, allowing them to "have their say."[36] When legislatures make law, everyone has an opportunity to weigh in on the issue. Not so in courts, which open their doors

29. Lucas, *supra* n.2, at 1609 & n.35 (citing the nine cases).
30. 670 F.3d 61 (1st Cir. 2012).
31. *Id.* at 83.
32. 132 S. Ct. 2156 (2012).
33. *Id.* at 2165–67 (discussing deference under *Auer v. Robbins*, 519 U.S. 452 (1997), and concluding that the agency's position was not entitled to deference).
34. Brief filed January 3, 2013, in No. 12-20605, *In re Wells Fargo Bank,* n.*A.* (5th Cir.).
35. Pamela Stanton Baron, *The Civil Amicus Brief*, 13 App. Advocate 4, 5–6 (2000).
36. Antonin Scalia & Bryan Garner, Making Your Case: The Art of Persuading Judges, at 102 (Thomson/West St. Paul, MN 2008).

only to actual litigants. So the amicus process allows others to comment on issues of importance to them.[37] This modern amicus practice was noted over forty years ago by Professor Samuel Krislov, who explained the reason for the evolving role of amici. Professor Krislov discussed the holding in *Strawbridge v. Curtiss*[38] that "each distinct interest should be represented by persons, all of whom are entitled to sue or may be sued in the federal courts."[39] As Krislov noted, this rule of limiting the case to the parties at hand has the effect of excluding non-parties from direct participation in federal court litigation and continues the common law history of hostility to intervenors. The common law tradition was to decide specific disputes, but its decisions often had effects beyond the parties. The amicus evolved into the vehicle of expression for those other affected interests.[40] Amicus participation may even be allowed as an alternative to intervention.[41]

The evolution of the amicus submission was also precipitated by the development of what Krislov called "bureaucratically sophisticated groups" that are able to exercise influence in the judicial sphere. Organizations have the flexibility to respond with written material and information. Professor Krislov concludes:

> The amicus curiae brief represents a prime example of a legal institution evolving and developing while maintaining superficial identity with the past. It has been a catch-all device for living with some of the difficulties presented by the common law system of adversary proceeding. The United States, in particular, has allowed representation of governmental and other complex interests generated by the legal involutions of federalism. In addition, the United States Supreme Court has helped foster its development as a vehicle for broad representation of interests, particularly in disputes where political ramifications are wider than a narrow view of common law litigation might indicate. Groups inherently weak in the political arenas and unequally

37. *Id.*
38. 7 U.S. (3 Cranch) 267 (1806).
39. *Id.* at 267.
40. Supreme Court Practice, *supra* n.12, at 426–28.
41. *Id.* (discussing amicus briefs as alternative to intervention); Ne. Ohio Coalition for Homeless v. Husted, 696 F.3d 580 (6th Cir. 2012).

> endowed with resources of wealth or skills have quite naturally been the leaders in the use of the brief.[42]

Such sophisticated groups have only grown since Krislov's observations. Moreover, the ability to create the printed word has grown with technology. Thus, the general rule these days is that the amicus is an advocate. That was suggested in *Jaffe v. Redmond,*[43] by Justice Scalia, who noted that there is "no self-interested organization out there devoted to the pursuit of truth in the federal courts."[44] His comment echoes the First Circuit's conclusion that the amicus curiae is usually not disinterested or impartial.[45] As an illustration, the First Circuit cited a humorous anecdote:

> As an attorney of our acquaintance once told the court, when asked for his response to the argument of the amicus: "That fellow isn't any more a friend of the court than I am."[46]

In some cases, the amicus is simply another litigant. In other cases, the amicus is an interest group, which may have an agenda very different from any of the litigants in the case. Thus, a distinction can be made between true amicus briefs and adversarial amicus briefs, and it is possible to discern at least three classifications of amici:

- the true disinterested amicus;
- the endorsing amicus; and
- the interest group amicus.

In 1990, the United States Supreme Court issued a rule discouraging the filing of redundant amicus briefs. As Rule 37 unmistakably advises the bar, amicus briefs that do not add something to the case are not favored and are

42. Krislov, *supra* n.1, at 720.
43. 518 U.S. I (1996).
44. *Id.* at 35–36 (Scalia, J., dissenting).
45. Strasser v. Dooley, 432 F.2d 567, 569 (1st Cir. 1970).
46. *Id.* at 567 n.2.

simply a burden.[47] That has not, however, decreased the extent of amicus practice in that Court or elsewhere.

The "elsewhere" of amicus practice is expanding as well. A new forum for amicus briefs is the international arena. A commentator who has noted this development refers to "an evolving global administrative law norm" for amicus briefs, following the common law tradition into international arbitrations.[48] The same commentator notes the increasing use of amicus briefs in civil law countries.[49] Some developing countries complain about the advocacy of non-governmental organizations through amicus briefs.[50] But allowing greater participation of amici in international arbitrations may provide for more thorough examination of complex issues and minimize inconsistency in decision making.[51] One commentator suggests general principles for evaluating the increasing participation by non-governmental organizations in international arbitrations.[52] Other commentators urge regulation of amicus briefs in international arbitrations, after discussing the rise of amicus briefing in these international proceedings and the pros and cons of the current practice.[53]

The Prevalence of Amicus Filings

Amicus practice is most prevalent at the highest court in the land. The vast majority of the cases that make it to the Court's oral argument calendar are now accompanied by at least one amicus brief.[54] Less frequent is the

47. S. Ct. R. 37.1.
48. Steven Kochevar, *Amicus Curiae in Civil Law Jurisdictions*, 12 Yale L.J. 1653, 1658 (2013).
49. *Id.* at 1659–63.
50. *Id.* at 1658; *see also* Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 Am. J. Int'l L. 611 (1994).
51. Alberto R. Salazar, *Defragmenting International Investment Law to Protect Citizen-Consumers: The Role of* Amicus Curiae *and Public Interest Groups*, 19 Law & Bus. Rev. of Americas 183 (2013).
52. Eric. De Brabandare, *NGOs and the "Public Interest": The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes*, 12 Chi. J. Int'l Law 85 (2011).
53. Katia Fach Gomez, *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest*, 35 Fordham Int'l L.J. 510 (2012); Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 Berkeley J. of Int'l L. 200 (2011).
54. Wohl, *supra* n.2, at 46; Supreme Court Practice, *supra* n.12, at 740.

filing of amicus briefs at the initial stage of the petition for certiorari, often because many potential amici want to use their resources in cases that will actually be heard. Nevertheless, amicus briefs have been found to be influential at the certiorari stage.[55] Effective amicus briefs were filed by Ohio and several other states in *City of Boerne v. Flores*[56] and by the Southern Christian Leadership Conference in *Scheidler v. National Organization .for Women Inc.*,[57] resulting in the grant of review.[58] It is seldom advisable to file an amicus brief opposing a petition for certiorari, since doing so may bring attention to the case and actually increase the chance the certiorari will be granted.[59] In contrast, amicus briefs are helpful when supporting the grant of review, increasing the chance of securing review from 8.5 to 37.1 percent.[60] Whether filing an amicus brief at such an initial stage can be helpful in state courts will depend on the jurisdiction.[61]

The number of amicus briefs being routinely filed in the Supreme Court has increased dramatically over the years. Amicus briefs are now filed in the Supreme Court in approximately 90 percent of cases, and in a recent term, 399 amicus briefs were filed in 74 of 79 cases.[62] Between the 1980 and 1991 terms, by contrast, amici appeared in 71 percent of the court's cases decided by opinion, and the figure was only 35 percent during the

---

55. *Gregory* C. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court,* 82 Am. Pol. Sci. Rev. 1109 (1988); Supreme Court Practice, *supra* n.12, at 512 (noting one study that amicus briefs can increase grant of review from 8.5 to 37.1 percent).
56. 521 U.S. 507 (1997).
57. 537 U.S. 393 (2003).
58. Dan Schweitzer, *Fundamentals of Preparing a United States Supreme Court Amicus Brief,* J. of Appellate Prac. & Process 530 (Fall 2003).
59. *Id.* at 528; Supreme Court Practice, *supra* n.12, at 513.
60. Supreme Court Practice, *supra* n.12, at 512 (citing H.W. Perry, Jr., Deciding to Decide 137 (1991) (Table 5.4)); G. Caldeira & J. Wright, *Amicus Curiae before the Supreme Court: Who Participates, When, and How Much?,* 52 J. Pol. 782 (1990); Mayer Brown LLP, Federal Appellate Practice 420–21 (2008).
61. In Florida, for example, amicus briefs are generally not helpful when the court is deciding whether to exercise its discretion to review because of the jurisdictional limitations imposed on the supreme court. *See* Joseph H. Lang, Jr. & Christopher J. Kaiser, *Amicus Briefs,* Florida Appellate Practice & § 15.2 (Florida bar 2006).
62. Supreme Court Practice, *supra* n.12, at 740; Farber, *supra* n.18, at 37 "Appendix: Data for the 1997 Term." Farber found that the number of amicus briefs does not necessarily mirror the importance of the case in terms of later citations by courts and commentators. *Id.* at 35–36. Farber further notes that amicus briefs in the Supreme Court tend to be filed in public interest "clumps" and industry "clumps."

1965–66 term.[63] In tabulating the numbers over the century, one extensive study of amicus briefs noted that amicus briefs are now as frequent in this century as they were rare at the beginning of the century.[64] In the last fifty years, while the United States Supreme Court has not increased its output of opinions, amicus filings have increased more than 800 percent.[65] Amicus briefs are filed at a rate of 500 per year in that Court.[66]

In a 2013 affirmative action case concerning higher education, 73 amicus briefs were filed.[67] In the *Grutter* case, more than 100 amicus briefs were filed.[68] In *Webster v. Reproductive Health Services,*[69] an abortion rights case, more than 85 amicus briefs were filed. During that same term, the civil rights case of *Patterson v. McClean Credit Union,*[70] dealing with racial harassment, drew fewer than 20 amicus briefs; but the amicus briefs in *Patterson* and *Webster* combined represented more than 100 public interest groups and nearly half the members of Congress.[71] *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*,[72] a prominent securities law case, garnered 39 amicus briefs.[73] *Citizens United*[74] attracted 54 amicus briefs. A case over legal aid funding attracted 22 amicus briefs.[75] In *Decker v. Northwest Environmental Defense Center*, 22 amicus briefs were filed, two by dueling groups of professors.[76] Twenty amicus briefs were filed in *FTC v. Phoebe Putney Health System, Inc.*[77] Almost 20 amicus briefs were submitted in

63. Wohl, *supra* n.2, at 46 (citing information from Bruce Ennis of Jenner & Block, Washington D.C.).
64. Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Briefs on the Supreme Court,* 148 Univ. of Pa. L. Rev. 743, 744 (2000).
65. *Id.* at 749.
66. *Id.* at 828.
67. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013).
68. Andrew Brownstein, *High Court Affirmative Action Debate: A Referendum on King's Dream,* 39 Trial 84, 86–87 (May 2003).
69. 492 U.S. 490 (1989).
70. 491 U.S. 164 (1989).
71. *Id.*
72. 552 U.S. 148 (2008).
73. Franklin A. Gevurtz, *Law Upside Down: A Critical Essay on* Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 103 Nw. Univ. L. Rev. Colloquy 488 (2009).
74. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
75. Phillips v. Washington Legal Found., 524 U.S. 156 (1998); *see* Farber, *supra* n.18, at 37 "Appendix: Data for the 1997 Term."
76. 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., concurring).
77. 133 S. Ct. 1003, 1016 (2103).

Bray v. Alexandria Women's Health Clinic,[78] which dealt with anti-abortion protests. An amicus brief was filed by eighteen states and one territory in *Wilson v. Seiter,*[79] which considered whether general prison conditions could amount to cruel and unusual punishment.

One of the most influential private amicus curiae in the United States Supreme Court has been the American Civil Liberties Union.[80] Since 1961, the ACLU filed amicus briefs in many of the landmark cases expanding the rights of those accused of crimes.[81] From 1961 to 1981, the ACLU filed amicus briefs in 44 percent of all criminal cases in which amicus briefs were filed.[82]

There is no doubt that the proliferation of amicus briefs is the result of their perceived impact on the Court's decisions. In *Grutter v. Bollinger,*[83] a case concerning affirmative action in higher education, an influential amicus brief was filed by retired military officers, including General Norman Schwarzkopf, arguing that diversity among military officers is important to national security.[84] Justice Ginsburg asked the Solicitor General to address that brief early in the argument.[85] A commentary on the effect of amicus briefs in *Grutter* argues that amicus briefs were valuable in providing the relevant social context,[86] which was important because the Court itself stated that "context matters" when applying strict scrutiny analysis.[87] Another commentator[88] cites the amicus brief of well-known constitutional scholar Laurence Tribe as influential in shaping the opinion in *Romer v. Evans*.[89]

---

78. 506 U.S. 263 (1993).
79. 501 U.S. 294 (1991).
80. Lucas, *supra* n.2, at 1608–09.
81. *Id.*
82. Gregg Ivers & Karen O'Connor, *Friends as Foes: The Amicus Curiae Participation and Effectiveness of the American Civil Liberties Union for Effective Law Enforcement in Criminal Cases,* 1969–1982, 9 L. & Pol. 161 (1987).
83. 539 U.S. 306 (2003).
84. *Id.*
85. Schweitzer, *supra* n.58, at 523–24.
86. Jonathan Alger & Marvin Krislov, *You've Got to Have Friends: Lessons Learned from the Role of Amici in the University of Michigan Cases*, 30 J.C. & U.L. 503, 526 (2004).
87. 539 U.S. at 327.
88. Lucas, *supra* n.2, at 1609.
89. 517 U.S. 620 (1996) (invalidating voter initiative barring laws protecting homosexuals from discrimination).

By no means, however, is amicus practice confined to the United States Supreme Court. The amicus brief appears with regularity in federal courts of appeals and also in state supreme courts and state intermediate appellate courts.[90] Amicus briefs are cited or quoted in many federal appellate decisions.[91] For example, in *Kitchen v. Herbert*,[92] the Tenth Circuit noted "scores of amicus briefs on sociological issues" were filed in a same-sex marriage case. A "large number" of amicus briefs received attention from the First Circuit in *Massachusetts v. U.S. Department of Health & Human Services*.[93] A case that concerned depriving whooping cranes of their habitat attracted a number of amicus briefs from governmental and environmental briefs.[94]

Likewise, amici participation in state high courts is both common and effective. The number of amicus briefs filed in state high courts tripled in the 1980s, and a recent study found that 31 percent of state supreme court cases cite to them.[95] These findings are consistent with a survey of state supreme court justices indicating that many amicus briefs influence the outcome of cases.[96] The New York Court of Appeals is known to be especially receptive to amicus briefs, and the number of motions for leave to file increased from 59 to 110 early in the new century.[97] The West Virginia Supreme Court of Appeals began to rein in amicus briefs in 1980 by adopting rules that limited their length, required disclosure of who is paying for

---

90. *See, e.g.,* Pamela Stanton Baron, *Amicus Briefs to the Texas Appellate Courts,* Fifth Annual Conference on Techniques for Handling Civil Appeals in State and Federal Court (Univ. of Texas School of Law, June 1995) (discussing amicus practice in Texas); Randy S. Parlee, *A Primer on Amicus Curiae Briefs,* Wis. Lawyer, Nov. 1989 (discussing amicus practice in Wisconsin).
91. Federal Appellate Practice, *supra* n.60, at 420 (in 2002, amicus briefs were cited in 37 percent of cases decided and were quoted in 11 percent of those cases).
92. 755 F.3d 1193, 1240 (10th Cir. 2014).
93. 682 F.3d 1, 7 (1st Cir. 2012).
94. *Ark. Project v. Shaw*, 756 F.3d 801, 808 n.2 (5th Cir. 2014).
95. Mary-Christine Sungaila, *The IADC Amicus Brief Program: Its Increasing Success and Influence*, 81 Defense Counsel J. 32, 32–34 (2014).
96. *Id.* (citing Victor E. Flango, et al., *Amicus Curiae Briefs: The Court's Perspective,* 27 Just. Sys. J. 180, 185 (2006)); Carrie Ann Wozniak, *Amicus Briefs: What Have They Done for Courts Lately?*, Fla. B.J., Jun. 2012 (discussing increased amicus filings in Florida courts and noting the citation of amicus briefs in 14 majority opinions by the Florida Supreme Court from 2007 to 2011).
97. Matthew Laroche, *Is the New York Court of Appeals Still "Friendless?" An Empirical Study of Amicus Curiae Participation*, 701, 710–11 Alb. L. Rev. 701 (2009).

the briefs, and declined to address issues raised only by amici.[98] There is even some amicus practice in trial courts, both federal and state. For example, Massachusetts Superior Courts have requested amicus briefs in some cases.[99] Early in this new millennium, the Appellate Body of the World Trade Organization (WTO) began accepting amicus briefs.[100] That controversial practice led one commentator to predict the effect of amicus briefs on the WTO by examining their effect in the United States Supreme Court.[101]

Nevertheless, the volume of amicus briefs in those courts does not approach the level of amici participation in the Supreme Court.[102] For example, a survey of amicus practice in the Eleventh Circuit revealed that the number of amicus briefs filed annually in that court ranged from 30 to 85 from 2003 to 2007, with the number actually decreasing over time, in part because the court often denies leave to file.[103] Another survey that reached all three levels of the federal judiciary revealed a modest amicus practice in courts of appeals and a small amicus practice in district or trial courts.[104] Example 14 in the Appendix is an amicus brief filed in district court. Forty percent of all state courts of last resort had no appreciable amicus practice in the 1990s.[105]

---

98. Amy M. Smith, *The History and Evolution of Amicus Curiae in West Virginia*, 2013 W. Va. Lawyer 42 (July–Sept. 2013).

99. *See* McGonagle v. Home Depot U.S.A., Inc., No. 011208, 2004 WL 3120556 (Mass. Super. Ct. Dec. 13, 2004) (Massachusetts Commissioner of Revenue accepted court's invitation to file amicus brief); Commonwealth v. Kamper, Civ. Action No. A 00–10580, 2000 WL 1724889 (Mass. Super. Ct. Nov. 20, 2000) (court invited briefing by any interested amici); Corcoran, Mullins & Jennison, Inc. v. Flanagan, Civ. Action A No. 97-3135E, 1999 WL 823855 (Mass. Super. Ct. Aug. 16, 1999) (Boston Police Department declined court's invitation to file an amicus brief or to intervene).

100. Josh Robbins, *False Friends: Amicus Curiae and Procedural Discretion in WTO Appeals under the Hot-Rolled Lead/Asbestos Doctrine,* 44 Harv. Int'l L.J. 317, 317 (2003).

101. Andrea Kupfer Schneider, *Unfriendly Actions: The Amicus Brief Battle at the WTO,* 7 Widener Law Symposium J. 87 (2001); *see also* C.L. Lim, *Asian WTO Members and the Amicus Brief Controversy: Arguments & Strategies,* 1 Asian J. of WTO & Int'l Health & Pol. 85 (2006).

102. *See* Federal Appellate Practice, *supra* n.60, at 419 (in 2002, amicus briefs were filed in 400 of the 27,000 cases decided on the merits by United States Courts of Appeals.).

103. P. Stephen Gidiere, III, *The Facts and Fictions of Amicus Curiae Practice in the Eleventh Circuit Court of Appeals*, 5 Seton Hall Circuit Rev. 1 (2008).

104. Linda Sandstrom Simard, *An Empirical Study of Amicus Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 Rev. of Litig. 669 (2008).

105. Paul Brace & Kellie Sims Butler, *New Perspectives for the Comparative Study of the Judiciary: The State Supreme Court Project*, 22 Just. Sys. J. 243, 253 (2001).

The Influence of Amicus Briefs

There are many examples that demonstrate that amicus briefs influence judicial decisions. These examples rebut the view of some that amicus briefs are a "waste of time, effort, and money in a useless function."[106] One commentator conducted a survey of 70 former Supreme Court clerks and noted these views about amicus briefs: (1) they are more helpful in highly technical cases, statutory cases, and cases dealing with obscure areas of the law; (2) most justices at least skim amicus briefs; (3) briefs considered more carefully come from the U.S. Solicitor General, state and local governments, and the ACLU; (4) briefs by prominent academics or reputed attorneys are considered more carefully; (5) collaboration in amicus briefs is desired.[107] The clerks' recommendations: don't repeat, keep it short, and write well.[108]

Some believe that amicus briefs are most influential when they resonate with the predilections of the Court. In the first term of the Roberts Court, the position of the U.S. Chamber of Commerce was upheld in 13 of the 15 cases in which the Chamber of Commerce filed amicus briefs.[109]

Although amicus briefs were once rarely cited by the United States Supreme Court, they are now cited more frequently, demonstrating their persuasive power. A study of Supreme Court decisions from 1969 to 1981 found that amicus briefs were specifically cited by at least one Justice in only 18 percent of the cases in which one was filed.[110] From 1985 to 1995, however, more than 35 percent of Supreme Court opinions in which amicus briefs were filed contained reference to at least one amicus brief.[111]

---

106. Philip B. Kurland, *The Business of the Supreme Court, O.T. 1982*, 50 U. Chi. L. Rev. 628, 647 (1983); *see also* Philip B. Kurland & Dennis J. Hutchison, *With Friends Like These . . . .*, ABA J., Aug., 1984 at 16.

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

108. *Id.* at 69–71.

109. Robert L. Kerr, *Considering the Meaning of Wisconsin Right to Life for the Corporate Free-Speech Movement,* 14 Comm. L. & Pol. 105, 106 (Spr. 2009 (citing Jeffrey Rosen, *Supreme Court, Inc.: How the Nation's Highest Court Has Come to Side with Big Business,* N.Y. Times Mag., Mar. 16, 2008, at 39–40)).

110. Robert E. Rains, *Fair-Weather Friend of the Court-On Writing an Amicus Brief,* Trial, August 1990 at 57–60 (citing O'Conner & Epstein, *Court Rules & Work Load: A Case Study of Rules Governing Amicus Curiae Participation,* Just. Sys. J., Spring 1983, at 35–42).

111. Robert W. Bennett, *Counter-Conversationalism and the Sense of Difficulty,* 95 Nw. U. L. REV. 845, 883–84 (2001).

Sometimes the influence of an amicus brief surfaces in the dissenting opinion. In *United States v. Castleman*,[112] Justice Scalia complained that the Court had relied on definitions of "domestic violence" contained in an amicus brief filed by the National Network to End Domestic Violence against Women rather than following the statute being considered. Similarly, Justice Sotomayor criticized the Court for relying on an FDA amicus brief in resolving an issue of preemption in a design defect case.[113] Of course, dissenters sometimes cite amicus briefs to support their outvoted views, as did Justice Breyer in a case concerning the right of prisons to conduct strip searches, when he cited examples in amicus briefs of strip searches of those accused of minor offenses.[114]

Other examples exist. Citations to an amicus brief are found in the following Supreme Court opinions:

- In *McDonald v. City of Chicago*,[115] the Court cited amicus briefs in finding a consensus for a right to bear arms for self-defense.[116]
- In *Bilski v. Kappos*,[117] the Court rejected a test of patentability as the sole test, citing criticisms of the test by amici.[118]
- In *United States v. Hayes,*[119] the Court cited amicus briefs filed by the Brady Center to Prevent Gun Violence and the National Network to End Domestic Violence in interpreting a federal firearms statute.
- Justice Breyer cited in a concurring opinion an amicus brief by law professors specializing in federal Indian law in *Carcieri v. Salazar.*[120]

---

112. 134 S. Ct. 1405, 1420 (2014) (Scalia, J., dissenting).
113. Mut. Pharm. Co. v. Bartlett, 133 S. Ct. 2466, 2493–94 (2013) (Sotomayor, J., dissenting).
114. Florence v. Bd. of Chosen Freeholders of County of Burlington, 132 S. Ct. 1510, 1528 (2012) (Breyer J., dissenting).
115. 561 U.S. 742 (2010).
116. *See id.* at 777 n.27. In fact, amicus briefs were cited numerous times in the opinions issued in this case. Justice Breyer's dissent criticized the Court's reliance on amici for the consensus, noting that amicus briefs had been filed on both sides of the incorporation issue. 130 S. Ct. at 3124 (Breyer, J., dissenting).
117. 561 U.S. 593 (2010).
118. 130 S. Ct. at 3227.
119. 555 U.S. 415, 427 (2009).
120. 555 U.S. 379, 398 (2009) (Breyer, J. concurring).

- *McConnell v. Federal Election Commission,*[121] the decision on campaign reforms against "soft-money," quoted from an amicus brief to discuss the coercive circumstances that can surround soft-money contributions.
- In *Lawrence v. Texas*,[122] the Court noted the filing of "scholarly amicus briefs" and cited those briefs in deciding to strike down an anti-sodomy law.
- *Republican Party of Minnesota v. White*,[123] contains frequent references to amicus briefs, including a brief filed by the ABA on the issue of the constitutionality of restrictions on campaign speech by candidates for judicial offices.
- The Court cited amici in its opinion in *Jaffee v. Redmond,*[124] which dealt with the patient/psychotherapist privilege.
- *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,*[125] a case involving the propriety of vacating federal civil judgments when the parties reach a settlement during the appellate process, cited amicus submissions.
- *Winthrow v. Williams,*[126] dealing with federal habeas review of alleged *Miranda* violations, cited to amicus briefs.
- *Mapp v. Ohio,*[127] which concerned the application of the exclusionary rule to the states, contained references to amicus briefs.
- The Court also cited amicus briefs in *Teague v. Lane,*[128] which barred peremptory jury challenges for reasons related to race; *Gregg v. Georgia*,[129] a death-penalty case; and *Sullivan v. Zebley*,[130] which dealt with social security benefits for disabled children.

---

121. 540 U.S. 93, 125 n.13 (2003).
122. 539 U.S. 558, 567–68, 572 (2003).
123. 536 U.S. 765, 773, 776, 788 n.l5 (2002).
124. 518 U.S. 1 (1996).
125. 513 U.S. 18, 24 n.2 (1994).
126. 507 U.S. 680, 690 n.6 (1993).
127. 367 U.S. 643 (1961).
128. 489 U.S. 288 (1989).
129. 428 U.S. 153, 233–36 (Marshall, J., dissenting).
130. 493 U.S. 521, 531 n.9, 534 n.13, 536 n.l7 (1990). This amicus brief appears as Example 1 in the Appendix.

In federal courts of appeals, amicus briefs are frequently quoted or discussed. Examples include:

- In *David v. Alphin*,[131] the Fourth Circuit "received and considered amicus briefs" in a class action for breach of fiduciary duty against a financial institution.
- In *Massachusetts v. U.S. Department of Health & Human Services*,[132] the court received many amicus briefs on both sides of the issue, some of which "proved very helpful."[133]
- In *Hitachi v. Home Electronics (America) Inc. v. United States*,[134] the Federal Circuit understood the importance of the issue because of the amicus briefs.
- In *Collazo-Santiago v. Toyota Motor Corp.*,[135] the First Circuit addressed but rejected two arguments made by the amicus curiae.
- Judge Posner considered, but rejected, an amicus brief filed by HUD in *Krzalic v. Republic Title Co.*[136]
- Amici successfully argued for implied immunity in a suit over an alleged conspiracy to manipulate stock prices in *Friedman v. Salomon/Smith Barney, Inc.*[137]
- In a separate concurring and dissenting opinion in *White v. Ford Motor Co.*,[138] dealing with the excessiveness of an award of exemplary damages of almost $70 million, a Ninth Circuit judge noted the maximum statutory fine for the defendant's conduct as stated in an amicus brief.
- In *Community Health Center v. Wilson-Coker,*[139] an amicus brief filed by the United States "clarified" a party's position on interpreting the Medicaid Act, resulting in a decision to overrule the district court's interpretation in favor of the Secretary of Health & Human Services.

---

131. 704 F.3d 327, 330 n.1 (4th Cir. 2013).
132. 682 F.3d 1 (1st Cir. 2012).
133. *Id.* at 7.
134. 676 F.3d 34 (Fed. Cir. 2012).
135. 149 F.3d 23, 27 nn.4 & 5(1st Cir. 1998).
136. 314 F.3d 875, 877, 881–82 (7th Cir. 2002).
137. 313 F.3d 796, 799 (2d Cir. 2002).
138. 312 F.3d 998, 1030 (9th Cir. 2002) (Graber, J., concurring in part & dissenting in part).
139. 311 F.3d 132, 137 n.8, 139 (2d Cir. 2002).

- The Seventh Circuit extensively discussed amici's arguments in *In re Volpert.*[140]
- The Ninth Circuit quoted from the ACLU's amicus brief in *Federal Election Commission v. Christian Action Network*.[141]
- The D.C. Circuit discussed, and rejected, the argument by amicus for a more stringent standard of review in *Independent Petroleum Association v. Babbitt.*[142]
- The Fifth Circuit discussed an issue raised only by the amici in *Bridges v. City of Bossier*.[143]
- An amicus brief submitted by the United States was quoted at length in *United States v. Chevron U.S.A., Inc.*[144]

Amicus briefs are also filed in district courts,[145]and federal district courts have cited amicus briefs in their opinions, as shown by these examples:

- In *Mason v. SmithKline Beecham Corp.*,[146] the court considered amicus briefs by the FDA in holding that a claim was preempted by federal law.
- In *United States v Boeing Co.,*[147] the court detailed the amicus brief's argument about industry practices and reliance on an alleged common understanding about a particular type of provision in a defense contract.

140. 110 F.3d 494, 499–500 (7th Cir. 1997).
141. 110 F.3d 1049, 1061 (9th Cir. 1997).
142. 92 F.3d 1248, 1258 (D.C. Cir. 1996).
143. 110 F.3d 1049, 1061 (9th Cir. 1997).
144. 72 F.3d 740, 745 (9th Cir. 1995).
145. Courts of appeals have commented on the filing of amicus briefs in district courts. *See, e.g.,* Nautilus Ins. Co. v. Country Oaks Apartments Ltd., No. 08-50652, 2009 WL 1067587 (5th Cir. Apr. 22, 2009) (plaintiffs filed amicus brief in district court declaratory judgment action on whether insurer's policy covered their claim against the apartment owner); United States v. Custer Battles, LLC, 562 F.3d 295, 300 (4th Cir. 2009) (government did not intervene in district court qui tam action but filed numerous amicus briefs).
146. 546 F. Supp. 2d 618, 625 (C. D. Ill. 2008). The defendant actually submitted FDA amicus briefs filed in other cases as summary judgment evidence. *See* SmithKline Beecham Corp.'s Opposition to Motion to Strike at 2007 WL 4802117. The Consumer Product Safety Improvement Act, Pub. L. 110–314, 122 Stat. 3016 (2008), limited the consideration of agency amicus briefs and statements on the issue of preemption. *See* John B. O'Loughlin, *Consumer Product Safety Improvement Act: Not the Last Word on Preemption,* 23 Toxics L. Rptr. 1104 (BNA) (Dec. 11, 2008).
147. 73 F. Supp. 2d 897, 904 *(*S.D. Ohio 1999).

- The court discussed at length but rejected an Indian tribe's arguments in its amicus brief supporting removal jurisdiction in a suit between casino developers and their competitors in *Sonoma Falls Developers, LLC v. Nevada Gold & Casinos, Inc.*[148]
- The court agreed with an argument "aptly" made by an amicus curiae in *California v. Mendonca*.[149]
- In *Milk Industry Foundation v. Glickman,*[150] the court considered the citations to evidence in the record that were contained in amicus briefs, although the court rejected amici's position.

Amici are also often mentioned in state courts. In a decision by the Texas Supreme Court, amici were applauded for their efforts with this statement: "(S]everal excellent amicus briefs in this case have offered pertinent and helpful observations and suggestions."[151] In another case, dozens of amicus briefs, including one by state legislators, caused the Texas Supreme Court to withdraw its opinion, set new oral arguments, and issue a new opinion, albeit with the judgment unchanged.[152] A number of California courts have likewise referred to amici as "helpful."[153] Further, the California Supreme Court has, on occasion, discussed arguments of amici at some length in its opinions.[154] In another example, the Supreme Court of Massachusetts

148. 272 F. Supp. 2d 919, 925–27 (N.D. Cal. 2003).
149. 957 F. Supp. 1072, 1124–25 n.6 (N.D. Cal. 1997).
150. 949 F. Supp. 882, 895 (D.D.C. 1996).
151. Reed v. Wylie, 597 S.W.2d 743, 750 (Tex. 1980) (Spears, J., concurring).
152. Entergy Gulf States, Inc. v. Summers, 282 S.W.3d 433 (Tex. 2009).
153. *See, e.g.,* Thorn v. Superior Court, I Cal. 3d 666, 674 n.8, 464 P.2d 56, 62 n.8, 83 Cal. Rptr. 600, 606 n.8 (Cal. 1970); City of Carmel-By-The-Sea v. Young, 2 Cal. 3d 259, 276, 466 P.2d 225, 238, 85 Cal. Rptr. 1, 14 (Cal. 1970) (Mosk, J., dissenting); Thrifty-Tel, Inc. v. Bezenek, 46 Cal. App. 4th 1559, 1569, 54 Cal. Rptr 2d 468, 475 (Cal. Ct. App. 1996); Williams v. Weisser, 273 Cal. App. 2d 726, 732 n.5 78 Cal. Rptr. 542, 545 n.5 (Cal. Ct. App. 1969); Faus v. Nelson, 241 Cal. App. 2d 320, 329, 50 Cal. Rptr. 483, 488 (Cal. Ct. App. 1966); Armistead v. City of Los Angeles, 152 Cal. App. 2d 319, 324, 313 P.2d 127, 130 (Cal. Ct. App. 1957); *accord* State v. Superior Court, 29 Cal. 3d 210, 216, 625 P.2d 239, 242, 172 Cal. Rptr. 696, 699 (Cal. 1981) (arguments of "extensive briefs by amici curiae" noted as being "of considerable assistance").
154. *See, e.g.,* Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 863 P.2d 795, 25 Cal. Rptr. 2d 550 (Cal. 1993); People v. Wharton, 53 Cal. 3d 522, 809 P.2d 290, 280 Cal. Rptr. 631 (Cal. 1991).

has commented on the quality of amicus briefs and has addressed issues raised by amici.[155]

Even when amicus briefs are not acknowledged in opinions, "[n]ot infrequently a good amicus brief may help shape the judicial decision."[156] In some situations, amicus briefs are very influential and the court's ruling may actually rest on a ground set forth in an amicus brief that was not stressed or even raised by a party.[157] For example, in *Romer v. Evans,* a case involving a voters' initiative barring the enactment of a law protecting homosexuals from discrimination, Justice Kennedy, writing for the majority, adopted arguments of the amicus, written by Professor Laurence H. Tribe and several other constitutional scholars. Nevertheless, Justice Kennedy never cited Tribe's brief in the opinion.[158]

Another example is *United States v. Winstar Corp*.[159] The Court cited remarks by a director of the now-defunct Federal Savings & Loan Insurance Corporation and deposition testimony from an official at the Atlanta Federal Home Loan Bank—both of which had been quoted in the amicus brief filed by the Franklin Financial Group.[160]

In some instances—as with Henry Clay's initial amicus brief in this country—courts solicit amicus briefs.[161] The influence of an amicus brief is likely to increase when the court itself invites the brief.[162] The Ninth Circuit issued

155. Polaroid v. Travelers Indem. Co., 610 N.E.2d 912, 920 n.l5 (Mass. 1993); Royal-Globe Ins. Co. v. Craven, 585 N.E.2d 315, 319 (Mass. 1992).

156. Supreme Court Practice, *supra* n.12, at 741; Michael E. Tigar, Federal Appeals Jurisdiction & Practice, 564 (2d ed. (1993); Bruce J. Ennis, *Effective Amicus Briefs,* 33 Cath. U.L. Rev. 603, 603 (1984) (dispelling the notion that amicus briefs are not influential and important).

157. Supreme Court Practice, *supra* n.12, at 741 (citing Humana, Inc. v. Forsyth, 525 U.S. 299 (1999). Freytag v. Comm'r of Internal Revenue, 501 U.S. 868 (1991); Teague v. Lane, 489 U.S. 288 (1989); Mapp v. Ohio, 367 U.S. 643 (1961).

158. Romer v. Evans, 517 U.S. 620 (1996); Wohl, *supra* n.2, at 46.

159. 518 U.S. 839 (1996).

160. *Id.* at 847 n.3 & 850 n.6.

161. *See, e.g.,* Kings County v. Santa Rosa Band of Indians, 429 U.S. 812 (1976); Qantas Airways, Ltd. v. Foremost Int'l Tours, 425 U.S. 957 (1976); Younger v. Harris, 393 U.S. 813 (1968).

162. Supreme Court Practice *supra* n.12, at 516–17, 738 (noting that Supreme Court occasionally invites non-parties to file briefs); Federal Appellate Practice, *supra* n.60, at 405 (also noting that D.C. Circuit Rule 29 allows the court to appoint a non-party to file a brief); *see, e.g.,* Smart v. Local 702 Int'l Bhd. of Elec. Workers, 562 F.3d 798, 806 n.6 (7th Cir. 2009) (thanking law professor for excellent amicus brief submitted at court's request); De Mercado v. Mukasey, Nos. 06-70361 & 06-70366, 2009 WL 1382915 (9th Cir. May 19, 2009) (court-appointed amicus curiae argued this immigration case for petitioners); *cf.* Cochran v. Holder,

an order that extended a general invitation to amicus input on the meaning of federal regulations that the court had to interpret.[163] An even more general invitation to amici was expressed by Chief Judge Judith S. Kaye of the New York Court of Appeals. Judge Kaye wrote a 1988 article in the *New York Law Journal* encouraging lawyers to submit amicus briefs so that the court would not miss any legal issues.[164] Forty-three times since 1954, the United States Supreme Court has invited lawyers to brief an argument that was abandoned by the party that prevailed below. In 2008, the Court heard two such cases, when the government agreed with the petitioners in criminal cases.[165]

The trend, however, is in the opposite direction. After being inundated by amicus briefs, the Court adopted Rule 37.1, expressly discouraging amicus briefs that do not add to the case.[166] As one commentary has noted:

> Not all amicus briefs are read by all of the Justices. The number is so great that most of the Justices have their law clerks sift out the briefs or parts of briefs which they think add enough to the party's brief to be worth reading. Many "say little more than 'me too'—the amicus agrees with one side in the controversy." Such briefs may impress the members of the amicus organization, but they will not help with the Supreme Court. Merely stating one's views as to how a case should be decided is not a legitimate reason for filing an amicus brief . . . Briefs that add nothing to the substantive factual or legal presentation by the parties are not likely to survive the preliminary examination by the law clerks, or to influence favorably a Justice or clerk who reads them. On the contrary they are regarded as wasteful of valuable Court time.[167]

---

564 F.3d 318, 324 (4th Cir. 2009) (EEOC declined court's invitation to file amicus brief on proper interpretation of EEOC regulation).

163. Palomar Med. Ctr. v. Sebelius, 672 F.3d 1152 (9th Cir. 2012).

164. Daniel Wise, *Amicus Briefs Illuminate Top Court Issues*, New York L.J. (Jan. 1994).

165. Brian P. Goldman, *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?*, 63 Stan. L. Rev. 907, 907 (2011). This author notes that prior to 1954, the Court had never appointed an amicus curiae to "support an orphaned argument" and argues that the current Court should more narrowly limit the occasions where it does so. *Id*.

166. *See* Supreme Court Practice, *supra* n.12, at 512 (discussing Rule 37.1).

167. *Id*. at 665.

The incidence of so-called "me too" amicus briefs has been investigated with somewhat surprising results. An analysis of the language and topics of amicus briefs filed from 2002 to 2004 in the Supreme Court reveals that amicus briefs "overwhelmingly contain original information," in part because they primarily argue outside the record.[168] That is echoed by a comment made by former Justice Sandra Day O'Connor, who remarked that amicus briefs address "points of law, policy considerations, or other points of view" not raised by the parties.[169]

As amicus briefs have proliferated, and as they have evolved from neutral submissions to opportunities for partisan advocacy, their overall effectiveness may have decreased. Certainly, the sheer number of amicus briefs tends to discourage judges from reading them. Thus, it is hardly surprising that a statistical study of amicus briefs in the United States Supreme Court failed to support the hypothesis that amicus briefs filed by state governments influenced proponents of federalism on the Court.[170] The authors surmised that amicus briefs may have become so "commonplace" that they have been "rendered meaningless."[171]

On the other hand, another statistical study indicates that "amicus briefs appear to affect success rates in a variety of contexts."[172] Sheer numbers of amicus briefs do not correlate with success, although small disparities in amicus briefs may support success rates.[173] Instead, amicus briefs by institutional litigants and experienced lawyers are the most effective.[174] The authors of one study explain that result by what they call the "Legal Model" of the amicus brief, which posits that amicus briefs are successful when they impart valuable new information.[175] Competing models are the "Attitudinal Model" (positing that judges decide cases based on their attitudes) and the

168. Paul M. Collins, Jr., Pamela C. Corley & Jesse Hammer, *Me Too? An Investigation of Repetition in U.S. Supreme Court Amicus Curiae Briefs*, 97 JUDICATURE 228, 234 (Mar.–Apr. 2014).
169. *Id.* at 229 (quoting a speech by Justice O'Connor to the Henry Clay Memorial Foundation).
170. Ruth Colker & Kevin M. Scott, *Dissing States, Invalidation of State Action During the Rehnquist Era,* 88 VA. L. REV. 1301, 1333–38.
171. *Id.* at 1338.
172. Kearney & Merrill, *supra* n.64, at 750.
173. *Id.* at 750, 796–97.
174. *Id.* at 750.
175. *Id.* at 750, 775–89.

"Interest Group Model" (positing that judges decide cases in accord with positions taken by interest groups).[176] The Attitudinal Model has the least support in statistical findings, and the Interest Group Model only equivocal support.[177] The Legal Model emerges as the best explanation because "legal doctrine matters."[178] A later survey of the effect of amicus briefs in New York state courts showed no support for the Attitudinal Model and support for the Information and Interest Group Models.[179]

A survey of the entire federal judiciary, which yielded a 23– 30 percent response rate, led to interesting conclusions.[180] First, a reputable brief writer is more likely to get the court's attention. The mere number of amicus briefs is not that significant, but the views of groups that may be affected by the decision is of importance to the court. Amicus briefs are viewed as helpful when they add legal arguments missing from the parties' briefs or when the named parties do not have strong representation. Supreme Court justices are interested in facts outside the record that amici can provide, but lower court judges, especially district judges, are not as interested in extrajudicial information.

A study of amicus briefs in the specialized area of patent law reveals that most amicus briefs are filed by the so-called patent insiders—the government, companies, lawyers, and industry groups.[181] Amicus briefs help in persuading the Supreme Court to grant review and appellate courts to grant rehearing.[182] Amicus briefs on the merits, however, seem to have much less success, unless filed by the government.[183]

---

176. *Id.* at 779–87.
177. *Id.* at 830.
178. *Id.*
179. Laroche, *supra* n.97, at 751.
180. Simard, *supra* n.104, at 688–96.
181. Colleen V. Chien, *Patent Amicus Briefs: What the Court's Friends Can Teach Us About the Patent System*, 1 U.C. Irvine L. Rev. 397, 432 (2011); *see also* Joy Lynn Bala, *Amicus Briefs: Sounding Off on Reforming Inequitable Conduct*, 45 Loy. L.A. L. Rev. 125, 143 (2011).
182. *Id.* at 424–27.
183. *Id.* at 427–431.

WHAT ARE THE FUNCTIONS OF AMICUS BRIEFS?

The amicus brief serves a number of functions. Generally speaking, amicus briefs can be useful to expose novel facts or legal arguments as well as signal to the court the importance of the case.[184] Other functions include:

- examining policy issues;
- providing a more attractive advocate;
- supporting the grant of discretionary review;
- supplementing a party's brief;
- endorsing a particular position;
- providing a historical perspective;
- providing technical assistance;
- showing potential unintended consequences;
- muting or minimizing expected precedent or paving the way for future precedent;
- defining the nature and scope of a problem;
- correcting, limiting, publishing or "de-publishing" a decision; and
- applying political pressure.[185]

One or more of these purposes will usually guide the decision whether to spend resources on the filing of an amicus brief. Some organizations make ad hoc decisions on whether to file amicus briefs, and others develop specific policy statements on amicus participation. An Internet search of "amicus brief policy" will reveal numerous such policy statements by professional associations.

---

184. David Orozco & James G. Conley, *Friends of the Court: Using Amicus Briefs to Identify Corporate Advocacy Positions in Supreme Court Patent Litigation*, 2011 U. Il. J.L. Tech. & Pol'y 107 (2011). These authors also believe that by promoting perceptions of responsiveness and inclusiveness, accepting "amicus briefs enhance[s] the court's own institutional legitimacy and standing in the eyes of others." *Id.* at 122–23.

185. Baron, *supra* n.35, at 4–8; Charles E. Carpenter, Jr., *The Role of Amicus Briefing*, in Appellate Practice in Federal and State Courts, at 9–15 to 9–21(2013, David M. Axelrad, ed.).

Examining Policy Issues

When larger policy or social issues are implicated by a decision, the amicus has a role that the parties often cannot play because, for example, the facts may be outside the record. Further, the parties are confined by the procedures in the case as well as the extent to which error has been preserved below. The amicus, however, can weigh in on any number of issues, even those that are not technically before the court, and emphasize the policies and values at stake.

The facts an amicus presents may not be contained in the record of the case, and may extend beyond the facts of the particular case at issue.[186] Such facts should be common-knowledge facts or resemble legislative facts rather than facts about the particular case.[187] Nevertheless, the amicus should not lose sight of the case actually before the court and should not stray too far from core legal issues. After all, the court is limited to deciding the dispute at hand. If an amicus emphasizes policy issues that are not implicated by the case, then the amicus can actually hurt the litigant it supports.

Problems can arise, of course, concerning the validity of information outside the record. One commentator has discussed the reliance of the National Labor Relations Board (NLRB) on social science statistics filed by parties and amici, given that the NLRB has no economists on staff.[188] The commentator questions whether the Board can effectively evaluate such data. At a higher level, a commentator critiques the reliance of the United States Supreme Court on economic evidence submitted in amicus briefs in antitrust cases, likening the Court's action in antitrust law as akin to rulemaking under the Administrative Procedure Act.[189] The commentator notes that the members of the Court have no particular training in industrial organization and none has an economics degree.[190]

---

186. Supreme Court Practice, *supra* n.12, at 741–42.
187. *Id.*
188. Xenia Tashlitsky, *A Critique of Supplying the NLRB with Social Science Expertise Through Party/Amicus Briefs*, 1 U.C. Irvine L. Rev. 1257 (2011).
189. Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 Tex. L. Rev. 1247 (2011).
190. *Id.* at 1263.

Providing a More Attractive Advocate

In some situations, a party to the litigation may not be the strongest advocate for a position because it is not an attractive litigant. One may recall Justice Clark's observation in *Mapp v. Ohio* that legal rules in the area of criminal justice are often for the "'benefit of a guilty person.'"[191] An amicus may be a much more attractive voice in articulating an argument.

An example is an amicus brief solicited by billboard owners attacking a city ordinance banning billboards in *Metromedia, Inc. v. City of San Diego*.[192] The owners solicited amicus support from the American Civil Liberties Union, which then argued that a ban on billboards would chill an effective form of political speech. The billboard owners were not in a position to advance the argument because they rented the billboards to others and did not themselves engage in first amendment activities.[193] Another example is, once again, the ACLU in the Supreme Court case dealing with a Nazi parade in Skokie, Illinois.[194] In that case, the ACLU was a much more attractive voice arguing to preserve the first amendment rights at issue than the party who was involved.

Supporting a Grant of Discretionary Review

Another role for the amicus is to increase the chance that a court will grant discretionary review. Supreme Court Rule 10 states the considerations governing review on writ of certiorari. Rule 10 states that a petition for writ of certiorari will be granted "only for compelling reasons."[195] The rule then lists examples of the "character" of the reasons the Court will consider, although the rule states that the listed considerations are "neither controlling nor fully measuring the Court's discretion." The listed considerations are:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same "important" matter; has decided an "important" federal question in

---

191. 367 U.S. 643, 658 (1961) (quoting Miller v. United States, 357 U.S. 301, 313 (1958)).
192. 453 U.S. 490 (1981).
193. *See* Ennis, *supra* n.156, at 606–07.
194. Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. 43 (1997).
195. S. Ct. R. 10.

a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or the decision of a United States court of appeals; and

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.[196]

Obviously, the United States Supreme Court hears very few cases, and the same is true of many state supreme courts. The amicus that files its brief prior to consideration of the petition for certiorari may help a party overcome the initial hurdle of obtaining a grant of discretionary review.[197] Indeed, the mere fact that many amicus briefs have been filed may convince the court that the case is significant and review should be granted.[198] Justice Roberts has stated that having amicus support on a petition makes a big difference because it helps convince the court that the issue is important to more people than just the parties. Amicus support may influence a jaded court that suspects that most petitioners exaggerate the importance of their cases in an effort to obtain review. For these same reasons, an amicus who is satisfied with the lower court's decision should postpone filing an amicus brief until after review is granted—an earlier filing may serve only to emphasize the importance of the case and encourage review.[199]

196. S. Ct. R. 10.
197. *See* Supreme Court Practice, *supra* n.12, at 513 (noting that, in the United States Supreme Court, amicus briefs "add force to a petitioner's contention that the case has public importance extending beyond the interests of the parties").
198. John F. Duffy, *The* Festo *Decision and the Return of the Supreme Court to the Bar of Patents,* 2002 Supreme Court Rev. 273, 300 (2002).
199. Supreme Court Practice, *supra* n.12, at 513.

Supplementing a Party's Brief

The fourth function of an amicus brief—supplementing a party's brief—may be the most frequent. Sometimes significant issues arise in cases in which the parties are represented by inexperienced or unskilled lawyers. In these cases, the quality of briefing can be poor, creating the risk that the issues and the parties' positions will not be presented clearly to the court.[200] The amicus can shore up a party's weak brief.

Even a good brief may omit, owing to page limitations, case law developments in other states or other relevant material.[201] This is particularly true in complex cases, where parties simply may not have the space to say all that needs to be said. Amicus support can provide the additional arguments that simply do not fit into, or otherwise do not appear in, the main briefs. They can also "defend" arguments made by opposing amici.[202]

Finally, in some cases, the amicus may make arguments that a party omits because it prefers not to make them. For example, the party may believe that it is less risky to distinguish a prior case rather than argue that it should be overruled. An amicus brief may be more suited to advance the riskier position.

A form of supplementation that is usually not advisable is restating or adding to the issues as framed by the parties. While flexibility is a hallmark of amicus briefs, restating issues may create inconsistencies, and trying to

200. Stephen M. Shapiro, *Amicus Briefs in the Supreme Court,* ABA Sec. Litig., Appellate Practice Manual 341 (Priscilla Anne Schros ed., ABA 1992); Making Your Case, *supra* n.36, at 104, 106 (noting, however, that it is unethical to allow the party to dictate what points the amicus brief should cover).

201. Brief writers have sometimes attempted to avoid page limitations by reducing font size and making arguments in the small print of footnotes. *See* Voices for Choices v. Ill. Bell Tel. Co., 339 F.3d 322, 544 (7th Cir. 2003) (Posner, J. in chambers) (noting that amicus briefs "may be used to make an end run around court-imposed limitations on the length of the parties' briefs"); *cf.* United States v. Boeing Co., 73 F. Supp. 2d 897, 900 (S.D. Ohio 1999) (rejecting argument that amicus brief was in reality an impermissible surreply). Appellate courts have curbed this conduct by declining to accept briefs when they violate rules governing font size and footnotes. Federal Rule of Appellate Procedure 32 sets the maximum length of briefs and specifies permissible font size, typeface, margins, spacing, and paper size. Local rules of courts of appeals may have additional rules and limitations. Supreme Court Rule 33 imposes detailed printing specifications.

202. Making Your Case, *supra* n.36, at 106.

reframe issues is not a justification for an amicus brief, unless the parties have truly been unable to articulate the issues in a meaningful way.[203]

Providing a Historical Perspective

The record on appeal often concentrates on the facts at hand, not the larger historical perspective. Sometimes, historians testify at trial, as Stephen Ambrose did in a suit against cigarette manufacturers.[204] When that has not happened, however, amicus briefs can provide a historical background. The contribution of historical background was a crucial feature of the amicus briefs submitted in *Brown v. Board of Education,*[205] according to one commentator.[206]

Providing Technical Expertise

As lawsuits have become more complex and technical, particularly with respect to scientific issues, there is an increasing need for amicus briefs to provide technical assistance.[207] The Third Circuit has expressly noted that "'[s]ome friends of the court are entities with particular expertise not possessed by any party to the case.'"[208] Such expert amicus briefs mark perhaps a return to one of the early purposes of amicus briefs—preventing courts from basing their decisions on erroneous scientific or technical concepts.

Endorsing a Party

An amicus brief may be filed to show support for a party or a position, including a risky position that a party may not have addressed out of concern for its effect on the overall appeal.

A typical endorsing amicus brief filed by a national association may support a single litigant's claims that an adverse decision will have far-reaching

---

203. Lawrence S. Ebner, *Representing Amicus Curiae*, Aspatore (Mar. 2013).
204. Jonathan D. Martin, *Historians at the Gate: Accommodating Expert Historical Testimony in Federal Courts,* 78 N.Y.U.L. Rev. 1518, 1518–19 (2003).
205. 347 U.S. 483 (1954).
206. Martin, *supra* n.204, at 1527–28.
207. *See* Stephanie Tai, *Friendly Science: Medical, Scientific, and Technical Amici, Before the Supreme Court,* 78 Wash. U.L.Q. 789 (2000).
208. Neonatology Assocs., P.A. v. Comm'r of Internal Revenue, 293 F.3d 128, 132 (3d Cir. 2002) (quoting Luther T. Montford, *When Does the Curiae Need an Amicus?,* I J. App. Prac. & Process 279 (1999)).

ramifications. An example is *Gideon v. Wainwright*.[209] In that case, the State of Florida was defending against a challenge to the right of a state to try an indigent felony defendant without providing him counsel. The Attorney General of Florida wrote to his fellow state attorneys general asking them to file amicus briefs supporting Florida in the case. The Attorney General of Minnesota, Walter Mondale, was so enraged with Florida's position that he participated in the filing of an amicus brief *opposing* it. The brief was endorsed by 22 other states.[210] Thus, the lesson is two-fold:

- indiscriminate canvassing for amicus support can be a risky venture; and
- in the proper case, it may be a good idea to search for an unexpected friend.

Sometimes a "me too" amicus brief is effective. They may be influential because of raw political pressure. Indeed, Justice Scalia has observed that the cover of briefs by national trade associations and the like often are sufficient to accomplish the purpose of showing the broad national impact of a decision.[211] Usually, however, a "me-too" amicus brief is simply redundant and not appreciated by the reviewing court.[212]

Seeking to Correct, Limit, Publish, or "De-Publish" an Opinion

The remaining functions of amicus briefs are narrower. An amicus brief may supplement a party's brief by noting the need to correct a decision that is not yet final. Often this happens after a decision has been rendered, but before the time for rehearing has passed. Further, an amicus brief may do nothing other than attempt to limit a feared unfavorable decision so that it does not go beyond the particular dispute at hand. In seeking to limit a decision, an amicus should expressly explain the unwanted ramifications or consequences of the expected opinion if it is not so limited.

---

209. 372 U.S. 335 (1963).
210. *See* Anthony Lewis, Gideon's Trumpet, chapter 10, 152–56 (1964); Rains, *supra* n.110, at 42.
211. Making Your Case, *supra* n.36, at 103.
212. Supreme Court Practice, *supra* n.12, at 742–43.

Finally, in some jurisdictions, an amicus aware of an unpublished or non-precedential decision may suggest the decision is worthy of publication or citation.[213] In California, an amicus may seek to have an opinion that it considers unwise or troublesome "de-published" and thus purged from the official reporter.[214]

Other Purposes

An amicus brief may serve many other functions. It may define the nature and scope of an issue. It may explain to the court potential consequences of a particular decision that the court would not desire. It may attempt to affect other litigation. A less ambitious amicus brief may attempt to persuade the court to narrow its holding in the case before it or to begin to develop a legal doctrine that can later blossom with the appropriate set of facts or the proper parties.[215]

WHO FILES AN AMICUS BRIEF AND WHY?

An amicus brief may come from almost anywhere. Someone may be monitoring your appeal and seek leave to file a brief on their own initiative. In some instances, the court may invite participation by an amicus, although the United States Supreme Court is more prone to do so than an intermediate court of appeals.[216] Usually, however, an amicus appears because a party has solicited amicus support. The Supreme Court will not entertain amicus briefs filed by non-lawyers or by lawyers who are not members of the Supreme Court Bar.[217]

---

213. *See, e.g.,* California Rule of Court 987.
214. California Rule of Court 979.
215. *See* Carpenter, *supra* n.185, at 9–17 to 9–21.
216. John Turron, *The U.S. Supreme Court Asks White House to File Amicus Brief in Barclays Case as Britain Publicly Threatens Retaliation*, Tax Notes Int'l. May 24, 1993, at 1246–47. *See, e.g.,* Thrifty-Tel, Inc. v. Bezenek, 46 Cal. App. 4th 1559, 1569, 54 Cal Rptr 2d 468, 475 (Cal. Ct. App. 1996) (court notes that it had solicited amicus briefs); Beverly Hills Multispeciality Group, Inc. v. Workers' Comp. Appeals Bd., 26 Cal. App. 4th 789, 32 Cal. Rptr. 293 (Ca. Ct. App. 1994) (court had invited several organizations to submit amicus briefs).
217. Supreme Court Practice, *supra* n.12, at 516.